THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES

Acta

15

CATHOLIC SOCIAL DOCTRINE AND HUMAN RIGHTS

Edited by

Roland Minnerath
Ombretta Fumagalli Carulli
Vittorio Possenti

The Proceedings of the 15th Plenary Session of the Pontifical Academy of Social Sciences

1-5 May 2009 • Casina Pio IV

VATICAN CITY
2010

CATHOLIC SOCIAL DOCTRINE AND HUMAN RIGHTS

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The opinions expressed with absolute freedom during the presentation of the papers of this plenary session, although published by the Academy, represent only the points of view of the participants and not those of the Academy.

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THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES
VATICAN CITY

His Holiness Pope Benedict XVI

Participants in the conference hall of the Casina Pio IV

Participants of the 15th Plenary Session

His Holiness Benedict XVI with the Participants of the 15th Plenary Session

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ADDRESS OF HIS HOLINESS BENEDICT XVI TO THE PARTICIPANTS IN THE FIFTEENTH PLENARY SESSION OF THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES

CONSISTORY HALL, MONDAY, 4 MAY 2009

Dear Brothers in the Episcopate and the Priesthood,
Distinguished Ladies and Gentlemen,

As you gather for the fifteenth Plenary Session of the Pontifical Academy of Social Sciences, I am pleased to have this occasion to meet with you and to express my encouragement for your mission of expounding and furthering the Church's social doctrine in the areas of law, economy, politics and the various other social sciences. Thanking Professor Mary Ann Glendon for her cordial words of greeting, I assure you of my prayers that the fruit of your deliberations will continue to attest to the enduring pertinence of Catholic social teaching in a rapidly changing world.

After studying work, democracy, globalisation, solidarity and subsidiarity in relation to the social teaching of the Church, your Academy has chosen to return to the central question of the dignity of the human person and human rights, a point of encounter between the doctrine of the Church and contemporary society.

The world's great religions and philosophies have illuminated some aspects of these human rights, which are concisely expressed in 'the golden rule' found in the Gospel: 'Do to others as you would have them do to you' (*Lk* 6:31; cf. *Mt* 7:12). The Church has always affirmed that fundamental rights, above and beyond the different ways in which they are formulated and the different degrees of importance they may have in various cultural contexts, are to be upheld and accorded universal recognition because they are inherent in the very nature of man, who is created in the image and likeness of God. If all human beings are created in the image and likeness of

God, then they share a common nature that binds them together and calls for universal respect. The Church, assimilating the teaching of Christ, considers the person as 'the worthiest of nature' (St. Thomas Aquinas, *De potentia*, 9, 3) and has taught that the ethical and political order that governs relationships between persons finds its origin in the very structure of man's being. The discovery of America and the ensuing anthropological debate in sixteenth- and seventeenth-century Europe led to a heightened awareness of human rights as such and of their universality (*ius gentium*). The modern period helped shape the idea that the message of Christ – because it proclaims that God loves every man and woman and that every human being is called to love God freely – demonstrates that everyone, independently of his or her social and cultural condition, by nature deserves freedom. At the same time, we must always remember that 'freedom itself needs to be set free. It is Christ who sets it free' (*Veritatis Splendor,* 86).

In the middle of the last century, after the vast suffering caused by two terrible world wars and the unspeakable crimes perpetrated by totalitarian ideologies, the international community acquired a new system of international law based on human rights. In this, it appears to have acted in conformity with the message that my predecessor Benedict XV proclaimed when he called on the belligerents of the First World War to 'transform the material force of arms into the moral force of law' ('Note to the Heads of the Belligerent Peoples', 1 August 1917).

Human rights became the reference point of a shared universal *ethos* – at least at the level of aspiration – for most of humankind. These rights have been ratified by almost every State in the world. The Second Vatican Council, in the Declaration *Dignitatis Humanae*, as well as my predecessors Paul VI and John Paul II, forcefully referred to the right to life and the right to freedom of conscience and religion as being at the centre of those rights that spring from human nature itself.

Strictly speaking, these human rights are not truths of faith, even though they are discoverable – and indeed come to full light – in the message of Christ who 'reveals man to man himself' (*Gaudium et Spes*, 22). They receive further confirmation from faith. Yet it stands to reason that, living and acting in the physical world as spiritual beings, men and women ascertain the pervading presence of a *logos* which enables them to distinguish not only between true and false, but also good and evil, better and worse, and justice and injustice. This ability to discern – this radical *agency* – renders every person capable of grasping the 'natural law', which is nothing other than a participation in the eternal law: '*unde...lex naturalis nihil aliud est quam parti-*

cipatio legis aeternae in rationali creatura' (St. Thomas Aquinas, *ST* I-II, 91, 2). The natural law is a universal guide recognizable to everyone, on the basis of which all people can reciprocally understand and love each other. Human rights, therefore, are ultimately rooted in a participation of God, who has created each human person with intelligence and freedom. If this solid ethical and political basis is ignored, human rights remain fragile since they are deprived of their sound foundation.

The Church's action in promoting human rights is therefore supported by rational reflection, in such a way that these rights can be presented to all people of good will, independently of any religious affiliation they may have. Nevertheless, as I have observed in my Encyclicals, on the one hand, human reason must undergo constant purification by faith, insofar as it is always in danger of a certain ethical blindness caused by disordered passions and sin; and, on the other hand, insofar as human rights need to be reappropriated by every generation and by each individual, and insofar as human freedom – which proceeds by a succession of free choices – is always fragile, the human person needs the unconditional hope and love that can only be found in God and that lead to participation in the justice and generosity of God towards others (cf. *Deus Caritas Est,* 18, and *Spe Salvi,* 24).

This perspective draws attention to some of the most critical social problems of recent decades, such as the growing awareness – which has in part arisen with globalisation and the present economic crisis – of a flagrant contrast between the equal *attribution* of rights and the unequal *access* to the means of attaining those rights. For Christians who regularly ask God to 'give us this day our daily bread', it is a shameful tragedy that one-fifth of humanity still goes hungry. Assuring an adequate food supply, like the protection of vital resources such as water and energy, requires all international leaders to collaborate in showing a readiness to work in good faith, respecting the natural law and promoting solidarity and subsidiarity with the weakest regions and peoples of the planet as the most effective strategy for eliminating social inequalities between countries and societies and for increasing global security.

Dear friends, dear Academicians, in exhorting you in your research and deliberations to be credible and consistent witnesses to the defence and promotion of these non-negotiable human rights which are founded in divine law, I most willingly impart to you my Apostolic Blessing.

ADDRESS TO THE HOLY FATHER

MARY ANN GLENDON

Holy Father,

Your Pontifical Academy of Social Sciences comes before you this morning with immense gratitude for the encouragement you have given us, as we strive to be ever more useful to the Church in the development of her social teachings.

Over the years, no matter what aspect of economics, law, sociology or political sciences has claimed our attention, there has been one central theme, one golden thread that has stitched all of our work together. Our central focus has always been on the dignity of the human person and the common good. This week, your Holiness, our Plenary Session has been entirely devoted to the way that theme has found expression in the concept of universal human rights.

In so doing, we have been mindful of the Church's long engagement with human rights, of her own decisive contributions to the dignitarian vision of rights embodied in so many human rights instruments, including the Universal Declaration of Human Rights; and of the Holy See as a fearless champion of that vision in international settings. That engagement has been characterized by a prudent recognition that the modern human rights project, like all human enterprises, constantly needs to be called to what is highest and best in its aspirations.

We have also been mindful of the fact that in today's world, ironically, many threats to the dignity of the person have appeared in the guise of human rights. As you pointed out in your memorable speech to the United Nations last year, there are mounting pressures to 'move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests'.

Accordingly in these days, with the help of experts in all the social sciences, we have reviewed the long reciprocal relationship between Christianity

and human rights ideas. We have explored the expanding circle of human rights protection in an effort to discern how new rights claims are, or are not, conducive to human flourishing. We have paid special attention to rights that are currently under assault such as the right to life, the right to found a family, freedom of conscience and religion, and to rights that have too long awaited fulfillment such as the right to decent subsistence. Then building on our previous studies of globalization, we have taken up the question of the proper roles of states, private actors, and international entities in bringing human rights to life.

I would also like to take this opportunity to thank you on behalf of all our members for your teachings on faith, hope and charity that provide an unconditional foundation for human rights, and for the example you set in the difficult Petrine mission to which providence has called you. We are deeply grateful for your constant solicitude towards our Academy, which is also manifested in the appointment of our new Academician Lubomír Mlčoch.

It only remains for me, dear Holy Father, to ask you to bless this Academy and all those who have generously shared their wisdom with us over the past few days. We thank you most sincerely for the gift of this encounter.

HUMAN RIGHTS AND CATHOLIC SOCIAL DOCTRINE

2009 PRESIDENT'S REPORT

The Fifteenth Plenary Session of the Academy in 2009 was devoted to 'Catholic Social Doctrine and Human Rights', a topic inspired both by the occasion of the 60th anniversary of the Universal Declaration of Human Rights, and the desire to explore the challenges and dilemmas highlighted by Pope Benedict in his Address to the United Nations in April 2008. Coordinated by Archbishop Roland Minnerath and Professors Ombretta Fumagalli and Vittorio Possenti, the meeting began by reviewing the long reciprocal relationship between Christianity and human rights ideas. Then, mindful of the Holy Father's observation in his UN speech that pressures are increasing to 'move away from the protection of human dignity towards the satisfaction of simple interests, often particular interests', the speakers examined the expanding catalog of human rights protection in an effort to discern how new rights claims are, or are not, conducive to human flourishing. Particular attention was devoted to rights that are currently under assault, such as the right to life, the right to found a family, freedom of conscience and religion, and to rights that have too long awaited fulfillment such as the right to decent subsistence. Then, building on the Academy's studies of globalization and subsidiarity, the participants took up the question of the proper roles of states, private actors, and international entities in bringing human rights to life.

In an audience for the Academicians and invited speakers, the Holy Father offered words of encouragement for the Academy's mission and expressed his hope that 'the fruit of your deliberations will continue to attest to the enduring pertinence of Catholic social teaching in a rapidly changing world'. Recalling that the Second Vatican Council had 'forcefully referred to the right to life and the right to freedom of conscience and religion as being at the center of those rights that spring from human nature itself', Pope Benedict told those present that 'human rights remain

fragile' if their basis is ignored. Taking note of the impact of the current economic crisis on the world's neediest persons, the Pope drew special attention to the importance of 'promoting solidarity and subsidiarity with the weakest regions and peoples of the planet', saying that it is 'a shameful tragedy that a fifth of humanity still goes hungry'.

* * *

Future Meetings

2010. Since the world economic crisis has a major impact on many areas that the Academy has studied over the years, it was decided to devote the 16th Plenary Session to 'Crisis in the Global Economy'. Professor José Raga has graciously agreed to be the coordinator for that meeting which will run from May 1 to May 5, 2010. The topic will also provide the Academy with an opportunity to study and discuss the implications for our work of the new papal encyclical, *Caritas in Veritate*, issued on June 29, 2009.

2011 and beyond. The planning process for the 2009 session on 'Catholic Social Doctrine and Human Rights' contemplated that it would be followed by a future session dealing with important topics that could not be covered within the confines of a single meeting, such as education for human rights, religious freedom (including models of secularism), development of just-war doctrine and other aspects of Catholic international relations theory. Similarly, the planning process for the 2010 session contemplated that a second session would probably be needed. As of this date, the order of those sessions remains to be determined.

* * *

The year 2009 also saw the publication of the Italian edition of *Papal Addresses to the Pontifical Academy of Sciences and the Pontifical Academy of Social Sciences by Popes John Paul II and Benedict XVI*. For the Pontifical Academy of Social Sciences, these papal messages have a special, one might even say quasi-constitutional, significance, for they amplify the brief description of the Academy's purposes set forth in our founding Statute. By bringing this valuable material together and providing it with a new and comprehensive introduction, our Chancellor, Bishop Marcelo Sánchez Sorondo, has performed an outstanding service for the Church and for all who are interested in Catholic social thought.

* * *

Since the Presidency of the Academy was temporarily vacant from 14 February 2008 to 19 January 2009 while the President was serving as U.S. Ambassador to the Holy See, I take this opportunity to thank all those who cooperated in the success of the Academy's 14th Plenary Session on 'Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together'. Coordinated by Professors Margaret Archer and Pierpaolo Donati, the 2008 Plenary had three principal aims: (1) to clarify the frequently misunderstood and misused concepts of common good, solidarity and subsidiarity; (2) to explore how, from practical as well as theoretical perspectives, solidarity and subsidiarity (properly understood) can work together to protect human dignity and promote the common good; and (3) to seek out new ideas and practices aimed at the ever more effective comprehension, integration, and implementation of the basic principles of Catholic social doctrine.

At a special audience for the participants, Pope Benedict XVI praised the Academy for its 'valuable contribution to the deepening and development of the Church's social doctrine and its application in the areas of law, economics, politics and the various other social sciences'. He assured the Academicians that 'your discussions will be of service to all people of good will, while simultaneously inspiring Christians to embrace more readily their obligation to enhance solidarity with and among their fellow citizens, and to act upon the principle of subsidiarity by promoting family life, voluntary associations, private initiative, and a public order that facilitates the healthy functioning of society's most basic communities'.

* * *

The year 2008 also saw the eagerly awaited publication of the Academy's *Summary on Globalization*, harvesting and presenting the main outcomes of several years' study by the Globalization Committee under the direction of Professor Louis Sabourin, joined in 2007 by Co-Director Professor Juan Llach. Professor Llach deserves our congratulations and gratitude for having undertaken the difficult task of preparing this valuable report. It will serve as an important element of the background as the Academy takes up the study of the global economic crisis.

* * *

On May 20, 2009, the Academy lost one of its most cherished members, Professor Jerzy Benedict Zubrzycki, who died at the age of 89 in Canberra, Australia. Professor Zubrzycki's role as a founding member of the Academy, his contributions to our work, his friendship with Pope John Paul II, and his radiant personality will long be gratefully remembered, and we will commemorate them at our next Plenary Session.

* * *

Finally, it is with great pleasure that I record here the addition of three new members to the Academy during the period covered by this Report: Professors Luis Ernesto Derbez Bautista, Angelika Nußberger, and Lubomír Mlčoch. We look forward to many years of fruitful collaboration with them.

INTRODUCTION

ROLAND MINNERATH,
OMBRETTA FUMAGALLI CARULLI, VITTORIO POSSENTI

'Where is your brother?' God's question to Cain (*Gen* 4:9) is posed to mankind in all epochs as a central question in the achievement of the Order of the Creation. It is proposed anew every time that the laws of a State or the practice of the international community or the behaviour of a people or the attitude of an individual forget that God is the supreme source of the dignity of the human person and his fundamental rights.

If one begins from this question and answers it by taking advantage of Catholic social doctrine, the listing of human rights emerges with a precise neutral grammar which places rights near to duties in the case of both individuals and communities: the right to life and to a family, to the integrity of the human person, to freedom of conscience, and to freedom of religion or belief. The slow emergence of the rights of freedom (as is the case with the various international charters of the modern age), from individual rights to political rights and social rights, has had to address this question, correlating itself with responsibility and duty as well.

A long historical itinerary, which was already taking place in the age when individual national states were affirming their sovereignty, witnessed the birth and flourishing of the ancient *ius gentium* as a regulator of the relations between peoples. This was a result of the fundamental contribution of the Dominican friar Francisco de Vitoria, a precursor of the idea of the United Nations. He argued that *totus mundus est quasi una res publica*. Other significant stages were reached in subsequent ages, at times in harmony with and at times in divergence with Christian principles.

The Situation Now

In the contemporary age the Universal Declaration of Human Rights and the references to it that have been made in the subsequent charters of individual States or the international community have been fundamental in

the consolidation in the collective consciousness of the importance of respect for human rights. 'Our society has rightly enshrined the greatness and dignity of the human person in various declarations of rights, formulated in the wake of the Universal Declaration of Human Rights, which was adopted exactly sixty years ago. That solemn act, in the words of Pope Paul VI, was one of the greatest achievements of the United Nations' (Benedict XVI, Address to the Diplomatic Corps, 7 January 2008).

This sentence confirms that the Universal Declaration of Human Rights was a seminal document in international law and marked a milestone in the journey of humanity towards respect for the rights of every human being. Since 1948 the Universal Declaration, together with other juridical instruments, has played a specific role in inserting new precepts and forms of behaviour into national and international relations. It has helped millions of people in their search for respect for human dignity, in the pathway towards better political systems, and in withdrawing the threat of violence and injustice from life in society. It has helped to install a 'culture of human rights' which by now is an essential dimension of the ethical, social and political debate nearly everywhere in the world.

However, we are painfully aware that fundamental human rights are violated often in a way that is equally dramatic to what happened sixty years ago, beginning with the right to life, and that millions of the citizens in the world are denied respect, freedom, development and the possibility of expressing their own opinions, of freely practicing their religion, and of freely enjoying a standard of living that ensures freedom from hunger and thirst. There is also an acute inability to counter the increasing phenomenon of the trade in humans, especially children. An unhealthy habitat, climatic disturbance, local and global inequalities, and an inability to achieve true solidarity towards the weakest regions continue to poison the contemporary world which is not able to pursue the authentic overall development of the person, the human family or the planet. The very pathway towards security and global peace runs the risk of taking more steps backwards than forwards given the absence of a strong system of governance leading towards supranational authorities that are able to work for global ends.

This differential description, made of light and darkness, has a multiplicity of causes, amongst which of importance is a correct understanding of the nature and range of human rights. Here the social doctrine of the Catholic Church illuminates an original approach. The dialectic relationship between the Church and human rights, which has occurred during modernity, cannot be seen as being closed for ever: new problems and new situations constantly emerge and they require discernment and exploration.

The Relationship between the Catholic Church and Human Rights

It is known that the Catholic Church is at the present time one of the few international authorities that defends the Universal Declaration of Human Rights of 1948. There are two reasons for this. This Declaration is in perfect harmony with the Christian vision of the dignity and the inviolability of the human person and the family based on marriage. The development of human rights of the first, second and third generations has largely lost from sight the anchorage of human rights in the natural order and has accentuated in an exaggerated way the subjective, that is to say individualistic, character of the very understanding of human rights. Whereas the Declaration did not exclude a horizon of transcendence in its upholding of the non-negotiability of human dignity, this foundation has not been looked for in the developments subsequent to 1966. The Catholic Church observes with amazement the proclaiming of rights that correspond more to the claims of organised minorities than requirements that are rationally based on the natural order.

This session wants to emphasise once again the specificity of the approach of the social doctrine of the Church which is based upon the notion of the dignity of the person who participates in relationships with others and interacts with the goods of the universe. The social doctrine quite rightly hesitates to engage with a subjective conception of rights. The approach of the Church sometimes gives the impression of not being very different from that of States and international organisations. We should return and pick up the thread that began with the approach exclusively centred on the natural law but which then drifted into an approach centred on the subjective rights of the person. This move should not be understood as an alignment with a specific line of positivist thinking but should be placed in its complete conceptual framework where the reference point remains John XXIII's *Pacem in Terris* (1963). The rights of the human person spring from his nature! They do not spring from his will or his desires. To speak about nature is to recognise the existence of that natural order which one has to study and experience for its laws to be discovered. Thus rights and duties cannot be separated and rights cannot be extended beyond what is revealed by the natural order of things.

For the social doctrine of the Church, human rights do not have substance if they are not based upon an anthropology and an understanding of the relationship between the person and society. It has tried to clarify which rights are more fundamental than others, those, specifically, that spring

from the nature of the person: the right to life, to physical and mental inviolability, to freedom of conscience and to religious liberty. These rights are consubstantial with the person and cannot be taken away by anybody. They are distinguished from the rights inherent to the person as a member of society such as civil and political rights. For these rights to be recognised at a practical level, the environmental conditions must exist. A person can be deprived of certain civil rights but not of his fundamental rights. An analogous situation exists with social and cultural rights. As for the third generation of rights, the right to peace, to a healthy environment, to development, and to diversity...are these rights? They are more objectives to be reached, conditions for the achievement of the 'common good', for which all authority exists.

To contribute in an effective way to clarifying the current debates and developments in relation to human rights, it is necessary to rediscover the pathway of their universality. This is located in the unchanging nature of man and not in a certain individualistic and relativistic Western culture which is not founded on being but on power. The contemporary drift of human 'rights' leads to the proclaiming of the right to an abortion, the right of a couple of the same sex to adopt children, and the right to avoid juridical precision as regards concepts such as 'the person', 'life' and 'the family', as rights. These negative trends, with their injurious consequences, must be condemned in the name of the rational coherence of human rights.

A Universal Anthropological Foundation: the Natural Law

In the tradition of the social doctrine of the Church, human rights are rooted in the natural moral law: '[it] states the first and essential precepts which govern the moral life. It hinges upon the desire for God and submission to him, who is the source and judge of all that is good, as well as upon the sense that the other is one's equal. Its principal precepts are expressed in the Decalogue. This law is called 'natural', not in reference to the nature of irrational things, but because reason which decrees it properly belongs to human nature' (*Catechism of the Catholic Church*, n. 1955).

Because of the influence of cultural and ideological factors, civil society today is in a situation of confusion: the original obviousness of the foundations of the human being and his ethical behaviour has been lost, and the doctrine of the natural moral law comes up against other conceptions which are its direct negation. In the case of by no mean few thinkers today there seems to dominate a positivistic conception of law, on the basis of

which it is society, or in fact a majority of citizens, which presents itself as constituting the ultimate source of civil law. At the roots of this trend we encounter ethical relativism, which by no means few see as one of the principal conditions for democracy because relativism is said to assure tolerance and mutual respect between people. However, on the basis of these assumptions the majority of the moment is said to become the ultimate source of law, whereas history itself demonstrates that majorities can be deceived. 'True rationality is not assured by the consensus of a large number of people but only by the transparency of human reason to creative Reason and by the shared listening to this Source of our rationality' (Benedict XVI, Address to those Taking Part in the Plenary Session of the International Theological Commission, 5 October 2007).

Rights and Duties

Although during the contemporary age awareness of rights has indeed developed, there has been an attenuation of knowledge about 'duties towards the community', which in the spirit of those who drew up the Universal Declaration was to have counterbalanced an unlimited expansion of rights with the responsible commitment of the individual to other individuals, which today has acquired the new meanings of intergenerational solidarity.

Now, the foundation of human rights in the natural law helps us to re-establish their authentic grammar, in relationship to responsibilities and duties as well. Rights without duties is the modern weakness, a weakness that is growing today because of the influence of individualistic and libertarian currents. This phenomenon has been pointed out on numerous occasions by the voice of the Church: 'Another observation needs to be made: the international community, which since 1948 has possessed a charter of the inalienable rights of the human person, has generally failed to *insist sufficiently on corresponding duties*. It is *duty* that establishes the limits within which *rights* must be contained in order not to become an exercise in arbitrariness. A greater awareness of *universal human duties* would greatly benefit the cause of peace, setting it on the moral basis of a shared recognition of *an order in things* which is not dependent on the will of any individual or group' ('*Pacem in Terris:* a Permanent Commitment', Message of His Holiness John Paul II for the Celebration of the World Day of Peace, 1 January 2003).

Connected with the imbalance between rights and duties, for some decades a *libertarian* paradigm has been growing which seeks to prevail

over an interpretation of human rights based upon the dignity of the human person. For respect for such rights to effectively assure the cohesion of the natural family, and of the national and international 'family', individual desires or claims should not be recognised *ipso facto* as collective rights. In this way, in fact, neither a 'family' nor a community is created but doors are opened to a dangerous collective individualism. Peace is not obtained but – in opening to every kind of recognition – one goes towards inevitable contrasts. On these points a renewed reflection is required on the principle of responsibility, which is immediately connected with the concept of duty.

Religious Freedom: the First and Fundamental Freedom

From the dualism brought by Christianity ('Render under Caesar what is Caesar's, and unto God what is God's'), sprung not only the freedom of the Church but also a right that the collective consciousness perceived much later – the right to religious freedom.

This has a triple dimension – the individual, the collective and the institutional. It is not, to put it in other terms, only the right of the person to believe in his innermost self in the truth of his own faith. It is also, and above all else, the right to express, profess and practice his own religion, to live it in an individual form and through association. And the right to freedom of the relationship with God postulates the right to the freedom of the Church as an institution, which represents the interests of the faithful before 'Caesar'. The ultimate foundation of these claims is the defence of the dignity of the person, which is intimately bound up with his freedom in every choice and above all in choices in harmony with his own religious belief.

As has often been repeated in international contexts by the Holy See, the verification of the right to religious freedom constitutes a test for the verification of all other rights, with the consequence that there are a multiplicity of questions to be examined in relation to this right, both as regards its contents, as laid down in international documents, and its actual defence.

One may think, for example, of the balance between freedom of speech and expression, on the one hand, and respect for religion and religious symbols, on the other. This is a question that the Holy See has raised in various international forums and it is of particular contemporary relevance, not only as regards the Catholic Church but also other religious confessions (prominent amongst them Islam).

Human Rights, Social Cooperation and Economic Development

Basing oneself on the principle of the *universal destination of goods*, called for with great emphasis by the social doctrine of the Church (cf. in particular *Gaudium et Spes*, *Populorum Progressio* and *Sollicitudo Rei Socialis* – according to this last the universal destination of goods is the 'characteristic principle of Christian social doctrine', n. 42), it is possible to bestow a new countenance on the 'social question' at a planetary level. It is not possible to think of access by the world's population to food, water and energy, but also to medicines and technology, or indeed control of the phenomenon of climatic change, without shared and global solutions. To be just and efficacious these solutions cannot but recognise the ethical value as well of these very urgent questions, which should be addressed always by looking at the common good and in a spirit of authentic solidarity. The right to life runs the risk of being gravely wounded if it does not include the natural right to have access to the goods of the earth and to procure for oneself what is required to live.

The correlation between human rights and social cooperation opens up important horizons in domestic and international politics, both in the relationship between peace and development and as regards the still unresolved problems posed by globalisation. A series of questions makes the whole area a troubled one. If it is not enough to assure the complex of strictly personal rights, how can the conditions be created for solidarity to be effective? To what extent are the domestic common good and the international common good compatible not only in political terms but also, and above all else, in economic and social terms?

Equally troubled is the correlation between human rights, economic development and democratic forms of government for the peoples of the world. Although, indeed, in the medium-term, a democratic system of government and respect for human rights has a positive effect on the economic development of a country, it does not follow that economic development always brings with it more democracy or more human rights. A question thus presents itself: which instruments, in an epoch when the economy is perhaps the only reality that is actually globalised, will allow an economic impact that will produce changes within States in terms of respect for human rights?

Amongst these there is the environment. The relevance of international protocols to world politics (the Kyoto Protocol) is becoming increasingly important, and is equal, unfortunately, to the inability of nations to find short-, medium-, and long-term, solutions, something that is also the result

of the influences of centres of political-economic power which have goals that are far from the common good. Nor is it only the environment that provokes major worry. Today primary goods such as water and food as well are not available to everyone. One statistic suffices here: about 900 million people, of whom most are children, suffer every day from malnutrition, especially in sub-Sahara Africa and in certain regions of Asia.

The Task of International Law and the Responsibility to Protect

For some decades now an international law of human rights has been forming as a body of doctrines and rules which, by grafting a non-territorial system onto an ancient territorial one of internal state law, has introduced a supra-state criterion of judgement and assessment at a higher level than the powers of individual States are called upon to honour. In this new law, whose defining feature is *dignitas humana servanda est*, there is concrete expression of the idea of the 'universal common good' (cf. *Pacem in Terris*, IV).

When they are solidly based, rights emerge as the guiding forces of a system of strong governance (see Cardinal Bertone's speech to the PASS in 2007) which aims at an international order above the present one and is endowed with planetary and supranational institutions. Weak, procedural and technical governance is not able to implement human rights, to act against transgressors (an international criminal court), to engage in initiatives of a humanitarian kind, or to address the subjects of justice and peace and prevent conflicts.

For that matter the implementation of human rights cannot take place in a coercive way following a single rationalistic, libertarian and Western model. It should be done by respecting the basic cement of the various societies of the world, the integrity of their peoples, and their cultures, which have experienced a long sedimentation, unless notable violations of human rights take place within them.

Political and humanitarian interference, or to put it better, as Benedict XVI specified to the United Nations, 'the responsibility to protect', remains a question of the highest interest. The Holy See has effectively theorised the right to humanitarian interference, well clarifying its limits as well, amongst which is a necessary and previous recourse to all the instruments of diplomacy.

This is a subject that not only calls into play the relationships between national sovereignty, national interests and global society, but which also

imposes reflection about the transformations of sovereignty and the new forms of political power: from NGOs to the mass media and on to mobilisation within specific forums (from the no global to the Davos meetings, for example). Do these new powers constitute new forms of interference? Today, what is sovereignty? Is sovereignty invoked against humanitarian interference an organised hypocrisy?

The Enforceability of Human Rights

Two major tasks lie before us: the effective assurance of rights which have been proclaimed but which are far having become effective for a notable part of mankind, on the one hand, and the pathway to identifying new real rights, on the other. The first subject is of particular relevance: who gains by proclaiming human rights that can be empty declarations when no juridical guarantee is present? We need to proceed to the juridical protection and related enforcement of human rights. This is a subject where debate has clarified that in addition to the assurances that States must offer to their citizens, a 'constitution of the world' is also required which, in determining which governments are good and which governments are bad, acts internationally against offences to human rights, genocide, massacres and violations through courts of justice that are now being constructed with difficulty. In the world geopolitical situation of our epoch, it falls in particular to the States of the planet to be committed to engage in specific forms of conduct within their borders, and this confirms that respect for human rights is a problem that is both national and international in character that needs structures that offer guarantees and apply sanctions at both levels.

Today questions arise in relation to the enforceability of human rights that have to be dealt with and the same may be said of verifications that have to be engaged in. One can proceed in the following way to achieve their effective defence:

– Through jurisdictional procedures. Have the numerous international courts with responsibilities which tend to be limited to a territory or to a sphere of concern produced positive outcomes? Perhaps, but have they actually produced cultural change and thus greater awareness of the universality of human rights and thus of their inviolability? It should, however, be stressed that the universality of the defence of human rights may never be achieved with these instruments given that they require the consent of States to their being subjected to the jurisdiction of these courts.

– Through political-diplomatic processes characterised in various ways in the international sphere by watching over respect for human rights. In addition to it being a diplomatic technique, 'soft law', the outcome of the contribution of technical officials (a bureaucracy that is very active in the drawing up of documents to be submitted to the decisions of the international agencies where such officials work) rather than of aware choices by politicians, is of interest. To what extent, as indeed seems increasingly often to be the case, can this pervert 'hard law'? What should be done in this case? One may think here, for example, of the concept of the 'family' which has been carelessly replaced by soft law with the concept of families, including homosexual ones.

– Through military intervention. Here there comes into play not only the question of the limits to humanitarian interference in the sovereignty of States but also, and above all, the question, which is now more acute than ever before, of the so-termed 'exportation of democracy' or 'freedom'. Any assessment should be made more in relation to the concrete actual results than the theoretical assumptions of these interventions.

Education and Human Rights

If, therefore, there is no absence of coercive instruments for respect for human rights, their spontaneous observation is nonetheless the goal that should be aimed for. Education of citizens in human rights, starting with the youngest generations, thus remains the most appropriate instrument.

The deliberations of our plenary session will devote to the subject of education in human rights some summarising references within certain papers but this is a subject of the highest importance which involves the human person in his relationships with the agencies of education. Amongst these, it should be stressed that in addition to the fundamental and inescapable role of the family there stand out the Churches, who have been wise midwives of democracy in authoritarian countries (one may think of their role in the countries of Eastern Europe even before the fall of the Berlin Wall). And not only the Churches as institutions, but numerous grassroots bodies of religious inspiration as well have worked and continue to work directly or through organs of communication: from parish communities to NGOs, and on to lay associations and missionary movements.

A series of questions remain in the background of our thoughts. In addition to schools and the family, what are the subjects and the agencies that

are most suited to education? Which are the more useful instruments – national programmes or international programmes?

Furthermore, what is the relationship between education and immigration? This phenomenon, which is specific to our epoch, of the immigration of people with cultures and traditions (including religious ones) that are diametrically different to those of the countries of destination, raises problems of integration. It may happen that national legislation has a catechetic function as regards immigrants, educating them in respect for human rights. Which models of possible integration have managed to avoid all forms of secular or religious fundamentalism?

The Task of the Social Sciences

In conformity with its specific task, the PASS wants to explore the subject of human rights in relation to the social doctrine of the Church and the social sciences, investigating their relationship, new problems, and their ability to point out new solutions under the impetus of the Gospel of Jesus Christ, which works as a yeast that is able to upset the horizons within which our forms of security are enclosed. In the nexus between human rights and the social sciences questions emerge. For example: to what extent do the social sciences dialogue with human rights? To what extent do they accept or do they change the signs of rationality and spirituality of man to the point of deforming the image of man as a person made in the image of God and in opposition to his singularity from conception onwards? Are the social sciences able to open themselves to the hope of being the bearers of hope? So as not to fall into cynicism or vice versa slip into disappointment, they need principles that go beyond what is convenient or special interests.

Thinking anew about human rights thus becomes of urgent importance and does not involve only leaders in public life but also, and above all else, the social sciences. Law, sociology, economics and political science today have duties that are more in number than those albeit important sciences that are involved in scientific inquiry and research: they have to offer solutions that can be achieved at a practical level, by coming down from the ivory tower of their respective disciplines and addressing actual reality.

The Programme

Divided into three days, the plenary session is organised in the following way:

1) The relationship between the Catholic Church and human rights, with attention also being paid to the influence of the former on the latter.

2) Thinking anew about human rights in the twenty-first century especially in relation to the nexus between rights and duties, and in some especially sensitive areas: life, the family, religious freedom and international social justice.

3) Studying the universality and interdependence of human rights in relation to the rights of the first, second and third generations; assessing the exposure of international law to the idea of the person; and addressing urgent questions such as humanitarian intervention, the crime of genocide, and the protection of human rights by international organisations.

PROGRAMME

XV PLENARY SESSION: 1-5 MAY 2009

FRIDAY 1 MAY 2009

Remarks of the President
Prof. Mary Ann GLENDON

Introduction to the Subject of the Meeting
H.E. Msgr. Prof. Roland MINNERATH, Coordinator of the Meeting

THE CATHOLIC CHURCH AND HUMAN RIGHTS

H.E. Msgr. Prof. Roland MINNERATH: *How Did the Catholic Church Come to Subjective Human Rights?*
Commentator:
Msgr. Prof. Michel SCHOOYANS

President Prof. Mary Ann GLENDON: *The Influence of Catholic Social Doctrine on Human Rights*
Prof. Herbert SCHAMBECK: *Die Menschenrechte in der Lehre der Katholischen Kirche*

RETHINKING HUMAN RIGHTS IN THE 21st CENTURY

Prof. Vittorio POSSENTI: *Antropologia cristiana e diritti umani. Diritti e doveri*
Commentator:
Prof. José T. RAGA

Panel:
Prof. Pierpaolo DONATI
Prof. Paul KIRCHHOF
Prof. Juan José LLACH
Prof. Fausto POCAR
Prof. Wilfrido VILLACORTA
From the 1948 Universal Declaration to the Last Generation Rights. How do Human Rights of the First, Second and Third Generations Interrelate?

SATURDAY 2 MAY 2009

HUMAN RIGHTS AND THE CHRISTIAN VISION OF MAN: LIFE AND FAMILY, FREEDOM OF CONSCIENCE AND RELIGION, INTERNATIONAL JUSTICE

Prof. Janne Haaland MATLARY: *The Right to Life and to Set Up a Family*
Commentator:
Prof. Kevin RYAN

Prof. Olegario GONZÁLEZ DE CARDEDAL: *Freedom of Conscience and Religion as Fundamental Human Rights. Their Importance for Interreligious Dialogue*
Prof. Ombretta FUMAGALLI CARULLI: *Freedom of Conscience and Religion as Fundamental Human Rights. Their Importance for Interreligious Dialogue*
Commentator:
Prof. Rocco BUTTIGLIONE

Prof. Olivier DE SCHUTTER: *The Right to Food*
Commentator:
Prof. Edmond MALINVAUD

Prof. Joseph STIGLITZ: *Human Rights and Globalization: The Responsibility of States and of Private Actors*
Commentator:
Prof. Lubomír MLČOCH

SUNDAY 3 MAY 2009

Holy Mass at the Papal Basilica of St Paul Outside the Walls celebrated by H.Em. Card. Andrea Cordero Lanza di Montezemolo
Visit of the Benedictine Monastery

MONDAY 4 MAY 2009

Assuring and Implementing the Universality, Indivisibility and Interdependence of Human Rights

Prof. Hsin-chi Kuan: *The Question of the Universality, Indivisibility and Interdependence of Human Rights: Focus on the Case of China*
Prof. Ravi Kanbur: *The Question of the Universality, Indivisibility and Interdependence of Human Rights: Focus on the Case of India*
Commentator:
Prof. Partha Dasgupta

Surveying and Enforcing Human Rights

Prof. Krzysztof Skubiszewski: *Human Rights and the International Criminal Court. The Crime of Genocide*

Commentator:
Prof. Otto Triffterer

Panel:
Prof. Janne Haaland Matlary
Prof. Pierre Manent
Prof. Angelika Nußberger
Prof. Louis Sabourin
State Sovereignty and Humanitarian Intervention: the Duty to Protect

H.E. Amb. Christian Strohal: *The Role of International Organizations and NGOs in Surveying Human Rights Compliance*

Sen. Giulio ANDREOTTI: *The Role of Policy in Surveying Human Rights Compliance Between Détente and Clash: A Statesman's Experience*

TUESDAY 5 MAY 2009

Panel:
Prof. Juan José LLACH: *Academy's Alerts on the Weaknesses of Globalization and the Present Crisis*
H.Em. Card. Oscar A. RODRÍGUEZ MARADIAGA: *The SDC and Poorest Countries' Viewpoint*
Prof. Hans TIETMEYER: *The PASS' Viewpoint*
Prof. Joseph STIGLITZ: *The PASS' Viewpoint*

General Discussion
PASS Summary on Globalization and the Present Crisis

Papal Audience

Conclusions and General Discussion

Closed Session for Academicians

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SCIENTIFIC PAPERS

THE CATHOLIC CHURCH AND HUMAN RIGHTS

LA DOCTRINE SOCIALE DE L'EGLISE ET LES DROITS SUBJECTIFS DE LA PERSONNE

ROLAND MINNERATH

I. La phase du rejet

Le magistère de l'Eglise catholique a longtemps entretenu les plus expresses réserves à l'égard de la notion de droit humain subjectif. La raison en est simple. Ces droits ont été formulés dans un contexte d'hostilité à l'Eglise, et surtout dans le cadre d'une anthropologie qui lui est étrangère.

Les Lumières ont fait émerger l'idéologie de l'individu et du contrat social. L'individu est un atome errant sans liens constitutifs avec les autres. Il est sa propre origine et sa propre fin. La société qu'il forme avec les autres se régit selon la théorie du contrat social. Ce contrat est l'expression de la libre volonté des individus qui abandonnent au souverain une partie de leur liberté à charge pour lui de les protéger les uns des autres. Il n'y a aucune référence à un ordre éthique antérieur au droit positif du contrat social. Il n'y a pas de référence supérieure à la volonté changeante des individus.

L'individualisme du contrat social se reflète dans les premières déclarations des droits humains. La *Déclaration d'indépendance* américaine (1776) se distingue de celles qui vont suivre par sa mention explicite du "Créateur de la nature", qui a doté les individus de droits inaliénables, dont le premier est le droit à la vie. La *Déclaration* française de 1789 énonce quatre droits inaliénables qui seraient propres aux individus en l'état de nature, et que la société s'engage à respecter: la liberté, la propriété, la sécurité et la résistance à l'oppression.

La réaction de l'Eglise a consisté en une condamnation de ces droits subjectifs. Précisons que les droits rejetés sont les droits civils et politiques liés à la Révolution française et au renversement de l'ordre ancien. Ce rejet s'explique pour deux raisons: ils renversent la notion même de droit et ils pla-

cent l'individu abstrait à la source de l'éthique sociale, l'érigeant en maître du bien et du mal. Pie VI condamne cette "liberté illimitée" de l'individu dont les choix ne sont orientés par aucune référence objective, mais sont l'expression de sa volonté arbitraire au service de ses désirs et de ses intérêts.

Jusqu'à la fin du XIXe siècle, l'Eglise a rejeté le libéralisme politique, économique et éthique sous-jacent à la culture des droits subjectifs. On peut rappeler les condamnations de Grégoire XVI (*Mirari vos,* dans *Acta Sanctae Sedis* (=ASS) 4 [1868] 341), qualifiant de "délire" les libertés de conscience et de culte, suivi par Pie IX (*Quanta cura,* dans ASS 3 [1867/68] 164), car ces libertés paraissaient indissolublement liées à une vision de la société basée sur l'indifférentisme en matière de vérité, le subjectivisme en matière de droit, le relativisme en matière de morale. Le *Syllabus* s'élève contre une compréhension de la raison coupée de toute référence à Dieu, raison qui crée sa vérité, au lieu d'explorer la vérité dans ce qui est. La proposition 3 condamne l'opinion de ceux qui prétendent que "la raison humaine, considérée sans rapport avec Dieu, est l'unique arbitre du vrai et du faux, du bien et du mal ; elle est à elle-même sa loi..." (ASS 3 [1867/68] 168).

L'Eglise ne pouvait que marquer sa désapprobation devant un système de droit sans ordre qui le fonde, connoté de relativisme éthique, de positivisme juridique et d'indifférentisme. L'idée même que le libéralisme avait de la religion comme pure création de l'esprit humain, était inacceptable. Il faut aussi se souvenir que l'apologétique catholique ne considérait pas alors les droits de la personne, mais réclamait le droit de l'Eglise à la liberté corporative. En effet de 1864 à 1964, a été développé l'enseignement de ce que l'on appelait "le droit public de l'Eglise", discipline qui visait à la défense des droits de l'Eglise face à l'Etat, à l'aide de la théorie des deux "sociétés parfaites". Cette doctrine maintenait que l'erreur n'avait aucun droit, tout au plus pouvait-on la tolérer pour éviter un plus grand mal.

On ne comprend bien la longue résistance de l'Eglise à l'idée de droit subjectif, qu'en la replaçant dans la crise ouverte en Occident par le nominalisme au XIVe siècle. Jusque-là prévalait dans la pensée philosophique la notion d'ordre créé. Saint Thomas avait admirablement fait la synthèse entre la révélation biblique et la pensée aristotélicienne, et posé les distinctions nécessaires entre foi et raison, ordre naturel et ordre de la grâce, ordre temporel et ordre eschatologique. Dieu est le créateur de l'univers comme de la raison humaine. L'univers est informé par la raison divine, et la raison de l'homme est une participation à la raison divine. Par la raison, les hommes sont capables d'arriver à l'intuition de l'ordre du monde et de l'ordre qui doit régner entre les êtres humains. Cet ordre, qui est de nature éthique, s'appel-

le la loi naturelle. Le Moyen Age avait donc conçu l'autonomie des réalités terrestres concevables par la raison et avait jeté les bases d'une éthique universelle fondée sur la loi naturelle, commune à tous les hommes.

L'éthique sociale était fondée sur l'ordre inhérent aux relations humaines, qu'il appartient à la raison de scruter sans cesse. Pour saint Thomas, tout homme manifeste son humanité commune aux autres hommes par des inclinations naturelles qu'il partage avec les autres êtres comme la conservation de soi et la reproduction de l'espèce ou qui lui sont propres comme le désir de connaître la vérité et de vivre en société. C'est donc dans un ordre naturel que sont fondés les besoins humains, non sur une liste de droits subjectifs. Le bien moral est objectif; il est inscrit par le Créateur dans la nature même des êtres créés. La raison scrute et découvre les structures fondamentales des relations entre les êtres humains. Les relations appellent un droit apte à les réguler. L'ordre naturel inspire donc la conception d'un droit naturel, qui consiste à établir rationnellement ce qui est dû à chacun en justice. Le droit positif n'est droit que s'il ne contredit pas ce droit naturel. Pour protéger la personne humaine, l'anthropologie thomiste ne parlait pas de droit subjectif, mais de nécessaire respect de l'ordre naturel voulu par Dieu.

Cette vision d'un ordre rationnel de l'éthique sociale a été brisée par Guillaume d'Occam et le nominalisme. Pour lui, il n'y a pas de raison en Dieu, seulement son imprévisible volonté. La raison humaine n'est donc pas participation à une raison plus haute, elle est sa propre fin. Le monde n'est pas intelligible. Nous ne découvrons pas les structures de nos relations humaines dans un ordre à déchiffrer. De même que Dieu est arbitraire en ce qu'il décide, et imprévisible, de même la volonté humaine se détermine-t-elle selon son bon plaisir. La loi est loi parce que expression de la volonté du législateur. Elle n'est pas loi parce que expression d'une loi rationnelle plus haute conforme à la loi naturelle. Il faut obéir à la loi parce que c'est la loi, non parce qu'elle est juste et bonne. Ainsi la liberté humaine n'est pas liberté de se mouvoir dans des contraintes et des limites données, elle est liberté absolue, sans référence à rien d'autre qu'elle-même. On a retenu de Thomas Hobbes la formule célèbre: "Auctoritas, non veritas facit legem" (*Le Léviathan*, [1651] XXVI). C'est cette conception du droit que l'Eglise a combattue.

On ne comprend la problématique des droits subjectifs que dans la tension: nature – personne. Dans la pensée constante de l'Eglise, personne et nature ne sont pas opposés. Chaque personne réalise de manière spécifique l'unique nature humaine. "Persona est individua substantia rationalis naturae" disait Boèce. Autrement dit, c'est dans notre nature, avec ses limites

concrètes, que nous découvrons les conditions d'exercice de notre liberté. Notre nature nous donne des orientations pour nos choix. La raison qui scrute la nature des choses, y découvre les intentions divines qui s'y manifestent. Le nominalisme dit que tout universel réel est un abus de langage. Si la liberté n'est plus exercée à l'intérieur d'un ordre qui lui donne sens et possibilité de se déployer, ses choix deviennent indifférents. La raison cède le pas à la volonté subjective arbitraire. La nature ne recèle plus de sens saisissable par la raison.

Avec le nominalisme, la pensée s'est installée dans la négation de la nature. La nature a été réduite à la pure extériorité, à la matière inerte, sans finalité, sans lien entre ses éléments constitutifs. Sur cette matière inerte, l'homme affirme son pouvoir. L'homme n'est plus dans la nature, il s'en sert pour affirmer sa seigneurie sur elle. La liberté ne se sent plus objectivement limitée. L'éthique n'est plus inscrite dans l'être. Elle est au bout du choix des individus. Toute hétéronomie provenant de la nature serait une menace à l'autonomie revendiquée par les individus. Donc le corps est un pur avoir, sur lequel l'individu a le pouvoir de décision. Ainsi l'idéologie récente du "genre" qui serait laissé au libre choix des individus, indépendamment du sexe auquel ils appartiennent selon la nature.

II. Vers une ouverture au discours sur les droits subjectifs

Dans l'enseignement social de Léon XIII, pourtant enraciné dans la pensée thomiste, apparaît pour la première fois un langage proche de celui des droits subjectifs. Alors que le libéralisme traitait les travailleurs comme des marchandises, et que le socialisme les sacrifiait à la collectivité, Léon XIII, dans son encyclique *Rerum novarum* (1891), s'élève avec force pour affirmer la dignité inaliénable de la personne. Tout homme a des droits antérieurs au système économique qui l'exploite. "L'homme est, en effet, antérieur à l'Etat, et avant que ce dernier fût formé, l'homme avait déjà reçu de la nature le droit de vivre et de protéger son existence" (ASS 23 (1890-1891) 643). Les premiers droits humains subjectifs affirmés par le magistère sont des droits sociaux: droit au travail, au juste salaire, droit de fonder une famille, d'éduquer les enfants, de disposer d'une propriété privée, de s'associer en syndicats professionnels.

Sans sortir de la vision de la nature qui confère à l'homme sa dignité, le langage glisse vers la considération de la personne en elle-même. Dans la pensée catholique, la personne ne sera jamais dissociée de la nature qu'elle parta-

ge avec toutes les autres personnes. Mais le langage déplace l'accent de l'objectivité de ce qui est dû selon la nature au sujet, qui devient un sujet de droits.

Un pas supplémentaire est franchi par Pie XI, dans *Quadragesimo anno* (1931). Il propose un modèle de société participative et corporative face aux régimes totalitaires de l'époque, en énonçant le principe de subsidiarité comme principe découlant de l'ordre naturel, selon lequel les groupes humains doivent pouvoir se prendre en charge et ne recourir à un niveau supérieur de régulation que lorsqu'ils ne sont plus en mesure de s'assumer eux-mêmes. Pie XI condamne le fascisme (1931), le national-socialisme (1937), le communisme (1937) comme autant de régimes politiques qui foulent au pied la dignité de la personne et les libertés qui doivent lui être reconnues. "Dieu a doté l'homme de prérogatives nombreuses et variées: le droit à la vie, à l'intégrité du corps, aux moyens nécessaires à l'existence; le droit de tendre à sa fin dernière dans la voie tracée par Dieu; le droit d'association, de propriété, et le droit d'user de cette propriété" (*Divini Redemptoris*, 27 dans *Acta Apostolicae Sedis* [=AAS] 29, 1937, 80). Insensiblement, le langage s'achemine vers la reconnaissance des droits subjectifs de la personne, droits bafoués, qu'il est urgent de défendre.

Un changement dans le discours de l'Eglise va apparaître à la suite de la *Déclaration universelle des droits de l'homme* de 1948. On peut observer une gradation significative dans l'acceptation de cette déclaration de la part du magistère. Pie XII avait émis les plus grandes réserves avant même sa publication. Ce texte ne se référait pas à la loi naturelle, et risquait de n'être qu'un catalogue de droits sans référence à l'ordre naturel qui les fonde. Cependant, à y regarder de plus près, la *Déclaration* ouvre un horizon de transcendance qui lui donne toute sa force. La dignité "inhérente à tous les membres de la famille humaine" y est affirmée sans condition. Cette dignité d'où vient-elle? Le seul fait de l'affirmer, ou plutôt de la déclarer, constitue un élément sur lequel peut se greffer une réflexion sur la nature humaine, en soi indisponible, dont la *Déclaration* entend tirer toutes les conséquences.

Pie XII place l'enseignement social de l'Eglise sur le terrain de la loi naturelle. "L'homme, loin d'être l'objet et comme un élément passif de la vie sociale, en est au contraire et doit en être et demeurer le sujet, le fondement et la fin... Nous disons que l'homme est libre, lié par ses devoirs, doté de droits inviolables, l'origine et la fin de la société humaine (Pie XII, Radiomessage de Noël 1944, in: *Acta Apostolicae Sedis* 37, 1945, 5). L'"ordre immuable des choses" confère à tout être humain des libertés ou des immunités par rapport au pouvoir de l'Etat. Ces libertés sont antérieures à tout régime politique et doivent toujours être protégées. Exprimées en termes de

droits humains, ces libertés ou domaines indisponibles, sont le droit à la vie, à la liberté, au mariage, le droit de fonder une famille et le droit des parents d'assurer l'éducation de leurs enfants (cf. *Radio-message* du 1er juin 1941, 5; 21). Toutes ces libertés avaient été refusées par les régimes totalitaires. Elles sont rappelées comme inviolables et ancrées dans la nature même de l'homme. Pie XII revient sur la liberté de presse qui n'est limitée que par le service de la vérité, de la justice et du droit.

La grande encyclique *Pacem in terris* de Jean XXIII marque un tournant dans l'approche du magistère dans la question des droits subjectifs. Ce document intègre le langage des droits subjectifs dans la perspective classique de la loi naturelle et du droit naturel. Les devoirs ne sont pas oubliés. Ils sont l'envers des droits. Les droits des uns créent des devoirs pour les tiers. Le passage au discours sur les droits n'était pas facile pour l'Eglise qui insistait traditionnellement sur les devoirs envers les autres (cf. les Dix commandements). On y lit au n. 9: "Le fondement de toute société bien ordonnée et féconde, c'est le principe que tout être humain est une personne, c'est-à-dire une nature douée d'intelligence et de volonté libre. Par là même, il est sujet de droits et de devoirs, découlant les uns des autres, ensemble et immédiatement, de sa nature: aussi sont-ils universels, inaliénables" (AAS 60, 1963, 260).

Le concile Vatican II fait sien ce langage. Dans la Déclaration *Dignitatis humanae* (=DH), n° 2, il fonde le droit subjectif à la liberté de religion sur la nature de la personne, créée libre et tenue de suivre sa conscience dans la recherche de la vérité. La liberté de conscience et de religion n'est pas fondée sur un choix arbitraire de la personne, mais sur son orientation naturelle à rechercher la vérité sur Dieu et son Eglise. Le concile a opéré une refondation de la notion de liberté de conscience et de religion. Même la conscience erronée a des droits du fait qu'elle est conscience. Ce droit consiste à ne pas subir de contrainte venant de l'extérieur. Elle a droit au respect de la part des tiers. La liberté de conscience et de religion sera conçue comme une immunité *ab extra*, nullement comme une concession à l'indifférentisme ou au relativisme. La vérité sur Dieu demande à être recherchée, trouvée et conservée librement.

Ce changement de perspective a été possible grâce à un renouveau de la réflexion concernant les rapports de l'Eglise et de l'Etat. La distinction des deux domaines étant acquise, il est devenu clair que l'Etat n'a pas pour rôle de promouvoir une confession religieuse, mais de garantir aux personnes l'exercice de leur liberté en matière de religion. Ainsi la vérité n'est plus captive d'un régime politique qui assurerait des privilèges à une confession majoritaire. La vérité est un défi pour l'Etat qui doit en garantir la libre

recherche; elle est un défi pour la personne qui doit la chercher et s'y conformer; elle est un défi pour l'Eglise qui doit l'accueillir et l'enseigner.

Depuis le concile, il est devenu habituel, dans le discours de l'Eglise de parler des droits de l'homme comme de droits subjectifs. Les commentateurs n'ont pas toujours compris que ce discours s'insère dans la perspective de la loi naturelle, et non pas du subjectivisme arbitraire qui a cours dans les enceintes internationales. Dans une perspective phénoménologique personnaliste, des textes de Jean-Paul II semblent faire reposer tout l'édifice des libertés et des droits de l'homme sur la seule personne humaine. En fait, il ne faut pas perdre de vue que la personne appartient à un ordre créé dont relève aussi la société, l'organisation des pouvoirs et l'ordination au bien commun.

Dans l'enseignement de Jean-Paul II, le fondement invoqué pour les droits humains est de moins en moins la loi naturelle que la qualité de créature "à l'image de Dieu" tirée de la révélation biblique. Cette démarche est évidente pour le croyant, mais n'est guère accessible aux autres hommes. Une théologie de la création passe nécessairement par l'évocation de la nature créée et de son aptitude à accueillir la grâce. Plutôt, la grâce révèle l'existence et la consistance de la nature, même blessée, de sorte que la raison humaine peut se laisser illuminer par la grâce et discerner ce qui est vrai, juste et bon pour l'ordre temporel. La référence à la loi naturelle en matière d'éthique sociale et de droits humains revient en force dans l'enseignement de Benoît XVI.

Des juristes ont reproché à l'Eglise catholique de s'être laissé entraîner sur le terrain du subjectivisme juridique en s'éloignant de la notion thomiste de droit. La conception classique, en effet, part de la distinction entre le fait et le droit. S. Thomas d'Aquin (*S. Theol.* IIa IIae , q. 66, art. 1) distinguer les biens qui font partie de notre être (la vie, la santé); les personnes qui nous sont attachées; les biens matériels que nous possédons. Il distingue le fait de détenir de tels biens et le droit d'en disposer. On est dans le domaine du droit lorsqu'il y a revendication d'un titre à détenir ces biens. Le droit est une mesure qui apparaît lorsqu'est établie une relation entre deux ou plusieurs personnes, que celles-ci soient physiques ou morales. S'il est possible de faire valoir un tel titre, c'est qu'il existe une détermination antérieure de ce qui revient à chacun, la mesure de ce qui est juste. Le droit n'est pas affaire de titre, mais de mesure. C'est ce qui distingue la conception classique du droit de la conception qui est devenue courante. Le droit est la mesure exacte à laquelle il faut se tenir dans les relations entre les personnes. La mesure est dans l'ordre des choses, ou la nature des choses. Voilà le droit naturel. Le

droit s'évince du fait. Il est une mesure édictée par le juge ou le législateur, à partir de ce qui apparaît juste. Ce qui apparaît juste à la raison, c'est ce que nous appelons le droit naturel, c'est la mesure parfaite. Il s'agit d'y tendre toujours, sans jamais la posséder une fois pour toutes.

L'Eglise catholique est aujourd'hui l'une des rares institutions qui prône le droit naturel. Il convient qu'elle le fasse avec toute la rigueur de la pensée dont elle a hérité, sinon son discours risque lui aussi de dériver vers les "droits" subjectifs qui invoquent des titres à disposer de toutes sortes de libertés, sans qu'existe la mesure juste incontestable qui les légitime.

III. La réserve devant les dérives des droits subjectifs

On comprendra facilement l'intérêt de cette réflexion sur les origines du discours ecclésial sur les droits de l'homme, si on se rapporte aux évolutions qui sont actuellement en cours dans ce domaine. D'une part, la communauté internationale, de conférence en conférence, explore de nouveaux droits dans la ligne du subjectivisme et du positivisme juridique. Ces développements sont la conséquence logique d'une anthropologie où aucune nature ne vient offrir sa résistance à la revendication de droits supposés tels. Il en est ainsi de la revendication du "genre", du droit à l'avortement, du droit au mariage homosexuel, droit au clonage reproductif, du droit de choisir les caractéristiques d'un enfant à naître, du "droit de mourir dans la dignité", et beaucoup d'autres revendications qui deviennent des droits.

On peut dater des années 1994-1995 la critique de l'Eglise vis-à-vis des droits issus des revendications sectorielles supposés droits universels. Il s'agit des conférences internationales du Caire (1994) et de Pékin (1995) sur Population et Développement. Le Saint-Siège a appelé les Etats membres de l'ONU à rester cohérents avec la *Déclaration* de 1948 et apporté des restrictions à son adhésion au document final. Il a pointé plusieurs mutations sémantiques dans la compréhension des droits de l'homme: absence de référence à la dignité de la personne, un individualisme excessif, aucune mention de la famille comme cellule de base de la société, une sélection opérée dans l'éventail des droits garantis par la *Déclaration universelle*, un "langage ambigu".

Aujourd'hui l'écart entre la vision catholique des droits humains et celle prônée par les organisations internationales devient patent. Il renvoie à la divergence des anthropologies explicites ou implicites sous-jacentes. Pour la pensée sociale catholique, les droits et les devoirs découlent de la

nature commune à tous les êtres humains. Ces droits et devoirs sont discernés par la raison à l'intérieur de cet ordre naturel dans lequel tous les hommes sont inscrits. Dans le discours international, on assiste à une érosion des concepts devenus classiques depuis 1948. La *Déclaration* elle-même est critiquée voire rejetée par des groupes de nations ou de cultures qui lui reprochent d'être trop occidentale.

La dérive des droits de l'homme s'est accentuée depuis une dizaine d'années dans les domaines qui ont directement trait à l'anthropologie: la conception de la vie, de la dignité humaine, de la personne, du mariage, de la démocratie.

Tous les instruments juridiques proclamant les droits humains mettent en tête le droit à la vie (Déclaration de 1948, at. 3; Pacte des droits civils de 1966, art. 6,1; Convention européenne des droits de l'homme de 1950, art. 2,1; Convention des droits de l'enfant de 1989, art. 6). Mais aucun de ces instruments ne protège la vie avant la naissance. Une résolution de l'Assemblée parlementaire du Conseil de l'Europe d'avril 2008 recommande même aux Etats membres d'adopter "un droit à l'avortement sans risque".

La dignité humaine est proclamée "première valeur" par la *Charte de Nice* de 2000, art. 3-5.

Elle figure dans le préambule de la *Déclaration* de 1948 qui la considère comme inhérente à tout être humain. Mais son interprétation est sujette à discussions. Ainsi une Commission du Parlement européen a émis l'opinion selon laquelle la maladie peut enlever à une personne sa dignité, et que mettre fin à la vie n'est pas "attenter au respect dû à la vie".

La notion de personne évoque dans la pensée catholique toute une anthropologie. La personne est une substance, chaque être est unique, une liberté irréductible. Or cette expression n'apparaît que dans le texte français des conventions internationales, alors que l'équivalent anglais est "everyone". La Commission des droits de l'homme du Conseil de l'Europe (1979) a précisé que la notion de personne à l'art. 2,1 de la *Convention européenne* de 1950, s'entend après la naissance et ne suggère pas un droit absolu à la vie du foetus. De même la Convention d'Oviedo relative à la biomédecine ne définit pas la notion de "personne".

Le langage international a intégré depuis 1994 une distinction entre "genre" et "sexe", le premier relevant d'une décision de l'individu indépendamment de son sexe physiologique. Le nombre de "genres" s'élèverait à cinq. Il en est de même pour la notion de "santé reproductive" comprise comme "un état de bien-être complet, physique, mental et social ... dans tous les domaines relatifs à la reproduction".

Le mariage a subi une évolution sémantique notable. La *Déclaration* de 1948 (art. 16), le *Pacte des droits civils* de 1966 (art. 23,2), la *Convention européenne* de 1950, art. 12, sont clairs. Ils affirment le droit au mariage entre un homme et une femme. Un texte plus récent, comme la *Charte de Nice* II, 9, ne donne plus cette précision et se contente de dire que "le droit de se marier et le droit de fonder une famille sont garantis selon les lois nationales qui en régissent l'exercice". D'autre part, la Charte dissocie mariage et fondation d'une famille.

La démocratie est une procédure politique de participation des citoyens aux choix qui les concernent. Pour qu'elle fonctionne correctement, elle doit être guidée par des valeurs éthiques communes. Mais la démocratie est aussi devenue une valeur en soi. Elle est même la valeur suprême des sociétés démocratiques, au risque de la tautologie. On absolutise la démocratie comme abstraction, devant laquelle toutes les autres valeurs doivent plier. Or la démocratie comme procédure politique est un moyen au service de la participation et du bien commun. Elle ne peut pas être une fin en soi. On prétend que la démocratie exige le relativisme éthique et l'équivalence des opinions. Or une telle déduction est mortelle pour la démocratie elle-même. La démocratie ne peut pas placer toutes les opinions politiques ou éthiques sur le même plan, car toutes ne sont pas bonnes et justes. La démocratie doit se mesurer, comme les autres domaines de l'éthique sociale, aux critères de liberté, de vérité, de justice, de solidarité. Elle ne peut se mesurer à elle-même.

On voit dans tous ces exemples que le droit ne cesse de s'adapter aux pratiques changeantes des sociétés au lieu d'inspirer ces mêmes pratiques et d'inviter à distinguer entre droit et désir de tel ou tel groupe de pression. Les glissements que nous avons observés vont tous dans le sens d'une déstructuration de la vision anthropologique à laquelle faisait encore référence la *Déclaration* de 1948. L'Eglise s'est reconnue dans cette *Déclaration* dans la mesure où elle pouvait être interprétée dans le sens de sa propre vision de l'homme en société. Ce n'est plus le cas en 2009, du moins si les dernières revendications de groupes très minoritaires sont prises en compte.

Pour la pensée sociale catholique, il n'est de droit humain subjectif que dans sa cohérence avec le droit naturel que la raison discerne. Les droits humains inhérents à la personne humaine forment ainsi un noyau intangible. Ce noyau est identique avec l'humain dans l'homme. Il est d'abord énoncé en termes de nature. Les droits humains renvoient à la nature humaine qui les fonde. Parmi les éléments intangibles de l'humanité de l'homme, il y a la vie, la conscience, la pensée, l'intégrité physique et psychique, la famille, la participation et l'éthique humaine élémentaire

contenue dans la règle d'or. Le noyau indisponible traverse les trois catégories des droits civils et politiques, sociaux, économiques et culturels. Le critère de l'indisponibilité est capital. Il s'agit de droits dont aucune personne ne peut être privée, quelles que soient les circonstances. Une personne peut, en effet, être privée de liberté par un tribunal, mais pas de sa liberté de conscience, ni de son droit à la vie. Une personne peut être déchue de ses droits civiques et politiques, mais pas de son immunité contre des traitements dégradants.

Une nouvelle réflexion pourrait conduire à considérer que les autres droits humains découlent de ce noyau intangible. Ce sont des droits dérivés, qui peuvent éventuellement être suspendus soit à la suite d'une condamnation pénale, soit en raison de circonstances particulières comme l'état de siège. Ces droits dérivés ne sont pas pour autant concédés par la société. Ce sont des droits inhérents à la personne humaine.

Dans le langage commun, beaucoup de droits subjectifs déclarés tels sont en réalité des devoirs de la société vis-à-vis des personnes: devoir de garantir la liberté de pensée et d'expression, le droit au travail, à la sécurité, à la santé, à l'éducation, à l'expression culturelle. Il y a intérêt à distinguer les plans et de mettre en sécurité – de préférence à l'abri de la constitution – le noyau indisponible de l'humanité de l'homme. Moins on y touchera, plus on pourra en déduire les devoirs de la collectivité envers les personnes et leurs besoins incompressibles de liberté et de bonheur.

Cette distinction permettra aussi de mieux prendre en compte les différences culturelles qui existent dans l'approche de la question des droits humains. L'idéologie individualiste qui favorise une dérive incontrôlable des “droits” de l'homme, a montré qu'elle était culturellement située, alors qu'elle met à mal l'universalité des droits humains. Ceux-ci ne peuvent être compris comme universels par toutes les cultures que s'ils se confondent avec les requêtes universelles de l'humanité de l'homme, ce que nous appelons la nature humaine.

COMMENTAIRE SUR LA DOCTRINE SOCIALE DE L'ÉGLISE ET LES DROITS SUBJECTIFS DE LA PERSONNE

MICHEL SCHOOYANS

En votre nom à tous, je désire remercier vivement Mgr Minnerath de nous avoir offert un exposé somptueux. Cette communication est certainement appelée à enrichir l'enseignement social de l'Église sur la question des droits de l'homme. Elle comporte en particulier une contribution extrêmement originale sur la question cruciale du fondement de ces droits. Il faut dire que sur cette question des droits de l'homme, et plus précisément des droits subjectifs de la personne, il y a un différend – que Mgr Minnerath analyse avec une grande pénétration – entre deux traditions: celle de l'Église et celle des Lumières. Notre commentaire comportera deux parties nettement distinctes: la première ressortira à l'anthropologie philosophique. Dans la seconde, nous recourrons davantage à la philosophie politique pour montrer la fécondité des thèses exposées par Mgr Minnerath lorsqu'elles sont sollicitées pour analyser des problèmes contemporains.

I. Les droits de l'homme revisités

Les droits de l'homme et la tradition illuministe

La tradition des Lumières a rattaché les droits subjectifs à une conception radicalement individualiste de l'homme et à diverses théories du contrat social. Cette tradition remonte elle-même à Guillaume d'Occam (~1285-1349), pour qui Dieu est sujet d'une volonté totalement arbitraire, imprévisible puisque indéfiniment changeante. Il en va de même pour l'homme qui est, lui aussi, sujet de volonté, laquelle varie au gré des intérêts et de l'utilité du moment. Hobbes (1588-1679) fait l'application de ce nomi-

nalisme au droit et à la politique. Il affirme que la loi procède de la volonté du prince. Il ouvre la voie au positivisme juridique contemporain: est juste ce que le prince affirme être juste. Selon cette tradition développée et répandue par les Lumières, pour que les hommes ne s'entredéchirent pas, il faut qu'ils renoncent à se faire justice eux-mêmes et qu'ils s'accordent pour instituer un dieu mortel, le Léviathan, dont la fonction première sera de définir ce qui est juste ou injuste, ce qu'il faut croire ou ne pas croire.

Selon les expressions plus récentes de cette tradition, les hommes peuvent aspirer à faire légaliser leurs besoins et leurs désirs, quels qu'ils soient. Ils pourront demander au Léviathan de donner à tel besoin le statut d'un droit. Donnant lieu à un droit, tel besoin devient exigible. La raison n'est ici d'aucun recours, car elle n'a pas la capacité d'accéder à la connaissance de ce qui est vrai, ni de ce qui est juste. Combiné à l'individualisme, l'agnosticisme de principe, caractéristique de cette tradition occamienne, appelle une conception purement positiviste du droit. Il n'y a de droits de l'homme que pour autant que ceux-ci procèdent d'un consensus entre les parties en présence. Mais la procédure censée mener à ce consensus doit être validée par la volonté générale, s'exprimer dans la norme suprême, postulée et appelée à valider, ou à invalider, les volontés particulières.

Les droits de l'homme et la tradition réaliste

La tradition réaliste a toujours eu la préférence de l'Église. Elle diffère profondément de la tradition nominaliste et illuministe. Cette tradition réaliste reconnaît l'existence d'un *ordre naturel* structuré, connaissable par la raison humaine. L'homme occupe une place particulière dans l'ensemble du monde des corps. Ses désirs eux-mêmes s'inscrivent dans l'ordre naturel. Certes il a des besoins; il désire vivre, mais il sait qu'il est mortel. Ses besoins ne procèdent pas du caprice des individus. Ils dérivent d'un ordre naturel, l'ordre des créatures, l'ordre qui régit l'existence humaine. La protection des hommes dépend du respect de l'ordre naturel, voulu par Dieu. Dans la mesure où il concerne l'homme, cet ordre naturel s'exprime dans le droit naturel. Celui-ci protège la vie humaine, la dignité de chaque homme, sa liberté.

L'anthropologie thomiste précise que l'homme est, par nature, une *personne*: un être, une réalité subsistante douée naturellement d'une activité rationnelle. En vertu de sa nature raisonnable, l'homme est capable de faire des choix; il est capable de les hiérarchiser. Ces choix, il les fait librement, mais sa liberté s'inscrit dans les limites de sa nature et donc dans l'ordre naturel des choses. L'homme n'est pas dieu pour lui-même, ni non plus

pour les autres. Les limites de sa liberté sont inscrites dans sa corporéité. C'est ce qui apparaît par exemple dans l'expression "acte contre nature". Cette expression indique que tel acte, l'homicide volontaire par exemple, est l'expression d'un *désordre*, d'un mauvais usage de notre liberté. Dans ce cas, l'homme use de sa liberté pour tenter de se poser en source et en maître de l'ordre des choses corporelles, de l'ordre inhérent à sa nature créée.

Les êtres humains sont *semblables*; ils ont en commun d'être doués de raison et de volonté libre. Ils inclinent à la sociabilité, sont ouverts à la fraternité pour autant qu'ils se connaissent et se reconnaissent comme des réalités naturelles, participant tous, à titre d'analogués secondaires, à l'existence de Dieu, analogué principal. L'homme n'est ni Dieu, ni bête. La dignité des hommes découle de leur nature commune, qui se réalise dans une multitude de personnes. Le droit naturel n'est rien d'autre qu'un énoncé raisonnable ayant pour but de rendre à chacun ce qui lui est dû en raison de ce qu'il est vraiment: non un simple corps individuel mais une personne.

Lorsqu'est occultée ou rejetée la connexion entre le corps et la personne, le mot nature change de sens au point de devenir *équivoque*. Comme Mgr Minnerath le souligne avec pénétration, le mot nature renvoie alors à la corporéité pure, coupée de la personne. Le mot nature renvoie ici à des êtres corporels, mais inférieurs à l'homme dans l'ordre des choses corporelles. La nature en tant qu'essence spécifique de l'homme est ici niée. Il n'y a plus d'ordre naturel, de hiérarchie entre les êtres. Il n'y a plus d'exercice de la raison pour découvrir la loi naturelle et le droit dans lequel celle-ci se concrétise. Il n'y a que la volonté, le pouvoir de décider sans référence à la raison. Les limites de notre liberté, pourtant inscrites dans notre corporéité, sont purement et simplement ignorées. Le corps, le corps humain spécialement, est un simple objet sur lequel s'exerce l'empire de l'individu.

Le droit naturel est ici éteint. Il est étouffé et remplacé par un droit issu de la volonté du sujet. La morale de l'être raisonnable est remplacée par l'éthique situationniste du choix purement volontaire. Le droit ne dit plus ce qui est juste. Il ne dit plus l'ordonnancement des êtres pour que les rapports soient justes entre les personnes. Il commence par affirmer que, désormais, il n'y a plus de limites à notre liberté. Il accueille ensuite comme des droits, et même comme de "nouveaux droits" de l'homme, des actes par lesquels il affirme, d'un seul coup, son autonomie vis-à-vis de la nature humaine entendue au sens d'essence spécifique, et sa seigneurie vis-à-vis de la nature entendue comme êtres corporels non doués de raison.

Que cette conception "moderne" des droits de l'homme soit en train de rivaliser avec la conception réaliste classique de l'Église, nous pouvons

nous en convaincre aisément. La crise des droits de l'homme est un volet majeur de la crise de la raison. Il suffit de voir comment, par le simple jeu des volontés consensuelles, sont introduits et multipliés de nombreux "nouveaux droits": concernant l'avortement, l'euthanasie, les manipulations génétiques, l'homosexualité, le genre, etc. Il serait en outre facile de montrer que cette conception des droits de l'homme rejaillit aussi sur les rapports économiques et sur la surexploitation des ressources naturelles. Nous allons cependant montrer, à partir de l'actualité, comment cette nouvelle conception des droits de l'homme et de ses fondements rejaillit aujourd'hui sur les relations internationales.

II. Les droits de l'homme à l'épreuve des relations internationales

En premier lieu, signalons qu'en invoquant de "nouveaux droits" subjectifs, des gouvernants de plusieurs nations dites "démocratiques" permettent l'élimination de certaines catégories d'êtres humains. Une telle société, évidemment, est déjà engagée de plain-pied sur la route du totalitarisme. Selon l'Organisation Mondiale de la Santé, 46 millions d'avortements sont réalisés chaque année dans le monde (<https://www.who.int/reproductive-health/publications/unsafeabortion_2000/estimates.pdf>). Ainsi le chemin est déjà ouvert pour que l'avortement devienne légalement exigible. Le droit lui-même pourra être précipité dans l'indignité lorsqu'il sera instrumentalisé et pressé de légaliser n'importe quoi, et mis, par exemple, au service d'un programme d'élimination d'innocents. A partir de là, la réalité de l'être humain n'a plus d'importance en soi.

La conséquence évidente de tels changements est que le nombre d'avortements va augmenter dans le monde a travers des programmes de contrôle de la natalité, de "maternité sans risque", de "santé reproductive" incluant l'avortement parmi les méthodes contraceptives qu'ils promeuvent. Une autre conséquence inévitable est naturellement le vieillissement de la population des pays developpes et des nations "bénéficiaires" de programmes de contrôle de la natalité présentés comme condition préalable au développement. Comment les leaders politiques bien informés peut-ils ignorer qu'une société qui avorte ses enfants est une société qui avorte son avenir?

De telles mesures sont destinées à avoir des répercussions au plan mondial. On voit l'extinction des principes moraux traditionels, et à leur place désormais la volonté et le pouvoir. On peut prévoir que tôt ou tard, l'avortement sera présenté à l'ONU comme un "nouveau droit humain", un droit

permettant d'exiger l'avortement. Il s'ensuivra qu'il n'y aura plus de place, en droit, pour l'objection de conscience. Ce même processus permettra l'inclusion dans la liste d'autres "nouveaux droits" subjectifs, comme l'euthanasie, l'homosexualité, la répudiation, la drogue, etc.

On peut prévoir aussi l'instrumentalisation des religions dans ces programmes. Déjà il y a des tentatives pour répandre les "nouveaux droits", en utilisant à cette fin les religions du monde et en adaptant celles-ci à leurs nouvelles tâches. Ces religions devront être réduites au même commun dénominateur, c'est-à-dire vidées de leur identité. Cela ne pourra se faire que moyennant l'instauration d'un droit international inspiré de Kelsen (1881-1973) et appelé à valider tous les droits propres aux nations souveraines. Ce droit devra aussi s'imposer aux religions du monde de telle façon que la "foi" nouvelle soit le principe unificateur de la société mondiale. Ce plan ne pourra se réaliser qu'au prix du sacrifice de la liberté religieuse, de l'imposition d'une lecture "politiquement correcte" des Écritures et du sabotage des fondements naturels du droit. Déjà Machiavel recommandait l'utilisation de la religion à des fins politiques...

Nous voici revenus au temps de Hobbes, sinon à Cromwell: c'est le pouvoir civil qui définit ce qu'il faut croire. La religion est vidée de son contenu propre, de sa doctrine; n'en reste qu'un résidu de morale, défini par le Léviathan. On ne dit pas qu'il faille nier Dieu, mais dorénavant Dieu n'a plus rien à faire dans l'histoire des hommes et de leurs droits: nous revenons au déisme. Dieu est remplacé par le Léviathan. A celui-ci de définir, s'il le veut, une religion civile. A lui d'interpréter, s'il le veut et comme il le veut, les textes religieux. La question de la vérité de la religion n'a plus de pertinence. Les textes religieux, et en particulier bibliques, doivent être compris dans leur sens purement "métaphorique"; c'est ce que recommande Hobbes (III, XXXVI). A la limite, seul le Léviathan peut interpréter les Écritures. Il faut en outre réformer les institutions religieuses pour les adapter au changement. Il faut même prendre en otages quelques personnalités religieuses, appelées à cautionner la nouvelle "foi" sécularisée, celle du "civil partnership".

Les droits de l'homme tels qu'ils sont conçus dans la tradition réaliste sont passés ici au fil de rasoir. Tout est relatif. Il ne reste de droits que ceux définis par le Léviathan. Comme l'écrit Hobbes, "La loi de nature et la loi civile se contiennent l'une l'autre, et sont d'égale étendue". (I, XXVI, 4). Il ne reste de vérité que celle énoncée par le même Léviathan. Seul celui-ci décide comment le changement doit être conduit.

Ce projet ne peut se réaliser sans remettre en question la distinction et les rapports entre l'Église et l'État. Ce projet risque de nous faire régresser

à une époque où le pouvoir politique s'attribuait la mission de promouvoir une confession religieuse ou d'en changer. Dans le monde actuel, il y a des fondations et des groupements d'intérêt qui cherchent même à promouvoir une et une seule confession religieuse, qu'un pouvoir politique universel, global, imposerait à l'ensemble du monde. Ce projet rappelle évidemment l'histoire de l'anglicanisme et de sa fondation par le "défenseur de la foi", Henri VIII. Le projet des religions unies et réduites à un commun dénominateur est toutefois plus discutable encore que ne l'était le projet d'Henri VIII. En effet, la réalisation de ce projet postule la mise sur pied d'un gouvernement mondial et d'une police globale des idées. Ainsi, les artisans de la gouvernance mondiale s'appliquent à imposer un système de positivisme juridique faisant procéder le droit de la volonté suprême, de laquelle dépend la validation des droits particuliers. Désormais, si toutefois devait se réaliser le projet de refaire les religions, les agents de la gouvernance mondiale imposeront, par un nouvel Acte de Suprématie, une religion unique, validée par les interprètes de la volonté suprême, dont le Vicaire général est peut-être déjà trouvé (Hobbes, III, XXXVI).

Ce que révèle l'analyse de telles initiatives, c'est que se profilent une Alliance de deux volontés convergentes, visant, l'une, à subjuguer le droit, l'autre, à subjuguer la religion. Telle est la nouvelle version de l'aigle à deux têtes. Droit et religion sont instrumentalisés pour "légitimer" n'importe quoi.

Cette double instrumentalisation est mortelle pour la communauté humaine. C'est ce qui ressort de diverses expériences réalisées dans le cadre de l'État-Providence. Celui-ci, à force de vouloir plaire aux individus, a multiplié les "droits" subjectifs de complaisance, par exemple en matière de divorce, de sexualité, de familles, de population, etc. Mais ce faisant, cet État-Providence a créé d'innombrables problèmes qu'il est incapable de résoudre. Avec l'extension de ces "droits" de complaisance à l'échelle mondiale, les problèmes de précarisation/marginalisation vont se multiplier à tel point qu'aucune gouvernance mondiale ne pourra les résoudre.

De même pour la religion. Depuis qu'est acquise la séparation de l'Église et de l'État, il est inadmissible que l'État se serve de la religion pour renforcer son emprise sur les cœurs, les corps et les consciences. Comme le dit Mgr Minnerath, l'État ne peut pas enchaîner la vérité religieuse et doit même en garantir la libre recherche.

Par ces canaux, il n'est pas difficile d'imaginer l'établissement d'une pyramide où la volonté du Prince est destinée à circuler par les canaux internationaux de l'ONU et à atteindre les canaux nationaux particuliers. A terme, ce processus, comme on le remarque, éteint l'autorité des parlements

nationaux tous Parlements Croupions, abolit l'autorité des exécutifs et ruine l'indépendance du pouvoir judiciaire. Il n'est pas difficile d'imaginer non plus un tribunal pénal international qui est appelé à s'étendre et qui doit être armé pour réprimer les récalcitrants – par exemple, les catholiques – qui refusent cette vision du pouvoir et du droit, d'un droit vassalisé par le pouvoir. Comment ne pas voir cette vérité aveuglante: nous assistons à l'émergence d'un terrorisme politico-juridique sans précédent dans l'histoire?

Pour finir, empressons-nous de rappeler que l'Église n'a pas le monopole du respect du droit humain à la vie. Ce respect est proclamé par les plus grandes traditions morales et religieuses de l'humanité, souvent antérieures au Christianisme. L'Église reconnaît pleinement la valeur des arguments fournis par la raison en faveur de la vie humaine. Comme Mgr Roland Minnerath l'a admirablement montré, l'Église complète et consolide cette argumentation en se prévalant de l'apport de la théologie: respect de la création; l'homme, image de Dieu; amour du prochai: nouveau commandement; etc. Ces arguments sont fréquemment exposés dans les déclarations de l'Église et les nombreux documents chrétiens sur la question.

Mais quand les plus hautes autorités des nations, et même de la première puissance mondiale, vacillent face au respect du droit humain fondamental, c'est un devoir pour l'Église d'appeler tous les hommes et toutes les femmes de bonne volonté à s'unir afin de constituer un front unique pour défendre la vie de tout être humain. La première attitude qui s'impose à tous, selon les responsabilités de chacun, est l'objection de conscience, qui d'ailleurs est maintenant en danger. Mais cette objection doit être complétée par un engagement à agir dans la sphère politique, dans les médias et dans les universités. La mobilisation doit être générale et se donner pour but l'objectif central de toute morale, et spécialement de toute la morale catholique: reconnaître et aimer le prochain, à commencer par le prochain le plus ténu et le plus vulnérable.

THE INFLUENCE OF CATHOLIC SOCIAL DOCTRINE ON HUMAN RIGHTS

MARY ANN GLENDON

In the history of Catholic social doctrine, surely one of the most important developments has been the Church's assimilation of what Pope Benedict XVI has called the 'true conquests of the Enlightenment'.[1] Nowhere is that phenomenon more striking than in the extent to which Catholic social doctrine has appropriated, and even championed, human rights ideas. The influence of human rights on Catholic social thought – and on the Holy See's international advocacy – has been widely discussed and debated. What has received less attention is the reciprocal character of that relationship. Hence, my assignment at this session is to initiate some reflection by the members of the Academy on the ways in which Catholic social doctrine has influenced, and might influence in the future, the theory and practice of human rights.

In this paper, I propose to trace that influence through five phases: first, in the post-World War II human rights 'moment'; second, in the Cold War years; third, in the heady days when human rights ideas were among the forces that led to the fall of oppressive regimes in South Africa and Eastern Europe; fourth, in the contests over meaning, interpretation and implementation that intensified in the 1990s; and finally in the pontificate of Pope Benedict XVI whose 2008 speech at the UN contained several pointed warnings about the future direction of the human rights movement.

Catholic Social Doctrine in the Post-World-War II Human Rights Moment

In the darkest years of World War II, the idea began to percolate that some sort of human rights provision should be included in an eventual

[1] Benedict XVI, *Address to the Roman Curia*, December 22, 2006.

peace treaty. One of the first suggestions came from the British writer H.G. Wells in 1940.[2] A year later, in a radio broadcast that probably reached a wider audience, Pope Pius XII commemorated the 50th anniversary of *Rerum Novarum* by deploring the disregard for the basic rights and duties that belong to all members of the human family. It was a somber message, as befitted the times. But he concluded it by saying, 'These are the principles, concepts, and norms, beloved children, with which we should wish even now to share in the future organization of that new order which the world expects and hopes will arise from the seething ferment of the present struggle'.[3]

The protection of human rights was not, however, among the priorities of the 'Big Three' (England, the Soviet Union and the United States) when they met to plan for the 'organization of that new order'. At the UN founding conference, it was largely due to the insistence of smaller nations, especially the Latin American group, that the UN established a Human Rights Commission, and charged it with the duty of preparing an international 'bill of rights'.[4]

Interestingly, for purposes of our present inquiry, there were striking similarities between the document that Commission produced and the language of the social encyclicals of Leo XIII and Pius XI: the pervasive emphasis on the 'inherent dignity' and 'worth of the human person'; the affirmation that the human person is 'endowed with reason and conscience'; the right to form trade unions; the worker's right to just remuneration for himself and his family; the recognition of the family as the 'natural and fundamental group unit of society' entitled as such to 'protection by society and the state'; the prior right of parents to choose the education of their children; and a provision that motherhood and childhood are entitled to 'special care and assistance'.[5]

The Commission's proximate sources for those provisions, however, were completely secular: the twentieth-century constitutions of many Latin American and continental European countries, and the draft document

[2] H.G. Wells, *The Rights of Man, or What are We Fighting For?* (Middlesex: Penguin, 1940).

[3] Pope Pius XII, *Radio Address*, June 1, 1941, 27.

[4] The discussion of the framing of the Universal Declaration of Human Rights that follows is based on Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

[5] UDHR, *Preamble and Articles* 1, 16, 22, 25 and 26.

that became the 1948 Bogotá Declaration of the Rights and Duties of Man. If we ask where the Latin Americans and continental Europeans got those distinctive formulations, the answer would be that they came mainly from the programs of political parties – parties of a type that did not exist in the United States, Britain or the Soviet bloc – namely, Christian Democratic and Christian Social parties. But if we ask where the politicians got those ideas about the family, work, civil society, and the dignity of the person, the answer is that they came mainly from *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931).

And if anyone should ask where the Church got those ideas, the short answer would be that those early social encyclicals were part of the process through which the Church had begun to reflect on the Enlightenment, the eighteenth-century revolutions, socialism, and the labor question in the light of Scripture, tradition, and her own experience as an 'expert in humanity'.[6]

The most articulate advocate for that whole complex of ideas among the framers of the UDHR was Charles Malik, a Lebanese philosopher of the Greek Orthodox faith. In his interventions as a member of the UDHR drafting committee, he frequently used terms like the 'intermediate associations' of civil society, and he insisted on the term 'person' rather than 'individual'. According to Malik's son, Dr. Habib Malik, his father had acquired that vocabulary from the heavily underlined copies of *Rerum Novarum* and *Quadragesimo Anno* that were among the books his father most frequently consulted.

Ideas from Catholic social thought were also brought into the UDHR by Latin American delegates to the early UN. In the drafting process, it was they (not the Soviets, as many now suppose) who were the most zealous promoters of social and economic rights. They continued to play an active role during the UN's general debate on the draft Declaration. In 1948, Latin American nations comprised 21 of the UN's 58 members, and their representatives used the power of numbers to offer many amendments based on the Bogota Declaration. One observer wrote in his memoirs that their speeches 'were laced with Roman Catholic social philosophy, and it seemed at times that the chief protagonists in the conference room were the Roman Catholics and the communists, with the latter a poor second'.[7]

[6] *Populorum Progressio*, 13.

[7] John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, N.Y.: Transnational Publishing, 1984), pp. 65-66.

Such were the principal channels through which Catholic thought helped to shape the UDHR. Other factors that may have played a role were the presence of observers from the U.S. National Catholic Welfare Conference (forerunner of the U.S. Conference of Catholic Bishops) at practically every session of the Human Rights Commission, and the fact that two members of the UDHR's drafting committee, René Cassin and Malik, were well acquainted with Jacques Maritain, who in turn had been one of the most active members of a UNESCO committee appointed to study the theoretical foundations of human rights.

Needless to say, Catholic social doctrine was only one of many tributaries to the Universal Declaration. Nevertheless, the record shows that it is no mere coincidence that the document's implicit vision of personhood, its attention to the mediating structures of civil society, its dignitarian character, and its insistence on the links between freedom and social justice so closely resemble the social teachings of Leo XIII and Pius XI.

(Against that background, the subsequent appropriation of rights discourse by the Fathers of Vatican II and the Popes from John XXIII to Benedict XVI is less surprising than some commentators have imagined. After all, the rights tradition into which the Church has tapped was importantly influenced by the biblically informed, continental, dignitarian tradition which she herself had already done so much to shape).

What I wish to emphasize about the influence of early Catholic social doctrine on the UDHR is that the features traceable to that influence turned out to have a broad appeal across many cultures and to resonate even with non-western traditions. The Chinese and Indian delegates, for example, were very concerned that a universal declaration should not separate rights from duties. The Catholic formulations helped the Declaration to avoid excesses of individualism or collectivism, and thus to win consensus from a UN whose 58 members in 1948 included representatives from six Asian nations, as well as from nine countries where Islamic culture was predominant. Of that group, only Saudi Arabia abstained from approving the UDHR.

The Cold War Years

The Universal Declaration gradually became, in a sense, the constitution of the postwar international human rights movement. But the Cold War Years were not hospitable to human rights ideas. The ink was barely dry on the 1948 Universal Declaration when the Cold War antagonists tore it in half, so to speak. The Eisenhower State Department dismissed the

social and economic provisions as 'socialistic', while their Soviet counterparts derided the political and civil rights as 'bourgeois'. What began as political opportunism soon hardened into habit, and thus began the now nearly universal practice of reading the UDHR as though it were simply a list of rights rather than an integrated document whose parts were meant to be interdependent and mutually conditioning.

Those years also saw the emergence of many newly independent nations, and the appearance of another kind of threat to the universal human rights project. Most of these countries modeled their new constitutions in part on the Universal Declaration. However, many leaders of the new nations took the position that human rights were a luxury that had to be put on hold until stability was achieved and economic conditions improved. Some attacked the very idea of universality, arguing for various forms of cultural relativism.

Throughout the 50s, 60s, and 70s, the Holy See was a relatively lonely voice upholding the universality principle and the principle of indivisibility, according to which political and civil rights are indispensable for social and economic justice, and vice versa. But in the international political climate of those years, the Holy See's position could hardly be called influential. That was the heyday of the self-styled political realists who had always scoffed at the idea that a mere declaration of human rights could make much of a difference in world affairs. To most observers, that skepticism seemed amply justified.

The 'Glory Days' of the Human Rights Movement

In the 1980s, however, skepticism gradually gave way to astonishment as human rights ideas became the principal rallying point for the forces that led to peaceful change in Eastern Europe and South Africa. By 1989, the world was marveling that a few simple words of truth – spoken by a few courageous people – could spark a change in the course of history. One of those people, Vaclav Havel, could hardly believe it himself. He wrote in 1989, 'I really do inhabit a world where words are capable of shaking the entire system of government, where words can be mightier than ten military divisions'.[8]

[8] Vaclav Havel, *A Word about Words*, January 25, 1989 speech, reprinted in *New York Review of Books*, January 18, 1990.

No one appreciated the power of 'calling good and evil by name' more than Pope John Paul II. And no Pope had ever deployed the language of human rights so vigorously as he. Although historians will long debate the relative importance of the various forces that resulted in the overthrow of communism in Eastern Europe, there is no doubt that John Paul II played a major role.[9]

His encyclicals, moreover, represented an important development of Catholic social thought on several fronts. Central to writings like *Laborem Exercens, Sollicitudo Rei Socialis,* and *Centesimus Annus* was his emphasis on the importance of an adequate concept of human personhood, and on the priority of culture over economics and politics. In *Centesimus Annus*, he taught that democratic politics and free economics can only promote human flourishing if the energies they release are tempered and directed by a vibrant public moral culture.[10] Where human rights are concerned, he insisted on the need for a culture that rejects freedom-as-license – a culture that fosters solidarity and the responsible exercise of freedom. He developed the Church's social doctrine further in *Evangelium Vitae* by pointing out that abortion, euthanasia, and the questions raised by new bio-technologies are, in fact, social justice issues – and that when grave moral evils are legally defined as rights, the entire human rights project is threatened.[11]

In the years when the human rights movement was enjoying its greatest successes, Pope John Paul II was one of the first to see that the more the international human rights idea began to show its power, the more intense would become the struggle to capture that power for various ends, not all of which are respectful of human dignity. As a philosopher, he was also especially concerned about the need for human rights to be grounded in an adequate concept of human personhood and to rest on credible foundations. In 1989, the very year when optimism about human rights was at its height, he was already warning that the 'Declaration does not contain the anthropological and moral bases for the human rights that it proclaims'.[12]

[9] George Weigel, *Witness to Hope: The Biography of John Paul II* (New York: Cliff Books, 1999).

[10] *Centesimus Annus*, 36, 46.

[11] *Evangelium Vitae*, 18.

[12] *Address to the Diplomatic Corps* 1989, 7.

Contests over the Direction of the Human Rights Movement

That concern turned out to be well-founded. The close of the Cold War was followed by a surge of bloody regional and ethnic conflicts, undermining the sense of the unity of the human family. Economic and technological developments brought new risks that human beings would be treated as instruments or objects. Secular prophets were popularizing philosophies that deny the existence of truth or the ability of the human mind to grasp it. And special interest groups began clamoring to have their agenda items included in the canon of universal human rights.

By the mid-1990s, efforts to capture the prestige of the human rights project for assorted causes had become especially intense, at the municipal, national, and regional levels. In the international arena, notably at the UN's Cairo and Beijing conferences, Holy See diplomats struggled to save the Universal Declaration from being pulled apart and politicized beyond recognition, and to keep alive the connection between freedom and solidarity. It is noteworthy that the provisions of the UDHR that came under heavy attack at those conferences were precisely those that were most influenced by Catholic social thought – provisions relating to marriage, the family, parents' rights, and freedom of religion. At Beijing, there was even a movement to delete any references to 'dignity' from the conference documents.

Those contests continue today. In his April 18, 2008 Address to the United Nations, Pope Benedict XVI began, as his predecessors Paul VI and John Paul II had done in that setting, with words of praise for the Universal Declaration. He described it as the outcome of a process designed 'to place the human person at the heart of institutions, laws, and the workings of society', and he credited it with having enabled 'different cultures, juridical expressions and institutional models to converge around a fundamental nucleus of values and hence of rights'.[13] But what is striking about the 2008 speech is that those expressions of appreciation were followed by what may well be the most sobering cautionary discussion about human rights that has ever appeared in any papal document. Pope Benedict signaled no fewer than nine dilemmas that are clouding the future of the human rights project. They are the dilemmas posed by: (1) cultural relativism, (2) positivism, (3) philosophical relativism, (4) utilitarianism, (5) selective approaches to rights, (6) escalating demands for new rights, (7) hyper-indi-

[13] *Address to the United Nations*, April 18, 2008.

vidualistic interpretations of rights, (8) forgetfulness of the relation between rights and responsibilities, and (9) the threat posed to religious freedom by dogmatic forms of secularism.

Pope Benedict's treatment of these issues should not be viewed as mere critique; rather it points toward constructive approaches to thorny dilemmas that have long haunted the human rights project. In particular, the time may be right for Catholic thought to offer helpful perspectives on current threats to universality, especially those posed by cultural relativism, the threat posed by selective approaches to rights, and the persistent problem of foundations.

Cultural Relativism

Consider, first, the challenge of cultural relativism. One of the greatest achievements of the human rights project was precisely to lift up the proposition that certain rights are so fundamental that they belong to everyone simply by virtue of being a member of the human family. After paying tribute to that accomplishment in his UN speech, Pope Benedict warned against the denial of universality 'in the name of different cultural, political, social and even religious outlooks', and criticized the use of 'the argument of cultural specificity to mask violations of human rights'. As everyone knows, some of the world's worst human rights violators have attempted to hide behind such arguments, claiming that human rights are 'western' or 'Judaeo-Christian' inventions and that they do not apply to their local circumstances.

Those challenges cannot be dismissed simply by asserting, as does the UN's 1993 Vienna Human Rights Declaration, that the universality of these rights is 'beyond question'. The fact is that the question of how there can be universal rights in a world marked by great cultural and political diversity is one that deserves to be taken seriously.

What Catholic social thought might bring to that debate is based on the Church's long experience in the dialectic between universal principles and diverse cultures. What the Church has found is that universal principles need not entail homogeneity in their implementation. The existence of different ways of implementing principles does not necessarily entail relativism about the principles themselves.[14] In fact, the common understand-

[14] *World Day of Peace Message* 1999, 3.

ing of core principles can be enriched by the accumulation of a variety of experiences in living those principles.

Pope John Paul II, in his 1995 Address to the 50th General Assembly of the United Nations, brought that experience to bear on human rights. Universal rights and particular cultures, he said, cannot be radically opposed. After all, rights emerge from culture; rights cannot be sustained without cultural underpinnings; and rights, to be effective, must become part of each people's way of life. Different cultures, he went on, 'are but different ways of facing the question of the meaning of personal existence'.[15] Thus there can be a 'legitimate pluralism' in forms of freedom, with different means of expressing and protecting basic rights, provided 'that in every case the levels set for the whole of humanity by the Universal Declaration are respected'.

To ignore the need for pluralism would be to court a risk as grave as that of giving in to cultural relativism. It would be to fall into the mindset that, regrettably, characterizes the professional culture of many international lawyers, international civil servants, and international NGOs – a mindset that is insensitive to local particularities and that insists on top-down imposition of its own dogmatic interpretations of human rights. In short, it would be to promote a kind of cultural imperialism.

As it happens, the pluralistic approach outlined by Pope John Paul II corresponds perfectly with the understanding of universality shared by the principal architects of the Universal Declaration: Mrs. Roosevelt, René Cassin, Charles Malik, and the Chinese philosopher-diplomat Peng-chun Chang. The records of their deliberations are replete with statements showing that they never intended that its common standard of achievement would or should produce completely uniform practices.[16]

Admittedly, it will not always be easy to distinguish between a cultural relativism that undermines universality and a legitimate pluralism that permits different means of expressing and protecting fundamental rights. But the distinction must be made if one is serious about bringing the universal principles of human rights to life under widely varying cultural conditions.

[15] *Address to the United Nations*, October 5, 1995.

[16] One of the most pointed examples occurs in Chang's speech urging the U.N. General Assembly to adopt the Declaration. The peoples of the world, he said, had had enough of the sort of uniformity that colonial powers once sought to impose on them – a standardized way of thinking and a single way of life. That sort of uniformity could only be achieved by force or at the expense of truth. It could never last. Summary Records, UN Geneal Assembly, 182nd Plenary Session, 895.

Positivism

The problem of distinguishing cultural relativism from legitimate pluralism brings us to the Pope's criticism of positivism. By what standard, he asks, can a nation's conduct be judged if rights are viewed merely as the result of legislative enactments or other official decisions? As he correctly points out, justice is often denied when rights are considered 'purely in terms of legality...divorced from the ethical and rational dimension which is their foundation and their goal'.[17] As a lawyer, however, I must pause to note the obvious: that fair procedures and rules of law, while not sufficient in themselves, are extremely important to the protection of human freedom and dignity (and are recognized as such in the UDHR). Like the fundamental rights they protect, they too represent hard-won, fragile cultural achievements.

Philosophical Relativism

Perhaps the most complicated challenge facing the human rights project at the present time is the problem of supplying credible foundations for the practical consensus that is embodied in major human rights instruments. In today's world, understandings of rights, justice, and natural law are hotly contested. Philosophical relativism has penetrated so deeply into popular culture that good men and women increasingly feel unable to say why any values should be defended or why any conduct should be condemned, except that it's a matter of preference. But if there are no common truths to which people of different backgrounds and cultures can appeal, it is difficult to see how universal rights can be upheld.

Pope Benedict speaks to this question on the basis of the Catholic tradition which holds that human rights arise from a natural order whose laws can be discovered by reason through study and experience by believer and unbeliever alike. In the lecture that he was to have given at *La Sapienza* University last spring, the Pope issued a kind of challenge to the faculty of jurisprudence. 'How', he asked rhetorically, 'can juridical norms can be found that guarantee freedom, human dignity and human rights? That is the question that occupies us today in the democratic processes of opinion formation, and that at the same time fills us with anxiety over the future of humanity'.

[17] *Address to the United Nations*, April 18, 2008.

The standard response one might have expected from jurists to such a question would emphasize the problem of 'who decides' and would point out that this problem is one that the liberal democracies have found best to approach through institutional structures designed to promote wide deliberation and to prevent abuse of authority.

Anticipating some such response, Pope Benedict observed that public argumentation in contemporary democracies aims above all at attaining majorities, and that 'sensitivity to the truth is constantly overruled by sensitivity to interests', often by 'special interests that do not truly serve everyone'.

Then, having uttered the word 'truth', he was faced with Pilate's question: 'What is truth?' How can one speak of 'truth' in a world where it has become fashionable to deny that there is any such thing as a universally valid proposition about human beings or human affairs? Pope Benedict's approach is simultaneously Pauline, Augustinian, and postmodern. The search for truth, he has said, is 'one that always demands strenuous new efforts, and that is never posed and resolved definitively'.[18] It is a never-ending process of reflecting on experience, coming to judgments, and subjecting those judgments to continuing scrutiny in the light of reason and experience. Thus, he said, he could not offer a definitive answer, 'but only an invitation to remain on the journey with the great ones who throughout history have struggled and sought with their responses and their restlessness for the truth which continually beckons from beyond any individual answer'.[19] 'There are really only two options', he said on another occasion. 'Either one recognizes the priority of reason, of creative Reason that is at the beginning of all things and is the principle of all things...or [one accepts] the priority of the irrational' – which means accepting that everything on earth and in our lives, including reason itself, is only accidental. 'The great option of Christianity', he said, 'is the option for rationality and the priority of reason'.[20]

In such statements, one sees the depth of Pope Benedict's commitment to what he calls 'the true conquests of the Enlightenment'.

[18] http://www.zenit.org/article-21526?1=english.

[19] *Ibid*.

[20] http://chiesa.espresso.repubblica.it/articolo/186421.

Utilitarianism

The problem of foundations has led many friends of human rights to defend them on the basis of what the Pope calls a 'utilitarian perspective'. Although utility has its place in many common situations, Pope Benedict points out that 'the greatest good for the greatest number' can put the weakest and most vulnerable members of society at great risk. Thus, utilitarianism can easily become a mere justification for the imposition of the will of the stronger.

Selectivity

A fifth problem mentioned by the Pope arises from the widespread tendency to treat fundamental rights like items on a menu from which one can pick and choose one's favorites, ignoring the rest. During the Cold War years threats to the interdependence of fundamental rights arose mainly from a perceived tension between political/civil rights on the one hand and social justice on the other. The 1948 Declaration, like the Catholic social doctrine which influenced it in this respect, insists on the mutual dependence of rights in those two areas. The UDHR was carefully constructed as an integrated document whose mutually conditioning parts were meant to be read in relation to each other. The idea was – as to the small core of rights deemed fundamental – that when the violation of one of them is accepted without reaction, all other rights are placed at risk. Over the years, the principle that universal rights are 'interdependent and indivisible' has been affirmed repeatedly in UN documents, yet it is conspicuously flouted in practice by nation states and interest groups alike.

One voice that has never wavered in defense of that principle has been that of the Holy See. During the Cold War, it resisted the separation of political and civil rights from social and economic rights (always recognizing that the UDHR allows more diversity in modes of implementation of the latter than the former). Today, with the provisions protecting marriage, the family, parental rights, and religious freedom under mounting assault, the Pope has had to insist again on the Declaration's unity, warning that it 'cannot be applied piecemeal, according to trends or selective choices'.

NEW RIGHTS

Closely related to the problem of selectivity is a sixth source of concern – the pressure to expand the category of rights that are so fundamental as to be deemed universal. That category cannot be closed, for, as the Pope pointed out, 'As history proceeds, new situations arise'. On the other hand, the more goods or desires that are recognized as rights, the more risk there is of trivializing core human values.

The problem is a concomitant of success. Now that the UDHR has been accepted as a universal standard, interest groups of all sorts have intensified their efforts to have their agenda items recognized as universal rights. No wonder, then, that the Pope felt moved to warn against pressures to 'move away from the protection of human dignity towards the satisfaction of simple interests'. And no wonder that he called for great 'discernment' in dealing with demands for new rights. In that connection, his last three cautions can usefully be viewed as aids to distinguishing proposals that represent healthy developments from those that are harmful to human dignity.

HYPER-INDIVIDUALISM

Consider, first, his warning against the tendency to adopt an excessively individualistic approach to human rights. '[R]ights and the resulting duties', he said, 'flow naturally from human interaction...They are the fruit of a commonly held sense of justice built primarily upon solidarity among the members of society'. Here, in this very condensed manner, he is evoking a large body of learning about how human rights can dissolve into scattered rights of personal autonomy, undermining the conditions for effective liberty. Useful questions to ask about any proposed new right, therefore, are: What are the human goods that it seeks to protect? What are its implicit assumptions about the human person? How does it relate to other rights?

RESPONSIBILITIES

An equally important question to ask about a proposed new right is whether it recognizes corresponding responsibilities. As the Pope put it, 'In the name of freedom, there has to be a correlation between rights and duties, by which every person is called to assume responsibility for his or her choices, made as a consequence of entering into relations with others'.

Dogmatic Secularism

Finally, let us note the Pope's allusion to one of his major concerns – the threat to religious freedom and human dignity posed by a dogmatic form of secularism that aims to entirely displace religion from public life. Though he mentions secularism only in passing, the reference is sufficient to evoke the recollection of extensive discussions elsewhere – by Pope Benedict, Marcello Pera, and Joseph Weiler, among others – of the dangers of ignoring the Biblical roots of the great achievements of modernity.[21]

Conclusions

At the beginning of the twenty-first century, it appears that the elements in national and international rights instruments that were most influenced by Catholic social thought are decreasingly present in contemporary rights discourse – despite the fact that Holy See diplomats, and the Popes from John XXIII to Benedict XVI, have been among the strongest and most loyal supporters of the ideals contained in those instruments.

The most important exception, I believe, has been the successful effort of Holy See diplomats to secure the adoption in many UN documents of the phrase that the human person must be at the center of concern in development. Whatever the issue, the Church's principal focus in the public arena has been guided by the need to protect the dignity of the human person. As Pope Benedict put in an Address to the European Peoples' Party, 'As far as the Catholic Church is concerned the principal focus of her interventions in the public arena is the protection and promotion of the dignity of the person, and she is thereby consciously drawing particular attention to principles which are not negotiable'.[22] That means that human beings must never be regarded as mere objects or instruments, and they may not be sacrificed for political, economic, or social gain. At the same time, Pope Bene-

[21] Joseph Ratzinger and Marcello Pera, W*ithout Roots: The West, Relativism, Christianity, Islam* (New York: Basic Books, 2006); Joseph Weiler, *Un'Europa Cristiana: Un saggio esplorativo* (Milan: BUR Saggi, 2003); Marcello Pera, *Perché noi dobbiamo dirci Cristiani* (Milan: Mondadori, 2008).

[22] Benedict XVI, *Address to the Members of the European Peoples Party*, March 30, 2006. See also, John Paul II, *The human person must be the true focus of all social, political, and economic activity,* Greeting to the U.N. Staff, 5 October 1995, No. 3.

dict has been careful to emphasize that not all moral issues have the same moral weight. For example, in 2004, as head of the Congregation for the Doctrine of the Faith, he wrote, 'There may be a legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia'.[23]

The 'influence' of one or another factor in the immensely complex unfolding of human events will always remain largely a matter of speculation. That is why the Church wisely teaches that Christians should not trouble themselves excessively about seeing the results of their efforts. As St. Ignatius Loyola advised, 'Pray as if everything depended on God and act as if everything depended on you'. From that perspective, it is remarkable that Catholic influence on the framing of the Universal Declaration of Human Rights can be so clearly traced. It is far more difficult to assess the effects of subsequent efforts by Church leaders and laypeople to lift up and promote those elements of the human rights project that are conducive to human flourishing, while striving to counteract trends that threaten human dignity.

It does seem worth noting, however, that *the clearest identifiable instance of influence by Catholic social doctrine on human rights took place through the efforts of well-informed lay men and women who brought those social teachings into the political processes of their own countries and into the framing of the Universal Declaration of Human Rights*. As Church leaders have consistently emphasized, the social apostolate is the particular responsibility of the laity; it is primarily up to the laity 'to evangelize the various sectors of family, social, professional, cultural and political life'.[24] That message was an especially prominent theme for Pope John Paul II. In *Sollicitudo Rei Socialis*, to take just one example, he called 'both men and women...to be convinced of...each one's individual responsibility, and to implement – by the way they live as individuals and as families, by the use of their resources, by their civic activity, by contributing to economic and political decisions and by personal commitment to national and international undertakings – the measures inspired by solidarity and love of preference for the poor'.[25] His advice on how to do that seems as relevant to today's challenges as it was when delivered in 1995: 'Sometimes witnessing to Christ will mean drawing out of a culture the full meaning of its noblest

[23] Joseph Ratzinger, *Memorandum to Cardinal Theodore McCarrick*, July 2004, No. 3.
[24] *Ecclesia in America*, 44.
[25] *Sollicitudo Rei Socialis*, 47.

intentions...At other times, witnessing to Christ means challenging that culture, especially when the truth about the human person is under assault'.[26] That wise counsel brings me back to the point I mentioned at the outset of these remarks: The Church's critical engagement with human rights is an outstanding example of her acceptance of the good gifts of the Enlightenment: the quest for freedom, respect for the dignity and worth of every human being, and – not least – the high value placed on human reason. 'Influence' in this area has always been a two-way street, for Enlightenment thinkers themselves owed a huge, if not always acknowledged, debt to the intellectual traditions and spiritual wisdom of Christianity. That dialogue between Catholic social teaching and the best of secular thought must continue, for as Pope Benedict wrote in *Spe Salvi*, 'Every generation has the task of engaging anew in the arduous search for the right way to order human affairs'.[27]

It only remains for me to conclude by recalling that it was to create a privileged place for that dialogue that Pope John Paul II created the Pontifical Academy of Social Sciences in 1994.

[26] Homily at Camden Yards, 1995, 6.
[27] *Spe Salvi*, 25.

DIE MENSCHENRECHTE IN DER LEHRE DER KATHOLISCHEN KIRCHE

HERBERT SCHAMBECK

Die Menschenrechte[1] *sind der positivrechtliche Ausdruck der Anerkennung der Würde des Menschen*[2] *und seiner Personhaftigkeit.* Roland Minnerath veranschaulichte es klar: „Mit der Person ist die Würde als ein nicht reduzierbares Faktum und als ein zu realisierbares Pensum gegeben“.[3]

I.

Die Menschenrechte stellen einen im Menschen personifizierten Wert dar, der präpositiv ist, weil er dem Staat und seiner Rechtsordnung vorgegeben vorangeht.[4] Er ist vom Staat und dem Recht nicht zu schaffen, sondern vielmehr durch das positive Recht anzuerkennen. Den Menschenrechten eignet ein deklaratorischer Charakter. Ein vorhandener Wert findet Anerkennung; dies zeigt sich auch expressis verbis, wenn Menschenrechte als Grundrechte[5] in das Verfassungsrecht eines Staates aufgenommen werden und in der Formulierung[6] das Wort „anerkennen“ gebraucht wird, z.B. „die Freiheit und Würde des Menschen wird anerkannt“.

[1] Dazu Felix Ermacora, *Menschenrechte in der sich wandelnden Welt*, 1974.

[2] Näher Paul Kirchhof, Menschenwürde und Freiheit, in: *Handbuch der katholischen Soziallehre*, hrsg. von Anton Rauscher, 2008, S. 41 ff.

[3] Roland Minnerath, Gegen den Verfall des Sozialen, *Ethik in Zeiten der Globalisierung*, 2007, S. 19.

[4] Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit*, 1976, S. 42 ff. und S. 60 f.

[5] Dazu Herbert Schambeck, Die Grundrechte im demokratischen Verfassungsstaat, in: *Festschrift für Johannes Messner*, 1976, S. 445 ff.

[6] Ausführlich Gottfried Dietze, *Über die Formulierung der Menschenrechte*, 1956.

Die Menschenrechte *bestimmen die Beziehungen des Einzelnen zum Staat*. Ihrer Ideengeschichte nach sind die Menschenrechte wesentlicher Teil des abendländischen Rechtsdenkens[7] und innerhalb derer eine Säkularisation christlichen Gedankengutes,[8] das die katholische Kirche grundgelegt hat. Mit der Lehre von den Menschenrechten sucht die katholische Kirche die Stellung des Einzelnen durch das Recht im Staat zu sichern.

Recht und Staat sind *für die katholische Kirche nicht eigentliche Lehrinhalte*. Recht und Staat können wesentliche Voraussetzungen für die pastoralen Aufgaben der Kirche enthalten, müssen es aber nicht. Dies hat der jeweilige Staat in seiner Rechtsordnung, insbesondere auf Grund seines Verfassungsrechtes, zu entscheiden. Sie bestimmen auch den Rechtsschutz des Menschen und anerkennen damit seine Individual- und Sozialnatur. In dieser Sicht berühren Gedanken über die Menschenrechte in der Lehre der katholischen Kirche auch die Beziehung von Glaube und politischem System.[9]

Diese Beziehung ergibt sich daraus, dass *die katholische Kirche kein politisches Programm* vertritt, sondern eine auf den Glauben an Jesus Christus begründete Lehre zum Heil des Menschen, der aber wieder selbst sowohl am religiösen wie am politischen Leben teilnimmt. Für den gläubigen Menschen und für die katholische Kirche sind daher der Staat und seine Rechtsordnung und vor allem mit diesen die Menschenrechte von zweifacher Bedeutung: zum einen dadurch, dass Recht und Staat das Ausmaß der Bekenntnisfreiheit des Einzelmenschen, also seine Rechtsstellung, bestimmen und zum anderen, dass sie die gesamten „politischen Umweltbedingungen“ des Menschen prägen. Aufgabe der katholischen Kirche war es daher auch nie, eine eigene Lehre von Recht und Staat zu entwickeln, sondern vielmehr in ihrer Heilslehre soweit auf den Staat und seine Ordnung Bezug zu nehmen, als dies pastoral erforderlich ist.[10] Im Mittelpunkt

[7] Siehe Alfred Verdross, *Abendländische Rechtsphilosophie*, 2. Aufl., 1963.

[8] Böckenförde, a.a.O.

[9] Ernst Wolfgang Böckenförde und Robert Spaemann, *Menschenrechte und Menschenwürde, Historische Voraussetzungen – saekulare Gestalt – christliches Verständnis*, 1997; siehe auch Gott verlassen Menschenwürde und Menschenbilder, 8. Ökumenische Sommerakademie Kremsmünster 2006, hrsg. von Severin Lederhilger, Linzer Philosophisch-Theologische Beiträge, Band 15, 2007, bes. Heribert Franz Köck, *Religionen und Menschenrechte*, S. 126 ff. und Severin Lederhilger, *Aspekte einer Pastoral der Menschenrechte – ein katholisches Statement*, S. 188 ff.

[10] Näher Herbert Schambeck, *Kirche, Staat, Gesellschaft*, 1967, und *ders*., *Kirche, Staat und Demokratie*, 1992, Joseph Ratzinger, *Neue Versuche zur Ekklesiologie*, 1987, bes. S. 137 ff.; ders. *Grundorientierungen*, 1997, bes. S. 219 ff. und 231 ff.

dieser Heilslehre der katholischen Kirche steht ihre Lehre von der Gottesebenbildlichkeit der Menschen, die ihre Freiheit und Würde begründet und dies in verschiedenen Bezügen.

Die besondere *Stellung des Menschen* in der Seinsordnung hat schon *in der Heiligen Schrift* ihren Beginn genommen. Dreimal *drückt die Genesis die Gottesebenbildlichkeit des Menschen aus*. In der Gen 1, 26-27 steht bereits: „Gott sprach: ‚Lasset uns den Menschen machen nach unserem Ebenbilde, uns ähnlich. Er soll herrschen über die Fische des Meeres und über die Vögel des Feldes und über alles Gewürm, das auf dem Erdboden kriecht' und Gott schuf den Menschen nach seinem Bilde, nach dem Bilde Gottes schuf er ihn, als Mann und Frau schuf er sie". Die zweite Stelle findet sich in Genesis 5,3 an der von Adam gesagt wird, er zeugte einen Sohn, „ihm gleich nach seinem Bild", und die dritte Stelle in Genesis 9, 6, wo es heißt: „Wer Menschenblut vergießt, des Blut soll durch Menschen vergossen werden! Denn nach seinem Blut hat Gott den Menschen gemacht". Nicht unerwähnt sei auch Psalm 8, 5-7: „Was ist der Mensch, dass Du seiner gedenkst, oder des Menschen Sohn, da Du in heimsuchst? Wenig geringer als einen Engel hast Du ihn über die Werke Deiner Hände gesetzt. Alles legest Du ihm zu Füßen".

Es wäre falsch anzunehmen, dass bereits in der Heiligen Schrift und hernach in der Patristik Grundrechtsformulierungen anzutreffen sind; das war nicht der Fall: Es sind Ansätze für die im katholischen Glauben fußende, besondere Stellung des Menschen festzustellen. Thomas von Aquin[11] stellt den Menschen vollends in die irdische Welt, in der er die ihm von Gott zugewiesenen Aufgaben zu erfüllen hat. Der Mensch erkenne diese Aufgabe aus den in seiner und der äußeren Natur durch den Schöpferwillen vorgezeichneten Zwecken. Der entscheidende Schritt von Thomas liegt darin, dass diese Zwecke auch Eigenzwecke des Menschen sind, durch deren Verwirklichung er seine Selbstverwirklichung findet. Auf diesem Eigenzweck beruhe die dignitas humana.

Einen starken Einfluss auf die Menschenrechtsentwicklung hat von der Heiligen Schrift ausgehend mit der Menschenwürde[12] die christliche Idee vom *Gemeinwohl*,[13] und zwar in nationaler und internationaler Sicht, näm-

[11] Thomas von Aquin, *Summa contra Gentiles III*, 17.
[12] *Siehe Der Mensch als Bild Gottes*, hrsg. von Leo Scheffczyk, 1969.
[13] Johannes Messner, *Das Gemeinwohl, Idee, Wirklichkeit, Aufgaben*, 1968.

lich im Hinblick auf das bonum commune humanitatis ausgeübt. Aus dieser Sicht kam es zu einem Überdenken der Rechte der menschlichen Person und der menschlichen Gemeinschaften, wie Staat und Völkergemeinschaft. Egon Kapellari hat es 2006 schon hervorgehoben: „Im biblischen Glauben sind Personwürde und Gemeinwohl gleichermaßen verankert und mit Verantwortung gegenüber Gott und den Nächsten ausgestattet. Vom Dekalog reicht eine direkte geistige, wenn auch geschichtlich oft vergessene und verlassene Spur zur allgemeinen Deklaration der Menschenrechte und in die Verfassungen heutiger demokratischer Staaten, auch dann, wenn diese keinen Gottesbezug in den Verfassungspräambeln aufweisen".[14] In diesem Zusammenhang gilt es, vor allem auf die Spanischen Moraltheologen des 15. und 16. Jahrhunderts, besonders auf die Schule von Salamanca[15] hinzuweisen und die Namen Francisco de Vitoria und Francisco Suarez zu nennen. In dieser Zeit finden wir zwar *noch keine vollständige Liste der Menschenrechte*, wohl ist aber der innere Gehalt jener Grundrechte bereits entwickelt worden, die spätere Verfassungsurkunden prägten, wie: das Recht auf Leben, die Unverletzlichkeit des Körpers, das Recht auf Ehe und Familie, auf gesellschaftliche und politische Freiheit, wobei gewisse Zugeständnisse der staatlichen Autorität zugunsten der bürgerlichen Freiheit vorgesehen waren, weiters bestimmte Formen der Gleichheit vor dem Gesetz und des Rechtschutzes, das Recht auf Privateigentum und der Vereinigung sowie das Recht, auszuwandern und das Recht, in jedem Land der Erde sich niederzulassen.

Es wäre aber falsch davon auszugehen, dass all das, was katholische Professoren der Moral in ihrem Wissensgebiet geschrieben haben, auch in dieser Zeit von den offiziellen Repräsentanten der Kirche immer und überall mit allen Mitteln verlangt worden wäre. In einem 1976 herausgegebenen Arbeitspapier der Päpstlichen Kommission Iustitia et Pax über „Die Kirche und die Menschenrechte" wurde schon festgestellt: „Es gab jedoch Zeiten in der Geschichte der Kirche, in denen die Menschenrechte in Wort und Tat nicht mit genügender Klarheit und Energie gefördert und verteidigt wur-

[14] Egon Kapellari, Recht und Unrecht in philosophisch-theologischer Sicht, in: *derselbe, Seit ein Gespräch wir sind* ... Neue Begegnungen, 2007, S. 335.

[15] Siehe Verdross, *Rechtsphilosophie*, S. 92 ff.; Heribert Franz Köck, *Der Beitrag der Schule von Salamanca zur Entwicklung der Lehre von den Grundrechten*, 1987 und Herbert Schambeck, La escuela de Salamanca y su significación hoy, *Anuales de la Real Academia de Ciencias morales y políticas*, Año XLII, Nr. 67, 1990, S. 85 ff.

den. Heute stellt die Kirche durch ihr Lehramt und ihre Tätigkeit einen wichtigen Faktor auf dem Gebiet der Menschenrechte dar".[16]

II.

Den *Weg zur Anerkennung der Menschenrechte* hierzu hat besonders *die Soziallehre der Päpste,*[17] vor allem beginnend mit Papst Leo XIII., gewiesen. Ihre Entwicklung war vorher unterschiedlich,[18] da die katholische Kirche im Laufe der Geschichte *lange unter dem Einfluss der monarchisch absolutistischen Staatsform* stand und manche Forderungen, die später der Demokratismus und Liberalismus erhoben hatten, in einer radikalisierten Form erlebte. Am deutlichsten ist letztgenannter Umstand im Zusammenhang mit der französischen Revolution 1789 erkennbar, deren Forderung nach Freiheit, Gleichheit und Brüderlichkeit eine Säkularisation alten christlichen Gedankengutes darstellte, das sich aber in jakobinisierter Form so präsentierte und aktualisierte, dass die katholische Kirche dies nicht akzeptierte.[19] Man darf nicht übersehen, dass die Monarchie, gegen die sich die revolutionären Bewegungen, beginnend vor allem mit Frankreich, richteten, die Staatsform war, in der sich die katholische Kirche seit ihrer Entstehung zurechtzufinden hatte. Eine mehr liberale, nicht jakobinisierte Form der Demokratie[20] wie in den aus den früheren nordamerikanischen Kolonien hervorgegangenen Vereinigten Staaten[21] mit ihrem Nebeneinander von frame of Government für die Staatsorganisation und bill or declaration of rights[22] für die Grundrechte in der Verfassung hat die katholische Kirche

[16] *Die Kirche und die Menschenrechte*, hrsg. Von der Päpstlichen Kommission „Iustitia et Pax", 1976, S. 8.

[17] Arthur Fridolin Utz/Gräfin von Galen (Hrsg.), *Die katholische Sozialdoktrin in ihrer geschichtlichen Entfaltung*, 1976, sowie Texte zur katholischen Soziallehre. Die sozialen Rundschreiben der Päpste und andere kirchliche Dokumente mit Einführungen von Oswald von Nell-Breuning SJ und Johannes Schasching SJ, 1992.

[18] Beachte Josef Isensee, Keine Freiheit für den Irrtum, Die Kritik der katholischen Kirche des 19. Jahrhunderts an den Menschenrechten als staatsphilosophisches Paradigma, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, *Band* 104 (1987), S. 296 ff.

[19] Dazu Hans Maier, *Kirche und Demokratie*, 1979 und *ders.*, *Die Kirche und die Menschenrechte*, IKZC Communio 1981, S. 501 ff., sowie Isensee, a.a.O., S. 214 ff.

[20] Siehe Hans Maier, *Revolution und Kirche*, 1973.

[21] *Näher Dokumente zur Geschichte der Vereinigten Staaten von Amerika*, hrsg. Von Herbert Schambeck, Helmut Widder und Marcus Bergmann, 2. Aufl., 2007.

[22] Dazu Georg Jellinek, *Allgemeine Staatslehre*, 1959, S. 517 ff.

anfangs nicht selbst miterlebt, sondern erst später in einer bisher in dieser Weise nicht gekannten Form dank der Trennung von Kirche und Staat erlebt. Die Lehre der katholischen Kirche vom Staat formte die Monarchie nahezu zu einem Modell gottgewollter Staatsform, zumal die Monarchie gelegentlich, z.B. im späten Römischen Reich, sogar theokratische Züge angenommen hatte. Andererseits ist die *Abneigung* katholischer Amtsträger und kirchlicher Lehräußerungen *gegenüber demokratischen und konstitutionellen Bewegungen auf die Kirchenfeindlichkeit* jener Kreise *zurückzuführen*, von denen diese Bestrebungen ursprünglich ihren Ausgang nahmen.

In diesem Zusammenhang gilt es, die gegen die katholische Kirche gerichteten Beschlüsse der damaligen französischen Nationalversammlung, beginnend mit der Revolution, zu nennen. 1791 hat daher auch Papst Pius VI. in seinem Breve „Quod aliquantum" die Constitution civile du clergé verurteilt und sich dabei auch gegen Freiheit, Gleichheit und die aus ihnen abgeleitete Religionsfreiheit des Individuums gerichtet; sie werden als unvereinbar mit Vernunft und Offenbarung erklärt. Pius VI. spricht sogar von einer absurden Freiheitslehre (absurdissimum ejus libertatis commentum).[23]

Nach der Wiedererrichtung des bourbonischen Königreichs hat sich Papst Pius VII.[24] in seinem Apostolischen Schreiben „Post Tam Diuturnas" 1814 an den Bischof von Troyes, Monsignore De Boulogne, gegen die allgemeine Gewissens- und Kulturfreiheit sowie gegen die Pressefreiheit gewandt. 1821 sprach sich Papst Pius VII. in „Ecclesiam a Jesu Christo" für die Einheit von „Thron und Altar" und damit für Autorität und Gehorsam aus. In der Enzyklika „Mirari vos" 1832 und „Singulari nos" 1834 setzte sich Papst Gregor XVI.[25] kritisch mit dem Freiheitsbegriff und den Demokratievorstellungen von Robert de Lamennais auseinander, den er verurteilte. In diese Phase kritischer Auseinandersetzung mit den Tendenzen des Demokratismus und Liberalismus gehört noch der Apostolische Brief „Quanta cura" Papst Pius IX.[26] von 1864 mit dem Anhang „Syllabus", welcher die wichtigsten Zeitirrtümer auflistet.[27]

[23] Utz/Galen, Bd. III, S. 2665 f., Nr. 13.
[24] Utz/Galen, Bd. I, S. 463 ff., Nr. 57 ff.
[25] Utz/Galen, Bd. 1, S. 137 ff, Nr. 1 ff.
[26] Utz/Galen, Bd. 1, S. 161 ff., Nr. 26 ff.
[27] Peter Tischleder, *Die Staatslehre Leos XIII.*, 1927, S. 11. Zur Hermeneutik des Syllabus, siehe Roland Minnerath, *Le Syllabus de Pie IX.*, 2000, S. 71 ff.

Eine Wende trat *mit Papst Leo XIII*. ein. Er setzte sich noch kritisch mit liberalen Demokratieauffassungen auseinander, geht aber bereits auf Distanz zu der bisher akzeptierten Staatsform der Monarchie und bekennt sich in seiner Lehre vom Staat, weitgehend auch von Thomas von Aquin beeinflusst, zur Zulässigkeit einer „gesunden Demokratie".[28] In seiner Enzyklika „Immortale Dei" 1885 erklärt Papst Leo XIII. bezüglich der Staatsform: „Das Befehlsrecht ist freilich an und für sich mit keiner Staatsform notwendigerweise verbunden. Es darf sich diese oder jene dienstbar machen, wenn sie nur imstande ist, Nutzen zu stiften und das Gemeinwohl tatkräftig zu fördern".[29]

Die gleiche Ansicht hat Papst Leo XIII. auch schon in seiner Enzyklika über die Staatsgewalt „Diuturnum illud" 1881 vertreten.[30] In der Enzyklika „Libertas praestantissimum" von 1888 betont Papst Leo XIII. bereits deutlicher die Zulässigkeit der Demokratie.[31]

III.

Dieser Hinweis auf *das Demokratie- und Freiheitsverständnis der katholischen Kirche* ist deshalb so wichtig, weil es im Zusammenhang mit der Haltung der katholischen Kirche zu den Menschenrechten steht, zu welchen die liberalen und demokratischen Grundrechte geradezu klassische Beiträge leisten. Die Einsicht in die Bedeutung und Notwendigkeit von Grundrechten hat sich in dem Maße für die katholische Kirche aktualisiert, als politische Entwicklungen, hervorgerufen insbesondere durch menschenunwürdige Ideologien wie Kommunismus und Nationalsozialismus, autoritäre und totalitäre Herrschaftssysteme entstehen ließen. In solchen Fällen ist es auch in Demokratien, unabhängig von der Staatsform Monarchie oder Republik, zu Unmenschlichkeiten mit Verletzungen der Freiheit und Würde des Menschen gekommen. Die Demokratie wurde daher zwar nicht mehr wie bis in das 19. Jahrhundert von der katholischen Kirche abgelehnt, sondern sie setzte sich mit ihr kritisch auseinander, wobei sie

[28] Tischleder a.a.O., insbes. S. 243 ff.

[29] Emil Marmy (Hrsg.), Mensch und Gemeinschaft in christlicher Schau, *Dokumente*, 1945, TS. 577, Nr. 841.

[30] Marmy, a.a.O., S. 557, Nr. 808.

[31] Marmy, a.a.O., S. 115, Nr. 137.

sich stets gegen jede jakobinisierte Form von Demokratie aussprach und die Verantwortung der demokratischen Staatswillensbildung für Freiheit und Würde des Menschen in Wahrung der Grundrechte betonte. Gerade durch diese Gefährdungen und Verletzungen der Menschenwürde hat sich für die katholische Kirche das Erfordernis ergeben, mit einer zunehmenden Breite und in einer auch vom Grundsätzlichen ins Einzelne gehenden Auseinandersetzung mit Politik, Recht und Staat vom katholischen Standpunkt her eine Lehre von den Grundrechten zu entwickeln. Dabei kann man rückblickend feststellen, dass *die Menschenwürde als Idee älter* ist *als die Menschenrechte und damit als die Grundrechte als Rechtseinrichtung*.

Für diese Menschenwürde, nämlich für das Recht auf Leben, Freiheit, Eigentum auch der Eingeborenen *haben sich* die *Päpste schon* zu einer Zeit *eingesetzt, als sie gegenüber Demokratie und Freiheitsrechten noch ablehnend waren*; so Papst Eugen IV. 1435 in seiner Bulle „Dudum Nostras" über den Sklavenhandel,[32] Papst Paul III. in seiner Bulle „Veritas ipsa" 1537 über die menschliche Würde der Heiden,[33] Papst Urban VIII. in seiner Bulle „Commissum nobis" 1639 mit dem Auftrag, jedweder Person zu verbieten, die Bewohner West- und Südindiens zu verkaufen, zu versklaven oder ihrer Frauen, Kinder und Besitztümer zu berauben,[34] Papst Benedikt XIV. in seiner Bulle „Immensa Pastorum" 1741 betreffend die Brüderlichkeit über alle Rassenunterschiede hinweg[35] und Papst Gregor XVI. in seinem Apostolischen Brief „In Supremo" gegen die Sklaverei in Afrika und Indien und gegen den Negerhandel 1839.[36]

Josef Isensee hat es auch hervorgehoben: Es „wurden viele Gebote der Menschlichkeit, die heute unter der Flagge der Menschenrechte segeln, vom Papsttum schon in Jahrhunderten vertreten, in denen die Menschenrechte als säkulare Kategorie noch nicht existierten. Beispielhaft seien genannt die Verwerfung der Folter und der Sklaverei, die Würde der Menschen aller Rassen, die Anerkennung unterschiedlicher Kulturen, die Ablehnung von Zwangsbekehrungen. Ein Menschenrecht, das seiner Substanz nach liberal ist, wurde im 19. Jahrhundert vom politischen Katholizismus eingefordert und im 20. Jahrhundert erfolgreich durchgesetzt: das

[32] Utz/Galen, Bd. 1, S. 398 ff., Nr. 15 ff.
[33] Utz/Galen, a.a.O., S. 381, Nr. 1.
[34] Utz/Galen, a.a.O., S. 382 ff., Nr. 2 ff.
[35] Utz/Galen, a.a.O., S. 389 ff., Nr. 6 ff.
[36] Utz/Galen, a.a.O., S. 406 ff., Nr. 18 ff.

Elternrecht. Von einer pauschalen Absage an die Menschenrechte kann also nicht die Rede sein. Objekt der Kritik ist der liberale Freiheitsentwurf in seiner ideologischen Dimension und in jenen Rechten der geistigen Freiheit, die für die hergebrachten Ordnungen der Religion, der Sittlichkeit und des Staates bedrohlich erscheinen".[37]

Die katholische Kirche ist bereit, jeden Staat unabhängig von der Staatsform, dem Staatsaufbau und seinem politischen Ordnungssystem anzuerkennen, so lange er dem Gemeinwohl dient und die Freiheit und Würde des Menschen wahrt. *Die katholische Kirche lehnt* nämlich jeden *Anspruch von Omnipotenz und Totalität* im Bereich des Rechtes, des Staates und der Politik *ab*. Sie sind unvereinbar mit der Freiheit und Würde des Menschen und den Aufgaben sowie der Lehre der katholischen Kirche. Dies zeigt sich auch in dem Prinzip der Subsidiarität, welches Papst Pius XI. in seiner Enzyklika „Quadragesimo anno" (Nr. 79)[38] 1931 statuiert hatte und das den „Grundsatz der ergänzenden Hilfeleistung"[39] darstellt. Er schützt die kleinere Einheit vor der größeren und begründet abgestufte Eigenverantwortungen, die sich in einem wechselseitig bedingenden Zusammenhang verbinden und auch den Menschen vor der Allmacht des Staates schützt.

Die Konfrontation der katholischen Kirche mit menschenunwürdigen Zeitumständen erfolgte besonders während des Zweiten Weltkriegs. Damals hatte auch die katholische Kirche mit Priestern und Laien in verschiedenen Staaten und Nationen unzählige Opfer zu erbringen. In dieser Zeit erfolgte die umfassendste Lehräußerung der katholischen Kirche zur Demokratie, und zwar in der Rundfunkansprache Papst Pius XII.[40] „Grundlehren über die wahre Demokratie" zu Weihnachten 1944. Erschüttert von der Grausamkeit des Krieges, der von der nationalsozialistischen Diktatur des Deut-

[37] Isensee, *Keine Freiheit für den Irrtum*, S. 301 ff.

[38] Marmy, a.a.O., S. 443 ff., Nr. 610 ff., bes. S. 478 f., Nr. 672 f.

[39] Johann Baptist Schuster, *Die Soziallehre nach Leo XIII. und Pius XI. unter besonderer Berücksichtigung der Beziehungen zwischen Einzelmensch und Gemeinschaft*, 1935, S. 7.

[40] Papst Benedikt XVI. Grundlehren über die wahre Demokratie, Radiobotschaft an die Welt, 24. Dezember 1944, AAS XXXVII (1945), S.10 ff in: *Soziale Summe Pius XII., Aufbau und Entfaltung des gesellschaftlichen Lebens*, hgb. von Arthur Fridolin Utz und Joseph Fulko Groner, II. *Band*, 2 Aufl., Freiburg 1962, S. 1771 ff., Nr. 3467 ff.; siehe näher Herbert Schambeck, Der rechts- und staatsphilosophische Gehalt der Lehre Pius XII., in: *ders*. (Hrsg.), *Pius XII. zum Gedächnis*, 1977, S. 447 ff., und *ders.*, *Pius XII. und der Weg der Kirche*, in: *ders*. (Hrsg.), *Pius XII. – Friede durch Gerechtigkeit*, 1986, S. 192 ff.

schen Reiches entfesselt worden war, begrüßt Papst Pius XII. die Neigung der Völker zur Demokratie.

Auch der demokratische Staat muss, wie jede andere Regierungsform mit wirksamer Autorität, ohne die er nicht bestehen kann, ausgestattet sein.

Eine Überlebensfrage und eine *Frage* des Gedeihens *der Demokratie* ist *die geistige und sittliche Qualität der Volksvertreter*, von denen die höchsten politischen Entscheidungen im demokratischen Staat getroffen werden. Papst Pius XII. erkennt, dass nur eine Auslese von geistig hervorragenden und charakterfesten Männern als Vertreter des gesamten Volkes wirken sollten. Wird der staatlichen Gesetzgebung eine zügel- und grenzenlose Macht zuteil, verkehrt sich nach Papst Pius XII. die demokratische Staatsform, die dann nicht mehr auf den unveränderlichen Grundgesetzen des Naturgesetzes und den geoffenbarten Wahrheiten beruht, trotz des gegenteiligen trügerischen Scheins in ein absolutistisches System. Eindringlich ermahnt Papst Pius XII. die Christen, von ihrem Wahlrecht Gebrauch zu machen. Dies sei ein Akt schwerer sittlicher Verantwortung, dessen Vernachlässigung die Gefährdung der Demokratie und dort, wo religiöse Dinge auf dem Spiele stehen, eine schwere, verhängnisvolle Unterlassungssünde bedeute.

IV.

Diese *Anerkennung der Demokratie durch die katholische Kirche* erfolgte nicht gleichmäßig sondern *in Etappen*. So hat Papst GregorXVI. 1832 in seiner Enzyklika „Mirari vos“ die Freiheitsrechte und mit ihnen die Demokratie noch verurteilt,[41] Papst Leo XIII. 1888 in seiner Enzyklika „Libertas praestantissimum“ die Zulässigkeit der Demokratie schon herausgestrichen, Papst Pius X. 1906 in seiner Enzyklika „Vehementer vos“ die Christen[42] vor der einseitigen Zuneigung zur demokratischen Staatsform aber gewarnt[43] und Papst Pius XI. noch 1922 in seiner Enzyklika „Ubi arcano“ auf die Gefahren für die Demokratien durch Parteienhader hingewiesen[44] Hingegen haben Papst Pius XII. und Papst Johannes XXIII. die Demokratie als politisches Ordnungssystem als durchgesetzt akzeptiert und sich in

[41] Marmy, a.a.O., S. 15 ff., Nr. 1 ff.
[42] Marmy, a.a.O., S. 632 ff., Nr. 968 ff.
[43] Marmy, a.a.O.
[44] Marmy, a.a.O., S. 716 f., Nr. 1102.

ihren Lehräußerungen mit ihren Grundsätzen und Konsequenzen für die Christen auseinandergesetzt.

In seinem verhältnismäßig kurzen Pontifikat von fünf Jahren hat Papst Johannes XXIII. Akzente gesetzt, die über seine Zeit hinaus für die katholische Kirche wirksam wurden; dazu zählen neben der Einberufung des II. Vatikanischen Konzils 1962 seine zwei Enzykliken, nämlich 1961 „Mater et Magistra" und 1963 „Pacem in terris". Während Papst Johannes XXIII. zum Jubiläum von „Rerum novarum" in „Mater et Magistra" die katholische Kirche in ihrer Weltverantwortung im Hinblick auf „die „jüngsten Entwicklungen des gesellschaftlichen Lebens und seine Gestaltung im Licht der christlichen Lehre"[45] auch mit zeitorientierten Sozialgestaltungsempfehlungen vorstellt, bemüht er sich in „Pacem in terris" um „den Frieden unter allen Völkern in Wahrheit, Gerechtigkeit, Liebe und Freiheit".[46]

Papst Johannes XXIII. hat *in „Pacem in terris" die päpstliche Lehre von Staat und Politik mit einer systematischen Darlegung der Menschenrechte* bereichert. „Pacem in terris" kommt deshalb eine besondere Bedeutung zu, weil in allen übrigen katholischen Lehräußerungen zwar punktuell Bezug auf Grundrechte genommen wird, aber in keinem einzigen Dokument ein derartig umfassender Katalog an Menschenrechten enthalten ist! Die umfassende Darstellung der Rechte der Menschen findet sich im 1. Teil des Rundschreibens „Pacem in terris" Papst Johannes XXIII. unter dem Titel „Die Ordnung unter den Menschen". In diesem Text steht die grundlegende Feststellung: „9. Jedem menschlichen Zusammenleben, das gut geordnet und fruchtbar sein soll, muss das Prinzip zugrundeliegen, dass jeder Mensch seinem Wesen nach Person ist. Er hat eine Natur, die mit Vernunft und Willensfreiheit ausgestattet ist; er hat daher aus sich Rechte und Pflichten, die unmittelbar und gleichzeitig aus seiner Natur hervorgehen. Wie sie allgemein gültig und unverletzlich sind, können sie auch in keiner Weise veräußert werden".[47]

Ausdrücklich wird neben der Personenhaftigkeit des Menschen *die Würde der menschlichen Person nach den Offenbarungswahrheiten betrachtet* und betont, wenn wir dies tun, „müssen wir sie noch viel höher einschätzen. Denn die Menschen sind ja durch das Blut Jesu Christi erlöst, durch die himmlische Gnade Kinder und Freunde Gottes geworden und zu Erben

[45] *Texte zur katholischen Soziallehre*, S. 171.
[46] Texte a.a.O., S. 241.
[47] Texte a.a.O., S. 243.

der ewigen Herrlichkeit eingesetzt“.[48] In “unauflöslicher Beziehung“ werden Rechte und Pflichten in derselben Person gesehen; zu den Rechten werden gezählt: „das Recht auf Leben und Lebensunterhalt (11)“, „moralische und kulturelle Recht (12, 13)“, „das Recht auf Gottesverehrung (14)“, „das Recht auf freie Wahl des Lebensstandes (15, 16, 17)“, „Rechte in wirtschaftlicher Hinsicht (18, 19, 20, 21, 22)“, „Recht auf Gemeinschaftsbildung (23, 24)“, „Recht auf Auswanderung und Einwanderung (25)“ und „Rechte politischen Inhalts (26, 27)“; bezüglich dieser letztgenannten Rechte wird in „Pacem in terris“ betont, „dass mit der Würde der menschlichen Person das „Recht verknüpft ist, am öffentlichen Leben aktiv teilzunehmen, um zum Gemeinwohl beizutragen (26, 27)“. Zur menschlichen Person gehört „auch der gesetzliche Schutz ihrer Rechte, der wirksam und unparteiisch sein muss in Übereinstimmung mit den wahren Normen der Gerechtigkeit“. Neben den Rechten wird die „unauflösliche Beziehung zwischen Rechten und Pflichten in derselben Person (28)“ betont, u.a. das Verantwortungsbewusstsein und das Zusammenleben in Wahrheit, Gerechtigkeit, Liebe und Freiheit (35, 36) gefordert.

Betrachtet man diese auf *die Stellung des Einzelmenschen* bezogenen Aussagen, so sind diese weniger normativrechtlich formuliert, sondern mehr *von sozialethischer Bedeutung*, aber in dieser Weise präpositive Werte betonend und Ansprüche postulierend, welche den deklaratorischen Charakter von Grundrechtsformulierungen in Verfassungsrechtsordnungen erklären lässt.

Daneben enthält „Pacem in terris“ auch Hinweise auf die Möglichkeit der näheren Ausführung dieser Menschenrechte. So betonte Papst Johannes XXIII. in bezug auf die „Teilnahme der Bürger am öffentlichen Leben“: „(73) Dass es den Menschen gestattet ist, am öffentlichen Leben aktiv teilzunehmen, ist ein Vorrecht ihrer Würde als Person, auch wenn sie die Teilnahme nur in den Formen ausüben können, die dem Zustande des Staatswesens entsprechen, dessen Glieder sie sind“! Er erkannte, dass „(74) aus der Teilnahme am öffentlichen Leben ... sich neue, sehr weitgehende und nützliche Möglichkeiten“ ergeben und erklärt, konkreter werdend, in bezug auf „Zeichen der Zeit“: „(75) In der heutigen Zeit begegnet man bei der rechtlichen Organisation der politischen Gemeinschaften in erster Linie der Forderung, dass in klaren und bestimmten Sätzen eine Zusammenfassung der den Menschen eigenen Grundrechten ausgearbeitet wird, die

[48] Texte a.a.O., S. 243.

nicht selten in die Staatsverfassung selber aufgenommen wird. (76) Ferner wird gefordert, dass in exakter juristischer Form die Verfassung eines jeden Staates festgelegt wird. Darin soll angegeben werden, in welcher Weise die staatlichen Behörden bestimmt werden, durch welches Band diese untereinander verknüpft sind, wofür sie zuständig sind, und schließlich, auf welche Art und Weise sie zu handeln verpflichtet sind. (77) Schließlich wird gefordert, dass im Hinblick auf Rechte und Pflichten die Beziehungen festgelegt werden, die zwischen den Bürgern und den Staatsbehörden gelten sollen; dass deutlich als Hauptaufgabe der Behörden betont werde, die Rechte und Obliegenheiten der Bürger anzuerkennen, zu achten, harmonisch miteinander in Einklang zu bringen, zu schützen und zu fördern".

Papst Johannes XXIII. hat mit seiner Friedensenzyklika „Pacem in terris" *nicht nur* den *umfangreichsten Katalog an Menschenrechten* angegeben, sondern *auch für deren Aufnahme in einer Staatsrechtsordnung Detailregelungen den Weg gewiesen*, wie dies in päpstlichen Lehräußerungen noch nicht der Fall war! Papst Johannes XXIII. wusste, dass heute der Schutz der Grundrechte über den Staat hinaus auch die internationale Anerkennung verlangt und zählte zu den „Zeichen der Zeit" (Nr. 142) als „(Nr. 143) ein Akt von höchster Bedeutung ... die allgemeine Erklärung der Menschenrechte" 1948, die „gleichsam als Stufe und als Zugang zu der zu schaffenden rechtlichen und politischen Ordnung aller Völker auf der Welt zu betrachten" (Nr. 144) ist. Die Bedeutung der UNO konnte Papst Johannes XXIII. zwar nicht mehr selbst durch seinen Besuch in dieser Weltorganisation unterstreichen, wohl aber seine Nachfolger Papst Paul VI., Papst Johannes Paul II.[49] und Papst Benedikt XVI.[50]

Die katholische Kirche erkennt, dass sittliche Postulate alleine nicht genügen, dass es vielmehr darauf ankommt, *mittels der Exaktheit positiven Rechts Rechtssicherheit* zu *gewähren*, da *nicht alle Ordnungsbezüge präpositiv bedingt* sind. Papst Pius XII. hat schon am 13. Oktober 1955 in einer Ansprache über „Koexistenz und Zusammenleben der Völker in der Wahrheit und in der Liebe" festgestellt, dass es nicht weniger lehrreich sei, zu

[49] Beachte Permanent Observer Mission of the Holy See to the United Nations, Path to Peace. A Contribution, *Documents of the Holy See to the International Community*, 1987; The Visit of His Holiness Pope John Paul II to the United Nations, 1996, und Permanent Observer Mission of the Holy See to the United Nations, Serving the Human Family, the Holy See at the Major United Nations Conferences, 1997.

[50] Papst Benedikt XVI., Eine menschliche Welt für alle. *Die Rede vor der UNO*, 2008.

sehen, „wie man immer das Bedürfnis erkannt hat, durch internationale Verträge und Vereinbarungen das festzulegen, was nach den Grundsätzen der Natur nicht mit Sicherheit feststand, und das zu ergänzen, worüber die Natur schwieg“.[51] Damit hat Papst Pius XII. mit einmaliger, oft viel zu wenig beachteter Deutlichkeit festgestellt, dass es *für das positive Recht Bereiche* gibt, *die nicht durch ein naturrechtlich begründetes, präpositives Recht vorherbestimmt sind*; hier ist auch nach Papst Pius XII. ein *Bereich der politischen Entscheidung* eröffnet. In diesem Zusammenhang sei auch nicht übersehen, dass bereits Papst Leo XIII. in seiner Enzyklika „Libertas praestantissimum“ 1988 betonte, dass sich nicht jede positivrechtliche Vorschrift auf einen Naturrechtssatz zurückzuführen lässt: es gibt „verschiedene Gegenstände, für welche die Natur nur allgemeine Angaben macht“[52] dem sei hinzugefügt, dass auch dort, wo sich kein Naturrechtspostulat dem positiven Recht ergibt, der Gesetzgeber um eine humane Regelung unter Beachtung der Menschenrechte und des Gemeinwohls bemüht sein soll!

V.

Trotz all dieser päpstlichen Lehräußerungen kann aber nicht angenommen werden, dass die katholische Kirche zu diesem Zweck der humanen Ordnung eine eigene Verfassungslehre entwickelt hätte. Die *Lehre vom Staat und von den Menschenrechten* ist *Teil der Soziallehre der katholischen Kirche*, in der sie seit Ambrosius neben der Individualethik eine Sozialethik entwickelt, d.h. neben der Sittenordnung für das private Leben des Einzelmenschen eine Sittenordnung für das öffentliche Leben des Einzelnen, von Staat und Gesellschaft, die ja beide für den Einzelmenschen, an den sich die Glaubenswahrheit der Kirche richtet, schicksalhaft sind.

Die katholische Kirche betont die Priorität des Menschen und seiner Menschenrechte gegenüber dem Staat. Zu diesen *Rechten in Bezug auf die Sozialordnung*, die jedem zustehen und unentziehbar sind, zählt nach Papst Leo XIII. Enzyklika „Rerum novarum“ das Koalitionsrecht.[53] Papst Johannes XXIII. betonte in seiner Enzyklika „Populorum progressio“ 1967 (in der

[51] Papst Pius XII., Koexistenz und Zusammenleben der Völker in der Wahreit und in der Liebe, Ansprache an das „Centro Italiano di Studi per la Riconciliazione Internazionale“, 13. Oktober 1955, AAS XLVII (1955), S. 764 ff. in Utz/Groner, S. 3783, Nr. 6286.

[52] Utz/Galen, I., S. 191, RN 47.

[53] Texte a.a.O., S. 30 f.

er die „Entwicklung, der neue Name für Friede" (Nr. 76) bezeichnet), den Wohlfahrtszweck des Staates,[54] den Papst Pius XI. in „Quadragesimo anno",[55] Papst Pius XII. in vielen Ansprachen, besonders in der Pfingsbotschaft 1941,[56] Papst Johannes XXIII. in „Mater et Magistra",[57] Papst Paul VI. besonders in seiner Ansprache vor der Internationalen Arbeitsorganisation 1969[58] und Papst Johannes Paul II. in „Laborem exercens" hervorgehoben haben. Papst Johannes Paul II. hat ja in dieser letztgenannten Sozialenzyklika 1981[59] unter erneuter Betonung der Personhaftigkeit des Menschen die Arbeit als Mittel der Persönlichkeitsentfaltung dargestellt, den *Vorrang der Arbeit vor dem Kapital* betont und *die Sozialrechte in den Zusammenhang mit den allgemeinen Menschenrechten* gestellt und somit die katholische Lehre der Menschenrechte, wie sie Papst Johannes XXIII. in „Pacem in terris" besonders entfaltet hat, weiterentwickelt.[60] Die Sozialverantwortung des Staates, aber auch der Völkergemeinschaft, wird in zunehmenden Maße betont. Einen Beitrag leisten hierzu, beginnend 1968 mit Papst Paul VI., die Weltfriedensbotschaften, welche der Nachfolger Petri jeweils zum Jahresanfang zu aktuellen Themen erlässt.[61]

Der Staat ist für die Kirche *nicht Selbstzweck*, sondern *hat helfende Funktion*. Papst Johannes Paul II. hat dies in „Centesimus annus" besonders hervorgehoben. Die Kirche nimmt den Staat nicht mehr in einer Neutralität an Ordnungsvorstellungen hin, sondern verlangt seine sozialgestaltende Kraft.

Diese *Sozialgestaltung im Sinne* der auf *Gesellschaftsverbesserung* ausgerichteten Soziallehre[62] der Kirche bekommt in „Centesimus annus" durch Papst Johannes Paul II. außerordentliche Deutlichkeit. Die Verwirklichung

[54] Texte a.a.O., S. 433.
[55] Texte a.a.O., S. 88 ff.
[56] Texte a.a.O., S. 123 ff.
[57] Texte a.a.O., S. 171 ff.
[58] Texte a.a.O., S. 441 ff.
[59] Texte a.a.O., S. 529 ff.
[60] Texte a.a.O., S. 241 ff.
[61] Siehe jeweils Donato Squicciarini (Hrsg.), *Die Weltfriedensbotschaften Papst Paul VI.*, 1979, *Die Weltfriedensbotschaften Papst Johannes Paul II.*, 1992 und *Die Weltfriedensbotschaften Papst Johannes Paul II.* 1993 – 2000, 2001 sowie Roland Minnerath, L'Eglise catholique et ses efforts pour la paix, in: J.P. Ribaut & J.F. Collange (Hrsg.), *Recevoir et construire la paix. Les religions et la paix* (Travaux de la Faculté de Theologie Protestante, 5), 1994, S. 49 ff.
[62] Beachte Alfred Klose, *Die katholische Soziallehre*, 1979; Rudolf Weiler, *Einführung in die katholische Soziallehre*, 1991 und Arthur Fridolin Utz, Zum Begriff „Katholische Soziallehre", in: *Die katholische Soziallehre und die Wirtschaftsordnung*, 1991, S. 6 ff.

der auf die Sozial- und Wirtschaftsordnung bezogenen Gestaltungsempfehlungen setzt eine bestimmte Ordnung des Staates voraus. In diesem Zusammenhang wird die Wichtigkeit der Teilung der drei Gewalten des Staates, nämlich der Gesetzgebung, der Verwaltung und der Gerichtsbarkeit, deren Bedeutung an wechselseitiger Kontrolle für den Schutz der Freiheit aller sowie das Prinzip des „Rechtsstaates“ genannt, „in dem das Gesetz und nicht die Willkür der Menschen herrscht“ (Nr. 44).[63]

Der Staat und seine Einrichtungen sind auch in „Centesimus annus“ nicht Selbstzweck, sondern stehen *im Dienste des Menschen*. In der Einstellung zum Menschen und seiner Würde liegt der Grund für die Beurteilung und damit der Unterscheidung der Staaten. Papst Johannes Paul II. bedauert es, dass die Menschen nur so weit respektiert werden, „als sie als Werkzeug für egoistische Ziele dienen“. „Die Wurzel des modernen Totalitarismus liegt also in der Verneinung der transzendenten Würde des Menschen, der ein sichtbares Abbild des unsichtbaren Gottes ist“ (Nr. 44).[64] Papst Johannes Paul II. bezeichnet den Menschen als „Subjekt von Rechten, die niemand verletzen darf: weder der Einzelne, noch die Gruppe, die Klasse, die Nation oder der Staat“ (Nr. 44).[65] Papst Johannes Paul II. geht damit von absolut geltenden Menschenrechten des Einzelmenschen aus, die dem Staat und seiner Gesetzesordnung vorgegeben sind und deren Außerachtlassung unzulässig ist. Johannes Paul II. verlangte die Anerkennung und den Schutz der Stellung des Einzelmenschen, der Familie, der Gesellschaft und der Religionsgemeinschaft. Er lehnte jede Form des Totalitarismus ab und verlangt die Anerkennung der Eigenständigkeit nichtstaatlicher Gebilde.

Sehr klar wird *jede Form der Uniformierung und Nivellierung und* damit auch jeder *Fanatismus und Fundamentalismus abgelehnt*. Die Kirche verlangt vielmehr die Achtung der Freiheit und der Unterschiedlichkeit, sofern sie mit der Würde des Menschen vereinbar ist. Die Demokratie kann dazu in der Staatswillensbildung die Möglichkeit bieten.

Diese *Wertbezogenheit der Demokratie* erfährt durch die Menschenrechte ihre besondere Begründung. „Centesimus annus“ beinhaltet zwar keine taxative Aufzählung der Menschenrechte, sondern bloß eine demonstrative, die aber eine bestimmte Rangordnung erkennen lässt: „Unter den vorran-

[63] Texte, a.a.O., S. 742.
[64] Texte a.a.O.
[65] Texte a.a.O.

gigsten Rechten sind zu erwähnen: das Recht auf Leben, zu dem wesentlich das Recht gehört, nach der Zeugung im Mutterschoß heranzuwachsen; das Recht, in einer geeinten Familie und in einem sittlichen Milieu zu leben, das für die Entwicklung und Entfaltung der eigenen Persönlichkeit geeignet ist; das Recht, seinen Verstand und seine Freiheit in der Suche und Erkenntnis der Wahrheit zur Reife zu bringen; das Recht, an der Arbeit zur Erschließung der Güter der Erde teilzunehmen und daraus den Lebensunterhalt für sich und die Seinen zu gewinnen; das Recht auf freie Gründung seiner Familie und auf Empfang und Erziehung der Kinder durch verantwortungsvollen Gebrauch der eigenen Sexualität. Quelle und Synthese dieser Rechte ist in gewisssem Sinne die Religionsfreiheit, verstanden als Recht, in der Wahrheit des eigenen Glaubens und in Übereinstimmung mit der transzendenten Würde der eigenen Person zu leben (Nr. 47)".

Das Grundrecht auf Leben ist während seines ganzen Pontifikates *ein besonderes und ständiges Anliegen* Papst Johannes Paul II. gewesen. Dieses Menschenrecht hebt er 1995 in seiner Enzyklika „Evangelium vitae" und 1999 in seiner Botschaft zum Weltfriedenstag hervor. „In der Achtung der Menschenrechte liegt das Geheimnis des wahren Friedens" war das Motto dieses Weltfriedenstages und das Lebensrecht stand dabei im Zentrum. Papst Johannes Paul II. betonte: „4. Das erste ist das Grundrecht auf Leben. Das menschliche Leben ist heilig und unantastbar vom ersten Augenblick seiner Empfängnis an bis zu seinem natürlichen Ende. ..."

Papst Johannes Paul II. sieht es als Aufgabe der katholischen Soziallehre an, dem Einzelmenschen nicht bloß Freiheit zu sichern, sondern ihm *die Verantwortung für die Nutzung der Freiheit* sowie aller ihm auch durch die Wissenschaft, wie z.B. der Medizin im Zusammenhang mit dem Recht auf Leben, eröffneten Möglichkeiten vor Augen zu halten und zu deren Nutzung im Sinne einer Persönlichkeitsentfaltung die erforderlichen sozialen und wirtschaftlichen Voraussetzungen zu vermitteln.

Alle auch aus Gründen der sozialen Gerechtigkeit und des Gemeinwohles in „Centesimus annus" an den Staat gerichteten Forderungen stehen unter der *Beachtung des Prinzips der Subsidiarität*. Papst Johannes Paul II. weist in „Centesimus annus" besonders auf die Bedeutung aller Gebilde im intermediären Bereich zwischen dem Einzelmenschen und dem Staat hin. Papst Johannes Paul II. spricht sich in Erfüllung des Subsidiaritätsprinzips für spezifische Solidaritätsnetze aus. Er will mittels der Prinzipien des Gemeinwohles und der Subsidiarität verhindern, dass einerseits der Staat gleich dem libertinistischen Nachtwächterstaat seine Sozialverantwortung übersieht und andererseits ein Versorgungsstaat mit einem aufgeblähten

Machtapparat entsteht. Auf diese Weise gibt er in „Centesimus annus" den Demokratien unserer Tage mit ihrem Instrumentarium an Rechts- und Verfassungsstaatlichkeit eine an der Freiheit und Würde der Menschen orientierte Sozialgestaltungsempfehlung, welche die Rechtslehre durch eine Rechts- und Sozialethik ergänzt. Die Menschenrechte haben dabei eine wegweisende Mittlerfunktion!

VI.

Diese *Mittlerfunktion der Menschenrechte* kann sich, bei der erforderlichen Anerkennung, in Solidarität sowohl im Miteinander der Menschen als auch in Gesellschaft, Staat und Völkergemeinschaft ausdrücken. Europa trifft dabei beispielgebend eine besondere Verantwortung. „In Europa ist zuerst der Begriff der Menschenrechte formuliert worden", betonte Papst Benedikt XVI. am 7. September 2007 anlässlich seines Österreichbesuches in Wien und verdeutlichte „das grundlegende Menschenrecht, die Voraussetzung für alle anderen Rechte, ist das Recht auf das Leben selbst. Das gilt für das Leben von der Empfängnis bis zu seinem natürlichen Ende. Abtreibung kann demgemäß kein Menschenrecht sein – sie ist das Gegenteil davon".[66]

Mit dieser Feststellung wollte Papst Benedikt XVI. richtig verstanden werden und sagte deshalb auch, er „spreche nicht von einem speziellen kirchlichen Interesse", er möchte sich „vielmehr ... zum Anwalt eines zutiefst menschlichen Anliegens und zum Sprecher der Ungeborenen machen, die keine Stimme haben".[67] Er „verschließe damit nicht die Augen vor den Problemen und Konflikten vieler Frauen" und sei sich bewusst, „dass die Glaubwürdigkeit" dieser „Rede auch davon abhängt, was die Kirche selbst zur Hilfe für betroffene Frauen tut".[68]

In vielen Gemeinschaften der katholischen Kirche geschieht viel auf diesem Gebiet, dass gezeugtes Leben auch geboren werden kann, wenn Frauen sich in Grenzsituationen befinden; als eine für viele sei die Kongre-

[66] Papst Benedikt XVI. in Österreich, Apostolische Reise aus Anlass des 850 Jahr-Jubiläums von Mariazell, *Die österreichischen Bischöfe* 8, 2007, S. 37 f.

[67] Papst Benedikt XVI., a.a.O.

[68] Papst Benedikt XVI., a.a.O.; siehe auch Reinhard Marx, Lebensschutz als Einsatz für die Menschenwürde, *Familia et Vita*, Nr. 1/2009, S. 36 ff. und *derselbe*, *Moral für das Leben*, 2009.

gation „Missionaries of Charity" genannt, die von Mutter Teresa in Calcutta gegründet wurde und heute weltweit wirkt.

Der *Name von Mutter Teresa* ist gerade *zur Personifikation der tätigen christlichen Nächstenliebe* geworden, auch was den Schutz des noch ungeborenen Lebens betrifft. So erklärte auch Mutter Teresa am 11. Dezember 1979 in ihrer Ansprache anlässlich der Entgegennahme des Friedensnobelpreises in Oslo: „Wir bekämpfen Abtreibung durch Adoption. Wir haben tausende Leben gerettet; wir haben Nachrichten gesandt an alle Kliniken, an die Spitäler, Polizeistationen: bitte, tötet kein Kind, wir nehmen das Kind ... Und wir haben eine große Nachfrage von Familien, die keine Kinder haben, das ist Gottes Segen auf uns".[69]

In gleicher Weise *tätiger Nächstenliebe* haben sich Gemeinschaften der Kirche um das Leid am Ende des Lebens angenommen; auch hier war Mutter Teresa mit ihrer Kongregation wegweisend.[70] All dies ist ein Handeln auch im Sinne des früheren Erzbischofs von Wien, Franz Kardinal König, der forderte: „Der Mensch soll nicht durch die Hand, sondern an der Hand eines Menschen sterben".[71] Ganz in dieser Haltung erklärte 2007 in Wien auch Papst Benedikt XVI.: „Die richtige Antwort auf das Leid am Ende des Lebens ist Zuwendung, Sterbebegleitung – besonders auch mit Hilfe der Palliativmedizin – und nicht ‚aktive Sterbehilfe'. Um eine humane Sterbebegleitung durchzusetzen, bedürfte es freilich struktureller Reformen in allen Bereichen des Medizin- und Sozialsystems und des Aufbaus palliativer Versorgungssysteme. Es bedarf aber auch konkreter Schritte: in der psychischen und seelsorglichen Begleitung schwer Kranker und Sterbender, der Familienangehörigen, der Ärzte und des Pflegepersonals. Die Hospizbewegung leistet hier Großartiges".[72]

Sicher werden diese *Hilfen für das Leben* im Besonderen und die Wahrung der Menschenrechte im Allgemeinen bedauerlicher Weise *nicht in allen Dimensionen und allen Erdteilen in gleicher Weise möglich* sein; es bedarf eines Bewusstseins der *Verantwortung für Menschlichkeit* sowie der entsprechenden kulturellen, rechtlichen, sozialen und wirtschaftlichen Vor-

[69] Mutter Teresa, Durch Liebe zum Frieden, in: *Apostolat und Familie, Festschrift für Opilio Kardinal Rossi*, hrsg. von Herbert Schambeck, 1980, S. XVI.

[70] Siehe Mutter Teresa, a.a.O., S. XVI. f.

[71] Kardinal Franz König, Brief vom 14. Jänner 2004 an das Präsidium und den Ausschuss 4 (Grundrechte) des Österreich-Konvents.

[72] Papst Benedikt XVI., a.a.O. S. 38.

aussetzungen zu deren Schutz. Die Staatengemeinschaft kann zu dieser Entwicklung Zweckmäßiges und Zielführendes beitragen; eine *Erziehungsarbeit* ist dazu *erforderlich*. Die katholische Kirche bemüht sich darum auch die Grenzen der Staaten und Kontinente überschreitend. Sehr deutlich war dies in der Rede Papst Benedikt XVI. vor der UNO am 18. April 2008 in New York anlässlich des 60. Jahrestages der Allgemeinen Erklärung der Menschenrechte. Er bezeichnete dieses Dokument als „das Ergebnis einer Übereinstimmung verschiedener religiöser und kultureller Traditionen, die alle von demselben Wunsch erfüllt waren, die menschliche Person in den Mittelpunkt der Institutionen, der Gesetze und des Vorgehens der Gesellschaft zu stellen und sie als wesentlich für die Welt der Kultur, der Religion und Wissenschaft anzusehen".[73] Er spricht von den Rechten des Menschen, „der für die Welt und die Geschichte der zentrale Punkt des Schöpfungsplanes Gottes bleibt"[74] und anerkennt gleichzeitig ihre Präpositivität. Papst Benedikt XVI. betont nämlich: „Diese Rechte haben ihre Grundlage im Naturrecht, das in das Herz des Menschen eingeschrieben und in den verschiedenen Kulturen und Zivilisationen gegenwärtig ist".[75] Wer diese Menschenrechte aus diesem Kontext herauslöst, würde „einer relativistischen Auffassung" nachgeben, die Papst Benedikt XVI. ablehnt.

Diese *Gefahr des Relativismus* hat Papst Benedikt XVI. schon vor seiner Wahl zum Nachfolger Petri erkannt und bereits in seiner Predigt in der Heiligen Messe „Pro eligendo Romano Pontifice" vor der Petersbasilika am 18. April 2005 hervorgehoben: „Wie viele Glaubensmeinungen haben wir in diesen letzten Jahrzehnten kennengelernt, wie viele ideologische Strömungen, wie viele Denkweisen … Das kleine Boot des Denkens vieler Christen ist nicht selten von diesen Wogen zum Schwanken gebracht, von einem Extrem ins andere geworfen worden: Vom Marxismus zum Liberalismus bis hin zum Libertinismus; vom Kollektivismus zum radikalen Individualismus; vom Atheismus zu einem vagen religiösen Mystizismus; vom Agnostizismus zum Synkretismus, und so weiter. Jeden Tag entstehen neue Sekten ...

Einen klaren Glauben nach dem Credo der Kirche zu haben, wird oft als Fundamentalismus abgestempelt, wohingegen der Relativismus, das

[73] Papst Benedikt XVI., *Eine menschliche Welt für alle*, S. 21.

[74] Papst Benedikt XVI., a.a.O.

[75] Papst Benedikt XVI., a.a.O.; beachte auch *derselbe*, Probleme und Perspektiven des Naturrechts, *L'Osservatore Romano*, Wochenausgabe in deutscher Sprache, Nr. 8, 23. Februar 2007, S. 9.siehe dazu Herbert Schambeck, Naturrecht in Zeitverantwortung, in: *Mensch und Naturrecht in Evolution*, 2008, S. 15 ff.

sich, ‚vom Windstoß irgendeiner Lehrmeinung hin- und hertreiben lassen', als die heutzutage einzige zeitgemäße Haltung erscheint. Es entsteht eine Diktatur des Relativismus, die nichts als endgültig anerkennt und als letztes Maß nur das eigene Ich und seine Gelüste gelten lässt.

Wir haben jedoch ein anderes Maß: den Sohn Gottes, den wahren Menschen. Er ist das Maß des wahren Humanismus. ‚Erwachsen' ist nicht ein Glaube, der den Wellen der Mode und der letzten Neuheit folgt; erwachsen und reif ist ein Glaube, der tief in der Freundschaft mit Christus verwurzelt ist. Diese Freundschaft macht uns offen gegenüber allem, was gut ist und uns das Kriterium an die Hand gibt, um zwischen wahr und falsch, zwischen Trug und Wahrheit zu unterscheiden. Diesen Glauben müssen wir reifen lassen".[76]

Papst Benedikt XVI. geht es um *die Anerkennung der Menschenrechte und auf deren Grundlage mit der Religions- und Glaubensfreiheit im Zentrum um eine humane Ordnung im staatlichen und internationalen Leben*. In dieser Sicht betonte er vor der UNO auch: „Es ist unbegreiflich, dass Gläubige einen Teil von sich – ihrem Glauben – unterdrücken müssen, um aktive Bürger zu sein. Es sollte niemals erforderlich sein, Gott zu verleugnen, um in den Genuss der eigenen Rechte zu kommen. Die mit den Religionen verbundenen Rechte sind umso schutzbedürftiger, wenn sie als im Gegensatz stehend zu einer säkularen Ideologie oder zu religiösen Mehrheitspositionen exklusiver Art angesehen werden. Die volle Gewährleistung der Religionsfreiheit kann nicht auf die freie Ausübung des Kultus beschränkt werden, sondern muss in richtiger Weise die öffentliche Dimension der Religion berücksichtigen, also die Möglichkeiten der Gläubigen, ihre Rolle im Aufbau der sozialen Ordnung zu spielen".[77]

Mit diesen Worten vor der UNO hat Papst Benedikt XVI. die Bedeutung der Menschenrechte sowohl individuell für den Einzelmenschen als auch sozial für Gesellschaft, Staat und Völkergemeinschaft betont. Die katholische Kirche leistet mit ihrer Lehre von den Menschenrechten über den

[76] Kardinaldekan Joseph Ratzinger, Heilige Messe „Pro eligendo Romano Pontifice", *L'Osservatore Romano*, Sonderausgabe 2005, S. 20; dazu Herbert Schambeck, Die Möglichkeiten der Demokratie und die Diktatur des Relativismus – ein Beitrag zur Zeitverantwortung in der Lehre Papst Benedikt XVI., *L'Osservatore Romano*, Wochenausgabe in deutscher Sprache vom 12. Mai 2006, Nr. 19, S. 10 f. und 19. Mai 2006, Nr. 20, S. 9 f.

[77] Papst Benedikt XVI., *Eine menschliche Welt für alle*, S. 33; beachte dazu *derselbe*, Die Würde des Menschen darf niemals von Gewalt erniedrigt werden, *L'Osservatore Romano*, Wochenausgabe in deutscher Sprache, Nr. 6, 6. Februar 2009, S. 3.

Kreis ihrer Gläubigen einen Beitrag zur Weltverantwortung, der allen Menschen zugute kommen kann, ganz im Sinne der Pastoralkonstitution des II. Vatikanischen Konzils „Kirche in der Welt von heute“ zu sein; möge dies mit Freude und Hoffnung möglich sein; mit Freude, weil auch Menschenrechte zur Persönlichkeitsentfaltung und Heilsfindung des Einzelnen beitragen und zur Hoffnung, weil Menschenrechte in Gesellschaft, Staat und Völkergemeinschaft dem Gemeinwohl dienend der Allgemeinheit zugute kommen können. Dies setzte aber voraus, dass *die Lehre der katholischen Kirche*, die ja an alle Staaten und politischen Systeme gerichtet ist, *nicht zur Legitimierung von einseitigen Machtansprüchen*, etwa *aus imperialen und wirtschaftlichen Gründen und Zwecken,*[78] *auch nicht zur Rechtfertigung von Kriegen missbraucht* wird, was die Glaubwürdigkeit gefährden würde, sondern als *Sozialgestaltungsempfehlung* mit Gewissensanspruch *an alle* beachtet, anerkannt und befolgt wird.

[78] Siehe dazu Herbert Schambeck, Kein gerechter Krieg im Irak, *Die Tagespost Würzburg* Nr. 61/62, 61. Jahrgang, 20. Mai 2008, S. 2 und *derselbe,* Schwierige Situation für die Christen im Irak, *L'Osservatore Romano*, Wochenausgabe in deutscher Sprache vom 3. Oktober 2008, Nr. 40, S. 6.

RETHINKING HUMAN RIGHTS IN THE 21ST CENTURY

ANTROPOLOGIA CRISTIANA E DIRITTI UMANI. DIRITTI E DOVERI

VITTORIO POSSENTI

Preambolo

L'ideale dei diritti umani riveste da oltre mezzo secolo una funzione di sintesi analoga a quella di altre grandi idee che hanno contrassegnato il pensiero politico moderno: il giusnaturalismo, il contratto sociale, la separazione dei poteri. Il richiamo ai diritti umani è da tempo il punto focale di ogni agenda politica che manifesti un *appeal* in Occidente e cui ci si volge per le grandi decisioni politiche, ma senza che vi sia sufficiente chiarezza su che cosa sia un diritto umano, e come esso possa sottrarre la politica al rischio di cedere all'irrazionalità. Oggi si assiste anzi ad una crisi dei diritti umani non più radicati nell'intangibile dignità dell'uomo, ad un'inflazione di presunti 'nuovi diritti' che trascurano la questione dei doveri, ad una ripresa di uno spiccato individualismo libertario.

Per venire a capo della situazione procederemo commentando i temi di cui si sostanzia il titolo: la problematica antropologica, il nesso tra diritti e legge naturale, il rapporto intrinseco tra diritti e doveri, l'attuale inflazione dei primi e dimenticanza dei secondi, iniziando con un cenno alla tradizione dei diritti umani.

La tradizione dei diritti dell'uomo

1. È impresa complessa stabilire un'attendibile sequenza della tradizione storica dei diritti umani, se non ci si vuole limitare all'elenco ben noto dei fondamentali atti pubblici che la scandiscono: la Dichiarazione d'Indipendenza del 4 luglio 1776, la Dichiarazione dei diritti dell'uomo e del cittadino del 27 agosto 1789, la Dichiarazione universale dei diritti dell'uomo

del 10 dicembre 1948. Su piano politico-giuridico la mente va agli antecedenti lontani della *Magna Charta*, della legge dell'*Habeas corpus*, della rivoluzione inglese del 1688 col suo *Bill of Rights*, e così via. In ogni caso la storia delle dichiarazioni dei diritti umani è più breve della vicenda dei dibattiti filosofici su di essi, sulla dignità e fratellanza degli uomini, la loro comune cittadinanza nella grande società del genere umano, l'esistenza di una legge morale superiore ai singoli e ai popoli. Questa tanto più lunga vicenda affonda le sue radici nell'area biblica, greca, ellenistica, romana, e poi cristiana, e riconosce i propri fondamenti nell'idea della dignità dell'uomo e in quella della legge naturale: i diritti umani rinviano ad una legge superiore ai tempi e alle vicissitudini storiche.

I grandi pensatori della legge naturale: Sofocle, gli Stoici, Cicerone, san Paolo, Seneca, san Tommaso d'Aquino, ecc. andrebbero considerati quali antesignani della questione dei diritti umani, sebbene ponessero l'accento più sui doveri (*De officiis*). E andrebbe pure sottolineata l'importanza dei pensatori politici spagnoli del '500 (de Victoria, Soto, Suarez, ecc.), che all'inizio del colonialismo spagnolo proclamarono i diritti degli Indiani d'America all'indipendenza e alla giustizia, nonché quella del giusnaturalismo del XVII e XVIII secolo, e infine il rilievo moderno della teoria politica liberale e democratica. Né sembri esagerato se in questa ricerca all'indietro si possa indicare nel Decalogo, quale codice fondamentale della moralità umana, una prima, forse la prima in assoluto, indicazione implicita di fondamentali diritti dell'uomo, espressi perlopiù nella forma dell'imperativo negativo. Lo stesso Mirabeau nel discorso all'Assemblea Nazionale del 17 agosto 1789 propose di porre il Decalogo mosaico quale preambolo della dichiarazione dei diritti dell'uomo e del cittadino. La cosa non deve destare sorpresa, poiché il Decalogo esprime i principali precetti scaturenti dalla legge naturale.

La concezione antropologica

2. I diritti umani rappresentano un'esplicitazione della realtà dell'uomo, e danno corpo all'assunto che nessuna antropologia è politicamente irrilevante. In altri termini è impossibile trovare una concezione dell'uomo che sia senza immediati riflessi sulla vita civile e sui diritti. Anzi oggi le questioni antropologiche risultano più decisive di quelle morali. Uomo, chi sei? È sempre più difficile rispondere a questa domanda, ma è anche sempre più importante anche in ordine ai diritti umani.

La loro concezione dipende fortemente da alcune idee circolanti nella società, come osservava acutamente Tocqueville: "Perché vi sia una società e, a più forte ragione, perché questa società prosperi, bisogna che tutti gli spiriti dei cittadini siano sempre riuniti e tenuti insieme da alcune idee principali, e ciò non potrebbe avvenire se ognuno di essi non venisse ad attingere le sue opinioni a una stessa fonte, e non accettasse di ricevere un certo numero di credenze belle e fatte".[1] Attualmente le visioni dei diritti rinviano a idee sull'uomo in competizione e in contrasto, quali sono la visione cristiana e quella che chiamerò "nuova antropologia secolare". Questa divergenza si manifesta in particolare nel campo dei diritti più direttamente legati all'essere umano: vita, famiglia, sessualità, matrimonio, morte.

La visione classica e cristiana, emergente da un lungo processo di elaborazione e approfondimento, si impernia attorno all'idea di *persona umana*, la quale a sua volta incorpora la nozione universale di *natura umana*. La determinazione di persona offerta da Boezio le raccoglie in unità: la persona è una sostanza individuale di natura intellettuale/spirituale (*rationalis naturae individua substantia*). La persona è primitiva; non si deduce da nulla e non si può ridurre a oggetto.[2] Qui si incontra una solida base dei diritti umani ed un pegno della loro fondamentale universalità.

La nozione stessa di diritti dell'uomo non avrebbe senso se non fosse sostenuta dall'idea di persona cui essi ineriscono, e dal concetto di natura umana di cui sono un'esplicitazione. Secondo il realismo filosofico il concetto di natura umana non è un puro *flatus vocis* o un termine nominale cui si può attribuire un contenuto qualsivoglia. È un concetto definibile e fondato nella realtà, che contiene i caratteri universali presenti dovunque vi sia un essere umano. Al concetto di natura umana corrisponde quello di legge naturale di tale natura/essenza. Emerge così il problema della forza norma-

[1] A. de Tocqueville, *La democrazia in America*, Rizzoli-BUR, Milano 1992, l. III, p. 427. E poco oltre prosegue: "Non vi è quasi azione umana, per quanto particolare, che non nasca da un'idea generale che gli uomini hanno concepito di Dio, dei suoi rapporti con l'umanità, della natura dell'anima e dei doveri verso i suoi simili. Non si può negare che queste idee non siano la fonte da cui deriva tutto il resto. Gli uomini hanno dunque un immenso interesse a farsi idee ben salde su Dio, l'anima e i doveri generali verso il Creatore e verso i suoi simili, poiché il dubbio su questi ultimi punti abbandonerebbe tutte le loro azioni al caso e li condannerebbe, in un certo senso, al disordine e all'impotenza. Questa è dunque la materia su cui è necessario che ognuno abbia idee ferme, e disgraziatamente è anche quella in cui è più difficile fermare le proprie idee con il solo sforzo della ragione", p. 437.

[2] Questi aspetti sono elaborati in V. Possenti, *Il principio-persona*, Armando, Roma 2006.

tiva della natura umana, che sta lentamente riacquistando peso nel campo dell'etica, della politica e del diritto. Queste posizioni consentono di intendere in modo autentico il richiamo oggi diffusissimo all'*autodeterminazione*, la quale non può essere intesa come possibilità di diventare ciò che si vuole, ma di diventare liberamente ciò che si è per natura.

A partire dall'evento originario della Creazione dell'uomo, la rivelazione del cristianesimo pensa l'essere umano come portatore di una scintilla divina, come *imago Dei*. È a queste profondità che si radicano il valore e la dignità dell'uomo: egli proviene da Dio ed a lui ritorna attraverso un'ordinazione immediata e diretta che trascende ogni bene comune terrestre. L'antropologia cristiana pensa l'uomo come dotato di logos, ossia di ragione e linguaggio, e perciò teso ad un'attività libera, attento al discernimento tra il bene e il male, aperto verso la trascendenza, uditore della Parola, e *capax Dei*. Le posizioni personaliste affermano appunto che nell'uomo vi è qualcosa di irriducibile alla natura cosmica: l'uomo non è un oggetto del mondo, qualcosa di riconducibile al cosmo, ma un ente dotato di autocomprensione ed esperienza di sé.

3. *La nuova antropologia secolare*. La concezione tradizionale dell'essere umano si è trovata sfidata negli ultimi decenni in molte maniere, tra cui qui sottolineo la critica veemente proveniente dall'evoluzionismo e dal riduzionismo. Sta in effetti mutando l'immagine dell'uomo che viene trasmessa nella società, e che si struttura come *nuova antropologia secolare*. Questa rifiuta l'idea di una natura umana comune, e piuttosto ritiene che l'essere umano sia una mera costruzione sociale in cui emergono la storicità delle culture, la decostruzione e la relatività delle norme morali, la centralità quasi inappellabile delle scelte individuali. Nel caso della famiglia e della procreazione ciò implica che maternità e paternità siano realtà costruite socialmente, che di conseguenza possono ad ogni momento essere liberamente ridefinite: non vi sarebbe alcuna definizione stabile e naturale di maternità, paternità, famiglia, dei vari ruoli, ma tutto risulterebbe sfuggente, instabile e malleabile.

Terminata in maniera catastrofica la prova totalitaria del XX secolo vòlta a modificare politica e mondo, si tenta ora di trasformare l'uomo mediante la tecnica da un lato e l'appello alla libertà monocratica del singolo dall'altro. L'influsso della scienza e della tecnica sul cambiamento in corso è espressamente mirato all'uomo, per formarne una nuova comprensione. La nuova antropologia secolare non solo espone una versione compiuta dell'esistenza umana lontana dall'antropologia della tradizione, ma riesce ad influenzare i programmi e le politiche di molte organizzazioni

internazionali, e ad essere presente in modo massiccio sui media mondiali. È divenuta l'antropologia implicita o esplicita di tante scienze sociali. Ne segue una seria difficoltà a far circolare una visione antropologica diversa, poiché quella 'secolare' è considerata ovvia, autoevidente, sostenuta dall'autorità della scienza, e scarsamente bisognosa di argomenti avvaloranti. Alla base vi è l'idea che sia impossibile offrire un resoconto universale della natura umana, e che alla conoscenza dell'uomo si può accedere solo attraverso le scienze.

Occorre qui differenziare scienze e scientismo: mentre le prime, appoggiate all'approccio realistico loro proprio, possono confermare le posizioni antropologiche della Chiesa, lo scientismo è una falsa estrapolazione filosofica della scienza. Spesso esso si esprime con l'assunto dogmatico che solo la scienza conosce e/o col ricorso indiscriminato al riduzionismo, secondo cui la domanda "qual è la natura di X?" possiede un solo significato degno di considerazione, e cioè: "in che modo X può essere ridotto alla fisica, chimica, neurofisiologia, ecc.?". Un noto esponente della biologia molecolare, Francis Crick, sostiene: "Lo scopo ultimo dell'indirizzo biologico moderno è in realtà quello di spiegare *tutta* [corsivo dell'autore] la biologia in termini di fisica e di chimica", che è una chiara posizione di riduzionismo radicale e senza compromessi.[3] Secondo il riduzionismo le leggi delle scienze più 'nobili', quali la sociologia, la psicologia, le scienze umane in generale, possono essere ridotte alle leggi di scienze di livello più basale quali appunto la fisica, la chimica, la biologia.

4. In queste condizioni appare più difficile di un tempo mantenere integra la verità sull'uomo come *persona* e *imago Dei*, invece che come un animale che non differisce da un altro se non per un maggiore grado evolutivo.

L'uomo si pensa ancora fatto ad immagine e somiglianza di Dio, o spesso si ritiene fatto ad immagine degli animali da cui – si sostiene – interamente proviene nel processo evolutivo? L'uomo, si dice, possiede intrinseca similitudine con la materia, è qualcosa di impersonale, è corporeità soggetta alla tecnologia e/o corporeità in cui si esprimono pulsioni. Il processo è indirizzato all'integrale naturalizzazione dell'uomo, risolto nella vita della *physis*, nel suo divenire evolutivo e cieco. Una grande demoralizzazione umanistica può essere l'esito di tale processo, che può giungere al dispotismo del biologico e dell'organico.

[3] Riprendo la citazione di Crick dallo scritto di Morowitz, "La riscoperta della mente", in *L'io della mente*, a cura di D.R. Hofstadter e D.C. Dennett, Adelphi, Milano 1985, p. 46.

L'immagine disfattistica di noi stessi e dell'altro rode in profondità e come talpa incognita l'autostima del genere umano. Emerge qui un fenomeno di enorme rilievo, poiché né singoli né l'umanità possono vivere senza un adeguato livello di autostima, necessaria come l'acqua e l'aria. Là dove vince il paradigma naturalistico-evoluzionistico, l'immagine dell'uomo nel mondo si modifica radicalmente e la stessa idea di dignità dell'uomo svapora, e con essa la stima e la considerazione che l'uomo ha per sé e per i suoi simili.

I diritti umani sono fondati nella legge naturale

5. Una sintonia di base corre tra l'universalità della Dichiarazione del 1948 e l'universalità dell'antropologia propria del cristianesimo. L'universalità dei diritti scaturisce dall'idea che la natura umana è dovunque la stessa, e che i diritti principali sono in essa fondati e non valgono come un'invenzione occidentale, come si disse negli anni '80 e '90 del secolo scorso. L'universalità della natura umana non muta attraverso il tempo e le culture, e rimane riconoscibile in virtù di una serie di atti che si mostrano dovunque: elaborare concetti, scegliere tra diversi corsi di azione e possibilità, creare l'arte, la filosofia, la scienza, la musica, essere sensibili all'idea del giusto e dell'ingiusto, ecc.

L'idea che la natura umana è dovunque la stessa implica che il processo di esperienza, riflessione e giudizio compiuto dai singoli esseri umani sia capace di condurre alle stesse verità fondamentali, e dunque ad una vera universalità dei diritti umani principali. La nozione di diritto umano ha senso se e solo se si concede che esiste un'universale natura umana, che può essere conosciuta attraverso esperienza e ragionamento.

I diritti scaturiscono dalla prima radice costituita dalla *legge morale naturale*, propria della natura umana, e capace di garantire un approccio transculturale ai diritti. Si tratta di legge morale e non fisica, propria dunque degli esseri dotati di ragione. Ciò dà origine ad un nucleo comune di principi normativi essenziali, che appartengono a tutti, non sono una proprietà od un'invenzione del mondo civilizzato, ma un bene comune che nasce dalla coscienza morale di tutti.[4] In virtù della partecipazione della

[4] Nella Dichiarazione di indipendenza americana del 1776 l'elemento giusnaturalistico, secondo cui i diritti dell'essere umano non provengono dallo Stato ma dal Creatore,

ragione umana alla Ragione di Dio, Tommaso d'Aquino stabilisce la legge naturale come partecipazione della legge eterna nella creatura razionale.[5]

A partire dalle inclinazioni fondamentali inscritte nella natura umana, la legge naturale assegna i nostri doveri e diritti.[6] In questo modo essi fanno riferimento a qualcosa di incondizionato, di stabile e di indisponibile, e non assumono un carattere meramente contrattuale derivante da un accordo, o un valore derivante solo da un atto di una maggioranza politica. I diritti umani appartengono all'area del diritto, non della decisione politica attivata da una maggioranza. Non sono un fatto solo giuridico ma morale e antropologico, ed obbligano in coscienza non perché sono statuiti dalla legge positiva ma in base al loro radicarsi nel bene: si potrebbe dire che i diritti umani sono antropologici, non politici. Il radicamento dei diritti nella legge naturale conduce all'idea che esistano diritti *validi per natura* e non per convenzione, un assunto che le scuole del positivismo giuridico negano espressamente. Tra i vari studiosi di tale orientamento ricordo N. Bobbio. Questi ritiene che esistano solo diritti a contenuto non assoluto e cangiante: "Ce qui parait fondamental dans une époque historique ou dans une certaine civilisation, n'est pas fondamental en d'autres époques et en d'autres cultures. Il ne peut pas y avoir un fondement absolu de droits historiquement rélatifs".[7] Naturalmente il fondamento stabile dei diritti non significa astoricismo, rimanendo vero che i diritti umani sorgono nella storia man mano che singoli e società ne prendono coscienza.

appare con tutta evidenza: "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness, that to secure that rights governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form as to them shall see most likely to effect their safety and happiness".

[5] Cfr. *S. Th.*, I II, q. 91, a. 2.

[6] "La vera filosofia dei diritti della persona umana si fonda sull'idea di legge naturale. La stessa legge naturale che ci prescrive i nostri più fondamentali doveri, e in virtù della quale ogni legge obbliga, è essa pure quella che ci assegna i nostri diritti fondamentali", J. Maritain, *I diritti dell'uomo e la legge naturale*, Vita e Pensiero, Milano 1977, p. 61.

[7] "L'illusion du fondement absolu", AA.VV., *Le fondement des droits de l'homme*, La Nuova Italia, Firenze 1966, p. 5 s. Bobbio non ha potuto superare questa apparente difficoltà, perché si è sempre tenuto lontano dall'idea di legge naturale e dal fatto che i diritti umani si radicano a diverse profondità in essa.

Il *Catechismo della Chiesa Cattolica* riassume il contenuto della dottrina sulla legge naturale, rilevando che essa "indica le norme prime ed essenziali che regolano la vita morale. Ha come perno l'aspirazione e la sottomissione a Dio, fonte e giudice di ogni bene, e altresì il senso dell'altro come uguale a se stesso. Nei suoi precetti principali essa è esposta nel Decalogo. Questa legge è chiamata naturale non in rapporto alla natura degli esseri irrazionali, ma perché la ragione che la promulga è propria della natura umana" (n. 1955).

Da tempo per influssi ideologici, filosofici e scientistici la dottrina della legge morale naturale si scontra con altre concezioni che ne sono la negazione, conducendo verso un'idea positivista del diritto, in cui la società, o la maggioranza dei cittadini, diventa la fonte ultima della legge civile. Naturalmente i diritti dell'uomo assumono concretezza e forza nel momento in cui vengono riconosciuti e tutelati come diritto positivo. Ma si tratta appunto di riconoscimento, non di creazione: se i diritti e i doveri dell'uomo e la dignità della persona sono radicati in un ordine stabile e non dipendente da un voto assembleare, si riducono molto i rischi di una loro interpretazione esclusivamente positivistica che ultimamente conduce al *nichilismo giuridico*. In questo si teorizza l'idea che la legge positiva possa avere qualsiasi contenuto e che la sua posizione dipenda non da un atto della ragion pratica ma solo da un atto della volontà in un determinato momento dotata di potere impositivo. Nel nichilismo giuridico non esistono né giusto né ingiusto in sé, ma giusto e ingiusto prendono valore solo dopo la statuizione della legge positiva.[8]

6. Il prezioso contributo ai diritti umani della Dottrina sociale della Chiesa, che si esplica anche con la presenza della Santa Sede nelle grandi organizzazioni multilaterali, sta nel costante raccordo del discorso sui diritti con la chiave antropologica della dignità della persona, con la legge naturale e il diritto naturale. Quest'ultimo ha trovato nuova vitalità nel mutamento del contesto culturale avvenuto intorno al 1989 col crollo del comunismo, e con l'assunto che il diritto non può essere esclusiva produzione dello Stato, ma garantito sopra esso.

Un passaggio-chiave del discorso di Benedetto XVI all'Onu (18 aprile 2008) riassume felicemente gli aspetti centrali richiamati: "l'universalità, l'indivisibilità e l'interdipendenza dei diritti umani servono tutte quali garanzie per la salvaguardia della dignità umana. È evidente, tuttavia, che

[8] Su questi aspetti cfr. V. Possenti, *L'uomo postmoderno. Tecnica, religione, politica*, Marietti, Milano 2009.

i diritti riconosciuti e delineati nella Dichiarazione si applicano ad ognuno in virtù della comune origine della persona, la quale rimane il punto più alto del disegno di Dio creatore per il mondo e per la storia. Tali diritti sono basati sulla legge naturale iscritta nel cuore dell'uomo e presente nelle diverse culture e civiltà. Rimuovere i diritti umani da questo contesto significherebbe restringere il loro ambito e cedere ad una concezione relativistica, secondo la quale il significato e l'interpretazione dei diritti potrebbero variare e la loro universalità verrebbe negata in nome di contesti culturali, politici, sociali e persino religiosi differenti".

Il Diritto nel giusnaturalismo e il rapporto intrinseco tra diritti e doveri

7. *Il Diritto*. Dalla percezione che l'essere umano non è un oggetto o una cosa nasce il sentimento di qualcosa che gli spetta, di un *suum* da riconoscergli, ossia di un Diritto naturale (*jus naturale*) che esiste in lui. Da qui sorge un costante sentimento di insoddisfazione verso il diritto positivo, reso necessario dal senso di giustizia che una volta che ha prodotto diritto e legge, procede a criticarli e ad elaborare una nuova misura. I vari sistemi giuridici possono essere intesi come approssimazioni ad un unico testo-base, originario e primario, che è il diritto naturale o il giusto naturale, e dunque il diritto positivo non è mai eterno, ma essenzialmente decostruibile e riformabile in base all'intuizione del giusto naturale. Si instaura così necessariamente un circolo in cui il diritto positivo nasce dalla percezione del *suum* che spetta ad ognuno e dalla giustizia che lo attribuisce, e che prosegue con la critica di ogni diritto posto in base all'idea del giusto naturale. Il motore reale del fenomeno giuridico dovunque è la sproporzione o la non-conformità tra diritto positivo e diritto naturale, e senza questa inadeguazione il fenomeno giuridico potrebbe scomparire.

Con queste frasi abbiamo riassunto il contenuto essenziale della posizione giusnaturalistica, la quale tiene fermo che diritto e giustizia non sono mera espressione di volontà ma di ragione, ossia che diritto e giustizia, pur comportando elementi contrattuali e pattizi, non si riducono ad essi ma includono elementi reali attinenti alla natura delle cose, dell'uomo e dei rapporti tra soggetti. Reciprocamente nelle posizioni antigiusnaturalistiche radicali il tema della giustizia è ritenuto senza soluzione, di modo che questa e il diritto sono affidati al volere e al potere.

Nel giusnaturalismo esiste un'anteriorità del Diritto sulla Giustizia, per cui il compito di questa è realizzare quello. Per la comprensione di tale

nucleo occorre precisare la *nozione primaria di diritto* (al singolare) come la determinazione di qualcosa che è dovuto all'essere umano come tale, che in quanto è un "io" è parimenti un soggetto di diritto, e che ontologicamente non è semplicemente parte di una totalità, ma è un "tutto". Orbene questo qualcosa che è dovuto all'essere umano è il suo diritto, di cui gli altri agenti morali sono obbligati in coscienza a riconoscergli e a non privarlo: è il *suum* che spetta alla persona come "suo dovuto". In senso fondamentale il diritto è l'avere titolo intrinseco al proprio *suum*, e questo concetto veicola quello di obbligazione, l'essere cioè vincolati al rispetto del *suum* di ciascuno e di tutti. In altri termini l'idea stessa di diritto *veicola necessariamente quella di dovere*: dovere verso l'altro e dovere/obbligazione verso il bene, per cui diritti e doveri procedono strettamente congiunti senza che sia possibile porre i diritti al di sopra dell'obbligazione. Esistono dunque due significati di diritto: il diritto come ciò che è dovuto alla persona, che le spetta per natura e che si apre a relazioni di giustizia, e il diritto positivo che ha per scopo la realizzazione della giustizia e la sanzione. Il massimo compito della giustizia politica è il rispetto dei diritti umani.

Che nei diritti umani si incarni la giustizia e che il loro rispetto sia compito primario della politica è la posizione di Benedetto XVI: "La Dichiarazione universale ha rafforzato la convinzione che il rispetto dei diritti umani è radicato principalmente nella giustizia che non cambia, sulla quale si basa anche la forza vincolante delle proclamazioni internazionali... I diritti umani debbono essere rispettati quali espressione di giustizia e non semplicemente perché possono essere fatti rispettare mediante la volontà dei legislatori" (discorso all'Onu, 2008) In tal modo si trasmette l'idea che i diritti umani non veicolano un'etica utilitaristica ma sono espressione di giustizia.

Inflazione dei 'diritti' e deflazione dei doveri

8. Il nesso che rinvia dai diritti ai doveri è antico e presente nella dinamica di alcune dichiarazioni francesi dei diritti e dei doveri, fra cui quella inserita nella Costituzione della Repubblica francese del 5 fruttidoro anno III (22 agosto 1795): "Tutti i doveri dell'uomo e del cittadino derivano da questi due principi, impressi dalla natura in tutti i cuori: Non fate agli altri ciò che non vorreste che sia fatto a voi stessi; fate costantemente agli altri il bene che vorreste riceverne". Andrebbe poi evocata la tradizione mazziniana dei doveri, che emerge dal titolo stesso dell'opera, piccola ma succosa, intitolata appunto *I doveri dell'uomo*. Stesa da Mazzini nel 1860 e dedi-

cata significativamente "agli operai italiani", il libro sottopone a critica la concezione dei diritti dell'uomo uscita dal 1789, e poi sostenuta dalle correnti che assegnano rilievo al benessere e alla libertà del singolo, e che pongono gli interessi materiali come fine. Dopo aver trattato di Dio e della Legge, Mazzini introduce e discute quattro livelli di doveri: verso l'umanità, verso la patria, verso la famiglia e verso se stessi.

9. Di fronte a tali esempi di un passato ormai lontano, da tempo si assiste ad un'inflazione di "nuovi diritti" e alla concomitante difficoltà di contemperarli in modo che non entrino reciprocamente in conflitto. La crescita è accaduta secondo tre modalità: la proclamazione di nuovi diritti che non sono esplicitamente riconosciuti nella Dichiarazione universale; la tendenza da parte di istituzioni internazionali, tra cui la Commissione Onu sui diritti umani (oggi conclusa), di procedere alla proclamazione di nuovi diritti umani senza fare riferimento all'Assemblea dell'Onu; la facilità con cui sono stati evocati nuovi diritti di cui non consta la base o il fondamento. Si pensi al diritto al turismo e al diritto al disarmo, che possono esprimere un voto o un auspicio variamente meritevole, ma che non sono in senso proprio diritti. Dobbiamo ora esaminare questi temi.

L'assunto del Magistero cattolico è che coloro che hanno a cuore i diritti debbano rinunciare a liberarli dai doveri, poiché i diritti vengono svuotati e diventano altro quando si rescinde il legame coi doveri. Negli interventi del Magistero questo nesso è stato sottolineato molte volte: ciascuno può rendersene conto consultando gli indici per temi delle raccolte di documenti della Chiesa sui diritti umani.[9]

Il tema è ripreso dal recente *Compendio della Dottrina sociale della Chiesa*: "Il Magistero sottolinea la contraddizione insita in una affermazione dei diritti che non ammetta una correlativa responsabilità".[10] Secondo la *Pacem in terris* (1963) "nella convivenza umana ogni diritto naturale in una persona comporta un rispettivo dovere in tutte le altre persone: il dovere di riconoscere e rispettare quel diritto" (n. 264). Sono gli stessi principi fondanti della Dottrina sociale della Chiesa che includono necessariamente la relazione diritti-doveri, come ben illustra il suddetto *Compendio* (cfr. cap. IV,

[9] Cfr. ad esempio G. Filibeck, *I diritti dell'uomo nell'insegnamento della Chiesa. Da Giovanni XXIII a Giovanni Paolo II* (1958-1998), Libreria Editrice Vaticana, Città del Vaticano 2001.

[10] *Compendio della Dottrina sociale della Chiesa*, Libreria Editrice Vaticana 2004, Città del Vaticano, n. 156.

Parte prima, pp. 87-114), richiamando i principi del bene comune, della destinazione universale dei beni, di sussidiarietà, di partecipazione e di solidarietà. Ora, tali principi si possono del tutto legittimamente comprendere come includenti i doveri correlativi, ossia il dovere di edificare il bene comune, di operare per un'adeguata destinazione universale dei beni, di costruire solidarietà e sussidiarietà, ecc.

La solidità della posizione di principio deve fare i conti con la situazione contemporanea reticente sui doveri. Valga qui un'espressione di Giovanni Paolo II, esplicita nel rilevare la carenza del discorso sui doveri: "Un'osservazione deve ancora essere fatta: la comunità internazionale, che dal 1948 possiede una carta dei diritti della persona umana, ha per lo più trascurato d'insistere adeguatamente sui doveri che ne derivano. In realtà, è il dovere che stabilisce l'ambito entro il quale i diritti devono contenersi per non trasformarsi nell'esercizio dell'arbitrio. Una più grande consapevolezza dei doveri umani universali sarebbe di grande beneficio alla causa della pace, perché le fornirebbe la base morale del riconoscimento condiviso di un ordine delle cose che non dipende dalla volontà di un individuo o di un gruppo".[11] Se viene a mancare la base del diritto naturale è quasi fatale che si rivendichino 'diritti' che non hanno fondamento nella natura umana.

I suggerimenti di Giovanni Paolo II significano che occorre sviluppare le basi antropologiche e morali della Dichiarazione universale, che non le contiene o le ospita solo indirettamente. Ciò anche allo scopo di evitare che presunti diritti o meglio meri desideri o pretese si ammantino della potenza evocativa e del prestigio del termine "diritti dell'uomo", per volgersi verso fini non coerenti con la dignità della persona.

10. È dunque urgente ristabilire il nesso inscindibile tra diritti e doveri, necessario affinché la società civile si presenti come luogo di responsabilità pubbliche, all'insegna di un'etica della responsabilità e recipro-

[11] *Pacem in terris: un impegno permanente*, Messaggio di Sua Santità Giovanni Paolo II per la celebrazione della Giornata Mondiale della pace, 1 gennaio 2003. Analoghe posizioni si riscontrano nel card. Ratzinger che nel dialogo monacense con J. Habermas (2004) osservò: "Forse oggi la dottrina dei diritti umani dovrebbe essere integrata con una dottrina dei doveri umani e dei limiti dell'uomo, e ciò potrebbe ora aiutare a rinnovare il problema se non possa darsi una ragione della natura e così un diritto naturale per l'uomo e il suo dimorare nel mondo". Gli interventi di Habermas e Ratzinger sono raccolti in *Humanitas*, n. 2, 2004. La citazione del secondo è a p. 257. Sul nesso diritti-doveri cfr. anche S. Fontana, *Per una politica dei doveri*, Cantagalli, Siena 2006.

cità. Per ottenere l'esito occorre chiarire che non si possono ridurre i diritti umani a *diritti di libertà* o porre questi ultimi al di sopra di ogni altro diritto: essere trattato come fine e non soltanto come mezzo non è un diritto di libertà, ma è la quintessenza della giustizia, da esercitare verso le donne, i deboli, gli svantaggiati, i vinti; il rispetto cui ha diritto l'embrione umano non è un diritto di libertà; neanche il diritto alla vita è un diritto di libertà; essere lasciate morire (in certi paesi) perché femmine che non generano reddito non è un'azione che viola un diritto di libertà. È impossibile affrontare la sfida ecologica sulla base dell'individualismo o su quella della libertà negativa; lo stesso vale per le questioni della solidarietà con le generazioni future.

L'esemplificazione potrebbe continuare a mostrare lo strabismo che si commette nell'individuare nella libertà lo scopo politico ultimo e nel porre i diritti di libertà al di sopra di tutto. Ovviamente la libertà è e rimane un grande bene, eppure non può essere l'unico, pena il fatto che la giustizia venga congedata. Abbiamo dunque bisogno di una concezione *postliberale* dei diritti umani, denotata da tre nuclei: i diritti di libertà non devono avere sempre e dovunque il predominio; il bilanciamento tra diritti e doveri deve essere più rigoroso che nell'individualismo liberale; infine più radicalmente la libertà non può essere lo scopo politico unico o supremo, perché questo è il bene comune il quale includa naturalmente anche la fruizione della libertà.

Occorre operare una differenza tra personalismo comunitario e personalismo liberale vertente sull'individuo. Un modo diffuso e insieme problematico di intendere i diritti umani si fonda sull'idea che essi riassumano nel divieto di interferire nella sfera altrui, e che di conseguenza in essi si esprima l'impossibilità di chiedere ad altri qualcosa che questi possono dare solo nella forma dello scambio: io appartengo solo a me stesso; io sono mio, io sono irrelato e non instauro rapporti con gli altri se non contrattualmente. Sempre più frequentemente si punta sul singolo inteso senza legami, senza affetti, senza inserimento in una reale comunità, su un'ipertrofia del sé da cui fluisce un'illimitata competizione fra soggetti separati intenti soltanto a promuovere se stessi, a dimettere le virtù civiche, ad elevare il singolo sopra e contro il bene comune. Questi rivendica una libertà senza misura, sostanzialmente "divina" – la divina autonomia dell'uomo – indifferente all'aspetto sociale della vita e nel contempo fortemente segnata dalla tecnicizzazione delle esperienze fondamentali del vivere e del morire.

Per una nuova semantica dei doveri

11. Le posizioni dei gruppi di interesse che reclamano sempre nuovi diritti si appellano a tre fattori che diventano il perno del loro argomentare: la libertà del singolo da ogni interferenza, il pluralismo dei valori, l'assunto che i valori riguardano solo la sfera privata. Ma la crescente sproporzione tra diritti e doveri richiede una nuova semantica dei doveri. È noto che la Dichiarazione universale è assai parca in merito, destinando solo il primo comma dell'art. 29 ai doveri: "Ogni individuo ha dei doveri verso la comunità, nella quale soltanto è possibile il libero e pieno sviluppo della sua personalità". La sobrietà può forse essere spiegata in rapporto al periodo in cui si usciva da atroci violazioni dei diritti umani che suggerivano di insistere sui diritti: la rilettura attuale rileva tuttavia che siamo dinanzi ad un'esplicitazione troppo sintetica e infine insufficiente. "Quand on lit la Déclaration Universelle des droits de l'homme dans la perspective africaine subsaharienne, on est frappé par la place accordée à l'individu, pendant que la communauté semble jouer un rôle nettement subordonné (cf. art. 29). Il est évident qu'un telle conception se heurte à des difficultés dans la tradition africaine qui attache une grande importance à la communauté".[12] Bujo spiega che mentre in Occidente ci si riferisce all'idea kantiana di individuo centrato sulla sua libertà e geloso all'eccesso della sua autonomia, nell'Africa nera "les personnes n'existent qu'en relations interpersonnelles" (p. 20).

Durante la preparazione della Dichiarazione del 1948 alcune voci si erano levate per ricordare il rilievo dei doveri. René Cassin stese una "bozza Cassin" che fu presentata alla Commissione dei diritti umani (*Human Rights Commission*) incaricata di preparare la Dichiarazione universale. Cassin aveva ben compreso il rilievo del problema dei doveri, osservando che ciascuno, potendo raggiungere i suoi fini con l'aiuto cooperativo della società, contrae dei debiti nei suoi confronti. La lista dei doveri che propose, includeva "obedience to law, exercise of a useful activity, acceptance of the burdens and sacrifices demanded for the common good".[13] Sebbene l'e-

[12] Bénézet Bujo, "Les droits de l'homme du point de vu de l'Afrique noire. Un pluralisme est-il possible?", *Notes et Documents*, Janvier-Avril 2008, p. 18. Una decina di anni fa l'ex-cancelliere Helmut Schmidt preparò uno studio sui doveri universali dell'uomo, che ricorda l'importanza delle virtù, dei doveri e della responsabilità dei singoli verso la famiglia, le comunità, la società e lo Stato. H. Schmidt (ed.) *Allgemeine Erklärung der Menschenpflichten. Ein Vorschlag*, München-Zürich 1997.

[13] Su questi aspetti cfr. M.A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York 2001, pp. 276ss.

lenco non risultasse molto esteso, venne ulteriormente diminuito sino alla finale breve sopravvivenza presente nell'art. 29.

La questione dei doveri non è sufficientemente presente nelle risposte di grandi personalità cui l'Unesco nel 1947 indirizzò un questionario sui problemi connessi alla preparazione della Dichiarazione universale. Tra le oltre 30 risposte, raccolte nel 1949 nel volume *Autour de la nouvelle déclaration universelle des droits de l'homme*, solo poche menzionano il problema dei doveri. In particolare si segnala la posizione del Mahatma Gandhi: "Ho imparato da mia madre, illetterata ma molto saggia, che tutti i diritti degni di essere meritati e conservati, sono quelli dati dal dovere adempiuto... È probabilmente abbastanza facile definire i doveri dell'Uomo e della Donna e collegare ogni diritto a un dovere corrispondente che conviene compiere in precedenza".[14] L'estendersi di un atteggiamento che rivendica diritti, veri o presunti, dimentica che il Gange dei diritti discende dall'Himalaya dei doveri. Da altri punti di vista S. De Madariaga e P. Teilhard de Chardin toccarono il tema. Secondo il primo "la parola e il concetto *diritti* appare dapprima troppo angusto, perché tale parola non rappresenta che un aspetto delle relazioni tra l'individuo e la società in cui vive... L'uomo è una sintesi che si potrebbe chiamare l'*individuo-nella-società*" (p. 65s). Per Teilhard l'uomo deve imparare a integrarsi nella società, a personalizzarsi tenendo conto dei suoi legami sociali sempre più esigenti (p. 149s).

La tendenza ad insistere sui diritti vale anche oggi: nella Carta di Nizza (*Carta dei diritti fondamentali dell'Unione Europea*, dicembre 2000) vi è un solo cenno ai doveri, nel Preambolo: "Il godimento di questi diritti fa sorgere responsabilità e doveri nei confronti degli altri come pure della comunità umana e delle generazioni future". L'articolato, che pur si presenta leggermente più ampio dell'art. 29 della Dichiarazione Universale per il significativo cenno alla responsabilità verso la comunità umana e le generazioni future, rimane insufficiente a controbattere l'enfasi sui diritti a scapito della formazione di un nuovo senso dei doveri.

Il ricorso ai criteri di eguaglianza e non-discriminazione quale leva per produrre "nuovi diritti"

12. La necessità di sviluppare le basi antropologiche e morali della Dichiarazione universale si fa manifesta nella dialettica contemporanea, in

[14] Cito dall'ed. italiana, *Dei diritti dell'uomo. Testi raccolti dall'Unesco*, Edizioni di Comunità, Milano 1952, p. 25s.

cui la visione personalistica e dignitaria dei diritti umani incontra difficoltà in rapporto alla visione libertaria degli stessi. La prima è intrinsecamente disposta a riconoscere il legame interno tra diritti e doveri, mentre la corrente libertaria e individualistica moltiplica i diritti e fatica molto a vederne il nesso coi doveri, pervenendo talvolta ad un acuto loro sbilanciamento. Singoli gruppi di interesse operano per includere nell'agenda dei diritti umani desideri e pretese che non sono propriamente diritti reali. Di fronte alla crescente richiesta di "nuovi diritti" è necessario un attento discernimento tanto per non bloccare l'effettivo valore di nuovi diritti quanto per non elevare a diritti ciò che non lo è e che vale solo come pretesa. Un tale discernimento può essere raggiunto mediante il tentativo di rispondere a domande del tipo: quale bene reale il "nuovo diritto" cerca di tutelare? E come si collega ai diritti basali? Negando il preteso "nuovo diritto" si compie ingiustizia e discriminazione verso qualcuno?

Il punto cardine su cui si fa leva per reclamare nuovi diritti o imporre un'interpretazione libertaria dei diritti umani, in specie di quelli attinenti la sfera della vita, della sessualità e del matrimonio, è la nozione di *uguaglianza*, cui si collega quella di respingere ogni *discriminazione*. Attraverso il loro impiego desideri o pretese individuali puntano ad essere riconosciuti quali diritti per tutti, aprendo le porte ad un pericoloso 'individualismo collettivo' e ad inevitabili contrasti. Il perno del problema consiste nel ritenere assoluti i principi di uguaglianza e di non discriminazione rispetto agli altri diritti fondamentali. Ciò in concreto comporta che a tutti si deve riconoscere un'uguaglianza aritmetica e astratta, chiedendo pari trattamento giuridico per situazioni che sono e rimangono fondamentalmente diverse. In altri termini, se è vero che un'uguaglianza fondamentale deve essere riconosciuta alle persone per quanto concerne un notevole numero di diritti quali il diritto alla vita, alla libertà religiosa, al lavoro, alla liberazione della miseria, non possiamo impiegare in maniera illimitata il criterio di uguaglianza e quello di non-discriminazione, senza ledere altri fondamentali diritti della persona.

La questione segnalata incrocia quella della *differenza*: se quest'ultima viene assolutizzata, allora non esisterebbero più diritti universali in cui si esprime la comune umanità, ma solo "diritti" ad affermare la propria diversità. L'impiego geometrico del criterio di eguaglianza dimentica che *la differenza non è sinonimo di diseguaglianza e di discriminazione*. Discriminare non è sempre qualcosa di cattivo o ingiusto, poiché è semplice giustizia trattare in modo diverso cose diverse. Fare delle differenze o riconoscerle non significa *ipso facto* discriminare. La differenza non si oppone all'eguaglianza ma alla somiglianza e all'identità. Gli esseri umani sono uguali per natu-

ra, ma diversi o differenti in tante altre cose. Non possiamo definire discriminazione una qualsiasi differenza: ciò sarebbe solo un falso egualitarismo in cui non esistono più volti, ma tutto è indistinto, amorfo e intercambiabile. Si apre così una strada verso un funzionalismo che perde il senso del valore delle persone e fa perno su un'idea di libertà che sconfina in quella secondo cui tutto è modificabile, malleabile, intercambiabile. In particolare si perde così il legame tra sessualità, coniugalità e procreazione.

Nel discorso all'Onu del 2008 Benedetto XVI ha ricordato che "la *Dichiarazione* fu adottata come "comune concezione da perseguire" (*preambolo*) e non può essere applicata per parti staccate, secondo tendenze o scelte selettive che corrono semplicemente il rischio di contraddire l'unità della persona umana e perciò l'indivisibilità dei diritti umani". La Dichiarazione non è una lista di garanzie assolutamente separate l'una dall'altra, di modo che ciascuno a piacere ne estrae quella che al momento gli viene utile. Essa è un quadro di diritti *inalienabili e interconnessi*, di modo che nessun diritto può essere assolutizzato e portato all'infinito a spese degli altri, e in specie dei diritti fondamentali. Se i diritti umani sono universali, indivisibili e interdipendenti è impossibile assumerne uno ignorando la sua relazione con gli altri di modo che nessun diritto può essere lasciato fuori e nessuno completamente subordinato ad un altro. D'altra parte se ogni diritto viene inteso come un assoluto privo di qualsiasi limitazione, l'esito sarà solo un inconciliabile conflitto. Ciò significa che oggi come ieri e domani abbiamo bisogno di una cultura realistica dei diritti umani che ne conservi e ne illustri il valore.

Integrazione dell'attuale Dichiarazione o una seconda Dichiarazione universale?

13. Nella Dichiarazione universale del 1948 si incontra un documento basilare che va difeso da ermeneutiche devianti che lo avviano al declino. Il problema concerne il modo con cui aggiornare la Dichiarazione, ossia se attraverso un processo evolutivo in linea con le sue intuizioni di fondo, o eventualmente ricorrendo ad una seconda Dichiarazione.

Ritengo che strada migliore sia quella di procedere ad un'integrazione della Dichiarazione universale su alcuni punti, tra cui la ricerca di un più chiaro ed esplicito bilanciamento tra diritti e doveri. Occorre riattualizzare la Dichiarazione tenendo conto che la cultura occidentale di indirizzo individualistico e libertario non è condivisa in altri contesti di

civiltà, e che sarebbe una sciagura insistere in tale direzione. Alcuni nuclei del processo integrativo dovrebbero riguardare il chiarimento del diritto alla vita dal concepimento alla morte naturale, i nuovi doveri verso il creato, una maggiore resistenza contro l'estensione dei criteri di eguaglianza e non-discriminazione fatti valere in maniera illimitata dalle ali radicali e libertarie.

Consideriamo l'art. 3: "Everyone has the right to life, to personal liberty and to personal security". Durante i lavori preparatori della Dichiarazione fu richiesto di precisare meglio e più distintamente la portata del diritto alla vita. La delegazione libanese, in cui spiccava la personalità di Charles Malik, aveva depositato il seguente articolato: "Everyone has the right to life and bodily integrity from the moment of conception, regardless of physical or mental condition, to liberty and security of person". Una seconda richiesta di integrare il dettato dell'art. 3, considerato troppo succinto sul diritto alla vita, provenne dalla delegazione cilena secondo cui il diritto alla vita spettava agli "unborn children and incurables, mentally defective and lunatics". I due tentativi però non ebbero successo.

Il diritto alla vita include il diritto al cibo e all'acqua, quale sua implicazione immediata. Il diritto all'acqua non è stato ancora riconosciuto come tale. Nel recente V Forum mondiale sull'acqua, svoltosi a Istanbul (marzo 2009), la nozione di "diritto di accesso all'acqua" non ha trovato posto. L'acqua compare come una necessità umana fondamentale, non come un diritto. Inoltre i dibattiti che in proposito si sono accesi testimoniano che esso non può venir inteso soltanto come diritto individuale alla vita, ma come diritto a dimensione anche sociale, divenendo diritto alla continuazione dell'esistenza dell'uomo sulla terra e alla salvaguardia del creato.

14. La sorte della Dichiarazione universale è legata alle fondamentali culture da cui ha preso origine e vigore, ed alle loro posizioni attuali, ossia in estrema sintesi alla radice cristiana "dignitaria" e a quella l'illuministica "libertaria" la quale include le due tradizioni del liberalismo e del socialismo. Da vari eventi sembra evincersi che queste due radici stiano allontanandosi. Scrive un osservatore acuto: "La cultura contemporanea dei diritti dell'uomo non si alimenta solamente a questa ispirazione cristiana. Essa deriva anche dal progetto di autonomia assoluta del soggetto umano creato dalla modernità e sfociante nell'individualismo edonista... La matrice antropologica cristiana – anche laicizzata – che ha fortemente ispirato i grandi documenti della metà del XX secolo (Dichiarazione universale del 1948, Convenzione europea del 1950, ecc.) tende a lasciar posto ad un'altra lettura, quella che, in nome della libertà, erige in assoluto l'ego dell'essere

umano, ridotto alla capacità di godere dei beni materiali senza altro freno che l'utilità sociale giuridicamente definita".[15]

Nel processo di allontanamento dell'interpretazione libertaria e di quella dignitaria dei diritti umani gioca un ruolo crescente l'azione di organismi, esperti e burocrazie nazionali e internazionali che, invertendo l'ordine della legittimità che spetta al diritto, preparano documenti e dichiarazioni influenzati dall'istanza libertaria e che i politici non di rado si limitano ad avallare.

In ogni caso non bisogna indietreggiare dinanzi alle pretese della "nuova antropologia secolare" oggi promossa dai media, e ciò può essere adempiuto mostrando il valore e la solidità dello schema antropologico della tradizione e rilevando carenze, riduzionismi e semplicismi del nuovo schema.

[15] Cfr. J.L. Chabot, "L'unione europea e i diritti dell'uomo", *La società*, n. 1/2001, p. 40.

ANNESSO

DIRITTI UMANI E PROBLEMI DI "GENDER"

Nel dibattito contemporaneo sui diritti umani assume grande rilievo il tema del femminismo, del genere (*gender*) e dell'orientamento sessuale per i riflessi che tali temi hanno sull'interpretazione dei diritti e su istituti fondamentali quali il matrimonio, la famiglia, la procreazione, l'adozione.

Conosciamo le due posizioni femministe più significative: 1) il femminismo della competizione fra uomo e donna secondo cui la donna, per essere se stessa, si costituisce quale antagonista dell'uomo, e intende gli uomini come nemici da vincere. L'idea di differenza qui perseguita non crede nell'uguaglianza tra uomini e donne, ma esalta le caratteristiche peculiari dell'uno e dell'altra; 2) la questione del *gender* secondo cui la base biologica è pienamente disponibile. In questa posizione la differenza corporeo-sessuale, chiamata *sesso*, viene minimizzata, mentre la dimensione strettamente culturale, chiamata *genere*, è ritenuta primaria.[1]

Soffermiamoci sulla seconda questione. Fa parte dell'antropologia cristiana (e non solo di questa, naturalmente) il fatto della differenza sessuale. Nel *Genesi* leggiamo: "maschio e femmina li creò" (1, 27). Non si tratta solo di una singolarità della Bibbia: la constatazione della differenza sessuale è alla base di ogni tradizione in merito e si prolunga negli istituti del matrimonio e della parentela. Da diversi decenni alcune correnti culturali intendono negare proprio tale presupposto, sostenendo che la differenza sessuale non si fondi su una realtà biologica ma dipenda dalla cultura e dall'educazione ricevuta, di modo che i confini tra uomo e donna non sono naturali ma mobili e culturali. In tal modo la teoria del *gender* può essere impiegata per favorire il punto di vista delle donne: non si è donne, ma si sceglie di esserlo, e ciò può diventare un'agenda politica per il futuro. Adottare una prospettiva di genere significa distinguere tra quello che è naturale e biologico e quello che è costruito culturalmente e socialmente, in modo da contrattare continuamente il confine tra il culturale-modificabile e il naturale-immodificabile, e staccare l'identità sessuale dalla realtà biologica e genetica. L'identità sessuale diventa non una realtà stabile biologicamente fondata ma una scelta libera, mobile e mutabile anche più volte nella vita

[1] Su questi aspetti vedi la lettera della Congregazione per la Dottrina della Fede sulla collaborazione dell'uomo e della donna nella Chiesa e nel mondo (luglio 2004).

di una persona. L'adozione di una prospettiva di genere è poi apertamente finalizzata a promuovere la compiuta giustificazione e accettazione della sessualità omosessuale.

La teoria del *gender*, impiegata per minimizzare la differenza biologica tra i due sessi e per pensarli come uguali o indifferenti, intende dissolvere l'idea di identità naturale, di matrimonio e di famiglia, ossia i nodi centrali di ogni antropologia e delle strutture basali dell'essere umano, in nome di una libertà di scelta che è pensata assoluta e capace di oltrepassare ogni limite dato. L'impiego disinvolto del concetto di genere manifesta un chiaro cedimento al relativismo e al contestualismo o culturalismo.

Se consideriamo il matrimonio esso non è soltanto o in primo luogo il riconoscimento di un legame affettivo di qualsiasi genere, in cui si esprime una concezione esclusivamente soggettiva del rapporto con l'altro. Lo Stato non è tenuto ad offrire un riconoscimento per questo tipo di rapporto, quando esso fosse eterosessuale ma senza impegni precisi o omosessuale. Nel primo caso non è presente la contropartita di doveri ed impegni sociali, senza di cui la concezione meramente individualistica e soggettivistica dei diritti come crediti o vantaggi da reclamare verso la società non tiene. Nel secondo caso (unione omosessuale) non si può fare ricorso al concetto di famiglia che coprirebbe del tutto nominalisticamente due realtà completamente diverse, e assumerebbe come secondaria e irrilevante la sessuazione. L'istituto matrimoniale e familiare non può essere inteso solo dal punto di vista della vita sentimentale e soggettiva dei cittadini. Il matrimonio quale inizio di una nuova famiglia, è l'alleanza tra un uomo e una donna per il mutuo sostegno e la procreazione della prole nel succedersi delle generazioni. Quale vantaggio ne deriva se da tale determinazione scompaiono i termini di uomo, donna e di prole? Per egualizzare tutto e neutralizzare tutto possiamo chiamare mele le pere in modo da cancellare ogni differenza tra i frutti? La formazione di una famiglia è collegata ad un atto sessuale aperto alla procreazione, che non può accadere nell'unione omosessuale. In breve ordine e diritto non sono concetti opposti alla libertà, ma la sua condizione; anzi, suoi elementi costitutivi.

CHRISTIAN ANTHROPOLOGY AND THE EFFECTIVENESS OF HUMAN RIGHTS OF AN ECONOMIC CONTENT

JOSÉ T. RAGA

In these pages we shall explore an issue so common and general that it receives absolutely no consideration. This lack of consideration represents a flagrant contradiction in the principles and attitudes of humans, and particularly those who, at a national and international level, have the function of managing the *res publica*, agreeing on and setting its objectives, on the one hand, whilst controlling the execution and achievement of these objectives, on the other.

We refer, naturally, to the recognition and solemn proclamation of certain rights corresponding to human persons, as people, when in fact such declarations in not a few instances, are mere public tokens, a theoretical reference not reflected in the real world. In that real world, the subjects find themselves deprived of many formally declared rights, and such a situation does not trouble the conscience and will of those who could and should oversee their effectiveness and efficiency.

Less than six months ago the entire world, and particularly the developed world, celebrated the sixtieth anniversary of the Resolution of the General Assembly of the United Nations by which the Universal Declaration of Human Rights was adopted and proclaimed. The text, coming in the wake of the Second World War, had the explicit aspiration of building a world in freedom, a world in which justice would reign and peace would be guaranteed. This could only be achieved by virtue of the recognition of the fundamental rights of man, of all men and women, without distinction. Hence, all the peoples and nations who came together reaffirmed their faith in the 'dignity and value of the human person', which constitutes the basis of such rights.

Sixty years subsequent to the proclamation of such faith in the rights, the dignity and the value of the person, it is necessary to question the effects

of that reaffirmation of faith, at a time when it is easy to demonstrate the denial of the most essential human rights in many countries and the fact that other rights are not guaranteed in virtually any country within the current world context. Herein, we shall focus on human rights of an economic nature, the proclamation of which has not been translated into political, economic and social reality.

It is surely true that other rights, perhaps those most essential for the very existence of man – the right to life itself – have been diminished in numerous legal systems under different pretexts. These pretexts include: the concept of human life, the moment at which life begins, the alleged conflict between the right to life of the unborn and right of the mother to terminate pregnancy, etc. We witness the regulation of abortion, or indeed, the right to decide the moment at which a life should be terminated, in the case of euthanasia, where the concept of the dignity of the person is identified with physical or mental state. Here it is right to unmask the creation of a legal structure which, with a large dose of pharisaism, attempts to justify the negation of a human right – the right to life[1] – by means of elaborate arguments, which add nothing to the dignity of life but rather clothe the perversion in a mantle of legality, a legality bereft of any basis apart from the positivism of the will of the legislator, in the absence of any other reference.

It is indeed true that different levels of recognised human rights can be distinguished, especially if we consider their transcendence, but it is no less true that they must enjoy legal protection in order to be exercised with full guarantees. When this does not occur, it is necessary to examine the underlying reasons. Perhaps the items contained in the Preamble to the Declaration are accepted formally but without any conviction on the part of the signatories.

Its wording, on the other hand, leaves no room for doubt. '*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have

[1] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 3. Literally *Everyone has the right to life, liberty and security of person*.

determined to promote social progress and better standards of life in larger freedom'.[2] It is clear that *intrinsic dignity* is an attribute that belongs to the human being himself and cannot be subject to the decision of third parties, regardless of whether such third parties constitute a majority or a unanimous group.

The term *human family*, used in the Declaration to refer to the members of humanity, is the express acknowledgement of a common origin, as children of the same Father, united by common paternity in a brotherhood, a *fraternity*, which should be the distinguishing feature of our common behaviour. The text of the Declaration itself states: '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'.[3]

Before entering into considerations of the greater or lesser effectiveness of the human rights we wish to examine, we would like to emphasise the clarity of the text of the Declaration and its unequivocal meaning. It is obvious, and this can be deduced from the literal nature of the text, that the peoples of the United Nations, through their representatives, were conscious that they were not legislating for the purposes of creating or endowing humanity with rights that would guarantee peaceful co-existence. They were, rather, compiling and rubberstamping in the form of a Universal Declaration, the express acknowledgement of rights corresponding to all men and women in equality, because of the simple and marvellous fact of their being men and women. These are inalienable rights inherent to them, whose existence does not depend on the will of another man or other men and women, however wise, prevalent or powerful these others might be.

The greater the degree to which we accept this characteristic of the rights included in the Declaration, the greater the doubt with respect to the scant efficiency of their application in some cases and the fact that they are completely ignored in others. Even more humiliating for humanity is the lack of unanimous and effective outrage at the systematic violation of human rights in not a few countries. This is true even of those rights which constitute the motto on the frontispiece of the Universal Declaration: 'life, liberty and security of person'.

[2] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, Preamble.

[3] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 1.

Regarding the nature of human rights

Also known traditionally as Natural Rights, these rights correspond to and form an inseparable part of the human person, the human person as a creature created in the image of the Creator, privileged amongst the beings of the Creation and the only living creature loved by God for himself.[4] Based on these postulates, Fray Luis de León said, '...though God created all things with order and composed an admirable harmony between them, he did not leave man without a concerto, nor wished him to live without rules or be in dissonance with his music... On composing this universal concerto, as a clear mirror image, he pointed to man with his finger and said to him: "Do you see? This is it. Here you can clearly understand that your welfare is to obey my law and your wisdom to know it; here you will find that you have your law; here you will see that by virtue of this law, like all other creatures, you will be in consonance with all aspects of the world; here you will come to understand that, if you break this law, you will be in dissonance with such aspects, you will contradict them and they will become your enemies... and in the same way that I embedded within the very being of other creatures the law to be followed, to you I gave the intelligence to understand my commandments; and in the same way that other creatures follow the intentions of the law, your intelligence is given to serve my law; and in the same way that their entire vocation and actions are devoted to following this law, your entire knowledge and life consists of such service"'.[5]

This higher law that governs the life of man, as part of the project of his creation, has had a permanent presence in humanity, as a vital reference for each individual and for the community as a whole. This can be inferred from the writings that form part of our knowledge. This need is manifest in cultures of profound belief, such as those committed to paganism.

The vision of the problem in classical Greece and Rome

The Greek texts are impregnated with petitions to the gods, be they petitions for mercy in the face of human injustice, or framework references for

[4] *Vide* Second Vatican Ecumenical Council Pastoral Constitution *Gaudium et spes*. Rome 07.12.1965, num. 24. Literally: ...*man, who is the only creature on earth which God willed for itself*...

[5] Fray Luis de León, 'Exposición al Libro de Job'. Chap. XXVIII. In *Obras completas castellanas de Fray Luis de León*, vol. 2. Biblioteca de Autores Cristianos. 5th Revised Edition. Madrid 1991.

the regulations governing life in community. In Homer, the Greek playwrights and the philosophical schools, there are constant references to a superior wisdom, to the configuration of a higher order that inspires the temporal order of things and therefore limits the will of the *polis* and their government, in order to better guarantee the reign of justice.

In that sense, Sophocles provides us with a very expressive reminder in a scene in which Antigone, who had buried her brother Polynices in contravention of the decree of Creon, the king of Thebes, is asked by the latter, 'and you dared to transgress these laws?' She exclaims, 'it was by no means Zeus who so decreed, nor was it the justice that cohabits with the divinities below... And I did not believe that your proclamations carried such weight that, being mortal, one could pass over the firm and unwritten laws of the gods... I could not, for fear of the opinion of any man, pay the punishment for this before the gods...'.[6] This is a clear argument that the law emanating from the King of Thebes must be subordinate to the ruling of a higher order, the eternal law of the gods. Here we have two levels, one of permanence – the eternal law of the gods – and the other of contingency, transience and opportunism – the prohibitive decree of Creon.

There are also numerous passages in Virgil's *Aeneid* that feature references to laws of a higher order, emanating from the gods for the order of man. Passages along the following lines: 'Do not be afraid Citerea... Aeneas... will unleash a great war in Italy and he will strike fierce peoples and impose laws and walls upon their men'; '...the greying Fides, and Vesta and Quirinius with his brother Remo will give their laws...'; speaking of Aeneas, he said that, 'he imparted justice and laws to the people...' (Book I). In another section, '...and he gave them laws...' (Book III). Also, '...he would give his laws to the entire globe...' (Book IV). With greater expressivity, he said '...he will indicate the forum and give laws to the fathers there gathered...' (Book V). '...first from heavenly Olympus came Saturn, fleeing from the arms of Jupiter and expelled from the lost kingdom. He established that rebellious and disperse people on the high mountains and gave them laws' (Book VIII). Finally, '...the merciful Aeneas... cried out to his people... Repress your anger! The pact is already agreed and all its laws are fixed' (Book XII).[7]

[6] *Vide* Sófocles (491 B.C. – 406 B.C.), *Antigona*. Editora Nacional. Madrid 1977; margin numbers 449-459, p. 188. (*Author's translation*).

[7] Publius Virgilius Maro (70 B.C. – 19 B.C.), *Eneida*. (*The Aeneid*). Books I, III, IV, V, VIII and XII. Edit. Planeta. Barcelona 2000. (*Translation into English by the author*).

But of all pagan thinking, it is perhaps Cicero who most brilliantly represents the concept of a higher law, independent of the will of the legislator and providing the legislator with a framework. Cicero said, 'legal science should not take as its source praetorian Edict, as practically all do today, or the Twelve Tables, as the ancestors did, but rather the essential philosophy itself'.[8] This essential philosophy is the main source of inspiration behind legislative activity and must be adhered to.

More specifically, he said elsewhere that, 'True law is an upright reason, consistent with nature, applicable to all, constant, enduring, whose precepts lead to the fulfillment of duties and whose prohibitions distance man... It is not legitimate to suppress this law, or partially derogate it, or abrogate it entirely. Nor can we be exempted from this law by the will of the senate or the people. Nor should we seek a Sixth Elio to explain and interpret this law. Nor can it be different in Rome and in Athens, today or tomorrow. On the contrary, there will always be one single law for all peoples and times, enduring and immutable; and there will be one god as a master or chief, common to all, to the author of such law, judge and legislator. He who disobeys flees from himself and will suffer the maximum penalty for having shunned human nature, however much he manages to escape from what he considers punishment'.[9]

Cicero clearly speaks of a single law for all, an immutable and enduring law, whose author is a unique god, master and chief of all. Furthermore, he adds that whoever disobeys this law, which constitutes an integral part of human nature, *flees from himself*, meaning that he will not find peace and

[8] Marcus Tullius Cicero (106 B.C. – 43 B.C.), *De Legibus*. I, 5. Centro de Estudios Políticos y Constitucionales. Madrid 2000, p. 69. The original text is as follows: *Non ergo a praetoris edicto, ut plerique nunc, neque a duodecim tabulis, ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas*. (Translation into English by the author).

[9] Marcus Tullius Cicero (106 B.C. – 43 B.C.), *De Republica*. III, 22. Edit. Gredos. Madrid 1984, p. 137. The original tex, ist: *Est quidem vera lex recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna, que vocet ad officium jubendo, vetando a fraude deterreat... Huic lege nec abrogari fas est neque derogari ex hac aliquid licet, neque tota abrogari potest; nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres ejus alius; nec erit alia lex Romae, alia Athenis, alia nunc, alia pothac, sed et omnes gentes et omni tempore una lex et sempiterna et inmutabilis continebit, unusque erit communis quasi magister et imperator ómnium Deus; ille legis hujus inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac, naturam homini aspernatus, hoc ipso luet máximas poenas, etiam si cetera supplicia, quae putantur, effugerit*. (Translation into English by the author).

will suffer the maximum penalties for *having shunned human nature*. For to disrespect a law intrinsic to man himself is to disrespect man, all men and therefore, human nature itself.

The nexus with that law, emanating from a single god, common master of all, is what determines the justice of the laws because 'it is absurd to think that all that is determined by the customs and laws of the people is just. And if they are the laws of tyrants? If the Thirty Tyrants in Athens had wished to impose their laws or if the people of Athens had been happy with the tyrannical laws, would that make such laws just?... There is a single Law that unites the community of all men, and it is made up of but a single law, and such law is the just criterion that rules or prohibits. Whosoever ignores it, be it written or not, is unjust'.[10]

And what Cicero says regarding the will of tyrants, he also extends to the popular masses, though their votes might numerically far outweigh those cast by people of correct judgement. He is, therefore, conclusive in his judgement of the aims of such legal positivism, when he says, 'If rights were founded on the will of the people, the decisions of princes and judges, robbery would be legal, forgery would be legal, the falsification of testaments would be legal, provided this was sanctioned by the votes and willingness of the masses. And if the will and opinion of the foolish is such that they, with their votes can pervert the nature of things, why then can they not sanction as good and healthy, what in reality is evil and pernicious?'[11]

It is clear that Cicero believes laws to be founded on more permanent elements, on that single law for everybody – of which he spoke – permanent

[10] Marcus Tullius Cicero (106 B.C. – 43 B.C.), *De Legibus*. I, 15. Centro de Estudios Políticos y Constitucionales. Madrid 2000, p. 93. The original text, is as follows: *Iam vero illud stultissimum, existimare omnia iusta ese qua escita sint in populorum institutis aut legibus. Etiamne si quae leges sint tyrannorum?. Si triginta illi Thenis leges imponere voluissent, et si omnes Athenienses delectarentur tyrannicis legibus, num idcirco hae leges iustae haberentur?... Est enim unum ius quo devincta est hominum societas et quod lex constituit una, quae lex est recta ratio imperandi atque prohibendi. Quam qui ignorant, is est iniustus, sive est illa scripta uspiam sive nusquam.* (Author' translation).

[11] Marcus Tullius Cicero (106 B.C. – 43 B.C.), *De Legibus*. I, 16. Centro de Estudios Políticos y Constitucionales. Madrid 2000, p. 95. The original text, is: *Quodsi populorum iussis si principum decretis, si sententiis iudicum iura constituerentur, ius essent latrocinari, ius adulterare, ius testamenta falsa supponere, si haec suffragiis aut scitis multitudinis probarentur. Quodsi tanta potestas est stultorum sententiis atque iussis, ut eorum suffragiis rerum natura vertatur, cur non sanciunt ut quae mala perniciosaque sunt, habeantur pro bonis et salutaribus?* (Translation into English by the author).

and immutable, emanating from a single god and substantially linked with and serving as sustenance to human nature itself. Other references are weak, ephemeral, voluble, based on the moods of princes, legislators or voters, with varying levels of knowledge or ignorance, and should not form any basis on which to found the community in which men live together.

It can be inferred that in both Classical Greece, with explicit petitions to their gods and the will emanating from them as the principal rectors of civic order, and the paganism of the blossoming Rome, with that call to the rules of a higher order, certainly higher than the will of princes and public servants, and also superior to the will of the people, that what is being demanded in terms of good governance for the *res publica*, is that the scope of legislative provisions be subject to permanent, common rules of a higher order and in accordance with human nature itself. Such rules, by definition, could not be the work of man, but rather must emanate from divinity, irrespective of our concept of this divinity. Such divinity must, naturally, be a higher being than the rest of humanity.

The people of Israel in the Old Testament

The experiences of the chosen people differ substantially from those of pagan Rome and Classical Greece. Cicero's references to the need for a common origin, a common god for all and permanent and immutable principles emanating from them, are the basis upon which the life of the people of Israel unfolds. With faith in a single God, Jehovah, creator of the world and all within it, known by means of the messengers and the prophets, who at all times instruct on the truth that has been revealed. From God emerges, as a living source, the supreme Law which should guide the conduct of the people, in order to be in accordance with his will. The goodness or evil of a human act will, therefore, depend on compliance with or failure to observe the revealed Law, which as such, is contained in the Holy Book and read in public and interpreted for the testimony and instruction of those who listen to it so that it can be put into practice.

The references to this Law of God, Law of Jehovah, occasionally Law of Moses and also, Law of the fathers, etc. are constant throughout the books that comprise The Old Testament, though it is important to note that we are speaking of the same Law in all cases; the Law that maintains the order of the Creation and to which created beings are subject, in accordance with its objectives. In some cases, these references are passages in which the necessity to observe the Law is proclaimed. This is true, for example, when

the Lord addresses Joshua in the following terms: 'Be strong and stand firm, for you are the man to give this people possession of the land which I swore to their ancestors that I would give them. Only be strong and stand very firm and be careful to keep the whole Law which my servant Moses laid down for you. Do not swerve from this either to right or to left, and then you will succeed wherever you go' (*Jos* 1:6-7).

To this call of Jehovah, there is a response, in some cases with a formal commitment in writing of the entire community, promising to follow the path laid down: '...have joined their esteemed brothers in a solemn oath to follow the law of God given through Moses, servant of God...' (*Ne* 10:30). In more than a few cases, it takes the form of an order to follow the path set out by the Law of God. An example is the order of David to his son Solomon, charging him with the construction of the Temple and which ends as follows: '...may Yahweh give you discretion and discernment, may he give you his orders of Israel, so that you may observe the Law of Yahweh your God' (*1 Cro* 22:12).

On other occasions, there is reference to the good arising from compliance with the Law of God or the bad arising from failure to obey. '...the kindly hand of his God was over him. For Ezra had devoted himself to studying the Law of Yahweh so as to put into practice and teach its statutes and rulings' (*Ezr* 7:9-10). In contrast, 'All these curses will befall you, pursue you and overtake you until you have been destroyed, for not having obeyed the voice of Yahweh your God by keeping his commandments and laws which he has laid down for you. They will be a sign and a wonder over you and your descendants for ever' (*Dt* 28:45-46).

We are speaking, therefore, of a law that is not the product of a whim on the part of men, leaders or people, kings, princes, judges or plebeians, but a law revealed by God to man. 'Yahweh said to Moses, "Come up to me on the mountain. Stay there, and I will give you the stone tablets – the law and the commandment – which I have written for their instruction"' (*Ex* 24:12). A Law revealed to man by God through Moses, a law that is innate in man and forms part of his very being, as a human person called to follow the path set out by the Creation: 'Wisdom comes from the lips of the upright, / and his tongue speaks what is right; / the law of his God is in his heart, / his foot never slips' (*Ps* 37:30-31).

If this Law is given by God to man, it is unnecessary to add that it is for all mankind; a common law for all, as Cicero would claim in the simple logic of the political administration of a community 'Yahweh spoke to Moses and said, "Speak to the Israelites and say... There will be one

law for you, members of the community, and the resident alien alike, a law binding your descendants for ever: before Yahweh you and the alien are no different". One law, one statute, will apply for you and the alien' (*Nb* 15:1-2, 15-16).

A single rule embedded in the heart of man, who tends towards its observance by virtue of his very nature, though it is true that freedom enables him to distance himself from it. These are the conclusive words of the Book of Jeremiah: 'Look, the days are coming, Yahweh declares, when I shall make a new covenant with the House of Israel (and the House of Judah)… Within them I shall plant my Law, writing it on their hearts. Then I shall be their God and they will be my people' (*Jr* 31:31 and 33). This rule, like any commandment, must be spread and made known so that it can be complied with or responsibility can be assumed for its rejection. Therefore, there are also multiple passages that describe the efforts and dedication of the peoples in spreading knowledge of the content of the Law of God. By way of example, it is sufficient to remind ourselves of the narration of how Jehoshaphat, in the third year of his reign, sent out his officials and with them the priests, 'They gave instruction in Judah, having with them the book of the Law of Yahweh, and went round all the towns of Judah instructing the people' (*2 Cro* 17:9).

In conclusion, the people of Israel lived with a knowledge, both of themselves and of the world, very different to that of their Greek and Roman contemporaries. The knowledge of a single God, Jehovah, the creator of man and all creatures, who manifested himself to the people through his messengers, and made known his doctrine, the Law of God, so that man could observe it faithfully and completely. Furthermore, mankind created by God assumes the prerogative or privilege of having been created in the image of God himself and God has entrusted him with the care of the creation, above all other created beings. The text of Genesis says: 'God said, "Let us make man in our own image, in the likeness of ourselves, and let them be masters of the fish of the sea, the birds of the heaven, the cattle, all the wild animals and all the creatures that creep along the ground". God created man in the image of himself, / in the image of God he created him, / male and female he created them. God blessed them, saying to them, "Be fruitful, multiply, fill the earth and subdue it. Be masters of the fish of the sea, the birds of the heaven and all the living creatures that move on hearth". ... And so it was. God saw all he had made, and indeed it was very good' (*Gn* 1:26-28, 30-31).

The contribution of Christianity: the iusnaturalist school

The incarnation of God in his son Jesus Christ, his birth, childhood and adolescence, his public life, his passion, Death and Resurrection, form a permanent testimony, through the will of the Father, to show man the way to salvation. In his own words: 'I am the Way; I am Truth and Life. / No one can come to the Father except through me' (*Jn 14*[6]). A way that appears secure to us because it is based on the mission of redemption of Jesus Christ, incarnate for that purpose: to free a people who had fallen into sin, founding a new alliance of reconciliation by forgiveness, which emerges from the commitment of the Son of God, his blood and his death, for the definitive triumph of the Glory, in the Resurrection.

Also expressive are the terms in which Saint Paul addresses the Hebrews: 'We have then, brothers, complete confidence through the blood of Jesus in entering the sanctuary, by a new way which he has opened for us, a living opening through the curtain, that is to say, his flesh' (*Heb. 10*[19-20]). Herein lies the great difference of man in Christianity: a man who feels himself redeemed and with a project for life whose end is in its origins, i.e., the salvation, the meeting with the Father, beginning and end of all that is created. A path that manifests its presence to the eyes of humanity, like the most vivid of realities, whilst at the same time offering the greatest security, given that it simply leads to the Father, through the Son who redeemed us and showed us the road to salvation. Let us not forget that until Jesus Christ revealed himself to us as the road to the Father, only the High Priest had access, once a year, to the Saint of Saints.

In this way, man broadens his horizons and cooperates with and continues the work of the Creation, whilst, as the privileged being of the Creator, he is at the centre of his own creative project. Hence, the opening of that human horizon to transcendence, that is to say, to God. Man, according to the Pontifical Council for Justice and Peace, '...is open above all to the infinite – God – because with his intellect and will he raises himself above all the created order and above himself, he becomes independent from creatures, is free in relation to created things and tends towards total truth and the absolute good. He is open also to others, to the men and women of the world, because only insofar as he understands himself in reference to a "thou" can he say "I". He comes out of himself, from the self-centered preservation of his own life, to enter into a relationship of dialogue and communion with others'.[12]

[12] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*. Libreria Editrice Vaticana, Città del Vaticano 2004, num. 130.

The *other*, is seen by the Christian as an opportunity to enter into perfection. The project of salvation acquires all its magnitude when we place it in humanity, and loses its meaning if we reduce it to a purely individual dimension. The 'I', as the horizon of life, is so reductionist that it ultimately denies itself. Before the image of a Christ offering himself up for all of us, there is no place for an exclusive or individualistic attitude in Christian life. Man is by nature a social being and therefore, he is sociable. He is called to a life in common, to enrich the community with his contributions and to be enriched by the contributions of the community. '...God did not create man as a solitary, for from the beginning "male and female he created them" (*Gen* 1:27). Their companionship produces the primary form of interpersonal communion. For by his innermost nature man is a social being, and unless he relates himself to others he can neither live nor develop his potential'.[13]

This sociability of man is based on an attribute given by God in order to distinguish him from other created beings: the rationality attached to freedom. Man is capable of thinking for himself and relating his thoughts to the environment of people and things in which his material, immaterial and spiritual life unfolds, for man is body and soul, matter and spirit. The words of John Paul II are clear: 'The spiritual and immortal soul is the principle of unity of the human being, whereby it exists as a whole... as a person. These definitions not only point out that the body, which has been promised the resurrection, will also share in glory. They also remind us that reason and free will are linked with all the bodily and sense faculties. *The person, including the body, is completely entrusted to himself, and it is in the unity of body and soul that the person is the subject of his own moral acts*. The person, by the light of reason and the support of virtue, discovers in the body the anticipatory signs, the expression and the promise of the gift of self, in conformity with the wise plan of the Creator'.[14]

This unity of being, body and soul, had already been described by Saint Augustine on asking himself about man. 'What is man? A rational soul with a body... – Before he says – A rational soul with a body does not make two people but rather a single man'.[15] The union of body and soul is a substan-

[13] Second Vatican Ecumenical Council, Pastoral Constitution *Gaudium et spes*. Rome 07.12.1965, num. 12.

[14] John Paul II, Encyclical letter *Veritatis splendor*. Rome 06.08.1993, num. 48.

[15] Saint Augustine, 'In Iohannis Evangelium' XIX, 15, pp. 512-513. Literally, *Quid est homo? Anima rationalis habens corpus... Anima habens corpus non facit duas personas sed unum hominem*. In *Obras de San Agustín*, Vol. XIII. – *The text among scripts is mine* –. Bi-

tial union, in which there is an indisputable hierarchy. The soul gives life to the body and God gives life to the soul. Similarly, the soul is spiritual and it is endowed with memory, understanding and will, attributes which do not constitute three lives, but rather a single life and substance.[16]

The body is not a simple instrument, a simple tool designed for the achievement of external objectives. On the contrary, it forms part of our very nature; indeed, we cannot forget that it was God himself who created it and, therefore, it is called to serve those ends for which it was created. When the body is separated from the paths that lead to the creator, it becomes the prison of the soul, inextricably linking it to its corruption. When this is not the case, the body enables man to connect to the material world and affords him the opportunity to exercise virtue using his own free will.

It is the spiritual dimension that exalts man above all other created beings. It is in his interior that man will come to know the Truth, and in its light, he will feel himself, not to be a mere appendix or anecdote of the creation, but rather a central part of it. '...man is not wrong when he regards himself as superior to bodily concerns, and as more than a speck of nature or a nameless constituent of the city of man. For by his interior qualities he outstrips the whole sum of mere things. He plunges into the depths of reality whenever he enters into his own heart; God, Who probes the heart, awaits him there; there he discerns his proper destiny beneath the eyes of God'.[17]

He decides his own destiny insofar as, by design of the Creator, he enjoys freedom. Thus, man can be defined as an *animal insecurum*, by comparison with the rest of the animals whose evolutionary possibilities are predetermined by their nature. The rich possibilities of man are shown externally through multiple expressions, but uncertainty, even within certainty, is also part of the human reason. Man is a doubting being, erroneous, uncertain, conscious of his limitation, his ignorance and his shortcomings. When he makes a decision, he does so with caution, for fear of

blioteca de Autores Cristianos. Madrid 1955. (Translation into English by the author). In analogous sense, 'De quantitate animae' XIII, 22; also in 'De moribus Ecclesia', I, 27, 52.

[16] *Vide* Saint Augustine, 'De Trinitate' Book XI, Chapt. 4.7, pp. 624-628. In *Obras de San Agustín*, Vol. V. Biblioteca de Autores Cristianos. Madrid 1956. (Translation into English by the author); also 'Confesiones' Book X, Chapt. VI on, pp. 478 and on. In *Obras de San Agustín* Vol. II. Biblioteca de Autores Cristianos. Madrid 1955.

[17] Second Vatican Ecumenical Council, Pastoral Constitution *Gaudium et spes*. Rome 07.12.1965, num. 14.

erring amidst the uncertainty he feels. He is uncertain that even the simplest information is entirely within his possession.[18]

This does not invalidate the principle of *nihil volitum nisi precognitum*. What we mean is that in ourselves, decisions of a diverse nature are produced. In effect, there are decisions that correspond to a reality, which, as far as we are aware, can be considered fully known and only error proves that our knowledge was not complete. But there are also those which are either pre-conscious decisions, on which we do not consider any possible contradiction, or decisions taken within the darkness of our knowledge. Therefore, following Hartmann, we can state that while, on the one hand, our freedom is an indication of our similarity to God, on the other, it shows our great inferiority to him.[19]

The great number of possibilities shown by man in his being and deeds leads us to conclude that his creation is of a singular rather than repetitive nature. That is to say '*Man exists as a unique and unrepeatable being, he exists as an "I" capable of self-understanding, self-possession and self-determination*. The human person is an intelligent and conscious being, capable of reflecting on himself and therefore of being aware of himself and his actions. However, it is not intellect, consciousness and freedom that define the person, rather it is the person who is the basis of the acts of intellect, consciousness and freedom. These acts can even be absent, for even without them man does not cease to be a person'.[20]

It is the subjectivity of man that ultimately configures him. His conscience and freedom lead him to construct, by virtue of his deeds, his own story, a story that differs from that of any other similar creature. Hence, it is impossible to reduce the immense human wealth to rigid formulae or schemes governing thoughts or actions. In this sense, Ortega is quite right when he states '..."human life", our life, the life of each and every one of us, has nothing to do with the biology or science of organic bodies... The primary and true meaning of the word "life" is not, therefore, biological but

[18] *Vide* Carl Menger, *Principles of Economics*; with an introduction by Frank H. Knight. Free Press. Glencoe, Illinois, 1950. Also with an introduction by F.A. Hayek. New York University Press, New York 1981.

[19] *Vide* Nicolai Hartmann, *Das Problem des geistigen Seins: Untersuchungen zur Grundlegung der Geschichtsphilosophie un der Geisteswissenschaften*. Walter de Gruyter & Co. Berlin 1933, pp. 143 and on. There is another edition from 1962, by the same editor.

[20] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*. Libreria Editrice Vaticana. Città del Vaticano 2004, num. 131.

biographical, a meaning it has always had in common language. It signifies all that we do and all that we are, that terrible task... of sustaining ourselves in the universe, of carrying or moving oneself amidst the things and beings of the world. "Living is, indeed, dealing with the world, addressing it, acting within it and being occupied by it"'.[21]

It is the unrepeatable singularity of man, that biographical rather than biological dimension, which gives rise to the imperative respect for his dignity when he cultivates and develops within himself the sociability that forms the community of persons. This dignity is inherent to him because he has been created in the image and likeness of God and, therefore, must be recognised, valued and protected by all, in the interests of a correct social order, in which personal order prevails over real order.[22]

The variety and variability of the external world, and even the internal world, with which man interacts, would present itself to man as a *totum revolutum*, as a confusing amalgam, if it were not for the mediation of this idea of order, not as a mere subjective guideline, but as a harmonic structure, a scheme of true connection amongst things. 'Where plurality exists without order, there is confusion' in the words of Saint Thomas.[23]

This concept of order refers us to the concept of the end. Every being has a natural inclination and sufficient disposition to the achievement of the end that is inherent to him and this end orders his behaviour. The end implies a sense of good. In turn, in every subject, true good is to be found in the achievement of his own end, that end which is the reason for his creation, that is, the end that represents the fullness of his essence. Hence, our tendency to achieve that end, or those ends, that are in accordance with our rational and free nature, is, in other words, our tendency towards good. The words of Saint Augustine tell us that good rests on the same concept as being: 'In quantum sumus, boni sumus'.[24] Likewise, Saint Thomas Aquinas said that: '...all beings, as such are good, not to exist and not to be good is

[21] José Ortega y Gasset, 'Misión de la Universidad'. Revista de Occidente. Madrid 1930; p. 109. (Translation into English by the author).

[22] *Vide* Second Vatican Ecumenical Council, Pastoral Constitution *Gaudium et spes*. Rome 07.12.1965, num. 26.

[23] Saint Thomas Aquinas, *Summa Theologiae*. Ia, q.42, a.3. Biblioteca de Autores Cristianos. Fourth edition. – Reprint –. Madrid 2001; Vol. I, pp. 409-410. (Author's translation).

[24] Saint Augustine, 'De doctrina christiana'. I, 32, pp. 98-99. In *Obras de San Agustín* Vol. XV. Biblioteca de Autores Cristianos. Madrid 1957. (Author's translation).

the same'.[25] On another occasion, he said: '"good is what everyone desires" Indeed, as the reason for good is the end... all to which man feels naturally inclined is seen by reason as good, and as an end, something that must be procured. We therefore find, above all in man, an inclination he has in common with all substance, consistent with the fact that all substance, by nature, tends to preserve its own being'.[26]

From all this, it is inferred that human conduct will be appraised by the degree to which it achieves those ends which are an inherent part of its very nature. Therefore, in the same way as in speculative understanding we consider the principles governing a determined situation, when we enter the realm of practical understanding, of man's actions as a subject agent, the ends to which the action and its kindness are directed – that is, its essential relationship with the being – are what are relevant in terms of the moral or ethical-legal appraisal of man's deeds.

Those ends, to which man feels a natural inclination, are presented to man as ends to be achieved, ends to which he will direct his actions to enable their attainment, that is, to arrive at good. We are saying, therefore, that in the conscience of the subject, the ends to be pursued are not neutral. On the contrary, they generate duties. Indeed, if there were no ends to be achieved, ends that appealed to the will of the subject and motivated his action, the duties assumed by the subject and to which he configures his itinerary in order to accomplish them, would not exist. And lastly, if there were no duties to be undertaken by the subject, rights would not exist. Rights that ultimately come down to the authority which should be guaranteed to those subjects, so that they have at their disposal the necessary means to enable them to fulfil their duties and, therefore, achieve the established ends.

If every created being has a mission to accomplish, a function to carry out towards which he aspires, the natural inclination of man will be to devote himself to his end, which is to participate in the Glory of God. We are not the owners of our destiny, but we have conscience and freedom with respect to such destiny. Our properly formed conscience allows for free discernment. Such freedom can deny the appeals of the conscience, as hap-

[25] Saint Thomas Aquinas, *Summa Theologiae*. Ia, q.48, a.1. Biblioteca de Autores Cristianos. – Reprint –. Madrid 2001; Vol. I, p. 473. (Author's translation).

[26] Saint Thomas Aquinas, *Summa Theologiae*. Ia-IIae, q.94, a.2. Biblioteca de Autores Cristianos. – Reprint –. Madrid 2001; Vol. II, p. 732. (Author's translation). In an analogous sense, vide also, Ia-IIae, q.18, in the same volume, pp. 177-190.

pened in the Garden of Eden (*Gn* 2:16-17, 3:6),[27] but with this denial, man would contradict himself, his very nature and his own end. In the terms of Genesis, he would be *doomed to die*.

In effect, 'God, on conceiving the essence of creatures, gives them an end and a direction, and though they are temporary, the divine reason must consider them and understand them as an eternal concept. One God, one idea, one will, one law; but several sectors in the application of that law. The eternal law projects itself over the organic and animal world and, as we rise through its scale, we perceive certain immediate reactions and visions which give the subject the appearance of autonomy and personality; it finally falls on man, and influences two powers, understanding and will. These are capable of recognising the eternal law and freely adjusting to it, but may also, by virtue of the risk inherent in human liberty, violate it temporarily, though in the end they will not elude its sanction'.[28]

Saint Thomas defined the eternal law as 'the will of divine wisdom as the guiding principle of every deed and movement'.[29] In other words, it is the will of divine wisdom in the ordering of all things to their ends, or the reason for the order governing all creation. Saint Augustine had already defined it as 'divine reason or will of God, which commands the preservation of the natural order and forbids its perturbation'.[30]

We are speaking of a law, the eternal law, aimed at the complete order of the universe, at the ends of creation itself, and therefore, at created beings. On contemplating the embedding of the eternal law in the human creature, we find ourselves before the Natural Law. It is indeed true that natural laws

[27] The literal text is as follows: 'Then Yahweh God gave the man this command, 'You are free to eat of all the trees in the garden. But of the tree of the knowledge of good and evil you are not to eat; for, the day you eat of that, you are doomed to die'...

The woman saw that the tree was good to eat and pleasing to the eye, and that it was enticing for the wisdom that it could give. So she took some of its fruit and ate it. She also gave some to her husband who was with her, and he ate it'. The text is from 'The New Jerusalem Bible'. Doubleday, New York 1990.

[28] José Corts Grau, *Curso de Derecho Natural*. Editora Nacional. Madrid 1953, pp. 195-196. (Author's translation).

[29] Saint Thomas Aquinas, *Summa Theologiae*. Ia-IIae, q.93, a.1. Biblioteca de Autores Cristianos. – Reprint –. Madrid 2001; Vol. II, p. 723. (Author's translation). The original text says: *Ratio divinae sapientiae, secundum quod est directiva omnium actuum et motionum*.

[30] Saint Augustine, *Contra Faustum*, XXII, 27, p. 540. The literal text, is: *Ratio divina vel voluntas Dei, ordinem naturalem conservari iubens, perturbari vetans*. In *Obras de San Agustín* Vol. XXI. Biblioteca de Autores Cristianos. Madrid 1993. (Author's translation).

can be understood as those laws that govern all creation. However, when we speak of the Natural Law, we are referring to the eternal Law, in accordance with the concept outlined above, insofar as it takes account of and affects human creatures, insofar as it governs human deeds. Saint Thomas defined it as, '...participation of the eternal law in the rational creature...'.[31]

We call it natural because it forms part of our very nature, because we can come to know it through the natural forces of reason and because we have a natural inclination to observe it. Such observance results in our satisfaction, while failure to observe it brings us discomfort and remorse. In this way, the legal order is no more than a sub-system within the universal order to which it belongs. When we endeavour to judge a deed or behaviour in terms of morality or justice, our reason is the second criterion. The first is none other than the eternal law.[32] In this sense, when we observe the rule, we are not creating it, but simply confirming it. In contrast, when we break the rule, we are not abolishing it. We are simply eluding it, as if it did not exist, until remorse imprisons our conscience.

Saint Thomas expressed this in the following terms: '...the first principle of practical reason is that which is founded on the notion of good, and it is formulated thus: "good is what everyone desires". In consequence, the first precept of the law is: "good must be created and sought after; evil must be avoided". And on this are founded the remaining precepts of the Natural Law, so that what has to be done or avoided falls under the precepts of this law insofar as practical reason naturally understands it as human good'.[33] Let us not forget, to avoid confusion, that the concept of human

[31] Saint Thomas Aquinas, *Summa Theologiae*. Ia-IIae, q.94, a.2. Biblioteca de Autores Cristianos. – Reprint –. Madrid 2001; Vol. II, p. 732. (Author's translation). In an analogous sense, vide also, Ia-IIae, q.18, in the same volume, pp. 177-190.

[32] With quite a lot of a differences, this was the underlying sense of the exclamation of Antigone in answering the interpellation of Creonte because of having unfulfilled a prohibitive ordinance *(Vide footnote 6)*, or the statement of Cicero that the rights cannot be founded in the will of the people, of the princes or in the sentences of the judges (*Vide footnote 11*).

[33] Saint Thomas Aquinas, *Summa Theologiae*. Ia-IIae, q.94, a.2. Biblioteca de Autores Cristianos. – Reprint –. Madrid 2001; Vol. II, p. 732. (Author's translation). The text is as follows: *...primum principium in ratione practica est quod fundatur supra rationem boni, quae est: 'Bonum est quod omnia appetunt'. Hoc est ergo primum praeceptum legis 'quod bonum est faciedum et prosequendum, et malum vitandum'; et super hoc fundantur omnia alia praecepta legis naturae, ut scilicet omnia illa facienda vel vitanda pertineant ad preacepta legis naturae, quae ratio practica naturaliter apprehendit esse bona humana*.

good is not whimsical, random or dependent on the transient and gratuitous opinion of each man. On the contrary, it is intrinsically linked to the end which is a natural part of the human condition.

The primary fundament of the Natural Law is the eternal Law, which accommodates the ends and possibilities of human nature. Natural cannot be interpreted as irrational, all that is the product of a spontaneous outbreak or uncontrolled impulse, because human nature is rationality and freedom above all other things. Rationality and freedom prevail over lower impulses, which in no way separate man from other animals, animals guided by instincts or uncontrolled or irrational reactions. If man acts in contrary to his reason he is contradicting himself. From the stoics, through Cicero's *vera lex, recta ratio*, through all the Scholastics, and through Grotius's *dictatum rectae rationis*, the rationality of the human being forms the basis of iusnaturalism. Nonetheless, it must be added that human reason does not create the order. Rather it affords the opportunity of coming to know it. Therefore, it cannot have regulatory power in the same way as the Natural Law. Reason is the instrument for the discovery of the Natural Law and the means by which to understand its conclusions.

Natural law and human rights

Is this merely a question of terminology? If that were so, it would not be worth devoting any attention to its study. Indeed, part of the doctrine used the term Rational Law to refer to Natural Law, as we have outlined above. The intention of this terminology was to link the legal phenomenon to man's rationality. It was, however, clearly given to understand that this law was embedded in the very nature of the human being, created in the image of God as a free and rational being. This is fully consistent with the human profile outlined in Christian anthropology. Nevertheless, the term human rights, at least in the way it is used, and given the diverse attitudes apparent in their application, generates, at the very least, a doubt which becomes a necessary ingredient for the confusion.

It is indeed true that in the Preamble to the Universal Declaration of Human Rights, it is established, as has been mentioned previously, that '...the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger

freedom'.[34] It is also obvious that if one has a clear concept of the *dignity and value of the human person*, there is no possible confusion because this concept is necessarily based on the fact of having been created in the image of the Creator. A privileged creature, on whom is bestowed authority over all that is created, and who is entrusted with caring for the garden for the purpose of cooperating in the work of the creation.

What is relevant, and worrying on a personal level, is that the replacement of the term Natural Law by Human Rights coincides with the beginning of the secularisation of life in community, and even more so, with the laicist empire in public life. This is why the proliferation of different interpretations of Human Rights is unsurprising, despite the fact that they are clearly expressed in the Declaration. Even the most indisputable rights are the object of constant offence. Pseudo-scientific arguments are used to justify such infraction, and the construction of these arguments shows the rejection of the basic principle of the recognition and respect for human dignity as it is understood by Christian anthropology, and as it can be understood from the underlying meaning of the term itself.

Let us reflect on the pages contributed by so-called scientific literature to decide the moment at which life commences and the time of its ending, for the simple purpose of casting humanity into the abyss of abortion and euthanasia. The discussion to justify abortion centres on the number of weeks of gestation or the presence of malformations in the unborn, which leads to the practice of abortion – euphemistically referred to in some countries, such as Spain, as *voluntary interruption of pregnancy* –.

Are we really before inalienable human rights inherent to the human person, representing Natural Law and in turn participation in the eternal Law? Or, on the contrary, are we faced with the codification of some rights agreed on by a concerto of nations, based on the express will of the legislators, more often than not with reservations of conscience, in order to decide the scope of their application? The risk is alerted by Benedict XVI: 'Experience shows that legality often prevails over justice when the insistence upon rights makes them appear as the exclusive result of legislative enactments or normative decisions taken by the various agencies of those in power. When presented purely in terms of legality, rights risk becoming weak propositions divorced from the ethical and rational dimension which is their foundation and their goal. The *Universal Declaration*, rather, has

[34] *Vide* the reference made to footnote 2 at the beginning of this paper.

reinforced the conviction that respect for human rights is principally rooted in unchanging justice, on which the binding force of international proclamations is also based. This aspect is often overlooked when the attempt is made to deprive rights of their true function in the name of a narrowly utilitarian perspective'.[35]

Hans Kelsen rejects the iusnaturalist concept of Natural Law because this entails, for him, an anarchic element, the reference to a Law superior to the positive laws emanating from State institutions. Such reference, according to Kelsen, diminishes the relevance of the latter and therefore, the authority of the State that enacts such laws. He, therefore, considers Natural Law as the expression of a forced and anarchic order.[36] According to him, this is due to the impossibility of reconciling the world of 'be' with that of the 'ought to be'. What is natural pertains to the former, that of the *sein* – that of *be* –, and what is legal or regulatory belongs to the world of *sollen* – that of the *ought to be* – according to Kelsen.

For Christianity, the question of Human Rights – accepting this name, which is by no means unworthy of their content – leaves no margin for doubt or distortion: '*...the roots of human rights are to be found in the dignity that belongs to each human being*. This dignity, inherent in human life and equal in every person, is perceived and understood first of all by reason. The natural foundation of rights appears all the more solid when, in the light of the supernatural, it is considered that human dignity, after having been given by God and having been profoundly wounded by sin, was taken on and redeemed by Jesus Christ in his incarnation, death and resurrection'.[37]

And when we speak of 'all people', we mean precisely that, all men and women, regardless of their condition. In the eyes of God, there are no differences based on race, intelligence, strength, etc. In Saint Paul, 'You have stripped off your old behaviour with your old self, and you have put on a new self which will progress towards true knowledge the more it is renewed in the image of its Creator; and in that image there is no room for distinction between Greek and Jew, between circumcised and uncircumcised, or

[35] Benedict XVI, *Address to the General Assembly of the United Nations*. New York 18.04.2008; paragraph 8.

[36] *Vide* Hans Kelsen, *Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*. Pan-Verlag. Charlottenburg 1928, p. 10. In their own words: *Das Naturrecht ist Seiner Idee nach zwangsfreie, anarchische Ordnung*.

[37] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*. Libreria Editrice Vaticana. Città del Vaticano 2004, num. 153.

between barbarian and Scythian, slave and free. There is only Christ: he is everything and he is in everything' (*Col* 3:9-11, *in the same sense Ga* 3:28).

Accepting the situation as such, human rights do not arise from the will of men, or from public authority, or from the privilege of the few to legislate for the many. Rather, they emanate as a consequence of man and the plan God his Creator has for him, and the nature of human rights is deduced from the very nature of man. John XXIII expressed this in the following terms: 'Any well-regulated and productive association of men in society demands the acceptance of one fundamental principle: that each individual man is truly a person. His is a nature, that is, endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights and duties are universal and inviolable, and therefore altogether inalienable'.[38]

They are *universal* because they belong to all humanity and individually to each person who makes up humanity. Human rights in their entirety and the specific right to exercise them correspond to each person. Society as a whole must respect the rights of each of its members and has the duty to oversee the effectiveness of such rights, so that recognition of them is not an empty pronouncement. The duty of all is, has been and will be, not to fall into the error of believing that Human rights constitute a closed and rigid code for a particular moment in history. This is a danger which may result from articulated documents that remind us of the benefits of any codification. The essential immutability of the Natural Law is linked to the immutability of human nature itself.

Human Rights progress and develop the virtualities that correspond to their own principles. They assimilate historical environments and endow them with the structure of universal order. Therefore, the static vision of Human Rights should be replaced by a dynamic concept, in touch with living reality, which after all is based on the development of the human person to whom they pertain. It can therefore be said that Human Rights are perfected in the manner of an idea that undergoes the process of becoming reality. This entails values which in themselves exist. Their existence cannot be denied but the appreciation we have of these principles and their formulation as laws comes from putting them into practice.

An excellent demonstration of what we are saying is to be found in the words of Benedict XVI to the United Nations: '...As history proceeds, new

[38] John XXIII, Encyclical letter *Pacem in terris*. Rome 11.04.1963, num. 9.

situations arise, and the attempt is made to link them to new rights. Discernment, that is, the capacity to distinguish good from evil, becomes even more essential in the context of demands that concern the very lives and conduct of persons, communities and peoples. In tackling the theme of rights, since important situations and profound realities are involved, discernment is both an indispensable and a fruitful virtue'.[39]

It cannot be denied that the unfinished process of creation, in which man participates through his activity, constantly presents new scenarios that demand new responses, ones that only man can provide with correct judgement. Our reason is a constantly developing power that can enable the appreciation and knowledge of rights that have their basis in the dignity of the person to be updated in every historical moment. This does not mean the creation of new rights, but rather perception of the ramifications of the essential right of the person whose personal dignity and inherent rights are recognised and respected.

This is why His Holiness Benedict XV appeals to *discernment* as an instrument for such updating, for such development of the only nucleus, human dignity, as a source of all human rights. Once again, the leading role in the process lies within man himself. '...Discernment, then, shows that entrusting exclusively to individual States, with their laws and institutions, the final responsibility to meet the aspirations of persons, communities and entire peoples, can sometimes have consequences that exclude the possibility of a social order respectful of the dignity and rights of the person. On the other hand, a vision of life firmly anchored in the religious dimension can help to achieve this, since recognition of the transcendent value of every man and woman favours conversion of heart, which then leads to a commitment to resist violence, terrorism and war, and to promote justice and peace'.[40]

In order to efficiently guarantee Human Rights, it is therefore essential that their origin and basis be placed in the *transcendental value of all men and women*, in what we have called the recognition of the dignity of the human person as such. This principle guarantees the essential immutability of human rights. It is the guarantee that the capriciousness that can arise from the changing situations of life does not alter the substance of Rights that belong to the human person by virtue of his very humanity.

[39] Benedict XVI, *Address to the General Assembly of the United Nations*. New York 18.04.2008; paragraph 9.

[40] Benedict XVI, *Address to the General Assembly of the United Nations*. New York 18.04.2008; paragraph 10.

Although we have entrusted discernment, which is the same as reason, and the conscience of the creature with the work of developing human rights in a historical context, both as regards time and place, the possibility of errors of reason or conscience cannot be overlooked. Therefore, man must endeavour to build an informed conscience which he will have at his disposal for faithful accomplishment of the end, as a co-operator in the work of the creation. This is why, John Paul II, aware of the possibility of deeds being affected by errors of conscience said that: '...in order to have a "good conscience" (*1 Tim* 1:5), man must seek the truth and must make judgments in accordance with that same truth. As the Apostle Paul says, the conscience must be "confirmed by the Holy Spirit" (cf. *Rom* 9:1); it must be "clear" (*2 Tim* 1:3); it must not "practise cunning and tamper with God's word", but "openly state the truth" (cf. *2 Cor* 4:2). On the other hand, the Apostle also warns Christians: "Do not be conformed to this world but be transformed by the renewal of your mind, that you may prove what is the will of God, what is good and acceptable and perfect" (*Rom* 12:2)'.[41]

This possibility of error leads us to state that when Benedict XVI proposes discernment as the instrument for the development of Human Rights, he is not speaking of simply any discernment. On the contrary, paraphrasing John Paul II, he is specifying an informed discernment; discernment based on truth. Ultimately, a discernment based on man, on his origins and his end.

From all we have said, and following the line of John XXIII, Human Rights, by their very nature, are *inviolable*, since, to violate them is tantamount to denying the transcendental dimension of the human person and his inalienable dignity. Because Human Rights are inviolable, the respect of the entire community for such rights and the exercising of such rights must be guaranteed. Any right, whatever it may be, which fails to beget obligations of the community for its efficient application, is a statement bereft of content. The guarantee of its exercise, the demand for which is even greater when we speak of the rights of the person, is linked directly to the human condition itself; it is, therefore, distant, because this is insufficient, from the will of legislators and authorities, whose power is limited to the recognition of rights and to their observance for the purpose of a correct order in life in common. This authority does not extend to the creation of rights or to their concession.

[41] John Paul II, Encyclical letter *Veritatis splendor*. Rome 06.08.1993, num. 62.

In addition to all this, they must also be *irrenounceable and inalienable*. Human Rights do not form part of the commerce of man. They cannot be renounced, as this would be tantamount to renouncing the human condition itself – a gift from God – nor can they be passed on because, being universal, the acquirer is already the owner of a full right, equal in extension and intensity. They are not tradable goods, because, in addition to renouncing his own dignity, the man would be availing of a right that God had entrusted to him to be exercised and administered correctly.

At this juncture, a question arises that has been present from the beginning. Is respect for Human Rights, all human rights, guaranteed by the man of today, in the awareness of the inalienable dignity of every human person? In the light of the Universal Declaration of December 10th 1948, is the determination to ensure their defence and efficiency deeply rooted in man? In other words, can it be said that this manner of being, this Christian anthropology, impregnates the consciences and guides the actions of the peoples of today?

A reference to Human Rights of economic content

At the beginning of our reflections on the specific nature of human rights that enter the realm of economic activity, an activity placed at the service of man, I am overtaken by a series of doubts regarding the phenomenon that condition and, at the same time, are conditioned by the decisions of the human person when he chooses amongst alternatives in a rational manner. And all this from a perspective that requires little elaboration, given that these rights clearly have very limited, if any, effectiveness in the world of social and economic reality. Consequently, these lines will give rise to more open questions than answers regarding the problems underlying the area under study.

Efficiency is expected of any rule, to such an extent that a rule lacking efficiency might well considered as non existent. At best it is reduced to a mere guide on human conduct to be followed or not, as the case may be, by individuals, with no other result than the one produced deep within each actor.

It is, therefore, worth examining the nature of the rights proclaimed in the Universal Declaration of 1948. It is said of these rights, and it could hardly be otherwise, that their owner is the person. His dignity and intrinsic value is solemnly recognised and the rights are founded on his attributes. The declaration could not be more expressive: 'Everyone is entitled to

all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[42]

When the Declaration proclaims that the person is the possessor of *all rights,* it is simply stating an utterly irrefutable principle: that the rights contemplated, and those that might derive from their updating in times to come, constitute a single and integral whole. Therefore, it is inconceivable to attend to the guarantee of some rights and not to that of others. It is even less conceivable that the possession of some universally recognised rights is acknowledged, while that of others is denied. Such a supposition would be the equivalent of saying that some persons are born superior to others and that, because of their superior human condition, they possess more rights. In the Declaration itself at the beginning of the section dealing with provisions, it is clearly established that 'All human beings are born free and equal in dignity and rights'.[43]

To divide the recognised and proclaimed rights into fragments of themselves, in such a way that there is greater stimulus to respect some in preference to others, would be equivalent to denying the very essence of Human Rights: the human person. In the words of Benedict XVI '...the universality, indivisibility and interdependence of human rights all serve as guarantees safeguarding human dignity. It is evident, though, that the rights recognized and expounded in the *Declaration* apply to everyone by virtue of the common origin of the person, who remains the high-point of God's creative design for the world and for history. They are based on the Natural Law inscribed on human hearts and present in different cultures and civilizations. Removing human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks'.[44]

It is evident that Human Rights, insofar as they belong to the human person, have the same entity as that human person: unity, integrity, indivis-

[42] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 2.

[43] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 1.

[44] Benedict XVI, *Address to the General Assembly of the United Nations*. New York 18.04.2008; paragraph 6.

ibility and, therefore, plenitude in the person, whose ownership of these rights derives from his dignity. This being so, what reason exists for certain rights to be given, at least in terms of social perception, a higher rank than others? It can be seen how respect is claimed for these rights, when those perceived to be of a higher rank are contravened. However, we must sadly state that their perception as having a higher rank does not result in the guarantee of their universal respect. I refer to the right of each individual to life, liberty and security of person (art. 3 of the *Declaration*), or to create a family (art. 16 of the *Declaration*), or to the recognition of their legal personality (art. 6 of the *Declaration*), or to be protected by the law (art. 7 of the *Declaration*), or the right to nationality (art. 15 of the *Declaration*), or to circulate freely and set up a residence (art. 13 of the *Declaration*), or the right to property, individual and collective (art. 17 of the *Declaration*), or the right to education and that of parents to choose the type of education for their children (art. 26 of the *Declaration*), etc.

It is clear that, in the case of all these rights and others omitted, in order to be brief, there is a social and public awareness of the duty to respect them and faithfully comply with them. This is true to the point that when they are not fulfilled in a given nation, cunning explanations are sought to cover up such infractions. In some cases, arguments of a scientific nature are offered, whilst, in others, reasons related to opportunity or convenience are present. Sometimes, it is simply declared that the rights are fully in force, when it is obvious that they do not enjoy any protection whatsoever.

Distinct consideration is given to the effective guarantee of other rights proclaimed in the Declaration and, as with most of those mentioned previously, they are incorporated literally into the different constitutions, which, as such, constitute the Law enacted by a superior order, which is the inspiration for legal-positive legislation. Let us consider, for example '...right to social security and... to realization... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality',[45] or '...right to work, to free choice of employment... to protection against unemployment... to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity...'.[46]

[45] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 22.

[46] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 23.

Perhaps the most ambitious of the human rights of an economic nature is represented by the proclamation in the Declaration that, 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...'.[47]

The description of each of the rights declared could not be more unequivocal. All have a positive content and, though the quantitative extent of protection could be subjected to some examination, it is indisputable that they are related to the dignity of the human person. Therefore, nobody should be the object of humiliation as a result of the degree of effectiveness of these rights. Furthermore, every right of a person, gives rise to a duty on the part of the rest of the community to protect that right, make it effective and ensure its complete fulfilment.

If this is the case, if the rights proclaimed in the Universal Declaration of 1948 are personal, inherent to the human person owing to the dignity that is part of him, if they are inalienable and irrenounceable, what can be said of the millions of people in the world suffering from unemployment, when every person has a right to work, and a substantial number of unemployed have neither benefits nor subsidies to alleviate their situation, when unemployment protection in order to guarantee standard of living is an established right?

Something similar could be said regarding the right to housing or clothing, ultimately, the right to a *decent standard of living*, corresponding to the dignity of man, when we see a third world, a world somewhat euphemistically called developing world, where there is a lack of the most essential necessities for the basic subsistence of human beings: hunger, disease, violence, death, extermination... these are situations also shared, almost in their entirety, by a fourth world, situated within the first world, living in the margin and ending up in exclusion. Where is the voice to claim the effectiveness of what is proclaimed in the Universal Declaration? Who is willing to listen to the voice of those who have no voice? Could it be that the proclamation is a necessary part of a political Declaration, when there is an underlying consensus that nothing can be done and that these are situations that must be fatalistically accepted?

Perhaps we are faced with the comprehensive statement of Adam Smith: 'Each sovereign, expecting little justice from his neighbours, is disposed to

[47] United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations on 10th December 1948, art. 25.

treat them with as little as he expects from them. The regard for the laws of nations, or for those rules which independent states profess or pretend to think themselves bound to observe in their dealings with one another, is often very little more than mere pretence and profession. From the smallest interest, upon the slightest provocation, we see those rules every day, either evaded or directly violated without shame or remorse'.[48] In all probability, we are in a situation similar to that described in the text of the Scottish author: *rules evaded or violated, in the absence of shame or remorse*.

Since twenty centuries ago, we have been instructed in the universal destiny of goods, given that the goods of the Creation were created for all humanity and not just part of it. We are given the example of the Samaritan taking pity on and coming to the aid of the beleaguered man he meets along the way; we are offered the image of greatness presented by the opportunity given by the poor, to sit them at our table so that we might share with them the goods with which God has favoured us; we are taught the sense of fraternity and the practice of virtue as instruments that bring man closer to his perfection; we are encouraged to share, not just the superfluous, but also the necessary. Has this entire seed fallen on infertile ground? Is the enjoyment of full rights for some compatible with the lack of many such rights for others? Does the employed person know and appreciate the feeling of frustration and social marginalisation of the unemployed, particularly the long-term unemployed? Similar questions can be asked of each and every member of a community, because, in the words of John Paul II, when defining solidarity, this '...it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all'.[49]

Nobody can remain distant from this reality because, in the ancient theory of law, every right in itself gives rise to a duty. The owner of a right is entitled to exercise it, with no limitations beyond those deduced as the configuration of the extent of its field of effectiveness. But, at the same time as this legal entitlement enables the owner to exercise that right, the converse of this right is the obligation or duty that falls on the community and is represented by the coherence of life with the right that is exercised. This implies a necessary respect for the rights of others and the exercise of such

[48] Adam Smith, *The Theory of Moral Sentiments*. Edited by D.D. Raphael and A.L. Macfie. Liberty Classics. Indianapolis 1982. Part VI, Section II, Chap. II, paragraph 3; p. 228.

[49] John Paul II, Encyclical letter *Sollicitudo rei socialis*, Rome 30.12.1987, num. 38.

rights and also the obligation to ensure that the exercise of this right is effective and not simply a token of goodwill or a proclamation bereft of content. It must be borne in mind that '...Every basic human right draws its authoritative force from the Natural Law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfil them, is like building a house with one hand and tearing it down with the other'.[50]

Therefore, we must all strive to ensure that rights of an economic nature are also efficient in the real world and are not reduced to simple speculation. Is this possible with the man of today? Adam Smith's presentation of the motivation of individuals hardly inspires hope: 'It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow-citizens. Even a beggar does not depend upon it entirely. The charity of well-disposed people, indeed, supplies him with the whole fund of his subsistence. But though this principle ultimately provides him with all the necessaries of life which he has occasion for, it neither does nor can provide him with them as he has occasion for them'.[51]

It is in Adam Smith's work itself that we discover the confirmation of a quite different personality. These, the butcher, the baker and the brewer, are engaged in productive activities in a competitive market, a market that ensures the efficient allocation of scarce resources. An efficient allocation whose guarantee is based on the fact that these are economic activities carried out with economic goods, goods that can be exchanged on the market through the use of the price mechanism. But man has more noble spheres of action, which cannot be placed within the simple framework of the market subjected to the mechanism of prices. Underlying such behaviour is altruism, the commitment to others, the desire to help others. In this behaviour, selfishness gives way to a preference for the interests of others.

[50] John XXIII, Encyclical letter *Pacem in terris*. Rome 11.04.1963, num. 30.

[51] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*. General Editors R.H. Campbell and A.S. Skinner. Textual editor W.B. Todd. Liberty Classics. Indianapolis 1981. Vol. I, Book I, Chap. II, Paragraph 2; pp. 26-27.

Smith says: 'The wise and virtuous man is at all times willing that his own private interest should be sacrificed to the public interest of his own particular order or society. He is at all times willing, too, that the interest of this order or society should be sacrificed to the grater interest of the state or sovereignty, of which it is only a subordinate part. He should, therefore, be equally willing that all those inferior interest should be sacrificed to the grater interest of the universe, to the interest of that great society of all sensible and intelligent beings, of which God himself is the immediate administrator and director'.[52]

In the light of this passage, the existence of a duality of sentiments in the human person can be asserted, as can the fact that they may be in some way compatible. Models which, distant from their principles, they communicate with each other and form part of wider spheres.

One model would be that presented by the butcher, the baker, and the brewer who, committed to the rational and efficient use of scarce resources, allow themselves to be guided by this end, the end of efficiency for the purposes of achieving the best possible result for their activity: to achieve, with the minimum resources, the maximum satisfaction for the greatest possible number of members of the community. The guiding lights – paths to follow – and the warning signals – areas to be avoided – are provided spontaneously by the market, in its own dimension and with its most visible instrument, none other than the mechanism of prices.

When the best has been achieved in the use of those resources, therefore resulting in the greatest accumulation of wealth for the community as a whole, we are faced with a second model, that of gratuity or a preference for the general interest over the individual interest. In this model, selfishness is renounced and gives way to benevolence, an attribute of the wise and virtuous. This model has the mission of ensuring that the wealth generated, benefits the entire community and not just part of it, with the rest left to live in poverty.

Why not trust everything to the market in the first model? Could man live with the avoidance of the consequences that the behaviour of the butcher or baker, carried out in exclusivity, would have for humanity? Or, in other words, would these characters omit such considerations when confronted by the poverty of their neighbours?

[52] Adam Smith, *The Theory of Moral Sentiments*. Edited by D.D. Raphael and A.L. Macfie. Liberty Classics. Indianapolis 1982. Part VI, Section III, Chap. III, paragraph 3; p. 235.

If we consider the right to work that is proclaimed, does it not seem logical that the baker, brewer and butcher would be willing to reduce their personal salaries – perhaps also with a reduction in working hours – so that their children could have access to a job, without the need to increase the total wage bill? Given that salary determines the cost of the work, and therefore limits the possibilities of production in the market, by way of this procedure, the son would also exercise his right to work, without the need to contravene the laws of economic efficiency in the use of resources. Making the right to work effective involves making effective the fulfilment of the person as a co-operator in the work of the Creation and in the service of society itself. This is not achieved by unemployment benefits or subsidies, which must always be considered a last resort and used as an instrument by which the economic system attempts to alleviate the situation of the unemployed person, who is a victim of the failure of the system.

We cannot confuse what is central with what is an accessory, though the latter can frequently become a priority when the former fails. The terms used in Genesis are particularly eloquent as regards the place occupied by man in the Creation and, therefore, the mandate he receives from the Creator. 'Man has to subdue the earth and dominate it, because as the "image of God" he is a person, that is to say, a subjective being capable of acting in a planned and rational way, capable of deciding about himself, and with a tendency to self-realization. As *a person, man is therefore the subject of work.* As a person he works, he performs various actions belonging to the work process; independently of their objective content, these actions must all serve to realize his humanity, to fulfil the calling to be a person that is his by reason of his very humanity'.[53]

The fulfilment of man in his humanity is what work seeks to achieve; this is the man that feels himself to be a co-operator in the project of the Creation; it is the man who feels himself useful to society, to the community to which he belongs; it is the man who grows in skills, in knowledge, thereby cultivating the attributes and talents given him by God.

What prevents this from being possible? The answer lies in the selfishness of the butcher and his colleagues, contemplated in the text of Smith. A selfishness that creates the situation that leaves one of their sons unemployed, and who knows how many sons of those unacquainted to them. The latter are, however, their brothers in a community of men known as the *human family*.

[53] John Paul II, Encyclical letter *Laborem exercens*. Castelgandolfo 14.09.1981, num. 6.

And what we have said with respect to the right to work could also be said of the right to decent housing. Will the baker achieve ease of conscience living in certain comfort, in the knowledge that his son and grandchildren lack a home and wander errantly each day in search of refuge? Would he not reduce his comfort in order to share with them a modest dwelling? And is it so difficult that the benevolent attitude he shows to his son might be extended to other members of the community, be they acquaintances or not, who suffer similar shortages?

If what we are saying, appears to at least bear some proximity to the real world, it is easy to accept that deep down within man lie two tendencies engaged in a permanent struggle: the path of selfishness, which undoubtedly can provide short-term and ephemeral satisfaction, and the path of gratuity, of commitment, of benevolence, which in both the short term and the long term enable a greater degree of happiness. This is because the latter path is appropriate to man and only he has access to it. The horizon of man cannot be reduced to a purely material scheme, one similar to the role of raw materials or goods produced in economic activity or even the role carried out in such economic activity by living beings of the animal or vegetable world. Man, because of his dignity, occupies a privileged place above the rest of what is created and, therefore, his superiority shines within him: a superiority that enables him to appreciate and possess what exists outside the material world. Ludwig von Mises expresses this in a very natural manner: 'It is arbitrary to consider only the satisfaction of the body's physiological needs as "natural" and everything else as "artificial" and therefore "irrational". It is the characteristic feature of human nature that man seeks not only food, shelter, and cohabitation like all other animals, but that he aims also at other kinds of satisfaction. Man has specifically human desires and needs which we may call "higher" than those which he has in common with the other mammals'.[54]

If we consider what is pursued by an action, any action and every action carried out by man, we shall have no difficulty in including amongst the objectives of human action, those of a higher rank, those needs or desires which, in the words of Mises, are *higher*, more in keeping with man, that is, the immaterial and spiritual objectives. '...Acting man is eager to substitute a more satisfactory state of affairs for a less satisfactory... The incentive that impels a man to act is always some uneasiness...

[54] Ludwig von Mises, *Human action. 'A treatise on economics'*. William Hodge and Company Limited. London, Edinburgh, Glasgow, 1949; pp. 19-20.

But to make a man act, uneasiness and the image of a more satisfactory state alone are not sufficient. A third condition is required: the expectation that purposeful behaviour has the power to remove or at least to alleviate the felt uneasiness. In de absence of this condition no action is feasible...'[55]

Indeed, was it not a feeling of discomfort that drove the butcher to share his job with his unemployed son? And was it not discomfort that moved the baker to reduce his physical comfort to provide a decent dwelling for his son and grandson? Then, unless their behaviour was irrational, it has to be concluded that the well-being or degree of satisfaction afforded by their actions is, in both cases, greater than the discomfort suffered by them owing to the decrease in salary, in one case, and the reduction of comfort, in the other.

Perhaps the problems lies in the possible asymmetry between the *micro* consideration, applied to the closest relations in a very narrow social circle, and the *macro* consideration, affecting humanity as a whole, which nonetheless we are not embarrassed to identify as the human family.[56] It is clear that from the individual perspective, the macro task of guaranteeing the efficiency of all human rights, including those of an economic content seems daunting and in fact, in all probability, it is. Nonetheless, for the achievement of this objective, individual conduct, in addition to the direct rewards produced, serves, in an indirect manner, as an example and stimulus to those who contemplate such conduct and who, considering it to be exemplary, opt to emulate it.

Smith clearly distinguishes the two levels and the duties pertaining to them. He states: '...The administration of the great system of the universe, however, the care of the universal happiness of all rational and sensible beings, is the business of God and not of man. To man is allotted a much humbler department, but one much more suitable to the weakness of hid powers, and to the narrowness of his comprehension; the care of his own happiness, of that of his family, his friends, his country: that he is occupied in contemplating the more sublime, can never be an excuse for his neglecting the more humble department'.[57] The conviction that from the micro

[55] Ludwig von Mises, *Human action. 'A treatise on economics'*. William Hodge and Company Limited. London, Edinburgh, Glasgow, 1949; pp. 13-14.

[56] *Vide* United Nations, *The Universal Declaration of Human Rights*. Resolution adopted by the General Assembly of the United Nations, on 10th December 1948; Preamble, first paragraph.

[57] Adam Smith, *The Theory of Moral Sentiments*. Edited by D.D. Raphael and A.L. Macfie. Liberty Classics. Indianapolis 1982. Part VI, Section II, Chap. III, paragraph 6; p. 237.

sphere, macro objectives can be achieved, has been ever-present in the work of the Scottish economist.

To a large extent, this principle is responsible for the frequent confusion regarding Adam Smith's individualism and his formulations favouring selfishness and self-benefit as the single and ultimate driving force of economic activity. The reality is quite different and in it the good of the community, the common good, is present and plays a decisive role. Another matter is to consider whether this objective of the common good is guaranteed more on the basis of individual behaviour or on the basis of a hypothetical collective activity. In this context, let us remind ourselves of a passage in the Wealth of Nations: 'Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society'.[58]

The true objective is, therefore, the *employment most advantageous to the society*, though Smith considers that this is best achieved, albeit it not consciously, by each member of society making the most beneficial use of resources for themselves as individuals. We cannot forget that for the classical world there is no qualitative disassociation between the singular person and the community as a whole. The difference is merely quantitative.

An equivalent dimension is to be found in a text of Ricardo, in which he states: 'Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically: while, by increasing the general mass of productions, it diffuses general benefit, and binds together by one common tie of interest and intercourse, the universal society of nations throughout the civilized world'.[59] Ricardo is con-

[58] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*. General Editors R.H. Campbell and A.S. Skinner. Textual editor W.B. Todd. Liberty Classics. Indianapolis 1981. Vol. I, Book IV, Chap. II, Paragraph 4; p. 454.

[59] David Ricardo, *The Principles of Political Economy and Taxation*. London: John Murray, Albemarle Street, 1817. Third Edition 1821. In Sraffa, Piero (Ed.) 'The Works and Correspondence of David Ricardo'. Vol. I, *On the Principles of Political Economy and Taxation.* Cambridge University Press, Cambridge 1951, pp. 133-134.

cerned with universal welfare, which, given the qualitative relationship identity between the universal and the individual, the former is achieved more efficiently by means of the latter. The subject is ultimately better capable of appraising and coming to know the true dimension of the latter.

When we go from what pertains to the individual to the realm of the common and, when it comes to judging the efficiency or inefficiency of economic human rights, we must question ourselves on the stimuli that cause man to act in one way or another in his economic activity. In all probability, this question had a permanent place in the analysis of the Classical economists, and hence, their observations and conclusions.

Is man this subject committed to humanity and separated from the self, in order to achieve greater welfare for society as a whole? How then can we explain the incentives and disincentives of material, power or dominion nature, which are constantly at work in the conditioning of the decision of the economic subject? It is indeed true that universal good, the guarantee and effectiveness of human rights for each and every man, should be the most powerful stimulus to ensure that the action of the human person is aimed at benefiting all humanity.

Nonetheless, it is true that selfishness, envy, resentment, are present in the human mind and they awaken the least noble of passions and sentiments in the person. They lead him to distance himself from the project of life that distinguishes him from the other beings of the Creation, as a rational and free being in the image of the Creator. This is true to such a degree that perhaps there is not an abundance of those people exclusively motivated by humanity and benevolence.[60] Such people require no other incentive to act in the benefit of society and the image of the privileges and inequality of some people or groups does not represent a disincentive to their action. Their ultimate aim is the good of the community.

What can be done in the face of actions exclusively determined by self-interest, in the absence of the common good? Can the sociability of the human person, essential to the Creation, continue to be affirmed when man acts in his own interests, and pays no heed to the common good? Can the wealth and well being of the individual, the motives behind economic materialism, displace within the person his commitment and responsibility to the human family? There is absolutely no room for doubt: '...The economy

[60] *Vide* Adam Smith, *The Theory of Moral Sentiments*. Edited by D.D. Raphael and A.L. Macfie. Liberty Classics. Indianapolis 1982. Part VI, Section II, Chap. II, paragraph 16; p. 233.

in fact is only one aspect and one dimension of the whole of human activity. If economic life is absolutized, if the production and consumption of goods become the centre of social life and society's only value, not subject to any other value, the reason is to be found not so much in the economic system itself as in the fact that the entire socio-cultural system, by ignoring the ethical and religious dimension, has been weakened, and ends by limiting itself to the production of goods and services alone'.[61]

It is, in effect, the absence of moral values, those values that determine the condition and greatness of the human person, which determines the state of matters at this point in time. This is the cause of the weakness and injustice at the heart of the human family itself. This is the cause of the lack of guarantee for the complete effectiveness of human rights, including those of an economic nature. This is the main problem confronting humanity. With great vision, Paul VI said: 'Human society is sorely ill. The cause is not so much the depletion of natural resources, nor their monopolistic control by a privileged few; it is rather the weakening of brotherly ties between individuals and nations'.[62]

Of course, this is the common denominator of many of the ills of humanity and the principal cause of the elusion of commitment to human rights in their entirety. It is, more specifically, the cause of the ineffectiveness of human rights of an economic nature. In the absence of fraternity, the economic sphere becomes a field of competitive struggle rather than cooperation, a field that favours the prevalence of the strongest and the exclusion of the weakest.

It will be thought that the guarantee of human rights, which is the specific preoccupation of these pages, can only be achieved through determined public action, which would solve a problem that private action has been unable to deal with. The reality does not inspire hope. Public Sector activity during the twentieth century and the beginning of the twenty first has been wide and deep, and I do not wish to say that it has had no any favourable effect. Nevertheless, this action, which ultimately comes down to levying the income of the subjects in the form of direct or indirect taxes to boost the public budget in order to spend such public resources on goods and services for the good of the community, is also influenced by the effects of providing incentives and disincentives to the individuals as regards pro-

[61] John Paul II, Encyclical letter *Centesimus annus*. Rome 01.05.1991, num. 39.
[62] Paul VI, Encyclical letter *Populorum progressio*. Rome 26.03.1969, num. 66.

ductive efforts and the creation of income and wealth, without which the Public Sector would be totally sterile.

Such attitudes as the elusion of entrepreneurs and professionals regarding the possibilities of job creation and of income generation, as a result of a disincentive caused by what they consider an excessive fiscal burden, or, on the contrary, the lack of interest of an unemployed person to look for a work position, determined by the incentive for him to perceive a subsidy without any effort, show how the political measures better guided to the common good, bring us just to the opposite results, when they are applied in a community guided by material ends, neglecting man's own nature in its social dimension and committed with the good of the human family.

It is not to the Public Sector where we must address our action. I do not mean that it cannot have a positive result, albeit always a partial one, and indeed it has had some positive effect. As John Paul II said, it is on man, and not on the system or structures, that we must place the responsibility and focus the appeal. It is necessary to get rid of the *old man*, so that the *new man* can appear. It is necessary to recover the countenance of the *Imago Dei* with which he is endowed through the will of the Creator. For this, there is only one way: the conversion that determines a change of attitude. 'For Christians, as for all who recognize the precise theological meaning of the word "sin", a change of behaviour or mentality or mode of existence is called "conversion", to use the language of the Rihle (cf. *Mk* 13:3-5, *Is* 30:15). This conversion specifically entails a relationship with God, with the sin committed, with its consequences and hence with one's neighbour, either an individual or a community. It is God, in "whose hands are the hearts of the powerful" and the hearts of all, who, according his own promise and by the power of his Spirit, can transform "hearts of stone" into "hearts of flesh" (cf. *Ezek* 36:26)'.[63]

CONCLUSION

Humanity has always needed the reference of a Law coming from a superior order to the laws dictated by man. There are two reasons for this: the first is to illuminate the legislative activities of the institutions to which such legislation has been entrusted and the other, of no less importance, is

[63] John Paul II, Encyclical letter *Sollicitudo rei socialis*. Rome 30.12.1987, num. 38.

to enable the community to use this reference provided by the superior Law to determine the justice or injustice of laws passed by men. Otherwise, how and by what benchmark, could the community decide whether a law passed by a parliament or even by a referendum of all the people was an unjust law? Should the most aberrant and destructive law for humanity itself be considered just simply because it has been passed by the competent authority?

The Universal Declaration of Human Rights of 1948, and the texts deriving from it in several spheres, represents a formal commitment from the signatory nations to respect the rights therein proclaimed. It also serves as a reminder of the minimum specific objectives, which must be guaranteed to make real the recognition and protection of the human person, every human person. '...it is necessary to recognize the higher role played by rules and structures that are intrinsically ordered to promote the common good, and therefore to safeguard human freedom. These regulations do not limit freedom. On the contrary, they promote it when they prohibit behaviour and actions which work against the common good, curb its effective exercise and hence compromise the dignity of every human person'.[64]

Even with the presence of the Universal Declaration, it must be acknowledged that much remains to be done. A good number of the rights proclaimed therein are only partially complied with, whilst others are totally ignored. Amongst the latter, special mention must be given to human rights of an economic content. The difficulty is evident and perhaps the final result will be seen at the end of a long educational process. These rights are subject to the economic decisions of the subjects and therefore, fall under the influence of elements which provide incentives or disincentives for the action of the individual itself; actions related to productive effort, the objective of well-being, the actions of benevolence, magnanimity, solidarity, etc. with the rest of the community.

It is a question of commitment to the common good, in preference to the interests of individual good; it is a question of feeling the interdependence of the human family in its entirety, in the same way as interdependence is felt with the family in its narrower and more limited sense.

The Public Sector, with its activity aimed at ensuring the efficiency of these rights can be of great help, though it must not be forgotten that this

[64] Benedict XVI, *Address to the General Assembly of the United Nations*. New York 18.04.2008; paragraph 3.

activity involves a fiscal effort, on the one hand, and benefits for the least favoured, on the other. Neither case is exempt from the perverse effects that may arise as a consequence of the above-mentioned incentives and disincentives for the affected parties and which could make public activity sterile or at least narrow the field in which it can be applied.

Full guarantees would be achieved from the conversion of man. A conversion in which man, precisely because of his dignity, ceases to be enslaved by economic and material matters and the short-term in an individual dimension, and makes effective his sociability, committing himself to the good of the community, to at least the same degree to which he is committed to his individual good, and radiates generosity, commitment and solidarity, certain in the knowledge that he will be a greater man, a greater brother and a greater son of God. The rest, sustenance, carnal needs give rise to the lowest instincts of beings and are felt and pursued also by the other mammals of the Creation. Man is the only being capable of rationally resisting the temptations that attract perishable objectives, perverse attitudes, which denigrate and humiliate the human person, rather than exalting the dignity that is his greatest asset.

This new man will guarantee the complete efficiency of human rights and particularly those of an economic nature, in order to guarantee the effective reality of Human Rights in their entirety; without this entirety, the observance of Human Rights does not exist.

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I DIRITTI UMANI COME LATENZA DI TUTTI GLI ALTRI DIRITTI

PIERPAOLO DONATI

1. Il problema: i diritti umani e il principio di cittadinanza

1.1. La cittadinanza nazionale moderna, cioè il complesso dei diritti del *citoyen*, ha cercato di comprendere, per non dire di inglobare, in sé tutti i diritti dell'*homme*. E oggi prosegue su questa strada.

Parlare di varie generazioni di diritti (la prima, la seconda, la terza generazione di diritti, e così via) è rischioso, perché porta a rimanere dentro l'orizzonte della modernità, il quale consiste nel compiere un progetto evoluzionistico che tende ad allargare il numero (la lista) dei diritti soggettivi e ad estenderli in senso universalistico, a tutta la popolazione di un Paese e a tutti i Paesi.[1] Le forme sovra-nazionali di tutela e promozione dei

[1] Si veda, per esempio, quanto viene affermato nel documento preparatorio della XV Sessione Plenaria della Pontificia Accademia di Scienze Sociali (2009): 'Per la dottrina sociale della Chiesa, i diritti umani non hanno consistenza se non sono fondati su un'antropologia e su una comprensione del rapporto tra persona e società. La dottrina sociale ha tentato di specificare quali diritti fossero più fondamentali di altri, per la precisione quelli che derivano dalla natura della persona: diritto alla vita, all'integrità fisica e psichica, alla libertà di coscienza e di religione. Questi diritti sono consostanziali alla persona e non possono essere oggetto di una privazione da parte di nessuno. Si distinguono dai diritti inerenti alla persona in quanto membro della società, come i diritti civili e politici. Affinché questi diritti siano effettivamente riconosciuti, occorre che le condizioni ambientali vi si prestino. Una persona può essere privata di alcuni diritti civili, ma non dei suoi diritti fondamentali. Una situazione analoga si presenta con i diritti sociali e culturali. Quanto alla terza generazione dei diritti, diritto alla pace, ad un ambiente sano, diritto allo sviluppo, diritto alla differenza…, sono essi dei diritti? Sono piuttosto obiettivi da raggiungere, condizioni della realizzazione del "bene comune" al servizio del quale ogni autorità è costituita'.

diritti individuali (le Carte internazionali) seguono la medesima logica. Esse cercano di allargare i diritti soggettivi alle relazioni fra gli Stati e ai sistemi politici sovra-nazionali.

Ma questa logica evoluzionistica non funziona più.

La cittadinanza in senso moderno, per quanto la si allarghi con il riconoscere sempre ulteriori diritti soggettivi, non riesce ad abbracciare, né ad esprimere, i diritti dell'*homme*. Di conseguenza, i diritti dell'Uomo (i cosiddetti 'diritti fondamentali') devono essere ridefiniti chiarendo quali rapporti abbiano con i diritti di cittadinanza.

In gran parte del mondo, il principio di cittadinanza (in primo luogo la cittadinanza nazionale) è in grande difficoltà a proteggere i diritti della persona umana, sia quella dei propri cittadini, sia quella delle minoranze che in un determinato Paese non sono riconosciuti come cittadini (apolidi, immigrati irregolari, migranti con la cittadinanza di un altro Paese, *denizens*, ecc.).

Anche nei Paesi più modernizzati, il complesso dei diritti di cittadinanza nazionale è entrato da tempo in crisi. La crisi è destinata ad accentuarsi per ragioni che chiarirò.

Il fatto che in altre nazioni, meno modernizzate, appena uscite da regimi autoritari o da un assetto pre-moderno, la cittadinanza nazionale appaia ancora come una grande conquista da raggiungere (come è avvenuto di recente nei Paesi dell'est europeo, in particolare nei Balcani, e come è il caso del Medio Oriente e di tante aree del continente africano), non deve confonderci: anche queste nazioni incontreranno prima o poi la crisi della cittadinanza nazionale.

Le ragioni di questa crisi sono infatti iscritte nelle tendenze storiche del XXI secolo. Esse sono in gran parte da ricondurre a quel complesso processo di cambiamento epocale che chiamiamo 'globalizzazione', che per molti versi è ineluttabile.

La sfida è grande perché la cittadinanza moderna ha rappresentato una grande conquista di civiltà, e la crisi di cui parliamo può avere esiti fortemente regressivi.

Il problema che dobbiamo affrontare è allora il seguente: che senso dobbiamo attribuire alla crisi della cittadinanza nazionale? La cittadinanza nazionale deve essere abbandonata? Se sì, perché? Se no, come il principio di cittadinanza – a livello nazionale, sovranazionale o inter-nazionale – potrà e dovrà essere riconfigurato alla luce dei diritti umani?

In questo breve contributo cercherò in primo luogo di approfondire l'analisi della situazione. In secondo luogo, mi propongo di delineare gli scenari futuri e i possibili sbocchi.

1.2. Vi sono molte ragioni che portano alla crisi del complesso dei diritti di cittadinanza moderna, cioè l'insieme dei diritti che siamo soliti chiamare civili, politici, sociali e culturali.

Uno di questi motivi sta nella confusione fra tutti questi diritti. Per esempio, il diritto alla vita, il diritto all'integrità fisica e psichica, il diritto alla libertà di coscienza e di religione sono spesso citati da alcuni come diritti civili, mentre da altri vengono considerati come diritti naturali. Conosciamo le ragioni storiche di queste confusioni, che rimontano al giusnaturalismo moderno, sulle quali qui non mi intrattengo. Il diritto all'istrzione viene talvolta citato come diritto sociale e altre volte come diritto culturale. E così via. Manca una 'bussola' per ragionare sui diritti. Una bussola che deve essere in grado di distinguerli e allo stesso tempo di relazionarli fra di loro.

Queste confusioni sono nate e si sono sviluppate con la modernità.

È mia convinzione che non possano essere risolte dentro la modernità.

La mia opinione è che la forma statuale moderna (hobbesiana) della cittadinanza, che è nazionale, ma viene pensata anche a livello sovra-nazionale (per esempio nelle costituzioni degli Stati federali o di entità sovranazionali come nel Trattato Costituzionale dell'Unione Europea), sia entrata in una crisi irreversibile. Nuove costellazioni simboliche e strutturali alimentano nuovi processi 'costituzionali' che elaborano un nuovo senso di che cosa significa essere cittadini di uno Stato o di una comunità politica sovranazionale.

Si tratta di cambiamenti simbolici nel sistema culturale, a cui corrispondono – seppure con discontinuità e incongruenze – dei cambiamenti istituzionali nel sistema politico e sociale, e che hanno dei precisi correlati nei modi di agire, di pensare, di vivere della gente (la riflessività agenziale e le pratiche sociali che ne derivano: Archer 2007).

Di fronte a questi processi, sono oggi in campo tre tipi di risposte: 1) al primo tipo appartengono le proposte di mantenere l'universalismo moderno con *soluzioni neo-moderne* (per esempio il patriottismo costituzionale di J. Habermas, 1992); 2) al secondo tipo appartengono le proposte di imboccare la strada di una *cittadinanza multiculturale* (per esempio nella forma del costituzionalismo multiculturale di J. Tully, 1995); 3) il terzo tipo di proposte persegue una cittadinanza che, mantenendo e anzi sviluppando il nucleo centrale dei diritti umani fondamentali, anche con nuove costituzioni civili (e non solo politiche), *persegue i valori universali contenuti nei diritti umani articolandoli in un universalismo differenziato*, attuato attraverso un intreccio fra 'cittadinanza statuale' e 'cittadinanza societaria', a tutti i livelli dei sistemi politici, nazionali e sovranazionali.

Io cercherò soprattutto di illustrare questo terzo tipo di risposte. Mi muove la convinzione che l'idea di cittadinanza non sia affatto morta, ma che il principio di cittadinanza vada profondamente modificato alla luce delle sue complesse relazioni con i diritti umani, nel quadro dei processi di globalizzazione.

2. La crisi del principio di cittadinanza

Come si manifesta la crisi della cittadinanza nazionale e quali ne sono le cause?

2.1. *Come si manifesta*

La crisi della cittadinanza nazionale si manifesta come crisi del modello politico che ha informato di sé lo stato nazionale moderno. Quel modello è sorto con la soluzione hobbesiana dell'ordine sociale, dopo la pace di Westfalia (1648), è si è incarnato nell'assetto moderno degli Stati-nazione e, seppure in svariati modi, anche nelle relazioni fra gli Stati.

Quell'assetto mostra oggi una crescente perdita di sovranità e, più in generale, una crescente frammentazione interna dei sistemi politici nazionali. Il cardine di questo assetto, cioè il *welfare state* istituzionale e nazionale classico, non fa più passi in avanti, ma semmai fa molti passi indietro. Ciò genera paure, incertezze, rischi nella vita quotidiana. La società sembra diventare più liquida. La cittadinanza nazionale perde di ordine e di chiarezza: essa diventa meno gestibile per i governanti e meno esigibile per i governati.

Per reazione a questo stato di cose, si affacciano nuovi localismi e nuovi particolarismi. Viene rimesso in discussione il rapporto fra sistema politico e società civile. Le spinte alla *deregulation* e alla *devolution* – sorte inizialmente nei paesi anglosassoni e poi fatte proprie anche in tanti altri Paesi – sono solo due esempi dei tanti fenomeni che esprimono la crescente crisi della cittadinanza moderna.

In breve, la crisi si manifesta come perdita di autorità (legittimazione), di effettivo potere, di capacità di essere cemento culturale e sociale da parte dei sistemi politici nazionali. Le stesse costituzioni politiche sono sottoposte a tensioni fortissime. Si evidenzia la fine di quel ciclo storico che, a partire dall'Ottocento, ha istituzionalizzato la cittadinanza nelle costituzioni politiche classiche. Ciò è confermato dalla difficoltà di perseguire quelle

soluzioni che, rifacendosi al costituzionalismo kantiano, propongono di puntare ad un nuovo 'patriottismo costituzionale', come generosamente si sono espressi studiosi del calibro di Jürgen Habermas e tanti grandi uomini politici. Non intendo certamente sminuire l'importanza della tradizione repubblicana (il 'patriottismo repubblicano' che è il *genus* a cui si rifà la specie 'patriottismo costituzionale'), di cui condivido i valori di fondo. Sto semplicemente cercando di svolgere un'analisi spassionata delle difficoltà incontrate da questa prospettiva, per mettere in luce come essa potrebbe essere reinterpretata nel contesto della globalizzazione.

La ricerca di un nuovo principio-guida deve infatti rispondere ad una serie di esigenze che gli Stati nazionali non possono più soddisfare. Ne segnalo solo alcune: riconoscere i diritti alla salute degli immigrati irregolari o non cittadini, impedire la *mercificazione* del pianeta e l'uso squilibrato delle risorse naturali; ridurre o almeno contenere le crescenti *disuguaglianze* fra popolazioni che la globalizzazione porta con sé; riconoscere i *diritti all'identità culturale* dei popoli; combattere la *corruzione* che emerge su scala mondiale come effetto della crisi di legalità e dell'impotenza regolativa dei singoli Stati nazionali; estendere le istituzioni della *democrazia* in tutte le parti del mondo.

Queste sfide non possono più, ormai, essere affrontate mediante la cosiddetta 'soluzione hobbesiana dell'ordine', la quale concepisce il potere politico come delega contrattuale fatta dai soggetti di società civile che alienano i propri diritti allo Stato (o sistema politico-amministrativo, anche democratico) per garantire la sicurezza della loro *privacy*, in cui poter esercitare le loro libertà individuali alla sola condizione di non ledere le libertà altrui. Quella soluzione non può più mettere dei seri limiti ai processi di mercificazione, alle disuguaglianze, alla corruzione. La concezione puramente procedurale (formale) della democrazia è divenuta chiaramente insoddisfacente a fronte delle scelte di valore che debbono essere compiute. Anzi, in quanto sostegno di quella forma di ordine sociale che chiamiamo 'individualismo istituzionalizzato' o 'emancipativo', sono proprio le soluzioni di tipo hobbesiano che alimentano squilibri, alienazioni umane e difficoltà di governo della globalizzazione. Il caso di Internet è un esempio emblematico. Un altro caso è quello delle minoranze etniche e dei migranti che non hanno la cittadinanza dello Stato in cui risiedono.

Si veda il caso della cittadinanza europea. Le ben note difficoltà incontrate dal progetto di arrivare ad una Costituzione Europea sono una conferma eloquente di questa analisi.

2.2. *Quali sono le cause*

È utile distinguere fra cause interne ed esterne ai sistemi politici nazionali.

Le cause esterne hanno certamente a che fare con la globalizzazione. Per 'globalizzazione' deve intendersi, infatti, prima e sopra di ogni altra cosa, una nuova espansione dei mercati nella forma di un capitalismo prorompente su tutto il globo: i mercati internazionali fanno emergere dapprima le imprese multinazionali e poi le nuove reti commerciali e comunicative la cui caratteristica fondamentale è quella di non avere confini territoriali e di sfuggire al controllo degli Stati-nazione.

Le cause *interne* stanno nell'incapacità del modello di origine hobbesiana di risolvere i problemi sociali e, fatto non secondario, di non potere in alcun modo gestire i grandi cambiamenti che la modernizzazione porta con sé, quali sono una generale rivoluzione delle aspettative crescenti, la ricerca di una nuova qualità del benessere, e lo sviluppo della 'società in rete' (Castells 2002). Ciò avviene in tutti i campi, da quello del lavoro e della famiglia, a quello dei consumi e della comunicazione, da quello della scienza a quello della tecnologia. Soprattutto si rivela nell'emergere di una nuova società civile, quella che si costituisce nel mondo associativo ('associazionale') delle reti transnazionali.

3. Gli scenari futuri e le possibili risposte: la cittadinanza deve farsi post-nazionale

3.1. Gli scenari futuri sono segnati da due grandi linee di forza che tendono a minare la cittadinanza nazionale, per così dire 'dall'alto' (da ciò che sovrasta gli stati nazionali) e 'dal basso' (dall'interno del sistema politico nazionale). Le possiamo caratterizzare come tensioni di *governance* a livello istituzionale e come richiesta di nuovi diritti (soprattutto economici, sociali, culturali) da parte dei cittadini e dei soggetti collettivi della società civile.

i) Il primo scenario è caratterizzato dal fatto che, laddove la dinamica delle istituzioni nazionali non può più essere governata dalle forze nazionali, quelle economiche, sociali, politiche e culturali specifiche di un Paese, possono manifestarsi reazioni di sistema che vanno verso le tentazioni nazionalistiche o, viceversa, verso tentazioni di accentuato localismo. In ogni caso, il ritorno ad uno Stato nazionale forte – per esempio nella forma di nazionalizzazioni di settori centrali dell'economia e del welfare state – è

escluso. Questo scenario è improbabile, per quanto alcuni segnali temporanei possano renderlo possibile.

ii) Il secondo scenario è caratterizzato da una emergenza forte di nuovi soggetti, movimenti e reti sociali 'dal basso' che reclamano nuovi diritti, al di là di quelli già riconosciuti. Rientra in questo scenario l'emergenza di una nuova *cittadinanza societaria* (Donati 2000), cioè di una cittadinanza concepita come affermazione di un complesso di diritti-doveri che non fanno più capo allo Stato nazionale, ma a una pluralità di nuovi soggetti sociali, e in particolare alla valorizzazione del welfare civile, della economia civile, del terzo settore, del privato sociale.

Se il 'complesso (dei diritti-doveri) della cittadinanza' deve crescere e non diminuire, è evidente che queste due linee di forza debbono incontrarsi e intrecciarsi.

Le tensioni che, dall'esterno e dall'interno, dall'alto e dal basso, tendono a sgretolare la cittadinanza nazionale impongono nuove riflessioni su quale sia il *senso* della cittadinanza in una società *dopo*-moderna (definisco così la società che cambia le sue distinzioni direttrici fondamentali rispetto a quelle della modernità, per es. pensa in termini di sviluppo sostenibile e qualitativo anziché in termini di sviluppo illimitato e quantitativo; il termine non è da confondere con quello di società post-moderna, che indica invece la radicalizzazione problematica della modernità, inclusa quella forma che è stata chiamata della 'modernizzazione riflessiva': Beck, Giddens, Lash, 1999).

3.2. Se per cittadinanza intendiamo l'appartenenza di un soggetto, persona o formazione sociale, ad una comunità politica, e quindi l'inclusione in un complesso di diritti-doveri definito dal suo ordinamento, ebbene tale appartenenza può avere molte e diverse declinazioni. Infatti, la comunità politica può andare dalla singola città, alla regione, alla nazione, a entità sopranazionali o transnazionali, fino alla comunità mondiale.

Tali declinazioni contengono sempre due dimensioni, fra loro complementari: i) da un lato, la dimensione istituzionale, in base alla quale la cittadinanza implica un sistema di istituzioni, aventi un carattere democratico; ii) dall'altro, la dimensione dei diritti-doveri dei cittadini, sia come individui sia come membri di formazioni sociali (dalla famiglia, al sindacato, ai vari tipi di associazioni civili).

Sotto tale punto di vista, allora, possiamo dire che le istituzioni e il complesso dei diritti-doveri propri dell'assetto moderno della cittadinanza non sono più sufficienti. *La crisi della cittadinanza nazionale si manifesta come cri-*

si del rapporto fra cittadinanza statuale e cittadinanza societaria che deve essere risolta nel contesto della società globale, cioè di un *world system* che vede affacciarsi una nuova società civile mondiale. I crescenti processi migratori, il fatto che la società diventi necessariamente multiculturale, multietnica, sempre più pluralizzata, impongono nuovi confini alla cittadinanza.

La cittadinanza deve farsi post-nazionale. Che cosa significa questo?

3.3. In termini pratici, io credo che le strategie con cui è necessario guardare allo sviluppo di una cittadinanza post-nazionale siano sintetizzabili in tre punti.

1) *È necessario uscire dagli schemi centro-periferia* (per esempio nei rapporti fra comunità politiche sovranazionali e Stati, così come fra lo Stato e le sue articolazioni territoriali interne) *per orientarsi a schemi di rete*. Già oggi i contenuti della cittadinanza sono sistemi a rete. Per usare un termine di Luc Boltanski e Laurent Thévenot (1991), già oggi le città sono 'per progetto', le nazioni 'per progetto', e dunque anche la cittadinanza 'per progetto'. Lo stesso capita ai diritti umani. Anche i diritti umani vengono configurati 'per progetto', e inclusi in questo insieme di diritti di cittadinanza.

In concreto, ciò significa una articolazione territoriale dei sistemi politici a cui possono e debbono corrispondere costituzioni politiche adeguate ai territori, dalle costituzioni cittadine e civiche, a quelle regionali, statali e sopranazionali o transnazionali.

Detto in altre parole, la cittadinanza si fa *'glocale'*, ossia adegua i contenuti della cittadinanza che si globalizza alle realtà locali, ai concreti contesti situati. Un esempio è dato dalle 'Carte dei diritti-doveri di convivenza civile' che varie città in Europa hanno approvato per stabilire un nuovo Patto fra autoctoni e immigrati (si veda il caso del Comune di Bologna). Un Patto che non può più essere pensato nei termini del contrattualismo hobbesiano.

2) Un tale cambiamento non può essere effettuato in base alle ideologie tipicamente moderne, che risalgono al Sette-Ottocento. Per quanto i principi del liberalismo e del socialismo abbiano dato importanti apporti, occorre fare ricorso a nuovi principi, meno 'ideologici', più pertinenti alle nuove esigenze di valori di cittadinanza che debbono essere allo stesso tempo universali e contestuati. Questi principi sono quelli della sussidiarietà e solidarietà combinati assieme. Si tratta di *'globalizzare' i principi di sussidiarietà e solidarietà come criteri-guida di governance* dei sistemi politici.

3) Tutto ciò fa intravedere che la crisi della cittadinanza nazionale rimanda, per soluzioni valide, ad una nuova 'costituzionalizzazione della società'. Questa linea di affermazione dei diritti umani ha un carattere *dopo*-moderno

in quanto deve affrontare il problema della 'costituzionalizzazione dei diritti umani nelle sfere private'. Detto in sintesi, deve basarsi su un nuovo intreccio fra costituzioni *politiche* e costituzioni *civili*. Le prime definiscono i diritti di cittadinanza nella sfera pubblica, le seconde definiscono i diritti di cittadinanza nelle sfere private, come le imprese, le ONG, i soggetti del terzo settore (pensiamo, ad esempio, alla *corporate citizenship*).

In sintesi, la cittadinanza deve adottare soluzioni di 'glocalismo intelligente', il che richiede l'adozione di principi ispirati alla sussidiarietà e solidarietà combinati assieme, basandosi sui quali possa essere avviato un nuovo processo di '*costituzionalizzazione della società*' – della società, non solo del sistema politico – una costituzionalizzazione adeguata ad un'epoca *dopo*-moderna.

3.4. Ci si può chiedere quali applicazioni tutto ciò possa avere per la cittadinanza nazionale nel quadro di una governante internazionale. Come dobbiamo pensare l'una e l'altra?

A mio avviso, le difficoltà di realizzare una cittadinanza sovra-nazionale, se non proprio internazionale, derivano dal fatto che prevale ancora una concezione 'hobbesiana' della cittadinanza, mentre la società sta entrando in un'epoca post-hobbesiana. La costruzione della cittadinanza, a qualunque livello, si trova di fronte ad un'alternativa: mantenere la concezione hobbesiana della cittadinanza oppure abbandonarla a favore di una cittadinanza costruita su un principio allargato di sussidiarietà (verticale, orizzontale e laterale) come criterio di *governance* globale (Donati 2005). In altre parole, si tratta di accedere ad una '*complex governance*' (Willke 2008).

Le Costituzioni politiche, così come le Carte internazionali dei diritti, debbono essere ridefinite in base a criteri di differenziazione degli assetti di *polity* (e di *policy*) sia all'interno sia verso l'esterno. A mio modesto avviso, l'errore della cosiddetta Costituzione Europea (nella versione del Trattato costituzionale sottoscritto a Roma nel 2004) è stato quello di pensarsi ancora nei termini hobbesiani (come se Bruxelles fosse una sintesi dei governi nazionali e Strasburgo una sintesi dei Parlamenti nazionali).

4. Un nuovo complesso di diritti-doveri di cittadinanza alla luce dei diritti umani

Per quanto io possa vedere, esistono due grandi scenari o linee-direttrici di possibile sviluppo del principio di cittadinanza, nazionale e sovrana-

zionale: la via di un nuovo asse fra Stato e Mercato, insieme più liberale e più equitativo (la via *lib-lab*) e la via *sussidiaria*.

La linea *lib-lab* è quella di una certa continuità con il modello hobbesiano. La linea *societaria*, invece, propone un modello post-hobbesiano, in cui la cittadinanza viene definita come l'appartenenza ad una comunità politica (non necessariamente lo Stato, ma anche la singola città, le comunità maggiori e minori sul territorio, le entità politiche sovranazionali, fino al livello del sistema-mondo) che realizza una sussidiarietà complessa al suo interno e verso l'esterno.

La struttura federale, il federalismo, ha senso come combinato disposto di sussidiarietà e solidarietà fra i federati, altrimenti equivale a separatismo.

Va da sé che, assumere un principio complesso di sussidiarietà come modello regolativo e di *governance* del sistema-mondo, implica assumere per esso delle precise radici culturali, cioè il riconoscimento della dignità della persona umana e delle comunità o formazioni sociali intermedie, anziché alla loro cancellazione o diluizione in un sistema di valori astratti e relativistici. Siamo con ciò rimandati a ripensare *ex novo* il complesso dei diritti-doveri di cittadinanza alla luce dei diritti umani.

Possiamo prendere le mosse dalla più classica delle teorie della cittadinanza, quella di T.H. Marshall (*Citizenship and Social Class*, 1950) che è ancor oggi considerata come la teoria-principe della cittadinanza nelle scienze sociali. Ebbene, secondo Marshall i diritti di cittadinanza sono di tre tipi: diritti civili (diritto alla vita, diritto alle libertà individuali di coscienza e religione, i diritti di opinione, di stampa, di associazione, di giusto processo se accusati di reato, ecc.), diritti politici (ossia diritti elettorali e di rappresentanza, connessi al voto nei regimi democratici) e diritti sociali (o diritti di welfare).

Si tratta, come si vede, di una teoria quanto mai riduttiva dei diritti di cittadinanza. Non si parla di diritti culturali, né tantomeno di diritti umani. E certamente sono assenti tutti quei diritti che sono stati portati sulla scena dai movimenti sociali tra la fine del secolo XX e l'inizio del secolo XXI (movimenti femministi, ecologisti, pacifisti, ecc.).

La sociologia relazionale propone allora un quadro concettuale il cui obiettivo non è quello di stendere una lista di diritti, né una gerarchia *a priori* fra di essi, né tantomeno una successione storica, più o meno evoluzionistica, dei diritti. L'obiettivo è quello di avere una mappa, o meglio una *bussola* per orientarsi nel vasto campo dei diritti delle persone umane e delle loro formazioni sociali. Infatti, ogni cosa potrebbe diventare un diritto soggettivo: per esempio, il diritto a spazi verdi, il diritto all'acqua naturale,

il diritto a servizi e a strumenti tecnologici aggiornati, ecc., oltre ai diritti più elementari.

Questa bussola (fig. 1)[2] dice che il complesso dei diritti-doveri di cittadinanza ha quattro dimensioni fondamentali.

L) La dimensione del *modello di valore* (il criterio di valorizzazione, la sua distinzione-guida) che sottosta ai vari tipi di diritti e alle loro articolazioni e combinazioni. Per quanto riguarda i diritti dell'individuo, il modello di valore è la dignità della persona umana. Per quanto riguarda i diritti delle formazioni sociali (come la famiglia, ecc.) e delle relazioni sociali, è la loro peculiarità di relazioni che debbono essere virtuose e servire il bene.

I) La dimensione di *integrazione* del complesso dei diritti-doveri di cittadinanza. Corrisponde a tutti quei diritti che rendono effettivo il perseguimento degli altri diritti in quanto favoriscono relazioni di sinergia fra di essi. Si tratta dei diritti sociali in quanto si riferiscono non solo ai diritti di *welfare* (che fanno fronte ai *basic needs*), ma anche alla sicurezza e alla coesione del tessuto sociale.

G) La dimensione finalistica (*goal-attainment*, o 'politica' in senso analitico) del complesso dei diritti-doveri di cittadinanza. Essa si riferisce all'esercizio dell'autorità e del potere, dunque ai processi decisionali e alle forme di rappresentanza che debbono implementarli per realizzare quella comunità politica da cui deriva il bene delle singole persone e delle loro formazioni sociali.

A) La dimensione adattativa (ovvero strumentale in senso analitico) del complesso dei diritti-doveri di cittadinanza. Essa si riferisce a tutti quei diritti che sono mezzi per realizzare il bene comune. Così vanno intesi tutti i diritti individuali che riguardano l'effettiva salvaguardia dell'integrità fisica e psichica, le libertà individuali (che sono positive e non solo negative) e gli strumenti per difenderle (giusto processo, diritto di difesa, ecc.).

Sarebbe oltremodo lungo e oneroso commentare le relazioni e tutte le possibili combinazioni fra queste dimensioni del complesso della cittadinanza, alla cui base stanno i diritti umani come 'fondamento' di tutti gli altri.

[2] Per una migliore comprensione dello schema analitico della fig. 1: cfr. Donati 1991: cap. 4.

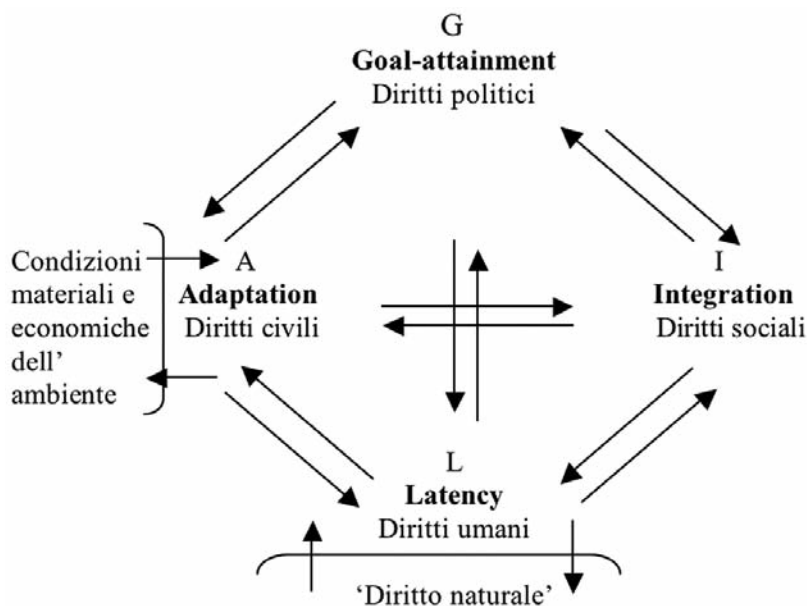

Figura 1. Il posto dei diritti umani in relazione al complesso dei diritti-doveri di cittadinanza.

Alla luce di questo quadro, si vede che nella teoria di Marshall sono presenti A (diritti civili), G (diritti politici) e I (diritti sociali di welfare), ma manca la L (che è sempre la più problematica). Si pone la domanda: che cosa può contenere la L dei diritti di cittadinanza? Ebbene, secondo la teoria relazionale, la risposta è: i diritti umani in quanto riferiti alla costituzione antropologica relazionale della persona umana. In altri termini, i diritti umani sono la dimensione latente di tutti gli altri diritti come loro 'modello di valore'. A loro volta, i diritti umani vengono definiti relazionalmente in rapporto all'ambiente (in senso sistemico) che li sostiene, cioè il diritto naturale. Il fatto di distinguere fra diritto naturale e diritti umani indica che la definizione, articolazione e gestione di tali diritti implica dei complessi processi di confine fra la dimensione della latenza (L) e l'ambiente della natura (umana e non solo).

Se ci si avvale di questo quadro relazionale, vediamo che i diritti umani possono essere di vario tipo. Per esempio possono riguardare l'identità culturale. Ma il loro senso più profondo sta nel fatto di essere diritti che ine-

riscono alla persona in quanto individuo-in-relazione, cioè alle relazioni umane che costituiscono la persona umana come tale (per es. il diritto del bambino ad una famiglia, così come il diritto all'educazione, ma non come ad un oggetto, bensì all'educazione come relazione).

Ma c'è di più. Secondo Marshall i diritti di cittadinanza sono emersi storicamente 'in fila indiana': cioè a dire, prima quelli civili, poi quelli politici, poi quelli sociali. Alla luce del quadro concettuale (AGIL della fig. 1), interpretato relazionalmente, ciò risulta essere solo una possibilità su numerose altre possibilità. Infatti, le quattro dimensioni dei diritti di cittadinanza (A,G,I,L) possono avere – sul piano storico – configurazioni e sviluppi storici assai diversi fra loro, in ragione dei gradi di libertà che esistono fra di essi. Di fatti, le ricerche storiche successive a Marshall hanno dimostrato che così sono andate, e tuttora vanno, le cose. Per esempio, in certi Paesi in cui si passa dalla dittatura alla democrazia politica con una rivoluzione, i diritti politici precedono spesso quelli civili. In altri Paesi, i diritti sociali esistono con scarsi diritti civili e con diritti politici solo di facciata (per esempio, nei regimi comunisti).

È importante comprendere la delicatezza del confine fra diritti umani e l'ambiente trascendente delle relazioni che definiscono e connettono i vari tipi di diritti.

5. Per concludere

La crisi del principio di cittadinanza deve essere trattata come una fase storica di cambiamento *epocale*, perché avviene in un contesto globalizzato che mette a confronto – anche in competizione – differenti culture regionali e nazionali, addirittura differenti civiltà, e impone loro di trovare una cittadinanza insieme più ampia (universale) e più situata (localizzata) rispetto a quella moderna.

Ciò può avvenire solo se i diritti umani sono considerati come la base (la funzione latente) di tutti gli altri diritti. Se vogliamo perseguire una 'società dell'umano' (Donati 2009), ogni e qualunque diritto che venga rivendicato dagli esseri umani deve trovare posto in questa cornice. Nella quale il complesso dei diritti-doveri di cittadinanza, a qualunque livello territoriale sia declinato, è in costante dialogo con i suoi ambienti, in primo luogo l'ambiente della costituzione antropologica relazionale della persona umana, e dall'altro gli strumenti che gli consentono di realizzare i fini propri e della comunità.

È finita l'epoca storica che ha costruito la cittadinanza sulla base della soluzione hobbesiana al problema dell'ordine sociale. Si è aperta un'epoca del tutto nuova, per la quale occorrono nuovi principi e nuove regole di democrazia più avanzata.

Se l'ipotesi del patriottismo costituzionale, per quanto idealmente apprezzabile, risulta insufficiente e non adeguata ai tempi, d'altra parte neppure l'idea di una cittadinanza ispirata all'ideologia del multiculturalismo risulta praticabile, perché provoca frammentazione della società, separatismo delle minoranze e relativismo culturale (Donati 2008).

La cittadinanza deve progredire in termini di un complesso più ricco e articolato di diritti-doveri delle persone e delle loro formazioni sociali, a tutti i livelli territoriali, dalle singole città, alle regioni, agli stati, alle comunità sopranazionali e alle relazioni internazionali.

Le molte discontinuità con la cittadinanza moderna sono chiare. Innanzitutto, si tratta di ampliare lo spettro dei diritti di cittadinanza, in direzione dei diritti umani, che vanno oltre quelli civili, politici e sociali della dottrina classica della cittadinanza (esemplificata da T.H. Marshall). E poi si tratta di andare oltre il carattere individualistico della cittadinanza moderna basata sull'asse Stato-individuo, per attribuire un complesso di diritti-doveri di cittadinanza anche alle formazioni civili intermedie fra Stato e individuo.

A questo proposito, va notato che il sistema politico non riesce ancora a vedere il Terzo settore e il Privato sociale come costituenti un polo simmetrico e autonomo rispetto a Stato e Mercato.

La crisi istituzionale degli attuali sistemi di cittadinanza si manifesta con tutta la forza che caratterizza l'evoluzione dei sistemi sociali, economici, politici e culturali, quando vanno incontro ad una crisi del simbolismo ultimo che li sostiene. Come insegna Eric Voegelin, quando la società va incontro ad un periodo di 'disintegrazione cosmologica', tutto viene rimesso in discussione e si deve procedere verso una nuova configurazione delle relazioni tra individuo, società e ordine cosmico. Il principio di cittadinanza non può sfuggire a questa sfida storica. Tale principio deve trovare un nuovo fondamento nei diritti umani.

Per la direzione del mutamento, è decisivo il fatto che sia disponibile una chiara e netta distinzione tra l'ordine sociale del presente storico e quello trascendente, in mancanza della quale la civiltà regredisce. L'esigenza cruciale di questa distinzione si evidenzia oggi in particolare sul tema dei diritti umani fondamentali, che possono essere riconosciuti e promossi solo se si riconosce il carattere trascendente della persona umana. Le frat-

ture di civiltà, e in particolare i conflitti sociali e culturali fra le nazioni, fra le 'patrie', potranno essere evitati solo se si riuscirà a mantenere come presupposto della civiltà umana il carattere trascendente della persona, e quindi la sua dignità pre- e meta-politica, non riducibile alle forme storiche di cittadinanza. Qui giace la grande sfida che i processi di globalizzazione pongono oggi alla ridefinizione del complesso dei diritti-doveri di cittadinanza, dal livello infra-nazionale a quello internazionale.

La dottrina sociale della Chiesa, sin dall'inizio, si è attestata su una posizione che riconosce e promuove i diritti umani in quanto rientrano nell'ordine naturale della creazione. Certamente, c'è stato qualche piccolo spostamento. Fino a Leone XIII, la visione dei diritti umani era di carattere oggettivistico e deduttivo: l'ordine sociale e umano dei diritti della persona veniva inferito dalla natura oggettiva (creata da Dio). I diritti erano pertanto fortemente connotati da un senso di obbligazione verso Dio e la creazione. Poi, a partire da Leone XIII, e sulla spinta della modernità, si è riconosciuta una certa autonomia all'ordine temporale, riconoscimento che è culminato nel Concilio Vaticano II (*Gaudium et Spes*).

Oggi giorno la dottrina sociale cattolica sembra cercare un qualche adattamento fra le sue premesse ontologiche trascendenti e un riconoscimento dei diritti umani che sia compatibile con tali premesse, valorizzando il soggetto umano entro il quadro della natura. L'obiettivo è sempre quello di contrastare ogni concezione dei diritti umani che sia di carattere soggettivistico e di tipo evoluzionistico induttivo, cioè una impostazione che rovesci le premesse oggettive e deduttive dell'ordine naturale. Non sono gli uomini che fanno i diritti. E tuttavia gli uomini possono dare una certa esplicitazione storica del diritto naturale che sia in qualche modo più 'evoluta'.

Con ciò, però, non è messo a tema il fulcro del problema, che è quello di comprendere la relazione fra natura e cultura nei diritti umani. Il problema non è come concepire i diritti umani culturalmente ammissibili – ma sempre in maniera deduttiva – dalla natura secondo lo schema 'natura→cultura' (ovvero: diritti naturali→diritti storicamente emergenti), comunque si declini questa inferenza. Il problema è uscire da una impostazione che continua ad evitare la questione di fondo, e cioè la visione della *relazione che connette* natura e cultura nei diritti umani. Occorre, in altri termini, elaborare una visione dei diritti umani che metta in relazione natura e cultura ('natura↔cultura'), concentrandosi sulla relazione come tale (cioè sull'azione reciproca fra i termini della relazione). Occorre, in breve, impostare il discorso su ciò che lega i diritti umani alla natura da un lato e alla cultura dall'altro *per via della mediazione che li connette*, cioè impostando il proble-

ma come questione del tipo: '*natura*←*relazione*→*cultura*'. Ho cercato di mostrare come questa impostazione sia utile nel trattare il tema dei rapporti fra i diritti dell'Uomo (natura) e i diritti di cittadinanza (cultura).

ABSTRACT

The current debate on human rights takes place within a historical and epistemological framework that is misleading, since it reproduces the mistakes of the basic assumption of modernity according to which the human rights (droits de l'homme) should be included into the citizenship complex of rights (droits du citoyen). The struggle for the recognition of the 'new rights' is lead by the same logic which has characterized the 'Hobbesian order' of the modern political system, both within and between nation-States. By this way, human rights are upset. The principle of citizenship, be it national or supranational, cannot embrace the human rights. Donati's thesis is that we need to rethink the complex of citizenship rights in relation to human rights as their 'latent basis'. Human rights are not a further generation of rights, but the foundation of all other rights. They are the premises included in the latent sphere of society, i.e. of any historical societal configuration, and they stem from the natural law. Natural law is the transcendental environment of society, and it admits historical developments, in such a way that it has to be *re*-translated and *re*-acknowledged (i.e. recognized anew) continuously. To accomplish this task, we must resort to a peculiar semantics able to relate human rights to all other rights in a reflexive way.

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FROM THE 1948 UNIVERSAL DECLARATION TO THE LAST GENERATION RIGHTS. HOW DO HUMAN RIGHTS OF THE FIRST, SECOND AND THIRD GENERATIONS INTERRELATE?[1]

PAUL KIRCHHOF

Herr Vorsitzender, herzlichen Dank. Ich möchte den Versuch machen, zu Antworten auf drei Fragen beizutragen, die sich uns heute vielleicht als Schwerpunktfragen gestellt haben.

Die erste: Wie entstehen Menschenrechte? Das heißt, warum entsteht verbindliches Recht?

Die zweite: Warum steht der Mensch im Mittelpunkt dieser Rechte?

Und die dritte: Was ist die Bedeutung unserer Religion?

Zum ersten: Unsere Präsidentin Frau Glendon hat heute morgen gesagt, die Kernfrage sind glaubwürdige Grundlagen der Menschenrechte. Das ist in der Tat so, und hier hatten die Vereinten Nationen 1948 einen schlechten Start. Man hatte nämlich damals gesagt, die Menschrechte gelten unter der Vorraussetzung, dass keiner fragt „warum?"; Rechte unter der Bedingung, dass wir sie nicht begründen müssen. Solche Rechte werden zusammenbrechen wie ein Kartenhaus, wenn sie ernsthaft belastet werden, und deswegen müssen die Vereinten Nationen so defensiv sein.

Der Geltungsgrund für Menschenrechte bei staatlichen Verfassungen ist ein anderer, weil die Staaten normalerweise Kulturgemeinschaften sind. Aber auch da sagen wir, zumindest in der westlichen Welt, diese Verfassungen entstehen und werden verbindlich, weil vor 200 Jahren Männer in einem fairen demokratischen Verfahren es so beschlossen haben. Das überzeugt nicht, denn warum sollen die Menschen von heute mit ihrem Willen gebunden sein an den Willen der Menschen vor 200 Jahren, die heute nicht

[1] As delivered.

mehr leben? Oder stellen wir uns vor, wir wollen es gut machen, und wir stellen am nächsten Sonntag nach sorgfältiger Vorbereitung in einem Verfassungsstaat an das demokratische Staatsvolk die Frage: „Wollt ihr Demokratie oder Tyrannei?" Und jetzt unterstellen wir, das Staatsvolk hat einen schlechten Tag und wählt Tyrannei. Ist dann durch diese einmalige Entscheidung an einem Sonntag unseren Kindern die Demokratie und die Freiheit vorenthalten? Natürlich nicht, wir werden sagen, diese Entscheidung ist eine Revolution, und die ist unzulässig. Allein der demokratische Wille bildet keine Menschenrechte. Wir lesen im Buch der Natur, wissen allerdings auch, dass dieses Buch oft schwer lesbar ist.

Ich darf Ihnen ein Beispiel aus meiner richterlichen Erfahrung nennen. Im deutschen Grundgesetz steht, die Todesstrafe ist abgeschafft, und alle Lehrbücher sagen, das ist ein einfacher Satz. Da braucht man nicht darüber nachdenken, die Sache ist klar. Jetzt hatte ich einen Fall, da sollte ein Amerikaner, von dem behauptet wurde, er habe einen Mord begangen, in die USA ausgeliefert werden, und dort drohte ihm die Todesstrafe. Jetzt standen wir vor der Frage – die deutsche Verfassung gilt nur in Deutschland nicht in den USA, das ist klar – wir standen vor der Frage, darf der deutsche Staat daran mitwirken, dass ein fremder Staat die Todesstrafe vollstreckt, und schon wird aus dem einfachen Satz ein schwieriger Satz. Wir haben das verneint, wir haben also gesagt, wir liefen nur aus, wenn die Todesstrafe nicht vollstreckt wird. Aber es wird ein schwieriger Satz.

Oder wir hatten die Frage – unser Grundsatz *die Würde des Menschen ist unantastbar* – die Frage: „Was ist ein Mensch?" Juristische Handwerklichkeit drängt jetzt auf saubere, prägnante Definition. Also haben wir uns auf den Weg gemacht und haben gesagt, der Mensch unterscheide sich von anderen Lebewesen durch den aufrechten Gang, durch die Sprache, durch das Gedächtnis, durch die Fähigkeit der Selbstreflexion. Da waren wir sehr stolz, dass es uns gelungen war, den Menschen so zu definieren, und plötzlich ist uns klar geworden, jetzt haben wir einen ganz schlimmen Fehler gemacht, nämlich den, wenn wir den Menschen so definieren, verweigern wir die Würde demjenigen, der nicht laufen kann, der kein Gedächtnis mehr hat, der keine Sprache hat, der nicht sich seiner selbst vergewissern kann. Durch das Bemühen juristischer Präzision machen wir den größten juristischen Fehler in der Würdegarantie. Damit wird deutlich, wir können das Recht nicht allein aus einem Gesetzgebungsverfahren und allein aus einem Sprachtext ableiten, sondern das Recht entsteht, weil der Mensch in der Lage ist, in seiner Religion, in seiner Philosophie, in seiner Kultur über sich selbst hinauszudenken, weiter zu denken als er selber existiert, weiter

zu denken als sein Wille reicht, und das ist der eigentliche kulturelle Geltungsgrund für Verfassungen.

Und dann spielt natürlich die Religion – die Früchte des Christentums – wir können nicht sagen „ihr müsst alle Katholiken werden“, sonst gibt es keine Menschenrechte, aber die Früchte des Christentums sind wie die Früchte anderer Religionen und anderer Philosophien unverzichtbar als kultureller Humus für die Menschenrechte, und wenn dieser Humus wegfällt, wird es schlecht bestellt sein um die Menschenrechte.

Zweiter Punkt: Die Naturwissenschaften drängen den Menschen aus der Mitte der Welt. Die Biologen sagen uns, zu 98,3% sind wir eigentlich Menschenaffen. Die Gehirnforschung stellt die menschliche Freiheit in Frage – wir sind alle determiniert. Die Genforschung heischt sich an, die Identität des Menschen verändern zu können. Das Christentum und die Menschenrechte rücken den Menschen in die Mitte der Welt – konträr – und da liegen Christentum und Menschenrechte sehr eng beieinander, und deswegen entwickeln wir aus der Vernunft und aus der Erfahrung in einem seit 2000 Jahren aufklärenden Christentum eine Idee des Menschen, der hat die Würde, eine Idee der Person, die hat Rechte. Das ist die Sensation der Moderne: Der Mensch hat eigene Rechte, weil er Mensch ist, nicht weil er Verdienste hat, allein weil er Mensch ist. In seinem Dasein und seinem Sosein hat er Rechte.

Und dann, drittens, der Mensch ist Persönlichkeit. Er hat die Fähigkeit zur Sittlichkeit. Das müssen wir mit einbeziehen in dieses Konzept der Menschenrechtsgarantie.

Und dann müssen wir sehen, das ist in unserer Diskussion heute noch nicht deutlich geworden. Die Menschenrechte richten sich in der Tradition und in der Gegenwart vor allem an den Staat. Die katholische Kirche hat natürlich den weltweiten Blick, aber die Menschenrechte, der reale Schutz für den einzelnen Menschen ereignen sich in einem der 200 Staaten dieser Erde, und da haben die Menschenrechte vier Funktionen.

Als erstes sehen die Menschenrechte den Staat als Gegner. Der Staat wird in seine Schranken gewiesen. Er darf nicht töten, er darf nicht willkürlich verhaften, er darf das Eigentum nicht enteignen. Dem Staat wird etwas verboten.

Zweiter Punkt: Der Staat soll etwas geben, er soll uns die Existenzsicherung geben, er soll uns die Bildung geben, Schulen und Hochschulen, er soll uns Frieden und Recht geben, er soll uns ernähren, er soll uns die Medizin geben wenn wir krank werden. Der Staat ist nicht Gegner der Freiheit, sondern der Staat ist Garant der Freiheit und der Menschenwürde.

Der dritte Inhalt, besonders staatsbezogen, der freie Mensch will in seiner Rechtsgemeinschaft mitwirken, die demokratischen Rechte, er will seinen Willen zur Geltung bringen, um den Willen der Gemeinschaft mitzubestimmen. Und das ist sehr klug, weil wir aus der Geschichte wissen: Herrschaft provoziert Widerstand und Herrschaft provoziert Aufstand, Bürgerkrieg, und deswegen sucht die Demokratie die gegenläufigen Interessen zu organisieren in Parteien und Verbänden und ständig in einem Gespräch zu halten. Das ist der Kernpunkt der Demokratie.

Und der vierte Inhalt, das ist die vierte Generation, manche sagen die dritte Generation. Das sind allgemeine Rechte auf Frieden, auf Umwelt, auf Entwicklung, auf Einkommen, auf Ernährung, auf Wasser, auf Technologie. Das sind nun sehr abstrakte Regeln, und wir müssen sehr vorsichtig sein, diese als Menschenrechte zu definieren, und zwar wegen der Rechtsfolgen. Wenn es Rechte sind, die in völkerrechtlichen Verträgen vereinbart sind, wo sich die Staaten verpflichten, den Menschen Gutes zu tun, einverstanden, wenn es Rechte sind, die ich als individuelles Recht vor einem Gericht geltend machen kann. Dann kann nicht ein einzelner Mensch die Friedenskonzeption dieses Staates beherrschen, und wenn es Menschenrechte sind, die etwa durch militärische Intervention verwirklicht werden würden – wir sprechen noch darüber, dann wird es dramatisch. So allgemeine und abstrakte Ziele dürfen nicht das Ziel sein, um militärisch zu intervenieren. Dann wird der menschenrechtliche Segen zum Fluch, und das heißt für die Idee der Toleranz.

Ein wichtiger Punkt unserer Gegenwart: Toleranz ist nicht der Weichmut des Wohlmeinenden, der allen Wohlklang für Wahrheit erklärt, sondern Toleranz ist ein intellektueller Kraftakt, der nämlich entscheiden muss was ist verzichtbar und was ist unverzichtbar, was ist vorgefunden und was ist mehrheitsfähig. Und da müssen wir uns natürlich bewusst machen, dass unsere Diskussion um die elementaren Menschenrechte einen ganz kleinen, aber den zentralen Ausschnitt des Rechts betrifft. Sehr viel wird entschieden, sehr viel ist Parlamentarismus und Mehrheit. Ein ganz kleiner, aber der zentrale, der elementare Punkt des Rechts ist eben vorgegeben, und wir lesen mit großer Anstrengung und guten Kulturbrillen im Buch der Natur.

Darf ich noch etwas zu meinem dritten Punkt sagen, oder besser nicht von der Zeit her? Herr Vorsitzender, ok, ich versuche es kurz zu machen, aber es ist wichtig, nur wenige Stichworte. Wir verdanken für unsere freiheitlichen Menschenrechte dem Christentum seit 2000 Jahren viel mehr als in unserer Diskussion gegenwärtig gesagt worden ist. Zum Beispiel die Idee von Verantwortlichkeit und von Schuldennachlass, etwa den Übergang von

der einseitigen Ehe – der Mann kauft sich seine Frau – zum Ehevertrag. Erste Elemente der Gleichberechtigung. Zum Beispiel vom Rachestrafrecht zum Schuldstrafrecht. Zum Beispiel das faire Verfahren mit gesetzlichem, mit rechtlichem Gehör, zum Beispiel die moderne Idee des Gesetzes *rule of law* – nicht der Mensch herrscht, sondern die Regel herrscht. All das sind doch Gedanken christlicher Aufklärung vor der historischen Aufklärung. Also, wir müssen uns gar nicht so verstecken in einem Kampf gegen die Aufklärung. Sondern wir sind ja eigentliche Aufklärer.

Und – oder die Kultur des Maßes: Die eigentliche Globalisierungsbewegung unserer Gegenwart ist doch die Ökonomie, und die predigt Gewinnmaximierung oder Gewinnoptimierung. Es kann gar nicht genug sein, und wenn ich viel habe, muss ich mehr haben, und unser Problem des Finanzmarktes ist, dass wir keine Instrumentarien haben, Haftung, Verantwortlichkeit für eine Kultur des Maßes. Das ist die Botschaft des Christentums für die dramatische Krise, in der wir gegenwärtig stecken, und vielleicht sollten wir das auch mal betonen – als Ergebnis.

Wir haben drei Quellen für Recht: die Wirklichkeit. Wer Hunger erlebt hat, möchte die Menschen ernähren. Wer eine Diktatur erlebt hat, möchte den Menschen Freiheit geben. Wer keine Bildung hat, möchte Schulen und Hochschulen einrichten. Hier ist das Buch der Natur ganz gut zu lesen. Dann der zweite Punkt: die historisch gewachsene Kultur. Menschenwürde, Freiheit, Gleichheit, Soziales, demokratische Mitwirkung. Hier ist das Buch der Natur erkennbar, aber schon etwas verborgener.

Und dann natürlich der große Bereich der willentlichen Entscheidung des jeweiligen Gesetzgebers, die Kompetenzen, die Organisationsformen, die Gewaltenteilung, die Steuer, Ausmaß des Eigentums und so fort. Alles drei ist ein Teil des Entstehungsgrundes für Recht, und das, meine ich, und damit komme ich zum Schluss, müssen wir bewusst machen, wenn wir an den vernünftig denkenden Mensch appellieren. Kein denkender Mensch wird, wenn er denken kann, die Frage nach Ursprung und Ziel seiner Existenz, nach dem Sinn seines Lebens aus seinem Denken ausblenden, und damit kommt er zur Frage der Religion, und weil er – wenn er klug ist – weiß, dass er nicht jede Frage allein beantworten kann, bedient er sich der Institutionen, die darüber schon lange, vielleicht 2000 Jahre nachgedacht haben. Wir müssen den Dialog führen in der Notwendigkeit, über uns hinauszudenken, die Endlichkeit des Menschen mitzubedenken und dann Antworten zu geben. Und plötzlich entdecken wir: Ich hatte kürzlich in Heidelberg eine Diskussion mit erklärten Atheisten, die sind im Kern ihres Denkens teilweise ganz fromme Menschen, sie wissen es nur nicht. Dankeschön.

THE RIGHT TO EDUCATION ACROSS GENERATIONS

JUAN J. LLACH

I was surprised when I was asked by our colleagues in charge of coordinating this meeting to discuss the interrelations between the three generations of human rights, beginning with the 1948 Universal Declaration. In this contribution I will limit my analysis to the evolution of the right to education both at the discourse level and its compliance through an effective access to education.

1. Introduction: Three Generations of the Right to Education

1.1. *1948: The Universal Declaration of Human Rights*

According to Karel Vazak's typology – which deserved not few criticisms – the Universal Declaration of Human Rights mostly addressed the first generation of human rights, whose emphasis, typical of the postwar context, was placed on liberty and participation in political life.[1] However, it devoted five articles to social and economic rights (22 to 26), most of them referred to work and social security and the last one completely devoted to the right to education.[2] Article 26 stated that 'Everyone has the right

[1] Of course, the ideas and values of human rights can be traced through history and in religious beliefs and cultures around the world. However, the contribution of Jesus' teachings and Christendom played a decisive role, very frequently ignored by the so-called 'politically correct way of thinking'. Many centuries afterwards, the Bill of Rights in England and the United States and the Declaration of the Rights of Man and of the Citizen also played significant roles. Vazak's typology was based on the three watchwords of the French Revolution: *liberté, egalité, fraternité* (liberty, equality, fraternity), each of them referring to first, second and third generation human rights.

[2] The Universal Declaration was adopted by the General Assembly on 10 December 1948 by a vote of 48 in favour, 0 against, with 8 abstentions, those of the Soviet Bloc states

to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children'. Article 25 stated that 'motherhood and childhood are entitled to special care and assistance' and that 'all children, whether born in or out of wedlock, shall enjoy the same social protection'. *However, they did not specifically deal with ideas or policies of early child development*.

In brief, the most relevant contributions of 1948 were as follows.

a) *Everyone's right to education*.

b) *Free (subsidized)* and *compulsory status* of education given only to elementary and fundamental stages.

c) *Availability status* conferred to technical and professional education.

d) *Accessibility status* conferred to higher education, on the basis of merit.

e) *Full development of human personality*, strengthening of respect to human rights and freedoms, and promotion of universal friendship and peace as central goals of education.

f) *The prior right of parents to choose the kind of education for their children*.

– Byelorussia, Czechoslovakia, Poland, Ukraine and USSR – and Yugoslavia, South Africa and Saudi Arabia. The following countries voted in favour of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay and Venezuela.

1.2. *1966-76: The International Covenant (ICESCR)*

Although cultural, social and economic rights were already contained in the 1948 Declaration, they were more explicitly developed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), that is considered part of the International Bill of Human Rights together with the 1948 Declaration and the International Covenant on Civil and Political Rights (ICCPR).[3] In terms of Karel Vazak's typology, the ICESCR is mainly addressed to second-generation human rights, those related to equality, whose historical origins are closer to our times and began to be recognized by governments after World War I.

Article 13 states: '1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall

[3] The ICESCR is a multilateral treaty adopted by the UN General Assembly on December 16, 1966, and in force from January 3, 1976. It commits its parties to working toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labor rights and rights to health, education, and an adequate standard of living. As of December, 2008, the Covenant had 159 parties. A further seven countries had signed, but not yet ratified the Covenant.

be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State'.

Article 14 states: 'Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all'.

Leaving aside the repetitions of the 1948 Universal Declaration, the most relevant mandates of ICESCR were as follows.

a) *Enable all persons* to participate effectively in a free society.

b) *Secondary education* – not explicitly mentioned in 1948 – in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free (subsidized) education.

c) *Higher education* shall be made equally accessible to all, on the basis of capacity (instead of merit in the 1948 Declaration), by every appropriate means, and in particular by the progressive introduction of free (subsidized) education.

d) Fundamental (=basic) education shall be encouraged or intensified as far as possible for those *persons who have not received or completed the whole period of their primary education*.

e) The development of a *system of schools* at all levels shall be actively pursued, an adequate *fellowship system* shall be established, and the *material conditions of teaching staff* shall be continuously improved.

f) *The prior right of parents* was much more developed and emphasized than in 1948, and the same happened with educational freedom, including

explicit mentions to 'ensure the religious and moral education of their children in conformity with their own convictions'.

g) *A stronger commitment 'to the goal of compulsory primary education free of charge*, obliging signatories to work out and adopt a detailed plan of action for its progressive implementation, within a reasonable number of years'.

1.3. *1990: UNESCO's Education for All (EFA)*

Education for All (EFA) is an international commitment first launched at the UNESCO meeting in Jomtien (Thailand) in 1990. The declaration was based on the very evident fact than 'in spite of notable efforts by countries around the globe to ensure the right to education for all, the following realities persist. More than 100 million children, including at least 60 million girls, have no access to primary schooling; more than 960 million adults, two-thirds of whom are women, are illiterate, and functional illiteracy is a significant problem in all countries, industrialized and developing; more than one-third of the world's adults have no access to the printed knowledge, new skills and technologies that could improve the quality of their lives and help them shape, and adapt to, social and cultural change; and more than 100 million children and countless adults fail to complete basic education programs; millions more satisfy the attendance requirements but do not acquire essential knowledge and skills'. According to the Declaration, these evidences were in sharp contrast with the fact that for 'the first time in history, the goal of basic education for all is attainable'.

Principles explicitly mentioned to justify the new declaration included education as a fundamental right of all people, women and men of all ages; the fact that education can help ensure a safer, healthier, more prosperous and environmentally sound world, simultaneously contributing to social, economic, and cultural progress, tolerance and international cooperation; recognizing that traditional knowledge and indigenous cultural heritage have a value; acknowledging that the current provision of education is seriously deficient; and recognizing that sound basic education is fundamental to the strengthening of higher levels of education and of scientific and technological literacy and capacity, and thus to self-reliant development.

The Jomtien Declaration is much longer and more comprehensive than those of 1948 and 1966-76. Its main new contributions are as follows.

a) To make the right to education real for all an 'expanded vision' is needed, surpassing present resource levels, institutional structures, curricula, and conventional delivery systems while building on the best in current

practices. This vision must include universalizing access and promoting *equity* (not included in previous declarations), focusing on learning; broadening the means and scope of basic education, enhancing the environment for learning and strengthening partnerships.

b) In providing education to all people, *the most urgent priority is to ensure access to, and improve the quality of, education for girls and women*, and to remove every obstacle that hampers their active participation.

c) Emphasis on the importance of *learning and outcomes*, rather than exclusively on enrolment and certifications.

d) Necessity of *redefining the scope of basic education* as to include: learning beginning at birth; primary schooling as the main delivery system for the basic education of children outside the family; diversity of learning needs should be met through a variety of delivery systems; all available instruments and channels of information and communications and social action could be used to help convey essential knowledge and inform and educate people on social issues.

e) Since learning does not take place in isolation, societies must ensure that all learners can receive the *nutrition, health care and physical and emotional support* they need in order to participate actively in and benefit from their education.

f) *Partnerships*. National, regional and local educational authorities have a unique obligation to provide basic education for all, but they cannot be expected to supply every human, financial or organizational requirement for this task. New and revitalized partnerships at all levels will be necessary.[4]

g) *Supportive policies* in the social, cultural, and economic sectors are required in order to realize the full provision and utilization of basic education for individual and societal improvement. The provision of basic education for all depends on political commitment and political will backed by

[4] Partnerships among all sub-sectors and forms of education, recognizing the special role of teachers and that of administrators and other educational personnel; partnerships between education and other government departments, and other social sectors; between government and NGOs, the private sector, local communities and religious groups, and families. The recognition of the vital role of both families and teachers is particularly important. Terms and conditions of service of teachers and their status constitute a determining factor in the implementation of education for all. Genuine partnerships contribute to the planning, implementing, managing and evaluating of basic education programs. When we speak of 'an expanded vision and a renewed commitment', partnerships are at the heart of it.

appropriate fiscal measures and reinforced by educational policy reforms and institutional strengthening.

h) If the basic learning needs of all are to be met through a much broader scope of action than in the past, it will be *essential to mobilize existing and new financial and human resources, public, private and voluntary*.

i) Meeting basic learning needs constitutes a common and universal human responsibility. It requires *international solidarity* and equitable and fair economic relations in order to *redress existing economic disparities*. All nations have valuable knowledge and experiences to share for designing effective educational policies and programs.

1.3.1. *Parents, liberty and freedom omitted, families roles limited*

Very surprisingly, both the role of parents and their right to freely choose the education of their children were omitted in the Jomtien Declaration. The word 'parents' is mentioned only once, and not in a very relevant context: 'The education of children and their parents or other care takers is mutually supportive and this interaction should be used to create, for all, a learning environment of vibrancy and warmth'. This omission is one of the most relevant changes in the conception of the right to education across generations. As regards families, they deserve some more mentions, but with a narrow view of their role. For instance, 'Family resources, including time and mutual support, are vital for the success of basic education activities. Families can be offered incentives and assistance to ensure that their resources are invested to enable all family members to benefit as fully and equitably as possible from basic education opportunities'; or mentioning families as just one of the many subjects relevant to partnerships (see footnote 4).

1.3.2. *From Jomtien to EFA goals*

In response to slow progress over the following decade, the commitment was reaffirmed in Dakar, Senegal in April 2000 and then again in September 2000, when 189 countries and their partners adopted two of the EFA goals (b and d of the following list) among the eight Millennium Development Goals. Evolving from Jomtien's original formulation, the six educational goals read nowadays as follows.

a) Expand and improve comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children.

b) Ensure that by 2015 all children, particularly girls, those in difficult circumstances and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality.

c) Ensure that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programs.

d) Achieve a 50% improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults.

e) Eliminate gender disparities in primary and secondary education by 2005, and achieve gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality.

f) Improve all aspects of the quality of education and ensure excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

2. Declarations and Realities: the question of the effectiveness of so many rights

2.1. *Do educational levels converge or diverge across countries and generations?*

We all know how far speeches tend to be from realities. Although the right to education is not an exception to this non written rule, relevant nuances appear.[5] On the one hand, both enrolments and graduation have had an amazing progress during the sixty years since the 1948 Declaration. Different is the situation as regards educational convergence. In Llach (2005) I analyzed what happened with the convergence or divergence of educational enrolment levels in last century's two most relevant globalizations waves, the first one from 1870 to 1930 and the second one since 1960 or 1970, the one we are still living in. In the first wave I found that, while a typical catch-up process took place regarding primary education, with the laggard countries clearly approaching the level of the more advanced ones, the opposite happened with secondary education. On the contrary, from 1960/1970 onwards the second one has witnessed signals of divergence. At the regional level, only the Middle East and Southern Europe have been

[5] This section is based on Llach (2005).

converging to the level of Northern Europe. Unlike what happened with primary education between 1870 and 1930, there has not been a catch-up process in this case.

However, Barro and Lee (2000) found that most of the regions' stocks of human capital were converging to that of developed countries during similar periods, Sub-Saharan Africa being the main exception, and a similar trend of convergence in average years of schooling was found by Araujo, Ferreira, and Schady (2004). There is no contradiction in the opposite trends of both indicators. Two are the main factors that explain the convergence in human capital stocks. First, the magnitude of the increase in primary and, to a lesser extent, secondary enrolment rates in developing countries and, second, a purely demographic factor, i.e., the gradual death of older cohorts with very low levels of literacy, if any.[6]

More optimistic signals arise if, instead of considering the period 1970-2002/3, the time span is limited to the last decade of the 20th century. While between 1990 and 2001 Latin America and the Caribbean was the only developing region whose school expectancy grew faster than North America and Western Europe, since 1998 all developing regions converged to the developed ones. Of course, the period is still too short to consider that a new trend of educational convergence is emerging. The continuity of the convergence in school expectancies is critical. Otherwise, as the demographic 'advantage' of developing countries will tend to vanish, convergence in human capital stocks will also be compromised. This will not happen only if there is a very rapid growth of enrolment rates in developing countries.

Another very relevant educational outcome of the ongoing wave of globalization has been the change in gender gaps. With the sole exception of Sub-Saharan Africa, in all the other regions women's school expectancies have grown so fast that they now surpass those of men.

The educational challenges we are confronted with in the context of the current wave of globalization look overwhelming. It is true that educational divergence partly has, perhaps, an embodied solution. Even when the

[6] Enrolment jumps in developing countries have not had a convergence impact on school expectancies because they have been overcome by even bigger jumps in secondary and tertiary enrolments in developed countries. For instance, between 1970 and 1997, gross secondary enrolment jumped from 75.7% to 100.1% in developed countries and from 22.7% to 51.7% in developing countries, while gross tertiary enrolment jumped, respectively, from 26.1% to 51.6% and from 2.9% to 10.3%.

expansion of post-tertiary education will probably continue, it is more difficult to conceive equivalent extensions of the educational life in the future. If such is the case, educational convergence has better years to come. However, developing countries confront now a more difficult stage to extend school expectancy, i.e., secondary education (Bloom, 2004).

2.2. *EFA 2009 evaluation of the fulfillment of educational goals*

According to UNESCO (2009) 'there has been remarkable progress towards some of the EFA goals since the international community made its commitments in Dakar in 2000. Some of the world's poorest countries have demonstrated that political leadership and practical policies make a difference. However, business as usual will leave the world short of the Dakar goals. Far more has to be done to get children into school, through primary education and beyond. And more attention has to be paid to the quality of education and learning achievement.

Progress towards the EFA goals is being undermined by a failure of governments to tackle persistent inequalities based on income, gender, location, ethnicity, language, disability and other markers for disadvantage. Unless governments act to reduce disparities through effective policy reforms, the EFA promise will be broken. Good governance could help to strengthen accountability, enhance participation and break down inequalities in education. However, current approaches to governance reform are failing to attach sufficient weight to equity'.

Goal 1: Early childhood care and education. 'Progress indicators for the well-being of children in their pre-school years are a source for concern. *The development targets set in the Millennium Development Goals for child mortality and nutrition will be missed by wide margins if current trends continue* (author's emphasis)'.

Goal 2: Universal primary education. 'The average net enrolment ratios for developing countries have continued to increase since Dakar. Sub-Saharan Africa raised its average net enrolment ratio from 54% to 70% between 1999 and 2006, for an annual increase six times greater than during the decade before Dakar. The increase in South and West Asia was also impressive, rising from 75% to 86%. In 2006, some 513 million students worldwide – or 58% of the relevant school-age population – were enrolled in secondary school, an increase of nearly 76 million since 1999. *Despite progress, access remains limited for most of the world's young people. In sub-Saharan Africa, 75% of secondary-school-age children are not enrolled in secondary school'.*

Goal 3: Meeting the lifelong learning needs of youth and adults. '*Governments are not giving priority to youth and adult learning needs in their education policies*'.

Goal 4: Adult literacy. 'An estimated 776 million adults – or 16% of the world's adult population – lack basic literacy skills. About two-thirds are women. Most countries have made little progress in recent years. If current trends continue, there will be over 700 million adults lacking literacy skills in 2015. Between 1985-1994 and 2000-2006 the global adult literacy rate increased from 76% to 84%. *However, forty-five countries have adult literacy rates below the developing country average of 79%, mostly in sub-Saharan Africa, and South and West Asia. Nearly all of them are off track to meet the adult literacy target by 2015. Nineteen of these countries have literacy rates of less than 55%*'.

Goal 5: Gender. 'In 2006, of the 176 countries with data, 59 had achieved gender parity in both primary and secondary education – 20 countries more than in 1999. At the primary level, about two-thirds of countries had achieved parity. *However, more than half the countries in sub-Saharan Africa, South and West Asia and the Arab States had not reached the target. Only 37% of countries worldwide had achieved gender parity at secondary level. There is a confirmed trend towards more female than male enrolments in tertiary education worldwide, in particular in more developed regions and in the Caribbean and Pacific*'.

Goal 6: Quality. 'International assessments highlight large achievement gaps between students in rich and poor countries. Within countries too, inequality exists between regions, communities, schools and classrooms. These disparities have important implications not just in education but for the wider distribution of opportunities in society. In developing countries there are substantially higher proportions of low learning achievement. In a recent Southern and Eastern Africa Consortium for Monitoring Educational Quality assessment (SACMEC II) in sub-Saharan Africa, fewer than 25% of grade 6 pupils reached a desirable level of reading in four countries and only 10% in six others'.

3. Conclusions

3.1. *The challenge of educational convergence*

If no solution is found to educational divergence, the globalization wave we are experiencing will probably not only be unfair, but even more fraught with disruptive events. Only accompanied by the plain access of exports of

developing countries to developed markets, universal access to education is the most important factor to build more equitable national and world societies in the new century. What are the possible explanations of the lack of educational convergence between developing and developed countries? This is the critical question we must answer to find the ways out. *Developing countries themselves, as well as in some advice of multilateral organizations, share part of the responsibility of the weak educational convergence*. There is a double speech in many developing countries' leaders regarding education, who all coincide on its crucial role to achieve an equitable development, but not many behave accordingly. Of course, as in everything human, correct explanations involve both parties. *The lack of educational convergence cannot be analyzed independently of the lack of convergence in economic growth* and it is very clear that both developed and developing countries are involved in the explanation of the last one (Llach, 2002 and 2003). Additionally, the sustained brain drain process that has been taking place at an increased pace, at least since the sixties of the last century, is essentially a relational phenomenon.

Even when these kinds of explanations of educational divergence can help find solutions, the fact is that at the time of giving advice to politicians in developing countries, neither the academy, nor educational policy experts agree about which of them are right. We have at least three different kinds of advice.

3.2. *On policies to make the right to education effective as well as to achieve educational convergence. More education, better education or both?*

We can find three different approaches and types of advice at the time of analyzing policies to achieve educational convergence.

Type 1 advice: more resources, more education. In this approach, the core recommendation is to guarantee universal access to the three levels of basic education (pre-primary, primary and secondary), with more emphasis on the first two levels. Since all of them imply more resources, strong emphasis is placed on increasing (mostly public) investment in education. This approach is very widespread among people directly involved in day-to-day education, particularly teachers and their unions, as well as among educational policy makers, and is also evident in the declarations on the right to education reviewed here.

Type 2 advice: better education and not more resources. This piece of advice is based on three premises. More education does not imply better

education; quality not quantity of education is what is most crucial to life opportunities and earnings and, thirdly, more resources are not associated with better education. Based on them, the central recommendations in this case are to reform educational systems in order to give them more accountability and, particularly, correct economic incentives to teachers, for instance based on their students' performance. This approach is mostly proposed by educational economists and, from time to time, by the staff of multilateral institutions too (see Hanushek, 2005), and completely absent in the declarations of 1948, 1966-76 and 1990. However, in UNESCO (2009) it can be seen that even an institution that traditionally has not given much importance to the reform of the governance and accountability of educational systems and schools is beginning to change its mind.

Type 3 advice: more education, better education and more resources. As usual, there are also 'third way' proposals that suggest that both pieces of advice are partly right and that more education, better education and more resources, the three of them, are needed together. This is the advice that the author favours.

Resources and enrolment. Let us first disentangle the discussion about resources. Even when expenditure is not the only key, nonetheless it is very clear that the higher the level of development, the higher the ratio of educational investment to GDP. Part of the explanation of this association is that the density of educational investment increases with the level of education. Using a more accurate indicator, such as public expenditure per student as a proportion of GDP per capita, we can find that in the case of primary education all developing regions show lower values than the world average, while the opposite happens with developed regions.

Elitist bias. Roughly the same happens in secondary education, with the interesting exception of Africa that has the highest investment per student as a proportion of its GDP per capita. This exception is a bit more general as regards tertiary education. Again, Africa shows the highest level of investment, but also Asia and Latin America have higher values than Oceania or Eastern Europe. *These sorts of 'exceptions' reflect an 'elitist bias' in the allocation of resources to the different levels of education*. This bias, measured as the quotient of expenditures in higher and lower levels of education, is higher the poorer the country.

Class size. Another controversial but nevertheless relevant indicator of investment in education is class size in pre-primary, primary and secondary education. It is much lower in OECD countries than in Latin America, Asia or Africa, and this contradicts some 'light' conclusions that have been drawn from

a developed countries-centered debate, according to which a reduction in class size has no significant results in educational outcomes.[7] The conclusion can tell some truth if it is referred to small increases or decreases in class size but, at the same time, it seems pretty clear that there are thresholds beyond which class size is very relevant. In other words, one thing is to say that decreasing the size of the classroom from 22 to 20 students has no impact on educational outcomes and another very different thing is to say that the learning process is the same with 20 or 30-something students in the classroom.

Length of school schedules and multiple intelligences. Beyond increase in enrolment and reduction in class size it is still possible to identify a third reason to justify the need for more resources. There are not enough international comparisons regarding the length of school schedules, but it is clear that, on average, it is longer in developed countries. In many developing countries, effective school time is just three and a half hours of language and mathematics, while in most developed countries it lasts up to six hours and includes arts, sports, foreign languages, technologies, philosophy and other channels that allow students to develop some of their multiple intelligences (Gardner, 1993). Of course, a longer schedule also implies more resources.

Weak representation of educational interests of the poor. Factors that support type 1 and 3 advice do not end here, however. Perhaps even more interesting is the fact that in the way of comparing educational investment around the world it was possible to find evidence of an educational elitist bias, particularly in developing countries. In most of them, the educational lobby of the poor is weak. This is evident not only in the scarce attention devoted to child development policies and to pre-primary and good primary education, both of them (particularly the first one) still far beyond universalization. It is also reflected, more crudely and painfully, in the fact that the schools attended by the poor are, on average, the worst ones. Given the very well known fact that ages up to 8 or 9 are critical to allow a good educational development, this school segregation is just the contrary to what is needed and, of course, contributes to maintaining or even increases internal social gaps, as well as international ones. That is why the author wants to emphasize that *giving priority to the youngest and to the poorest is the truest way to get educational equity* (Llach, 2006).

[7] The skeptical view of the impact of class size can be seen in *Economic Journal* (2003). On the other hand, Piketty (2004) offers a natural experiment that shows the relevance of class size.

The 'better education' agenda. Finally, it can be asked whether confronting such huge evidences in favour of the 'more education' agenda would be needed anyway to also implement the 'better education' agenda. The answer is yes. Besides the reasons that can be found in the literature, it is possible to add another one. Educational systems in developing countries, and also in some developed countries, work in the darkness. Just to give some examples, not many countries dare to participate in international assessments such as PISA, PIRLS or TIMSS; only a few perform national assessments based on a census and almost none have statistics that show investment per student in each school. All this not only hinders the development of educational policies at the school level, precisely the most important ones, but additionally, this opacity of the system prevents the poor from assessing the low quality of education their children receive, giving room to other, more powerful lobbies, educational or not, to be more successful at the time of obtaining budgetary resources. To end this section it is important to emphasize the relevance of giving greater diffusion to the discussion of these issues. Unfortunately, the most frequent situation in international forums is the prevalence of positions like the ones described in type 1 or 2 advice. If these approaches continue to prevail we will not find the way out of international educational divergence.

3.3. *Universalization and densification of rights, liquation of the subjects*

A second reading of the evolution of the right to education across generations poses to us further questions. The most salient trait of this evolution is the universalization of this right, i.e., everybody has been gradually entitled to have access to every level of education and to lifelong learning. Almost nobody would dare to deny that this universalization is a real and relevant progress, an astonishing progress really, if we compare it to the not so distant past of societies strongly stratified as regards access to knowledge. However, surprisingly and at the same time, a parallel process has been taking place, one in which some of the critical subjects of the rights to education that were at the core of the 1948 through 1976 declarations, tended to liquate from 1990 onwards. As we previously mentioned, both in 1948 and in 1966-76, there was a very clear emphasis on the prior rights of parents to choose the kind of education that shall be given to their children and the schools they attend, as well as to ensure the religious and moral education of their children in conformity with their own convictions. All these rights completely disappeared from 1990 onwards. More surprising-

ly, if possible, the mentions of 1948 and 1966-76 regarding the full development of the human personality as a central goal of the educational process also disappeared.

Independently of the values or the philosophical approach on which they are based, that many of us do not share, these omissions appear as a big scientific mistake. Firstly, because the roles of parents and families are the most influential for a child's education, particularly in the critical early childhood stage. Secondly, because the absence of parents or significant adults is very associated to dropouts and other indicators of low educational performance, particularly in poor countries and in poor neighbourhoods everywhere. Omitting these relevant roles and the rights that must be associated to them, leads to impoverishing the very idea of education as well as the chances of educational convergence, particularly concerning the poorest people.

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BRIEF NOTES ON THE UNIVERSAL DECLARATION AND THE GENERATIONS OF HUMAN RIGHTS

FAUSTO POCAR

In recent legal literature on human rights, a commonly accepted approach has been to classify such rights in terms of generations. Scholars often divide and ascribe human rights to their corresponding generation. In this practice, first generation rights are comprised of civil and political rights and freedoms, second generation rights include economic, social, and cultural rights, and third generation rights implicate such diffused rights as more recently identified in international human rights law, such as the right to peace, development, a safe and healthy environment, or use of natural resources. This classification is technically based in existing international legal instruments adopted within the framework of the United Nations since the Universal Declaration of Human Rights of 1948. On the one hand first and second generation rights are dealt with respectively in the two international Covenants of 1966. Whereas on the other hand, third generation rights are reflected in different specific instruments, mainly General Assembly declarations, as their emergence in international law is recent and uncertainties in their identification have prevented the adoption of a comprehensive legal instrument dealing with their protection.

I do not discredit the fact that there may be merit in the above-mentioned classification. This is due to the fact that defining human rights with a 'generations' approach reflects the progressive identification of human rights while demonstrating the need for distinct measures of implementation. However, it remains questionable whether a 'generations' approach is desirable for an accurate understanding of the nature and essence of fundamental human rights. I humbly submit that in this area of law, it is misleading.

First, it is important to note that the term 'generation' is manifestly inaccurate when describing categories of human rights. It implies a succession of existences whereby, when a new generation comes to life, the previ-

ous one becomes outdated. In this scheme, the older generation is progressively set aside in favour of the new generation, which will eventually replace it. It is, or at least should be, self-evident, however, that in the field of human rights, when a so-called new generation emerges, the new rights identified must be regarded in addition to those previously identified and protected for a prior 'generation'. This results in a succession of rights from the first generation to the second along with the emergence of additional rights which begin at, or are prior to, the birth of the second generation.

The main concern with the 'generations' approach is not merely one of terminology. It is the fear of abuse which may lead, and has indeed sometimes led, to affirming positions according to which new rights, in particular collective rights, are given, and setting aside or deleting former generations' rights, or at least granting priority over them.

Secondly, although a 'generations' approach would appear *prima facie* as a proper classification from a historical perspective a closer consideration reveals that such an approach is historically inaccurate. This inaccuracy is due to an incorrect reading of the Universal Declaration of Human Rights. The Declaration, as maintained by authoritative jurists, cannot merely be regarded as the first disaggregated list of rights, split into distinct groups of rights which come into existence when its protection progressively develops in the domestic and international framework. Rather, the Universal Declaration must be viewed as a coherent document where all the enumerated rights are indivisible, interrelated, and interdependent. As proclaimed in the first consideration of its preamble, the Universal Declaration represents a legal expression and specification of the recognition of the inherent human dignity, as the foundation of freedom, justice, and peace in the world. In this context, the rights of the so-called first and second generations are expressly and simultaneously listed in the document, while so-called third generation rights, although not expressly described, may largely, perhaps entirely, find their recognition under the general provision in Article 28. This Article states that: 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

Furthermore, a reference to 'generations' appears to overlook the notion that human rights, as described in the Universal Declaration, are not established by law, but are inherent in all human beings and, as such, should be recognized and protected under the law. The opening consideration of the Declaration intentionally refers to the 'recognition...of the equal and inalienable rights of all members of the human family', thus presup-

posing that these rights do not draw their existence from the law, but rather pre-exist their legal identification and protection. There is an intimate contradiction in referring to 'generations' of rights, while at the same time maintaining that human rights are inherent to human beings as such, i.e. that everyone is entitled to them by the mere fact of his or her birth. A reference to generations would imply that human rights may vary according to the generation to which they belong, and thus the entitlement to them may also differ. Such a reference would misconstrue the essence of the entitlement to human rights and the protection that may be accorded under the law. While the first does not change, the latter may be, and is undeniably subject to variation, as the extent to which human rights are recognized and afforded protection depends on the applicable law at a certain point in time and space.

In light of the foregoing considerations, it appears more appropriate to abandon a reference to 'generations' of rights and rather deal with them as different and subsequent phases or stages in the progressive legal recognition of human rights and in the degree of protection afforded to them under domestic and international law.

Turning now to the interrelation between groups of rights as mentioned above, I will not dwell on the interplay between civil and political rights on the one hand, and economic, social and cultural rights on the other. Their interdependence has been largely explored by social and legal doctrines, and is clearly established under the Universal Declaration. It is also widely accepted that the distinction between the two groups of rights cannot simply rely on a time consideration which would place their recognition in a temporal sequence, although it is true that the initial declarations of human rights adopted in the eighteenth century, the 1776 American Declaration and the 1789 French Declaration, only referred to the first group. Nor can it be explained in political doctrine terms by maintaining, as was usual during the Cold War, that the first group of rights was consonant with the western tradition and liberal thinking while the second group better reflected the eastern socialist approach. Rather, the reason for splitting the rights enshrined in the Universal Declaration into two groups as set forth in the two Covenants of 1966 is to be found in the need for distinct mechanisms of implementation. While States were immediately prepared to undertake the task of respecting and ensuring civil and political rights to all individuals, this was not the case with regard to economic, social and cultural rights. With respect to the latter category, States felt that the full realization of economic, social, and cultural rights would have to be realized only pro-

gressively and also through international assistance and cooperation. Thus, in reality there is no distinct conceptual or ideological approach behind the separation of the two categories of rights: both continue to constitute a single set of rights as in the Universal Declaration, however, they were separated based on the obligations surrounding their implementation.

The analysis of the interrelation between the two abovementioned categories of rights taken together and the third category consisting of diffused rights, improperly called third generation rights, raises more difficult issues. First, can these rights be appropriately regarded as inherent rights of human beings, thus as individual rights? Secondly, can any mechanism of enforcement of these rights be envisaged, which would be available to individuals or groups of individuals? Finally, can any remedy be provided to individuals for their violation?

As to the first question, there is no doubt that, in light of their diffused nature, the rights at issue present a collective dimension, which appears to prevail over their individual features. There is also always a danger in the field of human rights, in recognizing collective rights. The danger is that individual rights are diluted to make them dependent on the superior interest of the society. If it goes without saying that individual rights must harmonize with the collective interest, they should not be given a subordinate role that would nullify their essence and their inherent nature. The act of harmonization may not cross the threshold of sacrificing individual rights entirely for a collective interest or right, which would deserve protection only as far as it is the result of a consideration of the individual rights of all the members belonging to the group. In the case of most diffused rights at issue, and without prejudice to the identification of smaller groups, the membership belongs to all human beings, as the group is represented by all mankind, or, as the Universal Declaration describes it, by the 'human family'. Thus, the harmonization process should lean towards making the collective interest functional to ensuring individual rights.

In order to avoid the risk of diluting individual rights beyond an unreasonable point, one may wonder whether a prudent approach should be followed in characterizing these diffused rights as human rights comparable with the rights set forth in the Universal Declaration and the Covenants, as well as in the legal instruments that describe them in more detail. As a matter of fact, the rights of the so-called third generation may be regarded more as means to ensure the respect for and the enjoyment of individual human rights than as human rights themselves. Peace, a safe and healthy environment, development, and an equitable distribution of resources are

definitely necessary conditions for the enjoyment of all individual human rights and freedoms, but it may be doubted whether it is correct to define them as additional human rights, inherent in human nature. There may be merit in regarding them as prerequisites for ensuring the rights which can be immediately associated with human nature. However, should such an approach be followed, the emphasis would inevitably be put on the duty of the society, in particular of, but not limited to the international community, to ensure the existence of these prerequisites so that individual human rights may be exercised by those entitled.

This approach is not incompatible with the identification of possible mechanisms and procedures whereby individuals may seek measures capable of enforcing the maintenance of peace, the preservation of the environment, the adoption of policies of development, or an equitable distribution of resources. It is not necessary, for this purpose, to define these situations as the object of human rights, their relationships with individual rights being sufficient to justify mechanisms and procedures of this nature. The provision of the remedy, which is a necessary consequence of the violation of human rights, makes such a definition even more problematic, since in most cases, and with the possible exception of some instances concerning the preservation of the environment, it would be difficult to identify appropriate and specific remedies for an alleged violation of the obligation to ensure these conditions for the enjoyment of individual rights, which would not coincide with the remedy available for the latter.

The consideration of the so-called third generation rights as conditions for ensuring the enjoyment of individual rights rather than as additional rights themselves, and the emphasis put on the obligation to implement such conditions, raises the issue of the definition of the scope of this obligation. The latter is clearly related to the implementation of the Universal Declaration and to the meaning that has to be given to the term 'universal'. This term is generally understood as indicative of the recognition of human rights as inherent to all human beings without distinction of any kind, including the status of the country or territory to which a person belongs. Article 2 of the Universal Declaration itself points to this understanding, and there is no doubt that the term 'universal' implies that everyone is entitled to the rights proclaimed therein.

However, one must question whether universality should be regarded only as a concept having a horizontal dimension, which would entail the applicability of the Declaration to everyone, everywhere, in any specific point in time. Or rather, should universality also be given a vertical dimen-

sion, which would imply the recognition of the rights of future generations, thus entailing an obligation to ensure the preservation of the conditions for their enjoyment as well?

I advocate for this dual dimensional approach, maintaining that the second dimension also forms part of the concept of universality. If it is accepted that human rights are inherent to human beings, they cannot only belong to current members of society but must also correspond to members of future generations of civilization, and the Universal Declaration must be regarded as also aimed at protecting these future generations in anticipation of their existence on Earth. It goes without saying that the duty of ensuring respect for and enjoyment of the rights will only become tangible when the persons entitled to such rights are born. However, the obligations related to maintaining and preserving the conditions which are essential for allowing both the enjoyment of the rights and the effective discharge of the duty to ensure them must be understood as having a vertical, or diachronic, meaning and dimension, and thus apply, at any point in time, not only with respect to the then present individuals, but also to the future members of the human family.

One may further argue that these obligations impose a special responsibility for any present generation, a responsibility that brings us back to the implementation of what are improperly characterized as the rights of the third generation. The disregard of these obligations goes clearly against the Universal Declaration and should be regarded as a violation thereof, without the need for creating new categories of rights. Rather, the emphasis should be put on the responsibilities that existing human rights carry with them in their universal dimension understood in the vertical dimension as maintained above, including the criminalization of their violations when the relevant conduct or omission is intentional. In this perspective, the notion of crimes against humanity should not be limited to systematic or widespread denial of fundamental human rights against existing human beings, but may also refer to such denial when it will affect future generations. In conclusion, it is not now, nor has it ever been appropriate to refer to human rights in a 'generations' approach. It is more beneficial to the progressive identification of human rights to expand the definition of universality as dual dimensional while categorizing the so-called third generation rights as conditions for ensuring the enjoyment of individual rights rather than as additional rights in their own right.

THE INDIVISIBILITY OF RIGHTS OF THE HUMAN PERSON

WILFRIDO V. VILLACORTA

The 'Three Generations' of Rights

The so-called three generations of human rights comprise (a) the first-generation human rights that concern themselves with political freedoms and participation in political life, to ensure the protection of citizens from misuse of state authority, (b) the second-generation human rights which pertain to the right to equality in economic, social and cultural development and access to opportunities, and (c) the third-generation human rights which refer to the collective rights of communities and nations, such as the right to self-determination, rights of indigenous peoples, right to economic and social development of nations, right to natural resources and a healthy environment, right to communications and participation in cultural heritage, and right to intergenerational equity.

The first-generation rights include freedom of speech, right to a fair trial, freedom of religion, freedom of the press, and right of suffrage, among others. Most of these rights were embodied in democratic revolutions in different parts of the world and were first enshrined at the global level by the 1948 Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The second-generation rights include the right to be employed, right to housing, right to education, right to health care, the right to strike, right to bargain collectively, right to work, and right to cultural heritage. These rights were recognized after the Industrial Revolution in Europe and were rallying cries in anti-colonial revolutions. Like the first-generation rights, they are covered by the Universal Declaration of Human Rights. They are also enshrined in the International Covenant on Economic, Social, and Cultural Rights.

The third-generation rights are articulated in the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development, and other international documents. A third-generation right such as the right to a healthy environment does not belong solely to an individual but can be claimed by an entire nation and even by the international community. The duty to preserve a healthy environment can be demanded by the people as a collectivity on a state, an individual, a company or a community because the consequences of environmental pollution affects individuals and communities, in their own country as well as in other countries.

Indivisibility of Human Rights

All the three generations of human rights are common standards which are internationally recognized and are rooted in the major cultural traditions of the world. There cannot, therefore, be a relativist and selective approach to the acceptance, prioritization and implementation of any of these indivisible rights.

This interrelated and interdependent relationship of rights of human persons as well as rights of nations was enunciated in Papal Encyclicals: John XXIII's *Pacem in Terris,* Paul VI's *Gaudium et Spes, Populorum Progressio a*nd *Evangelii Nuntiandi, and* John Paul II's *Ut Unum Sint* and *Sollicitudo Rei Socialis*.

A leader who would be in the best position to know the equal value of both freedom and equality – Nelson Mandela – asserts that 'we must address the issues of poverty, want, deprivation and inequality in accordance with international standards which recognise the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom'.

Authoritarian regimes generally employ two arguments to justify their cavalier attitude towards human rights. They insist that low-income countries must give priority to economic development and cannot yet afford to adopt full political and civil rights. In addition, they invoke cultural relativism, different historical experiences as well as the imperatives of nation-building to postpone the implementation of democracy and human rights.

This approach is unacceptable. Human rights uphold the natural worth and dignity of every human person. These rights are essential for enabling

everyone to live as human beings. Article 1 of the Universal Declaration of Human Rights affirms that human rights spring from the inherent nature of all persons: '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'.

Common Human Nature and Human Heritage

Human rights are not based solely on Western teachings, Western culture or historical experience. Because human rights are inalienable and universal, they find support in the teachings of the major religious and philosophical traditions – Hinduism, Buddhism, Judaism, Christianity and Islam. Elements of human rights were manifested in the edicts of Emperor Ashoka of India and the Constitution of Medina which was framed by Muhammad.

For obvious reasons, not all the modern forms and applications of human rights can be inferred from these edicts nor from ancient scriptures or medieval texts. Historical milestones of later centuries – democratic revolutions, the Industrial Revolution, two World Wars, the Holocaust, the end of colonialism – generated greater awareness of and enhanced expectations on human rights. The Universal Declaration of Human Rights was drafted by representatives of all regions and legal traditions. It has stood the test of time and resisted attacks based on 'relativism'. Its core values apply to everyone, everywhere and always.

The principles of the Declaration were institutionalized in landmark documents approved and ratified by most member-states of the United Nations and other international organizations, and reinforced by charters of regional organizations and by national constitutions. To name a few, the African Charter on Human and People's Rights, the American Declaration of the Rights and Duties of Man drafted by the Organization of American States, the European Convention on Human Rights, and more recently, the ASEAN Charter.

The United Nations adopted two international covenants that complement the Universal Declaration on Human Rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the UN General Assembly in December 1966, and has been in force from January 1976. The International Covenant on Civil and Political Rights (ICCPR) is a United Nations treaty based on the Universal

Declaration of Human Rights, created in 1966 and entered into force on 23 March 1976.

Also part of the international human rights framework are the Convention on the Rights of the Child, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women. These human rights documents are premised on the interrelatedness, indivisibility and interdependence of the rights of persons and communities.

Love as the Basis of Human Rights

Commitment to human rights and justice must of necessity be tied to love for fellow human beings and respect for their human rights. In Christianity, human rights are premised on God's love for human race, whom He created in His image and likeness.

In his Encyclical Letter *Deus Caritas Est*, Pope Benedict XVI asserts that 'the Church's social teaching argues on the basis of reason and natural law, namely, on the basis of what is in accord with the nature of every human being. It recognizes that it is not the Church's responsibility to make this teaching prevail in political life. Rather, the Church wishes to help form consciences in political life and to stimulate greater insight into the authentic requirements of justice as well as greater readiness to act accordingly, even when this might involve conflict with situations of personal interest'.

He stresses that 'the Church cannot and must not take upon herself the political battle to bring about the most just society possible'. He cautions, however, that the Church 'cannot and must not remain on the sidelines in the fight for justice' but 'has to play her part through rational argument and she has to reawaken the spiritual energy without which justice, which always demands sacrifice, cannot prevail and prosper'.

He delineates the role of the Church in providing love or *caritas* to complement the responsibilities of the State: 'There will always be suffering which cries out for consolation and help. There will always be loneliness. There will always be situations of material need where help in the form of concrete love of neighbour is indispensable. The State which would provide everything, absorbing everything into itself, would ultimately become a mere bureaucracy incapable of guaranteeing the very thing which the suf-

fering person – every person – needs: namely, loving personal concern. We do not need a State which regulates and controls everything, but a State which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces and combines spontaneity with closeness to those in need. The Church is one of those living forces: she is alive with the love enkindled by the Spirit of Christ'.

As an international moral force, the Church remains a major champion of human rights. It is at the forefront of worldwide efforts to promote the indivisibility and interdependence of the three generations of rights. As we had said, the protection of human rights is based on love for all human persons who were created in the Divine image – a basic pillar of our Christian faith.

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HUMAN RIGHTS AND THE CHRISTIAN VISION OF MAN: LIFE AND FAMILY, FREEDOM OF CONSCIENCE AND RELIGION, INTERNATIONAL JUSTICE

WHAT'S IN A NAME?
THE RIGHT TO LIFE AND THE RIGHT TO FORM A FAMILY: HUMAN RIGHTS IN THE POLITICAL PROCESS

JANNE HAALAND MATLARY

'When I use a word', said Humpty Dumpty,
'It means just what I choose it to mean
– neither more nor less'.
Lewis Carroll, *Through the Looking-Glass,*
1872, ch 6

Eminences, Excellencies, dear Colleagues,

The title assigned to me consists of two fundamental human rights, the 'right to life' and 'the right to form a family'. The two are not directly connected, but are nonetheless also related insofar as life arises from conception and the child necessarily has two biological parents. Thus a biological family is made: the nuclear family as it traditionally has been known.

The right to life is often considered the first human right, as no other rights can be enjoyed if the rights bearer is dead. The right to form a family is likewise one of the fundamental human rights that is enshrined in art. 16 of the Universal Declaration of Human Rights of 1948 and in subsequent conventions, such as the European Convention on Human Rights of 1950.

This paper is not an empirical account of the status of these two human rights. Everyone knows that major political battles over abortion, euthanasia, the death penalty, and the family have taken place and are taking place in most states today, especially in the Western part of the world. For instance, I was recently debating whether the right of the child to know his parents and receive care from them (*Convention of the Rights of the Child*, 1989, art. 7,1) means that the child has a right to know and be cared for by his biological parents. I think this is a reasonable and logical interpretation

of this paragraph. But my opponent, the professor of law[1] who has provided the Norwegian government with a legal opinion on the matter, stated that there are no objective answers to this question and that it must be interpreted in light of both political developments and biotechnological progress by the so-called 'dynamic' legal method. In other words, there is no contradiction between art. 7,1 and the Norwegian Gender-Neutral Marriage Act of 2008 which contains a right to state-paid insemination of lesbians with anonymous donor semen.

Since we are talking about a legal issue, viz. the interpretation of a convention, the professor of law can claim professional authority whereas the professor of political science cannot. Those without professorships, only armed with common sense, presumably have no say at all.

However, on giving a talk at the Norwegian attorney general's office the subsequent day[2] about the dangers of divesting national politics of control by accepting the 'inflation' of human rights that now takes places, I found that lawyers in this office agreed with me on the unclear content and status of the 'dynamic method' as it is practised in the ECHR in Strasbourg. The attorney general himself has voiced criticism of the scope that this court defines for itself regarding human rights.[3]

The Meta-Level: What, if anything, distinguishes a human right from politics?

One cannot suppress the deeper question: If human rights are to be interpreted in light of political trends, what difference is there between law

[1] Professor Aslak Syse, Faculty of Law, University of Oslo. The legal opinion in question is entitled 'Farskap og annen morskap', NOU, in a debate at the Law Faculty on April 22, 2009.

[2] Regjeringsadokatens kontor, Oslo, luncheon speech, April 24th, 2009. The attorney general of Norway, Sven Ole Fagernæs, has voiced concern over the expansionist activity of the ECHR and what he calls the general 'inflation' of human rights. His office represents the Norwegian state vis-à-vis the international human rights courts and bodies, such as the ECHR. It has been state practise for Norway to implement the judgements of the ECHR – where the state has lost several times – but recently the minister of culture declined to follow a judgement from the court which made it illegal for the Norwegian parliament to forbid TV adds for political parties because this was seen as a breach of freedom of expression.

[3] 'Verdibørsen', July 2006, Interview and debate on the 'inflation' of human rights with attorney general Fagernæs.

and politics? If there is no clear legal method for interpreting international human rights, aren't judges then dangerously close to being political actors without a political mandate from the electorate? Unaccountable judges-*cum*-politicians must be representatives of the worst of all possible worlds, especially of they are at the international level where checks-and-balances regarding accountability do not exist.[4]

The worry is over two trends: that human rights come to include almost all aspects of politics and that the definition of what is politics and what is law is left to the judges of the court and not decided by nationally accountable politicians. *The legalization and the concomitant supra-nationalisation of human rights is a major democratic problem if human rights cannot be delineated, defined and adjudged in a transparent, clear, and apolitical manner.*

There is, as you will know, an academic literature on the various aspects of this *problematique*: The so-called 'legalization of world politics' is a central liberal political cause celebrated by most Western academics as well as scholars, counting myself among them. The change of the anarchy of international affairs in the direction of a *Rechtsstat* that resembles the rule-of-law of domestic politics is a major goal for most people, presumably creating more democracy and peace. The development of *Volkerrecht*, or international law itself, was a major movement from the 1890s onwards, coupled with peace aspirations. The League of Nations and, later, the UN are the foremost fruits of this.

In our time there is the development of the International Criminal Court (ICC) and prior to that, the war crime tribunals that were *ad hoc*, such as ICTY in the Hague and the Rwanda tribunal in Harare. In addition, there is a tribunal for Cambodia at work now. The development of international courts for war crimes and crimes against humanity, genocide and also rape of women as a tactic in war, are in my view great steps towards a more just world.

In a somewhat different vein we have the supranational court of the EU, which has 'supranationalised' itself and been accepted as such by all member states. The academic literature on this court points to the undemocratic nature of this development, but also to the effectiveness of the court itself (see e.g. the work by Joseph Weiler; Hjalte Rasmussen, Karen Alter).

[4] This is indeed the topic I addressed to this papal academy a few years ago when I commented on professor Kirchhof's work on the status of fundamental human rights in Europe.

The only human rights court is the ECHR, based on the European Convention of Human Rights. This court has been in existence since 1950, but has become much more prominent and used in the years after 1990.

The UN system has no court, but a human rights council (prior there was a human rights commission). This council is responsible for *inter alia* the Durban-II conference that took place in Geneva two weeks ago. The chair of the council was Iran and president Ahmadinejad was the main speaker. The EU walked out in protest as he spoke, the US, Germany, Canada and other states boycotted the conference. The theme was racism, but it became a conference that was intensely politicized, seeking to call Israel racist and to define freedom of expression in an islamist variant where perceived blasphemy would be punishable (see para 11 of final draft text). This first draft for the conference text was only changed when the 27-member block of the EU put forward an ultimatum.

The Iranian foreign office presented a diplomatic protest to the Czech EU chair the day after the opening speech of Iran which led to the walkout, saying that Iran was concerned about the disrespectful behaviour of the EU towards free speech and that Iran is worried about the many human rights abuses in EU states, e.g. denial of freedom of education for certain Muslim minorities and alleged murder and other persecution of human rights activists.

I mention this example of human rights politicization in detail because it illustrates *how undemocratic states now enter the human rights arena of the UN* to the fullest, and also that human rights are intensely politicized at present. This is a development we have seen throughout the 90s at various UN conferences where the right to life and the family were the contentious human rights. At that time there was no Western concern over politicization of human rights, whereas the present situation, as seen in Durban-II, enrages Western politicians.

We have now come full circle in terms of the politicization of human rights: *human rights are turned against themselves.* But who can define human rights? If they cannot be defined but are subject to the so-called 'dynamic' interpretation, who can deny Iran its interpretation?

The Durban-II conference was a welcome wake-up call for the West because it is now necessary either to define basic human rights or to agree that every state can have its own interpretation of them. The question of what a human right is, as compared to a political matter, is therefore very urgent. *Unless basic human rights can be defined as non-political, as 'common standards' for all human beings, they will be subject to ever more politicization.*

In the natural law tradition that is preserved and developed in the Church there is a clear answer to this question: human rights can and must be defined, and the Universal Declaration itself invites a clear interpretation if we look at all the rights as a whole. Professor Glendon has developed this theme in her work, as have many other scholars. The main problem is anthropological, not legal or political, one would agree from this vantage point. I am not going to develop this theme in this paper. I have written a book on the need and possibility of defining fundamental human rights, and such a definition requires that we start with the concept of human nature, i.e. human anthropology.[5] The philosophical underpinnings of the concept of human rights are all well known to this audience. What my contribution here will be, is *an analysis of the driving forces of the Western political process around human rights,* exemplified by the two fundamental human rights, 'life' and 'family'.

I will now leave this meta-issue and return to the two rights that this paper deals with, viz. the right to life and the right to form a family.

Essentially Contested Concepts

What do these rights mean? If we look at the words 'human right', 'life', and 'family', they are all what we term 'essentially contested' – indeed, all these terms are by now extremely contentious and contested in Western politics.

The term 'human right' is used all the time in everyday speech, not only in political debates. When we want to underline the importance of some issue, we call it a 'human right'. There is seldom any reference to where the alleged human right is enshrined, and even less to the wording of it if it exists – Norwegian farmers' associations e.g. routinely state that it is a human right to eat Norwegian produce. One wonders whether this is a universal human right, given that only 4% of Norwegian land is arable.

When we look at the term *life*, we meet the same problem. Abortion rights start from various gestational ages in various countries, and euthanasia is variously defined in the same. The death penalty is forbidden in Europe and the ECHR has a protocol to that effect, but it is practised in the USA.

[5] *When Might Becomes Human Right: Essays on Democracy and the Crisis of Rationality,* Gracewing Publishers, UK, 2007. Editions in various other languages (in Italian: *Diritti umani abbandonati? La minaccia di una dittatura del relativismo,* EUPRESS, Lugano, 2007).

Some say that 'life begins at forty'. Seriously, in the abortion debate, no authoritative definition can be given. Whether it begins at 12 weeks, 18 weeks or after that remains a conclusion based on mere political compromise. The question of when life begins is never discussed seriously anymore anyway because the issue is not talked about as one of ending a life. The discourse is not about when human life can be terminated, or whether, but about stated women's rights to decide on this. When the issue is cast in rights-terms for women, it is an entirely different issue compared to the question 'Under which circumstances can the state take human life?'. *The terms of the debate largely decide the debate and its outcome*. It follows from this that the most important struggle is over the name – what we call the issue we debate: who sets the agenda and determines the terms for debate? Is the agenda set as a political or legal one? In the former case, there will be natural disagreement, in the latter case, only lawyers and their methods constitute legitimate actors.

The political arena is naturally full of disagreement, whereas the legal arena varies with the legal tradition – natural law-inspired lawyers arrive at different results than will a positivist account.

The debates about whether the *family* can be defined and in that case, how to define it, also rage in most of our states. The gay marriage agenda has been strong over the last years, and has now resulted in the redefinition of marriage and the family in many European states. The legal interpretation of human rights conventions seems to follow a so-called 'dynamic' principle. In Europe, the ECHR is supra-national, and its rulings take effect in member states. Thus, if we ask what it means to have a right to 'form a family' as part of fundamental human rights, we immediately see that the answer depends on how we define 'human right', 'family', and human nature itself.

There are broadly two classes of arguments in the political debate about the family: those that rest on the presumption of *constructivism* – gender, not sex, is socially constructed, sex roles are thus constructed, and sex is constructed in terms of the feminine and the masculine and variations 'in between', more like a continuum than two categories. In turn this means that fatherhood and motherhood are socially constructed, and therefore the family can be freely defined and redefined. In fact, on this view it is pointless to seek a definition, as there is none to be found. What was the typical 'nuclear family' in some societies in some historical periods, changes. When the empirical manifestations of the family dissolve into many types of households, the definition of the family also changes. This argument is

embedded in a view of society and politics that sees both as processes where there is no 'Fester Punkt' to be discovered.

The other point of view, the *natural law* argument, assumes the existence of a fixed human nature, consisting of two sexes, where the family is a natural and constant institution in human life – it makes sense to speak of something as *natural*. Motherhood and fatherhood are therefore constants, and the family cannot be redefined, but exists as a norm in all societies, albeit with many instances that differ from the norm, due to widowhood, single parents, etc. The *social* roles of the sexes are however malleable and thus, 'socially constructed' to a great extent. Yet motherhood and fatherhood exist as 'archetypes' of human existence with much more than mere biological qualities.

Corresponding to these two views on the family's constituent units, the parents, we find *two entirely different views on the rule of law (Rechststaat), the status of international human rights, and the limits of politics*. To the constructivist viewpoint corresponds the view that 'all is politics', as one critic put it to me: there are no limits to the political process in terms of human rights, and what we call human rights today, can be changed tomorrow, as we define new human rights. Likewise, if a majority today thinks that the traditional form of the family is obsolete, how can anyone stop it from redefining it when the ultimate political decision-making belongs, on the national level, to the electorate in a given nation-state? The empirical facts matter as well: the fact that there are many types of family constellations, high divorce rate, many single parents, etc. are facts that must reflect on politics. If the nuclear family disappears more and more as the dominant organisational form in a society, it seems natural that the term 'family' covers all sorts of combinations in a household setting. There are thus considerable problems today if one tries to uphold mother-father-child as 'the family' or even as a 'model' or 'norm'. I have no data on this, but it seems that in my society – Norway – second families are so common that the typical pattern is 'my children, your children, and our children'.

Similarly, to the view that there is a human nature that can be discovered and defined, corresponds a view of law that we usually call 'natural law': international human rights are apolitical and prepolitical, resting on the discovery of human nature and its dignity. If the family is protected and privileged by human rights, they are valid in all places at all times. Given the turn of international politics after Nuremberg, whose famous trials laid down the validity of natural law above all positive law, this is a very strong argument. But as we know, to paraphrase Tip O'Neill, 'all pol-

itics is local': who can sanction a national parliament who passes a law that contravenes international human rights? Furthermore, to this view belongs the assumption that the public and the private are definable, that politics is limited to the issues of the common weal. Regarding the family, this means that its political relevance lies in its child rearing: it needs protection from political intrusion but also political protection.The ideological assumptions of natural law and *Rechsstaatsdenken* are so different from social constructivism that there is no bridge between them. In Norway we see an interesting polarisation on this meta-political level, implicit in the political arguments used. When a prize for free speech was given to a major critic of statal insemination rights for lesbians, the philosopher Nina Karin Monsen, in April 2009, an extremely vitriolic debate ensued: Monsen argued that the state cannot remove the child's right to know its biological parents (this right is granted when the child is 18 under Norwegian law) and certainly not 'design' babies through selection of donor semen according to the criteria of the mother, whereas the lesbians argued that Monsen insulted them and hurt their children by criticizing this new Gender-Neutral Marriage Act. *The terms of the debate were diametrically opposed* to one another: the gay community had set the agenda on this issue throughout the political campaign to change the old marriage act by arguing that they were discriminated against and that they were denied their human rights. When Monsen entered the scene, her arguments were along the lines of children's human rights and the importance of biological parenthood, whose importance had by then been successfully marginalised in the Norwegian debate. There is basically no debate on the *substance* of the issue at all – whether the state can remove the child's right to know his father until age 18 – but a fierce fight over the *terms of the debate:* Who is discriminated? Whose human rights are violated? What is the issue all about – this is what the power struggle concerns. The ones who can claim human rights/non-discrimination on their side, have won the debate.

It is therefore important to analyse how the 'symbolic politics' of human rights functions in Western democracy today. It is certain that both the right to life and the right to form a family have been redefined in major ways in the last 30 years in Europe and the US. The family has become politicized over the last few years, and national policies have changed in these areas. The frame of reference for this has been human rights.

Human rights were codified as a response to the political and legal relativism of Hitler's Germany and World War II; which put in a nutshell the

relativist problem of obeying orders from the legal ruler of the realm – in this case Hitler – when these orders were contrary to morality. The Nuremberg trials laid down that it is wrong to obey such orders; that there is in fact a 'higher law' – a natural law if you will – that not only forbids compliance, but which also makes it a crime to follow such orders. In the wake of this revolutionary conclusion in international affairs – it was the first time in history where a court had adjudicated in such a way – there was a growing movement to specify what this 'natural law' for the human being entailed. This resulted in the Universal Declaration of Human Rights only three years later – a supra-national set of inherent and inalienable rights for every human being. It is very clear that the statement of human rights was to be a 'common standard for all mankind', as stated in the preamble, and not something that could be changed at will by political actors.

The rights defined in this document are parts of a whole, making up a fullness of rights which reflect a very specific anthropology. The rights are clear and concise, and the underlying anthropology is equally clear. The intention of the authors of the declaration was to put into a solemn document the insight about human dignity that could be gleaned from an honest examination, through reason and experience, of what the human being is. Therefore they wrote explicitly that 'these rights are inviolable and *inherent'. In other words, these rights could not be changed* by politicians or others, because they were inborn, belonging to every human being as a birth-right, by virtue of being a human being. The declaration is a natural law document which was put into paragraphs by representatives from all over the world, from all regions and religions. Human rights are *pre-political* in the sense that they are not given or granted by any politicians to their citizens, but are 'discovered' through human reasoning as being constitutive of the human being itself. They are also therefore *apolitical* because they are not political constructs, but anthropological – consequences of our human nature. As one of the key drafters of the declaration, Charles Malik, said: 'When we disagree about what human rights mean, we disagree about what human nature is'. The very concept of human rights is therefore only meaningful if we agree that there is one common human nature which can be known through the discovery of reason.

But this stands in stark contrast to present politics in the West. What characterises the politics determining human rights today?

First Characteristic: Democracy as *Procedure*

In classical political philosophy, tyranny refers to illegitimate or unjustified governance, and as such implies that the notion of justification or justice is meaningful. Tyranny is in classical political thought the usurpation of just rule, and is always presented as a perversion of good forms of government.

Democracy is the form of government where legitimacy emanates from the people. It can vote rulers down in a recall mechanism – rulers have to be accountable to the people. Democracy thus becomes tyrannical when this condition no longer obtains. When justice in terms of the common good is no longer sought by politicians, but only maximization of their private interests, a democracy becomes tyrannical.

So far the ancients. Notice the fundamentally *moral* language of politics. It is a language which still is with us, even though people today want to remove morality from politics. Yet if one asks whether tyranny is a value-neutral term, the answer is necessarily no. It cannot be, as the word itself denotes moral qualities.

The legacy of liberal democracy is the normative model for most European states, and the only acceptable form of government in the West today is democracy. Even among self-professed sceptics that hold that no values or norms are universal, one is hard pressed to find a critic of democracy as such. All agree that this form of government is the best one, or at least the best there is to get in the absence of Platonic philosophers of the real kind. Democracy has come to stay and has developed in West over the last 2-300 hundred years. It is perhaps the only concept that is openly spoken of in Western politics as something that all should enjoy: one states that democracy must be instituted all over the world.

This form of government gradually included the whole population over a certain age by extending the suffrage to them, it contains representative institutions and holds period elections. Elected politicians are accountable to the electorate and can be 'recalled' in a new election. The government is accountable to Parliament and there is a formal separation of powers in the legislative, the executive, and the judiciary. The constitution contains a Bill of Rights that list fundamental rights for citizens – typically the right to life, liberty, property, the right to freedom of religion, association and free speech. The French constitution serves as a model for many European constitutions.

Typically these *fundamental norms are regarded as 'higher' than other law* and as so fundamental that they cannot easily be changed. Parliaments

thus have elaborate and cumbersome procedures for changing constitutions. In some countries there are special constitutional courts that are in charge of interpreting what the constitution really says. In short, modern democracies are equipped with a *code of higher norms* that are supposed to be safe form political change and which are therefore insulated from the political process.

How were these norms generated? Where did they come from? In the French 'code civil' they were simply decided on, as they were in other constitutions. For John Locke, the precursor of the modern democratic theory, the fundamental norms were self-evident. *He held that there were some higher norms, but that they could not be reasoned about.* But they were generated in the establishment of the 'social contract' and were thus not 'pre-political', belonging to man as a human being.

Modern democratic theory arose as part of social contract theory, and rests on three assumptions: First, that there are *self-evident rights that belong to the individual and which should be protected by the constitution*. These rights are however only postulated as such; they are not part of any argument about natural law. Second, the need for protection of these postulated rights is the reason for the creation of society in a social contract: in the state of nature man is thought to pursue self-interest in the form of power maximization but he needs to be protected from the others. Third, the state is a minimalist arbiter of pluralism among atomistic individuals: the state carries no values, politics is value-neutral. This institutional apparatus is what largely constitutes the legacy of modern democracy in the West.

Mill, Tocqueville, and others were, over a century back, extremely concerned with the problem of majority tyranny. Mill's *On Liberty* (1859), the classic plea for liberty as the highest norm, agonizes over this issue:

> *Protection against the tyranny of the magistrate is not enough*; there needs to be protection also against the tyranny of the prevailing opinion and feeling...*against the tendency of society to impose...its own ideas and practises as rules of conduct on those who dissent from them...there is a limit to the interference of collective opinion with individual independence, and to find that limit is as indispensable to a good condition of human affairs as protection against political despotism.*

On the one hand, Mill saw the emergence of such a tyranny in democracy, on the other hand he could not find any remedy against it. This was because his premises were inconsistent: he postulated tolerance or liberty as the highest norm, saying that all is allowed that does not harm others. Politics is value-neutral, and only if you harm others should your freedom

not be allowed. Yet he clearly held that some actions and norms are right and true, whereas others are wrong, but could not argue for this as he had no criterion of ranking value-judgements. The interpretation of what does harm and what does not ultimately rests with subjective opinion, since the state has to somehow decide here, it is unavoidable that politics embodies values and is about value-judgements.

Mill's problem is the same that we face today: Tolerance or liberty is the almost the only norm that democracy accepts, and is certainly the highest norm. We see this all the time in the public debate: new interest groups claim freedom from interference, claim tolerance for their interests, whatever the moral content of them. Morals or ethics are thought to belong to the private sphere and to be subjectivistic. Value pluralism is the key premise.

Given this, how can – if at all – fundamental norms be safeguarded? The procedure of democracy is some form of majority voting. Even constitutions can be changed by parliaments, although the procedures are more cumbersome than simple majority and take more time. However, the basic premise is that all political power is vested in the people, who in a social contract invest it in the institutions of state. Even the rights in the constitution come from the people, it would seem. But is this the case? *Here we see an inherent inconsistency between the 'self-evident' character of fundamental individuals rights, which are simply postulated, and the tendency today to usurp these rights by changing them through majority voting*.

Classical democracy conceived of constitutional rights as being beyond the reach of the majority procedure, although constitutions could be changed. The judiciary was designed to be independent of the legislature in order to interpret and protect the constitution. However, the crux of the matter with regard to law and politics is not in variants of institutional design, but in the *view of the origin of law*. If all is reducible to politics, there can be no protection from the application of the majority procedure to any principled question of human rights.

SECOND CHARACTERISTIC: PRAGMATIC DEBATE ABOUT PRINCIPLES

The major problem of modern Western democracy, viz. the reduction of ethical question to pragmatic ones. This is manifested in the lack of respect for human life in its non-utilitarian forms: unborn, handicapped, old, and sick; and in subjecting the taking of human life to pragmatic decision-making by majority procedure. This empirical development shows that the right

to life enshrined in constitutions and international human rights documents carries little if any weight when pitted against other interests. More importantly, it shows that modern democracy is reduced to the majority procedure. This development is inconsistent with the *Rechstsstaatstradition* which is based on the primacy of higher, unchangeable norms and independent institutions to safeguard them.

For example*, abortion* came to the fore in the public debate in Western democracies some 30 years ago. Everyone knew that abortions had always been performed, in secrecy, in the private sphere. Now women demanded that the state should perform them. Their argument was pragmatic: abortions will happen, they should be made 'safe'. Abortion was politicized, i.e.. placed in the public-political sphere, by feminist interest groups.

The terms of the debate had to be pragmatic because the liberal state cannot deal with 'value' questions. The state does not represent norms – the constitutional norms are just there to protect the individual from intrusion into his private sphere. The decision-making procedure in liberal democracy is majority decision. *If however the terms of the debate are about universal norms of right and wrong, this procedure makes no sense.* The political discussion thus has to be set in other terms. It has to be pragmatic.

In the case of the abortion debate, the fierce struggle was about the terms of the debate: if the question is 'under which conditions can human life be taken?' one has to consider the constitutional norms of right to life and the international instruments of human rights that state this as the highest norm. If the debate is cast in pragmatic terms, e.g. as a women's issue, this is not necessary. *The abortion issue was decided when the terms of the debate were decided*. But abortion represents a watershed in Western politics precisely because it exhibits a total cleavage in views on what is legitimate democratic politics and procedure.

The same political process can be seen in the debate over *euthanasia*, which is now becoming politically prominent in Scandinavia, Australia, the US, and gradually in other Western states. The terms of the debate are being set in a very important process. For instance, one sees reports in the press on the increasing number of people that favour euthanasia, doctors who find it good for the patient, euthanasia as the right to choose, it is a new human right, etc.

A third issue that illustrates the inability to discuss ethical issues in ethical terms, is that of using *foetal tissue* from induced abortion for medical purposes. In Norway an expert commission was set up to advice the government on this issue. Even the one bishop on the commission – a member

of the Lutheran state church – turned out to be sympathetic to the government's proposal to use such tissue medically. The interesting aspect of this was however his way of reasoning: being against legalised abortion, he nonetheless argued for the use of foetal tissue because as abortion is allowed, one might as well make use of the results of it. He could not understand that there were problems with this argument from an ethical point of view – and in truth, his was a valid pragmatic argument: abortions will happen, let's make some use of them if we can. He could not understand that if he held that abortions were wrong on principle, he would also have to hold that the ancillary act, using the foetal tissue, was wrong and in fact might contribute to justifying the abortion itself.

These examples illustrate that the political discourse on ethical issues in liberal democracy is *de facto* pragmatic. Moreover, I have argued that *it has to be* pragmatic in order to fit with the central assumptions and institutions of liberal democracy: majority procedure, politics as 'value-free', and ethics as belonging to the private sphere. Yet it is also cast in human rights language – the right of women to abort, the right of old people to euthanasia, and so on.

Third Characteristic: Human Rights as *Slow Politics*

But also the 'rights' language is justified by pragmatic reasoning: because women have abortions, they are a right; and because many people accept euthanasia, it is a right. In this debate there is no discussion of which topics should belong in the private sphere – the strategy is to lift them all into the public sphere. There is no hierarchy of principles for determining what is a common, and thus political problem; and what is not.

Human rights have become the new political 'Bible' in two ways – as the only point of reference in a relativist political community – but also as the source of legitimacy in political debates: no actor can 'afford' to be seen to violate human rights. It is extremely important to be in accordance with human rights in modern European politics; they thus carry very much power in themselves. Yet there is often a denial that they can be objectively defined, something which undermines the authority of these rights in the long run.

There are thus at least *two paradoxes* at work here: while Europe and the West extols the rest of the world to follow human rights and in fact uses this as conditions for aid and cooperation, European politicians simultaneously refuse to define, in an objective manner, what these rights really

mean. Secondly, while these rights are appealed to more and more, they are undermined as sources of authority in the erosion of the belief that they can be defined in a clear and objective way.

The situation is one where there is no clear distinction between politics and law, and between the national and the international level. Actors that seek to achieve political change in these areas, act at both levels, and influence from the international to the national level and vice versa, occurs. If the legal interpretation of human rights is based on how society, science, and politics evolve, then it is but 'slow politics', a *post hoc propter hoc* measure. But legal statement of definitions carries the highest authority politically, especially if we talk about a human right.

Thus, politics in the form of human rights law is the most powerful of all political action. Today's politics increasingly deals with value questions and human rights discourse is becoming the major form of political argumentation, nationally as well as internationally. Human rights instruments have proliferated, both as hard as well as soft law. Legalization as hard law, where there is a clear definition of states' obligations, is usually difficult to achieve in the human rights area, normally requiring consensus. For this reason those who want to change existing human rights norms mostly opt for soft law strategies, where one uses 'soft law to cast the normative net more widely, building as broad a coalition as possible. Strengthening the normative consensus and possibly the hardening of legal commitments is left to a more gradual process of learning' (Kahler, 1979). In addition, we should note that most soft law obligations are obeyed by states. Non-compliance is rare in all international regimes, even in the absence of coercive measures of enforcement. Chayes and Chayes (1995) investigated a number of international regimes where there were tenuous monitoring and implementation mechanisms, and found, like Koh (1998) in his major legal review, that international obligations are met by Western states, even in soft law cases. This indicates that the 'shaming' of non-compliance is feared, and that states do not want to be seen as unreliable international citizens. This is also why those who want to change human rights seek an international strategy of soft law for the new norm above all else. We also notice that the political agenda often is set by professional interest groups that invoke more or less well established international human rights norms as their basis of legitimacy. These actors we call 'norm entrepreneurs'. They are highly specialised, highly committed, and work exclusively for their cause. They are thus eminently equipped to succeed. Once an issue has been defined in human rights terms, it acquires a special legitimacy that is difficult to counter.

New actors that are transnationally organised use whatever is convenient for their cause. The NGOs that promote alternative family forms or abortion will use the Beijing Final Document instead of the Universal Declaration, although the former has no legal or authoritative status. What matters, is simply to find some UN document that can be invoked because UN documents carry legitimacy in most states around the world. The legal scholars Abbott and Snidal. notice that 'soft law' – non-binding international documents – often carry much weight and are in fact treated by interested actors as if they were hard law: this applies directly to the UN conferences in the last decade (Abbott and Snidal, 2000). In fact, aiming for soft law bases for new norms is a preferred strategy because its status in the international political system is so ambiguous.

Soft law instruments as well as legalization at the international level have increased very much in the last decades. Legalization is a strategy to create binding norms which carries more weight and legitimacy than mere soft law, but which is harder to achieve and which requires member state approval and often consensus (Keohane et al., 2000). Thus, soft law is the preferred tool for those who want to change norms (Goldstein, 2000; Abbot et al., 2000). Further, the growth of transnational advocacy networks is very important to the understanding of value politics today (Risse-Kappen, 1995). The growth of national NGOs is to be found in single-issue areas, and these groups easily network in horizontal ways. Modern communications help this organizational form (Kamarck and Nye, 1999). NGOs typically seek out causes where it is easy to present the issue as a singularly good thing, as an improvement or progress, and use human rights language as mode of argumentation and as justification. First, something is defined as a human right, e.g. abortion. Then abortion is justified because it is a human right.

Keck and Sikkink (1998) have done an extensive analysis of such transnational advocacy networks. They describe the strategies of these actors as a *pincer movement*: First, the new or redefined norm is sought to be established at the international level. Here UN conferences are the best arenas because they carry the most legitimacy, but also other arenas may be attractive in specific regions. The norm change sought is typically that of soft law, which does not require member state consensus. Once a text change has been established, it can be invoked at the national level as authoritative. The national NGOs work at this level all the time, seeking to prepare the public debate and public opinion. The invoking of the norm from the international to the national level is successful only if there is

some preparedness for its reception (Cortrell and Davis, 1996). This can be created by the *elite policy level*, where civil servants incorporate SOPs (standard operating procedures) in bureaucratic routines that have political significance, such as defining the abortion pill as 'emergency contraception', as has been done by the WHO and then, by national bureaucracies. In order to succeed in doing this, one preferably needs both some scientific basis (which can be had for any argument today), as well as some text in an international document.

The important role of scientific evidence has been studied especially under the aegis of the environment, in the case of climate change, which has been essentially contested for a long time. Haas has shown how 'epistemic communities' – important groups of experts who agree on what the 'state of the art' in their field concludes – form to support a scientific view-point, and that such communities exert major influence on both policy-makers and public opinion (Haas, 1992 and 1993). There are no systematic studies of medical science in this regard: are there epistemic communities regarding homosexuality and gender issues? Do psychiatrists basically agree on whether homosexuality is learned behaviour or innate? Do they agree on whether children need both male and female role models in their upbringing? From Soviet history we know that all science can be manipulated, but the interesting question is to what extent political actors in Western democracies try to create such epistemic communities in these areas today. It is clear that any position can find its scientific 'evidence' in the global marketplace, but it is politically significant if some actors, such as NGOs, actively seek to create scientific strongholds for their views. We know that the tobacco industry has supported medical research on smoking – a case in Denmark was just exposed – and there is every reason to believe that also other types of interest groups try to mobilise science on their side.

There are essentially three sources of authority for political arguments about norms and values: *international approval, popular, domestic approval, and scientific evidence.* Thus, new norms can also be seemingly generated from below, through agenda setting of the public debate. NGOs are of course expert at this. Finnemore and Sikkink lay out how the invocation of the international norm happens while the same norm is being supported from below, so that one arrives at both democratic legitimacy as well as being 'told' by the UN or some other international body to follow the norm (Finnemore and Sikkink, 1998). In the period after the norm has received some international recognition in some text, the advocacy networks work intensely to create a 'cascade': the norm should be seen and debated every-

where. Thus, one overcomes resistance to the norm by becoming familiar with it, and one thinks after a while that the norm is both just, the result of progress, and natural.

Thus, the interaction between the international and national level is an important one where the two levels consolidate each other: A norm invoked from the international level confers *legitimacy* (Hurd, 1999) – a key variable in modern transparent politics – and a norm seen to emerge from below likewise confers the most important source of legitimacy of all, viz. *democratic* legitimacy. Politicians will then follow suit, based on their respect for popular opinion (or fear thereof!). The campaign is successfully completed when the new norm is embedded in national legislation and practise. At this point it is part of national practice and perhaps law, and that makes it almost unassailable.

Both national and international organisations and bureaucracies may be actors in norm change – they are 'norm entrepreneurs', as Sikkink calls them. These strategic actors are often operators between the national and international levels, and we know that they wield important influence on negotiations in international conferences, working in networks of transnational civil servants.

There are several success stories of how transnational advocacy networks have achieved their goals: For instance, the international campaign to ban land-mines (ICBL) managed to get a core set of states to support its cause, and the convention on the use and stock-piling of land-mines actually achieved hard law status – it is a legally binding convention. In this process the NGOs were the major actors in setting the agenda and launching a process, against the persistent opposition of the US (Price, 1998). One can also mention the anti-apartheid movement in South Africa, where again the US was opposed to the claims for abolition, but was gradually forced to change its national position (Klodz, 1995). It is obvious that in order to succeed in such a norm change, one has to have a 'good cause' in the sense that it can be easily put in terms of a human right, and preferably in terms of good vs. bad. In the two cases mentioned above, this was easy. But in addition to a 'good cause' that easily persuades, one has to have a number of other political resources: a well-functioning transnational network, access to press and media, access to the relevant international arenas, access to favourable scientific knowledge when necessary, and ability to stay the course during the period of international norm establishment and its domestic diffusion and embedding. In the two cases mentioned above, it was critical to the transnational NGO to get a core set of states on board.

States are still the main actors of international politics. Once a 'coalition of the willing' has been established, this tends to attract also other states which do not want to be seen as laggards. If bandwagoning really gets started – as it was in the land-mine case – then no state, apart from those that really have a vital national interest at stake, wants to be left behind.

The number of international arenas for norm-creation has increased significantly in the last decade. A plethora of UN conferences on normative issues have been held: on the environment, on population and development, on women, on social policy, and to come next year, inter alia on small arms and light weapons, and on racism. In addition, there are very many other fora where international norms are debated and developed: in the whole UN 'family' of organisations, in the OSCE, the Council of Europe, the WTO, OECD, etc.

Conclusion: Setting the Agenda, Defining it in Rights Terms, Creating a Critical Mass of Support

Those who want to influence the definition of human rights or promote new human rights, must design a political strategy that contains a movement from below (democratic support and demand for change), import international legitimacy in the form of 'soft law', preferably from a UN text, create NGOs as single interest actors in the given area, and work hard to get the desired norm change into what is called the 'cascade' phase. If we look at the right to life in terms of abortion, this issue has left the political agenda many years ago (although resistance exists on a permanent basis in the US). But in Europe the 'right to abortion' is clubbed. No significant political engagement on this issue exists any longer. The 'cascade' phase took place in the 1970s.

If we look at euthanasia as a variant of the right to life – as a right to die – this issue is not yet in the 'cascade' phase. In my own country, there are persistent attempts to set the agenda on this new right, but the Association of Doctors keeps it away from serious debate. I also think that death is such a taboo topic in Western politics today that it is unlikely that people will take to the streets to lobby for the right to die. This issue will more likely be defined as something else, as a variant of terminal medical treatment. Death is to uncomfortable a topic for Western political debate.

Regarding the family, we can conclude that the redefinition of the family, also redefining the right to form a family, reached the 'cascade' phase some time ago in countries like Norway, Denmark, Sweden, and Spain. The

right of the child to its parents have been redefined as an adult right to have a child, as an individual right regardless of the marital status of the adult. This political process has been very successful in terms of transitional organisation of the gay movement (here we have not yet had any empirical studies of this movement, but it is clearly a very able and powerful one) and most of all, in defining the terms of the debate, which have become entrenched as redressing discrimination. The best indicator of this is the marginal role that biological parenthood plays in the political process on this. Biological parenthood, which has been of absolutely key importance in all family law always, is now seen as 'essentialist' and as an old-fashioned issue, as far as I can judge from the Norwegian debate. It is logical that constructivist views of sex brackets biology as a defining variable of parenthood; indeed, it has been necessary to marginalise biology in order to argue that the 'caring ability' of adults should be what counts regarding parenting.

In sum, all fundamental human rights can be changed in political processes if there is no agreement on anything in society as such – and by that I mean no agreement on whether there is a human nature and how to define it, on whether there are two sexes or endless deconstructive processes of sexes, and on whether there can be definitions that are deductive rather than inductive. When all these 'first principles' are essentially contested, as they are today in Western society, human rights have a precarious existence.

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PUSHING BACK AGAINST THE AGE

KEVIN RYAN

I come from a nation that has recently witnessed a direct and quite successful assault on the topic of Professor Matlary's papers, 'The Right to Life and to Set Up a Family'. Less than two years ago, a largely unknown political figure forcefully laid out his political plank regarding the right to life and the role of law and government in front of the nation's leading political advocacy group for unrestricted abortions, Planned Parenthood. In that address, he made it crystal clear that in the coming election a woman's quote 'fundamental right' to an abortion was at stake and that, if elected, he would make 'reproductive freedom' at the center of his agenda as President of the United States. He recited his record before coming to Washington as a state senator, where he fought legal restrictions on abortion, famously including a restriction on partial-birth abortion. He outlined his plan in detail and won the hearts and pocketbooks of his Planned Parenthood audience.

Six months ago he was elected as our president with the support of a majority of the Catholic vote. Now he is putting his and Planned Parenthood's agenda into effect through key cabinet appointments, his judicial nominees, his lifting of restrictions on federal funding for abortion providers overseas, allowing the destruction of human embryos for research, and his targeting of the 'conscience clause' protections for doctors and nurses. All but unchallenged, my new president is using the full instrumentality of the state to implement and, with public tax revenues for all Americans, financially support what Pope John Paul II identified as the 'culture of death'.

Clearly we live in a time of radical cultural swift. Actions, like extracting a child from a mother's womb, were just a few decades ago considered as high crimes in my country and around the civilized world. Legally redefining marriage and family as the consenting sexual and domestic

arrangements of any two individuals would have then provoked laughter.

The prevailing popular culture, driven by an insatiable pleasure principle and an all but unrestrained free market, has spawned a media that in so many cases has replaced the family as children's 'first educator'. We have, also, allowed civil authorities, that is the state, to take over more and more of the traditional duties of the family, witnessing an enormous and quite public violation of the Church's principle of subsidiary.

In my own field of education, state schools, which educated nearly 90% of my country's children from ages 5 to 18, have quite consciously taken over the moral and ethical training of children. Educators have replaced teaching reverence for God with teaching reverence for Mother Earth. Schools are in the forefront of morally legitimizing same sex marriage and the homosexual lifestyle. The point raised by Professor Mlčoch yesterday about the delegitimizing of the concept of 'good' and 'bad' in his university is an active and on-going process in our state elementary and secondary schools. A friend, a professor of history at Harvard University, has written about his experience teaching undergraduate students there and has coined the term 'no fault history', based on his teaching of a course on the history of World War II. He found his students continually justifying and rationalizing Hitler's extermination of the Jews and many of his other atrocities as the result of perhaps bad parenting, having been bullied or poor socialization. They continually explained away man's capacity for conscious evil acts in totally psychological terms. Then there is the treatment of religion in our state schools. All too often our secular state schools are a force separating children from the faith of their fathers and mothers. Through neglect, through trivialization and often through direct attack, state schools are a force separating children from faith of their fathers and mothers.

This educational situation would, I believe, be ameliorated greatly if parents could control the education of their children, a right mentioned yesterday in both morning's and afternoon's sessions. But this right is severely limited in the case in the United States and many other nations. Parents in my country are required by law and by threat of imprisonment to provide an education for their children. And they have in theory a choice among schools. However, because of the exorbitant cost of schooling, the overwhelming majority, 88% of American students, go to state schools. The rest go to a shrinking combination of private and religious schools. Just a few decades ago, the Catholic Church in the United States educated 12% of American students. Now it educates a mere 6% and shrinking. The reason for this is primarily financial. The results are that few families, Catholic or

otherwise, are free to educate their children consistent with their religious or philosophic views. The questionable idea of the secular state controlling crucial questions such as 'What is a worthy life?', 'What is most worthy knowing?' [that is, the substance of what the school curriculum should be] and other life-shaping questions go largely unchallenged.

Professor Matlary makes several points in her paper which both provide insight into our discussions of the right to life and the rights to marriage and the family. Her description regarding how judges are using the 'dynamic legal' theory, in which court decisions are made free of criteria of what are, in fact, human rights, is particularly pertinent for the questions before us. She makes the point strongly that, without a well-established human rights doctrine, clearly grounded on binding common standards for all human beings, discussions and legal decisions will continually be subject to the type of politicalization we have seen in recent U.N. and other world conferences. Her discussion of the tactics of various rights groups, like the homosexual rights community, employed to move from their desires to binding legislation, for instance in forming 'epistemic groups', is particularly instructive and raises the question of what can the Catholic community learn from them to promote the rights and dignity of the human person.

In the quite lucid introduction to this meeting, *Catholic Social Doctrine and Human Rights*, written by our colleagues Minnerath, Fumagalli Carulli and Possenti, they make reference to Christ's dictum, 'Render unto Caesar what is Caesar's and to God what is God's'. And go on to state, 'The right to freedom of the relationship with God postulates the right to the freedom of the Church as an institution, which represents the interest of the faithful *before Caesar*. The ultimate foundation of these claims is the defense of the dignity of the person'.

Other than the Gospels, the Church has no greater gift to the world than its annunciation and advocacy for this concept of the 'dignity of the person'. However, buffeted as it is between forces of libertarian individualism, on the one hand, and smothering collectivism, on the other, our understanding of what it means to be a human person is losing ground. It is the family, the original unit of social life, rightly called a 'domestic church', which is the first and most powerful teacher of this concept of intrinsic human dignity.

The social science community, and specifically our academy, is called to do all we can to support the Church and, in turn, to support parents in their work of teaching and actively projecting to their young a clear understanding of the dignity of the human person. Our disciplines must be directed to protecting children from our culture's corrupting assaults on their emerg-

ing understanding of personhood. More than that, we need to enlist and train our children to be warriors again this toxic culture.

The late American writer, Flannery O'Connor, a gentle woman and fierce Catholic, whose recognition in my country grows yearly, captures our duty well: 'You have to push as hard as the age that pushes against you'. This age is certainly pushing hard against our families and our children.

LIBERTAD DE CONCIENCIA Y DE RELIGIÓN COMO DERECHOS HUMANOS FUNDAMENTALES

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Introducción

La afirmación, comprensión y regulación jurídica de los derechos humanos, tal como las vivimos hoy son el fruto de un largo camino, de un trabajoso esfuerzo intelectual y moral en la historia de la humanidad. En esta conquista han colaborado la razón humana y la fe cristiana, en un empeño conjugado unas veces y enfrentado otras por llegar a descubrir las dimensiones y a realizar las exigencias fundamentales del ser humano. Me permito enumerar solo cuatro grandes momentos en los que la historia dio un paso adelante en este orden: la obra pionera del dominico profesor en Salamanca, Francisco de Vitoria, con sus relecciones *De indis recenter inventis* y *De iure bello hispanorum in barbaros* (1539), *La Déclaration des droits de l'homme et du citoyen,* incorporada a la Constitución francesa de 1791, la *Declaración universal de los Derechos humanos* proclamada por las Naciones Unidas en Paris el 10 de diciembre de 1948, y finalmente la Declaración del Concilio Vaticano II "Dignitatis humanae" sobre la libertad religiosa del 7 de diciembre de 1965, reafirmada y concretada por los papas posteriores hasta los últimos documentos de Benedicto XVI. Hoy estamos ante la sagrada tarea de llevar a convicción social y a ordenamiento jurídico en el orden político lo que ese descubrimiento de los derechos humanos ha supuesto sobre todo en el último siglo. Tarea por tanto de *concreción*, de *universalización* y finalmente de *fundamentación* antropológica de manera que adquieran una solidez en las conciencias e instituciones, y no queden a merced de los poderes, ideologías o sistemas políticas dominantes en cada momento.

La libertad del hombre ganada contra Dios o desde Dios

Para clarificar las responsabilidades del presente y columbrar las del futuro es necesario volver la mirada a la historia y preguntarnos cómo se ha vivido en la conciencia reflexiva y en la vida pública la relación entre los que en un momento se designaron derechos de Dios y porqué se contrapusieron con los derechos del hombre. Al comienzo de la era moderna se fue gestando la escisión entre el orden de la voluntad divina y el orden de la razón humana (Ockam y el nominalismo), como una alternativa entre la pura omnipotencia y decisión de Dios por un lado y la realidad moral, y la vida del hombre por otro. Si para Sócrates y Platón lo bueno era bueno en sí y por eso Dios lo quería en una interrelación de fondo entre querer de Dios y realidad moral (algo es bueno y por eso Dios lo quiere y porque el Dios bueno quiere algo por ello esa realidad es también buena),[1] a partir de la actitud nominalista se van a contraponer el orden objetivo, cuya racionalidad se intenta descubrir, y el orden divino, constituido por la pura voluntad y omnipotencia divinas, más allá de toda bondad real , que el hombre pueda descubrir e identificarse con ella por una conveniencia objetiva que su razón puede percibir.

El legado final de ese largo proceso es la contraposición entre Dios y el hombre en el siglo XIX, en el que Dios aparece como el antagonista del hombre, como el límite que hay que transgredir para que todo el horizonte sea propiedad humana, el soberano que hay que subyugar para que el hombre sea libre definitivamente en el mundo.[2] La *y* conjuntiva que había unido a Dios con el hombre ahora es convertida en una o disyuntiva: O Dios o el hombre. La libertad era la suprema reclamación en una agresión recíproca, que desembocó en un malentendido mortal. Para unos la libertad y derechos de Dios eran absolutos e incuestionables, mientras que para otros la evidencia estaba del lado del hombre, lo único verificable, universal e inmediato para todos.

El resultado de esa evolución paralela de la conciencia humana y de la conciencia cristiana en Occidente, que luego se irá extendiendo a otros continentes, es la aparición de binomios puestos en alternativa en lugar de la

[1] Platon, *Eutrifón* 2-16, en *Platonis Opera I* (Oxford 1958).

[2] Remitimos sólo a dos diagnósticos clásicos: H. de Lubac, *El drama del humanismo ateo (1943),* ahora en: *Oeuvres Complètes* I (Paris 1999) y K. Löwith, *Von Hegel zu Nietzsche. Der revolutionäre Bruch im Denken des 19. Jahrhunderts* (Stuttgart 1964); Id., *Gott und Mensch in der Metaphysik von Descartes bis zu Nietzsche* (Göttingen 1967).

conjunción y de la colaboración, que exigen en el fondo tanto la razón humana como la fe cristiana:

Omnipotencia de Dios	Libertad del hombre
Derechos de Dios	Derechos del hombre
Revelación divina	Razón humana
Creación divina originaria	Cultura humana creciente
Vida eterna futura	Vida temporal presente
Gracia de Dios	Creatividad del hombre
Derechos de la Iglesia sobre el mundo	Derechos de los Estados
Voluntad de adoración y sumisión	Voluntad de poder
Verdad objetiva	Libertad subjetiva

Esa contraposición, que primero es teórica y luego es practica, ha envenado las conciencias a la hora de reestablecer la idea de libertad religiosa, ya que para unos equivale a reclamar los derechos incondicionales de Dios más allá del hombre e independientemente del hombre (integrismos y fundamentalismos), mientras que para otros significa afirmar los derechos del hombre frente a la realidad de Dios, si es que existiere y (la no existencia es para ellos evidente) frente a una idea que se ha convertido en fuente de desgracia, temor y pérdida de dignidad para el hombre (ateísmo, agnosticismo). Esa lucha de fondo que corre a través del siglo XIX está determinada por los nacionalismos insurgentes, la unión de la autoridad espiritual del Papa como cabeza de la Iglesia católica y del soberano de los Estados Pontificios, la pretensión de las nuevas ideologías de conferir sentido mundano a la vida humana excluida toda religión y toda revelación. El *Syllabus* de Pio IX (8 de diciembre 1864) es el ejemplo máximo donde se mezclan todas esas cuestiones teológicas y políticas, de orden espiritual y de soberanías temporales, de legítimas reclamaciones seculares y de intolerables pretensiones absolutistas por parte de los nuevos gobiernos frente al mensaje de la Iglesia.[3] Esclarecer y purificar la memoria, para saber de donde han nacido algunos rencores y rechazos contra el cristianismo, es necesario para no mantener ciertas actitudes y sobre todo para comprender el lugar de entronque entre las exigencias de una conciencia humana, que lentamente avanza en la historia, y los contenidos de la revelación divina. La modernidad es en buena parte hija del cristianismo aunque en no pocos de sus representantes se haya vuelto contra la iglesia; por eso no se pueden rechazar y aceptar en bloque sus aportaciones sino que por

[3] Cf P. Christophe-R. Minnerath, *Le Syllabus de Pie IX*. Préface de Mons. C. Dagens (Paris 2000).

un lado hay que reconocer su voluntad de verdad y de libertad, a la vez que discernir las conclusiones, aceptando unas y rechazando otras.

Si el siglo XIX fue el del la contraposición y antagonismo entre Dios y el hombre y si el siglo XX fue el de una búsqueda de la convergencia y reciprocidad entre Dios y el hombre, el siglo XXI deberá ser el de la universalización en todos los ordenes (ético, político, religioso), concreción, transposición al ordenamiento jurídico y profundización en la naturaleza y exigencias de esos derechos constituyentes e inalienables de la persona humana, que derivan de su dignidad sagrada. En este siglo debería ser logro definitivo lo que F. Ozanam proclamaba para el siglo XIX: "La grande affaire du XIX siècle, l'alliance de la religion et de la liberté". Desde el cristianismo deberá aparecer con toda transparencia la "philantropia de Dios",[4] que Dios es Dios de los hombres, que el destino humano se ha convertido en el destino de Dios, siendo así Enmanuel, Dios con nosotros y por nosotros. De esta forma será manifiesto que si el hombre es ya el destino definitivamente elegido por Dios, Dios es la vocación constituyente del hombre.

La libertad religiosa

En el curso de nuestra historia hemos ido avanzando en la diferenciación de los órdenes de la realidad y en su valoración específica (orden físico, orden moral, orden político, orden espiritual, orden religioso) y en el descubrimiento de lo humano universal junto a lo humano particular. Así hemos pasado de considerar a los individuos como *súbditos* (posesión o dependencia de un señor), como *ciudadanos* (parte de un Estado, que defiende y apoya a los que pertenecen a él), *hombres* (portadores de una trascendencia sobre el resto de realidades mundanas, abiertos al Absoluto y cargados con una dignidad que no puede ser convertida en función, medio o instrumento para algo posterior o superior).[5] El descubrimiento y

[4] Tito 3,4. Las liturgias orientales invocan casi siempre con este título "Oh Dios, tú que eres amigo de los hombres y te has encarnado para su salvación", mientras que las occidentales latinas le invocan preferentemente con estos otros dos adjetivos: "Dios omnipotente y eterno".

[5] Esta es la aportación de Kant en este orden: "El hombre, y en general todo ser racional, existe como fin en sí mismo y no sólo como medio para cualesquiera usos de esta o aquella voluntad, y debe ser considerado siempre al mismo tiempo como fin en todas sus acciones, no sólo las dirigidas a sí mismo sino las dirigidas también a los demás seres racionales". E. Kant, *Fundamentación de la metafísica de las costumbres*. Cap. II (Madrid: Espasa 1994) 102.

valoración de la libertad tal como la vivimos hoy tiene también una larga historia. Hegel esbozó la trayectoria de ese reconocimiento. La dignidad y libertad eran en principio características propias del rey, por ser de origen divino y representante de los dioses en el mundo (Babilonia, Egipto); luego eran condición de los ciudadanos de la polis en Grecia y de la Urbs en Roma. Con la revelación bíblica apareció la libertad como la insignia grabada en la frente de todo hombre por ser cada uno de ellos imagen de Dios, su lugarteniente en el mundo y sustraído a la soberanía violenta de los otros, ya que incluso siendo fratricida, cual Caín, no puede ser matado por los demás, ya que es imagen de Dios y solo Dios es su soberano, porque es la fuente de su conciencia, libertad y dignidad.[6] Han tenido que pasar siglos para que ese saber, desde siempre sembrado en el corazón del hombre[7] se haya convertido en un derecho civil, reconocido, defendido y favorecido por los poderes públicos.

Para evitar el rechazo o la sospecha de ciertos grupos cristianos y de algunas religiones no cristianas hay que precisar con todo rigor la noción de libertad religiosa y su conexión con la verdad, hasta donde llega la capacidad decisiva del hombre y donde comienza el reino exclusivo de Dios. Primero hay que comenzar por la eliminación de equívocos. Hablar de libertad religiosa no se refiere a algo negativo, que permitiera al hombre quedarse ajeno, distante u opuesto a las realidades constituyentes de la existencia humana. No se refiere a la *relación del hombre con la verdad*, como si pudiera elegir indiscriminadamente entre ella y el error, porque él esta hecho para la verdad; tampoco se refiere a la *relación personal del hombre con la religión*, como si todas las religiones fueran iguales; menos se refiere

[6] Este es el sentido del capítulo 4 del Génesis: definir al hombre como guardián responsable de su hermano, mostrarle que esa responsabilidad no es soberanía porque esta es exclusiva de Dios; que éste vela por Caín, quien a pesar de ser fratricidio (segundo pecado original) sigue siendo imagen de Dios; que no puede ser aniquilado por los demás, quedando confiado al juicio y benevolencia de Dios mismo.

[7] “Lex scripta in cordibus hominum”. San Agustín, *Confesiones* 2,49. La ley natural, por tanto, no remite a algo que estuviera objetivado fuera en el mundo, con lo que el hombre se tropezara como se tropieza con una piedra o un árbol. “Esta ley se llama natural no por referencia a la naturaleza de los seres irracionales sino porque la razón que la proclama pertenece propiamente a la naturaleza humana”. *Catecismo de la Iglesia católica* Nr. 1955. El hombre va descubriendo esa ley en la medida en que va escrutando su propio corazón y la manifestación sucesiva de Dios en la historia: hay una historicidad del orden moral como hay una historicidad tanto de la revelación de Dios como del propio conocimiento que el hombre va adquiriendo de su ser y de su misión.

a la *relación de cada uno con Dios*, como si el hombre fuera un absoluto sin relación previa, religadora y obligante, a Dios y sin destinación a él. El hombre llega a ser plenamente hombre en la medida en que se descubre ordenado a la verdad abierto al bien, religado al Absoluto, destinado a una misión; y en la medida que descubre esas dimensiones de su ser, descubre la libertad para existir yendo hacia ellas. La libertad es la capacidad de lo definitivo y eterno, de lo que deriva y a lo que se ordena la existencia del hombre.[8] La libertad exterior, la libertad psicológica, y la libertad espiritual son así el camino y el dinamismo que conducen a la verdad, al bien, al fin, a Dios. Buscar la verdad, adherirse a la verdad y conformar la vida según las exigencias de la verdad con elemento constituyentes de la vida humana. Para eso es la libertad, que se funda no en las disposiciones subjetivas del individuo sino en la misma naturaleza de la persona.[9] Igualmente hay que distinguir la libre decisión de la voluntad (*liberum arbitrium hominis*), exigencia fundamental de una metafísica de lo humano, de la libertad que como gracia de Cristo alumbra el hombre y redime su voluntad haciéndola capaz de adherirse al bien que necesita, tal como la exponen sobre todo San Juan, San Pablo y tras ellos San Agustín (*libertas Christi et christianorum)*; finalmente de la carencia de coacción social y política del individuo en el orden civil (*libertas civis in re publica*). Estos tres órdenes están conexos pero como tales son independientes y no pueden confundirse, ya que cada uno de ellos remite a un orden de realidad: el ser del hombre (persona), el plan salvífico de Dios (creyente), la sociedad civil (ciudadano).

La libertad religiosa de la que hablamos se refiere a la relación de los hombres entre ellos, a la relación de la sociedad con los individuos que la constituyen, del Estado con las personas y los grupos sociales y políticos. Tampoco estamos haciendo un discurso teológico sobre la libertad tal como

[8] "La libertad no es precisamente la capacidad de revisar siempre de nuevo, sino la única facultad de lo definitivo, la facultad del sujeto que mediante esa libertad ha de ser llevado a su situación definitiva e irrevocable; por ello, y en este sentido, la libertad es la facultad de lo eterno. Si queremos saber qué es lo 'definitivo', entonces hemos de experimentar aquella libertad trascendental que es realmente algo eterno, pues precisamente ella pone un carácter definitivo, que desde dentro ya no quiere ni puede ser otra cosa. La libertad no existe para que todo pueda ser siempre de nuevo diferente, sino para que algo reciba realmente validez y condición ineludible. La libertad es en cierto modo la facultad de fundar lo necesario, lo permanente, lo definitivo". K. Rahner, *Curso fundamental sobre la fe. Introducción al concepto del cristianismo* (Barcelona 1979) 123-124; 373.

[9] Concilio Vaticano II, *Declaración sobre la libertad religiosa "Dignitatis humanae"* (DH) 2.

aparece en el relato de la creación, cuando hombre y mujer son creados a imagen de Dios, y como tales son sus reflejos en el mundo, con una divina constitución indeleble, que no es abolida ni destruida por el pecado.[10] No hablamos tampoco de la libertad para la que nos ha redimido Cristo, ni del don de su Santo Espíritu que, derramado en nuestros corazones, nos otorga la filiación del propio Hijo y es la que nos hace definitivamente libres en el mundo. Finalmente tampoco se habla de la libertad en la Iglesia, donde vigen como en todo lugar los derechos humanos universales, que por las características especiales de su naturaleza referida a la voluntad positiva de Dios revelada en Cristo y los apóstoles lleva consigo determinaciones especiales.[11] Partiendo de esa dignidad objetiva y derechos de la persona, previos a todo ordenamiento jurídico, que éste debe reconocer, hablamos de la dimensión social, pública y política de la libertad personal, que los regímenes políticos deben proteger y fomentar a la vez que regular su ejercicio, estableciendo aquellos límites que viene exigidos por la tutela eficaz de todos los ciudadanos, la paz y la moralidad pública y lo que el bien común u orden público reclamen en situaciones concretas. La libertad de la persona no es un absoluto, ya que tiene que coexistir con la libertad de las demás, con los valores universales y con la convivencia en la diversidad.[12]

La libertad religiosa aparece primero como una concreción de la libertad de conciencia general, y segundo como exigencia de una verdad de cuya naturaleza se deriva que sólo lo es para el hombre si pasa por su libertad.[13] La Declaración de París en 1948 enumera primero el pensamiento y la conciencia, sin duda para mostrar que ellos son la raíz de la que nace la liber-

[10] Génesis 1,26-29; Gál 2-5; Rom 8,2 y 21; 2 Cor 3,17; Sant 1,25; 1 Ped 2,16; Jn 8,32-36.

[11] "La libertad religiosa proclamada en el Documento como un derecho de la persona, no se refiere a las relaciones de los seres humanos con la verdad o con Dios: se refiere a sus relaciones entre ellos en la vida social. Tampoco se refiere a las relaciones entre los miembros de una comunidad religiosa cualquiera y las autoridades respectivas en el interior de ella... Es evidente que también en el seno de la Iglesia, y en el interior de cualquier otra comunidad religiosa, las relaciones entre los miembros, y entre estos y las autoridades, no pueden ser reguladas sino según los criterios y con los métodos que responden a su dignidad de personas, por tanto según el criterio y con los métodos de la libertad. Pero la iglesia y las comunidades religiosas tienen una naturaleza profunda, una finalidad propia, un orden jurídico propio". Mons. P. Pavan, *El derecho a la libertad religiosa en sus elementos esenciales*, en: J. Hamer-Y. Congar, *La libertad religiosa*, 193-194.

[12] DH 7.

[13] (Cf K. Rahner, *Vorbemerkungen zum Problem der religiösen Freiheit*, en Sämtliche Werke. Band 22/2. Freiburg 2008. Pág 113-121).

tad de religión: "Toda persona tiene derecho a la libertad de pensamiento, de conciencia y de religión; este derecho incluye la libertad de cambiar de religión o de creencia, así como la libertad de manifestar su religión o su creencia, individual y colectivamente, tanto en público como en privado, por la enseñanza, la práctica, el culto y la observancia".[14] Estas tres palabras circunscriben tres órdenes de realidad: el pensamiento, que discierne la verdad (orden de la reflexión), la conciencia que se orienta hacia el bien (orden de la acción moral), la religión por la que el hombre se abre al primer origen y al último sentido (orden del transcendimiento absoluto hacia el Absoluto o de la salvación). Estos tres órdenes están conexos entre sí de forma que no hay actuación de la existencia creyente si no van mediadas las decisiones del hombre por el pensamiento, que discierne, conoce y reconoce, a la vez que por la voluntad que descubre un bien y se orienta hacia él.

La unión de las tres palabras es esencial, ya que han existido o pueden existir regímenes que reconocen la libertad de investigación y de pensamiento, pero excluyen la de religión por decidir de antemano que la religión es una alineación de la vida humana que no tiene fundamento en la razón y en la ciencia. La conexión entre las tres palabras es, por ello, esencial. El pensamiento abre, aunque por sí solo no conduzca necesariamente a la religión; la conciencia abre aunque por si sola tampoco exija la afirmación religiosa. La ejercitación religiosa añade a uno y otra una entrega a otro orden de realidad, que está en coherencia con los dos anteriores (verdad y bondad) pero que los excede. Las razones para creer son del orden personal, que presuponen las científicas y morales, pero que van más allá de ellas.

El Concilio Vaticano II explicita las exigencias que hacia la sociedad y la autoridad civil implica ese derecho humano fundamental: "Esta liberad (religiosa) consiste en que todos los hombres deben estar inmunes de coacción, tanto por parte de personas particulares como de grupos sociales y de cualquier potestad humana, y ello de tal manera, que en materia religiosa ni se obligue a nadie a obrar contra su conciencia ni se le impide que actúe conforme a ella en privado y en público, solo o asociado a otros dentro de los límites debidos".[15] El pensamiento, la conciencia, la religión son los que podríamos llamar "derechos raíz o derechos tronco", ya que de ellos derivan los demás su coherencia y su dignidad, y sin ellos el ejercicio de los otros derechos carecerían de su base objetiva.

[14] Artículo 18.
[15] DH 2.

En ese sentido escribía Newman: "En este mundo no hay otra fuerza que el compromiso con la razón ni otra libertad que sentirnos cautivos de la verdad".[16] Dupanlup, en su comentario clásico al Syllabus de Pío IX, del 23 de enero de 1865, habla de "la plus noble des libertés, la sainte liberté des âmes". No se puede emplear la fuerza, ni el engaño, ni el ocultamiento de algo a favor de la verdad, ni de la verdad del hombre ni de la verdad de Dios. La verdad como fin reclama los medios correspondientes y connaturales para llegar a ella. Dado que la manifestación de Dios a las conciencias o su revelación en la historia es una oferta libre y amorosa, destinada a hacer de él un compañero de alianza y un amigo de destino, la respuesta del hombre solo puede ser el resultado de un discernimiento luminoso y de un consentimiento amoroso.

Nos queda por decir una palabra sobre el sujeto y el fundamento de ese derecho. El giro fundamental en la conciencia durante el siglo XX tuvo lugar al reconocer que en el orden externo y público el sujeto de los derechos no son las ideas, ni las cosas, ni las situaciones, sino las personas, tanto en su expresión individual como social y comunitaria. Aparece la persona como el orden supremo de lo real, como lo radicalmente fundante y sagrado, desde el cual se tienen que comprender la sociedad, el Gobierno y las leyes. La persona, que es algo más que individuo aislado, incluye una historia, un contexto, una herencia y una dimensión comunitaria pero todos ellos adquieren relevancia en la medida en que son de la persona y la persona los hereda, los afirma y los mantiene vivos. La dificultad para algunos obispos y grupos de católicos para aceptar la Declaración del Vaticano II sobre la libertad religiosa derivaba de la afirmación contraria: "La verdad es la única que tiene derechos; por tanto quienes están en el error carecen de ellos y reconocérselos sería oponerse o negar la verdad a la que estamos obligados". Aquí es necesario distinguir los órdenes: uno es el interior, personal, subjetivo del hombre ordenado a la verdad, impulsado por el deber y la ley moral, necesitado de una Plenitud que le haga feliz; y otro en cambio es el orden exterior de la convivencia social y del ordenamiento jurídico. El hombre es hombre verdadero y pleno en relación con la verdad, el bien y el fin; sabe que solo con ellos y nunca contra ellos llega a su propia autonomía y libertad. Por eso sabe que en un cierto sentido su vida debe ser una permanente batalla contra sí mismo y a favor de lo que le funda y excede, llama y plenifica. Así se deben entender las afirmaciones de dos gran-

[16] J.H. Newman, *Poder y ganar*. Cáp. 3. Madrid 1994. Pág 43.

des pensadores que fueron a su vez excelsos paladines de la libertad y que como lema ascético o propuesta dramática para su propio proyecto de existencia, afirman: “Antes la verdad que la paz” (Miguel de Unamuno) y “Antes la santidad que la paz” (Newman).

Otro orden distinto, en cambio, es el social, jurídico y político. Este debe ser la plasmación de lo que las personas, que son el fundamento y destino de ese orden, eligen y trasponen desde su interior al exterior mediante decisiones, instituciones y programas, fruto, por tanto, de su libertad personal, individual o comunitaria. Es necesario reconocer que solo si son las personas las que establecen los valores, los ideales, los fines escapamos al poder dominador de unos sobre otros. La verdad tiene la primera y la última palabra, pero dado que esta no está ahí en el mundo como los ríos, los montes o las fábricas, hay que buscarla y encontrarla como personas y como tales articularla en el ordenamiento jurídico. Si no se hace esto, la verdad queda en manos de quienes tienen el poder, las fuentes de la riqueza dirigen las masas anestesiadas, o se han apropiado de los resortes instituciones mediante el ejercicio político. La verdad es lo primero, en la medida en que existe en las personas y en la medida en que éstas son dueñas de su destino. Hay algo común a todos los hombres que nos permite esperar que vayamos llegando a encontrar la verdad y a encontrarnos con la verdad, y que sea ella la que nos corrija en su búsqueda y nos confirme con su plenitud, pero el camino no puede ser otro que la libertad.

El fundamento de este derecho, que es universal, imprescriptible y anterior a las leyes positivas, no es una disposición subjetiva de algunos hombres, de su bondad moral, de su inteligencia especial o de su situación concreta, sino la naturaleza objetiva de la persona, de todas las personas en cuanto tales. Uno de los textos más incisivos del Concilio Vaticano II ha sido el siguiente: “El derecho a la libertad religiosa no se funda en la disposición subjetiva de la persona sino en la misma naturaleza. Por lo cual el derecho a esta inmunidad de coacción externa permanece también en aquellos que no cumplen la obligación de buscar la verdad y adherirse a ella, y no puede impedirse su ejercicio con tal de que se respete el justo orden publico”.[17] Aquí hay que volver la mirada a la historia para percatarnos de donde nacían las dificultades que no pocos obispos tenían ante semejantes planteamientos. “Las dificultades que los objetantes sacaban de los textos de León XIII procedían de lo que éste conservaba de la teología

[17] DH 2,2.

agustiniana medieval que vinculaba el *ius* con la *iustitia* y por tanto con la *veritas*, que vinculaba, en resumen, todo verdadero derecho con la verdad absoluta, objetiva y tomada en sí misma... Pero Santo Tomás y San Alberto habían desprendido y fundamentado una consistencia de la naturaleza independientemente de su condición de justicia sobrenatural o de pecado, y consiguientemente una validez del orden natural independiente de la fe y de la caridad".[18]

Desde esta dificultad presentada por ciertos grupos de obispos en el Concilio se entiende que éste haya comenzado la Declaración afirmando la verdad de la revelación cristiana y de su permanencia en la única iglesia de Cristo, a la vez que la obligación del hombre de buscar la verdad y de adherirse a ella. De esta forma cerraba el paso a la acusación de indiferentismo y de soslayar el carácter definitivo y normativo de la revelación de Dios en Cristo y de su permanencia en la Iglesia católica. Pero estas afirmaciones exigen para ser legítimas el reconocimiento de que a la verdad solo se llega por la libertad, también la religiosa y de manera especial a la cristiana, que es oferta de Dios a un hombre para ser su compañero de alianza, no su esclavo de carga "Confiesa a si mismo el sagrado Concilio que estos deberes tocan y ligan la conciencia de los hombres y que la verdad no se impone de otra manera que por la fuerza de la misma verdad que penetra suave y a la vez fuertemente en las almas".[19]

III. El diálogo interreligioso

Histórica y teológicamente es un hecho significativo que el Concilio Vaticano II promulgase en la misma sesión la *Declaración sobre las relaciones de la Iglesia con las religiones no cristianas* (28 de octubre de 1965), la *Declaración sobre la libertad religiosa* (7 diciembre 1965), la *Constitución pastoral sobre la iglesia en el mundo actual* (7 de diciembre 1965), además del *Decreto sobre el ecumenismo*, que había publicado en la sesión anterior (21 de diciembre 1964). Quedaban así establecidos e iniciados los tres grandes cauces del dialogo por parte de la iglesia católica: con los otros cristianos (*diálogo ecuménico*), con los otros creyentes (*diálogo inte-*

[18] Y. Congar, en J. Hamer-Y. Congar, *La libertad religiosa. Comentario a la Declaración 'Dignitatis humanae'* (Madrid 1969) 22-23.

[19] DH 2,3.

rreligioso), con todos los hombres al margen de su cultura, religión o no religión *(diálogo intercultural)*.

Con estos documentos la iglesia católica no deponía su convicción de ser la portadora de la revelación escatológica de Dios en Jesucristo. Ahora bien, esta afirmación de identidad no significaba la negación sino el reconocimiento explícito de un valor humano a otras religiones e incluso de un valor salvífico en los planes de Dios. El punto de partida de esta perspectiva conciliar es de nuevo la persona en libertad como punto de partida para la relación con Dios y para la relación con sus semejantes. *Y la persona en situación y en decisión*. Afirmar que el punto de partida es la persona en situación equivale a decir que se hace un reconocimiento de cómo el hombre es lugar, tiempo e historia y debe ser acogido y valorado no en un vacío de concreciones históricas sino en ellas y desde ellas; que él así mismo debe buscar la verdad partiendo del lugar de nacimiento de formación en el que Dios le ha puesto. Lo que Rahner y Kasper dicen del punto de arranque de la cristología cristiana lo podemos aplicar a la reflexión teológica que cada religión debe hacer desde sus principios y fundamentos tal como ellos son históricamente vividos por la propia comunidad creyentes.[20]

Esto significa a la vez que ningún contexto ni cerco particulares cierran la puerta de la inteligencia y de la libertad humanas para acceder a la verdad, para la afirmación religiosa y para la relación con Dios. Para nuestra cuestión esto significa que la Iglesia propone y acepta el dialogo con todas las religiones tal como ellas existen, en orden a un descubrimiento de lo verdaderamente humano, al cultivo de la solidaridad, y a la perfección de la vida personal y comunitaria, pero sobre todo al cultivo de lo que es la aportación específica de las religiones a la humanidad: una oferta de sentido último como luz y fuerza para vivir, como esperanza para pervivir, como confianza en el sobrevivir, en una palabra salvación. Libertad para aceptar y amor para colaborar en orden a que los hombres se encuentren en la paz

[20] "Tesis 1. Tanto desde la perspectiva de la teología fundamental como desde el punto de vista humano es perfectamente legítimo para una cristología partir de nuestra relación con Jesucristo. Consideramos esta relación tal como es comprendida y vivida de hecho en las iglesias cristianas". K. Rahner. en K. Rahner-W. Thüsing, *Cristología. Estudio teológico y exegético* (Madrid 1975) 21. "Punto de arranque de la cristología es la fenomenología de la fe en Cristo, tal y como en concreto se cree, vive, anuncia y practica en las iglesias cristianas". W. Kasper, *Jesús el Cristo* (Salamanca 1974-1978) 30.

y en la esperanza, – dimensión personal y dimensión social de la fe cristiana – son esenciales en el dialogo interreligioso.[21]

El presupuesto y a la vez el objetivo del diálogo es la búsqueda y encuentro de una verdad, que nos es anterior y superior a todos, que nos convoca a todos a trascendernos a nosotros mismos para encontrarnos en ella y desde ellas revisar nuestras diferencias, para ver como se abren a ella y se plenifican en ella. El encuentro por tanto tiene lugar no directamente entre nosotros mismos sino en aquello a lo que tendemos y que de formas distintas todos confesamos que es el origen, el fundamento y la meta de la vida humana. El cristiano no dice que eso es Dios sino que Dios constituye el fundamento metafísico y el don personal al hombre de lo que esas palabras en ultimidad quieren significar. El diálogo tiene a su vez unos fundamentos que lo sostienen. Ante todo, fundamentos antropológicos. Estos son tres: *communis humanitas* (igualdad fundamental de todos los hombres), *communis sacralitas* (reconocimiento de que el ser humano es lo máximo en el orden de la realidad, de las necesidades, de los deberes y de los derechos, abertura a un orden sagrado al cual acoge en adoración y del cual espera salvación), la *communis historia* (experiencias sagradas de encuentro con la divinidad y de santidad a la vez que de horror y violencia. A estos fundamentos antropológicos hay que añadir, en perspectiva cristiana, los fundamentos teológicos: común origen de todos los hombres en la acción creadora de Dios, el común destino de sus lugartenientes en el mundo, la vocación al conocimiento de Dios, a la filiación divina con Cristo, a la colaboración con la acción del Espíritu Santo que alienta la marcha del mundo y el retorno al Padre).[22]

Estos elementos comunes, con el reconocimiento de la persona y la libertad de cada uno, son los que constituyen el fundamento y garantía de

[21] "El esfuerzo con miras al testimonio común de la fe de los cristianos – al ecumenismo – está incluido en la prioridad suprema de la iglesia. A esto se añade la necesidad de que todos los que creen en Dios busquen juntos la paz, intenten acercarse unos a otros, para caminar juntos, incluso en la diversidad de su imagen de Dios, hacia la fuente de la luz. En esto consiste el diálogo interreligioso. Quien anuncia a Dios como Amor 'hasta el extremo' debe dar testimonio del amor. Dedicarse con amor a los que sufren. Rechazar el odio y la enemistad, es la dimensión social de la fe cristiana, de la que hablé en la Encíclica *Deus caritas est*". Benedicto XVI, *Carta a los obispos de la iglesia católica.* 10 de marzo 2009.

[22] Comisión teológica internacional (CTI), *El cristianismo y las religiones*. Nr. 27-79 en CTI, Documentos 1969-1996 (Madrid BAC 1998) 567-587. (Los presupuestos teológicos fundamentales: la iniciativa del Padre en la salvación, la única mediación de Jesús, la universalidad del Espíritu Santo).

logros positivos en el diálogo. Por tanto no los elementos particulares de historia particular. Estos deben ser aportados, reconocidos y amados por cada uno de los dialogantes, en orden a colaborar en el diálogo con igual dignidad e incrementar su hondura y riqueza. "El diálogo interreligioso se fundamenta teológicamente en el orden común de todos los seres humanos creados a imagen de Dios, sea en el destino común que es la plenitud de la vida en Dios, sea en el único plan salvífico divino a través de Jesucristo, sea en la presencia activa del Espíritu divino entre los adeptos de otras tradiciones religiosas".[23]

El diálogo se ordena al encuentro de la verdad divina, y a nuestro encuentro común con ella, como realidad sagrada, a la que cada una de las religiones comprenderá con unas categorías, a la vez que se dejará guiar por ellas para pasar de los conceptos nuestros a la realidad suya, tal como ella nos la manifiesta y entrega. "Todo diálogo vive de la pretensión de verdad de los que participan en él".[24] Pero la verdad no es algo material, exterior, preexistente ahí como las cosas materiales. La verdad nos precede a la vez que es resultado del dinamismo espiritual del hombre. La verdad pasa por la conciencia y por la libertad del hombre. Sin libertad no hay verdad, sin libertad y verdad no es posible la fe, ni se accede a la salvación. La verdad no es mero resultado de una proposición exterior y menos de una violencia material sino de aquella ejercitación de la persona que se explicita en el deseo, en la deliberación y en la predilección, en el amor y en el juicio. Desde siempre la filosofía ha afirmado que la verdad no está en la simple aprensión ni por supuesto en la arbitraria opción, sino en el juicio que precede y fundamenta la decisión, que entonces es responsable y resulta necesaria.

El hombre no funda la verdad sino que va al encuentro de ella y cuando se trata del orden personal al encuentro con ella. No la instaura sino que la reconoce. Ella se le ofrece como a sujeto personal. Dios no se impone como un poder, una ley cósmica, una necesidad biológica o un terror insuperable. Si es verdad que hay *religiones de equilibrio*, referidas a la realidad cósmica, que proponen la inserción del hombre en las leyes que regulan la vida en orden a superar las tensiones y lograr una paz final, sin embargo la mayoría de ellas, en las que aparece más claro el elemento personal y personalizador, que es lo más propio del orden religioso, se han comprendido como *religiones de ruptura*. En ellas el hombre es despertado a su identidad

[23] Id., Nr. 25. (BAC 566).
[24] Id., Nr. 101 (BAC 596).

como sujeto ante una alteridad que le llama, nombra por su nombre, envía, encarga con una misión y responsabiliza de ella. Y esto en un doble orden: en el ético (imperativo absoluto del deber) y en el religioso (manifestación fascinadora de lo Santo, que atrayendo engendra libertad, como la engendran la belleza, el amor y la fidelidad en su gratuidad dramática). Tal experiencia, en cuanto suscitadora de libertad, envía a una responsabilidad y solo es vivible como permanente ejercitación de libertad.

El binomio revelación-fe tiene como su estructura específica la libertad: la libertad de Dios para comunicarse y la libertad del hombre para responderle en la palabra consenciente y corresponderle en la vida. El mismo Dios que en libertad llama es el que suscita la conciencia de ser un sujeto digno y dignificado para la respuesta. El que llama por fuera es el mismo que ilumina por dentro. Ese único hombre recibe una iluminación de la inteligencia y fortalecimiento de la voluntad para corresponder a la llamada desde dentro de sí mismo. Por eso se siente siempre religado y obligado pero nunca coaccionado, sino por el contrario liberado, aun cuando sea dramáticamente ya que la libertad nunca radica en el solipsismo de un sujeto cerrado sobre sí sino abierto a la realidad cósmica, al acontecimiento histórico y a la palabra personal de los otros y del Otro. La categoría de persona en la historia del pensamiento humano tiene sus raíces en esta experiencia de ser alguien porque se es llamado por Dios, de tener un nombre propio, una vocación propia y una responsabilidad inalienable; en una palabra ser alguien personal y libre, no un “Nadie” como el protagonista en la Odisea o un “Cualquiera”, como expresa el lenguaje común

La persona con su libertad es así un descubrimiento no sólo pero sobre todo, de la experiencia religiosa tal como ella ha tenido lugar en el universo bíblico.[25] Es resultado pero a la vez es presupuesto. Sobre la marcha de la historia ha ido apareciendo cada vez más clara la naturaleza individual de la confesión religiosa. El individuo pertenece a un pueblo y comparte su destino, que es vivido delante de Dios en vocación y misión especialmente por aquellas “personalidades corporativas” o personalidades-cabeza del pueblo como son Abraham, Moisés, David, Jesucristo en quienes Dios anti-

[25] Sobre la contribución del cristianismo a la formación y afirmación del concepto de persona, cf las obras clásicas de S. Álvarez Turienzo, A. Grillmeier, J. Zizioulas. C. Andresen, B. Studer, citadas en S. del Cura, Contribución del cristianismo al concepto de persona: Reflexiones de actualidad, en I. Murillo (ed.) *Religión y persona* (Madrid 2004) 17-46, O. González de Cardedal, *El quehacer de la teología* (Salamanca 2008) 114 nota 7.

cipa los proyectos que tiene para todos, pero ellos no son suplentes ni sustitutos sino iniciadores, anticipadores y posibilitadotes de lo que tiene que realizar cada uno en conciencia y libertad. Del Deuteronomio a Ezequiel va un largo camino en el descubrimiento de la responsabilidad individual: Los padres son responsables de sus acciones y los hijos de las suyas. En el Nuevo Testamento Cristo nos anticipa a todos y "muere" por todos, pero no suple a nadie ni le ahorra su elección y decisión a nadie. Con ello estamos enunciando la tesis general: *El sujeto de la religión es la persona individual, no el pueblo, no el clan, no la cultura, no la política*. Este sujeto personal vive en un entorno, en el cual, desde el cual, contando con el cual y en diálogo con el cual debe realizar su decisión de fe o de increencia. Analógicamente hay que afirmar que *el sujeto del diálogo interreligioso es el sujeto personal, en la articulación social y comunitaria*, que en cada religión tenga, de forma que puede y debe llevarse a cabo en la libertad de las personas y en la representación autorizada y autoritativa de aquellos que en cada comunidad creyente son portadores de la voz común.[26]

El diálogo, por consiguiente, sólo es posible y verdadero donde se ha dado la nítida diferencia y reconocimiento de la autonomía entre los distintos órdenes que constituyen la vida y la sociedad: el orden político, el orden social, el orden moral, y el orden religioso. Y además allí donde a la vez que la diferencia teórica exista un reconocimiento práctico y un ordenamiento jurídico que reconozca estos derechos. El establecimiento teórico y la articulación jurídica de esta diferencia de órdenes no se ordena a contraponerlos sino a la salvaguarda de todos esos derechos y a la colaboración entre ellos. La persona, en su conciencia y libertad, es anterior a todos sus atributos posibles y su afirmación es la condición de toda dignidad humana y de toda validez religiosa. El carácter sagrado de este derecho a la libertad religiosa, como condición de vida personal, de integración comunitaria y de diálogo con los demás, es percibido ya por una inmensa mayoría de los

[26] Las iglesias están formadas por personas libres, que son creyentes y se unen en comunidad para el ejercicio de su vida religiosa. Los Estados no pueden pretender tratar aisladamente con los creyentes al margen de sus comunidades y autoridades respectivas sino deben hacerlo con aquellos que las representan y expresan autorizada y autoritativamente el sentir de esos grupos. La tentación de todos los gobiernos totalitarios es destejer la sociedad, marginando los grupos humanos que la forman e instaurando relaciones entre el Estado y el individuo, lo que equivale a la relación entre el pigmeo y el gigante. Tal exclusión de los grupos es una de las formas más sutiles de dictadura, que no por coincidir con un discurso verbalmente democrático, deja de ser por ello real.

humanos. Esa universalidad objetiva debe acreditarse hoy en una universalización subjetiva y en una regulación jurídica eficaz. La libertad religiosa hay que reafirmarla como un derecho universal, no solo como resultado particular de una religión o de una cultura, dentro de las cuales esos derechos hayan sido descubiertos y subrayados, pero que han acreditado su validez más allá de ellos. Por tanto deben ser propuestos, vividos y protegidos jurídicamente más allá de:

– una cultura (Occidente)
– una religión (Cristianismo)
– una clase social (Burguesía)
– una raza (Blanca)
– un sexo (Masculino)
– un continente rico (Norte)
– un sujeto privilegiado (quien tiene saber, poder, riqueza).

¿Dónde se encuentran hoy las *dificultades o rechazos de esta libertad religiosa*, como condición de afirmación de la propia fe y del diálogo interreligioso? Yo creo que provienen de tres campos: la sujeción política de la religión, su determinación ideológica, y el integrismo religioso. La primera dificultad proviene de aquellas formas de cultura, sociedad y gobierno que no han hecho la separación entre los distintos órdenes de la realidad, que unen inseparablemente religión y política, religión e historia nacional, autoridad religiosa y autoridad política, fuero interno y fuero externo, pertenencia natural a la familia y pertenencia libre a una iglesia. En todos estos casos se convierte en sujeto de la religión a entidades apersonales, prepersonales o suprapersonales, que dejan fuera al sujeto personal o lo condicionan hasta el límite de no poder actuar en libertad. No pocos de estos regímenes argumentarán que el derecho a la libertad religiosa tal como se propone hoy día es resultado de una religión (el cristianismo) y de una cultura (Europa), que están condicionados, son dependientes de ambos y, por tanto, no son universales, ni tienen validez en aquellos espacios culturales y religiosos donde occidente y el cristianismo no han estado presentes o han sido sustituidos por otras religiones.

Ante tales objeciones habría que comenzar advirtiendo que la propuesta de libertad religiosa no se hace para favorecer la presencia o pretensión del cristianismo, sino para crear el espacio de afirmación religiosa de todo hombre: en su identidad religiosa, irreligiosa, o antirreligiosa, hasta el extremo de que tal afirmación de libertad es incluso la garantía y defensa pública del ateísmo, al cual solo se le exige lo que a las religiones: respeto a los derechos de otros, respeto a la historia, a la paz y moralidad públicas,

al bien común y a la convivencia pacífica. En segundo lugar hay que intentar mostrar cómo esa afirmación de la libertad religiosa otorga dignidad a cada sujeto humano, más allá de su origen, pertenencia, sexo, religión o cultura; que por consiguiente esa igualación del pobre con el rico, del culto con el inculto, no es una depreciación de esos valores sino la relativización de todos ellos a lo que es primordial en la vida humana: la persona, su dignidad sagrada, el carácter único de cada hombre, su condición de absoluto como humano y por tanto su imposible reducción a mero agente, operario, votante, esclavo. El cristianismo tiene que ser consciente de cómo estas categorías que están en su punto de partida: Dios personalizador y personal, el hombre como imagen del Dios personal, su condición de absoluto porque Dios ama a cada uno y Cristo murió por cada uno, no encuentran en todas las religiones esos acentos personalistas, derivados de la comprensión de Dios como libertad, amor, benevolencia originaria y compartida. Tendrá por tanto que hacer un esfuerzo, con palabras y con obras, para mostrar la convergencia de esos descubrimientos cristianos con las dimensiones, anhelos, esperanzas y experiencias antropológicas fundamentales. ¿No es mayor la dignidad del hombre cuando es reconocido como personal ante un Dios personal, con una vocación personalizadora en el mundo y un destino final que no es aniquilación o reducción de conciencia y libertad sino participación indestructible en la libertad originaria y amorosa de Dios? ¿No es Dios la mejor salvaguarda del hombre? ¿No son su justicia y santidad las garantías últimas de una justicia interhumana que no existe en este mundo y sin la cual nada tendría sentido y la vida humana sería una farsa procaz? Estas afirmaciones de Dios como último garante de la justicia de los hombres, no pueden ser tomadas como alibi para descuidar o postergar la justicia que hay que instaurar en el mundo, pero no por ello dejan de ser verdaderas, ni dejan de convertirse en aguijón para crear justicia en este mundo, pues la forma de vivir en este se convierte en criterio para el juicio sobre nosotros en una vida futura.

La segunda dificultad para la libertad religiosa y el diálogo interreligioso viene de aquellos sistemas o ideologías que elevan a categoría absoluta para comprender al hombre y organizar la sociedad un sistema en el que el individuo es reducido a número de una masa, instrumento al servicio de un régimen que reclama ser la verdad y por ello tener la autoridad para decidir en nombre de sus ciudadanos. En tales regímenes la religión es comprendida como alienadora de la vida humana, como freno para la humanización colectiva y para el progreso social. Consiguientemente no se reconoce libertad para aquello que es considerado una degradación de la vida,

bien se interprete la realidad de Dios y los otros elementos de la religión con categorías filosóficas como sustitución del hombre (Feuerbach), como inversión de la naturaleza y por ello como perversión del hombre (Nietzsche), como fruto de una neurosis infantil y colectiva (Freud). En nombre de una teoría filosófica, de un proyecto político o moral, y de una indagación psicoanalítica se declara ilusa e inhumana la religión y por ello se excluye la libertad para ejercitarla, no se la apoya públicamente y no se le otorga el reconocimiento civil y la protección jurídica correspondiente. En tales contextos el diálogo interreligioso no es posible, porque en ellos no hay personas sino solo súbditos, de un dictador personal o de una dictadura ideológica de partido o de libro, bajo la cual la persona pervive en esclavitud.

La tercera objeción procede de campos en los que la experiencia religiosa es especialmente intensa en una línea hasta dejar fuera de juego a las demás percepciones de lo que Dios es para la vida humana. Tal percepción parte del carácter absoluto, incondicional y sagrado de Dios ante el cual el hombre se reconoce nada y pecado, de realiza ante él como puro oyente y obediente ante las órdenes recibidas, sin entrar en una relación con él determinada por nuestra inteligencia, razón histórica y esperanza personal. En tal actitud se acentúa sobre todo lo que en él es autoridad, voluntad y ley respecto del hombre de forma que el elemento “trascendencia” y “ley” queda subrayado hasta el límite de apenas dejar espacio para el reverso necesario: su trascendencia y su amor. La voluntad de Dios es vista solo fuera del hombre, en la historia, en el profeta, en el libro, como realidades antepuestas al hombre que le sobrevienen como la tormenta a la tierra o la ley de la gravedad a los cuerpos. Aquí aparecen las categorías de las que hablamos al principio: los derechos de Dios contrapuestos a los derechos de los hombres, la gloria de Dios contrapuesta a la gloria del hombre, la gracia de Dios contrapuesta a la libertad del hombre, ejerciendo tal peso lo divino sobre lo humano, que solo son posibles la sumisión y el acatamiento incondicional de voluntad sin poner en juego la inteligencia que Dios nos dio, en primer lugar para conocerle, entrar en relación con él y comprender su palabra. Aquí la revelación lo es todo y la razón casi nada; la obediencia es absoluta y la experiencia apenas cuenta, el acatamiento incondicional total y el amor apenas perceptible. La absolutización de una de estas dos dimensiones de Dios y de estas dos actitudes del hombre ante él hace imposible la experiencia religiosa en toda su complejidad y hondura y como consecuencia el diálogo interreligioso.

Junto a la anterior me parece que hay otros tres elementos que caracterizan a esta actitud integrista. 1) No reconoce o integra suficientemente lo

que son la esencial historicidad de la razón y de la fe junto con el crecimiento dogmático en la iglesia, al que siguen un crecimiento moral y un descubrimiento de nuevas exigencias pastorales. El Concilio de Nicea y el de Calcedonia quieren entender y proponer al único Cristo pero no están ante las mismas cuestiones. Nicea tiene que clarificar la relación de Cristo con Dios y Calcedonia la relación de Cristo con los hombres. La misma fe avanza así en continuidad creadora, referida al Cristo, que es su norma imperativa del origen, interpretando su realidad que no es agotada por ninguna palabra, en una interpretación, garantizada por la presencia permanente del Espíritu Santo y la autoridad que el mismo Cristo confirió a los apóstoles, y estos a su sucesores.

2) En la cuestión de la libertad religiosa hay que mostrar que no son las mismas preguntas las del siglo XIX y las del siglo XX, que en aquel iban mezclados muchos rechazos de naturaleza diversa: políticos, culturales, eclesiásticos y también específicamente religiosos. Las mismas palabras significaban cosas totalmente distintas: por ejemplo, liberalismo en sentido dogmático (negación de la revelación positiva) y liberalismo en sentido político (regímenes democráticos frente a autoritarios). Se mezclaban los tres niveles de la autoridad que hemos mencionado al comienzo. En ese debate histórico la iglesia ha ido diferenciando lo que son legítimas y en el fondo cristianas reclamaciones de una modernidad crítica con ella de lo que son rechazos explícitos de la fe. Y en este sentido ha habido un real progreso de la iglesia en la cuestión de la libertad religiosa, que corrige fórmulas y actitudes anteriores, en orden a corresponder mejor a la naturaleza de la fe, que solo es posible desde la libertad personal, y de la iglesia que solo es posible mediante la adhesión persona.

3) La actitud integrista se ha guiado por un principio escolástico, en una aplicación perversa, que niega de hecho la condición histórica del hombre, la pedagogía de Dios con los hombres y termina haciendo imposible nada bueno en este mundo. “Bonum ex integra causa, malum ex quocumque defecto”. Desde él se ha enjuiciado a las otras religiones, y a la luz de los elementos negativos que se encuentran en ellas se las ha rechazado en totalidad. Con ese principio se podría descartar también al cristianismo, en el cual encontramos no pocos elementos negativos. Se dirá que en aquellas el elemento negativo es constituyente mientras que en este es adveniente. Pero la respuesta integrista no resuelve el problema, porque se impone de antemano la solución desde un poder o autoridad religiosa que se proyecta sobre otras personas, sin dejarlas pasar por su conciencia y libertad, que son el camino para llegar a la verdad del hombre y a la verdad de Dios.

En el diálogo interreligioso estamos ante una delicada y sutil tarea de dilucidación de los aprioris antropológicos, teológicos y de filosofía de la historia, que subyacen a nuestras propuestas. Clarificarlos, mostrar su convergencia o divergencia, aceptar los largos tiempos que la maduración de las conciencias colectivas exige es una de las tareas primordiales. Nada se puede forzar contra la inteligencia del hombre y hay que reconocer la lenta marcha de ésta hasta la verdad. San Agustín apostrofaba a quienes se reían de su larga búsqueda y de su tardía conversión. ¡No saben esos acusadores, dice él, el coste de la verdad personal y de la fe religiosa! El cristiano se sabe agraciado con la fe y justamente por ser consciente de que ella no es fruto de conquista particular sino don de Dios, actuará ante los hombres sin fe o de otra confesión más por el testimonio y la caridad que por la palabra y la autoridad.

La Comisión teológica internacional ha subrayado cómo en el mundo actual hay por un lado la afirmación teórica de los derechos humanos a la vez que su cuestionamiento incluso por algunos grupos religiosos, que no acaban de ver cómo se concilia el carácter absoluto de la palabras de Dios y de la libertad del hombre. Aquí estamos ante la necesidad de elaborar una comprensión de Dios y del hombre en *correspondencia* (Entsprechung, respuesta, responsabilidad): vamos sabiendo quien es Dios en la medida en que vamos conociendo mejor al hombre, pero a la vez vamos conociendo mejor las posibilidades, necesidades y vocación última del hombre en la medida en que conocemos mejor a Dios. "El mundo contemporáneo parece preocuparse al menos en teoría por los derechos del hombre. Algunos integrismos, incluso entre los cristianos, oponen a ellos los derechos de Dios. Pero, en esta oposición, ¿de qué Dios se trata y, en último término, de qué hombre?"[27] En una religión como el cristianismo, en la que confesamos a Dios encarnado, hecho hombre por nosotros y nuestra salvación, habrá que mantener la analogía a la vez que la dialéctica entre lo divino y lo humano. En él la dialéctica nunca podrá llegar a ver en Dios el antagonista, el enemigo, el mero límite del hombre, a lo que inclina una cierta radicalización del pensamiento nacido de la reforma de Lutero, Calvino, Kierkegaard y Barth, al reclamar que su gracia lo es todo, y al exigir el *soli Deo gloria*.[28] La gloria de Dios no es ajena ni alternativa a la gloria del hombre. Esta consiste en que el hom-

[27] CTI Nr. 108 h (BAC 600).

[28] Barth se distanciará de ese radicalismo, que acentúa la "diferencia cualitativa infinita" y la "distancia insalvable" entre Dios y el hombre en su famosa conferencia "La

bre viva y su vida deriva del conocimiento de Dios.[29] Desde este conocimiento el hombre tendrá que discernir lo que en su vida es fruto de la ley divina inserta en su corazón, y lo que es fruto del instinto animal, del pecado personal y del lastre social, separándolo de lo que es voluntad de Dios o inspiración de su santo Espíritu. En este sentido existirá una permanente tensión dramática entre la voluntad del hombre, así afectada por la historia, la sociedad y la propia persona, y la voluntad de Dios que le guía y llama. Pero nunca podrán oponerse los derechos de Dios y los derechos del hombre. La defensa de esos derechos de Dios ha sido muchas veces fácil pretexto para conculcar los derechos del hombre, para violar la justicia, subyugar a los más pobres de cultura o de bienes materiales y expoliar a los más desvalidos (huérfanos, viudas, extranjeros, emigrantes, niños), tal como denuncian ya en el Antiguo Testamento los profetas.[30]

humanidad de Dios", pronunciada en la Asamblea de la Sociedad pastoral suiza, en Aarau, el 15 de septiembre de 1956, que comienza con estas palabras: "La humanidad de Dios: cuando se comprende bien esta expresión designa la relación de Dios con el hombre y su condescendencia para con él; – su Palabra, portadora de sus promesas y de sus mandatos; – el ser, la intervención y la obra de Dios para con él; – la comunión que establece con su criatura; – su gracia libre, por la cual quiere ser justamente el Dios del hombre sin dejar de ser él mismo".

[29] A lo largo de la historia, desde San Ireneo a San Ignacio y sobre todo en la época posterior se ha dado una inversión del sentido bíblico de la expresión "gloria de Dios". La Biblia y la patrística la entienden como el "ser-luz – resplandor-peso-gracia" de Dios que él otorga al hombre para que la reconozca, con ella se enriquezca y viva gozosamente de ella en el mundo (sentido teológico, vertical, descendente). Una vez así personalizada esa gloria que es de Dios, el hombre se la devuelve en alabanza (glorificación). Es Dios quien da la gloria al hombre y éste se la devuelve agradecido en reconocimiento y alabanza. Dios no necesita ni espera que le demos gloria en arrendamiento servil. En este sentido la fórmula moderna "dar gloria a Dios" invierte el sentido de la expresión y la convierte en algo ascético (sentido antropológico, moral, ascendente). Tal inversión es una de las causas que han colaborado a la increencia del hombre moderno, que con razón rechaza a ese Dios indigente, que exige del hombre tal tributo de gloria. Desde aquí hay que entender la fórmula ignaciana de que hemos sido creados para (recibir y vivir de la) gloria de Dios y glorificados por ella devolvernos gozosamente agradecidos en alabanza (dar gloria a Dios). (Efesios 1,6.12). Cf O. González de Cardedal, *La gloria del hombre* (Madrid 1985); N. Martínez-Gayol, *La gloria de Dios en San Ignacio (*Bilbao-Santander 2005); Id., *Gloria*, en Diccionario de espiritualidad ignaciana (Bilbao-Santander 2007) II, 905-914 con bibliografía.

[30] "L'affirmation inconditionnelle du 'droit de Dieu' ne peut que servir d'alibi aux usurpations intégristes, qu'elles soient catholiques, protestantes, islamiques ou juives, qu'elles inspirent la nouvelle croisade des évangélistes américains, l'irrédentisme des colons de Transjordanie ou le *jihad* des 'fous d'Allah'". P. Magnard, *Pourquoi la religion?* (Paris 2006) 144-145.

IV. Criterios cristianos ante la libertad y diálogo interreligioso

1. El diálogo interreligioso se sostiene sobre dos pilares: la libertad de los hombres que hablan y la verdad de Dios hacia la que los hombres dirigen su mirada y su esperanza. La libertad del hombre queda amenazada por una comprensión integrista de la relación que ve al hombre y a Dios en contraposición, por una comprensión ideológica que subyuga la religión a la política y por una denegación de autonomía a la religión dentro de las actividades de la vida humana. La verdad de Dios, que es el horizonte y meta hacia la que se dirigen los hombres, queda amenazada cuando el hombre pretende enseñorearse de ella, ponerla a su servicio y desde ahí someter a los demás. La verdad de Dios nunca es posesión del hombre sino don recibido que tiene que poner al servicio de los demás. Esta puesta en común de la verdad propia tiene lugar por el diálogo, el testimonio y la proposición explícita de su verdad. Esa triple oferta (diálogo, testimonio, oferta) la hace el cristiano en obediencia al mandato de Cristo a la vez que por amor a su prójimo a quien le ofrece lo que él considera un tesoro.

2. Tres son por tanto los criterios que deben tenerse presentes: deberes para con Cristo, derechos de la persona y situaciones históricas del oyente: "Deben, pues, tenerse en cuenta los deberes para con Cristo Verbo vivificante que hay que predicar, como los derechos de la persona humana, y la medida de la gracia que Dios por Cristo, ha con cedido al hombre que es invitado a creer y profesar voluntariamente la fe".[31] Sentido de Dios, sentido del hombre y sentido de la historia circunscriben la lógica y objetivos del diálogo interreligioso.

3. Este diálogo es esencial al cristianismo y se sitúa en continuidad con la forma en que ha tenido lugar la revelación divina, que no ha acontecido por imposición externa sino como conversación de Dios con los hombres invitándolos a acoger su palabra y a responderla. El acto de fe es esencialmente un acto de libertad y de amor, que no pueden ser ni impuestos ni prohibidos por la violencia."En esta revelación de Dios invisible (cf Col 1,15; 1 Tim 1,17), movido de amor, habla a los hombres como amigos (cf Ex 33,11; Jn 15,14-15), trata con ellos (cf Bar 3,38), para invitarlos y recibirlos en su compañía"[32] y está también en la lógica del testimonio y de la tradición de la iglesia: "El diálogo religioso es connatural a la vocación cristiana. Se ins-

[31] DH 14,3 final (BAC 802).

[32] Vaticano II, *Constitución sobre la revelación divina* (DV) 2; 7 (Apostoli ex ore, conversatione et operibus Christi acceperunt).

cribe en el dinamismo de la tradición viviente del misterio de la salvación, cuyo sacramento universal es la iglesia; es un acto de esta tradición".[33]

4. Este diálogo no puede ser vivido entre los interlocutores sólo como un mero intercambio de ideas, de experiencias históricas o de propuesta de métodos de comportamiento moral y de acción histórica conjunta sino como un encuentro personal, a la vez que en un transcendimiento hacia la realidad que buscamos en común, que tiene lugar por lo que casi todas las religiones llaman oración. Ella es la expresión máxima de la libertad humana, ya que en ella el sujeto se recoge todo en la palabra, se expresa en el signo y se consuma en la rendición agradecida a Dios por la alabanza y la súplica. Donde la oración, realizada por cada uno en el modo que le permita su comprensión de Dios o de lo divino, no es posible, allí difícilmente el diálogo interreligioso llegará hasta el fondo. Será sólo diálogo de éticas o de culturas, de políticas o de utopías, bello en sí pero distinto del religioso.

5. El cristianismo debe entrar en ese diálogo con una actitud doble. Una, la clara conciencia de su identidad como resultado de la revelación y donación suprema posible de Dios a la historia por la encarnación del Hijo y don del Espíritu, con las que se revela el ser mismo de Dios como comunión trinitaria, a la vez que se revela y hace posible la realización del ser mismo del hombre como capacidad de Dios, necesidad de Dios y vocación a Dios. La segunda actitud es el reconocimiento de que Cristo, centro y meta de la historia, expresa de manera exhaustiva y definitiva el ser de Dios y el destino del hombre, pero que con ello no anula las sucesivas manifestaciones de Dios con anterioridad y exterioridad a Cristo. Dios es coextensivo a la historia humana y por ello podemos encontrar sus huellas, palabras y presencia en todo el mundo. El Hijo y el Espíritu Santo nos permiten descubrirlas, discernir su verdad y sus límites, otorgarles el valor que en sí mismo poseen a la vez que la ordenación a ser situadas en ellos, completando y siendo completadas. Desde aquí hay que afirmar la real alteridad de las otras religiones y no verlas solo como inicios que quedan integrados en una religión absoluta (Hegel, Harnack) que lo sería todo en todos los órdenes. Ser algo en raíz y tronco no es serlo todo en ramas, flores y frutos.

6. La aportación suprema que el cristianismo debe hacer a ese diálogo es su comprensión de Dios como realidad personalizadora y suprapersonal, en el sentido de que no es sujeto individual como lo somos los humanos, pero que posee en grado máximo esa característica nuestra. Cuando habla-

[33] CTI Nr 114 (BAC 603).

mos del Dios personal queremos indicar su condición de sujeto en clara conciencia tanto de sí mismo como del resto de la realidad y de la historia; sujeto en clara voluntad, de forma que no es ciego dinamismo de mera naturaleza; sujeto en limpia libertad de forma que la comunicación de sí mismo hacia fuera no obedece a una indigencia o a una emanación necesaria. De esta comprensión de Dios ha derivado la comprensión cristiana de la persona en su dignidad, libertad e historicidad concreta.

7. Esta propuesta teológica personalista de la que deriva una comprensión personalizadora del hombre tiene que acreditarse en aquellas acciones históricas del cristiano individual y de la iglesia en las que se explicita lo que ellas pueden significar concretamente para el individuo. El cristianismo se acreditó en sus orígenes ante todo por esta atención en libertad, expresada como amor y servicio a los más necesitados, pobres, extranjeros, niños, muertos, clases marginales.[34] La caridad fue el testimonio más eficaz de lo que la fe significaba tanto para este mundo como para el futuro. Quien se hacía cristiano recibía una dignidad nueva más allá de su origen racial, profesión, cultura o historia anterior. Un ser nuevo, una tarea nueva, una esperanza nueva. Lo mismo que Jesús acreditó el mensaje del Reino con los milagros y su doctrina con la autoridad misericorde que la acompañaba así la palabra de la iglesia en el diálogo interreligioso sobre la libertad de la persona sólo será creíble si va acompañada de unas acciones que verifiquen lo que ella significa, no solo una liberación de algo sino a la vez servicio, caridad, solidaridad.

8. El diálogo con las otras religiones tiene que ser vivido como un ejercicio real de humildad, recordando que la iglesia no siempre ha respetado la libertad, que ha apoyado instituciones y acciones que impusieron la fe por la violencia y que ha obligado a los hombres a compartir la fe oficial del lugar donde viven al margen de la propia decisión. Ha habido países donde la iglesia mantenido la obligación política de la unidad de la fe católica con la prohibición de otras religiones hasta los mismos días del Concilio

[34] "Este es el hecho nuevo, la novedad total del cristianismo. Esto es lo que conmovió los corazones. Esto es lo que convirtió. No la palabra sino el ejemplo. O mejor: la verdad de la palabra probada por el ejemplo. Las sublimidades de la doctrina pasaban sin duda por encima de las cabezas, como pasan todavía. Pero veían el espectáculo de esta caridad incesante, y se beneficiaban de él. Si esto no hubiera existido, el mundo sería pagano todavía. Y el día en que ya no exista esto, el mundo volverá a ser pagano" A. Festugière, *La esencia de la tragedia griega* (Barcelona 1986) 92-93.

Vaticano II. La diferenciación de órdenes es un dato esencial del evangelio: "Dad al Cesar lo que es del Cesar y a Dios lo que es de Dios" (Mr 12,17) y con él la libertad de conciencia para no colocar los problemas religiosos bajo el poder político ni los problemas políticos bajo la autoridad religiosa. Juan Pablo II en el final del segundo milenio hizo una confesión de culpas con la consiguiente petición de perdón, en la medida en que como cabeza de la iglesia reconocía esa contradicción entre los principios anunciados por ella y sus acciones. No hacía sino prolongar la confesión del Concilio Vaticano II en este sentido: "Aunque en la vida del pueblo e Dios, peregrino a través de los avatares de la historia humana, se ha dado a veces un comportamiento menos conforme con el espíritu evangélico, e incluso contrario a él, no obstante siempre se mantuvo la doctrina de la iglesia de que nadie debe ser forzado a abrazar la fe".[35]

9. El conocimiento teórico, el reconocimiento social y la salvaguarda jurídica de la libertad de las personas ha sido una conquista que se ha hecho en Occidente como resultado de la convergencia de grandes fuerzas dinamizadoras: el espíritu grecorromano, la revelación judeocristiana y la subjetividad moderna. Esa libertad permanecerá viva mientras permanezcan vivos los dinamismos de estas tres fuerzas, que han convivido en un desafío permanente y del que ha nacido la actual situación democrática: una razón que es aguijón para la fe, una fe que es aguijón para la razón absolutizada, y una acción social que pone a la fe y a la razón ante los problemas concretos en los que tienen que verificar la verdad de su pretensiones tanto la razón como la fe. Desde aquí aparecen dos problemas: a) Occidente solo mantendrá viva la libertad si mantiene vivas las fuentes de la democracia y la herencia de esa triple matriz de su nacimiento. b) Las culturas que no han hecho este recorrido, iniciado fundamentalmente al comienzo de la edad moderna, con el diálogo público entre razón y fe, tendrán mayores dificultades en el dialogo religioso. Es necesario reconocer las dilaciones y que tiene que transcurrir tiempo hasta que se alcance el nivel de maduración colectiva desde la que se perciba cómo esta libertad de conciencia no es una sustracción de los derechos de Dios por el hombre sino el reconocimiento de lo que él le ha dado al crearle a su imagen. Santo Tomás, con toda la tradición bíblica y la patrística representada por San Juan Damasceno, comprende al hombre como imagen de Dios justamente desde esa inteligencia y libertad divinamente otorgadas. "Restat ut conside-

[35] DH 12,1 (BAC 797).

remus de eius (Dei) imagine, id est de homine, secundum quod et ipse est suorum operum principium, quasi liberum arbitrium habens et suorum operum potestatem".[36]

10. El diálogo interreligioso tiene que ser vivido desde dentro de esta exigencia que es simultáneamente de la conciencia moderna y de la fe: no mandar sino ofrecer, no imponer sino enseñar, no apelar a la autoridad sino al testimonio, no acreditarse solo con ideas propias sino con acciones gratuitas en favor del prójimo. Esto vale tanto para el dialogo, como para el anuncio explícito; y lo que decimos como exigencia objetiva para proponer el evangelio de Cristo hay que enunciarlo como exigencia también para todas las demás religiones que participan en este diálogo. Por ello concluimos con estas palabras del P. Congar en su presentación del Documento conciliar sobre la libertad religiosa: "No es sólo la Declaración *Dignitatis hunanae*, es todo el movimiento del mundo moderno, son las condiciones en las que hoy es necesario ser discípulo de Jesucristo las que imponen a la iglesia el deber de entregarse cada día más no exclusivamente a mandar o a enseñar, sino a 'educar' las conciencias... Nosotros tenemos que dar hoy pruebas de nuestra sinceridad. No podemos llegar válidamente a los que no participan de nuestra fe y nuestra esperanza, sino mostrándoles con evidencia que no tratamos de dominar por el poder sino de servir a los hombres con miras a lograr su bien".[37]

[36] Sto. Tomas, *Summa Theologica* I-2. Prologus.
[37] Y. Congar, en J. Hamer-Y. Congar, *La libertad religiosa*, 25.

FREEDOM OF CONSCIENCE AND RELIGION AS FUNDAMENTAL HUMAN RIGHTS. THEIR IMPORTANCE FOR INTERRELIGIOUS DIALOGUE

OMBRETTA FUMAGALLI CARULLI

1. Il ritorno di Dio

Dai tempi della Rivoluzione Francese, gli annunciatori della morte di Dio e, con lui, della religione, si susseguono e si rivelano falsi profeti.

Sono passati più di due secoli da quando un funzionario del comune di Valence annota sui registri comunali la morte "del detto Giannangelo Braschi, che esercitava la professione di Pontefice"; e ne trasmette la notizia a Parigi, annunciando che il Papa appena morto è sicuramente l'ultimo della storia.[1]

È passato più d'un secolo, da quando Nietzsche proclama: "Dio è morto. E noi – voi ed io – l'abbiamo ucciso".[2]

Più recentemente, nel secolo scorso, l'idea positivista preconizza lo stadio scientifico come punto di superamento e di arrivo di una umanità ineluttabilmente destinata ad oltrepassare lo stadio religioso. Ma l'assunto, sul quale essa si basa, si rivela infondato. Al progresso della scienza e della tecnologia non si accompagna affatto il declino della religione.

L'eclissi del sacro[3] nella civiltà industriale non ha luogo. Anche il sociologo americano Harvey Cox,[4] teorizzatore dell'indifferentismo religioso, è

[1] Episodio ricordato dal Card. J.-L. Tauran nell'intervento *Quante volte si è già sepolta la Chiesa*, riportato da *L'Osservatore Romano*, 10 febbraio 2008.

[2] F. Nietzsche, *La gaia scienza*, sezione 125.

[3] È il titolo di un volume di S. Acquaviva (1961), capofila italiano della "sociologia della secolarizzazione".

[4] Mi riferisco, in particolare, al *revirement* di Cox dalle tesi di *The Secular City*, New York, 1965 a quelle di *Fire from Heaven. The Rise of Pentecostal Spirituality and the Reshaping of Religion in the Twenty-First Century*, Reading (Mass.), 1995. Sul ritorno del sacro

costretto nel giro di pochi decenni a riconoscere l'inatteso "ritorno del sacro". È un ritorno tanto evidente da essere considerato, insieme al cambiamento climatico, una delle due sfide del nostro secolo persino dal Presidente di una nazione che della laicità ha fatto una bandiera, il francese Sarkozy, che ne ha parlato quest'anno nel suo Discorso al Corpo Diplomatico.

Tuttavia il ritorno della religione nelle nostre società, pur positivo, presenta anche aspetti critici. Il primo è il fondamentalismo, la cui incidenza sulla libertà religiosa è evidente. Altrettanto rilevante è il riduzionismo del fatto religioso, il credere senza appartenere (*believing without belonging* per riprendere la definizione di Grace Davie).

Di tutto ciò intendo trattare, con particolare attenzione alle sfide attuali. Al fine di inquadrarle meglio, parto dal Novecento con alcune notazioni sul contributo della Chiesa cattolica e delle Carte internazionali all'emersione della libertà religiosa come diritto umano.

2. Chiesa cattolica e libertà religiosa

Un punto va anzitutto fissato: che punto focale del Novecento quanto alla concezione dei diritti umani in rapporto alla Dottrina Sociale della Chiesa è l'insegnamento dei Padri Conciliari.

La Dichiarazione Conciliare *Dignitatis Humanae* afferma che "la persona umana ha il diritto alla libertà religiosa"[5] e che suo fondamento è la dignità della persona. È tappa di arrivo di un cammino lungo. Sarebbe interessante ripercorrerlo a ritroso, sin dall'inizio della storia cristiana,[6] con la drammatica testimonianza dei martiri dei primi tre secoli, che vivono tragicamente il problema della politica nei rapporti con la religione, perseguitati e condannati a morte perché si rifiutano di bruciare il granello di incenso al *Divus Caesar*.

Volendo qui limitarci ai tempi moderni, evidenzio che nel XIX secolo, cent'anni prima del Vaticano II, il magistero della Chiesa è attestato su principi differenti. Il Sillabo di Pio IX annovera tra i "principali errori dell'età nostra" la libertà di "ciascun uomo di abbracciare e professare quella reli-

nelle società contemporanee v. P. Norris – R. Inglehart, *Sacred and Secular. Religion and Politics Worldwide*, Cambridge University Press, 2004.

[5] *Dignitatis Humanae*, n. 2.

[6] O. Fumagalli Carulli, *A Cesare ciò che è di Cesare; a Dio ciò che è di Dio. Laicità dello Stato e libertà delle Chiese*, Milano 2006, p. 4 ss.

gione che, sulla scorta del lume della ragione, avrà reputato essere vera". Nega così ogni valore giuridico esterno alla coscienza soggettiva erronea, concedendo la libertà solo nell'ambito della verità.

Tuttavia, già Leone XIII, nella sua prassi diplomatica, avvia una pratica di *tolerantia* verso quegli Stati che considerano lecito il pubblico esercizio di culti diversi dalla religione cattolica.[7] Il *Codex Iuris Canonici* del 1917, accogliendo un magistero rinvenibile sin dal XVII e XVIII secolo, statuisce che *ad amplexandam fidem catholicam nemo invito cogatur*;[8] formula riecheggiante il *nemo coegi factum potest*, principio generale di qualsiasi ordinamento giuridico.

Nella preparazione del richiamato magistero conciliare, un importante contributo è dato da Pio XI, con la denuncia delle persecuzioni sovietiche,[9] l'accusa del nazismo nell'Enciclica *Mit brennender Sorge* (1937), la dura reazione contro il governo fascista italiano a difesa della libertà religiosa dell'Azione Cattolica nell'Enciclica *Non abbiamo bisogno* (1931).

[7] Così si pronunciava nell'Enciclica *Immortale Dei* del 1885: "non v'è neppure valido motivo per accusare la Chiesa di essere restia più del giusto ad una benevola tolleranza, o nemica di un'autentica e legittima libertà. In realtà, se la Chiesa giudica che non sia lecito concedere ai vari culti religiosi la stessa condizione giuridica che compete alla vera religione, pure non condanna quei governi che, per qualche grave situazione, mirando o ad ottenere un bene, o ad impedire un male, tollerino di fatto diversi culti nel loro Stato".

[8] CIC, can. 1351.

[9] Il coraggio cristiano ed il rigore etico di Achille Ratti si manifestano già nell'agosto 1920 di fronte all'invasione bolscevica della Polonia. Ratti è allora Nunzio; tutti i diplomatici fuggono, ma egli resta al suo posto dichiarando a padre P. Theissling, generale dei Domenicani, presente in quei giorni a Varsavia: "Mi rendo perfettamente conto della gravità della situazione, ma questa mattina, celebrando la messa, ho offerto la mia vita a Dio. Io sono prete in qualsiasi circostanza". Un foglio dei taccuini inediti di Eugenio Pacelli (all'epoca segretario di Pio XI) conservati negli archivi vaticani (di recente reso pubblico), con riferimento alla politica della "mano tesa", proposta dai comunisti francesi una settimana prima delle elezioni del 1936, rivela una disponibilità del Pontefice ad aprire un dialogo, quasi un'anticipazione di quella che sarebbe stata l'impostazione di *Pacem in Terris*. A proposito della *main tendue*, "durante la notte insonne ma calma e riposante" del 6 novembre 1937, Pio XI scrive: "Noi prendiamo le vostre mani e vi offriamo le nostre con il proposito di farvi del bene. Nessuna commistione o confusione ideologica, come si suol dire oggi, nessuna transazione sopra i principi che tutto il mondo conosce e riconosce alla Chiesa cattolica, ma farvi del bene. Forse sarebbe bene che, poiché la cosa è nata in Francia, l'Episcopato francese facesse un atto simile. Se lo facessero ... il S. Padre risponderà: bene, avete interpretato benissimo il pensiero del Santo Padre, perché non avrete fatto che interpretare il pensiero di Gesù Cristo. Gesù Cristo è venuto al mondo per portare a tutti la salvezza e i suoi benefici. Venite a me *omnes*".

Quanto a Pio XII, parlano in particolare i suoi drammatici Radiomessaggi.

Punto di svolta nella seconda metà del Novecento è *Pacem in Terris* di Giovanni XXIII (11 aprile 1963). Essa sottolinea la stretta connessione tra protezione dei diritti fondamentali e promozione dello sviluppo integrale dell'uomo nei suoi molteplici aspetti (politici, sociali, economici e culturali); proclama il "diritto di onorare Dio secondo il dettame della retta coscienza",[10] dal quale deriva "il diritto al culto di Dio privato e pubblico";[11] e soprattutto distingue tra errore ed errante, aprendo la via alla irrilevanza della coscienza soggettiva erronea.

Siamo così alle porte di quella grande occasione storica, che, nella seconda metà del Novecento, diviene l'Assise del Vaticano II, annunciata da Giovanni XXIII e portata a compimento da Paolo VI (7 dicembre 1965). Emerge la preoccupazione che il riconoscimento del diritto di libertà religiosa anche all'errante porti fatalmente con sé l'affermazione dell'uguaglianza di tutte le religioni ed alimenti pertanto l'indifferentismo. Ma, alla luce dello stretto nesso tra dignità umana e libertà religiosa, il Concilio conclude in favore del concetto di libertà religiosa indipendente dall'ortodossia della fede professata, in quanto connaturata all'uomo in quanto tale. La libertà religiosa, in altri termini, va riconosciuta anche a "coloro che non soddisfano l'obbligo di cercare la verità e di aderire ad essa".[12] *Dignitatis Humanae* lascia trasparire, in queste espressioni, un formidabile ottimismo nella forza della verità, con la fiducia che essa si difende e si impone da sé.

Il medesimo testo conciliare richiede, poi, che il diritto alla libertà religiosa sia "riconosciuto e sancito come diritto civile nell'ordinamento giuridico della società", ribadendo ed insieme attualizzando l'antica e perenne rivendicazione della libertà religiosa come chiave di volta di ogni sano rapporto tra società civile e società religiosa.

La Costituzione conciliare *Gaudium et Spes*, d'altro canto, rivendica con chiarezza il diritto della Chiesa di "dare il proprio giudizio morale, anche su cose che riguardano l'ordine politico, quando ciò sia richiesto dai diritti fondamentali della persona e dalla salvezza delle anime" (n. 76). Questa osservazione – si badi – dà un nuovo fondamento alla tradizionale richiesta che la Chiesa rivolge alle comunità civili di rispetto per la libertà del pro-

[10] "Retta coscienza" nel linguaggio della tradizione cattolica è la coscienza che dà un giudizio retto, oppure quella che dà un giudizio erroneo dovuto ad ignoranza invincibile.

[11] *Pacem in Terris*, n. 8.

[12] *Dignitatis Humanae*, n. 2.

prio magistero, ed anzitutto per la libertà di espressione del Pontefice. L'intervento della Chiesa, in quanto servizio alla dignità della persona, è esteso oltre i confini medievali della *ratio scandali* o della *ratio peccati,* comprendendo le ipotesi di violazioni dei diritti fondamentali della persona. In nome di essi e non più come potenza politica, la Chiesa non rinuncia ad esprimere il suo pensiero, anche quando esso possa apparire scomodo rispetto a opinioni correnti.[13]

Insisto: l'impegno della Chiesa a difesa dei diritti umani, primo tra i quali la libertà religiosa, non riposa su una concezione esclusivamente religiosa, ma sul riconoscimento della superiore dignità di ogni persona. Ciò le apre la possibilità di dialogare e collaborare con altre confessioni, come con altre tradizioni culturali, avendo comunque sempre a stella polare il principio che i diritti umani sono universali, indivisibili ed interdipendenti,[14] proprio perché ancorati nella legge naturale iscritta nel cuore di ogni uomo e presenti nelle diverse culture. Forte di questi apporti, la Santa Sede partecipa oggi ai più importanti *fora,*[15] non più come potenza politica ma come fautrice della promozione umana. I suoi rappresentanti siedono a fianco dei rappresentanti degli Stati nelle varie organizzazioni multilaterali con il prestigio della forza morale di un intervento, che prescinde dal fatto di avere o no diritto di voto. Il magistero sociale, inaugurato da Leone XIII e sviluppato dai suoi successori, fornisce loro un ventaglio di valori in grado di dare risposta ai problemi dell'umanità.[16] Ed essi difendono con forza la libertà religiosa non solo in ragione della *sollicitudo omnium ecclesiarum*, specie di quelle perseguitate, ma anzitutto perché la Chiesa conciliare si pone come *avvocata dell'uomo* (secondo la

[13] Si veda la presa di posizione vaticana del 4 aprile di quest'anno (in *L'Osservatore Romano*) riguardo alla Risoluzione della Camera belga, che ha impegnato il Governo a protestare presso la Santa Sede per le considerazioni del Pontefice su preservativi e AIDS.

[14] Davanti all'ONU (18 aprile 2008) Benedetto XVI ha ribadito: "Rimuovere i diritti umani da questo contesto significherebbe restringere il loro ambito e cedere ad una concezione relativistica, secondo la quale il significato e l'interpretazione dei diritti potrebbe variare e la loro universalità verrebbe negata in nome di contesti culturali, politici, sociali e persino religiosi differenti".

[15] Rinvio a O. Fumagalli Carulli, *Il Governo universale della Chiesa e i diritti della persona,* Milano 2003, p. 271 ss.; ID., *A Cesare ciò che è di Cesare a Dio ciò che è di Dio. Laicità dello Stato e libertà delle Chiese*, p. 115 ss.

[16] Il *Compendio della Dottrina Sociale della Chiesa*, edito dal Pontificio Consiglio della Giustizia e della Pace (2004), rappresenta oggi un manifesto del buon governo con il quale i manifesti laici sono chiamati a confrontarsi.

bella espressione cara a Paolo VI), dei suoi diritti e delle sue libertà, senza guardare alla religione che egli professa.[17]

D'altro canto la libertà religiosa per la Chiesa cattolica non è soltanto uno dei diritti umani fondamentali. È il preminente tra essi, perché sintesi delle altre libertà.[18] Ancorando l'uomo verticalmente alla sua vocazione trascendente, è solido fondamento degli altri diritti fondamentali, grazie ai quali la persona esplica sul piano orizzontale le relazioni con i suoi simili. Tra le molte, mi piace qui ricordare una plastica immagine di Giovanni Paolo II, pronunciata di fronte alla Unione Interparlamentare, e perciò agli eletti di tutti i popoli del mondo. La libertà – egli ha detto – è un prisma di cristallo dalle molte facce; una di esse è la libertà religiosa; se essa è oscurata l'intero prisma non riluce.[19] Dove la libertà religiosa fiorisce, germogliano e si sviluppano le altre libertà; quando è in pericolo, anch'esse vacillano. La sua violazione è una "ingiustizia radicale", sottolinea il medesimo Pontefice in un testo ancor più importante del suo Magistero, l'Enciclica *Redemptor Hominis* (1979): "radicale" in quanto tocca le radici della dignità umana, nulla essendo più sacro nell'uomo della sua ricerca di Dio, Assoluto della verità.

Va poi precisato che nel pensiero della Chiesa cattolica, sin dall'inizio della sua vita storica, la libertà religiosa si specifica in tre aspetti: come libertà religiosa individuale (riconosciuta alla persona *uti singula*), collettiva (ai gruppi sociali), istituzionale (alla confessione). Sono aspetti diversi ed interdipendenti, al secondo ed al terzo dei quali la tutela esplicita della comunità internazionale arriverà tardi, come vedremo più avanti. Proprio del magistero dei Pontefici è respingere ogni interpretazione individualistica e restrittiva della libertà religiosa, che non riconosca la dimensione pubblica della religione o neghi ai credenti di partecipare alla costruzione dell'ordine sociale e confini la tutela della libertà religiosa alla sola libertà di coscienza.

Lo ha ricordato di recente Benedetto XVI all'ONU,[20] sottolineando come fatto positivo che l'azione delle Nazioni Unite negli ultimi anni abbia permesso al dibattito pubblico di offrire punti di vista ispirati da una visione religiosa in tutte le sue dimensioni, compreso il rito, il culto, l'educazio-

[17] Paolo VI, Enciclica *Popolorum Progressio,* 26 marzo 1967; Esortazione Apostolica *Evangelii Nuntiandi*, 8 dicembre 1975.

[18] Giovanni Paolo II, *Centesimus Annus,* 74.

[19] *Discorso ai partecipanti alla 69^ Conferenza dell'Unione Interparlamentare*, n. 6, 18 settembre 1982.

[20] *Discorso* 18 aprile 2008.

ne, la diffusione di informazione e la libertà di professare e scegliere la propria religione. Tutela internazionale della libertà religiosa tanto più importante a fronte di Stati che si reggano su un esclusivismo ideologico o religioso contrastante con il pluralismo delle fedi: "Non dovrebbe mai essere necessario – ha affermato il Pontefice nella stessa occasione – rinnegare Dio per poter godere dei propri diritti. I diritti collegati con la religione sono quanto mai bisognosi di essere protetti se vengono considerati in conflitto con l'ideologia secolare prevalente o con posizioni di una maggioranza religiosa di natura esclusiva". Ed ha con forza ribadito che "non si può limitare la piena garanzia della libertà religiosa al libero esercizio del culto; al contrario deve essere tenuta in giusta considerazione la dimensione pubblica della religione e quindi la possibilità dei credenti di fare la loro parte nella costruzione dell'ordine sociale".

3. L'ONU e la tutela internazionale della libertà religiosa

Per comprendere il cammino della libertà religiosa percorso dalla comunità internazionale nel Novecento, occorre muovere dall'inferno dei regimi nazista e comunista. Da esso nasce la domanda di "una nuova legge sulla terra per l'umanità",[21] di un nuovo Sinai[22] in grado di restituire libertà ai popoli, ancorando i diritti umani alla dignità della persona, a prescindere dalla comunità di appartenenza ed anche quando questa sia minoritaria.

Questa "nuova legge", coralmente richiesta, si concretizza in molteplici documenti: Carte internazionali, Costituzioni democratiche degli Stati, Accordi bilaterali Stato-Chiesa. Grazie ad essi si può concludere che il Novecento, apertosi come il secolo della sconfitta della libertà, si chiude come quello della sua rinascita.

Il percorso è complesso. Sul piano internazionale il 1948 segna la tappa più significativa con la Dichiarazione Universale dei Diritti Umani.[23] La tutela in essa contenuta della libertà religiosa ha precedenti in trattati internazionali. Basti ricordare il Trattato della pace di Westfalia, vero e proprio

[21] H. Arendt, *Le origini del totalitarismo* (1951), trad. it., Milano 1967, p. 594.

[22] C. Cardia, *La sfida della laicità. Etica, multiculturalismo, Islam.* Milano 2007, p. 104.

[23] Prima di essa, la Carta di S. Francisco del 1945 ad opera della Conferenza delle Nazioni Unite si fonda anch'essa sul rispetto universale dei diritti umani senza distinzione di razza, sesso, lingua o religione, ma è ancora legata al concetto della libertà funzionale alla sicurezza tra le nazioni.

spartiacque tra il vecchio ordine internazionale e quello destinato a resistere sino al sistema dell'ONU. O, per menzionare un documento di fine secolo XIX, si rammenti il Trattato di Berlino del 1878 istitutivo dello Stato bulgaro. Ma questi accordi fondano la tutela delle minoranze religiose sui rapporti di forza tra potenze stipulanti, senza considerare il diritto alla libertà religiosa vincolante *erga omnes*, perciò da far valere nei confronti dell'intera comunità internazionale.

Se il 1948 è il momento iniziale per il nuovo percorso con la Dichiarazione Universale dei Diritti Umani, altre tappe sono successivamente raggiunte sino ai nostri giorni. Mi limito ad indicare le più significative, sottolineando che se dalla dignità della persona, radice di ogni libertà, parte anche l'ONU, l'emersione dei tre aspetti della libertà religiosa (individuale, collettiva, istituzionale), rivendicati dalla Chiesa cattolica, è assai lenta.

Dichiarazione Universale dei Diritti dell'Uomo

Punto di svolta sullo scenario internazionale è l'art. 18 della Dichiarazione Universale dei Diritti Umani. Dalla premessa che "l'avvento di un mondo in cui gli esseri umani godano della libertà ... di credo ... è stato proclamato come la più alta aspirazione dell'uomo", consegue il diritto di ogni individuo alle tre libertà dello spirito "di pensiero, di coscienza e di religione",[24] intese come intimamente connesse *in interiore hominis*, con la ulteriore importante precisazione che "tale diritto include la libertà di cambiare di religione o di credo".

Si badi: queste tre libertà, pur assai importanti, sono riconducibili alla prima delle tre categorie poc'anzi citate, cioè alla sola libertà individuale. Non siamo ancora al riconoscimento della libertà religiosa collettiva né della autonomia istituzionale delle confessioni religiose. Per la loro esplicitazione si dovranno attendere vari anni.

Insieme all'art. 19 (diritto alla libertà di opinione e di espressione), e all'art. 20 (diritto alla libertà di riunione e di associazione, evidentemente comprensiva anche di quelle di carattere religioso), l'art. 18 è la pietra angolare dell'edificio ONU della libertà religiosa. La tutela di specifici settori è

[24] In sede di redazione della Dichiarazione il delegato francese, René Cassin, espresse l'opinione che nel lemma "libertà di pensiero e di coscienza" dovesse ritenersi ricompresa la libertà di religione, sicché – a suo dire – l'affermazione di essa si presentava come tautologica.

garantita da altre non meno rilevanti prescrizioni: dal divieto di discriminazione su base religiosa (art. 2), al diritto al matrimonio senza alcuna limitazione a causa della religione (art. 16), all'impegno ad indirizzare l'istruzione alla promozione della comprensione, tolleranza, amicizia tra i gruppi religiosi (art. 26), con la specifica statuizione del diritto dei genitori a scegliere il genere d'istruzione da impartire ai propri figli.

Quanto ai limiti della libertà di religione, essi sono quelli previsti in generale (art. 29) per tutte le statuizioni: limitazioni "stabilite dalla legge per assicurare il riconoscimento e il rispetto dei diritti e delle libertà degli altri e per soddisfare le giuste esigenze della morale, dell'ordine pubblico e del benessere generale in una società democratica". Limiti – va osservato – che non possono operare con riferimento alla sfera interiore della libertà di pensiero, coscienza e religione, l'obbligo di abbracciare un determinato credo religioso o di altro genere non potendo mai essere imposto.

La Dichiarazione (a differenza delle Convenzioni) non è giuridicamente vincolante, né è previsto in essa qualche meccanismo (non necessariamente giurisdizionale) per la verifica della sua osservanza. Tuttavia essa ha un'importanza fondamentale per almeno tre ragioni: anzitutto perché per la prima volta introduce in ambito universale un catalogo dei diritti umani; in secondo luogo perché è base di partenza per le successive codificazioni internazionali; in terzo luogo perché è ritenuta da pressoché tutta la dottrina fonte del diritto consuetudinario internazionale in materia di diritti umani.

Patto Internazionale sui Diritti Civili e Politici

Così l'art. 18 del Patto Internazionale sui Diritti Civili e Politici (adottato dall'Assemblea Generale delle Nazioni Unite il 16 dicembre 1966[25]), è profondamente debitore della Dichiarazione Universale, pur segnando rispetto ad essa sostanziose novità.

Anch'esso sancisce il diritto di ciascuno alla libertà di pensiero, coscienza e religione, nonché il diritto di manifestare la propria religione o credo.[26]

[25] Entrato in vigore, ai sensi dell'art. 49, il 23 marzo 1976, dopo il deposito del trentacinquesimo strumento di adesione o ratifica. Come il coevo Patto sui diritti economici, sociali e culturali, anche il Patto sui diritti civili e politici è frutto dell'impegno quasi ventennale della Commissione per i diritti umani.

[26] Già nei lavori preparatori le discussioni sui concetti di pensiero, coscienza e religione vedono posizioni differenziate, che vanno da chi (il delegato dell'Argentina, ad esempio, sostenuto dalla Spagna) ritiene che anche i termini "pensiero" e "coscienza" si riferiscono

La diversità sta nel fatto che nel Patto manca l'espressa indicazione della "libertà di cambiare religione o credo", limitandosi esso ad affermare che il diritto di libertà religiosa "include la libertà di avere o di adottare una religione o un credo". Nel verbo "adottare" si cercherà da parte della dottrina di fare entrare anche la libertà di cambiare la religione.

Ma la lettera del testo, con l'abbandono dello *ius poenitendi*, è espressione dell'influenza nel frattempo acquistata all'interno dell'Assemblea Generale dai paesi islamici, ostili ad una disciplina contrastante coi severi divieti dell'Islam, riguardo alla conversione di un suo fedele ad altra religione.

Il Patto prevede una più puntuale ed ampia articolazione dei vari profili e settori di esplicazione della libertà religiosa.[27] Tuttavia nulla dice di più rispetto a quanto emerga dalla lettura sistematica della Dichiarazione Universale. Anzi, rispetto a questa per taluni profili regredisce. Della libertà di cambiare religione s'è già detto.

Altra diversità sta nell'aggiunta di ulteriori limitazioni alla manifestazione della libertà religiosa o di credo (art. 18 c. 3), purché in forza di legge: "per tutelare la sicurezza pubblica, l'ordine pubblico, la sanità pubblica, la morale pubblica o altri diritti e libertà fondamentali".

Sono limiti non privi di razionalità, ma aprono il fianco ad applicazioni così discrezionali da consentire l'arbitrio dell'autorità competente: si pensi in particolare alla previsione del motivo di pubblica sicurezza.

a questioni spirituali a chi invece ritiene i tre termini concettualmente distinti, considerando religiose solo le fedi caratterizzate dalla presenza di Scritture Sacre e di profeti. Analogo problema si presenta quanto al termine credo (*belief*): il delegato sovietico propugna una interpretazione tesa a farvi rientrare l'ateismo, mentre Spagna ed Argentina sostengono che esso è tutelato non dall'art. 18, bensì dall'art.19 (libertà di opinione e di espressione). All'interpretazione che comprende nell'art. 18 anche le convinzioni di carattere non religioso spinge lo studio Krishnaswami sulla discriminazione religiosa, che, pochi anni prima, aveva proposto di utilizzare il doppio termine *religion* e *belief* al fine di includere accanto alle concezioni ateistiche altre forme di convinzione (agnosticismo, libero pensiero, razionalismo). Il *General Comment* del 1993 precisa che nel termine *belief* rientrano tutte le forme di pensiero che non si presentano come portatrici di una verità. Oggi si considera pacifico che l'art. 18 protegge convinzioni teiste, non teiste, ateiste, oltre al diritto di non professare alcuna religione o credo.

[27] Difatti, i commi successivi al primo dell'art. 18 del Patto esplicitano ulteriori profili della libertà religiosa: il divieto di assoggettamento a coercizioni che incidano sulle libertà dello spirito (art. 18, c. 2); la possibilità di limitazioni esclusivamente della libertà di manifestare la propria religione od il proprio credo, solo se in forza di legge e per tutelare la sicurezza pubblica, l'ordine pubblico, la sanità pubblica, la morale pubblica o altri diritti e libertà fondamentali (art. 18, c. 3); l'impegno degli Stati contraenti a rispettare la libertà dei genitori di assicurare l'educazione religiosa e morale dei figli, in conformità alle proprie convinzioni (art. 18, c. 4).

Diventa pertanto decisiva la sua interpretazione ed applicazione ad opera, principalmente, del Comitato per i diritti umani, organo di monitoraggio e controllo dell'attuazione del Patto presso gli Stati aderenti (la cui attività è oggetto di ampie riflessioni della dottrina all'interno di un discorso più generale sui sistemi di protezione della libertà religiosa in ambito ONU[28]). Rilevante riferimento interpretativo è il Parere o Osservazione Generale (*General Comment*) – non indirizzato al singolo Governo ma alla generalità degli Stati[29] –, che il Comitato formula contribuendo ad elaborare percorsi pratici di attuazione effettiva dei diritti umani.

Nel Patto manca – a differenza dell'art. 16 della Dichiarazione Universale – la garanzia del diritto di contrarre matrimonio senza che vi sia limitazione a causa della religione (libertà matrimoniale).

Manca altresì l'esplicitazione della libertà collettiva ed istituzionale, nonostante nel 1966 la dottrina abbia già ben evidenziato questi importanti profili. Neppure il *General Comment* del 1993 (considerato una sorta di interpretazione autentica ad uso degli Stati aderenti) va oltre la visione della libertà di religione come diritto solo personale, non avendo esso recepita una proposta del Gruppo di Lavoro di accogliere nel concetto di libertà religiosa la "adesione collettiva ad una credenza", perché snaturante l'ottica del Patto di garantire la libertà all'individuo in quanto tale, il quale poi la esercita in forma individuale o associata.[30] Questa prospettazione spiega anche una particolarità: a differenza del sistema della Corte Europea dei Diritti dell'Uomo, che in alcuni casi ammette il ricorso di comunità religiose che si ritengono lese nei loro diritti, il Comitato per i Diritti Umani dell'ONU (organo non giurisdizionale, ma pur sempre mezzo di pressione sugli Stati), può esaminare[31] solo ricorsi individuali (non essendo ammesso

[28] Tra gli altri, si veda M.D. Evans, The United Nations and freedom of religion: the work of the Human Rights Committee, in R. Ahdar (ed.), *Law and Religion*, Aldershot, 2000, p. 35 ss.; E. Souto Galván, *El reconocimiento de la libertad religiosa en Naciones Unidas*. Madrid-Barcelona, 2000.

[29] Furono i Paesi della area socialista a premere perché i *General Comments* non fossero diretti al singolo Stato (B.G. Tahzib, *Freedom of religion or belief. Ensuring effective international legal protection*, The Hague-London, 1996, p. 308 nota 189).

[30] M. Bossuyt, *Guide to the* 'Travaux Préparatoires' *of the International Covenant on Civil and Political Rights*, Dordrecht, 1987, p. 363.

[31] Il procedimento delle "comunicazioni individuali" (espressione scelta dopo avere scartato il termine petizione, in quanto rinviante a sistema più formale) non è previsto dal Patto, ma dal primo suo Protocollo facoltativo, che specifica che il Comitato può ricevere comunicazioni concernenti solo gli Stati che abbiano esplicitamente sottoscritto il medesimo Protocollo facoltativo.

nessun tipo di *actio popularis*) e in riferimento a lesioni concrete della libertà religiosa, non invece a lesioni solo possibili.[32]

L'art. 18 ultimo comma del Patto precisa che "gli Stati parti del presente Patto si impegnano a rispettare la libertà dei genitori e, ove del caso, dei tutori legali, di curare l'educazione religiosa e morale dei figli in conformità delle proprie convinzioni".

Tra gli altri aspetti positivi, mi limito a ricordare la tutela di un duplice obbligo, negativo l'uno e positivo l'altro (ricavabile dal combinato disposto tra art. 18 e art. 2): per un verso l'obbligo negativo degli Stati di astenersi da qualsiasi interferenza nella professione (o non professione) di fede da parte dei cittadini; per altro verso l'obbligo positivo di adottare legislazioni o altre misure idonee a rendere effettivi i diritti riconosciuti dal Patto, considerandosi dunque il *favor religionis* la ragione giustificatrice delle azioni positive dirette a garantire la libertà.

Dichiarazione sull'eliminazione di tutte le forme di intolleranza e discriminazione basate sulla religione e sulla convinzione

Sin dalla Dichiarazione Universale dei Diritti dell'Uomo vi è l'intenzione, nell'ambito delle Nazioni Unite, di adottare documenti volti a garantire ed incrementare la diffusione della tolleranza religiosa.

Senza poter qui ricostruire dettagliatamente il percorso compiuto,[33] basti ricordare che, dopo dieci anni di lavori (a livello di Commissione dei diritti dell'uomo e Sottocommissione per la prevenzione della discriminazione e per la protezione delle minoranze), l'Assemblea Generale delle Nazioni Unite nel 1962 con una risoluzione[34] conferisce mandato agli orga-

[32] Il Comitato nel 1984 ha ritenuto irricevibile (D.F. v. Sweden, Comm. No. 183/1984, U.N. Doc. CCPR/C/OP/1 at 55) la comunicazione presentata da un cittadino svedese a nome suo e di tutti gli arabi e musulmani residenti in Svezia, nella quale si sosteneva che tutti erano oggetto di discriminazioni da parte delle autorità locali. Il ricorrente non aveva dimostrato a quale titolo egli si esprimesse a nome degli altri, né in quali casi fosse stato oggetto di discriminazioni.

[33] Il percorso prende avvio dal Rapporto Halpern sulle discriminazioni in tema di diritti e di pratica religiosa (1954). Pietra miliare è lo studio del Relatore speciale Krishnaswami, che nel 1960 presenta un Rapporto sulle discriminazioni religiose in 86 Stati membri, focalizzando l'attenzione non solo sugli ordinamenti normativi dei singoli Stati ma anche sulla prassi.

[34] Risoluzione 1781 del 7 dicembre 1962.

ni citati di predisporre una bozza di Dichiarazione ed una di Convenzione sulla eliminazione di tutte le forme di intolleranza religiosa. L'obiettivo dichiarato è di adottarle, la prima nella sessione del 1963 e la seconda non più tardi della sessione del 1965 dell'Assemblea.

L'urgenza di giungere all'approvazione di tali documenti risulta affievolita a causa del clima della guerra fredda. Ci vogliono quasi vent'anni per giungere finalmente nel 1981 all'approvazione della "Dichiarazione sull'eliminazione di tutte le forme di intolleranza e discriminazione basate sulla religione e sulla convinzione".[35]

È presto abbandonato ogni tentativo di trovare un accordo per l'approvazione di una Convenzione (come tale giuridicamente vincolante per gli Stati), in considerazione delle prevedibili innumerevoli difficoltà a varare un testo sufficientemente condiviso. Menziono tre difficoltà: l'insistenza dei paesi del blocco comunista in favore dell'espressa tutela dell'ateismo, compreso quello militante; la questione relativa alle Chiese di Stato ed al regime di privilegio provocante discriminazioni; la questione, posta dai paesi islamici, del (non) diritto al cambiamento della religione (di cui s'è già detto).

La Dichiarazione adottata nel 1981 amplia, per certi versi, l'ambito di tutela. Per la prima volta afferma esplicitamente (IV considerando ed art. 1, c.1) la libertà – oltre che di pensiero, coscienza e religione – di avere qualsivoglia credo o convinzione (il termine nella versione ufficiale in lingua inglese è *whatever belief*), aderendo così alle aspettative sovietiche di vedervi comprese le posizioni atee ed agnostiche. Va notato che, venuta meno sulla scena internazionale l'influenza dei paesi comunisti, oggi sono i sostenitori dell'umanismo razionalista antireligioso e del pensiero libero-muratorio antiecclesiastico (che sembrano in sorprendente ripresa[36]) ad enfatizzare questa libertà, quasi in contrapposizione ed a scapito della libertà religiosa.

[35] Risoluzione dell'Assemblea Generale 35/55 del 25 novembre 1981.

[36] Un loro successo è avere ottenuto sin dal Trattato di Amsterdam 2 ottobre 1997, Allegato 11, la parificazione delle organizzazioni filosofiche alle confessioni religiose con una norma destinata a influenzare tutto il successivo processo di integrazione europea: "L'Unione europea rispetta e non pregiudica lo status previsto nelle legislazioni nazionali per le chiese e le associazioni o comunità religiose degli Stati membri: – L'Unione europea rispetta egualmente lo status delle organizzazioni filosofiche e non confessionali". A parte la discutibilissima parificazione (spinta da rappresentanti belgi) tra confessioni religiose ed organizzazioni filosofiche – frutto, pare, di un compromesso con organizzazioni massoniche –, questo testo presenta indubbi aspetti positivi anche per le Chiese, poiché riconosce il loro ruolo giuridico-sociale in un documento internazionale significativo per la costruzione costituzionale dell'Europa politica. Nel processo costituente europeo il ruolo

La Dichiarazione del 1981 riconosce inoltre che la religione "costituisce per colui che la professa uno degli elementi fondamentali della sua concezione della vita" con la conseguenza che "la libertà di religione o convinzione deve essere integralmente rispettata e garantita" (V considerando). Ma a tali dichiarazioni essa non fa seguire un'altrettanto positiva enunciazione di principi nell'articolato, già sotto il profilo del numero di disposizione contenute, venendo alla luce ridimensionata rispetto ai progetti iniziali.

Anche il titolo pare riduttivo, tolleranza e non discriminazione essendo un *quid minus* rispetto al più vasto concetto di libertà religiosa.

Inoltre, l'art. 1 (che in massima parte riprende l'art. 18 del Patto) menziona solo la libertà di avere, non quella di "adottare" una religione; espressione presente nel Patto, alla quale in via interpretativa il *General Comment* riconduce la libertà pure di cambiare religione.

In breve: dalla Dichiarazione Universale dei Diritti dell'Uomo alla Dichiarazione in esame, viene meno l'esplicita menzione del diritto a cambiare religione.[37] Ciononostante la dottrina,[38] con una serie di argomentazioni che non è possibile qui riportare, considera il diritto di cambiare religione il nocciolo duro della libertà religiosa.

Manca, poi, ogni definizione di religione o convinzione,[39] mentre l'art. 2 reca una definizione di "intolleranza e discriminazione fondate sulla religione o sul credo/convinzione", comprendendovi "ogni distinzione, esclusione, restrizione o preferenza fondata sulla religione o sul credo/convinzione ed avente ad oggetto o per effetto la soppressione o la limitazione del

pubblico delle Chiese continuerà ad essere riconosciuto sempre con la parificazione alle "associazioni filosofiche", sino al recente Trattato di riforma dell'Unione Europea che, come si dirà sopra nel testo recepisce all'art. 2, 30 un testo identico all'art. 52 della prima parte del precedente Trattato costituzionale europeo, che si era mosso, con qualche modificazione, sulla scia dell'Allegato 11 Trattato di Amsterdam.

[37] Qualche anno dopo i rappresentanti di 24 Paesi, nel corso di un Seminario promosso a Ginevra dal Centro per i Diritti dell'Uomo delle Nazioni Unite affermano all'unanimità che sia nel Patto del 66 sia nella Dichiarazione dell'81 la libertà religiosa comprende anche il diritto di cambiare religione (F. Margiotta Broglio, *Libertà religiosa e diritti dell'uomo. Un piccolo passo nella direzione della garanzia internazionale specifica*, in *Quaderni di diritto e politica ecclesiastica*, 1984, p. 159 ss.).

[38] M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, Kehl Strasbourg, 1993, p. 316; R. Torfs, Actes du Colloque international "Droits de l'homme et liberté de religion: pratiques en Europe occidental", in *Conscience et liberté*, 2001, p. 26.

[39] Tale assenza, rilevata dalla dottrina, non pare, poi, una pecca particolare di questo documento giacché ogni tentativo definitorio di religione e credo non è affatto agevole e, soprattutto, non scevro da pericoli.

riconoscimento, del godimento o l'esercizio dei diritti dell'uomo e delle libertà fondamentali su una base di uguaglianza".

Il concetto di "intolleranza" è per la prima volta menzionato in un documento onusiano, anche se pare frettolosa la assimilazione dell'"intolleranza" alla discriminazione, già oggetto di precedenti Convenzioni delle Nazioni Unite.

L'apporto specifico più importante alla emersione degli aspetti della libertà religiosa (quale richiesti dalla Chiesa cattolica) riguarda la libertà istituzionale. La Dichiarazione del 1981 (art. 6) elenca le libertà da riconnettersi alle forme di manifestazione religiosa, enucleando specifici atti e comportamenti.[40] Tra essi, oltre alla peculiare[41] libertà di istituire organizzazioni caritatevoli ed umanitarie, per la prima volta fissata in un documento internazionale, sono da evidenziare le libertà sulla nomina dei vertici delle confessioni religiose, nonché sulla garanzia di comunicazioni anche internazionali.

Dobbiamo insomma giungere al 1981 per trovare il primo riconoscimento esplicito in ambito ONU della libertà religiosa istituzionale: un profilo di libertà tanto più importante se si considera la situazione dell'Est europeo, allora ancora diviso dal muro di Berlino, riguardo alle chiese cattoliche prive a lungo di sedi vescovili (vacanti a causa della opposizione delle autorità civili alla nomina dei successori), e la loro impossibilità pratica di avere contatti liberi con la Sede Apostolica.

Relatore speciale sulla libertà di religione e di culto

Nell'elenco dei passi importanti verso una migliore tutela internazionale va inserita la Risoluzione 20/1986 (10 marzo 1986), con la quale la Com-

[40] Si tratta delle libertà di: praticare un culto e riunirsi per finalità religiose nonché di creare e mantenere luoghi per questi scopi; fondare e mantenere istituzioni caritative ed umanitarie; produrre, acquistare ed usare, in quantità adeguata, gli oggetti ed i materiali necessari per i riti ed i culti; scrivere, stampare e diffondere pubblicazioni di carattere religioso; insegnare una religione in luoghi adatti a questi scopi; sollecitare e ricevere donazioni e contributi da parte di persone o istituzioni; formare, nominare, eleggere o designare per la successione i vertici, conformemente alle necessità ed alle norme della confessione religiosa; osservare il giorno di riposo e celebrare le feste e le cerimonie secondo i precetti della religione; stabilire e mantenere le comunicazioni con individui e comunità a livello nazionale ed internazionale.

[41] Si tratta del primo e forse unico documento internazionale in cui è prevista tale libertà.

missione dei diritti dell'uomo nomina un "Relatore speciale sull'intolleranza religiosa", incaricato di esaminare episodi e misure governative incompatibili con la Dichiarazione ONU del 1981, raccomandando altresì quali misure prendere. Titolo dell'incarico poi modificato in "Relatore speciale sulla libertà di religione e di credo" con Risoluzione 33/2000.

Dall'istituzione dell'incarico nel 1986 ad oggi, il Relatore speciale ha inviato più di 1150 lettere di contestazione ed appello urgenti a 130 Stati, che consentono di comprendere quali e quante siano le più frequenti e gravi violazioni della libertà religiosa.

Nonostante il silenzio del Patto del 66 e della Dichiarazione del 1981 sul diritto di cambiare religione o credo (*ius poenitendi*), da vari anni il *Report* del Relatore speciale sulla libertà religiosa non manca di sanzionare politicamente la pratica delle conversioni forzate o i casi di persone sottoposte all'arresto al fine di abbandonare la propria fede, come avviene in Cina o in Arabia Saudita. Anche nell'ultimo *Report* del 6 gennaio di quest'anno, il Relatore speciale, Asma Jahangir, evidenzia come i casi più ricorrenti riguardino la libertà di manifestare il proprio credo in pubblico, nonché il problema delle conversioni (sono numerosi i casi di irrogazione di sanzioni contro coloro che si convertono, così come di conversioni forzate).

Tra le forme di manifestazione religiosa più controverse, nei *Report* è altresì messa in luce la situazione preoccupante relativa alla costruzione di luoghi di culto. Santuari, templi, monasteri ed in genere edifici di comunità religiose subiscono aggressioni da parte dei privati o restrizioni delle autorità pubbliche quanto alla loro gestione.

Sfide antiche e sfide nuove

Il ventaglio di diritti garantiti dai documenti sin qui sintetizzati – come da altri che occupandosi di specifiche tematiche ne tutelano anche i profili religiosi[42] – è ampio. La libertà religiosa è finalmente garantita in tutti i tre aspetti evidenziati dal Magistero della Chiesa cattolica: individuali, collettivi, istituzionali.

[42] Tra essi la Convenzione contro il genocidio (1948), la Convenzione contro la discriminazione razziale (1965), la Convenzione sull'eliminazione di ogni forma di discriminazione contro le donne (1981), la Convenzione per i diritti dei minori (1989), la Convenzione per la protezione dei diritti dei lavoratori emigrati e i componenti delle loro famiglie (1990), la Dichiarazione sui diritti delle persone che appartengono a minoranze nazionali, etniche, religiose e linguistiche (1992).

Ma la realtà va spesso in senso opposto. Alle antiche sfide, riguardanti la libertà di coscienza e di religione individuale e collettiva, si aggiunge oggi la sfida alla libertà istituzionale ed alla dimensione pubblica della religione. Garantite a livello internazionale, queste ultime sono tra le più minacciate.

Lo stesso dialogo interreligioso, ed ancor prima il dialogo interculturale, sono difficili, nonostante sia in crescita la consapevolezza (esplicitata pure in Risoluzioni ONU) del possibile contributo delle confessioni alla soluzione di problemi politico-sociali. Su entrambi gravano timori di perdita di identità, acuiti da una sorta di sentimento di impotenza ad affrontare le sfide della globalizzazione, che avanza con una celerità di fronte alla quale la cultura sembra arrancare nel delineare un sano rapporto tra *global* e *local*.

La trasformazione di società una volta omogenee in società ormai multi-etniche non è ancora metabolizzata neppure da molti Paesi democratici, che in alcuni ordinamenti religiosi di matrice non occidentale vedono minacce sia alla laicità, cioè alla separazione della religione dalla politica, sia ai valori universali consacrati nelle Carte ONU, dalla sacralità della vita, all'eguaglianza tra tutti gli esseri umani, alla libertà religiosa compresa la libertà di cambiare fede, alla pari dignità tra uomo e donna, tra credenti e non credenti.

Sull'onda di queste legittime preoccupazioni si tende a fare di ogni erba un fascio ed a negare illegittimamente diritti di libertà a coloro che questi valori non comprendono.

Per fare un esempio, si pensi al ventaglio amplissimo di problemi, pratici e culturali, posti oggi da due delle tante articolazioni della libertà religiosa in molti Paesi europei, a cominciare dal mio: il diritto a costruire edifici di culto, o quello di vedere garantito il giorno di riposo secondo il dettame della propria confessione. Entrambi questi diritti faticano – non senza comprensibili motivazioni – a trovare concreta attuazione in riferimento all'Islam. Nonostante sembrino migliorare le relazioni tra intellettuali e le conversazioni interreligiose ad alto livello,[43] nella quotidianità, con la

[43] Di specifico interesse sono gli incontri più recenti organizzati dal Pontificio Consiglio per il Dialogo Interreligioso: dall'Incontro del novembre 2008, nato in seguito al carteggio tra 138 intellettuali musulmani (diventati poi 301) e le autorità del mondo cristiano, alla Riunione annuale del *Comitato Congiunto per il Dialogo* (Comitato Permanente di Al-Azhar per il Dialogo tra le Religioni Monoteistiche e Pontificio Consiglio per il Dialogo Interreligioso) del 24 e 25 febbraio 2009, conclusa con una Dichiarazione congiunta che al punto 6, riconoscendo il forte legame fra pace e diritti umani, afferma che "bisogna prestare particolare attenzione alla difesa della dignità della persona umana e dei suoi diritti,

quale la politica si deve misurare, prevale la paura che l'improvvisa massiccia immigrazione di musulmani si trasformi in fondamentalismo.

Minacce gravi – teoriche e pratiche – alla libertà religiosa continuano poi ad essere poste nei Paesi tutt'oggi retti da regimi totalitari[44] o fondati su un esclusivismo ideologico o confessionale, che non permettono pertanto ai credenti di vivere liberamente la propria fede o di cambiare le proprie convinzioni religiose.

La negazione di ogni reciprocità da parte dei Paesi musulmani riguardo alla libertà dei cristiani è infine talmente nota da non avere bisogno qui di approfondimento.

4. Carte regionali

La produzione di documenti internazionali sui diritti umani è copiosa, anche fuori della sede ONU, come copiosi sono gli organi deputati al loro rispetto, al punto che ci si domanda se tutto ciò non sia eccessivo e ridondante,[45] anche in considerazione dei risultati concreti tutto sommato modesti.

Rimane comunque interessante esaminare la trattazione della libertà religiosa in Carte adottate a livello regionale. La condurrò in termini estremamente sintetici, seguendo un ordine cronologico, con l'obiettivo di cogliere le differenze di impianto concettuale.

La *Dichiarazione Americana dei Diritti e dei Doveri dell'Uomo*, adottata dalla Conferenza degli Stati Americani, è nel 1948 il primo strumento internazionale di tutela dei diritti umani nella loro interezza, precedendo di qualche mese la Dichiarazione Universale delle Nazioni Unite. Il suo terzo

in particolare in riferimento alla libertà di coscienza e di religione". Quanto alle aperture di esponenti significativi della cultura musulmana si vedano i vari contributi (dal filosofo libanese F. Zabbal, all'indiano I.B. Syed, al palestinese M. Abu Sway, all'iracheno Y. Tawfik) riportati dal numero monografico (2009) della rivista *Nuntium* dedicato a *Le sfide di Ratisbona: Fede, ragione, ricerca e dialogo*.

[44] Un recente studio (E. Neumayer, *Do international Human Rights Treaties Improve Respect for Human Rights?*, in *Journal of Conflict Resolution,* 2005, p. 925 ss) evidenzia che nei sistemi dittatoriali la ratifica dei trattati sui diritti umani spesso peggiora la condizione effettiva all'interno del Paese.

[45] Quanto alla sede ONU, già nel 1995 si auspica la creazione di un unico Comitato di controllo sull'applicazione delle Convenzioni ONU sui diritti umani, così da semplificare e rendere più efficiente il sistema: B. Boutros-Ghali (ed.), *The United Nations and Human Rights, 1945-1995,* New York, The United Nations Blue Books Series, 1995, vol. VII, 122.

articolo sancisce il diritto a professare, praticare e manifestare liberamente una fede religiosa, mentre altre disposizioni tutelano altri diritti correlati (non discriminazione, riunione, assemblea, etc.).

Particolare importanza riveste l'art. 9 della *Convenzione Europea sui Diritti dell'Uomo*. È l'Europa, dopo la Dichiarazione ONU, a fornire il primo concreto contributo a considerare il rispetto dei diritti e delle libertà della persona (prima tra le quali la libertà religiosa) irrinunciabile momento di civiltà giuridica e di nuovo costume politico.[46] Siamo nel 1950. Il nuovo ordine giuridico, impostosi dopo la seconda guerra mondiale, postula ed accoglie il principio secondo il quale il rispetto dei diritti umani trascende la sovranità nazionale e non può essere subordinato a fini politici o compromesso da interessi nazionali. I campi di sterminio nazisti prima ed i gulag dell'est poi indirizzano le riflessioni europee intorno ad una duplice esigenza: porre i diritti inviolabili della persona come prioritari rispetto a qualunque potere statale ed abbandonare il dogma che solo l'ordinamento dello Stato debba disciplinare la vita dei rispettivi cittadini. Non è certamente più la *Respublica christiana* ad essere auspicata. Ma è comunque sempre una società fondata sul rispetto dei valori della persona, della libertà, del pluralismo, centrali nel pensiero cristiano.[47] In questo contesto l'art. 9 CEDU assume speciale rilievo non solo perché inserito in una Convenzione (perciò vincolante gli Stati), ma anche in considerazione del fatto che per la sua tutela concreta è istituita la Corte Europea dei Diritti dell'Uomo.[48] Ad essa possono accedere cittadini e/o persone giuridiche, che hanno

[46] Per un commento più articolato rinvio a F. Margiotta Broglio, *La protezione internazionale della libertà religiosa nella Convenzione Europea dei diritti dell'uomo*, Milano 1967.

[47] In questo scenario, politici cristiani – come Adenauer, Schuman, De Gasperi – sottolineano l'importanza dell'apporto cristiano in senso non confessionale. Lo testimonia, ad esempio, una notissima affermazione pronunciata a Parigi da Alcide De Gasperi nella Conferenza parlamentare europea, che, a più di cinquanta anni dalla sua pronuncia (21 aprile 1954), rimane di straordinaria attualità: "Se affermo che all'origine di questa civiltà europea si trova il cristianesimo (...), non intendo con ciò introdurre alcun criterio confessionale, esclusivo nell'apprezzamento della storia. Soltanto voglio parlare del retaggio europeo comune, di quella morale unitaria che esalta la figura e la responsabilità della persona umana, col suo fermento di fraternità evangelica, (...) con la sua volontà di verità e di giustizia acuita da una esperienza millenaria".

[48] La Convenzione europea è altresì un riferimento essenziale per il processo di integrazione europea, tanto da essere espressamente recepita nella "Carta dei Diritti Fondamentali dell'Unione Europea" del 7 dicembre 2000. Oltre ad essere riferimento normativo della Corte europea dei diritti dell'uomo, essa è considerata già negli anni sessanta dello scorso secolo dalla Corte di Giustizia delle Comunità Europee di Lussemburgo come fon-

esperito già i rimedi giurisdizionali nei rispettivi ordinamenti nazionali per fare rispettare non solo i diritti fondamentali risultanti dalle tradizioni costituzionali comuni agli Stati membri e dalla stessa CEDU, ma anche da altri strumenti del diritto internazionale. L'art. 9 CEDU riproduce pressoché fedelmente l'art. 18 della Dichiarazione universale, statuendo che il diritto alla libertà di pensiero, di coscienza e di religione "include la libertà di cambiare di religione o di credo e la libertà di manifestare la propria religione o credo individualmente o collettivamente, sia in pubblico che in privato, mediante il culto, l'insegnamento, le pratiche e l'osservanza dei riti". Le uniche restrizioni – afferma il c. 2 del medesimo articolo – "stabilite per legge, costituiscono misure necessarie in una società democratica, per la protezione dell'ordine pubblico, della salute o della morale pubblica, o per la protezione dei diritti e delle libertà altrui".

Successivamente (1969), anche l'Organizzazione degli Stati Americani si dota della *Convenzione americana sui diritti umani*,[49] che menziona – all'art. 12 – il diritto alla libertà religiosa, riprendendo l'art. 18 della Dichiarazione Universale e del Patto, ed istituisce anch'essa un organo giurisdizionale per la tutela dei diritti dell'uomo: la Corte Interamericana dei Diritti dell'Uomo.

Nuovamente nell'ambito regionale europeo,[50] assume una speciale importanza (anche quanto alla emersione della tutela della libertà religiosa in tutti gli aspetti rivendicati dalla Chiesa cattolica) un organismo volto a promuovere la pace mondiale grazie alla distensione in Europa tra Ovest ed Est: l'Organizzazione per la Sicurezza e Cooperazione in Europa (OSCE). Oggi vi appartengono 56 Stati (tutti gli Stati europei, di qui e di là da Vienna, comprese le ex Repubbliche Sovietiche e la Turchia, oltre USA e Canada). Essa nasce come Conferenza (CSCE) in un momento nel quale la presenza di una cortina di ferro dall'apparenza incrollabile fa apparire l'obiettivo della distensione a molti commentatori poco più che una bella utopia;

te dei principi generali del diritto comunitario e perciò fonte di obblighi. La tutela dei diritti dell'uomo e delle libertà fondamentali è pertanto ormai condizione di legalità degli atti comunitari.

[49] A San José, Costarica, il 22 novembre 1969, entrata in vigore il 18 luglio 1978.

[50] In assenza di una definizione giuridica, le organizzazioni internazionali regionali europee rispecchiano concetti molto diversi di Europa. L'Unione Europea è indecisa sull'europeità della Turchia, paese che invece fa parte sia del Consiglio d'Europa che dell'OSCE. Quest'ultima Organizzazione (peraltro, ricomprendente Canada e USA) considera europee anche tutte le ex repubbliche sovietiche tra cui Kazakistan, Kirghizistan, Tagikistan, Turkmenistan ed Uzbekistan (queste ultime, invece, escluse dal Consiglio d'Europa).

ed invece si dimostra presto di grande utilità.[51] È noto, al proposito, il ruolo propulsore della Santa Sede, membro *pleno iure,* al fine di comprendere, sin dall'*Atto Finale di Helsinki* del 1975, la libertà religiosa tra i diritti umani,[52] menzionandola esplicitamente, cosicché nelle successive Riunioni di *follow-up* della Conferenza se ne precisano man mano i contenuti. Il *Documento Finale di Vienna* del 1989[53] rimane a tutt'oggi tra i migliori documen-

[51] Dell'ampia bibliografia mi limito a ricordare A. Casaroli, *Il martirio della pazienza. La Santa Sede e i paesi comunisti,* Torino 2000; G. Barberini, *L'Ostpolitik della Santa Sede. Un dialogo lungo e faticoso*, Bologna 2007; G. Barberini (ed.), *La politica del dialogo. Le Carte Casaroli sull'Ostpolitik vaticana*, Bologna 2008; J.-L. Tauran, *Verso l'Europa a piccoli passi*, in A. Silvestrini ed., *L'Ostpolitik di Agostino Casaroli*, Bologna 2009, p. 77 ss.; A. Silvestrini, *La sollecitudine per le Chiese,* ibid., p. 89 ss.

[52] VII principio del Decalogo.

[53] Di seguito la disposizione in materia del Documento Finale di Vienna: (16) Al fine di assicurare la libertà dell'individuo di professare e praticare una religione o una convinzione, gli Stati partecipanti, fra l'altro,

(16.1) adotteranno misure efficaci per impedire ed eliminare ogni discriminazione per motivi di religione o convinzione nei confronti di individui o comunità per quanto riguarda il riconoscimento, l'esercizio e il godimento dei diritti dell'uomo e delle libertà fondamentali in tutti i settori della vita civile, politica, economica, sociale e culturale e assicureranno l'effettiva uguaglianza fra credenti e non credenti;

(16.2) favoriranno un clima di reciproca tolleranza e rispetto fra credenti di comunità diverse nonché fra credenti e non credenti;

(16.3) riconosceranno, su loro richiesta, alle comunità di credenti, che praticano o che sono disponibili a praticare la loro fede nel quadro costituzionale dei propri Stati, lo status per esse previsto nei rispettivi paesi;

(16.4) rispetteranno il diritto di tali comunità religiose di: costituire e mantenere luoghi di culto o riunione liberamente accessibili; organizzarsi secondo la propria struttura gerarchica e istituzionale; scegliere, nominare e sostituire il proprio personale conformemente alle rispettive esigenze e alle proprie norme nonché a qualsiasi intesa liberamente accettata fra esse e il proprio Stato; sollecitare e ricevere contributi volontari sia finanziari che d'altro genere;

(16.5) si impegneranno in consultazioni con i culti, le istituzioni e le organizzazioni religiose al fine di pervenire ad una migliore comprensione delle esigenze della libertà religiosa;

(16.6) rispetteranno il diritto di ciascuno di impartire e ricevere un'istruzione religiosa nella lingua di propria scelta, individualmente o in associazione con altri;

(16.7) rispetteranno, in tale contesto, fra l'altro, la libertà dei genitori di assicurare l'educazione religiosa e morale dei loro figli conformemente ai propri convincimenti;

(16.8) consentiranno la formazione di personale religioso nelle istituzioni appropriate;

(16.9) rispetteranno il diritto dei singoli credenti e delle comunità di credenti di acquisire, possedere ed utilizzare libri sacri, pubblicazioni religiose nella lingua di loro scelta ed altri oggetti e materiali relativi alla pratica della religione o della convinzione;

(16.10) consentiranno ai culti, alle istituzioni e alle organizzazioni religiose la produzione, l'importazione e la diffusione di pubblicazioni e materiali religiosi;

(16.11) considereranno favorevolmente l'interesse delle comunità religiose a partecipare al pubblico dialogo, fra l'altro, tramite i mezzi di comunicazione di massa.

ti internazionali in materia. In esso sono previsti, oltre ai tradizionali diritti di libertà individuale e collettiva, diritti specifici delle comunità religiose: tra essi, il diritto ad "organizzarsi secondo la propria struttura gerarchica e istituzionale", nonché il diritto di "scegliere, nominare e sostituire il proprio personale conformemente alle rispettive esigenze e alle proprie norme, nonché a qualsiasi intesa liberamente accettata tra esse e il proprio Stato". Nel corso dei primi anni del nostro secolo, la peculiare attenzione alla libertà religiosa come elemento fondamentale per il mantenimento della sicurezza spinge l'OSCE, preoccupata del dilagante antisemitismo (non disgiunto da gravi fenomeni di riduzionismo, e perfino negazionismo della Shoah), a promuovere un programma in favore della tolleranza, con riferimento a tutte le confessioni religiose. Il programma, certamente positivo ed importante, segnala però un'involuzione: di "tolleranza dei culti" si parlava nell'Ottocento a fronte di sistemi istituzionali sostanzialmente negatori della libertà religiosa. Si sperava che le nostre società fossero in grado di dimostrare verso le religioni qualcosa di più della mera tolleranza. Evidentemente non è così. Quanto alle modalità di verifica del rispetto dei diritti umani, l'OSCE si affida a meccanismi puramente politico-diplomatici, aprendoli ad un'ampia partecipazione delle Organizzazioni Non Governative, preferendo questa via all'istituzione di organi giurisdizionali.

Sino ad ora ci siamo soffermati su documenti sorti in ambito occidentale. Concentriamoci ora, anche se molto sinteticamente, su regioni del pianeta con cultura altra.

Per quanto riguarda l'Africa, l'*Organizzazione per l'Unità Africana* (ora Unione Africana) nel 1981 adotta una *Carta sui diritti umani e dei popoli*[54] che, pur muovendo da una cultura di natura comunitarista differente da quella occidentale,[55] sul punto della libertà religiosa garantisce la libertà di coscienza e quella di professare e praticare liberamente una religione, con una norma invero un po' sintetica, ma che non si discosta molto dai documenti internazionali sinora visti.

Impostazioni nettamente diverse presentano invece i documenti elaborati in ambito islamico ed arabo. Essi fanno discendere una diversa visione della libertà religiosa dalla diversa gerarchia tra individuo e comunità, non-

[54] Adottata il 27 giugno 1981, entrata in vigore il 21 ottobre 1986.

[55] Per un confronto con la cultura europea si veda B. Ndiaye, De l'Europe à l'Afrique: le modèle européen est-il exportable?, in *Quelle Europe pour les droits de l'homme? La Cour de Strasbourg et la réalisation d'une "union plus étroite" (35 années de jurisprudence: 1959-1994),* Bruxelles 1996, p. 439 ss.

ché tra diritti individuali e collettivi, sottesa alla loro cultura. Si tratta di una tendenza diffusa anche nel sud-est asiatico, dove all'inizio degli anni novanta è organizzata una Conferenza regionale per sottolineare la conflittualità tra *Asian values* (non codificati peraltro in alcuna Carta internazionale) e valori individualistici della Dichiarazione Universale dei Diritti dell'Uomo.[56] Tanto la *Dichiarazione Universale Islamica dei Diritti dell'Uomo*[57] (1981), elaborata dal Consiglio Islamico d'Europa (pertanto priva di ufficialità, in quanto documento di organismo privato), quanto la *Dichiarazione de Il Cairo sui diritti umani nell'Islam,*[58] adottata dall'Organizzazione della Conferenza Islamica (1990)[59] (non ratificata dai Capi di Stato facenti parte dell'OCI) riconoscono il diritto alla libertà religiosa (soffermandosi molto sulla necessità di una tutela penale dei culti), unitamente al divieto di discriminazione su base religiosa.[60] Ma entrambe – in conformità alla con-

[56] La questione dei "valori asiatici" è sollevata (in previsione della Conferenza di Vienna del 1993 indetta dalle Nazioni Unite) da alcuni Paesi del Sud Est asiatico – tra essi Singapore, Malesia, Taiwan e Cina – all'interno di una *Conferenza regionale* organizzata a Bangkok, che elabora una dichiarazione sottoscritta da 34 Stati asiatici. In linea con essa il capo-delegazione cinese Liu Huaqiu, nella Conferenza di Vienna del 1993, afferma: "Il concetto di diritti umani è un prodotto dello sviluppo storico (...) Non si può e non si deve pensare al sistema e al modello dei diritti umani propri di certi Paesi come l'unico appropriato e chiedere che tutti i Paesi si conformino". Importanti uomini di cultura, tra i quali A. Senn (cfr. Diritti umani e valori asiatici, in *Laicismo indiano*, Milano 1988, p. 163) e J. Habermas, vedono nella dichiarazione di Bangkok il tentativo di giustificare le resistenze di alcuni governi autoritari alla tutela dei diritti fondamentali. Come puntualizza J. Habermas (Legittimazione tramite diritti umani, in *L'inclusione dell'altro* (trad. it.), Milano 1998, p. 226), la collisione con i valori asiatici viene affermata riguardo a tre aspetti: la generale tendenza della Dichiarazione Universale alla priorità dei diritti sui doveri; l'insufficiente salvaguardia della gerarchia di natura comunitarista tra i diritti dell'uomo; gli effetti negativi che l'eccessiva enfasi sui diritti individuali produce sulla coesione sociale.

[57] Proclamata in sede UNESCO il 19 settembre 1981. Che i diritti dell'uomo siano "diritti cogenti in virtù della loro origine divina e non possono essere soppressi, abrogati, invalidati o trascurati" è ribadito anche nella posteriore *Dichiarazione di Dacca sui Diritti dell'Uomo in Islam* del 1983, nella quale gli Stati membri dell' Organizzazione della Conferenza Islamica (OCI) ribadiscono che le libertà e i diritti fondamentali conformemente alla Shar'ia sono parte integrante dell'Islam (M. Aminal – Midani, La Déclaration universelle des Droits de l'Homme et le droit musulman, in *Lectures contemporaines du droit islamique. Europe et Monde Arabe,* sotto la direzione di F. Fregosi, Strasbourg 2004, p. 169).

[58] Adottata dall'Organizzazione della Conferenza Islamica il 5 agosto 1990.

[59] XIX Conferenza dei Ministri degli Affari Esteri della OCI, risoluzione n. 49/19-P del 2 agosto 1990.

[60] Altri riferimenti in S.A. Aldeeb Abu-Sahlieh, I diritti dell'uomo e la sfida dell'Islam (Diagnosi e rimedi), Atti del Seminario internazionale *Diritti dell'uomo e profili etnico-religiosi: una prospettiva globale* (Milano 3-4 dicembre 1998), in *Jus* 1999, p. 101 ss.

cezione che i diritti fondamentali non sono meri diritti naturali, ma doni divini fondati sulle disposizioni della Shari'a, fonte di ogni libertà e dignità umana –, fondano i diritti dell'uomo sui principi della fede islamica, che vieta con la pena di morte la conversione ad altra fede. L'esercizio dei diritti in esse previsti è dunque subordinato all'osservanza della Shari'a, secondo quel primato teologico-giuridico della legge sulla persona, che è l'esatto opposto della visione del primato della persona sulla legge, immesso dal cristianesimo nella cultura occidentale. Le riserve, a suo tempo manifestate da Egitto e Arabia Saudita quanto alla Dichiarazione Universale dei Diritti dell'Uomo sul modo di concepire il diritto di libertà religiosa[61] e di coscienza, tornano dunque a farsi sentire e rendono le due Dichiarazioni islamiche assai lontane dai modelli occidentali.[62]

Più vicina al modello onusiano è la *Carta Araba sui Diritti Umani,*[63] espressione non tanto dell'Islam, quanto dell'anima laica del nazionalismo arabo iniziato a fine Ottocento in ottica anti-ottomana. Essa riconosce espressamente nel Preambolo la Dichiarazione Universale dei Diritti dell'Uomo e tutela ampiamente la libertà religiosa e di coscienza con formule[64] rispecchianti sostanzialmente quelle del Patto e che consentono (o almeno dovrebbero consentire) un dialogo culturale di speciale interesse per la politica euro-mediterranea[65] su specifici obiettivi, come testimoniano iniziative

[61] Altre riserve riguardavano lo status giuridico dei coniugi e della donna.

[62] R. Mazzola, *La convivenza delle regole. Diritto, Sicurezza e Organizzazioni religiose*, Milano 2005, p.112 ss.; R. Guolo, Politica, religione, diritti umani nel mondo islamico, in M. Nordio-V. Possenti (ed.), *Governance globale e diritti dell'uomo*, Reggio Emilia 2007, p. 153 ss.

[63] Adottata dalla Lega Araba, dopo una prima versione del 15 settembre 1994 mai ratificata da nessuno Stato, il 22 maggio 2004 ed entrata in vigore il 15 marzo 2008.

[64] Art. 26: "È garantita la libertà di credo, pensiero e opinione a tutti gli individui"; art. 27: "Ogni individuo, qualunque sia la religione a cui appartiene, ha il diritto di praticare i propri riti religiosi, inoltre ha il diritto di esprimere il proprio pensiero con la parola, con la pratica o con l'insegnamento senza pregiudizio dei diritti altrui; non potranno essere poste restrizioni alla libertà di credo, di pensiero e di opinione se non sono previste dalla legge".

[65] In considerazione dei paesi arabi, che, avendo ratificato il Patto internazionale relativo ai diritti civili e politici, si sono impegnati a far rispettare i predetti diritti nei loro paesi, l'Unione Europea si è dotata di una specifica strategia verso il mondo arabo e le sue riforme, specie riguardo ai Paesi frontalieri del Mediterraneo (in particolare la Partnership Euro Mediterranea, conosciuta come Processo di Lisbona). Essa ha trovato una recente sintesi nella Risoluzione del Parlamento europeo del 10 maggio 2007. Nel ricordare che la Carta araba dei diritti umani, adottata nel 1994, è espressione della volontà di garantire il rispetto dei diritti umani nel mondo arabo e nel deplorare che alcune sue disposizioni siano formulate in modo tale da consentire interpretazioni diverse, questa Risoluzione si col-

politiche[66] e sociali. Ma la Carta, ovviamente, non fa alcun cenno alla libertà di cambiare religione, approfittando del silenzio su di essa serbato dai Patti del 66. Al riguardo va evidenziato che l'Alto Commissario per i diritti umani delle Nazioni Unite ha criticato questo documento, come non conforme agli *standard* internazionali quanto alla pena di morte per i minori ed ai diritti

lega alle relazioni sullo sviluppo umano nel mondo arabo pubblicate nel 2002, 2003 e 2005 dal programma delle Nazioni Unite per lo sviluppo (UNDP), in particolare a quella pubblicata nel 2004 intitolata "Verso la libertà nel mondo arabo". Essa sottolinea che la strategia per il mondo arabo, presentata nel 2003 dall'Alto rappresentante dell'UE, è stata in massima parte la risultante dei rischi e delle minacce emerse in seguito agli attentati terroristici dell'11 settembre 2001 e che passi avanti sono stati successivamente compiuti, ad esempio con la dichiarazione finale adottata dal Consiglio della Lega degli Stati arabi in occasione del vertice di Tunisi del 23-24 maggio 2004, contemplante l'impegno a riformare e modernizzare i paesi membri della Lega, attraverso il consolidamento della democrazia e la partecipazione politica. Considerando che il movimento arabista, quale concepito dai suoi padri fondatori, ha iscritto tra i suoi obiettivi la secolarizzazione delle società, mentre lo stallo della riforma politica alimenta l'islamismo radicale e il suo discorso di odio verso gli ebrei, la Risoluzione rileva che, al fine di esercitare un'influenza concreta, l'Unione europea dovrebbe non manifestare alcun senso di superiorità né dare l'impressione di impartire lezioni, bensì fare del dialogo euro-arabo un vero e proprio dialogo tra eguali; e che, sebbene sia estremamente importante che le relazioni euro-arabe includano la necessità di combattere il terrorismo, è fondamentale che la lotta al terrorismo non oscuri o freni tutta una serie di altre tematiche tra le quali la libertà religiosa, di espressione e associazione. Di qui la necessità per l'Unione europea di condurre un ampio dialogo culturale promuovendo nei suoi interlocutori arabi i valori di riferimento dell'Unione (Stato di diritto, diritti dell'uomo, democrazia, ecc.), pur tenendo conto delle differenti percezioni culturali e politiche. In particolare la Risoluzione auspica che i Paesi arabi, che non l'hanno ancora fatto, diano prova di un maggiore impegno a favore della libertà di culto o del diritto delle persone e delle comunità a professare liberamente il loro credo e la loro fede, anche garantendo l'indipendenza e la separazione delle istituzioni e del potere politico dalle autorità religiose. A tale riguardo – sottolinea la Risoluzione – le testimonianze di milioni di musulmani che vivono in Europa dovrebbero aiutare i paesi arabi a dare al loro interno attuazione al principio costante delle relazioni internazionali che è la reciprocità. Infine essa incoraggia gli Stati membri ad istituire sul proprio territorio nazionale Centri studio finalizzati allo scambio e al confronto culturale tra paesi arabi e paesi europei, così da creare spazi per approfondimenti interdisciplinari e ponti per una reciproca conoscenza.

[66] L'anno scorso, la Presidenza di turno dell'Unione Europea, preso atto della perdita di slancio accusata dal Processo di Barcellona, ha convocato il Vertice di Parigi (13 luglio 2008) per lanciare una specifica organizzazione internazionale, l'*Unione per il Mediterraneo*, quale struttura permanente dedicata alle relazioni tra l'Unione Europea e gli stati rivieraschi del Mediterraneo (compresi la Giordania e la Mauritania, oltre che la Lega Araba). La Dichiarazione congiunta finale richiama l'importanza del rispetto della libertà religiosa nonché il rifiuto di ogni tentativo di associare la religione al terrorismo.

(negati) della donna, nonché quanto alla equiparazione del Sionismo al razzismo. Ma nulla ha eccepito in punto di libertà religiosa.[67]

Da ultimo, nell'ambito dell'Unione Europea (che sempre più sta assumendo i profili di uno Stato federale), la Carta di Nizza o *Carta dei Diritti Fondamentali dell'Uomo nell'Unione Europea* (7 dicembre 2000) riprende testualmente (art. 10) l'art. 9 della Convenzione Europea, senza tenere conto dell'intervenuta evoluzione del diritto di libertà religiosa avutasi con la giurisprudenza della Corte di Strasburgo. Il rapporto tra Carta di Nizza e Convenzione Europea e tra Corte Europea dei Diritti dell'Uomo e Corte di Giustizia delle Comunità Europee rappresenta uno degli snodi attualmente più dibattuti circa la tutela dei diritti umani nell'area UE, che esula però da questa mia relazione.

Molto rilevante per il tema che stiamo trattando è, infine, il recente *Trattato di riforma dell'Unione Europea* (*Trattato di Lisbona, 13 dicembre 2007*): oltre ad attribuire carattere giuridicamente vincolante alla Carta dei diritti (con l'obbligo per gli Stati membri di aderire alla CEDU), all'art. 2, 30 – identico all'art. 52 della prima parte del precedente Trattato costituzionale europeo – si riferisce esplicitamente alla dimensione istituzionale della libertà religiosa, garantendo il diritto delle confessioni di organizzarsi liberamente, in conformità allo statuto che le regola. La stessa norma, inoltre, impegna l'Unione Europea a mantenere un dialogo "aperto, trasparente e regolare" con le confessioni religiose, così riconoscendo la loro identità ed il loro contributo specifico.

5. Un esempio di best practices: il contributo delle Chiese europee alla democrazia

L'ultimo quarto del sec. XX vede diffondersi in Europa la consapevolezza che il dibattito sulla libertà religiosa deve agevolare lo sviluppo delle diversità spirituali e culturali, assecondando il dialogo delle confessioni tra loro e con il mondo come prezioso contributo alla soluzione di sfide delicatissime, quali la pace, lo sviluppo durevole, i diritti dell'uomo, l'ambiente.

Di questa consapevolezza è insieme causa ed effetto l'atteggiamento delle stesse Chiese di fronte alla formazione di un'Europa politica. È significa-

[67] *Statement* 30 gennaio 2008 in http://www.unhchr.ch/huricane/huricane.nsf/view01/6C211162E43235FAC12573E00056E19D,opendocument.

tivo, ad esempio, che le Chiese cristiane costituiscano appositi organismi per seguire il processo politico di integrazione europea.[68] Ancor più significativo è che esse si dimostrano "levatrici sagge" di democrazia nel passaggio da esperienze totalitarie a esperienze democratiche: dapprima alla caduta dei sistemi nazifascisti e poi alla caduta dei regimi comunisti. Nel diventare "protagoniste" dell'evoluzione democratica, esse diffondono la cultura dei diritti fondamentali, tra i quali primeggia la libertà religiosa. Ogni Stato ex-totalitario avverte questo loro ruolo tanto più intensamente quanto più le stesse religioni si dimostrano (come avviene ad esempio nella Conferenza delle Chiese Europee svoltasi a Belgrado nel 1996) impegnate a superare antiche divisioni interne.

Siamo di fronte ad un esempio di quelle *best practices*, che tanta importanza hanno nella realtà delle organizzazioni internazionali e che produce proficui risultati quanto al consolidamento teorico e pratico della libertà religiosa.

L'unità di azione a difesa dei diritti umani e delle libertà fondamentali rende infatti le confessioni partecipi del consolidamento delle istituzioni democratiche nei singoli Paesi europei. Questo consolidamento, a sua volta, diviene la migliore garanzia sia dello specifico *status libertatis* delle Chiese, sia della tutela della dignità e libertà della persona in un quadro sociopolitico di riconciliazione civile e religiosa.

Il ruolo centrale della libertà religiosa nel cammino politico della società europea, finisce con l'influenzare anche il diritto interno degli Stati più tiepidi o addirittura di quelli separatisti, come la Francia, che riconosce piena libertà di autorganizzazione alla Chiesa ed accetta la presenza cattolica in settori importanti, come l'istruzione.[69]

[68] La COMECE raggruppa gli Episcopati cattolici dei Paesi membri dell'Unione Europea; la CCEE comprende gli Episcopati cattolici di tutta l'Europa anche dei paesi oggi non facenti parte della UE; la KEK raggruppa rappresentanti delle Chiese cristiane non cattoliche (battisti, cattolici non romani, luterani, metodisti, ortodossi, pentecostali, riformati). Benché la Chiesa cattolica romana non faccia parte della KEK, le relazioni con essa sono strette ed un certo numero di incontri sono organizzati congiuntamente con le Conferenze Episcopali Europee (CCEE), rappresentando essi un importante e concreto contributo al cammino ecumenico ed insieme un fronte unitario dal quale fare emergere richieste a coloro che stanno costruendo l'unità politica europea.

[69] Il favore avutosi in Francia nell'ultimo cinquantennio riguardo alle scuole confessionali (sia pure sulla base di una più generale politica di attenzione riguardo al settore privato) si è tradotto in leggi del tutto impensabili ai tempi (1905) in cui la Francia scelse la separazione tra Stato e Chiesa con un atteggiamento di lotta anticlericale piuttosto che di rispet-

Il contributo all'integrazione europea è dato più facilmente dalle Chiese cattolica e protestante rispetto alle Chiese ortodosse, tuttora legate a principi di unione confessionale con lo Stato. Nel contempo pare condivisa da tutte le Chiese la grande lezione del Concilio Ecumenico Vaticano II: che "se vige la libertà religiosa (...) la Chiesa raggiunge una stabile condizione di diritto e di fatto per la necessaria indipendenza nell'adempimento della sua divina missione" (*Dignitatis Humanae*, 13).

Il favore per l'evolversi dei processi di integrazione sopranazionale verso modelli sempre più consoni alla giustizia e alla pace, comune a tutte le Chiese, le porta a mutare anche l'atteggiamento riguardo agli Stati. La tradizionale rivendicazione della *Libertas Ecclesiae,* come prioritaria nel confronto con la comunità politica, cede il passo (salve singole eccezioni di alcune Chiese ortodosse, come quella greca) alla priorità della rivendicazione della libertà religiosa come diritto umano da riconoscersi a tutti, nonché del perseguimento della pace tra i popoli e di relazioni tra gli Stati improntate a giustizia e solidarietà.

In questo scenario si colloca la battaglia combattuta dalla Santa Sede e dai suoi rappresentanti contro la riduzione dell'Unione Europea ad un'espressione solo geografica od economica, priva di un collante culturale e spirituale e contro la "marginalizzazione"[70] delle confessioni nel processo di integrazione europea. Di qui la richiesta del duplice inserimento nel Trattato costituzionale europeo del riferimento alle radici cristiane d'Europa, nonché della tutela del ruolo pubblico delle confessioni. È battaglia che vede unite tutte le Chiese europee, quelle ortodosse più sensibili al tema delle radici cristiane e quelle protestanti più sensibili al ruolo pubblico delle Chiese. Viene vinta solo per la seconda rivendicazione (il ruolo pubblico delle Chiese), come poco sopra abbiamo visto a proposto del Trattato di Lisbona.

Giovanni Paolo II, alfiere della libertà religiosa[71] istituzionale per tutte le Chiese, comprese quelle separate da Roma, realizza nei fatti un dialogo

to delle scelte religiose. Oggi la rete scolastica francese privata è il 16% della rete nazionale ed al 90% è a gestione cattolica. Beninteso: la tendenza, propria ai modelli di relazione tra Stato e Chiesa di tipo separatista, ad estromettere la religione da ogni struttura pubblica permane anche in Francia ed anzi si accentua. Lo dimostra l'ampio dibattito sui segni e simboli religiosi nella scuola pubblica, giunto, in nome della laicità separatista, a proibire a studentesse islamiche di velare il capo. Ma vi è maggiore consapevolezza, rispetto al passato, del ruolo positivo che le strutture scolastiche confessionali possono avere.

[70] O. Fumagalli Carulli, Costituzione europea, radici cristiane e Chiese, in *Ius* 2005, p. 129 ss.

[71] Se già con Pio XI e Paolo VI la battaglia per la libertà religiosa è tra quelle prioritarie del Pontificato, con Giovanni Paolo II essa diventa martellante: una libertà reli-

ed un'unione ecumenica come mai avvenuto prima. Anche Benedetto XVI sottolinea, sin dall'inizio del suo Pontificato, il ruolo delle religioni nel consolidamento del bene comune europeo, stimolando al proposito una più stretta intesa dei cristiani tra loro.[72]

6. Le violazioni della libertà religiosa al giorno d'oggi

Il diritto alla libertà religiosa, nonostante sia più volte proclamato e precisato dalla comunità internazionale nei documenti appena richiamati (oltre che nelle Carte costituzionali di gran parte degli Stati), continua ad essere diffusamente violato. Oggi non meno di ieri. Non c'è purtroppo confessione o parte del pianeta immune da discriminazioni, atti di intolleranza, violazioni della libertà religiosa, perpetrate in molteplici forme.

Molti sono i casi[73] portati all'attenzione degli organi giurisdizionali o politico-diplomatici previsti nelle carte internazionali per la verifica degli impegni assunti. Non tutti, peraltro, sono noti, poiché in ambito politico-diplomatico si ricorre sovente a procedure riservate (*confidential*).

giosa non rivendicata come privilegio, ma come possibilità per tutti i credenti di godere effettivamente della libertà religiosa nel significato più ampio del termine e di continuare ad apportare il proprio specifico contributo, al riparo da ogni arbitrio. Si tratta di una battaglia ideale fondamentale per la sensibilizzazione della coscienza mondiale, che il lungo Pontificato di Giovanni Paolo II consente di combattere con risultati così importanti da meritare al Pontefice polacco una *leadership* poche volte riconosciuta ai capi politici. Tra i più significativi documenti sono certamente: il discorso pronunciato all'Assemblea Generale delle Nazioni Unite nel 1979, il documento inviato ai capi di Stato e di Governo dei Paesi firmatari dell'Atto finale di Helsinki nel 1980, il discorso al II *Colloquium Romanum* sempre nel 1980, il discorso all'Unione Interparlamentare del 1982, vari discorsi al Corpo diplomatico accreditato presso la Santa Sede e messaggi per la pace con la presentazione della libertà religiosa, come condizione per la pacifica convivenza tra i popoli.

[72] In questi termini la lettera indirizzata al Cardinale Tauran in occasione dell'incontro di Atene del 16 novembre 2005 per la presentazione della pubblicazione facsimile del Menologio di Basilio II, un testo che raccoglie le notizie sul "santo del giorno" da leggersi nella ufficiatura del mattino e che risale al 976-1025, cioè ad età di piena comunione tra Chiesa greca e Chiesa di Roma. In esso è sottolineato il ruolo degli ortodossi "che possono insieme aiutare con maggior forza le nazioni europee a riaffermare le loro radici cristiane al fine di ritrovarvi la linfa nutriente e feconda per il proprio futuro".

[73] Una interessante analisi di singoli casi portati davanti al Comitato per i Diritti Umani nelle Nazioni Unite è in S. Angeletti, *Libertà religiosa e Patto Internazionale sui Diritti Civili e Politici. La prassi del Comitato per i Diritti Umani nelle Nazioni Unite,* Torino 2008, p. 73 ss.

Mi soffermerò sulle violazioni della libertà religiosa che colpiscono i cristiani nel mondo, con una analisi di tipo pragmatico, piuttosto che teoretico.

La ragione per la quale scelgo di focalizzare questo tema non è solo il fatto contingente che ci troviamo qui riuniti in un'Accademia vaticana, né è solo il fatto che sono esperta di diritto della Chiesa cattolica. È soprattutto la mia volontà di contrastare una tendenza culturale, che reputo insidiosa, a sottovalutare i casi di discriminazione contro i cristiani, a fronte di un'enfasi dei casi di discriminazione contro qualsivoglia altra religione.

Al fine di raggruppare i casi di violazione della libertà religiosa dei cristiani con metodo sistematico, utilizzo due categorie: la prima riguarda le violazioni classiche della libertà religiosa; la seconda le nuove forme di intolleranza e discriminazione.

Violazioni classiche della libertà religiosa dei cristiani

Con riferimento alla prima delle due annunciate categorie, inizio dalle violazioni più radicali. Esse si compiono, purtroppo, in numerose regioni del mondo mediante la negazione del primo dei diritti fondamentali dell'uomo: il diritto alla vita.

Tra le pagine che rendono amara la storia dello scorso anno, è l'ondata di violenza in India, costata la vita a diverse decine di cristiani. A questi fatti se ne aggiungono, poi, molti altri in così numerosi punti del pianeta, che ogni elenco rischia l'incompletezza. Ogni anno poi si ingrossano le fila dei missionari martiri della fede. Presi singolarmente, i casi non destano clamore negli organi di informazione e, tantomeno, nell'opinione pubblica; per il solo 2008 l'Agenzia *Fides*[74] ne ha segnalati venti (tra cui l'Arcivescovo Caldeo di Mosul e due volontari laici).

In molti Paesi le comunità cristiane subiscono inoltre dalle autorità pubbliche, specie di polizia, persecuzioni di vario genere: fermi, arresti illegali, perquisizioni, sequestri arbitrari ed illegali dei beni. Basta leggere le agenzie specializzate (*Asianews* per citarne una) o rapporti di associazioni o fondazioni ("Aiuto alla Chiesa che soffre", ad esempio) o anche solo digitare su *Google* le parole *christians*, *police*, *harassment* per rendersi conto di quanto queste pratiche siano diffuse.

[74] Agenzia di stampa della Congregazione per l'Evangelizzazione del Popoli. Elenco degli operatori pastorali. Sacerdoti, religiosi, religiose e laici uccisi nell'anno 2008 in www.fides.org.

In parecchi Stati, poi, un sistema di registrazione delle confessioni religiose, di per sé non conflittuale con la libertà religiosa (servendo ad ottenere la personalità giuridica, e con essa la possibilità di possedere beni o avere dei benefici), è un vero e proprio cavallo di Troia. Essendo la registrazione presupposto necessario perché la confessione religiosa possa operare all'interno di un paese, è sufficiente che i funzionari neghino tale registrazione, per costringere i *christifideles* nelle moderne catacombe.

Né mancano casi in cui l'esercizio discrezionale, anzi, arbitrario del potere di riconoscimento delle pubbliche amministrazioni crea discriminazioni tra confessioni religiose, persino negli Stati che hanno ratificato tutti gli strumenti internazionali sin qui esaminati. È triste, per esempio, vedere un paese di tradizione cristiana quale la Grecia (non avversato, sembrerebbe, dalla Chiesa sorella Greco-Ortodossa) limitare i diritti della Chiesa cattolica, impedendole di possedere beni immobili, con violazione tali dei principi di libertà, da provocare una condanna da parte dalla Corte Europea dei Diritti dell'Uomo.[75]

Numerosi paesi, poi, vietano *de facto* l'evangelizzazione. I visti d'ingresso per religiosi e laici missionari sono sistematicamente negati. Le legislazioni contro il proselitismo, anziché tutelare il diritto dei cittadini contro l'invadenza delle confessioni, servono a paralizzare l'annuncio del Vangelo.

Anche la libertà istituzionale delle confessioni religiose è spesso violata. Il principio di autogoverno delle Chiese, delineato dalla normativa internazionale, è disatteso persino in Europa, continente cristiano per tradizione. Mentre nei Paesi a tradizione cattolica (Italia e Spagna) la riforma dei rispettivi Concordati, armonizzati con i principi di libertà sia del Vaticano II sia delle Costituzioni degli Stati, ha abolito ogni intromissione dello Stato nell'autogoverno della Chiesa, ponendosi in linea con le norme internazionali, residui giurisdizionalisti permangono altrove. In Paesi del Nord Europa essi sono derivazioni della storia delle Chiese di Stato, luterana o anglicana.[76] Nei Paesi del Centro essi sono legati ad organismi ecclesiastici

[75] Canea Catholic Church vs. Greece, 16 December 1997.

[76] Si pensi ad esempio alla Gran Bretagna, dove la Regina è capo della Chiesa anglicana, Vescovi e clero anglicano ricevono privilegi e prebende dal potere politico e le tradizioni giurisdizionaliste sono così forti da avere impedito – come ricorda R. Rémond, *La secolarizzazione. Religione e società nell'Europa contemporanea* (1998), tr. it., Roma-Bari 2003, p. 77) – al Principe del Galles, erede al trono, di assistere ad una Messa privata di Giovanni Paolo II. Residui giurisdizionalisti sono anche nell'ordinamento della Norvegia, dove la maggioranza del Consiglio dei Ministri deve essere luterana ed i Ministri non lute-

con competenza finanziaria (come avviene in Svizzera,[77] dimostrandosi dunque che il regime democratico non è di per sé garanzia di libertà della Chiesa) o a speciali imposte di culto,[78] anche se il *trend* va verso il superamento. Non è difficile intravedere in questi sistemi gli epigoni delle due antiche forme di giurisdizionalismo, quello ostile antireligioso di derivazione illuministica e quello in certo senso benevolo della tradizione confessionista, che hanno caratterizzato le relazioni tra lo Stato e le Chiese nel Continente europeo.

Altri casi di violazione della libertà religiosa sono giustificati con l'argomento (assai discutibile) del divieto di ingerenza negli affari interni dello Stato: si pensi alle molte volte che si pretende il silenzio dalla Chiesa, quando essa legittimamente e rispondendo ad un suo preciso dovere, denuncia la pia-

rani non possono partecipare alle riunioni collegiali del Consiglio medesimo quando esso debba decidere questioni relative alla Chiesa luterana. In Svezia invece è stato abolito il sistema giurisdizionalista.

[77] In alcuni Cantoni svizzeri organismi ecclesiastici con competenza in materia di gestione finanziaria sono creati per legge statale senza alcun riscontro nel diritto della confessione religiosa ed agiscono sulla base del principio democratico di maggioranza. Si ha uno sdoppiamento istituzionale: la parrocchia vive accanto al "Comune ecclesiastico" e, a livello cantonale, la direzione episcopale accanto alla Commissione centrale. Ne consegue che l'ambito interno della Chiesa, amministrato dal Vescovo diocesano è ridotto ad appendice delle istituzioni politiche (v. A. Cattaneo, Le anomalie del diritto ecclesiastico in Svizzera, in *Rivista teologica di Lugano,* 2005/10, p. 273 ss). È evidente la violazione della normativa internazionale sulla libertà religiosa, in particolare di due diritti delle confessioni: di amministrare la comunità religiosa sulla base del proprio ordinamento, nonché di gestire sulla base dei propri ordinamenti la massa finanziaria disponibile per le necessità della comunità. Per comprendere il rischio per la libertà, basti pensare alla possibilità che gruppi di pressione provvisti di disponibilità finanziaria si strutturino per influenzare la nomina dei parroci o dei Vescovi, con l'ulteriore conseguenza di ridurre parroci o Vescovi eventualmente nominati sulla base di una siffatta sollecitazione ad esecutori della volontà delle rispettive maggioranza politica.

[78] Pericoli per la libertà religiosa presentano i sistemi di finanziamento pubblico tedesco e quelli che ad esso si ispirano (Austria e la stessa Svizzera), che chiedono una dichiarazione formale di non appartenenza alla Chiesa al cittadino che voglia sottrarsi alla speciale imposta destinata al culto (*Kirchensteuer*). Egli infatti per non pagare la tassa deve fare atto di apostasia. Il sistema italiano, invece, non lede la libertà religiosa poiché chi fa la dichiarazione dei redditi è libero di dare l'8 per mille della sua aliquota IRPEF (reddito delle persone fisiche) a chi vuole, alla Chiesa cattolica, ad una delle altre sei confessioni per il momento accreditate o allo Stato. Per una analisi puntuale si vedano i vari saggi contenuti in AA.VV., *Stato e Chiesa nell'Unione Europea*, Milano 1996. Una efficace sintesi in C. Cardia, Libertà religiosa e autonomia confessionale, in *Stato e Chiese e pluralismo confessionale,* rivista telematica, www.statoechiese.it, novembre 2008, p. 4 ss. e 11 ss.

ga dell'aborto e gli abomini di certe pratiche bioetiche, o quando chiede che tacciano le armi e sollecita a riconoscere nei più poveri e nei *sans-papier* il volto sofferente di Gesù. In casi siffatti si può certamente parlare di ingerenza: ma non della Chiesa nello Stato, bensì dello Stato nella Chiesa.

Essi si aggiungono agli episodi di ingerenza delle autorità politiche, amministrative o giudiziarie negli affari interni delle confessioni diffusissimi ovunque, in Paesi ad esclusivismo ideologico come in Paesi di tradizionale pluralismo religioso.

Ai casi più eclatanti, come quello ricordato della Cina, che non solo non consente alla Chiesa cattolica di esercitare il suo diritto di nominare liberamente i vescovi, ma continua ad incarcerare il clero della Chiesa clandestina (l'ultimo caso è l'arresto del Vescovo di Zhengding, Mons. Giulio Jia Zhiguo, reso noto lo scorso 2 aprile), si aggiungono oggi nuovi casi, certamente meno gravi ma che pregiudicano anch'essi la libertà della Chiesa, ancorchè in modo sottile e privo di clamore.

Un esempio tratto dal mio Paese: in applicazione dello "sbattezzo", l'Autorità Garante per la Privacy ha imposto ad una Parrocchia l'obbligo di annotare a margine del registro dei battezzati la volontà di un fedele di non essere considerato membro della Chiesa cattolica. Siamo di fronte ad una tipica applicazione orizzontale dei diritti umani, cioè ad un intervento dell'autorità pubblica per assicurare che anche all'interno dei corpi intermedi vengano applicati i diritti umani. È una prassi che presenta luci ed ombre e che va affrontata tenendo ben distinta la sfera dell'ordinamento confessionale e quella dell'ordinamento politico (sia esso il diritto interno di uno Stato o il diritto internazionale). Altro infatti è che la Chiesa nella sua autonomia annoti nei suoi registri la defezione formale di un battezzato,[79] altro

[79] Sul punto è intervenuta la Dichiarazione *Actus formalis defectionis ab Ecclesia Catholica* 13 marzo 2006 del Pontificio Consiglio per i Testi legislativi, sulla quale rinvio a O. Fumagalli Carulli, *Il matrimonio canonico tra principi astratti e casi pratici,* Milano 2008, p. 63 ss. Essa, oltre a ricordare che l'*actus formalis defectionis ab Ecclesia* deve essere un atto giuridico valido, posto da persona canonicamente abile in conformità alla normativa canonica (cann. 124-126), e che deve essere emesso in modo personale, cosciente e libero, lo concretizza in 3 momenti: a) decisione interna di uscire dalla Chiesa cattolica; b) attuazione e manifestazione esterna di questa decisione; c) recezione da parte della autorità ecclesiasticamente competente di tale decisone. Precisa inoltre che l'atto va manifestato dall'interessato in forma scritta, davanti alla autorità competente della Chiesa cattolica: Ordinario o parroco proprio, al quale unicamente compete giudicare se nell'atto di defezione esista o no la volontà di rompere i vincoli della professione di fede, dei sacramenti e del governo ecclesiastico (vincoli – si badi – richiesti dal diritto costituzionale

che vi sia una imposizione della pubblica autorità, con la creazione di un istituto, lo sbattezzo appunto, che nulla ha a che vedere con i meccanismi presenti all'interno dell'ordinamento canonico. Nel primo caso l'autogoverno è esercitato, nel secondo violato.

Per comprendere meglio le conseguenze alle quali questa tendenza può condurre, facciamo un altro esempio relativo ad un fondamentale diritto umano: l'eguaglianza tra uomo e donna. *Nulla quaestio* che agli Stati islamici, in quanto comunità politiche, venga contestata la violazione nella loro legge o nella loro prassi del principio di uguaglianza contemplato dalle Carte internazionali. Ben diversa è invece l'ipotesi che il giudizio politico riguardi non l'ordinamento politico di uno Stato, ma l'ordinamento interno della confessione religiosa.

Rappresenta, perciò, una forma d'indebita ingerenza nell'autogoverno della Chiesa una Risoluzione come quella del Parlamento Europeo[80] (2002) che, invocando il rispetto dell'eguaglianza, "deplora l'esclusione delle donne dai posti di comando nella gerarchia religiosa" e, mettendo tutto sullo stesso piano di pari illegittimità, "esorta gli Stati membri dell'Unione a non riconoscere i Paesi nei quali le donne sono escluse dal governo".

Se così si continuerà a ragionare, avallando l'ingerenza delle autorità pubbliche nel governo e nel magistero interno alle confessioni religiose, non è da escludere che un domani, in nome della non discriminazione degli omosessuali, si contesti alla Chiesa cattolica la violazione dei diritti umani, in quanto essa nega il matrimonio canonico agli omosessuali.

Sempre più numerosi, infine, sono i casi in cui non viene garantita l'obiezione di coscienza. Quella al servizio militare, legata al ripudio delle armi quale mezzo di risoluzione delle controversie tra i popoli, trova accoglimen-

canonico, precisamente dal can. 205, come necessari per essere *Christifidelis* in senso pieno). Configurandola come vera separazione dagli elementi costitutivi della Chiesa, il Pontificio Consiglio afferma dunque che si ha defezione formale ogni volta che vi sia un atto di apostasia, eresia o scisma (secondo che la defezione riguardi rispettivamente la fede, i sacramenti o il governo della Chiesa), che non solo si concretizzi esternamente, ma sia altresì manifestato all'autorità ecclesiastica. La coincidenza dei due elementi – il profilo teologico dell'atto interiore e la sua manifestazione all'autorità competente – costituisce insomma l'atto di formale defezione. La Dichiarazione in questione statuisce altresì che la stessa autorità ecclesiastica competente è tenuta a provvedere perché nel libro dei battezzati (cfr. can. 535 § 2) sia fatta l'annotazione con la dicitura esplicita di avvenuta *defectio ab Ecclesia catholica actu formali*.

[80] Risoluzione del Parlamento Europeo sulle donne e il fondamentalismo 13 marzo 2002, nn. 4 e 34.

to favorevole in molte democrazie. Non altrettanto avviene se medici o infermieri chiedono di astenersi dall'impiegare le "armi" della medicina per uccidere bambini che non si vogliono far nascere; o quando magistrati sono sanzionati disciplinarmente (come accaduto nel Regno Unito e in Spagna) perchè contrari all'adozione di bambini da parte di coppie omosessuali.

Nuove forme di intolleranza e discriminazione

Il caso dello "sbattezzo" e quello dell'appena citata risoluzione del Parlamento Europeo rappresentano – a mio modo di vedere – esempi (insieme a quelli che farò tra poco) di un nuovo e per certi versi paradossale fenomeno. Esso si sta diffondendo nei paesi di cultura occidentale dove, nello stesso momento in cui si giunge a garantire la libertà religiosa (in tutti i tre aspetti: individuale, collettivo ed istituzionale) a tutte le confessioni, comprese quelle di minoranza, emergono fenomeni ed episodi di intolleranza contro il cristianesimo, benché (o, forse, proprio perché) religione maggioritaria.[81]

Si tratta di fenomeni relativamente nuovi, che l'Occidente, più o meno consapevolmente, sta avallando, partendo dall'idea (non nuova) che una società democratica e pluralistica può essere tale solo se le credenze religiose e le visioni morali ispirate dalla religione vengono relegate nella sfera privata dell'uomo. Un'idea che in realtà sarebbe da considerarsi ormai sconfitta, stante la consapevolezza (anche in Carte ONU) del ruolo pubblico della religione, della quale a lungo si è detto. A rinverdirla è oggi la realtà o, secondo i casi, lo spettro del fondamentalismo islamico, che certa cultura occidentale spera di rimuovere proponendo una frettolosa "secolarizzazione qualitativa", con la quale non si mira tanto a fare scomparire la religione, ma a marginalizzarla, privatizzando il sacro, annullandone ogni valenza pubblica. La tendenza è estremamente pericolosa, poiché confonde la doverosa distinzione tra politica e religione (la "sana laicità", per riprendere la terminologia del Vaticano II) con l'apporto pubblico che, nel rispetto

[81] A tale riguardo si rinvia, in particolare, al sito www.christianophobia.eu ove si possono trovare numerosi casi, tra cui quelli richiamati nel testo. Sotto il profilo istituzionale la denuncia delle discriminazioni contro i cristiani nei Paesi nei quali essi sono maggioranza è stata ribadita nella riunione OSCE di Vienna 4 marzo 2009 dal "Rappresentante personale" della Presidenza OSCE contro razzismo, xenofobia e discriminazione, con particolare riferimento alla discriminazione contro i cristiani, M. Mauro, a conclusione di una tavola rotonda programmata per discutere ed approfondire natura e portata delle manifestazioni di intolleranza contro i cristiani.

di questa distinzione, le religioni possono dare alla costruzione di una comunità politica pacificata e solidale.

Il passo poi è breve, all'interno di questa tendenza, ad escludere i credenti dal dibattito pubblico nelle società democratiche. Siamo di fronte ad un *trend* silente cui, però, occorre prestare attenzione. Ciò, infatti, non solo impedisce ai cristiani di partecipare a pieno titolo alla vita sociale e civile, ma può facilmente trasformarsi in una più o meno aperta discriminazione o intolleranza.

Un esempio: dal 1° gennaio di quest'anno è entrata in vigore in Svezia una legge che impedisce persino nelle scuole private di ispirazione religiosa l'insegnamento di dottrine e principi religiosi fuori dalle ore specificamente destinate all'insegnamento della religione. Il che farebbe sorridere, se si pensa che non è possibile conoscere la storia dell'Europa senza conoscere la differenza anche dottrinale tra Riforma e Contro-riforma. Ma è purtroppo uno dei tanti modi con cui si vuole estirpare la radice religiosa europea.

Altra tendenza diffusa nelle regioni in cui i cristiani sono maggioritari è la presentazione erronea e irrispettosa della religione cristiana, in particolare, della Chiesa cattolica e del Papa.

L'esempio del romanzo ed omonimo film *Il Codice da Vinci* è lampante, visto che la casa produttrice del film non ha neppure accolto la richiesta di inserire, all'inizio della pellicola, la formula di stile d'avvertenza che si trattava di fatti immaginari. Ancor maggiore stupore desta la decisione dell'autorevolissima BBC di autorizzare la satira irriverente ed offensiva contro il Vaticano, non, invece, quella contro l'Islam, sulla scorta della considerazione che quest'ultimo è "più suscettibile" del primo. Per tacere, poi, dei filmati visibili su *YouTube*, dove la blasfemia raggiunge livelli così insopportabili, che non si possono neppure accennare.

Come ciò costituisca una forma di discriminazione emerge con chiarezza se si pensa che, alla pubblicazione in Danimarca della famose vignette su Maometto, alcuni governi europei (Spagna in testa) si affrettarono a dichiarare la loro solidarietà alle comunità islamiche del paese, mentre le vignette che sbeffeggiano il Papa o la Chiesa cattolica sono pubblicate quasi quotidianamente, senza che ciò desti alcuna reazione.

In breve: non si può pensare che le violazioni della libertà religiosa, l'intolleranza e la discriminazione siano più o meno gravi a seconda che si indirizzino verso minoranze oppure verso confessioni maggioritarie. Esse debbono essere considerate gravi di per sé.

7. Il dialogo interreligioso: quale e perchè

Il ritorno del religioso di cui ho detto in apertura ed il conseguente pluralismo religioso sta determinando nelle nostre società fenomeni problematici. Si pensi ad esempio alla forte tendenza sincretista di chi, anziché rifiutare, accetta acriticamente le varie proposte contraddittorie (come accade nella *New Age*), scivolando nel relativismo religioso ed etico. Ma vi è un pericolo ancora più insidioso: la fuga verso "isole protette", impermeabili all'esterno, dove è possibile rifiutare e così eliminare la complessità. Proprio le violazioni della libertà religiosa ed i fenomeni di intolleranza rischiano di spingere i fedeli al fondamentalismo o, comunque, al ritrarsi in enclave, sicché si potrebbe giungere ad uno scontro di civiltà che non si conoscono, di culture che non si parlano, di religioni che non si rispettano reciprocamente. Ogni dialogo insomma verrebbe meno.

Già nel corso della mia esposizione ho avuto modo di accennare più volte all'importanza del dialogo interreligioso. Dopo avere esaminato l'evoluzione del concetto di libertà religiosa, vorrei soffermarmi più specificamente su esso, cominciando da una constatazione: come per la libertà religiosa, ad aprire la strada è la Chiesa cattolica, che nelle confessioni religiose riconosce la presenza dei *semina Dei*.

Quanto alle modalità concrete, è interessante ripercorrere brevemente le tappe del magistero che gli ultimi Pontefici hanno segnato in età conciliare e postconciliare.

Paolo VI disegna nell'*Ecclesiam Suam* (6 agosto 1964) una teologia del dialogo articolata in più cerchi concentrici: dialogo della Chiesa con il mondo intero, dialogo con i membri delle altre religioni, dialogo con le altre Chiese cristiane, dialogo all'interno della Chiesa.

Il Vaticano II riprende questo disegno, in ordine inverso, nella conclusione di *Gaudium et Spes,*[82] la Costituzione conciliare significativamente rivolta "al mondo contemporaneo" e che non si muove sul terreno dogmatico (lasciato a *Lumen Gentium*), bensì su quello pastorale.

Giovanni Paolo II opera una distinzione tra modalità di dialogo, non su base soggettiva bensì oggettiva, avendo cioè riguardo all'oggetto del dialogo, anziché ai soggetti. E delinea quattro forme e livelli del dialogo interreligioso: dialogo della vita, dialogo delle opere, dialogo teologico e dialogo dell'esperienza religiosa.[83] Vediamone i contenuti.

[82] n. 92.

[83] Giovanni Paolo II, Udienza generale, 19 maggio 1999.

Il dialogo della vita trova fondamento nella comune origine divina di tutti gli uomini, in vari modi ordinati al popolo di Dio. Consiste nella condivisione di *gaudium et spes, luctus et angor hominum huiuis temporis* in uno spirito di apertura e di buon vicinato.

Il dialogo delle opere nel mondo contemporaneo riguarda la pace, oltre che la giustizia e solidarietà: è il grande tema della carità cristiana nei suoi aspetti sociali, che, lungi dal portare allo scontro tra civiltà[84] (come assume chi, alterando la religione stessa, sostiene che siano proprio le religioni a costituire un ostacolo all'autentico progresso dell'umanità ed alla concordia tra i popoli), pone le condizioni per quell'alleanza delle civiltà, che anche la comunità internazionale faticosamente sta oggi cercando di favorire.[85]

Il dialogo teologico consente agli esperti di approfondire la comprensione delle loro rispettive eredità religiose, così da apprezzarne i valori spirituali grazie ad incontri destinati ad evidenziare, oltre alle differenze, le convergenze (il credere in un unico Dio Creatore, l'aspirazione alla trascendenza, la pratica del digiuno e del ringraziamento, il ricorso alla preghiera ed alla meditazione, l'importanza del pellegrinaggio).

Pur con le dovute cautele, è possibile anche un dialogo dell'esperienza religiosa. Difatti la preghiera, suscitata dallo Spirito Santo, misteriosamente presente nel cuore di ogni uomo, è la manifestazione più caratteristica di tutte le esperienze religiose autentiche.

Molto scalpore hanno destato le parole del Pontefice oggi Regnante, Benedetto XVI:[86] "un dialogo tra le religioni nel senso stretto della parola non è possibile, mentre urge tanto più il dialogo interculturale che approfon-

[84] S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York, 1996.

[85] L'importanza del dialogo in relazione alla tutela della pace emerge chiaramente dal *Messaggio di Sua Santità Giovanni Paolo II per la celebrazione della Giornata mondiale della Pace 2001* dell'8 dicembre 2000, dal significativo titolo *Dialogo delle culture per una civiltà dell'amore e della pace*. Dopo l'11 settembre 2001, la comunità internazionale ha preso consapevolezza della necessità di scongiurare il *clash of civilizations* e, a tale riguardo, pare significativa anche nella denominazione l'iniziativa del Segretario Generale delle Nazioni Unite, *Alliance of Civilizations,* affinché venga promossa la fiducia e la comprensione tra le diverse culture, in particolare tra le società occidentali e quelle musulmane. Per il canto suo, l'Unione Europea ha dichiarato quello passato Anno per il Dialogo Interculturale e tra i vari eventi organizzati nell'ambito di esso pare utile segnalare quattro seminari della COMECE, tenutisi presso il Parlamento Europeo, sul tema: Islam, Cristianesimo ed Europa (i relativi *Report* sono reperibili su www.comece.org).

[86] Nella lettera indirizzata a M. Pera in prefazione al libro *Perché dobbiamo dirci cristiani*, Milano, 2008.

disce le conseguenze culturali della decisione religiosa di fondo". Come è stato autorevolmente precisato,[87] va prestata molta attenzione all'espressione "nel senso stretto della parola" poiché "è ovvio che il Papa si situa nel solco del documento della Commissione Teologica Internazionale *Il cristianesimo e le religioni* (30 settembre 1996) e della *Dominus Iesus* (6 agosto 2000), nel primo dei quali è possibile leggere che "a partire dal Vaticano II la Chiesa cattolica si è coinvolta in modo deciso nel dialogo interreligioso".[88]

Al di là delle singole posizioni del magistero pontificio, che non sono tra loro conflittuali ma integrabili, ed avviandoci alla conclusione, un punto mi pare doveroso precisare: cioè che, rispetto al dialogo interreligioso occorre mettere in guardia da un rischio. Vanno moltiplicandosi le iniziative, dei governi nazionali come delle Organizzazioni Internazionali, in favore del dialogo tra le religioni. Esse sono lodevoli. Tuttavia, se non si vuole introdurre una nuova forma strisciante di giurisdizionalismo, bisogna avere ben presente che non è di competenza né degli Stati, né della comunità internazionale, dettare tempi e modi del dialogo interreligioso, poiché essi sono materia propria delle religioni. La comunità politica deve limitarsi a verificare che tale dialogo sia concretamente possibile e che in ogni società sia garantita la reciprocità necessaria per il libero esercizio di tutte le confessioni religiose.

Seppur breve, il XX Secolo è stato teatro di diversi e sanguinosi genocidi, che hanno colpito gli appartenenti a tutte le religioni discendenti dal comune padre Abramo: prima il Grande Male che ha sterminato gli Armeni, poi l'Olocausto degli Ebrei ed, infine, il più recente genocidio dei bosniaci musulmani. Se la religione non è stata la causa scatenante delle uccisioni di massa, non è tuttavia riuscita ad essere freno e monito per fermare la mano di Caino. Per evitare il ripetersi di questi tragici eventi è importante ricordare, ma ancor più importante è impegnarsi perché le religioni, anche grazie al dialogo, si propongano – le parole sono di Benedetto XVI – "quali veicoli non di odio, bensì di pace".

[87] Card. J.-L. Tauran, Le religioni chiamate ad essere scuole d'umanità, *L'Osservatore Romano*, 4 gennaio 2009.

[88] n. 105.

FREEDOM OF CONSCIENCE AND RELIGION AS FUNDAMENTAL HUMAN RIGHTS. A COMMENTARY

ROCCO BUTTIGLIONE

I wish to put a question mark in front of two fundamental concepts that stand today in the centre of the public debate: what is 'freedom of conscience' and what are 'fundamental human rights'?

It seems to me that a preliminary clarification on these two issues may help us to better understand what values are at stakes in the current discussion on human rights.

What is freedom of conscience and what is conscience? Socrates explains to us that there is an inner voice in man that forbids him to do what is wrong. This voice contrasts with the inclination given to the will by the passions and instrumental leanings of the individual. In the classical vision of conscience, conscience contrasts with the lower potencies of man and leads to the discovery of the will that must stay in accord with the intellect. Conscience forbids Socrates to comply with the laws of Athens when this compliance would have saved his life and would have avoided the death sentence of the Areopagus. Against the will to life and all inclinations of the senses, conscience indicates the most difficult path of action: the sacrifice of one's life in order to obey to truth, in order not to betray truth. Conscience defies all social powers and the threats they bring to bear against the individual in order to compel him through the menaces of the use of force or through the corruption of promises of sensual satisfaction.

We find again the same pattern when Socrates refuses to save his life through an escape from his jail that his friends had already prepared. Conscience forbids him to disobey the laws of Athens.

The commandment of the law must be complied with even when it demands the sacrifice of life. The only justification not to do what the laws demand is not to betray the truth the intellect has recognized. If conscience authorizes us to disobey the laws of the country this is possible only

because of a law that stands higher and above the law of the state. Conscience is free from the duty to obey the laws of the state because she complies with a higher law, the law of nature.

If we move our attention from Greek philosophy to Greek tragedy and from Socrates to Euripides we are confronted once again with the same patterns. Antigones wants to comply with a law that stands over the law of the state, the law of nature.

To make a long story short: the obedience to truth makes men free from the commands of all earthly powers. Truth will make you free. Truth, and nothing else. If we understand the structure of thought that I have tried to delineate, then it becomes apparent that there has been a significant shift in the use of the word conscience and of the word freedom in the contemporary philosophical and political debate.

In order better to understand this point we may ask the question: what is left of conscience when we renounce the idea of truth? Can we be free if we do not obey truth?

Conscience that does not have any living relation to truth loses its justification and its meaning. It is no more the right to obey truth but rather the right to obey one's arbitrary inclinations. Socrates said: I disobey the laws of the state because they are unjust, they pretend of me that I do what is morally wrong.

The Anti/Socrates of our times would say: Conscience gives me the right to do whatever I wish, to follow my passions and nobody has a right to demand of me any justification of my decisions. This correspond to the historical and sociological process that Max Horkheimer labelled 'Befreiung des Genusses', liberation of pleasure.

In this case and according to this mood conscience protects me from all outside interventions to allow me not to obey to truth but to surrender to the pressure of instincts and passions.

Let us make one thing clear: conscience is an inviolable defence of the integrity of the person. When somebody opposes to an intromission coming from outside the conviction of his conscience nobody can enter into his conscience and judge whether this conscience is correct or not and not even whether he is saying the truth or just making an instrumental use of the word conscience in order to defend his wish to remain dependent upon his passions.

We must deny any public authority the right to enter into the sacred place of conscience. We cannot however at the level of cultural analysis avoid the necessity of becoming aware of the shift that has occurred in the concept of conscience.

Let us now take one step forward. What is the meaning of freedom of conscience, once we have registered the ambiguity that has entered now into the concept of conscience?

In the classical perspective the enemy of conscience are the passions and the instincts of the individual. In the archetypical case of Socrates conscience speaks against the instinct of self-preservation and survival. The knowledge of truth obliges the person to comply with what has been recognized as true. Conscience is the place in which this act of recognition takes place and is also the agent that exercises a coercion on the passions of the soul. The passions have a natural propensity to follow their own inclination against truth and against conscience. This inclination may be reinforced by human individuals or socially empowered agencies that can impose their will on the person by threatening her with a punishment in case she does not comply with their demands.

There is therefore an alliance between social authorities willing to enslave the person and the instinctual structure of individual. This becomes apparent, once again, in the case of Socrates. The Athenians threaten Socrates with the death punishment and they imagine that he will bow to the awe and fear of death. The power of conscience counteracts and balances compulsion and fear. Obedience to truth is here opposed to obedience to the power of the state *and* to the instinctual passions. The pressure coming from the outside, from the social powers, and the pressure coming from inside, from the instinctual structure, are here allied among themselves.

In this perspective freedom is based on knowledge of truth and obedience to truth. Aristotle explains that a man who does not stand in command of his passions cannot be free and is a slave by nature.

The power of despotism enslaves man entering into an unholy alliance with the inferior passions of the soul.

G. Mazzini summarizes this anthropological vision saying that there is only one right, the right to comply with one's duties. At the beginning of the Protestant Tradition Martin Luther makes a sharp distinction between the Christian freedom of the spirit and the freedom of the body. The first is based on the recognition of truth. The second on the denial of truth.

The classical structure of the concept of freedom of conscience runs today the danger of being turned upside down. We seem to have entered into a particular paradox of freedom. The human subject does not recognize any truth and therefore the only normative truth is that there is no truth. As a consequence, no limit can be imposed upon the control of passions over the individual. Without truth, spiritual freedom becomes impossible and instinctual

freedom is all that is left. This freedom includes the possibility of making use of other human beings if only one succeeds in obtaining their consent. Now a conscience void of any content seems to have entered into an unholy alliance with passions and the only function she exercises is that of removing any limits set to the arbitrary will of the individual.

What shall we say in front of this evolution in the concept of freedom? Can freedom exist without the authority of truth?

In order to answer these questions we must make one important distinction between private and public sphere.

I suggest we should adopt the following principles: many evils must be tolerated in order not to forbid greater goods. If an individual says that he in his conscience does not see any reason not to satisfy his passions we cannot impose on him a truth he does not recognize. If on the one hand (ontologically) conscience is based on truth, on the other hand truth is also (functionally) dependent upon conscience, because the authority of truth in the individual and concrete case is dependent upon the recognition given to it by conscience. This does not imply, however, that we should not recognize in the public sphere the truth this individual does not want to accept in his private life. And individuals who pretend that their conscience does not accept this or that value have no right to pretend that these values be banned from the public square because they are (or pretend to be) offended by their recognition. Let us imagine that some of us do not recognize the value of the family: They cannot be constrained to act according to this value. But they cannot pretend that the state does not support the family and recognize its value affirming that in this case they would be discriminated. The family is a public value, other forms of sexual relations pertain to the private sphere. We mean that the state or the other political communities have a right and a duty to protect values, and social interests closely related to values, that manifest themselves in the conscience of the people, even if some people resist these values. If within a religious community one member is an atheist he does not have the right to pretend that the public space remain void of any religious signification. He has the right not to participate but not the right to forbid others to act in the public sphere according to their convictions. If we disavow this principle the result will be the 'naked public sphere' described by R.J. Neuhaus.

How shall we determine which values should be allowed in the public sphere? I suggest the following response: through a public discussion oriented by the natural law. We cannot avoid the criterion of consent. This is linked to an elemental perception of human dignity: why should I act

according to the judgement of another human being and why should his perception of values enjoy a privilege over mine? I have the right not to accept a position I am not convinced of. In the last instance, in the process of formation of the common will of a political community, we have to vote. Of course we know that the majority is not always right. Sometimes the majority opinion is wrong. After all we know that the majority was against Socrates and voted him to death. The justification of the democratic principle does not lie in the superstitious idea that the majority is always right but in the principle of human dignity, According to this principle I must be able to feel the action of the community to which I belong as my action, and this implies that I participate with equal rights in the decision-making process. The right to participate is however balanced by the duty to offer a reasonable argument and of listening to the reasonable arguments produced by others. The vote should take place between alternative formulations of the common good and not between conflicting interests with the majority ready to completely sacrifice the legitimate interest of the minority. We have said that the public discussion should be oriented by the natural law. What does it mean? Natural law is not a fixed set of precepts but rather a form of reasoning based on self-evident principles and historical experience. I have written in this article that the family belongs to the public interest and should have an official recognition while other lifestyles should remain in the sphere of privacy. Why? In the family children are born and educated. Without children a nation disappears from history. The new generation will take care of the old and the alliance of the generations pertains to the essence of mankind. The family is the appropriate environment in which children are born and raised. Children can be born also out of wedlock but they need the care and the protection of their parents and the family is the social institution where this is guaranteed in the best possible way. The demand that the family receive public recognition is grounded in the social function of the family. Those who do not perform the social function of the family cannot have the same rights as the family. Nobody should be compelled to get married and to raise a family but those who do not shoulder this burden cannot pretend to enjoy the corresponding rights. The state has an interest in the existence and in the strength of the family and has therefore a duty to encourage and protect it.

We have here translated in a more modern language one of the oldest principle of natural law that was formulated already by the Romans: 'jus naturale est quod natura omnia animalia docuit, sicut maris et phoeminae coniunctio, prolis procreatio etc.' (natural law is what nature has taught all

living beings, like the union of the male and the female, the generation of children etc.). The way in which humans generate and educate children is of course different from that of animals. In the animal world the preservation of the species does not encompass a preoccupation with the destiny of each individual and most of the offspring die before reaching adulthood. In the case of man each individual is in her/himself precious and we try to protect in so far as possible each human being that is born. The natural law is not valid in the same way for men and for beasts. Men have to adapt the general principles that regard also animals to the specific personalistic nature of man. This comes better to the fore in another quotation from St. Thomas Aquinas 'Lex est quaedam hominis ad hominem proportio quae servata societatem servat, currupta corrumpit' (law is a certain proper relation of men to one another, if it is preserved the society will flourish, if it is disregarded the society will perish). Natural law is intrinsic to human nature and to the nature of the human society.

Human rights are connected with human nature. Every human being has the right to attain the ends that are proper to his human nature. This foundation of natural law is completely secular, not ecclesiastical. It belongs to the most precious heritage of the Enlightenment and can be found in authors like Locke or Leibniz, Barbeyrac or Voltaire. We can read this language of natural rights in the American declaration of independence and in the American constitution.

What happens to human rights when they are disconnected from the idea of natural law? It seems that all rights disappear but one. We will call this right the right to non discrimination. Any human demand is equally legitimate as any other. Each man determines her/his own nature and has the right to do so with an equal recognition of the state. The right to non discrimination absorbs all other rights. This right to non discrimination seems to flow from the principle of equality of all human beings. On second thoughts it becomes apparent that it is not so. Aristotle has formulated the principle of equality in the following way: the just man will treat the same situations in the same way and different situations in different ways. It is unjust to treat the same situations in different ways but it is equally unjust to treat different situations in the same way. Is it a discrimination against homosexuals to say that they do not have the right to marry among themselves? It seems that, since they cannot have children, their lifestyle does not perform the social function of marriage and therefore cannot be recognized as marriage. Not all demands constitute rights. To discriminate etymologically means simply to make distinctions. There are distinctions

that are justified and distinctions that are unjustified. Not all distinctions are unjustified and cannot therefore be labelled as (unjust) discrimination.

Much of the public debate in our countries today moves around the non discrimination principle and the need to qualify it. It is therefore necessary to go back to a form of public discourse that allows us to make the proper distinctions and this leads us back to the natural law tradition.

Not all wishes and demands of the individual constitute human rights. Some of them are based on human nature and can be defended on the basis of natural law and some others do not. We must be able to make the proper distinctions. In the private sphere these distinctions are made by the individual and the state should not interfere, even if the judgment of the individual should be wrong. *Conscientia erronea obligat* (even if wrong conscience maintains the right to command). In the public sphere the distinctions are the result of a public discussion based on natural law.

The sphere of privacy must be left to the individual. If he opposes the rights of his conscience not to be interfered with, nobody can overcome this barrier, although he may make use of the rights of his conscience to subtract his action to the examination of his conscience or to choose a course of action contrary to his conscience.

What cannot be accepted is that it should be forbidden in the public sphere to act according to reason and natural law because of an alleged human right not to be discriminated that might be offended by the public recognition of a value the individual does not accept as rule of his action.

Values that cannot be *imposed* on the individual can and should be *recognized* and *enhanced* by the public authority.

All that we have said in this contribution can be seen as a commentary to a principle of the teaching of Benedict XVI: not all wishes can be labelled as rights.

THE RIGHT TO FOOD[1]

OLIVIER DE SCHUTTER

I will try to be as short as possible to benefit from the comments and questions from the audience. There are many unanswered questions which I hope we make progress in elucidating. What I would like to do is very simply this: to describe what is the mainstream understanding and framing of the issue of hunger and then challenge this mainstream view in order to show the added value of a rights-based perspective and what the right to food can bring to the debate. Essentially my message to you will be the one I gave to the UN bodies to whom I report: the Human Rights Council and the UN General Assembly, which is to say that mostly our views about what global hunger requires in terms of actions and initiatives underestimate the political economy considerations, the responsibilities of actors, the governance issues, because they focus exclusively on one dimension of the equation which is food availability, enough production, forgetting about issues of accessibility, justice and combating discrimination and marginalisation.

The contemporary challenge of hunger is now very much at the top of the political agenda, since the global food crisis of 2007-8, but the reading made of the challenge we are facing seems to me to be wanting in a number of respects. The mainstream view is that we are now facing a Malthusian situation, where the supply of food will be unable to meet growth in demand, as a result of a number of very important structural factors which are threatening, for the first time in recent history, our ability to feed the planet. First of all, population growth. Of course, we are now at 6 billion 700 million individuals on the planet. We will be reaching probably 9.3/9.5 individuals by 2050 and that number will probably reach a ceiling a bit below 10 billion at the end of the century. Most of this increase in population will occur in developing countries where there is already some food

[1] As delivered.

insecurity. That is the first factor. Not only this population is increasing but, in addition, their diets switch to more animal protein-rich diets, dairy products, meat, so that the increasing demand for cereals is even more rapid than the increases in population itself.

A second factor, which is generally seen as hugely important for the future, is climate change. Climate change is an issue which is difficult to estimate, because in the short term there will be increases in yields thanks to global warming in certain regions of the world, particularly in the northern hemisphere, where the fertilisation will be better improved by their being a more important concentration of carbon dioxide in the atmosphere and where summers will be longer. But the consensus within the international scientific community is nevertheless that climate change will very severely affect our agricultural productivity by the end of the century. For example, the intergovernmental panel on climate change has estimated that between now and 2020, in rain-fed agriculture in sub-Saharan Africa the yields will decrease by 50% and we must remember that, in many regions of sub-Saharan Africa, the fields are not irrigated so they are highly dependent on the regularity of rains, the quality of rainfalls and their predictability. That will, in the very short term, have a very severe impact in the southern hemisphere. Between now and 2080 it is estimated that the overall productivity of agriculture will decrease between 3 and 4%. There will be certain gains in Canada, Russia, Ukraine, Scandinavian countries, but the world overall shall lose in comparison to the levels of production which were reached in 2000. And this is in a context where the population shall have increased by at least 33%. The areas in which climate change shall affect agricultural productivity are mainly the southern hemisphere tropical areas, sub-Saharan Africa, Latin America and much of South Asia.

A third factor is the increased energy needs and particularly the increased demand for oil. Our consumption of oil shall continue to increase, particularly as a result of economic growth in emerging economies, very significantly in India and China, and this shall affect the food systems in a variety of ways. Firstly, it shall mean that the demand for agrofuels, the production of bioethanol or biodiesel from plants shall be increasing. It will be seen as a more and more desirable source of alternative energy and this will, of course, put more pressure on the demand side of the global equation on the markets of agricultural commodities.

The production and consumption of bioethanol and biodiesel has been very significantly increasing since 2002-3, particularly as a result of policies of the US and EU which are stimulating demand and production by tax

incentives, by subsidy schemes, and this will continue in the next few years as the prices of oil will increase in average and will certainly become more volatile in the future. This volatility itself is a problem for food systems, since the prices of agricultural production are very closely correlated with the prices of oil. As shown on this graph, where the evolution of the prices of the oil barrel is correlated with the prices of wheat, corn and soybean, the cost of the production of food is very closely correlated with the shifting prices of oil and that is, of course, to be attributed to the fact that we need oil to transport inputs to the fields, we need oil to work on the fields in mechanised agricultural production, we need oil in our fertilisers and pesticides, and we need oil, of course, to transport the food from where it is produced to where it is sold and ultimately consumed. So the prices of food commodities are very closely correlated to the increasingly volatile and unpredictable prices of oil.

Fourthly, and this is again part of the global equation, we witness a decline in the growth of agricultural productivity. The productivity of agriculture, the quantity of tons of wheat or rice we were able to produce per hectare, has been very significant in the 1960s and 1970s. Since then it has been growing still but this growth has been declining every year. You have on this graph a comparison between the years 1967-82, this is the green column, the years 1982-94, this is the blue column, and the years 1995-2020 estimates which is the red column. You see that the growth in agricultural productivity has been declining over the years. We are, in our regions, the EU, Canada, the US, reaching a ceiling and we will not be able to increase the yields very much per hectare, so the only possibility we will have to provide more food to the planet will be by increasing the surfaces which are cultivated, and there are many controversies about how much can still be cultivated, given that the soils we are cultivating currently are being depleted at a very rapid pace and that the areas which are not cultivated for the moment may not be as fertile as those which are already under cultivation. So there are many uncertainties as to whether we will be able in the future, very simply, to produce enough cereals, enough grain, to feed the entire planet. And when I took up my mandate, one year ago exactly, 1 May 2008, the international community was in this mindset. It was a panicky mood, governments were extremely nervous about this challenge they were facing and they were told, we need to increase the production of food by 50% before 2030, we need to double the production of food by 2050 – these are figures from the World Bank – otherwise we will be facing very serious problems and we will be unable to feed the global population. That was the

Malthusian scenario that was being presented to us. Since after the Second World War we have always maintained this equilibrium between the production of grain and the needs of the population. As shown on this graph, consumption has been making progress regularly and, despite certain ups and downs, we have always managed to maintain an increase in production in order to satisfy this demand: well it is the balance that is now being threatened. And so the main challenge, as it has been seen, is how to produce more, how to increase the yields, by which technologies, by which improved seeds, by providing which fertilisers, and this was essentially a matter dealt with by agronomists and economists. My argument is that the question of hunger is not simply a technical question though; it is also a political question. It requires that we take a broader look at what hunger is about and not simply remain with this global equation and this threatened balance between supply and demand. And let me try to nuance this mainstream view by two considerations, the second of which is closely related to my mandate, which is to report on the means to remove the obstacles to the realisation of the right to food.

The first nuance I would like to add to this picture is that much of the price increases we have seen in 2007-8 on the international markets for agricultural commodities was, in fact, a purely financial phenomenon, linked to the massive arrival of index funds on the futures markets of agricultural commodities. Now, for many months this fact has been underestimated by leading economists and by institutions such as the International Monetary Fund, who did not consider that this was a real problem, the argument being essentially that the futures markets are unrelated to the spot prices of the commercial traders on the markets of agricultural commodities. However, when we look at, for example, the evolution of prices on the international markets, this begins in September 2007 and goes up to July 2008, when the prices began going down, this kind of movement of prices cannot be explained simply by the real economy, by the fundamentals. It has something to do with the formation of a speculative bubble on these markets for agricultural commodities and, if we look at the number of the contracts that were passed on the futures markets of agricultural commodities, in this case wheat, corn, soybeans and rice, we see that in 2005-6 the number of these futures contracts on these markets has very significantly increased as a result of the arrival of commodity index funds on those markets. To give you an idea, in 2002-3 the volumes traded on the futures markets of agricultural commodities was about 20 times the volume of the real production and it was 80 times the volume in 2007, so it

was multiplied by 4-5 between those two periods. I believe that this has led private traders and governments to resort to hoarding practices and speculation and I believe that this has had a very serious impact on the formation of a bubble on these markets in 2007-8 and I think we need to address this. I think we need to identify ways to ensure that speculation on these markets will not make it even more unpredictable, for countries who depend on importing food to feed the population, to manage that situation and I think it is something which can be addressed by means maybe we will have time to discuss.

But the second and, in my view, more important nuance I would like to bring to the mainstream approach to what hunger is about is the one we are provided by the work of Amartya Sen. As you know, in his very famous reading of certain famines in this century, Amartya Sen emphasised that hunger, famines, occur in times of increased production, boost famines exist. In other terms, famines do not occur simply, or even mainly, in this century as a result of their being too little food produced, too little food available on the markets. Famine occurs in his study of a number of contemporary famines, when the incomes of certain groups of the population rise much faster than the incomes of other groups, so that the latter are priced out and have no sufficient purchasing power to cope with the increase of prices of food commodities. Taking this view, the real challenge is not just to produce enough food, it is not just a question of food being available, it is also and perhaps primarily a question of food being accessible to the poorest, it is a question of social justice, it is a question of combating discrimination, it is a question of redistributive policies. If you want to combat hunger in New York, it will not do to just multiply by two or three the number of supermarkets in New York: you need to provide money to those who are homeless, poor, marginalised and are hungry not because there is no food available, but because their purchasing power is insufficient.

Now, ideally, the two views, focusing on food availability, sufficient quantities, and the view focusing on accessibility, entitlements, should be complementary. You need both in order to address the problem of hunger. In fact, however, in public policies these two views are sometimes in tension with one another and the reason is very simple, there are ways of increasing production which could increase inequalities, which could increase marginalisation, which could make things worse for the poorest in the population and could increase inequalities both between and within countries.

Let us take a closer look at who is hungry in the world. As you know, today we have passed, just about, the mark of 1 billion people hungry in the

world. The figure was 923 million at the beginning of 2008, it was 854 million in 2005, it was 820 million in 1996. We are losing this fight against global hunger and we are losing this fight despite the fact that our productivity gains in agriculture have been very significant. So let us take a closer look at who are those who are hungry and what are the real obstacles to the right to food of these populations being realised. Those who are hungry fit in two broad categories. First of all you have a vast majority of them who are food producers. Fifty per cent are small-scale farmers, living off 1 or 2 hectares of land to make a living, often they do not move beyond subsistence farming, in most cases one of the members of the household works as a seasonal worker on large-scale plantations because these families simply do not make enough money off the crops they produce in order to feed themselves and to overcome hunger. We have in the world some 2 billion individuals, 500 million households living off small-scale farming and it is within this group that we have 50% of those who are hungry. We have also 10% of those who are hungry, some 100 million people in the world, who are also food producers living off raising livestock, fishing and the produce of the forests. And then we have 20% who are landless labourers, workers living on large-scale plantations often without any legal protection, we have 700 million labourers in the agricultural sector on large-scale plantations, and they often do not manage to have a living wage for their work, they are not protected by social security schemes, they have no legal protection whatsoever, and they are exploited and abused in many cases. Then we have 20%, who are the urban poor, normal food producers and who are of course the most severely impacted by high prices since in no way does this lead them to raise their incomes.

Now, keeping in mind that these are those who are hungry, let us take a closer look at what this so-called global food crisis suddenly discovered by our governments was about. Taking a slightly broader historical perspective, the crisis of 2007-8, the almost doubling of prices on international markets between June 2007 and June 2008 was really an epiphenomenon. We had seen high prices earlier, during the first and the second oil shocks. We had seen, since the second oil shock of 1979, a structural decline of prices of agricultural commodities on international markets and this, remember, was not a solution, it was a problem. It was a problem for developing countries over-dependent on agriculture for their export revenues, it was a problem for farmers in developing countries, unable to afford to live off farming, it was the source of deteriorating terms of trade for the developing world. It was not a solution, it was a problem. And it was a problem

also because it led mainstream institutions to underestimate the importance of agriculture in their development policies. For example, in the official development assistance programmes of OECD countries the proportion of funds dedicated to agriculture has declined from 18-20% in 1980 to 4-5% in 2007 and suddenly now, and that is very welcome of course, there is a renewed interest in agriculture and there is an awareness that we have underestimated the need to fight poverty by investing into the rural areas agriculture which for many years had been completely neglected.

So, given these complexities, how to describe the challenge? I would argue that we must move away from a misguided focus on volumes on the level of prices. I think that is a mistaken view. I am not underestimating the need to maintain increases in production and I am certainly not underestimating the need to protect the poor households from the impact of high prices but, if the objective is to boost production in order to lower the prices, this is not a good solution, it will only further marginalise rural households, the countryside will be further impoverished in order to provide cheap food to the cities, and in the cities not only to the poorest but also to the elites who could afford higher prices. So I think we need to have a much more targeted approach towards these different groups which are, for the moment, food insecure. And there are again three main groups: smallholders, small self-employed food producers, agricultural workers and the urban poor. Smallholders have to be helped by reducing the gap between founded prices and the prices paid by the consumer for processed foods at the end of the chain. The gap between founded prices and end of chain prices has been increasing over the years and it is this which is a problem, not high prices, not low prices, the prices are too high for the consumer but they are too low for the producer. We need to narrow down this gap and this is something that is not easy to do and I will return to this issue in a second. We also need to help smallholders in other ways, to which I shall return.

I would like to develop very briefly a number of possible remedies to the situation I have described, but first of all let me say, because this is the topic of my presentation, what the right to food can contribute to the discussion. The right to food is a right recognised in international law since 1948, art. 25 of the Universal Declaration on Human Rights, but it really has gained visibility since the mid 1990s, since the World Food Summit convened in Rome in 1996 which requested, inter alia, that the normative content of the right to food be clarified and this was done in essentially three ways. First of all, my Norwegian colleague, Asbjørn Eide, proposed that

each human right, particularly the right to food, has three types of implications for states. They must respect the right, not interfere with it, they must protect the right, legislate in order to regulate private actors, so that they do not violate the right at stake and, thirdly, they must fulfil the right, they must take measures to progressively realise the right. So that was extremely useful to help states understand that the right to food was not something abstract, conceptual, therefore only advocacy purposes, it was something very concrete which could guide them in the policies they adopt.

We also had the Committee on Economic, Social and Cultural Rights clarifying, in a general comment adopted in 1999, the content of the right to food, again providing guidance to states about what needed to be done in order to make progress in this direction, and then we have a very important instrument adopted by the FAO member states, 187 states, in 2004, called 'The Voluntary Guidelines for the Progressive Realisation of the Right to Food in the Context of National Food Security'. So, after ten years of these discussions, we now have a right to food which is much more than a slogan, it is a very operational concept and in my discussions with the World Bank, the IMF, Unicef, the UNDP for example, I am always surprised to see that although everybody is sympathetic to the right to food, they believe that whatever they seek to do to achieve food security is in fact implementing the right to food. That is not so. The right to food has very operational consequences in that it obliges us to establish accountability mechanisms, to identify the food insecure and the vulnerable in order to target our efforts very carefully, it obliges us to evaluate the effectiveness of our programmes in reaching the poorest and so it is something more than just trying to achieve food security, it is something which ensures accountability of governments towards the needs of the poorest and the most vulnerable. It is an issue of governance, one which is added to the traditional approaches which are providing emergency assistance or investment into agriculture, which are the two tracks usually pursued in order to achieve food security. In my current work with the FAO, the FAO is now thinking about how to use the right to food as a third track in addition to emergency assistance and to agricultural investment. In order to achieve food security they understand now that establishing accountability mechanisms, putting governments under pressure, monitoring what they are doing, is essential in order to ensure that their efforts remain on track and serve those who need to be helped the most.

So what needs to be done? I would suggest that there are perhaps a few priorities which could be identified for action at the international and

national level. First of all, we must reinforce the bargaining position of smallholders in the food production and distribution chain. I think the image of an hourglass is appropriate to describe their situation. Small producers are, for the moment, increasingly squeezed between a very small number of very large corporations who provide seeds, fertilisers and pesticides and this is a sector which is increasingly concentrated since 10-12 years as a result of mergers and acquisitions between seed producers, fertiliser producers and the agrochemical industry, which puts producers in a very strong position of dependency vis-à-vis this oligopoly formed by this small number of input providers. So the top of our scheme is very concentrated. Then we have a large number of smallholders, 500 million households in the world, and then these producers have very few ways to sell their crops. In the countries I visit most, in sub-Saharan Africa, often producers have only one trader with whom they interact, so this person comes two or three weeks after harvest in order to buy whichever crops are on offer and the producers have no bargaining whatsoever to do, they are just price-takers, they sell their crops at the prices that are offered to them. They cannot negotiate, they are price-takers. They have no storage facilities, so they have to sell their crops, moreover, at a time when the prices are lowest, rather than being able to wait for the lean season when the prices sometimes are twice or three times as high. So they have very few possibilities to sell on the markets. Their crops are bought, the food is processed, the food is then distributed in large supply chains to the millions of consumers of which we all are a part. So the shape of this food production and distribution system shows the inequalities here and I think there is a very serious issue of governance here, there is an issue of political economy, how these actors are regulated in order to ensure that they contribute to the right to food rather than undermining the right to food by their buying and pricing policies. There are other issues linked inter alia to intellectual property rights on inputs, particularly seeds, but I do not have time to expand much on this.

A second issue I would like to mention is the access of smallhold farmers to productive resources, land, water, inputs. In many countries, people cultivating the land have no legal title to the land they cultivate and are not secure in their property rights. I think this is a problem. I think it is important that titling makes progress, particularly in Africa and Latin America where, increasingly, you have small peasants evicted from their land without any ability for them to seek remedies before courts, without any compensation, they are just asked to leave their land in order to make room for large-scale plantations because investors come in, often in order to produce

for export markets and they have no protection, and we need to improve this but this is not enough, and it is not enough because this market solution of reinforcing property rights will not answer one important problem, which is the smaller and smaller plots these small-scale farmers can cultivate. At each generation the surface of land they cultivate is, of course, smaller. Consider the example of India. In India in 1960 the average surface per household was 2.6 hectares. In 2000 it was 1.3. How can a family live decently with 1.3 hectares to cultivate, that is the problem. We need agrarian reform, in many countries land is extremely concentrate in the hands of a very small number of important landowners, and countries need to have the political courage to redistribute land and they may have to have financial incentives to do so because, for those who wish to implement land reform programmes, there may be a need to compensate landowners if they do not want to launch a revolution and they may need to be helped in this respect. These are some of the issues raised in access to inputs, I do not have time to expand much on all the issues.

Thirdly, international trade. I recently produced a report on the WTO and the right to food and I have to say I was very encouraged by the very good collaboration I received from the WTO Secretariat and Director General Pascal Lamy in this respect, I would like to make a few comments on this, it is a very complicated issue on which I cannot be very detailed. We are now in a situation where there is a unanimous recognition that the current system, according to which trade in agriculture is organised, is failing entirely. We know that there are market distorting measures that exist and that the current system plays against developing countries' interests. However, it does not follow that removing these obstacles will be a magic bullet which will satisfy the needs of farmers in developing countries. In a country such as Benin, Mali, Burkina Faso or the Democratic Republic of Congo the farmers are unable to make a decent living not just because of subsidies, not just because of difficult access to the markets of industrialised countries, not just because of those market distorting measures, they simply are much less competitive than farmers in OECD countries. Remove these trade-distorting measures and they will still be much less competitive than farmers in our countries so these economies must be able to protect themselves until their agricultural sector is robust enough to be able to compete on equal terms, as it were, with our farmers in OECD countries and I could expand on this. I would simply like to say that the idea that we could achieve a level playing field by removing the existing trade distorting measures is, in my view, completely utopian.

Secondly, international trade is premised on the idea that, by allowing and incentivising each country to specialise into whichever production in which it has a comparative advantage, we will have allocated efficiency gains and all will benefit. But this Ricardian approach is completely oblivious of the qualitative dimension of the international division of labour. It is not the same thing for Portugal to specialise on wine and for England to specialise on textiles. In our international system international division of labour is making progress and some countries are basically locked into agriculture, unable to develop their industries and their services sectors and, even if we encourage agricultural production further, they will continue to lose in terms of trade against industrialised countries because the returns in agriculture are decreasing, while they are increasing in the industry and services sector, so I am very sceptical about the very premise on which international trade is based in this respect.

There are also a number of problems linked to the way international trade has developed. It has essentially led countries to specialise in export crops and depend on international markets in order to feed the population, and making these countries increasingly dependent on international markets to feed the population. In a context where the prices of food on international markets will be more and more volatile, this is a source of vulnerability for these countries and this map from the World Bank shows that those countries who are the most dependent on international markets to feed the populations are those who have, of course, been more severely impacted by the high prices of 2007-8 because they have been producing cotton, tea, coffee, tobacco and they have been importing the rice and cheap food to which they were addicted, which was available on international markets, so this is not a sustainable solution.

And finally there are microeconomic impacts to international trade, particularly an increasingly dualised farming system, whereby the largest agricultural producers gain from the opportunities created by international trade because it is much easier for them to be linked to global supply chains when many smallholders are just marginalised further and you have an increasingly segmented world of farming in this respect.

Two last remarks, one on the link between food security and modes of agricultural production. There is now much talk about how to increase yields and whether we should not launch a third Green Revolution, this time for sub-Saharan Africa. As you know, the Green Revolution has been benefitting Latin America and South Asia in the 1950s and 1960s and these regions have remarkably improved the productivity of their agriculture, but

this was not without certain social and environmental consequences, which they are now paying a high price for: marginalised smallholders, depletion of soils and pollution of groundwater, which is now seen as a very serious problem. We need to learn from those mistakes. I think the recipes of the Green Revolution, which is more irrigation, more external inputs, fertilisers and pesticides, and improved seeds that this recipe, this technological recipe, if you wish, is insufficiently attentive to the social and environmental consequences and I believe that there are alternatives that might deserve more attention from governments.

Let me finally say this. One of the vulnerable segments of the population are the urban poor. We have 1.2 billion people living in slums today in developing countries while 80% of the world population has no access to social protection whatsoever. We need to protect them. And it is much more efficient to speak like economists to protect them than to artificially lower the prices for all to benefit from cheap food. But countries in the developing world need to be helped to set up generous social protection schemes that are robust enough.

Thank you very much.

COMMENT ON OLIVIER DE SCHUTTER'S PAPER[1]

JOSEPH STIGLITZ[2]

I am going to try and be a little briefer. Two recent events, I think, have brought the issue of food into centre attention. The first is, right before this crisis there were very high prices but interestingly, as was pointed out, not high historically but they were still marked increases over what they had been before, increases of 100%. The second point is that, as we go now into a global economic crisis, the prices have come down but there are many groups in the population who do not have the income to buy food. So, on both accounts, we are facing larger numbers of people who are facing problems of food.

I want to spend a moment trying to analyse the sources of the high prices that existed prior to the economic crisis. Part of it had to do with climate change, but climate change has been happening in a relatively steady way, nothing spectacular happened and yet the prices changed very suddenly. But one of the things that did change rather quickly, two things changed, one is that the price of oil increased dramatically and a number of governments, the United States, Europe, went simultaneously to try to encourage, in response to climate change, high levels of switching towards biofuels, in, you may say, a very artificial way, trying to encourage the production of these as a renewable energy source. The result of that was that a lot of land that had been devoted to food production got switched to production of biofuel. Probably this is the most important single factor that contributed to the increase of the price of foods. I think the western governments that did this realised they had made a big mistake. They realised that, in fact, their policies were, in some sense, incoherent, they had not really priced,

[1] As delivered.

[2] This text is a Professor Joseph Stiglitz's interpretation of a note sent by Former President Professor Edmond Malinvaud.

and I will come back to that, they had not fully evaluated the environmental consequences of those policies, those were policies that were, for the most part, not very efficient and policies that did not even take into account deforestation that was being encouraged as a result of the high price of biofuels. So the net impact on climate change may not have been as positive as the advocates of renewable energy had thought.

There is a second factor but one that was somewhat of a puzzle and that was, as you pointed out, the role of speculation. The fact, as some people put it, that commodities became an asset category, large increases in speculation. From the point of view of most economists that was a little bit of a mystery because, in principle, what we call the 'spot price', the demand and supply on the market, is not affected that much by speculation and that is why the general consensus on this raised the question, how could speculators about the future price affect current prices of food. And I think the answer, in a way, had to do with the fact that there were millions of farmers all over the world, seeing that the price of seed in the future was likely to be higher, decided to put aside a little bit more seed, a little bit more grain, and so that the worries about the ability to purchase seed in the future, the uncertainties, the absence of insurance, all led to a supply response in, as I said, millions of farmers, and that probably contributed to an increase in the spot price, the current price of food. And then, the stories that were mentioned, the high price of food had a real impact on the real sector, on the rural landless, on the urban poor, on the many rural workers who still, even though they are farmers, buy a lot of food and therefore the increase in the price of food made them much worse off.

I am going to make just a couple of comments, one of them has to do with an optimism about why the problem of the overall supply of food may not be as serious as some people have worried, and then some remarks about why it may be worse than we have taken into account. The fundamental problem is that we have not allowed, we have treated two of the world's scarcest commodities, clean air and water, as if they were a free good, when in fact they are very scarce. That means the price system has not worked, people have not had the right signals, and the result of that really goes throughout the economic system. For instance, it affects incentives to innovate, we have not had incentives to economise on the use of water in the way that we would if we had good price signals. One of the things is that if we had had good price signals it almost surely would be the case that the price of meat products, meat, would be much higher relative to the price of grains. And if that were the case, it is probably since the production of each unit of

beef requires a lot of grain, a relatively small switch of consumption from beef to grain increases the total available food supply. So, in fact, on the available space of land we can actually produce a lot more food if we use it in a more efficient way, but our price system is not working well now.

The second reason for a little bit of optimism is the point that was made about underinnovation in research, particularly research related to Africa. Land used to be very abundant in Africa and so there was very little attention to the problems posed by land scarcity. That has changed very dramatically in the last 25 or 30 years and so there are at least some reasons for optimism that if there are more investments, particularly public investments, in agriculture in Africa, that it could have a potential of increasing productivity. The data that you have described is one that is obviously very disturbing, and people have been worried about this, the fact that the rate of increase of productivity in agriculture has not been very strong and it may be that, in fact, we have run out of new ideas that will work but, on the contrary, I think that there are reasons to believe that, in fact, if we devote our resources to this, it could be a benefit. The third reason for optimism is the hope that there are new technologies for the production of biofuels using marginal land that cannot be used for grain production. The new generation of biofuels use land that is not suitable for the production of grains but could be suitable for the production of biofuels so the hope would be that with more rational policies in biofuels and more research, the current drain of land used for biofuels will stop and there will be a change.

The other point that was made, that I think is very important to emphasise is the point that Amartya Sen made, it is not just the overall supply of food, it is access, purchasing power, the ability to buy, which is obviously the key issue right now as the global economy goes into a slowdown. Let me comment in particular on some problems facing small producers, that, in fact, the difficulties are actually much worse than have been highlighted and the problems that have been discussed for a number of years have been proven very resistant. The first is, focusing just for a moment on the small producers, Paraguay provides an example where in fact big landowners are taking over small landowners. This is a country where the concentration of land already is extraordinarily high. The Gini coefficient, which is a measure of inequality on land ownership is over 0.9 – 1 would be perfect inequality and in Paraguay it is over 0.9 – extraordinarily high. But one of the things that has been going on, from what I have been told, is that the large landowners are spraying from the air using herbicides and Monsanto and the other companies have developed forms of seeds which are resistant to

the herbicides that they are spraying, so their own crops are protected and this increases the productivity of the large farmers, because they kill out all the weeds in a very efficient way and the genetically modified plants survive, but the small farmers who cannot afford the expensive seed have their crops devastated and the result of that is that they are forced to sell their land to the large farmers and so, in fact, it is a way of actually killing off the small farmers and turning what were small farmers into landless workers.

The issue of increasing concentration of marketing agents is a problem that many African governments try to address at one time by creating private parties. The question is how to control that, because it goes down to glocal level, where there is only maybe one person controlling the transportation system and that could be local kinds of mafia where competitor shippers have physical violence against them, so do we go and recreate the government marketing boards? I suspect that that is probably what ought to be done, at least in some countries, but it is certainly a difficult issue. A third example of the problems being faced by small producers highlighted in India, where, as many of you may know, there has been a rash of suicides going on, actually for a number of years now, in the hundreds of thousands of farmers committing suicide. While we do not have a clear understanding of all the reasons, one of the problems is that, under pressure from international seed producers, governments have lowered the standards for germination so that, when they buy seed, a higher portion of the seed does not germinate and the reason they did that, obvious reasons, is that some of the big seed companies did not want to be held to higher standards. Part of the reason is that some of the new seeds are more sensitive to weather and to water and so the germination might be affected by those variables. In any case, the consequence of this is that the quality of seeds has been going down, shifting more risk onto small farmers and therefore leading to a higher vulnerability and difficulties.

The point that you did not have time to talk about as much, but I think is very important, is intellectual property because one of the important areas for advance is the production of more productive seeds, but if those more productive seeds are controlled by a few seed companies, the benefits of those will be appropriated by the seed companies as opposed to going to income of the farmers and, if they are distributed in the form of higher prices and non regerminating seeds, it makes them more cash dependent, as you suggested, and making them more cash dependent increases their vulnerability to price volatility.

The final point is, if this were not sort of a depressing view, going forward there is a real risk of things being much worse. In parts of India, the

groundwater has been depleted at a very rapid rate and, though agricultural productivity has, in fact, been going up much lower than economic growth, at a rate of 1 or 2%, it is not sustainable. Even that low agricultural productivity is not sustainable unless big innovations occur, because it requires use of groundwater, which is running out.

Some of the other proposals for reform, like land reform, are, I think, very important but one should remember the long history of failure of land reform. There are many examples of land reform that have not worked, and we know a little bit about why they have not worked but one has to be very careful. For instance, just to give one example, one of the arguments put forward in response to land being taken away is titling and I think, in general, titling is a good thing but one of the consequences of titling, in many cases, is that farmers have borrowed on the basis of their land title and, when they have a bad crop or when the price gets low, they lose their land and titling becomes a legal way, as opposed to the extralegal ways that you describe, a legal way to convert farmers into landless farmers with all the consequences that that has.

One final comment I would like to make is the special relationship of food security or access to food to broader issues of human rights and I will just raise a very specific question that a number of economists have raised, which is a notion of specific egalitarianism. Should we be concerned about access to food or access to a minimum standard of living to make sure people have access to food? What should be the focus of attention, is it food or is it broader income, adequate income, to make sure that they have the ability to purchase the food that they need to have?

HUMAN RIGHTS AND GLOBALIZATION: THE RESPONSIBILITY OF STATES AND OF PRIVATE ACTORS[1]

JOSEPH STIGLITZ

Let me begin by reviewing some things that may have been discussed earlier, and that is the concept of human rights, which I think, in some ways, has broadened since the Universal Declaration of Human Rights right after World War II. That focused not only on the political rights but also on economic rights. Let me just try to emphasize that I do think that economic rights are very important, one cannot meaningfully exercise political rights if one is starving. Since then there been elaboration and nuancing of the notion of these rights, particularly, for instance, South Africa in its constitution has reflected, adopted a number of notions of economic rights and trying to define more precisely what they mean is not easy, but I think it is an important step forward.

The other area where it has been obviously broadened is environmental rights: rights to clean air, you might say rights to survive. Global warming has shown that those rights are at risk. Countries like the Maldives, you might say that the basic human rights of their citizens have been put in jeopardy by the pollution coming from the advanced industrial countries. The life expectancy of their country is 75 years or less and I met with the Prime Ministers and heads of government of many of the South Pacific island states and they too have a very limited life expectancy because of the rising sea level.

There are other elaborations or extensions of basic political rights, for instance the citizens' right to know what their government is doing has become a very important human right both directly and as part of the mechanism by which we insure that governments behave in ways that correspond to the wellbeing of their citizens.

[1] As delivered.

Traditionally, national authorities have been the locus of responsibility for the implementation and enforcement of these rights. In the US, for instance, it is reflected in the first ten amendments to the Constitution. What I want to do is talk a little bit about how globalization has affected these notions of rights and it is in three ways that I will try to comment. First, it is unambiguously positive that one aspect of globalization has been the globalization of ideas. One of the important ideas that has spread all over the world, through globalization, has been the idea of human rights. I think it has given force to these ideas, the ideas have been globalized and I think this is a very positive aspect of globalization. The second is that the responsibility for implementation and enforcement of human rights has changed in ways that have moved, you might say, both up and down, both up in scale to an international level but down to the level of non-state actors. It has moved up in the sense, for instance, that the notion of the duty to protect is an important extension of international responsibility that was recognised at the end of the last decade. And, obviously, one of the motivations of that was the kinds of atrocities which occurred – issues of genocide, as we saw in Rwanda – questions were asked, and the citizens of one country sit idly by when the human rights in another are being violated. Obviously these cross-border responsibilities pose some severe difficulties, for instance on what are appropriate standards, whose views, how do we effectively enforce or implement our appropriate concepts. An example, I think, is illustrated by what happened in the US during the Bush era, where I think there is a broad consensus that the Bush Administration violated the International Convention on Torture. The question is, the international community obviously did not do anything to stop it, to ostracize in any way what were, at the time, clear violations of international law, and since then the documents that have been released have made it even more clear that they were engaged in a violation of international law. So it raises very difficult questions about the enforcement of these rights and questions of holding particular individuals accountable for those violations.

The same thing, of course, is that we have begun to create international frameworks. The International Criminal Court is an important step forward in globalizing the implementation enforcement of what may be basic human rights. So that is going up in a way that globalization is the responsibility not just of the state but of the international community, but it has also gone down that non-state actors have a responsibility for enforcement implementation of human rights and it is both civil society, corporations and individuals. One of the interesting developments is that some firms

have actually adopted as part of their corporate charters the Universal Declaration of Human Rights and they take it quite seriously. Not most firms, I have to say, regrettably, but a few firms have. Hydro is a Norwegian firm that has not only adopted it but has training sessions for older management on what does it mean for the actions of the company and actions of individuals within the company to be consistent with the Universal Declaration of Human Rights. Hydro is a company that deals in hydrocarbons, an area where there are frequent violations of human rights, where the difficulties arise from acquiring oil and gas rights, dealing with governments – it was mentioned before – that are corrupt, and quite often violations of human rights have been an important part of the extractive industry in their behaviour. An important suit that is going on right now, for instance, in Ecuador involves the violation by Texaco and Chevron of, you might say, the basic human rights of the people in Ecuador, where I think the evidence is pretty clear, the only question is, will they have some sense of accountability through legal mechanisms.

Civil society today, I think, is playing an increasingly important role in the implementation of human rights. The basic notion here is what economists call a public good, that society as a whole is better off if there is respect for human rights, and that, in general, the notion that the public good and is a public good and will, as a result of that, be under supplied. There need to be collective responses for the provision of public goods and the enforcement, and that is where I think civil society has taken a particularly important role. In the US, for instance, it was only because of the intervention of civil society that there was disclosure of the torture memos, that there was an attempt to keep, which goes to another, as I say, basic human right, what I view as a human right, the right to know, there was an attempt at non disclosure but, as a result of the intervention of civil society, the government was forced to disclose and that information, I think, has had a very big impact.

I think there is a basic moral responsibility of each individual not to interfere with the human rights of others, but there is also a basic responsibility, a moral responsibility, to help enforce the human rights of others. It raises some very particular issues: is there a special responsibility when it comes to actions or violations of the human rights by one's own government? Do American citizens have a particularly strong responsibility for countering actions of their government that violate the human rights of others? I think that is a difficult issue but I think the answer is yes, and that is both for the political rights and for the economic rights. For the

political rights the issue of torture is obviously uppermost in people's minds today. On the economic rights the issue is that this global economic crisis has a very much *Made in USA* label on it. We exported not only the deregulatory philosophy that enabled the spread of the crisis around the world but we exported many of our toxic mortgages. Let me try to emphasize. These toxic mortgages is a description which suggests that they were highly risky but those toxic mortgages were far worse than that, they were deliberate exploitation by the banking sector and the financial community of the poorest Americans, Afro-Americans. They were an attempt – you know, there has been a lot of discussion about, in recent years, the discovery that there is money at the bottom of the pyramid – what America's financial community tried to make sure was that it did not remain at the bottom of the pyramid but that it moved to the top, and they were remarkably successful in moving the money from the bottom of the pyramid to the top. If you see the devastation that has been done to middle class and lower income Americans in communities like Baltimore and Cleveland you understand the moral dimension of what America's financial market has done. So it is not just that it is a wreck to the American economy or it is not just that it has wrecked the global economy: these subprime mortgages, by themselves, were intensely, I think, immoral on any ground. But then we exported that, we persuaded others to accept these, and as I say, I think 'toxic' is too kind of a word for them, the Administration now calls them 'legacy assets'. There was an evolution in terms, first it was 'toxic' and then it became 'troubled assets' and now they are 'legacy assets' and I think that really does not do justice to the opprobrium that they should have received. Anyway, the global crisis now is having effects all over the world and the most severe effects are in the poorest countries. For a variety of reasons, the worst impact is on the poorest countries and these countries do not have the resources to cope, to undo, to offset the effects and so the effects on poverty are likely to be very severe in the developing countries. Estimates of between 100 million or more will move into poverty as a result of this global crisis. So the question is here, in a sense, the actions of one country have very severely affected the wellbeing of citizens in another. The question is, is there a moral responsibility of the US, having created the crisis, to do something to help the poorest countries? My view is that there is, but unfortunately the US has been the least forthcoming in providing that international assistance. Japan and Europe have been much more forthcoming in providing that assistance than the US.

There is a third dimension that has led to a weakening of the human rights of many individuals, both directly and indirectly, both economic rights and political rights. Let me just try to illustrate what I have in mind. The impact on, you might say, economic rights broadly conceived is illustrated by the example that I just gave, where problems in one country can be amplified and lead to an increase in poverty in another. But it is also the case that the rules of the game, the way by which the global governance have in many instances weakened the ability of national authorities, which have been the traditional locus of responsibility for enforcement of human rights, it has weakened the ability of national authorities to do so. Let me just give you a couple of illustrations, examples, of the ways in which this has happened. IMF conditionality, I think there is a broad consensus, has weakened democracy, democratic processes in many countries. The World Trade Organization (WTO) has imposed conditions which have taken away certain degrees of national sovereignty in ways which can undermine the ability of national authorities to protect their citizens. So these international structures have had the effect of simultaneously exposing developing countries to more volatility, therefore putting at risk the citizens of those countries to depravation of their basic economic human rights, at the same time that they have undermined the ability of the nation state to respond to those problems. The recent crisis, I think, illustrates some of the issues in a very intense way.

One example that illustrates, I think, some of the difficult issues, is Iceland. Iceland responded to the global wave of enthusiasm about deregulation and several banks, three banks in Iceland, grew to the stage where their size, in some sense their assets, were greater than the GDP of Iceland. Now, when those banks failed, the question was whose responsibility was it. The failure of those banks meant that there were economic consequences for many people in the UK and other countries, including charities, individuals who had put their money into these Icelandic banks, getting a higher rate of return than they would have gotten elsewhere, whereas there is no such thing as a free lunch, which meant that they should have known that there was more risk, but the IMF's response was to demand that Iceland, the people of Iceland, take over these private obligations. IMF was successful with the UK government in persuading the Icelandic government to do that and the implication is that the citizens of Iceland will be impoverished, will be poorer than they would have been, for generations to come. The citizens never had voluntarily undertaken in some sense this obligation, it was undertaken by their government, it was an elected government to be sure, and the government, after it did this, was forced out of office, but the obli-

gations remain. So, in the world of globalization, one has this increasing risk of the socialization of private obligations, the socialization, in particular, of private losses, while you have the privatization of profits, which is obviously a system, I think, that is inequitable, but clearly raises very deep issues.

Again, in its current economic crisis, state power is being used to transfer large amounts of resources to fulfil private obligations and to recapitalize private institutions. Globalization has had a very big role in shaping this, for instance in the US one of the interpretations of why the large mortgage company Fannie Mae was treated the way it was, in particular there were large debt holders in Fannie Mae, who, under a normal process of conservativeship, of financial restructuring, would have had to have paid the obligations but this was not done. The US tax payers assumed 6 trillion dollars of obligations: that is a lot of money, to go on [incomprehensible]. The reason was that of those obligations, a large amount, not huge, 300 billion, were held by the Chinese and the feeling was that to make those people pay would have had international consequences that we did not want to deal with at the time. The point I want to raise, and the subject of this talk, is how has globalization affected the way we approach issues of human rights. Here globalization, in effect, was a huge transfer of resources, changing the rules of the game, and the result of that is that resources that would have been available for a huge number of other uses have been devoted to giving money to bond holders that did not have any contractual right to those but got them because of the international complications of not giving those moneys to particular actors.

So globalization has clearly made the implementation of economic human rights much more difficult. I think that, going forward, the issues of economic, political, environmental human rights, within a global context, will continue to be a subject of a great deal of discussion and I think the vocabulary of economic and political rights is a vocabulary that is a useful way of approaching these issues. We will have more discussion on Monday on exactly that topic, which Ravi Kanbur is going to be talking about more in detail.

HUMAN RIGHTS AND GLOBALIZATION: THE RESPONSIBILITY OF STATES AND PRIVATE ACTORS

LUBOMÍR MLČOCH

It was a great honour for me to be invited to comment on the paper of such a distinguished person. I decided to prepare my comment on the fact that family is still just a 'dependent variable' (S. Zamagni) from the economic point of view. On the other hand, the family question is at the heart of the interest of the Church, and the family question is one of the very few where Catholic social teaching anticipated a global (universal) perspective of the 'social question', agenda of human rights included. The Church came first with a recognition that the social question, influenced by factors beyond regional boundaries and national frontiers, has taken on a worldwide dimension (PP 1967, SRS 1987). My focus concerns the 'Charter of the Rights of the Family' (Holy See, 22 October 1983), and the ideas of SRS in this context. 'True development...on the internal level of every nation, respect for all rights takes on great importance, especially the right to life at every stage of its existence; the rights of the family, as the basic social community, or "cell of society"; justice in employment relationships...' (SRS, 33).

Only development which respects and promotes human rights is really worthy of man (ibid., o.c.). Nevertheless the question 'Who is the Man?' is answered in a different way in an individualist, utilitarian and consequentionalist perspective of economics, and in the Social Doctrine of the Church. The human person as 'imago dei' has expressed human rights as an individual, nevertheless these rights 'have a fundamental social dimension which finds an innate and vital expression in the family' (first – A – proposition of the Preamble of the Charter). Ten years later, in the Letter to Families – written on the occasion of the celebration of the International Year of the Family (1994) – John Paul II stressed the idea that a family is something more than the sum of its members, and that the rights of the family are not just a mathematical sum of the rights of individual family

members! Economics as a science and economy as a way of life ought to discover an ancient concept of 'common good', and the common good of every society starts in the family.

Thus including family and family rights in the agenda of 'pursuing the common good' at the last annual meeting of the PASS was fully justified. Nevertheless, 'the state and family in a subsidiary society' in the keynote address of Professor Donati, is only part of the truth, and only the second one. According to my argumentation in previous studies (Mlčoch, 2008, 2009), a crisis of the family within Western – post-modern society – evolved from two types of strengthening feedbacks which resulted in the institution of the family being increasingly badly defined ('ill structured'), undergoing vertical disintegration and becoming increasingly dependent both on the temptations of the consumer society (the primary loop) and on state aid (the secondary loop). That is why to comment on Professor Donati's paper just such personalities from Germany, i.e. Professors Manfred Spieker and Paul Kirchhof, were invited. The first one writes about the paradox that rich Germany is – with regard to childbirth rates – among the 'poorest countries' in the world (ranking no. 180 out of a total of 191 listed countries). The second one speaks about the 'scandal' of the contemporary social welfare state, as it exists in Germany, because 'childless members of the workforce accrue retirement claims that must be honoured by the children of the next generation...'.

At the roots of this scandal – failure of the rights of the family – is not only some flaw in social security laws, but a 'technical civilization' based on utilitarianism and individualistic freedom without responsibility. The Holy Father John Paul II wrote in his Letter to Families about a civilisation of products and hedonism, 'things' but not persons; or even persons used as things: he warned against this civilisation where woman can be degraded as an object for man, children as an obstacle for parents, and the family – an institution – as an obstruction to the freedom of its members.

The problem of our time and our Western civilisation is an inconsistency between the Catholic Charter of the rights of the family on one hand, and the EU's Charter of Fundamental Rights of the European Union (Nice 2000, Lisbon 2007) on the other. Professor Donati's sharp analysis shows clearly that an institutionalized individualism of the EU's Charter leaves little room for family functions, family has no citizenship in this document. Referring to Professor Glendon's paper, Donati's point is that individualistic and contractualistic models of family in the later EU Charter are incompatible with the natural rights of persons in the form of 'relational rights' (in the former Catholic Charter of the rights of the family).

Perhaps the deepest difference is the lost perspective of eternity in contemporary European societies (Manfred Spieker) – and in an 'imperial economics' as well. Nevertheless even G. Becker (together with Murphy) gives a touch of *species aeternitatis* in his fertility analysis. Allow me, please, a short but very symptomatic point in this context. Becker and Murphy consider ('with a heroic amount of additional imagination') contracts between 'parents and potential children'. In such a hypothetical case 'a potential child could commit to compensating his parents eventually if he is born'.

'...This contract would be Pareto improving...if the child would still prefer to be born'. They conclude: 'Since such contracts are impossible, some children may not get born even when both parents and children could be better off'. These authors are certainly right, the whole western civilisation is in a Pareto sub-optimal situation as to unborn children. The 'economic man' is actually conceptualised as a 'contractual man'. Contracts between parents and unborn *potential children* are impossible in principle; but they would also be 'illegal' because human embryos in late modernity have reached neither a legal nor a moral status (which they had before World War II), and it was the state which authorised abortions, and now a super-state of the EU – which repeatedly confirm this 'institutional change'. Before that, unborn children had their 'barristers' in God's Law: induced abortion was not allowed.

In the global world, a 'demographic revolution' born half a century ago in the capitalist West and communist East, tied by a common 'spirit of revolt' (Hannah Arendt) and purely materialistic culture, is slowly expanding on other continents. The book *Living in the Global Society* (Papini, R., Pavan, A., Zamagni, S., eds.) provides a broad spectrum of insights in this sense. Msgr. Henry D'Souza writes about 'economic invasion' and its effects on Asian cultures. Orlando B. Quevedo is criticising development in Asia 'from below'. What is most striking (and dangerous) is the fact that 'many of the threats to family stability are unintended consequences of goods and freedoms that modern men and women prize' (Glendon, M.A., 2002, p. 107). And I add to this the quotation from Henry D'Souza 'It is immaterial to establish whether the economy is determining culture, or cultural invasion is determining the economy' (o.c., p. 94).

Looking back to the Charter of the rights of the family, and comparing the situation of the rich North (and West) to that of the poor South (and East), we have to say that family is endangered globally, in different ways. Nevertheless, the threats from a *new technological totalitarianism* (Cardinal Martino) are even more serious – as the title of the recent Dembinski-But-

tet-Rossi di Montelera book warns – 'car c'est de l'homme dont il s'agit'! Certainly the family in poor African, Asian, Latin American and Caribbean countries suffers in many ways. The Federation of Asian Bishops' Conference (FABC VI) – typically – observes: 'The Asian family...is bombarded on all sides by anti-family forces of dehumanisation and disintegration, ranging from material and moral poverty to secularistic values and external pressures leading to anti-life types of bioethics and practices of abortion and contraception'. Material poverty is *nihil novi sub sole* in least developed countries, but new threats for the family came from a 'knowledge society' of the most developed countries. Just a glance at the 'Preamble' of the Charter of the rights of the family shows clearly that, for example, the European family ceases to be 'based on marriage' as the 'natural institution', 'suited to teach and transmit cultural, social, spiritual and religious valus', where 'different generations come together', and where even society is losing 'the need to recognise and defend the institution of the family'. According to Article 4, 'human life must be respected and protected from the moment of conception' and 'abortion is a direct violation of the fundamental right to life of the human being'. We could continue looking at the experimental manipulation or exploitation of the human embryo, interventions on the genetic heritage of the human person, and so on... The most developed countries – UK, US – are pioneers on this road to hell, and globalization in this sense is just an export of the culture of death to other continents.

Twenty-five years ago a group of Asian Bishops (Institute for Social Action – BISA I) pointed out this paradox: 'Our people are not poor as far as cultural tradition, human values, and religious insights are concerned. In these things of spirit, they are immensely rich'. Globalization of a 'materialistic culture' leads to a very ambivalent and controversial type of development, and to new attacks on the ancient institution of the family. FABC and BISA do not hesitate to speak about *economic imperialism and neo-colonialism.* On the other hand, in communist China's model of 'totalitarian capitalism', the family suffers in many ways, especially due to a coercive demographic policy, and the Charter of the Rights of the family in China is just a challenge for the future. It seems to me that the stance of FABC, pronounced only three years after the publication of the Charter, is still valid: 'We have criticised classical capitalism because, while professedly promoting economic growth, it has deprived man of the just fruits of his labour. We now criticise communism because, while professedly promoting liberation, it has deprived man of his just human rights. In their historical realisation, both have hindered true human development, the one creating

poverty in the midst of affluence, the other destroying freedom in the pursuit of equality'.

Our Asian brothers in Christ are calling for and looking at an 'alternative development model', 'an integral, equitable and sustainable development' (Orlando B. Quevedo, Henry D'Souza, o.c.).

Research on alternative visions to the contemporary face of globalization has also attracted the best economic 'brains', Professor Joseph Stiglitz among them. By the way, his book about the discontents of globalization had been translated into the Czech language as 'A Different Way to the Market'. The effort of politician and Professor Derbez Bautista to solve the problems of global financial markets – based on the experience of Latin America – are also well known and topical especially in times of global financial crisis. The Lateran University in its *Nuntium*, on the occasion of the anniversaries of two Pontifical Encyclicals about development, *Populorum Progressio* and *Sollicitudo Rei Socialis,* devoted a double number (31, 32, Anno XI, 2007, 1-2, to this challenge of seeking true development in a Christian perspective. *La dimensione globale e la visione delle Encicliche*).

Allow me, please, to also mention my own modest contribution to this core problem, from the point of view of the family. In *Nuntium* (pp. 147-151), I provided a 'Franciscan sketch' of a 'solidarity-based development', where temptations of 'catching up' richer (but not happier) are substituted by a 'joyful economy' of sharing gifts in contraposition to Tibor Scitovsky's 'joyless economy' (all in the original English version). A spiritual and cultural conversion of this type has – as a 'precondition' – the discovery of the fundamental error of dominant economic thinking, that 'having more things is always better'. That same year – again in a 'Franciscan' perspective – I contributed to the book *Car c'est de l'homme dont il s'agit* (Dembinski-Buttet-Rossi di Montelera, 2007, pp. 157-174). In my 'économie de la frugalité' sometimes 'more is less' (GDP 'per capita') for subjective happiness (bonheur). This is especially valid for the 'size of the family' – children are this very joy and source of happiness!

More than twenty-five years from G. Becker's 'Treatise on the Family' represents a period of newly born 'family economics' with its hyper Merationality, a generalized economic calculation – 'production of children' included, consumer manipulation, 'soft family budget constraint' (i.e. growing family indebtedness) and self-fulfilling hypothesis of the market dominance over the family. This way of thinking can be rejected as an essentially defective economic reductionism in family relations; this does not help us much, however, because the market has already long been broken

through the traditional ethical limits of the family. A second way is more promising: to take this logic 'at its word' and to include the argumentation, which arises from this approach, in the results. Economists know the protection of competition in the market, and the concept of countervailing power (John Galbraith). Otakar Hampl, my brother in a Czech family of the Secular Franciscan Order, speaks (especially as far as the status of families with children is concerned) of the unequal standing of the family and of the artificial deformation in the investment market involving individual factors of economic development. In particular this involves 'human capital', the investments in it and the reproduction of the workforce which suffers from an inequality of this type. The child as a 'normal product'? The child as an investment competing with the purchase of an automobile? That may be so. But if so, the correct question is: why does every businessperson (be it a physical or legal entity) have the option of writing off the cost of the purchase of an automobile from his or her tax base over five years? The 'investment in a child' involves a horizon which is four or five times longer, i.e. it is therefore encumbered with a higher time discount and is, to be honest, a much 'higher risk'. It is absolutely logical to require the family, as a 'producer of children', to have the right to deduct the costs of a child from its tax base throughout the entire period of the investment. This is how we can summarise O. Hampl's argumentation and the proposals to 'alleviate the inequalities' which still predominate.

It happened that I had the occasion to present our common 'Franciscan argumentation for the financialized word' ('le monde financialisé' of Paul. H. Dembinski) at the recent Czech EU Presidency conference about the family in Prague (see Mlčoch, 2009). The proposal to alleviate the unequal standing of the family in the current economic system is relatively simple, and resistant to abuse due to its structure. I am convinced that this social and financial innovation is an answer to the speaker's question of Cardinal Ennio Antonelli, President of the Pontifical Council for the Family at the same conference in Prague. The Cardinal – after his caracterising of the past decades when 'more and more often the liberal, relativistic, individualistic, utilitarian and consumer culture has been enforced, which is, of course, not beneficial to families, and very often regards the family as something outlived and condemned to extinction' – raised the question: 'Why should a family that decides to have children be poorer?'

The structure of compensation for the costs borne by families with children in the area of tax is remarkable as it understands the family as being a socially cohesive entity from the very beginning – in full consistency with

the Charter of the Rights of the Family. It goes further – in a positive direction – than the 'joint taxation of married couples' which we abandoned in the Czech Republic after a short and successful trial (just for ideological reasons). This version of the tax system is family friendly, because it is based in fact on the old Catholic idea of 'family wage' (see *Compendium*, article 250, originally *Quadragesimo Anno* from 1931). An example of an uncomplicated system which is simple precisely because its solution goes to the root of the matter. This is a way to correct the existing sub-optimal investment in human capital – because till now 'work in the family is not a priority in Europe' (E. Antonelli) – and represents hope for maintaining the family as an 'economically competitive' 'economic agent' (Stefano Zamagni) – even in the developed world.

Msgr. Orlando B. Quevedo (in Papini-Pavan-Zamagni, Jacques Maritain Institute 1997) – refering to FABC IV (in Tokyo) stressed the idea, that 'in Asia free enterprise has failed to recognise "the principle of the priority of labour over capital"' (LE, article 12, now *Compendium*, articles 276-281). But the same is true for the 'affluent society' of the West. The problem is even deeper since it also affects the relationship between labor and private property (*Compendium*, articles 282-300, especially 294 – the family and the right to work). And the problem is also broader, because in the contemporary world, it concerns not only human work in an enterprise, but also unpaid work within families. The PASS organized a Forum on 'The Meaning of the Priority of Labour' (*Miscellanea* 4, 2003), but this new 'family dimension' is mentioned just at the margin. Nevertheless, Msgr. Roland Minnerath said at this Forum six years ago: 'So we should elaborate not only on the primacy of work over capital, but, deepening the question, on the primacy of humanly meaningful labour in accordance with socially meaningful outputs...The family mother at home...gives little importance to the notion of capital. More important is the social benefit of the work done' (o.c., p. 72). As we accept that priority of labour over capital 'applies to all historical epochs and human situations' as 'the abiding heritage of the Church's teaching' (LE 12), we are obliged to say that this principle is just an ideal more than a reality, and not only in poor Asia, but – in a different form – also in the affluent West. The demographic implosion is one of the most striking features of the prevailing 'priority of capital over labour' in the late capitalism. One of the most important causes of the falling fertility was a massive social shift towards pension schemes with the 'penalization' of families taking care of children: in economic terms, it is possible to interpret this evolution as a kind of substitution of 'investment in children' for

investment in pension funds... Substitution of 'labour for capital'... According to the recent empirical evidence about the volume of pensions, it is possible to explain about 80% of the variations in fertility across countries.

Developments in Europe have shown the apparent priority of 'financial capital' over 'human capital', of which the demographic implosion is merely a consequence. During the ongoing global financial crisis private pension funds are among those worst affected by this crisis of trust. As a consequence, the relative weight of importance has shifted back to family policies. This is a chance for investing again in turning the demographic trends. The European political élite willing to serve the common good of families is, of course, a necessary condition to ensure that the family becomes a real and not just a declared priority, and that the Charter of the Rights of the Family is more respected in this world where politicians are parsimonious as to the family's social expenses, and eager to justify the horrible public costs for averting the financial crisis. 'Should we encourage political decision-makers to recognise the importance of the home economy and the costs of raising children?' (M.A. Glendon, 2002). We should. Thank You.

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ASSURING AND IMPLEMENTING THE UNIVERSALITY, INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS

THE UNIVERSALITY, INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS: THE CASE OF CHINA

KUAN HSIN-CHI

Introduction

All social life is an expression of its unmistakable protagonist: the human person. The foundation of a just society is the principle that affirms the inviolable dignity of the human person. Sadly however, respect for human dignity is not a dominant social practice everywhere. The principle of just society is often challenged either by the Machiavellian dictum of Realpolitik or the economic maxim of utility maximization. Though these challenges come predominantly from within, they are not confined to, national boundaries. Violations of human dignity by governments are often defended in the name of state sovereignty and national development, while human degradations by multinational corporations are justified in terms of share-holders' interest and global competition in production costs. The development of international human rights law and human rights regime have made some inroads in qualifying the principle of state sovereignty, whereas the organization of the world into sovereign nation-states still allows a rights claim by the state to withstand intervention in its domestic affairs by external agents. The conflict between a universal understanding of human rights and a state's preoccupation with national particularities is a serious matter that this chapter purports to analyze, with reference to changing practices in mainland China.

To fully understand human rights practices in China, we need to take a developmental perspective – development of human rights is path-dependent. Cultural legacies are deep-seated forces that may be activated selectively to form preferences, thereby affecting strategic actions of agents. Political ideologies such as Marxism and nationalism can also have an important influence at different times depending on the domestic and international circum-

stances. Human rights development in China has been embedded in the state's nation-building project and its quest for modernity. Path adaptation and breaking points are affected by the trajectory of sociopolitical changes at both the domestic and international levels. It is altogether a matter of political learning, a protracted process where the role of government is crucial. The reason is twofold. In a general sense, protection of human rights everywhere ultimately hinges on the exercise of public authority and at the same time the restraint of this very authority. In the Chinese case, civil society had been weakened or even destroyed by the state after the communist seizure of power. The path of political learning does not end with a positive change to the general policy line, as institutional guarantees are yet to be secured and new practices need to be habituated. A developmental perspective has also to address the issue how members in the resurrected civil society think and behave. Such a perspective will lead to a conclusion with a guarded optimism.

Cultural Legacies

It is sometimes held that traditional Chinese culture is detrimental to the development of human rights. It is however a gross mistake to compare Chinese culture and the Western idea of human rights, since the concept and discourse of human rights is a unique phenomenon of modernity, only to appear first in the West during the 17th and 18th centuries and was practically unknown in ancient China. There are indeed cultural elements in traditional China that are incompatible with the modern concept of human rights, such as hierarchical social structure with rather fixed positions of authority and subordination, despotic power[1] of the emperor as a Son of Heaven, the priority of communal interests over individual ones, and an ethos for social order and political unity at the expense of diversities and dissents. But similar elements can also be found in feudal Europe. It is true that the modern concept of human rights in China is an imported good. It is equally unnecessary or even futile to prove the existence of such a modern concept in old China with reference to phrases in the Confucian or Taoist texts. For instance, it is one thing to discover in the former the mention of human worth and the possibility for the human person to become a sage through the exercise

[1] In the sense of Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results', *European Journal of Sociology*, Vol. 25 (1985), pp. 185-213.

of *ren* (literally two-man-mindedness, as a moral exhortation to treat others as oneself).[2] But it is a different thing to consider whether these precepts amount to an affirmation of human dignity *as a matter of rights*.[3] In the same vein, the saying of the Taoist master Laozi that the human person partakes in the Nature, and that the Nature's Way is the human Way, has nothing to do with 'natural law' as understood in the West. Confucianism is by no means rights-oriented. It is an ethical doctrine that emphasizes obligations and self-nurture in virtues. Obligations are not constructed on a legalistic principle of equality but in a moral register concerned with designated roles in social relationships. The closest thing to the Western concept of rights is *fen*. It is generally translated as roles or functions performed, but a better translation of *fen* should be 'shares', that is, a particular kind of role morally grounded in mutual respect and reciprocity. The closest equivalent to the Western idea of natural law is *tianming (*Heaven's imperative). Yet, 'Heaven' is not nature and 'imperative' is no law. In Confucianism, *tianming* is ultimately based on human moral sentiments. In short, the crux of the classics is not about equality of rights and duties, but an equality of human worth and common morality (rites) that calls for mutual respect and reciprocal conduct in *ren*. Scholars argue that these ideas of human worth, morality of a common humanity, *ren*, *tianming* and many others provide an important link between Chinese traditional philosophy and contemporary human rights documents.[4] But in this author's view, the two discourses represent quite different approaches to the worth of the human person.[5]

[2] Mou Zhongsan, a great neo-Confucian scholar, for example, described China's challenge and the challenge for contemporary Confucians as 'the opening up of a new mode of outward kingliness', which he identified as the way of democracy and human rights. Like a number of twentieth century Confucian thinkers, Mou believed that the seeds for democracy and human rights lie within the Chinese cultural tradition itself. See Albert Chen, 'Chinese Cultural Tradition and Human Rights', *China Perspectives*, Vol. 1 No. 5 at http://www.oycf.org/perspectives/5_043000/contents.htm. 'Outward kingliness' is one of the dual virtue of the dictum for the best life as 'inner sagehood and outward kingliness'.

[3] The concept of rights did not exist in traditional China. See Lee Seung-kwan, 'Was there a Concept of Rights in Confucian Virtue-Based Morality?', *Journal of Chinese Philosophy*, Vol. 19 (1992), p. 241.

[4] See Wm. Theodore de Bary and Tu Weiming, eds., *Confucianism and Human Rights*, N.Y.: Columbia University Press, 1998, in particular the chapter 5, 'Fundamental Intuitions and Consensus Statements: Mencian Confucianism and Human Rights', pp. 95-116.

[5] It is important to note the coming back of Confucianism in post-Mao China, see John Makeham, *Lost Soul: Confucianism in Contemporary Chinese Academic Discourse*, Cambridge: Harvard University Press, 2008.

Flat denial of universality of human rights in the era of Mao Zedong (1949-76)

China under Mao was a place where the universal idea of human rights was unequivocally refused.[6] Traditional cultural legacies have nothing to do with it. When the modern idea of inalienable human rights was introduced to China in the early 20th century, it was well received by the intelligentsia. In his book *Datong pian* (On the Great Harmony), Kang Youwei (1902) hailed human rights as a foundation for social-political reform. In 1930, the nationalist government promulgated the first ever law of the kind: *renquan baohu ling* (edict on protection of human rights), only to be breached in practice later on. Nationalist China is a founding member of the United Nations. Its representative P.C. Chang (Zhang Pengjun) was one of the two vice-chairpersons of the Human Rights Commission set up in 1946 to draft the Universal Declaration on Human Rights. At its meeting, Mr. Chang proposed, in vain, to add to article 1 of the UDHR the Confucian concept of *ren* (two-man mindedness) to complement the reference to reason. Citing traditional Chinese philosophy, he stressed that man should act in consideration of his fellow human beings.[7] Mr. Chang's initiative serves to demonstrate the compatibility between Confucian ethics and human rights. It is even more interesting to note that among P.C. Chang's contemporaries were founding leaders of the communist movement, for instance Chen Duxiu and Li Dachao, who had once embraced the idea of universal human rights.[8] It was not until the Chinese Communist Party was established that they changed their stand. Communism prevailed over Confucianism and won the hearts of many young intellectuals who were dissatisfied with the political situation of the day. During the Sino-Japanese war and the civil war, authorities in Communist-controlled parts of China occasionally employed the term 'human rights' in their criticisms of the nationalist government. With a view to winning over public support for the revolutionary cause, those communist authorities even enacted regulations to protect 'human

[6] This entails that the issues of indivisibility and interdependence were irrelevant too.

[7] Comments by Mr. Chang were reproduced in Stephen C. Angle & Marina Svensson, eds., *The Chinese Human Rights Reader: Documents and Commentary* 1900-2000, N.Y.: M.E. Sharpe, 2001, pp. 206-213.

[8] Translations of their rights-related writings are provided in Angle & Svensson, *ibid*., pp. 62-80.

rights' in their areas. Nevertheless, it is important to note that 'human rights' in their pronouncements and regulations was still based on class analysis and political-situational morality with protection of specific rights available only to people of recognized classes at specific times, e.g. those who were qualified to be co-opted into the United Front for the anti-Japanese war. Mao was no believer in innate human rights, but in his essay 'On Policy' written in December 1940, was willing to concede that 'all landlords and capitalists not opposed to the War of Resistance shall enjoy the same human rights, property rights, and right to vote, and the same freedoms of speech, assembly, association, thought, and belief, as the workers and peasants'.[9] Despite this tactical concession, communist ideology and political objectives as a rule remained the prime factors contributing to the denial of universal human rights for the first 30 years after the founding of the People's Republic.

It is in order to dwell a little bit on the political objectives after 1949. Conservation of power and socialist construction were the key objectives of the political leadership. The fate of human rights was thus closely knitted with the trajectory of power struggle and fights on policy line, which swung between the extreme left and the extreme right. But the dynamics of power struggle at home had an external background. For the first thirty years, this background includes the leaders' memory of China's sufferings from imperialism and semi-colonialism, hostile vicissitudes of the cold war, isolation and self-isolation of China, Cross-Taiwan-Straits conflicts and strains in the Sino-Soviet relations. Against this hostile background, designated groups of persons were sometimes treated as accomplices of foreign powers and with harsh policies and measures that resulted in human rights violations.

In the first few years, the policy imperative perceived by the Party-government was to consolidate political power against the enemies of the new regime. The construction of socialism required the elimination of undesirable old elements and the winning of the broadest support of all others. The Common Programme of the People's Political Consultative Conference passed on 29 September 1949 – which is regarded as the first, albeit provisional constitution of China – adopted a conciliatory policy on the issue of rights. There was neither explicit mention of human rights nor rights of cit-

[9] See for example, Mao Zedong (1940), 'On Policy', reproduced in Angle & Svensson, *ibid.*, pp. 187-191.

izenship. The language was 'people' instead.[10] One may therefore argue that to the authorities, the individual human person *per se* is not the subject of rights.[11] Furthermore, putting all rights-related provisions into a holistic context, one can find that rights are not universal, but class-based. The rights generally available to the 'people' are denied to certain classes of people.[12] For instance, the right to private property was differentially distributed. It was granted to workers, peasants, petty bourgeoisie and national bourgeoisie, but not to bureaucratic capitalists whose assets were to be confiscated. The Common Programme further established an undefined offence of counter-revolutionary activities as a target for resolute suppression. Those classes of people found to have committed such an offence, i.e. 'Kuomingtang war criminals' and 'other un-repented, major counter-revolutionaries', would be severely punished without regard to rights. For those who were classified as common reactionaries, feudal landlords and bureaucratic capitalists, their political rights would be deprived but their survival permitted, subject to a penalty of re-education through forced labour. Such a scheme of class struggle against treason and counter-revolution provided a sweeping excuse for widespread violations of human rights during many suppressive campaigns in the following decades. In such a light, the Common Programme can better be regarded as a policy agenda of socialist revolution rather than a normative document.

An ordinary constitution was enacted in 1954, against the background of a more relaxed environment after successful consolidation of political

[10] 'People' and 'nations' are two terms used in the Common Programme. The differences between them were explained by Zhou Enlai in his report to the People's Political Consultative Conference in September 1949 as follows. Nationals were those bureaucratic capitalist class and landlords who were subjected to repression of their reactionary activities and re-education through labour. Unlike the 'people', they had no rights but duties. The distinction between 'people' and 'national' were eliminated in the 1982 constitution where the concept of 'citizen' was for the first time adopted.

[11] Mo Jihon, 'The Significance of the Conception of Human Rights in the Constitution of China', in C Raj Kumar and D K Srivastava eds., *Human Rights and Development: Law, Policy and Governance*, Hong Kong, Singapore: LexisNexis, 2006, pp. 119-135, here p. 120.

[12] While Mao Zedong in his earlier writings was willing to grant the people a full range of freedom rights after the Communist revolution, he did not mean by 'the people' that all Chinese citizens are political equals. The meaning of the people was laid bare in his article about the 'People's Democratic Dictatorship' that combines democracy for the people and dictatorship against the reactionaries. It implies that there are no universal rights. See 'On Coalition Government' and 'On Peoples' Democratic Dictatorship' in *Mao Zedong xuanji* (Works of Mao Zedong), Vol. 3 and 4 respectively.

power, initial achievements in collectivization in the countryside[13] and the end of the Korea War in 1953. The constitution of 1954 is important for its introduction of the concept of citizenship and citizen rights. It offered a comprehensive catalogue of civil, socio-economic and political rights for Chinese citizens. These provisions of citizen rights allow some Chinese scholars to later claim that legal protection of human rights had already been enshrined in 1954. It is sometimes argued further that citizen rights are a better form of rights than human rights because the former are more concrete and enforceable. It is clear that the concept of sovereignty lies behind such a discourse. It is a matter of the sovereign's will to give concrete effect to the general requirements of human rights, rather than the state's responsibility to respect and safeguard human rights. It would be, however, a mistake to equate human rights with citizen rights as stipulated in the 1954 constitution. Not only were these rights not conferred to all persons *qua* their human hood[14] but as citizen rights they could be withdrawn by the Party-state. In fact, Article 7 of the Common Programme was retained with slight modification in Article 19 of the 1954 Constitution. There were still different categories of people with different entitlements to rights or without any entitlement at all. In other words, a residual of class analysis coexisted with the modern concept of citizenship in the same document. Such a citizenship with rights is still a far cry from the acceptance of the universality of human rights grounded on the dignified human person.

An acid test of the limit of these citizen rights came a few years after the promulgation of the 1954 constitution. From the end of 1956 through June 1957, a hundred flowers campaign[15] was launched on the occasion of a rec-

[13] By the end of 1952, a total of 8.3 million mutual cooperation teams were formed covering about 40% of the total rural households. Experiments with deeper agricultural cooperation in the form of agricultural production cooperative society (basic society) were launched in several places.

[14] While the universal idea of human rights had not obtained a hold at home, Zhou Enlai spoke, in his report to the 1955 Bandong Conference, of basic human rights to be enjoyed by different people around the world without any discrimination in terms of ethnicity or skin colour. This resonates with the pre-1949 communist strategy of differentiation whereby universality of human rights were denied at home but recognized and encouraged in specific international contexts.

[15] The term 'Hundred flowers' refers to an old policy line on literature and arts: 'let hundred flowers bloom and hundred schools of thought contend'.

tification campaign within the Party.[16] Even non-Party intellectuals and members of the democratic parties were invited to speak out against bureaucratism, subjectivism, and sectarianism within the Chinese Communist Party. The invitees' response was lukewarm in the beginning, but they eventually became active participants in the campaign after the publication of Mao Zedong's 'On the correct handling of the contradictions among the people' and the Party Central's 'Guidelines on the Rectification Campaign'. The former suggested a relaxation of the class struggle and the latter promised no post-facto penalty against criticism. It is in the ensuing criticisms we can see for the first time since 1949 the language and issues of human rights were evoked against the Party and the government. Violation of human rights was said to be widespread during the previous political campaigns. Young university students[17] openly disagreed with the Party's position on human rights as a bourgeois idea. They vowed to strive for equality of human rights in the law and even demanded the National People's Congress to pass a bill of human rights. This demonstrates therefore that the idea of universality of human rights was already acceptable to young Chinese in the 1950s.

The political thaw did not last long before the regime decided to take revenge from June to August 1957. During the strike-back, people who had been critical of the Party were labeled as rightists or extreme rightists and subjected to six different types of punishments, with the most severe being re-education by (forced) labour. Re-education by (forced) labour is an institution that has contributed to a large number of human rights violations in the history of the People's Republic. Among the 550,000 rightists persecuted, only about one fifth survived to experience their rehabilitation twenty years later. Establishment scholars made comments on the rightists' use of human rights as a tool in their critique of the regime. In these comments, major tenets of the official line on the subject in those days are revealed as follows.

The first is a flat denial of the universality of human rights. As the analysis goes, human dignity is unequal in a class society. It is denied to the exploited class but enjoyed by the exploiting class. Human rights serve as an

[16] It is unclear whether this campaign had to do with events in the Soviet bloc. In 25 February 1956, Khrushchev delivered a secret speech against Stalin for his cult of personality and brutal violence. A revolution in Hungary against the Stalinist government broke out and lasted from 23 October to 10 November.

[17] See the three translated statements from students in Angle & Svensson, *ibid.*, pp. 217-222.

imperialist instrument of the capitalist class in the West to suppress the peoples in the third world. Secondly, the Peoples' Republic of China is a democracy led by the working class in alliance with the peasants. They have rights and dignity. In contrast, there is rightly a minority group of persons without rights and dignity, such as the imperialists, landlords, bourgeois bureaucrats, and counterrevolutionaries. They are the objects of the revolution and of the dictatorship. Thirdly, violations of human rights were committed by the above-mentioned elements in pre-1949 China and the greatest violation pertains to that of the human rights of the Chinese people as a whole. They once had neither human dignity nor a rightful place in the world. The collective right of the Chinese people to development is therefore more important than those individualist rights advocated by the rightists. Fourthly, the government justified its various campaigns against the categories of bad people as legitimate activities of a class struggle in the interests of the socialist project, i.e. consolidation of the party leadership, establishment of the state-owned economy, reform of the feudal, imperialist, capitalist thinking of the counterrevolutionary intellectuals, and development of a strong, prosperous and independent state. Violations of individual rights are necessary to defend the state's right to collective development. Fifthly, errors and mistakes in those campaigns despite conscious efforts to avoid them are understandable because of the scale and difficulty of the tasks. It is more important that the Communist Party and the government are quick to discover their mistakes and correct them correspondingly.

A different twist was added to the above policy line after the suppression of an uprising in Tibet in 1959. Tibet had been related to the Qing dynasty (1644-1912) variously as ally, opponent, tributary state or region under Chinese control. In 1724, the Tibetan regions of Amdo and Kham were incorporated into China's western provinces. In 1951, the new China decided to liberate the Tibet proper from the Dalai Lama's reign. A 17-point agreement was reached with the Lhasa government according to which socialist land reform would be executed in Amdo and Kham but postponed in Tibet. In June 1956, Tibetans in Amdo and Kham revolted and were met with Chinese army reprisals. In 1958, the Dalai Lama's efforts to end the escalating fighting through negotiation failed and his delegation returned to Lhasa as supporters of Amdo and Kham's cause. On 10 March 1959, some 300,000 Tibetans staged a protest in Lhasa. The Dalai Lama went into exile on the 15th before the major fighting began in the capital of Tibet on the 19th. The People's Liberation Army put the uprising down in two days. Studies report that the suppression involved brutal violation of human

rights, resulting in the death of about 87,000 Tibetans. There are also reports that the U.S. funded the training and arms of Tibetan guerillas before and several years after the uprising.

It is apparent that the government of the day did not recognize the issue of Tibet as one that concerns human rights. Rather, the uprising was interpreted as a desperate resistance of feudal Tibetan landlords against a socialist land reform that was designed to benefit the peasants. It was also charged as a plot of foreign forces to promote Tibet's independence. It was hence a matter of state sovereignty and territorial integrity for China and the suppression was justified. From that point on, the insistence on the principle of state sovereignty constituted a cornerstone in China's rhetoric on human rights. In later statements on the subject, the government even argues that China was a defender of human rights in Tibet for having liberated Tibetans from the feudal serf system.[18]

We cannot leave the 1950s without treating the Great Famine (1959-1961). I submit that it is another major issue of human rights, i.e. the right to subsistence for Chinese peasants. The Great Famine is one of the worst in modern history of the world, with an official estimate of around 15 millions of 'unnatural death'. A reputed scholar put the figure at about 36 millions.[19] The government initially attributed the famine solely to the spell of nature by using the term 'three year natural disaster'. As more information and figures were discovered, it became prepared to admit other causes with a new characterization of a 'three year difficult period'. Decades later when scholars managed to gain access to more information for independent research, they were able to confirm that policies and institutions at the time were responsible for the fatal casualties. The major causes were thus found to be the Great Leap Forward campaign whereby agriculture was blindly exploited for the sake of crude industrialization, the People's Commune system that robbed the peasants' freedom to manage their production and social life, the self-interested bureaucrats who submitted false production

[18] This year, to commemorate the 50th anniversary of 'the liberation of Tibet', the People's Congress of the Autonomous Region of Tibet resolved to institute 28 March as an annual holiday to celebrate the liberation of Tibet's feudal slaves.

[19] The most thorough study of the famine is by Yang Jisheng, *Mubei – zhongguo liushi niandai da jihuang jishi* (Tombstone – The Great Famine in the 1960s), 2 volumes, Hong Kong: Cosmo Books, 2008; For an account in English, consult Basil Ashton *et.al.*, 'Famine in China: 1958-1961', *Population and Development*, Vol. 10, No. 4 (December 1984), pp. 613-645.

information to the top leadership for policy-making, and the reckless increase in forced requisition by purchasing at government fixed prices in midst of dropping yield. When millions of peasants died of hunger, is it not an issue of the right to subsistence? Certainly, the right of subsistence was then an unknown concept in China.[20]

Liberalization and Human Rights in the 1980s

The Cultural Revolution (1966-76) was a mass movement initiated by Mao Zedong to fight those elements within the government and the Party who were critical of radical policies in general and his role in the Great Leap Forward in particular. Young rebels known as red guards were agitated to do whatever they wanted to do. A kind of mob rule had followed, which had incapacitated political institutions including the Party itself. It brought widespread social chaos and disrupted economic production. The army had to be engaged to restore order but mass campaigns still protracted for a few more years until Mao's death put an end to the Revolution.

The Cultural Revolution had ample implications for human rights. It reminds us of the way in which communist leaders had deployed the discourse of rights in the struggle against class enemies according to a situational morality. As a result, the Revolution means countless violations of human rights of those 'enemies'. During the Revolution, the so-called four big freedoms and big democracy[21] were granted to the rebellious students without any legal restraints while their victims were deprived of the most basic human rights of personal integrity. Nearly three million party members identified as spies, revisionists or counter-revolutionaries were subjected to abuse, torture, imprisonment, forced displacement and execution. Countless ordinary citizens were wrongfully purged one way or another. A

[20] It took more than three decades before the government took up the language. In its human rights dialogue with the outside world, the government gave the right to subsistence the top priority over all others. See Section V on particularity below.

[21] They were free 'to speak out, to air one's views freely, to write big-character posters and to hold great debates'. The second one is sometimes replaced by 'to network freely' meaning to cut class and travel free of charge to meet other activists in other places. These Freedoms were enshrined in the 1973 constitution but were removed when a new constitution was enacted in 1982.

large number of young people from the cities were forcibly moved to the countryside to receive re-education by the poor peasants.[22]

There are two less obvious implications of the Cultural Revolution for subsequent development of human rights in China. First, the excesses during the revolution and extreme sufferings had stimulated people to critically reflect on many things, including Marxist ideology, the rule of the Party, and the predicament of China. It led to a subsequent erosion of communist ideology, a thirsty search for alternative ideas and a revival of humanism.[23] Secondly, among the victims of the Revolution were high-ranking cadres of the government and the Party, including senior leaders like Liu Shaoqi and Deng Xiaoping (with his son, Deng Pufang, who was victimized and rendered paralegic). What impact did their personal sufferings have on their attitudes towards human rights for the following decade has never been systematically studied. Two competing hypotheses are plausible though. First, the post-Cultural-Revolution leadership had acquired a strong ethos for stability. As a consequence, the Cultural Revolution was evaluated only as serious, individual mistakes committed on the part of Mao in general and the Gang of Four in particular, rather than as something wrong with the Party-state system. The lesson to be learned was to avoid the kind of anarchy that prevailed during the Revolution. Since the anarchy was produced by too much participation by uncontrollable mobs under the influence of the cult of personality, it was necessary to restore the legal system, strengthen the Party's capacity for social control, while stressing its collective leadership. In conclusion, personal experiences of victimization and of rights violation had no positive impact on the subsequent development of human rights in China. Rather, the ethos 'stability above all' and the insistence on the absolute 'leadership of the Party' would jointly serve as a brake on future advance towards human rights. The other hypothesis sees the personal experiences of those leader-victims as consequential in an awakening to

[22] Harry Harding, *China's Second Revolution: Reform after Mao,* Washington, D.C.: Brookings Institution Press, 1987.

[23] For example, the novel *Man, Oh Man*! by Dai Houying published in 1987, represents forceful yearning for humanism, set against the agonizing background of the Cultural Revolution. In the prologue, the author speaks of her two recent publications dealing with the theme of the human person. In both, she writes 'I loudly cry for the return of the Soul and happily record the resuscitation of the human nature'. The novel is available at http://www.mwjx.com/other/book/story/top100/076.rar/index.html

human rights,[24] or at least for a strengthening of socialist 'legality' as a kind of desirable normative structure beyond a purely instrumental tool of social control. The early, vague idea of legality became a precursor for later ideas of *yifa zhiguo* (rule by law) and *fazhi* (rule of law).

At any rate, a completely different era developed as the leaders were determined to first restore law and order and then try a new path of development. The surviving rightists were rehabilitated and a new constitution was promulgated. The practical end to class struggle as proclaimed in the Resolution of the third Plenum of the 11th Central Committee in 1978, and as reiterated in the new constitution promulgated in December of the same year, unexpectedly removed a major barrier to future development of human rights.[25] For the first time in Chinese history, the preface of this current constitution requires all political parties, thus including the Chinese Communist Party, to abide by constitutional norms in their activities. In reflection of the bitter lessons learned from the Cultural Revolution, the first Criminal Code was promulgated in 1979, and article #38 introduced in the 1982 constitution prescribes that 'the human dignity of citizens is inviolable and any humiliation, libel, false accusation or frame-up is prohibited'.[26] Finally, the Party-government adopted a new policy paradigm of reform and opening that would ultimately facilitate an empirical and pragmatic mode of policy-making, end China's self-isolation from the world and call for new ways to deal with Western countries. The resumption of diplo-

[24] Deng Pufang was a driving force behind the formation of the China Disabled Person's Federation. It aims among others to promote the 'legitimate rights' of the handicapped. The Federation does not use the words 'human rights' in its work and Deng Pufang preferred to call himself a humanitarian. In this case, it is the deeds that matter, not the words. He was awarded in 2003 the United Nations Human Rights Prize for his contribution to the human rights of the handicapped. On the occasion, he said in his speech the following: 'Human rights represent a holy and lofty pursuit. As I used to be subjected to the misery of being deprived of dignity and freedom, I deeply appreciate the true value of human dignity and freedom. I must also thank the arrangement of fate, which has enabled me to experience personally the challenges facing persons with disabilities and given me the opportunity to work unremittingly for the protection of their rights and the improvement of their status'. See http://www.cdpf.org.cn/old/english/top-3.htm.

[25] Ideology-based class struggle and power-based policy line struggle can be regarded as the two major barriers in the Chinese context.

[26] This innovative and extremely important provision is the result of bitter lessons learned from the Cultural Revolution when human dignity was blatantly violated. The 1982 constitution has a regrettable defect though, i.e. the removal of some important rights from previous constitutions, i.e. right to strike, right to move and right to residence.

matic relations between the U.S. and China on 1 January 1979 and the visit of Deng Xiaoping to the US ushered a new era in China's diplomacy, including human rights diplomacy.

All in all, on the eve of the 1980s, a relaxed environment was in place for an ideological and intellectual spring. A democracy movement surfaced in November 1978 and human rights became one of the popular ideas in big character pollsters and other writings in magazines. On 1 January 1979, China Human Rights League was established in Beijing and published a Chinese Declaration of Human Rights.[27] It contains no theoretical discussion about human rights but presents nineteen concrete demands or appeals. A more theoretical contribution is made by a radical human rights advocate in this period, Wei Jingsheng, who saw human rights as 'innate' and 'universal'. He argued that 'the moment one is born, one has the right to live and the right to fight for a better life' and asked 'on what basis can they (the socialist countries) say that the people are their own masters if universal equal human rights are absent?'[28] Such a view is significant in and of itself, but it is more significant that it comes from a self-learned worker. Advocates of human rights in the hundred flowers campaign were university students and intellectuals, the appearance of Wei in the 1980s suggests the spread of the human rights idea to a broader spectrum of Chinese society.

After the crackdown of the 1978 democracy movement, top leaders actually became open-minded to the issues of human rights. A landmark change was visible when on 6 June 1985, Deng Xiaoping said 'China ought to talk about human rights'. Deng's remark set the line for other leaders to take in the following years, such as praising the international human rights regime[29] or arguing that human rights are not a monopoly of capitalist countries.[30] Then in 1988, the Universal Declaration of Human Rights was signed to signal China's formal acceptance of the universality of human rights. China also became in the same year a party to the UN Convention

[27] English translation of the Declaration can be found in Angle & Svensson, *ibid*., 262-266.

[28] 'Human Rights, Equality, and Democracy', English translation available in Angle & Svensson, *ibid*., pp 253-261. See also James D. Seymour, ed., *The Fifth Modernization: China's Human Rights Movement, 1978-1979* Stanfordsville, N.Y.: Human Rights Publishing Group, 1980, pp. 141-46.

[29] See for example the speech by the Chinese Foreign Minister during the general debate at the 41st session of the United Nations General Assembly held in 1986.

[30] For instance, this was maintained by Premier Li Peng in his conversation with Soviet Union's General Secretary, Gorbachev on 16 May 1989.

against Torture, albeit with reservations with respect to Article 1 and Article 30, Section 1.

The positive new trend was disrupted in spring 1989. Hu Yaobang, former general secretary of the Party, died on 15 April. Spontaneous mourning activities by students on campuses in Beijing soon developed into escalating protests against bureaucrats' racketeering and corruption to be followed by demands for press freedom and democratic election of some leaders. In view of the rapid spread of the movement to other cities, moderate elements within the Party led by General Secretary Zhao Ziyang tried in vain to stabilize the increasing precarious situation through dialogues with students. The People's Daily published a verdict made by the conservatives within the leadership was published on 26 April as its editorial declared that the protests and demands amounted to an anti-revolutionary rebellion. This further agitated the students, leading to a hunger strike starting on 13 May and drawing widespread sympathy from all walks of life. As the movement turned more radical, the hardliners in the ruling camp become more resolute to resort to force. Zhao Ziyang had to step down on 17/18 May and the movement was suppressed by the army on 4 June. It is beyond doubt that there were violations of human rights during the violent suppression.

Particularity and prioritization of Human Rights: The 1990s

What happened on 4 June in Tiananmen, Beijing is indeed very sad. Apart from inexcusable violations of human rights, it shattered the leadership's confidence in carrying out political reforms without risking instability. The more liberal and balanced reform measures undertaken in the late 1980s gave way to the one-dimensional, economic reform only strategy. The breakdown of communism in Eastern Europe and the Soviet Union on the other hand further reinforced the Chinese leaders' acute sense of insecurity. While the policy paradigm of reform and opening was there to stay, the dual emphasis was on stability and economic development, as suggested by the slogans 'stability above all' and 'development is the sure way'. In this context, human rights paradoxically played a useful role in China's diplomacy vis-à-vis the West. To better equip itself for the task, the government actually encouraged scholars, through commissioned projects, to conduct more and better research on human rights. In addition, incremental reform of the legal system to match the goal of socialist legality – first set forth after the Cultural Revolution – continued

without disruption. Both trends had positive spillover effects on China's positions towards human rights in the years to come.

Official policy on human rights in the 1990s was marked by the publications of a series of nineteen white papers. They made clear that the Chinese government now appraised the Universal Declaration of Human Rights, recognized their implementation as the sublime goal of all peoples and nations, but argued for flexibility in the light of *guoqing*, i.e. particularities and prioritization. The latter involves an attitude against the integral promotion of every category of human rights. The question of indivisibility of rights and duties received only scant attention.

The first White Paper 'Human Rights in China' of 1 November 1991[31] set out the basic views of the government for the more specialized white papers in the coming years. The position was basically defensive, arguing that socialist China had achieved significant progress in many fields of human rights, with occasional attacks on inhuman practices of imperialist countries in China and on the Nationalist government of the Republican era. It was acknowledged that China had suffered from setbacks and there is still much room for improvement, due to China's status still as a developing country. The defense of being a developing country led to the advocacy of particularity and priority of human rights. On particularity it was argued that the evolution of the situation in regard to human rights everywhere is circumscribed by the historical, social, economic and cultural conditions of various nations. Since the issue of human rights falls by and large within the sovereignty of each country, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. On priorities among human rights, the Chinese government held it as a simple truth that, for any country, the right to subsistence is the most important of all human rights, without which the other rights are out of the question. The right to subsistence entails, as a precondition, a right to development,[32] 'since without national independence, there would be no guarantee for the people's

[31] An English translation is available at http://news.xinhuanet.com/ziliao/2003-01/20/content_697545.htm. An English excerpt is available in Angle & Svensson, *ibid.*, 355-36.

[32] The right to development has both individual and collective dimensions. It was argued that this is provided for in the Universal Declaration of Human Rights. The 1991 White Paper says that the Chinese government 'pays due attention to the protection and realization of the rights of the country, the various nationalities and private citizens to economic, cultural, social and political development'.

lives'. What does this right to development mean? Given the official argument that China already had gained independence in 1949 and by 1991 secured for the people basic conditions to eat their fill and dress warmly, the right to development could only mean something beyond the subsistence level, i.e. towards a *xiaokang*, i.e. well-off society and national strength. Otherwise, the already secured people's right to subsistence could still be threatened, it was argued. Thus, the utmost priority of all government work is to develop the national economy and only under this umbrella the right to subsistence enjoys the highest priority before all other human rights.

Such a basic position goes a long way to explain why the government did not take its 'responsibility to protect' seriously when it comes to civil and political rights. It becomes also understandable why it could accede to the International Convention on Social, Economic and Culture Rights, signed in 1997[33] but fail to ratify the International Convention on the International Convention on Civil and Political Rights, signed in 1998.[34] The plain reason is that the latter Convention can pose a threat to the Party's monopoly to rule and partially also the government's capability to steer economic development without checks and balances against misuse of power. In its efforts to promote legislation to back up its pledge on human rights, the government also privileged economic legislation over all others. The 1990s thus witnessed a bifurcated development whereby economic rights protection gradually converged with international standards while civil and political ones generally lagged far behind if not retrogressed from time to time.

One cannot help wonder whether the official pronouncement on respect for human rights amounts to no more than just a kind of human rights diplomacy in the service of the 'opening to the world' policy of economic development. It is partly true that the official positioning on the issues of human rights in the 1990s was grounded in an attempt to deal with critique from the West. One should however not miss another at least equally significant trend that ultimately contributed to progress in the protection of human rights. This is the construction of the legal system, especially in terms of legislation, which brought about improvements of statutory conditions for the protection of human rights. These conditions

[33] It was ratified in March 2001 with reservations on some rights, e.g. freedom of assembly and freedom to form (independent) trade unions.

[34] On occasion of the Olympic Games in Beijing in 2008, a public petition to urge the ratification of the Convention passed unheeded by the National People's Congress.

offered members of the public a persuasive tool to fight for their rights in later years. The trend had already started in 1979 and now gained momentum in the 1990s, especially in terms of securing the right to private property and other economic rights. This specific progress in the economic field was achieved through amendments made in 1988, 1993 and 1999 to the 1982 constitution and subsidiary legislations. In addition, the protection of civil and social rights benefited from four major legislations: state compensation law, criminal procedure law, administrative penalty law and criminal law. Rights recognized in constitutions and statutory laws are useless if a victim of rights violation has no access to judicial remedies including compensation. The first three laws provide such remedies. The State Compensation Law is most specific and direct among all three laws. It was promulgated in 1994 after five years of drafting and came into effect from 1 January 1995. It covers rights to personal integrity and freedom as well as property rights and compensation claims arising of their infringement by administrative units and their staff. The Criminal Procedure Law experienced important revisions in 1996 by strengthening the right to defense and introduced a new provision of 'no offence shall be established except by a verdict made by the court in accordance to the law'.[35] The Law Governing Administrative Penalty was promulgated in 1996 with a view to reigning in the arbitrary edicts produced by administrative organs that had often resulted in violations of rights. Article 9 clearly specifies that any coercive (administrative) measures that restrict personal freedoms may be enacted only by law. Besides, Articles 10 and 11 also stipulates that both national and local administrative regulations may determine penalties *except* those that restrict personal freedom. Important amendments were also made in 1997 to the 1979 Criminal Code. The overall objective is to align Chinese law with international standards. For instance, the principles of 'a legally prescribed punishment for each specified crime', 'suitable punishment for each crime' and 'criminal law equally applicable to everyone, public trials and statutory procedures' were adopted. The offence of counter-revolutionary activities was revised as that of 'threat to national security', with a reduction in its political elements. Other rights related to personal integrity were better specified.

These legislative advances are definitely not without defects. Moreover,

[35] However, Article 48 of the said law prescribes that 'anyone who are informed about the case is obliged to testify'. This provision violates the right to silence as specified in the Convention on Civil and Political Rights.

their implementation depends on the administrative authorities, who did not necessarily take human rights as an important consideration in their work. The judiciary which could serve as an independent guardian of access to human rights remedies was not yet up to its task. The 1990s continued to witness widespread violations of civil and political rights. The most alarming phenomenon of the decade was a dramatic increase in the use of death penalty, partly due to anti-crime campaigns. In its 1995 China Human Rights Fact Sheet, the Robert F. Kennedy Memorial Center for Human Rights reported that in 1993, 77% of all executions worldwide were carried out in China (1419 out of 2564 people sentenced). On a single day, 9 January 1993, 356 death sentences were handed down by Chinese courts; 62 executions took place that day.[36] All in all, it is fair to say that the human rights situation in the 1990s did experience steady progress in attitudinal, ideological, and legislative terms. The progress was crowned by adoption of the phrase 'respect for human rights' in the Party's report to the 15th Congress on 12 September 1997,[37] to be followed by a corresponding amendment to the Party Charter[38] passed at the 17th Congress on 25 October 2007. The latter is apparently not a step required by human rights diplomacy but took a decade after the 15th Congress to realize.

The Era of Rights in 2000s

The new millennium offers new hope for the advancement of human rights. It may become a period of real rights. The broader context was much more favourable than that in previous periods. Two decades of economic reforms had brought about remarkable material progress to the extent that people began to speak of 'peaceful rising up (of China)' and 'responsibility of a big state' in the world. As a result of the entry into the World Trade Organization on 10 December 2001, the government had to step up its legislative work to annul, revive or otherwise enact new economic laws and regulations in pertinent areas. This contributed to ongo-

[36] The full text of the Fact Sheet can be downloaded at http://www.christusrex.org/www1/sdc/hr_facts.html. in 2006; in 2006, the Supreme Court resumed power to review all death penalty verdicts and number of death executions has since declined.

[37] Full text available at http://rwxy.shfu.edu.cn/dangjianketi/shiwudabaogao/.

[38] Full text available at http://news.xinhuanet.com/newscenter/2007-10/25/content_6944081.htm.

ing convergence between Chinese and world legal standards, which in turn entailed further adaptation and restructuring of governmental functions vis-à-vis the Chinese economy and society. The whole context of economic liberalization lent support to the domestic pressure for developing constitutionalism whereby the government should first of all be held accountable to what it has already promised in the current constitution and laws. As a corollary, the government was urged to make further revisions to realize constitutionalism by removing factors that inhibit the enjoyment of citizen rights. The pressure for constitutionalism was helped by a growing maturity of legal studies and their authors during the previous decade, in terms of independence, critical capability, specialization and methodological sophistication and influence on government. Apart from this legal community, various human rights networks also gradually evolved in a society with a growing number of citizens becoming more rights conscious[39] and inclined to support collective actions to defend rights. One may even submit that since government had given up its totalitarian character, thereby opening up space for the civil society to grow, the development of human rights became a different game. Since the mid-2000s, the rights movement took off with promising results. Asking for reform towards constitutionalism constitutes a new strategy for the human rights activists. They now have endogenous tools to do their job while their predecessors had to rely on external resources.

The establishment of the Shanghai Cooperation Organization (SCO) in 2001 is a major event in China's proactive diplomacy to gain a say in world

[39] It is not easy to document the first emergence of rights consciousness among the general public. Rights consciousness can be detected from writings of the victimized rightists in late 1950s and political dissidents in the late 1970s and late 1980s. The same may be inferred from collective actions taken by workers and peasants in the early to mid-1990s. The language used was not rights as such in the beginning, but a sense of fairness, as depicted in *Qiu Ju Goes to Court*, a realist movie produced by Zhang Yimou in 1992. It is about a true story with some shots secretly filmed on the spot. It tells of a peasant woman persevering in securing a 'shuofa' (an explanation) from a local cadre for hurting her husband. In academic jargon, it means a demand for political answerability. Findings from a not-yet-published survey conducted in 2007 in four counties of China's countryside demonstrated a very high level of rights consciousness among present-day peasants. On the statement of 'human rights are inborn', 16% answered 'very much agreed' and 64% 'agreed', as compared with 19% who disagreed or very much disagreed. [The rest are missing value. Sample size=1600.] On another question about the ground for inborn rights 'Without human rights, peasants have no human dignity', the corresponding figures are 3%, 14%, 68%, 15%, respectively [without missing value due to round-up].

affairs. On 7 June the following year, a declaration of the heads of its member states had the following to tell the world:

> The Shanghai Cooperation Organization member states, undertaking to act in accordance with the principles of the United Nations Charter, reaffirm the universality, indivisibility, interdependence and interrelationship of all human rights, as well as their obligations to observe human rights and basic freedoms, regard peace and development as the main guarantee of the promotion and defense of human rights and come out against the use of 'double standards' in questions of human rights and interference in the internal affairs of other states under the pretext of defending them.[40]

This is the first time when China unambiguously affirmed in an official document the indivisibility and interdependence of all human rights and the state's responsibility to protect human rights. However, such an affirmation was meant for an overseas audience only, because in the official Chinese translation, the whole paragraph was deleted.[41] To say the least, the Chinese government still maintained an ambivalent attitude towards the principles of indivisibility and interdependence.

Another probably more practical development towards constitutionalism happened in March 2004 when an amendment bill to add 'the state respects and safeguards human rights' to the 1982 constitution was adopted by the National People's Congress. The state's responsibility to protect human rights was thus elevated from a political concept to be a constitutional principle for the first time in Chinese history. Should this be charged as purely symbolic or human rights diplomacy again, the government was quick to add on 16 March 2006, for the first time in the Republic's history, into its 11th Five-Year Outline Plan on National Economy and Social Development[42] the item 'Respect and safeguard human rights and to promote the comprehensive development in the work of human rights' under Chapter 43, Section 1. In the same vein, it was declared that human development (*yiren weiben*) is the basic objective of

[40] An official translation from Russian at http://www.shaps.hawaii.edu/fp/russia/sco_20020610_4.html.

[41] See http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/world/2003-05/30/content_893213.htm.

[42] Full Chinese text downloadable at http://news.xinhuanet.com/misc/2006-03/16/content_4309517.htm.

economic development.[43] It turned out that among the 22 planning targets, those concerning economic growth and structure amounted to 2 and 4 respectively, while the rest went to cultural, social and environmental issues.

Surely, just a human rights agenda item does not mean much in reality. In April, 2009 the government published a two-year National Human Rights Action Plan of China.[44] In terms of basic principles, the action plan vows 'to improve laws and regulations for the protection of human rights and to promote *balanced* [italics mine] development of economic, social and cultural rights as well as civil and political rights, in adherence to the principles of interdependency and indivisibility of human rights'. The vow echoed China's commitment expressed by its signature to the Moscow Declaration of SCO Heads in 2001 and together meant a significant break from the previous decade when universality of human rights is acknowledged but not interdependency. Yet, this apparent breakthrough turns out to be a lip service because the third principle of the Action Plan emphasizes a kind of *xianshi* ('realism' as an approximate translation) – or sensitivity to basic realities – according to which human rights development must be based, thus harking back to the old theme of particularity of human rights. Besides, the Introduction to the Plan repeats the old theme of rights priorities that 'as a developing country with a population of 1.3 billion, China must give priority to the protection of the people's rights to subsistence and development'. The theme was reiterated by Mr. Wang Chen, Director of Government Information Office of the State Council in the press conference on the Action Plan. These contradictory statements in a single official document, which may reflect the lack of consensus on the human rights issues among the authorities, are most regrettable. They serve to neutralize those positive points in the Action Plan such as benchmarks with deadlines for specific rights and concrete measures to discourage torture during

[43] More than two years before the submission of the Outline Plan, government-sponsored development research projects had already began to employ the United Nations Human Development Index as a reference for planning activities instead of just gross national product and its growth rate.

[44] English text available at http://news.xinhuanet.com/english/2009-04/13/content_1117 7126.htm. The United Nation had in fact repeatedly urged the Chinese government to work out an action plan on human rights. Preparation was started in 2008 and the forthcoming Action Plan was announced in November. Some commentators took issue of the timing as to meet the challenges of the periodic review of human rights by the UN Council on Human Rights scheduled for Spring 2009 when China's record would be examined. Others also suspected that the 20th anniversary of the June 4 incident might also play a role.

interrogation. The contradictions also alert readers to significant omissions in the plan like the fate of the notorious system of administrative detention without trial, including 're-education through labour'.[45]

The changing political and legal environment was accompanied by a further growth of the civil society and of rights consciousness among the public. A prominent case of what is called the *weiquan* (rights protection) movement happened in 2003 when Sun Zhigang, a university graduate and fashion designer who went to Guangzhou to seek work, was detained and beaten to death while in custody. He was a fatal victim of the 'custody and repatriation' regulation under the *hukou* (household registration and residency or temporary residency permit) system originally designed to control rural migration into urban areas. Such a system amounts to an enforced apartheid structure that together with differential social and other policies had rendered the peasants – the majority of the Chinese population – second class citizens. Migrants without a temporary residency permit are liable to detention and repatriation. Sun had not applied for one and forgot to bring his national personal identity card. His death drew a public outcry in the mass media against police brutality. An upsurge of emails and SMS calls for the government to remedy the wrong quickly developed across the country. Legal scholars wrote to the National People's Congress questioning the constitutionality of the regulation concerned. The administrative punishment of custody and repatriation obviously violates Article 10 and 11 of the Law Governing Administrative Penalty. A few months later, the government announced the replacement of the said regulation with 'Measures for Assisting Vagrants and Beggars with No Means of Support in Cities' that came into effect on 1 August 2003. Sun's father received from the government a cash settlement and local government officials involved either directly or as accessories in Sun's 'murder' were sentenced. The Sun Zhigang case is extremely significant in terms of bringing the efficacy of a civil society to light, especially, the roles of critical press, the courageous network of legal scholars and workers, and last but not least interested and energetic netizens.

There was another prominent case in the same year but of a different nature. About a thousand small private oil field enterprises with over sixty

[45] In 2005, the government was planning legislation on criminal rehabilitation in replacement of the re-education through labour system. The initiative was allegedly resisted by the security authorities. It is unknown whether the same subject had been discussed during the drafting of the 2009 Action Plan.

thousand investors in Northern Shanxi, which had been established in response to earlier official calls for oil field development, were nationalized with zero to inadequate compensation. The case was widely reported in the mass media and attracted support from legal scholars and 'rights protection' lawyers. Unlike the Sun's case where torture was committed by a local authority, higher level authorities had been implicated in the case at various stages. A protracted struggle between the government and the affected investors ensued. The latter's application to sue for damage was rejected twice by the high court of the province concerned. The leader and other organizers of the protest actions were later charged and sentenced to two to three years of imprisonment for an offence of mobilizing masses to disrupt social order.

Incessant collective actions of workers and peasants since the early 1990s have presented the regime much greater pressures for change than the above two isolated cases. Apart from a rapid growth in number,[46] these actions have matured in strategy and organization. In the new millennium, *yifa weiquan* ('rights protection through the law') has become the mainstream of collective actions of grassroots people, especially the peasants in China.[47] It has become a citizen rights movement. The new political leadership has so far shown respect for the peasants' rights movement by introducing in recent years new policies to improve the peasants' odds in the countryside and alleviate the plight of migrant workers in the cities. These include a promise in the afore-mentioned Action Plan to extend to the countryside policies that so far have mainly benefited cities. Policies aimed at reforming the apartheid-like *hukou* (registration and residence) system have yet to be institutionalized, reforms that would protect peasantss right to move, to reside and work wherever they want.[48] Without reforming the *hukou* system, peasants will remain second-class citizens at best.

[46] It is estimated that in 1993 the number of cases is about 8709. It is increased by three folds to 32,000 in 1999 and to over 40,000 per year sine 2002.

[47] Earlier phases were characterized by peaceful petition and lawful resistance respectively.

[48] Two new laws coming into effect from 1 January 2008, if faithfully implemented, were designed to considerably alleviate the plight of all workers in general and rural migrant workers and other vulnerable groups in particular. The Labour Contract Law enshrines the principle of fairness for contract and the Law on Employment Promotion stipulates the principle of non-discrimination and specifically prescribes equal employment opportunity and fair employment terms for all.

Conclusion

This year is the 60th anniversary of the People's Republic of China. Its record of human rights registers a remarkable change from a flat rejection of human rights in both words and deeds in the first thirty years to an evolving acceptance in theory and underperformance in practice since 1978. The rejection was grounded on a Marxist theory of class struggle, anti-imperialist and nationalist ideologies, as well as the perceived need to consolidate political power and construct a socialist utopia. It took thirty years for leaders committed to the 'general policy line of reform and opening' to first entertain the idea and language of human rights, before embracing human rights in the name of diplomacy and governance, and then finally, to accepting universality of human rights with more and less qualifications. Ever since 1991, acceptance has become firmer with respect to the ideas of universality and indivisibility, although in the latter case, the language is often times of 'unity between rights and duties'. When it comes to interdependence of human rights, the official acceptance is still a bit ambiguous, since recent policy documents contain a formal acknowledgement of interdependence, while highlighting the priority of some rights over others. Of course, what matters ultimately is not just ambiguous word, but practice, in which interdependence has not been honoured. The development of civil and political rights has lagged far behind that of social and economic rights.

The trajectory of changes in the human rights situation is embedded in China's political development. To begin with, flat denial of human rights was offered by a totalitarian regime poised to subjugate any person who disagreed with its goal of socialist construction or its means of ruthless mobilization. Today's China is an authoritarian regime with a human face. The ideology of class struggle has given way to a language of *hexie shehui* (harmonious society) and *kexue fazhan guan* (theory of scientific development). After all, how can Chinese people still be differentiated in terms of Marxist class analysis after the successful completion of the Communist revolution and elimination of classes? With the end of class politics and the erosion of ideology, an era of citizenship politics based on the principle of equality has dawned.

To the extent that agency matters more than structure, leadership change should play an important role in the development of human rights in China. There are marked differences between the pre-1978 leaders and the new generation of today. In the first thirty years, the Republic was ruled by fervent revolutionaries with ideologically motivated policies. Their place

is now taken over by pragmatic technocrats who follow an empirical approach to policy-making. There is no hard evidence on the difference between these two groups of leaders with regard to human dignity. With a risk of exaggeration, we can observe a huge contrast between the supreme leader Mao Zedong who boosted, in the 1950s, of China's affordability to lose human lives in a nuclear war given its huge population and Premier Wen Jiabao who instructed, on 14 May 2008, the Sichuan earthquake rescue team in Beichuan that 'the highest priority was to save lives and any trapped victim with a dim of hope must be rescued with hundredfold efforts'. Or, just compare the two following scenes to get the huge sea change. In the 1950s' propaganda materials, human lives belonged to the nation and can be sacrificed for the sake of great projects such as the Great Leap Forward campaign. On 30th May last year, an earthquake fundraising soiree was organized by the Sichuan Television in Chengdu with singers from all parts of Greater China. The banner for the event exhibited the theme 'In the name of life' and the group song was 'Prayer'.[49]

In the old days when almost all livelihood resources were centralized in the Party-state and human life from the cradle to the grave was subjected to arbitrary intervention by the all-powerful government, domestic opposition to rights violations was fatally hazardous. Courageous dissident intellectuals in the 1950s paid with their lives for speaking the truth. State-society relations started to change after the strategic policy of reform and opening in 1978. The results are on-going processes of redefinition of the role of the state, cautious restoration of the market and spectacular growth in the economy and concomitantly in individual wealth, thereby enhancing the citizens' capability to political participation. Society is growing stronger while the state is losing its traditional power of control. More importantly, the people are rapidly awakening to their rights entitlement and are increasingly less tolerable of rights violations. They are readier to respond by pressuring the government through various kinds of private or collective actions. In this context, workers and peasants are becoming a driving force for better protection of citizen or human rights.[50] In both ideological and

[49] See http://blog.sina.com.cn/s/blog_4e8bca310100accr.html.

[50] It is not meant here to belittle the valuable efforts of the intelligentsia and political dissidents who have played and will continue to play an important role in the promotion of human rights. For instance, the *lingba xianzhang* (Charter 08) campaign towards the end of 2008 on occasion of the 60th anniversary of the Universal Declaration of Human

practical terms, the state has to adapt with bold reforms in human rights to survive and proper further.

All in all, the domestic landscape has become much more favourable for the development of human rights. The same may be true too for the external environment of China. The phase of flat denial of human rights fell in the context of the Cold War when China's memory of humiliations by the West still remained fresh and leaders were suspicious of human rights as a self-serving tool of imperialist countries. Chinese leaders' sense of insecurity was constantly renewed by the Korean War in early 1950s, the Taiwan Straits crisis in late 1950s, Sino-Soviet split in early 1960s and the collapse of the Soviet bloc in late 1980s. In contrast, the post-cold war world is welcoming China's integration into the global economic system and increasingly expecting China to play a greater role in many global issues. Since 1996, Western powers have been able to supplement condemnation of rights violations with dialogue and partnership programmes, thereby enabling closer engagement and practical cooperation projects on human rights. This changing context carries intriguing implications for the prospect for human rights development. The baseline is however that China's own desire to integrate and interact with the West has so far remained one driving force for human rights-focused reform. With growing self-confidence in rising to greater power status, China may learn to become a responsible member by making contributions to the global normative framework. After all, there is also mounting social pressure at home, especially from workers and peasants, on the state to take seriously its responsibility to protect the human person.

To wrap up the Chinese government's record of human rights, we note good progress at the conceptual and epistemological levels but sluggish improvement in deeds.[51] Reformist practice is most noticeable in terms of social and economic rights but remains very poor in the area of civil and political rights. On the other hand, it is gratifying to learn that civil society is playing an increasingly more active role in promoting and safeguarding human rights. The prospect is therefore still optimistic.

Rights and the 10th anniversary of China's signature has attracted widespread support from the said groups of persons. See text at http://www.chinainperspective.net/ArtShow.aspx?AID=92.

[51] One can argue that the decreasing scale of rights violations is significant. The large scale of violations during the various political campaigns in the 1950s and 1960s and the Cultural Revolution no longer repeats itself.

Poverty reduction – or, in the eyes of the rulers, the right to subsistence, is an area where China has done best. According to the World Bank, China is responsible for 75% of poverty reduction in the developing world from early 1980s to early 2000s, having lifted more than 400 million people above US$1 a day poverty levels in that time.[52] On the other hand, much more remains to be done with respect to old and new problems, for example, rising inequalities across regions and social strata as well as to the lack of social security for the disadvantaged.

Government authorities should apply the same vigor in social-economic rights protection to the civil and political areas. Outstanding measures abound in the fields of legislation, institution-building and policy development. It is imperative to accelerate the legislative work of improving criminal justice by adopting presumption of innocence, offering right to silence, and establishing inadmissibility of evidence extracted by forced confession, and by securing for defense lawyers a role equal to the prosecutors in the litigation process. In terms of institution building, nothing is more important than the development of an independent and impartial court system. With regard to policy development, the National Human Rights Action Plan is a good start but too timid. With regard to practice, there is still a long way to go, as attested to by a recent event. On 23 June this year, a Tiananmen veteran and leading dissident writer, Liu Xiaobo[53] was formally charged for subversion of the state regime. Liu was previously detained, a few hours before the release on 8 December 2008 of the 'Charter 08', of which he was a key drafter and organizer. It was intended for online co-signature to mark the 60th anniversary of the Universal Declaration of Human Rights. The Charter, originally signed by 303 persons – including academics, intellectuals and ordinary people from other walks of life – proposed 19 measures to improve human rights in China, including freedom of speech and association, an independent legal system and free elections. While the name Charter 08 and the call for an end to party-rule might have agitated the top leadership,[54] Liu's arrest without a decent warrant and the formal charge with-

[52] See http://www.finfacts.com/irelandbusinessnews/publish/article_10003611.shtml and the updated research report by World Bank downloadable at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2008/08/26/000158349_20080826113239/Rendered/INDEX/WPS4703.txt.

[53] For a brief introduction of Mr. Liu, please consult http://en.wikipedia.org/wiki/Liu_Xiaobo.

[54] It may be conjectured that the name 'Charter 08' models after the 'Charter 77' circulated in Czechoslovakia in January 1977. It is later regarded as the first of similar move-

out prima facie evidence suffice to make the government's Action Plan a mockery. While it is sad that the government has not taken rights seriously, the signatories[55] of the Charter are brave citizens who, in defense of a good cause for humanity, risk a lot like career and personal freedom.

Where there is a will, there is hope. With more citizens now having the will to defend human rights, China is more hopeful.

ments that contributed to the breakdown of the authoritarian regimes in Eastern Europe and the Balkan. Such political transitions are called colour revolutions of which the key characteristic is non-violence. The Communist regime has been apprehensive of the risk of a colour revolution in China for years. Back in 2005, General Secretary Hu Jintao made an important political report to the Politburo of the Party in which he urged for persistent vigilance against such a revolution.

[55] Up to April 2009, the number of signatories to the Charter 08 has increased to over 8,000, as reported by Mr. Tian Ye of Voice of America. The report is available at http://www.voanews.com/Chinese/archive/ Click the calendar for first quarter of April 2009, move to 3 April and open the file 'lingba xianzhang qianshuzhe zao daya dan bu fangqi (Charter 08 signatories are suppressed but won't give up)'.

ATTACKING POVERTY: WHAT IS THE VALUE ADDED OF A HUMAN RIGHTS APPROACH?

RAVI KANBUR*

In two interesting papers on Human Rights and Extreme Poverty,[1] Arjun Sengupta develops an argument for viewing extreme poverty as a violation of human rights. His discussion contributes to the broader discourse on whether and how economic and social rights can be integrated into the human rights agenda, and what benefits such integration might bring.

In these notes I would like to approach the question posed in the title, and in the literature, from a purely consequentialist perspective. In other words, I want to ask, would treating extreme poverty as a violation of human rights actually lead to a reduction in poverty, or at least lead to the conditions which would in turn lead to a reduction in poverty? This is not to minimize or deny the importance of deontological arguments and intuitions in the great debates on human rights, and the relevance of criteria other than simple outcomes for evaluating policy proposals.[2] Rather, I think the consequentialist strand of argument exposes a number of issues that any discussion of poverty and human rights will have to take account of. At any rate, it is a route worth exploring, and one that is indeed explored in the debate.

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[1] UN Commission on Human Rights, E/CN.4/2006/43, March 2, 2006; and E/CN.4/2005/49, February 11, 2005.

[2] For example, Amartya Sen, 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs*, Volume 32, No. 4, 2004.

In the discourse on poverty eradication, it is often argued that 'we know what to do – what is lacking is political will'. It is in the latter dimension that the rights based approach is meant to contribute. This point is made strongly by Sengupta:

> It would be difficult to argue that poverty alleviaton programs have not worked because appropriate programmes cannot be designed or are not technically feasible...The only reason why such programmes have not been adopted is that countries have shown no political will to adopt them or have not accepted their 'obligations' that would follow from their legal recognition of the relevant human rights.[3]

While I agree in essence that the most important missing element is 'political will', I think we need to appreciate just how much debate still survives in the development discourse on the best (or only) methods for poverty reduction. In my paper, 'Economic Policy, Distribution and Poverty: the Nature of Disagreements', I set out to try and understand the sometimes virulent disagreements among people who all claim to have the interests of the poor at heart.[4] I highlighted the competing perspectives that still remain unresolved and are the subject of lively debate. Even when there is a shared perspective, there are many narrowly technical aspects of empirical assessment that remain subjects of dispute and disagreement.[5] Sometimes, even the basic facts are in dispute.[6]

Having made this point about the uncertainties in development strategy and in the evaluation of specific interventions, I will turn to my main focus – the difficulty of achieving change even when there is professional agreement that a move in that direction will in fact reduce poverty. It is common practice to say that this is because the political interests of the rich, who control the policy processes, do not allow changes that benefit the poor but hurt the rich. Before taking this point head on, however, I need to make another point. The dirty little secret of policy reform and development interventions is that, for many instruments, certainly for those that

[3] UN Commission on Human Rights, E/CN.4/2006/43, March 2, 2006, p 14.

[4] Ravi Kanbur, 'Economic Policy, Distribution and Poverty: the Nature of Disagreements', *World Development*, Vol. 29, No. 6, 2001, pp 1083-1094. http://www.people.cornell.edu/pages/sk145/papers/Disagreements.pdf

[5] Examples are the impact of lower tariffs on growth, the effects of aid on growth and poverty, the effects of water privatization on the poor, the extent to which health and education should be privatized, etc.

[6] For example, how much poverty has changed in India, or in the world.

operate at a high level of aggregation (like macroeconomic policy or broad budgetary instruments), there is not only a conflict between rich and poor, but *among* the poor themselves. Thus, for example, while devaluation benefits the poor in the exporting and import-competing sectors, it hurts the poor in the non-tradable sector. The fact that overall poverty may fall (because the incidence of poverty is higher in the export sector, say), this fall is a weighted sum of an increase and a decrease, and it is cold comfort to those whose poverty has actually gone up.[7] There are a multitude of such examples. It is not at all clear how the rights based approach to poverty reduction would deal with such cases. If the operation of an instrument raises poverty for some but decreases it for others, should it be applied, or not? I leave this is as an important issue for future debate and discourse.

So we come finally to the point that, in situations where the operation of instruments, interventions and policies that would reduce poverty is opposed by the rich because it would make them worse off, the adoption of (extreme) poverty as a denial or violation of a human right would somehow help to overcome this resistance. This would be the consequentialist argument for integration of poverty into the human rights agenda. How is this supposed to work? Presumably there are two channels: Firstly, the integration should increase the cost to the rich and powerful of resisting the interventions that reduce poverty. Secondly, the integration should make the rich and powerful want poverty reduction more, or want the presence of poverty less. In economic terms, while the second works through a change in preferences of the rich, the first works through a change in their opportunity sets. Let us take each of these channels in turn.

Begin by taking a polity as homogeneous, or at least to have resolved its internal conflicts as it decides to sign an international convention and then give that convention a legal form. Since, presumably, the polity can do what is required in the convention without having signed it, then why sign the convention? The benefits of signing may be some financial or other assistance that comes with the signing. But, perhaps equally important is the benefit of not being a country that has not signed a convention that others have signed – the peer group effect. If this were all, then every country would sign. But there is more. There is a cost to signing, because while

[7] These points are developed further in my paper, 'Pareto's Revenge', *Journal of Social and Economic Development*, Vol. 7, No. 1, January-June, 2005, pp 1-11. http://www.arts.cornell.edu/poverty/kanbur/ParRev.pdf

there is indeed a cost to not signing because of peer pressure, the cost of signing but not implementing when others are doing so is also present, and possibly higher – again because of peer group pressure. On this view of the calculus of a polity committing itself to an international convention, there is clearly a value added to poverty reduction of having a convention for countries to sign and implement, that value added being increased the greater is the importance of peer group effects, and the stronger and more aggressive are the monitoring and 'naming and shaming' provisions among those who have signed the convention. The latter may deter some from signing for any given strength of peer group influences, but among those who sign, they will encourage greater compliance.

Nancy Chau and I have tested the above conceptual argument against actual data for the adoption of ILO Conventions.[8] It is sometimes argued that these conventions have 'no teeth', and the whole mechanism is a waste of time and resources. Applying the above model of rational choice to adopting or not adopting a convention, we argued that if there were really no genuine costs and benefits to adopting ('no teeth'), then the *pattern of adoption* should be random, not systematically related to factors that might reasonably be thought to explain such costs and benefits. Using appropriate time series analysis, and attempting to characterize the probability of adopting[9] at a particular time, conditional on not having adopted up to that time, we find that these estimated probabilities are not at all random. Most importantly, the probability of a country adopting a convention depends crucially upon how many other countries in its peer group, variously defined, have also adopted that convention. We also argue, on the basis of evidence for a smaller number of countries, that adoption actually increases the costs of non-compliance. We interpret this as evidence in favor of the effectiveness of the general method of establishing international norms and standards and campaigns to get countries to sign them.

So much for a model of the polity as a unified entity. But, of course, we need to unpack this, and look at processes within a country and how inte-

[8] 'The Adoption of International Labor Standards: Who, When and Why', (with N. Chau), *Brookings Trade Forum*, Brookings, Washington, D.C., 2002. http://www.arts.cornell.edu/poverty/kanbur/ckbrookings07-03.pdf

[9] Note that there is a difference between signing a convention and adopting one – the latter is a stronger provision, requiring the incorporation of the convention into the legal framework of the country. In what follows, however, we will use the two terms interchangeably.

gration of poverty into the human rights agenda would play out in this context. A closely related question that might help us along is the following: what is the value added of a country passing a law on some aspect of poverty reduction, as opposed to simply having poverty reduction schemes? A specific case in point is India's National Rural Employment Guarantee Act (NREGA) of 2005. The elections of 2004 brought to power a coalition, the leading party of which (the Congress party) won a sharp increase in its seats by pitting the slogan 'The Common Man' against the Bharatiya Janata Party's slogan, 'India Shining'. The Congress-led ruling coalition that emerged developed a Common Minimum Programme (CMP) as the policy basis of the coalition, and the NREGA, which was in the Congress platform, was an important plank of the CMP.

The specific details of the NREGA have been discussed by myself, Arnab Basu, and Nancy Chau in two papers.[10] The key general point for the discussion in this note is, why pass a law? India has had employment guarantee *schemes* for a long time. Passing a law makes the proposed intervention 'justiciable'. No government likes to be taken to the Supreme Court, and it is this cost that is being used as the key element of the 'commitment technology'. Notice, however, that in this case the passage of the law, while important in ensuring the implementation of the CMP, is a *reflection* of the balance of power in favor of poverty reduction. It is not a *cause* of the shift in power between those who would support and those who would oppose employment interventions of this type as a poverty reduction device. The insight here is that the possibility of signing a law, of adopting a convention, offers a commitment device to implement a shift in balance of power in the polity in favor of poverty reduction schemes, even if the law or convention is not itself the cause of the shift in power.

Finally, let us now turn to the argument that integration of poverty into the human rights agenda should make the rich and powerful want poverty reduction more, or want the presence of poverty less. In other words, integration might induce a change in preferences. We have already touched

[10] Arnab Basu, Nancy Chau and Ravi Kanbur, 'The National Rural Employment Guarantee Act of India, 2005', in K. Basu (ed.), *The Oxford Companion to Economics in India*, Oxford University Press, 2007. http://www.arts.cornell.edu/poverty/kanbur/EGAOxfordCompanion.pdf; and Arnab Basu, Nancy Chau and Ravi Kanbur, 'A Theory of Employment Guarantees: Contestability, Credibility and Distributional Concerns', *Journal of Public Economics*, 2009. http://www.arts.cornell.edu/poverty/kanbur/BasuChauKanburEmploymentGuarantees.pdf

upon preferences indirectly, when we argued above that the presence of a convention without signing it might make a polity feel peer pressure. But might the presence of the convention in and of itself change preferences? I suppose there is an argument to be made here in terms of how the convention might bring forward the better angels in those among the rich and powerful previously opposed to poverty reduction because of self interest. The process itself reveals realities of poverty that might shock some into changing their views. I feel this is perhaps a weak reed to lean the whole argument on. Rather, I would argue as follows, taking the lead from the discussion of the NREGA above, transposed to the global human rights context. The process of integration of poverty into the human rights agenda, if it succeeds, will alter the costs and benefits of implementing interventions that reduce poverty. This will happen not only because of peer pressure, but because the signing of the convention will reflect the shift in the balance of power that brought it about. However, to the extent that there are those whose preferences on particular issues are determined by how many others they perceive to think in a particular way, every signing of a convention, or every passage of a law, provides a signal, however weak, that the balance of opinion is shifting. This could lead the waverers at the margin to shift, strengthening the movement for poverty reduction even further.

The above sheaf of consequentialist argument does establish, in my view, the case for advancing the integration of extreme poverty into the human rights agenda. While the debate has focused on this issue (and the deontological arguments), to my mind the difficult (or equally difficult) issues are those that this literature seems to take as granted, as reflected somewhat in Arjun Sengupta's papers. First, do we really know what sorts of policies and interventions work for poverty reduction? Are there no more technical/professional disagreements? Second, can we talk of 'extreme poverty' in aggregated fashion, thereby sidestepping the difficult issues of what happens, as is the case in almost every intervention of significant scale, when some poor are made worse off as the price of making others better off? Whose human rights count then?

HUMAN RIGHTS AND ECONOMIC DEVELOPMENT

PARTHA DASGUPTA

In their interesting contributions to this year's Plenary, Professors Kuan Hsin-chi and Ravi Kanbur have brought contrasting perspectives to the place of human rights in economic development (Hsin-chi, 2009; Kanbur, 2009). In many ways their perspectives reflect the contrasting experiences during the past six decades of people in China and India, respectively. Kanbur gives qualified support for a suggestion that extreme poverty should be classified as a violation of human rights. He thinks that if that were done, it would oblige governments to give more attention to poverty eradication because of their signed commitment to the United Nations' Human Rights Charter.

Hsin-chi in contrast offers an account of the idea of human *worth* as it was understood in classical China and uncovers the process by which civil society in China was weakened by the State following the Maoist revolution. He notes that in the Constitution enacted in 1954, the idea of *citizens'* rights was given shape in the form of a catalogue of civil, political and socio-economic rights for citizens. Hsin-chi then points to the re-emergence of civil society in recent years and is guardedly optimistic about the future of human rights in China. If Kanbur supports re-branding extreme poverty as a violation of human rights, Hsin-chi focuses on the place of civil and political liberties in the realm of human rights and locates them at the very centre of that realm.

I agree with Professor Hsin-chi that it's correct to keep civil and political rights separate from socio-economic rights. Food and water, health-care, clothing, and shelter are fundamental human *needs*. There are serious conceptual as well as tactical problems with re-branding an access to those human goods as human 'rights'. Below I try to explain why.

1. Positive and Negative Rights[1]

Fried (1978) classified *rights* in a binary way. We are to think of *positive* rights as a claim *to* something, a share of material goods or some particular commodity, such as education when young and medical attention when in need. It is to the satisfaction of such needs that we have positive rights, and Fried derived them from the primary morality of respecting the integrity of persons as free, rational, but incorporated beings. A *negative* right, on the other hand, is a right that something *not* be done to one, that some particular imposition be withheld. It is a right not to be wronged intentionally in some specified way. This too is derived from the primary morality alluded to above.

Fried observed that positive rights are asserted to scarce goods and that scarcity implies a limit to their claim. He also suggested that negative rights, for example the right not to be interfered with in forbidden ways, do not to have such natural limitations. ('If I am let alone, the commodity I obtain does not appear of its nature to be a scarce or limited one. How can we run out of people not harming each other, not lying to each other, leaving each other alone?' Fried, 1978: 110.) This is not to say that protection against unauthorized violence doesn't involve material resources. But then the claim to protection from, say, the government against such violence is a positive right, not a negative one.

Fried's distinction is important. The seeming asymmetry in resource costs may even explain the powerful hold negative rights have on our moral sensibilities. It is always feasible to honour negative rights (there are no direct resource costs, remember), but it may not be feasible to honour positive ones: the economy may simply not have sufficient resources to enable all to enjoy adequate nutrition. It is then possible to entertain the idea that negative rights are inviolable, in a way that positive rights are not. For how can a right be inviolable if it is not always possible to protect it?

The asymmetry between positive and negative rights also offers an explanation for why we regard all persons to have *equal* negative rights, even while we eschew the idea of full equality in the distribution of goods to which we have positive rights. Negative rights don't have to be created, they have only to be protected. In contrast, positive rights are produced goods, and in deliberating their distribution we have to care about differences in individual talents *to* produce, we have to worry about incentives

[1] Parts of this section have been taken from Dasgupta (2007a).

and the concomitant notion of obligations (to honour agreements, not behave opportunistically, and so forth), we have to worry about needs, as well as the related matter of deserts. The realization of positive rights involves a resource allocation problem, with all its attendant difficulties. This observation alone tells us to be wary of associating human rights to every human good we happen to identify. Food and water, health-care, clothing, and shelter are *vital human needs*. One cannot survive without them. But one can survive without political freedom. That alone suggests that needs (even the deepest of human needs) and rights do not point to the same set of human goods. I conclude that it is as well to regard political and civil liberties, on the one hand, and economic development, on the other, as separate types of human goods.

The domain of rights has expanded continuously since the United Nations made their Universal Declaration of Human Rights. That may not be unrelated to the fact that the majority of the world's poorest countries have been violating their citizen's *civil* rights with vengeance. As Professor Hsin-chi reminds us, the concept of 'rights' was developed only some 350 years ago in connection with the rights of citizens against the State. Since then the word has become so elastic that it is used today not only in connection with such goods as 'freedom of expression', but also to a '35-hour working week'. That creates obvious problems, because it shades differences between (i) the right to speak freely, (ii) rights based on deep human needs, and (iii) rights that have a purely instrumental value. If all human goods are made into rights, the term loses its force and urgency and is unable to do much for us. Societies inevitably face trade-offs between the human goods we care about and want to protect and promote. We do not have to follow Dworkin (1984) into believing that rights trump all other human goods, but we should applaud him for explaining why civil and political rights matter and why we should expect trade-offs among the multitude of human goods.

It can be predicted with confidence that extreme poverty in the world's poorest nations will not be eradicated in the foreseeable future. Governments will claim (many with justification) that their tax bases are too weak for them to be able to do so. Now suppose the United Nations follow Kanbur by regarding extreme poverty as a violation of human rights. Observing that one kind of human rights can be violated with impunity, governments in poor countries could be tempted even more to violate all others by mixing the entire range of human goods in a common package of 'rights'. So I reach a conclusion that is opposite to Professor Kanbur's: there are tactical

reasons (not just ethical reasons) why it would be as well not to regard extreme poverty as a violation of human rights. Human needs for the material means of survival don't gain any further urgency by the re-assignment Kanbur advocates.

2. Political and Civil liberties and Economic Development

Political and civil liberties and economic development are human goods; which is why they are valuable. But are they compatible when countries are poor, or are we faced with trade-offs among them?

You should know that until the early 1990s political and civil liberties sat uneasily in development discourses. Historians of economic thought will not look kindly at professional development economists for that neglect. All sorts of ghastly regimes ruled in sub-Saharan Africa throughout the 1960s-80s, but the only ones development experts denounced were South Africa and Zimbabwe. Textbooks had nothing to say about political and civil liberties. 'Food before Freedom' was a frequent slogan. Given that it *was* a slogan, it must have been taken for granted that there is conflict between freedom and economic development. The latter was taken to mean increases in material well-being (access to food and water, health-care, clothing, and shelter) – crudely speaking GNP. That citizens of many poor countries were ruled by corrupt and predatory governments or suffered under uncivic culture were not of concern.[2]

It is possible that differences in the development experiences of people in China and India had a lot to do with the viewpoint I have just recalled. In view of their sheer sizes, those two countries can't but dazzle the intellectual eye. In the accompanying table I have summarized contemporary figures for economic performance and political and civil liberties in China and India. The table suggests that societies, at least when they are materially poor, face a cruel choice between economic development on the one hand and political and civil liberties on the other. The last two rows, containing figures for the two types of liberties in the mid-1990s, are taken

[2] There were outstanding development economists who pointed to the denial of civil liberties in most parts of the poor world, prominent among them being Bauer (1971, 1984). But he was very much an outsider in what may be called, 'official development economics'.

from Freedom House, an organization that publishes such figures annually. Those who are unfamiliar with Freedom House indices, should know that the higher the number awarded to the practice of a given liberty, the worse it is. The indices run from 1 to 7.7 is very bad news while 1 is very good news. Notice that India scores well relative to China, on political and civil liberties. India also does reasonably well in terms of income inequality. However, India lags behind China in all other indices of well-being, including income per head, life expectancy, and literacy. So, there would seem to be a tension between political and civil liberties on the one hand and economic development on the other.

Lipset (1959) famously observed that growth in GNP per head helps to promote democratic practice. The converse, that democratic practice and civil liberties promote material prosperity, has also been suggested by social scientists. Democracy and civil liberties, including the existence of a free press, have been seen not only as ends in themselves, some have seen them also as the means to economic progress. Understandably, rulers in the world's poorest countries have thought otherwise. That political and civil liberties on the one hand, and economic development on the other, involve trade-offs when countries are poor has been the stated conviction of people in power in most of today's poorest countries. However, in their pioneering empirical work on what they termed 'social capability', Adelman and Morris (1967) saw societal openness to discussions and ideas as a driver of economic progress. Unfortunately, their work had little impact on official development economics.

Matters are different now. Societal transformation in 1989-91 is a big reason. Freedom is now seen as a precondition of economic development. Sen (1999) has even re-labelled development *as* freedom. I don't believe rebranding a concept necessarily illuminates it. In the case of freedom I remain unconvinced it does, because it makes you think that a multidimensional object like freedom can be straight-jacketed into an all-purpose human good. And by the time you have reduced every human good into freedom, you have converted it into a sort of fluff. There are intellectuals who don't necessarily go in for re-branding, but who nevertheless see the instrumental worth of freedom everywhere. Kuper (2002) claimed that 'it has been demonstrated repeatedly that non-democratic regimes are unfailingly detrimental to human rights and wellbeing'. If only that was so. There are many counter-examples of recent vintage.

So, the intellectual pendulum has swung enormously in the past two decades. But what if you were a citizen of an arbitrarily chosen country? Sup-

pose you were about to help draft a Constitution. What kind of Constitution would you favour? It's no good pointing to India or China, because they offer only a pair of observations. It seems to me a statistical study is required.

In a crude statistical analysis of what in 1970 were 51 countries with the lowest GNP per head (Dasgupta, 1990), I found that during the period 1970-80 those nations whose citizens had enjoyed greater political and civil liberties had also on average performed better in terms of growth in GNP per head and improvements in life expectancy at birth. (In the case of literacy, the correlation was just the reverse.) The correlation wasn't strong, but it was positive and significant. Of course, correlation isn't causation, but as I was relating *average* figures for political and civil liberties in the 1970s to *changes* in GDP per head, *improvements* in life expectancy at birth and literacy, I believe I was pursuing the right animal.

The findings relating to GDP per head and life expectancy pleased me; the one on literacy, didn't. What I took away from that crude exercise is that political and civil liberties are not luxuries in poor countries; they don't necessarily hinder economic development. Subsequently, several more elaborate investigations were published. They included not only poor nations but rich nations too. The most elaborate among them was Barro (1996), who found that among those nations where freedom was highly restricted, there was a positive correlation between political and civil liberties on the one hand and growth in GNP per head on the other, but that among those where freedom was considerable, there was a negative correlation.[3] During the decade of the 1970s, the bulk of the worst offenders of restrictions in citizens' freedom were governments in the world's poorest countries, most of them in sub-Saharan Africa. Barro's findings were therefore consistent with mine.

That said, Barro's and mine are only two empirical studies. Importantly, Freedom House aggregates a multitude of freedoms into a scalar index. When I say a 'multitude', let's remind ourselves that democracy – I'll use that as a shorthand for political and civil liberties – means many things at once: regular and fair elections, government transparency, political pluralism, free press, freedom of association, freedom to complain about the degradation of the environment, and so forth. What if you take them one at a time and relate them to economic development? Aghion *et*

[3] Political and civil liberties, even though they are distinct goods, are highly correlated in the contemporary world.

al. (2009) have done that. In a large sample of countries, they have studied the relationship between economic growth and the various components of freedom. They have found that some of the components are positively related, others not so.

One problem I have with these findings is that they regard economic development to be synonymous with growth in real GDP per head. There is no mention of environmental issues. A recent literature has shown that human well-being is closely related to an inclusive notion of *wealth* (Dasgupta, 2001, 2007b; Arrow *et al*., 2003). By inclusive wealth I mean wealth that includes not only reproducible physical capital (buildings, roads, machines), but also human capital (education and health), knowledge (the differential calculus), institutions (both social and legal), and natural capital (ecosystems). By *sustainable development* we should mean a path of development along which inclusive wealth per head does not decline. So we should be asking whether political and civil liberties are correlated with sustainable development. I have no idea whether they are. More generally, no one knows which aspects of freedom are most potent in bringing about sustainable development. So, we should be alert to the possibility that there are trade-offs between some components of democracy and those other things we care about. That being the case, a commitment to democracy can't be based on grounds that the latter promotes sustainable development. We should favour democracy because (i) it is innately a good thing, and (ii) it isn't known to hinder economic development and may possibly even help to bring it about.

3. Decency, Trust, and the Rule of Law

Many thinkers point to the primacy of the rule of law in economic development. The rule of law, however, is consistent with many forms of government. It isn't only a political democracy in the Western mode that can be expected to protect and promote it. Practice of the rule of law, more generally, an expectation of decency in the public domain, creates trust among people, as they go about their daily lives. Mutual trust is the lubricant that makes for economic development. (In my *Very Short Introduction to Economics* (Dasgupta, 2007b), I have tried to explain why it is so). Without trust the millions and millions of transactions that are in principle possible would not be undertaken, so all parties would be worse off than they could otherwise be. Imagine two islands, A and B, which are

visibly identical. For every person in B there is a corresponding person in A and vice versa. And for every piece of capital asset in A there is a corresponding piece in B, and vice versa. Imagine that the property-rights regimes are identical too. Imagine, however, that people in A harbour a mutually consistent set of beliefs that one cannot trust others, while people in B have institutions in place that enable them to maintain a mutually consistent set of beliefs that people can be trusted. Other than beliefs, we are therefore imagining that the islands are to begin with indistinguishable. Nevertheless, the pair of disjointed set of (rational) mutual beliefs and expectations would lead the islands to diverge over time. B would prosper, while A would remain undeveloped.

How does a society tip from one belief system to another? That seems to me to be the fundamental question in the social sciences, to which we economists really do not have much of an answer. What we do know is that mutual trust – and the social norms and laws that buttress that trust – involves a lot of coordination among the actors, whereas mutual distrust doesn't. That is why destroying a society is whole lot easier than rebuilding it. You can establish as fine a set of institutions as you care, but it will all come to nothing if people don't trust one another. The institutions won't work. The deepest question in the social sciences remains unanswered: how do grace and decency establish themselves among wide and disparate groups of people?

CONTEMPORARY CHINA AND INDIA: COMPARATIVE STATISTICS		
	China	**India**
Population (billions)	1.32	1.17
GDP per head in international dollars (PPP) (For comparison: Sweden: $40,850)	4,660	2,460
Annual % growth rate in GDP	11	7.8
Gini coefficient of income	0.45	0.33
Literacy rate (male/female) per 100 adults	95/87	73/48
Ratio of girls to boys in primary & secondary schools	1	0.99
Doctors per 1000 people	1.4	0.6
Total fertility rate	1.8	2.5
Life expectancy at birth (years)	73	65
Infant mortality rate (per 1000 infants)	24	76
% of children under 5 underweight	7	43
% of population below $1 a day	16	35
% of population below $2 a day	47	81
Corruption index*	0.73	0.48
Media freedom index (rank out of 173 countries)	167	118
Political/Civil liberties index, 1996 (Range: 1-7)	7/7	2/4

* Percentage of private firms who paid bribes to government officials.
Data Sources: (i) *World Development Indicators* (2008), World Bank. (ii) World Development Report (2008), World Bank. (iii) Freedom House, 1998.

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SURVEYING AND ENFORCING HUMAN RIGHTS

HUMAN RIGHTS, GENOCIDE AND THE INTERNATIONAL CRIMINAL COURT

KRZYSZTOF SKUBISZEWSKI

I. Human Rights in International Law Seen against the Background of the Social Doctrine of the Church

1. In the past, apart from the position of aliens, international law regarded the situation of the human person as one belonging to the domestic jurisdiction of each State. Thus rights of individuals only exceptionally became the subject of international regulation and protection. Examples are freedom of religion guaranteed by some treaties, rights of individuals under the laws of war (especially the Red Cross Convention of 1864 and the Hague Conventions of 1899 and 1907) or rights of members of certain minorities.

2. This restrictive approach began to be eroded after the First World War. Also, in the twenties and thirties there developed a systematic doctrinal discussion on the situation of the individual in international law. The breakthrough resulted from the atrocities committed during the Second World War; among these, the extermination of Jews in Europe by the German Reich (the 'Third' Reich), with the aid of some of its allies and collaborators, particularly stood out. Under the Charter of the United Nations (1945), one of the purposes of the Organization it created is to achieve international cooperation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, § 3). In its preamble, the Charter reaffirms faith 'in the dignity and worth of the human person'. In his paper on the social doctrine of the Church and the subjective rights of the person (presented at this Session) Msgr Roland Minnerath explained why for a long time the Church has entertained the most serious reservations with regard to the very notion of the subjective human right (*droit humain subjectif*). While I agree with his diagnosis, my paper deals with the present position of the social

doctrine of the Church with regard to the international law on human rights and fundamental freedoms. The successful growth of this law can be regarded as the most significant hallmark of the post-1945 development of international law, though its implementation is another matter.

3. From the very outset the United Nations embarked on a multifaceted activity to pursue the goal of respect for human rights. It acted on the universal plane. Its first basic instrument in this field was the Universal Declaration of Human Rights adopted as a UN General Assembly resolution in 1948.[1] The Declaration was proclaimed 'as a common standard of achievement'. This feature, and the fact that the Declaration was no more than an Assembly resolution, made it a non-binding instrument. However, after its adoption, there was a development which lead to its becoming part of general (customary) international law on human rights. In accordance with its vocation, the Declaration is now not only universal in its name and contents, but it also gives expression to rules that are universally binding. All States have to abide by them. For, depending on circumstances and various requirements, some UN General Assembly resolutions can generate customary international law.[2] It is recognised both in the practice of States and by writers that human rights were one of the matters where the UN General Assembly resolutions helped to bring about customary legal rules.

4. It can be further assumed that the Universal Declaration of Human Rights now belongs to the peremptory norms of general law (*jus cogens*) on human rights. According to Article 53 of the Vienna Convention on the Law of Treaties (1969)[3] 'a peremptory norm of general international law is a

[1] Resolution 217 (III), International Bill of Human Rights, 10 December 1948, Universal Declaration of Human Rights. No State voted against it, there were eight abstentions. For a critique, from the standpoint of the social doctrine of the Church, of some other pronouncements of the United Nations in the field of human rights, see M. Schooyans, *La face cachée de l'ONU*, Le Sarment, Paris 2000 and the paper by Msgr R. Minnerath, especially part III.

[2] This process and other legal problems of the U.N. General Assembly resolutions are subject of a vast literature. See, in particular, the work accomplished by the *Institut de Droit International, Annuaire*, vol. 61, part I, Session of Helsinki, 1985 (Travaux préparatoires) and vol. 62, part II, Session of Cairo, 1987; B. Sloan, General Assembly Resolutions Revisited (Forty Years Later), *British Year Book of International Law*, vol. 58, 1987, pp. 39-150 (in 1948 Sloan wrote in the same *Year Book* a pioneering study on this matter); and W. Hensel, *'Weiches' Völkerrecht. Eine vergleichende Untersuchung typischer Erscheinungsformen*, Nomos, Baden-Baden 1991.

[3] *United Nations Treaty Series* (UNTS), vol. 1155, p. 331; *International Legal Materials* (ILM) vol. 8, 1969, p. 679.

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'.

5. 'The Church's Magisterium has not failed to note the positive value of the *Universal Declaration of Human Rights* [...] which Pope John Paul II defined as "a true milestone on the path of humanity's moral progress"'. On another occasion John Paul II said that the Declaration 'remain[ed] one of the highest expressions of the human conscience of our time' (*Compendium*,[4] § 152).

6. With the Encyclical *Pacem in Terris* Pope John XXIII inaugurated a long series of papal pronouncements on human rights. This Encyclical was a turning point in the Church's approach to human rights (see Msgr Minerath's paper) and to the work done on them by international organizations, though the Church remained highly critical of some of that work's aspects. Also, one has to note the documents of the Second Vatican Ecumenical Council, especially the Declaration *Dignitatis Humanae* and the Pastoral Constitution *Gaudium et Spes* (1965). Teachings of Popes Paul VI, John Paul II (in particular the Encyclical *Centesimus Annus*) and Benedict XVI have specified various human rights and have called for their protection. Theological anthropology constitutes the foundation of human rights in the social doctrine of the Church. They belong to an objective order created by God. There is an intrinsic and inherent link between human dignity and human rights.[5] The existence of that link has been emphasized by the Second Vatican Ecumenical Council. The Magisterium also underlines the connection between rights and duties: when rights are affirmed, corresponding responsibilities have to be acknowledged (*Compendium*, § 156; Encyclical *Caritas in Veritate*, § 43).

7. Human rights are 'universal, inviolable, inalienable' (*Compendium*, § 153).

8. In particular, a word should be said about universality. The Church teaches that human rights are universal, 'because they are present in all

[4] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Libreria Editrice Vaticana 2004 (cited hereinafter as *Compendium*).

[5] The existence of that link has been emphasized by the Second Vatican Ecumenical Council, see Declaration *Dignitatis Humanae* and Pastoral Constitution *Gaudium et Spes*, § 22, 27 and 41. For a recent analysis of the subject, see C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law*, vol. 19, 2008, pp. 655-724.

human beings, without exception of time, place or subject', and there is 'the duty of respecting them by all people, everywhere, and for all people' (*Compendium*, § 153). Indeed, the principles of universality and indivisibility of human rights are the cornerstone of legal regulation and of practices based on law. The universality stems from the equal dignity of all human persons which is the material source of human rights.

9. However, the problem, as we know, is not simple. At least two arguments are adduced to weaken universality.

The first consists in the economic differentiation of the world, which accounts for divergent priorities in the policies of States affecting people. There is also a rather confusing discussion on the conditionality of human rights protection. At any rate, poverty is the enemy of human rights. Pope Benedict XVI emphasizes

> a flagrant contrast between the equal *attribution* of rights and the unequal *access* to the means of attaining those rights. For Christians who regularly ask God to 'give us this day our daily bread', it is a shameful tragedy that one-fifth of humanity still goes hungry. Assuring an adequate food supply, like the protection of vital resources such as water and energy, requires all international leaders to collaborate in showing a readiness to work in good faith, respecting the natural law and promoting solidarity with the weakest regions and peoples of the planet as the most effective strategy for eliminating social inequalities between countries and societies and for increasing global security.[6]

The second argument against universality bases itself on cultural peculiarities: they are said to prevent the full application of some human rights as defined in the Universal Declaration either completely or with regard to certain categories of persons, e.g. women or minorities. To this it should be responded that we all have to respect different cultures and civilizations: they are our mutual heritage and enrichment. But cultural diversity is no reason for lowering or diluting human rights enjoyment and protection. Any relativization of human rights leads to their denial.

10. We encounter such relativization in civilizations and customs prevailing in some regions of the world. However, regulation and implementa-

[6] Address to the Pontifical Academy of Social Sciences, 4 May 2009, L'Osservatore Romano, no. 102, 4-5 May 20009, p. 7. See also the Encyclical *Caritas in Veritate* by Benedict XVI, § 29 and 43.

tion of human rights at the regional level can be helpful in promoting and encouraging their respect. All depends on what the regional approach is, i.e., whether it conforms to universal standards. There are instances in which regional law-making and especially regional action enhance the universality of human rights.

11. In fact, the United Nations' activity in the field of human rights was soon supplemented and, at least in one instance, even surpassed on the regional level. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its Protocols[7] created the most developed and advanced system and mechanism for the protection of human rights. Nothing comparable exists within or without the United Nations, although a model similar to the European one can be found in the American Convention on Human Rights (1978).[8]

12. The consequence of the regulation of human rights by and in international law is that their protection and implementation no longer belong to the exclusive jurisdiction of any State. Thus the system of government of each State and the practice of its organs, including the conduct of its foreign policy, must conform to general international law on human rights and to treaties the State has concluded thereon. In the international forum, any State can raise any encroachment on human rights by another State. The plea of State sovereignty is no longer valid here.

13. Needless to say, Governments do not always comply with the laws guaranteeing human rights and fundamental freedoms, whether domestic or international. In a democratic system there are some remedies. A more serious problem is with authoritarian or totalitarian regimes which, even if they accept international treaties or other instruments on the protection of human rights, more often than not do not go beyond their formal acceptance because they actually do not implement them. The same is true of the attitude of such regimes towards the international customary law on human rights. Sometimes their respect for human rights, if there is any, is highly selective. It has been said that that these regimes recognize human

[7] UNTS, vol. 213, p. 221. In particular, Protocol No. 11 (1994) restructuring the control machinery established by the Convention, ILM, vol. 33, 1994, p. 960, should be noted.

[8] UNTS, vol. 1144, p. 123. The present paper does not discuss the issue of the relation between the Universal Declaration and some other instruments on human rights e.g., the African Charter on Human Rights (1981), ILM, vol. 21, 1982, p. 58, Islamic Declarations and Arab Charter on Human Rights; on the Islamic and Arab instruments and, generally, the regional instruments, see the paper by prof. O. Fumagalli Carulli.

rights by non-observance. The Church's *'essentially religious mission includes the defence and promotion of human rights'* (*Compendium*, § 159). The Church is fully aware of the many and persistent violations of human rights in the contemporary world. In the first place, the Church points to genocide (*Compendium*, § 158). The notion of genocide is the subject of Part II of this paper.[9]

II. Genocide

1. *Origin of the Concept*

14. The author of the notion and the concept of genocide was Rafał (Raphaël) Lemkin (1900-1959), a Polish lawyer and scholar who worked until 1939 in Warsaw, Poland, and from 1940 in the United States.[10] He dis-

[9] Apart from the texts already mentioned, attention should be drawn to the United Nations Covenants, *viz.*, the International Covenant on Economic, Social and Cultural Rights, UNTS, vol. 993, p. 3, and the International Covenant on Civil and Political Rights, *ibid.*, vol. 999, p. 171. See also the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief proclaimed by U.N. General Assembly Resolution 36/55 of 25 November 1981. On a recent pronouncement by Pope Benedict XVI on the right to religious freedom, see the Encyclical *Caritas in Veritate*, § 29.

[10] He was born in Bezwodne (where his father owned a farm) near the town of Wołkowysk in what then constituted the Polish part of Russia. This area returned to Poland when she regained her independence as a result of the First World War (since 1945 the said area belonged to the Soviet Union, now to Belarus). The fact that the mass killings of Armenians in Turkey during the First World War and the pogroms of Jews in Ukraine in 1918-1919 went unpunished led to Lemkin's deep involvement in combatting the crime of extermination of individuals as members of a group, and, consequently, extermination of the group as a whole. He decided to discontinue his linguistic studies and read law instead. After graduating from the John Casimir University at Lwów (then in Poland, now in Ukraine) in 1926, he became a secretary in the Warsaw Court of Appeals. He was subsequently appointed assistant prosecutor first in southern Poland and soon thereafter at the District Court in Warsaw. He resigned from this post in 1934 to practise law. He participated in the work of the Penal Section of the Polish Codification Commission. He also gave lectures on various issues of criminal law and was very active in international cooperation in the field of that law. When the Second World War broke out in 1939 he fled Poland (thus avoiding the Holocaust) and went to the United States (1940) where he fully devoted himself to the problem of genocide. R. Szawłowski, Rafał Lemkin (1900-1959). Polski prawnik twórcą pojęcia 'ludobójstwo', *Sprawy Międzynarodowe*, vol. 58, No. 2, 2005, p. 103. See also J.L. Panné's introduction to the writings of R. Lemkin, *Qu'est-ce qu'un génocide?*, Éditions du Rocher, Paris 2008.

tinguished genocide from other crimes under which its various elements and manifestations could have been and occasionally were earlier subsumed. He also coined the very term 'to denote an old practice in its modern development'.[11] He was more than right in referring to 'old practice': genocide is as ancient as humanity's recorded history.

15. By genocide Lemkin means 'the destruction of a nation or of an ethnic group'. His definition has two essential features. First, there is the biological aspect, i.e., extermination of a community, whether by killing or by causing its progressive decline leading to its disappearance. Second, the actions involved are directed against individuals, not in their individual capacity, but as members of the nation or the ethnic group.[12]

16. Lemkin, who speaks of genocide with regard to a nation or an ethnic group, did not lose sight of other groups. He saw them rather as 'elements of nationhood' or 'fields', in which genocide is carried out. Describing German practices of 1939-1944, such fields, he said, are political, social, cultural, economic, biological, physical, religious and moral.[13]

17. In 1933, Lemkin submitted to the Fifth International Conference for the Unification of Penal Law proposals to the effect that actions aiming at the destruction and oppression of populations should be penalized as a separate crime. What he meant were actions 'directed against individuals as members of a national, religious, or racial group' (the crime of barbarity) and the destruction of works of art and culture 'because they represent the specific creations of the genius of such groups'.[14]

18. Lemkin presented a strong plea in favour of nations as 'essential elements of the world community' while making a basic distinction between the idea of a nation and that of nationalism. The latter must be rejected. 'The world represents only so much culture and intellectual vigor as are created by its component national groups'.[15] In his 'Recommendations for the Future', Lemkin emphasized that since the regulation of land warfare by the Hague Convention of 1899 and 1907 'the evolution of international law [...] has brought about a considerable interest in national groups as distin-

[11] R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation – Analysis of Government – Proposals of Redress*, Carnegie Endowment for International Peace, Washington 1944, p. 79.

[12] *Ibid*.

[13] *Ibid*., pp. 82-90.

[14] *Ibid*., p. 91. At p. 93, he enumerates the criteria of nationhood, religion or race.

[15] *Ibid*., p. 91.

guished from state and individuals',[16] while German practices in occupied Europe during the Second World War led to 'the need to review international law'. He also referred to the well-known example of the protection of minorities originating with the peace settlements of the First World War and with the League of Nations.[17]

2. Definition

19. On 8 August 1945, after some preparations during the war, France, the United Kingdom, the United States and the USSR concluded in London the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. Several other States acceded to this Agreement which provided for the establishment of an International Military Tribunal to try those war criminals whose crimes had no particular geographical location. The Charter of the Tribunal was annexed to the Agreement.[18] The Tribunal had its seat at Nuremberg, Germany. In fact, only one trial took place before this Tribunal, i.e., that of the major German war criminals. The Tribunal did not try any persons from other countries which belonged to the 'European Axis'.

20. Under Article 6 of the Charter the jurisdiction of the Tribunal included three categories of crimes:

> (a) *Crimes against Peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities,

[16] *Ibid.*, p. 90.

[17] It may here be added that that protection was selective, which was its weakness. It covered the minorities in some countries only, while other countries were left free not to accept any international obligations in this respect.

[18] For the texts of the Agreement and the Charter, see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946* (Trial), Nuremberg 1947, vol. 1, p. 8. For the Tokyo Tribunal, see § 43 below.

> towns, or villages, or devastation not justified by military necessity; (c) *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

21. It can be seen from the above that the term 'genocide' does not figure in the list of 'crimes against humanity'; yet it certainly belongs to that category; when committed during the war, it is also a war crime. It is under the latter rubric that genocide was expressly mentioned by the Indictment submitted to the Nuremberg Tribunal. In Count Three (relating to war crimes) the Indictment refers to

> deliberate and systematic genocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.[19]

22. The judgement of the Tribunal, read on 30 September and 1 October 1946, found several of the defendants guilty of crimes against humanity.[20] In connection with the Nuremberg Trial attention should be drawn to the contemporary importance of the doctrine of command or superior responsibility. In the exercise of international criminal jurisdiction it is critical to reach the leadership level.

23. During the second part of its First Session the U.N. General Assembly affirmed 'the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal' (Resolution 95 (I) of 11 December 1946). It also took up the issue of genocide. In its Reso-

[19] Trial, vol. 1, pp. 43-44. The following information can be added here on other instances of genocide. There was extermination through hunger of certain groups of Ukrainian population during forced collectivization of agriculture in the thirties by the Soviet Union (under its Stalinist regime). The same regime committed genocide in time of war with regard to some groups of Poles, in particular the officers of the Polish Armed Forces, taken prisoner as a result of Soviet aggression against Poland in 1939, who were all executed in the Katyń Forest and other places in 1940. There was systematic extermination of thousands of Polish civilians in German-occupied Eastern Poland in 1943 with the participation of some Ukrainian nationalists.

[20] Trial, vol. 22, p. 411.

lution 96 (I) of the same date the Assembly affirmed that genocide is a crime under international law and provided for studies on the matter with a view to drafting a convention on genocide.[21]

24. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly on 9 December 1948.[22]

25. According to the Convention, genocide, 'whether committed in times of peace or in time of war, is a crime under international law' (Article I). Article II of the Convention provides that genocide consists of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such'. Those acts are:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[23]

Apart from genocide itself, conspiracy, direct and public incitement and attempt to commit genocide and also complicity in genocide are punishable (Article III). Persons committing genocide or any of the foregoing acts[24] shall be punished, 'whether they are constitutionally responsible rulers, public officials or private individuals' (Article IV).

26. In 1951, acting on the request of the U.N. General Assembly, the International Court of Justice gave an Advisory Opinion concerning reservations made to the Convention.[25] The very issue of reservations, which is

[21] H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Nijhoff (Brill), 2 vols., Leiden 2008. See Also A. Cassese, *International Law*, Oxford University Press 2001, pp. 252-254, where he points to various national and international judicial decisions on genocide.

[22] UNTS, vol. 78, p. 277.

[23] Article II. The Convention does not mention cultural and political groups. However, their annihilation also amounts to genocide. There is no reason for excluding them. It may be added that the Statute of the International Criminal Court (see below § 52) in its Article 6 repeats the definition of the Convention.

[24] For the purpose of extradition, genocide or any of these acts shall not be considered as political crimes (Article VII). Extradition treaties normally exclude political offenders from extradition. Article VII eliminates any political plea to protect perpetrators of genocide or acts connected therewith.

[25] *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, *ICJ Reports 1951*, p. 15.

part of the law of treaties, need not be discussed here. Suffice it to say that the Court held, *inter alia*, that any such reservation had to be 'compatible with the object and purpose of the Convention'.[26] The Court explains:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.[27]

27. In the reasons for the Opinion the Court also mentions 'the special characteristics' of the Convention and refers to its origin. The Court says that 'a denial of the right of existence of entire human groups [...] shocks the conscience of mankind and results in great losses to humanity'; it 'is contrary to moral law'. According to the Court, two consequences follow from this conception. The first is that

> the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).[28]

28. The foregoing dictum on the nature of the Convention principles (the 'first consequence') is to be noted. It is an elucidation and reaffirmation of the earlier position of the United Nations that genocide is a crime under international law (§ 23 above) – international law means here universally binding international law, i.e., the criminality of genocide does not depend on or follow from treaty obligations entered into by States, but is part of general law. Under its Statute, the International Court of Justice

[26] *Ibid.*, p. 18.

[27] *Ibid.*, p. 23. The Court repeated this dictum in its Judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (Bosnia and Herzegovia *v.* Yugoslavia), *ICJ Reports 1996*, p. 595, at p. 611, § 22.

[28] *ICJ Reports 1951*, p 23. In his Dissenting Opinion in that case Judge Alvarez discussed the Genocide Convention from the perspective of what he termed 'new international law', *ibid.*, pp. 51-53.

applies not only treaties and customary law, but also 'the general principles of law recognized by civilised nations' (Article 38, § 1, letter c).[29] They belong to the *corpus juris* binding on States and other subjects of international law. The criminality of genocide also has its basis in customary international law (letter *b* of the same provision).

29. In the case concerning the *Application of the Convention, Preliminary Objections* (1996, cited in note 27) the Court referred to the 1951 Advisory Opinion and concluded that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*'.[30] It also specified that 'the obligation each State thus has to prevent and punish the crime of genocide is not territorially limited by the Convention'.[31]

30. In another case, viz. that concerning *Armed Activities on the Territory of the Congo* (*New Application: 2002), Jurisdiction of the Court and Admissibility of the Application* (Democratic Republic of the Congo *v*. Rwanda), the Court, referring to its previous dicta on genocide, qualified the prohibition of genocide as a peremptory norm of general international law (*jus cogens*).[32]

31. On 6 February 2007 the International Court of Justice issued its Judgment in the case concerning the merits of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*.[33] It is generally agreed that this Judgment constitutes the fundamental judicial pronouncement on the meaning and scope of the Convention.

32. This Judgment resolved, *inter alia*, the dispute between the two States on whether the Convention provided for the responsibility of States

[29] The Court's Statute 'forms an integral part' of the U.N. Charter (Article 92) and is annexed to it. For the text of the Statute, see ICJ, *Acts and Documents concerning the Organization of the Court*, No. 5, 1989, p. 61.

[30] ICJ Reports 1996, p. 616, § 31 *in fine*. This conclusion followed a dictum which the Court made much earlier, *viz*. in 1970, see *Barcelona Traction*, *Light and Power Company, Limited (New Application: 1962),* Second Phase (Belgium *v*. Spain), *ICJ Reports, 1970*, p. 3, at 32, where the Court included the prohibition of genocide among 'the basic rights of the human person'; they are 'the concern of all States'. The Court added: 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*', *ibid*., § 33. The Court said that, *inter alia*, the outlawing of genocide had 'entered into the body of general international law' and cited the Genocide Convention, *ibid*., § 34.

[31] ICJ Reports 1996, p. 616, § 31 *in fine*.

[32] Judgment of 3 February 2006, *ICJ Reports 2006*, § 64. For the definition of *jus cogens* under the Vienna Convention on the Law of Treaties, see § 4 above.

[33] *ICJ Reports 2007*, p. 43.

for acts of genocide as such. The question was whether State responsibility existed under the Convention, irrespective of responsibility of individuals or their groups and organizations. It seems that for most non-lawyers and at least some lawyers (including the present rapporteur) the question would seem to be moot in view of a State's obligation to prevent and punish genocide; that obligation (which, it is to be recalled, is one *erga omnes* and has the nature of *jus cogens*, see § 29 and § 30 above) *eo ipso* means that the State itself is prohibited from committing genocide; if it acts against this prohibition, it bears responsibility under international law. Yet the Court could not avoid considering this question: the Parties were in dispute on it. While Bosnia and Herzegovina contended that the Convention created State responsibility for genocide, Serbia and Montenegro defended the interpretation that the Convention was limited to the responsibility of States for the prevention and punishment of genocide alone.

33. The Court rejected the latter interpretation.[34] The Court concluded that 'the effect of Article I of the Convention is to prohibit States from themselves committing genocide'; 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.[35] The 'Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or groups whose acts are attributable to them'.[36]

34. As already indicated (§ 12 above) matters pertaining to human rights do not belong to the exclusive jurisdiction of States. This principle finds corroboration in Article VIII of the Convention which provides as follows:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

35. It maybe assumed that the Magisterium fully supports the implementation of the U.N. Convention on Genocide. It speaks in favour of the protection of rights and duties of minorities. Their basic right is to exist; 'overt or indirect forms of genocide' constitute the most extreme denial of that right (*Compendium*, § 387). The Magisterium states (*Compendium*, § 506):

> *Attempts to eliminate entire national, ethnic, religious or linguistic groups are crimes against God and humanity itself, and those respon-*

[34] For a discussion of that issue by the Court, see *ibid*, pp. 108-119, § 155-179.
[35] *Ibid.*, p. 113, § 166.
[36] *Ibid.*, p. 114 § 167.

sible for such crimes must answer for them before justice. The twentieth century bears the tragic mark of different genocides from that of the Armenians to that of the Ukrainians,[37] from that of the Cambodians to those perpetrated in Africa[38] and in the Balkans.[39] Among these, the Holocaust of the Jewish people, the Shoah, stands out: 'the days of the *Shoah* marked a true night of history, with unimaginable crimes against God and humanity'.

36. These tragic facts have started to influence, too late one has to say, the development, interpretation and implementation of law; the prohibition of intervention could not apply to genocide or other large-scale humanitarian atrocities. In such situations there is an international responsibility to protect and if, for whatever reason, there is no collective exercise of that responsibility by the United Nations, individual States or groups thereof can act within the limits of what is absolutely necessary to save human lives and health, when other measures have failed. International humanitarian law must be vindicated.[40]

37. The Church concurs in that approach. Referring to attempts to eliminate entire national, ethnic, religious or linguistic groups, the Church emphasizes that States, as members of the international community, 'cannot remain indifferent: on the contrary, if all other available means should prove ineffective, it is "legitimate and even obligatory to take concrete measures to disarm the aggressor"'. 'The principle of national sovereignty cannot be claimed as a motive for preventing an intervention in defence of innocent victims' (*Compendium*, § 506).

38. The foregoing position adopted by the social doctrine of the Church means that States should treat the prevention of genocide as a priority. States should be watchful about the danger of genocide, irrespective of its

[37] See note 19.

[38] Somalia, Rwanda and Sudan (genocide committed in Darfur). For the practice of the International Criminal Tribunal for Rwanda, see Cassese, *op. cit*., p. 235.

[39] In Yugoslavia during its dismemberment and the armed conflict there. In its Judgment referred to in § 31 above the International Court of Justice found that Serbia had violated her obligations under the Genocide Convention by not preventing the genocide that occurred in Srebrenica in July 1995 and by having failed to transfer General Ratko Mladić for trial by the International Criminal Tribunal for the former Yugoslavia (ICTY). *ICJ Reports 2007,* p. 238, § 471, subparagraphs 5 and 6. The ICTY dealt with genocide in several of its judgments.

[40] See the Panel on State Sovereignty and Humanitarian Intervention: The Duty to Protect, present Session of the Academy.

geographical location. Whenever there are any signs of it to happen, they have to cooperate to restore respect for law and, as the case might be, to hinder an aggravation of the situation, by resorting to diplomatic, economic or other peaceful sanctions. Only swift reaction can be effective. However, States still lack a policy for preventing and opposing genocide. This has been amply shown by circumstances surrounding genocides committed after the conclusion of the 1948 Convention (see § 35 above). Resort to military force by another State or States (as set forth in § 36 above) in the territory where genocide is about to take place or already occurs is a possibility of which the potential or actual perpetrators of genocide should always be kept aware.

III. International Criminal Court and Other Judicial Organs: A Brief Comparative Survey

39. Article VI of the Genocide Convention provides that

> [p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

40. The idea of an international penal tribunal goes back to the end of the First World War and the work of the League of Nations. In the inter war period, it was discussed by legal scholars.[41]

41. By virtue of Article 227 of the Peace Treaty with Germany, signed on 28 June 1919 at Versailles, the Allied and Associated Powers 'publicly arraigned' Wilhelm II, formerly German Emperor, 'for a supreme offence against international morality and the sanctity of treaties'.[42] The Peace Treaty of Versailles provided for the constitution of a special tribunal to try him. It was to be composed of five judges; Japan, France, Great Britain,

[41] For bibliographical indications, see L. Oppenheim, *International Law. A Treatise*, 7th edition by H. Lauterpacht, Longmans, Green and Co., London/New York/Toronto, p. 586, note 1. See also V.V. Pella, La répression des crimes contre la personalité de l'État, Académie de Droit International de La Haye, *Recueil des Cours*, vol. 33, p. 671.

[42] For the French text of the Versailles Treaty, see L. Le Fur and G. Chklaver, *Recueil de textes de droit international public*, 2nd ed., Dalloz, Paris 1934, p. 297.

Italy and the United States were to each appoint one judge. However, no such tribunal was ever set up because The Netherlands refused to extradite the former Emperor who sought refuge there in 1918.

42. Nor was another attempt to create an international criminal court successful, though this time the scope of the jurisdiction would be broader, i.e., not limited to one particular individual. In reaction to the terrorist assassination of King Alexander I of Yugoslavia in Marseilles on 9 October 1934 (another victim was the then French Foreign Minister Louis Barthou) there was drafted, under the auspices of the League of Nations, a Convention against Terrorism together with a supplementary Convention providing for an International Criminal Court to try terrorists (16 November 1937).[43] Neither Convention entered into force.

43. On the other hand, immediately after hostilities of the Second World War ended, the victorious Allies established two Tribunals: one in Nuremberg, which tried the leaders of Nazi Germany (see § 19 above), and another in Tokyo, the International Military Tribunal for the Far East, to try the Japanese leaders.[44] The judgements of these Tribunal were rendered in 1946 and 1948, respectively. They constitute a significant contribution to the development of international criminal law and, in particular, the concepts of crimes against peace, conventional war crimes and crimes against humanity. Though the two Tribunals were created by the victors, the latter did not act arbitrarily. At the time the Nuremberg and the Tokyo Tribunals were set up, international law empowered belligents to punish enemy war criminals during the war or during occupation of enemy territory (in the present context we do not need to consider the punishment of foreign nationals when the war and occupation ended). As to an aggressive war, at that time the law already provided for criminal responsibility for it. True, there was an element of novelty in the notion of crimes against humanity. However, when committed during the war (which was the case of the accused in the Nuremberg and Tokyo Trials) they constituted war crimes and for that reason there

[43] For the texts of these two instruments, see M.O. Hudson, *International Legislation*, vol. VII, pp. 862 and 878.

[44] B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgment*, APA-University Press Amsterdam 1977 and 1981, vols. 1-3. The following States at war with Japan each appointed one Member of the Tribunal: Australia, Canada, China, France, Great Britain, India, The Netherlands, New Zealand, Philippines, United States and USSR. As to the Nuremberg Tribunal, each of the four Powers occupying Germany (France, Great Britain, USA and USSR) appointed its Member and Alternative Member to serve on the Tribunal.

could have been no doubt as to the conformity of the said trials with international law also in respect of this category of crimes.

44. While the Nuremberg and Tokyo trials were a step forward in the enforcement of the laws of war, prohibition of aggression and the humanitarian law in general, and therefore, in the enforcement of many human rights, it was clear that the model for the future would be to act in advance and constitute a permanent court having jurisdiction conferred on it for all conflicts by a treaty or treaties to which practically all the States would be parties. Such a court had to be international: there are circumstances where national courts may not be the adequate solution. Hence the Genocide Convention, while providing for national jurisdiction, mentioned the possibility of establishing an 'international penal tribunal' to try persons charged with crimes under it (§ 38 above).

45. The next stage was the work of the U.N. International Law Commission on the Code of Offences against the Peace and Security of Mankind. Though it started in the first decade of the United Nations, it took many years before the Commission submitted to the U.N. General Assembly in 1994 a draft statute for a permanent international criminal court.[45] The Assembly's and the Commission's work on the draft statute was triggered by the grave and massive humanitarian crises in former Yugoslavia and Rwanda and by the response to them by the Security Council.

46. For it was beyond doubt that before the work on a permanent court could come to fruition, much earlier action was necessary to deal with the responsibility for the atrocities committed in those countries. It is for that purpose that the Security Council established two criminal judicial organs.

47. The Security Council first created, by its Resolution 827 of 25 May 1993, the International Criminal Tribunal for the Former Yugoslavia to prosecute persons responsible for serious violations of humanitarian law committed in the territory of that former State since 1 January 1991.[46] These violations comprised grave breaches of the Geneva Conventions for

[45] *Yearbook of the International Law Commission*, 1994, vol. II, part two (Report of the Commission to U.N. General Assembly). For a discussion of the draft, see same *Yearbook,* vol. I.

[46] The Resolution is reprinted in ILM, vol. 32, 1993, p. 1203. For the Statute of the Tribunal, see *ibid*., p. 1192. The Tribunal for the Former Yugoslavia may be regarded to partially fulfil the expectation that eventually an international penal tribunal will be established, see the Genocide Convention (§ 39 above) and Article V of the International Convention on the Suppression and Punishment of the Crime of 'Apartheid' adopted by the U.N. General Assembly on 30 November 1978, Resolution 3068 (XVIII), ILM, vol. 13, 1974, p. 50.

the Protection of War Victims of 1949,[47] violations of the law or customs of war, genocide and other crimes against humanity (Articles 2-5 of the Statute of the Tribunal). The decision of the Security Council was based on Chapter VII of the U.N. Charter which provides for action with respect to threats to the peace, breaches of the peace and acts of aggression. It was a decision binding on all Members of the United Nations. There was some criticism of the mode adopted for the creation of the Tribunal (i.e., a Security Council resolution instead of a treaty),[48] yet choosing that way guaranteed a speedy organization of the Tribunal and beginning of its functioning. It held its first session at the end of 1993 and issued its first indictment and warrant for arrest in November 1994.

48. The Tribunal and national courts have concurrent jurisdiction. Yet the former has 'primacy over national courts', i.e., at any stage of the procedure the Tribunal may request national courts to defer to its competence (Article 9 of the Statute).

49. Though an *ad hoc* institution, the Tribunal for the former Yugoslavia constitutes a breakthrough in the efforts to have an international organ effectively exercising criminal jurisdiction and judicially enforcing international humanitarian law. Through its case law the Tribunal made a very important contribution to the development, enhancement and strengthening of humanitarian law.[49]

50. A year later, i.e., in 1994, the Security Council established the International Tribunal for Rwanda.[50] The Tribunal was created at the request of the

[47] Conventions I, II, III and IV, UNTS, vol. 75, pp. 31, 85, 135 and 287, respectively. Also Additional Protocols I and II to these Conventions, *ibid*., vol 1125, pp. 3 and 609, respectively.

[48] See, *inter alia*, K. Zemanek, Is the Security Council the Sole Judge of its Own Legality?, E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui*, Kluwer Law International, The Hague/London/Boston 1999, p. 629, at pp. 637-640 and G. Arangio-Ruiz, On the Security Council's Law-Making, *Rivista di Diritto Internazionale*, vol. 83, 2000, p. 609, especially at pp. 720-724.

[49] The first volumes of the Tribunal's *Reports* were published by Kluwer Law International, vols. I and II (1994-1995) and vol. 1 (1996) *et sequentes*. They are now published by M. Nijhoff Publishers. For a selection of the Tribunal's case law, see J.E. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Court for the Former Yugoslavia with Selected Materials from the International Criminal Tribunal for Rwanda*, Kluwer Law International, The Hague/London/Boston 2000.

[50] Resolution 955 (1994) dated 8 November 1994 to which the Statute of the Tribunal was annexed, reprinted in ILM, vol 33, 1994, p. 1600. The full name of the Tribunal is given in the preamble to the Statute.

Government of Rwanda (§ 1 of the Resolution). What happened in Rwanda in 1994 was the worst genocide since the Holocaust during the Second World War and the mass extermination of the two million or more Cambodians, that is one fourth of the population of Cambodia, by the Khmer Rouge regime. The world, including the United Nations, though cognizant of the situation, remained passive.[51] One writer recalls that 'it has been suggested that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda Tribunal was established because of the precedential effect of the Yugoslav Tribunal'.[52] Indeed, the Tribunal for Rwanda certainly owes its existence to the same policy that led to the earlier creation of the Tribunal for the Former Yugoslavia.

51. The jurisdiction of the Rwanda Tribunal comprises genocide, crimes against humanity and 'serious violations of Article 3' common to the 1949 Geneva Conventions and the 1977 Additional Protocol No. II thereto (that Article sets forth the minimum protection each Party is bound to apply to the victims of an armed conflict *not* of an international character).[53] Like the Tribunal for the former Yugoslavia, the Rwanda Tribunal has concurrent jurisdiction with national courts, with primacy of the Tribunal's jurisdiction over the latter (Article 8; § 48 above).

52. As already indicated (§ 45 above), it is only in the nineties that the United Nations resumed and speeded up its interrupted work on the creation of a permanent criminal court. The contribution by the International Law Commission has already been mentioned (§ 45 above). Subsequently, the U.N. General Assembly set up the Ad Hoc and Preparatory Committees which elaborated a draft statute (1995-1998). The Statute of the International Criminal Court (ICC) was adopted on 17 July 1998 by a United Nations conference convened for that purpose at Rome.[54] It entered into

[51] See B. Boutros-Ghali, *Unvanquished: A U.S.-U.N. Saga*, Tauris, London/New York 1999, pp. 129-140. The former U.N. Secretary-General concludes: 'The Security Council did nothing', *ibid.*, p. 140.

[52] P. Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, *American Journal of International Law* (AJIL), vol. 90, 1996, p. 501.

[53] Articles 2-4 of the Statute. The Tribunal's competence also extended to Rwandan citizens responsible for such crimes in the territory of neighbouring States. For the Geneva Conventions and Protocol II see note 47 above. That Protocol relates to the protection of victims of non-international armed conflicts. The seat of the Rwanda Tribunal is in Arusha, Tanzania.

[54] I.L.M., vol. 37, 1998, p. 1002. Ph. Kirsch and J.T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, AJIL, vol. 93, 1999, p. 2.

force in 2002. With the election of its judges and Prosecutor and the appointment of its staff the ICC began to function in 2003; the first 'situations' under the Statute were referred to it in 2004. Yet it took some more years before the first trial began in 2009 (against the Congolese warlord Thomas Lubanga). The Court was criticised for being slow in getting on with its task.

53. The ICC is 'a permanent institution' and has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'. They are the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Articles 5-8).

54. However, the exercise of jurisdiction over the crime of aggression has been suspended until the time

> a provision is adopted [...] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations' (Article 5, § 2).

If one day the State Parties to the Rome Statute agree on a definition, that provision will be adopted in accordance with Articles 121 (Amendments) and 123 (Review of the Statute) of the Statute. Why this gap in the Statute of the ICC? The problem is highly political. States still differ on the definition of aggression despite rich legal practice on it. Thus, some treaties (only regional ones, it is true) defining aggression were concluded in the 1930s. Further, substantial case law exists on the subject, resulting from trials before both national and international courts that took place in consequence of the Second World War. And last, but not least, long before the setting up of the ICC the UN General Assembly in 1974 by its Resolution 3314 (XXIX) adopted the definition of aggression; that Resolution, obviously, does not have the force of a treaty. The conclusion of the Statute of Rome could not be adjourned until an agreement on the definition of aggression was reached. Otherwise, we would still await the establishment of the Court – and in 1998 the delay was already great.

55. The jurisdiction of the ICC is 'complementary to national criminal jurisdictions' (principle of complementarity, Article 1 of the Rome Statute; see also Articles 17-20). Thus the ICC is competent when a State is 'unwilling or unable genuinely to carry out the investigation or prosecution' (Article 17, § 1(a)).[55] The ICC has no jurisdiction when a State acting on strong

[55] For other exclusions of admissibility, see the remaining provisions of that Article.

grounds decided not to prosecute or, when there was prosecution, the accused was acquitted after a fair trial. The principle of complementarity has been described as 'the decisive basis for the entire ICC system'.[56] In this respect one should note a difference with the former Yugoslavia and Rwanda Tribunals (§ 48 and § 51 above, respectively). But in those two Tribunals it could not have been otherwise. The successor States of Yugoslavia were torn by strong feelings of hatred and enmity and the deep conflicts among them, though stopped on the military plane, still persisted. In those years, when several of the accused were to be tried, the usefulness of national criminal courts in the relevant successor States of Yugoslavia was none. Subsequently, prosecutions started also in national courts of some of those States and this very fact was due exclusively to the activity of the Yugoslavia Tribunal. Total impunity in the Balkans was avoided solely thanks to the International Tribunal. The ICC will certainly be confronted with the problem of national *versus* international jurisdiction in similar circumstances; indeed, it already deals with it, namely with regard to Darfur (see § 56 below). Thus, the principle of complementarity has its own limitations. They follow from State practice and policies. In various situations resort to the ICC will be the only alternative to impunity. A truce and reconciliation commission, no matter how important, is something else.

56. The ICC has jurisdiction over nationals of States Parties or offences committed on their territories (Article 12, § 2). This provision constitutes a limitation of the ICC jurisdiction. Only if the criterion of nationality or that of territory is met, may a State Party refer a case to the Prosecutor for investigating and determining whether the person or persons involved should be charged with a crime or crimes within the jurisdiction of the Tribunal (Article 14). As of this writing such referrals were made by the Democratic Republic of Congo, Central African Republic and Uganda. They are sometimes called 'auto-referrals' because the State relinquishes its jurisdiction in favour of the ICC. Further, the Prosecutor may 'initiate investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the court' (Article 15); to investigate, the Prosecutor needs the authorization of the Pre-Trial Chamber. The Court is thus able, independently of a State's request, to decide whether to proceed in a case. Finally, in a situation in

[56] H.-P. Kaul, The International Criminal Court – Its Relationship to Domestic Jurisdiction in: C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court,* Nijhoff, Leiden/Boston 2009, p. 33.

which one or more crimes within the jurisdiction of the ICC appears to have been committed, the Security Council, acting under Chapter VII of the Charter of the United Nations (Article 13),[57] may refer this situation to the Prosecutor; the Security Council enjoys here full freedom, i.e., it can act irrespective of the nationality of the person or the location of the crime. Such a referral took place on 31 March 2005 with regard to the genocidal situation in Darfur in Sudan, a non-party to the Statute of Rome which was and is unwilling to accept the jurisdiction of the ICC.[58] In this case the ICC Prosecutor acted on the basis of the Security Council's referral and the Tribunal issued an arrest warrant against the president of Sudan, Omar Hassan Ahmad al-Bashir (4 March 2009).

57. While a Security Council referral favours, generally speaking, the administration of justice, the Rome Statute also provides for deferrals to take place. The Security Council, acting again under Chapter VIII, can request the Court not to commence a case or not to proceed in a case already pending for a period of 12 months; such a request may be renewed (Article 16). Though each instance of the exercise by the Security Council of that competence should be judged on its own merits, there is room for the view that a deferral might have a negative influence on the Court's functioning. For it constitutes interference by a political body which prevents proceedings from being instituted or stops them when they have already started. In this context one may recall the notorious fact that the Permanent Members of the Security Council are the biggest producers and exporters of weapons.

58. Another weak side of the ICC is the fact that many States whose concurrence would increase the number of cases decided by it are non-Parties to the Statute. They are, *inter alia*, China, India, Iran, Iraq, Israel, Pakistan, Russia and the United States; the entire Middle East, with the exception of Jordan, remains out of the Court.

59. Nor did the adoption of the Statute of Rome forbear States from setting up *ad hoc* tribunals to try those who committed certain crimes. Their establishment attests to the usefulness of such tribunals, to preferences of States and to possibilities dictated by circumstances surrounding the criminal act or acts.

[57] Consequently, such a referral is binding on all Members of the United Nations.

[58] S.C. Resolution 1593 (2005).

60. Thus a Special Court for Sierra Leone was established by virtue of the Agreement between that country and the United Nations done at Freetown on 16 January 2002.[59]

> The Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone (Article 1, § 1, of the Court's Statute).

These violations are crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II,[60] some other violations of international humanitarian law and certain crimes under Sierra Leonean law (Articles 2-5). But '[a]ny transgressions by peace keepers and related personnel [...] shall be within the primary jurisdiction of the sending State' (Article 1, § 2). Thirteen indictments were issued by the Prosecutor, two of them were subsequently withdrawn (due to the deaths of the accused). When this paper went to press, the trial of former Liberian President Charles Taylor was in its final phase.

61. After a long delay, Cambodia established the 'Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea', i.e. from 17 April 1975 to 6 January 1979 under the Khmer Rouge regime. In particular, that regime was guilty of genocide in which some two million or more Cambodians perished. The Extraordinary Chambers are a national court with international participation. The prosecution of the said crimes became the subject of an Agreement signed between the United Nations and Cambodia at Phnom Penh on 6 June 2003. These crimes comprised genocide, other crimes against humanity and grave breaches of the 1949 Geneva Conventions; they also included 'crimes and serious violations of Cambodian penal law' (Articles 1 and 9 of the Agreement). The Extraordinary Chambers have personal jurisdiction over senior leaders of Kampuchea and 'those who were most responsible for the [said] crimes'. The Parties to the Agreement cooperate in bringing to trial those persons.

[59] E. Hilwig, R. van Laar and W.-J. van der Wolf, *International Courts and Tribunals: Selected Documents and Materials*, Wolf Legal Publishers, Nijmegen 2004. p. 67.

[60] See § 51 above.

62. There is also a Special Tribunal for Lebanon to try all those responsible for the bombing of 14 February 2005 in Beirut that killed former Lebanese Prime Minister Rafiq Hariri and twenty two others. The Tribunal's jurisdiction could be extended to some other attacks in Lebanon, both preceding and following that bombing. The Tribunal was established by virtue of an Agreement between the United Nations and Lebanon (see Security Council Resolutions 1664 (2006) and 1757 (2007)). The Tribunal consists of Lebanese judges and judges from other countries. It applies the Lebanese Criminal Code taking into account the standards accepted in international tribunals.

63. To sum up, it is too early to say whether the establishment of the International Criminal Court is a milestone in the administration of international criminal justice and, therefore, in the development of international law and its implementation. It is, no doubt, a very significant step towards achieving such tenets. 'The Magisterium has not failed to encourage this initiative time and again' (*Compendium*, § 506). But it still remains to be seen whether it will become a constant, firm and effective institution for the exercise of international criminal jurisdiction in the world at large. While any international body relies on the cooperation of States, there are different degrees of it. To fulfil its task the ICC depends rather heavily on States. The absence of some States from the Tribunal (§ 58 above) is limiting its jurisdiction. The same is true of the politics of the administration of justice under the Statute of Rome. The Prosecutor, who enjoys a strong position in the ICC, should not take political considerations into account. Unavoidably, the Security Council which potentially plays a key role in the functioning of the ICC (§ 56 and § 57 above) is guided by political motives. Much will depend on how the Security Council conceives of that role.[61]

[61] Only some of the numerous writings on the Court can be indicated here: M.C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley 1998; W. Bourdon and E. Duverger, *La Cour pénale international. Le Statut de Rome*, preface by Robert Badinter, Éditions du Seuil, Paris 2000; A. Cassese, P. Gaeta and J. Jones, (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press 2002, 3 vols.; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C.H. Beck, Hart, Nomos, München/Oxford/Baden-Baden 2008 (1st ed., 1999); and Stahn and Sluiter, *op cit*. in note 56 above.

COMMENT

OTTO TRIFFTERER

I. Introduction

Human Rights have experienced a tremendous extension by number and 'quality' not only since the French Revolution, but even more in various differentiations since the period of decolonisation and self-determination, in particular after the Second World War. They now embrace all kinds of rights and duties of individuals and groups and are developed as well as promoted, but equally violated by individuals or different national and international institutions and organisations.[1]

To put them in a nexus to the International Criminal Court makes both of these issues not more transparent and understandable. This connection rather demonstrates that several legal institutions approach each of these two matters from different angles and may serve different purposes. Both as well as their interdependency therefore justify an introduction.

With regard to genocide this complexity becomes at least a little, though not much more transparent; because this crime under international law, acknowledged and defined since 1948 in detail in a Convention, is one of the most complicated violations of Human Rights. It triggers for instance individual criminal responsibility for the completed crime, even if the intent of the perpetrator, to destroy the group the victim belongs to, is not (yet), and perhaps will never be realized, notwithstanding serious (additional) endeavours of the perpetrator.[2] This third subject matter to be discussed in this session therefore also needs an introduction.

[1] For the development and for violations of Human Rights all over the world see the Reports of Human Rights Watch, visible under http://www.hrw.org/ (13 Oct. 2009).

[2] See for instance O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as expressed in Article 28 Rome Statute?', in: 15 *Leiden Journal of International Law* (2002) 179-205.

The task ahead

My task as a commentator has to be orientated on two aspects: the 'Program' of the Conference and the contribution of Prof. Skubiszewski. The XV Plenary Session of the Pontifical Academy of Social Sciences is dedicated to 'Catholic Social Doctrine and Human Rights'. While the first and the third Session of the 'Program' emphasize the relation of Human Rights to the Catholic Church respectively the Christian vision of men and international justice, the others take a more neutral approach to Human Rights. So does for instance our Section Four, 'Surveying and Enforcing Human Rights'; it addresses the issue without approaching or limiting it by a relation to the Christian vision or the Church.

Against this background my task is to analyze the three issues just mentioned and I have to comment within this context on what Prof. Skubiszewski has contributed to 'Human Rights and the International Criminal Court'. My obligation thus makes it necessary to consider scope and notion of both issues as mentioned in this heading, to find out whether the Court protects in particular the Christian and Catholic Church-achievements or what other interdependences may exist between Human Rights and the Court.

The contribution of Prof. Skubiszewski is convincing and I agree in principle and in detail with all what he has presented. To comment on this would thus be a repetition. Therefore, my comment will concentrate on the theoretical structures and the practical handling of what Prof. Skubiszewski presented to us with regard to the subject matters, including the crime of genocide.

For this orientation, we do not have to recall the Human Rights recognized and promoted by the Church and the Catholic Social Doctrine. They are analyzed and evaluated in other parts of this Plenary Session.[3] Here we merely have to survey scope and notion of the International Criminal Court to find out, whether and to what extent the Rome Statute acknowledges, guarantees or merely enforces already existing Human Rights, when exercising its specific role and function, to contribute to the prevention of the crimes listed in Article 5 Rome Statute and defined in the following Articles 6 to 8 there.

A similar attention has to be given to the 'crime of genocide', which according to the organizers of this Plenary Session, shall serve in my comments as an example. The definitions for its various alternatives correspond almost verbally, wherever they are included into one of the several different

[3] See for instance the presentation of Prof. Herbert Schambeck to this Plenary Session, *Die Menschenrechte in der Lehre der katholischen Kirche*.

international documents. This perpetuation of defining genocide since more than 50 years with identical formulations makes this crime a particular suitable example for a demonstration of the practical importance of crimes under international law for protecting Human Rights over the years. In addition, genocide demonstrates more than other core crimes, falling within the jurisdiction of the Court, the relationship and interdependence between Human Rights emphasized by the Catholic Social Doctrine (CSD) like life, freedom of religion and the right to have, as well as to grow up in a family on the one side, and most serious crimes of concern to the international community as a whole on the other; because it endangers collective and individual Human Rights alike through various threats.

In this context it plays also a role that genocide can be committed by one person on a single member of a protected group.[4] Because characterizing for all alternatives is that they are punishable only when committed with the (additional) intent, to destroy more, namely that 'group as such, in whole or in part', just by that act or omission of the perpetrator against one or several of its members. This (additional) intent goes beyond the ordinary *mens rea* required for all material elements, as already mentioned above. It therefore does not need its realisation to have a completed crime, as long as such an intent exists: *Vice versa*, without it, therefore, no crime of genocide, not even an attempt, is committed.[5]

Though acting in or out of a position of power is not required, it is rather typical for the commission of genocide; because in principle only such a position enables the perpetrator to continue with and achieve a result for his 'line of intent'; he or she thus may finally and more easily reach what they have been 'going at': a broader achievement of criminal harm as on first sight visible: an additional consequence of his or her genocidal act.

Further, genocide is an especially suitable example not only for my task, but also for many new international criminological appearances; because the tendencies and endeavours for an economical, political and social globalization are quite often accompanied by an intent, to destroy a specific group or at least endanger their identity to cut out resistance; only strong

[4] See for instance W.A. Schabas, 'Article 6 – Genocide', in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed., 2008), at 148 *et seq.*

[5] See for command responsibility without genocidal intent O. Triffterer, '"Command Responsibility" – crimen sui generis or participation as "otherwise provided"?', in: O. Lagodny *et al*. (eds.), *Festschrift für Albin Eser* (2005) 901-924.

minority groups, namely, may be capable to effectively oppose activities to achieve globalization in whatever direction, endangering ethnical structures, the natural environment or even future life in the field. It therefore can not only be helpful, but is indispensable, to refer to the Introduction into our Program as well as to the latest encyclical letter on *Caritas in veritate* where these guarantees are dealt with.[6]

Finally, genocide, in particular in the context with globalization, is further not only dangerous for individuals and groups; it may also threaten 'peace, security and the well-being of the world', when natural resources are exploited or political power is strived at to reach a domination on a political or economic situation, two aspects which can not be left aside for our coming considerations.

I therefore will proceed in my analysis according to the following lines:

What is the Court and the present situation in which it is operating?

How can its approach to Human Rights be enforced?

Are there Human Rights established or shaped by the Catholic Social Doctrine which are or need in particular to be protected by the Court?

Shape Court decisions Human Rights and/or shape the Catholic Social Doctrine some alternatives of the core crimes?

As provided already in our Program, and due to the space available, these aspects can however only be 'surveyed' as can their 'enforcement'.

The Court and the ius puniendi *of the community of nations in the international legal and political framework*

While the nexus between Human Rights and the Catholic Social Doctrine, as well as the endeavours of the Church to guarantee and enforce universal divine law, for instance to abolish slavery, are easily to be found, such a context with the International Criminal Court is rather difficult to be made visible in the same way.[7] However in the legal history of an inter-

[6] See the Introduction into the Program of the XV Plenary Session of the Pontifical Academy of Social Sciences and also *Encyclical Letter Caritas in Veritate of the Supreme Pontiff Benedict XVI to the Bishops, Priests and Deacons, Men and Women religious the lay faithful and all People of Good Will on Integral Human Development in Charity and Truth*, 29 June 2009, visible under http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html (29 Sept. 2009).

[7] For Human Rights in the Catholic Church in general see for instance W. Wolbert, *Was sollten wir tun? Biblische Weisung und ethische Reflexion* (2006) and id., 'Menschen-

national criminal jurisdiction the *ius puniendi* of the Pope in the Medievals has been referred to as the beginning of such an institution. The Holy Seat was, at that time, the only impartial supranational institution, which by its position of power on international Church – and non-Church matters was able to interfere for protecting the legal order between states with criminal measures.[8]

However, this starting position may remain open. More important than to have a look at the very beginning of the *ius puniendi* of the community of nations is the aspect that more legal and political institutions were and still are claiming competence to access grave violations of Human Rights and account them to states or their organs, though mainly not under penal aspects. The International Criminal Court therefore has to be separated for instance from the International Court of Justice; the later has jurisdiction not over individuals, but exclusively over states and has no *ius puniendi*. However, both Courts are partly overlapping. The ICJ claims jurisdiction over situations, for instance to assess whether during the belligerent struggles on the territory of former Yugoslavia the involved states were obliged to prevent and repress certain core crimes, like the massacre of Srebrenica as the commission of genocide.[9]

The Security Council also has jurisdiction with regard to situations endangering peace and security of the world, even with a sanctioning power under Chapter VII of the UN-Charter. This quasi-criminal-jurisdiction includes the assessment of belligerent struggles inside one state or between states and the power to react by political sanctions or even military interventions, if necessary to achieve peace and security or to protect civilians attacked.

In addition, several international, regional or universal commissions, tribunals and courts deal with Human Rights violations. They are not exercising a *ius puniendi*. But their jurisdiction may be called quasi-criminal because putting the moral blame on states and judging on the questions of compensations or on changing the starting position, for instance the legal basis, which formally has made it possible to violate individual rights in a

würde, Menschenrechte und die Theologie', in: 7 *SaThZ* (2003) 161-179. For slavery in particular see id., 'Der Proportionalismus und die in sich schlechten Handlungen', in: 45 *Studia Moralia* (2007) 377-399.

[8] For details see H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952), at 19 *et seq.* with further references.

[9] See the case *Bosnia and Herzegowina vs. Serbia and Montenegro*, ICJ, case 91, 26 Feb. 2007.

specific state, like in cases of legally permissible but unproportional too long pre-trial detention.[10]

All these institutions, like the European Court on Human Rights, have had already been called by Felix Ermacorea jurisdictions 'ohne Biss' (without any bite). They therefore are calling for the establishing of a better enforcement of Human Rights to prevent these violations and protect more effectively the most valuable Human Rights against the most severe violations,[11] in particular against dangers through those in power. The need for improvement became more and more urgent, though after Nuremberg the General Declaration on Human Rights 1948 and the 1966 two Covenants for civil and political respectively social and cultural Human Rights can be seen as a certain success.

Individual criminal responsibility under international law, ultima ratio *protection for Human Rights*

This underlying situation continued till the end of the last century. It therefore does not surprise that more and more ideas of the enlightening movement (Aufklärung) with its humanitarian endeavours were re-vitalized. The major political leaders called for more engagement of the international community as a whole to increase the effectivity of protecting Human Rights.[12] Consequently, the Major Powers intervened more frequently by using diplomatic and military means when in (other) states Human Rights were ignored or violated in an unbearable manner.[13] Such

[10] The European Court of Human Rights has placed particular emphasis on the obligation of authorities to show 'special diligence' when the accused is in pre-trial detention; see for instance the decisions *Punzelt v. Czech Republic*, ECHR, case Number 31315/96, 25 Apr. 2000, 169; *P.B. v. France*, ECHR, case number 38781/97, 1 Aug. 2000, 406; *Assenov and others v. Bulgaria*, ECHR, case number 24760/84, 28 Oct. 1998, 98; and *W. v. Switzerland*, ECHR, case number 14379/88, 26 Jan. 1993, 1.

[11] See F. Ermacora, 'Rechtspluralismus und universelle Menschenrechte', and O. Triffterer, 'Universeller Menschenrechtsschutz auch durch das Völkerstrafrecht?', both in: Hanns Seidel Stiftung (ed.), *Die universale Geltung der Menschenrechte, Politische Studien, Zweimonatszeitschrift für Politik und Zeitgeschehen, Sonderheft 1* (1995) 14-19 and 32-55.

[12] See for instance H. Jescheck, *Verantwortlichkeit*, supra note 8, at 39 and O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (1966), at 8.

[13] See H. Jescheck, *Verantwortlichkeit*, supra note 8, at 40 and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

interventions however concentrated on the prevention or on the determination of violations.[14] They had no penal character with regard to those in power who may have been responsible for these atrocities. For developing a new independent penal approach, the state sovereignty was still too strong and absolute. In addition, the principles, the States can do no wrong and *par inter parem non habet jurisdictionem,* had granted impunity to state organs, acting in official capacity. Therefore, the theoretical basis was not yet suitable at that time to promote the punishability of crimes committed by abuse of state power under national or international law.[15]

However, the pressure increased by the observation, that it was more or less at the disposal of those in power, not only to formally guarantee Human Rights on their territory, but also to ensure their practical enforcement worldwide. The result of the First International Investing Committee after the Balkan wars 1912/1913 was, that 'it would have needed only one word of those in power and all belligerent struggles and atrocities committed with them would have stopped immediately'.[16]

This statement raised new hope and called for common activities.[17] Violations by abuse of state power became the main focus of interest for international penal regulations. Because those in power could in the majority of cases not be brought to court in their respective state and therefore an independent responsibility was needed at the international level. Its practical importance however, was limited to an *ultima ratio* protection in cases, where national laws and practice were not sufficiently effective, because the suspects are still in power or have good friends, protégés in the domestic legal system.[18] After such a responsibility of the German Emperor, provid-

[14] See H. Jescheck, *Verantwortlichkeit*, supra note 8, at 41 and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

[15] See O. Triffterer, 'Article 27 – Irrelevance of Official Capacity', in: O. Triffterer, *Commentary*, supra note 4, at 780 *et seq.* and see for instance O. Triffterer, 'Irrelevance of Official Capacity, Article 27 Rome Statute undermined by obligations under international law or by agreements, Article 98?', in: I. Buffard *et al.* (eds.), *International Law Between Universalism and Fragmentation: Festschrift in honour of Gerhard Hafner* (2008) 571-662.

[16] See L. Tindemans, *Unfinished Peace: Report of the International Commission on the Balkans – Carnegie Endowment for International Peace* (1996); the report of the International Commission on the Balkans is available online at http://www.promacedonia.org/en/carnegie/index.html (8 Oct. 2009).

[17] See for instance O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

[18] See for instance O. Triffterer, 'Ursprung, Entwicklung, Gegenwärtiger Stand und Zukunftsperspektive für das Völkerstrafrecht und dessen Durchsetzung – Eine hohe

ed for in the Versailles Peace Treaty 1919, could not be enforced, and Nuremberg was criticised under several aspects of legality,[19] the endeavours where interrupted by the 'Cold War' till at the end of the century the two ad-hoc Tribunals 1993 and 1994 and finally 2002 the ICC were established.

II. Human Rights, protected and guaranteed by the Court

It may be presupposed that everybody is (to a certain degree) familiar with the rights and duties of individuals. But as far as scope and notion of the International Criminal Court is concerned, the situation is different. The average person may know, that criminal law tries to prevent and punish grave violations of individual Human Rights and those of the community. But what the International Criminal Court has to do with state guarantees for Human Rights is not so obvious. In addition, we have to be aware, that the different organs of this Court have to guarantee procedural Human Rights when investigating and prosecuting. They therefore have to take due care not to violate such rights of suspects, witnesses and victims by any official activities of the Court. Since this obligation put the Court into relation to Human Rights, we have to find out about a possible interdependence of both categories of Human Rights. The following contribution shall help to better understand this subject matter.

1. *Theoretical foundation and structuring elements*

For developing a more effective policy of interventions to protect Human Rights against violations of the state, which ought to guarantee and

Rechtskultur, vornehmlich zur Bekämpfung krassester Formen von Macht- und Rechtsmissbrauch?', in: G. Fornasari/R. Wenin, *Aktuelle Probleme der Internationalen Strafjustiz – Akten des XXVII. Internationalen Seminars deutsch-italienischer Studien, Meran 26.-27. Oktober 2007* (2009) 7-55, at 13 *et seq.*

[19] See for instance G. Hankel, *Die Leipziger Prozesse – Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (2003) and M. P. Scharf, *Have we really learned the lessons of Nuremberg?*, Address presented 17 November 1995 during the conference 'Nuremberg and the Rule of Law: A Fifty-Year Verdict' held in the Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, November 17-18, 1995; the report is visible under http://www.pegc.us/archive/DoD/docs/Lessons_of_Nuremburg.doc (3 Oct. 2009): 'There were four main criticisms levied on Nuremberg. First, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defen-

enforce these rights, quite a few changes in international law were necessary. Legal theory had to slowly create the basis for a 'real' international approach within a penal system, which ought to be 'supra-national' in the sense of 'above' the states and therefore possibly in conflict with the traditional law of nations and its absolute sovereignty of states.[20] For a long time therefore an independent 'world-Court' was not in sight. Most of the former proposals tried to overcome the difficulties by providing with regard to cases of relevant violations of Human Rights an *ad hoc* 'transfer' of part of their sovereignty respectively of the national jurisdictions to such an international court, for instance the Anti Terror Convention of the League of Nations.[21]

With regard to these endeavours it was right from the beginning agreed upon, that states could be the addresses of penal norms to implement them into their national legal systems; but that they could not be held criminally responsible themselves, as indirectly expressed by Article 25 para. 4. They were obliged to contribute to the prevention of such crimes, but the criminal responsibility rested with or was supposed to rest exclusively with human beings, who acted, and not with abstract entities.[22]

a. *Individual criminal responsibility of natural persons under the law of states*

However, it was not so easy to hold natural persons accountable directly under the law of nations. They first had to be accepted as subject within this legal system. The acknowledgement of universal rights and duties of men therefore was the first step to open the development in the direction

dants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. And finally, that it was a tribunal of first and last resort, because it had no appellate chamber'.

[20] See for instance the paper of Prof. L. Sabourin to this Plenary Session, *State Sovereignty and Humanitarian Intervention: the Duty to Protect*.

[21] In 1934 the League of Nations took the first major step regarding terrorism by discussing a draft convention for the prevention and punishment of terrorism. Although the Convention was eventually adopted in 1937, it never came into force. Since 1963, the international community has elaborated 13 universal legal instruments and three amendments to prevent terrorist acts. See for instance *UN Action to Counter Terrorism*, visible under http://www.un.org/terrorism/instruments.shtml (21 Oct. 2009).

[22] See for instance K. Ambos, 'Special Print: Art. 25 – Individual criminal responsibility', in O. Triffterer (ed.), *Commentary*, supra note 4, at 768 *et seq.* and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 158 *et seq.*

of individual criminal responsibility 'outside' their own domestic systems or those of other states.

One of the starting points that has to be recalled on this occasion was, that every legal system carries the possibility in itself, to create and enforce penal law in order to prevent grave violations of its basic values, at least as *ultima ratio.*[23] To accept this also with regard to the law of independent states was viewed as an interference with their sovereignty, one of the basic pillars of their independence. It therefore would have been easier to accept for the states to build the international criminal law and its enforcement on a transfer of domestic jurisdictions to organs of the international community as a whole, as provided by the Anti-Terror Convention 1934.

But the historical development was more favourable for a direct international criminal responsibility as an inherent part of the legal system of this international community as a whole. The agreement of the states to this tendency was finally supported by the fact that states play anyhow an important role for the creation of the law of nations and its enforcement and therefore could influence the future development more than any other institution.[24]

Before this background it was not surprising, that first humanitarian conventions, obliging the states to care for individual criminal responsibility of their citizens, sporadically made individuals directly responsible, for instance for breaking an armistice in the The Hague Law Article 41.[25]

Consequently, the Peace Treaty of Versailles 1919 called the former German emperor to responsibility for breaking the law of wars and the holiness (sanctity) of treaties. This document demonstrates the abolishing of the 'Act of States Doctrine' and thus of the absolute sovereignty of the state, as already mentioned above: Organs of states acting in official capacity could no longer enjoy impunity and thus not be exempted from punishment.[26]

[23] See for instance O. Triffterer, 'The Court in Danger? Future Perspectives for International Criminal Law and its enforcement mechanisms', in: C. Burchard *et al*. (eds.), *The Review Conference and the Future of the International Criminal Court – Proceedings of the First AIDP Young Penalists Symposium in Tuebingen, Germany* (forthcoming), under 1.A. therein.

[24] See for instance Art. 38 ICJ-Statute, where treaties are mentioned as the main source of international law.

[25] See Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 Oct. 1907, Art. 41: 'A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained'.

[26] See for instance O. Triffterer, 'Irrelevance of Official Capacity', supra note 15, 571-662.

To be effective, the new type of law should no longer favour a structure which provided only the responsibility of states for taking the necessary activities that their citizens and other inhabitants respect the law of nations and protect the values of this international community as a whole. They respectively their organs should be held directly responsible also for acts committed in official capacity: this was the final break with the Act of State Doctrine.[27] And once the law was applicable to everybody including state organs, the demand for an international court to apply and enforce this law, could no longer be suppressed.[28] Because the failures to enforce the provided penal responsibility after the First World War, demonstrated already in between and in particular when faced with the cruelties of the Second World War[29] that an international individual criminal responsibility of states organs was indispensable.[30]

b. *Legal values and interests, inherent to the international community as a whole*

Criminal law deals in principle and by its nature with the *ultima ratio* protection of the highest values of the legal system it belongs to. Including the new international criminal law into the legal system of the law of nations, the international community as a whole had to reflect what are the most precious values inherent to this system. It could not merely refer to the cooperation of states in criminal matters; because mutual legal assistance to make the national protection more effective was not the issue of the day. Such regulations protected only national values and the prosecution of violations is coordinated in order to make the prevention more successful. But the values protected remain those of national legal systems involved.[31]

[27] See for instance O. Triffterer, 'The Court in Danger?', supra note 23, under 2.A. therein.

[28] See for instance Beling, *Die strafrechtliche Bedeutung der Exterritorialität* (1896). For the development of the work of the United Nations see O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 65 *et seq.*

[29] See for instance G. Hankel, *Die Leipziger Prozesse*, supra note 19, and G. Hankel/G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen – Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (1995).

[30] *Ibid*.

[31] See O. Triffterer, 'Present Situation, Vision and Future Perspectives', in: A. Eser/O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law, Documentation of an International Workshop 1991, Freiburg im Breisgau* (1992) 369-386.

'Peace, security and well-being of the world'[32]

The difference of this national approach of value protection in comparison to 'Völkerstrafrecht' can be demonstrated by two examples: Slavery for instance is committed in various stages on one or the other territory of states. The transport of the 'kidnapped' victims through or to another country with different jurisdictions, made cooperation necessary to ensure prosecution and thus contribute to the prevention of these violations of Human Rights. The application of the Universality Principle was required to protect the victim in as many states as possible, in the interest of abolishing the crime against legal values protected in many states, though not in all. Only when the question of the admissibility of slavery led to a civil war between the northern and the southern states of America, values of the international community as a whole, namely peace and security were endangered.[33]

With regard to piracy, the situation was and still is different. Not primarily human beings needed to be protected against violations of their individual rights, but the open sea as a common good for all was the predominant value which belonged to all states and their citizens; and therefore it could and had to be protected everywhere, where pirates appeared. This value, peace, security and liberty on the high sea, was the prevailing issue to justify international regulations. The interests of the owners of the attacked ships as well as the rights and liberties of the crews, were as individual Human Rights indirectly protected in the same way.[34] It was no longer merely the common interest of states to protect national values of each of them; it rather appeared more and more indispensable to protect values which could not be assigned to any of them alone, but only to the community to which all states belong. Just this structure made it not only desirable but even necessary, to apply also for such violations the Universality Principle.

Having for instance this development and the comprehensive laws and customs of war in mind, it was only a small step to demand and establish

[32] See Preamble of the Rome Statute, Section 3.

[33] For more information about the American Civil War see http://en.wikipedia.org/wiki/American_Civil_War (13 Oct. 2009) and J. Keegan, *The American Civil War* (2009).

[34] See for instance O. Triffterer, 'The Court in Danger?', supra note 23, at 47 *et seq.* For the present military situation to fight piracy see D. Wiefelspütz, 'Die Beteiligung der Bundeswehr am Kampf gegen Piraterie – Völkerrecht und Verfassungsrecht', in *4 Neue Zeitschrift für Wehrrecht* (2009) 133-150, at 135.

'Peace and security of the world' as the basic values inherent to the international community as a whole. Correspondingly these two values were already right from the beginning anchored approximately thirty times in the Statute of the UN. In addition, it was clarified that protecting these values was at the same time protecting individual rights and liberties, directly or indirectly endangered through war, armed conflicts and other belligerent or insecure situations.[35]

Grave violations of individual Human Rights, endangering collective values

The just mentioned interdependence between international criminal law, its enforcement and Human Rights does not only work in the described 'one way'. On the opposite, it can be characterized as a 'two way' relation. Based on the interventionalist politics of the major powers in the Medieval it became namely more and more obvious, that grave violations of individual Human Rights by the state itself, in particular when committed through abuse of power and on a large scale, were endangering also collective values and thus, as a reaction or a countermeasure, called for humanitarian, diplomatic or even military interventions.

It was this mutual interdependence between violations of collective values inherent to the international community as a whole and violations of rights and liberties of individuals, attacked as members of the community, which called for common action to supply these two groups of rights with an *ultima ratio* protection by international law. This structure is mirrored more or less in all groups of core crimes under the jurisdiction of the Court, as will be explained in detail below under III.1.b. But it becomes in particular obvious with regard to genocide as summarized under IV. below.

2. *Substantive law, an indispensable protection against arbitrary arrest and discriminatory judgements*

To fight and thus prevent violations of individual or collective rights by penal law seemed right from the beginning and up till now not satisfying. Violating or limiting Human Rights of suspects or even convicted persons as reactions to their violations, therefore needed to be based on

[35] See for instance O. Triffterer, 'Preamble', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 8 *et seq*.

legal restrictions to guarantee, that innocent persons are not punished. Since holding individuals criminally responsible was not new, it was more and more recognized that every legal system needed a substantive criminal law, to limit the power of its judiciary and make its decisions subject to control.

But the sanctioning only of the defeated enemy by the victor, according to the national laws or peace treaties, appeared in the overwhelming majority of cases not sufficiently impartial to be accepted by the enemy and in the majority of cases equally not by third states. It thus was not a solid basis for reconciliation and peace.

a. *Definitions of crimes to be 'strictly construed'*[36]

One way to guarantee objectivity and impartiality was to define which behaviour should be criminal and punishable. To achieve this goal, it was more and more requested to create unified law with detailed regulations about the behaviour and its result (material elements) and the mental elements to be required for punishability. This decisive law should not be left at the discretion of the victor. The Hague and Geneva Conventions document corresponding endeavours in the years since the second half of the 19th century.

For avoiding arbitrary and discriminatory judgements was not only demanded to accept the law, but that states transferred their international obligations 'one to one' into their national law. This proceeding could be to apply the international law directly and enforce it within the domestic legal systems, or to accept it by a formal legislative act by the competent state organ. Only such a correspondence of the national laws with international requirements for infringements into Human Rights of suspects or convicted persons appeared as a certain guarantee against partial jurisdictions of the victors on the defeated enemies.

But though the laws and customs of war were more and more detailed since the beginning of the last century, the Nuremberg crimes were rather vaguely 'described' in Article 6 of the International Military Statute for this Tribunal and therefore not well accepted. It was more and more requested, that criminal appearances which should be condemned and sanctioned had to be defined according to the principle *nullum crimen, nulla poena sine*

[36] Art. 22 para. 2 Rome Statute.

lege. They thus would guarantee international standards, which were already anchored in many national legal systems of the world.[37]

After Nuremberg, the increasing number of non international and international belligerent struggles called for more guarantees to at least ensure future progress. The codification movement started very soon with regard to the crime of genocide; however, no more than this minimum consensus could be achieved at that time. But even then for instance no agreement about what groups should be protected and what should be excluded from the list given in the Convention for the Prevention and Punishment of the crime of Genocide 1948, was obtainable.[38]

In addition, at least the International Red Cross made the next step to improve clarity and acknowledgment of what was generally accepted, by drafting and adopting the Four Geneva Conventions of 1949. They define grave breaches of the laws and customs of war as crimes to be prosecuted in all states in order to protect Human Rights in situations of international and non-international armed conflicts. Within the organizational framework of the United Nations not more could be reached as a Genocide Convention. But for years the Draft Code of Crimes against the Peace and Security of Mankind and the Draft Statute for an International Criminal Court were discussed. However, due to the 'Cold War' and other political inconsistencies the development stopped at the end of the fifties for decades.[39]

b. *'General principles of criminal law'*

In this context it has to be kept in mind, that as important as these basic definitions of the crimes are for the present situation, almost the same ranking have the 'general principles of criminal law', as described in Part III of the Rome Statue. Compared with others general parts of domestic legal systems, these regulations are rather meagre. But with regard to participation it is rather broadly sufficient, not withstanding that there are discussions going on, for instance with regard to the concept and notion of

[37] See for instance O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 92 *et seq.*

[38] See for instance W.A. Schabas, *Genocide in International Law – The Crime of Crimes* (2nd ed., 2009).

[39] See *Revised Draft Statute for an International Criminal Court* (Annex to the Report of the Committee on International Criminal Jurisdiction), U.N. Doc. A/2645 (1954) and *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/2693 (1954).

responsibility for joint criminal enterprise or concerning command responsibility as defined in Article 28.[40]

Anyhow, according to Article 21 Rome Statute the applicable law can be amended, for instance by generally accepted national principles or the law of the state where the crime had been committed.

The definitions of crimes have to clearly describe, what behaviour consequences and circumstances, *actus reus*, as described in Article 30 Rome Statute, as well as the harm resulting should be punishable. But in such definitions it is not always anchored in which way a participation in the crime may trigger that a person will be held, together with others, accountable. General principles appeared therefore necessary to be precisely in their wording for narrowing or extending responsibility and thus to limit scope and notion of a crime.

In general, inspiring others to commit crimes is punishable as well as aiding and abetting in the commission. For genocide however, the punishability is 'vorverlegt' (anticipated): Who in public and directly incites others to commit genocide, though nobody in fact was thus inspired to commit genocide, is also punishable. The reason is that with regard to this crime the inciting, though without success, is dangerous for the protection of the individual and group, values underlying the crime of genocide.

The importance of these general rules becomes further obvious also by Article 31, according to which certain situations constitute 'grounds for excluding criminal responsibility',[41] even though all elements contained in the definition of the crime are fulfilled. As an example may serve 'self-defence'. In this context also Article 25 is relevant; because its definitions decide that besides the principle perpetrator, fulfilling all elements, aiding and abetting for instance will be sufficient to hold other persons responsible.

The most complicated regulations with regard to extending or narrowing responsibility by interpreting the modalities for responsibility is Article 28. It is an excellent example for the structure of crimes, even though not for a short and nevertheless clear and understandable definition. Extensive analyse comes to the conclusion that the responsibility of a military commander for genocide committed by his subordinates does not require his genocidal intent,

[40] See V. Haan, *Joint Criminal Enterprise – Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht* (2008) and R. Arnold/O. Triffterer, 'Article 28 – Responsibility of commanders and other superiors', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 795 *et seq*.

[41] See for instance A. Eser, 'Article 31 – Grounds for excluding criminal responsibility', in: O. Triffterer (ed.), *Commentary,* supra note 4, at 863 *et seq*.

as generally demanded. It is sufficient that the principal perpetrator has such an intent and the commander or the superior knows or assumes that the subordinate acts with such a genocidal intent, and that he or she supports, though by omission, such activities. The same is true with regard to subordinates, who do not need to act with a particular genocidal intent as long as they aid or abet as mercenaries for instance corresponding activities.[42]

c. *Extending the jurisdiction of the Court?*

After the Second World War the questions arouse, whether it was sufficient to have international criminal responsibility directly under the law of nations for the 'core crimes' prosecuted at Nuremberg. At that time there were only three groups: crimes against humanity, war crimes and crimes against the peace; out of the first group genocide was later separated. However the numerous drafts proposals within the UN, International Scientific Organisation and by Individuals, always considered a (partly considerable) extension of this number.[43] This discussion about other crimes included the protection of under-sea telephone cables, diplomats, international mail and of course international terrorism and organised drug trafficking.[44]

Against such an extension was however argued that it would not be easy to achieve an agreement and that not all of these definitions fulfilled the requirements of international criminal law, namely to endanger the highest legal values inherent to the international community as a whole. Therefore, it was feared that including so called 'soft crimes' would diminish the reputation of and respect for the Court.[45]

[42] See for instance O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as expressed in Article 28 Rome Statute?', in: 15 *Leiden Journal of International Law* (2002) 179-205.

[43] See for instance *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/10, 17 July 1998, Annex I, lit. E., para. 6: 'Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court'.

[44] See for instance M.Ch. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) and id., *The Legislative History of the International Criminal Court: an Article-by-Article Evolution of the Statute* (2005).

[45] See O. Triffterer, 'International Crimes and Domestic Criminal Law, Efforts to Recognize and Codify International Crimes, General Report', in: *Revue International de Droit Pénal* (1989), at 29 *et seq.*

In order to risk no breakdown of the Rome Conference, this question was left open, in particular with regard to state terrorism and organized drug trafficking. But now, more than in the first decades after the Nuremberg, and ten years after Rome, the question arises, whether the globalization leads to appearances of misbehaviour which might be of sufficient gravity and structured in a way to fulfil the demands of international criminal law in the narrow sense.[46] Since continuously people are starving on this earth – with all due respect for the achievements made –, the uneven distribution of wealth and poverty and the criminal appearances coming with globalization tendencies lead to proposals to include more and more the protection of social human rights in the schedule of the core crimes and within the jurisdiction of the Court.[47]

However, it nevertheless cannot be expected, that at the First Review Conference in Kampala 2010 an extension will be agreed upon. The definition of aggression is not such an extension. It does not create the punishability but only defines strictly construed the different alternatives for what is already accepted as a crime against the peace.[48]

3. *Enforcement mechanisms*

However, as can be seen by the development of Human Rights, the best substantive law alone is not sufficient to prevent violations. When it cannot be made visible or otherwise proved that the law will be applied and violations prosecuted, the effectivity of the law is highly questioned.

[46] For the differentiation between narrow and broad sense see ibid. and for Human Rights and Globalization see the paper of Prof. J. Stiglitz to this Plenary Session, *Human Rights and Globalization: The Responsibility of States and of Private Actors*. See also the proposals of the World Future Council regarding 'Crimes against Future Generations', visible under http://www.worldfuturecouncil.org/startseite.html; for the expression 'in the narrow sense' see O. Triffterer, 'International Crimes and Domestic Criminal Law', supra note 45, at 29 *et seq*.

[47] See O. Triffterer, 'Die Dritte Welt vor der Türe Europas – Katastrophe oder Chance?', in: H. Schmidinger (ed.), *Die Eine Welt und Europa, Salzburger Hochschulwochen 1995* (1995) 119-164 and id., 'Preliminary Remarks', in: O. Triffterer, *Commentary*, supra note 4, at 46 *et seq*.

[48] See O. Triffterer, 'The object of review mechanisms', in: R. Bellelli (ed.), *Turin Conference on International Criminal Justice* (forthcoming), under 4.B. therein; for a summary of this text see R. Bellelli (ed.), *Conference on International Criminal Justice* (2008), at 40 and 41.

a. *General requirements*

To expect obedience to the law, its precise wording and notion has to be made familiar to the citizens. They must know and be aware of what they have to expect whenever they violate the law. The enforcement also serves the purpose, to demonstrate to those who do not violate the law, that it is worthwhile to remain inside the legal boundaries, because otherwise punishment has to be expected. Therefore clarity and awareness of the law, acceptance and general obedience, are equally indispensable as an inherent enforcement.

b. *Available modalities*

For an enforcement at the domestic level the judiciary has several 'state agencies' at its disposal; help can be requested for instance by the police and all other states authorities, which have to assist the local judiciary by 'Rechts- und Amtshilfe'.

In some states are in addition to these 'inherent' organs on the local or regional level 'private security forces' entrusted with the task to prevent crimes and trace suspects as well as arrest them to transfer them immediately to the official state authorities. In a similar way are also for the enforcement of international law different modalities available which may influence scope and notion of the international jurisdiction in this field.

Organs of the community of nations

Predominant as on the domestic level is also for international criminal law to enforce its substantive law by organs, inherent to the legal system it belongs to, the law of nations. Such an enforcement mechanism promises at first sight the best results. This has always been expected, correspondingly demanded since more than one century and, meanwhile, been proven by practical experiences of the ICTY and the ICTR.

However, special organs of the community of nations to directly apply the substantive law can be created through different procedures (direct enforcement models).

One of the possibilities was used in 1993 and again in 1994 for creating the International ad-hoc Tribunals for the Former Yugoslavia (ICTY) respectively the ICTR. Both had been established by the Security Council

as its Sub-organs.[49] They had been assigned the task of the international community as a whole, to directly apply what was and still is beyond a reasonable doubt the substantive law of this community and to guarantee the enforcement of their decisions.[50] This modality is limited by time and to a certain territory. It can be called back or be prolonged when requested by whom ever, through a decision of the Security Council.[51]

Both Tribunals were the first organs of the international community as a whole, exercising the *ius puniendi* of this body. They are partly overlapping by having one Prosecutor and a common Appeals Division. The ICC, created by a treaty, the Rome Statute, exercises the same *ius puniendi*, but permanent and since its entry into force on 1 July 2002 without any temporal or territorial limitation as provided for the first two Statutes.

All these organs have no inherent executive agencies at their disposal. Arrest, surrender and execution of sentences therefore have to be made with the help of national criminal justice systems, or other international, for instance peace-keeping UN-forces, for which however the competence of such legal aid is disputed.

Already these aspects, but mainly the historical development supported therefore the idea, to use the national enforcement agencies to supply 'Rechts- und Amtshilfe' for special organs of the international community as a whole.

Execution through national justice systems

Instead of enforcing the international law by international organs within their international legal system, but anyhow with some help of domestic agencies, as explained above, another possibility is to transfer the complete execution of the *ius puniendi* to national criminal justice systems. This is called the indirect enforcement model, because not organs of the interna-

[49] See for instance O. Triffterer, 'Grundlagen, Möglichkeiten und Grenzen des Internationalen Tribunals zur Verfolgung der Humanitätsverbrechen im ehemaligen Jugoslawien', in: *ÖJZ* (1994) 825-843.

[50] See Report of the Secretary General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), 3 May 1993; with regard to the question of reasonable doubt see para. 34. therein.

[51] See Article 1, ICTY-Statute; see for instance O. Triffterer, 'Grundlagen, Möglichkeiten und Grenzen', supra note 49. For the end of its competence in 2013 see for instance http://www.icty.org/sections/AbouttheICTY (22 Oct. 2009).

tional community, rather states or member states which 'build up' this community, enforce the international law, which is anyhow comparable and has to be made compatible or consistent with their own legal systems, though it is higher ranking under the aspect of a 'world order'.

For the operation of this model it is not relevant, whether the respective state can apply the law of nations directly or whether it needs to implement the international law before, for formal or substantial reasons, into its national legal system by the competent national organ.

New alternatives and reconciliation

After the Second World War criminological research came more and more to the result that serving (long term) imprisonment was not so much preventing further crimes by reconciliation, but rather promoting recidivism.[52] As an effective counter measure long term imprisonment was as much as possible avoided, for instance by probation or parole. In addition, new regulations, for instance 'außergerichtlicher Tatausgleich' or 'Schuldausspruch ohne Strafe' or 'mit Strafvorbehalt' were created and operated effectively in praxis.[53] Social therapy seemed for a long time to be the best method to prevent future crimes.[54] In addition, assistance to crime prevention through alternative 'security forces', private agencies entrusted for instance with police functions, were growing. All these measures had in common, that they changed the attention, when criminal acts appeared, from traditional formalized procedures to consulting negotiations with the main persons concerned, namely the perpetrators and the victims.

All these alternatives have been and partly still are in comparison to inherent traditional organs and institutions of the judiciary disputed on the national level. But on the international level comparable 'soft solutions' were considered more and more to be helpful for the prevention of core crimes. Because these crimes are typically committed by persons abusing their power or at least silently tolerating or assisting in such an abuse. They

[52] See for instance J. Grünberger, *Humaner Strafvollzug: Am Beispiel Sonderanstalt Mittersteig* (2007) as well as the literature to Social Therapeutic Institutions. See for instance Schüler Springorum, *Subkultur in den Gefängnissen* (1957).

[53] See H. Hinterhofer, *Diversion statt Strafe – Untersuchungen zur Strafprozessnovelle 1999* (2000).

[54] See for instance R. Ortmann, 'The Effectiveness of Social Therapy in Prison – A Randomized Experiment', in: 46/2 *Crime and Delinquency* (2000) 214-232.

therefore in general also have the power, to stop the violations of Human Rights, as already reported with regard to the Balkan wars 1912/1913 by the Carnegie Endowment for Peace.[55]

This involvement of strong political or military leaders makes it in general indispensable to negotiate with them about ending the situation which caused such crimes and the most severe violations of Human Rights.[56] Such persons therefore often have to be included and addressed in almost every negotiation for peace. Against this background they quite often demand and partly have been promised impunity in order to inspire and guarantee their help for stopping the situation as soon as possible and permanently.

In addition, the slow process of creating the ICC and the tension in different aspects on judging core crimes or other violations of Human Rights called for more emphasis on reconciliation. I mention in this context that for instance the massacre on the Armenians in 1919 came not to a reconciliation till finally on 10 October 2009, which means ninety years later, the states involved signed a treaty concerning peaceful settlement of the main issues concerned. It was a strong desire to find better ways to overcome the past as criminal responsibility of the individual actors had to offer.[57]

The slow process of creating a permanent ICC and the tremendous difficulties called again and again for more emphasis on reconciliation. In this context it must be referred to some of the first states making use of new possibilities to overcome the past. It were Peru and South Africa creating 'Truth and Reconciliation Commissions' at the end of the Eighties and the 'transitional justice' after the two Germanies were united. The last solution was practically unique, notwithstanding the situation in Korea still waiting for coming also to reconciliation.

The first Truth Commissions however have meanwhile been copied several times.[58] Such a solution provides that a state organised and estab-

[55] See L. Tindemans, *Unfinished Peace*, supra note 16.

[56] See *ibid*.

[57] See for instance http://news.bbc.co.uk/2/hi/8299712.stm.

[58] For a list of all Truth and Reconciliation Commissions see http://en.wikipedia.org/wiki/Truth_and_reconciliation_commission (20 Oct. 2009). For the Truth and Reconciliation Commission South Africa (TRC) see http://www.doj.gov.za/trc/ (20 Oct. 2009); for the Truth and Reconciliation Commission in Sierra Leone see http://www.trcsierraleone.org/drwebsite/publish/index.shtml (20 Oct. 2009); for the Commission for Reception, Truth and Reconciliation in East Timor see http://www.cavr-timorleste.org/ (20 Oct. 2009); for the Truth and Reconciliation Commission in South Korea see http://jinsil.go.kr/english/ (20 Oct. 2009); for the Peruvian Truth and Reconciliation Commission see http://www.cverdad.org.pe/ingles/pagina01.php (20 Oct. 2009).

lished neutral commission takes care of former crimes in order to achieve reconciliation by friendly means without traditional penal procedures and perhaps by granting amnesty or other modalities to achieve impunity.[59]

All these endeavours convince against the just mentioned background that the struggle between Turkey and Armenia about the massacre on the Armenians in 1919 will perhaps find a solution by a treaty almost hundred years later.

In general, the conditions for such a success are mainly collected and almost accepted: a clear confession, admission of violations of the law and an apologize to the victims as well as financial compensation. As alternative, in cases these conditions are not fulfilled, remains criminal responsibility before national courts. Whether then the Rome Statute is applicable or national law with sanctioning according to international criminal law standards, has to be decided on a case to case basis.

Helpful for the development of new alternatives was also the experience all over the world that neither national law nor international institutions were offering by traditional means and methods satisfying solutions with regard to reconciliation. 'Internationalized' and comparable 'hybrid' courts or tribunals on the opposite seemed to offer a compromise between the two alternatives which already by the first agreements on how to proceed based hope to finally achieve a peaceful solution.

While truth and reconciliation commissions only investigate and not prosecute according to traditional national lines, the 'hybrid' courts do. They are 'internationalized' because in particular the judges, but also other organs of such institutions, are elected and appointed with the cooperation of the UN; in principle 50 per cent are national and 50 per cent international judges and other organs, in particular the Prosecutor. Sometimes, however, there is a small majority of one of the two groups or the possibility to use a veto by the representatives of the international community as a whole. In accordance with the UN, the General Secretary of the General Assembly or the Security Council, some countries like Sierra Leone, had both, a Truth and Reconciliation Commission as well as a Special Court;[60]

[59] See for instance M. Freeman, *Truth commissions and procedural fairness* (2006).

[60] The Report of the Sierra Leone Truth and Reconciliation Commission is available unter http://www.africa focus.org /docs04/sl0410.php; for the Special Court of Sierra Leone see http://www.sc-sl.org/.

and Charles Taylor, for example, has to stand trial before the Special Court for Sierra Leone sitting in The Hague.[61]

After meanwhile more or less satisfying experience with such new compromising institutions, a systematisation of these additional possibilities was elaborated and put on discussion by Cherif M. Bassiouni with the 'Chicago Principles on Post Conflict Resolution'.[62] These principles as a whole are meant to substitute traditional penal proceedings; and their aim is to solve the conflict by agreement and by, if necessary, using even an amnesty to achieve a peaceful permanent new society. The Chicago Principles as well as the similar Nuremberg Declaration on Peace and Security[63] mention amnesty expressly as one of the possibilities to achieve peace and reconciliation. However, in both documents is emphasized that this may not be the right solution for 'main' or major perpetrators, as they were held responsible for instance in Nuremberg. Methods and means of the traditional criminal justice system are therefore kept 'in reserve' if so called 'soft solutions' do not lead to the result required, namely reconciliation with (under) conditions promoting permanent peaceful living together.[64]

III. Present Situation

On the above considered theoretical foundation and structuring elements including the endeavours to find new solutions, the present situation has to be evaluated. Of course, the substantive law can only be surveyed as well as the enforcement mechanisms shaping right now the situation. The *status quo* therefore will not be exhaustingly analysed and reported. Instead of giving too many details I will concentrate on what are the prevailing issues in this field at the beginning of the twenty first century.

[61] See also for the tendency in Africa, to find a regional solution T. Goodman, *Staging solidarity – truth and reconciliation in a new South Africa* (2009). See also G. Werle, 'Without truth, no reconciliation. The South African Rechtsstaat and the Apartheid Past', 29 *Verfassung und Recht in Übersee* (1996) 58–72.

[62] See for instance International Human Rights Law Institute, Chicago Council on Global Affairs, *The Chicago Principles on Post-Conflict Justice* (2008).

[63] *Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General – Nuremberg Declaration on Peace and Justice*, UN Doc. A/62/885, 19 Jun. 2008.

[64] See for instance the Court of Bosnia and Herzegowina, which is a domestic court of the state of Bosnia and Herzegowina but also includes international judges and prosecutors. For jurisdiction, organization and structure of this court see http://www.sudbih.gov.ba/?jezik=e (07 Oct. 2009).

1. *The first permanent International Criminal Court and the law to be applied*

The outstanding and most important legal and political achievements for theory and practice of this new field are the Rome Statute and its meanwhile established and operating International Criminal Court. Both represent the first and only institutions of such high quality. The law to be applied is in principle international law according to which the Court is established; and relevant national laws concerning specific situations and cases may also be taken into consideration and thus be decisive as far as mentioned in Article 21 Rome Statute and as their application is in the interest of justice or at least not against it.[65]

a. *The Rome Statute and the Rules of Procedure and Evidence*

The Court is a 'treaty based' solution established by the Rome Statute, after 60 states became members of this Treaty. The Treaty and the Rules of Procedure and Evidence, the latter given to the Court not by its judges, as in Nuremberg and for the ICTY and the ICTR, but by the Assembly of States Parties (ASP), did not create the *ius puniendi* of the international community as a whole. They create only the executive organs for this enforcement model and the general outlines for the proceedings to investigate and prosecute crimes within the jurisdiction of the Court. This *ius puniendi* is inherent to the international community as a whole, not to the Court; the Court rather has merely to exercise this right. But the Court may leave this execution to another reliable institution, in principle to a domestic criminal justice system, if the state concerned is not suspicious of abuse of power as already mentioned above, or otherwise unable or unwilling to genuinely proceed in the sense of Article 17.

This modality to create the Court by a Treaty and not within the UN, as the ad-hoc Tribunals, was preferable, compared with other possibilities to establish a court or tribunal. Because it makes the Court (more) independent from political influence on its organs and agencies as the other just mentioned modalities for creating an international criminal court.[66]

[65] See for instance M. McAuliffe deGuzman, 'Article 21 – Applicable law', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 708, margin No. 14.

[66] For the position of the defence counsel in international criminal justice see for instance J. Temminck Tuinstra, *Defence Counsel in international criminal law* (2009) and O. Triffterer, 'Preface', therein at V. See also O. Triffterer, 'The Court in danger?', supra note 23, at 54 *et seq*.

b. *Acknowledging and defining the crimes 'beyond reasonable doubt'*[67]

Treaties and conventions are the main sources of the Law of Nations as referred to in Article 38 ICJ Statute. By a treaty, the community of states may for instance decide what behaviour should be prevented and repressed by penal sanctions. The question therefore arises whether the Rome Statute when listing the four groups of crimes in Article 5 lit a-d and defining three of them in Articles 6, 7 and 8, has created new crimes or (merely) decided about the jurisdiction of the Court with regard to already existing crimes with responsibility of individuals directly under international law.

'Collecting' the 'most serious crimes of concern to the international community as a whole'[68]

The Rome Statute refers several times to the Court and its jurisdiction over 'most serious crimes of concern to the international community as a whole'. The context of these references clearly indicates that there are other 'most serious crimes' not within the jurisdiction of the Court and also 'serious crimes' under international law.[69] Examples for the first category are perhaps state terrorism and organised drug trafficking. Almost equally questioned is whether also grave violations of Human Rights like the right to life, to food and to survive is or should be a most serious crime. Into the second categorie may also be listed non grave breaches of the Four Geneva Conventions of 1949. However, all these crimes are by now excluded from the jurisdiction of the Court by being not mentioned in the Rome Statute.

The Rome Statute is the 'Statute of the International Criminal Court' and not the penal code of crimes against the peace and security of mankind. Though it defines substantial and procedural law, both have to be accessed differently. The Rome Statute did not create the law establishing international criminal responsibility for various appearances of crimes. The situation at the Rome Conference was similar to the one referred to in the Report of the General Secretary of the UN when proposing to the Security Council the Statutes for the ICTY and one year later for the ICTR. He,

[67] See supra note 70.

[68] Preamble to the Rome Statute, Section 4.

[69] See for instance O. Triffterer, 'Preliminary Remarks', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 36 *et seq.*, margin No. 61.

in May 1993, expressed the opinion that the judges would have 'to find' the law, respectively to find out what is a criminal behaviour directly under international law, exactly 'beyond a reasonable doubt'.[70] A similar though much more limited reference is contained in the Letter dating 9 December 1994 of the General Secretary to the President of the Security Council. In paragraph 145 with regard to the precise notion of certain crimes

> [t]he Commission of Experts recommends that the Prosecutor explore fully the relation between the policy of systematic rape under a responsible command as a crime against humanity on the one hand, and such a policy as a crime of genocide, on the other.

Comparing the situations in 1993 and 1998 at Rome, there is a relevant though not too big difference. Except with regard to genocide for which a Convention defines the different alternatives since 1948 'strictly construed', war crimes and crimes against humanity are in the Statutes of the Tribunals less precisely defined. Articles 3 respectively 5 ICTY and ICTR Statutes contain for instance with regard to 'the power to prosecute' that it 'shall include but not be limited to' the following crimes listed; and this list ends in Article 5 respectively 3 with the vaguely described 'catch-clause': 'other inhuman acts'. The partly rather summarizing description of core crimes therefore had to be in detail analysed and interpreted as punishable behaviour under international law before the Tribunals applied them. With regard to war crimes, this task was relatively easy. Because the Hague and Geneva laws, in particular the four Geneva Conventions of 1949 and their Additional Protocols of 1977, were of great help, precising the laws and customs of war.[71]

The failure to describe exactly 'strictly construed' all criminal behaviour falling within the jurisdiction of the two Tribunals had of course meanwhile been compensated by the jurisprudence of these two Tribunals. Already the Rome Conference therefore had to take due consideration of possible changes or amendments. To keep in line with Nuremberg, the Rome Statute therefore limits the jurisdiction of the Court to the four core crimes, the classical Nuremberg crimes. Genocide was the first crime under international law since long time precisely defined by positive international law.

[70] See Report of the Secretary General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), 3 May 1993; with regard to the question of reasonable doubt see para. 34. therein.

[71] See for instance E. van Sliedregt, *Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) and Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 4 *et seq*.

With regard to crimes against humanity there was more need for precision, than for the war crimes; because for the latter the just mentioned Geneva Conventions and their 1977 Additional Protocols where helpful; and the 'catch clause' of the Statutes of the Tribunals had for instance been replaced in Article 7 para. 1 lit. k Rome Statute by: 'Other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

Notwithstanding these difficulties an agreement existed worldwide ever since Nuremberg that genocide, originally merely an alternative of the crimes against humanity, was at that time not yet precisely enough defined and therefore needed detailed elements to fulfil the demands of *nullum crimen, nulla poena sine lege* in its Convention 1948. The same is true, but though not in the same extent for war crimes, because there the laws and customs of war had already for centuries tried to define more and more precisely what should be prohibited and what punishable because of its gravity in violating legally protected values. This step of development becomes evident when we look at the 1949 Geneva Conventions, where these laws and customs of war have been grouped and summarized under various aspects. Now the even greater precision in the Rome Statute is almost satisfying, though always open for improvement as the jurisdiction of the Tribunals and the decisions of the Court demonstrate.

One of the reasons for this improvement by clearly defined provisions was besides the various aspects of a fair trial, to avoid that alleged and obviously unjustified charges, complains and accusations or just submissions by whom ever were raised against other states, state organs, parliamentarians, military commanders, etc. By transparency and an easy control should be prevented, that for instance political opponents would be falsely charged with violating Human Rights or other values of the international community as a whole (by committing crimes under international law). It was feared that otherwise by rather vague, inconsistent charges it could be too easy to throw the moral or political blame on states or persons acting in official capacity for something which does finally not constitute a core crime. For political or other purposes it should be impossible to deliberately and by false charges trigger investigations of the Court and thus raise the impression, there was reasonable ground to believe, a crime within the jurisdiction of the Court could have been committed.

The best examples for the endeavours to exclude such an abuse of the Court was the demand for 'strictly constructed' definitions of crimes against the peace, before the Court could insofar execute its jurisdiction.

The situation was similar as for crimes against humanity. However, the Rome Conference could not agree on what exactly should be the punishable alternatives of relevant crimes against the peace within the jurisdiction of the Court. The minimum consent was that at least such crimes exist. This made it possible to put aggression into the four groups of crimes listed in Article 5. But since the Conference could not even agree on a summarizing definition for at least one single alternative, to punish aggression within the jurisdiction of the Court, a political compromise had to be accepted at Rome: aggression was included into the list of crimes within the jurisdiction of the Court, Article 5 para. 1 lit. d; but at the same time it was ruled in Article 5 para. 2, that though competence for these crimes already existed, it could not be exercised by the Court before the Assembly of States Parties had defined at least one alternative of crimes against the peace; and, in addition, conditions should be fixed by the ASP under which this *ius puniendi* then should be exercised.

Discussed are for instance to require an opinion of the Security Council before the Court could start investigating or prosecuting a situation or case with regard to being an aggression.[72] The right to peace, security and well-being of the world was thus confirmed as well as the individual Human Rights which are always endangered in belligerent struggles or armed conflicts. Though the violations of civilian objects and persons are manifold comprehended by the definitions of crimes against humanity, with regard to collateral damage on these protected targets, for instance, the corresponding war crime is not satisfyingly defined in Article 8 para. 2 lit. b (iv).[73]

Referring to traditional appearances of crimes

As already mentioned above under II. 2. a., not only the various definitions of crimes have to be 'strictly construed', but also their different appearances, like commissions by a single person, as principle perpetrator, aider or abetter or in any other form of participation. Correspondingly 'individual criminal responsibility' under the Statute can only be established 'if that per-

[72] See for instance A. Zimmermann, 'Article 5 – Crimes within the jurisdiction of the Court', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 135 *et seq.*

[73] For collateral damage see for instance O. Triffterer, 'Ius in bello: Eskalation durch "Kollateralschäden" wie durch Kriegsverbrechen – Beweisbarkeit und Vermeidbarkeit?', in: R. Moos *et al.* (eds.), *Strafprozessrecht im Wandel – Festschrift für Roland Miklau zum 65. Geburtstag* (2006) 559-584.

son fulfils one of the alternatives' listed in Article 25 para. 3 lit a-f. Article 28, however, extends this list by ruling that 'in addition to other grounds of criminal responsibility', meaning those in Article 25, commanders and other superiors can be held responsible when fulfilling the elements strictly construed in Article 28.

c. *Creating specific investigation and prosecution proceedings*

My considerations on the Court in operation would be incomplete without a few surveying remarks on the proceedings. They will demonstrate how far compromises can go and where some weak-points remain.

Looking at the historical examples and experiences judging war crimes under national legal systems, in particular before military courts, with limiting the rights of suspects, for instance for free choosing a counsel,[74] a strong engagement for a new approach became dominant. It was unanimously agreed and decided that it was not satisfying to proceed according to any mentioned standard. To avoid the danger of arbitrariness or partiality, because of the implications involved on the national level in many cases, it was rather agreed, that it was indispensable to create an inherent at least partly revised international criminal procedure. The aim was to prevent all disadvantages of national law and establish as many advantages as possible from there. In particular abuses of power in such proceedings had to be avoided, for instance by excluding a trial *in absentia*. Rather, a fair trial with its various components like the rule of law, due process of law and equality of arms had to be guaranteed. The standards summarising by this key-word are meanwhile well accepted by customary international criminal law.[75]

Compromising between common and civil law

An own high standard was however difficult to achieve; because two major legal systems had already clashed at Nuremberg and again were concurring when the ICTY and the ICTR investigated and prosecuted. However, an institution assigned with the task to watch out for the protection of

[74] See for instance J. Temminck Tuinstra, *Defence Counsel*, supra note 66.

[75] See for instance P.L. Robinson (Presdient of the ICTY), The Right to Fair Trial in Customary International Law and the Jurisprudence of International Tribunals, lecture on 16th October 2009 at Rome III (forthcoming).

Human Rights and against most serious violations, needs a very good reputation to be accepted. The acceptance does not only depend on the quality of the substantive law, but at least equally on the proceedings. Therefore the members of the Rome Conference tried to find a compromise between common and civil law, claiming to have the best of both systems written down in the Rome Statute. It does therefore not surprise that the right to be heard is extremely developed in the Rome Statute and includes the right of everybody at any time of proceedings to initiate by writing or orally a (re)consideration of situations or cases.

Nuremberg for instance has strived to avoid former disadvantages of partial and unfair national criminal proceedings, in particular of victors prosecuting former enemies. Though it achieved an acceptable, rather fair criminal post-war justice, it nevertheless has raised sceptical opposition, missing for instance an equality of arms, right from the beginning and till the end.

In addition it was criticised that Nuremberg was established almost exclusively by common law states, where judges decide about 'their rules', thus dominating their procedure. After Nuremberg the various endeavours to create direct international enforcement mechanisms therefore demanded to establish proceedings which clearly and beyond reasonable doubt were conducted impartial, fair and in accordance with the rule of law, guaranteeing sufficient rights to the defence.[76]

The creation of the two ad-hoc Tribunals, for the Former Yugoslavia and for Rwanda, was done too much in a hurry to take due consideration to the Draft Code and the Draft Statute already existing at that time. Agreement on a symbiosis between the two systems could therefore not be found so quickly. This was the reason why the Statutes continued to grant mainly the procedural rights of Nuremberg. Consequently, because of the dominance of common law, for each case had to be assigned a common law lawyer as one of the defence counsel.[77]

[76] For more details see O. Triffterer, 'Zum Beachtungsanspruch des Völkerstrafrechts in staatlichen Rechtssystemen', in: Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), *Internationale Strafgerichtshöfe und Menschenrechte (*2006) 69-117, at 106 *et seq*.

[77] For details on these questions see *ibid*. and, for instance, C. Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in: A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 143-159, at 150 *et seq*.

This factual and legal situation, which some of the presiding judges of the ICTY compensated *ad hoc*, was the basis for the preparatory work facing the Rome Conference. The desire to come up with a symbiosis between the different procedural laws and structures nevertheless could not be achieved. How difficult this is can be seen in the framework of the European Union, where merely a unification of arrest warrants could be achieved. But no further 'rapprochement' is in sight for the near future.

However, in a few parts of the Rome Statute, satisfying deviations from the procedures of the *ad-hoc* Tribunals can be found. The Rome Statute provides for instance expressly that the Prosecutor can initiate a proceeding '*proprio motu*'. He then has to notice not only the States Parties but also the Pre-Trial Chamber delivering the evidence to this Chamber and ask for authorisation to start official investigations, Article 15 Rome Statute. In addition provides Article 19, that the jurisdiction of the ICC or the admissibility of a case can be separately appealed.[78]

Striving for the highest standard for a fair trial

This is the background against which at the Rome Conference many Delegations strived to elaborate and adopt the highest standards for Human Rights achievable in criminal proceedings. This aim appeared further desirable, because such standard on the international part of the Complementarity Regime of the Rome Statute could and should serve at the same time as a model for domestic criminal jurisdictions. To give an example was, in addition, advisable, since national jurisdictions have in principle a certain priority. It therefore may be argued that with regard to crimes falling within the jurisdiction of the Court, states as the constituent parts though but individually substituting are in a certain way representing the international community as a whole respectively its jurisdiction. It therefore is understandable that relevant regulations of the Rome Statute go beyond those contained in the rather quickly adopted Statutes for the ICTY and the ICTR.

It was this aim to make clear that only the hightest standards of Human Rights for all partcipants should govern the proceedings before the Court. Disputed rights or limitations should not spoil the reputation of the Court.

[78] For these and the following considerations see O. Triffterer, 'Beachtungsanspruch', supra note 76, at 110-112 and C. Kreß, 'The International Criminal Court', supra note 77, at 149 *et seq*.

It was this aim and intent to keep high standards for procedural guarantees. For instance, with regard to genocide by denying sufficient food, the alternatives (a) *killing* or (b) *causing serious bodily harm* could be fulfilled. The same is true if conditions are 'inflicted' on the group, which were 'calculated' to bring about its physical destruction.

Progressive stages under the control of the Pre-Trial Chamber

When regulating the specific proceedings before the Court, one of the main aims was to prevent abuses of the organs and possibilities of the Court to discredit another state or its organs. Right from the beginning a neutral institution therefore was suggested to pre-decide whether a case was stringent when brought before the Court or whether it was suspicious of raising alleged accusations for political purposes.[79]

Instead of creating such a separate organ to control the start of official proceedings, the Rome Conference preferred to have a continuous supervision of investigations and prosecutions and established particular proceedings for this purpose. At different stages different rights and duties exist to be obeyed by the organs of the Court. This system of 'checks and balances' with controlling powers is entrusted to the Pre-Trial Chamber, for instance with regard to the final confirmation of charges in Article 61.

But this is not all. Right from the beginning, whenever situations or cases were presented to the Prosecutor, he or she is obliged to refer to the Pre-Trial Chamber requesting its permission or better the confirmation that the Prosecutor is 'doing right' and therefore may start or continue investigations concerning situations or cases. Of course not only the official start of investigations and collecting evidence is depending on the agreement of the Pre-Trial Chamber. As in all states in particular the arrest and pre-trial detention depend on the decision of judges. These checks and balances serve the purpose to protect the rights of the suspect against unjustified interferences of the judiciary within his or her rights and liberties.

Witness protection, victims participation and compensation in the context with other rights and duties of the Prosecutor

In Article 66 Rome Statute the presumption of innocence is, for instance, expressly mentioned. But, Article 68 regulates for the first time direct in a

[79] See for instance A. Cassese, *International Criminal Law* (2nd ed., 2008), at 395 *et seq.*

Statue the 'protection of the victims and witnesses and their participation in proceedings', amended by Article 75, 'reparations to victims'.

New in this context are also the more detailed regulations of rights for the accused in Article 67 combined with the protection of victims and their participation in proceedings. These rights clearly set limits in paragraph 1 and paragraph 2 by emphasizing, that all measures taken or positions granted to victims during the proceedings 'shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

How the Prosecutor has to proceed and what his or her rights and duties are, is in detail regulated in Articles 53 and 54. For the first time it is expressly confirmed as one of his duties, to establish the truth. Article 54 para. 1 lit. a) obliges the Prosecutor to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'.

In a similar way the rights of the suspect are fixed in Articles 55 and 66 as well as 67; there the immediate defence and its presence when witnesses are questioned, are ruled. Evidence may be formally withheld in a reduced way, even though the ICC Pre-Trial Chamber controls this issue to keep it within certain limits.

Though such requirements and the Rule of Law are mentioned further a few more times in the Rome Statute, it is up till now disputed what exactly is necessary to meet these standards and which infringements of civil rights and liberties can be tolerated in the interest of justice.[80] For instance the question of undue delay has been disputed not only in the case of *Prosecutor v. Lubanga* but also in the case of *Prosecutor v. Al-Bashir.*[81]

[80] For general remarks on the principle of a fair and expeditous trial see A. Cassese, *International Criminal Law* (2003), at 395 *et seq*, For a more detailed explanation see J. Pejic, V. Lesnie, *What is a Fair Trial? – A Basic Guide to Legal Standards and Practice* (2000), available online at http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf (15 Oct. 2009); copies of this report are also available from comm@lchr.org.

[81] See *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, case No. ICC-02/05-01/09, available online at http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ and at http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf (25 Sep. 2009) and *Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06, available online at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/ (11 Oct. 2009). See also R. Heinsch, 'How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?', in: C. Stahn/G. Sluiter, *The emerging practice of the International Criminal Court* (2009) 479-500.

In the last case this may be due to political questions, because the suspect is supposed to have acted in official capacity as head of state. But in particular in such situations of alleged abuses of power, legal guarantees of Human Rights have to prove their validity and practical importance for protecting suspects. These considerations I have on another occasion dealt with by a few admittedly sophisticated questions in order to see, whether the high standard strived at has been reached in the Rome Statute. The result was that with regard to the qualification of defence counsel, for instance, the Rome Statute offers no satisfying regulation. Concerning judges there is no clear provision regulating the situation, where election or re-election depends on a state official, who has or may become a suspect. Should the judge concerned then be obliged to ask to be excused before this can be made an issue by any other person involved?

Since there may be more of such hidden issues, it is the task of the young generation to keep the role of the defendant and his client as well as the rights for both in international law under permanent critical observation; because perhaps there is a better solution available as in the Rome Statute?[82]

2. *The task of the Court*

The context between Human Rights and the Court, addressed in the heading for this discussion, raises the question what does the Court can, should or can not contribute to the protection of Human Rights and does its` approach work in practice?

a. *To protect Human Rights by 'contributing to the prevention of core crimes'*

We have already seen above that creating and shaping awareness of justice presupposes that justice will be done and that it can be seen to be done. Therefore, the Court has to make everything transparent and in particular the results at the end of the proceedings, the decision: acquitted or sentenced.

But of equal importance is the procedure in between, for instance the reasoning for a warrant of arrest and its execution. It can, as the case of Milosevic demonstrates, be a condition for reconciliation even though finally because of the absence of the suspect, there may be no acquittal or sentence of the Court.

[82] See for instance O. Triffterer, 'The Court in danger', supra note 23, under 2.B.4.b.

In addition, though this comparison limps, the Court may be seen as a 'watch dog'. The difference is that such dogs have to directly protect legal values and thus directly prevent violations; and the Court mainly becomes active, investigating and prosecuting, when a crime has been at least attempted, occurred or allegedly occurred. To be in addition preventive for the future, the Court therefore has also to concentrate on spreading the news on what is going on in The Hague as often as such an information is in the interest of justice and in so far, as, it appears admissible, to all the population in the world.

The news should not only reach the potential perpetrators, but equally the citizens as voters in political elections of state organs and also the states in their judiciary power; because in this function they have to take care of it, in principle, primarily to enforce the Rome Statute by preventing crimes by educating everybody about what is prohibited. The churches also play an important role in this task. Such a communication by all organs of the Court therefore is integrated in the general crime prevention Program of the United Nations but also of states and all individuals, military and civilians, obliged to defend and thus promote peace, security and well-being of the world.

b. *First situations and cases pending, focusing on violations of individual Human Rights*

According to the huge number of information on crimes within the jurisdiction of the Court which has been received as 'communications' from individuals or organizations, a few of major issues pending deserve some additional attention. All express the acceptance of the exercise of jurisdiction, referring a situation to the Prosecutor through a State Party or the Security Council and the Prosecutor initiating an investigation *proprio motu* in accordance with Article 15.[83]

With regard to the Democratic Republic of the Congo, one of the indicted persons is charged with 'enlisting and conspiring of children under the age

[83] See for instance L. Moreno Ocampo, 'Lessons from the First Cases', in: The Austrian Federal Ministry for Foreign Affairs and Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law (eds.), *Salzburg Retreat, May 2006: The Future of the International Criminal Court* (2006), at 4 *et seq.*; see also the situation in Sudan: three cases are being heard before Pre-Trial Chamber I: *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*; *Prosecutor v. Omar Hassan Ahmad Al Bashir* and *Prosecutor v. Bahr Idriss Abu Garda*.

of 15 years into the forces'. This using children to participate in activities and hostilities in the context of an armed conflict of an international character is punishable under Article 8 para. 2 lit. e (vii) Rome Statute. In this case the charges are rather limited on recruiting too young 'soldiers', but nevertheless indirectly focusing also on the protection of those minors directly concerned.

With regard to *Prosecutor v. Germain Katanga*, these charges are amended by claiming that the accused has jointly with and through other persons directed an attack against civilian populations, namely wilful killing, destruction of property, pillaging and sexual slavery respectively rape.[84]

Though in these cases individual Human Rights are emphasized and protected against violations of law and customs of warfare, peace and security are underlying legal values also for these definitions of crimes. Because every violation of international humanitarian law carries the danger of causing an escalation in an armed conflict and thus may lead to further violations of Human Rights. This is in particular true also when, like in this case, in addition, from the crimes against humanity, murder, rape and sexual slavery are charged.[85]

As far as president Al-Bashir is concerned, the warrant of arrest lists seven counts with responsibility 'as an indirect (co)perpetrator'. Allegedly committed in this modality are murder, torture and rape as well as extermination and forcible transfer of population. While the first three crimes protect individual Human Rights the last two concentrate more on collective rights, even though individuals are victimized necessarily also by the commission of these crimes.[86] The two additional war crimes charged are of a similar structure, namely intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities.[87] Here however the difference between civilian population and individual civilians show very clearly that one definition may put in front individual Human Rights while another emphasizes more collective rights, as being primarily the (protected) object of an attack.

Another specifity is also contained in *Prosecutor vs. Jean-Pierre Bemba Gombo*, who as a military commander is charged with murder and rape as overlapping war crimes and crimes against humanity.[88]

[84] See Article 25 para. 3 lit a, Article 8 para. 2 lit a (i), lit b (i), (xiii), (xvi), (xxii).

[85] See Article 7 para. 1 lit a, g.

[86] See Article 7 para. 1 lit a, d, f, g.

[87] See Article 8 para. 2 lit e (i), (v).

[88] For similar charges see Prosecutor vs. Bahr Idriss Abu Garda. However with the intentionally directing attack against installation, material, units or vehicles involved in a peacekeeping mission, Article 8 para. 2 lit e (iii).

Looking at these and comparable cases, charging crimes within the jurisdiction of the Court, it becomes obvious that though all regulations mainly stay in context with the protection of peace and security, they all equally aim to protect, though with different emphasis, individuals attacked and thus defend their personal Human Rights involved.

3. *Investigating and prosecuting in a* per se *incomplete criminal justice system*

As already mentioned above, international criminal justice can properly be exercised by investigating, prosecuting and of course sentencing through its organs, which at the moment are the ICTY, the ICTR and the ICC. But all three can fulfil their task only with the help of national criminal justice systems. Whether there will be one day a 'task force' or something similar to make the Court (more) independent from 'legal state aid' and thus make it more inherently equipped, is not predictable.

a. *Direct enforcement of the Rome Statute, though partly with the help of domestic criminal justice agencies*

Even the direct enforcement of the Rome Statute by the Court needs such help. Except for cases where suspects voluntarily appear in front of the Court or even more, for instance transmit to the Court a reliable written confession or present other convincing evidence for their crimes, the Court depends on the help of state agencies. When it has received communications hinting at certain places for hidden dead bodies or for other evidence, the team of the Prosecutor has to ask the respective state for the permission, not only to work at these places but also for the necessary elementary equipment, for instance for digging in mass graves to exhume the victims, and even more for arresting suspects and for their surrender to the Court.

The same is true with regard to questioning witnesses. They either have to be heard on the spot or asked to come to the Seat of the Court, but cannot be forced by the Court to appear. In the latter case they, in addition, quite often may need the permission to leave their country and to enter the Netherlands in order to be able to testify in front of the Court.[89]

[89] With regard to the difficult situation of victims to be questioned at home and to be convinced to come to The Hague see for instance D.D. Cattin, 'Article 68 – Protection of the victims and witnesses and their participation in the proceedings', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 1275 *et seq*.

b. *Delegating the* ius puniendi *of the international community generally to states or leaving merely its execution to them?*

With regard to the indirect enforcement the task is easier to be managed. The states use their ordinary 'tools' of their domestic criminal justice systems. But since the guidelines and the law to be applied come from the international level, the question about the nature of this indirect enforcement is of some relevance.

Article 12 confirms that 'the Court with respect to the crimes referred to in Article 5' has jurisdiction; because otherwise the State Party would not by its ratification 'accept the jurisdiction of the Court'. According to Article 12 the states on the territory of which the crimes within the jurisdiction of the Court are committed and those states, of which the perpetrator is a national, have, in principle, even prior competence to investigate and prosecute the respective situation or case. The question therefore arises, whether they exercise their own *ius puniendi*, helping to enforce the overall *ius puniendi* of the international community as a whole, or substituting the community but, as already mentioned above, only exercising its *ius puniendi*.

However, Article 12 sets merely preconditions for the exercise of the jurisdiction, namely that 'the State on the territory of which the conduct in question occurred' or 'of which a person accused of the crime is a national' is a State Party or has accepted the jurisdiction of the Court. The only exception from this limitation is a referral by the Security Council according to Article 13 lit b; because Article 12 para. 2 does not mention this alternative.

The ductus 'accepting the jurisdiction of the Court' even though the state has according to the territoriality principle for instance also jurisdiction, justifies the interpretation, that the formulations in Articles 12 and 15, in particular 'within the jurisdiction of the Court', presuppose that the Court exclusively is entrusted with the administration of *ius puniendi* of the international community as whole. Since no opposite has to be deduced from the Statute or the Rules, the states and thereby their national courts when accepting the jurisdiction are not substituting the community but only exercising its powers according to the Statute. The domestic level therefore, merely executing this *ius puniendi* on behalf of the community, is bound by the framework which this community has decided to be the necessary prerequisites: namely, 'genuinely' to proceed in the sense of Article 17.

In such cases the state may even have a double function: exercising its own *ius puniendi* for crimes created by its national law, and at the same time helping to enforce the over all *ius puniendi* of the international community as a whole. The situation may be comparable with states in a con-

federation, union or Republic of states where the *ius puniendi* is with the supra national institution but executed by the members. However, at least for the decisive part this execution it is under the supervision, control and appeal to the highest courts in the higher organization.

This question of the theoretical structure between national jurisdiction and the complementarity jurisdiction of the ICC, however, is not decisive. More important is that the enforcement on the domestic level by States Parties and non-Parties equally apply the relevant international criminal law to hold persons responsible for crimes listed in Articles 5 to 8 Rome Statute. Therefore, when international criminal law has to be enforced by states, it is the scope and notion of this law that decides the assessment of specific situations or cases dealt with by domestic agencies or state organs.

If at all, there is a small discretion on the domestic level with regard to analyzing and interpreting this international law. It remains the supreme law of the nations and what this is, will be decided in the last instance by the Court. Because finally the Court decides whether a state was able and willing to 'genuinely' proceed, Article 17, and whether there is need to apply Article 20, namely by lifting the *ne bis in idem* rule, when the national jurisdiction had shielded the suspect or did not conduct the proceeding 'independently and impartially' or in a way 'consistent with an intent to bring a person concerned to justice'.

c. *Tension between competing enforcement levels*

Already the just mentioned possibility to control, supervise and finally correct national proceedings according to Articles 17 and 20 Rome Statute, triggers a tension between the direct international and the indirect national enforcement model. The last, even if investigating and prosecuting *bona fide* has to be careful, to sufficiently demonstrate and express to the public and the Court that it is properly applying the law contained in the Statute and the Rules as well as in other relevant international documents; even if the national jurisdiction has given its best, the results may not correspond with what the International Criminal Court deems to be genuinely, independently, impartially or in any other way as 'consistent' with what is described in these Articles.

And if the domestic level was not *bona fide* it had to be all the time very careful not to be trapped by the 'superior' court. In both cases the situation is right from the beginning not without tension; because each level is observing the other with suspicion perhaps to find 'mistakes' or even proof for 'cheating'.

To avoid or at least to diminish such a tension between a domestic court in Bosnia Herzegovina and the ICTY, representatives of both, in particular judges met at the end of October 2009 in The Hague to discuss open questions. Such an exchange appears not only advisable when like according to Article 9 ICTY two institutions have 'concurrent' jurisdiction, though one, the ICTY 'shall have primacy over national courts at any stage of the procedure and correspondingly may formally request to defer to the competence of the ICTY'. Such an exchange of ideas and cooperation appear advisable also with regard to the ICC, where according to the Preamble para. 10 and Article 1 the International Criminal Court '...shall be complementary to national criminal jurisdictions'. And Complementarity in this sense means the competence may be triggered whenever the provided conditions are fulfilled.

d. *The 'Complementarity regime' of the Rome Statute: A political compromise in the interest of justice and Human Rights*

Such a predictable tension was the background before which the discussion at the Rome Conference about different proposals for assigning prior competence to the national or to the international level was negotiated. Dominating for shaping this relationship or competition of the two levels in the Rome Statute were, in particular, former Drafts out of which Articles 12, 13, 15, 17 and 20 emerged.[90] Recommended were in addition to the competence of the territorial or the national state, as described in Article 12, the primary competence of the custodial state and, in general a higher threshold for triggering the competence of the Court, only when the competent state being unable or unwilling to prosecute genuinely.[91]

The political compromise finally was, to limit the competence of the Court by Article 12 to the territorial and the nationality principle. But this rather small basis for starting an international criminal jurisdiction was mitigated by exceptions permitting to start immediately at the Court, listed in Articles 12 para. 3, 13 lit a-c and 15. In particular lit b opens the possi-

[90] See for instance C. Bassiouni, *An Article-by-Article Evolution*, supra note 44, at 97 *et seq.* See also S.A. Williams/W.A. Schabas, 'Article 12 – Preconditions to the exercise of jurisdiction'; id., 'Article 13 – Exercise of jurisdiction'; M. Bergsmo/J. Pejic, 'Article 15 – Prosecutor'; S.A. Williams/W.A. Schabas, 'Article 17 – Issues of admissibility'; I. Tallgren/A. Reisinger Coracini, 'Article 20 – Ne bis in idem', all in O. Triffterer (ed.), *Commentary*, supra note 4, at. 547 *et seq.*, 563 *et seq.*, 581 *et seq.*, 605 *et seq.*, 669 *et seq.*

[91] See S.A. Williams/W.A. Schabas, 'Article 17', at 616.

bility for the Security Council to refer a situation directly to the Court. Such a referrals broadens the primary competence of the Court and thus of the international level to fight core crimes by reacting immediately and rather independent of domestic criminal justice systems. Because according to the wording of Article 12 para. 2, Article 13 lit b is not mentioned, with the consequence that the limitations of Article 12 are not applicable in cases of referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

As the referral concerning the situation in Darfur has demonstrated, the critical point is when in the context of such a referral persons are suspicious who have acted as state organs or in any other official position. Article 27 provides without any exception the 'irrelevance of official capacity' with regard to criminal responsibility and emphasizes in para. 2 that

> immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

But this denial of impunity, though convincingly and without exceptions formulated, has to be seen in the context with Article 98 para. 2. This rule permits states for instance not to cooperate with the Court and to refuse a request for surrendering the suspect to the Court, if such an act would be inconsistent with other international obligations of that state. However, Article 98 para. 2 has a disputed validity and cannot change the basic rule, that the Court should not be barred to exercise its jurisdiction by any official position of the suspect.[92]

This and similar historical and present examples mirror the ambivalent situation at Rome. It was shaped by the fear that ruling heads of states and organs of states would be easily without reasonable ground blamed or even prosecuted for allegedly having committed a crime. And on the other side granting them impunity and denying and not enforcing their international criminal responsibility might increase atrocities and abuse of power worldwide. When searching for a solution, almost everybody was extremely cautious. Nobody wanted to take the responsibility for favouring or even promoting one or the other of the two extreme possibilities.

[92] See O. Triffterer, 'Irrelevance of Official Capacity, Article 27 Rome Statute', supra note 15, at 592 *et seq.* and C. Kreß/K. Prost, 'Article 98 – Cooperation with respect to waiver of immunity and consent to surrender', in: O. Triffterer (ed.), *Commentary*, supra note 4, at. 1601 *et seq*.

And on the other side, nobody wanted to be responsible for a break down of the Conference. Because blocking the adoption of the Statute would prevent the establishment of an International Criminal Court, perhaps forever. It appeared impossible to continue beyond the provided end of 17th of July 1998, or to postpone the Conference to a later date. Everybody was convinced that a Conference without the requested result would not lead in predictable time to a new Conference with the same aim. Notwithstanding that never again such an enthusiasm was expected as in Rome, a delay for years or even decades was feared might cause a failure of the whole project forever.

The situation appeared for just a few Delegates rather desperate till all of a sudden, unexpected the word 'complementary' was thrown into the discussion. It was till then no issue, neither in Rome nor in the history of the Statute for an international criminal court. The Delegates, however, were aware that Nuremberg did not need a special agreement on the issue, which level should have priority, the national or the international. Because the four major Allied and the 19 'co-opting' states trusted each other. They all wanted that the main perpetrators should be sentenced at Nuremberg, because their acts were transgressing national borders and it would not be easy to assign to them specific localities; and those who committed their atrocities in other countries should be brought back to the places where they had committed their crimes.

But at the beginning of 1991 the situation in Yugoslavia and Rwansa were different. Correspondingly, the Statutes for the ICTY and the ICTR used the word 'concurring jurisdiction'. It needed however immediately a limitation, so Article 9 para. 2 and Article 8 para. 2 respectively ruled that the Tribunals 'shall have primacy over the national courts of all states' and obliged 'at any stage of the procedure', if 'formally requested national courts to defer to its competence'.

The underlying situation was that nobody trusted anybody at that time on one of the relevant territories and even abroad. For instance without other reasons than that the ICTY did not have a suspect available at that time, the Prosecutor of the ICTY asked Germany to surrender Tadič, the first case then which became quite famous because it shaped several aspects to be observed and in particular the position of the defence.

With the word 'complementary' mentioned at the Rome Conference, immediately a certain calming effect appeared. Obviously there was a different meaning for the two words; concurring expresses more a competing situation, like running for the same aim; and complementary expresses an avail-

able cooperation as it is expressed in Article 86 *et seq*. of the Rome Statute: assisting if needed and only then the international level was challenged. This scope and notion made it superfluous to regulate priority expressly. Because the underlying structure presupposes that states carry the main load already for practical reasons; they are obliged primarily to deal with relevant situations and cases; since a huge amount of suspects like in Rwanda could not be managed by an international tribunal. Therefore, the underlying structure to deduce jurisdiction of the Court is decisive, in particular as expressed in Articles 12, 13 to 15, 17 and 20, as already mentioned above.

The Court is designed for standing aside, keeping 'contenance' as long as what could be observed or reported in a reliable way was in accordance with the aims and purpose of international criminal justice. The Court should have the power to investigate and to prosecute only when situations occurred, not consistent with the relevant parameters established in the Rome Statute. It was a compromise to accept a narrow concept in principle, but to provide exceptions in Articles 12 para. 3, 13 and 15.

This relation, rule and exception, was expected to dominate the situation after the Statute and the Court came into operation. But to the surprise of all, exceptions finally started the first activities of the Court. This is in particular true with regard to the referral of the situation in Darfur by the Security Council. It has shaped the first operating situations of the Court tremendously. It appeared not necessary to exhaust the provided procedures on the domestic level, as long as it became obvious and agreed between the national and the international level, in particular the Security Council, that the international level should start immediately as being the more reliable and suitable body for investigation and prosecution in this situation.

In addition, during the beginning of such proceedings, there are anyhow enough possibilities to challenge the admissibility and the jurisdiction of the Court, according to Articles 18 and 19.

But the first cases pending, as already mentioned above, have shown that there was sufficient trust into the Court worldwide though a few critical voices up till now can be heard, like from African states but also from the U.S., and they have to be heard. In particular a court just starting to enforce justice and Human Rights should be listening carefully to critical voices. The First Review Conference 2010 in Kampala opens for instance a suitable opportunity to control and if necessary amend the Statute, the Rules and other underlying laws.

The above comment on the complementarity regime of the Rome Statute demonstrates that though still disputed, the relevant regulations

are, in principle, satisfying. The 'preconditions' listed in Article 12 narrow the direct enforcement model, which however has been broadened by quite a few exceptions; and all these, in particular referrals according to Article 13 lit b, have demonstrated right at the beginning, when the Court started its activities, how important it is in praxis, for the protection of Human Rights, to start investigation and prosecution as soon as possible by a direct enforcement model, without first exhausting the perhaps or most properly time consuming activities to prevent further or stop crimes by prosecuting in domestic criminal justice systems, the indirect enforcement model.

IV. Genocide and its particular features

At the end of my presentation I will survey why genocide is a particular satisfying example for the task of our session and what are the consequences, part of which have been discussed already when analyzing the theoretical background for our subject matter. A detailed analysis of relevant issues I have published on another occasion when commenting § 321 Austrian Penal Law. In order to avoid repetition I refer to this publication and emphasize here only a few aspects which are especially suitable to demonstrate the importance of Human Rights for the prosecution of crimes within the jurisdiction of the Court.[93]

[93] See O. Triffterer, '§ 321', in O. Triffterer *et al.* (eds.), *Salzburger Kommentar zum StGB* (2004); the contents there, from which the important issues can be taken are the following:
Gliederung:
A. Allgmeines
  1. Entstehungsgeschichte, internationale Vorgaben und Entwicklungstendenzen
  2. Geschützte Rechtsgüter und Angriffsobjekte
  3. Systematische Einordnung und gewählte Deliktstypen
B. Die Anwendungsvoraussetzungen im Einzelnen
  I. Die Tatbestandsmerkmale
    1. Objektiver Tatbestand
      a) Gemeinsames Merkmal für alle Varianten: Betroffenheit von einzelnen Mitgliedern und von einer der geschützten Gruppen
        aa) Unmittelbare Betroffenheit
        bb) Die geschützten Gruppen
          (1) Das Ganze und dessen Teile
          (2) Die benannten Gruppen

1. *General aspects relevant for Human Rights*

Article 6, genocide is the only group within the jurisdiction of the Court, which defines all alternatives by focusing each of them on more than one Human Right to be protected:

- in lit a and b, life and physical integrity of one or more individuals, are the directly protected targets;
- in lit c, 'conditions of life calculated to bring about its physical destruction', also protect individuals and, at the same time, all members of the attacked group against dangers for their physical integrity and life;
- 'measures intended to prevent birth within the group', lit d, violates the rights of every single member to plan and have a family, as well as the continuing existence of the group;
- and finally, according to lit e 'forcible transferring children to another group' violates the right of parents to bring up children and edu-

(a) 'Kirche oder Religionsgesellschaft'
(b) 'Rasse'
(c) 'Volk' und 'Volksstamm'
(d) 'Staat'
b) Die einzelnen Begehungsformen
aa) Tötung
bb) Zufügung schwerer körperlicher oder seelischer Schäden
cc) Aufoktroyierung von zur Lebensgefährdung geeigneten Bedingungen
dd) Verhängung von Maßnahmen zur Geburtenverhinderung
ee) Zwangsweise Überführung von Kindern in eine andere Gruppe
c) Verknüpfung von Handlung und Erfolg
d) Größerer Sachzusammenhang?
2.Subjektiver Tatbestand
a) Tatvorsatz
b) Erweiterter Vorsatz
II. Rechtswidrigkeit
III. Schuld
C. Besonderheiten
1. Zusammenwirken mehrerer
a) Verabredung zur gemeinsamen Ausführung, Abs. 2
b) Verhetzung, § 283
c) Sonstige Formen
2. Konkurrenzen
a) Überschneidungen zwischen den Varianten
b) Zusammentreffen mit anderen Tatbeständen
3. Verfolgbarkeit

cate them as well as the right of children to grow up in a certain group with their parents or another group of their choice.[94]

For a criminal responsibility, one of these objective appearances of harm has to be committed or at least attempted to be realized. While all alternatives presuppose an aggressive behaviour against one or more individuals though the act as such may be addressed to a group, like the last three alternatives, this chain of material elements are for no alternative the only requirement to establish the harm described in the definition. All alternatives presuppose, in addition, that whatever the specific behaviour of the perpetrator for his *actus reus* was, it has to be covered by an intent to destroy the group, the person addressed belongs to, 'as such in whole or in part'. Through this particular intent, collective values of protected minorities are approached and thus an additional harm has entered the definition. But the specifity is that the particular intent does not have to be realized, as already mentioned above. It is sufficient that the perpetrator at the beginning of his criminal behavior believes, his act against one or more members of the group could or would 'destroy the group as such in whole or in part' even if shortly after the act it becomes obvious, that this 'second result' would definitely not occur. Decisively is that the perpetrator believed it would or could and already then he has fulfilled the necessary prerequisites for an attempted or completed crime, even if the particular intent is finally prevented to lead to the intended consequences.

This particular intent differentiates for instance the alternative killing and causing bodily or physical harm from the ordinary murder with the same consequences. It thus demonstrates how high the quality of this particular intent is for shaping one of 'the most serious crimes of concern to the international community as a whole'.

Further general aspects for all alternatives of genocide are the following, as partly already mentioned above:

- The crime may be completed even if the intent, to destroy the group in whole or in part, has not and cannot be anymore realized. This 'double' mental element has to be emphasized, because this is the

[94] All these are material elements directly interfering with Human Rights. The fact that one of them refers to a mental element by the wording 'deliberately inflicting' and another by referring to 'intended to prevent birth' is not decisive. For the protection of Human Rights this may be a deviation from dogmatic rules not mixing material and mental elements; but important is that all these material elements focus directly on Human Rights and their protection.

constitutive part of genocide. It makes this crime so dangerous for individual Human Rights as well as for peace, security and the well-being of the world.

- Another important issue are orders to commit genocide. They are in no case relevant for the responsibility of the subordinate. Since Article 33 para. 2 contains a *presumptio iuris et de iure*; the possibility to prove the opposite is thus excluded. The subordinate therefore cannot achieve impunity by referring to an error in law or in fact.
- Finally, it ought to be mentioned that according to Article 25 para. 3 lit e, a public and direct incitement triggers responsibility for genocide, even if nobody was 'seduced' or otherwise inspired to commit genocide.

2. *Specifities concerning material elements*

The three above mentioned general aspects have already demonstrated how high for the protection of Human Rights the punishability of genocide is accessed. This evaluation is confirmed by some of the specific definitions. In lit c, 'deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part', the consequence, that these conditions really are successful, is not required. An abstract danger by the condition as such is sufficient. The crime therefore is completed when those conditions are established independent of whether they are or will be successful.

A similar approach is contained in the alternative under lit d, 'imposing measures intended to prevent birth'. Whether such measures like prohibiting sexual intercourse between members or to use preventive measures are successful or not is not decisive. The aim of this alternative is to avoid any limitation of the Human Rights of this particular group.

With regard to transferring children from one group to other the situation is similar. It does not count what is better for the child, because it is the right to be brought up in his or her own group and to be protected against influences by another groups, which have not been chosen by the victim. However, though this alternative defines a continuing crime (Dauerdelikt), the question, whether (a help to) self defence excludes criminal responsibility in the sense of Article 31 depends on a case to case basis.

The special structure of this alternative has to be observed, because it establishes criminal responsibility for a result without a visual harm: Perhaps the education in this group may be all around better, but this does not

count. It is an abstract potentially dangerous behaviour justifying the accountability, because every group has the right to bring up their children their own way. So even if the education in the receiving group will be all around better, the crime is nevertheless completed.

3. *The mental side*

Most of the relevant aspects have been addressed already above. It needs only to summarize that intent and knowledge shape all mental elements according to Article 30, 'unless otherwise provided'. This means no special high or low degree is required, where only 'intent' is mentioned. And this is with regard to genocide only once: 'deliberately inflicting conditions'; that means here is a higher degree for the intent required than for the genocidal intent to destroy the group as such in whole or in part.

The intellectual part and the voluntative part are more detailed described in Article 30, though not with the same clarity. Therefore, the request to demand for genocide a special intent, the highest quality in the sense of *dolus directus*, is not justified.[95]

V. Conclusions and future perspectives – Visions beyond

At the end of my comments a few remarks on what we have to expect by the International Criminal Court and its substantive law basis. To anticipate part of the answer: the development of new Human Rights cannot be expected from criminal law and its enforcement, neither on the national nor on the international level.

In this context I have not to deal with procedural rights before the Court in detail. That they ought to be guaranteed on the highest level is, as already mentioned above, self evident. Only as far as withholding such rights on the domestic level, in particular to members of minority groups, when attacking civilian populations by crimes against humanity or military personal as well as protected targets through war crimes, these rights play a role in the context of responsibility under international law.[96]

[95] See for instance O. Triffterer, 'Art. 27 – Irrelevance of Official Capacity', in: O. Triffterer (ed.), Commentary, supra note 4, at 779 *et seq.* and O. Triffterer, *Österreichisches Strafrecht, Allegmeiner Teil* (2nd ed., 1994), at 64 *et seq.*

[96] See S. Zappala, *Human Rights in International Criminal Proceedings* (2003) and O. Triffterer, 'Preface', in: J. Temminck Tuinstra, *Defense Counsel*, supra note 66.

1. *Other groups outside the definition of genocide to be protected*

There is no tendency visible to extend the definition of genocide to for instance, social, cultural or political groups. The reasons for limiting the present scope and notion of Article 6 are first the specifities of the groups mentioned in the definition of genocide. They are, according to the experience over centuries, in particular endangered by abuse of power. To include others could diminish the preventive effect of this definition. In addition, social, cultural or political groups are included in the scope and notion of crimes against humanity, Article 7 para 1 lit. h, persecution, including protection against large scale and wide spread attacks endangering their existence. An anticipated protection like for genocide is not needed, because Articles 7 and 8 contain sufficient possibilities to prosecute discrimination of these groups by severe infringements, for instance on prisoners of war.

And finally there is a theoretical problem and a hesitation for practical reasons. To define genocide on social, cultural or political groups in the sense of Article 22 para. 2 'strictly construed' is not only difficult but also needs an amendment to the Genocide Convention. And it is feared that any tendency to narrow or extent the scope and notion of the present concept of genocide may trigger a general debate on this Convention and endanger one of the highest achievements we had since Nuremberg, notwithstanding the Rome Statute, the ICTY, the ICTR and, of course, the four Geneva Conventions.

2. *Extending the jurisdiction of the Court to protect additional Human Rights*

There is no doubt that not all Human Rights are protected by crimes defined as constituting 'the most serious crimes of concern to the international community as a whole'. Quite a few of the political and civil as well as the social and cultural rights granted by the 1966 Covenants, are not to be found in all the alternatives of the four core crimes within the jurisdiction of the Court. This is the consequence of the task assigned to international criminal law, to establish direct responsibility and enforcement only for those crimes, where as *ultima ratio* an international engagement is required, because the shielding system on the domestic level appears, mainly because of abuse of power, not sufficient. I refer in so far to the right for asylum as well as the right to be born, to live, and to die in dignity, all of which are strongly supported by Catholic Social Theory and partly go back to the Christian Universal Declarations.

More and more, however, the right to live is expressly extended to include to live without hunger and fear to starve. The Preamble of the Rome Statute therefore includes as protective values of the international community as a whole besides peace and security also 'the well-being of the world'. This implies for every single human being to participate on the wealth of the world, in particular with regard to children. They and the coming generations have to be protected against destroying and exhausting the natural resources of the world.[97]

The present situation is a shame for all of us, with all due respect for the achievements in the last decades. But it seems to be intolerable that daily millions of persons have not enough to eat or even starve while in other places of the world superfluous basic food is destroyed to stabilize the prices. Should the criminal law of the international community as a whole not 'help' to change the situation?[98]

3. *Rights of future life?*

It has been on several occasions considered, what rights future generations should have, and how to protect now for instance natural sources, without which they cannot live at all or at least have to accept a severe reduction of their present chances to live. Even according to the Rome Statute, Article 8 para. 2 lit. b (iv), '[i]ntentionally launching an attack...that ...will cause...widespread, long-term and severe damage to the natural environment...' is one of the war crimes. A similar formulation is contained in Additional Protocol I (1977) to the Geneva Conventions.[99]

A remarkable initiative has lately been started by the World Future Council.[100] It proposes 'Crimes against future generations of life' but not meaning only generations of human beings. For these crimes the starting point can be any 'act[s] or conduct, when committed with knowledge of

[97] See O. Triffterer, *Umweltstrafrecht – Einführung und Stellungnahme zum Gesetz zur Bekämpfung der Umweltkriminalität* (1980).

[98] See O. Triffterer, 'Die Dritte Welt', supra note 47, 119-164.

[99] See Additional Protocol I, Art. 55. See also O. Triffterer, 'Recht als eines der Instrumente zur Bewältigung der Umweltkrise', in: D. M. Bauer/ G. Virt, *Für ein Lebensrecht der Schöpfung* (1987) 48-142; In the original German version it is argued that the created earth has an independent right to live.

[100] See for the current work of the World Future Council http://www.worldfuturecouncil.org/startseite.html (2 Nov. 2009).

their severe consequences on the health, safety, or means of survival of future generations of humans, or of their threat to the survival of entire species or ecosystems'. It is especially mentioned 'military, economic, cultural or scientific activities, or the regulatory approval or authorisation of such activities', when they cause one of the above mentioned consequences or a specific danger to protected values. It is as far as I see the first time that such a broad responsibility is demanded. Even though with regard to the International Criminal Court there is no chance that such an extension of its jurisdiction will within due time seriously be considered or voted upon. But it is already worthwhile to discuss or bring to the attention of the audience at the First Review Conference 2010 this new approach, which hopefully will change the attitude towards the environment already by its consideration in such a gremium.

The Churches with their big influence on millions of people have the task and the possibility to propose and to promote such a protection of the environment. They may as well by their basic organisations, like the Caritas, provide to diminish or perhaps even abolish to a great extent the causes for crimes.

I am not qualified to refer the bible. However, all of us should remember that the donation 'Fill the earth and subdue it'[101] is followed by 'to take care of it'.[102] We thus all have the responsibility for the 'well-being of the world' in the sense of Preamble, para 3, Rome Statute. This value is obviously not only the basis for our present existence but also the condition to survive in future generations in our 'Mitwelt'. Solidarity therefore is required not only for the environment and future generations, but also for those who carry the burden now under unfavorable conditions compared with other privileged parts of the world.[103]

This will finally bring us to an old demand, now even more urgent than before: who dares to refuse endangered people to land on a safe shore ahead? Throwing them back into the open sea violates not only human dignity but may trigger in many countries criminal responsibility for the failure to help or perhaps also for causing danger to life or even death!

Of course, neither criminal proceedings nor penal sanctions are dominated by humanity. The enforcement of social rights is only to a very small part

[101] Genesis, 1:28.
[102] Genesis, 2:15.
[103] See for instance O. Triffterer, 'Die Dritte Welt', supra note 47.

the task of national criminal justice systems; for instance when parents deliberately refuse maintenance for their children; and 'bystanders' are at least obliged to be Samaritans, while persons with closer relations to the emergency situation or the victims may even have to face criminal responsibility for omitting to prevent harm and thus contribute to the commission of a crime.

With regard to international criminal law the situation is at least a little different. Its rules (commandments) call for instance quite often for a minimum humanity, even during armed conflicts. Since grave breaches of 'international humanitarian law' are punishable, it is not only prohibited to be inhuman, but required to exercise this virtue by omitting such violations. This interrelation between prohibition and commandment obliges in particular military personal and others acting in official capacity to actively 'practice' Human Rights when confronted with weak, endangered or handicapped human beings, unable to take an active part in armed conflicts.

State organs and other persons acting in official capacity, therefore, have to 'take care' and exercise this virtue whenever humanity is required to protect peace, security and well-being of the world. Prisoners of war for instance and minority groups listed in Article 6 shall not be denied sufficient basic food, as can be seen by the punishability of 'inflicting...conditions of life calculated to bring about its physical destruction in whole or in part'.

This requirement, to abstain from inhuman conduct is established to prevent crimes falling within the jurisdiction of the Court by putting an end to impunity. The punishability thus is a considerable contribution to this prevention.

But much more effective than criminal law would be, to diminish or even completely abolish the causes for such crimes. And violations of social rights, in particular when they amount to withhold basic conditions for living and appear in hunger, poverty and starvation, are one of the major factors causing crimes. Therefore, even though the chance that the community of nations as a whole will agree on criminalizing the destruction of food for the purpose to stabilize prices, while in other parts of the world people starve, is low, it is worthwhile to repeat continuously, that hunger, poverty and starvation have to be abolished not only in the interest of humanity, but also for the effective prevention of crimes; at least, as far as domestic law is not able or willing to fulfil this talk, international criminal law should be considered to 'take over', as *ultima ratio* the protection of Human Rights for everybody, to be protected against starvation.

HUMANITARIAN INTERVENTION AND THE 'RESPONSIBILITY TO PROTECT': RHETORICAL EXERCISES WITHOUT IMPLEMENTATION?[1]

JANNE HAALAND MATLARY

There can be little doubt that this unprecedented international attention to the internal governing structures of states has significant implications for the current content and future direction of international law'. The recent wave of democratization (...) has had ramifications the conduct of international organizations, and consequently, for international law'.
Fox & Roth (2000: 4)

Humanitarian intervention is not a new phenomenon. It is simply not correct to assume, as many realists do, that geo-strategic interests remained the motivation for the use of force until the decade of 'humanitarianism' of the 1990s. As also Finnemore points out, several wars in the 19th century had strong humanitarian elements – among them the Greek War for Independence, the Lebanese-Syrian conflict, the British interest in the Bulgarian case of Ottoman persecution of Bulgarian Christians, and the Armenian case of being the object of repeated Turk genocides from 1894 onwards (Finnemore 1996: 162-169). She concludes that humanitarian interventions did occur, but only when they happened to accord with geo-strategic long-term interests. The two variables worked in tandem, so to speak – and this is different from assuming away the humanitarian motive altogether, which is what traditional realism does.

The discussion about 'just war', referring to the criteria for intervention and warfare, is as old as political philosophy and international law itself. The 'just war' tradition was based on natural law argumentation as developed in the Middle Ages and before that. St. Thomas Aquinas is known for

[1] This paper draws on my book *Values and Weapons: From Humanitarian Intervention to Regime Change*, Palgrave Macmillan, London, 2006.

his principles of *justum bellum*; and the 'father' of international law *(Völkerrecht)*, Hugo Grotius (1583-1645), argued that, in extreme cases, the subjects of a ruler were entitled to revolt against tyrants.

The ancient tradition of 'just war' can fruitfully be seen as a precursor to what was later defined as the human right to security of person, or 'human security'. The core criterion was that of justice: an aggressor can and should be unarmed, but the use of force should be proportionate to the goal to be achieved. In such cases it was legitimate to be aided by another state, thus making for a 'value-based' type of intervention. Grotius' thesis about the right to a heavily conditioned intervention was employed by international jurists well into the 19th century; at that time, there were several interventions based on values, such as the violations of the individual right to religious freedom of Christians in Muslim countries.

The Post-War Period

The Cold War period was one of low-level activity by the UN Security Council. However, in at least two cases human rights violations were the main cause of Council action: in 1966 in *Southern Rhodesia* (Zimbabwe) the Security Council for the first time regarded breaches of human rights a threat to international peace. In 1965, the white minority had declared the independence of the territory, against the majority of blacks. In res. 217 (1965) the Council declared this situation to be a threat to international peace and security, and encouraged economic sanctions against the regime. When this had no effect, another resolution, 221 (1966) requested the UK to head the blockade of ships carrying oil to the regime, and in doing this, to use military force if necessary.

The second time the Council invoked human rights in the Cold War period was in 1977, against the apartheid regime in *South Africa*. In res. 418 (1977) the Council, after repeated condemnations of this policy, mandated a weapons embargo against the country.

There were thus some precursors to the Security Council practice in the 1990s in terms of reasoning about humanitarian factors, but there were few cases. Below I recapitulate the sequence of humanitarian intervention after the Cold War – some of which have been partially discussed from different angles in the previous chapters. Then I look at the justifications for these interventions and whether they carried legitimacy in an attempt to see which of my 'models' of legitimacy can best explain the dynamics of intervention.

Cases

The first major intervention mandated by the UNSC after the Cold War period was in *Iraq*. In res. 688 (1991) the Council decided that the regime's suppression of the Kurds in the north of the country represented a threat to international peace and security in the region. The Security Council demanded that humanitarian organizations be given free access to Iraq at once; on the basis of this resolution, many humanitarian organizations went to Iraq.

The next 'hot-spot' for the Council was *Bosnia*. Here the civil war was at its height from 1991 onwards, with the siege of Sarajevo and the massacres of civilians in so-called 'safe enclaves' of the UN from 1994. The worst imaginable examples of massive human rights violations were seen in Europe itself, when more than 7,000 boys and men were executed in the UN 'safe area' of Srebrenica.

The international community was slow and reluctant to intervene. Driven by events and media, there was a clear pressure that 'something must be done'. The first step was economic sanctions against Serbia and Montenegro, mandated by res. 757 (1992) and based on an assessment that the situation represented a threat to 'international peace and security'. A later resolution (770/92) the same year mandated a military intervention to protect convoys with humanitarian aid, while the UN called on NATO to protect its 'safe areas' in 1994. Finally, the Council established the war crimes tribunal, ICTY, in res. 827/93, for judging war criminals from the FRY. The mandates for military intervention in the FRY followed the pattern of embargoes first, and then assistance to protect the UN peace-keeping force UNPROFOR and the civilian population in UN 'safe areas'.

Another difficult case in the same year was *Somalia*. Here the UNSC again mandated a weapons embargo (res. 733/92), and later, a military intervention (794/92) because the humanitarian tragedy caused by civil war represented a threat to international peace and security. In this resolution the Security Council did not mention any border spillover of the security threat: it was simply *caused by and confined to the situation inside Somalia alone*. Thus, the international character of the conflict was non-existent, and the Security Council clearly opined that it was entitled to deal with internal conflicts. This is an important point, as it marks the end of the state-to-state defining characteristic of security policy in the official pronouncements of this body. As the Council's mandate is to react to 'a threat to *international* peace and security', we see here that the intervention in this case was mandated without any reference to this international context. In the case of

Somalia, however, the intervention was also a reluctant one, spurred in the end by the tremendous humanitarian tragedy caused by the civil war. As we saw in Chapter 5, the USA did not rush to intervene: quite the contrary.

The next case of humanitarian non-intervention was *Rwanda*, where the civil war reached huge proportions in 1994. Again the UNSC mandated a weapons embargo, based on a humanitarian situation that was diagnosed as a threat to international peace and security (res. 918/94). When the situation deteriorated, the Council mandated a military intervention to alleviate the humanitarian situation (res. 929/94), but the 21 states that were requested to contribute troops, failed to do so. The genocide took place without any attempt being made to stop it. 800,000 were killed in four months. Afterwards the Security Council established a tribunal for war crimes, crimes against humanity, and serious breaches of international humanitarian law (res. 955/94) – further recognition of the human rights basis of security policy.

In *Kosovo*, from 1998 onwards, the Security Council was engaged along with the 'Group of Six', the major states, the OSCE, and various diplomatic initiatives. Here it became clear that China and Russia would use their veto in the Council, making it impossible to achieve a mandate for an intervention. The UNSC came as close to this as possible, however – a point that may also, incidentally, be made in the case of Iraq 2003.

First, the Council passed a resolution, 1160/98, which condemned the use of force against civilians by both the Serbs and the Kosovars. Then it adopted a weapons embargo against the Former Republic of Yugoslavia, and also advised that the situation represented a threat to peace and security in the region (res. 1199/98). Finally the Council warned that further measures would be taken unless the demands set out in res. 1160 were implemented.

The next resolution on Kosovo was, however, not a mandate for intervention, but the settlement with the regime in Belgrade about peace implementation and the establishment of UNMIK in Kosovo (res. 1244/99). There had been no explicit mandate for intervention, but two resolutions had diagnosed a threat to international peace and security. NATO attacked in an air campaign that lasted from 26 March to 10 June 1999. The official reason given was that of 'halting a humanitarian catastrophe and restoring stability'. Again there was the provision of a UN mandate to use force to protect UNPROFOR, but it was quite unclear whether any state would send forces for this purpose. The West did not want to intervene with ground forces, and seemed prepared to let the war-

ring factions continue on their own. Sarajevo had been under siege for almost two years, and nothing had been done by the West apart from sanctions and humanitarian aid. Embarking on the actual use of hard power was not easy: any land force would involve large losses. Which democracy would willingly endorse that?

The moral debate about the injustice done to the Bosniaks and also the Croats continued in the Western press, with calls for hard-power intervention to assist them. US politicians led by Bob Dole wanted to arm these two groups and to lift the embargo, an initiative called 'lift and strike'. This eventually became the US position, but was resisted by the Europeans, who manned UNPROFOR. They naturally feared retaliations against peace-keepers, who had been taken as hostages by the Serbs on several occasions.

The decisive turn came with human rights atrocities shown on the world media. The Bosnia war received unique media coverage, especially the siege of Sarajevo. First came the move into the 'safe haven' to separate the boys and men from the population. They were escorted to their death outside the town. All this happened while the UN was still trying to stop the use of force to prevent the massacre: UN Special Representative Yasushi Akashi did his best to maintain the 'impartiality' of the UN to the end. When the NATO attack came, the worst massacre since the Second World War had already been carried out (Thune & Hansen, eds., 1998).

The Bosnia intervention was a non-intervention for four years while the war was going on. It became a reluctant and belated hard-power intervention only when the critical considerations impelling NATO to take action were those of humanity, with no possibility of identical national interests in the Balkans that they sought to pursue.

The political logic of the preparations for intervention naturally also played a role. Once the threat of hard power had been launched, NATO credibility was at stake. Now that intervention was on the political agenda, no Western leader was likely to back down. True, there was the possible danger of a massive exodus of refugees into neighbouring states, but this did not constitute a credible security threat to NATO states as such. The most likely explanation for the decision to threaten the use of force – the launching of ACTORD – was the escalation of internal displacement, harassment and violence in Kosovo. However, without the recent experience of non-action in the similar situation in Bosnia it is unlikely that the Kosovo intervention would have happened.

No intervention trend, no logical consistency

What can we conclude from this survey of Security Council action in the 1990s?

First, the *UNSC is a body for great-power politics, and is not a legal court of interpretation of a treaty.* It is clear that cases brought to the Security Council were put on the agenda by states themselves, and that the Council itself could not act without such state support. The Council is a political body which does not act without the will of its member states. Thus, some internal armed conflicts have received no or scant attention; others have been 'adorned' with military forces and peace-keeping operations. The Security Council is a political body, not a legal court. Thus, its agenda is determined by great-power politics: a veto (as expected from Russia and/or China) would have stopped a new resolution on Kosovo; and the record of Russian and US vetoes in the history of the Council is a long one, not counting the vetoes that are never cast because they are expected and thus many conflicts are never put on the Council agenda. Thus, for example, the war in Chechnya has not been on the agenda, as is the case with many other conflicts in Southern Caucasus.

Second, *there has been no consistency* in the Council's attention to conflicts: the ones in Europe – Bosnia and Kosovo – have received far more attention and action than the many still on-going wars in Africa. Also this underlines the essentially *political* character of the Council. Were it governed by law, one would expect a certain consistency in its behaviour, but there has been none. The conflicts most in need of such intervention – Rwanda, then Bosnia, etc. – did not get assistance. If there had been a substantial criterion of humanitarian need as the basis of intervention, reality would have been different.

However, it is clear that, despite this uneven practice, *all the major conflicts dealt with in the 1990s have had major humanitarian consequences*. The humanitarian situation has remained a constant cause for diagnosing a situation as being in accordance with Chapter VII's criteria for a threat to international peace and security. Every modern armed conflict does involve such threats; but in the interventions outlined above, it is a feature that there were no clear 'national security interests' at stake. We simply cannot find a traditional realist explanation of intervention here.

Wheeler, who has studied humanitarian intervention in his standard work *Saving Strangers?*, concludes that normative changes on the national level explain these interventions in *the few cases when they do occur*: 'Nor-

mative changes at the domestic level alter conceptions of national interests' (2000: 292).

Thus, we can assume that the *Realpolitik* of human rights plays a key role, but what enables it to do so? Why no intervention in Rwanda, but one in Kosovo? Here we immediately enter into the debate about the role of media, which is central; as Wheeler has noted, 'in the cases of northern Iraq and Somalia, media coverage played a critical role in cajoling Western policy-makers into intervention' (Wheeler 2000: 238).

There is agreement in the literature on the media factor as a driver for intervention to help the Kurds in Northern Iraq in 1991. The most common explanation is that media were the cause of UK and US intervention, yet this is confusing an enabling condition with cause. In the case of Iraq, Wheeler makes the point that UNSC Res 688 enabled the intervention, by bestowing legitimacy on it. This was true in both the USA and in the UK. We are thus left with a political dynamic that probably works in stages: the media attention is a necessary condition for public opinion to be formed on a possible intervention, whereas a Security Council mandate greatly enhances the legitimacy for such.

This was also the case in the USA with regard to the intervention in Somalia – where one is hard pressed to find any kind of traditional security interest. Henry Kissinger voiced the realist's assessment when he wrote:

> *The (new) approach in Somalia claims an extension in the reach of morality. 'Humanitarian intervention' asserts that moral and human concerns are so much a part of American life that not only treasure but lives must be risked to vindicate them; in their absence, American life would have lost some meaning. No other nation has ever put forward such a set of propositions*. (Kissinger 1992).

However, media made for political mobilization also in this case, and Bush Sr. needed a UN resolution (794) because he wanted the UN to take over Operation Restore Hope in Somalia. The resolution as well as the media coverage were enabling conditions for the intervention, and the resolution was also necessary in order to have an exit strategy. As Wheeler concludes:

> *The media's power to stir the conscience of US public opinion was a key determinant of US action – but this was not motive, which was Bush' strong moral sense that he should act, his desire to end his presidency on a glittering high note, and most importantly, the belief of Bush and his senior advisors that there was a clear exit strategy and no great risk of losing soldiers' lives.* (2000: 201).

Media attention to an internal conflict thus seems to be a necessary, but not sufficient condition, for an intervention to take place:

> *The fact is that no Western government has intervened to defend human rights in the 1990s unless it has been very confident that the risks of casualties were almost zero. This suggests that there are clear limits to the CNN effect – media coverage of the humanitarian emergencies in Northern Iraq and Somalia was an important enabling condition, though not a determining one; in making intervention possible.* (Wheeler 2000: 300).

Thus, Rwanda really stood no chance of being assisted, as there was little media coverage; and the coverage that was, did not urge action of imply a Western responsibility, according to Wheeler.

The realism of traditional security policy is misguided in assuming that territorial interests are always relevant to modern security policy. Sometimes they are, but not like in the Cold War period. Wheeler makes the very salient point that the realist view does not distinguish between power based on dominance and power based on shared norms that is legitimate because of this (2000: 290). In this study, I have argued that it is the importance of shared norms – immaterial power – that constitutes the *Realpolitik* of human rights. The term *Realpolitik* has been chosen to underline that there is real power to move governments towards even military intervention *if* the cause is strong enough in public opinion. This was not the result of manipulation of public opinion by the foreign policy elite in these cases – governments were not keen to intervene.

On the contrary, 'state leaders will accept anything other than minimal casualties only if they believe national interests are at stake' (Wheeler 2000: 301). Thus, the government or elite reaction is typically a very conservative one – when no traditionally realist security interest is at stake, there will be no intervention. We saw that this was the case with regard to Somalia, Bosnia and Kosovo, although the genocide in Srebrenica probably made the intervention threshold in Kosovo far lower than usual.

If this is correct, we are left with the following picture: In most cases, there is little or no willingness to intervene, as this entails own losses, uncertain and even no exit, and high-level political controversy. Resorting to military force is a very serious matter with considerable risk of unanticipated consequences, so state leaders refrain from using it as much as possible.

However, the pressure to use force now comes from two quarters: the Security Council if a mandate is forthcoming and the Secretary-General requests troops; and domestic public opinion, if it is created in a medialized

situation where a demand to 'do something' arises. The domestic and the UN process usually run in parallel. In Europe, a mandate creates definitive legitimacy for intervention, but plays much less of a role in the USA.

However, as we have seen, the desire to intervene is small indeed. Governments prefer not to; and only if public pressure is very strong will there be intervention – also without a mandate in exceptional cases, such as Kosovo. The power that makes for legitimacy is that of moral or ethical conviction in such a case, not one of traditional security threat. This is where the realists are in error. The power of human rights, if we put it thus, is the *Realpolitik* of the very few cases that engage public opinion enough to constitute a call for armed intervention.

Wheeler makes the interesting point that such truly humanitarian intervention is compatible with classical realism, which never denied the importance of ethics. We are simply speaking about a totally different use of military force in these cases, as compared to the territorial security policy that has always dominated the state system always, and may still be the dominant type of security policy on the whole.

'This is the key point, which is compatible with realism – no jeopardy of national security interests, and no "body bags" expected' (Forde 1991: 81-82), underlining that when there is no expectation of own losses – as was the US case in Somalia – and there is no risk to own territorial security, states may intervene for purely humanitarian reasons.

If we are correct in saying that political factors decide on the intervention decision, but that the Security Council mandate matter very much for legitimacy – which in turn is the major political factor here – how are we to interpret the legal significance of the UNSC debate? Is there any importance allotted to the legal justifications themselves, as we surmised in the discussion in Chapters 2 and 3? Do the legal canons determine whether a mandate is forthcoming or not?

The Political Legitimacy of Legal Consistency

Inger Østerdahl, a jurist, has written her doctoral thesis on the UNSC interpretation of art. 39 (Østerdahl 1998). She makes the point that the very broad interpretation of 'threat to international peace and security' that the Security Council has adopted is far from advantageous from either a legal or a political point of view. Legally this widening of this key criterion for deploying force renders the law less powerful, as there are seemingly no limits to how it can be interpreted. The legal dilemma is that, whereas a

wide application of this key criterion makes the Security Council relevant and able to act in new situation, this openness makes for 'more politics' in the sense that the legal context of interpretation – what is considered legal canon – is made more *diffuse*. The legal professional cadre would seem to lose authority to the political actors in the Council.

One may of course add that necessity is the mother also of legal invention. The criterion for using force must be able to be interpreted in ever-new ways in order for a mandate to be given. Yet Østerdahl's final conclusion to her detailed examination of how 'threat to international peace and security' has in fact been interpreted in the 1990s does *not* strengthen the case for legal stringency:

> *The impression one gets from studying the way the UNSC has interpreted 'threat to the peace' is that its interpretation is rather arbitrary. The criteria which make a particular situation a 'threat to the peace'...seem fluid, especially when one takes into account also all the situations in which the UNSC did not intervene...* (Østerdahl 1998: 104).

This general conclusion concurs with the thesis of this study, viz. that the legal issue regarding a mandate cannot be isolated from the political power play that surrounds each mandate debate. As we have seen, there are differences in terms of legitimacy between the US lawyers who not only interpret the norm of self-defence in a pre-UN manner, disregarding the peremptory character of the latter, but who also argue that only state practice on war and not policy statements can effect a change in international customary law; and the mainstream of international lawyers, who generally hold a strict view of the exclusive role of the UNSC as actor in this area, and who also uphold the non-intervention norm as the major one in terms of *ad bellum* rules. Thus, canons of interpretation of this norm do exist – some legal positions are more legitimate, some are less legitimate.

To this comes the fact that all political juggling about a mandate at the Security Council must be cast in terms of legal arguments. The debate is about art. 39, about previous resolutions, about what constitutes material breach, and about how to interpret the vital terms 'severest consequences', etc. Thus, all interest-driven discourse must be 'translated' into legal arguments and presented as such – bargaining must become justification, and justification is not bargaining where sheer power can impose its preferred solution. For example, the USA can act as a superpower in a bargaining situation, but it cannot impose a legal interpretation unless this is consistent with legal canon. The difference between bargaining and justification as modes of decision-making are important.

This gives a major and powerful role to the legal experts. The force of arguments as such must also be assumed to matter. In this study we have pointed out that security interests in the humanitarian and democracy field are not givens. They are not geo-strategic at a systemic level, as in the Cold War period. Finnemore makes the very important point that there are often no such 'neo-realist' interests to be found: 'The US action in Somalia is a clear case of intervention without obvious interests' (1996: 156). In fact, the problem has not been too much interventionism, but too little. In Rwanda there was a mandate but only France committed troops, and throughout the 1990s, the USA was extremely reluctant to intervene in armed internal conflict. Daalder (1996) points out that the US military preferred 'real wars' with 'real' interests where one could fight with overwhelming force. Humanitarian intervention has been, and still is, the stepchild of security policy.

As for 'democracy' – building or 'nation-building, the enthusiasm has not been greater. The US policy has been to win wars with decisive force and not to linger on to create democracies: 'The US consistently refused to take on the state-building and democratization mission in Somalia' (Finnemore 1996: 157). There has been no rush to intervene on the whole, neither in Europe nor in the USA.

However, concerning those interventions that have taken place, Finnemore is right to make the point that there are no traditional geo-political interests, at least none that alone would make an intervention logical. In this study I have not analysed the motivations for the various interventions, but looked for justifications provided and for the political drivers for a general development of both 'humanitarian' and 'democratic' intervention. As mentioned in Chapter 1, only a very simple realist theory would posit a one-to-one relationship between political power and changes in international norms and even law. Further, only a simple realist would cling to the security paradigm of the Westphalian nation-state, looking for the pursuit of geo-political interests in these interventions.

I do not suggest that such security interests have disappeared, but that they are mostly not applicable in the context discussed in this study. Instead we speak of another type of security policy, one that could be termed 'human security' and/or 'democratization as security policy'. In the Cold War period we would often find geo-strategic security interests in these armed conflicts, because of superpower overlay. Now we rarely do. The scope of the security policy agenda in these conflicts is smaller. The regional level simply matters more than before – a major analytical point to Buzan and Wæver (2004).

Since the 'failed' state agenda is but one type of security problem, we should not expect geo-political interests to prevail in these conflicts or to be able to explain them. The 'interests' involved are really the post-national ones of playing a constructive role on the international scene, of being a 'good international citizen', of satisfying domestic demands for 'doing something', and of actually stabilizing a war torn state and rebuilding it – a goal that is both an ethical and a security policy one.

Thus, there are plenty of rational 'interests' for state actors to pursue also in this field. But none of them, apart from stabilization, relates to the traditional security policy agenda. The lack of an existential threat to own population and territory implies that state interest in acting in this new area of security policy is more uncertain than in a traditional situation determined largely by geo-politics.

To return to the legal issue: argumentation at the Security Council, in the media and at the national level may be persuasive or not in this kind of security policy. In a situation without given security interests, determined by geo-politics, states have leeway for changing positions. Also, they are not pursuing some interest set in stone under the pretext of debating and justifying. As Finnemore rightly points out, justification matters in and of itself, as interests are not given and static. This is at least the case in this type of foreign and security policy.

Does the empirical evidence indicate that this is correct? Here we must distinguish between stages in the policy-making process. A possible intervention has often matured politically in international networks and domestically long before the case comes onto the Security Council agenda. The cases of Somalia, Bosnia, Kosovo and East Timor come to mind. There were long processes in international media, domestic publics, and in elite networks and organizations before the UNSC was asked to decide. In other instance, there may be parallel processes at the Security Council and domestically, such as in the Iraq case.

The role played by justification, not bargaining, in such open medialized processes can be assumed to be great. This is the more salient because the publics play major roles in decision-making for intervention. It is in the domestic process that interventions are really decided on. The elite level can no longer decide on the use of force alone, as a matter of 'national security'. On the contrary, new actors – such as NGOs, press, even churches – play roles in the security field of 'failed states'. The urge to 'do something' is activated on the basis of media reports on the human rights situation of an armed conflict somewhere, and elites have to communicate with their

new security policy constituencies while negotiating on the international level. It is illogical to think that the elite can commit forces unless there is a clear mandate from home.

In this model of decision-making, the domestic level matters more than the international level – which turns traditional security policy with the 'foreign policy prerogative' upside down. We do not have empirical studies of decision-making in this area yet, at least not comparative ones, so my suggestions must remain speculative. However, it seems safe to say that the importance of domestic legitimacy trumps the international level. This explains why, in the Iraq case, the USA can act quite comfortably with solid domestic legitimacy only. In addition, it has tried to acquire international legitimacy through coalition building and, first of all, a UN mandate. But the mandate was not decisive for the decision to intervene in Iraq, nor was it decisive for domestic legitimacy.

What does the new importance of domestic actors in security mean for the process of justification – the acquiring of legitimacy? It means, first of all, that there are at least two versions of legitimacy around – the European and the US view, as discussed in the above chapters. It further means that the 'value' of having a UN Security Council mandate differs between these domestic publics. In Europe, a mandate decides the question of legitimacy and closes all discussion. In the USA it matters much less.

The route to getting a mandate is one where we may assume that the importance of arguments diminishes with time: as decision time at the UNSC approaches, we can assume that positions have been decided, and that any change can be ascribed to bargaining and/or pressures. At this stage, the issue of the kind of case at hand, whether one should 'do something, etc., has long since been agreed. Thus, the role of justification for the issue of mandate or not is probably quite early in the political process, when options are still open.

The process over the mandate is thus a combined justificatory and bargaining process. Again, we lack in-depth studies of how actors define and redefine their positions in this process. The cases examined in this study suggest that domestic opinion played a key role in the decisions to act in Bosnia and Kosovo, finally putting sufficient pressure on policy elites. However, the mandates were often denied by veto powers that pursued traditional security interests and/or retained Westphalian views of sovereignty – in the cases of 'failed' states, most often China and Russia.

As the Security Council process really concentrates world attention on a given case, new evidence presented here may change positions. The presen-

tation of 'evidence' of WMDs in Iraq by US Secretary of State Colin Powell was intended to turn the tables on the mandate issue, but it failed to do so.

The final importance of law here is, however, another one: the 'prize' for the whole political exercise at the UNSC is a legal one – a dichotomous variable: a mandate, or no mandate. Sometimes the objective is to hinder a mandate; sometimes it is the opposite.

Intervention beyond the UNSC?

However, there is also the question posed by UN Secretary-General Kofi Annan: what happens when the Security Council is not acting and there unfolds a major human rights tragedy? The Korean 'Uniting for Peace' resolution adopted by the UN General Assembly when the Security Council was unable to act remains a theoretical possibility also in the future. This resolution sets a precedent for similar actions by the General Assembly. (Annan 1999).

Even beyond this, there are arguments that international law provides a basis for military intervention. The UK issued a memo to all NATO allies on the Kosovo case where it argued that 'Security Council authorisation to use force for humanitarian purposes is now widely accepted…but force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSC resolution'. The following criteria would need to be applied: There must be evidence of 'overwhelming humanitarian necessity', of 'extreme humanitarian distress in a large scale', and the force used must be 'proportionate' and 'limited in time and scale'. These UK proposals, although well intended, run the risk of divesting the use of force from an international and collective context, placing it again, as before in history, in the hands of the individual state.

In his own UN intervention, however, on 20 September 2000, Kofi Annan said:

> *State sovereignty is being redefined by the forces if globalisation and international cooperation. The state is now widely understood to be the servant of its people, not vice versa. The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests – universal legitimacy and effectiveness in defence of human rights – can only be viewed as a tragedy. It has revealed the core challenge to the Security Council and the UN as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand.*

The Secretary-General called for a new type of national interest, that of the pursuit of democracy, human rights, and the rule of law, and reforms of the Security Council so that it can perform its role. It is unacceptable to stand by and watch massive violations of human rights – that undermines the whole idea and spirit of the United Nations.

In his 1999 lead article in the *Economist* Annan speaks about two concepts of sovereignty – one old-fashioned and static, the other that of the state that respects human rights and serves its people. Clearly, the implication is that only the latter types of states – democracies – are legitimate in the eyes of the world community. In an important address to the international peace conference in The Hague the UN Secretary-General put in a nutshell what the debate of human rights vs. state sovereignty is about: '...unless the Security Council can unite around the aim of confronting massive human rights violations and crimes against humanity on the scale of Kosovo, then we will betray the very ideals that inspired the founding of the UN'.

US lawyers have been the key ones in arguing that when the UN is unable to act, the mandate for taking action recedes to states. Both the UK and the USA argued that Kosovo was such a case; and as we see, Kofi Annan raised the same *problematique.* This is a valid and unresolved issue with extremely serious implications for the use of force. If force is used in a purely humanitarian intervention, it would seem that the *Realpolitik* of human rights trumped the problem of an 'unjust' veto in the UNSC. But this opens the Pandora's box of force as a tool of unilateral foreign policy: Iraq was also a case of failing to achieve a mandate. The 'thin red line' between the Kosovo and Iraq cases lies in moral justification, or in the legitimacy that these justifications carry. In terms of UN 'history' and the missing mandate, the cases are so not very different.

Regime Change and the R2P

The growing legitimacy for non-military intervention – the imposition of political conditionality in foreign policy *tout court* – is accompanied by the emergence of 'integrated missions' where the military tool is but a tool, a very necessary one, in the toolbox.

In this section, we consider how military intervention and democracy evolve. Four cases of military intervention premised on restoring democracy are examined (Panama, Haiti, Sierra Leone and Liberia). The relationship between the military and non-military tools in modern integrated missions

appears less sharp than before, and also this facilitates a certain 'mission creep' in terms of bestowing legitimacy for using this tool more randomly.

Non-Military Intervention: The emerging 'democratic entitlement'

There are several reasons why the political norm change towards the view that 'only democracies are sovereign' or as we call it here, 'conditional sovereignty', has been especially strengthened in the post-Cold War period:

First, *the power behind the ideological contender imploded with the fall of the Soviet Union*. We find that human rights at this time become firmly 'wedded' to democracy as the sole political form that can realize them, marked perhaps best by the 1990 Charter of Paris.

The fact that no major power has opposed democracy in its human rights-based, liberal variant after 1990 has consolidated the norm. At the OSCE, COE, and EU as well as at the UN we see that human rights and democracy are linked as a whole.

Even Kofi Annan states this clearly 'It is increasingly recognized that good governance is an essential building block for meeting the objectives for sustainable development, prosperity and peace...Good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political process of their countries and in decisions affecting their lives' (Annan 1997: 5, para 2).

Today most states are democratic, by far the largest majority of the UN membership. Politically, it has become impossible to argue for anything less than democracy as a legitimate form of government – *vide* the widespread political conditionality in membership criteria (EU, Council of Europe) and the explicit 'mission' in conditionality in all but humanitarian aid. Further, there is no longer adherence to the still legally valid 'occupation law' when a military intervention has taken place. although it prescribes that political institutions be left as they were before the occupation. Instead, the occupant seeks to impose democracy and cannot leave until this is accomplished. All interventions now aim at democratization, and the holding of elections is the very pre-requisite for any kind of exit strategy. As Annan notes, 'what began as an adjunct to conflict resolution has grown to a broader, institutionalized legitimating function'.

Second, *security is increasingly linked to development and democracy*. 'Security sector reform' has become a key theme for democratization of

'failed states', and the need for physical security is now a standard theme for development policy discussion. Only some years ago these themes were not regarded as interrelated.

Third, the European thesis of the *liberal peace*, dating from Kant's 1776 *Zum ewigen Frieden*, has received renewed interest and relevance today with the success of the EU integration model as a 'security community'. Security through democratization is a powerful argument with empirical referents, but also the converse seems to be correct: no democratization *without* security.

Fourth, there *has been a steady development of election monitoring on the part of the UN and other international organizations*. These are by now standard, and have evolved over forty years. The UN has an extensive history of monitoring elections in states emerging from colonialism, but its first mission to an independent state was in 1990, Nigeria. This implies that the international community is not at all indifferent to the internal condition of a state, but that there is a growing body of political practice and also international law which considers that an emerging democratic entitlement exists:

Fifth, we see the *development of the 'democratic entitlement' in international law:* Whereas the American Law Institute in 1987 wrote that 'international law does not generally address domestic constitutional issues, such as how a national government is formed' (quoted in Fox & Roth 2000). Thus, continue the authors, 'prior to the events of 1989-91, "democracy" as a word rarely found in the writings of international lawyers', the same lawyers today agree that 'it is now clear that international law and international organizations are no longer indifferent to the internal character of regimes' (*ibid*. 2).

It is some American scholars of the New Haven school of international law that most strongly insist that there is a new conditional sovereignty at hand. Reisman argues that the UN Charter, which is 'based on the principle of self-determination of peoples', as its art. 1 reads, thereby introduces a new sovereignty concept vested in the people and in human rights (Reisman 2000: 240). He adds: 'No serious scholar still supports the contention that internal human rights are essentially within the domestic jurisdiction of any state' (*ibid*. 243).

Thus, there are major reasons why 'conditional sovereignty' is today the dominant conception. The changes after the Cold War have enabled this development also in terms of standard foreign policy. But is there an extension of this agenda into a new norm of 'democratic intervention'?

Military intervention for democracy?

In response to the military coups in Sierra Leone and Haiti, political boycotts of the regime followed. There has also been a vigorous military response in some few cases, such as the restoration of Jean Bertrand Aristide in 1994 (SC Res. 940) in Haiti and the removal Ahmad Kabbah in Sierra Leone in 1998.

Using military force against military coups seems to be increasingly accepted, although the practice of the UN varies: One protested against the coups in Myanmar and Nigeria through economic sanctions, one tolerated Kabila in DR Congo and Zaire, and little has been done in the case of Algeria. We find no consistent state or UN practice in response to military coups.

Nonetheless, the statements from Kofi Annan are strong: in 1997 he asserted it as an 'established norm' that 'military coups against democratically elected governments by self-appointed juntas are not acceptable'. Thus, there is a strong statement of a norm, implying that breaches of the norm must be dealt with.

If we look at interventions historically, we find that that very few, if any, were justified in terms of restoration or creation of democracy, although many actual interventions contained such elements. As early as in the attempted coup in Tanganyika in 1964 when President Nyerere asked the UK for help, troops were flown in and suppressed the coup in a single day.

The pattern seems to have been political condemnation rather than intervention: In the Gambia in 1994 there was a bloodless military coup by young insurgents who claimed it would be a 'coup with a difference'. But no military help came to President Jawara, who had asked for it. A US warship off the coast refused to intervene, but the coup was condemned politically.

The intervention in Haiti, briefly discussed in Chapter 5, was the first case of a UN resolution where there was a reference to democracy in connection with a 'threat to international peace and security'. Again the UNSC adopted economic sanctions at first, but when these had no effect, the Council mandated a military intervention because the coup and the humanitarian situation represented a 'threat to international peace and security' (res. 940/94). In this case, the threat of intervention worked: the regime re-installed President Aristide.

The remarkable fact is that this intervention was mandated with reference to 'international threats' to peace and security, while the fact remains that the threat came from the form of government: it was not democratic, but a military dictatorship. But the principle this would create would mean

that military intervention could be allowed in all cases where the form of government is not a democracy. The resolution explicitly stated that this was a unique case, but nonetheless it is one which may create a precedent. Almost all the cases of the UNSC in the 1990s are presented as unique cases with unique mandates, but this raises the issue of when a row of 'exceptions' makes for a new practice and a new canon of interpretation. The resolution text reads: 'in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region' (res. 841/93, preamble). The care taken to point of that this is 'unique' and 'exceptional' is a general trait of all resolutions that depart from the state-to-state standard of war, and can be found wherever a humanitarian or democratic justification is given. Some states, like China and Russia, are jealous guardians of traditional state sovereignty and the traditional interpretation of the non-intervention norm.

The diagnosis that the lack of democracy in Haiti was a threat to peace in the region resulted in much debate. Refugee flows may be one answer, as was presented later in the Kosovo case. In the assessment of Byers and Chesterman (2000: 285), there was no acceptable argument in this vein – no outflux of refugees followed, and the humanitarian argument was not made in the resolution. In short, the democracy-security link in the Haitian case was a very weak and unconvincing one.

Again it is prominent US lawyers who argue that this case has set a precedent for 'an international principle of democratic rule and of collective humanitarian intervention' (Teson 2003: 252). Byers and Chesterman argue that this resolution does not at all constitute such a precedent, and that it instead can be seen as a result of an invitation to assist by the elected leader of Haiti, Aristide himself. He was in exile, and asked the UN to assist him, and 'an invitation of this kind is widely acknowledged to legitimate unilateral or collective invitation in the absence of UNSC authorization'), they argue (Byers & Chesterman 2000: 287). However, also this interpretation is not convincing, as the USA was ready and willing to intervene, and several years had passed since Aristide had been exiled. There was no imminence in the situation.

Byers and Chesterman conclude, however, that the 'the international legal system is undergoing rapid change, especially in the area of human rights...it is therefore proper for the UNSC cautiously and gradually to adapt its conception of international peace and security over time' (2000: 288). Here two important issues of principle are addressed: One, the legal development in the 'democratic entitlement' direction is so dynamic that it

must have implications for the law on intervention in the sense that the latter must adapt to it; and two, law follows political developments that are gradually reflected in legal standards that evolve. The Security Council must adapt to these evolving legal standards.

The second 'pro-democratic' intervention with a Security Council mandate was in Sierra Leone in 1997. The elected government of President Kabbah was overthrown by a military coup carried out by the Armed Forces Revolutionary Committee (AFRC). This was part of an ongoing war situation, dating back to 1991. There were political condemnations, and the regional peace-keeping force under ECOWAS announced that it would reverse the coup. The ECOWAS was given a mandate by the Organization for African Unity (OAU), and the UNSC adopted resolution 1132/97, mandating the ECOWAS force to prevent the AFRC from acquiring weapons and other resources. The resolution text made reference to a threat to international peace and security constituted by the 'situation', and there was also a 'demand' on the new military regime that it relinquish power and restore democracy. In the political debates around the mandate, some remarkable arguments were adduced – like the South Korean one, which amounted to a causal claim that the lack of democracy in Sierra Leone 'had a destabilizing effect on the whole region by reversing the new wave of democracy which was spreading across the African continent'(!).

In this case, as in many others, the mandate from the Security Council came after the fact. Also the mandate given by the OAU, and in fact first proclaimed by ECOWAS itself, was retrospective. The fact was that ECOWAS had already decided what to do, and did so without consulting the Security Council. As most states agreed with this course of events, the mandate was forthcoming. But the timeline here is important: we cannot speak about any determination on the part of the Security Council to intervene militarily in order to restore democracy in Sierra Leone. Instead, this was a case of 'mandate creep'. Then, in 1998, the force under ECOWAS, ECOMOG, successfully restored the elected government to power in Sierra Leone.

Legal views vary on whether this case set a precedent for pro-democratic intervention. Major US scholars such as Teson and d'Amato support this. So does Roth (1999), who states that 'Sierra Leone is the best evidence yet of a fundamental change in international legal norms pertaining to "pro-democratic intervention"...The argument can be made that coups against elected governments are now *per se* violations of international law, and that regional organizations are now licensed to use force to reverse such *coups* in member states'. Against this view stands the opposite conclusion of Byers and Chester-

man: retrospective validation of the military actions cannot be taken as a precedent and is not a principled change in international law. Interestingly, these two scholars depart from the analytical mode and become highly normative in discussing this issue: 'We take the view that pro-democratic intervention may...actually be inimical to human rights (...) the restoration of democracy is not yet – and should not in the future be – considered sufficient basis for [military intervention]' (Byers & Chesterman 2000: 288).

Not only are legal scholars in stark disagreement on the crucial issue of whether the intervention norm now allows for 'democratic intervention', but their agreement is political and normative rather than based on sound legal foundations. This points up the intensely political character of this question, and that there is no clear legal direction to be found. This in turn indicates that we are correct in our conjecture that the legal 'canons' in this field are very diffuse and give little direction to the interpretation of this kind of intervention.

Unilateral pro-democratic interpretation?

There is a legal debate that started with US legal experts on the issue of whether the Security Council can 'lose' its unique mandate as the organ that determines the question of using force in international affairs. Reisman set off the debate in 1984 in an editorial in the *American Journal of International Law* (Reisman 1984), in which he argued that in cases where the UN fails to act – when it ought to – then states are called upon to do so. In his view, self-help is allowed; he continued this argument in a further article in the same journal (Reisman 1990). This line of argument is echoed by d'Amato: the pro-democratic intervention in Panama was legal since the USA did not intend to annex Panama and the justification given, viz. the 'restoration of democracy', was therefore the real motivation as well (d'Amato 1990: 520).

This debate is similar to the arguments made by Kofi Annan in the Kosovo case, discussed in Chapter 6. Here he stated that when the UNSC is unable to act – in this case, its inability to mandate the Kosovo intervention – the sovereignty to act reverts to member states. This is an argument with major and perhaps unanticipated consequences, as it fits logically with the arguments of Reisman and d'Amato, which seek to legitimate unilateral humanitarian and/or pro-democratic intervention. In the New Haven school, these and other scholars argue that moral legitimacy trumps international law and the status of the UN Security Council. Their interpreta-

tion, known as 'policy-oriented jurisprudence', holds that law is indeed related to notions of justice and is just a means to an end: 'The authority of institutional arrangements is context-dependent...and must always be determined empirically in a given context' (Roth 2003: 244).

This seemingly opens up for an ethical determination of a 'just war', but it could also admit a new Brezhnev doctrine if left to states to implement. It is the combination of the reversal to states *and* the claim of morally sound purpose – humanitarian or otherwise – that constitutes the explosive implication of this turn of legal thought. On the surface, it seems a very just and attractive idea: when a veto-power state, for no other reason than sheer national interest and/or fear of a weakening of the old sovereignty notions, opts for the veto and no mandate is possible, why not turn to states actually involved, as was the case with Kosovo? The moral imperative to act is faultless for most.

The invective against the positivist model of legitimacy seems correct. In the words of one representative of this school:

Positivist jurisprudence...identifies lawfulness in terms of compliance with rules...the decision-maker at the pinnacle, however, does not think in terms of compliance with rules, but in terms of making decisions that optimize the many policies that may be expressed in rules...from the perspective of the positivist jurist, the decision-making is acting unilaterally and unlawfully. Using a different and quite possibly more appropriate jurisprudential lens could lead to the opposite conclusion. (M. Reisman, as quoted in Roth 1999: 246).

This view of the authority of law and legal canons leads to complete political freedom to interpret the former. This is controversial, to say the least; however, the many humanitarian interventions in the 1990s have not only 'stretched' the UNSC legal canon, but also weakened the role of the Council as such when an intervention has taken place without a mandate, as in the case of Kosovo. In fact, it could be argued that Kosovo, rather than the Iraq case, has weakened the Security Council and the intervention norm precisely because it was a morally, therefore politically, legitimate intervention.

Further, what started with the Kosovo case was a privileging of morals, or political legitimacy, over positivist legal interpretation. There was agreement, in NATO and elsewhere, that the intervention was morally right although legally wrong. This opened the Pandora's box for later interventions without a mandate. In the case of Iraq, it was the clumsy process of justification that failed, as well as the fact that a new resolution was called for – a concession the USA made to the UK. If Washington had argued con-

sistently along the humanitarian and/or pro-democratic lines, perhaps more international political legitimacy would have been forthcoming. This is logically also true if the WMD argument has been right. In both these cases of justification, there might have been an outcome that commanded political legitimacy, also without a Security Council mandate.

The pro-democratic intervention argument by US legal experts rests on the ethical intention behind the interventions argued for – Panama and Grenada, where the 'evidence' of such is the fact that the USA was not seeking occupation or annexation, but withdrew after the restoration of democracy. By emphasizing political-moral legitimation, they avoid international law altogether. The result is a development away from the unique role of the UN and a 'realist' type of intervention regime – this time not for reasons of traditional *Staatsraison,* but reasons of 'doing good'. Even if the latter in some cases actually amounts to this, the principle remains the same.

Unilateralism equals self-help, as the traditional realist term calls it. Several examples from US practice come to mind: the June 1993 missile strikes on Iraq in response to an alleged assassination attempt on President George Bush, the 1998 missile strikes on Sudan and Afghanistan in response to terrorist attacks, the December 1998 strikes on Baghdad by the USA and the UK, the continued enforcement of the no-fly zones, and Iraq 2003.

Østerud (2004) makes the point that 'democratization' was one of the justifications offered for the invasion of Iraq, but that it was not very well developed, nor did it rank high on the agenda. However, if the democracy argument had received much more political prominence, it could have commanded much more legitimacy, thereby making for a 'Kosovo' case.

The 'mainstream' legal interpretation remains, however, that 'there is (as yet) no general principle for the armed redress of 'serious human rights violations', argues Roth (1999: 249). But, he concedes, it is political will that ultimately drives legal changes of interpretation; and he asserts that there is 'little reason to believe that states widely accept that outsiders will have the last word' (*ibid*.). However, this in turn invites the realist argument that only powerful states will have the power to say no to such 'pro-democratic' intervention. And with that, we are in fact back where we started, with the 'failed states' agenda.

Failed states drive the pro-democratic intervention agenda

In Chapter 3 we analysed 'mission creep' in terms of democracy in several UN missions of the 1990s. The point was that two different develop-

ments coincided in time: the need for democratization, and the need for security in these states. The security requirement became paramount with the 'lessons learnt' in these places – an increasingly militarily robust mandate was issued by the UNSC in cases such as Somalia and Bosnia.

The sheer need for physical force dictated this development. Also at stake was the legitimacy of any of these missions: without military 'success' there would be no humanitarian and/or democratic 'success'. Thus, military robustness came to be an integral part of any such missions, reluctantly but nonetheless steadily.

This point is a key one: the drive, from politically informed Western publics, to intervene in failed states was premised on the moral or ethical conviction that 'something had to be done'. When that 'something' resulted in an intervention, the failure of the humanitarian/democratic project was certain when there was not sufficient and adequate security on the ground. It is this 'lesson learnt' that accounts for the actual rise in military intervention in the 1990s at the UN. There was never the motivation to invade and conquer in the traditional realist mode, but rather the 'implication' of force by default.

Here we should note that 'pro-democratic' intervention happened as part of the larger 'failed' states agenda, and that legal practice often was *post hoc*. But this in turn led to heightened legitimation for such interventions, both politically and legally.

This general development has greatly aided the USA in acting unilaterally with such motivations. The more legal interpretations of 'international peace and security' departed from standard state-to-state threats at the UN, the more room there was for 'moral' interventions when a Security Council mandate failed due to traditional veto reasons. After all, why accept that some states retained the old notions of sovereignty and non-intervention when in fact the 'new' human security notion of 'conditional sovereignty' was condoned by both the UN and, in the absence of the UN, NATO itself? Further, if the law could be stretched so far, why not farther? The Kosovo case represented a major blow to a positivist view of international law in putting morality above the UN Security Council.

The implications of this are many: the Security Council is not really needed when the case is a morally good one – a view that also Kofi Annan advocated. Moreover, morality in the sense of a *Realpolitik* of human rights trumps the legal canons of interpretation, or at least can change them – as underlined by the willingness to interpret new 'threats' on the part of the UNSC in the 1990s.

Where does that leave us? In fact, we are left with a very open and 'dangerous' situation regarding intervention at present. Abandoning a positivist view of the intervention norm and turning instead to a substantive moral or ethical one can lead to 'good deeds' being done – but it also to a weakening of the status of the UNSC and to a weakening of the status of legal norms, by making the canons of their interpretation so broad that the 'mainstream' legal interpretation is no longer hegemonic or authoritative.

The advent of terrorism linked to failed states completes this picture. Intervening against a perceived terrorist threat is an act of self-defence, and as such condoned by the UNSC and international public opinion in the case of Afghanistan. Such threats are existential if they are real threats, which means that each state will weigh the need for multilateral decision-making in the UNSC against the imminence of the threat. Sometimes pre-emptive unilateral action is chosen.

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STAATLICHE SOUVERÄNITÄT UND HUMANITÄRE INTERVENTION

ANGELIKA NUßBERGER

DIE RECHTFERTIGUNG DES NICHT RECHTFERTIGBAREN

„Kriege sind die Geißel der Menschheit". „Der Krieg ist der Vater aller Dinge". „Kriege wird es immer geben". – Kriege haben viele Namen: Eroberungsfeldzug, Kreuzzug, Dschihad, humanitäre Intervention oder einfach: „Wiederherstellung der verfassungsmäßigen Ordnung", wie der russische Präsident Boris Jelzin beim Einsatzbefehl für die russischen Truppen zum Angriff auf Tschetschenien und – wortgleich – der georgische Befehlshaber Kurashvili beim Einsatzbefehl für die georgischen Truppen zum Angriff auf Südossetien formulierten. Die Orte, an denen Kriege gewonnen oder verloren wurden, markieren Zeitenwenden: Issos, Waterloo, Königgrätz, Stalingrad. Und was sagt das Völkerrecht dazu? Sind Kriege erlaubt? Nein, grundsätzlich nicht. Aber ... Die Erklärungsversuche, warum es ein „Aber" geben müsse, sind überaus facettenreich. „Das Völkerrecht skandalisiert die Anwendung von Gewalt und legitimiert sie zugleich", meint der Politikwissenschaftler Lothar Brock und nennt dies die „grundlegende Ironie des Völkerrechts".[1]

Dies gilt auch für das Völkerrecht der Gegenwart. Auch wenn es Gewaltanwendung im internationalen Bereich grundsätzlich zu minimieren versucht, werden doch immer neue Ansätze gefunden, um militärische Interventionen zu rechtfertigen. Teilweise werden damit – dem Wolf im Schafspelz vergleichbar – machtpolitische Intentionen als völkerrechtspoli-

[1] Lothar Brock, Von der „humanitären Intervention" zur „Responsibility to Protect". Kriegserfahrung und Völkerrechtsentwicklung seit dem Ende des Ost-West-Konflikts, in: Fischer-Lescano/Gasser/Marauhn/Ronzitti (Hrsg.), Festschrift für Michael Bothe, Baden-Baden, 2008, S. 19 ff.

tisch korrekt vorgeführt; teilweise wird aber auch versucht, auf echte Dilemmata in der internationalen Politik angemessen zu reagieren. So schreibt der ehemalige Generalsekretär der Vereinten Nationen, Kofi Annan, in einem Bericht zur Rolle der Vereinten Nationen im 21. Jahrhundert:

> „[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"[2]

Bereits zuvor – und unter dem Eindruck der unentwirrbar schwierigen Situation im Kosovo, hatte Kofi Annan angeregt, zwei Konzepte von Souveränität zu entwickeln. So sei der staatlichen Souveränität eine individuelle Souveränität der Einzelpersonen gegenüberzustellen. Bei einer Kollision müsse die internationale Staatengemeinschaft abwägen, wie lange sie im Bereich der Menschenrechte untätig bleiben könne, um den Schutz der staatlichen Souveränität zu wahren. In keinem Fall dürften aber massenhafte Menschenrechtsverletzungen hingenommen werden.[3] – Dies war der Anstoß zur Erarbeitung des Konzepts der „responsibility to protect".

Die „responsibility to protect" ist das – vorerst – letzte Glied in einer Kette von Argumentationen, die Anwendung von kriegerischer Gewalt um eines hehren Zweckes willen zu rechtfertigen. Es wird kontrovers diskutiert, ob der Ansatz innovativ oder doch nur alter Wein in neuen Schläuchen ist. Die Geschichte des Völkerrechts lässt sich auch schreiben als eine Geschichte der – mehr oder weniger vergeblichen – Versuche, Kriege einzuhegen und einzudämmen, zugleich aber auch für notwendig und gut zu erklären. Vor diesem Hintergrund ist die „responsibility to protect" zu sehen, die den Auftakt bildet zur völkerrechtlichen Diskussion über Krieg und Frieden, Gerechtigkeit und Verantwortung im 21. Jahrhundert.

Der „gerechte" Krieg

Die Vorstellung, es ließen sich gerechte Kriege von ungerechten Kriegen unterscheiden, findet sich bereits bei den Römern. Der Begriff *bellum iustum* (gerechter Krieg) bezeichnet im frühen römischen Recht den Krieg,

[2] UN-Doc. A/54/2000 (27.03.2000) The Millennium Assembly of the United Nations "We the peoples: the role of the United Nations in the twenty-first century. Report of the Secretary-General", Absatz 217.

der bestimmten rituellen und sakralen Vorschriften entspricht. Danach musste ein Staatspriester als Gesandter des römischen Volkes dem potentiellen Kriegsgegner die Forderung nach Genugtuung überbringen und, falls innerhalb einer bestimmten Frist keine Genugtuung erfolgte, den möglichen Krieg ankündigen. Befürwortete der römische Senat den Krieg, hatte eine feierliche Kriegserklärung zu erfolgen, indem der Priester eine blutige Lanze über die Grenze ins Feindesland schleuderte.[4] Dieses formalistische Verständnis wird im spätrömischen Recht durch ein ethisches Begründungsmuster verdrängt. Nach Cicero ist ein *bellum iustum* ein Verteidigungskrieg oder ein Krieg zur Vergeltung erlittenen Unrechts.[5] Entscheidend für die völkerrechtliche Entwicklung ist, dass auch der Krieg als ein dem Recht unterliegendes Phänomen verstanden wird. Das berühmte Dictum des Geschichtsschreibers Livius gibt davon Zeugnis: „Sunt et belli sicut pacis iura“ (es gibt Gesetze des Kriegs wie des Friedens).[6]

Für das abendländische Verständnis vom „gerechten Krieg“ prägend sind die Schriften des Augustinus, der an die Lehre Ciceros anknüpft, zugleich aber dem Krieg einen Ort im Gefüge der christlichen Lebensordnung zuweist.[7] Damit wird der Krieg nicht mehr, wie im Urchristentum, in jedem Fall abgelehnt und das Gebot für Christen, den Kriegsdienst zu verweigern, seiner Grundlage beraubt. Nach Augustinus muss eine Kriegserklärung aber einen gerechten Grund (*iusta causa belli*) haben: „Gerecht sind diejenigen Kriege zu nennen, die ein Unrecht sühnen, etwa wenn ein Volk oder ein Gemeinwesen, das mit Krieg überzogen werden soll, verabsäumt hat, die Missetaten der Seinen zu bestrafen oder das wieder zurückzugeben, was mittels jenes Unrechts geraubt worden ist“.[8] Entscheidend sei auch die innere Einstellung des Kriegführenden, seine gerechte Absicht (*intentio recta*). Nicht Rachsucht oder Unversöhnlichkeit dürften Motiv sein, sondern vielmehr der Wunsch, den „rechten Frieden“ und damit einen

[3] Kofi Annan, Rede zum Jahresbericht, abgedruckt in: Manuel Fröhlich (Hg.), Kofi Annan. Die Vereinten Nationen im 21. Jahrhundert, Reden und Beiträge 1997-2003, Wiesbaden 2004, S. 258 ff.

[4] Vgl. dazu Karl-Heinz Ziegler, Völkerrechtsgeschichte, 2. Auflage 2007, S. 41.

[5] Ziegler (aaO), S. 48.

[6] Ziegler (aaO), S. 49.

[7] Wilhelm G. Grewe, Epochen der Völkerrechtsgeschichte, Baden-Baden 1984, S. 133 ff.

[8] “Iusta bella definiri solent, quae ulciscuntur iniurias, si gens vel civitas quae bello petenda est, vel vindicare neglexerit quae a suis improbe factum est, vel reddere quod per iniurias ablatum est”. (In Pentat. VI, 10).

Zustand der Ruhe, der sich auf eine gerechte Ordnung gründet, wiederherzustellen. Letztlich werde der Krieg auch zum Besten des Gegners geführt, da ihm die Möglichkeit genommen werde, Böses zu tun. Schon während des Krieges müsse der Friede dadurch gestiftet werden, dass, wie Augustinus schreibt, „der Besiegte durch den Sieg vom Sinn des Friedens überzeugt wird". Den „gerechten Grund" erkennen, den Krieg mit der „rechten Intention" führen kann allerdings nur der Kriegsherr. So begeht der einzelne Soldat, wenn er an einem ungerechten Krieg teilnimmt, keine Sünde: „Wenn es also einem Gerechten zustößt, unter einem unwürdigen König zu kriegen, so kann er ohne Verstoß gegen die Gerechtigkeit seinen Befehl ausführen, wenn es feststeht, dass dieser Befehl nicht dem Gesetz Gottes zuwiderläuft; es kann also geschehen, dass der König sich durch seinen ungerechten Befehl schuldig macht, während der den Befehl ausführende Soldat schuldlos bleibt".[9]

Beispielgebend für die weitere Entwicklung der Diskussion um Krieg und Frieden fasst Thomas von Aquin die Ideen des Augustinus in drei Erfordernissen zusammen, die für die Annahme eines „gerechten Krieges" erfüllt sein müssen: die Machtbefugnis eines Herrschers, der keinen höheren Richter über sich hat und daher sein Recht selbst suchen muss (*auctoritas principis*), die gerechte Sache, die in der Vergeltung und Bestrafung eines Unrechts liegen muss (*iusta causa*), und die Absicht, das Gute zu fördern und das Böse zu verhindern (*recta intentio*). Damit war dem Kaiser aufgetragen, aufgrund der ihm verliehenen Schwertgewalt die inneren und äußeren Feinde der Christenheit zu bekriegen. Aber die Kirche sah sich ebenfalls berechtigt, „Heilige Kriege" – auch diese Formulierung findet sich bereits bei Augustinus – zu führen. Der geistige Boden für die Kreuzzüge war bereitet.[10]

Es war aber nicht nur die christliche Lehre vom gerechten Krieg, die das Recht von Krieg und Frieden im Mittelalter bestimmte. Einfluss nahm vielmehr auch das ritterlich-feudale Fehdewesen mit seinem Ideal vom ehrenhaften Kampf gleichstehender, sich gegenseitig respektierender Gegner, ein Ideal, das in der Wirklichkeit allerdings kaum Niederschlag fand. So vermochten weder die Regeln des *ius ad bellum*, des Rechts zum Krieg, noch die Regeln des *ius in bello*, das die Art der Kriegsführung bestimmte, die grausamen und blutigen Auseinandersetzungen im Mittelalter zu verhindern.

[9] Zitiert nach Grewe (aaO), S. 135.
[10] Vgl. dazu im Einzelnen Grewe (aaO), S. 135 ff.

Dies gilt auch für die Eroberungskriege in der Neuen Welt, die Conquista. Sie lassen sich allerdings nicht mit der Vorstellung des Augustinus, Unrecht müsse wieder gutgemacht werden, begründen. Der spanische Völkerrechtler Francisco de Vitoria findet dennoch einen Weg, das Vorgehen der Spanier gegen die Eingeborenen Südamerikas zu rechtfertigen So schreibt er in seiner berühmten Abhandlung *De Iure Belli Hispanorum in Barbaros* (Über das Recht der Spanier zum Krieg gegen Barbaren): „Wenn sich die Barbaren infolge des Schreckens zusammenrotten, um die Spanier zu verjagen und zu töten, so können sich diese in den Grenzen des Notwendigen verteidigen, aber sie dürfen nicht die anderen Rechte des Krieges gebrauchen, das heißt, wenn der Sieg davongetragen und die Sicherheit hergestellt ist, so haben sie nicht das Recht, die Barbaren zu töten, zu plündern und ihre Städte einzunehmen; denn in diesem Falle sind die Barbaren, wie wir annehmen, unschuldig. Die Spanier dürfen sich verteidigen, aber nur, indem sie den Barbaren so wenig wie möglich zufügen, denn der Krieg ist reine Verteidigung“.[11]

Während nach mittelalterlichem Verständnis nur eine der beiden kriegführenden Parteien „im Recht“ sein und einen gerechten Krieg führen konnte, wurde im Völkerrecht des 16. und 17. Jahrhunderts auch ein „von beiden Seiten gerechter Krieg“ (*bellum iustum ex utraque parte*) für möglich gehalten. Diese Entwicklung spiegelt das Aufbrechen des mittelalterlichen Weltbildes, das auf der Vorstellung, es gäbe nur „eine“ Kirche und „einen“ Glauben, beruht hatte. In Konfessionskriegen sind beide Seiten überzeugt, die Wahrheit, den Glauben und das Recht auf ihrer Seite zu haben. Zunächst wird in der Völkerrechtslehre zugestanden, dass auch derjenige, der sich in einem unüberwindlichen Irrtum (*ignorantia invincibilis*) befinde, einen gerechten Krieg führen könne. Der in England lebende Völkerrechtler Alberico Gentili (1552-1608) entwickelt diese Idee weiter und akzeptiert, dass ein Krieg objektiv auf beiden Seiten gerecht sein könne. Kriege, mit denen Unrecht gesühnt werden solle, vergleicht er mit Strafprozessen, Kriege, die der Durchsetzung eines bestrittenen Rechtsanspruchs dienten, mit Zivilprozessen. Allerdings geht er nicht so weit, Sieg oder Niederlage als Beweis für die Berechtigung der Ansprüche zu interpretieren; nicht notwendig muss es der Stärkere, Siegreiche sein, der auch im „Recht“ ist. In jedem Fall müsse der Sieger einen „gerechten Frieden“ gewähren. Dies bedeutet, dass die vom Sieger geforderten Entschädigungen nicht so beschaffen sein dürfen, dass

[11] De Ind. III, 6; Übersetzung zitiert nach Grewe (aaO), S. 243.

Frieden auf Dauer nicht mehr möglich ist: „Der Sieger ist im Unrecht, der einen Frieden anbietet, der kein Friede ist".[12]

Die Idee vom „gerechten Krieg" wird mit der Lehre vom beidseitig gerechten Krieg aber weitgehend relativiert und in den folgenden Jahrhunderten immer mehr von der Vorstellung verdrängt, souveräne Staaten hätten ein freies Kriegführungsrecht. Für den im 19. und zu Beginn des 20. Jahrhunderts dominierenden Völkerrechtspositivismus war die Gerechtigkeit des Krieges grundsätzlich ein juristisch irrelevantes Problem der politischen Ethik, „eine rein persönliche Gewissensfrage", wie der französische Völkerrechtler Pillet formulierte.[13] Nichtsdestotrotz ist die Auffassung, gerechte und ungerechte Kriege ließen sich unterscheiden, nie verstummt. So griff etwa die französische Nationalversammlung nach der Revolution darauf zurück und bestimmte in einem Dekret aus dem Jahr 1790, dass nur derjenige Krieg erlaubt sei, der geführt werde, um einen unmittelbar bevorstehenden Angriff abzuwehren, einen Verbündeten zu unterstützen oder ein eigenes Recht zu wahren.[14] Auch die religiös fundierte Annahme, die Gläubigen hätten ein Recht, gegen die Ungläubigen zu kämpfen, ist, der Säkularisierung des Völkerrechts zum Trotz, zumindest in der islamischen Lehre vom Dschihad noch immer präsent.[15] Eine besondere gleichermaßen auf eine bestimmte Weltsicht gegründete Variante fand sich in der sowjetischen Völkerrechtslehre, die als „gerechte Kriege" Verteidigungs- und nationale Befreiungskriege ansah, in denen die ideologischen Gegner automatisch im Unrecht waren.[16]

Die Idee des „gerechten Krieges" wirkt bis in die Gegenwart fort, auch wenn die Diskussion nicht mehr unter diesem Begriff geführt wird. Der Sache nach sind aber ebenso Kriege, die dem Schutz der Menschenrechte der Bürger anderer Staaten dienen sollen – so genannte „humanitäre Inter-

[12] De iure belli, III, xiii, Übersetzung zitiert nach Grewe (aaO), S. 250; diese Berechtigung dieser Forderung hat nicht zuletzt der Versailler Vertrag deutlich gemacht.

[13] Pillet, *La Guerre actuelle et le droit des gens*, Paris 1916, S. 17.

[14] Décret du 22 mai 1790. Assemblée nationale. Moniteur universel du 23 mai, article 3.

[15] Vgl. Rudolph Peters, *Jihad in Classical and Modern Islam*, Wien 2005; Fred M. Donner: The Sources of Islamic Conceptions of War. In: John Kelsay und James Turner Johnson (Hg.), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*. Greenwood Press, 1991, S. 47.

[16] Vgl. Friedrich Christian Schröder, Die Rechtmäßigkeit des Krieges nach westlicher und sowjetischer Völkerrechtsauffassung, in: R. Maurach/B. Meissner, *Völkerrecht in Ost und West*, 1967, S. 183 ff.

ventionen" – nichts anderes. Und auch die Berufung auf das Selbstverteidigungsrecht soll den Krieg letztlich zu einem „gerechten Krieg" machen.

Der „gebändigte" Krieg

Sieht man den Krieg wertfrei als eine Art von Duell, so sind den miteinander streitenden Parteien in gleicher Weise Rechte und Pflichten zuzugestehen. Dies ist die Grundlage des *ius in bello*, des Rechts im Krieg, mit dem eine Begrenzung, Mäßigung und Humanisierung des Krieges erreicht werden soll.

Grundlegende Regeln zum *ius in bello* werden bereits von Alberico Gentili in seinem Werk „Drei Bücher vom Recht des Krieges" (1588) ausgearbeitet. Gefordert werden etwa eine Kriegserklärung und ein Moratorium bis zum Beginn der Feindseligkeiten sowie eine Beschränkung der verwendeten Mittel. Beispielsweise ist der heimtückische Mord des Feindes oder die Verwendung von Gift nicht erlaubt. Kriegsgefangene dürfen nicht wie Sträflinge behandelt und insbesondere nicht getötet werden. Auch die „Unschuldigen" (*innocentes*), wozu Gentili Frauen, Kinder, ältere Menschen, Geistliche, Bauern, Händler und Reisende zählt – der Begriff der Zivilbevölkerung ist noch nicht bekannt –, sind zu schonen. „Oh, halte uns, großer Gott, in Deiner Güte die Barbarei, Wildheit und unversöhnliche Feindschaft ferne! Mögen der Ochse und der Löwe den Hai fressen, und möge der Ochse nicht die Grausamkeit erlernen, sondern der Löwe die Barmherzigkeit! Mögen Deine Christen nicht von den Barbaren barbarische Methoden der Kriegsführung erlernen, sondern die Barbaren menschlichere Mittel von Deinen Gläubigen"![17]

Das Völkerrecht in der Zeit vor 1914, in dem die „Freiheit zum Krieg" grundsätzlich bejaht wird, steht ganz im Zeichen der Ausarbeitung von „fairen" Regeln zur Kriegführung. Man mag es als eine Art der resignativen Selbstbeschränkung des Rechts gegenüber der Politik lesen, wenn der englische Völkerrechtler W.E. Hall 1880 schreibt: „Das Völkerrecht hat keine andere Möglichkeit, als den Krieg – unabhängig von der Gerechtigkeit seines Ursprungs – als ein Verhältnis zu akzeptieren, welches die an ihm beteiligten Personen herstellen können, wenn sie es wollen; es kann sich lediglich mit der Regelung der Wirkung dieses Verhältnisses beschäftigen. Deshalb werden beide Parteien eines jeden Krieges als in einer identischen

[17] De iure belli II, zitiert nach Grewe (aaO), S. 253.

Rechtsstellung befindlich und infolgedessen als mit gleichen Rechten ausgestattet angesehen".[18]

Aber mit diesem Ansatz, so fatal er sein mag, wird doch ein gewisser Fortschritt im Völkerrecht bewirkt, da es gelingt, Grundregeln einer humanen Kriegsführung zu kodifizieren. Manches wurde zwischenzeitlich ergänzt und erweitert; die Grundlagen des so genannten humanitären Völkerrechts wurden im 19. Jahrhundert geschaffen. Ein erster Markstein war die Genfer Konvention über die Verbesserung des Loses der Verwundeten der Heere im Felde von 1864. Wahrhaft bahnbrechend waren die dreizehn Abkommen der Haager Friedenskonferenz von 1907, wobei das bedeutendste das IV. Haager Abkommen war, das die Gesetze und Gebräuche des Landkriegs betraf. In der Präambel wird von dem Bemühen der Staatsoberhäupter gesprochen, „Mittel zu suchen, um den Frieden zu sichern und bewaffnete Streitigkeiten zwischen den Völkern zu verhüten". Zugleich wird aber betont, dass es von Wichtigkeit sei, „auch den Fall ins Auge zu fassen, wo ein Ruf zu den Waffen durch Ereignisse herbeigeführt wird, die ihre Fürsorge nicht hat abwenden können". Die Abfassung des Abkommens sei durch den Wunsch angeregt worden, „die Leiden des Krieges zu mildern, soweit es die militärischen Interessen gestatten"; die Regelungen sollen den Kriegführenden „als allgemeine Richtschnur für ihr Verhalten in den Beziehungen untereinander und mit der Bevölkerung dienen." In der dem Abkommen beigefügten Haager Landkriegsordnung finden sich ausführliche Bestimmungen zu Kriegsgefangenen, zu den „Mitteln zur Schädigung des Feindes", zu den Folgen des Waffenstillstands und zur Ausübung der militärischen Gewalt auf besetztem feindlichen Gebiet. Darin ist etwa ausdrücklich festgelegt, dass die Ehre und die Rechte der Familie, das Leben der Bürger und das Privateigentum sowie die religiösen Überzeugungen und gottesdienstlichen Handlungen zu achten sind.[19] Die Kriegsparteien sowohl des Ersten wie auch des Zweiten Weltkriegs waren in der Mehrzahl an dieses Abkommen gebunden. Hätten sie sich daran gehalten, hätte viel Leid verhindert werden können.

Die Unzulänglichkeiten der Regelungen hat man – jeweils mit Blick auf die Erfahrungen von besonderen Grausamkeiten sowie auch auf den Mis-

[18] W.E. Hall, *Treatise on International Law*, 1880, S. 52.

[19] Vgl. dazu Michael Bothe, The historical evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law, in: H. Fischer et al (Hg.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection*, FS für Dieter Fleck, Berlin 2004, S. 37 ff.

sbrauch – auszugleichen versucht und so nach den Weltkriegen weitere Abkommen zum humanitären Völkerrecht abgeschlossen: insbesondere das „Protokoll über das Verbot der Verwendung von erstickenden, giftigen oder ähnlichen Gasen sowie von bakteriologischen Mitteln im Kriege“ im Jahr 1925 und die vier so genannten Genfer Rotkreuz-Abkommen im Jahr 1949, die die Verbesserung des Loses der Verwundeten und Kranken, die Behandlung der Kriegsgefangenen und den Schutz von Zivilpersonen in Kriegszeiten betreffen. All diese Regelungen gelten nur in „klassischen“ Kriegen, die Staaten gegen Staaten führen, nicht aber in Bürgerkriegen. Dabei ist es gerade diese Art von Konflikten, die in den letzten Jahrzehnten überproportional zugenommen und zu besonderem Leid der Zivilbevölkerung geführt hat, man denke nur an die Grausamkeiten im ehemaligen Jugoslawien oder auch im Tschetschenien-Krieg. Bereits im Jahr 1977 hatte man zwei Zusatzprotokolle ausgearbeitet, von denen das zweite Regelungen für den Schutz der Opfer nicht-internationaler bewaffneter Konflikte enthält. Allerdings haben es viele Staaten noch nicht ratifiziert. Um Unrecht dennoch auch in internen Konflikten einer rechtlichen Bewertung unterwerfen zu können, greift man auf eine allen Genfer Abkommen gemeinsame Bestimmung zurück, die, wenn auch nur mit allgemeinen Worten, die in jedem Fall zur Anwendung kommenden Standards festsetzt. Geboten ist unter allen Umständen eine Behandlung mit „Menschlichkeit“ „ohne jede auf Rasse, Farbe, Religion oder Glauben, Geschlecht, Geburt oder Vermögen oder auf irgendeinem anderen ähnlichen Unterscheidungsmerkmal beruhende Benachteiligung“. Völkerrechtlich verboten sind alle Kriegsgräuel wie Folterungen, Geiselnahmen, Beeinträchtigungen der persönlichen Würde sowie Verurteilungen und Hinrichtungen ohne faires Verfahren. Dass die Wirklichkeit anders aussieht, demonstrieren die täglichen Zeitungsberichte aus Krisenregionen wie Darfur oder Zimbabwe.

Der „geächtete“ Krieg

Recht zu schaffen, das missachtet wird, kann nicht genügen. Trotz des nach dem Ersten Weltkrieg in den Briand-Kellogg-Pakt im Jahr 1928 aufgenommenen Verbots des Angriffskriegs, trotz der Formulierung der Regeln einer „zivilisierten“ Kriegführung in der Haager Landkriegsordnung tobte in den Jahren von 1939 bis 1945 weltweit ein Krieg in einer bis dahin unvorstellbaren Grausamkeit und Brutalität. Die Präambel zur UN-Charta liest sich vor diesem Hintergrund wie ein trotziges „Jetzt-erst-recht“, wenn

es heißt, man wolle die Kräfte vereinen, um den Weltfrieden und die internationale Sicherheit zu wahren. Waffengewalt wird nicht ausgeschlossen, aber sie soll „nur noch im gemeinsamen Interesse angewendet“ werden. Von Idealen wie der Vorstellung, „gerechte“ und „ungerechte“ Kriege seien unterscheidbar, nimmt die Charta ebenso Abstand wie von der pazifistischen Vorstellung, dass, wenn nur alle keinen Krieg wollen, auch kein Krieg ausbrechen werde. Vielmehr formalisiert man das *ius ad bellum*, unterwirft es einem einfachen Abstimmungsmechanismus und setzt einen mit militärischer Durchschlagskraft ausgestatteten Wächter über Krieg und Frieden ein. Der aus einem Grundsatz und zwei Ausnahmen bestehende Grundgedanke des Systems ist frappierend einfach: Gewalt zwischen Staaten ist verboten,[20] es sei denn, ein Staat kann sich – dies ist die erste Ausnahme – auf sein Selbstverteidigungsrecht berufen[21] oder der Militärschlag ist – so die zweite Ausnahme – vom Sicherheitsrat sanktioniert.[22] Das Selbstverteidigungsrecht ist dabei nur im Falle eines „bewaffneten Angriffs“ zulässig, während der Sicherheitsrat bereits im Vorfeld, bei einer „Bedrohung oder einem Bruch des Friedens oder einer Angriffshandlung“, eingreifen kann. – Wann immer Soldaten auf Soldaten zielen, gilt es daher im Grunde nur zwei Fragen zu prüfen, um festzustellen, wer im Recht ist: Verteidigen die Soldaten ihren Staat gegen einen bewaffneten Angriff eines anderen Staates? Oder beruht ihr Handeln auf einer Resolution des Sicherheitsrates? Wenn ja, ist die Gewaltanwendung völkerrechtlich gerechtfertigt, wenn nein, ist sie völkerrechtswidrig.

[20] Art. 2 Abs. 4 UN-Charta: „Alle Mitglieder unterlassen in ihren internationalen Beziehungen jede gegen die territoriale Unversehrtheit oder die politische Unabhängigkeit eines Staates gerichtete oder sonst mit den Zielen der Vereinten Nationen unvereinbare Androhung oder Anwendung von Gewalt“.

[21] Art. 51 UN-Charta: „Diese Charta beeinträchtigt im Falle eines bewaffneten Angriffs gegen ein Mitglied der Vereinten Nationen keineswegs das naturgegebene Recht zur individuellen oder kollektiven Selbstverteidigung, bis der Sicherheitsrat die zur Wahrung des Weltfriedens und der internationalen Sicherheit erforderlichen Maßnahmen getroffen hat. Maßnahmen, die ein Mitglied in Ausübung dieses Selbstverteidigungsrechts trifft, sind dem Sicherheitsrat sofort anzuzeigen; sie berühren in keiner Weise dessen auf dieser Charta beruhende Befugnis und Pflicht, jederzeit die Maßnahmen zu treffen, die er zur Wahrung oder Wiederherstellung des Weltfriedens und der internationalen Sicherheit für erforderlich hält“.

[22] Art. 39 UN-Charta: „Der Sicherheitsrat stellt fest, ob eine Bedrohung oder ein Bruch des Friedens oder eine Angriffshandlung vorliegt; er gibt Empfehlungen ab oder beschließt, welche Maßnahmen auf Grund der Artikel 41 und 42 zu treffen sind, um den Weltfrieden und die internationale Sicherheit zu wahren oder wiederherzustellen“.

Nur, so einfach, wie es zu sein scheint, ist das in der UN-Charta niedergelegte System nicht. Denn: Kann es sein, dass ein Staat warten muss, bis er bereits von einem – unter Umständen vernichtenden – Schlag getroffen wird, oder darf er auch in Selbstverteidigung handeln, wenn ein Angriff unmittelbar bevorsteht, wenn, wie im Sechs-Tage-Krieg in Israel die Kampfflugzeuge der Gegner abflugbereit und aufgetankt bereitstehen? Kann, wenn der Sicherheitsrat durch das Veto eines – möglicherweise in seinen eigenen Interessen tangierten – Mitglieds handlungsunfähig ist, tatenlos zugesehen werden, wie sich eine Bedrohung des Friedens zu einem bewaffneten Konflikt entwickelt? Hat ein Staat, der in eine Schießerei an der Grenze verwickelt worden ist, das Recht, mit seiner gesamten militärischen Macht zurückzuschlagen?

Seit mehr als sechzig Jahren hat sich das Völkerrecht mit derartigen Fragen auseinandergesetzt und mittlerweile – manchmal theoretisch-abstrakt, manchmal aber auch zur Rechtfertigung eines bestimmten Verhaltens in einem bestimmten Konflikt – eine nuancen- und facettenreiche Doktrin zur Rechtfertigung des Einsatzes von Gewalt entwickelt.[23] Immer wieder wird versucht, die in der Charta vorgegebene Grundstruktur aufzubrechen und neben den beiden explizit vorgesehenen Ausnahmen zum Gewaltverbot – der Intervention mit einem Mandat des Sicherheitsrats und der Selbstverteidigung – weitere Ausnahmen zu definieren und etwa militärische Angriffe auch bei einem allgemeinen Notstand oder zum Schutz der eigenen Staatsangehörigen im Ausland zuzulassen. Zugleich wird das Konzept der Selbstverteidigung so sehr gedehnt, dass es auch – wie im Irak-Krieg – Präventivschläge gegen Massenvernichtungswaffen umfassen oder – wie im Afghanistan-Krieg – noch Jahre nach einem Angriff militärische Maßnahmen rechtfertigen soll. Trotz aller Unzulänglichkeiten mag man das System eines in gewisser Weise formalisierten Krieges im Rückblick als positive Entwicklung ansehen. Zumindest ist allgemein anerkannt, dass Krieg zu ächten ist. Und, auch wenn die Ausnahmen überaus weit interpretiert werden, so vermögen sie dennoch dem Kriegführungsrecht Grenzen zu ziehen. Eine „liberté à la guerre“, eine Freiheit, wie sie im 19. Jahrhundert postuliert wurde, ist Vergangenheit.

[23] Vgl. dazu die beiden aktuellen Monographien Christine Gray, *International Law and the Use of Force*, Oxford University Press, 3. Auflage 2008; Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, 3. Auflage 2001.

Die humanitäre Intervention

Das System des „geächteten Krieges" ist pragmatisch, balanciert Machtpolitik und konkrete Eigeninteressen und baut darauf, dass eine akzeptable Lösung gefunden wird, wenn die Mächtigen und Einflussreichen gezwungen sind, vor der Weltöffentlichkeit ihr „Ja" oder „Nein" zu einem kollektiven Eingreifen zu rechtfertigen. Die Geschichte der Vereinten Nationen aber dokumentiert, dass Eigeninteressen im Zweifel über Kollektivinteressen gestellt werden und die Bereitschaft zum Konsens minimal ist. Über weite Strecken ist die Geschichte der Vereinten Nationen die Geschichte des Kalten Krieges, die Auseinandersetzung zwischen sich ideologisch unversöhnlich gegenüberstehenden Blöcken. 105mal hat die Sowjetunion in den Jahren von 1946 bis 1970 von ihrem Vetorecht Gebrauch gemacht und Entscheidungen blockiert. Danach wendete sich das Bild; zwischen 1970 und 1990 waren es die U.S.A., die 68mal ein Veto einlegten, während die Sowjetunion auf dieses Instrument nur mehr 10mal zurückgriff. Erst nach dem Ende des Kalten Krieges, als Denker wie Fukuyama sogar vom „Ende der Geschichte" ausgingen, war die vom Sicherheitsrat geführte Weltgemeinschaft für kurze Zeit in der Lage, sich von ideologisch verhärteten Positionen zu lösen und sich um eine Beilegung von Konflikten auf der Grundlage der Regeln der Vereinten Nationen zu bemühen. Doch dieser Frühling dauerte nur kurze Zeit; bereits bei der Kosovo-Krise waren die Positionen wieder unversöhnlich. Und so gab es auch in dieser Zeit wieder Fälle, in denen niemand bereit war zu handeln, und die sich so tief in das Gewissen der Menschheit eingegraben haben: Ruanda, Darfur.

Vor diesem Hintergrund wurde das System zur Eindämmung von Gewalt im internationalen Bereich von internationalen Akteuren und Völkerrechtswissenschaftlern als unzulänglich empfunden.[24] Mit dem Instrument der „humanitären Intervention" versuchte man, wiederum materielle Elemente in die Diskussion um Krieg und Frieden einzubringen. Das UN-

[24] Vgl. etwa zur Auseinandersetzung mit der „humanitären Intervention" im Kosovo-Krieg Stellungnahmen, die den Einsatz zwar für völkerrechtswidrig halten, dennoch aber eine Weiterentwicklung des Völkerrechts in dieser Richtung befürworten: Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, in: *European Journal of International Law* (10) 1999, S. 1 ff.; Antonio Cassese, Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermerasures in the World Community? In: *European Journal of International Law* (10) 1999, S. 23 ff.

System sollte aber nicht in Frage gestellt, nur die bestehenden Defizite ausgeglichen werden. Auf der Grundlage der UN-Charta ist es aber schwierig, Argumente für die Rechtmäßigkeit einer humanitären Intervention zu finden, wenn kein Mandat des Sicherheitsrats vorliegt.

Ein möglicher Begründungsansatz für das Recht auf eine humanitäre Intervention ist, das in der Charta der Vereinten Nationen enthaltene Gewaltverbot nicht umfassend, sondern eingeschränkt zu interpretieren. Wörtlich heißt es, dass „jede gegen die territoriale Unversehrtheit oder die politische Unabhängigkeit eines Staates gerichtete oder sonst mit den Zielen der Vereinten Nationen unvereinbare Androhung oder Anwendung von Gewalt" zu unterlassen ist. Eine humanitäre Intervention, so lässt sich argumentieren, sei aber „selbstlos", diene dem Schutz der Menschenrechte und sei damit gerade nicht verboten. Dies ist eine juristische Spitzfindigkeit, mit der im Grunde das in der Charta angelegte Kriegsverhütungsrecht untergraben wird. Zumeist wird die Zulässigkeit der humanitären Intervention daher auf ein neues Völkergewohnheitsrecht gestützt, das sich – entgegen dem expliziten Wortlaut der UN-Charta – gebildet habe, wobei als Bezugspunkt insbesondere der NATO-Einsatz im Kosovo genommen wird.[25] Dies ist allerdings aus mehreren Gründen nicht haltbar. Zum einen hat eine Reihe von Staaten – am lautesten und deutlichsten Russland – den Kosovo-Einsatz für rechtswidrig erklärt. Auch die in der Gruppe 77 zusammengeschlossenen Entwicklungsländer haben ausdrücklich betont, dass sie eine humanitäre Intervention ablehnen. Damit fehlt es an einer „opinio iuris" für die Herausbildung neuen Völkergewohnheitsrechts; die „westliche Welt" kann nicht für alle sprechen. Zudem ist die humanitäre Intervention im Kosovo bisher ein Einzelfall geblieben und daher auch eine entsprechende Staatenpraxis nicht nachweisbar.[26] Die auf dasselbe Argumentationsmuster gestützte Argumentation Russlands im Krieg gegen Georgien ist weltweit auf Ablehnung gestoßen. Selbst die Befürworter der humanitären Intervention sehen die Gefahr, dass sie zu einer „Art Blanko-Vollmacht für einen menschenrechtlichen Imperialismus" (Herdegen) werden könne.[27] Diese Gefahr ist mehr als real.

[25] Befürwortend etwa Matthias Herdegen, Völkerrecht, 8. Auflage München 2009, S. 245 ff.

[26] Vgl. Neuhold, Human Rights and the Use of Force, in Breitenmoser/Ehrenzeller/Sassòli/Stoffel/Wagner Pfeifer (Hrsg.), *Menschenrechte, Demokratie und Rechtsstaat, Liber amicorum Luzius Wildhaber*, S. 484.

[27] Herdegen (aaO), S. 247.

Nichtsdestotrotz hat das Europäische Parlament in einer Entschließung aus dem Jahr 1994 die humanitäre Intervention unter engen Voraussetzungen für zulässig erklärt.[28] So müsse es sich zum einen um eine „außerordentliche und äußerst ernsthafte humanitäre Notsituation in einem Staat handeln, dessen Machthaber auf andere Weise als mit militärischen Mitteln nicht zur Vernunft zu bringen sind". Zudem müssten alle anderen Lösungsversuche ausgeschöpft und erfolglos geblieben sein und insbesondere der UN-Apparat nicht in der Lage sein, rechtzeitig zu reagieren. Schließlich dürfe die Interventionsmacht kein besonderes Eigeninteresse haben; die Gewaltanwendung müsse angemessen und zeitlich begrenzt sein. Damit aber wendet sich das Europäische Parlament von dem in der Charta der Vereinten Nationen enthaltenen Verständnis des Kriegsführungsrechts ab und propagiert erneut den „gerechten Krieg". Das Nicht-Eingreifen der UNO, die Hilfe bei schwersten Menschenrechtsverletzungen, das fehlende Eigeninteresse sind letztlich nichts anderes als moderne Surrogate dessen, was Augustinus und Thomas von Aquin als „auctoritas principi", „causa iusta" und „recta intentio" bezeichnet hatten.

Die „responsibility to protect"

Die Kosovo-Krise Ende der 90er Jahre hatte gezeigt, dass die Idee der humanitären Intervention weltweit nur bedingt Zustimmung findet. Angeregt durch Kofi Annan wurde so ein neues Begründungsmuster für ein Eingreifen in Konflikte um der Gerechtigkeit willen – konkret zum Schutz vor schwersten Menschenrechtsverletzungen – entwickelt.

Die grundlegenden Elemente des neuen Ansatzes wurden von der „International Commission on Intervention and State Sovereignty" (ICISS) im September 2001 in einem Bericht unter dem Titel „The Responsibility to Protect" vorgestellt.[29] Nächster Schritt der Ausarbeitung war der Bericht „A more secure world: Our shared responsibility",[30] der von dem „High-level Panel on Threats, Challenges and Change" ausgearbeitet wurde. Auf dem Weltgipfel 2005 in New York wurde das Konzept diskutiert und in die Reso-

[28] ABl. 1994, Nr. C 128, S. 225.

[29] http://www.iciss.ca/pdf/Commission-Report.pdf (letzer Zugriff 10.07.2009).

[30] UN-Dok. A/59/565, http://www.un.org/secureworld/report.pdf (letzer Zugriff 10.07. 2009).

lution der UN-Generalversammlung über das Ergebnis des Weltgipfels aufgenommen.[31] Die Annahme der Resolution erfolgte zwar einstimmig, allerdings wurden darin nur allgemeine Grundsätze festgehalten und die eigentlich strittigen Punkte ausgeklammert.[32]

Damit lassen sich nach dem gegenwärtigen Stand der Entwicklung des Völkerrechts zwei unterschiedliche Ausprägungen der „responsibility to protect" abschichten: der inoffizielle, aber umfassende Ansatz, mit dem die humanitäre Intervention weiter entwickelt und eine militärische Nothilfekompetenz postuliert wird einerseits und der offizielle, aber beschränkte Ansatz, der eine Verantwortung der Weltgemeinschaft für die Verhütung schlimmster Menschenrechtsverbrechen festlegt, die dafür nach der UN-Charta notwendigen Voraussetzungen aber nicht aufweicht. So heißt es in der relevanten Resolution:

> „The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity".

Neu an diesem Konzept ist die Vorstellung, dass Souveränität nicht mehr nur als Recht eines Staates, nach innen und nach außen unabhängig zu handeln, sondern auch als Verantwortung den eigenen Bürgern gegenüber verstanden wird.[33] Jeder Staat wird als verpflichtet gesehen, die Sicherheit und die grundlegenden Menschenrechte seiner Bürger zu schützen. Vermag er dies nicht, so „verspielt" er seine Souveränität und die internationale Gemeinschaft hat subsidiär einzugreifen. Nach diesem Verständnis wird das in der UN-Charta normierte völkerrechtliche Interventionsverbot bei Eingriffen zum Schutz von Menschenrechten nicht verletzt, vielmehr

[31] UN-Dok. A/RES/60/1.
[32] Vgl. Abschnitt 138 und 139 der Resolution.
[33] ICISS-Bericht, Abschnitt 2.13.

wird die Reichweite dieses Verbots neu – und enger – definiert. Kommt ein Staat seiner sich aus dem Souveränitätsprinzip ergebenden Verantwortung nicht nach, kann er das Recht auf Nichteinmischung als Ausfluss der Souveränität nicht mehr geltend machen. Damit wird zur Begründung der „responsibility to protect" an einem der grundlegendsten Konzepte des Völkerrechts angesetzt.

Dennoch sind die Unterschiede zur Diskussion um die humanitäre Intervention nicht so groß, wie es scheinen möchte. Ein Novum ist, dass nicht mehr nur ein Recht, sondern eine Pflicht zum Eingreifen gefordert wird.[34] Konsequenz wäre, dass die internationale Gemeinschaft oder auch einzelne Staaten – sieht man auch sie eigenständig in der Pflicht – im Zweifelsfall nachweisen müssten, dass ihr Nicht-Eingreifen gerechtfertigt wäre.[35] Dies würde eine Beweislastumkehrung bedeuten, auch wenn noch schwer vorstellbar ist, in welcher Weise diese Verantwortung geltend gemacht werden könnte.

Neu ist auch, dass die „responsibility to protect" mit dem Dreischritt „responsibility to prevent", „responsibility to react" und „responsibility to rebuild" in einen größeren Kontext der Konfliktverhinderung gestellt wird – dies ist grundsätzlich zu begrüßen, wäre aber auch nach dem geltenden UN-Recht über die Feststellung einer „Bedrohung des Friedens" zu verwirklichen, wenn rechtzeitig prophylaktisch und auch in Nach-Konflikt-Situationen die erforderlichen Maßnahmen getroffen werden.

Im Übrigen entsprechen die Voraussetzungen der „responsibility to protect", so wie sie in dem ICISS-Bericht definiert werden, im Wesentlichen der humanitären Intervention.[36] So ist der Anwendungsbereich in Form einer militärischen Intervention eröffnet, wenn ein gerechter Grund („just cause") für eine Intervention gegeben ist, insbesondere bei massenhaftem Verlust von Menschenleben und massenhaften ethnischen Säuberungen – dabei gilt es sich an der Genfer Völkermordkonvention von 1948 zu orientieren. Außerdem muss mit redlicher Absicht interveniert werden und das humanitäre Motiv des Menschenrechtsschutzes im Vordergrund stehen („right intention"). Eine militärische Intervention darf auch erst durchge-

[34] Vgl. Rede von Kofi Annan anlässlich des G77-Treffens in Havanna im September 2006-SG/SM/10636 vom 15.09.2006: www.un.org/News/Press/docs/2006/sgsm10636.doc.htm (letzter Zugriff 10.07.2009); Probst, *Die Humanitäre Interventionspflicht*, Münster 2006.

[35] Christopher Verlage, *Responsibility to Protect*, Tübingen 2009, S. 189.

[36] Verlage (aaO), S. 195.

führt werden, wenn alle präventiven Mittel und nicht-militärischen Zwangsmittel erfolglos geblieben sind. Zudem muss die Intensität der Intervention in einem angemessenen Verhältnis zur Schwere der zu bekämpfenden Menschenrechtsverletzungen stehen („proportional means"). Auch darf die Intervention nicht von Beginn an als offenkundig aussichtslos erscheinen („reasonable prospects"). Zuletzt wird in dem Kriterienkatalog des ICISS-Berichts gefordert, dass die Intervention von der richtigen Instanz autorisiert wird („right authority"). Dabei wird auf den Sicherheitsrat verwiesen; ist er blockiert, käme eine Uniting-for-Peace Resolution der UN-Generalversammlung in Betracht, um politischen Druck auf den Sicherheitsrat auszuüben. Die entscheidende – offene – Frage aber ist, ob auch ohne seine Autorisierung eingegriffen werden dürfte. Hier sieht der ICISS-Bericht vor, dass auch Regionalorganisationen unter Kapitel VIII der UN-Charta tätig werden können, wenn die Aktion nachträglich durch den Sicherheitsrat autorisiert wird. Der High-Level-Panel und das Dokument des Weltgipfels 2005 dagegen betonen die exklusive Verantwortung des Sicherheitsrats. An diesem entscheidenden Punkt scheiden sich so weiterhin die Geister.

Das neue Konzept der „responsibility to protect" hat so zwar neue Aspekte in die Diskussion eingebracht – insbesondere den Gedanken der Verantwortung der Staatengemeinschaft und die Vorstellung einer zum Schutz verpflichtenden Souveränität; das Grunddilemma zwischen dem moralischen Anspruch, mit allen, auch militärischen Mitteln, zu helfen und zu schützen, wo dies möglich ist, und der Erkenntnis, dass in der Völkerrechtsgeschichte „gerechte" Kriege noch nie gerecht waren und ebenso viel Leid verursacht haben wie alle anderen Kriege, wird einer Lösung aber nicht näher gebracht. Der unter dem UN-System reglementierte und auf Selbstverteidigung und kollektives, durch den Sicherheitsrat autorisiertes Handeln beschränkte Krieg scheint im Vergleich zu dem Modell des „bellum iustum" vorzugswürdig zu sein. Krieg ist nicht gerecht. Und er wird auch dann nicht gerecht, wenn man ihn nicht mehr beim Namen nennt, sondern euphemistisch von einer „responsibility to protect" spricht.

Nach Immanuel Kant ist der „ewige Friede" keine „leere Idee". Vielmehr bestehe eine „gegründete Hoffnung" auf eine „ins Unendliche fortschreitende Annäherung". Aus der Perspektive des 21. Jahrhunderts erscheint diese im Jahr 1795 ausgesprochene Vision als zu optimistisch. Dem Krieg lassen sich keine Fesseln anlegen, er lässt sich nicht bändigen

und auch der Versuch, ihn einem Abstimmungsprozess zu unterwerfen, ist in der Praxis nur bedingt erfolgreich. Es wird weiterhin die zentrale Aufgabe des Völkerrechts bleiben, ein nicht nur in der Theorie überzeugendes, sondern auch ein die Wirklichkeit veränderndes Konzept zu schaffen, so dass, wie es im Buch Jesaja heißt, die Schwerter zu Pflugscharen und die Spieße zu Sicheln werden. Neue Denkansätze zur Begründung des Einsatzes von Gewalt vermögen dazu nicht beizutragen.

COMMENTAIRE SUR LA RESPONSABILITÉ DE PROTÉGER

LOUIS SABOURIN

Si "la responsabilité de protéger" est devenue *un sujet d'actualité* depuis un peu plus d'une décennie et en même temps *une question très litigieuse*, c'est parce qu'elle touche à la fois aux intérêts fondamentaux des États et des individus et qu'elle représente un volet distinct et saillant de la promotion et de la défense des droits humains. Fondamentalement, le droit d'intervention humanitaire est lié à la *problématique* suivante: Des États ont-ils jamais le droit de prendre des mesures coercitives – et particulièrement militaires – contre un autre État pour protéger des populations menacées par ce dernier, et si oui, dans quelles circonstances? Cette problématique touche donc trois éléments principaux à savoir: 1) *la souveraineté des États*; 2) la *prévention*; et 3) *l'intervention*.

Chacune de ces questions pourrait faire l'objet d'exposés approfondis mais qu'il me suffise de souligner que nous avons eu dans cette salle, l'an dernier, un débat fort intéressant sur la notion de la souveraineté. Les évènements survenus depuis, en particulier au cours des derniers mois, en Corée du Nord, en Iran, en Irak, à Gaza, dans les eaux au large de la Somalie, au Darfour, au Tibet et en Birmanie démontrent abondamment que ce n'est pas demain la veille que l'on règlera de façon définitive les contentieux concernant la réduction et la limitation ainsi que l'assertion et la défense de la souveraineté soit *absolue* soit *relative* dans les relations internationales. Une chose est certaine: si la souveraineté absolue est une espèce en voie de disparition, elle est quand même tenace. La primauté va maintenant aux débats concernant la notion de la *double souveraineté*, celle des *États* et celle des *individus*, telle qu'énoncée par Kofi Annan dans son célèbre article "The Two Concepts of Sovereignty" dans *The Economist,* du 18 septembre 1999. Ces discussions sont très vibrantes et

se poursuivront pendant très longtemps encore. Le Secrétaire général des Nations Unies de l'époque a bien défini le dilemme en soulignant:

> State sovereignty in its most basic sense, is being redefined – not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

Il ne fait aucun doute à mes yeux qu'il s'agit ici de la *voix* de la raison ainsi que la *voie* à suivre à l'avenir par les États; mais nous savons que la *Raison d'État* a trop souvent d'autres objectifs et d'autres moyens que le Droit pour les promouvoir ou les atteindre.

* * *

La deuxième notion, à savoir la *prévention*, continue depuis très longtemps à soulever l'imagination et à mettre de l'avant des propositions pour prévenir et réduire la portée de crises humanitaires, comme la mise en place antérieure de projets d'assistance et de programmes de lutte contre la faim, la pauvreté, les abus contre le non-respect des droits humains, la mise en place de réformes favorisant le respect de l'État de droit, d'autres mesures, comme les bons offices, la médiation, la conciliation, jusqu'aux sanctions économiques et diplomatiques et les menaces de recours à l'embargo et à la force. La création d'une Cour pénale internationale et de tribunaux spéciaux, dans le cas du Rwanda, de la Bosnie et récemment du Cambodge représente d'autres instances liées à des crises humanitaires. La prévention est maintenant considérée, surtout dans le cadre des organismes internationaux, comme la pierre angulaire de la responsabilité de protéger. Mais, à l'évidence, ce qui se passe présentement dans le cas du Chef de l'État du Soudan démontre les limites de ce recours. Malgré un mandat d'arrêt émis par le Procureur de la Cour pénale internationale, il se permet de voyager dans plusieurs États qui ne reconnaissent pas l'autorité du Tribunal international.

* * *

Mais c'est la troisième dimension qui est beaucoup plus problématique, c'est-à-dire *l'intervention humanitaire directe*. Cette notion ne date pas des années récentes. En fait on trouve ses fondements lointains chez Hérodote, dans *Le droit des gens* et surtout dans *De jure belli ac pacis,* publié par Grotius en 1625, et dans lequel il faisait la critique de l'esclavage. Si tous les pères du droit international moderne, y compris De Vitoria, ont traité de divers aspects de l'intervention internationale, il a fallu attendre le 19ème siècle pour voir naître la théorie et la pratique de l'intervention humanitaire. Elle a commencé à apparaître dans la littérature du droit international dès 1840 après les actions en Grèce de l'Angleterre, la France et la Russie, en 1827, pour arrêter les massacres et la suppression des populations; il en fût de même, après l'intervention de la France, en 1860, pour protéger les Chrétiens maronites en Syrie. En fait, il y a eu plus de cinq interventions humanitaires par les puissances européennes dans l'Empire ottoman, entre 1827 et 1908.

* * *

Le vingtième siècle allait ouvrir la porte à un développement exponentiel de traités, de chartes et d'études autant sur la nature même des droits humains, comme on l'a vu ici, que sur le droit humanitaire. À la suite des deux guerres mondiales et des abus commis, la Société des Nations et les Nations Unies favoriseront l'énoncé de Conventions et de Déclarations à cette fin. La Charte des Nations Unies et les décisions de la Cour internationale de Justice, notamment dans *l'affaire de Corfou* et dans celle du *Cas du Nicaragua contre les États Unis*, ont précisé les attributs de ce que pourrait être l'assistance humanitaire.

Par la suite, le débat sur cette importante notion a été, comme tant d'autres choses, teinté par les tensions existantes entre l'Est et l'Ouest. Pendant près d'un demi-siècle, on s'est déchiré sur "la nécessité d'intervenir" auprès des Kurdes, des Palestiniens, des Haïtiens, des Cachemiris, des Birmans, des Cambodgiens, des Tibétains, des Tamouls et plusieurs peuples africains. On a beaucoup parlé du "droit d'intervention" lors des crises de Hongrie, de Suez et de Tchécoslovaquie, et à la suite de nombreux conflits et guerres civiles sur plusieurs continents. Alors que les Opérations pour le maintien de la Paix de l'ONU, établies en 1956, devenaient courantes du Moyen-Orient au Congo, et ailleurs sur la planète, les interventions des Grandes et Moyennes Puissances, parfois par États interposés, du type de Cuba en Angola, allaient se poursuivre aussi sur une importante échelle. Les

abus contre les droits humains devinrent aussi fort évidents à l'occasion de la multiplication de guerre civiles et de drames internationaux, comme celui des réfugiés du Viet Nam, lesquels poussèrent diverses organisations non gouvernementales à tenter d'aller plus loin que pouvaient se le permettre La Croix Rouge internationale et Le Croissant Rouge international. C'est à l'époque de la Crise du Biafra que *Médecins sans Frontières* chercha, d'une manière directe et bien médiatisée, à faire reconnaître en 1966, la notion du "droit d'intervention humanitaire" dont le Professeur Bettati et Bernard Kouchner ont défini les dimensions et les limites dans leur ouvrage *Le devoir d'ingérence*, qui fit beaucoup de bruit à l'époque. Quelques années plus tard, le Ministre des Affaires étrangères du Canada, M. Lloyd Axworthy, suggéra qu'on utilise plutôt l'expression "la responsabilité de protéger".

D'une part, l'effondrement du Mur de Berlin en 1989 et l'implosion de l'Union soviétique en 1991, tout comme son retrait antérieur de l'Afghanistan, ainsi que la première guerre au Koweït et en Irak ont entraîné un changement profond dans l'opinion publique mondiale et des réclamations plus soutenues en faveur d'interventions internationales entendues en Bosnie et au Kosovo et non entendues au Rwanda et dans plusieurs autres régions.

Vers la fin des années quatre-vingt-dix, le terrain était prêt pour une discussion plus approfondie sur "la responsabilité de protéger". À la suite d'un appel lancé par Kofi Annan, en 1999 et surtout en 2000, le gouvernement canadien et quelques grandes fondations ont annoncé à l'Assemble générale de l'ONU l'établissement de "la Commission internationale de l'intervention et de la souveraineté de l'État". Formée de douze membres de réputation internationale, la Commission a tenu des tables-rondes dans tous les régions du monde, consulté plus de deux cents experts et publié son rapport en septembre 2001, à peu près à la même époque que le 11 septembre, c'est-à-dire que sa teneur n'avait pas été influencée par ce tragique évènement. Toutefois, l'intervention des États-Unis et de plus d'une quarantaine de pays en Irak, en mars 2003, et en Afghanistan allait donner à la lutte contre le terrorisme un ascendant spécial et réduire l'impact et la médiation de la notion de "la responsabilité de protéger".

Compte tenu de l'existence de nombreuses crises, le concept de "la responsabilité de protéger" fait partie de la problématique des relations internationales contemporaines. Plusieurs États la récusent alors que d'autres réclament sa mise en œuvre régulièrement. Les juristes ont tendance à reconnaître le bien-fondé des constatations de la Commission. Cette dernière a établi deux principes fondamentaux à savoir: 1) que c'est à l'État luimême qu'incombe au premier chef "la responsabilité de protéger"; 2) que si

l'État n'est pas disposé ou apte à mettre un terme aux souffrances de son peuple, la responsabilité internationale de protéger prend le pas sur le principe de non-intervention. Cette responsabilité trouve ses fondements dans quatre éléments: 1) les obligations inhérentes à la notion de souveraineté; 2) l'article 24 de la Charte de l'ONU qui confère au Conseil de Sécurité la responsabilité de maintien de la paix et de la sécurité internationale; 3) les impératifs juridiques particuliers énoncés dans les déclarations, pactes et traités relatifs aux droits de l'homme et à la protection des populations, le droit international humanitaire et la législation nationale; 4) la pratique croissante des États et des organisations régionales ainsi que du Conseil de Sécurité lui-même.

"La responsabilité de protéger" comprend trois obligations particulières, notamment: 1) la responsabilité de *prévenir* dont j'ai fait déjà fait mention et qui incite à éliminer à la fois les causes profondes et les causes directes des conflits internes et des autres crises produites par l'homme qui mettent en danger les populations; 2) la responsabilité de *réagir* devant des situations où la protection des êtres humains est une impérieuse nécessité, en utilisant des mesures appropriées pouvant prendre la forme de mesures coercitives telles que des sanctions et des poursuites internationales et, dans les cas extrêmes, en ayant recours à l'intervention militaire; 3) La responsabilité de *reconstruire:* fournir, surtout après une intervention militaire, une assistance à tous les niveaux afin de faciliter la reprise des activités, la reconstruction et la réconciliation, en agissant sur les causes des exactions auxquelles l'intervention devait mettre un terme ou avait pour objet d'éviter.

L'opérationnalité de la responsabilité de protéger doit tenir compte enfin de cinq conditions: 1) la gravité des périls: il faut raisonnablement craindre des atteintes ou des préjudices irréversibles et irrémédiables; 2) la finalité strictement humanitaire de l'intervention: il faut qu'elle vise à empêcher les dommages, les souffrances et les pertes humaines; 3) son caractère de dernier recours après l'épuisement des moyens pacifiques préalables; 4) sa soumission au principe de proportionnalité: les moyens militaires déployés devront être adaptés à la finalité salvatrice et comporter des règles d'engagement appropriées; 5) son déclenchement et la conduite des opérations reposeront sur le principe de bonne gouvernance de manière à éviter l'enlisement et l'échec (mobilisation de moyens matériels et humains suffisants et véloces en réserve).

Voilà donc pour les principes. Ceux qui suivent à la fois l'évolution du droit international et de la pratique des relations internationales savent que la théorie de "la responsabilité de protéger" a connu bien des avatars, au cours de la

dernière décennie, et surtout beaucoup d'interprétations différentes selon les lieux, les crises, les acteurs et les circonstances. Mais le 16 septembre 2005, le Sommet des chefs d'États et le gouvernement affirmait à l'ONU:

> Nous sommes prêts à mener en temps voulu une action collective résolue, par l'entremise du Conseil de sécurité, conformément à la Charte, notamment son Chapitre vii, au cas par cas et en coopération, le cas échéant, avec les organisations régionales compétentes, lorsque ces moyens pacifiques se révèlent inadéquats et que les autorités nationales n'assurent manifestement pas la protection de leurs populations contre le génocide, les crimes de guerre, le nettoyage ethnique et les crimes contre l'humanité.

Finalement, on a décidé de créer à New York un centre mondial pour la responsabilité de protéger. Ce centre, parrainé par le Canada, les Pays-Bas et le Rwanda, a été lancé le 14 février 2008. Des centres régionaux sont prévus en Afrique, en Europe et en Australie.

Conclusion

Pour ma part, je ne saurais suivre la ligne de certains qui nient la montée spectaculaire du droit humanitaire depuis la fin de la Seconde guerre mondiale, ni celle de ceux qui entrevoient le monde à travers des prismes déformants en ne percevant pas la gravité des problèmes, des conflits, des terribles assauts contre les droits humains en maints lieux de la planète. La loi du plus fort et la loi du silence prévalent malheureusement en trop d'endroits face aux pires atrocités.

Je terminerai en mentionnant deux faits incontournables. Il y avait deux milliards et demi d'habitants sur la terre il y a 50 ans, il y en aura sept milliards, l'an prochain. Il y avait alors une soixantaine d'États-membres à l'ONU, alors qu'aujourd'hui il y en a 192. Notre monde est devenu fort complexe. "La responsabilité de protéger" a un immense avenir devant elle. Mais quel avenir?

Dans son remarquable texte devant les Nations Unies, le 18 avril 2008, Benoît XVI disait à ce sujet, et je conclue en le citant:

> La reconnaissance de l'unité de la famille humaine et l'attention portée à la dignité innée de toute femme et de tout homme reçoivent aujourd'hui un nouvel élan dans le principe de la responsabilité de protéger. Il n'a été défini que récemment mais il était déjà implicitement présent dès les origines des Nations unies et, actuellement, il caractérise toujours davantage son activité. Tout État a le devoir pri-

> mordial de protéger sa population contre les violations graves et répétées des droits de l'homme, de même que conséquences de crises humanitaires liées à des causes naturelle ou provoquées par l'action de l'homme. S'il arrive que les États ne soient pas en mesure d'assurer une telle protection, il revient à la communauté internationale d'intervenir avec les moyens juridiques prévus par la Charte des Nations unies et par d'autres instruments internationaux. L'action de la communauté internationale et de ses institutions, dans la mesure où elle est respectueuse des principes qi fondent l'ordre international, ne devrait jamais être interprétée comme une coercition injustifiée ou comme une limitation de la souveraineté. A l'inverse, c'est l'indifférence ou la non-intervention qui causent de réels dommages. Il faut réaliser une étude approfondie des modalités pour prévenir et gérer les conflits, en utilisant tous les moyens dont dispose l'action diplomatique et en accordant attention et soutien même au plus léger signe de dialogue et de volonté de réconciliation.

Le principe de la "responsabilité de protéger" était considéré par l'antique *ius gentium* comme le fondement de toute action entreprise par l'autorité envers ceux qui sont gouvernés par elle: à l'époque où le concept d'État national souverain commençait à se développer, le religieux dominicain Francisco De Vitoria, considéré à juste titre comme un précurseur de l'idée des Nations unies, décrivait cette responsabilité comme un aspect de la raison naturelle partagé par toutes les nations, et le fruit d'un droit international dont la tâche était de réguler les relations entre les peuples.

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THE QUEST FOR PROTECTION: THE ROLE OF INTERNATIONAL ORGANIZATIONS AND NGOs IN SURVEYING HUMAN RIGHTS COMPLIANCE

CHRISTIAN STROHAL

Every State has the primary duty to protect its own population
from grave and sustained violations of human rights,
as well as from the consequences of humanitarian crises,
whether natural or man-made.
If States are unable to guarantee such protection,
the international community must intervene...

H.H. Pope Benedict XVI,
Address to the General Assembly of the UN,
18 April 2008

The *raison d'être*, and the final proof, of any human rights *regime* lies in the effectiveness of the protection of the individual human being – and of every human being. It is for checking this effectiveness that compliance is being monitored – at the local, national, and – with increasing vigour – at the international level.

The international system for the protection and promotion of human rights and fundamental freedoms has therefore been developed as a response to insufficient protection, or the lack of protection, at the national level.

Surveying – or monitoring[1] – is not an end in itself: It is the reports about the effectiveness of protection that intend to identify shortcomings, and help rectify them. In spite of a dense web of national, regional, and global human rights 'instruments' and 'mechanisms', numerous individuals

[1] Monitoring is the term habitually used in the international human rights system for all procedures relating to the control of the implementation for human rights standards at the national level.

continue to be victims of severe human rights violations at the hand of governments. For specific cases when rectification continues to fail, the international community has been discussing a *droit d'ingerence*, the need to enforce protection. This in turn, has led to the concepts of a duty to protect, or a responsibility to protect.

Long before this discussion, the quest for protection[2] has been a central and ongoing concern in the development of the international human rights system:

The quest for protection – like the responsibility to protect – concentrates on the implementation gap between international standards and national, or local, situations on the ground; it has been conducted, at the international level, in the framework of international organizations, both global and regional. International human rights diplomacy, and politics, have been characterized by an offensive, and therefore at the same time also defensive, character, changing from an East-West conflict during the time of the Cold War to a configuration oriented more along North-South lines today (or, as some would argue, towards a clash of civilizations or even religions).

I will take a practical approach, based on my experience in international human rights diplomacy, and identify briefly some of the key challenges in this regard, arguing for a more co-operative approach to the international human rights debate. In the final analysis, what constitutes our key challenge is to garner the necessary political will to be held accountable, and to hold accountable – and the related need for international leadership. Overall, however, the international human rights system has developed very positively and tended to exceed, over the long run, what could have been realistically expected at the moment; so there is reason for cautious optimism.

[2] I am indebted to a long-standing member of the UN secretariat and former acting UN High Commissioner for Human Rights, Dr Bertrand Ramcharan, who has coined this term in his recent book *The Quest for Protection: A human rights journey at the United Nations.*

1. Framework for the evolution of the international human rights system: From conference rooms to the field

Political context

The political context of the evolution of the international human rights system is characterized by the principles of State sovereignty, State responsibility and, more specifically, State accountability. The system is based on international treaties, based on the 1948 Universal Declaration of Human Rights and the two 1966 Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, on the one hand, and, on the other, on political decisions taken in the framework of international organizations, all of this both at the universal and regional levels.[3]

In parallel, and with increasing intensity, the need was felt to develop monitoring procedures and mechanisms, to be able to follow up on these decisions in a more systematic manner.

Later on, capacity was built also to provide guidance, and assistance, for following up on the results of monitoring – for bringing, in other words, the debate from the global (or regional) level to the effective implementation of international standards at the national (and local) level. Increasingly, international actors strengthened their capacity to support national institutions and civil society.

So what had started in the conference rooms of international organizations was increasingly reaching its final purpose: improve performance regarding the protection of human rights at the national level.[4]

[3] It is not intended to provide an even rudimentary scientific *apparatus*. Literature is abundant, and all international texts referred to in this contribution can be found on the websites of the relevant international organizations. In addition, the *Introduction* of Profs. Minnerath, Fumagalli Carulli, and Possenti to the XV Plenary Session of the Pontifical Academy of Social Sciences is providing an excellent overview of the basic developments and current challenges.

[4] An overview of the current debate can be found in Benedek *et al.* (eds.), *Global Standards – Local Action: 15 Years Vienna World Conference on Human Rights* (Vienna 2009), summarizing an international expert conference held in Vienna in August 2008.

Framework of monitoring

What is being monitored?

Monitoring aims, first of all, to examine the compliance of national practice with (national and) international human rights standards, i.e. with international law, treaty and customary law. In doing so, it obviously examines *violations* of human rights: In addition to violations suffered by individual human beings, monitoring also, and often explicitly, looks at the broader picture, i.e. systematic, and systemic, violations and structural shortcomings. Especially in this context, monitoring also has to take into account best practice, i.e. existing experience on how to respond to identified shortcomings.

The purpose of monitoring, therefore, has been continuously expanding, moving from identifying violations, especially when they become systematic and severe, to also providing a basis for reparations for victims; to assist in the prevention of violations; to contribute to the identification of best practice, and of key areas for change and for (international) assistance.

Who does the monitoring?

It is of course individuals who monitor, but in most cases they act in the name of institutions, be it national institutions, or international organisations and institutions. This includes non-governmental organizations (NGOs). We will revert to this in more detail.

How is the monitoring done?

Monitoring centres around finding facts. A range of methodologies has been developed in this regard (see below). There are two main processes in doing this:

– *Peer review* – especially in the form of States monitoring other States, by using instruments which have been developed together, such as treaty bodies, or Special Procedures in the UN system, or bilateral commissions or 'human rights dialogues'.

– *'bottom up'* – monitoring undertaken by local actors at the local level, as it has become most visible in the work of NGOs but has also increasingly become a key element in the field activities of international organizations.

Obviously, it is the combination of both approaches which is providing the most promising framework for successful monitoring and follow-up activities.

A key feature which needs to be addressed by monitors is the method of communicating their findings: do they want to undertake their work in confidentiality, reporting directly to the authorities concerned, or do they intend to work transparently and openly, and apply public pressure *('naming and shaming'*).

There is, therefore, a very specific role of the media, who, in turn, often become the subject of human rights violations.

A number of (pre)conditions have emerged for making monitoring effective: In addition to a general framework, i.e. a general understanding in society about human rights and the monitoring of their implementation, there is a clear need for a *methodology* for monitoring, as well as for reporting and for identifying and pursuing the necessary follow-up. Monitoring has to aim for *credibility*, which, in turn, presupposes the independence of the monitors. This, together with a feeling for 'ownership', provides the arguments for the legitimacy of the exercise, both vis-à-vis the political leaders as well as the general public.

Overall, monitoring provides a reality check for political actors and for society. Its purpose is to trigger the necessary *response*: repair violations, ensure effective protection of all rights for all, and prevent future violations. It also contributes to broader objectives, including not only the establishment and maintenance of a system for the effective protection of human rights, but also for ensuring the rule of law and, altogether, for strengthening human security.[5]

2. The international Quest for Protection: The long way towards the Responsibility to Protect ('R2P')

This development from standardization through international (legal) instruments to monitoring their implementation and responding to violations has been the result of a broad-based international quest to ensure pro-

[5] Human security is one of the terms used for a broader and more comprehensive security concept, putting the individual – rather than the state – at the centre. Cf. *www.humansecuritynetwork.org*.

tection. This quest was pursued both at the regional and the universal level, starting against the experience of the horrors of the Holocaust and the two World Wars. Some of the most salient features of this development shall be briefly summarized.[6]

In the framework of the *Council of Europe*, created in 1949, the 1952 European Convention for Human Rights established the possibility to bring individual complaints directly to a supranational body, the European Commission and (subsequently also) the European Court for Human Rights in Strasbourg. Additional treaties established other, more specialised bodies to examine state compliance, such as the Committee for the Prevention of Torture. Finally, a Commissioner for Human Rights was created to deal with systematic, or structural, human rights questions and problems.

Within the *Organization for Security and Cooperation in Europe*, a political approach was chosen, after *détente* had led in 1975 to the adoption of the Helsinki Final Act. After the collapse of the communist block, the Conference for Security and Cooperation, as it was then called, turned into a more institutionalized organization basing its work for the monitoring and promotion of human rights on regular implementation control at meetings of the representatives of its (now) 56 member States, together with international and non-governmental organizations; at the same time, it promoted increasingly practical approaches, conducted by a number of field missions in (post-) conflict situations, and by specific Institutions: the Office for Democratic Institutions and Human Rights, the High Commissioner on National Minorities (both created in 1990-1992), and the Representative for the Freedom of the Media (1998). In addition, the Chairman-in-Office, i.e. the Foreign Minister of the country elected to chair the organization for a year, is endowed with wide-ranging responsibilities, including on the protection of human rights.

At the global level, it was the *United Nations (UN)* which provided the framework for the development of monitoring mechanisms: After the two Covenants had established Committees *(treaty bodies)* to examine state reports about compliance, and after other, subsequent treaties, had expand-

[6] I will not be able to include a description of the regime administered by one of the oldest international organizations, the International Labour Organization ILO, through the thorough examination of the implementation of its more than 100 treaties on specific aspects of social affairs.

ed and developed this system further,[7] states were also seeking a framework to deal with petitions which were increasingly sent by individuals to the UN secretariat: In 1975, a specific and confidential procedure was created for this purpose, in the framework of the Commission on Human Rights (the *1503-procedure)*.

This Commission, which was conceived as the main intergovernmental and specialized UN body to deal with all human rights issues, subsequently also created a number of other procedures to respond to specific occurrences of human rights violations, which became known as the *Special Procedures*. The major stages in this development can be summarized as follows:

– 1975: creation of the first *ad hoc* Working Group on allegations of gross human rights violations in Chile following the coup d'état there. Other working groups followed, on Apartheid in South Africa and on the Territories occupied by Israel in the 1967 war.

– 1980: A Working Group on Disappearances was created in the aftermath of further developments in Latin American countries, in particular in Argentina, El Salvador and Guatemala.

– 1982/85: The first 'thematic' Special Rapporteurs were created, on arbitrary executions, and on torture.

– Country-specific rapporteurs were added when it was felt that governments did not respond adequately to the expression of international concern regarding severe violations of human rights.

This system is now well established; at the same time, however, it has come increasingly under threat from governments who argue that it is being applied selectively, or that it is being 'politicized' – arguments used primarily by governments whose domestic human rights situations give rise to concern.

From 1989, with the end of the cold war, a new optimism on overcoming ideological confrontations over human rights led to the convening of a *World Conference* on Human Rights. This Conference, which took place in 1993 in Vienna, was widely seen as providing a paradigmatic change. But did it?

Yes, it led to the establishment of a new function within the UN, the *High Commissioner for Human Rights* which has become, since its creation,

[7] There are now eight treaty bodies, conducting a broader range of activities beyond the periodic examination of reports from State parties, including direct communications, urgent requests for reports, as well as country visits and the competence, in some cases, to receive individual complaints.

a major global player, currently employing around 1000 people across 50 states, so very directly illustrating the trend I have called 'from the conference rooms to the field'. On the other hand, however, much energy was employed to defend the universality of human rights which had come under attack, in the 2-year preparatory process for the Conference, in particular from Asian countries who invoked regional, national, religious, historic or other *particularities* as excuses which would have to be taken into account when addressing human rights situations.[8] These arguments have not fully disappeared.

Overall, it took until 2006 to fully respond to the key aspirations which had led to the Vienna Conference, especially with the creation of a new UN Human Rights Council and the Universal Periodic Review of national human rights situations in all countries (see also below, ch. 7).

3 – The Practice of Monitoring: Finding facts and early warning

This body of international 'mechanisms' dealing with human rights questions has been growing ever since: Today, there are eight treaty bodies and 38 Special Procedures in the UN system, not to speak of the specific roles of the UN Secretary-General, especially his good-offices function, and those of the High Commissioner for Human Rights, nor of that of special ad hoc missions, field missions, and, of course, UN peace-keeping missions. In the broader context, most other activities of the UN system have human rights connotations too, be it in relation to development, health concerns, or the situation of women and children, or humanitarian assistance. They all have to monitor concrete situations, as well as the impact of their activities on them.

These mechanisms have developed, in turn, a broad range of working methods to fulfill their respective mandates. As far as the Special Procedures of the UN are concerned, these are summarized in a Manual of Operations of the Special Procedures of the Human Rights Council, a 32-page

[8] This issue was among the most contentious throughout the whole preparatory process, especially pursued by some Asian governments, and took until the very end of the Conference to be resolved through the following formulation: *'While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms'.*

document detailing issues such as communications and urgent appeals, country visits, relations with non-state actors, reporting and public statements, and following up to their work, in particular their recommendations. A few figures shall suffice to illustrate the scope of these activities:

> In 2008, these procedures had close to 1000 communications with governments of more than 100 countries, conducted over 50 fact-finding missions to over 40 countries, issued 135 reports to the Human Rights Council and 19 to the General Assembly of the UN, and made 177 public statements, especially regarding situations of grave human rights violations of cases of continued non-response from governments concerned.

In regional organizations, similar developments have been taking place. As one example, OSCE election observation can be highlighted, as it is providing a comprehensive, independent, long-term, and professional monitoring of specific events, elections, in which a number of human rights are being tested to a high degree. This monitoring combines all stages of sophisticated fact-finding and public reporting, as well as relating this to assistance activities.

Some key aspects of the work of Special Procedures have been summarized in a recent report by the High Commissioner for Human Rights to the Human Rights Council (relating, more specifically, to genocide, but containing also more general points on the work of Special Procedures):[9]

> Special Procedures mandate holders have a number of characteristics (...) In particular, in view of Special Procedures' independence, field activities and access to Governments and civil society, they are a useful instrument to collate and impartially analyse in-depth information on serious, massive and systematic violations of human rights. Mandate holders can also provide an independent and holistic assessment of the situation and present recommendations on the steps to be taken by the concerned Governments and the international community at large to defuse tensions at an early stage.
>
> Special Procedures mandate holders are also able, through the communications regularly sent to Governments, to draw attention to emerging problems, including patterns of human rights violations such as extra-judicial executions, torture, mass arbitrary arrests and detention or disappearances and sexual violence, as well as serious

[9] A/HRC/10/25 pp. 17 sq.

> violations of economic, social and cultural rights, which could forewarn of a potentially genocidal situation. Through reporting to the Human Rights Council and General Assembly, they also endeavour to contribute to a better understanding of and early warning on complex situations, for example involving systemic anathematization, exclusion and discrimination that might lead to crimes against humanity, genocide and other mass atrocities. (...)
> While massive violations of civil and political rights have more often been associated with early warning signs of possible escalation to mass atrocities, crimes against humanity and even genocide, it is important to acknowledge that patterns of gross violations of economic, social and cultural rights can also provide early warning about situations that can potentially lead to genocide. (...)
> Special Procedures mandate holders have noted that, subsequent to the shortcomings in earlier attempts to prevent genocide, the appointment of the Special Advisor on the prevention of genocide in 2004, the convening of the 2005 World Summit and the emergence of the 'Responsibility to Protect' doctrine, rightly put emphasis on strategies to take prompt action on early warning signs.

4. The specific role of NGOs: Monitoring and advocacy

Also with regard to the work of NGOs, monitoring activities have evolved and become increasingly professional and comprehensive. NGOs are, of course, as varied in their work as are international organizations, ranging from big international advocacy groups such as Amnesty International or Human Rights Watch to a myriad of local and 'grass-roots' organizations with a very broad range of objectives. Their work, in addition to monitoring activities, spans the whole spectrum of awareness-raising, advocacy and 'lobbying', as well as service activities, including support to victims of violations, and helping to implement national or international goals for the protection of human rights.

While the roots of non-governmental organizations go back to anti-slavery organizations of the 18th century, they have received a major boost through the development of the international multilateral frameworks described above. They have been promoted through international documents, such as the Helsinki Final Act, which develops a 'right of the individual to know and act upon rights and duties'; this has led, subsequently,

to the foundation of a number of 'Helsinki-groups' in communist countries reminding governments of their promises made in the Helsinki process, and monitoring and reporting to CSCE, and OSCE, conferences.

The role of NGOs received specific recognition in 1977 when Amnesty International was awarded the Nobel Prize for Peace. A further recognition came, in the UN context, through the adoption of the Human Rights Defenders Declaration, the so-called *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* in 1998.

As varied as they are, NGOs have become, in many instances, an indispensable link and interface between global and local concerns. They are also partners in the framework of the activities of international organizations, including preparing governmental decision-making – many international initiatives, including in the field of international law, have at their root the expertise, and the lobbying, of NGOs.

5. Other actors: National commissions and international courts

The protection of human rights has increasingly been pursued on parallel tracks by judicial as well as non-judicial means. In the non-judicial field, an increasingly important role is being played by National Human Rights Commissions and Institutions – an instrument which has also 'taken off' after the Vienna Conference, and which is now established in over 100 countries, increasingly following the criteria laid down in the 'Paris Principles': This document adopted in 1993 set out the basic criteria for determining what constitutes a national institution for the promotion and protection of human rights and whether such institutions are effective, independent and pluralistic. These national human rights commissions or institutions exist in different forms and can have different competencies but they can only be effective if they are independent of government control and pluralistic in their membership, representing all parts of society. There is no doubt that these institutions, if independent and effective, are crucial actors in promoting and protecting human rights, ensuring good governance and respect for the rule of law as well as in addressing accountability issues and contributing to the fight against impunity.

Complementing national judicial process, recent years have seen the creation of international courts addressing criminal responsibility in specific contexts, such as the tribunals on former Yugoslavia or Rwanda, and

globally, the International Criminal Court. In the present context, the development and work of these courts cannot be elaborated – suffice it to say that overall, they certainly constitute a major contribution to the necessary sense of responsibility and accountability vis-à-vis the international community. They have also triggered a growing discussion of the desirability of a world human rights court, which could be modeled along the lines of the International Criminal Court.

6. The responsibility to protect: Concept and operationalization

So overall, a broad and specific, if not always very systematic, international system has emerged, but human rights violations continue, and so does, in too many instances still, the impunity of perpetrators, and of governments.

It is in this perspective that one can see the presentation of the concept of a responsibility to protect by the then UN Secretary General, Kofi Annan. In addressing the General Assembly in 2005, presenting his report *In Larger Freedom*, he said the following:

> In the third part of the report, entitled 'Freedom to Live in Dignity', I urge all states to agree to strengthen the rule of law, human rights and democracy in concrete ways.
>
> In particular, I ask them to embrace the principle of the 'Responsibility to Protect', as a basis for collective action against genocide, ethnic cleansing and crimes against humanity – recognizing that this responsibility lies first and foremost with each individual state, *but also that, if national authorities are unable or unwilling to protect their citizens, the responsibility then shifts to the international community; and that, in the last resort, the United Nations Security Council may take enforcement action according to the Charter.*[10]

This proposal was adopted at the Millennium Summit of Heads of State and Government in 2005.

That a Secretary-General of the UN was able to say, write and propose such action is indicator for a lengthy discussion, building on the concept of a *droit d'ingérence* and the work of an international expert commission.[11]

[10] (Emphasis added).

[11] This is being discussed in other papers for this session in more detail.

One of the co-chairs of that commission, the former Australian foreign Minister Gareth Evans recently has been mentioning, in a number of speeches, three main challenges to the advancement of this norm: conceptual, institutional, and political.

> 1. *Conceptual misunderstandings* – it must be made clear that: a. the term is not another name for humanitarian and military intervention; b. R2P does not necessarily mean the use of coercive military force, even in extreme cases; c. no country however big or powerful is immune from collective pressure;
> d. R2P does not cover all human security issues such as HIV/AIDS, climate change or cluster bombs, but is restricted to genocide, ethnic cleansing, crimes against humanity and war crimes;
> e. the invasion of Iraq must be set as a classic example of how not to apply the R2P norm.
> 2. *Institutional preparedness* – Assuming there is an understanding of the need to act, there is a necessity to ensure that there will be physical capacity to do so within international institutions, governments, and regional organizations – whether preventively or reactively, and whether through political, diplomatic and economic or legal, policing and military measures.
> 3. *Political preparedness* – There is a need to generate political will and to have in place the mechanisms and strategies to ensure effective political responses as R2P situations arise.

Mr. Evans also remarked on the crucial role of NGOs in addressing these challenges, specifically in clarifying the concept in order to avoid misunderstandings and to move forward on related discussions regarding the development of criteria for military intervention.[12]

Another member of the Commission, Ramesh Thakur, writing in March 2009, comments on the activities of the new Secretary-General, Ban Ki-Moon:

> Former U.N. Secretary General Kofi Annan described R2P as one of his most precious achievements. Ban has not been shy of adopting R2P as his own cause, confident enough of his own worth not to worry that he will merely be advancing his predecessor's legacy. (...) Interestingly, Ban was the only candidate to refer to R2P during the yearlong campaign to seek Annan's office. After Ban took office, his task was complicated as many countries saw him as Washington's

[12] Cf. International Crisis Group, *The Responsibility to Protect (R2P): A Primer.*

> choice. The problem was compounded by choosing American Ed Luck as his special adviser, one with little professional background on the subject. (...)
> Drawing on Luck's wide-ranging consultations and reflections, on Jan. 12 (2009) Ban published his report on 'Implementing the responsibility to protect'. It rightly takes as a key point of departure not our original 2001 report, but the relevant clauses from the 2005 outcome document. It clarifies and elaborates that 'force as the last resort' does not mean we have to go through a sequential or graduated set of responses before responding robustly to an urgent crisis. (...)
> The new report is effective and clever in repackaging R2P in the language of three pillars:
> – The state's own responsibility to protect all peoples on its territory;
> – international assistance to help build a state's capacity to deliver on its responsibility; and
> – the international responsibility to protect.
> If the metaphor helps to garner more widespread support, all praise to Ban and his team. (...)
> More seriously, the report goes over the top in elaborating on the metaphor by insisting that the 'edifice' of R2P will tilt, totter and collapse unless all three pillars are of equal height and strength. This is simply not true. The most important element–the weightiest pillar – has to be the state's own responsibility. And the most critical is the international community's response to fresh outbreaks of mass atrocity crimes. (...)
> On these key issues, we are no further ahead today: We seem to be recreating the 2005 consensus instead of *operationalizing* and implementing the agreed collective responsibility. The use of force by the United Nations against a state's consent will always be controversial and contested. That is no reason to hand over control of the pace, direction and substance of the agenda of our shared, solemn responsibility to the R2P skeptics.[13]

In this context of further operationalizing the concept, it is also noteworthy how a leading NGO representative – L. Leicht, head of EU advocacy at Human Rights Watch – outlined suggestions on the respective role for the

[13] Ramesh Thakur, *Ban a champion of U.N.'s role to protect,* in: *The Daily Yuimiori,* 10 March 2009.

EU. Focusing on early warning, early preparedness, conflict management and post-conflict rebuilding, she provides a number of recommendations:

– Identifying early-warning indicators which can then be used publically by EU Special Envoys in statements and reports for increased transparency and better communication with Brussels on preventive warnings;

– Strengthening the capacity and building expertise and knowledge within the EU on sanctions, incentives, and punitive measures;

– Better and more systematic enforcement of human rights clauses in cooperation agreement between EU and various countries and/or regional organizations;

– Increased information-sharing with the International Criminal Court since the EU has a Memorandum with the ICC.[14]

7. Achievements and Challenges: International system and national political will

It is because of this debate that finally, human rights have been designated one of three pillars of the UN – together with peace and security, as well as development – proposed by Kofi Annan and adopted by the Millennium Summit. This has led to the creation of a Human Rights Council in 2006 which – together with the Security Council, existing UN bodies, and the new Peacebuilding Commission – is to assume specific responsibility for promoting universal respect for the protection of all human rights and fundamental freedoms, to address situations of violations of human rights, and for the effective mainstreaming of human rights within the UN system. In addition, with the new peer review mechanism, the *Universal Periodic Review*, all UN member states are now being monitored, and examined, within a four-year-cycle in a procedure which includes written material not only from the state under review, but also from treaty bodies, Special Procedures, international organizations, and NGOs, as well as a public dialogue with a delegation from the country concerned which is also webcast globally. This mechanism has the potential of creating a new, and comprehensive, framework for government accountability.

[14] Dialogue on the Responsibility to Protect: European perspectives – Conference Report: Discussion Draft, cited on *www.responsibilitytoprotect.org*

Key achievement

As stated at the beginning, the international community was not only quite successful in the establishment of a comprehensive international system for the protection and promotion of human rights; furthermore, results in most cases proved, at least in the longer run, to exceed what realistically could have been expected at the time.

Today, the system makes it increasingly difficult for perpetrators of massive human rights violations to remain undetected, or to hide, or to escape, in the longer run, international accountability.

The 'tools', in other words, are there – what counts is the use made of them.

But there are dangers, too: dangers of a system overload – there are already serious coordination challenges among the different actors; of insufficient follow-on and follow-through on their work and recommendations through practical activities on the ground; and potentially even of a backlash from governments who feel over-exposed, or simply overstretched, or just overburdened.

Key challenge

In political terms, we hear, again, arguments of non-interference in internal affairs (China, Cuba, Egypt, Algeria, South Africa), coupled with continuing complaints about 'double-standards' (a number of countries with lower national incomes when confronted with serious human rights violations try to argue back with violations also occurring somewhere else without always being exposed), or tit-for-tat counter-allegations. It seems that human rights diplomacy continues to be seen widely as being of an intrinsically confrontational nature, so that governments would prefer to conclude that it is better to employ aggressive rather than defensive approaches.

The key challenge, in my view, lies in *ensuring the necessary political will* – and correlating international leadership – to confront not each other but human rights violations as such, and to identify not only the problems, but also the solutions.

Political will is therefore needed in two key regards:

To be held accountable, at the national and international level: too many governments not only still use the defensive arguments cited above, but also take national and international criticism as a threat to – their – security, and, as a consequence, resort to harass-

ing the critics, following the principle 'shoot the messenger'. But even a number of 'mature democracies' who routinely criticize the situation in other countries find it sometimes quite difficult to discuss their own problems in a multilateral international setting.

To hold accountable, i.e. to hold each other accountable:

the concern for concrete human rights situations has become a legitimate subject influencing official relations – but all too often, it continues to suffer from being only one element among – often conflicting – foreign policy objectives. However, the protection of human rights has rightly, and repeatedly, been identified as a key factor for national and international security and stability – *cf.*, e.g., *In larger Freedom,*[15] or the overall concept pursued in the framework of the OSCE. To hold each other accountable means nothing more – and nothing less – than to respect and implement one's promises made in international instruments to each other – this principle has been elaborated and illustrated, e.g., in the 2006 OSCE/ODIHR report *Common Responsibility,* which details achievements and failures of implementing human rights commitments and calls upon the 56 OSCE states to 'redevelop a common responsibility not only towards each other, but, even more importantly, towards their citizens as primary beneficiaries' of their collective values.[16]

In order to achieve this fundamental objective, it is necessary to use all the instruments at the disposal of governments, creatively and systematically, those in international organizations such as the UN as well as those available in bilateral relations, and, most importantly, to connect these two strands for action.

There is a need for leadership to assure a positive response to these two challenges, challenges which are in fact the two sides of one. Thematically, leaders must be prepared to maintain a clear human rights focus; structurally, they must be ready to engage systematically and forcefully. 'Naming and shaming' could then remain the exception when all other means of engagement fail; willingly learning from each other should become the norm.

The current international economic and social crisis can be seen as providing a positive impulse in this regard: Responses which have been devel-

[15] *Op. cit*.

[16] *Common Responsibility – Commitments and Implementation,* report submitted to the OSCE Ministerial Council in response to MC Decision No. 17/05 on Strengthening the Effectiveness of the OSCE, at www.osce.org/odihr/item_11_22321.html, p.v.

oped so far indicate already a readiness to adapt the international system – *cf.* the stronger role given to the G-20 as well as first steps in adapting the international financial architecture (IMF, also World Bank). They also highlight the need, and readiness, to strengthen the thematic interconnectedness – a good example in this regard is the growing work of the UN Security Council regarding humanitarian and human rights catastrophes. And they illustrate the need to strengthen 'new coalitions' – new groupings not only of so-called 'like-minded countries', but also of wider groups comprising non-governmental organizations. So far, however, they have not assumed a specific rights-based approach.

Overall, we have come a long way indeed – but we must keep going forward: Not only is there no reason for complacency, to the contrary, those who want to weaken the protection of human rights are 'learning', too. Coalitions have to be maintained, partnerships strengthened. This is clearly a role for governments and for NGOs, and, most certainly, also for the Holy See.

Not only human rights are universal, but so is the human person.[17] We must heed the Pope's call.

[17] Address to the UN General Assembly 2008.

IL RUOLO DELLA POLITICA NEL GARANTIRE IL RISPETTO DEI DIRITTI UMANI TRA DISTENSIONE E SCONTRO. L'ESPERIENZA DI UNO STATISTA EUROPEO

GIULIO ANDREOTTI

Signora Presidente, Eminenze ed Eccellenze Reverendissime, illustri Accademici delle Scienze Sociali, Eccellentissimo Cancelliere.

Consentitemi anzitutto di rendervi partecipi della mia intensa commozione di essere in questa meravigliosa Casina Pio IV, sede della due Pontificie Accademie, delle Scienze e delle Scienze Sociali. Entrando in questo edificio, un ormai antico ricordo si è affacciato improvvisamente alla mia memoria. Desidero condividerlo con voi. Ero poco più di un ragazzo, quando venni qui, grazie alla cortesia di un conoscente che frequentava questi luoghi. Vidi Papa Pio XI e Guglielmo Marconi. Potete immaginare la mia emozione, che ora sto rivivendo, nel vedere insieme due personalità di quella importanza. Quello che ai miei occhi giovanissimi parve un significativo omaggio di un grande Pontefice lombardo alla scienza e alla tecnologia mi ha accompagnato sempre, confortandomi nella convinzione, consolidatasi via via nel corso della mia ormai lunga vita, che l'alleanza tra Chiesa e Scienza produce benefici effetti per il progresso dell'umanità intera.

Successivamente, essendo stato designato da Mons. Montini (futuro Paolo VI) Presidente della Federazione degli Universitari Cattolici Italiani (FUCI), ho messo a frutto l'insegnamento sociale della Chiesa, approfondito anche grazie ad un prezioso volumetto di Igino Giordani sulla dottrina sociale attinta dai documenti pontifici. Già da quel volume si poteva vedere quella che a noi giovani appariva cosa straordinaria: una continuità di pensiero ed una intuizione di sviluppi futuri già ben delineati ed ai quali la realtà politica è arrivata tardi, talvolta passando attraverso contrasti sanguinosi. Continuità che oggi possiamo ancor meglio riscontrare in un volume, che voi ben conoscete,"Il Compendio della dottrina sociale cattolica", edito dal Pontificio Consiglio della Giustizia e del-

la Pace; volume che – lo dico per inciso ma non perciò vuole essere osservazione secondaria- andrebbe fatto conoscere ai molti giovani che sono alla ricerca di punti di riferimento forti.

Riandando ora ad anni successivi, cioè all'inizio del cammino della democrazia italiana, che potei compiere a fianco di uno statista quale Alcide De Gasperi, la sfida era esaltante: costruire una società ed una democrazia parlamentare costituzionale fondata sulla dignità di ogni persona e sulla libertà in tutti i suoi aspetti dalle macerie lasciate dall'autoritarismo fascista e dalla sciagurata alleanza con il nazismo. Per fare ciò dovevamo individuare punti fermi che ci consentissero, per dirla in termini sportivi, di svolgere la nostra azione politica non in difesa ma all'attacco. Ancora oggi sono convinto che noi non dobbiamo solo cercare – appunto in difesa- i motivi per cui non sono giuste le critiche che ci sono rivolte, ma dobbiamo piuttosto cercare – in attacco – in che modo si possa influire su altre culture, su altre formazioni, per far sì che quanto noi crediamo abbia concreta attuazione. La dottrina sociale cattolica ci fornisce principi forti.

Sin dal mio ingresso nella politica attiva, ho cercato di mettere in pratica l'incoraggiamento che ci era stato dato dai nostri Assistenti spirituali alla FUCI, prima Mons. Pini, poi Mons. Montini: basare pensiero ed azione su valori solidi e su essi costruire un avvenire, che non fosse legato solo alla potenza militare o alla potenza economico-finanziaria, ma alla capacità della persona, al suo intelletto, alla sua tensione etica e religiosa; valori che ci consentissero, insomma, un forte avvicinamento con altre persone distanti dalla nostra cultura perfino sul piano religioso e talvolta addirittura ostili. Queste esigenze, permettetemi di sottolinearlo, sono tuttora presenti sullo scenario culturale e politico, in quanto dati perenni del doveroso servizio della cultura e della politica alla persona.

Si trattava allora di individuare punti fermi universalmente applicabili, così da contrastare l'ampia violazione dei diritti umani presente in varie parti del mondo. Ma si trattava anche di entrare negli specifici problemi del nostro Paese. Ci fu utile un'esperienza ed un documento, che vorrei qui ricordare: una settimana di studio (18-23 luglio 1943) di 50 giovani dell'Azione Cattolica e della FUCI nel monastero di Camaldoli, nel Casentino; ne uscì il Codice di Camaldoli, documento programmatico di politica economica, radicato nella dottrina sociale cattolica. I principi, ispirati al Codice di Malines, vennero elaborati da Sergio Paronetto, Pasquale Saraceno, Ezio Vanoni. Alla stesura definitiva partecipai anch'io, insieme a Mario Ferrari Agradi, Paolo Emilio Taviani, Guido Gonella, Giuseppe Capograssi, Ferruccio Pergolesi, Vittore Branca, Giorgio La Pira, Aldo Moro, Giuseppe Medi-

ci. Dai 99 punti di Camaldoli la Democrazia cristiana avrebbe poi tratto il sistema delle partecipazioni statali, con lo sviluppo dell'IRI e dell'ENI: un sistema che consentì all'Italia negli anni settanta di oscillare tra il quinto ed il sesto posto nella graduatoria delle potenze economiche mondiali.

Ho accettato ben volentieri l'invito di essere tra voi. Ma preciso subito che mi pongo in posizione di ascolto delle vostre riflessioni su un tema tanto stimolante come "Dottrina sociale cattolica e diritti umani".

Mi chiedete di parlarvi dell'esperienza di uno statista europeo. Spero di non deludervi se vi dico che non ho particolari insegnamenti da offrirvi, se non la lunga presenza nelle istituzioni italiane con un servizio, che ho cercato di svolgere in fedeltà ai valori fondativi del partito di ispirazione cristiana di mia militanza. Siete al contrario voi, con gli approfondimenti delle vostre scienze – dal diritto, alla politica, all'economia, alla politologia, alla sociologia –, a potermi dare utili suggerimenti per l'attività istituzionale che continuo a svolgere, ormai libero da incarichi governativi, da Senatore a vita come membro della Commissione Esteri del Senato della Repubblica italiano.

Cercherò comunque di presentarvi alcune mie considerazioni su come i diritti umani siano causa ed effetto dello svilupparsi della cultura politica europea.

1. I diritti umani nel rapporto euratlantico

Ho sempre pensato che per comprendere il ruolo dei diritti umani, anche nella politica di oggi, occorre riandare molto indietro e ripercorrere momenti significativi del cammino della nostra storia. Di qui vorrei partire accompagnando le mie riflessioni con qualche ricordo personale, al fine di rendere più vivace la conversazione.

È un dato oggettivo che i diritti dell'uomo sono legati alla storia politica dell'Europa e dell'America. Ma non bisogna mai dimenticare che il messaggio di fraternità universale e dignità inalienabile di ogni essere umano ci è venuto dalla Palestina. La Grecia ci ha lasciato in eredità la ragione, il senso logico. Roma ci ha indicato gli strumenti in grado di arginare gli eccessi inevitabili di ogni coesistenza: il senso civico, il diritto, l'organizzazione politica.

Con questo bagaglio la cultura politica europea ha collocato i diritti umani al centro di almeno tre rapporti, che possiamo considerare come il punto focale di tre cerchi concentrici: il rapporto euroatlantico, il rapporto comunitario, il processo di Helsinki (CSCE oggi OSCE).

Mi soffermerò su essi per passare poi, sia pure brevemente, al tema della libertà religiosa, che in questa sede mi pare doveroso affrontare, anche in considerazione del contributo di pensiero e di azione della Chiesa cattolica.

Mi rendo ben conto che il tema meriterebbe ben più ampi giri d'orizzonte, ma penso che da un politico europeo, quale io sono, voi desideriate ascoltare l'esperienza maturata in rapporti direttamente o indirettamente coinvolgenti l'Europa e da un politico cattolico vi attendiate qualcosa su un diritto che il magistero considera fondamentale in sé e nelle relazioni con la comunità politica, cioè la libertà religiosa.

Cominciando dal rapporto euroatlantico e cercando di individuarne le radici, non posso certo ignorare che gli storici ci insegnano che, a partire dal 1770, un'unica rivoluzione sconvolge l'Occidente, richiamandolo alla centralità della tutela dei diritti della persona. È la grande rivoluzione atlantica, che intreccia la rivolta di Boston con la presa della Bastiglia, producendo due esplosioni subitanee, pur assai diverse quanto a modi pacifici o violenti o quanto ad ispirazione religiosa o antireligiosa.

Se la politica mutua dall'astronomia il termine rivoluzione con il senso di svolta che vi è insito, quei remoti anni aiutano a comprendere la svolta che nell'età moderna costituisce la presenza degli Stati Uniti per gli equilibri europei. Ed aiutano anche ad interpretare meglio alcuni valori fondativi della nostra democrazia attuale.

Con il passare dei secoli la Costituzione degli Stati Uniti ed i diritti in essa codificati hanno retto all'usura del tempo, mentre i regimi politici e le Carte degli Stati europei ci hanno fatto precipitare nei drammi del Novecento, che solo il dopoguerra del secondo conflitto mondiale riesce a superare. Nei momenti peggiori l'Europa ha trovato nei modelli americani una specie di ancora di salvezza, la certezza astratta per mandare avanti le sue superstiti speranze nella libertà.

In questo senso i diritti dell'uomo sono elemento costitutivo del rapporto euroatlantico e non si possono comprendere sino in fondo le ragioni dell'adesione dell'Italia alla Nato se non partendo di qui: un'alleanza alla quale dobbiamo essere fedeli, ma mantenendo sempre una posizione di sana dialettica.

Talora ho usato al proposito un'espressione scherzosa, tratta dal gergo militare: non dobbiamo sempre essere sull'attenti; qualche volta possiamo anche essere a riposo. Con ciò intendevo solo rivendicare la pari dignità, essenziale nella fisiologia del rapporto tra alleati.

De Gasperi ci ha insegnato una grande dignità nel trattare con l'estero, pur essendo consapevole che l'Italia aveva all'inizio del nostro percorso democratico un bisogno senza alternative dell'aiuto altrui. In un mondo

che, una volta sconfitto Hitler, si lasciava alle spalle la coalizione anglo-russo-americana per bipartirsi in una guerra fredda tra democrazia e stalinismo, il posto dell'Italia era logicamente sul primo fronte, anche se ne doveva conseguire una lacerazione interna, che solo il tempo e la fermezza avrebbero rimarginato.

Ripercorrere attraverso le discussioni del Consiglio dei Ministri (di cui fui segretario dal 1947 al 1954) le tappe del nostro reinserimento internazionale – come ho fatto anche nel un volume *Gli USA visti da vicino* – è per me sempre utile sotto due aspetti. Il primo riguarda la documentazione, che mi capita di tanto in tanto di riguardare: essa conferma come soltanto la pazienza e il coraggio di alcune menti illuminate crearono le premesse per la ricostruzione in senso globale dell'Italia. Il capolavoro di De Gasperi, di Sforza e di Saragat e di altri pochi fu proprio l'intuizione del punto esatto della convergenza di interessi tra l'Italia e le grandi democrazie. Ma si doveva altresì avviare un processo di decantazione per dare, oltretutto, credibilità al nostro ruolo di alleati. Con quasi metà degli italiani fideisticamente schierati dall'altra parte (il socialista Nenni onorato con il Premio Stalin ne fu espressione), che sicurezza militare avremmo noi avuto e offerto nel caso, tragico, di un terzo conflitto mondiale?

De Gasperi non arrivò a vedere il riavvicinamento delle due Europe, ma la sua chiarezza nel considerare l'Alleanza atlantica ben più di un patto militare ha illuminato tutto il cammino successivo e ci è tuttora di guida.

Quanto al disgelo, avendo potuto seguire dal 1983, letteralmente *ad horas* il corso del grande negoziato USA-URSS, non ho mai avuto dubbi sull'esito finale: non perché ritenessi Gorbaciov e Reagan cherubini al confronto di angeli totalmente cattivi che li hanno preceduti, ma per le condizioni obiettive, che avevano consentito loro di invertire le rotte storiche divergenti. Talvolta non era facile credere al disgelo, a fronte di forze più o meno occulte che frenavano i corsi favorevoli proprio nei momenti di suscitate speranze. L'essenziale era non rassegnarsi e avere la coscienza che non fossero solo i due superpotenti a poter prendere utili iniziative. Un esempio: per rimuovere certa incomunicabilità, invitammo a Villa Madama a Roma fisici di tutti i paesi di chiara fama perché dessero consigli positivi su validi modelli di controllo. Non voglio dire che sia stato questo un fattore determinante, ma sta di fatto che lo schema individuato corrispondeva alle linee dell'accordo che si sarebbe firmato l'8 dicembre 1987.

Mi piace in questa sede sottolineare che ho sempre ritenuto importante – non solo sul piano più propriamente culturale ma anche su quello più strettamente istituzionale – promuovere contatti tra scienziati a sostegno

della politica in generale e di quella particolare relativa al costruttivo disgelo internazionale. La firma, ad esempio, nel 1987 di un protocollo per la collaborazione sovietica alle attività del World Laboratory, l'iniziativa Est-Ovest-Nord-Sud promossa dal professor Zichichi, consentì di avviare un dialogo tra uomini di scienza ed una apertura di sedi dello stesso Laboratory in Unione Sovietica di diretta utilità politica. In quel modo riuscimmo a precorrere il recupero dei colloqui tra i due blocchi, che si erano contrapposti pericolosamente sino a giungere talvolta al rischio della rottura.

2. I diritti umani nel rapporto europeo

Nello stesso tempo in cui i diritti umani sono il punto focale del rapporto euroatlantico, sono anche elemento costitutivo del rapporto europeo: dapprima del rapporto comunitario e poi di quel processo costituente europeo che ha avuto più di una difficoltà ed è tuttora in corso.

Essi sono cioè insieme causa ed effetto di quel percorso storico di discontinuità, che ha visto l'Europa della seconda metà del Novecento impegnata a superare un passato non sempre glorioso, in quanto segnato da realtà o culture opposte alla pacificazione dell'intero continente. Pensiamo ad esempio ai micidiali conflitti dei momenti di passaggio dal pluralismo medievale al monismo assolutistico con la rivendicazione da parte dello Stato di sovranità su tutto, compresa la sfera spirituale. O pensiamo alle esasperazioni nazionaliste provocate da guerre confessionali. O, ancora, pensiamo agli orrori del primo Novecento con la doppia tragedia, dei gulag comunisti e dei campi di sterminio nazisti.

Una storia tanto pesante, nel momento in cui l'Europa occidentale costruiva una politica democratica dalle ceneri del secondo conflitto mondiale, non poteva che acuire la nostra sensibilità sui diritti umani. Il nuovo ordine giuridico non poteva non essere imperniato altro che nel principio che il rispetto dei diritti umani trascende la sovranità nazionale e non è subordinabile a fini politici o interessi nazionali, a costo di abbandonare il dogma vetero-liberale che solo l'ordinamento dello Stato debba disciplinare la vita dei rispettivi cittadini.

La sfida per noi politici cattolici era esaltante. Se non potevamo certo auspicare un'antistorica rinascita della *Respublica christiana,* operavamo comunque per la costituzione di una società fondata sul rispetto dei valori della persona, della libertà, del pluralismo: valori centrali nel pensiero cristiano e che – desidero sottolinearlo – ora come allora noi continuiamo a

rivendicare in senso non confessionale. Consentitemi di leggervi una significativa dichiarazione pronunciata a Parigi da Alcide De Gasperi nella Conferenza parlamentare europea (21 aprile 1954):

> Se affermo che all'origine di questa civiltà europea si trova il cristianesimo (...), non intendo con ciò introdurre alcun criterio confessionale, esclusivo nell'apprezzamento della storia. Soltanto voglio parlare del retaggio europeo comune, di quella morale unitaria che esalta la figura e la responsabilità della persona umana, col suo fermento di fraternità evangelica, (...) con la sua volontà di verità e di giustizia acuita da una esperienza millenaria.

Avevamo visto restringersi sul nostro continente gli spazi di libertà sino agli orrori dell'Olocausto e volevamo garantire almeno nell'Europa occidentale il rispetto concreto della dignità della persona umana e delle sue scelte di vita in un quadro di società democratica e pacificata. Avevamo condiviso l'amarezza di Einstein: a lui, che lasciava alle sue spalle un'Europa tanto distante dalla "città di Pericle", era stato chiesto, all'ingresso del Paese d'approdo, di riempire un formulario; alla voce "razza" il grande scienziato aveva annotato sinteticamente e significativamente "umana".

Se la Dichiarazione Universale delle Nazioni Unite aveva raccolto nel 1948 la domanda, proveniente dall'inferno dei regimi nazista e comunista, di una nuova legge sulla terra per l'umanità in grado di restituire libertà ai popoli, ancorando i diritti umani alla dignità della persona, è l'Europa con la Convenzione Europea dei Diritti dell'Uomo e delle Libertà fondamentali (CEDU), sottoscritta a Roma il 4 novembre 1950 dai paesi membri, a fornire il primo concreto contributo, considerando il rispetto dei diritti e delle libertà della persona irrinunciabile momento di civiltà giuridica e di nuovo costume politico.

E la Comunità europea, da rinsaldare almeno tra i Paesi occidentali, ci sembrava traguardo possibile e utile per giungere poi all'Unione europea con la riunione Est-Ovest.

Non ci bastavano garanzie meramente verbali, affermazioni più retoriche che reali. Perciò la Convenzione Europea dei Diritti dell'Uomo non si sarebbe limitata soltanto ad enunciare dei diritti, ma li avrebbe concretamente tutelati con un apposito organo giurisdizionale, la Corte europea dei diritti dell'uomo.

Lo ripeto, essendo obiettivo per noi irrinunciabile: l'unità europea, alla quale ho sempre creduto, non poteva a nostro avviso progredire sulla pavida e cinica indifferenza nei confronti della violazione dei diritti umani, né legittimarsi in termini semplicemente contabili o sulla pura filosofia dell'u-

tile, anche se di questo si è spesso discusso a Bruxelles. Sin dall'inizio intendevamo la Comunità europea come basata o da basare su due fattori trainanti: uno tecnico-economico e l'altro ideologico-culturale.

In questo scenario vanno collocate sia le istituzioni europee, sin dalla prima forma di processo di integrazione europea riguardante gli Stati che si raccolgono intorno al Consiglio d'Europa con il comune obiettivo di superare le devastazioni della guerra, sia le Carte dei diritti a cominciare dalla CEDU, sia la Corte Europea dei diritti dell'uomo di Strasburgo, alla quale fare accedere cittadini o persone giuridiche, dopo avere esperito i rimedi giurisdizionali nei rispettivi ordinamenti nazionali.

Avendo frequentato in rappresentanza del Governo italiano il Palais de l' Europe di Strasburgo, sede del Consiglio d'Europa e del Parlamento europeo, ho più volte sostato davanti alle foto dei Padri fondatori della "nuova" Europa uscita dalle rovine del secondo conflitto mondiale: da Schuman a De Gasperi, da Churchill a Spaak, da Adenauer a Van Zeeland e tanti altri. Ed ho riflettuto sulla tensione morale di quegli statisti. Animati da profonde aspirazioni democratiche e da una convinta visione europeistica essi appunto vollero, nel 1949, quel Consiglio d'Europa, al quale lo Statuto tuttora affida l'impegno di garantire il rafforzamento e il progresso degli ideali di democrazia pluralistica.

E mi sono spesso domandato se fosse ancora viva la tensione ideale, condivisa peraltro dall'opinione pubblica degli Stati fondatori del Consiglio d'Europa, dalla quale era nata la Convenzione europea dei diritti dell'uomo. Da rappresentante del Governo italiano in più occasioni pubbliche ho avuto l'onore di celebrarla. Ne ricordo una in particolare con commozione, in occasione del quarantennale celebrato solennemente a Palazzo Barberini a Roma il 5 novembre 1990. Era il giorno antecedente un'altra cerimonia, che si sarebbe tenuta nella stessa sede: l'adesione al Consiglio d'Europa dell'Ungheria, primo tra i Paesi che con mestizia allora chiamavamo l'"altra Europa". Il nostro auspicio, che a nome del Governo italiano in quella occasione formulai, fu che all'ingresso ungherese potesse seguire quello di tutti gli altri Paesi dell'Europa centrale ed orientale, così che la "casa comune europea" potesse concretamente cominciare ad essere edificata.

Tutti ben conosciamo le speranze ma anche le difficoltà del processo di integrazione europea, che prende avvio con i Trattati di Roma del 25 marzo 1957, istitutivi della Comunità economia europea (CEE) e della Comunità europea per l'energia atomica (Euratom). Sarebbe ora interessante ripercorrerne le tappe che dal Trattato di Maastricht (7 febbraio 1992) al Trattato di Amsterdam (2 ottobre 1997) alla Carta dei diritti fondamentali

dell'Unione Europea, varata dal vertice di Nizza 7-9 dicembre 2000, ci conduce sino ai nostri giorni con il Trattato di Lisbona. Ma il discorso sarebbe troppo lungo.

Mi limito a sottolineare che dall'originario Trattato di Roma ad oggi il pluralismo della cultura, in ricordo di quello che eravamo e nella coscienza di quello che siamo, ha certamente ricondotto noi europei ad una maggiore omogeneità. La cultura, la scienza, l'informazione, l'elaborazione del sapere hanno assunto un rilievo via via maggiore, non solo all'interno degli Stati ma anche nelle loro relazioni esterne, nel miglioramento della qualità della vita come nella capacità di influire sugli eventi del mondo.

Noi europei possiamo dire di avere recuperato un retaggio storico di coabitazione e di confronto nello stesso spazio che ha finalmente condotto, anche se per percorsi non sempre rettilinei, alla affermazione di principi di valore universale, quali la libertà politica e di pensiero, la laicità dello Stato, l'autonomia della scienza, la valorizzazione dell'iniziativa individuale, la giustizia sociale.

Gli stessi Stati dell'Est, anche quando erano separati dall'Ovest, si rendevano conto che la circolazione delle idee è condizione di ricchezza materiale e che il tempo in cui vivevamo era tempo di accresciuta ed in un certo senso gelosa coscienza della propria dignità.

L'uomo moderno vuole capire e per questo vuole interrogare, vuole potere obiettare: di qui la spinta verso una maggiore interdipendenza tra Est ed Ovest, che ha indotto le due Europe ad aprirsi nel campo delle idee parallelamente a quello che avveniva nei negoziati politico-militari. La stessa perestroijka di Gorbaciov assume pieno significato se si parte da qui, così come la determinazione del cancelliere Khol di riunire le due Germanie, pur prevedendo qualche flessione nel consenso politico.

Oggi le sfide vengono da culture altre, da grandi emigrazioni in Europa di popoli ai quali la giustizia sociale internazionale non è ancora riuscita a garantire una degna condizione di vita. E si ripropongono in termini nuovi gli antichi problemi dell'assenza di libertà di movimento, ieri nell'Europa divisa dalla cortina di ferro, oggi tra Sud e Nord del mondo. Come allora anche ora è sempre più difficile accettare confini invalicabili, che tolgano alle persone la capacità di migliorare la loro sorte spostandosi. Analoghe considerazioni andrebbero svolte, ove ve ne fosse tempo, quanto al conflitto arabo-israeliano.

3) I diritti umani e l'OSCE

Il terzo dei cerchi concentrici, dei quali il sistema dei diritti dell'uomo è il comune punto focale europeo, riguarda la nostra dimensione internazionale rivolta all'Est negli anni in cui il muro di Berlino ci separava e noi speravamo che l'Europa potesse estendersi politicamente "dall'Atlantico agli Urali", secondo la bella espressione che sarebbe stata cara a Giovanni Paolo II.

Snodo essenziale per questo traguardo diviene negli anni settanta dello scorso secolo la Conferenza per la sicurezza e cooperazione in Europa (CSCE). L'Europa è ancora divisa in due blocchi, ma il lungo percorso della distensione comincia a delinearsi, anche se ad alcuni appare allora più utopistico che realistico.

La Conferenza – aperta il 3 luglio 1973 a Helsinki, proseguita a Ginevra dal 18 settembre al 21 luglio 1975 e conclusa ad Helsinki il 1 agosto 1975 – è costituita dagli Alti Rappresentanti di tutti gli Stati Europei di qui e di là da Vienna (eccezion fatta per l'Albania, che avrebbe però in seguito aderito), nonché da Stati Uniti e Canada. Una occasione dunque formidabile per mettere i primi germi del lungo processo di riunificazione delle due Europe.

Tra i membri più attivi, specie nell'impegno a garantire la libertà religiosa come diritto umano, sin dall'inizio è la Santa Sede, per ferma volontà di papa Paolo VI ed intelligente attività del Card. Agostino Casaroli, iniziatori di una nuova presenza vaticana della Santa Sede negli organismi multilaterali.

Nella CSCE i Trentacinque – mi piace qui menzionarli tutti: Austria, Belgio, Bulgaria, Canada, Cecoslovacchia, Cipro, Danimarca, Finlandia, Francia, Repubblica Federale di Germania, Grecia, Irlanda, Islanda, Italia, Jugoslavia, Liechtenstein, Lussemburgo, Malta, Monaco, Norvegia, Paesi Bassi, Polonia, Portogallo, Regno Unito, Repubblica Democratica Tedesca, Romania, San Marino, Santa Sede, Spagna, USA, Svezia, Svizzera, Turchia, Ungheria, URSS – adottano il 1 agosto 1975 l'Atto Finale di Helsinki, definendo con queste parole uno dei loro impegni fondamentali: "Gli Stati partecipanti rispettano i diritti dell'uomo e le libertà fondamentali, inclusa la libertà di pensiero, coscienza, religione o credo, per tutti senza distinzione di razza, sesso, lingua o religione".

Per l'Italia, vorrei ricordarlo, era presente Aldo Moro, vittima tre anni dopo di barbara violenza in nome di un ideologia negatrice di ogni tolleranza.

Nella parte più significativa dell'Atto Finale, che codifica i dieci principi che debbono regolare le relazioni tra gli Stati, è conferito carattere vincolante al rispetto dei diritti inalienabili della persona umana fino a farne un elemento della reciproca sicurezza. Altre tappe sono poi segnate da suc-

cessive riunioni (Madrid 1980-1983; Vienna 1986-1989) della CSCE, che con la fine della guerra fredda, nel 1994 da Conferenza diviene Organizzazione ed è denominata OSCE.

Forse oggi si tende a sottovalutare l'importanza di questa organizzazione multilaterale. Ritengo invece che essa sia stata e continui ad essere un foro internazionale al quale guardare con interesse e fiducia.

Grazie all'Atto Finale di Helsinki – ricordiamolo sempre- negli anni settanta dello scorso secolo nello spazio circoscritto dell'Europa e dell'America settentrionale i diritti dell'uomo conoscono un ulteriore passo avanti, quasi una terza età.

Dopo la proclamazione delle grandi libertà, risultato delle rivoluzioni di fine '700; dopo la affermazione dei diritti sociali verso lo Stato ed il potere politico (educazione, lavoro, sicurezza sociale), si passa alla loro sanzione internazionale.

I paesi partecipanti sanno che ognuno di essi può essere chiamato a rendere ragione di come tratta i propri cittadini, sino a rendere concreto un sentimento collettivo di solidarietà al rispetto di regole fondamentali. Ed è interessante che ciò avvenga nella vecchia Europa, negli USA e nel Canada e che si possa, almeno su queste basi, ricostituire un minimo di unità normativa tra Paesi così intimamente legati dal corso della loro storia. Nel riconoscere la rilevanza del rispetto dei diritti umani nei loro reciproci rapporti, i Trentacinque affermano nei fatti che la loro effettiva tutela costituisce un fattore essenziale della pace, della giustizia e del benessere necessari ad assicurare lo sviluppo di amichevoli relazioni.

In tale prospettiva è legittimo ed appropriato il coinvolgimento delle intere società civili, a fianco dei Governi e degli Stati partecipanti; e ciò perché, se soggetti di tale processo rimangono gli Stati, diretti beneficiari ne sono soprattutto i singoli individui, le cui libertà fondamentali ed i cui diritti (siano essi civili, politici, economici, sociali e culturali; siano essi esercitati a titolo individuale o in un quadro collettivo) sono solennemente assunti come valori universali da rispettare integralmente. Tanto più questo coinvolgimento è valido se si tiene conto della tendenziale imparzialità delle organizzazioni non governative o dell'autorità morale di istituzioni come le Chiese.

L'Atto finale di Helsinki si presenta dunque subito come innovatore. Lo ripeto: esso è il solo che include i diritti della persona nella politica di distensione Est-Ovest; contiene una serie di impegni (diventati il fulcro del cosiddetto "processo di Helsinki") relativi ai diritti umani; e stabilisce i principi fondamentali (il "Decalogo") regolanti la condotta degli Stati riguardo ai cittadini, nonché tra di loro. Pur non rivestendo una specifica natura giuridica

e pur non essendo munito di sanzioni in caso di trasgressione degli impegni assunti, esso è il documento internazionale che più "entra" nell'opinione pubblica generale europea, che in quella fase di distensione ne sente l'esigenza. Inoltre rappresenta la prima "convergenza" tra Est ed Ovest, quasi sanzionando una prima significativa caduta di barriere di separazione. Infine impone per così dire ai Governi di ritrovarsi con cadenza abbastanza precisa per evidenziare la dimensione dinamica propria dell'Atto ed approfondirne le interpretazioni, oltre che avanzare nuove proposte.

Se si considerano le quattro condizioni, richieste ad ogni Stato per l'adesione – l'impegno a rispettare la libertà religiosa, l'introduzione di un sistema democratico, la convertibilità della moneta, l'introduzione di un modello di libero mercato – e se si riflette sulla situazione vigente oltrecortina, la via non poteva essere che lunga e difficile. Di qui certa delusione sui risultati o mezzi, serpeggiante quando qualche paese dell'Est faticava, o non voleva, o non poteva per ragioni interne adeguarsi ai principi pur sottoscritti; di qui l'impazienza di arrivare finalmente alla caduta del muro di Berlino.

I seguiti della CSCE hanno registrato tutta la fatica della conclusione in ciascuna dimensione: la dimensione umana, quella della sicurezza militare e quella della cooperazione in ambito economico, scientifico culturale; dimensioni tutte di pari importanza e tutte reciprocamente complementari. Ma il tempo ha dato ragione a chi, per attenuare la divisione dell'Europa, confidava in una combinazione di realismo nella gradualità degli esiti via via da conseguire ed insieme di idealismo nelle attese di fondo da continuare a nutrire.

Per combattere a favore dei diritti umani gli strumenti sono molti: dalla diplomazia discreta alle prese di posizione pubbliche, dal ritiro dell'assistenza economica alle sanzioni. La via più produttiva non è sempre quella del confronto aperto; ed in politica si sa che la distanza minore tra due punti non è sempre una linea retta. Ma si può dire, con una valutazione obiettiva che il passare degli anni consente di fare, che in un'ottica di lungo periodo la "dimensione umana" del processo avviato a Helsinki ed oggi portato avanti dall'OSCE ha prodotto buoni risultati e può continuare a produrne anche sui nuovi temi che sono all'ordine del giorno.

Mi sia consentito in questa tanto autorevole Accademia pontificia sottolineare l'esemplarità della Ostpolitick della Santa Sede, non da tutti all'inizio compresa, ma che si è rivelata ancora una volta maestra di diplomazia. Dalle posizioni, che ho già ricordato, lungimiranti e concrete di Paolo VI e del Card. Agostino Casaroli, all'azione diplomatica svolta successivamente sotto l'impulso di Giovanni Paolo II ed oggi di Benedetto XVI, la pre-

senza della delegazione della Santa Sede alla CSCE prima ed oggi all'OSCE è considerata di tale autorevolezza da meritarle un universale apprezzamento, che la storia già oggi non manca di sottolineare e, sono certo, tanto più sottolineerà quando il distacco temporale renderà ancor più limpida la visione d'insieme.

4) La libertà religiosa

Tra i diritti umani vorrei focalizzare il diritto di libertà religiosa. Ho visto il testo della relazione dell'on. Ombretta Fumagalli Carulli, con tante considerazioni che sarebbe bene fossero approfondite nella vita quotidiana della nostra realtà cattolica, non sempre provvista degli esatti dati conoscitivi.

Da parte mia vorrei svolgere qualche considerazione non tanto o soltanto sulla libertà religiosa individuale o collettiva, ma piuttosto sulla libertà istituzionale.

In un mondo nel quale l'esigenza del pluralismo senza monopoli di coscienza è sempre meno comprimibile, il ruolo delle Chiese come istituzioni a difesa dei diritti dell'uomo ha assunto, anche per le coscienze laiche, un valore imprescindibile.

Certo la religione va vissuta con atti interiori, ma gli esseri umani, intrinsecamente sociali, sono quasi irresistibilmente portati a testimoniare la credenza religiosa ed a professarla in forma comunitaria, ad esprimerla individualmente e collettivamente. Questa aspirazione deve essere anch'essa senza limiti e senza ostacoli, poiché la Chiesa, non più avvolta dai privilegi offerti dall'autorità civile, si presenta oggi (per riprendere le toccanti parole dell'Enciclica *Ecclesiam Suam* di Paolo VI) "non più armata di esteriore coercizione ma solo per la via legittima dell'umana educazione, dell'interiore persuasione, della comune conversazione ed offre il suo dono di salvezza sempre nel rispetto della libertà personale e civile".

Le religioni nell'aggregare comunità di fedeli al di là e al di fuori di ogni confine etnico, nazionale o statale, sono elemento di coesione tra i popoli e in definitiva di reciproca loro intesa. Con queste riflessioni abbiamo salutato come evento assai positivo il primo incontro ad Assisi nell'ottobre del 1986 dei rappresentanti di tutte le confessioni per lanciare insieme un messaggio di pace, che ha toccato profondamente anche le coscienze laiche; incontro al quale un secondo è successivamente seguito con altrettanto consenso universale.

Il Magistero pontificio offre su questi temi un vero e proprio tesoro al quale ispirarsi. Ad esso ho più volte attinto. Aprendo a Venezia, come Mini-

stro degli Esteri, un Convegno su "I diritti umani e libertà religiosa in Europa, nella pace e nello spirito di Helsinki" nel febbraio 1988 feci mie alcune parole di un messaggio di Giovanni Paolo II, che desidero riproporre a voi:

> a nessuno può sfuggire che la dimensione religiosa, radicata nella coscienza dell'uomo, ha una incidenza specifica sul tema della pace e che ogni tentativo di impedirne o coartarne la libera espressione si ritorce inevitabilmente, con gravi compromissioni, sulla possibilità dell'uomo di vivere serenamente con i suoi simili.

Anche sul piano della coesione interna degli Stati, non è più consentito vedere nel libero manifestarsi delle convinzioni e nel libero esprimersi della fede religiosa una minaccia. L'epoca degli scontri religiosi in Europa è finita da tempo ed è del tutto anacronistico il perdurare ed il riemergere di situazioni di intolleranza. Osserviamo tuttavia ancora remore a riconoscere pienamente la libertà religiosa (ad esempio quella di insegnamento religioso), ovvero a consentire alle autorità religiose di valersi per fini di culto di mezzi di comunicazione di massa. Sono certo che il *Supplementary Human Dimension Meeting* (che avrà luogo a Vienna il prossimo 9-10 luglio 2009) sul tema della "Libertà di religione o di credo", organizzato dall'OSCE-ODIHR, fornirà dati su cui riflettere quanto a tre specifici settori: la salvaguardia della libertà di religione o di credo, lo status delle confessioni religiose, i luoghi di culto.

Pur nella consapevolezza dei problemi che ogni evoluzione della società civile verso livelli di maggiore libertà può comportare, le preoccupazioni riscontrabili in alcuni Paesi al riguardo della libertà religiosa sono ascrivibili ad un riflesso conservatore che in nessun caso si giustifica.

Certo, oggi in Europa si pone il confronto non più tra confessioni cristiane in certo senso gelose l'una dell'altra, ma pur sempre di comune derivazione; ma con confessioni altre, dall'Islam a religioni di culture estranee al nostro patrimonio storico (buddismo ad esempio) o addirittura con nuovi movimenti religiosi. E cresce la preoccupazione che alcuni ordinamenti religiosi di matrice non occidentale minaccino sia la laicità, cioè la separazione della religione dalla politica, sia i valori universali consacrati nelle Carte internazionali, dalla sacralità della vita, all'eguaglianza tra tutti gli esseri umani, alla libertà religiosa compresa la libertà di cambiare fede, alla pari dignità tra uomo e donna, tra credenti e non credenti. Sull'onda di queste legittime preoccupazioni si tende a fare di ogni erba un fascio, negando illegittimamente diritti di libertà a coloro che questi valori non comprendono. Per fare un esempio, si pensi al diritto a costruire edifici di culto, o di vedere garantito il giorno di riposo secondo il dettame della propria confessione.

Entrambi faticano a trovare concreta attuazione in riferimento all'Islam. Le ragioni risiedono sia nella paura che l'improvvisa massiccia immigrazione di musulmani si trasformi in fondamentalismo, sia nella negazione di ogni reciprocità da parte dei Paesi musulmani riguardo alla libertà dei cristiani.

Nonostante questi nuovi problemi, complessi ma non impossibili da superare, sono fermamente convinto dell'importanza del ruolo delle Chiese per lo stabilirsi e crescere di una comunità pacifica e giusta, come hanno dimostrato sul campo le Chiese cristiane europee, dando un fattivo contributo all'evoluzione dei Paesi dell'Est verso la democrazia ed alla diffusione della cultura dei diritti fondamentali.

Ho sempre ritenuto scelta avveduta quella della nostra Costituzione repubblicana di ritenere il problema dei rapporti tra Stato italiano e confessioni di tale importanza da inserirlo tra i suoi principi fondamentali, assicurando l'eguale libertà di tutte le confessioni (anche quelle diverse dalla cattolica) grazie ad un meccanismo (l'Intesa) che tende a coinvolgere le stesse confessioni, valutando con esse le istanze di libertà.

È curioso invece che nel processo di integrazione europea il ruolo istituzionale delle Chiese ed il loro apporto sociale abbia tardato ad essere formalmente riconosciuto. Ancora nel 2000 la Carta dei Diritti fondamentali nell'Unione Europea si limita a tutelare i profili individuali e collettivi della libertà religiosa. Solo il recente Trattato di riforma dell'Unione Europea (Trattato di Lisbona 13 dicembre 2007, come già il precedente c.d. Trattato costituzionale europeo) si riferisce alla dimensione istituzionale della libertà religiosa, garantendo non solo il diritto delle confessioni di organizzarsi liberamente, in conformità allo statuto che le regola, ma soprattutto impegnando l'Unione Europea a mantenere con esse un "dialogo aperto, trasparente e regolare". È un passo avanti, che in parte rimedia all'assenza del riferimento alle radici cristiane d'Europa.

Del resto anche in sede ONU si deve attendere sino al 1981 (Dichiarazione sull'eliminazione di tutte le forme di intolleranza e discriminazione basate sulla religione e sulla convinzione) per vedere la libertà istituzionale esplicitamente sancita.

A fronte di timori ed esitazioni riguardo alla tutela a tutto campo della libertà religiosa, vale la plastica immagine che sentii evocare da Giovanni Paolo II in una udienza concessa all'Unione Interparlamentare: cioè che la libertà è un prisma di cristallo dalle molte facce, una delle quali è la libertà religiosa; se questa faccia è oscurata l'intero prisma non riluce.

Anche in considerazione di questa immagine il 4 novembre del 2000, i rappresentanti di più di 100 Parlamenti di tutto il mondo si trovarono a

Roma per il Giubileo dei responsabili della cosa pubblica insieme a moltissimi amministratori pubblici, per iniziativa dell'Intergruppo Parlamentari per il Giubileo, d'intesa con la Santa Sede. Delle tre mozioni elaborate ed approvate all'unanimità in una memorabile giornata di intenso lavoro nell'Aula Paolo VI (trasformata in via del tutto eccezionale in un singolare "Parlamento del mondo") e solennemente consegnate a Giovanni Paolo II, una fu dedicata a "libertà religiosa e dignità della persona". Le altre due avevano ad oggetto rispettivamente "riduzione del debito estero dei Paesi poveri e dei Paesi in via di sviluppo", nonché "etica e globalizzazione": aspetti non meno importanti del grande tema della libertà, che meriterebbero qui maggiore approfondimento del rapido cenno, che sono costretto a fare per ragioni di tempo.

Con questo ricordo termino, rinnovando il mio ringraziamento e ribadendo che la libertà è un bene prezioso. Lo è anzitutto la libertà di pensiero, coscienza e religione. Senza essa non è possibile la realizzazione della pace, dello sviluppo, degli stessi diritti umani. Il suo pieno dispiegarsi è essenziale non solo per la dignità delle persone, ma anche per la convivenza dei popoli, come lo è ogni libera creazione ed interscambio di attività artistica e prodotto culturale, ogni libera circolazione del sapere scientifico al di fuori e al di là degli angusti limiti delle frontiere nazionali.

Diceva Niehbur che, se sono le virtù dell'uomo a rendere la democrazia possibile, sono invece i suoi difetti a renderla necessaria. Lo stesso potrebbe dirsi delle regole della comunità degli Stati. Lo dico avendo in mente la pace, senza la quale lo sviluppo è impossibile; lo sviluppo, senza il quale i diritti dell'uomo sarebbero illusori; ed infine i diritti dell'uomo, senza i quali la pace sarebbe violenza dissimulata.

THE ACADEMY'S ALERTS ON THE WEAKNESSES OF GLOBALIZATION AND THE PRESENT CRISIS

JUAN J. LLACH

Introduction to the Round Table on the Summary on Globalization and the Present Crisis

Perhaps it's not proper behaviour to say 'We told you so'. But, as it can be seen in the quotations presented in this paper, an important part of the work of our Academy on Globalization[1] was focused on the failures of the governance of globalization and in the very negative consequences it could entail,

[1] The complete list of the meetings of the Pontifical Academy of Social Sciences (PASS) on globalization is as follows. A) *The Social Dimensions of Globalization* (2000, workshop). B) *Globalization: Ethical and Institutional Concerns* (2001, plenary session). C) *Globalization and Inequalities* (2002, colloquium). D) *The Governance of Globalization* (2003, plenary session). E) *Charity and Justice in the Relations Among Peoples and Nations* (2007, plenary session). Other issues related to globalization have been dealt with in the following plenary sessions. F) On *Democracy* (1998). G) On different aspects of *Intergenerational Solidarity* (2002, 2003 and 2006). H) The seminar of the Joint Working Group of the Pontifical Academies of Sciences and Social Sciences on *Globalization and Education* (2005). Other relevant and pertinent works of the Academy are the following. I) Edmond Malinvaud and Margaret S. Archer (2003, editors), *Work and Human Fulfillment*, Michigan: Sapientia Press, a synthesis of the work of the Academy on work, employment and unemployment (1996, 1997, 1998 and 1999 plenary sessions). J) The forum on the priority of labor that took place on May, 5, 2003 (published in 2004). K) The synthesis of the work of the Academy on democracy (a workshop in 1996 and the plenary sessions of 1998 and 2000), prepared and edited by Hans F. Zacher (2005), *Democracy in Debate. The Contribution of the Pontifical Academy of Social Sciences*. The PASS website is at: http://www.vatican.va/roman_curia/pontifical_academies/acdscien/index_social_en.htm. A short summary of most of these meetings can be found in Juan J. Llach (2008, editor), *Summary on Globalization. Main Outcomes of the Work of the Pontifical Academy of Social Sciences on Globalization*, Vatican City: The Pontifical Academy of Social Sciences.

particularly in the field of national and international finances. Of course, we were not the only group of people who warned against these risks. But the fact is that all of us failed, the worst world economic crisis since 1929 exploded and the costs in terms of increased unemployment and poverty are going to be tremendous. It is very evident that something went wrong.

1. The Pontifical Academy of Social Sciences' Summary on Globalization[2]

1.1. *Governance in general*

"1.2.1.2. *Multilateralism and the weakening of world governance*[3]

Whereas unilateral, bilateral and regional actions and organizations proliferate in the international arena, multilateralism seems to be weakening dangerously. This can be seen in a broad variety of issues... like the serious problems of finding ways to fix world financial and trade imbalances and misalignments of exchange rates. In parallel, there is a deterioration of multilateral institutions, such as the UN, the WTO, the IMF or the World Bank and their regional counterparts, whose roles are either blurred or increasingly difficult to perform. *As it is developed in section 2.9 of the book, the need for sound, solid world governance is one of the main conclusions of the previous work of the Academy, and the crisis of multilateralism is a serious obstacle to it*".

"2.2.6. *Universal common good and the governance of globalization*

Because of the worldwide dimension of the problems confronted, the constitution of a public authority with universal competence and oriented towards a universal common good centered on the human person is needed (HH John XXIII, *Pacem in Terris, 1963*). Now is the time 'to work together for a new constitutional organization of the human family', an organization that would be in a position to meet the new demands of a globalized world. This does not mean creating a 'global super-state', but continuing the processes already underway to increase democratic participation and promote political transparency and accountability in international institutions (HH JPII, *PASS*, 2003)".

[2] See last quotation in footnote 1.

[3] Numerals in brackets refer to the Summary quoted in footnote 1.

"2.2.8. *Worldwide nature of the social question, globalization in solidarity, integral human development and the role of freedom*

The social question has become worldwide by its very nature and answers to it must be found in a new vision of integral development, which 'fosters each man and the whole man' (HH Paul VI, *PP*). Thanks to their freedom, human beings will strive to overstep existing boundaries, particularly state or knowledge ones, and globalization has the potential to increase any kind of exchanges based on the principle of freedom".

"2.9.1.1. *Weak governance*

We are experiencing a stage of weak governance, characterized both by an insufficient consideration of ethical issues and a prevalence of technical approaches. These have not been able to solve any of the most important challenges we are having, like war, trade or the environment, or an even more urgent and elementary task such as humanitarian aid. More than that, a mere technological approach is the one that underlines the idea of solving world problems with wars conceived as surgeries. Instead, conflicts and wars must be prevented through justice and integral development. So we need to escape from a technical approach and go into a world governance based on ethics".

"2.9.1.3. *Chaos risk*

National institutions no longer suffice when seeking to establish the right order for a global world. But globalization bears a chaos risk, because of the erosion of the ordering and pacifying role of the national state and because of the deficits of international policy and the lacunas of international law. A more international government carries the risk of institutionalizing 'bad' governments. There is no place for the crucial, civil society-government dialectical relationship at the world level. There is a big, dangerous gap developing between the global social space and the domains of particular entities. Global society is too weak and tentative to play that role. Lack of democracy at the international level is impeding the humanization of the global system ('to temper globalization'), contrary to what happened at the national level because of the development of democracy. Bargaining powers are different at the international level and, very frequently, governments did not represent their peoples, particularly the poor. *Subsidiarity* affirms

the value of international institutions, but avoids uncritical acceptance of internationalism. It promotes freedom and integrity of local cultures, without reducing particularism to pure devolution".

"2.9.1.4. *The question of a world government*

It is impossible to deny the impression of precariousness within the international order at the economic, juridical and political levels. Wars continue to break out and there is a shortage of effective and just global initiatives. The structures of the international milieu seem to resist any form of democratic control. On the threshold of the twenty-first century, global governance requires a new set of international ethical standards. Civil democracy founded upon public opinion, non-governmental institutions and the acceptance of the standards of international agreements, constitutes one of the premises. Additionally, appropriate governance solutions should take care to limit the weight of purely economic considerations. One of the main motivations for the *request for a world government* is the need to keep peace through binding international law and sanctions, and it is also connected with the notion of universal common good. It is utopian to think of it as a structured central government, but not if we think of a coordination of the decision-making process at the international level. World governance requires the participation of all the governmental levels – local, national, international – as well as a first class leadership. In this framework, an alternative concept to globalization can be envisaged, and it is universalization, emerging at the social, more than at the political level, as the proliferation of a lot of NGOs shows. It is possible to feel that the embryo of worldwide governance is developing, following a growing consciousness of a common responsibility. This can be seen in the recognition of the right to intervene, the legitimacy conferred to the UN Security Council, the institutionalization of world leaders' summits, the efforts towards a rational and joint management of the planet's resources, together with the preoccupation for a sustainable development and the establishment of a worldwide judiciary system – like the one put in place in the International Criminal Court – in which all governments could be summoned. But power politics is still alive, and it seriously threatens all that has been done during the last twenty-five years to build an international order based on cooperation and consultation. Additionally, other reforms are yet to be performed to implement a better governance of globalization, like the reform of the UN and its economic institutions; putting in place new norms to regulate the environment, trade, finances, investments and the activities of

transnational corporations; the elaboration of a worldwide tax or fiscal system and the building of new relationships between civil society and the public and private sectors".

"2.9.2. *Towards a democratic international order*

2.9.2.1. *The nexus between the rule of international law and democracy*

2.9.2.6. *Governance of international institutions*

'Unfortunately nothing is less democratic or less open to participation than some international institutions in which one single vote has a greater weight than that of the majority. Unless there are serious reforms in governance, the legitimacy of the institutions will be undermined; unless there are serious reforms in the practices, there may well be a backlash'".

1.2. INTERNATIONAL FINANCES

1.2.1. *Diagnoses*

"1.2.2.2. *International finances: world imbalances and weaknesses and increased autonomy of emerging countries*

'International finances have also reached the new millennium with contrasting news. On the one hand, the already mentioned twin surpluses of many emerging countries imply that they are financially more autonomous than in the past, even up to the point of becoming relevant bankers of the planet, creating problems of idle capacity for their traditional lenders like the IMF, the World Bank and the regional banks. The flip side of the coin is the continuous increase in the balance of payments deficits of some developed countries. Taken together, these imbalances reveal a misalignment of some of the most relevant exchange rates and are, at the same time, a potential problem for the stability of the world financial order and a threat to the continuity of the current world economic growth. This risk is leveraged because of new financial developments that rapidly increase world liquidity and offer new opportunities for development financing but, at the same time, threaten world financial stability. International coordination of monetary and financial supervisory authorities is more necessary than ever to gain in coordination and codes of conduct. Already many people think

that some financial developments like the explosive growth of private equity and derivatives markets could be excessive when compared to the 'real' economy. While the Bretton Woods system had a clear mandate to create a fair system of aid to developing nations, the governance structure of the current system, almost exclusively in the hands of private agents and speculative investments, carries a risk of contagion and is frequently unfair'.

'Because of a perverse interaction between the inherent volatility of financial markets and the paramount importance of reputation in them, capital flows are very frequently going against theoretical predictions, i.e., from developing to developed countries. It also seems convenient to rethink the global system of monetary reserves that could be neither the optimal one nor the most equitable. A cautious reform of this system might eventually generate resources to finance the development of the least developed countries'".

"2.9.3.2. *Governance of international finances*

Financial globalization accelerated in the 1980s with the fast liberalization of international capital movements in many countries. After a series of severe financial crises in a number of emerging countries, we witness a widespread questioning of the vision which had led to expect from the earlier trend manifest and widely shared benefits.

a) Ethical issues in the globalization of finance and responsibilities and duties of international financial institutions (IFI). The most developed countries and especially multilateral institutions have a duty to advise LDCs on what are prudent levels of debt, and on how to manage their risks, but they have not done so and have often provided advice which has exacerbated the risks for LDCs.

b) Countries' insolvency and bankruptcy regimes. A very delicate question concerns the solution for those cases in which a country is perceived to be insolvent. The comparison with the legal treatment of insolvency of a firm makes ethical sense and it seems fair to institute a formal procedure for the solution of such cases.

c) *Highly indebted countries*. In some cases, the degree of culpability of the lenders may be sufficiently great that the moral case for debt forgiveness seems compelling. There is one important reason however, against debt forgiveness, namely, that it encourages bad borrowing ('moral hazard'). Until an international authority is created, it is the moral duty of rich and powerful countries to act in ways designed to help the world's disad-

vantaged. The HIPC (Highly Indebted Poor Countries) and PRSP (Poverty Reduction Strategy Papers) initiatives and the recent debt and poverty reduction strategies of Bretton Woods institutions, are allowing significant progress in the countries which have already benefited from them.

d) Policies to confront crises. In emerging countries crises have meant much disarray and misery. Their recurrence shows that they have a systemic character, which calls for a reconsideration of practices and policies applied during the last decade.

e) The global reserve system. An outsider looking at the global financial system would note one peculiarity: the richest country in the world seems to find it impossible to live within its means, borrowing in 2006 some $850 billion a year (6.5% of its GDP) from abroad – including almost half from emerging countries. Part of the problem lies with the global reserve system, which entails countries putting aside money for emergencies. The 'reserves' are typically held in hard currencies, particularly in dollars, and this implies that poor countries lend to the United States substantial sums every year. The instabilities and inequities associated with the global reserve system can impose high costs on the poor.

f) Financing of the public sector that is unconnected to controllable productive projects is especially worthy of consideration. This is because of the onerous conditions often attached to such lending, where 'onerous conditions' means those that are more stringent than normal market conditions and that, accumulated over time, end up constituting an unbearable burden on the borrowing countries. Believing that all governments are committed to the common good of the people, that is, the well-being of each and every one of a country's inhabitants, is an expression of naivety that must be punished in cases where the government is controlled by ruthless dictators who subject society to their will, denying its natural inalienable rights, governing for the enrichment of themselves, their families and those close to them who helped them to remain in power.

g) Recent points of progress. i) The further development and restructuring of some activities of the IMF and World Bank; ii) the establishment of the Financial Stability Forum in Basel; iii) the supplementing of the ongoing cooperation between the G-10 countries by the new G-20 grouping; iv) the intermediate evolution of many codes and standards for the financial markets and for the supervision of financial systems; v) the adoption of new anti-crises facilities in the IMF.

h) Renewed challenges. As it was mentioned in 1.2.2.2, 'recent developments in international finance with the introduction of ever changing and

ever more sophisticated financial instruments have resulted in the current, dangerous crisis originated in the so-called sub-prime mortgages market. It is clear that new financial technologies also need new forms of supervision and regulatory norms, both at the national and at the global levels, i.e., new forms of world financial governance. In its absence, the whole promising process of economic development at the world level, and particularly in emerging and least developed countries, will be permanently at risk'".

1.2.2. *Proposals*

"2.11.11. *International finances*

a) International financial institutions. There is now a need for a third wave of regulatory agencies controlling the unregulated but immensely powerful global finance markets. Ethics certainly recommends a new balance in the statutes of the IMF and the WB as well as in other initiatives like the Financial Stability Forum, giving more representation to LDCs.

b) International financial regulations. It is essential to develop a clear vision of an appropriate financial architecture in the new circumstances, including: obtaining through international cooperation appropriate transparency and regulation of international financial loans and capital markets; provision of sufficient international official liquidity in distress conditions; orderly debt workout procedures at the international level; international measures both for crisis prevention and management; mechanisms to give or allow appropriate liquidity and development finance for low income countries and to regulate excessive surges of potentially reversible capital flows in recipient countries, without discouraging them excessively. The appropriate way to overcome crises in emerging markets is not to scale down the role of the IMF. According to its critics, it would blindly follow preconceived principles, labeled as ideological by the protesters: full freedom of capital transactions and the balance of public budgets, without enough consideration of prerequisites regarding the development of the national financial system or the surrounding business trends. These criticisms are worth considering.

c) National policies and regulations. Better policies are needed to make more difficult the development of bubbles on the financial markets as well as to improve transparency both in the private and in the public sectors.

d) Developing countries' crises. Regarding crises, increased caution is required from national authorities, particularly regarding exchange rate

management, macroeconomic regulation and the surveillance of the financial system.

e) Aid, foreign direct investment and debt relief. Public and private aid via transfer of capital and the help of individuals or groups is in most cases necessary and the Church should encourage such help. But this is not enough. Aid-receiving countries themselves must also create the conditions for attracting private capital from outside (FDI, foreign direct investment), that can also play an important role in economic development. The same has to be said for debt forgiveness. Even the HIPC-Initiative of the IMF and World Bank can only contribute to more and lasting wealth for the people if the freed resources are used in a way that is really productive. Debt relief is clearly not a panacea. Further progress should now result from the active implementation of the Monterrey consensus, which aims at replacing with a partnership what has so far been a frequently frustrating assistance relationship between industrialized and developing countries.

f) Global reserve system. There are reforms that would address the global reserve system's problems, eventually including an annual emission of SDR ('global greenbacks'), which could be used to finance development and other global public goods".

1.2.3. *Some frequently ignored traits of current globalization*[4]

"1.2.1.6. *Silent building of a new consensus on the roles of the state, markets and the civil society*

In spite of all the criticism towards world order, or disorder, and perhaps more in line with the so-called crisis of the ideologies, there are some budding signals of the end of the age of extreme alternatives on the socio-economic front, like market vs. planning and, on the political front, individualism vs. totalitarianism. A three-dimensional social order seems to be emerging instead, based on a renewed role of autonomous organizations of the civil society, together with the markets and the state".

[4] Pessimistic views of the current wave of globalization are so widespread, particularly in developed countries, that they just ignore many of the positive outcomes for developing countries summarized here.

"1.2.2. *Economic growth, trade and finances: The possibility of a long and widespread wave of economic growth*

The beginning of the 21st century has been accompanied by an acceleration of economic growth almost all over the world, only comparable to what happened during the 'golden age' of the late fifties, the sixties and the early seventies of the last century. There are good chances that this acceleration will last, becoming a long wave of economic growth and, perhaps for the first time in human history, some of its main drivers are coming from emerging and even poor countries. First, the acceleration of economic growth in Asia, which implies the incorporation of almost half of the world population in modern patterns of consumption and a huge supply of low-wage labor, also leads to a strong increase in the demand and price of commodities, most of them produced in LDCs. Secondly, emerging and even poor countries have an enormous potential to catch up, incorporating the newest information and communication technologies in production and consumption, resulting in rapid increases in productivity. Thirdly, a new consensus on economic policies is emerging and being applied in many LDCs, centered on obtaining twin fiscal and external surpluses and accumulating foreign reserves. Fourthly, many LDCs are consistently increasing their concern over education and their investment in it. However, this developing countries-driven long wave of economic growth confronts serious threats coming from financial world imbalances, trade restrictions, environmental deterioration and social gaps and poverty, all of them mentioned in other parts of the book. But at the same time we are witnessing an impressive growth in the world trade of goods and services Furthermore, it is a growth with a pro-poor bias because of the induced increase in commodities' prices. For the time being, the traditional deterioration of the terms of trade against poor countries has reversed, and more so if we consider the increased purchasing power of commodities in terms of biotechnological products and information, and communications technology hardware and software, whose prices go down every year.

In this century Africa's GDP per capita has been growing at 3.6% per year. This rate would allow the poorest continent in the world to duplicate its income per person in just twenty years. The last time Africa could do it, it took one century. Things like these have been put at risk because of the failures in international governance we have just described.

However, I do not have a pessimistic view regarding future prospects for the world economy. I think the situation is completely different from the

one the world experienced during the Great Depression. We do not have deflation, we do not yet have the brutal protectionism of those times and, most importantly, a process of consensus-building is taking place, as we saw in the G-20 meeting in early April. Every week there are signals that the world economy is landing and, very probably, it will take off in the second half of 2009. If this happens it will be due to the good economic and social policies of many emerging and poor countries and to very rapid reactions of the economic policies in most of the world. Both are good signals of the building of a new consensus on economic and social policies, closer to the Social Doctrine of the Church".

2. What can be learned from this collective failure?

In spite of all our and others' eloquence, the fact is that we were not sufficiently able to find ways to speak so as to be listened to by the relevant audiences. Or it might also be that we practiced a sort of weak thinking and were not convinced of the relevance of what we were saying. We would very probably not have been successful if we had spoken in a louder voice either. Powerful interests were, and still are, opposed to the very idea of some kind of world governance. But in any case we need to find ways to have our ideas and our works known by people everywhere, and particularly by political, academic and cultural leaders in each of our countries.

PANEL ON GLOBALIZATION[1]

OSCAR ANDÉS CARDINAL RODRÍGUEZ MARADIAGA

Thank you very much, especially for being invited to this very important meeting, I am delighted to be here. I will talk about global economics on the road to Damascus. A world built on the globalisation of greed and fear, rather than the globalisation of solidarity was never sustainable or desirable and now the bubble has burst, not with a whimper but with a cacophony that will ring in our ears for a generation. We have experienced our own Jericho moment and the walls of the deregulated free market lay in rubble about us. The current economic crisis has caused the United States and Europe to sneeze but poor countries got a cold and even an epidemic now. Our fears are that the poorest people who have benefited least from decades of unequal economic growth will pay the greater price for this folly. New estimates for 2009 suggest that lower economic growth rates will trap 46 million more people on less than 1.25 USD a day than was expected prior to the crisis. An extra 53 million will stay trapped on less than 2 USD a day. This is on top of the 130-155 million people pushed into poverty in 2008 because of soaring food and fuel prices. Preliminary World Bank estimates for 2009 to 2015 forecast that an average of 200 thousand to 400 thousand more children a year, a total of 1.4 to 2.8 million, may die if the crisis persists. *Caritas Internationalis*, of which I am President, reports that poverty in the 200 countries it works is deepening with 100 million more people in need of food aid. *Caritas*, and the people it serves, is experiencing a crisis of exclusion, of injustice and inequality. 60% of the world's population still exists on only 6% of the world's income, while entire communities are exploited and neglected. If we learn one lesson from this misadventure it must be that the actions we take in 2009 cannot be aimed at resuscitating the old system but must aim at a blueprint for a better world based on justice and respect for all.

[1] As delivered.

2009 provides us with plenty of opportunities and inspirations to get it right. The Holy Father made his first pastoral trip to Africa; the Pauline Year runs till 29 June to mark the approximately 2000th anniversary of the saint's birth, and the Synod of African Bishops meets in Rome in October. All will be opportunities for the Church to encourage politicians to make the right steps. Pope Benedict XVI visited Cameroon and Angola. He attended the African Episcopal Conference in Cameroon, to prepare for the African Bishops' Synod in October and visited Angola to celebrate the 500th anniversary of its evangelisation. It was the first papal visit to sub-Saharan Africa since 1998, when Pope John Paul II visited Nigeria. The visits to Angola and Cameroon by the Holy Father and the Senate were a wonderful opportunity to celebrate the work of the Church in Africa with a moment to reflect on the challenges that face people in Africa where, for many, poverty remains an unacceptable scandal. The Synod of Bishops in October will be the second for Africa and the theme is *The Church in Africa at the Service of Reconciliation, Justice and Peace*. Four decades ago, Paul VI said prophetically: 'The new name of peace is development'. Forty years later, Africa is still waiting for that to come true. Until poor Africans feel they have a chance to live in the dignity promised by Christ, the African continent will be unable to experience lasting political stability or overcome the devastating effects of poverty.

People across the continent are experiencing deteriorating living conditions, reduced social services, human rights abuses and conflict. African countries will be hit hard by the global recession as the demand for raw materials falters or private capital flows dry up and high food prices push 100 million more people into destitution, but the situation will be made worse by rich countries if they cut aid abroad and adopt populist protectionism measures at home. We pray that Pope Benedict's inspiration will act as a reminder to world leaders that the poor must not be excluded from plans to rescue the global economy. World leaders must resist domestic pressure and show genuine leadership to convince voters that supporting the poor is not a fair weather choice but a moral responsibility.

Today the Church faces a new challenge in our global world. Benedict XVI said, in his message for the World Day of Peace of this year: 'Fighting poverty requires attentive consideration of the complex phenomenon of globalisation'. World leaders met both in London in April for the G-20 and will meet in Sardinia in July for the G-8 to decide a global response to the worst economic crisis in 80 years, and a new deal on climate change will emerge in December. For years we have been campaigning to get the rich

nations to honour the commitment they made around 40 years ago to devote 0.7% of their incomes to overseas development aid. Only five countries have so far met that target and the best the United States has managed is just over 0.2%. Italy has cut its foreign assistance by 56% for 2009. This is a 20-year low of 0.009 of GDP despite promises to spend 0.7% on overseas aid. The Italian cuts are an ominous sign of the 2009 G-8 summit this year in Italy. Global aid levels, even before the financial crisis, have been in decline, falling by 8.4% in real terms before 2006 and 2007. In 2007 global aid flows stood at 103.9 billion USD, representing just 0.28% of the combined national income of developing countries. Governments collectively need to provide an additional 18 billion USD per year between 2008 and 2010. These disappointing figures fail to take into account of governments inflating their aid figures by counting spending on debt relief, educating foreign students and housing refugees in Europe. It has, therefore, been astonishing to see the huge sums of money being committed to economic bailouts. President Obama's financial rescue package of about 18 billion USD is almost equivalent to the total amount of development aid provided over the past 10 years by 23 of the world's richest countries. World leaders must not use the financial meltdown as an excuse to cut aid. When 70% of your financing for health services comes from foreign donors, as is the case in many African countries, cuts in aid cost lives. And we talk about humanitarian assistance. Aid works when spent wisely: Kenya, Tanzania, Uganda and many other countries have abolished fees for primary schools, resulting in dramatic increases in enrolment during the space of a few years thanks to debt relief. As Caritas Internationalis' President I know our members realise the importance of spending aid well. A new survey that took a snapshot of 19 of the biggest Caritas members and put their combined humanitarian assistance for voluntary services at 294 million a year, almost equivalent to that of Sweden, the sixth largest bilateral donor last year, our development aid must be targeted at encouraging long term economic growth, good governance and human development as well as effective and rapid response to disasters and conflict.

Above all, we need a green revolution in Africa, transforming every aspect of farming to ensure food security, as we heard in this meeting. We know that the world will need to double food production in the next four years to meet projected population growth. Our ability to meet these food needs is challenged by increasing water scarcity, climate change and the costs of fuel and transport. In Africa, growth in our agriculture is central to both food security and economic growth. The strong potential to create

such agriculture sector growth is now constrained by the financial crisis and economic recession, which will bring reduced income and employment. Soaring unemployment, failing banks, rising bankruptcies, slumping exports and ballooning deficits are critical issues. However, our global financial system is tightly bound up with present social and justice issues, which will only be further exacerbated as our governments, public and private institutions focus on their economies. In a world so deeply divided between rich and poor, north and south, religious and secular, us and them, we need more than ever common values and a global ethics that unites us as a global community. We increasingly need leaders who are able to incorporate values, respect for human dignity, human rights and the environment into their decision-making. All of us need the ability to hold governments accountable for their performance. That will not only be good for governments and good for business, but it will also be a powerful force in realising the common good for all. We can either greet 2009 with paralysis or as an opportunity for change. The financial crisis is a symptom of deeper flaws within the economic system. This is not a banking failure but a systemic failure. Systemically, the problems are secrecy and lack of transparency in real and virtual economies. The rich offloading risk, both financial, environmental and social, onto poor people in rich and poor countries through economic boom-built and rampant consumerism and unsustainable debt levels to finance it, promote new levels of greed and individualism. The rapid consumption and disposal of goods and services at unprecedented levels has had an enormous impact environmentally on greenhouse gas emissions and on our natural resource base. The enormous power in the global economy and lack of accountability of a relatively small number of players, multinational banks, non banks and the private sector but our fear is that economic ministers are not intent just on rearranging the deckchairs of the Titanic, but patching up the holes and manning the pumps just to stop the ship sinking. As we struggle to understand what is going on, the crisis will have passed and we will be on to the next one. And talking about climate change, in 2009 economics must take the place of egonomics. Climate change is a reality today, affecting the lives and livelihoods of millions in developing countries by exacerbating storms, droughts and natural disasters. It is our moral obligation to take urgent action to tackle climate change and to do so in support of those most affected. We can waste no time. There must be a radical effective agreement at the UN Convention in Copenhagen in December this year based on climate justice and the principle that the polluter pays. We call on you to achieve a strong,

binding and just climate agreement to ensure the survival and wellbeing of all God's children. As a matter of equity and responsibility, those who have created the problem must pay for the solution. Economically developed nations have a moral obligation to tackle climate change because of their disproportionate consumption of natural resources. It is imperative that these countries receive the economic and technical assistance they need to adapt to climate change and ensure better lives and livelihoods for their people. And I will conclude because my time is over.

St Paul knew a thing or two about globalisation. Not only was he a great traveller but also a force behind the globalisation of Christianity. In this year of St Paul we remembered how the Apostle to the Gentiles summoned the Church to open herself to all peoples, their histories and their cultures, and so become a better image of our Lord, in whom there is neither Jew nor Greek, slave nor free, male nor female, for you all are all one in Jesus Christ. We must discover the aspirations and the rights of all peoples and be aware of their true needs, recalling the advice received by Paul from the pillars of the Church of Jerusalem, remember the poor. We must hope St Paul's inspires the leaders of the world's most powerful and richest countries to experience their own road to Damascus moment. There must be a conversion, away from the old system of blind greed to one where our eyes are opened to justice and dignity for all. Thank you.

GLOBALISATION AND THE PRESENT CRISIS

HANS TIETMEYER

Not only has the present financial and economic crisis now assumed global proportions, its causes and course so far are likewise linked, to a significant degree, with the progressive globalisation above all of the financial markets over the past few decades. However, mono causal analyses should be treated with caution. An objective analysis has to take into account both the diverse causalities and the various driving forces behind the crisis which, despite all regional differences, is global.

Some Remarks on Analysing the Causes

Especially the current public debate on the origins of the crisis is dominated by simplistic arguments which address only a part of the wider reality. Thus many commentators have attempted to heap the blame on misguided financial managers and inept supervisory authorities. Such oversimplifications then often lead to generalisations and populist pronouncements about a supposed general failure of the markets, the universal advance of 'casino capitalism' and wholesale errors in the fields of economic and fiscal policy. While there is a kernel of truth in most of these accusations, such sweeping generalisations are of little help when it comes to diagnosing the causes or prescribing the necessary therapy. I believe that a broader and deeper analysis of the causalities and interconnections is needed before we can start drawing any conclusions. In my brief talk, however, I can only highlight few points which, in my opinion, deserve to be analysed in greater depth.

I view the following five points as the main causes of and reasons for the emergence of the current crisis.

1) Following the progressive easing of national restrictions – especially for financial markets – in most industrial countries and many

emerging economies, the development of financial activities themselves was galvanised, in particular from the early 1990s onwards, by the new information and communications technologies. Financial markets were now able to operate globally without time lags, which increasingly made them frontrunners of globalisation.

2) These progressively integrating markets also increasingly undermined the existing national regulations and prudential rules for financial institutions. The supervisory authorities of the G10 countries, in particular, made a timely attempt to counter the growing regulatory arbitrage through informal cooperation under the Basel Accord. This met with relatively limited success, however, not least on account of the divergent viewpoints of the national authorities. Even the establishment of the Financial Stability Forum in 1999, which I myself initiated, did not produce sufficient progress. Both the idea of expanding its membership beyond the G7 or G10 to embrace the G20 group, as I proposed, and of giving it a more far reaching mandate were rejected, mainly because of opposition from the Anglo-Saxon countries. This blocking of more far-reaching international cooperation meant that, in the wake of the growing internationalisation of the financial markets, the existing national prudential rules were increasingly eroded and considerably scaled back in many countries as a result of international competitive pressure.

3) The widespread use of new technologies and the erosion of many existing rules and controls, in turn, increasingly transformed financial market activities. This was reflected in investment banking, in particular, not just in a considerable growth in the number of market players. The banking sector as a whole concurrently experienced a fundamental transformation in what had previously been its dominant activities. The traditional 'buy and hold' business of the banks and financial institutions gave way more and more to an 'originate and distribute' model for certificates. The upshot of this was a growing loss of transparency about the spread and aggregation of risks, both for the banks themselves and also for their customers. Although the rating agencies graded these new products, they were undoubtedly often too generous in the grades they assigned.

4) This was compounded by the increasing use of mark-to-market valuation methods, especially from the 1990s onwards. At the same

time, the publication of quarterly results with a correspondingly short-term horizon became more and more prevalent. Some countries in continental Europe had long opposed this type of accounting and valuation owing to the associated procyclical effects. In practice, however, the Anglo-Saxon view increasingly prevailed. The outcome of this is now clear. This approach to accounting and valuation first artificially bloated values on the financial markets and then massively exaggerated the step slide in the prices of financial products.

5) Besides the points cited, major errors in macroeconomic policy undoubtedly played a part in the emergence of the crisis. In particular, the longstanding build-up of huge global current account imbalances (especially between the USA and a number of large emerging economies) not only made artificially high growth possible over a period of many years, most notably in the countries concerned but was also accompanied by an extreme expansion of global liquidity, which was reinforced by the strong build-up of US dollar currency reserves. For a prolonged period this massive expansion of liquidity did not lead to any exorbitant global inflation, above all because international competition was becoming of the international financial markets that I mentioned earlier. This extreme expansion of liquidity is, above all, the result of an unrealistic *de facto* fixing of exchange rate parties, especially between the USA and Asian countries but, in my assessment, also results in part from a clearly too accommodating monetary policy stance, especially of the US Fed, which was supplemented by granting very generous financing to homebuyers.

It is now largely undisputed that the outbreak of the crisis originated primarily in the United States. Although the subprime crisis in the USA quickly also exposed the accumulated shortcomings in other financial markets – including in Germany – it was and indisputably remains the key trigger of the worldwide crisis. The surprising collapse of Lehmann Brothers investment bank in September 2008 undoubtedly unleashed a global crisis of confidence on the financial markets, the termination and repercussions of which still cannot be foreseen.

There is much to suggest that, for the first time since the 1930s, we are dealing with a global crisis that will leave behind a lasting mark on the real economy in many ways and pose new challenges to the globalisation process.

New Challenges for Policymakers

The new dimension of the crisis and the diverse new causalities also pose new challenges worldwide, especially for policymakers. The G20 declaration in London of 2 April 2009, in particular, has now documented the major economies' willingness to cooperate internationally. This essentially concerns the following four areas of action going forward.

> 1) First of all, restoring the functional viability of the financial markets as a whole has to take centre stage. The large central banks, in particular, have worked hard to prevent an acute collapse of the financial markets, in some cases by taking forceful and innovative monetary policy measures, since as early as August 2007. During the course of 2008, the political authorities of almost all countries strove injections in order to at least keep the 'systemically relevant' banks and financial institutions afloat and restore the functional viability of their domestic financial system. To date the measures have been predominantly successful, although the definitive outcome will only become clear during the next years.
>
> 2) The slump in the real economy that has now become apparent worldwide far exceeds all the cyclical downturns of the past few decades. Policymakers, especially in the large economies, were therefore called upon to take stabilizing countermeasures. The multiplicity and scale of the initiatives launched so far demonstrate that the risk of further growth losses and rising unemployment have largely been taken seriously by the policymakers, even though one might question the programmes' composition and suitability in some cases. Another key issue is to ensure a timely exit from the current intervention strategy, which is solely justifiable as a temporary measure and harbours substantial risks, especially regarding its impact on the level of public debt.
>
> 3) An absolutely crucial need is to extend and improve, throughout the world, the prudential rules for banks and financial markets and their governance. It is gratifying that the G20 summit in London initiated major guidelines and institutional improvements. This includes not only enlarging the membership of the aforementioned Financial Stability Forum but also transforming it into a Financial Stability Board and thereby upgrading its political status. However, only the

coming years will show whether this reorientation and improvement in the rule-setting procedure will yield more effective results.

4) Another important objective, at least in the longer term, is to further develop the international monetary system and its key bodies, the IMF and World Bank. Besides organisational matters and the political orientations given so far, the hitherto dominant role of the US dollar will also increasingly come under the spotlight in this context. In the short term, however, I cannot see any proposals concerning unresolved questions of institutional architecture or the reserve currency issue that are capable of winning a consensus. The controversies revealed in other areas in connection with organising cooperation at the UN level show how difficult it is to find globally acceptable and practicable solutions. The growing globalisation of the markets means that longer-term, more far-reaching solutions are inevitable, however. In particular, the instrument of mandatory disclosure can and should play an increasing role in this context for the necessary supervision of the markets.

Concluding Remark

The current global financial and economic crisis, which has by no means been overcome yet, has made it abundantly clear that the ongoing functioning of the financial markets, in particular, requires a durable, internationally effective regulatory framework. However important the globalisation of markets may be for security freedom and fostering global prosperity, it is also requires a minimum of consistency, continuity and, thus, credibility in the underlying policy framework. And the market players also have to respect this framework in reality.

Furthermore, in the context of an increasingly globalised world, freedom in the markets also imposes an obligation of individual responsibility for public welfare on all market participates. Not least the owners and managers who take the key entrepreneurial decisions must be mindful of their responsibility for maintaining the ongoing functional viability of the system and its fair and just operation. This is the only way in which a free-market system can continue to ensure the necessary degree of social justice in future. Appropriate codes of conduct should therefore be drawn up for economic and political decision-makers to stimulate the necessary consciousness of their responsibilities.

All things considered, the current crisis will be holding the attention of policymakers and economic agents for a long time to come. The German Bishops' Conference discussed this topic back in early March 2009 and published a corresponding communiqué. I believe that our Academy, too, should deal with this subject in greater depth at its next session.

GLOBALISATION AND THE PRESENT CRISIS

HANS TIETMEYER

Die gegenwärtige Finanz- und Wirtschaftskrise hat inzwischen nicht nur ein globales Ausmaß angenommen; auch ihre Ursachen und ihr bisheriger Verlauf stehen zu einem erheblichen Teil im Zusammenhang mit der progressiven Globalisierung insbesondere der Finanzmärkte in den letzten Jahrzehnten. Dennoch ist gegenüber monokausalen Analysen Vorsicht geboten. Eine sachgerechte Analyse muss zugleich der Vielfalt der Kausalitäten sowie den unterschiedlichen Triebkräften der trotz aller regionalen Unterschiede globalen Krise Rechnung tragen.

Einige Anmerkungen zur Ursachenanalyse

Besonders in der gegenwärtigen öffentlichen Debatte über die Ursachen der Krise dominieren vielfach den realen Sachverhalten nur begrenzt Rechnung tragende Simplifizierungen. Als Hauptursachen werden nicht selten nur ein Fehlverhalten der Finanzmanager sowie ein Versagen der Aufsichtsbehörden herausgestellt. Und diese verkürzten Analysen führen dann oft auch zu generalisierenden und zugleich populistischen Thesen wie ein generelles Versagen der Märkte, ein allgemeines Vordringen des sog. Kasino-Kapitalismus sowie allgemeine Fehlentwicklungen in der wirtschafts- und finanzrelevanten Politik. Zwar steckt in all diesen Aussagen zumeist auch ein gewisser Kern an Wahrheit. Solche simplifizierende Generalisierungen führen jedoch zumeist weder bei der Kausalanalyse noch bei der notwendigen Therapie weiter. M.E. ist vor allem eine breiter und tiefer angelegte Analyse der Ursachen und der Zusammenhänge notwendig, bevor man zu gewissen Schlussfolgerungen kommen kann. In meinem kurzen Beitrag kann ich allerdings nur einige wenige Punkte aufzeigen, die nach meiner Meinung eine vertiefte Analyse verdienen.

Die hauptsächlichen Ursachen und Gründe far das Entstehen der derzeitigen Krise sehe ich vor allem in folgenden fünf Punkten:

1.) Nachdem schon zuvor insbesondere für die Finanzmärkte die nationalen Grenzen sowohl in den meisten Industrie- als auch in vielen aufstrebenden Entwicklungsländern zunehmend geöffnet worden waren, kam es bei den Finanzaktivitäten selbst insbesondere seit Beginn der 90er Jahre des vergangen Jahrhunderts zu einer starken Weiterentwicklung auf der Grundlage der neuen Informations- und Kommunikationstechnologie, Die Finanzmärkte konnten nunmehr weltweit ohne Zeitverlust handeln und wurden so immer stärker zu Frontrunnern der Globalisierung.

2.) Diese immer stärker zusammenwachsenden Märkte untergruben zunehmend auch die bisherigen nationalen Regulierungen und Aufsichtsregeln für die Finanzinstitute. Dem zunehmenden regulatorischen Wettbewerb versuchten zwar insbesondere die Aufsichtsbehörden der G10-Länder schon früh durch eine informelle Kooperation im Rahmen der sog. Baseler Vereinbarungen entgegenzuwirken. Der Erfolg blieb jedoch – insbesondere auch infolge der unterschiedlichen Auffassungen zwischen den Ländern – relativ begrenzt. Auch die von mir persönlich 1999 initiierte Gründung des sog. Financial-Stability-Forums führte leider nicht zu ausreichenden Fortschritten. Sowohl eine Ausweitung der Mitgliedschaft über die G7 bzw. G10Länder hinaus auf die vor mir vorgeschlagene G20-Gruppe als auch ein weitergehendes Mandat wurde damals insbesondere von angelsächsischer Seite abgelehnt. Diese Blockade einer weitergehenden internationalen Kooperation hatte dann zur Folge, dass mit der progressiven Internationalisierung der Finanzmärkte die bestehenden nationalen Aufsichtregeln immer stärker erodiert und infolge des internationalen Wettbewerbsdrucks in vielen Ländern auch erheblich reduziert wurden.

3.) Die zunehmende Anwendung neuer Technologien und die Erosion vieler bisheriger Regeln und Kontrollen hat auch die Finanzmarktaktivitäten zunehmend geändert. Insbesondere im Bereich des sog. Investment-Banking wuchs nicht nur die Zahl der Player erheblich. Zugleich vollzog sich im Banking insgesamt auch eine fundamentale Veränderung der früher dominierenden Aktivitäten. Aus den traditionellen „buy and hold“ Aktivitäten der Banken und Finanzinstitute wurde zunehmend ein „originate and distribute“

von Zertifikaten. Die Konsequenz war ein wachsender Verlust an Übersicht über die Verteilung und Aggregierung von Risiken für die Banken selbst, aber auch für deren Kunden. Wohl klassifizierten die sog. Rating-Agencies die Produkte; aber sie waren dabei oft wohl auch zu großzügig.

4.) Hinz kam – insbesondere seit den 90er Jahren – auch eine zunehmende Anwendung der sog. mark-to-market Bewertung in der Rechnungslegung und Bilanzierung sowie ein Vordringen der Publikation von kurzfristigen Quartalsergebnissen. Ein Teil der kontinentaleuropäischen Länder hat sich zwar lange gegen diese Art der Rechnungslegung und Bilanzierung wegen der damit verbundenen prozyklischen Effekte gewehrt. Die angelsächsische Seite hat sich jedoch in der Praxis zunehmend durchgesetzt mit dem heute deutlichen Ergebnis, dass diese Rechnungslegungund Bilanzierung sowohl in den vergangenen Jahren die Hypertrophie an den Finanzmärkten zunächst artifiziell verstärkt als danach den Absturz der Preise für Finanzprodukte großenteils extrem übersteigert hat.

5.) Neben diesen genannten Punkten haben zweifellos auch gewichtige Fehler in der makroökonomischen Politik zum Entstehen der Krise beigetragen. Insbesondere die schon seit längerem aufgebauten gewaltigen globalen Leistungsbilanzunglcichgcwichte (vor allem zwischen den USA und einigen großen emerging economies) haben nicht nur vor allem in den betroffenen Ländern über Jahre hinweg ein artifiziell hohes Wachstum ermöglicht; sie waren auch mit einer extremen Ausweitung der weltweiten Liquidität verbunden, die noch verstärkt wurde durch den starken Aufbau von US-Dollar als Devisen-Reserven. Diese gewaltige Ausdehnung der Liquidität hat zwar – insbesondere infolge der gleichzeitig stark zunehmenden Intensivierung des internationalen Wettbewerbs – längere Zeit hindurch nicht zu einer exorbitanten weltweiten Inflation geführt. Sie hat jedoch wesentlich zu der bereits erwähnten Hypertrophie der internationalen Finanzmärkte beigetragen. Und diese extreme Liquiditätsausweitung ist vor allem die Folge einer unrealistischen *de facto* Fixierung der Wechselkurse insbesondere im amerikanisch-asiatischen Verhältnis sowie einer nach meiner Beurteilung eindeutig zu großzügigen Geldpolitik insbesondere der US-Fed, die zudem noch durch eine besonders großzügige Eigenhcimfinanzierung ergänzt worden ist.

Heute ist weitgehend unbestritten, dass der Ausbruch der Krise ja auch in den USA begonnen hat. Wohl hat die Subprime-Crisis in den USA schon bald auch die aufgelaufenen Schwächen in anderen Finanzmärkten – auch in Deutschland-aufgedeckt, sie war und ist jedoch unbestreitbar der zentrale Auslöser der weltweiten Krise. Und der überraschende Kollaps des Bankhauses Lehman Brothers im September 2008 hat zweifellos an den Finanzmärkten eine weltweite Vertrauenskrise ausgelöst, deren tatsächliches Ende auch heute noch nicht abzusehen ist. Vieles spricht dafür dass wir es zum ersten Mal seit den 30er Jahren des vergangenen Jahrhunderts mit einer weltweiten Krise zu tun haben, die in vielen Bereichen auch nachhaltige Wirkungen in der realen Wirtschaft hinterlassen und den Prozess der Globalisierung vor neue Herausforderungen stellen wird.

Neue Herausforderungen für die Politik

Die neue Dimension der Krise und die vielfältigen neuen Kausalitäten haben insbesondere auch die Politikverantwortlichen weltweit mit neuen Herausforderungen konfrontiert und werden dies sicher auch in Zukunft tun. Insbesondere die Deklaration des G20-Treffens in London vom 2. April 2009 dokumentiert inzwischen auch die Bereitschaft der großen Länder zu verstärkter internationaler Kooperation. In der Substanz geht es gegenwärtig und in Zukunft vor allem um folgende vier Aktionsbereiche:

1.) Im Vordergrund muss zunächst die Wiederherstellung der Funktionsfähigkeit der Finanzmärkte insgesamt stehen. Nachdem insbesondere schon seit August 2007 vor allem die großen Zentralbanken sich bemüht haben, durch teilweise auch aggressive und innovative Maßnahmen im Bereich der Geldpolitik einen akuten Kollaps der Finanzmärkte zu vermeiden, haben sich die politischen Autoritiäten fast aller Länder im Laufe von 2008 zur Bereitstellung staatlicher Rettungsschirme in Form von Garantien und Kapitalzufuhr bemüht, zumindest die „systemrelevanten“ Banken und Finanzinstitute zu erhalten und das Finanzsystem in ihren Ländern wieder funktionsfähig zu machen. Insgesamt waren die Maßnahmen bisher überwiegend erfolgreich, wenngleich die endgültigen Ergebnisse sich voraussichtlich erst in den nächsten Jahren abzeichnen werden.

2.) Der inzwischen auch in der Realwirtschaft weltweit deutlich gewordene Einbruch übersteigt alle konjunkturzyklische Rückgän-

ge der letzten Dekaden bei weitem. Insbesondere die Politik der großen Länder war und ist deswegen zu stabilisierenden Gegenmaßnahmen gefordert Die Vielzahl und Größe der bisherigen Programme beweist, dass die Gefahr weiterer Wachstumseinbrüche und zunehmender Arbeitslosigkeit weitgehend ernst genommen wird, wenngleich man über die Zusammensetzung und Angemessenheit der Programme im einzelnen natürlich streiten kann. Von großer Bedeutung wird insbesondere auch der rechtzeitige Exit aus dieser nur vorübergehend zu vertretenen Politik sein, die insbesondere auch im Bereich der öffentlichen Verschuldung erhebliche Gefahren entfalten kann.

3.) Unverzichtbar ist insbesondere auch eine möglichst weltweite Ausweitung und Verbesserung der Aufsichtsregeln für die Banken und Finanzmärkte und ihrer Governance. Es ist erfreulich, dass der G20-Gipfel in London hier wichtige Orientierungen und institutionelle Verbesserungen auf den Weg gebracht hat. So hat auch das bereits erwähnte Financial Stability Forum nicht nur eine größere Mitgliedschaft erhalten; auch der politische Status ist durch die Umwandlung in einen Financial Stability Board aufgewertet worden. Allerdings werden erst die nächsten Jahre zeigen, ob diese Neuorientierung und Verbesserung der Regelsetzungsprozedur effektivere Ergebnisse bringen wird.

4.) Zumindest längerfristig bedeutsam wird auch die Weiterentwicklung der internationalen Währungssystems und der dafür zuständigen Organisationen (IWF und Weltbank) sein. Neben Organisationsfragen und den bisherigen Politikorientierungen wird dabei auch die bisher dominierende Rolle des Dollars zunehmend ein Thema werden. Kurzfristig sehe ich jedoch weder bei den offenen institutionellen Architekturfragen noch in der Reservewährungsfrage konsensfähige Lösungen. Die bei der Gestaltung der UN-Kooperation in anderen Bereichen deutlich gewordenen Kontroversen zeigen, wie schwierig es ist, weltweit akzeptierte und handlungsfähige Lösungen zu finden. Die wachsende Globalisierung der Märkte macht jedoch längerfristig weiterführende Lösungen unausweichlich. Insbesondere das Instrument des Publizitätszwanges sollte dabei für die notwendige Beaufsichtigung der Märkte eine zunehmende Rolle spielen.

Abschließende Bemerkung

Die gegenwärtige und derzeit noch keineswegs überwundene globale Finanz- und Wirtschaftskrise hat deutlich gemacht, dass insbesondere die Finanzmärkte für ein nachhaltiges Funktionieren eines dauerhaften Ordnungsrahmens bedürfen, der auch internationale Wirkung entfaltet. So wichtig die Globalisierung der Märkte für die Sicherung der Freiheit und die weltweite Ausbreitung des Wohlstandes ist, sie bedarf auch eines Mindestmaßes an konsistentem, kontinuierlichem und damit auch glaubwürdigem politischen Rahmenwerk. Und die Teilnehmer an den Märkten müssen dieses Rahmenwerk auch tatsächlich respektieren.

Darüber hinaus bedeutet Freiheit an den Märkten aber für alle Teilnehmer gerade auch in der zunehmend globalisierten Welt individuelle Verantwortung für das Gemeinwohl. Insbesondere auch die für unternehmerische Entscheidungen zuständigen Eigentümer und Manager müssen sich ihrer Verantwortung für die Erhaltung der dauerhaften Funktionsfähigkeit des Systems und seiner gerechten Wirkungen bewusst sein. Nur so kann die freiheitliche Ordnung auch in Zukunft das notwendige Maß an sozialer Gerechtigkeit sichern. Für die Entwicklung des dafür notwendigen Bewusstseins sollten deshalb auch angemessene Verhaltenkodices für die Verantwortungsträger in Wirtschaft und Politik formuliert werden.

Insgesamt wird die derzeitige Krise Politik und Wirtschaft noch längere Zeit beschäftigen. Die deutsche Bischofskonferenz hat sich Anfang März 2009 bereits mit diesem Thema befasst und eine entsprechende Stellungnahme veröffentlicht. Auch unsere Akademie sollte meines Erachtens dieses Thema in der nächsten Session vertieft behandeln.

PANEL ON GLOBALIZATION[1]

JOSEPH STIGLITZ

The discussion so far has been very interesting and I also will not be giving the PASS view, I will be giving my view. Let me begin with some preparatory remarks. First, this is, I think, a very big systemic failure that highlights broader problems with the economic system, it is not just a matter of a little plumbing failure that you correct, you call in a plumber, you change a few things, I think it is symptomatic of much deeper problems. The second observation is that we cannot, and we should not, think about just going back to the economic system as it was before the crisis, that there were fundamental problems before that and, among the problems, are things that have been already pointed out: the world economy was supported by excessive consumption by Americans and the world was characterized by global imbalances, the basic economic model in the long run was not sustainable, that has to do with the issue of global warming that was referred to, but also, in the short run, it was based on Americans, in the richest country in the world, consuming beyond their means, and that is what sustained the global economy.

It also illustrates, I think, deeper problems in the economic system. For instance, American financial markets, global financial markets, prided themselves on innovation but, mostly, innovation was directed at accounting arbitrage, regulatory arbitrage, and tax arbitrage. They were supposed to be managing risk, they created risk, they did not allocate capital wealth, they misallocated capital wealth. A small fraction of America's financial market was actually devoted to creating wealth, the part that was supporting venture capital, new investment, new firms, expansion, most of it was really a giant casino. And so, I think, in many of the discussions about regulation, what we will come back to, there was a fear that it would suppress innova-

[1] As delivered.

tion, but we have to realise that the innovation was not socially constructive. They talked about risk but they did not create products that enabled most Americans to manage the simple risk of staying in their homes. The result of that is that millions are being thrown out of their homes and losing with that their life savings. So, if we look at the social function which the financial system is supposed to perform, it did not do it. At the same time, a good financial system is supposed to be a small financial system, exposed to perform the tasks of risk management, capital allocation, transaction costs, at low cost. In the United States and some other countries the costs of the system were huge, a third or more of all corporate profits went to finance. It is supposed to be a means to an end, not an end in itself, but it became an end in itself. And you can see, for instance, the contrast between what was possible: on the basis of the new technologies that were referred to, we could have had a very efficient global electronic payment mechanism. We do not. We have a very expensive electronic payment mechanism in which the banking system skimmed off 1-2% of all transactions, it was really an outrage and they did it as a result of monopoly power.

There was also the fact that market mechanisms that we usually talk about, evolutionary forces, did not work in the way they were supposed to, it was not the best firms that survived, it was the most risk-taking. In fact, many firms said they had to undertake gambling because, if they did not, they could not survive. And that, I think, says something about the nature of the short-sightedness of market processes. Fifthly, it showed the corruption of the political process. There was, in a sense, a bipartisan buying of the political process by the financial markets, they succeeded first in buying deregulation, even though the risks were clearly pointed out, clearly discussed, and now they are buying a bank bailout of massive proportions. I think a very important comment was made about the magnitudes, not just the 700 billion dollars that is officially being spent, but the losses that are embedded in the Federal Reserve: the Central Bank has undertaken unprecedented kinds of activities taking on collateral and the estimates are that there will be large losses on these collateral of the kind that would normally not be accepted by a central bank.

The magnitudes of these transfers to the financial system are really so huge that we almost get numb to the numbers, it being an amount equal to almost all the foreign aid given by all the developed countries to all the developing countries over a period of a decade gives a sense of proportion. And let me emphasise, and if I have time I will come back to it, this was totally unnecessary, there were ways of restructuring the financial system

that did not require these massive bailouts. Simple debt to equity conversions playing by the rules of capitalism would have avoided this. It was simply a political buyout by the financial institutions that bought this massive redistribution of wealth. One of the reasons that I was very sensitive to this issue is that I have seen financial crises in developing countries all over the world and in each of these cases a very similar pattern occurs. Massive redistributions occur to the financial system under the guise of a crisis.

There is a final point that I think I should raise in this context, which is there is a massive moral failure on the part of our bankers and, to a lesser extent, on the part of our politicians. We use words like subprime mortgages that gives it a technical overtone but we should remember that the subprime mortgages were people, people were borrowing and the banks targeted the poorest Americans, and targeted Afro-Americans in particular, targeted them with deceptive practices to induce them to borrow beyond their means. They used securitisation to take these toxic assets, and the evolution from toxic to troubled assets under Paulson and to now Geithner calling them legacy assets should not distract us from the real moral character of what has occurred by our financial system, by our bankers. The politicians allowed it, we knew that there were predatory practices, predatory lending going on, usury, things that ought to be and, in the past, have been outlawed but, under the guise of deregulation, they were allowed and, again, the corrupt political practices allowed it. For instance, Dick Armey, number two in the Republican Party, is on the board of one of the most usurious firms that engages in these predatory lending practices, so we should be clear, there were links between politics and this kind of corruption.

These are some of the problems. Let me just share a view that I do not think that the spring sprouts do indicate that we are about to emerge from this crisis, I think it is going to be much harder, partly because we may be at the end of a freefall, and that is obviously good news, but remember that what sustained the American economy and the global economy was this consumption based on debt. America's savings rate was down to zero, people were borrowing, and that model of consumerism is not going to be resurrected very quickly. If savings even return to a more normal 4 or 5%, let alone the 6-7% that one might have expected, there will be weakness in the American economy and in the global economy.

Let me just make a few remarks about the global response. One aspect of globalisation I talked about before is that economic globalisation has really outpaced the political globalisation, globalisation involves the fact that externalities of actions by one country affect others, America created these

toxic mortgages, it exported the deregulatory philosophy that persuaded others to be willing to buy these toxic mortgages and Americans are very thankful that the Europeans bought so many of our toxic mortgages because if you had not, America's downturn would be even worse, so we thank you. But the consequence is that now this economic downturn has spread. We have to recognise that the international institutions failed and that was not a surprise. The international institutions actually pushed the philosophies that caused the problem. The IMF pushed deregulation. The Financial Stability Forum did not really criticise the deregulatory framework. You have the IMF, one country, that had a veto power, so how are you going to have the source of the problem criticised by an organisation in which they have the veto power. Changing the name from Financial Stability Forum to Financial Stability Board, and having a few more countries on it, is not going to change the outcome. So I am not as optimistic that the initiatives taken at the G-20 meeting are adequate. I also want to raise the question that there are 192 countries in the world, 172 beyond G-20, and there is a certain lack of political legitimacy, I think, of an arbitrary self-selected group even if it does represent a large fraction of global GDP. We have created international institutions with some political legitimacy, the UN, and I would have preferred having this done within the context of the UN system, although there is obviously a need for an improvement in the way the UN system works. But still, moving from the G-8 to the G-20 was a big step forward of recognition that this is a global problem that cannot be handled by the old boys' club that had tried to handle these problems in the past.

Let me just make a couple of very specific remarks about some of the other proposals that went on in the G-20. One of them was a recognition that the developing countries are among those that are going to be most adversely affected and a resolution resolved to do something about it. Two problems: first of all, the money was going to be dispersed, or going to be dispersed mostly through the IMF. We have already talked about the problems of the IMF, the IMF does not have the confidence of many of the developing countries, some of them have said to me very explicitly that they would almost rather be on their deathbed before they will turn to the IMF. The second is that the countries with large amounts of liquid money do not want to turn it over to the IMF, because the IMF does not reflect their views, the values of countries in Asia and in the Middle East. The result of this is, for instance, that I know some African countries, some Asian countries, are going directly to particular donors, to China, to the Middle East, for funds rather than to the IMF and I think it would be much better to create a mul-

tilateral system that is effective. What we need to do is to create new lending facilities. But that is a second point. We do not want to create another debt crisis, we are just emerging from a problem of overburdened debt in the developing countries and so more of the money should be provided in the form of grants rather than debt.

One of the problems with the IMF is that it has associated giving money or lending money with counterproductive pro-cyclical conditions and we saw that in the East Asian crisis, in the Latin American crisis, and this is one of the reasons that countries are reluctant to turn to it. Our UN group is proposing the creation of a new emergency credit facility to try to help deal with the problem. One of the reasons for the global imbalances, in fact, is related to the way the IMF mismanaged the crisis a decade ago. Part of the reason, one of the responses to that mismanagement, very clear on the part of many of the developing countries, is that they decided to build up huge amounts of reserves. The Prime Minister of one of the countries told me he was in the Class of '97, he learned what happens if you do not have enough reserves, you lose your economic sovereignty, so the developing countries have built up trillions of dollars of reserves. Well, it is individually rational but it is an illustration of what is called the 'paradox of thrift'. As they were all saving, it contributed to the global imbalances and a global insufficiency of aggregate demand. This is one of the reasons, but only one of the reasons, why one of the most important recommendations of our UN group is the creation of a global reserve system. We are very interested that this idea has gotten some resonance from China, as was mentioned. The obvious reason why there is some resonance now, the dollar has been the reserve currency, the dollar is yielding very low returns and has a very high risk. The combination of low returns and high risk naturally leads people to say, let's have a different system. Whether we can get a global reserve system to work is another question, but I am actually very optimistic. Finally, let me mention one point that I think that, as one thinks about the failures of central banks, and it is hard not to think about central banks, they failed in several ways. One of the ways is that they did not perform their role as regulators, the important role of making sure that money is lent well, they did not focus on financial stability, they focused too much on inflation and we have now seen the consequence. But I do not think, I am not sure they should be blamed for having too low of an interest rate. The reason why I say that is, low interest rate should have been an opportunity. If the market is working well, you give people the market's low cost of capital, it could have been the basis of massive growth, it could have led to high investment

in real things that would have made the economy more prosperous. The problem was that markets did not work, they did not take the opportunity of low cost of capital, investing it well, rather they took the low cost of capital and used it to exploit poor Americans and the result of that is that we misallocated capital. So I think the burden of the complaint about the low cost of capital should be with the way the market used this opportunity or, I would say, misused or abused this opportunity and the failure of the regulators to stop these abuses. But having low cost of capital could have been, for instance, an opportunity to retrofit our economy, for the Green Economy, for the problems of global warming there are huge needs that our societies have and it is the failure to take advantage of those opportunities that is the question we ought to be thinking about.

PANEL ON GLOBALIZATION

WILFRIDO V. VILLACORTA

I must congratulate Academicians Sabourin and Llach for having provided the dedication and leadership in organizing and integrating the different forums of our Academy on the subject of globalization.

Peace and Justice as Goal of Globalization

The theme of the Academy's work in this field has always reflected the Church's conviction that the primary goal of globalization should be world peace and justice. This goal is, in turn, realizable if we democratize the globalization process so that poverty and inequality in all parts of the world are eventually eradicated. We know that this is a lofty aspiration, but should not history lead to the progressive improvement of the human condition?

Pope Benedict XVI, in his speech on World Peace Day on 1 January 2009, stressed that 'fighting poverty requires attentive consideration of the complex phenomenon of globalization'. He exhorts us, in our dealings with the poor, to clearly recognize that 'we all share in a single divine plan: we are called to form one family in which all – individuals, peoples and nations – model their behaviour according to the principles of fraternity and responsibility'.

Allow me to quote Pope Benedict XVI as he expounds on the task of unifying the world in the pursuit of world peace:

> One of the most important ways of building peace is through a form of globalization directed towards the interests of the whole human family. In order to govern globalization, however, there needs to be a strong sense of global solidarity between rich and poor countries, as well as within individual countries, including affluent ones. A 'common code of ethics' is also needed, consisting of norms based not upon mere consensus, but rooted in the natural law inscribed by

> the Creator on the conscience of every human being (cf. Rom 2:14-15). Does not every one of us sense deep within his or her conscience a call to make a personal contribution to the common good and to peace in society? Globalization eliminates certain barriers, but is still able to build new ones; it brings peoples together, but spatial and temporal proximity does not of itself create the conditions for true communion and authentic peace. Effective means to redress the marginalization of the world's poor through globalization will only be found if people everywhere feel personally outraged by the injustices in the world and by the concomitant violations of human rights.

Challenges of the Global Crises

His was a timely reminder now that humanity is faced with one of the most severe crises in history – the global recession and worsening poverty, a looming pandemic, environmental deterioration, international terrorism, unbridled proliferation of nuclear weapons and other weapons of mass destruction, world food and energy crises, worsening drug trade, human trafficking and other transnational crimes, etc.

The G20 Summit held last month in London focused on the global economic crisis, which the Leaders described as requiring a global solution. The participants that represented all regions of the world consisted of Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the U.S., the U.K. and the European Union.

For the first time, the Leaders declared that 'prosperity is indivisible; that growth, to be sustained, has to be shared; and that our global plan for recovery must have at its heart the needs and jobs of hard-working families, not just in developed countries but in emerging markets and the poorest countries of the world too; and must reflect the interests, not just of today's population, but of future generations too. We believe that the only sure foundation for sustainable globalisation and rising prosperity for all is an open world economy based on market principles, effective regulation, and strong global institutions'.

Likewise, they admitted that 'major failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis'. They pledged to 'take action to build a stronger, more globally consis-

tent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens'.

They all agreed to establish the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires and 'to guard against risk across the financial system; dampen rather than amplify the financial and economic cycle; reduce reliance on inappropriately risky sources of financing; and discourage excessive risk-taking. Regulators and supervisors must protect consumers and investors, support market discipline, avoid adverse impacts on other countries, reduce the scope for regulatory arbitrage, support competition and dynamism, and keep pace with innovation in the marketplace'.

The Leaders recognized the disproportionate impact of the current crisis on the vulnerable in the poorest countries.

Contribution of the Church's Social Doctrine

Long before the current crisis, the Church had called attention to widespread poverty and unequal development among countries and the need to address them. Both the *Populorum Progressio* and the *Sollicitudo Rei Socialis* upheld authentic human development, anticipating what was to become the more advanced form of materialism: untrammeled globalization. They were an indictment of what has been proffered as the supreme end of human society – maximum accumulation of material wealth and unlimited access to goods and services, while ignoring the ever increasing deprivation among most people of the world.

The *Populorum Progressio* decried in the strongest terms possible wasteful expenditure so common among the economic elites of both developed and developing countries:

> When so many people are hungry, when so many families suffer from destitution, when so many remain steeped in ignorance, when so many schools, hospitals and homes worthy of the name remain to be built, all public or private squandering of wealth, all expenditure prompted by motives of national or personal ostentation, every exhausting armaments race, becomes an intolerable scandal. We are conscious of Our duty to denounce it. Would that those in authority listened to Our words before it is too late!

The reminder of Paul VI on development assistance extended by rich countries to the poor countries rings true to this day:

> ...dialogue between those who contribute wealth and those who benefit from it, will provide the possibility of making an assessment of the contribution necessary, not only drawn up in terms of the generosity and the available wealth of the donor nations, but also conditioned by the real needs of the receiving countries and the use to which the financial assistance can be put. Developing countries will thus no longer risk being overwhelmed by debts whose repayment swallows up the greater part of their gains...And the receiving countries could demand that there be no interference in their political life or subversion of their social structures. As sovereign states they have the right to conduct their own affairs, to decide on their policies and to move freely towards the kind of society they choose. What must be brought about, therefore, is a system of cooperation freely undertaken, an effective and mutual sharing, carried out with equal dignity on either side, for the construction of a more human world.

In *Sollicitudo Rei Socialis*, John Paul II wrote that 'the serious problem of the unequal distribution of the means of subsistence originally meant for everybody, and thus an unequal distribution of the benefits deriving from them' take place 'not through the fault of the needy people, and even less through a sort of inevitability dependent on natural conditions or circumstances as a whole'.

The Encyclical likewise paid due attention to the disadvantaged position of developing countries. It stated that 'if the social question has acquired a worldwide dimension, this is because the demand for justice can only be satisfied on that level. To ignore this demand would encourage the temptation among the victims of injustice to respond with violence, as happens at the origin of many wars'.

Sollicitudo Rei Socialis presaged the debacles at the start of the 21st century when it warned that 'peoples excluded from the fair distribution of the goods originally destined for all could ask themselves: why not respond with violence to those who first treat us with violence? And if the situation is examined in the light of the division of the world into ideological blocs a division already existing in 1967 – and in the light of the subsequent economic and political repercussions and dependencies, the danger is seen to be much greater'.

John Paul II deplored the phenomenon of 'super-development' characterized by 'an excessive availability of every kind of material goods for the

benefit of certain social groups' and 'makes people slaves of "possession" and of immediate gratification'.

The global financial crisis had made it clear that globalization should not solely serve the ends of the market and its main beneficiaries in the most developed countries. So much focus is given to competitiveness and deregulation as the primary vehicles of globalization. Such a priority can only lead to the perpetuation of the 'beggar-thy-neighbor' policy that has exacerbated acrimony and inequality among states.

On the contrary, globalization, if it is to contribute to world peace and prosperity, requires regulation. It must allow for an authentic international public space that is geared towards the production of international public goods based on imperatives of economic and social justice. The process entails a more accountable, transparent, participatory and multi-level global governance system. It should come with an institutional architecture for regulating globalization that combines economic efficiency and social equity, with priority given to public interest over private/corporate interests in global governance.

The Church has been a potent voice that has defended poor countries and the poor in rich countries. As Benedict XVI stated in his World Peace Day address this year, 'the Church, which is the "sign and instrument of communion with God and of the unity of the entire human race" will continue to offer her contribution so that injustices and misunderstandings may be resolved, leading to a world of greater peace and solidarity'.

Re-Examining Globalization Premises

We now see the consequences of unbridled capitalism. In its latest regular regional economic briefing at the World Bank/IMF Spring Meetings, the World Bank reported that 'after enjoying a decade of strong growth and poverty reduction, the countries of Eastern Europe and Central Asia (ECA) are now seeing the global economic and financial crisis push almost 35 million people back into poverty and vulnerability, or about one-third of the people that had escaped from it over the last ten years'.

In its study, *Emerging Asian Regionalism,* the Asian Development Bank observes that, while Asia's increasing integration creates a new platform to bolster economic growth, economic integration can also be associated with negative side effects, e.g. greater dislocation of exposed sectors and negative impacts on the poor. The ADB admits that premature financial liberal-

ization combined with inadequate social protection can have serious social repercussions such as what happened during the 1997/98 crisis. Moreover, it warns that persistence of inequality, especially within many countries in the region, may undermine support for regional integration: 'High inequality can limit the impact of economic growth on poverty reduction. It may also hinder growth itself, since the potential of the less fortunate is wasted. It may spur demands for growth-sapping redistributive policies'. Inequality in low-income countries usually has negative effects on growth because it undermines factors that foster growth and make them vulnerable to elite capture. The ADB study confirmed that the rich are better equipped to exploit the opportunities offered by economic change.

In his book, *Making Globalization Work,* Academician Joseph Stiglitz deplores the democratic deficit in the way globalization has been managed. He calls for 'greater concern both for the poor countries and the poor in rich countries, and for values that go beyond profits and GDP'. He lamented that globalization has circumscribed the ability of democratic governments to temper the market economy and has eroded public confidence in global institutions which are perceived as serving the interests of advanced industrial countries. The present global economic crisis bears out this main thesis of his book.

Reality Check for World Leaders

Fortunately, the G20 Summit proved to be more responsive than expected to the sentiments of the international community. U.S. President Barack Obama adopted a more conciliatory stance, saying that 'in a world that is as complex as it is, it is very important for us to be able to forge partnerships as opposed to simply dictating solutions'.

The Leaders pledged to impose stronger restraints on hedge funds, credit rating companies, risk-taking and executive pay. Professor Joseph Stiglitz was quoted by Bloomberg News as having said that the joint communiqué of the Summit repudiated the previous U.S.-led push to free capitalism from the constraints of governments: 'This is a major step forward and a reversal of the ideology of the 1990s, and at a very official level, a rejection of the ideas pushed by the U.S. and others. It's a historic moment when the world came together and said we were wrong to push deregulation'.

It is heartening to know that the conclusions and recommendations of the different workshops and seminars on globalization sponsored by the

Pontifical Academy of Social Sciences have been vindicated by events of the past ten years. We find comfort in the fact that our deliberations were buttressed by the faith and thinking of the leaders and members of our Church and other religious and philosophical traditions, and the wisdom of the members of our ecumenical Academy.

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FINAL STATEMENT

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The XV Plenary Session of the Pontifical Academy of Social Sciences addressed the topic of 'Catholic Social Doctrine and Human Rights' one year after the 60th anniversary of the Universal Declaration of Human Rights, with the following main conclusions:

1. The Cornerstone of the Universal Declaration

The Universal Declaration of Human Rights, considered by Paul VI as one of the United Nations' greatest achievements, has been fundamental in contemporary history to consolidate the collective awareness of the respect for rights and to integrate the grandeur and dignity of the human person in subsequent Declarations. This process has been positively influenced by the Catholic Social Doctrine on human rights, which has become operational even in non-Western cultures and traditions. Especially since the Encyclical *Pacem in terris*, the Catholic Church has offered growing support to the Universal Declaration.

2. Anthropological Bases of Human Rights. Rights and Duties

Within this shifting framework, with the human rights agenda also considering the introduction of 'new rights', it is important to develop the anthropological and moral bases of the rights proclaimed by the Declaration. Indeed, contemporary culture has inherited an anthropocentric view of the world in which the individual is the source of good and evil, while the 'social contract' is an agreement modifiable at will. This view is challenged

by the realistic Aristotelic-Thomistic anthropology adopted by the Social Doctrine of the Church, which considers the human person as being in a constitutive relationship with other people and with Creation, that is, in an order – called natural law – that reason must highlight. The solidity of this anthropology is currently challenged by secular anthropologies with an evolutionistic and constructivistic background. These anthropologies refuse the idea of a common human nature and believe that the human being is a social construct in which only the historicity of the various cultures, the relativity of moral rules, and the centrality of individual choices emerge. In the case of the family and procreation, it implies that maternity and paternity are socially constructive realities that can be redefined freely at each step.

We have come to somewhat abuse the notion of right, intended in a very flexible sense. A right, however, does not derive from a wish or a passion, but is the just measure of what is due to a person in his or her relationship with other people or with the institutions. This measure is correct not because of an arbitrary decision, but because it originates from the natural order of things.

The search for the anthropological bases of the Universal Declaration also motivates us to reconsider the inseparable relationship between rights and duties and the need for a new attention to duties, especially in certain geopolitical and cultural areas where new rights are frequently demanded, but without offering any justification or explaining their connection with duties. Quite a few aspects of the exceptional economic crisis that has befallen our planet can be attributed to a widespread disconnection between rights and duties and to the violation of justice and equity. The central assumption of the Catholic Magisterium is that human rights are void when their ties with duties are broken. The right to life, to a family, and to food translate into real duties for others and society to protect life, encourage the establishment of families, and organise society in such a way that each person may ensure his or her own subsistence through his or her work.

3. Human Rights: Universal, Indivisible and Interconnected

Human rights are inherent in the nature of the human being, created in the image and likeness of God. Even though their elaboration largely derives from Western legal culture, they respond to the nature of each human being and, by virtue of this, are universal. They have been ratified by almost all the states in the world, thus representing a universally shared ethos.

The Declaration, however, is not a list of rights from which each person can pick one or two to strengthen and rewrite according to his or her interests and pragmatic opportunities of the moment. The rights listed in the Declaration are universal, indivisible and interconnected, so that none can be left aside.

4. Synchronic and Diachronic Universality of Human Rights

As mentioned during the Session, we can speak of 'horizontal or synchronic' universality. In all of the world's regions, therefore, the right to life, to a family, to religious freedom, and to food must be guaranteed. The Session studied these in detail.

Peace, environment and development – usually catalogued as third generation rights – are the bases to enable future generations to benefit from first generation rights (civil and political) and second generation rights (economic and social). From this viewpoint we can speak of 'vertical or diachronic universality', in the sense that their implementation enables human rights to be guaranteed not only to present generations but also to future ones.

Third generation rights are not justiciable and respond rather to humanity's noble aspirations, not to be confused with the category of right in the real sense of the word.

Nevertheless, they too need a solid ethical and political basis.

5. Dialogue between Religions and Sciences

Intercultural and interreligious dialogue is an important tool to consolidate and implement the universality of human rights, always keeping their interdependence and indivisibility as a beacon.

Interreligious dialogue contributes to the common commitment towards justice and peace and shows how all religious confessions can aspire to the good of humankind.

The dialogue among different kinds of knowledge is also useful for the common good. This is true in particular today for the dialogue between scientific knowledge and theological knowledge. Indeed, scientific progress ever more frequently proves that the Truth of faith does not go against scientific truth. Natural order and science are not in contrast with each other. One example for all is the first human right, the right to life: the fact that the

embryo is a personal human life is not just an affirmation of the Catholic Church, but also the result of the best current scientific research. Even though, as Benedict XVI underlined, Human Rights are not truths of faith in the proper sense, they gain their full light and confirmation from faith.

6. Human Rights and Economic Development

Studies show that, in the mid term, a democratic structure of government and the respect for human rights have a positive effect on a country's economic development. It would be interesting to know whether the contrary is also true: that is, whether the economic development of a country always brings with it more democracy and better human rights.

The cases of China and India, which were studied in particular detail, are a litmus test of this.

7. Human Rights Crisis, Democracy Crisis, Capitalism Crisis

The Human Rights crisis was caused by several factors.

From a phenomenological point of view, despite being affirmed in numerous international documents, Human Rights are widely violated in many countries in all regions of the world, even those governed by democratic regimes. For example, Catholic Social Doctrine puts religious freedom at the centre of the rights deriving from human nature and is now considered by international charters and documents a human right in all its aspects (individual, collective and institutional). However, it is still denied in various states (a Bishop was arrested in China at the beginning of April) and discrimination against believers continues, particularly in those countries without a Christian tradition, with the novel twist that today, in countries with Christian roots, such as Spain, for example, discriminated people belong to the religious majority.

But there is a deeper crisis. First of all, it is caused by the disconnection of Human Rights from the natural order. Not only is their subjective and individualistic character exasperated, but simple wishes are raised to the status of rights.

Secondly, the effective, concrete capacity of the international community to guarantee their compliance is experiencing a crisis. Therefore, equal attribution of rights continues to correspond to unequal access to the means to obtain it.

Regrettably, the proliferation of international documents and institutions (agencies, organisations, special rapporteurs...) has not always worked to the advantage of protecting these rights as demanded. For example, the 1948 Universal Declaration of Human Rights considered food a human right, but the World Food Summit was not held until 1996 and the Guidelines only appeared in 2004. Even in this field, being late means denying a right. As His Holiness Benedict XVI underlined, in his address to the Pontifical Academy of Social Sciences, the fact that, today, a fifth of humanity still goes hungry 'is a shameful tragedy', which implies international responsibilities just like the problems of water and energy.

8. The Response to the Crisis

There is growing awareness that a global response to the crisis is necessary. This response must gain the maximum consensus possible and must be shared as widely as possible.

From this point of view the central role played by the G20 rather than the G8 is a positive sign, but other means and instruments must be found to guarantee proper representation of the cases of the least developed countries.

Besides, protection of the weakest certainly cannot be left to the antiglobalisation movement, a strongly ideologised spontaneism.

Respect for natural right and promotion of solidarity and subsidiarity with the poorest regions and populations, so as to eradicate social inequalities, is a commitment for all, for those who have decision-making responsibilities at the international or national level, no less than for private players.

9. Ethics and Politics: Democracy and Capital

Above all, it is necessary today to return to the primacy of ethics over politics and of politics over technology.

Politics as the highest form of Christian charity (Paul VI) requires respect for the ethics of responsibility. It is the instrument with which ethics can be reintroduced in the system.

Law or economics alone, without the control and guidance of politics, run the risks of becoming technicalities which, far from guaranteeing the common good, tend to make the rich richer and the poor poorer. The current financial crisis is an example of this: very sophisticated instruments

from a legal and economic point of view have been employed to the detriment of the weakest links in the social chain.

Companies (especially multinational corporations) must be urged (through international regulations, state laws and public opinion campaigns) by international organisations, states and NGOs (that is, by all political decision-makers), to question the role they play in ensuring Human Rights. A few of them are already committed to doing this. The approach must be global: activities as a whole must be ethically inspired and must comply with these criteria all over the world.

The financial bubble that is producing devastating consequences, although it was backed by laws enabling it, is now and ever more adopting analogous aspects to those characterising crimes against humanity. The principle of enumerated powers prevents the issue from being submitted to the international courts, which, besides, would be too late to meet the real needs. However, it is necessary for everyone to become aware of the ethical gravity underlying the current financial crisis. Moreover, in this field too it is necessary to reaffirm both the primacy of politics over technical aspects in an international setting, and the significance of economic and social rights. In respect of these rights a reduction of state control over labour regulations and a lowering of the social standards of protection and implementation are taking place.

10. Globalisation of Solidarity and Responsibility to Protect

Natural law, inscribed in the heart of each human being, calls on everyone, beginning with international organisations, to promote the globalisation of solidarity in view of helping the most fragile areas of the planet, protecting human life, promoting religious freedom, encouraging families, and safeguarding the environment. In this scenario the 'responsibility for the protection of man', which Benedict XVI referred to at the UN General Assembly, concerns all Human Rights. None of them must be bent to special interests, disrespectful of the unity of the human person and the indivisibility of his or her rights.

Using weapons to respond to aggression is possible, provided that it is the last resort after the failure of all possible diplomatic measures. This is part of the responsibility of protecting populations or ethnic groups threatened with genocide or extermination, and of addressing situations of serious humanitarian emergency.

In promoting the globalisation of solidarity, as in exercising the responsibility to protect, we should let Christian hope lead the way.

11. Implementing and Monitoring Human Rights

The importance was pointed out of monitoring human rights violations through international agencies capable of implementing actions for the correction and compliance with violated rights, using all available resources in view of the evolution towards an international human rights law, based on the axiom *dignitas humana servanda est*.

FINAL STATEMENT

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La XV Sessione Plenaria della Pontifica Accademia delle Scienze Sociali ha discusso il tema: "Dottrina Sociale Cattolica e Diritti Umani", ad un anno di distanza dal 60° anniversario della Dichiarazione Universale dei Diritti dell'Uomo. Queste le principali conclusioni:

1. La pietra miliare della Dichiarazione universale

Nell'età contemporanea la Dichiarazione Universale dei Diritti dell'Uomo, considerata da Paolo VI uno dei maggiori titoli di gloria delle Nazioni Unite, è stata fondamentale per il consolidamento nella coscienza collettiva del rispetto dei diritti e per integrare in ulteriori Dichiarazioni la grandezza e la dignità della persona umana. In questo processo ha influito positivamente la dottrina sociale cattolica sui diritti umani, risultata operante anche in culture e tradizioni non occidentali. In specie a partire dalla *Pacem in terris*, la Chiesa cattolica ha offerto crescente appoggio alla Dichiarazione universale.

2. Le basi antropologiche dei diritti umani. Diritti e doveri

In questo quadro in movimento, in cui l'agenda dei diritti umani volge anche verso l'introduzione di 'nuovi diritti', è importante sviluppare le basi antropologiche e morali dei diritti che la Dichiarazione proclama. In effetti la cultura contemporanea è erede di una visione antropocentrica del mondo in cui l'individuo è fonte del bene e del male, mentre il "contratto sociale" è un accordo mutevole delle volontà. A questa visione risponde

l'antropologia realistica aristotelico-tomista assunta dalla dottrina sociale della Chiesa. Essa vede la persona umana inserita in una relazione costitutiva con gli altri e con il creato, cioè in un ordine – chiamato legge naturale – che la ragione deve mettere in luce. Attualmente la solidità di questa antropologia viene sfidata da antropologie secolari a sfondo evoluzionistico e costruttivistico. Esse rifiutano l'idea di una natura umana comune, e ritengono che l'essere umano sia una costruzione sociale in cui emergono la storicità delle culture, la relatività delle norme morali, la centralità delle sole scelte individuali. Nel caso della famiglia e della procreazione ciò implica che maternità e paternità siano realtà costruite socialmente, che possono ad ogni momento essere liberamente ridefinite.

Si è arrivati ad un certo abuso della nozione di diritto, inteso in senso molto elastico. Il diritto non è però frutto di un desiderio o di una passione, ma la misura giusta di ciò che è dovuto alla persona nel suo rapporto con gli altri o con le istituzioni. Questa misura è giusta non per decisione arbitraria, ma perché scaturisce dall'ordine naturale delle cose.

La ricerca sulle basi antropologiche della Dichiarazione universale spinge anche a riconsiderare la relazione inscindibile tra diritti e doveri e la necessità di una nuova stagione dei doveri, in specie in talune aree geopolitiche e culturali in cui vengono richiesti sempre nuovi diritti, di cui non si pone in luce la giustificazione né il loro nesso coi doveri. Non pochi aspetti dell'eccezionale crisi economica che si è abbattuta sul pianeta possono essere ricondotti ad una estesa sconnessione tra diritti e doveri e alla violazione di giustizia ed equità. È assunto centrale del Magistero cattolico che i diritti umani sono svuotati quando si rescinde il loro legame coi doveri. I diritti alla vita, alla famiglia, al cibo si traducono in veri doveri per gli altri e la società di proteggere la vita, di favorire la costituzione delle famiglie, di organizzare la società in tal modo che ognuno possa assicurare la propria sussistenza mediante il suo lavoro.

3. I diritti umani: universali, indivisibili, interconnessi

I diritti umani sono inerenti alla natura dell'uomo, creato ad immagine e somiglianza di Dio. Anche se la loro elaborazione è in gran parte frutto della cultura giuridica occidentale, essi rispondono alla natura di ogni uomo ed in virtù di ciò sono universali. Essi sono stati ratificati da quasi tutti gli Stati del mondo, rappresentando perciò un ethos universale condiviso.

La Dichiarazione non è però una lista di diritti da cui ciascuno sceglie secondo gli interessi e le opportunità pragmatiche del momento uno o più diritti da potenziare e rielaborare. I diritti elencati nella Dichiarazione risultano universali, indivisibili ed interconnessi, di modo che nessuno può essere lasciato da parte.

4. Universalità sincronica e diacronica dei Diritti Umani

Come è stato detto nel corso della Sessione, si può parlare di universalità "orizzontale o sincronica". In tutte le regioni del pianeta vanno pertanto garantiti il diritto alla vita, alla famiglia, alla libertà religiosa, al cibo, dei quali la Sessione ha fatto specifico approfondimento.

Pace, ambiente e sviluppo – usualmente catalogati come diritti della terza generazione – sono la base per consentire alle generazioni future di godere dei diritti di prima generazione (civili e politici) e di seconda generazione (economico-sociali). Da questo punto di vista si può parlare di "universalità verticale o diacronica", nel senso che la loro attuazione consente di garantire i diritti umani non solo alle presenti ma anche alle future generazioni.

I diritti umani di terza generazione non sono "giustiziabili" e rispondono piuttosto a nobili aspirazioni dell'umanità, da non confondere con la categoria del diritto in senso proprio.

Ciononostante anche essi hanno bisogno di una solida base etica e politica.

5. Dialogo tra le religioni e tra le scienze

Il dialogo inter-culturale e quello inter-religioso rappresentano uno strumento importante per consolidare l'universalità dei diritti umani e realizzarli tenendo sempre a stella polare la loro interdipendenza ed indivisibilità.

Il dialogo inter-religioso aiuta l'impegno comune in favore della giustizia e della pace e mostra come tutte le confessioni religiose possono aspirare al bene dell'uomo.

Anche il dialogo tra i saperi è utile al bene comune. Lo è oggi, in particolare, il dialogo tra il sapere delle scienze ed il sapere della teologia. Il progresso scientifico dimostra, infatti, sempre più frequentemente come la Verità della fede non configge affatto con la verità scientifica. Ordine naturale e scienza non sono in contrasto tra loro. Un esempio per tutti relativo

al primo dei diritti umani, il diritto alla vita: che l'embrione sia vita umana personale non è solo un' affermazione della Chiesa cattolica, è anche il frutto della migliore ricerca scientifica odierna. Pur non essendo in senso proprio verità di fede, ha sottolineato Benedetto XVI, i Diritti Umani acquistano piena luce e trovano conferma dalla fede.

6. Diritti umani e sviluppo economico

Gli studi dimostrano come a medio termine un assetto democratico di governo ed il rispetto dei diritti umani incide positivamente sullo sviluppo economico di un paese. C'è da domandarsi, peraltro, se sia vero anche il contrario: cioè se lo sviluppo economico di un paese porti sempre con sé più democrazia e più diritti umani.

I casi della Cina e dell'India, oggetto di speciale riflessione, sono una cartina di tornasole.

7. Crisi dei Diritti Umani, crisi della democrazia, crisi del capitalismo

I fattori che hanno prodotto la crisi dei Diritti Umani sono molteplici.

Da un punto di vista fenomenologico, nonostante le numerose riaffermazioni di essi nelle carte internazionali, i Diritti Umani sono diffusamente violati in numerosi paesi di tutte le regioni del mondo, anche in quelli retti da regimi democratici. Ad esempio la libertà religiosa per la Dottrina Sociale Cattolica è al centro dei diritti scaturenti dalla natura umana ed è ormai considerata diritto umano da carte e documenti internazionali in tutti i suoi aspetti (individuale, collettivo ed istituzionale). Ma essa continua ad essere negata in vari Stati (all'inizio di aprile è stato arrestato un Vescovo in Cina) e continuano le discriminazioni contro i credenti, particolarmente nei Paesi a tradizione non cristiana e con la novità, quanto ai Paesi a radice cristiana, che oggi ad essere discriminati sono coloro che appartengono alla maggioranza religiosa (ad esempio in Spagna).

Ma vi è una crisi più profonda. Essa è, anzitutto, dovuta allo scollegamento dei Diritti Umani dall'ordine naturale. Non solo viene esasperato il loro carattere soggettivo ed individualista, ma semplici desideri vengono eretti a diritto.

In secondo luogo è in crisi l'effettiva e concreta capacità della comunità internazionale di garantirne l'osservanza. All'attribuzione uguale dei diritti continua pertanto a corrispondere l'acceso diseguale ai mezzi per ottenerla.

La proliferazione di documenti ed organismi internazionali (agenzie, organizzazioni, relatori speciali...) non è sempre purtroppo andata a vantaggio della più sollecita tutela. Un esempio relativo al diritto al cibo: la Dichiarazione Universale dei Diritti dell'Uomo del 1948 lo considera diritto umano, ma si deve attendere il 1996 per trovare il World Food Summit ed il 2004 per le Linee Guida. Anche in questo campo arrivare tardi significa negare il diritto. Come ha sottolineato S.S. Benedetto XVI, nel discorso che ci ha rivolto, il fatto che ancora oggi un quinto dell'umanità soffre la fame "è una tragedia vergognosa", che implica responsabilità internazionali; come lo è il problema dell'acqua e dell'energia.

8. La risposta alla crisi

Va crescendo la consapevolezza che per rispondere alla crisi è necessaria una risposta globale che deve trovare il maggior consenso e la maggior condivisione possibili.

Da questo punto di vista il ruolo centrale assunto dal G20 piuttosto che dal G8 è un segnale positivo, ma si devono trovare mezzi e strumenti per garantire una giusta rappresentanza delle ragioni dei paesi meno sviluppati.

La tutela dei più deboli, d'altro canto, non può certamente essere lasciata solamente al movimento no-global, spontaneismo fortemente ideologizzato.

Rispettare il diritto naturale e promuovere la solidarietà e la sussidiarietà con le regioni e le popolazioni più povere, così da eliminare le ineguaglianze sociali, è un impegno per tutti, per coloro che hanno responsabilità decisionali a livello internazionale o nazionale, non meno che per gli attori privati.

9. Etica e politica: democrazia e capitale

Soprattutto è oggi necessario un ritorno al primato dell'etica sulla politica e della politica sulla tecnica.

La politica come forma più alta di carità cristiana (Paolo VI) richiede il rispetto dell'etica della responsabilità. Essa è lo strumento con cui l'etica può essere reintrodotta nel sistema.

Il solo diritto o la sola economia, senza il controllo e la guida della politica, corrono il rischio di tradursi in un tecnicismo che, lungi dal garantire il bene comune, tendenzialmente fa diventare ricchi i più ricchi e poveri i più poveri. Ne è esempio l'attuale crisi finanziaria: strumenti molto sofisti-

cati da un punto di vista giuridico ed economico sono stati impiegati a danno degli anelli più deboli della catena sociale. Anche le imprese (specie le multinazionali) devono essere sollecitate (norme internazionali, leggi statali, campagne di opinione pubblica), dalle Organizzazioni Internazionali, Stati e ONG (cioè da tutti i decisori politici), ad interrogarsi sul ruolo che esse hanno nell'assicurare i Diritti Umani. Già alcune di esse si impegnano in tal senso. L'approccio deve essere globale: l'intera attività deve essere ispirata eticamente e in ogni parte del mondo rispettare tali criteri.

La bolla finanziaria che sta producendo conseguenze devastanti, benché abbia avuto alle sue spalle leggi che l'hanno consentita, assume ormai e sempre più aspetti analoghi a quelli caratterizzanti i crimini contro l'umanità. Il principio di tassatività della fattispecie impedisce di sottoporre la questione a corti internazionali, le quali peraltro arriverebbero ben tardi rispetto alle reali necessità. Ma occorre comunque che tutti prendano consapevolezza della gravità etica sottostante alla odierna crisi finanziaria. Occorre inoltre anche in questo campo riaffermare il primato della politica sulla tecnica all'interno del concerto internazionale, e il rilievo dei diritti economici e sociali, in rapporto ai quali sta accadendo una destatualizzazione degli ordinamenti giuslavoristici e un abbassamento degli *standards* sociali di protezione e implementazione.

10. Globalizzazione della solidarietà e responsabilità di proteggere

La legge naturale, iscritta nel cuore di ogni essere umano, impone a tutti, a cominciare dalle Organizzazioni Internazionali, di promuovere la globalizzazione della solidarietà perché le zone più fragili del pianeta siano aiutate, la vita umana tutelata, la libertà religiosa promossa, la famiglia incoraggiata, l'ambiente rispettato. In questo scenario la "responsabilità di proteggere l'uomo" di cui ha parlato Benedetto XVI all'Assemblea Generale dell'ONU riguarda tutti i Diritti Umani. Nessuno di essi deve essere piegato ad interessi particolari, non rispettosi dell'unità della persona umana e dell'indivisibilità dei suoi diritti.

Opporre le armi alla mano dell'aggressore è possibile, purché sia il rimedio ultimo al fallimento di ogni possibile via diplomatica. Viene qui realizzata la responsabilità di proteggere popolazioni o gruppi etnici minacciati di genocidio o sterminio, e di sanare situazioni di grave emergenza umanitaria.

Nel promuovere la globalizzazione della solidarietà come nell'esercitare la responsabilità di proteggere la speranza cristiana sia la stella polare.

11. Implementazione e monitoraggio dei diritti umani

È stata sottolineata l'importanza di monitorare le violazioni dei diritti umani attraverso agenzie internazionali capaci di porre in atto azioni di correzione e di ristabilimento dei diritti violati (*compliance*), facendo perno su tutte le risorse disponibili e sull'evoluzione contemporanea verso un diritto internazionale dei diritti umani, basato sull'assioma *dignitas humana servanda est*.