THE RIGHT TO SELF-DETERMINATION AND THE PROMOTION OF INTERNATIONAL LEGAL PROTECTIONS OF HUMAN RIGHTS: SOME PROBLEMS AND STRATEGIES

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It is the simple intention of this paper to call attention to points which, to this writer, are most cogent in the consideration of the rather complex topic assigned to this panel: the promotion of international legal protections of human rights. Perhaps, considering the limited possibilities of this particular forum, the most one can hope for as output is to try and identity some problem areas and attempt at advancing some strategies toward the attainment of defined objectives. For perhaps, if the subject of "human rights" is viewed with less arrogance and more understanding, sober considerations would take the place of the currently fashionable polemics which generally accompanies this admittedly sensitive subject.

The Problem of Definition

Law depends on precision of language. It behooves this panel to define its terms of reference. What, to begin with, does "promotion" encompass? How to distinguish this from "protection," "ensuring" or "enforcement" of human rights? Would this include direct intervention in the implementation of the law on human rights within nations? Or would it limit itself to encouraging respect for and creating awareness of human rights the world over?

Far from being merely facetious, states perceive real threats in ambiguous terms, while at times seek refuge behind precisely this ambiguity. Thus, in the drawing up of the documents on human rights, proceedings show that debates centered precisely on the choice of terms to use, i.e., between "promotion" and "protection."

Perhaps the one real contribution this assembly of international luminaries could make would be the clarification of legal terminologies in the degree of precision necessary for an operative law.

And then, again, there is the term "international" which may seem innocuous but which in fact strikes at the core of the topic. Would this

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refer only to UN activities or UN-related activities and/or agencies? Or would it include and justify the unilateral act of one state exercising what in its opinion is its moral, or perhaps even legal, duty to act in the protection of human rights when such act has implications on the affairs of another state? Or do we mean only the programs to promote or protect human rights by inter-governmental agencies? And what of the growing number of non-governmental agencies which claim international competence and concern in the protection of human rights everywhere in the world?

These are some considerations which must be taken into account if we are to force ahead meaningfully, from mere debate to effective consensus and perhaps to programs of action.

To Whom Is The Law On Human Rights Addressed?

With the entering into force of the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights together with the Optional Protocol to the latter, on January , 1976, there can no longer be any doubt that there is international law on human rights. These instruments are supplemented by at least sixteen multilateral treaties relating to human rights which had been prepared and adopted by the United Nations. It is therefore now timely to dwell on the question: Who are contemplated as addressees of the law?

Professor J.J. Lador-Lederer, in his book, *International Group Protection* has suggested that there are three categories of addressees of the law: (1) the Obligatee, (2) the Beneficiary, and (3) the Agent of protection.

Who is the obligatee? Traditionally, obligatee status under international law was limited to those entities which could be contracting parties to treaties. Should this still be applied in the light of the recent developments in international law which has seen fit to punish international criminals, if necessary above the heads of the States of which they are nationals, and which promises protection, and does what it can to hold this promise? Professor Lador-Lederer suggests:

> It seems to be clear that, as understood here, obligatee status can no more be limited to the role of obligatees resulting from synallagmatic treaties. It is broad enough to include the status of an addressee burdened with obligations by a legal construction symmetric to the status of a beneficiary even where the latter is not a party to the treaty in question. (p. 48)

This problem goes into the heart of the controversial status of the individual in international law. Some basic re-examination of concepts in this area is therefore in order.

Assuming now the identity of the obligatee, there remains the even greater problem of identifying the "basic obligations" to be fulfilled by the obligatee in the area of human rights.

It is, for instance, easier to conceive of a justiciable issue in the enforcement of a right arising from the Internatioanl Covenant of Civil and Political Rights, for one could perhaps file a complaint (in a proper tribunal) arising from a denial of the right to due process. But many of the basic rights set forth in the International Covenant for Economic, Social and Cultural Rights could scarcely be enforced through tribunals. The existence or non-existence of desirable economic and social conditions are not justiciable issues. How can there be a legal remedy against poverty? And if such is made available, to what practical purposes?

For the need to protect human rights arises either out of the social and economic conditions of human society, or out of political drama. And within the present societal millieu, protection would have to take the form of more than legal remedies.

If economic and social conditions are the real enemies in bringing to reality the enjoyment of human rights, then the main "obligatees," namely governments of States are instrumentalities, not adversaries, of the individual beneficiary. It is suggested that this puts a unique element in the international enforcement of the law on human rights.

A look in the enumeration of internationally protected human rights lead to the conclusion that beneficiaries of protection of human rights have been identified as falling in either of two categories: the individual human being, or a group. There exist human rights that can be protected only in the individual; and there are those which can best be protected through a group. It can also be said, to complete the observation, that most individual rights may be endangered because of, and through group affinity.

The individual as beneficiary. Most of the rights under the two covenants, as well as the Declaration of Human Rights and the 16 multilateral treaties on human rights, pertain to the individual as beneficiary. Perhaps it is indicative of the state of human rights today that it is the "individual" which is given the least importance in considering programs to promote internationally protected human rights. It would seem to be self-evident that the best protection for the effective enforcement of legally guaranteed rights would be the individual's keen awareness of his inherent worth and dignity, knowledge of the law that guarantees protection of these, and a strong sense of militancy against any encroachment thereof. Beyond these, governmental institutions can only provide the institutional structures which

would give meaning to these rights. Within this scenario, governments would have very little choice but to comply with their obligations.

It is therefore recommended that the strategy to promote the international protections of human rights must keep the central importance of the individual who after all is not only the beneficiary but, assuming as we must in law, that he is a rational being, the individual must still be the final judge of what he wishes to protect and how he wants to protect this. To assume the supremacy of international mechanisms without regard to the individual is to open the world to new visions of history's old spectres: colonialism, imperialism and unilateral acts of intervention, whether military or humanitarian.

The group as beneficiary. There are some rights in the covenants and conventions on human rights which are naturally functions of a group, notably the right to self-determination provided in article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The conventions outlawing genocide, racial discrimination and slavery, the law protecting minorities, refugees and other special groups such as women, children and workers pertain to group rights. Dr. Lador-Laderer asserts that in this case group protection is given by International Law subsidiarily for a missing governmental protection on a nationality link. (p. 16)

Addresses: Agents of Protection. In the event of a divergence of interests between the obligatee state and the beneficiary individual or group, who is now to intercede? Dr. Lador-Laderer says that there are "agents of protection" which must play this role.

These agents include: the UN, inter-governmental organizations, and non-governmental organizations.

I submit that it is these agents of protection which must be the focus of our attention in this panel. There is a lacuna in traditional international law. This lacuna exists largely because these organizations are relatively new phenomena. But their growing number and importance make it imperative that their role and status be defined and regulated. Consider the following questions: (1) While NGO's enjoy the prestige of being free from formal political affiliations and connections, and therefore may be presumed to be free from bias and political constraints, are they also free from obligations to answer for any damage that may arise from their publicized acts/findings? Nations could very well fall on such publicity.

(2) Some of these organizations receive funding from private source. But what guarantee is there that these may not be used as instrumentalities of identified political or even economic interests? Surely, good intentions

asserted are no guarantee of genuine interest. Without international control or regulation, could not NGO's be the next source of international controversy? For it is entirely possible, though not necessarily probable, that in the name of international concern for human rights, a new version of intervention is rearing its ugly head in the international scene. Who is to protect the beneficiary from the self-appointed agent of protection?

New States and the International Legal Protection for Human Rights

New states have come of age in the twentieth century. Before the Second Hague Convention in 1904, small nations had been treated as nominal members of the international community. The Big Powers not only ran the world; they did so without self-consciousness — it seemed the natural thing to do.

When the League of Nations adopted universal membership in principle (except for those the Big Powers wanted to exclude), small nations attained new status. The structure of the Assembly, the rule of unanimity which gave veto powers to all members, the one-country-one-vote rule giving reality to legal equality — these were some of the major concessions to small nations who in turn had to accept the inevitable Big Powers hegemony in the Security Council.

In the United Nations small nations attained unprecedented respectability. Many factors contributed to this development, one of major importance being the dramatic increase in the number of new small states after the second world war when former dependencies became full-fledged international personalities. If only by sheer force of number, the new nations which were mostly small (with a few exceptions such as India and Indonesia), were inevitably going to affect the character and dimensions of international relations, and the shape and direction of international law. The small nations combining force with the big new nations have became a potent force in the United Nations as in general world politics. Although not always acting in concert, their numerical superiority in the General Assembly has made such an impact that has transformed that body into an agency with far more power than had been intended or envisioned by the framers of the Charter. Even the amendment increasing the membership of the Security Council was a concession to the demands for fair representation by the newly-independent states of Africa and Asia.

Doubt had been cast upon the claims of a "Third Force" of Afro-Asian nations in the United Nations as in world politics in general where the bipolar system of the superpowers had been largely accepted. But

that these nations' full potential as a "bloc" has not yet been fully exploited is what makes the prospect more thought-provoking.

This paper aims at exploring the role of the new small nations in the development of the international law on human rights.

NEW STATES: THEIR IMPACT ON INTERNATIONAL LAW

Even limiting the term "new states" to those that became sovereign after the second world war, it would already include more than half of the membership of the United Nations today. While not always acting as a working bloc, these nations share certain sentiments that have influenced if not determined some aspects of development in international law.

Judging from their active participation in its codification as well as in their readiness to invoke it when settling disputes, new nations do not appear to deny the existence or binding force of international law. However, they have persistently asserted their desire to see some changes in a body of rules which they feel is no longer relevant, having been made by a small minority of states located in a small portion of the globe, under circumstances which have since radically changed.

Without going into the merits of the arguments, such stance taken by the new nations has had impact, if only because to ignore the demands from a significant number of subjects of the law would render such law an anachronism. At the same time, the Western nations of the *ancien regime* have had their own reasons for wanting revisions made, finding that the rules no longer yield adequate protection for their present interests.

It is at this juncture in the development of the law of nations that the interests of the old and new members of the international community had a fortunate convergence for this made possible the adoption of the 2 covenants and the optional protocol in 1966 by the General Assembly.

Even a cursory examination of the list of states which ratified the covenants will reveal the interesting fact that the new nations stand out as the more enthusiastic States Parties.

Their impact in this area of law is manifest.

The right to self-determination is asserted in the first article both in the International Covenant for Economic, Social and Political Rights and in the International Covenant of Civil and Political Rights. This physical position in both instruments is surely not without significance, both legal as well as political.

Of particular interest to this forum, is the legal question and political problem: How is the right to self-determination to be interpreted vis-a-vis the promotion of the international protection of human rights?

As an interesting point of departure for discussion, I wish to focus attention to the views of three outstanding scholars.

Thomas M. Franck and Nigel S. Rodley, in their well-documented articles "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (AJIL, Vol. 67, No. 1, April 1973, pp. 275-305) assert that the continuing illegality and immorality of intervention, even when done in the name of humanitarian considerations, thus:

> History shows that when the humanitarian justification has been invoked, it has mostly been under circumstances in which there is at least a strong suspicion that the facts and usually the motive, were not as alleged.

The authors likewise cited the Court's decision in the *Corfu Channel* case, and assert that this is still good law, "as relevant to law and policy today as they were in 1949." (p. 302)

Mr. Moses Moskowitz in his thought-provoking book, *International Concern With Human Rights,* has this to say on intervention and the Philippine situation under martial law:

> Yet there was no question that what had taken place in the Philippines was a matter which concerned that country alone; that martial law was imposed within the Philippine constitutional framework and that it was up to the people of the Philippines to try to temper tyranny with genuine social reform and to hasten the restoration of democratic institutions and liberties. For the organized international community to have asserted an interest in the internal developments of a Member State and to question the motives of the legally constituted authorities would have been regarded as an intolerable presumption; to have passed judgment on the fundamental problems which led to the proclamation of martial law would have been rejected as preposterous; and to have intervened, even by way of inquiry, would have been condemned as a violation of the United Nations Charter. (p. 122)

Even where the European Commission on Human Rights made a positive finding of violations of human rights perpetrated by the Papadopolous Government in Greece, Moskowitz raises the legality of intervention in the light of a state's right to save a nation from impending chaos, as perceived by the authorities.

He aptly concludes:

> Perhaps we may never be able to reconcile the requirements of international concern with human rigths with the assertions of the sovereign state, any more than we can resolve the basic conflict between liberty and equality. (p 133)

The Problem of Legal Enforcement

Since January, 1976 the covenants on human rights have come into force for the 35 nations which ratified these instruments. But this makes only law for the States Parties. The objective now is to make these into general law.

It is indeed ironic that the United States of America, whose President is now known to be the most dedicated exponent and advocate of the international protection of human rights, has not seen fit to ratify both Covenants. In short, it is not a State Party to the Covenants. Perhaps it will go a long way for the promotion of human rights if the USA would match its verbal commitments to human rights with its act of binding itself to the legal effects of the law on human rights. Let not the fate of human rights go the way of the ill-fated League of Nations.