From State-Centric Int'l Law Towards a Positive Int'l Law of Human Rights

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The Protection of Human Rights in Disintegrating States: A New Challenge
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I. The State-Centric Nature of International Law

According to the prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states. That consent may be expressed explicitly, as it is in treaties, or implicitly through the practices of states which give rise to rules of customary international law.\(^1\) This is one important sense in which international law is centered on states, or "state-centric." In addition, international law was traditionally thought to create rights and obligations only for states. According to this view international law was a law by and for states, in which the rights of individuals had no place.

An important step beyond state-centrism is implicit in the idea of an international law of human rights, since the rights concerned are those of individuals, or groups of individuals rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty, while traditional "state-centric" approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion. This traditional concept of international law is inherently inadequate to the task of protecting the human rights and fundamental freedoms which the UN system is pledged to promote.

II. A Dynamic View of International Law

International law must be capable of changing and adapting to the realities of the international system, just as it has adapted to such changes in the past. During the Middle Ages the prevailing conception of international law was that it reflected the application of the Law of Nature (natural law) to the conduct of states. When Europe's Holy Roman Empire collapsed, a new international system developed in its place, and it was supported by a new conception of international law. The 1648

\(^1\) See Article 38 of the Statute of the International Court of Justice which defines the law which that court is to apply in deciding disputes between states. This authoritative statement of the sources of international law refers to three principal sources, i.e. "a. international conventions .. establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law" and "c. the general principles of law recognized by civilized nations." Each of these involves building law upon the recognition or acceptance of states or nations, i.e. upon their consent. Judicial decisions and the teachings of publicists are referred to in Article 38(d) as "subsidiary means for the determination of rules of law."
Peace of Westphalia formalized the transition from a nominally unified Empire to a system of sovereign Nation-States. New theories of international law developed by Grotius, among others, adapted the prevailing concepts of natural law to the changed conditions by divorcing it from Catholic theology and supplementing it with notions of positive international law. By the 19th century most states in regions formerly part of the Empire no longer accepted the theologically based notion that they were subject to obligations stemming from natural law. The idea of a positive international law based on the consent of states emerged as the only generally acceptable theory of international legal obligation.

More recently, this process of evolution and development has taken international law in the direction of a renewed interest in positive expressions of natural law concepts. It is in the field of international human rights that it is most difficult to insist upon a purely positivistic model of international law. The idea of universal human rights has its origins in the concept of natural law, but the international law of human rights has developed well beyond its philosophical origins.

The horrors of the Nazi holocaust brought home to many the need for a positive international law of human rights. When concerned people and governments abroad protested the treatment of Jews and other oppressed groups in Germany, Hitler rejected these protestations by characterizing the issue as a matter within the domestic jurisdiction and national sovereignty of the German state. Although the genocidal "final solution" was morally abhorrent and unmistakably wrong, its illegality under positive international law was less clear. The inadequacy of the existing positive international law became apparent, and this provided the impetus for changes to come.

Since the Second World War there has been a major thrust toward the enactment of a positive international law of human rights. By articulating human rights norms in treaties and other international normative instruments, States and international organizations have done more than simply create a few more rules of positive international law. They have begun to transform the nature of the international system.

III. The United Nations Charter and Human Rights

The United Nations Charter represented a major advance in the codification of the international political order, and it did much to develop the international legal order as well. Promoting and encouraging respect for human rights and fundamental freedoms for all is explicitly mentioned as one of that organization's purposes, and thus human rights were for the first time definitively declared to be a matter of international concern. At the same time, the Charter is not very specific about the human rights and freedoms to be promoted.

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3 See, Hugo Grotius, De jure belli ac pacis, libri tres. (On the Law of War and Peace) Trans. by Francis W. Kelsey [with others] New York : Oceana, 1964. (Classics of international law.) Grotius lived from 1583-1645. This work was first published in 1646.
4 see the Preamble of the United Nations Charter, and Article 1(3).
Another problem is that the Charter also expresses principles which can be invoked against international action to protect human rights. It reaffirms the "sovereign equality" of UN member states, and the UN's lack of authority to intervene in the domestic jurisdiction of its members. The latter two provisions serve to reinforce the argument that state sovereignty should preclude any intrusive international action for the protection of human rights.

Some of these deficiencies were remedied when the Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948, and the post-Charter evolution of international human rights norms and procedures began. The Universal Declaration proclaims itself "as a common standard of achievement for all peoples and all nations" in the field of human rights, and it is, in fact, the most frequently cited standard of international human rights. But as a resolution of the UN General Assembly it is formally non-binding, and this raises the question of its effect upon the development of international human rights law.

Georges Abi-Saab has noted that the normative effect of UN General Assembly resolutions depends upon three factors, i.e. the degree of consensus behind the resolution, the degree of concreteness of the normative language in the resolution, and the extent to which mechanisms of implementation have been provided for. The Universal Declaration was adopted by the General Assembly with no negative votes (although there were 8 abstentions); thus, the consensus behind that resolution was very strong. Today, more than 40 years after the adoption of the Declaration, the international consensus on the question of human rights remains strong, and as far as concreteness is concerned, the Universal Declaration represents a vast improvement over the general human rights language found in the UN Charter.

Like the UN Charter before it, the Universal Declaration contains no specific authorization for UN action in the field of human rights. But over the years, as international human rights norms have gained strength, certain UN mechanisms for the application of these norms have developed well beyond anything explicitly authorized by the Charter. Only in Article 68 does the Charter mention an organ or mechanism for the promotion or protection of human rights. While that article provides for the creation of a UN Commission for the promotion of Human Rights, operating under the United Nations Economic and Social Council (ECOSOC), it does not invest that commission with any specific powers.

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5 Charter Article 2, paragraph 1, states that "The Organization is based on the principle of sovereign equality of all its Members."

6 Charter Article 2, paragraph 7 states that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or shall require the Members to submit such matters to settlement under the present Charter..."


8 Id., preamble.


10 Article 68 of the Charter states that "The Economic and Social Council shall set up commissions in the economic and social fields and for the promotion of human rights, and such other commissions as
It is in the context of the deficiencies of the Charter that we must evaluate the so-called "1503 procedure" of the United Nations Human Rights Commission, which represents only a minimal intrusion upon state sovereignty. It does not involve any coercive method of enforcement, but instead it relies upon the use of publicity to "shame" states into improving their human rights records.

In 1947 ECOSOC decided that it had "no power" to take any action in regard to any complaints regarding human rights. Thus it could not take any action on any of the many complaints it began receiving as soon as the UN was created. In 1959 it confirmed this lack of power in another resolution, and at the same time consolidated UN procedures for cataloging these communications and reporting on them. As UN Human Rights procedures have developed since that time, they have stressed a confidential approach to the consideration of complaints about human rights.

ECOSOC Resolution 1503 establishes a confidential procedure by which the UN Human Rights Commission and its subsidiary organs can consider communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. This resolution does not grant the Human Rights Commission any authority to take direct action for the enforcement of human rights. What the Commission can do, after carefully examining a reported situation, is to make recommendations to ECOSOC about the need for further investigation. Under the 1503 procedure all actions taken by the UN remain confidential until such time as the Commission may decide to make recommendations to ECOSOC.

The 1503 procedure is very limited. It is slow, and it applies only to situations where there have been large scale or systematic denials of fundamental human rights. The confidential, non-public nature of the procedure is often criticized as well. But the confidential nature of the procedure allows for the judicious use of the "shaming" power. States under review for human rights violations generally prefer to avoid public disclosure of this fact. This provides an incentive for them to cooperate with the Commission in the hope of avoiding the adverse publicity which results from a failure to resolve matters with the Commission behind the scenes.

The 1503 procedure is supplemented by a public procedure under Resolution 1235. This procedure serves as an important basis for debate and public discussion during the annual meetings of the Commission and Sub-Commission on Human Rights. This procedure sometimes leads to resolutions being adopted by the Commission or Sub-Commission, expressing concern about human rights violations in particular countries. Special rapporteurs, special representatives, experts and other

may be required for the performance of its functions." No specific authority is granted to any of these commissions under the Charter.

11 ESOSOC Resolution 75 (V) (August 5, 1947).
12 ECOSOC Resolution 728F (XXVIII) (July 20, 1959).
14 Id. Article 8.
15 ECOSOC Resolution 1235 (XLII) (June 6, 1967)
envoys are also sometimes sent to countries pursuant to the 1235 procedure. The effectiveness of this procedure depends upon the power of “public shaming” to influence the human rights practices of states.

UN procedures for addressing systematic violations of human rights involve only a minimal (and minimally effective) intrusion upon the sovereignty of its Member States. In fact, these procedures rely upon the existence of a national authority politically responsible for the local human rights situation. How then can the UN act to protect human rights in cases where state authority is in a state of disintegration?

Author Note: The UN Human Rights Commission has been replaced, as of summer 2006, with a new Human Rights Council. It remains to be seen whether this will represent any real improvement upon the now-defunct UN Commission for Human Rights.

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16 This discussion of action under Resolutions 1503 and 1235 refers only to UN procedures of general applicability. There are a number of other UN procedures which are applicable to states which have consented to be bound by UN negotiated human rights treaties such as the Convention Against Torture and the International Covenant on Civil and Political Rights.