

# Even-handedness and the Politics of Human Rights

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Dr. Eric Heinze\*

## INTRODUCTION

Since the end of the Second World War, human rights have gained recognition not only as legal norms, but as criteria of political legitimacy. Today, no assessment of a government is complete without some account of its human rights record.<sup>1</sup> One disadvantage of that elevated status is that human rights can easily become a political football. Perceptions of a manipulated human rights discourse awaken when condemnations for abuses appear to be unfairly “selective”: when one internationally responsible actor is singled out for condemnation, whilst others escape censure for similar abuses.

Consider the Israel-Lebanon conflict of July 2006. In a widely publicized report, the non-governmental organization (“NGO”) Human Rights Watch (“HRW”) denounced the Israel Defence Forces (“IDF”) for cross-border strikes that claimed civilian lives.<sup>2</sup> Some observers, such as Harvard Law School Professor Alan Dershowitz, jumped to criticize the report for overlooking Hezbollah violations.<sup>3</sup> In Dershowitz’s view, HRW had published a one-sided account of human rights violations in order to push a politically biased, i.e., anti-Israeli, agenda. Suppose, only for argument’s

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\* Professor of Law and Humanities, Faculty of Laws, University of London, Queen Mary. *Maîtrise* (Paris 1986); J.D. (Harvard 1991); *Doctoraat* (Leiden 1995). This paper was presented at the Civil Liberties section of the Society of Legal Scholars Conference, University of Durham, September 10–13, 2007. Thanks to Gavin Phillipson and Helen Fenwick for chairing the session, and to Michael Hamilton for acting as respondent. A subsequent presentation was hosted at the *Centenário da Segunda Conferência da Paz, em Haia*, Rio de Janeiro, October 18–19, 2007, with thoughtful comments provided by Charles Gomes. Thanks also to Evert Alkema, Shazia Choudhry, Brice Dickson, Malvina Halberstam, David Harris, Henry Steiner, and an anonymous reviewer, for their valuable comments. Finally, special thanks are due to Dina Awerbuch, Laura Fontaine, Shuan Lue, Nilofer Umar and the staff of the *Harvard Human Rights Journal* for their thoughtful suggestions. In particular, it should be noted that some of my arguments rely upon documents available only on websites. Web sources raise important questions of verification, since site managers can, at any time, delete or revise material. I am grateful to the *HRJ* staff for having verified the web citations and sources, which are accurate at the time of this article going to publication.

1. See generally, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* (1990) (examining historical shifts in the legal and political status of human rights).

2. HUMAN RIGHTS WATCH, *FATAL STRIKES: ISRAEL’S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON* (2006), available at <http://hrw.org/reports/2006/lebanon0806/>.

3. Alan Dershowitz, *What are They Watching?*, N.Y. SUN, Aug. 23, 2006, at 8. Cf., critically, Aryeh Neier, *The Attack on Human Rights Watch*, N.Y. REV. OF BOOKS, Nov. 2, 2006, at 41.

sake, that Dershowitz was right. If HRW's factual allegations against Israel were reliable, would they be rendered illegitimate by HRW's failure to report even-handedly on Hezbollah violations? HRW's right to condemn Israel entails no legal duty to condemn Hezbollah, but does it create a moral duty, or a professional responsibility, to do so?

Likewise, in Europe, one might ask whether it would have been legitimate to criticize British policing in Northern Ireland without criticizing the leadership of the Irish Republican Army<sup>4</sup> or to criticize the Spanish government's repression of separatist violence without criticizing Basque terrorist actions.<sup>5</sup> In a similar vein, *The Economist* has recently asked whether leading organizations like Amnesty International are right to devote as much attention to the isolated abuses of democratic governments as they devote to massive oppression in China, Saudi Arabia, North Korea, or Zimbabwe.<sup>6</sup>

We can state those questions in general terms: what degree of even-handedness should be expected of those who bring accusations about human rights violations? The concept of even-handedness, although mentioned by various writers,<sup>7</sup> has not been theorized in any systematic way. In this article, I shall examine the problem of "selective" condemnation of human rights violations, asking whether, and in what way, even-handedness is required for legitimate human rights advocacy or scholarship. I shall propose both a general *legitimacy thesis* and a more systematic three-pronged *legitimacy test* as tools for determining appropriate levels of even-handedness in the condemnation of human rights violations.

In Part I, I begin by examining some basic concepts relevant to the analysis. I provide a general statement of my legitimacy thesis as a foundation for a more systematic legitimacy test to be developed in the remainder of the article. In Part II, I set forth the first prong of the legitimacy test. The first prong serves to ascertain four core elements of human rights claims, which then become relevant to the more substantive inquiry into their legitimacy. I call those four elements: "territory selection," "issue selec-

4. For over thirty years, the Northern Ireland controversy faced historically unprecedented scrutiny under the European Convention on Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953). See generally, e.g., *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978); *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) (1988); *Brannigan v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993).

5. See, e.g., U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Spain*, ¶¶ 3, 10–12, 17–18, U.N. Doc. CCPR/C/79/Add.61 (Apr. 3, 1996).

6. See *Many Rights, Some Wrong*, *Economist*, Mar. 22, 2007, at 75. See, e.g., Paul Reynolds, *Who Violates Human Rights the Most?*, BBC News, Nov. 10, 2004, [http://news.bbc.co.uk/1/hi/world/middle\\_east/4000385.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4000385.stm), for similar concerns about even-handedness.

7. See, e.g., Aryeh Neier, Letter to the Editor, *Not All Human Rights Groups Are Equal*, *N.Y. Times*, May 27, 1989, at 22. See also, generally, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 *N.Y.U.L.Rev.* 1971 (2004); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations, and the Idea of International Civil Society*, 11 *EUR. J. INT'L L.* 91 (2000).

tion," "victim selection," and "temporal selection." In Part III, I introduce the second prong of the test, which involves a fifth, more controversial, type of selection, called "perpetrator selection." I argue that, in most cases, it is perpetrator selection that will raise *prima facie* questions about the legitimacy of selective condemnations of human rights violations. In Part IV, I turn to the third and most important prong, where, in most cases, legitimacy will be determined. Drawing on a variety of examples, I argue that perpetrator selection becomes illegitimate when condemnations of human rights violations effectively recapitulate the position of a contentious party to a recognized political, social, or cultural conflict that is extraneous to the content of the relevant human right. In Part V, having completed an examination of the three prongs, I provide a concise statement of the test.

## I. BASIC CONCEPTS

Concerns about even-handedness in the application of human rights law are not new. Whenever human rights abuses emerge from a broader political, social, or cultural controversy, condemnation of one party to the controversy tends to provoke suspicion as to whether other parties are receiving equal scrutiny.<sup>8</sup> Any ideal of even-handedness then easily descends into tit-for-tat squabbling.

Is there any way to rescue that ideal? Can we develop a concept of even-handedness that would serve not to fuel politicized human rights discourses, but to overcome them? In this section, I shall suggest that if a useful concept of even-handedness is to be developed, some basic definitions, along with some initial notion of "legitimacy," will aide the inquiry. At this initial stage, some of the definitions I propose may appear unduly schematic; however, my only aim for now is to clarify terms that will be used. Concrete examples will be introduced as the analysis progresses in Sections II - IV.

### A. "Accusers" and "Perpetrators"

I shall begin by asking, first, which organizations or individuals condemn human rights violations and, second, whom those organizations or individuals condemn for those violations. I shall define the former under an inclusive concept of "Accuser" and the latter under an inclusive concept of "Perpetrator."

*The Accuser.* I shall use the term "Accuser" broadly to denote *any entity that attributes responsibility for human rights violations to any state or other internationally responsible actor.* On that definition, an Accuser may be: (1) a non-governmental organization ("NGO"); (2) an international or intergovern-

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8. See *supra* notes 6-7 and accompanying text.

mental organization (“IGO”), or organ thereof; (3) a government, or organ thereof; (4) a public or private institute for research or public affairs; (5) the media or member thereof; or (6) an individual politician, diplomat, scholar, or concerned private citizen.

I shall use the upper-case “A” to make it clear that I am using the term “Accuser” only in the sense defined here,<sup>9</sup> and not with any further legal or moral overtones that the term “accuser” might carry in other contexts. For example, it would be misleading to call bodies such as the European Court of Human Rights or the U.N. Human Rights Committee “accusers” in the colloquial sense, as their tasks largely encompass the assessment, under some assumption of neutrality, of accusations brought by others. Under category (2), however, those bodies can be “Accusers,” in the limited sense that their functions include attributing responsibility for human rights violations to states or other internationally responsible actors.<sup>10</sup> In this article, the broader concept of “Accuser” will be important, as even an international body formally charged with making neutral pronouncements on human rights, such as the former U.N. Human Rights Commission, can be shown to have acted illegitimately through political bias.

*The Perpetrator.* I shall use the term “Perpetrator” to denote *any state or other*<sup>11</sup> internationally responsible actor to whom responsibility for human rights violations can be attributed, assuming a reliable factual record. Here, too, I shall use the upper-case form to emphasize that this definition sets forth the only sense in which the term “Perpetrator” will be used. Again, this definition may appear abstract when stated in such formulaic terms, but the definition will be further illustrated with examples. For the time being, two points are germane to that definition.

First, “assuming a reliable factual record” is by no means a straightforward affair. Conflicting factual claims commonly emerge out of controversial situations. Well-known questions of legitimacy in human rights law and practice arise from methodological questions of reliable fact-finding; political bias can certainly manifest itself through one-sided or otherwise unreliable fact-finding.<sup>12</sup> My focus in this article, however, will not be on

9. I shall use the pronoun “it” unless the Accuser in a specific case is an identified individual.

10. By analogy, in a traditional domestic judicial proceeding, particularly under a system of adversarial justice familiar in common law systems, we would not intuitively refer to a court or a judge as an “accuser,” as that term would more appropriately describe someone playing the role of prosecutor or plaintiff. Nevertheless, if we were to extend the meaning of the term “accuser” to describe *any* entity that attributes responsibility for violation of a legal obligation to a responsible actor, then a court or a judge could be called an “accuser” whenever it rendered judgment against any such actor—as long as it was clear that we were using the concept entirely as a term of art, in contrast to its traditional usage.

11. See, e.g., Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56 (1999), for the responsibilities of non-state actors under international human rights law. See generally, ANTONIO CASSESE, *INTERNATIONAL LAW* 124–50 (2d ed. 2005); IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57–67 (6th ed. 2003); MALCOLM N. SHAW, *INTERNATIONAL LAW* 140–95 (4th ed. 1997).

12. See, e.g., HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 747–53 (3d ed. 2008).

the fact-finding stage of human rights work, but on the condemnation stage. We shall see that inappropriate political bias may emerge even where there is no serious or relevant dispute about an overall factual record.

Second, the phrase “can be” is of particular importance in the definition. The problem I am examining is that an Accuser may attribute responsibility for violations to some Perpetrators, while ignoring one or more equally abusive Perpetrators for reasons of bias. In other words, responsibility in the ignored cases “can be” attributed to those Perpetrators in principle, but the Accuser has failed either to do so at all, or to do so even-handedly.

### B. *Limits of Legitimacy Testing*

Some questions about legitimacy have nothing to do with specific allegations of human rights violations. For example, a human rights organization whose stated positions are otherwise sound may lose credibility because its employees pocket charitable donations, or because it is wasteful or poorly managed, despite its good intentions.<sup>13</sup> In this article, however, I shall not examine issues of funding, membership, internal structure, or specific operation. My legitimacy test will stand only as a *necessary*, not as a *sufficient*, condition for the legitimacy of allegations of human rights violations. A policy or organization must pass the test only as one necessary criterion of legitimacy. Other criteria, such as efficiency or absence of corruption, are also important, but will not be examined here.

The test I shall propose need not be officially adopted in order to be useful. I shall not principally be urging that the test be adopted by international organizations, to be used, for example, in determining when to assign NGO observer status. The test could, perhaps, be used in that way, but I shall not explore the pragmatics of such a step. Certainly, the aim of the test is not to recommend that those who fail should be silenced.<sup>14</sup> Rather, I prefer to liken the test to a code of ethics adopted by professionals as a model of best practice. Indeed, in some cases, it would simply require that NGOs re-consider how they write their websites and other published materials. I am more interested in promoting a critical approach to the discourse and values of human rights than in dishing out prizes and penal-

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13. For an example of standards adopted by leading NGOs, see, e.g., INTERNATIONAL ADVOCACY NON-GOVERNMENTAL ORGANISATIONS (IANGO) WORKSHOP, INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS ACCOUNTABILITY CHARTER (2006), available at <http://www.ingoaccountabilitycharter.org/> (last visited 1/19/07).

14. Some observers have asked whether an assessment of illegitimacy would mean that the Accuser in question should not have the “right” to make the claim in question. I have no such consequences in mind. A claim, however legitimate or illegitimate it may be, may certainly be made incident to prevailing rights of free speech. The aim of the legitimacy test is not to regulate freedom of speech, but to promote substantive rigor and fairness in claims made about human rights violations. Elsewhere I have defended an “absolutist” approach to free speech. See Eric Heinze, *Viewpoint Absolutism and Hate Speech*, 69(4) MOD. L. REV. 543, 577–78 (2006) [hereinafter *Viewpoint Absolutism*]; Eric Heinze, *Towards the Abolition of Hate Speech Bans*, in RELIGIOUS PLURALISM AND HUMAN RIGHTS 295–309 (Titia Loenen & Jenny E. Goldschmidt eds., 2007) [hereinafter *Abolition*].

ties. In Part IV, I shall use the legitimacy test to criticize certain organizations, not with the aim of having them shunned, but in the hope of urging them to review their positions.

### C. "Legitimacy"

Even if some Accusers appear to be serving one-sided political agendas, it might be said that their voices should nevertheless be heard for the sake of inclusiveness. Consider the following argument, which could be called a *pluralist thesis*:

Human rights are inextricably linked to politics. Even the most conscientious human rights advocates inevitably harbor political preferences. As long as their claims display reasonable factual diligence and accuracy, they should be considered. For example, Catholics in Northern Ireland may well highlight Protestant abuses, whilst Protestants may highlight Catholic abuses. To expect each group to be precisely as harsh with itself as it is with the other is to expect super-human perfection. We should not seek to condemn or condone those political perspectives, but to listen to all of them in order to act with as much information as possible.<sup>15</sup>

The pluralist thesis is important, as it suggests grounds for skepticism about the entire enterprise of legitimacy testing. The pluralist thesis seems to promote inclusiveness and broad-mindedness, values that have driven much of the international human rights movement. On that view, accusations of human rights violations should be examined on their own merits, without being subjected to any over-arching "test" of legitimacy. That pluralist approach might also be embraced in the spirit of a "marketplace theory" of ideas, on the view that the broadest possible airing of views creates the best circumstances under which accuracy about human rights violations may emerge, i.e., through unconstrained scrutiny applied in open and frank debate.

In this article, however, I shall suggest that the pluralist approach, though certainly important in the human rights movement, is ultimately question-begging, and therefore fails as a satisfactory means of evaluating the legitimacy of human rights claims and arguments. The pluralist approach fails to identify the criteria that must be applied within an "open and frank debate" in order to yield the conclusion that some accusations of human rights violations lack even-handedness. For example, the pluralist thesis might rightly suggest that it was open and frank scrutiny that had

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15. I posit this statement in a purely hypothetical vein, and not as a statement of any position formally adopted by any IGO, NGO, government, or individual.

led to the dissolution of the U.N. Human Rights Commission,<sup>16</sup> on grounds of the Commission's lack of even-handedness.<sup>17</sup> However, the pluralist thesis would still fail to explain the criteria that were required or presupposed in order to warrant that finding. I shall argue that the value of pluralism is maintained only insofar as some minimum level of even-handedness underlies accusations of human rights violations. The relationship between the values of pluralism and legitimacy is not one of mutual exclusion, but of priority. Accordingly, the legitimacy test imposes articulated requirements of even-handedness that must be fulfilled. Once they are met, we can still admit a high degree of pluralism, i.e., of human rights claims made from diverse political, ethical, and cultural perspectives. While pluralism brightens the path of human rights, the journey must begin with legitimacy.

I shall propose both a *legitimacy thesis* and a *legitimacy test*. The aim of the thesis, which I develop first, is to set forth, in succinct and general terms, a minimum standard of even-handedness. However, a thesis stated in general terms is not always obvious as to its particular applications. Therefore, once that basic statement of the legitimacy thesis is in place, I shall then proceed, in the remainder of the article, to set forth the elements of the legitimacy test.

A problem with thinking about even-handedness in general terms is that any obvious or intuitive notion is likely to be unsatisfactory, and must be refined if it is to be of any use. Consider, for example, the following concept of legitimacy, which, albeit stated in somewhat technical language, might be said to reflect an everyday or intuitive notion:

*Intuitive Concept of Legitimacy.* An Accuser acts illegitimately when it brings accusations only against one or more Perpetrators to whom its political objectives are opposed, while failing to condemn Perpetrators of the same kinds of abuses, but with whom it shares political objectives.

That concept expresses the kind of criticism that Dershowitz levelled against HRW. In three ways, however, it is inadequate. We may consider them in turn, as each will help us to progress from an inadequate intuitive concept to a more precise and useful one.

### 1. *The element of duration*

One difficulty with the intuitive concept is that it provides no sense of whether the Accuser is to be assessed for each isolated accusation, or must instead be evaluated in terms of its overall approaches to a situation over

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16. See G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006) (establishing the Human Rights Council); Comm'n Hum. Rts. Res. 2006/2, *Procedural Resolution on the Closure of the Work of the Commission*, U.N. Doc. E/CN.4/2006/L.2 (Mar. 24, 2006) (closing the work of the Commission).

17. See *infra* Section IV.E.

some longer period of time. As we shall see, one problem with Dershowitz's criticism was his failure to note that HRW, in its general approach to the Middle East, has *not* focused only on Israeli conduct. HRW has routinely condemned Israel's enemies for violations, casting doubt on the claim that HRW acts upon an anti-Israeli bias. (I shall return to that point in Section IV.C.) Accordingly, we can begin to revise the intuitive concept as follows:

*First Revised Concept of Legitimacy.* An Accuser acts illegitimately when it brings accusations only against Perpetrators to whom its political objectives are opposed, while failing—*not just sporadically, but systematically, over a sufficiently long period of time*—to condemn Perpetrators of the same kinds of abuses, but with whom it shares political objectives.

Of course, phrases like “systematically” and “sufficiently long” are not amenable to scientific precision. However, at least they improve somewhat upon the intuitive concept, which had entirely overlooked them. (In Sections III and IV, we shall see that those phrases acquire clearer meaning in concrete cases.)

## 2. *The element of “politics.”*

A further problem with the initial, intuitive concept arises from the phrase “political objectives.” Arguably, every position taken on a substantive human rights norm is in some sense “political.” For example, to condemn a state for censorship of political dissent, or for lax protection of women's rights, or for persecution of a minority group, is certainly “political” insofar as it censures one kind of state conduct and expressly or tacitly urges adoption of another. Imagine that an organization like Save the Children were to select “problem” Perpetrators, perhaps Romania or Pakistan, for special attention based on evidence of unusual levels or modes of abuse of children in those states. The choice to focus on such states would certainly be “political,” as special criticisms of Romania or Pakistan would inevitably implicate broader political conduct within such states. However, it would not render the organization's work illegitimate if that choice were based on the specific content of the human rights norms being applied (i.e., if it were based on identifiable problems arising in those states from children's right to life, rights against torture or cruel, inhuman, or degrading treatment, etc.).

But now suppose that Save the Children, systematically and over a sufficiently long period of time, had condemned only the abuses of children in Northern Ireland by Protestant paramilitary groups, but not by Catholic groups, despite evidence that Catholic groups had committed equal or greater levels of abuse. Such a choice would not raise questions of illegitimacy merely because the organization was “acting politically” (again, any



Accuser in some sense “acts politically” whenever it condemns any Perpetrator). Rather, questions of legitimacy would arise if Save the Children seemed to be selecting Perpetrators for condemnation on political grounds *extraneous to the specific content of the rights it was purporting to apply*.

In this article, then, *political bias* will be taken to refer to *political objectives extraneous to the human rights norms that the Accuser purports to be applying, but which systematically, over a sufficiently long period of time, guide the Accuser in selecting Perpetrators for condemnation*. To be sure, the term “extraneous,” like the terms “systematically” and “sufficiently long,” may be controversial, and will become clearer later through examples. For now, in order to continue developing our basic concept of legitimacy, we can further revise the intuitive concept as follows:

*Second Revised Concept of Legitimacy.* An Accuser acts illegitimately when it brings accusations only against Perpetrators to whom its political objectives are opposed, *insofar as those objectives are extraneous to the norms it purports to apply*, while failing—not just sporadically, but systematically, over a sufficiently long period of time—to condemn Perpetrators of the same kinds of abuses, but with whom it shares political objectives.

### 3. *The element of “promissory estoppel”*

Finally, there is a third problem with the original, intuitive concept. I shall suggest that perfect even-handedness is neither possible nor desirable for the fair and effective promotion of human rights law. Diplomats, activists, and scholars must constantly make choices about which rights or victims they wish to examine, and not all such choices are illegitimate. For example, we do not accuse Save the Children of illegitimacy for focusing “only” on children, and overlooking abuses of adults; indeed, we are likely to praise that mandate as a means of mobilizing efforts and resources effectively around an important and clearly defined aim. Nowadays, it is not humanly possible for any Accuser, even acting in the most conscientious way, to devote equal attention to all issues, victims, and Perpetrators throughout the world (even assuming universal agreement on what qualifies as “issues,” “victims,” and “perpetrators,” which is by no means self-evident). Accordingly, I shall argue in Section II that legitimacy in human rights advocacy does *not* require a strictly even-handed application of all human rights norms to all conceivable Perpetrators. Rather, I shall argue that the onus of legitimacy is actually lighter and easier to bear: legitimacy merely requires that the Accuser act even-handedly *in applying its own declared human rights mandate*.

Adopting a “mandate” commonly means that an Accuser (particularly an institutional one, like an IGO or NGO) holds itself out to the public as being concerned with some expressly or tacitly identifiable *class* of viola-

tions,<sup>18</sup> and therefore ordinarily holds itself out as being committed to acting or commenting upon them. That class may be broad (e.g., all human rights set forth in the Universal Declaration of Human Rights) or narrow (e.g., protection of free speech for journalists). Different Accusers choose different mandates, and are generally recognized as rightly enjoying full freedom to do so.

I shall argue, however, that once an Accuser holds itself out to the public as being concerned with some identifiable class of violations, and wishes that we, the public, recognize its policies, reports, or claims, based on that mandate, then we, in turn, are entitled to expect that the Accuser avoid systematic political bias (as I have defined that term above) in pursuing its own declared mandate. In support of that thesis I would note, for example, the work of One World Trust (“OWT”), itself an NGO, which scrutinises the aims and activities of other NGOs “in order to make [the latter] answerable to the people they affect.”<sup>19</sup> OWT’s mandate suggests that more is required than an NGO’s own say-so if the latter is to be demonstrate a credible commitment to human rights.

As noted in the previous example, there is nothing illegitimate about an organization like Save the Children selecting a “problem area” like Romania or Pakistan, based on unusual levels or modes of abuse in those states, as assessed on the basis of the specific human rights being invoked. However, once Save the Children chooses to hold itself out to the world—once it defines its own mandate—as being concerned generally with the human rights of children, and wishes that we, the public, recognize that mandate, questions of illegitimacy would arise if the organization appeared to be selecting Perpetrators for condemnation on grounds of a political bias that is extraneous to Save the Children’s own declared commitment to the human rights of children generally.

At this point, one might raise the following objection: “Once we have conceded the general freedom of the Accuser to choose its own mandate—to choose for itself the human rights with which it will be concerned—we cannot then deny it the freedom to decide for itself which Perpetrators it wishes to condemn. After all, just because some Accuser condemns some Perpetrator, that never obliges us to acquiesce in that act of condemnation, or to do so entirely on the Accuser’s own terms. We are always free to reject or to modify the Accuser’s claims. We are always free to reach our own conclusions.” That objection effectively recapitulates the pluralist thesis, placing the burden entirely on us, the public, to decide which claims we will accept or reject, relieving the Accuser of any onus of even-handedness.

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18. We can imagine human rights campaigns or organizations focused entirely on one individual or situation, such as, for example, the house arrest of Aung San Suu Kyi, leader of Burma’s National League for Democracy. But the focus here will be on Accusers with mandates extending to classes of potential victims.

19. See One World Trust, *OWT Strategic Plan* (Feb. 21, 2005) available at <http://www.oneworldtrust.org/pages/download.cfm?did=213&page=1> (last visited 1/19/07).

I am arguing, however, that human rights advocacy pre-supposes a kind of “promissory estoppel” principle: arguably, there was never any obligation on any given Accuser to become involved in human rights, or to commit itself to any specific human rights mandate, *at all* (even the original member states of the United Nations were never obliged to give it a human rights mandate, or indeed to create the organization at all). However, once an Accuser does come into existence, once it holds itself out to the world as being concerned with some identifiable class of rights or victims, and once it expects to be heard in the positions it takes pursuant to that mandate, then we, in turn, are justified in expecting it to pursue its own mandate in good faith. The Accuser is perfectly free to adopt a very narrow mandate, if either its specific social concerns, or its available resources, warrant no broader one.<sup>20</sup> It acts illegitimately, however, by purporting to be concerned with an entire class of violations, while systematically condemning Perpetrators of those violations on political grounds extraneous to the relevant human rights norms. (Of course, we might reject the Accuser’s declared mandate altogether. We shall see, however, that in practice such a scenario is rare. The real concern is with a *prima facie* legitimate mandate that implies an even-handedness which the Accuser does not in fact embrace).

In freely adopting its own mandate, the Accuser effectively invites us to judge it according to (or, in the terms of promissory estoppel, to “reasonably rely upon”) its own declared and freely undertaken aims. Admittedly, the analogy to promissory estoppel should not be pushed too far. There is no way in which the Accuser could be legally bound to execute any specific performance merely through adopting a general human rights mandate. Rather, insofar as an Accuser seeks our recognition of its claims, it becomes appropriate for us, in return, to ask that that the Accuser make those claims in a vein of good-faith adherence to the human rights norms it purports to apply. Certainly, we remain free to accept, to reject, or to modify any claim made by any Accuser. My whole aim in this article, however, will be to investigate the criteria we should apply in reaching such a conclusion.<sup>21</sup>

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20. See *infra* text accompanying notes 45–46.

21. The promissory estoppel principle might seem vulnerable to a second objection, which could be called the “loophole objection.” It would run like this: “The promissory estoppel principle is easy to dodge. All the Accuser needs to do to appear legitimate is to adopt a mandate that is overtly *not* even-handed. For example, if Save the Children had declared from the outset that it was only going to examine children in Protestant areas of Northern Ireland, then we could ‘hold it to that mandate’ without the organization appearing illegitimate for failing to examine children in Catholic areas. Yet Heinze’s concept of legitimacy seems scarcely useful if it allows such an enormous loophole.” On closer examination, however, that loophole, if it is one at all, is not very big. If Save the Children were openly to make such a statement, it would show itself to be a fundamentally different kind of organization than the one it has in fact been and has always held itself out to be. The whole aim of Save the Children, like most legitimate human rights NGOs, is to condemn violations of human rights falling within a specified class (i.e., children’s rights), *without* further narrowing its mandate in ways irrelevant to the specific content of the norms with which they are concerned. (In Section IV.D I shall examine some organizations that explicitly identify themselves with overtly partisan positions, and therefore do *not* hold them-

In a nutshell, we are justified in saying to an IGO, NGO, diplomat, activist, or scholar, for example, “If you *say* ‘universal,’ then you should *mean* ‘universal.’ If you are vindicating universal human rights, or universal children’s rights, or universal rights to be protected from torture or discrimination, then show that commitment in your actual acts of condemnation. And if you do *not* mean ‘universal,’ then do not say it. Be honest about which persons or interests you are genuinely vindicating, and do not use the discourse of human rights in a universalist way if it is only the human rights of some, and not of all, that you are pursuing.” Again, that was what Dershowitz was, in effect, saying to Human Rights Watch. Our task will be to determine whether HRW is guilty as charged. For now, the intuitive concept of legitimacy can be further refined to produce the final legitimacy thesis that I shall be adopting in this article:

*Third Revised Concept of Legitimacy.* An Accuser acts illegitimately when (a) it claims to condemn an entire class of violations, while (b) bringing accusations only against Perpetrators to whom its political objectives are opposed, insofar as those objectives are extraneous to the norms it purports to apply, thereby (c) failing—not just sporadically, but systematically, over a sufficiently long period of time—to condemn Perpetrators of the same kinds of abuses, but with whom it shares political objectives.

For the sake of economy, I began this section by assigning specific meanings to the terms “Accuser” and “Perpetrator.” However, for a more general (albeit slightly more cumbersome) formulation, which does not rely on those terms, the legitimacy thesis can also be stated as follows:

*Legitimacy Thesis.* A state, organization, or individual purporting to promote human rights acts illegitimately when (a) it claims to condemn an entire class of violations, while (b) bringing accusations only against states or internationally responsible actors to whom its political objectives are opposed, insofar as those objectives are extraneous to the norms it purports to apply, thereby (c) failing—not just sporadically, but systematically, over a sufficiently long period of time—to condemn states or internationally responsible actors with whom it shares political objectives for the same kinds of abuses.

As we have seen, even that statement of the thesis will require further clarification. Under (a), we must now examine how a mandate—i.e., a “class” of violations to investigate, which an Accuser holds itself out as

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selves out to be human rights organizations. They expressly identify themselves as political action or lobbying groups, and cannot be accused of illegitimate human rights advocacy when they never held themselves out as being human rights organizations, or as being specifically concerned with any kind of systematic application of recognized international human rights norms.)

having adopted—is ascertained. As to (b) and (c), we must seek further clarity on the concept of “political objectives” that are “extraneous” to an Accuser’s declared mandate, and the concept of condemnation that lacks even-handedness “systematically, over a sufficiently long period of time.” A more systematic approach, then, is now in order. That will be the task of the legitimacy test, which I shall also articulate in three steps or “prongs.” Admittedly, division of the test into “prongs” may run the risk of appearing artificial or mechanical. However, my aim, not unlike John Rawls’ notion of “lexical ordering,”<sup>22</sup> will be to provide a means of identifying several distinct elements of legitimacy, and the relationships among them, in a coherent fashion. A complete restatement of the test appears at the conclusion of this article in Part V.

## II. FIRST PRONG: THE MANDATE PARAMETERS

On the estoppel principle, then, an Accuser is generally free to determine its mandate; once it wants us to recognize its positions, however, we can and should hold it to its own declared mandate. The first step of the legitimacy test will be to examine what we mean by a “mandate,” what a mandate’s ingredients are, and what it means for an Accuser to hold itself out as having adopted it.

To adopt a mandate is to make limiting choices about the kinds of human rights the Accuser purports to vindicate, or the way in which the Accuser purports to vindicate them. In other words, to adopt a mandate is to engage in “selectivity”—in a selective approach to human rights. We have seen from the hypothetical example of Save the Children that there are many forms of selectivity. Most need not raise serious questions of legitimacy, such as the postulated selections of Romania or Pakistan, if such states can be shown to raise concerns specifically relevant to norms that the organization purports to vindicate. Many kinds of selectivity are inevitable, and even desirable.

Legitimate selectivity allows a constructive division of labor. Save the Children obviously “selects” children as the victims relevant to its mandate (or, as I shall explain in this Section, its mandate is “victim-selective”), not because it scorns the human rights of adults, but because children’s circumstances differ from those of adults. Similarly, the NGO Article 19 is selective in focusing on the issue of free speech (or, as I shall explain, its mandate is “issue-selective”), not because it denies the importance of other rights, but because, in its words, “[f]reedom of expression is a fundamental human right which underpins all other rights, including life.”<sup>23</sup> Legal in-

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22. JOHN RAWLS, *A THEORY OF JUSTICE* 37–38 (2d ed. 1999).

23. Article 19 - About, <http://www.article19.org/advocacy/index.html> (last visited 1/19/07).

struments, too, such as the Genocide Convention<sup>24</sup> and the Convention Against Torture<sup>25</sup> are often "issue-selective," drafted not to eclipse other human rights, but to devote detailed attention to certain kinds of abuses.

Selectivity, then, can take different forms. In this Section, I shall set forth the first prong of the legitimacy test by examining various kinds of selectivity involved in adopting a mandate. I shall first identify some generally uncontroversial kinds, called "territorial selectivity," "issue selectivity," "victim selectivity," and "temporal selectivity." I shall argue that passing the first prong of the test is easy: Accusers are free to select their territorial, issue, victim, and temporal parameters, subject only to very minimal criteria. We shall see that, taken alone, it would be rare for one single form of selectivity to undermine legitimacy. Nevertheless, the first prong shows how an Accuser holds itself out to the world as having adopted a particular mandate, and which expectations of good-faith adherence to that mandate it thus invites. After reviewing those four basic kinds of selections in turn, in parts III and IV I shall examine how those selections combine with a more controversial form of selectivity, called "Perpetrator selectivity," to warrant assessments of legitimate and illegitimate claims.

#### A. Territorial Selectivity

Under the United Nations Charter, membership in the organization is open to all of the states that participated in its founding<sup>26</sup> and "to all other peace-loving states which . . . are able and willing to carry out [Charter] obligations."<sup>27</sup> Member states are deemed to be bound by the general purposes of the organization,<sup>28</sup> which include respect for human rights,<sup>29</sup> as subsequently defined by the Universal Declaration of Human Rights ("UDHR")<sup>30</sup> and the numerous treaties, resolutions, and decisions promulgated by various U.N. bodies. In practice, concepts such as "peace-loving" and willingness to carry out Charter obligations have rarely posed barriers to membership. A cardinal aim of the U.N. has been to include as many states as possible, in the hope that even states performing poorly may be induced to improve through U.N. influence.<sup>31</sup> Virtually all states are currently members. Accordingly, the U.N. provides a model of an organization

24. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277.

25. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

26. U.N. Charter art. 3.

27. *Id.* at art. 4, para. 1.

28. *Cf.* G.A. Res. 2734 (XXV), ¶ 1, U.N. Doc. A/RES/25/2734 (Dec. 16, 1970) (reaffirming the "universal and unconditional validity of the Purposes and Principles of the Charter . . .").

29. U.N. Charter, art. 1, paras. 3, 55-56.

30. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (adopted as an authoritative but not binding resolution).

31. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 159-60 (Bruno Simma et al. eds., 1995).

with a territorial reach that is almost—or perhaps the better word is *ideally*—limitless, or universal.<sup>32</sup> Within that universal mandate, specialized bodies may be created for territorially restricted issues, such as the international tribunals for Rwanda or the former Yugoslavia, as established by the Security Council. Generally speaking, however, the leading U.N. human rights bodies have sought territorially unrestricted mandates.

In contrast to the U.N., regional organizations, by definition, formulate their mandates through territorial selection. The Charter of the Organization of American States limits its membership to “American states.”<sup>33</sup> It is by no means unthinkable that the Council of Europe might, in a few decades’ time, admit states like Morocco, Tunisia, or Israel, if such states sought membership; however, while reaching beyond the bounds of Europe as traditionally recognized, the organization would still be far from territorially universal. Among the major intergovernmental organizations, then, only the U.N. is conceptually universal in its territorial human rights mandate.

Governmental and non-governmental organizations divide along similar lines. For example, under the statute of Amnesty International, the organization “urges *all* governments to observe the rule of law, and to ratify and implement human rights standards . . . .”<sup>34</sup> Similarly, the U.S. State Department reports cover all states (excluding the U.S. itself, although analyses and positions on national affairs are available under separate headings). The U.K. annual reports take the same approach. Those approaches claim for themselves a broad, arguably universal, territorial mandate. By contrast, an NGO like the Kurdish Human Rights Project reflects strong territorial selectivity, insofar as its focus remains on the principle areas of origin of Kurdish communities. The NGO describes itself as “[w]orking to protect and promote the human rights of all persons living throughout the Kurdish regions of Iran, Iraq, Syria, Turkey and the former Soviet Union.”<sup>35</sup>

It would be unusual for a state’s, organization’s, or individual’s territorial scope as such to be illegitimate. Under the first prong of the legitimacy test, only blatantly random or arbitrary territorial selection would raise real concerns, and there do not seem to be many such cases in practice. Rather, we shall see that the real doubts about territorial selectivity arise when, once a general territorial mandate has been selected, only certain Perpetrators *within* that mandate are condemned, while abuses by others are either ignored or downplayed on grounds of political bias. We shall see, then, that doubts about territorial selectivity arise in conjunction with Perpetrator selectivity.

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32. *See id.* at 159.

33. Charter of the Organization of American States arts. 4–5, Apr. 30, 1948, 119 U.N.T.S. 3.

34. Statute of Amnesty International art. 3, *as amended* Aug. 11–17, 2007, <http://www.amnesty.org/en/who-we-are/accountability/statute-of-amnesty-international> (emphasis added).

35. Kurdish Human Rights Project - About KHRP, <http://www.khrp.org/content/view/15/29/> (last visited Dec. 9, 2007).

### B. Issue Selectivity

Although the drafters of the U.N. Charter considered including a list of human rights, consensus in favour of doing so was lacking. A decision was taken to include codification of human rights in separate instruments.<sup>36</sup> Thus, without enumerating specific human rights, the Charter includes among the organization's purposes "promoting and encouraging respect for human rights and for fundamental freedoms for all."<sup>37</sup> In principle, then, the black letter of the Charter, just as it is in principle territorially universal, can also be called "issue-universal," because anything that counts as a human right is potentially included (as confirmed, for example, in the practice of the U.N. Sub-Commission on Human Rights which, in recent years, has been disposed to consider any plausible human rights issue<sup>38</sup>). Similarly, the U.N. Economic and Social Council is designated, *inter alia*, to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all,"<sup>39</sup> again, without the term "human rights" being more narrowly-defined in the Charter itself. Instruments like the Genocide Convention and the Convention against Torture are, in comparison, strongly issue-selective. Similarly, no current NGO mandate qualifies as issue-universal. Even the most prominent and territorially universal NGOs do not become involved with all rights violations.

In view of the breadth of current human rights norms, it is difficult to imagine many limits to issue selection. For example, organizations for economic development or for environmental protection can now be seen as promoting recognized values of the human rights movement.<sup>40</sup> The only obvious challenge on grounds of issue selection would arise where the substantive norms embraced by a policy expressly contradict core human rights in ways that allow no plausible reconciliation. For example, in a 2003 press report, Massoud Shadjareh, then Chairman of the Islamic Human Rights

36. See, e.g., A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 26–27 (4th ed. 1996).

37. U.N. Charter, art. 1, paras. 3, 55–56.

38. As its earlier name implied, the Sub-Commission, originally called the Sub-Commission on Prevention of Discrimination and Protection of Minorities, was originally established to meet a narrower mandate, under U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Human Rights and the Environment*, Annex 1, *Draft Principles on Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) prepared by Fatma Zohra Ksentini. Cf. Health, Development, Information and Policy Institute, <http://hdip.org/> (last visited Dec. 9, 2007); Weltwirtschaft, Ökologie & Entwicklung (World Economy, Ecology & Development), <http://www.weed-online.org/> (last visited Dec. 9, 2007); Center for Human Rights and Environment, <http://www.cedha.org/en/> (last visited Dec. 9, 2007).

39. *Id.* at art. 62, para. 2.

40. See, e.g., Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Human Rights and the Environment*, Annex 1, *Draft Principles on Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) prepared by Fatma Zohra Ksentini. Cf. Health, Development, Information and Policy Institute, <http://hdip.org/> (last visited Dec. 9, 2007); Weltwirtschaft, Ökologie & Entwicklung (World Economy, Ecology & Development), <http://www.weed-online.org/> (last visited Dec. 9, 2007); Center for Human Rights and Environment, <http://www.cedha.org/en/> (last visited Dec. 9, 2007).



Commission (“IHRC”) (which I shall examine shortly in greater detail), welcomed the Nigerian high court victory of Amina Lawal, a woman who received worldwide media attention after having been sentenced to death by stoning for breaching an Islamic law against fornication (*zina*). Shadjareh claimed that “*Hudood* punishments under the banner of shariah in a secular state are unacceptable and cannot be the starting point for the implementation of shariah.”<sup>41</sup> He narrowed that view, however, in stating, “A woman who is *not married* at the time of accusation of fornication does not deserve capital punishment.”<sup>42</sup> The IHRC further states the view of the “majority” of schools of thought, according to which the appropriate punishment would have been “a certain number of lashings.”<sup>43</sup>

That view, which the IHRC at no point challenges, cannot be called a compromise position or a reconciliation of Islam with international human rights law. It is a categorical rejection of core human rights: namely, against cruel, inhuman, or degrading treatment (if not torture), as well as, arguably, privacy or freedom of conscience or religion.<sup>44</sup> Nevertheless, as with territorial selectivity, instances of illegitimacy based solely on issue selectivity seem rare. We shall see that, as with territorial choices, serious doubts about issue selectivity arise when, once a general issue mandate has been selected, only certain Perpetrators *within* that mandate are condemned for violations, on grounds of political bias. Here too, the serious doubts about issue selectivity will arise in conjunction with Perpetrator selectivity.

### C. Victim Selectivity

It might be easy to confuse victim selectivity (e.g., “torture victims”) with issue selectivity (e.g., “torture”), but in some cases they are distinct. For example, an NGO by the name of Aboriginal Deaths in Custody Watch Committee of New South Wales (“ADCWC-NSW”) calls itself “an indigenous community organisation monitoring the treatment of Aboriginal people in police and justice custody.”<sup>45</sup> Accordingly, territorial and issue

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41. Press Release, Islamic Human Rights Commission [hereinafter IHRC], Nigeria - Lawal Appeal Victory Welcomed by Islamic Group (Sept. 25, 2003), <http://ihrc.org.uk/show.php?id=768>.

42. *Id.* (emphasis added).

43. Press Release, IHRC, Injustice in the Name of Islam (Aug. 22, 2002), <http://ihrc.org.uk/show.php?id=378>.

44. Even if Islamic institutions imposing *Hudood* punishments upon individuals are not acting under color of state authority, any legitimate human rights organization today must recognize established doctrine to the effect that responsibility for human rights is attributable under international law to non-state as well as state actors. See *supra* text accompanying note 11. To its credit, the IHRC does maintain that unduly selective applications of Shariah amount to “miscarriages of justice” when “only being implemented against the poor.” Shadjareh notes, “In particular, it is the total abuse of the whole concept of Shariah for a secular government to only implement the ‘*huddud*’ in a corrupt and unjust society and claim it to be an implementation of Islamic justice.” The press release continues, “Amina Lawal has become the latest victim in the case of local sectarian politics being played out in the name of shariah.” Press Release, IHRC, Injustice in the Name of Islam, *supra* note 43.

45. Justice Action Australia - Watch Committee <http://www.justiceaction.org.au/oldWebsite/actNow/Campaigns/Indig/adwcwnsw.html> (last visited Dec. 9, 2007).

selection for the organization's mandate are clear. The territory is limited to New South Wales, and the organization focuses not on all human rights, but on those concerned with police or judicial custody. Taken alone, those two very narrow selections could apply to anyone in custody in New South Wales. The ADCWC-NSW, however, further limits its mandate through its concern with Aboriginals, who have a long history of oppression in Australia.<sup>46</sup>

Victim-selectivity is not rare. As to territory, the mandate of the International Lesbian and Gay Association, for example, is universal: "The International Lesbian and Gay Association is a world-wide network of national and local groups dedicated to achieving equal rights for lesbian, gay, bisexual and transgender and intersex (LGBTI) people everywhere."<sup>47</sup> As to issues, its mandate is also broad, encompassing a full catalogue of civil rights and liberties, covering abuses such as torture, murder, freedom of speech, unjust detention, and discrimination.<sup>48</sup> However, the victims the organization focuses on are generally limited to sexual minorities.<sup>49</sup>

An organization may, even in good faith, make conflicting mandate statements. As noted earlier, the organization's actual practice must be taken into account. For example, the Islamic Human Rights Commission states that it "campaign[s] for justice for all peoples regardless of their racial, confessional or political background."<sup>50</sup> On closer inspection, that statement, suggesting a broad victim mandate, is not strictly true. The organization's website includes an incident reporting service addressed to any person feeling he or she may be a "victim of *anti-Muslim* harassment or discrimination."<sup>51</sup> The website also includes hundreds of press releases setting forth positions issued by the organization since its founding. With rare exceptions (e.g., criticism of the attacks on New York and Washington of September 11, 2001<sup>52</sup>), condemnations only concern harms to Muslims or Muslim interests.

Here too, however, the IHRC cannot be faulted for a *de facto* victim selection that is narrower than the one set forth in its general mission statement. Save the Children and Article 19, too, would no doubt willingly issue occasional statements endorsing all human rights, for everyone, every-

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46. The ADCWC-NSW mission statement provides further insight into that choice: "The Watch Committee was formed in June 1987 following concerns and voices about the rate of Aboriginal deaths in custody, the circumstances about the deaths, and the vague explanations offered by police and prison officials." *Id.*

47. International Lesbian and Gay Association (ILGA), <http://www.ilga.org/aboutilga.asp> (last visited Dec. 9, 2007).

48. *Id.* at <http://www.ilga.org/> (last visited Dec. 9, 2007).

49. *Id.* See generally, ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 243-53 (1995).

50. IHRC, <http://www.ihr.org.uk/> (last visited Dec. 9, 2007).

51. IHRC - Incident Reporting Form, <http://www.ihr.org/incidents/> (last visited Dec. 9, 2007) (emphasis added).

52. Press Release, IHRC, *IHRC Condemns Attacks in New York & Washington; Period of Calm Urged; IHRC Asks Media to Stop Talking up Blind Retribution* (Sept. 12, 2001), <http://ihr.org.uk/show.php?id=33>.

where, even while their focus remains on specific issues and victims. The IHRC can legitimately say it is no different when it focuses on abuses of Muslims in the belief that special attention or expertise is required, but without thereby denying abuses committed against others. Confusion arising from discrepancies between apparent and actual victim mandates can, then, be avoided as long as we bear in mind the possibility of de facto victim mandates, ascertainable through an organization's actual practice. As with territorial and issue selectivity, then, we shall see that choices about victim selectivity are generally legitimate, but, as we shall see in Part III, doubts arise when, once a general victim mandate has been selected (e.g., torture victims), only certain Perpetrators are condemned for violations, on grounds of political bias.

#### *D. Temporal Selectivity*

Special tribunals, such as those for Rwanda, the former Yugoslavia, or for Nazi war criminals at Nuremberg, are concerned with abuses committed only after one specified time and before another. For the most part, however, temporal selectivity is rare, as most human rights policies and organizations are concerned with ongoing abuses. While misuse of temporal selectivity can be imagined in theory (e.g., governments or actors accused of conduct falling outside of the recognized time frame), they do not appear to arise much in practice.

#### *E. Overview of First Prong*

Two important points emerge from these four modes of selection. First, they provide an understanding of what is meant by a "class" of violations in the legitimacy thesis. An Accuser adopts or assumes an entire class of places, issues, victims, or time periods whenever it expressly or tacitly adopts (or "holds itself out as being concerned with") some identifiable territorial, issue, victim, or temporal selection. Second, we see that the first prong of the test rarely poses problems in practice. Accusers are largely free to focus their work by territory, issue, victim, and time frame. In that way, the aforementioned pluralist thesis is not wholly abandoned. It will simply need to be supplemented by the legitimacy thesis. Those four selections need only fulfill minimal criteria, such as avoiding a blatantly random territorial mandate, or avoiding outright contradictions with basic human rights norms, which is usually easy to do. We can now examine the more controversial element of Perpetrator selectivity.

### III. SECOND PRONG: PROPORTIONATE PERPETRATOR SELECTIVITY

Territorial, issue, victim, and temporal selections could be called "analytic" or "descriptive": they are expressly or tacitly presupposed by the

very existence of a human rights mandate. Even a policy that does not accuse anyone of anything, but merely states rules, principles, or recommendations, would presuppose those four elements. Consider the proposition, "All workers in the EU have a right to one-month paid holiday leave." Barring any hidden or extraordinary factors affecting meaning or context, that statement could ordinarily be taken to presuppose (a) a territorial mandate extending throughout the EU, (b) an issue mandate extending to conditions of employment, (c) a victim mandate extending to workers, and (d) an unlimited temporal mandate.

By contrast, the element of *Perpetrator Selectivity* is "accusatory" or "prescriptive," arising only where responsibility for violations is expressly attributed to named states or actors. From the black letter of the proposition, "All workers in the E.U. have a right to one-month paid holiday leave," there is no way of knowing which E.U. states actually *will* be condemned for violations. However, assuming no other relevant factors, simply by its nature as a human rights norm cast in general terms, it does presuppose a tacit accusatory or prescriptive element, namely, that Perpetrators *should* be selected solely in proportion to otherwise reliably-attested levels of violation (again, in this article, I am not examining questions of fact-finding methods or standards). More precisely, Perpetrators should be selected solely in proportion to violations as measured by the mandate freely adopted by any Accuser applying the norm—i.e., solely in proportion to the norm's own correlative territorial, issue, victim, and temporal parameters—and not by any normative objectives extraneous to those parameters (in other words, not by any objectives extraneous to the specific content of the norm being applied).

Unsurprisingly, then, Perpetrator selectivity will provide the key criterion of legitimacy. The legitimacy of Perpetrator selection depends on how the Accuser selects Perpetrators within the framework of its own territorial, issue, victim, and temporal parameters. Accordingly, the test's second prong can be stated as follows: *The Accuser must select Perpetrators in proportion to each Perpetrator's responsibility for violations, as defined by the Accuser's own declared territorial, issue, victim, and temporal parameters.* Certainly, standards like "in proportion" or "responsibility" are themselves subject to differences of opinion and viewpoint.<sup>53</sup> Accordingly, my focus will be on *gross and systematic disproportion* between Perpetrator selectivity and the Accuser's own adopted mandate parameters.<sup>54</sup> My concern is with levels of disproportion about which there can be no reasonable disagreement, as when, for

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53. See, e.g., Stanley Cohen, *Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims*, 18 HUM. RTS. Q. 517, 528–29 (1996) (discussing various methods used to assign blame for human rights violations); see generally STEINER, ALSTON & GOODMAN, *supra* note 12, at 1420–32.

54. The concept of "gross and systemic disproportion" is intended to mirror that of "gross and systemic" violations of human rights which has long counted among the principle criteria for attention to human rights abuses within the UN. See, e.g., U.N. Econ. & Soc. Council [ECOSOC] Res. 1503 (XLVIII) ¶ 1, 48th Sess. Supp. No. 1A, U.N. Doc. E/4832/Add.1 (May 27, 1970).

example, even Accuser itself does not seriously dispute the disparity, but, rather, seeks only to justify it on grounds irrelevant to actual occurrence of human rights violations.

What counts, then, as “proportionate” and “disproportionate” Perpetrator selectivity? Consider again the Islamic Human Rights Commission (“IHRC”). The IHRC is a U.K.-based NGO established in 1997. It has a prominent voice, is widely regarded as moderate, and is extensively cited in the mainstream press.<sup>55</sup> The IHRC’s mission statement reads as follows:

{The Islamic Human Rights Commission is} an independent, not-for-profit, campaign, research and advocacy organization based in London, UK. We foster links and work in partnership with different organizations from Muslim and non-Muslim backgrounds, to campaign for justice for all peoples regardless of their racial, confessional or political background.

Our aims are manifold, and our inspiration derives from the Qur’anic injunctions that command believers to rise up in defence of the oppressed. IHRC volunteers and campaigners . . . share in the common struggle against injustice and oppression. Our work includes submitting reports to governments and international organizations, writing articles, monitoring the media, cataloguing war crimes, producing research papers, taking on discrimination cases and so on.

Aside from our countries index we have a number of country specific projects and research areas e.g. Chechnya, Mauritius, Turkey, Palestine and Nigeria. Our issue related work includes researching war crimes, campaigning for prisoners of faith and other prisoners held for their beliefs, campaigning against religious discrimination and persecution, as well as many other issues

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55. For recent coverage, see, e.g., Reynolds, *supra* note 6; JON SILVERMAN, *How Far Can Freedom of Speech Go?*, BBC NEWS, July 18, 2007, <http://news.bbc.co.uk/1/hi/uk/6236730.stm>; Tania Branigan, *No 10 Accused of Condoning Islamophobia over E-petition*, GUARDIAN UNLIMITED, May 16, 2007, <http://www.guardian.co.uk/religion/Story/0,,2081073,00.html>; *Islam’s Young Radical Front*, BBC NEWS, Jan. 29 2007, <http://news.bbc.co.uk/1/hi/uk/1787322.stm>; *Flag-burning Law Criticised*, BBC NEWS, Oct. 29, 2006, <http://news.bbc.co.uk/1/hi/uk/6096810.stm>; Anthony Browne, *I Would Prefer Women Not to Wear the Veil at All, Says Straw*, TIMES ONLINE, Oct. 7, 2006, <http://www.timesonline.co.uk/tol/news/politics/article664168.ece>; Mark Bridge & Agencies, *Ministers Give Schools Right to Ban Veils*, TIMES ONLINE, Mar. 20, 2007, [http://www.timesonline.co.uk/tol/life\\_and\\_style/education/article1544812.ece](http://www.timesonline.co.uk/tol/life_and_style/education/article1544812.ece); *Veils Harm Equal Rights*, BBC NEWS, Oct. 11, 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/6040016.stm](http://news.bbc.co.uk/1/hi/uk_politics/6040016.stm); *Government “Aided Israeli Terrorism,” Human Rights Group Tells Court*, GUARDIAN UNLIMITED, Aug. 22, 2006, <http://www.guardian.co.uk/israel/Story/0,,1855929,00.html>; Alex Kumi, *Removal of Men from Holiday Flight Condemned*, GUARDIAN UNLIMITED, Aug. 21, 2006, <http://www.guardian.co.uk/airlines/story/0,,1854722,00.html>; Daniel McGrory & Richard Ford, *Extremist on Deportation List is Linked to Islamic Advice Group*, TIMES ONLINE, Sept. 1, 2005, <http://www.timesonline.co.uk/tol/news/uk/article561157.ece>; *Anri-Terror Legislation Condemned*, BBC NEWS, Aug. 16, 2005, <http://news.bbc.co.uk/1/hi/uk/4156218.stm>; *Muslims Making Headlines Debate*, BBC NEWS, Mar. 16, 2005, <http://news.bbc.co.uk/1/hi/uk/4348709.stm>; DOMINIC CASCIANI, *Muslims Launch Rights Guide*, BBC NEWS, Sept. 25, 2004, <http://news.bbc.co.uk/1/hi/uk/3687948.stm>.

in and across areas as far afield as the UK to China, Bosnia to Papua New Guinea, Europe to the United States of America and South Africa.<sup>56</sup>

Application of the first prong is straightforward. Naming all corners of the globe, and not suggesting any exceptions either in the mandate itself or in its hundreds of reports and press statements, the IHRC's territorial mandate is presumptively universal.<sup>57</sup> Although, as we have seen, its de facto victim mandate is limited to Muslims, that is itself a very broad victim mandate, in view of the size, diversity, and territorial dispersal of the global Muslim population. Nor is the mandate strongly issue selective: while making no detailed reference, say, to social or economic rights, it does refer to a broad range of civil and political rights,<sup>58</sup> and its many published reports confirm that interest.<sup>59</sup> Finally, the mandate's temporal parameters are unlimited. Accordingly, although cases such as the aforementioned Lawal affair can raise questions of legitimacy in particular instances, the IHRC's broadly stated territorial and issue mandates, combined with its de facto victim mandate, could broadly be presumed to pass the first prong of the test.

However, serious questions arise under the second prong, in view of the IHRC's Perpetrator selectivity. Within its hundreds of press statements, very few condemn governments in those Muslim or predominantly Muslim states that have strongly Muslim-identified governments. For example, Turkey is the only predominantly Muslim country routinely criticized, mainly for actions it has taken pursuant to its comparatively *secular* norms.<sup>60</sup> In other words, although the IHRC does criticize governments in Muslim states,<sup>61</sup> it is often for conduct perceived as too secular or too pro-Western.<sup>62</sup> Certainly, Turkey, like many states, can be, and has been, criticized on many counts.<sup>63</sup> However, the overall level of freedom and democracy in Turkey today cannot seriously be compared to the highly oppressive re-

56. IHRC - About Us, <http://ihrc.org.uk/about.php> (last visited Dec. 9, 2007).

57. I have been unable to ascertain, either from the IHRC website or elsewhere, and despite a query sent to the organization, whether the reference to a "countries index" in the quoted passage is intended to have any precise content. However, nowhere in the IHRC's ample archive of published documents is any territorial limitation in evidence.

58. IHRC - About Us, *supra* note 56.

59. IHRC - Reports, <http://ihrc.org.uk/section.php?section=4&page=1> (last visited Dec. 9, 2007).

60. See generally IHRC press releases on Turkey, IHRC - Press Releases, <http://ihrc.org.uk/section.php?section=2&page=1> (last visited Dec. 9, 2007).

61. See, e.g., IHRC Briefing, Uzbekistan - Torture, the Language of Repression (Jan. 13, 2003), <http://www.ihrc.org.uk/show.php?id=500>.

62. See, e.g., Press Release, IHRC, IHRC Condemns Andijan Massacre as Natural Product of Western Support of Uzbek Dictatorship (May 17, 2005), <http://www.ihrc.org.uk/show.php?id=1381>; IHRC Briefing, Azerbaijan and the Hijab Ban: A New Kemalist Nightmare? (Feb. 8, 2003), <http://www.ihrc.org.uk/show.php?id=527>.

63. See, e.g., Amnesty Int'l, *Turkey*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/europe-and-central-asia/balkans/turkey>.

gimes of, say, Libya,<sup>64</sup> Saudi Arabia,<sup>65</sup> Syria,<sup>66</sup> or Turkmenistan.<sup>67</sup> The IHRC criticizes Pakistan several times for its hard line on Muslim clerics<sup>68</sup>—again, a policy perceived as too *secular*—but pays little attention, say, to child executions, or to the government’s failures in punishing widespread rapes or honor killings.<sup>69</sup>

Rarely do IHRC press releases condemn many of the Muslim regimes in which Muslims themselves—the supposed concern of IHRC—have faced serious abuse, such as Algeria, Iran, Morocco, Syria, Tunisia, or Turkmenistan.<sup>70</sup> Rarely do IHRC press releases condemn, say, female genital mutilations in Muslim West African communities<sup>71</sup> or in Egypt, Oman, Yemen, or the United Arab Emirates.<sup>72</sup> Whilst some recent IHRC “alerts” do mention mistreatment of Ethiopian, Somali,<sup>73</sup> and Eritrean<sup>74</sup> refugees in Libya, little information is provided about Libyan repression of its own citizens.<sup>75</sup> Neil Hicks, comparing Turkey and Egypt as the two larger regional Islamic powers, notes Turkey’s “substantial progress in the human rights field over the last two decades,” while Egypt’s record of gross abuses has remained generally constant during that same period.<sup>76</sup> Yet, compared to its focus on Turkey, the IHRC has paid little attention to Egypt. The IHRC rightly criticizes France for imposing limits on wearing the *hijab*;<sup>77</sup> rarely, however, does it criticize Muslim states or practices that force girls

64. See, e.g., Amnesty Int’l, *Libya*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/middle-east-and-north-africa/north-africa/libya>.

65. See, e.g., Amnesty Int’l, *Saudi Arabia*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/middle-east-and-north-africa/west-gulf/saudi-arabia>.

66. See, e.g., Amnesty Int’l, *Syria*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/middle-east-and-north-africa/east-mediterranean/syria>.

67. See, e.g., Amnesty Int’l, *Turkmenistan*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/europe-and-central-asia/eurasia/turkmenistan>.

68. See, e.g., Press Release, IHRC, Pakistan: Execution Under Anti-Terrorist Act Scheduled for Monday, (Aug. 31, 1999), <http://www.ihr.org.uk/show.php?id=173>; Press Release, IHRC, Pakistan: Fears for Human Rights in Pakistan (July 31, 1997), <http://www.ihr.org.uk/show.php?id=167>.

69. See, e.g., Amnesty Int’l, *Pakistan*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/asia-and-pacific/south-asia/pakistan>.

70. See generally reports of U.N. treaty-based committees, available at Univ. of Minn. Human Rights Library, U.N. Documents, <http://www1.umn.edu/humanrts/un-orgs.htm> (last visited Dec. 9, 2007); Amnesty Int’l, <http://www.amnesty.org> (last visited Dec. 9, 2007); Human Rights Watch, [www.hrw.org](http://www.hrw.org) (last visited Dec. 9, 2007).

71. See, e.g., Amnesty Int’l, *Somalia*, in REPORT 2007 (2007), available at <http://www.amnesty.org/en/region/africa/east-africa/somalia>.

72. See, e.g., Amnesty Int’l, *What is Female Genital Mutilation?*, [http://www.amnesty.org/en/alfresco\\_asset/df016baa-b3ef-11dc-b033-974214843c58/act770061997en.pdf](http://www.amnesty.org/en/alfresco_asset/df016baa-b3ef-11dc-b033-974214843c58/act770061997en.pdf) (last visited Jan. 3, 2008).

73. Press Release, IHRC, Libya: All Ethiopian and Somali Refugees Deported (July 16, 2007), <http://www.ihr.org.uk/show.php?id=2837>.

74. Press Release, IHRC, Alert: Eritrean Refugees in Libya Facing Torture/Forcible Return to Their Homeland (July 12, 2007), <http://www.ihr.org.uk/show.php?id=2836>.

75. Amnesty Int’l, *supra* note 64.

76. Neil Hicks, *Does Islamist Human Rights Activism Offer a Remedy to the Crisis of Human Rights Implementation in the Middle East?*, 24 HUM. RTS. Q. 361, 363 (2002).

77. See, e.g., Press Release, IHRC, France Urged to Scrap Headscarf Ban (Jan. 11, 2004), <http://www.ihr.org.uk/show.php?id=900>.

or women to wear it.<sup>78</sup> The problem is not that the IHRC might have failed to report any particular incident—as noted earlier, we cannot expect every NGO to report every incident arising from its mandate—but that, *contrary to its own declared issue and victim mandates*, it has largely declined to report countless extreme abuses committed against Muslims by Perpetrators that strongly self-identify as Muslim.

Aside from those criticisms mostly directed against governments such as those in Turkey or other states seen as overly secular or pro-Western, IHRC criticism has generally focused on abuses against Muslims in non-Muslim regimes including Australia, Britain, Bulgaria, Cambodia, France, India, Israel, Macedonia, Mauritius, Moldova, Nigeria, Serbia, Singapore, South Africa, Tanzania (with respect to Zanzibar), Thailand, and the United States.<sup>79</sup> In other words, with very few exceptions—certainly not enough to approach any kind of proportionality between its Perpetrator selectivity and its declared victim mandate—actual IHRC condemnations remain largely limited to those abuses against Muslims that are committed by Perpetrators that are either Western, strongly secular, or distinctly pro-Western on key policy issues. The IHRC grossly and systematically ignores the rights of large numbers of victims falling within its own declared mandate, on grounds of norms or values extraneous to the parameters of its own adopted mandate, and thus extraneous to the normative content of the human rights it purports to be applying.

On the whole, the more oppressive an Islamic state is, and the more it officially propagates pro-Islamic doctrines or institutions, the less likely the Islamic Human Rights Commission has been to criticize it. That approach offends any concept of fairness in the application of human rights. The IHRC's patterns of Perpetrator selectivity emerge, then, as highly disproportionate to its own declared mandate parameters. With respect to some of the world's most oppressive states, which count Muslims among their primary victims, an organization holding itself out as concerned with the rights of all Muslims remains largely silent. That disparity between what the IHRC promises, on behalf of large numbers of victims falling within its own mandate, and what it delivers, raises serious questions about the IHRC's honesty towards the victims whose rights it claims to advocate, and ipso facto towards the human rights norms which it purports to embrace, and towards the international human rights community. There is a substantial disproportion between the Perpetrators that IHRC actually selects for condemnation, and the full set of Perpetrators that *would* qualify under the organization's own selected territorial, issue, victim, and temporal man-

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78. See, e.g., Amnesty Int'l, *Justice, Not Excuses*, <http://web.amnesty.org/actforwomen/justice-3-eng> (last visited Oct. 10, 2007) (reporting on several dozen schoolgirls who were killed or injured in a school fire when religious police prevented them from leaving, and prevented rescue attempts, because the girls were not wearing headscarves).

79. IHRC, *supra* note 50.



date. That disproportion cannot plausibly be seen as marginal or borderline. It is pervasive, fundamentally defining most of the IHRC's press and policy statements and civic activities since its founding.

The criterion of *substantially disproportionate Perpetrator selectivity* can be stated as follows: there is substantially disproportionate Perpetrator selectivity when the Accuser grossly and systematically condemns only a limited number of Perpetrators, out of a greater number that would qualify under the Accuser's own selected territorial, issue, victim, and temporal parameters. As we shall see under the third prong, however, even substantially disproportionate Perpetrator selectivity, albeit suggesting lack of even-handedness, does not, in itself, suffice to suggest illegitimacy—i.e., to suggest that the lack of even-handedness rises to an illegitimate level. In some cases, it may merely reflect insufficient time, resources, or expertise to condemn all Perpetrators qualifying for condemnation under the Accuser's own stated parameters. We turn now to the third prong in order to determine when substantially disproportionate Perpetrator selectivity is admissible. That analysis will also allow us to examine some other organizations and policies.

#### IV. THIRD PRONG: NON-PARTISANSHIP

Under the final, and key, prong of the test, I shall now argue that it is permissible in some circumstances for Perpetrator selectivity to be substantially disproportionate to an organization's own mandate parameters; however, for a human rights mandate to retain legitimacy, substantially disproportionate Perpetrator selectivity must not effectively recapitulate a position within a recognized political, social, or cultural conflict that lies outside the confines of the norm applied.

As we have seen, countless human rights stances take sides in broader political, social, or cultural conflicts. It is not uncommon or surprising for organizations, however broad their territorial mandates may be, to pay particular attention to the countries in which they are located, and thus to devote disproportionate attention to local circumstances. For example, the Dutch branch of the International Commission of Jurists, while attentive to global and European violations, focuses much attention on the Netherlands—in contrast to, say, the Netherlands Helsinki Committee, which pays limited attention to the Netherlands, focusing instead on Central and Eastern Europe and territories of the former Soviet Union.<sup>80</sup> Those kinds of Perpetrator selectivity might at first appear to fail the second prong, but are not illegitimate insofar as they would rarely fail the third prong: it would be difficult to identify generally recognized political, social, or cultural conflicts characterized by distinctly “pro-Dutch” or “anti-Dutch” positions

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80. Evert Alkema brought these examples to my attention.

(although evidence of more broadly pro-Western and anti-Western—and *in that sense* pro-Dutch or anti-Dutch—positions might indeed merit third-prong scrutiny). In virtually all cases, it is the third prong that will determine the legitimacy of a mandate. In the remainder of this discussion, I shall now illustrate the full application of the test through examples.

### A. *The Islamic Human Rights Commission*

The IHRC is highly Perpetrator selective along the strongly partisan lines that have emerged throughout the post-colonial period between political, social, or cultural forces commonly identified as Western or secular, and those commonly identified with Islamic religion or communities. For example, the IHRC expressed no serious condemnation of figures such as Hafez Al-Assad or Saparmurad Niyazov, who perpetrated massive abuses against Muslims under the most repressive regimes. The IHRC occasionally criticized Saddam Hussein while he was still in office, but typically did so in the wholly incidental vein of arguing that some non-Muslim figure or regime, usually Israel or Ariel Sharon, should be deemed equally heinous.<sup>81</sup>

Although the IHRC does claim to condemn anti-Jewish conduct or utterances,<sup>82</sup> its occasional references to the Jewish Holocaust are made largely in the context of equating Israel with Nazi Germany.<sup>83</sup> No such analogy to Nazi Germany is drawn to any Muslim figure or state, even those that have claimed far more victims. Terms such as “Nazi,” “Nazism,” or “Holocaust” are commonly used to depict treatment of Muslims by non-Muslims (as disclosed through the IHRC website’s search engine),<sup>84</sup> but rarely to characterize even the most brutal and totalitarian Muslim regimes in their treatment of their own Muslim citizens.

The IHRC endorses re-adoption by the United Nations of the principle that “Zionism is Racism,”<sup>85</sup> condemning the resistance to that effort led by

81. See, e.g., Press Release, IHRC, Saddam War Criminal, What about Sharon? (Apr. 26, 2001), <http://www.ihrc.org.uk/show.php?id=78>.

82. See, e.g., Press Release, IHRC, Removal of Jewish Passenger for Praying Shows Rise in Intolerance on the Back of Islamophobia (Sept. 8, 2006), <http://www.ihrc.org.uk/show.php?id=2083>.

83. See, e.g., Press Release, IHRC, Sharon’s Final Solution (Apr. 2, 2002), <http://www.ihrc.org.uk/show.php?id=295>; Press Release, IHRC, Holocaust Victims Forgotten (Jan. 25, 2001), <http://www.ihrc.org.uk/show.php?id=84>.

84. *Id.*

85. The states voting in favor of the original declaration of this principle in 1975, G.A. Res. 3379 (XXX), U.N. Doc. A/RES/3379 (Nov. 18, 1975), amounted, at the time, to a *Who’s Who* of totalitarian regimes, including some of the world’s most egregious human rights abusers during the early 1970s: Afghanistan, Albania, Algeria, Bahrain, Bangladesh, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, China, Congo, Cuba, Czechoslovakia, Egypt, Equatorial Guinea, German Democratic Republic, Hungary, Indonesia, Iran, Iraq, Jordan, Kuwait, Laos, Lebanon, Libya, Malaysia, Mauritania, Mongolia, Morocco, Mozambique, Oman, Pakistan, Poland, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, Vietnam, Yemen and Yugoslavia. Despite the rejection of that resolution by states with better human rights records, the Council of the League of Arab States, whose members continue to include among the most highly oppressive regimes, cf. text accompanying notes 64–66 *supra*, has recently adopted an “Arab Charter on Human Rights,” entering into force in

former U.N. Commissioner for Human Rights, Mary Robinson.<sup>86</sup> Similarly, the IHRC has effectively endorsed Iranian President Mahmoud Ahmadinejad's call for the state of Israel to be "wiped off the face of the Earth."<sup>87</sup> In one depiction of Holocaust memorial ceremonies, the Auschwitz survivor and author Elie Wiesel is described as follows: "the inevitable Holocaust cultist, with his inevitable tortured expression, delivered his inevitable speech."<sup>88</sup>

A greater variety of views does emerge through some secondary documentation. For example, in one letter to a correspondent, the IHRC, at least in part, acknowledged human rights abuses committed more generally in Islamic states.<sup>89</sup> However, such statements rarely appear in the IHRC's principal, or principally featured, reports and policy statements. They can only really be found through imaginative probing of the organization's internal website. Many have an improvised character, leaving unclear whether the views expressed are intended to represent serious IHRC policy.<sup>90</sup>

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March 2008. An earlier version had twice retained the tacit but unmistakable equation of Zionism with racism. See Arab Charter on Human Rights, *entered into force*, Sept. 15, 1994, *reprinted in* 18 HUMAN RIGHTS L.J. 151 (1997), preamb. para. 4 (wherein States Parties claim to be "[r]ejecting all forms of racism and Zionism"). See also art. 1(b). In the revised draft, that equation is rendered categorical. States Parties claim to be "rejecting all forms of racism and Zionism." LEAGUE OF ARAB STATES, Revised Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUMAN RIGHTS REP. 893 (2005), *entered into force* MAR. 15, 2008, preamb. para. 5. See also art. 2(3), 2(4). If the phrase "all forms" is intended not as a polemic, but to have genuine meaning, it can only signify that even a liberal, humanist Zionism, advocating peaceful and prosperous co-existence of Israelis and Palestinians, is "rejected" and declared tantamount to racism.

86. Press Release, IHRC, Robinson's Attack on NGO Declaration Misleading (Sept. 8, 2001), <http://www.ihr.org.uk/show.php?id=34>.

87. Only the views of the Irish Anti-War Movement in support of Ahmadinejad are expressly stated, but in context in which the IHRC, in language uncharacteristic of even the harshest criticisms by bodies such as Amnesty International, Human Rights Watch, or the U.N. Human Rights Committee, calls Israel "obnoxious" and maintains that "[q]uestioning the right of the Israeli state to exist is part of a legitimate debate on how to bring justice and peace in the Middle East. The current consensus among the International [sic] political elite is that peace between Jews and Arabs will be achieved by a two-state solution with a Palestinian state and Israeli state side by side in what was historic Palestine. Many that genuinely want to see peace between Jews and Arabs share this view. However, this is only an opinion not an absolute truth. To question this view as probably a majority of people in the Middle East do is also legitimate." Press Release, IHRC, Denunciations of Iran Laced with Double Standards (Oct. 28, 2005), <http://www.ihr.org.uk/show.php?id=1607>. Although Ahmadinejad's remark has been subject to various interpretations, nothing in the IHRC's stance expressly endorses any fundamentally milder view.

88. Uri Avnery, *Aren't You Ashamed*, May 7, 2005, <http://www.ihr.org.uk/show.php?id=1374>. To be sure, I am not accusing the IHRC of Holocaust *denial*, which it clearly does not do. That article duly refers to the Holocaust as "the defining event in the Jewish history of the last century, and perhaps of all times. It was a warning to all humanity." *Id.* Nevertheless, taken not in isolation, but as a whole, IHRC references to the Holocaust are used to advance the political allegiances I have described. It would be difficult indeed to find similar remarks made by any credible human rights organization.

89. Letter from IHRC, *Dear Margaret*. . . (Mar. 17, 1998), <http://www.ihr.org.uk/show.php?id=107>.

90. The said letter, for example, asserts that "[a]ll major faiths and ideologies believe that their belief system is the correct one." *Id.* That is a highly unusual (and, of course, simplistically monotheis-

In a world perceived by many Muslims as Islamophobic, where media images regularly portray Americans and Western Europeans as living in fear of Muslims, Muslim organizations may well be justified in seeking to generate contrasting images—images of Muslims as victims of Western, pro-Western, or strongly secular policies or regimes—thereby seeking to show that the values of human rights are neither distinctly Western, nor secular, nor necessarily well observed in the Western or pro-Western world.<sup>91</sup> Moreover, it might be argued that the IHRC is simply attempting to reflect views that are widely held among Muslims themselves which, would presumably entail the view that Muslims themselves view Hafez al-Assad or Saparmurad Niyazov in a better light than Ariel Sharon. Yet such a view (assuming it does represent common Muslim opinion) would be inconsistent with an essential principle of human rights law, as reflected in the approaches taken by leading IGOs and NGOs, namely, that a given abuse A of a human right R against a victim V is *no worse* when committed by one government G<sub>1</sub> as opposed to another government G<sub>2</sub>.<sup>92</sup> From the point of view of human rights law (I shall take no view on whether Islam is compatible with this principle), torture, rape, or silencing of a Muslim is no worse when committed by a Christian or Jew, atheist or Maoist, than when committed by another Muslim. By extension, it would be a misreading of the values of human rights for a Muslim organization to claim, for example, “We know that bad things happen in the Muslim world, but that is our own internal affair.” Fundamental to human rights law is the precept that, within the bounds of an otherwise legitimate territorial mandate, no affair is “internal” or “external.” Every major international human rights treaty, every norm of customary international human rights law, confirms that the aim of the human rights movement is to lead international law away from its early modern origins in principles of absolute state sovereignty, and as far as possible towards overcoming jurisdictional boundaries insofar as fundamental interests of human beings are at stake.

A related argument would be that IHRC’s mandate may legitimately consist of, so to speak, filling in the gaps of other human rights organizations. It might be argued that other organizations, like Amnesty Interna-

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tic) position for a human rights organization to take, and certainly not one that credible scholars of comparative religion would adopt.

91. The theme of Islamophobia is frequent in IHRC articles and reports. See, e.g., Press Release, IHRC, End Islamophobia in the British Educational System (Oct. 28, 1999), <http://www.ihr.org.uk/show.php?id=171>; Press Release, IHRC, Media Islamophobia in the Wake of Recent Tel-Aviv Bombing (May 1, 2003), <http://www.ihr.org.uk/show.php?id=633>; Press Release, IHRC, IHRC Announces Winners of “The Annual Islamophobia Awards” (May 30, 2003), <http://www.ihr.org.uk/show.php?id=640>; Press Release, IHRC, Winners of Islamophobia Awards 2004 Announced (June 26, 2004), <http://www.ihr.org.uk/show.php?id=1124>.

92. *But cf. infra* text accompanying notes 102–104 (regarding international responsibility for human rights violations during legitimately declared states of emergency); Eric Heinze, *Truth and Myth in Critical Race Theory and LatCrit: Human Rights and the Ethnocentrism of Anti-Ethnocentrism*, 20 NAT’L BLACK L.J. (forthcoming spring 2008).

tional, document abuses in Muslim regimes generally, and that the IHRC, while not denying the findings of other organizations, simply seeks to highlight abuses of Muslims by Western, secular, or pro-Western regimes. Yet that position, too, would be implausible. Amnesty, HRW, and others unrelentingly criticize Israel, but that has not deterred the IHRC from adding its own voice. More importantly, even if the IHRC can serve that role, it can hardly justify the organization's systematic neglect of abuses against Muslims by strongly Islamic states, in light of mandate parameters which suggest concern for the human rights of all Muslims.

It is a truism that law is not only a taskmaster but also a teacher. Indeed, in an age when the most experienced lawyers struggle to figure out what law is, and when the most basic norms and processes of law and government appear opaque to the average person, we can question how true that aphorism really is. Yet if there is one area in which it has some force, it is in human rights. People may pay their taxes without understanding the arcana of tax law. They may engage in countless transactions without knowing much commercial or contract law. However, it is part of the very meaning of an international human rights movement that even (or especially) the poorest and most outcast should know they have fundamental rights and what it means for them to be violated, and should know that we live in a world where heinous violations are constantly committed against others.<sup>93</sup> Many organizations have long understood the educational mission of human rights law, and see education as crucial elements of their work. Many of their websites are consciously designed for educational purposes. Part of their legitimacy, then, must lie in the quality of information they provide.

Someone (perhaps a student interested in Islam and human rights) who consults the IHRC website, effectively accepting the IHRC's own invitation to find insight into the human rights of Muslims throughout the world, should have that promise fulfilled to some reasonable degree. Certainly, organizations operating under conditions of extreme poverty, hardship, or crisis may be unable to design impeccable websites (although the site for the Palestinian Non-Governmental Organizations Network, which I discuss in the next section, is by no means unprofessional, and, in any event, the IHRC operates under no such adversity); even the best funded and equipped organizations cannot easily have websites that become encyclopaedic sources. Hence, again, my focus on gross and systematic neglect of human rights violations falling within Accusers' *own* declared mandates.

As noted earlier with respect to the concept of promissory estoppel, an organization should not define itself as interested in the human rights of Muslims generally when that is not, and has never been, its interest; when

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93. See, e.g., Office of the United Nations High Commissioner for Human Rights, World Programme for Human Rights Education (2005-ongoing), <http://www2.ohchr.org/english/issues/education/training/programme.htm> (last visited Dec. 9, 2007).

its interest, instead, has been to align itself with a longstanding partisan platform—a platform that may indeed have important human rights ramifications, and may indeed stake out important partisan political positions, but which cannot be understood as, primarily, a human rights policy. The IHRC can indeed do excellent work. Its incident reporting service, for example, provides valuable Internet, e-mail, and telephone links for Muslims who have encountered violence, discrimination, or harassment.<sup>94</sup> Those kinds of initiatives are common elements of human rights organizations. In themselves, however, they do not suffice to confer legitimacy on the fundamental positions taken by the IHRC.

### B. *The Palestinian Non-Governmental Organizations' Network*

The Palestinian Non-Governmental Organizations' Network ("PNGO") was established in 1993. Although created as an umbrella group comprising a variety of NGOs, it is not a purely administrative unit. It regularly publishes its own views and statements. As its "Overall Goal," the PNGO cites "the development and empowerment of civil society within an independent Palestinian state based on the principles of democracy, social justice and respect for human rights."<sup>95</sup> According to its mission statement, the PNGO "envisages the establishment of an independent and democratic Palestinian state based on the rule of law, social justice and the respect for human rights."<sup>96</sup> It thus seeks to "[a]dvocate for the rights of the Palestinian people" and to "[s]trengthen democratic values within society."<sup>97</sup>

That mandate is legitimate only if the PNGO extends scrutiny of abuses to all entities to whom legal responsibility for human rights in the Occupied Territories is attributable. However, the PNGO's rigorous condemnations are reserved entirely for the Israeli government and armed forces.<sup>98</sup> On some more long-term issues that are unrelated to the immediate security crisis, like the status and treatment of women, the PNGO's criticism of the Palestinian Authority,<sup>99</sup> and even of attitudes among the Palestinian people,<sup>100</sup> is often candid. However, allegations of immediate, systemic,

94. IHRC - Incident Reporting Form, <http://www.ihrc.org.uk/incidents/> (last visited Dec. 9, 2007). I am unaware of any independent assessment of those procedures in practice, but their availability in principle is sound.

95. The Palestinian Non-Governmental Organizations' Network [hereinafter PNGO], <http://www.pngo.net/pngo.htm> (last visited Dec. 9, 2007).

96. *Id.*

97. *Id.*

98. See PNGO - Press Releases/Statements, <http://www.pngo.net/publications/statements.htm> (last visited Dec. 9, 2007).

99. See, e.g., Press Release, PNGO, Palestinian Civil Society Organizations Condemn PLC Decision to Drop Article No. 24 of the Local Council Law Which is to Ensure Fair Representation Along Gender Lines (Oct. 25, 2004), [http://www.pngo.net/statments/local\\_council\\_law\\_251004.htm](http://www.pngo.net/statments/local_council_law_251004.htm).

100. See, e.g., Press Release, PNGO, Statement by the Palestinian NGO Network (PNGO) Condemning the Recent String of Honour Killings (May 3, 2005), [http://www.pngo.net/statments/PNGO\\_Statement\\_honour\\_killing\\_03\\_05\\_05.htm](http://www.pngo.net/statments/PNGO_Statement_honour_killing_03_05_05.htm).

and ongoing violations of civil and political rights committed by the Palestinian Authority are almost always omitted.<sup>101</sup> In other words, the PNGO, while passing the first and second prongs, fails the third.

It might be argued that the PNGO must take a milder approach, as the Palestinian Authority operates under arduous conditions, lacking the stability enjoyed by the governments of full-fledged states. Certainly, an instrument like the International Covenant on Civil and Political Rights (“ICCPR”), as to its stated parties, recognizes derogations from certain obligations under genuine, declared states of emergency.<sup>102</sup> That general principle can arguably be applied to the Palestinian Authority, even if, lacking statehood, Palestine is not a party to the ICCPR as such.<sup>103</sup> The important point, however, is that, in two senses, such a norm cannot relieve NGOs or IGOs of the duty to acknowledge *prima facie* violations falling within their declared territorial, victim, and issue mandates. First, such an approach still cannot excuse the PNGO from failing to report abuses by the Palestinian Authority of non-derogable rights. Second, the Palestinian Authority may indeed *subsequently* be deemed to be fully or partly relieved of international responsibility for some abuses, *to the extent* that a state of emergency is deemed to exist.<sup>104</sup> However, it is neither for IGOs nor for NGOs to decline to report *prima facie* evidence of abuse simply on their own prior assumption that a state of emergency justifies or exculpates such abuse. In a nutshell: the PNGO, in view of its own declared mandate, is bound to recognize *prima facie* abuses committed by the Palestinian Authority, even if, in some instances, the Palestinian Authority, on subsequent examination, is found not to hold full responsibility, on grounds of a genuine state of emergency.

### C. *Human Rights Watch*

I noted earlier the 2006 report of Human Rights Watch (“HRW”), condemning actions undertaken by the Israel Defence Forces (“IDF”) during the July 2006 armed conflict against Hezbollah in Lebanon. Alan Dershowitz accused HRW of overlooking evidence of Hezbollah or Hamas atrocities. Former HRW executive director Aryeh Neier subsequently

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101. Cf., e.g., Amnesty Int’l, *Palestinian Authority*, in Report 2007 (2007), available at <http://www.amnesty.org/en/region/middle-east-and-north-africa/east-mediterranean/palestinian-authority>.

102. International Covenant on Civil and Political Rights art. 4, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

103. It is plausible to assume a norm admitting legitimate derogations under genuine states of emergency for a non-state or quasi-state actor like the Palestinian Authority. It would be ludicrous to imagine that, say, an international judicial or quasi-judicial body, or indeed a credible NGO, would deny some principle of derogation to an internationally responsible entity solely on the grounds that the entity was not a state and therefore not a party to a human rights instrument containing a derogations clause. The character of the Palestinian Authority suggests that the very existence of a non-state entity may result from the unrest characteristic of states of emergency.

104. See U.N. HUM. RTS. COMM., GENERAL COMMENT NO. 29, U.N. DOC. CCPR/C/21/REV.1/ADD.11 (AUG. 31, 2001).

challenged several of Dershowitz's claims.<sup>105</sup> Dershowitz did not challenge HRW's general mandate parameters, and thus levelled no question of illegitimacy relevant to the first prong. Rather, under the second prong, his criticism amounted to an accusation of disproportionate Perpetrator selectivity, whereby HRW condemned Israel, while overlooking its adversaries—some of whose actions, like those of Hezbollah or Hamas, would explain *prima facie* IDF abuses.

Under the third prong, however, disproportionate Perpetrator selectivity cannot be ascertained in isolation, but only in light of HRW's overall pattern of advocacy within a broader political context. Its positions cannot be condemned solely because serious challenges might be raised about individual reports. More importantly, even if disproportionate criticism of Israel by HRW could be alleged over time, HRW would pass muster under the third prong. HRW cannot be accused of systematically siding against Israel, as it regularly reports on abuses by Israel's adversaries. In one report, for example, it condemned Hezbollah cluster bombing during the hostilities.<sup>106</sup> Similarly, in 2006, HRW "called . . . on the leaders of Palestinian factions and Palestinian government officials to bring an immediate end to the lawlessness and vigilante violence that has plagued the Occupied Palestinian Territories and to hold the Perpetrators of this violence accountable."<sup>107</sup>

While it might be argued that those latter statements were issued only as tardy responses to the criticisms of Dershowitz and others, such an inquiry into motives is neither feasible nor necessary. Even if it were true, it would only suggest that frank and constructive disagreement is possible without the legitimacy of positions, as credible human rights policy, being called into question. Indeed, HRW's longstanding scrutiny of Israel's adversaries, such as Syria<sup>108</sup> and Iran,<sup>109</sup> confirms that the organization's policies have remained well within the bounds of legitimate human rights advocacy, strongly distinguishing it from an organization like the ICHR. In highly controversial situations, even the most well-intentioned human rights advocacy can never win approval from all, equally well-intentioned onlookers. However, insofar as an overall ethos of even-handed reporting and condemnation is respected, a position or mandate can be deemed to play a legiti-

105. Neier, *supra* note 3, at 43–44.

106. Press Release, Human Rights Watch, Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict (Oct. 19, 2006), <http://www.hrw.org/english/docs/2006/10/18/leban014412.htm>. See also HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON: ISRAEL'S USE OF CLUSTER MUNITIONS IN LEBANON IN JULY AND AUGUST 2006 (2008) (sharply rebuking Israel, but also noting important violations by Hezbollah).

107. Press Release, Human Rights Watch, Occupied Palestinian Territories: Factions Must Stop Endangering Civilians (Oct. 6, 2006), <http://hrw.org/english/docs/2006/10/06/isrlpa14337.htm>.

108. See Human Rights Watch, Syria, <http://hrw.org/doc/?t=mideast&c=syria> (last visited Dec. 9, 2007).

109. See Human Rights Watch, Iran, <http://hrw.org/doc/?t=mideast&c=iran> (last visited Dec. 9, 2007).



mate role in advancing human rights. That point is important, as it should not be suggested that my analysis has sought merely to censure pro-Muslim voices. In this case, I am arguing that HRW criticism of *Israel*, even if it failed to provide the fullest possible picture of events on the ground, nevertheless counts as legitimate.

#### D. *The Pro-Israel Lobby*

Nevertheless, one anonymous reviewer of an earlier draft of this article asked whether my focus was unduly balanced against Muslim organizations, which would scarcely seem to fulfill a goal of even-handed approaches to human rights. That reviewer asked why there is no analysis of organizations like the American Israel Public Affairs Committee ("AIPAC"), "which invoke human rights discourses only to 'defend' Israel."<sup>110</sup> As I have just argued, however, criticism of Israel, like that of HRW, which may at first appear one-sided, is *not* necessarily illegitimate under the test.

It is indeed worthwhile to consider an organization like AIPAC. In the style of its self-presentation, AIPAC could not be more different from the Islamic Human Rights Commission or the Palestinian Non-Governmental Organizations' Network. In its very name, for example, AIPAC expressly identifies itself *not* as a humanitarian or human rights organization, but, quite blatantly, as "America's pro-Israel Lobby."<sup>111</sup> AIPAC's mission statement altogether omits reference to "human rights," instead expressly using the term "[p]olitical advocacy," and stating that, "[i]n addition to working closely with Congress, AIPAC also actively educates and works with candidates for federal office, White House, Pentagon and State Department officials, and other policymakers whose decisions affect Israel's future and America's policies in the Middle East."<sup>112</sup> At no point does AIPAC suggest that its activities include any kind of systematic documentation of international responsibility for human rights violations. Or, in the language of the legitimacy test, AIPAC does not, either expressly or tacitly (under the first prong), lay claim to any ascertainable issue or victim parameters against which (under the second and third prongs) proportionate or disproportionate Perpetrator selectivity *could be* ascertained.<sup>113</sup>

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110. E-mail from anonymous reviewer to author (Mar. 2007) (on file with author). For an example of recent criticism of AIPAC by an influential observer sympathetic to Israel, see George Soros, *On Israel, America & AIPAC*, N.Y. REV. OF BOOKS, Apr. 12, 2007, at 20.

111. AIPAC - America's Pro-Israel Lobby, <http://www.aipac.org> (last visited Dec. 9, 2007).

112. AIPAC - Learn About AIPAC, [http://www.aipac.org/about\\_AIPAC/Learn\\_About\\_AIPAC/default.asp](http://www.aipac.org/about_AIPAC/Learn_About_AIPAC/default.asp) (last visited Dec. 9, 2007).

113. Nilofer Umar, editing this piece for the *Harvard Human Rights Journal*, has levelled a contrary objection, arguing that such discussion of AIPAC "is not particularly illustrative, given that it is undisputed that AIPAC is a lobby group rather than a *human rights organization*." Umar states, "This still does not address the criticism that your approach is unduly balanced against Muslim organizations. Instead, to adequately address that criticism, you should address in your paper a human rights group that largely involves itself with critiquing governments in Islamic states or with critiquing Muslims." E-mail from Nilofer Umar, Executive Editor, *Harvard Human Rights Journal*, to author (9/28/07) (on file

In that respect, AIPAC is indistinguishable from, say, the Arab-American Institute (“AAI”)<sup>114</sup> which—also stating plainly its partisan, political activities, without systematic recourse to the one-sided condemnations that pervade the IHRC and PNGO sources—certainly would *not* fail the legitimacy test. Like AIPAC, AAI in no way suggests that its activities include any kind of systematic documentation of international responsibility for human rights violations. In terms similar to those of the AIPAC, the AAI’s mission statement expressly claims that the organization “represents the policy and community interests of Arab Americans throughout the United States and strives to promote Arab American participation in the U.S. electoral system. AAI focuses on two areas: campaigns and elections and policy formation and research.”<sup>115</sup> Like AIPAC, AAI refrains from adopting any specific issue or victim parameters against which Perpetrator selectivity could be assessed. The IHRC website, by contrast, promises ongoing and detailed coverage of specific abuses against all Muslims.

Far from failing the legitimacy test, organizations like AAI and AIPAC serve as models that should be followed by organizations seeking to promote overtly political agendas distinct from specific attributions of responsibility for human rights violations. Of course, even as political lobbyists, such groups can still be scrutinized for bias. For example, in one recent report, AIPAC criticizes anti-Semitism in Saudi textbooks (e.g., accusing Jews of “devil worship”), without, however, inquiring into the historical accuracy of Israeli textbooks.<sup>116</sup> Similarly, reporting on “the horror in Gaza,” a recent AAI report condemns Israel for “prepar[ing] to further inflict damage in an already desperate humanitarian crisis,” with little balanced or detailed examination of the dilemmas faced on both sides of the conflict.<sup>117</sup> However, the legitimacy test is not intended to extend to every conceivable kind of political claim. It remains limited to human rights discourses that adopt or assume ascertainable territorial, issue, victim, temporal, and Perpetrator selections.

### *E. Intergovernmental Organizations*

I have focused on recent issues concerning Islam, Israel, and the Middle East, as questions of legitimate human rights discourse have been of partic-

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with author and the *Harvard Human Rights Journal*). Nevertheless, in both written and live exchanges, several scholars have maintained that the American pro-Israel Lobby should be discussed as a factor of ongoing concern to questions of overall political balance. More importantly, if any human rights IGO or NGO condemns Muslim states at a level substantially disproportionate to other perpetrators included within its own adopted mandate, then it should certainly be subjected to scrutiny.

114. The Arab American Institute, <http://www.aaiusa.org/> (last visited Dec. 9, 2007).

115. The Arab American Institute - About AAI, <http://www.aaiusa.org/about/14/our-mission> (last visited Dec. 9, 2007).

116. Press Release, AIPAC, Teaching Intolerance: A Review of Saudi Arabia’s Textbooks (June 5, 2006), [http://www.aipac.org/The\\_Issues/2374\\_2257.asp](http://www.aipac.org/The_Issues/2374_2257.asp).

117. The Arab American Institute, The Horror in Gaza: A View from the Ground (July 23, 2006), <http://www.aaiusa.org/issues/1841/gazacrisis>.

ular importance in those controversies. Nevertheless, other examples are also available. Throughout its existence, the U.N. Human Rights Commission (recently replaced by the Human Rights Council) was condemned as a politicized body, in which members shielded their own governments, as well as allied and friendly governments, from criticism or investigation, with disregard for actual victims. To call it “politicized” is to say that its substantially disproportionate Perpetrator selectivity had proceeded along partisan lines, generally following such high-profile conflicts as East versus West (during the Soviet period) or Western versus Islamic. As a result, only states insufficiently relevant to the ongoing conflict, such as Chile, Israel, and South Africa, faced close scrutiny, while heinous violators of human rights, such as China, Libya, Saudi Arabia, Syria, and the former Soviet Union and its satellites, were left unscathed.<sup>118</sup> That record contrasted strongly, during the same period, with the approach of the treaty-based Human Rights Committee, which cultivated an even-handed method—praising improvements even within the worst regimes and criticizing defects even within the best.<sup>119</sup> In other words, if passing the first and second prongs, the Commission failed the third. While its territorial, issue, victim, and temporal selections were legitimate, its grossly and systematically disproportionate Perpetrator selections disqualified it from recognition as a credible human rights body.

Similar scrutiny could be applied to the African human rights protections, particularly through the Cold War period. In form, the erstwhile Organization of African Unity (“OAU”)<sup>120</sup> began life as a recognizable brand of intergovernmental organization, adopting norms that recognized universal human rights in terms which, albeit conceding weightier concepts of collective rights, remained largely consonant with the universalist scope of the Universal Declaration of Human Rights.<sup>121</sup> In other words, while generally confining its territorial mandate to the African continent, the OAU’s issue and victim mandates, within those territorial bounds, were broad.

For many years, however, it sold out that professedly universalist mandate to an agenda of global partisan politics. In various proclamations, for example, it condemned South African apartheid, American racism, and even Zionism<sup>122</sup>, while, in both word and deed, systematically overlooking the

118. See ROBERTSON & MERRILLS, *supra* note 36, at 88. See generally *id.* at 83–89.

119. See Human Rights Committee comments on country reports, available at <http://www1.umn.edu/humanrts/hrcommittee/hrc-country.html>. As of this writing, the Human Rights Council is still too new to warrant any reliable assessment. I would note my concern, however, that biases of the Commission are at risk of being repeated.

120. Now replaced by the African Union. Constitutive Act of the African Union, July 11, 2000, OAU Doc. CAB/LEG/23.15.

121. See, e.g., African Charter on Human and People’s Rights, adopted June 27, 1981, 21 ILM 58 (entered into force Oct. 21, 1986).

122. See, e.g., *id.* at pmb1. para. 4 (condemning “all forms of colonialism [in] Africa”); *id.* at pmb1. para. 9 (condemning ‘colonialism, neo-colonialism, apartheid [and] zionism’).

primary source of human rights violations on the continent, namely, abuses committed by non-white African regimes. It thereby created a disproportion between criticisms directed at white or Western-style regimes and those directed at indigenous African regimes. The Ghanaian human rights lawyer Evelyn Ankumah, for example, notes that OAU Member States in the organization's formative years were "reluctant to criticize massive and notorious breaches of human rights in specific African States with the notable exception [of *apartheid* in] South Africa and Namibia."<sup>123</sup> Ankumah adds, "Despite strong pressure from NGOs and the international community, the OAU failed to condemn the massacres which occurred in Uganda, the Central African Republic, Equatorial Guinea, Eritreia, Burundi and Angola to cite only a few of the notorious examples."<sup>124</sup> Post-colonial politics thus served more as a means to foil attention to human rights than as a means of promoting it. The reforms of the 1990s were directed largely at reversing that trend, i.e., at conferring legitimacy upon institutional policies and practices.

#### F. *Intrinsic and Extraneous Politics*

To claim that human rights have been "politicized" is not the same as claiming that they are "political." Again, human rights always involve politics. No clear line can be drawn between them. We have seen, however, that human rights are subject to biased application when influenced by political factors that are extraneous to the content of the norm being applied. Whilst illegitimacy arises from extraneous political factors, then, it by no means follows that all factors that are political are therefore extraneous. Two examples can help to illustrate the point—one from the area of civil and political rights, another from the area of social and economic rights.

##### 1. *Civil and Political Rights: the Example of Hate Speech Bans*

Questions about the content and limits of hate speech bans have led to politically charged debates about the scope of free speech. For example, the NGO Article 19 has endorsed hate speech bans, as required under leading human rights instruments, insofar as they are narrowly drawn.<sup>125</sup> By contrast, in my own writing, I have argued that bans, albeit possibly appropri-

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123. See, e.g., EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS: PRACTICE AND PROCEDURES* 4 (1996).

124. *Id.* at 5 (noting also, "The OAU and its Member States justified their silence on human rights breaches in African States by relying on the domestic jurisdiction principle").

125. See, e.g., Article 19, *Policy on Laws which Prohibit Incitement to Hatred or Discrimination*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 315–318 (Sandra Coliver ed., 1992).

ate for weak or newly emerging democracies, are generally inappropriate for longstanding, stable, and prosperous democracies.<sup>126</sup>

That disagreement certainly has a political dimension. Hate speech, and the regulation of it, may reflect pervasive racial, ethnic, religious, national, sexual, or other social conflicts. Those endorsing hate speech bans commonly view them as an essential means of combating intolerance, discrimination, and hate crime, and promoting democratic participation.<sup>127</sup> Those opposing the bans see them as dangerous to the foundations of democratic citizenship, and ineffective in the fight against intolerance, discrimination, and hate crime.<sup>128</sup> That disagreement will certainly affect the evaluation of countries' attitudes towards free speech. Observers who welcome hate speech bans are likely to applaud a state like the Netherlands, whose hate speech bans extend to cover several categories of victims,<sup>129</sup> while criticizing jurisdictions like Hungary<sup>130</sup> or the United States,<sup>131</sup> which have avoided hate speech bans. Opponents of bans would make precisely the opposite Perpetrator selections.

Debate about hate speech bans has been fierce. That passion, however, does not, in itself, suggest "politicization" of human rights, in the sense of introducing an otherwise superfluous political bias. Debates about the appropriateness or extent of hate speech bans fall well within legitimate concern about the interpretation of rights of speech and expression, and can in no sense be called extraneous to the scope of those rights.

## 2. *Social and Economic Rights: "Social Welfare" versus "Civil Liberties" Models*

Examples of politically charged, but not necessarily illegitimate, applications of human rights norms also arise in areas of social and economic rights and economic development, including such issues as nutrition, health care, employment standards, homelessness, primary child care, and the like. Debates have long raged about how much priority developing states should accord, on the one hand, to social and economic rights, and, on the other hand, to civil and political rights.

Two "classic" positions have emerged. Some observers have taken the familiar "social welfare" view, that rights to speak or to vote are of limited value when one lacks sufficient food or shelter. Others have taken the tradi-

126. See, e.g., Heinze, *Viewpoint Absolutism*, *supra* note 14.

127. See generally WORDS THAT WOUND (Mari Matsuda et al. eds., 1993).

128. Heinze, *Viewpoint Absolutism*, *supra* note 14; Heinze, *Abolition*, *supra* note 14

129. See, e.g., U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: The Netherlands*, ¶ 5, U.N. Doc. CERD/C/64/CO/7 (May 10, 2004).

130. See, e.g., U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 376, U.N. Doc. A/57/18 (Nov. 4, 2002).

131. See, e.g., U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 391, U.N. Doc. A/56/18 (Oct. 30, 2001).

tional “civil liberties” view that economic and social rights are of little use if a state lacks adequate democratic norms and institutions (free and fair elections, free press) to assure that the delivery of services remains transparent, accountable, and efficient. The more strident partisans of the latter view have often gone so far as to suggest that, notwithstanding the positive-law status of instruments such as the International Covenant on Social, Economic and Cultural Rights, social and economic rights are not “really” rights at all.<sup>132</sup>

Leaving aside the more extreme positions in either camp, the moderates, who generally accept both sets of rights,<sup>133</sup> define their positions by placing, respectively, more or less emphasis on social and economic rights relative to civil and political rights, at least insofar as the needs of the poorest are concerned. That disagreement, too, will determine the kinds of states that are selected for criticism. Partisans of the “civil liberties” view are more likely to criticize states like China or Cuba, arguing that poverty can best be eliminated through liberalization and democratization. Meanwhile, states like India or Brazil, despite longstanding and widespread poverty, are likely to be praised under that model insofar as they have, in recent years, promoted at least some measure of liberal-democratic society and institutions—criticisms thus aimed more at strengthening than at wholly replacing existing arrangements. Of course, partisans of the “social welfare” model take the opposite view—if not positively praising China or Cuba, then arguably less likely to draw vast or categorical differences between genuine conditions of poverty in China and Cuba, on the one hand, and India and Brazil, on the other—examining specific delivery of services in four such states not as a function of liberalization, but regardless of it.

As with hate speech bans, we find, here too, issues with the broadest of political consequences. The “civil liberties” view expressly endorses specific democratic institutions that run contrary to, and are potentially destabilizing for, those currently in place in one-party states like China or Cuba. The “social welfare” view, by contrast, is more overtly consequentialist—less concerned with the means of delivery (i.e., whether it be through democratic or one-party systems) than with the material results at the point of delivery.

Given the fundamental philosophical differences underlying those two approaches, and the very different ways in which Accusers are likely to select Perpetrators for criticism, one can certainly imagine instances of illegitimate Perpetrator selectivity. If, say, a U.S. administration, or an international financial institution, like the World Bank, were wholly to disregard gross poverty in states like India or Brazil, while condemning the

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132. STEINER, ALSTON & GOODMAN, *supra* note 12, at 237–320 (examining debates about social and economic rights).

133. See, e.g., World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

same in China or Cuba, it would appear that the discourse of human rights was being used for no purpose other than to push for certain overall political preferences, with little regard to the material circumstances of the poor in the more democratized and liberalized countries. In practice, however, positions are rarely so stark, if only because even liberalized, democratized states are generally deemed to require any number of improvements along liberal and democratic lines.

Certainly, disagreements between civil libertarians and social welfarists are likely to persist, as that debate is hardly superfluous to questions about the delivery of social and economic protections. Accordingly, while grossly imbalanced selections might suggest sheer political bias, and thus illegitimate recourse to human rights discourse, subtler imbalances, preferring one or the other model (or some hybrid or alternative), although still likely to breed controversy, would not, in themselves, render *illegitimate* accusations of violations of social and economic rights that are not otherwise motivated by extraneous political factors.

## V. RESTATEMENT OF THE TEST

Taking the three prongs together, the mandate legitimacy test can be stated as follows:

*First Prong: Parameters.* Territorial, issue, victim, and temporal mandates may be freely chosen, subject only to the minimal standards of avoiding gross arbitrariness or irreconcilable contradiction with core human rights norms. If those criteria are met, proceed to the second prong.

*Second Prong: Proportionate Perpetrator Selectivity.* Perpetrator selection—criticism of internationally responsible actors—must accord with the mandate parameters adopted under the first prong. It must therefore be proportionate to *prima facie* incidents of abuse, as defined by the selected issues, victims, and time frame, throughout the entire selected territory.

(a) Occasional or minor breaches in proportionate Perpetrator selection may be deemed legitimate. The test is then passed, and stops here.

(b) Substantially disproportionate Perpetrator selection requires application of the third prong.

*Third Prong: Non-partisanship.* Substantially disproportionate Perpetrator selection must not effectively recapitulate the position of any contentious party to a recognized political, social, or cultural conflict.

Again, the test identifies only necessary, not sufficient, criteria of legitimacy. It does not allow all illegitimate organizations to be identified (on grounds of corruption, mismanagement, etc.), but does allow us to say that organizations that *do* fail it take illegitimate positions on human rights. We have seen that the criteria of legitimacy are minimal. They are not hard

to fulfill, and can therefore accommodate a broad range of participants in human rights discourse. Legitimacy does not preclude pluralism, but rather promotes broad participation while assuring a minimum of credibility and good faith in the use of human rights discourse. Policies failing the test may make valuable contributions to broader political debate, but should not be recognized as human rights policies.

Debate and disagreement are essential ingredients of a healthy society. They are certainly related to core human rights claims of personal and collective identity, free expression, and political participation. That does not, however, mean that every cause, even every good cause, is a human rights cause. The touchstone of a human rights organization or policy remains its willingness to provide candid criticism of all governments, or other responsible entities, falling within an otherwise plausibly defined territorial, temporal, issue, and victim mandate. Policies failing that test may play a valuable role in political discussion, but are not legitimate human rights policies.