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INTERNATIONAL LAW AND HUMAN RIGHTS

Developments in international law since World War II have made obsolete the old concept that a State's treatment of its own citizens within its own borders on matters of human rights and fundamental freedoms lies essentially within its domestic jurisdiction. Even before World War II that old concept was giving way before guarantees for minorities, the people of mandated territories, persons facing involuntary servitude and others.

Today the prevailing legal view is that the principles of sovereignty and non-intervention in internal affairs do not constitute a legal bar to a State's international responsibility for any matter falling within the scope of the duty to respect and promote human rights and fundamental freedoms. Accordingly, there is now ample legal justification for diplomatic representations to a State concerning its treatment of its own nationals, where such treatment violates minimum standards of international law.

Under the United Nations Charter members are obliged to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. However, since the Charter does not further prescribe how to fulfill that obligation in respect to particular violations by others, there are usually complex questions of policy, tactics and law to be considered in deciding when and how the United States can best seek to discharge that obligation in a particular case consistent with its commitments to other goals, including that of maintaining international peace and security. Such questions include the seriousness of the violation, the various options for United States initiatives, and the consequences of inaction. Among the options for consideration are:

(a) Bilateral and multilateral efforts to clarify the facts and to cause there to be careful consideration of the whole matter by the governments concerned - especially any government which might be in violation - before official positions become more deeply entrenched. Such efforts typically involve quiet diplomatic representation, and the procedures of the United Nations and Inter-American Human Rights Commission, of the United Nations High Commissioner for Refugees and of important private international bodies such as the International Committee of the Red Cross and the International Commission of Jurists.

(b) Further bilateral efforts, including more forceful or formal demarches, public statements of concern or condemnation, withdrawal of the principal diplomatic representative and partial or total suspension of aid - economic or military;

(c) Further multilateral efforts, including resolutions of important organs of the United Nations and the Organization of American States, inquiries and resolutions of the specialized agencies, ad hoc arrangements for United Nations or Organization of American States conciliation, mediation, observation or investigation, reference to the International Court of Justice, suspension of international financial or economic assistance, voluntary embargoes and, in extremis, mandatory economic sanctions.

Historical Background

Since the beginnings of modern international law, human rights of aliens have enjoyed protection. Numerous treaties have protected religious freedom from the 16th Century on. Following World War I, the rights both of minorities and of the inhabitants of mandated territories enjoyed international protection. Deprivation of liberty through the practice of slavery came under international sanction. The rights of the working man and woman came under the protection of conventions and standards of the precedent-making International Labor Organization. The existence and limits of the right of humanitarian intervention were the subjects of learned discussion. The adoption of the United Nations Charter brought further fundamental change. Through it, member States undertook an international legal obligation to respect and promote human rights and fundamental freedoms. A similar obligation was imposed on Romania, Bulgaria, Hungary, and Italy (then non-member States) through the post-war Peace Treaties, to which we and the Union of Soviet Socialist Republics are parties. The adoption of the Universal Declaration of Human Rights in 1948, and continuing multilateral efforts thereafter, gave that obligation substantive definition. In particular, the United Nations General Assembly adopted and opened for signature in 1966 the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

The rapid post-war expansion of the international law of human rights and fundamental freedoms took place against a backdrop of traditional sensitivity on the part of governments concerning their sovereign prerogatives, particularly

their exclusive "domestic" right to treat their own citizens in their own territory largely as they chose and without being subject to outside interference. The principles of "sovereignty" and "non-intervention in domestic affairs" were also traditionally used as screens by States seeking to avoid international responsibility or inquiries regarding torture, political or religious repression, racial discrimination, denials of fair trial, and the like.

When the United Nations Charter was first adopted, some commentators viewed its human rights provisions as intended to establish something less than a legal obligation. But the weight of legal authority is now to the contrary. Respect for and promotion of human rights and fundamental freedoms have come to be generally recognized as among the principal international legal duties of States. This is confirmed by the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which was adopted by consensus (including the Union of Soviet Socialist Republics) in 1970. Additional evidence is found in the establishment by Economic and Social Council Resolution 1503 (XVIII) of May 27, 1970 of a now generally accepted procedure for United Nations consideration of situations revealing a consistent pattern of gross and reliably attested violations of human rights. Similarly, European States have placed human rights violations in the hands of a European Commission and eventually a Court of Human Rights, while the American Republics have entrusted them to an Inter-American Human Rights Commission.

Illustrative of the prevailing view, Oppenheim, a leading authority on international law, recognizes in his discussion of humanitarian intervention that to the extent that human rights and fundamental freedoms have become a legal obligation, they cease to be a matter which is essentially within the domestic jurisdiction of States. The United States adopted this view in the 1959 Camp David talks, when President Eisenhower and Secretary of State Herter pursued questions regarding the Union of Soviet Socialist Republic's treatment of Soviet Jewry in discussions with Premier Khrushchev and Foreign Minister Gromyko. Again, by consensus, the Union of Soviet Socialist Republics and the United States being present, the Chairman of the United Nations Human Rights Commission on March 1 cabled the Government of Chile calling on it to allow citizens and foreigners seeking asylum to leave the country in the course of calling generally for cessation of human rights violations.

A further problem, of course, is to determine how the obligation may be discharged and the reach of the human rights and fundamental freedoms to be respected. The answers to these questions have to be determined in the traditional fashion of the law. First, of course, there is the guidance provided by Article 38 of the Statute of the International Court of Justice. In deciding disputes in accordance with international law the Statute says to apply international conventions establishing rules expressly recognized by the contesting States, international custom evidencing law, recognized general principles of law, judicial decisions and teachings of the most highly qualified publicists. Numerous international conventions may be relevant, depending on subject matter and the parties. For example, an overwhelming majority of states are parties to the Geneva Conventions of 1949 which spell out human rights protections for both internal and international conflict. Such provisions as Common Article 3 appear to be binding not only as treaty obligations but also as general customary international law. Similarly, judicial decision may be relevant. For example, the 1971 Advisory Opinion of the International Court of Justice on Namibia stands for the proposition that apartheid is a violation of human rights.

In practice, of course, and this is important, States almost always consult the Universal Declaration of Human Rights as authoritative evidence of the meaning of Charter terms. That Declaration, having passed the General Assembly a quarter of a century ago without a negative vote and with only 8 abstentions, and having been referred to as authoritative in numerous conventions and resolutions, partakes at once of the character of recognized general principles of law and international custom. In addition, its widespread acceptance is evidenced by its inclusion in whole or in part in the constitutions and legislation of many States. Increasingly, too, as their adherents increase and their use as authoritative reference points grows, the International Covenants on Civil and Political and on Economic, Social and Cultural Rights assume a position of great authority. Finally, with respect to what is required in particular situations to discharge a State's obligation, there are inevitable differences as to how far and how quickly States must move. Situations will vary from those (a) where there is a virtually absolute obligation for immediate and complete compliance - as when a State is violating the rights of its own citizens through torture, genocide, murder or the like - through those (b) where certain procedural guarantees may

be modified or suspended only for so long as and in such ways as are absolutely required by an immediate threat to national security, and to others (c) where the question is what means are open, available and promising for a State to use its best efforts to promote respect by another State of the nationals of the latter. The wide range of options for action has already been outlined.

[Adapted and generalized by L/HR from a paper prepared for the current Moscow summit, drafted by David Small (L/EUR) and Charles Runyon (L/HR) and approved by Mr. Aldrich and, in draft, by Messrs. Schwebel and Hewitt. The Moscow paper was attached by Mr. Maw to his recent memorandum to Mr. Ingersoll on Section 32 and human rights.]