American University International Law Review

Volume 10 | Issue 4 Article 3

1995

# A Festschrift in Honor of Seymour J. Rubin

Claudio Grossman

Tom Farer

Andreas J. Jacovides

Herman Schwartz

Bennett Boskey

***See next page for additional authors***

**Authors**
Claudio Grossman, Tom Farer, Andreas J. Jacovides, Herman Schwartz, Bennett Boskey, William Diebold, and Christina M. Cerna

SEYMOUR J. RUBIN

# FESTSCHRIFT IN HONOR OF SEYMOUR J. RUBIN

## *Opening Remarks*

*Claudio Grossman*
*Dean, Washington College of Law*
*at The American University*

It is my honor and pleasure to open this issue of *The American University Journal of International Law and Policy* dedicated to Emeritus Professor of Law, Seymour J. Rubin. Professor Rubin has been a distinguished member of the faculty and long-time friend of the Washington College of Law.

It is very difficult to summarize the tremendous contributions Professor Rubin has made to the field of international law and the Washington College of Law. In a career spanning more than five decades, Professor Rubin has played an important role in the effort to shape a new international legal order. He represented the United States on various committees of the United Nations, including the Commission on Transnational Corporations, the Special Subcommittee of the Security Council, and the Commission of International Trade. He served as a member of the Inter-American Juridical Committee of the Organization of American States, and as the U.S. Member on the Panel of Conciliators for the International Center for Settlement of Investment Disputes. Moreover, Professor Rubin held the posts of Executive Vice-President and Executive Director of the American Society of International Law (ASIL), from 1975 - 1982, and worked to expand even further the relevance of one of the most important associations of scholars and practitioners in the world. Today, he continues to serve ASIL as a Senior Consultant and Honorary Vice-President.

As a legal scholar, Professor Rubin has been a prolific writer, authoring and editing numerous books and articles on various aspects of international law. His original ideas about transnational corporations, trade and the environment, and conflict resolution are required reading material for all scholars, practitioners, and students of international law.

As a faculty member of the Washington College of Law, where he continues to teach courses on transnational corporations, Professor Rubin has been instrumental in building the law school into one of the finest centers of international law in the United States. In addition to his teaching responsibilities, Professor Rubin was active in the development of a unique LL.M. program that today draws over 150 students from 50 countries around the world. In spite of his many activities and obligations, the faculty and students always find in Professor Rubin a valuable colleague, a trustworthy friend, and a role model as a scholar, a devoted teacher, and a first-rate practitioner of international law.

The Washington College of Law is proud to recognize the impressive contribution of Professor Rubin, and to honor him in this issue of *The American University Journal of International Law and Policy*. His example and achievements will continue to inspire our community well into the next century.

# HOMAGE TO A SINGULAR MAN

Tom Farer*

"Education does not consist merely in adorning the memory and enlightening the understanding," Joubert wrote in his Nineteenth Century *Pensees*. "Its main business should be to direct the will." Education directed Seymour Rubin to a life of public service and scholarship which continues now, past his eightieth year.

Although I have known and worked with Sy for over two decades, I never before quite appreciated the breadth and importance of his service. Close familiarity, as much as vanity, often makes us a little myopic. In the day-to-day of existence, we tend to see frequent associates as much like ourselves, unremarkable. We see them thus until, on the occasion of some celebration, we are asked to write about them. By defamiliarizing the subject, writing creates distance. In written form, a man like Rubin assumes his true height. We look up and see him as if for the first time.

Before beginning to write, I extracted a copy of Sy's resume from the Dean's files. Its terseness is eloquent. Had it come from a less confident man, a vast sprawl of minor recognitions would have surrounded and, ironically, obscured the spare list of major offices and published works which reveal a remarkable productivity, an avid energy, and the earned respect of his peers. Like a visitor from another world, Rubin is one of the last survivors of a generation of optimistic and practical idealists. Leading members of it refined the New Deal, fought and managed the Second World War, and then simultaneously managed the long Cold War and the coincident European peace. Being human, their achievements were flawed. Still, few generations could claim so many contributions to the mitigation of the human condition.

In the realm of international relations, Rubin and his colleagues were the principal architects of profound changes in collective mentality and political structure. They encouraged and assisted the transformation of

* Grazier Fellow, Professor and Director of the Joint-Degree Program in Law and International Relations at The American University.

Western and Northern Europe from a place of coiled mutual hostilities into a community of states among whom war now seems inconceivable. By covering that emerging community with a security umbrella and otherwise subordinating narrowly conceived U.S. economic interests, the leaders of Rubin's generation augmented the resources available to European governments for building welfare states which vastly reduced and in some cases virtually eliminated poverty and consolidated democracy.

For the world as a whole, Rubin's generation designed and implemented a set of liberalizing norms and institutions which provided the framework within which once impoverished peoples found their way to prosperity. I am hardly blind to the imperfections of the system of trade and finance which that generation designed or to the misery and poverty for which it had insufficient answers. However, relative to the national parochialism that previously prevailed with its pitiless zero-sum games, the liberal international economic order manages to seem benign. Certainly no previous era in North American and European, much less world history, has witnessed such sustained (albeit uneven) growth. In the developed, as well as a fair number of developing states, growth has coincided with a dramatic augmentation of material well being for most social classes.

It is in the economic realm, more than any other, that Rubin has made his mark. He was still short of his thirty-fifth birthday when he served as the United States delegation's legal advisor at the world conference which negotiated the General Agreement on Tariffs and Trade, still the linchpin of economic order. Throughout the 1950s and 1960s, Rubin was prominently engaged at the critical points where political and economic interests converged: as chief of the United States delegation negotiating Marshall Plan agreements with European governments, agreements that helped open the road to economic union; as a senior administrator of the country's initial essays in foreign economic assistance beyond Western Europe; as General Counsel to the restructured and vastly enlarged program of assistance to the Third World established by President John F. Kennedy; and as the chief representative to the Development Assistance Committee.

By the 1970s, the three principal focal points of Rubin's remarkable career became clear. One was geographic and was signified by his election in 1974 to the Inter-American Juridical Committee to which he would be reelected three times and which he would chair. It in turn implies a second focal point, namely the progressive development of international law, an abiding interest of Rubin's which led him to serve for seven years as the Executive Vice-President and Executive Director

of the American Society of International Law. The third, overlapping the other two, was inter-governmental organization, a concern evidenced in his work on the Juridical Committee, his representation of the United States in various capacities at the United Nations, and his consultancy with the Inter-American Development Bank.

In fact, Rubin is too Protean a figure to admit to any neat career taxonomies. Focused enough to be enormously successful in his main endeavors, Rubin has nevertheless strayed outside the main lines of his occupational interests, drawn by the urging of conscience. Nothing better typifies the human concerns that have always animated him than Rubin's founding of the Inter-American Legal Services Association. Through his efforts, Rubin gave the Association permanent institutional form and quickly transferred full authority to Latin American colleagues. This achievement typifies Rubin's practical wisdom, his ecumenical sensibility, and, a trait remarkable in successful public people, his ability to let go of a thing.

Most men would be satisfied and stretched just by public service such as Rubin's. But for him it was not enough. A doer, Rubin also meditated on what was being done. Even before he left government, Rubin had begun the scholarly work that has continued to this day and that continues to illuminate the international legal process. His daunting list of books, contributions to the books of others and articles exposes a man for whom cerebration is more than service, for whom it is a form of exalted play.

It was not Rubin's only form of play, I am happy to say. If a man is only his career, then while we may admire we will not especially like him. And it is hard not to like this sociable, human, and no less than gifted and forceful character and to be very glad indeed that he made the Washington College of Law the academic venue of his distinguished career.

# CYPRUS—THE INTERNATIONAL LAW DIMENSION*

Andreas J. Jacovides**

From its inception as an independent state in 1960, Cyprus has always endeavored to abide by the rules of international law, to participate constructively in major United Nations Conferences, and to make its contribution internationally in such areas as developing compulsory third party dispute settlement procedures and the adoption of progressive notions of international law such as *jus cogens* (peremptory norms from which no derogation can be allowed by agreement or otherwise).

The all-embracing concern for the people of Cyprus over the past several decades has been what is generally known as the Cyprus problem. Several phases span the years, from the pre-independence anti-colonial struggle in the 1950s, to the present grave dimensions of foreign invasion, continuing occupation, attempted secession, and massive human rights violations. The year 1994 marked the twentieth anniversary of the brutal invasion and occupation of a large part of Cyprus by the Turkish armed forces, with its disastrous consequences in terms of human suffering and its implications for international legal order and for peace in this volatile region. It is the nature and extent of these consequences, together with the wider issues of principle involved, that render the Cyprus problem one of international concern which needs to be urgently addressed and solved. Its continuation is a tragic anachronism in today's world and, even though it may have faded from the daily headlines and more topical international situations have superseded it, the issues of principle involved are as valid today as they were twenty years ago.

The Cyprus problem in its basic dimensions is simple and should be of universal concern. Although it has its constitutional and other aspects, the Cyprus problem in its essence is an international problem of aggres-

---

* Based on a lecture at the University of Virginia Law School's John Bassett Moore Society of International Law (Nov. 7, 1994).

** Ambassador of Cyprus to the United States.

sion, invasion, occupation, and of massive violation of human rights. It involves the illegal invasion and occupation of a small country by a far larger and militarily much stronger neighbor, bent on imposing by force its arbitrary prescription of a partitionist political solution; it involves attempted secession in violation of international treaties; it involves the systematic destruction of the cultural heritage of an ancient land with thousands of years of history and civilization; it involves "ethnic cleansing" on a massive scale with the forced displacement of practically all of the Greek Cypriot inhabitants of the area under Turkish occupation (constituting eighty percent of the inhabitants of that area and more than a third of Cyprus' total population) and the importation of a large number of colonists aimed at altering the historic demographic composition of the island; and it involves the tragedy of missing persons that raises humanitarian issues of major significance.

Consequently, the Cyprus question is a test-case of the effectiveness of the United Nations and of the universal applicability of many of the most basic rules of international law. There is a solid basis for the proposition that if the international community had taken effective steps in 1974 not to allow the victimization of Cyprus through its forcible division and deliberate massive "ethnic cleansing," similar deplorable actions in the former Yugoslavia and elsewhere would not have taken place. Bad precedents, when tolerated and condoned, tend to be repeated.

Turkey's illegal actions in Cyprus have received universal disapproval from the United Nations and from virtually all other international forums. Turkey's invasion of Cyprus, which was carried out through the use of American-supplied arms in violation of American law and bilateral United States—Turkish agreements, raised the "rule of law" issue and resulted in the arms embargo against Turkey by decision of the United States Congress.

On numerous occasions, the United Nations Security Council called for the withdrawal of all foreign troops from Cyprus, the voluntary return of refugees to their homes, the cessation of all interference in the internal affairs of Cyprus, and respect for its sovereignty, independence, territorial integrity and unity. Turkey chose to ignore the decisions of the international community and did so with impunity. This is a very sad commentary on the state of international legal order.

Despite the international remonstration, the Cyprus Government showed its goodwill, sense of pragmatism, and genuine wish for a peaceful solution by entering into negotiations in the conviction that there is much more that unites all Cypriots than the differences that

presently divide us. The Cyprus Government and the Greek Cypriot side made a number of painful concessions in the hope that the Turkish side would respond with reasonable proposals and thus reach a solution. Basically, we asked for the establishment of a viable and genuine federation based on democratic principles, as in the case of all other federal states, and with special provisions to meet the particular circumstances of Cyprus. The demand from the Turkish side called for the establishment of, in effect, two separate states with separate armies, separate treaty-making capacity, and separate economies. In short, while paying lip service to a federal system, the Turkish objective remains a partitionist solution through the legitimization of the internationally condemned invasion.

The Turkish objective is evidenced in the recent position of the Turkish Cypriot leadership as reflected in the resolution adopted in August 1994 by the so-called "Turkish Cypriot Assembly," with the full support of Ankara, to abandon federation as the only solution to the Cyprus problem. This proposition is in direct defiance of United Nations resolutions, including the most recent Security Council Resolution on Cyprus[1] which, in operative paragraph 2, defines very clearly the basis of a solution of the Cyprus problem. It reaffirms:

> the position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bizonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession.[2]

This recent manifestation of Turkish intransigence in flagrant disregard of the international community's position forces current United Nations efforts to an impasse, with ominous implications for the prospects of a negotiated settlement. As the Cyprus Government made clear, there really is no prospect for negotiated progress unless the Turkish Cypriot leadership unequivocally accepts Resolution 939, including paragraph 2.

The position of the Turkish side can be viewed as a continuation of the Turkish intransigence displayed earlier in the year in response to the United Nations' efforts to reach an agreement on a package of confidence-building measures. The Secretary General concluded in his report

---

1. Res. 939, U.N. SCOR, 3412th mtg. at 1-2, U.N. Doc. S/Res 939 (1994).
2. *Id.*

to the Security Council that: "[t]he Security Council finds itself faced with an already familiar scenario: the absence of agreement due essentially to a lack of political will on the Turkish Cypriot side."[3] The implications of this conclusion should be clear. Alternative means to implement in practice the many United Nations resolutions on Cyprus and to tackle the overall Cyprus problem, particularly its more substantive aspects, in an effective and result-oriented manner, should now be considered as a matter of utmost importance.

Progress towards a negotiated settlement cannot be expected unless the Turkish side musters up the necessary political will. The necessary political resolve will not be found unless the factors that sustain Turkish intransigence are removed. The primary factor is the overwhelming presence of occupying Turkish troops. The proposal of President Clerides for the demilitarization of the Republic of Cyprus represents a viable resolution to this problem. It is a significant and constructive proposal with far-reaching implications in terms of meeting the perceived Turkish security concerns, and the much more real security concerns of the Republic of Cyprus, and its acceptance would substantially enhance the prospects for a peaceful resolution of the situation.

If Turkey respected the relevant principles and rules of international law, the Cyprus problem, in its basic dimensions of aggression and invasion, continuing occupation, massive violation of human rights, and attempted secession, would not have arisen. By applying international principles and rules, this situation could be resolved in a manner that is fair to all Cypriots and consistent with the legitimate interests of the States involved. The international legal option is particularly relevant in light of the impasse to which the Turkish intransigence has led the negotiating process. Third party determination of the legal issues involved in the Cyprus situation, preferably by the main judicial organ of the United Nations, the International Court of Justice in the Hague, would go a long way towards promoting a just solution. Cyprus would have an iron-clad case before the International Court of Justice. Under the present stalemated situation, recourse to such an international forum offers significant possibilities and could be brought about in the absence of Turkey's consent to adjudication through a request by the Security Council or by the General Assembly of the United Nations for an advisory opinion on the issue by the International Court of Justice.

---

3. *Report of the Secretary General on His Mission of Good Offices in Cyprus*, U.N. Doc. S/1994/629 (1994).

As early as 1963, the Cyprus Government turned to the United Nations Security Council seeking protection against outside threats and acts of aggression. The present situation in Cyprus—traceable from the July-August 1974 Turkish invasion and continuing occupation, forcible expulsion of one third of the Greek Cypriot population, massive violation of human rights, attempts to alter the demographic composition of the island through the introduction of colonists from Turkey, the tragic issue of missing persons, and the illegal attempt at secession of the occupied area in November 1983—has global implications going far beyond the narrow geographic confines of Cyprus. This unremedied state of affairs, involving a gross violation of many of the most basic norms of international law, including peremptory norms of *jus cogens*, ought to be of grave concern to all who believe in the universal protection of human rights and the application of democratic principles and the rule of law. The issues involved pose a challenge to the international legal order, to the United Nations, and to the United States as a global power and the leader of the Western alliance.

The criminal coup d'etat of July 15, 1974 inspired by the junta then ruling Greece, against the legitimate and democratically-elected President of Cyprus, gave Turkey the long-sought opportunity to invade Cyprus in order to impose its will by force of arms which it seized. In July and August 1974, the Turkish army, using 45,000 men and hundreds of jet airplanes, tanks, heavy artillery and napalm bombs, completed, and in fact exceeded, its stated objective and established the notorious Attila Line across Cyprus. The blatant act of aggression, unprecedented in the United Nations era, and paralleled only by Saddam Hussein's invasion of Kuwait in 1990, brought nearly forty percent of the territory of the Republic under Turkish military occupation, including seventy percent of its economic resources. The invasion forcibly uprooted some 200,000 Greek Cypriots from their ancestral homes, rendering many Cypriots destitute refugees. It left several thousand dead and missing. It wreaked havoc with the economy of Cyprus, which had been prospering until then, and entailed massive violations of human rights by the Turkish army.

The Turkish invasion marked the first time since the end of World War II that a member of the Council of Europe and a signatory of the Helsinki Final Act[4], through the use of armed force, penetrated the bor-

4. EVGENY CHOSSUDOVSKY, UNITAR RESEARCH REPORT NO. 24, THE HELSINKI FINAL ACT VIEWED IN THE UNITED NATIONS PERSPECTIVE, TOWARDS STRENGTHENING THE CONTINUITY AND COHERENCE ON SECURITY AND COOPERATION IN EUROPE, U.N.

ders of another European state, a member of the Council of Europe, an associate member of the European Community and a cosignatory to the Helsinki Final Act. Turkey's attempt to alter systematically the demographic character of the occupied part of the island by importing an alien population from Turkey, expelling the remaining Greek Cypriots from the occupied area, and destroying the cultural and religious heritage of the area under occupation tragically resulted in human suffering, vast material destruction and gross violations of international and humanitarian law.

The current phase, from July 1974 to date, renders Cyprus a test-case of unremedied aggression, continuing occupation, and a massive violation of human rights. Fundamental rules of international law, both customary and conventional, continue to be flouted with impunity, and the United Nations resolutions continue to be ignored by the occupying power.

The government of Cyprus has relied heavily upon international law to pursue its cause of justice. Cyprus presented its position, couched in terms of applicable rules of international law, in all available forums. The United Nations General Assembly, in a landmark resolution, laid down the framework and principles for a just and lasting solution to the Cyprus problem, consistent with applicable rules of international law.[5] The Resolution demanded the withdrawal of the foreign troops, the return of the refugees, respect for the sovereignty, independence, and territorial integrity of the Republic of Cyprus, and called for an end to all intervention and interference in its affairs. Although this unanimously adopted Resolution, endorsed by the Security Council in its Resolution 365 (1974) has binding legal force under article 25 of the Charter, it remains unimplemented.

The key issue is whether the Turkish military invasion of July-August 1974 was justified legally under Article 4 of the 1960 Treaty of Guarantee. Article 4 provides in pertinent part:

> [i]n the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take

---

Sales No. E.80.XV.RR/24 (1980).

5. In its landmark Resolution 3212 of 1974 as well as in many other resolutions and decisions.

> action with the sole aim of reestablishing the state of affairs created by the present Treaty.

The clear answer is that this invasion, from which many other illegal consequences flowed, was not justified legally, either in terms of Article 4 or in terms of the peremptory norm in Article 2(4) of the Charter. First, the requirement of consultations under Article 4 was not met. Second, the term "action" could not be interpreted as meaning the use of "armed force." Under the principle of construction *ut res magis valeat quam pereat*, "action" should be interpreted as meaning peaceful action. Third, the Turkish military action, despite some faint lip service at the time, was not taken "with the sole aim of reestablishing the state of affairs created by the present Treaty" but to impose by force Turkey's prescription of a political solution inconsistent with the 1960 Treaty. Even though the removal of the coupist regime and the assumption of power by the constitutional acting President as early as July 23, 1974, reestablished the constitutional order, the Turkish occupying forces remain in Cyprus more than twenty years later.

Under Article 2 (4) of the Charter, the prohibition against the threat or use of force is absolute, and the two exceptions should be interpreted narrowly. Professor Waldock cogently summarizes that:

> The final result is that Article 2(4) prohibits entirely any threat or use of force between independent states except in individual or collective self-defence under Article 51 or in execution of collective measures under the Charter for maintaining or restoring peace. Armed reprisals to obtain satisfaction for an injury or armed intervention as an instrument of national policy otherwise than for self-defence is illegal under the Charter.[6]

Hence, Article 4 of the Treaty of Guarantee did not and could not authorize use of armed force by Turkey against Cyprus. Under the opposite interpretation, Article 4 would conflict with Article 2(4) under Article 103 of the Charter and would be null and void under *jus cogens*, as defined by the 1969 Vienna Convention. Despite the foregoing, Turkey did not act in accordance with its own interpretation of Article 4, which clearly states that the sole aim of the action is for reestablishing the state of affairs created by the Treaty of Guarantee.

Particular attention should be paid to the findings of the European Commission of Human Rights which, after a quasi-judicial inquiry,

---

6. Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, *in* HAGUE ACADEMY OF INTERNATIONAL LAW, 11 RECOUEIL DES COURS 493 (1952).

found Turkey, as the occupying power, responsible for the infractions in the area of Cyprus under its occupation and found the Turkish army guilty of serious violations of the Rome Convention.

The "declaration of independence" by the Turkish Cypriot leadership and attempted secession of the part of Cyprus occupied by the Turkish armed forces on November 15, 1983, drew immediate condemnation throughout the world. This action, which could not have taken place without Ankara's prior knowledge and approval—indeed Turkey is the only country in the world to have recognized it as an "independent state"—is in flagrant violation of the United Nations resolutions, international law, and more specifically the 1960 Nicosia Treaties, to which Turkey is a signatory, which guarantee that the territory of Cyprus remain "one and indivisible," exclude "separatist independence," and prohibit "any activity aimed at promoting, directly or indirectly . . . partition of the Island."[7] By promptly recognizing the secessionist entity, Turkey violated its treaty obligations and confirmed its longstanding partitionist designs for Cyprus.

The attempted secession yielded widespread international condemnation. The United Nations, the Council of Europe, the European Community, the Commonwealth Conference, the United States, most other states, and Greece and Britain, cosignatories of the 1960 Treaties, demanded reversal of this situation. Turkey is the only state to recognize the secessionist entity. If any other state legally recognized the secessionist entity, this would raise legal issues against any state that purported to do so under the well established rules of international law on the recognition of states and, in particular, the duty not to recognize situations brought about through the illegal use of force.

The United Nations Code of Crimes against the Peace and Security of Mankind is of particular relevance to the Cyprus situation.[8] In addition to aggression and other crimes listed and defined under this Code, aspects of two other crimes were introduced at the insistence of Cyprus. The first, under Article 21 of the Code, entitled "[s]ystematic or mass violations of human rights," is the "deportation or forcible transfer of population." The second, under Article 22 of the Code, entitled "[e]xceptionally serious war crimes," is "the establishment of settlers in

7. Nicosia Treaties, Resolution 1514 (XV), Dec. 14, 1960.

8. *Comments and Observations of Governments on the Draft Code of the Crimes Against Peace and Security of Mankind Adopted on First Reading by the International Law Commission at its 43d Session*, U.N. GAOR, Int'l L. Comm'n, 45th Sess., U.N. Doc. No. A/CN.4/448/Add.1 (1993).

an occupied territory and changes to the demographic composition of an occupied territory." As the commentaries to these provisions make clear, these are exceptionally serious crimes and individuals who commit or order the commission of such violations are subject to prosecution and conviction and the state itself may be responsible under the rules of international law.

With regard to prospects for a solution to the Cyprus problem and despite the existing deadlock, there exists both a framework for a solution and a procedure for pursuing efforts to this end.[9] The framework is provided for in the United Nations Resolutions. As for the procedure, the good offices of the Secretary General and his personal involvement provides a potentially helpful element. The Secretary General's efforts, in turn, enjoy the support of most states, including the United States and the other permanent members of the Security Council. The political will for a just and lasting compromise solution, as demonstrated in deeds over the years, undoubtedly exists on the part of the Cyprus Government and the Greek Cypriots. The basic difference is that, while the Cyprus Government and the Greek Cypriots aim at reunification of the country within a fair, reasonable and workable federal system, the Turkish side is systematically aiming at consolidation and legitimization of the existing division. The Turkish objective must be overcome and Ankara must be persuaded that it is to its long term benefit to temper its intransigence. If this can be achieved, a just and lasting solution is not beyond reach, for there is much more that unites all Cypriots than the differences that at present divide us. If this does not happen, regrettably, the prospects ahead are for continued confrontation, increasing tension, crisis, and even conflagration which may well spread beyond Cyprus.

Cyprus attaches great importance to the active support of the United States in the efforts to reach a just and viable solution to the Cyprus problem. The United States as a superpower and leader of the West, and as a country with vital interests and influence in the region, is in a unique position to assist. The United States Congress expressed its interest and support in a variety of ways and President Clinton has publicly declared his interest "to work for an end to the tragic conflict in Cyprus, which is dividing too many people in too many ways."

Indeed, some of the many weighted statements offered in the aftermath of Iraq's invasion of Kuwait aptly apply to the Cyprus situation.

---

9. Notably Resolution 3212 endorsed by the Security Council in its Resolution 365 and reaffirmed by all subsequent resolutions including Resolution 939 of 29 July 1994.

Following his warning to friend and foe alike that the acquisition of territory by force is unacceptable and that aggression will not stand, President Bush stated in his address to Congress in January 1991, that:

> We have before us the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations. When we are successful, and we will be, we have a real chance at this new order, an order in which a credible United Nations can use its peacekeeping role to fulfill the promise and vision of the United Nations' founders.[10]

Distinct from the moral and geopolitical reasons for the United States to exercise its influence toward implementation of the United Nations resolutions on Cyprus, a legal case can also effectively be made. As a founding member of the United Nations and a permanent member of the Security Council, the United States is bound under Article 25 of the Charter "to accept and carry out the decisions of the Security Council in accordance with the present Charter."[11]

Moreover, the legal aspect is also relevant to the United States in terms of United States legislation, notably Section 620C of the Foreign Assistance Act of 1961, and bilateral United States-Turkish agreements, because of Turkey's illegal use of American arms supplied for an expressly different purpose in its invasion and continuing occupation of a large part of Cyprus. This rule of law issue resulted in a congressionally mandated arms embargo against Turkey in 1975. Cypriots welcome and appreciate the Administration's repeatedly expressed support for the Secretary General's efforts regarding a Cyprus settlement, as well as the strengthening of the team dealing with the Cyprus problem through the appointment of a Presidential Envoy.

The situation in Cyprus can be resolved permanently through the application of international rules and principles. It is frustrating that seemingly much more intractable problems such as that of the division of Germany, apartheid in South Africa, and the conflict in the Middle East, are resolved or on their way to a solution, while the situation in Cyprus remains unresolved. It is consoling, however, that only a few years ago no one could have guessed that Germany would be reunified or that apartheid would be peacefully dismantled or that significant progress would occur in the Middle East. Indeed who would have

---

10. *President Bush Answers American People: We Will Not Fail*, WASH. POST, Jan. 17, 1991, at A29.

11. U.N. CHARTER art. 25.

guessed, a few short years ago, that the Soviet Union would no longer exist and that democracy would be the norm in Eastern Europe?

In October 1990, I was fortunate enough to be present at the historic ceremony in Berlin to mark German reunification. In September of 1993, I was on the White House South Lawn for the signing of the Israeli–Palestinian joint declaration of principles and, in July 1994, I was present at the Joint Session of Congress when King Hussein and Prime Minister Rabin declared that the state of war no longer existed between Jordan and Israel, which led to the conclusion of a Peace Treaty between them. I like to believe that one day in the not too distant future a similarly auspicious event will take place marking the just solution to the Cyprus problem. So, frustrating though it may be, we must persevere, stay the course, redouble our efforts in the conviction that our cause is right and continue to believe that justice and the rule of law will ultimately prevail.

# DO ECONOMIC AND SOCIAL RIGHTS BELONG IN A CONSTITUTION?

Herman Schwartz*

When I first met Sy Rubin thirty years ago, he was already an established star. He is still a star, undimmed by time, sending out illumination and warmth. His step is slower, but not his wit or his wisdom.

But he's not *always* right. Even Homer nodded. Some years ago, he wrote an article, which, among other things, raised doubts about establishing economic and social benefits as full-fledged rights. With characteristic insight and realism, he observed that:

> when one discusses civil and political rights, one is generally talking about *restraints* on governmental action, not *prescriptions* for such action . . . . [I]t is easier to tell governments that they shall not throw persons in jail without a fair trial than they shall guarantee even a minimal but sufficient standard of living . . . . [These] may be beyond their capabilities, or may require major societal readjustments . . . [that] involve conflicts within societies, as well as among nations.[1]

I think this and similar other criticisms are overdrawn, especially where new constitutions are concerned, and I'd like to use this occasion to explain why. Happily, Sy doesn't have a right of reply, so that he will not be able to expose my flaws and fallacies, which he would otherwise be very quick to do.[2]

---

* Professor of Law, Washington College of Law, The American University.

1. Seymour L. Rubin, Economic and Social Rights and the New International Economic Order, Address Before the American Society of International Law (on file with the AM. U. J. INT'L L. & POL'Y) (emphasis in original).

2. A more thoroughgoing critique of the constitutionalization of economic and social rights appears in Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the Constitutions of Post-Communist Europe*,E. EUR. CONST. REV. 35, 35-38, Winter 1993. My responses to these arguments appear in Herman Schwartz, Economic & Social Rights, 8 AM. U. J. INT'L L. & POL'Y. 551 (1993) and *In Defense of Aiming High: Why Economic and Social Rights Belong in the Post-Communist Constitutions of Europe*, E. EUR. CNST. REV. 25, Fall 1992.

Whether economic and social rights should be included in the new European constitutions is one of the most controversial issues in current constitutional theorizing. In practice, it is a non-issue because all of the constitutions already adopted by these nations contain a relatively full complement of such rights, though in a variety of formulations.[3] Those nations which have not yet adopted new constitutions, such as Poland, Georgia and Ukraine, plan also to include such rights, in one form or another.[4] And insofar as the parties that are successors to the former Communist parties regain powerful positions in their respective governments—which seems to be happening almost everywhere in the former Soviet bloc—the likelihood that such provisions will be adopted increases.[5] Nevertheless, in parts of the world, including some countries of the former Soviet bloc, where constitutions are being either revised or written anew, the issue is still a live one.[6]

For purposes of discussion, the competing arguments can roughly be divided into what might loosely be called practical and philosophical. The former focuses on whether economic and social rights are judicially enforceable, the latter on whether placing economic and social rights in a constitution is consistent in principle with the establishment of a free,

---

3. The different formulations have been described in a recent unpublished paper by Professor Francoise Dreyfus, presented on March 11, 1995 at a conference in Krakow, Poland (on file with author).

4. Even established nations like Finland and Germany, which are revising their constitutions, are considering adopting such provisions. A conservative government in Finland, during a very severe economic recession, has already started the process and will probably complete it in September 1995. For a discussion of the effort, *see* Krzysztof Drzewicki & Allan Rosas, *Social Rights in a United Europe, in* SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE 11, 19-20 (Krzysztof Drzewicki et al. eds., 1994) [hereinafter Drzewicki, Krause & Rosas]. In Germany, the issue has become a very contentious one between East and West, and it is unlikely that any new constitution will be adopted. The current German Basic Law has very few such provisions.

5. Hungary is considering revising its current constitution which consists of its Communist constitution but with so many amendments that almost nothing is left of the original instrument. The victory of the post-Communist party led by Gyula Horn would seem to ensure that if the constitution is revised, the currently existing ESR will not be substantially weakened.

6. *See* Sunstein, *supra* note 2; Wictor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. H.R. L. REV., 111, 138-45 (1994); Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. H.R. 451 (1992); D.M. Davis, *The Case Against the Inclusion of Socio—Economic Demands in a Bill of Rights Except As Directive Principles*, 8 S. AFR. J. H.R. 475 (1992).

democratic, market-oriented civil society. Put another way, the first question turns on a supposed dichotomy between positive and negative rights, the second on the kind of society that is most desirable.

To most American lawyers, putting economic and social rights in a constitution verges on the unthinkable.[7] Americans are taught to think that constitutional rights depend on judicial enforceability almost by definition. No matter that, in practice, courts refrained from enforcing these rights for most of the first 150 years of our existence.[8] Formally, the courts were available as an appropriate forum. In a nation that relies on legal resolution of disputed issues more than any other, including the protection of rights, the presumed inappropriateness of a conventional judicial resolution seems to imply as a matter of linguistic logic that the concept of "right" may not be used for something that does not lend itself readily to such resolution.

There is also the related belief, reflected in Sy's comments, that courts can effectively enforce only negative rights, only those rights that *deny* power. Our Bill of Rights seems to contain only such denials. Although there is no shortage of demands on government for everything from tariff protection to outright subsidies and social protection, these are not considered a matter of right. To the contrary, the national ethos has always been anti-government and negative, especially where social rights are concerned, as we are seeing today. Today, no serious person would suggest establishing economic and social rights as a matter of American constitutional law.[9]

Before turning to these questions, a preliminary clearing away is necessary. The central issue is not really about social and economic rights, but primarily about social rights. More precisely, it is about social and certain economic rights. There seems to be no controversy,

---

7. American academic thinkers have argued that such rights could be drawn from the American Constitution. *See* Frank I. Michelman, *The Supreme Court's 1968 Term—Forward? On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *see also* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). These theories seem to have had no practical effect.

8. The first case in which First Amendment free speech provisions enforced the Amendment by striking down a state-created restriction was *Near v. Minnesota*, 283 U.S. 697 (1931). *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

9. This is one reason why the chances that the United States will ratify the International Covenant on Economic, Cultural, and Social Rights any time in the foreseeable future seem virtually nil to this observer.

certainly on the part of opponents of constitutionalizing such rights, about the appropriateness of protecting property and other forms of private economic activity against governmental action. This is justified (or perhaps rationalized) on the ground that this involves only a negative right; that is, preventing the state from interfering with property. That, of course, overlooks the vast panoply of protections that property owners expect the state to provide—police, courts, a legal structure—in order to give substance to property rights.[10]

Insofar as the issue is put in terms of the contrast between positive and negative rights, it should first be noted that many of the social rights involved are themselves negative rights. The rights under discussion, as set out for example in the International Convention on Economic, Social, and Cultural Rights, include the right to work as variously defined; the right to just and favorable conditions of work; the right to form trade unions and to strike; the right to social security, adequate food, clothing, housing, education, health and health care; and the right to special protection for mothers and children. Some of these, such as the right to form unions, are just variations of the right to associate, a traditional negative right. Similarly, the right to strike includes a right to be free from interference with strikes, also a negative right. Even so "outlandish" a right as the right to a clean environment, a so-called "third generation" right, will often call for stopping governments and others from polluting the atmosphere or the home, something that is not too different from traditional public nuisance litigation.

Moreover, some social rights that require courts to order affirmative remedial measures involve only traditional judicial functions. The right to safe working conditions is a good example. Courts enforce this right all the time in statutory, common law, and even constitutional cases. Thus, prisoner litigation in the 1970s frequently challenged unsafe and unhealthy conditions in prison workshops under so vague a rubric as the Eighth Amendment's cruel and unusual punishment clause, with a good deal of success.

A related aspect of the negativity of many of these social rights is their close relationship to other rights that are indisputably negative. The most significant of these is the right to be free from discrimination. Most countries already have statutes which create rights to public health care, education, maternity benefits, housing, social security, and other

---

10. *See* Veli-Pekka Viljanen, *Abstention or Involvement? The Nature of State Obligations Under Different Categories of Rights*, *in* Drzewicki, Krause & Rosas, *supra* note 4, 52-60 (arguing that negative rights necessarily entail personal rights).

social benefits. In the enforcement of such statutory rights, the right of putative recipients to be free from discrimination has been invoked routinely.[11]

Discrimination is obviously not the only possible abuse. Established social programs may be administered in other unfair ways implicating other recognized "negative" rights. Benefits can and are denied to people because of their outspokenness, parentage, or class status. The same goes for interference with the right to work, and can come up in the context of hiring, discharge, or unfair working conditions.[12]

The courts' role in issuing orders commanding specific positive actions and not just prohibitions, discussed earlier, raises a larger consideration. As Professor Abram Chayes pointed out over twenty years ago, courts today are far beyond the narrow roles they used to play.[13] The modern court engages in a wide variety of affirmative activities, ranging from the supervision of school desegregation, prisons, and nursing homes, to the monitoring of corrupt unions. Courts have always supervised the administration of estates, bankruptcies, and receiverships. In all these cases, courts are doing much more than merely saying no—they are actually setting standards and in many cases requiring the expenditure of public money.[14]

It is this latter point—court-ordered expenditures of public money—that raises the problems to which the criticism of constitutionalizing rights is primarily addressed. Suppose there is no health care or housing or education system. By what authority does a court tell a legislature that it must create a health care or education system, a welfare program,

---

11. *See* Martin Sheinin, *Economic and Social Rights as Legal Rights, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 41, 44-45 (Asbjorn Eide et. al., eds.).

12. *See* Miroslaw Wyryzkowski, *Social Rights in the Jurisprudence of the Commissioner for Citizens' Rights in Poland, in* Drzewicki, Krause and Rosas, *supra* note 4, at 267-69.

13. Abram Chayes, *The Role of the Judge in Public Interest Litigation*, 89 HARV. L. REV. 1281 (1976); Morton J. Horwitz, *Forward: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1993).

14. An anecdote from my own experience may illustrate the point. Years ago, I sued a prison administrator because he would not allow the prisoners to make telephone calls on Sunday. I knew the administrator well, and I asked him, "Why not allow them to make telephone calls on a Sunday?" He replied, "Every time a prisoner goes to a telephone, a guard must accompany him, and that costs money I can't afford. If you sue me, you will probably win. The court will then order it, and the legislature will feel compelled to comply with the court's order and give me a bigger budget."

or some other kind of benefit system? This certainly raises issues relating to budgetary priorities, separation of powers, judicial authority, and competence. As Sy suggests, these issues will induce conflicts within societies, for they involve reordering fundamental priorities. How can courts reorder the priorities established by a democratically elected legislature and executive? And suppose there is little or no money so that the programs cannot be established? Won't there be disillusionment with democracy if such rights are not implemented?

As noted, this problem is usually more theoretical than real. Almost all modern nations already have governmental health care, education, social security, and similar programs. Where established programs exist, the usual problems revolve around the discriminatory or arbitrary administration of these programs, as previously discussed. Courts have been dealing with such problems in Europe and the United States for a long time.

Where such programs do not exist, these rights may not be quite so judicially unenforceable. To some extent, it is a matter of separation of powers. Americans wince at the thought that a court may order a legislature to pass legislation or spend money, despite Supreme Court cases like the Prince Edward County and *Missouri v. Jenkins* decisions,[15] which come close to doing precisely that. Much that courts do, including American courts, requires the expenditure of substantial funds on pain of contempt or some other unacceptable consequence.

Moreover, many European constitutional courts do not seem at all reluctant to tell legislatures that they must adopt specific legislation. The Hungarian Court recently told the Parliament that it must pass legislation protecting minorities. This is not unusual in Europe and is often constitutionally authorized, though foreign to Americans.

The legislature may, of course, refuse to follow the court's direction. Will this not weaken a court and indeed the rule of law itself, perhaps irreparably? Perhaps, but it is not likely. Courts throughout the world are defied, but this rarely impairs their prestige, so long as such defi-

15. Griffin v. Prince Edward Co. Sch. Bd., 377 U.S. 218 (1964) (holding that the Prince Edward County's closing of public schools, while financially contributing to private, segregated, white schools, violated African-American children's right to equal protection); Missouri v. Jenkins, 495 U.S. 33 (1990) (dealing with the school district's financial obligations for the desegregation of the school system). In cases involving prisons, mental institutions, nursing homes, etc., court orders barring unconstitutional living conditions such as overcrowding have often forced the expenditure of large sums on pain of the institutions being closed. *See* Hutto v. Finney, 437 U.S. 678 (1978); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

ance is isolated and not routine. The Hungarian Constitutional Court, for example, ordered the adoption of legislation on television. Although legislation is still not enacted, the Hungarian court remains one of the strongest in the world. In March 1992, the Russian Constitutional Court told the Republic of Tatarstan that it could not hold a referendum on Tatar independence. Tatarstan ignored the Court's order. Nevertheless, and despite numerous controversial decisions, that Court went on to become one of the most respected institutions in Russia until mid-1993, when it involved itself too deeply in the political struggle between President Boris Yeltsin and the Russian Parliament. Courts are simply not such fragile institutions, despite the ritual warnings to that effect.

Nor is it likely that nonenforcement of social rights will depreciate the currency of all rights, or of the rule of law itself, even though this is often asserted.[16] There is simply no evidence that the denial or nonenforceability of some rights prejudices the enforcement of others, whether in the United States or elsewhere.

Nor does it necessarily follow that the presence of rights in a constitution requires that they be *judicially* enforceable for them to be meaningful. For one thing, there is *political* enforceability, which judges who claim to espouse judicial restraint routinely invoke.[17] Putting rights into a constitution, even if not judicially enforceable, is not an idle gesture. Something that is considered a conditionally mandated legislative obligation is likely to have a lot more clout in the political debate over bud-

---

16. *See, e.g.*, Sunstein, *supra* note 2.

17. *See* Maher v. Roe, 432 U.S. 464, 480 (1977); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring); *see also* Laurence H. Tribe, *American Constitutional Law*, 1336-37, (2d ed. 1988):

> These observations imply that the affirmative governmental duty to meet basic human needs cannot always be enforced directly . . . if the state and federal governments were to wash their hands altogether of the sick, hungry and poor, none of the interstitial doctrines sketched here could provide a remedy. But that is simply a reminder of the basic point suggested as long ago as 1827 by Chief Justice Marshall—that a government which wholly failed to discharge its duty to protect its citizens would be answerable primarily in the streets and at the polling booth, and only secondarily, if at all, in the courts. To say this is not to deny that government has affirmative duties to its citizens arising out of the basic necessities of bodily survival, but only to deny that all such duties are perfectly enforceable in the courts of law.

Tribe, *supra*, at 1336-37.

geting priorities than something that is completely discretionary with the legislature. The American health care debate might be very different if health care were considered a matter of constitutional right. Moreover, even if a court cannot or should not order the legislature to do anything, merely announcing the obligation can be important by establishing the fact and nature of the legislative obligation. It is then up to the legislature to balance its various obligations, constitutional and otherwise.

People also realize that some rights are conditional on the existence of financial and other resources, and cannot be implemented if the resources are inadequate.[18] Disillusionment with democracy is unlikely if constitutionally mandated benefits are not provided simply because of a lack of money.

These considerations also seem applicable to what are called "third generation rights," such as the right to a healthy environment. The difference, of course, is that a national government cannot wholly control its environment. But a state can take measures to help. And perhaps these latter rights mean nothing more than that, for it must not be forgotten that most people are not fanatisists. They live in the same world we do. They know no nation can, by itself, create a "healthy" environment to fulfill the right completely. Articulating a right to a healthy environment is simply a way of imposing political and moral obligations on those who operate the state's governmental apparatus to avoid steps that damage the environment and to improve it, because that is a basic priority of the people. By making a healthy environment a constitutional right, the likelihood is increased that those who control and manage state power will be punished politically if the environment is damaged or not improved.

One final point: Positive rights are not unknown to American constitutional law. Almost all state constitutions provide for a right to an education, and some states recognize constitutional rights to welfare, housing, health, and abortions.[19] For example, some twelve state constitutions set forth a state constitutional obligation to care for the sick and needy. Although some state courts virtually ignore such provisions, New York's highest court ruled that the New York State Constitution Article XVII, § 1 which provides that "[t]he aid, care and support of the needy

---

18. *See* Kopp, *The Right to An Adequate Standard of Living: Justice, Autonomy, and Basic Needs, in* ECONOMIC RIGHTS 231, 243-47 (Ellen F. Paul et. al., eds. 1992).

19. *See* Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HAST. L.J. 79, 97-98 (1992).

are public concerns and shall be provided by the State and by such of its subdivisions and in such manner and by such means as the legislature may from time to time determine," requires that the legislature not deny aid to needy individuals on the basis of criteria unrelated to need.[20] This is a case where the issue might have been treated as a discrimination matter, but as noted, in the modern welfare state, that holds for many economic and social issues.

Even the United States Constitution implies some positive obligations. The Thirteenth Amendment prohibition of slavery covers private action, and though the Supreme Court has invoked it only to strike down state legislation,[21] this would seem to impose an obligation on the federal government to protect people against private violations of this right. The Seventh Amendment requires the federal government to provide jury trials in civil and federal cases even though, unlike criminal cases, the state is not directly involved. And in the criminal context, the Supreme Court has required the state to provide counsel,[22] trial transcripts and other aids to defendants.[23]

Indeed, it can be said that an organized society always makes a claim on government to create institutions and programs "to provide for the common defense [and] promote the general welfare." The fact that these latter are not conventional social rights is unimportant. We demand that the government provide certain things, and to that end obligate it to create certain programs, because we believe that as citizens we are entitled to them.

Nor does this mean that courts will second-guess the adequacy of governmental programs where such rights are concerned. American courts are fully aware of their limitations in this regard, and one can presume that foreign courts are aware of their limitations as well. In most cases, they are likely to exercise very little supervision over the details of such programs, so long as basic rights to non-discrimination and the like are honored.[24] For example, in a case involving rent reductions in Austria, the Constitutional Court ruled that the legislature has a

---

20. Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977).

21. *See* Tribe, *supra* note 17, at 1688 n.1.

22. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant in state criminal prosecution has the right to have counsel appointed to him).

23. *See* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that indigent defendants have the right to be furnished with trial records and transcripts, without cost, for appellate purposes).

24. Zlinsky, J., unpublished address at Krakow (on file with the author).

"wide margin of appreciation" where economic and social policies are concerned.[25]

Nevertheless, the question remains: why should these rights be included in a constitution? As a matter of constitutional principle should the State be obligated to provide such benefits? American lawyers are used to thinking that the quality of a constitution is directly proportionate to its brevity. Occam's Razor is usually a good working principle.

To respond to these considerations it is useful to consider the nature of a constitution. Although it is indeed a legal document, a constitution is much more than that. It is the foundation charter of the political society, which draws on the experience of the past and the hopes for the future to create a set of mechanisms and values that are beyond the power of ordinary legislative majorities to change. The American Constitution is of course a paradigm of that latter point: we have had very few constitutional amendments during our more than two hundred year history.

Obviously, constitutions include the mechanisms for the distribution of power, which are the most controversial, everywhere and at almost every time, whether in Philadelphia in 1787 or Poland today. Rendered equally immune to transient legislative majorities are the fundamental values of the society. In the United States, we have long accepted the fundamental nature of the basic civil and political rights, and that is certainly true in most western societies. But—and this may come as a surprise to most Americans—almost all societies save our own also recognize the prime importance of economic and social rights. Far from such rights being newly sprung from the paternalistic soil of Communism,[26] these rights go back at least to Franklin D. Roosevelt's Four Freedoms, and appear in constitutions as conservative as the French Gaullist constitution of 1958, which explicitly incorporated the Preamble to the 1946 Constitution with its economic and social guarantees, as well as in Italy, Spain, Japan and virtually everywhere else.[27] Throughout the world, it is now recognized, in Justice Holmes' aphorism, that "a necessitous man is not a free man," which Sy quoted at the head of his article. Economic and social rights are inextricably intertwined with

---

25. Sheinin, *supra* note 11, at 51.

26. *See* Sunstein, *supra* note 2.

27. The universal acknowledgement of the primacy of these rights is reflected in Articles 22-27 of the United Nations' Universal Declaration of Human Rights, adopted overwhelmingly in 1948—interestingly enough, except, by the Communist States—but supported by the United States, as well as in numerous other international agreements and declarations.

civil and political rights. In part, this is because genuine representative democracy involves widespread participation, as well as tolerance and compromise. Destitute, hungry people don't vote, and idle, hungry people have no patience for the slow, often tedious haggling among often sharply differing groups that democracy requires.

It has also been suggested that putting positive rights into a constitution will encourage the sense of entitlement and discourage individual initiative; but such psychological speculation is both unproven and implausible. It is hard to believe that the current move toward a free-market economy will be affected in any way by the inclusion of positive rights in a constitution. The existence of Czechoslovakia's Charter on Human Rights and Freedoms has not weakened that government's Thatcherite policies in the slightest. In fact, the right-wing Czech government of Vaclav Klaus has offered to leave the economic and social rights of the former federal charter intact, in part as a bargaining tool with the opposition, and in part out of fear of a negative international reaction. Individual initiative is flourishing even in the former Soviet Union. And if people are asserting an excessively heightened sense of entitlement, insisting that, for example, they are entitled to job security in all circumstances, this may be because they are suffering great hardship merely trying to acquire such basics as food and shelter.

Finally, it has also been argued that positive rights establish governmental interference with markets as a constitutional duty.[28] But clearly the mere presence of such rights in the Czechoslovak or Hungarian constitutions has not interfered with the Czechoslovak or Hungarian free market reforms; nor is their presence in the Russian or Polish constitutions a significant factor in Russia's or Poland's policies and problems. It must therefore be the implementation of constitutional duties that is held to constitute an interference.

This is not really an argument against putting these rights into the constitutions, but against having them anywhere, for there is no reason to think that it is the constitutionalization of these rights that is crucial. Regardless of whether the programs implementing such rights are put in place by a statute adopted by a politically created majority or by some governmental action fulfilling a constitutional duty, the governmental interference with the market economy is the same. The fact that the interference results from an entrenched constitutional mandate rather than

28. *See* Cass Sunstein, *On Property and Constitutionalism* 17 (Chicago Law and Economics Working Paper, No. 3 (1991)).

from the enactments of a possible transient majority does not affect the fact and degree of interference.[29]

In closing, I should note that I am not sure that Sy is really opposed to such considerations. At the close of the essay to which I have already referred, he comments with respect to international instruments which provide for such rights,

> [T]here is a valuable role to be played by a formulation of general and rather sweeping standards, despite their being generally ignored. Such standards influence conduct and often lead to specific and workable rules. Indeed, the rules may well not be internationally mandated for them to be effective. The more useful course is their adoption by national rule-making authorities.[30]

To which I would add my hearty assent.

---

29. *But see* Sunstein, *supra* note 2.

30. Seymour L. Rubin, Economic and Social Rights and the New International Economic Order, Address Before the American Society of International Law (on file with the AM. U. J. INT'L L. & POL'Y).

# SEYMOUR J. RUBIN—SOME OF THE ORIGINS

Bennett Boskey*

It is a special pleasure for me to participate in this publication to celebrate the achievements of Seymour J. Rubin. Sy Rubin and I have a long acquaintance and close friendship, dating all the way back to our time together at the Harvard Law School; he was in the Class of 1938, and I, the Class of 1939.

Sy came to Harvard with an undergraduate degree from the University of Michigan where he entered as a young man from the midwest sanctum of Chicago. At Michigan, he had compiled an excellent academic record, and rendered a meritorious performance as a member of the University's wrestling team. Wrestling is not for everyone; it calls for a rather specialized combination of fortitude, determination, strength, agility, and skill—qualities which the short but wiry youthful Sy had in abundance. At Harvard Law School, he "made" the Harvard Law Review at the end of his first year and served on Volumes 50 and 51. There our paths began to cross with frequency; I served on Volume 51, and I served as the Book Review Editor of Volume 52.

Sy stayed on to do a year of graduate work at the Law School, after some prompting from Professor Felix Frankfurter to whom Sy's exceptional facility in writing and in dialogue had become evident. Professor Frankfurter was then the sole arbiter in the annual selection of a law clerk for each of the two Judges Hand on the United States Court of Appeals for the Second Circuit. Professor Frankfurter sent Sy to Judge Augustus N. Hand, known familiarly as "Gus," and sent me to Judge Learned Hand, known familiarly (though at the time I was not yet aware of it) as "B"—"B" being a surviving remnant of his original first name, "Billings," which he had put into discard. This was to be the last occasion on which Professor Frankfurter exercised this important function since during the academic year he was nominated and confirmed as a Justice on the Supreme Court of the United States.[1]

---

* Member of the District of Columbia Bar; Member of the Council and Treasurer, The American Law Institute.

1. Felix Frankfurter was nominated on January 5, 1939. On the afternoon of

Sy and I began our new assignments in the Second Circuit at the end of Summer 1939. An initial objective was to meet our respective Judges Hand for the first time; their practice had been to engage Professor Frankfurter's selectee sight unseen—a display of confidence that not many federal judges today would care to emulate. The real duties of the law clerks would be explained—in a very minimal fashion, Sy and I each found out—by the outgoing law clerk who by that date had little time to spare for such a briefing since he was in an undisguised hurry to depart.

A few words should be said concerning the Second Circuit's structure, particularly since it was so different from what one would see today. The court had a total of six circuit judges in contrast to today's thirteen active circuit judges and eight senior circuit judges. The six were Judge Learned Hand, whose seniority made him what then was called "the Senior Circuit Judge" and imposed on him a mild version of the kind of administrative responsibilities now lodged in what came to be called "the Chief Judge" of the circuit; Judge Thomas W. Swan, a former Dean of the Yale Law School; Judge Augustus N. Hand, who was Learned Hand's cousin and lifelong close friend and confidant; Judge Harrie B. Chase, a canny Vermonter by origin and instinct; Judge Charles E. Clark, who also but more recently had been the Dean of the Yale Law School and had been a moving spirit in the formulation and adoption of the Federal Rules of Civil Procedure; and Judge Robert P. Patterson, formerly a New York lawyer who had been awarded the Congressional Medal of Honor for valor during World War I and who in July 1940 resigned from the court to accept appointment as Assistant Secretary of War.

As is still the case, the court normally sat in panels of three in the Federal Courthouse at Foley Square, located in the lower part of Manhattan in New York City—near Chinatown and in good proximity to

---

President Roosevelt's White House announcement, a few of us from the Law Review went to the Frankfurter residence to express our pleasure and offer our good wishes. We found Mr. and Mrs. Frankfurter having tea with Professor Alfred North Whitehead and Mrs. Whitehead. The confirmation hearing was much publicized but happily relatively short, and again, a few of us from the Law Review escorted Professor Frankfurter to the train station in Boston the night before he was scheduled to testify at the hearing in Washington. "Curiously, for one so frequently in the storm center of controversy, only a few cranks opposed the nomination. The Senate unanimously confirmed it." Resolutions of the Bar, *read at* the Supreme Court Proceedings in Memory of Honorable Felix Frankfurter, Oct. 25, 1965, 382 U.S. xix, xxvi (1965). He took his seat on January 30, 1939.

what we came to discover were more than passable Chinese, and other, restaurants. Unless court sessions compelled his presence in New York City, Judge Chase usually stayed and worked at his chambers in Brattleboro, Vermont; and Judge Clark often, though not quite so regularly, stayed and worked at his chambers in New Haven, Connecticut.

Each judge had one—repeat one—law clerk. This contrasts sharply with the situation today in which three law clerks are the entitlement of an active circuit judge, in addition to the smaller number assigned today to a senior circuit judge, plus some additional law clerks who are deemed to be working for the court as a whole. In other words, at the present time the Second Circuit has well over forty law clerks, as opposed to what Sy and I found to be our six. This is not to suggest that with the passage of time an undue proliferation of law clerks has necessarily occurred; at least a good part of the change is accounted for by the undue proliferation of the cases on the docket, which nobody seems able to control in this litigious nation of ours. But the change over the past five decades does inevitably diminish the collegiality of the group.

Thus, of our six law clerks the man who served Judge Chase worked exclusively (or at least almost exclusively) in Brattleboro. I cannot recall ever meeting him and I understand that neither can Sy. That left us with only five, for the purpose of any discussions we might wish to have among ourselves—and these were numerous, in which Sy was a vigorous participant. In addition to Sy and myself, was a classmate of mine, John W. O'Boyle, who was Judge Patterson's clerk; as might be expected, there was a Yale Law School graduate, Harold Steinberg, who served as Judge Swan's clerk; and Judge Clark's clerk, Lloyd N. Cutler, who had been editor-in-chief of the Yale Law Journal and lately has been much in the news as President Clinton's temporary White House counsel. Learned Hand enjoyed referring to our group as the "puisne judges," which was flattery beyond what we deserved, and of course each of us found that the relationship with his own judge was somewhat different from the others. But it was a cozy court, abounding in friendliness,[2] and the judges—especially the two Hands—were willing, and

2. The two Hands would sometimes tease Judge Clark about the Rules of Civil Procedure, which they felt Judge Clark counted on too much to provide salvation for the federal courts. Notwithstanding this, and being too early for the irritation with Judge Clark later felt by some of his brethren (as reported by Gunther, *infra*, pp. 517-524), there was a pleasing congeniality of all six judges, following the resignation of Senior Circuit Judge Martin T. Manton, effective February 7, 1939 (which made Learned Hand the Senior Circuit Judge) and the appointment of Judge Patterson to fill the resulting vacancy. Manton resigned because he was about to be indicted on a variety of bribery charges. He was subsequently convicted and took an appeal to the

even seemed pleased, to engage in lively discourse which often included law clerks other than their own.

The court's operations are well described in Gerald Gunther's recent magnificent biography of Learned Hand.[3] The opinions of the court for this particular year—the October Term of 1939—are scattered throughout the volumes 107 F.2d to 114 F.2d. They cover an astonishing variety of subjects—not many of them being of constitutional dimensions.

It seems that a look at the opinions of Augustus N. Hand for that year will foretell much about the Sy Rubin who developed in later

---

Second Circuit, where the conviction was affirmed by a specially-designated panel consisting of retired Justice Sutherland, Justice Stone and Judge Clark. United States v. Manton, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940); *see* G. GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 503-13 (1994). Manton's appeal to the Second Circuit was argued during October Term 1939, and I well remember the indignation of the two Hands when they learned that Manton, in going to the courtroom to listen to the oral argument, had seen fit to make use of the judges' "private" elevator. Ultimately, Manton spent seventeen months in the federal penitentiary at Lewisburg, Pennsylvania.

3. *See* GUNTHER, *supra* note 2, at ch. VII, ch. XII (respectively titled *The Second Circuit Court of Appeals in the 1920s and 1930s: Hand as First Among Equals* and *The Chief Judgeship and World War II*). Judge Clark subsequently expressed his own feelings as follows:

> In fact, my deepest recollection of my years of service with these two distinguished men [Judges Hand and Hand] is of the pure fun involved. Each had a marvelous sense of humor, and to each the foibles and inconsistencies of mankind always made a deep appeal. To say that it was a stimulus to work with them is a vast understatement.

C. E. Clark, *Augustus Noble Hand*, 68 HARV. L. REV. 1113 (1955).

> As stated by Wilfred Feinberg, a later Chief Judge of the Second Circuit:
> The court was "small," supporting personnel (which would include us law clerks) were "few," the judges "worked hard and steadily" but "in a comparatively unhurried atmosphere" and "were uncluttered by the trappings of modernity." As to opinion-writing, "[N]o one felt obliged to write compendious opinions in routine cases, but there was an opinion in almost every case that had been briefed and argued."

WILFRED FEINBERG, THE REMARKABLE HANDS: AN AFFECTIONATE PORTRAIT at i-ii (1983). Judge Feinberg summed it up:

> If Learned Hand and his brethren were alive today, what would they think? . . . My guess is that they would be shocked by how different the life of a Second Circuit judge is today. They would, I think, be amazed by three major trends: the overwhelming increase in the use of the federal judicial system, the diminution of judicial time available for case-related activity and the increased manifestation of discontent with government and, indeed, with all public institutions, including the judiciary.

*Id.*

years. It is not that Sy ever really wrote the opinions of Gus Hand; to the best of my knowledge Gus never had a law clerk who could properly make such an assertion about his own role. But for the most part Sy and Gus were in harmony as to the outcome of the cases, and had been more than casually instructive to each other as the opinions developed.

The year was one which came during the rather extensive period when the Court of Appeals for the Second Circuit was widely regarded as the leading court in the country on matters of commercial and business law. The eminence of its judges and the manifest care with which their opinions were crafted lent extra authoritativeness to their pronouncements on such subjects.

As one looks over Gus Hand's opinions for the October Term of 1939 one must be impressed by the wide range of the areas covered, by the meticulous attention to detail in measuring lawyer's advocacy against statute and precedent, and by what (in contrast to today's far more spacious standards) would appear to be a strong deliberate drive toward succinctness of expression. Gus Hand, with the help of Sy Rubin, had the opportunity to write in cases which involved a number of the federal specialties. These specialties included the admiralty jurisdiction (where international uniformity has long been a principal, though not always overriding, objective), the patent jurisdiction, and the bankruptcy jurisdiction. Some of these cases had at least peripheral transnational implications which might bring them into a zone of familiarity with other contents of this festschrift. For example, there was an opinion in a patent case in which one of the issues was the significance of certain foreign patents as prior art which might invalidate the United States patent in suit.[4] Another example was of a collision in New York Harbor where a vessel was found to be contributorily negligent because its master, fascinated with observing the movements of a nearby Russian vessel, had been inattentive to what was straight ahead of him.[5] A third example was that of a French co-partnership which was suing to recover damages for breach of a contract entered into in London. In this case, a

4. Art Metal Works v. Abraham & Straus, 107 F.2d 940 (2d Cir. 1939), *cert. denied*, 308 U.S. 621 (1939) (this is a customary way to seek to undermine a United States patent).

5. The William C. Atwater, 110 F.2d 644 (2d Cir. 1940); *see also* The Sagnache, 112 F.2d 482 (2d Cir. 1940) (involving a seaman's claims for maintenance and care and for negligence, arising out of events on the high seas and in foreign ports).

Finnish vessel was chartered for certain international voyages and the scope of an arbitration clause was in dispute.[6]

Similarly, Gus' portfolio of opinions for the Term included a significant number in the federal tax field. Although the Internal Revenue Code of today has become frustratingly complex to some, reviewing these 1939 Term opinions will show that it was ever thus, though probably to a lesser degree. "[I]n tax matters, however, precision is important, and so is clarity."[7] What shines through these tax opinions which must be attributed partly to Sy Rubin as well as primarily to Gus Hand is the clarity and the success of the methodology. The Internal Revenue Code and the facts are examined side by side. The surrounding precedents receive due respect. All plausible arguments advanced by the parties are dealt with, and a conclusion is stated with admirable brevity.

What more does all this tell us about Sy Rubin?

First and foremost, his year with Gus Hand demonstrates that when a talented young law school graduate has the good luck to serve as law clerk to an experienced and talented judge, the benefit for the law clerk can be enormous. In Sy's instance, the year helped to foster in him the orderliness and wisdom that have been reflected in his later extensive writings and oral presentations.

Second, such service in a court where the relationships among the judges were not only cordial but highly congenial, and where a spirit of accommodation prevailed, helped to foster the skills of diplomacy which have been so characteristic of Sy. He displayed these skills in the notable public service he has rendered and in the series of important posts which he later came to occupy with unfailing distinction.

Finally, the sheer variety of the work in the Second Circuit during October Term of 1939 helped to foster Sy's exceptional ability to deal with new situations as they arose, such a welcome hallmark of Sy's entire professional career.

---

6. The Wilja, 113 F.2d 646 (2d Cir. 1940), *cert. denied*, 311 U.S. 687 (1940).

7. Chief Judge Richard S. Arnold, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 1, 8 (1994).

# SOME SECOND THOUGHTS

William Diebold*

When I heard there was to be a *Festschrift* for my old friend Sy Rubin, I was delighted. I looked forward to reading it. But when I was asked to write something for it, I was taken aback. What could I say? There was no time for original research. I am not one who has unpublished manuscripts around the house that can be put into shape for any occasion. Others could examine Sy's many diverse activities more authoritatively than I, an economist among lawyers; many had worked more closely with him than I. But I did not want to be left out.

Seymour Rubin and I have lived through the same period and much of the time we were paying attention to the same facets of it. As I thought about these matters I realized that in a way I was providing the answer to the question, What to write? Although we were only occasionally involved in the same enterprise, we had often been thinking about the same problems and observing the same events. It seemed natural to ask, What do we think now about what we thought then? Second thoughts would be my subject. But then an awkward second thought intruded: I do not really know what Sy thought about all the issues that came up, much less what he thinks today; so there will have to be some fudging. Worse, most of the time there is no escaping the fact that I shall be talking mostly about my own views. It will be as if my maxim were *sum, ergo cogito*—or whatever the right tenses should be. Perhaps I can sometimes hide behind a general view of what the informed opinion was at the time.

That settled, I faced another question: What issues to write about? It did not seem promising to try to take in the whole world economy for fifty years and more. So I have settled arbitrarily on three topics that have been of concern to both Sy Rubin and to me: the creation of what I call the Bretton Woods world (which means more than the agreements reached in that New Hampshire resort in 1944); the system for promoting liberal trade that has been part of that world and which has given

* Senior Fellow Emeritus, Council on Foreign Relations.

us both satisfaction and trouble, successes and failures, for quite a long time; and finally, Sy's experience as a prod to what he called "the conscience of the rich nations." As these are not small subjects, additional arbitrary slicing is called for, as will be apparent in what follows.

By definition second thoughts cannot be altogether original. Sometimes their main interest lies in seeing how today's view differs from that of the past. But "second thoughts" does not mean "second guessing," although some of the second thoughts may be prompted by the efforts of others to second guess what was done in the past and tell us what *ought* to have been done. Even if the second thoughts are no different from what we said in the past, they may be worth voicing. After all, the same statement has a different meaning when it is said in different circumstances. And to say something twice is not the same as saying it once. As Saburo Okita, the Japanese economist who became Foreign Minister, said, "[o]ld wisdom may be only stupidity under different circumstances."[1]

*The Bretton Woods World*

The creation of the Bretton Woods world was the basis for understanding everything that followed in the international economy. Other developments were essential, such as the Marshall Plan, Western European integration, the modernization of Japan, decolonization, and even the Cold War in its way. But they were all approached within the framework of the complex multilateral agreements to promote cooperation that made up the Bretton Woods system along with the intergovernmental institutions embedded in those agreements. The Bretton Woods world was not created by governments alone; its makers included many private citizens who, during the war and after, studied the problems that had to be faced. They set forth arguments, made recommendations, and above all created a climate that supported the taking of major, unprecedented steps to create a new world order. Within governments, it was not only the highest-placed officials and political leaders who counted, but also all levels of civil servants, some permanent and some temporary, who not only produced ideas, but also drafted the rules, the constitutions, and the agreements that were needed to implement these ideas.

As they worked, these creators of the Bretton Woods world had to think every day about three questions: What to do? How to do it so that it was acceptable to most of the world? How much of what they pro-

1. SABURO OKITA, THE DEVELOPING ECONOMIES AND JAPAN 94 (1980).

posed would the United States accept—especially the United States Congress? The full answers they found to these questions are too complex and lengthy to set out in this essay, so I shall single out just one key part of each.

No one who took part in shaping the Bretton Woods world had any doubt that much of the answer to what to do was defined by "the lessons of last time." It was essential to find ways to avoid the errors of the Versailles peace settlement and also eliminate the conditions that had brought on international financial instability, the depression, fascism, and then World War II. These lessons were not just history; they were part of living experience, all of it condensed into only twenty years. Does this mean that the creators of the Bretton Woods world were fighting the last war? My second thoughts led me to the conclusion that was the right war to fight. It would not be making the errors of those who built the Maginot Line so long as you also took account of some key changes in the world, notably in what people expected their governments to do to avoid depressions and provide economic security.

The answer to the second question includes a long list of elements of the Bretton Woods world that were put into the structure to make it acceptable to one country or many that would be in quite different positions at the end of the war. None was more important than finding ways to permit countries to cope with their balance of payments difficulties without undermining the system's basic principles of liberalization and equal treatment. The complex rules set out in the fine print of the General Agreement on Tariffs and Trade (GATT) and the partial exemption from the rules of the Articles of Agreement of the International Monetary Fund that were put in for these purposes were not very popular in the United States at the time. Many people said the Americans were once again losing out to clever foreigners in an international negotiation. The learning process by which American economists and civil servants had come to accept the need for such arrangements had been crucial to the understandings with the British which underlay the Bretton Woods agreements in trade as well as monetary matters. Although the interpretation and application of these provisions gave rise to much trouble and controversy over a period of years, it hardly requires a second thought to see that these measures—and other steps that filled in gaps between production and consumption, such as the Marshall Plan—were vital not only to the acceptance of the Bretton Woods arrangements, but also to their carrying them out.

As to the third question—how much of what the creators of Bretton Woods worked for was accepted by the United States—my second

thoughts are the same as my first: more than might have been expected and less than would have been desirable. It is true as Raymond Vernon has pointed out that the "early positions of the U.S. team proposed to constrain the behavior of national governments and to concede autonomous powers to international institutions to a far greater degree than was to appear in the final agreements."[2] He sees a similar process in much of what the United States has done in working out other international economic agreements and ascribes this kind of behavior to the peculiarities of the American political system. The case is well argued, but it is also true that at Bretton Woods, and after, the United States accepted an unprecedented number of international obligations and agreed to follow policies drastically different from those it had pursued in the past.

Other people have made it sound as if the United States got everything it wanted from the postwar settlements because the other countries had no choice but to yield to its hegemony. That is not true. The United States was proposing a system of cooperation that would fail if it did not provide benefits to all participants—or at least to most of the important ones. This required compromise all along the line. As the United States was the strongest and richest, it goes almost without saying that other countries were sometimes constrained to accept arrangements they did not like because it was all the United States would agree to—a position often determined by what American negotiators thought Congress would accept or insist on. Perhaps it does need saying—although it is hardly a second thought—that putting restraints on American policies and creating obligations for the United States in the Bretton Woods world were major objectives not only of foreign countries, but of the Americans who did most to shape the Bretton Woods plans. That was already true of the Reciprocal Trade Agreements Act of 1934. Only if the United States behaved differently from the way it had in the 1920s and 1930s could the principles of the Bretton Woods system be carried out.

Over the last fifty years there have been quite a few second thoughts about the Bretton Woods institutions. For a time after the war, these institutions were hardly able to function because the world economy set tasks beyond their strength. Then when they became able to work more or less as planned, the world economy was quite different from what

2. Raymond Vernon, The U.S. Government at Bretton Woods and After, Bretton Woods, N.H., Oct. 15-17, 1994 (paper prepared for the conference *Bretton Woods Revisited*).

had been assumed when they were created. Consequently, much of what the Bretton Woods institutions do now is rather different from what was expected at the beginning. For example, the International Monetary Fund was never intended to be an important source of development financing; the Marshall Plan, not the World Bank, became the main source of funds for European reconstruction; the dollar standard, the core of the international monetary system for so much of the postwar period, worked quite differently from the system envisaged when the Bretton Woods agreements were drawn up; the shift from semi-fixed to semi-floating exchange rates was a drastic move away from one of the dominant ideas that had shaped the Bretton Woods world—but it was not the "end of Bretton Woods" as it has so often been called.

One of the reasons second thoughts are imperative is that predictions about international relations are so often wrong. Has there ever been a process that provided as much material for what looked like sound predictions as the history of Western European integration? There have been plans, studies, and debates. One agreement has followed another, often to make it more concrete or provide "the next step," all of them parts of a string of continuing activities that were supposedly moving toward a broadly agreed objective. At the end of the war, however, few people thought that such an objective was to be taken seriously, because under the Bretton Woods agreements, each government was presumed to be responsible for its own national economy. After a while many people came to believe that at least six countries would soon act as a single state. The High Authority of the Coal and Steel Community was seen as the first of a series of supranational agencies; none followed. Other expectations have not materialized: Euratom's central part in providing Europe's energy and security; the development of a common foreign policy—or even a common trade policy; promised dates for a true monetary union. Much of the elaborate program for a symbolic year, 1992, was set forth in the same terms used in the 1950s about the opening of the Common Market—and then not carried out. British entry into the European Community was off, then on, vetoed, and achieved, but with reservations.

It is striking that two of the greatest authorities on European integration, one American and one British, who made their share of predictions, have underlined the problem in statements made thirty years apart. In a book published in 1964, Miriam Camps observed that after the French Assembly had voted against the idea of a European Defense Community "anyone who had then predicted that the Six would soon be actively engaged in the creation of two new Communities might reason-

ably have been dismissed as a light-headed visionary."[3] In a book published in 1994, François Duchene said, " . . . it has taken over thirty years for the EEC to erect most of the pillars of economic union it was supposed to raise in a decade . . . The European Union has grown up virtually in the opposite way to any of its supposed models."[4]

Another place where second and more thoughts about the Bretton Woods world have been necessary is in following out the relations between trade and investment. And this, it turns out, is a matter on which Sy Rubin and I were both working long ago, though not in the same way, and not together.

*The Liberal Trading System*

At the time the Bretton Woods conference was setting up the Fund and the Bank, work aimed at creating a complementary—and in many ways comparable—body to deal with trade was well underway. Because it was taking so long to get agreement on the Charter of the International Trade Organization (ITO), one part of that agreement was set in motion in advance—the GATT. But the ITO never came into existence and the "temporary" GATT has survived until now. Moreover, it worked so well at first that by the end of the Kennedy Round in the mid-sixties it had brought about a far greater reduction of tariffs than any reasonable person expected in 1947. How it has fared since is another matter.

This brief story prompts many second thoughts. One of the ITO's major strengths was that it covered a wider range of trade restrictions than traditional agreements, but the GATT's relative narrowness proved to be not a weakness but a strength. The President of the United States could agree to it under the powers given him by the Trade Agreements Act, whereas the ITO required action by Congress and that was where it foundered. One of the main reasons President Truman decided to withdraw the Charter from Congress in 1950, before that body had taken any action, was that most of the major American business organizations were against it. They had complaints all along but would probably have supported the Charter had it not been for the weak protection of the rights of private investors provided by some clauses negotiated at the final conference on the ITO in Havana in 1948. Those clauses, which

3. MIRIAM CAMPS, BRITAIN AND THE EUROPEAN COMMUNITY, 1955-1963, at 20 (1964).

4. FRANÇOIS DUCHENE, JEAN MONNET, THE FIRST STATESMAN OF INTERDEPENDENCE 402 (1994).

were certainly open to much objection, would not have been there if the same business organizations had not persuaded the upper reaches of the State Department—against the better judgment of most of its staff and many outside observers—to try to strengthen the weak but probably innocuous language about investment that had been adopted earlier. There were other factors working against American acceptance of the ITO but frequent second thoughts have not led me to abandon the judgment I formed in 1952 that this was the main cause of the demise of the ITO.[5]

I did not know then that Sy Rubin was the State Department official stuck with the nearly impossible job of producing satisfactory language when the United States was almost alone in arguing against the rest of the world on what the Charter should say about investment. He had managed the matter so well that his principal adviser from business had said that the language that had been worked out would be acceptable. After the signing of the Charter, however, the American business organizations held a discussion that led most of them to take the position that the negative features of the Charter outweighed the advantages it might bring.

Later efforts—usually spurred by business groups in the United States and Western Europe—did not produce any strong multilateral agreements about private investment. Nevertheless, investment has grown tremendously and has played a large part in shaping both the patterns of international trade and the great changes in the structure of world production over the last fifty years. Would it have made much difference if there had been an ITO Charter with either strong or weak investment provisions? Would it be wise to try now to get international agreement on "a GATT for investment" as proposed from time to time? Is the inclusion of trade-related investment provisions in the agreement for a new World Trade Organization a good way to start that process? To answer these questions one must deal with still others. In the time of the ITO people thought in terms of American business investing abroad, mostly in certain kinds of activities. Now investments come from almost all countries and may go anywhere; funds may come from a third country and technology and management from others. The ownership and "nationality" of enterprises is often complicated, diffused, and sometimes confused. It is hard to imagine a modern satisfactory comprehensive code on international investment that does not deal with intellectual property and condi-

5. William Diebold, Jr., *The End of the ITO*, *in* ESSAYS IN INTERNATIONAL FINANCE (1952).

tions of competition and take account of a variety of government–business relations. A rather long string of second thoughts would be required to pursue these matters, not to mention the other multiple facets of the world trading system. I will elaborate on only one of them.

There was a period in the early 1980s when Sy Rubin brought me into some discussions on the international economy conducted by the American Society of International Law. One result was that in April 1983 I found myself presiding over a discussion of the question "Can the GATT Resolve International Trade Disputes?"[6] The first speaker was Sir Roy Denman, then the head of the European Communities' delegation in Washington. He complained of the disputes settlement procedure in the GATT. Almost everyone did in those days and since, but Sir Roy's emphasis—and not for the first time, I believe—was that part of the trouble lay in the fact "that the United States was a very litigious society and was frequently frustrated with the fact that it was impossible to get a quick, or rather instantaneous, judgment . . . " He thought matters "would be improved if the emphasis were placed on conciliation and negotiation."

The first comment from the floor was by Professor Rubin who said "that Sir Roy seemed to be taking a characteristic 'nonlawyer's attitude toward lawyers and noted that when the United States talked about improving the GATT it did not necessarily mean it wanted 'quick fixes,' but rather that the parties should abide by the GATT rules." He was certainly right that views about lawyers of the sort he ascribed to Denman were nothing new. Visiting Nantucket in 1782, Crèvecoeur was pleased to find that there was only one lawyer making a living there. Usually, he said, lawyers were numerous in populated places because

> they are plants that will grow in any soil that is cultivated by the hands of others . . . The fortunes they daily acquire in every province, from the misfortunes of their fellow-citizens are surprising! The most ignorant, the most bungling member of that profession will, if placed in the most obscure part of the country, promote litigiousness, and amass more wealth without labor, than the most opulent

6. *Proceedings, Seventy-Seventh Annual Meeting, The American Society of International Law*, 287-92 (Washington, D.C., Apr. 14-16, 1983).

> farmer, with all his toils . . . They have become
> so necessary an evil in our present constitutions,
> that it seems unavoidable and past all remedy . . . .[7]

Behind the exchange between Denman and Rubin lay an old issue that remains with us. The United States is often accused of taking a legalistic approach that is unduly rigid and sometimes too simplistic to deal properly with the complexities of modern commerce; Americans see the appeal for "negotiation and conciliation" as an effort by the Europeans to evade their obligations. Both may be right part of the time.

As one who knows what a world without the GATT was like, and saw that agreement formulated, I have always thought that the failure of some countries to live up to the rules—and the inability or unwillingness of others to enforce them—was the largest part of the problem. Too many "out of court" settlements are simply tests of strength that deprive weaker countries of their rights. But then I had some second thoughts when Miriam Camps and I were trying to get to the root of the increasing difficulties the liberal trading system was encountering.[8] Failure to apply the rules was, of course, an important part of the story. But the scale on which governments had, explicitly or tacitly, resorted to arrangements that were not compatible with the GATT suggested something more. Great changes were taking place in the world economy, often quite rapidly. The impact on individual countries or major industries was often severe, and out of these pressures came some of the most troublesome measures that violated the principles, the aims, and the letter of the GATT. To urge a stricter enforcement of rules would be futile. What seemed to be needed was some means to work out arrangements that would help bring about the necessary structural changes in trade and production and to press governments to make adjustments instead of blocking them.

That could be a risky course, as exemplified by the cotton textile agreements. At the time we wrote they had for twenty years, in the name of the GATT and nominally under its supervision, not only permitted but fostered protection, discrimination, and bilateralism on a large scale, all quite contrary to the principles of the GATT. Less formally,

---

7. J. HECTOR ST. JOHN DE CRÈVECOEUR, LETTERS FROM AN AMERICAN FARMER 153-55 (1957). Though he had farmed for twenty years in Orange County, New York, and become a naturalized citizen, Crèvecoeur never altogether lost his Frenchness.

8. *See generally* MIRIAM CAMPS & WILLIAM DIEBOLD, JR., THE NEW MULTILATERALISM, CAN THE WORLD TRADING SYSTEM BE SAVED? (1986).

governments had taken steps—multilateral, bilateral, and unilateral—that, in effect, took out of the GATT other major segments of world trade, including steel, automobiles, and most agricultural products. When problems of this sort were really deep-rooted, it would strengthen, not weaken, the GATT to try to deal with the underlying problems by measures going beyond traditional trade rules. At the same time, there had to be better enforcement of most trade rules and improved arrangements for settling disputes.

The GATT had other weaknesses that could not be rectified by simply enforcing rules. It did little or nothing to force or induce countries to end the use of safeguards or help them make adjustments that would make it politically or economically acceptable to get rid of other barriers. Although the Tokyo Round adopted codes to deal with a few nontariff barriers, governments were not rushing to use them. Little or nothing had been done to adapt the GATT rules to the needs of the developing countries, or, for that matter, the problems of the older industrial countries when newly industrializing countries became exporters of manufactured goods. After years of effort, Japan, one of the great trading countries, still did not fit into the GATT system in a satisfactory manner. In all these matters it was not the "GATT" that was the problem but the governments working through the GATT—or not working through it.

This is not the place to rehearse the conclusions of *The New Multilateralism*. Suffice it to say that we concluded that the system of cooperation to liberalize trade that started with the launching of the GATT in 1947 has deteriorated since the early 1970s. Although the achievements in escaping from the postwar controls and the reduction of tariffs up through the Kennedy Round had been remarkable, there was no contemporary system capable of producing comparable results. If the world trading system could be saved, as we asked in our subtitle, it would have to be changed. When a distinguished group of experts met to review a draft of our findings, Seymour Rubin was in the chair.

That does not make him responsible for what we said, whatever his second thoughts on the trading system may be. For myself, I have found no reason to change the basic analysis of that pamphlet whenever I have reassessed these issues, even though there have been occasional improvements in cooperation and the behavior of some governments. Does the inauguration of the new World Trade Organization (WTO) change the situation fundamentally and set the trading system off in a new upward direction? I cannot say.

The favorable judgments about the whole or parts of the WTO by

some of my most knowledgeable and experienced friends have impressed me. Some of the bits and pieces that have come to my attention look good, others do not. The broadening and strengthening of the GATT that seem possible under some of the provisions are promising; possibilities will open that did not exist before. But in trade policy as in art and architecture, God is in the details—and so is the devil. I did not follow the Uruguay Round negotiations closely nor have I studied the final documents. I may never do so. I am daunted by their length and think wistfully of the two and a half pages or so that sufficed for the Reciprocal Trade Agreements Act of 1934 that wrought such great changes in American trade policy and is the real origin of the GATT. Even if the WTO passes the written test, so to speak, how will it work in practice? That, like so many other things in this world, falls into that large and unsatisfactory category of what "remains to be seen."

*The Conscience of the Rich Nations*

"Trade not aid" was for a long time a slogan that had a lot of support in both the rich and poor nations of the world. Today it might be replaced by "Trade not debt," even while remembering that one of the purposes of incurring the debt is to expand the trade. But aid was once the dominant part of the subject to be discussed, and as Seymour Rubin was for a time in the middle of one of the potentially most important developments in the practice of aid, and wrote about it, this seems a suitable focus for the last part of this article.[9] Here the second thoughts are his but date from 1966. One wonders if his colleagues in the Development Assistance Committee (DAC), where he was the American representative from 1962 to 1964, ever thought he might someday write about their work (though very discreetly and without names). There was no one to warn them as Robert Burns warned his compatriots when Francis Grose was compiling his *Dictionary of the Vulgar Tongue*, "A Chield's amang you takin' notes, and, faith, he'll prent it!"

DAC came after the DAG, as acronyms have a way of doing. This was back in the days when the United States was the greatest provider of aid to developing countries, and there was widespread confidence that good could be achieved by the right kind of aid in the right places. There was a strong conviction in Washington that the European coun-

9. This section is based on SEYMOUR RUBIN, THE CONSCIENCE OF THE RICH NATIONS: THE DEVELOPMENT ASSISTANCE COMMITTEE AND THE COMMON AID EFFORT (1966). The quotations that follow come from various places in the text.

tries—with the Marshall Plan and the recovery that followed well behind them—ought to be providing more aid, and to a wider range of countries. Japan was learning that it must think of itself as an advanced industrial nation and not a leader of the poor part of the world. As a result of American urging, DAG was created in 1960 and held a series of meetings in different capitals. When the Organization for European Economic Cooperation (OEEC)—which stimulated and supervised Western European cooperation in handling Marshall aid, was transformed in October 1961 into the Organization for Economic Cooperation and Development (OECD), DAC succeeded DAG and became a committee of the new organization. It drew on the staff and various activities of the larger body but retained a largely independent existence.

DAC had the same assignment as DAG: to coordinate bilateral aid programs. That sounded good. As Rubin says, "Co-ordination holds out the happy prospect of achieving the virtues of multilateral, internationalized action without the pain of relinquishing charge of one's resources. Whether this prospect is in fact realizable, or to what extent, is a serious question . . . ." He discusses the many kinds of coordination there might be; quite a few were tried at one time or another by DAC in what he calls "its process of defining by doing." He explains that the results of coordination were limited mainly because "the difficulties lie in the likelihood that agreement will be general while difference is specific." The book shows admirably what this last phrase means in its discussion of the ways in which each national program had some special characteristics, either in its economic structure and practices or in the country's foreign policy aims. France was particularly concerned with its former African colonies; Britain was committed to the Colombo Plan; Germany wanted to support the Hallstein doctrine; the Japanese wanted to expand and diversify markets. Although the United States hoped other countries would give financial aid to the Alliance for Progress, it "did not convey . . . any feeling that [it] . . . desired any advice . . . ." Everyone tried to find ways to tie aid to domestic sales, in reality if not in form.

DAC became a good forum for discussion, a source of information (including, as much as possible, statistics on a uniform basis), and an arena for the exchange of advice, whether solicited or not (though always polite and restrained, Rubin says). Its principal *modus operandi* was the collective examination of each member's aid policy and practice. The combination of emulation and criticism may have paid off. Although it is usually all but impossible to say that such and such a discussion in DAC produced a given response in a certain country, or in

many, Rubin feels sure that "the 1961 review of aid doctrine in the United States . . . led to an American policy of forty-year loans, carrying 3/4 percent interest (or service charge) and a ten-year grace period." It is also very likely that the wish to make a respectable presentation in DAC sometimes strengthened the position of aid officials against other parts of their own governments, such as finance ministries.

We do not have many good studies of international organizations by people who have taken part in them. Part of the lasting value of this one is that it not only describes activities in quite concrete terms but also comments on what arrangements have the most impact on the effectiveness of the work, which set back progress, and the like. Rubin discusses, for instance, the question of who comes to the sessions, what responsibilities they have at home, how high and low levels of representation affect what can be done, whether annual meetings at a ministerial level are useful, the way differences in views in national capitals affect a country's influence in DAC, and many other things. Although he emphasizes the extent to which DAC may have helped developing countries find some common ground with the rich nations, he is blunt about the value of limited membership. It is a point worth underlining in a time when "participation" is rated so highly, but attention is not always given to what Miriam Camps called the "efficiency-participation dilemma."

Too often, alumni either celebrate everything that was done by the international organizations in which they served or are disillusioned and condemning. Sy Rubin, as we would expect, is his usual sensible self in the way he sets out the slightly murky record of the early years of DAC, an effort that was as necessary, and perhaps as inevitable, as it was highminded. He also gives us a graphic and attractive account of how the keepers of the conscience of the rich went about their business.

The meeting place, he reminds us, "is not the usual sanitized and characterless public building." It is the Chateau de la Muette, the headquarters of the OECD near the Bois de Boulogne, a former home of Rothschilds.

"The room is large, with windows that run from floor to ceiling, open onto a flagstone terrace, and look toward a well-groomed lawn. Beyond, one hears the murmur of Paris traffic . . . Inside is the U-shaped table which is the mark of the international meeting . . . ."

"The weak sunshine of Paris filters through the windows as the delegates arrive. There is a quiet bustle of chairs being pulled back, of words of recognition and greeting, or muted conversation as one delegate or another mutters a few words of comment or persuasion to his

colleague, or confers hastily with a Secretariat member . . . ."

"At the end of the Paris day, the delegates rise, stretch, fold papers, fill briefcases, and hasten back to offices for the inevitable reporting telegrams, prior to the evening round of receptions or dinners. Small groups gather in the corridors, sometimes talking of the day's discussion, making an additional point or hammering one home, hoping to influence a colleague or to explain a point that was intentionally or otherwise not apparent in the meeting. Wishes for a pleasant return to capitals, words in anticipation of meeting at the next session, are exchanged. Another DAC session is over."

As there was always another day for DAC, so there have been many other days in which the trading system has gone on, for better or worse, within the framework of the Bretton Woods world, which continues to blend change and continuity. In these and in other fields that we have not touched upon, Seymour Rubin, too, has gone on, to the pleasure and benefit of all of us.

# A SMALL STEP FORWARD FOR HUMAN RIGHTS: THE CREATION OF THE POST OF UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Christina M. Cerna*

Many years ago, perhaps more than either of us wishes to acknowledge, I was a student of Professor Rubin's at the Washington College of Law of The American University. Professor Rubin was, at that time, involved with a United Nations commission that had something to do with transnational corporations. From my student perspective, I interpreted his role in the United Nations to be that of taking the transnational corporations to task for illegal monopolistic activities and exposing them to worldwide condemnation. Somehow I imagined that Professor Rubin worked for the United Nations, the Organization of American States, the United States State Department, American University and the American Society for International Law, all at the same time. I took his seminar on International Business Transactions and although I did not follow in his footsteps in that area of the law, Professor Rubin was an inspiration for me to seek employment with an international organization. For the past sixteen years I have worked professionally in the field of international human rights law. I spent most of those years at the Washington, D.C. headquarters of the Organization of American States, but the last two years were spent (on loan) with the United Nations at the United Nations Centre for Human Rights in Geneva. A little over a year ago, during my tenure at the Centre the United Nations General Assembly took the historic decision to create the post of U.N. High Commissioner for Human Rights. This essay will take a look at the creation of that post and the High Commissioner's activities over the past year.

---

* Organization of American States. Affiliation for identification purposes only. The opinion are those of the author alone and are not to be attributed to the Organization of American States or any of its organs.

This year, the United Nations is celebrating its Fiftieth Anniversary. Fifty years after the adoption of the United Nations Charter in San Francisco, the purposes of the United Nations "to maintain international peace and security"[1] and "to achieve international co-operation"[2] in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[3] are again receiving international attention. In the absence of a global unifying force, in this age of shrinking distances due to the tremendous technological advances in worldwide communications and transportation, the United Nations, at fifty, is being looked to, once again, as a potentially relevant body.

In June 1993, the United Nations convened the second World Conference on Human Rights in Vienna, Austria.[4] It was originally planned to be held in Berlin, which would have had great symbolic value given the fall of the Berlin Wall, Germany's recent reunification, the reunification of Europe and the fact that the international human rights movement began in reaction to the Nazi atrocities committed during the Second World War. Unfortunately, the Germans withdrew their invitation and the Austrians stepped in, offering to host the Conference in Vienna. The connotations that Vienna conjures up hark back either to a different era, or to an unfinished (un-begun?) self-examination of Austria's role in the War.

The Austrian team was obliging, hard-working and ultimately ingratiating. Everyone liked them and Vienna turned out to be a much more congenial and embracing city than Geneva whence so many of the diplomatic participants came in order to attend the Conference. Vienna was only a few hundred miles, however, from the conflict raging in Bosnia. This geographic fact served as a constant reminder of the international community's failure to act in the Bosnian conflict. The year-long preparatory process before the World Conference, in Geneva, had also been fraught with conflict and bitterness. The slightest advances towards an agenda for the Conference were frustrated by those countries that did not wish to see the conference take place at all. The inability to achieve consensus on an agenda meant that one finally had to be handed down from headquarters in New York, reducing the efforts of the Geneva-based diplomats to naught.

---

1. U.N. CHARTER art. 1, ¶ 1.
2. U.N. CHARTER art. 1, ¶ 3.
3. *Id.*
4. The first was held in Teheran, Iran in 1968.

After some initially horrific bad press once the Conference opened—a protest by the invited Nobel Prize winners after the World Conference refused to seat the Dalai Lama, having succumbed to Chinese pressure; and the wholesale booing of former United States President Jimmy Carter by the Non-Governmental Organization (NGO) forum—the Conference did manage to produce a final document. The Working Document of the Conference had been drafted by Mr. Ibrahima Fall, the Senegalese Secretary-General of the Conference. That document, recycled by the Conference's Drafting Committee, became the albatross known as the "Vienna Declaration and Programme of Action."[5]

The Vienna Declaration is being cited routinely in the Palais des Nations in Geneva these days. The Declaration is comprised of everyone's ideas, even if these ideas are totally contradictory. Consequently, the document can be used to support almost any proposition one chooses to make. For example, many cite to the fifth paragraph of the Declaration concerning universality, or perhaps more appropriately, cultural relativism:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[6]

If all rights are "indivisible and interdependent and interrelated" and must be treated "in a fair and equal manner, on the same footing, and with the same emphasis," then any attempt to set priorities would appear to violate the spirit of the Vienna Conference. Why then is universal ratification of the Convention on the Rights of the Child set for 1995, whereas universal ratification of the Convention on the Elimination of All Forms of Discrimination against Women set for the year 2000?

The Vienna Conference might have been better off recycling the Proclamation of Teheran from the first World Conference on Human Rights held in 1968. Three regional blocs (the Americas, Africa and Asia) presented short Declarations of their own, but none rang with the

---

5. *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, 32 I.L.M. 1661 (1993).

6. *Id.* at 1665.

necessary eloquence to take center stage to become the Working Document of the Vienna Conference. Mr. Fall's document did not ring with the necessary eloquence either, but the fact that the Secretary-General of the Conference had gone to the trouble to produce a document, and such a lengthy one at that, gave it a certain pride of place. A power struggle, however, took place first. After stating that he had merely sought to be useful to the process, the Secretary-General of the World Conference did not offer to withdraw his document, once submitted to the Preparatory Committee, but instead faced down governmental charges that he had exceeded his authority in presenting it, with the intention that it be used as the Conference's Working Document on a par with the regional declarations. The West came to his rescue, having produced no regional declaration of its own and virtually adopted Mr. Fall's document. The Western Europe and Others Group (WEOG), notably Europe, Canada and the United States, had decided not to organize a regional meeting and thus did not produce a document which would represent the views of the West at the Vienna Conference. The West's lack of interest in presenting a united proposal was explained away by comments such as "everyone knows the West's point of view as regards human rights" or as an attempt to avoid a deliberate imposition of Western values on the rest of the world. At the very last minute, during the *ad hoc* third week of the fourth and final Preparatory Committee meeting (a month before the Vienna Conference), several Western States, singly or collectively, put together a number of ideas, the only memorable one being the adoption of Amnesty International's proposal for the creation of the post of High (Special) Commissioner for Human Rights by the United States. As a result, WEOG was ready to adopt the draft declaration prepared by the Secretary-General of the Conference.

The Vienna Conference will be remembered, if at all, for having led to the creation of the post of High Commissioner for Human Rights, an idea which had not been included in the draft Working Document prepared by the Secretary-General of the Conference. The United States deservedly can take credit for promoting the idea of High Commissioner and helping to bring about the creation of the post. The member states of the United Nations apparently did not choose to reward Mr. Fall for his efforts in drafting the Working Document which became the Vienna Declaration because they did not make him the High Commissioner.

Instead, Mr. José Ayala Lasso, the Ambassador of Ecuador to the United Nations in New York, was selected as the first United Nations High Commissioner for Human Rights. Ambassador Ayala headed the Working Group in New York which led to the adoption by the General

Assembly of resolution 48/141 of December 20, 1993 which created the post of United Nations High Commissioner for Human Rights. Mr. Ayala's negotiating skills reportedly turned into reality what had first appeared to be only a far-off possibility. The member states rewarded his achievement by offering him the post of High Commissioner. On April 5, 1994, the High Commissioner assumed his duties in Geneva.

Almost a year has since elapsed. The High Commissioner is mandated to report annually on his activities to the United Nations Commission on Human Rights, and through the Economic and Social Council, to the General Assembly. He has now presented two reports, one to the United Nations General Assembly[7] and the other to the United Nations Commission on Human Rights.[8]

The opening paragraphs of the High Commissioner's report to the United Nations General Assembly read like the Vienna Declaration. For example, the report states that the High Commissioner acts according to three "principles," one of which is to take "a comprehensive and integrated approach to the promotion of human rights."[9] Such an approach, the report continues, "means that those rights are understood to be civil, cultural, economic, political and social rights, as well as the right to development, to be dealt with on an equal footing and in a fair and even-handed manner."[10]

Once past this language we can begin to piece together what the High Commissioner has actually accomplished during the period between April 1994 and January 1995. He has made official visits to Switzerland, Austria, Bhutan, Cambodia, Denmark, Estonia, Finland, Germany, Japan, Latvia, Lithuania, Malawi, Nepal, Norway, the Republic of Korea and Sweden. In addition, the High Commissioner visited Cuba in November 1994, and Colombia in December 1994, each at the invitation of the respective Government. More importantly he made two trips to Rwanda and also Burundi. He has also met with the Special Rapporteur, experts, chairpersons of working groups and treaty bodies, United Nations specialized agencies, regional organizations, NGOs, etc.

---

7. *Report of the United Nations High Commissioner for Human Rights*, A/49/36, Nov. 11, 1994.

8. *Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1995/98, Feb. 15, 1995.

9. *Report of the United Nations High Commissioner for Human Rights*, 49th Sess., U.N. Doc. A/49/36 (1994) [hereinafter *Report*].

10. *Id.*

THE HUMAN RIGHTS FIELD OPERATION IN RWANDA

The events in Rwanda in April 1994 provided the High Commissioner with his first opportunity to respond to serious violations of human rights. In response to the High Commissioner's initiative, a Special Session of the United Nations Human Rights Commission was held on May 24-25, 1994 to consider the serious human rights situation in Rwanda. At the end of the session, the Commission decided to appoint a Special Rapporteur to Rwanda, who was mandated to seek out all credible and reliable information on violations and atrocities committed in that country. The Special Rapporteur, Mr. René Dengi-Ségui of the Ivory Coast, visited Rwanda three times and presented two reports containing his observations and recommendations. The Human Rights Commission also decided that the Special Rapporteur should be assisted by a team of human rights field officers. Presently, there are approximately one hundred human rights field officers throughout the country. The Human Rights Field Operation in Rwanda (HRFOR) of the United Nations High Commissioner for Human Rights is the first field operation of the High Commissioner and according to the Operational Plan, is designed "to create conditions instilling confidence among Rwandese citizens, and in particular, those most vulnerable elements of Rwandan society, such as refugees and internally displaced persons, so that they eventually return to their country and homes to resume their lives in safety and dignity."[11]

On July 1, 1994, after the United Nations Human Rights Commission created the post of Special Rapporteur to Rwanda, the United Nations Security Council adopted Resolution 935 (1994), requesting the Secretary–General to establish a Commission of Experts to examine and analyze information concerning violations of international humanitarian law and genocide in Rwanda and to present its conclusions to the Council before November 30, 1994.[12] The Secretary-General in his report to the Security Council of July 26, 1994 announced that the Commission would be based in Geneva and would benefit from the resources of the High Commissioner, and in particular, would have access to those resources already made available to the Special Rapporteur to Rwanda. The High Commissioner was requested to ensure coordination between the work of the Commission of Experts and the Special Rapporteur. The Commission undertook a mission to Rwanda in August-September 1994

11. *Id.* at 17.
12. *Id.* at 18.

and presented an interim report to the Secretary-General on September 30, 1994, which recommended, *inter alia*, the establishment of an international tribunal.

The HRFOR was created as a result of United Nations Human Rights Commission Resolution S-3/1, establishing the mandate of a Special Rapporteur, Security Council Resolution 935 (1994), establishing the Commission of Experts, and General Assembly Resolution 48/141, establishing the mandate of the High Commissioner for Human Rights. According to the Operational Plan, the field operation in Rwanda has four objectives: (a) to carry out investigations into violations of human rights and humanitarian law; (b) to monitor the ongoing human rights situation and, through its presence, prevent future human rights violations; (c) to cooperate with other international agencies in re-establishing confidence, and thus facilitate the return of refugees and displaced persons and the rebuilding of civic society; and (d) to implement programmes of technical cooperation in the field of human rights, particularly in the area of the administration of justice.[13]

The High Commissioner's field operation in Rwanda is carrying out investigations into violations of human rights and humanitarian law, is monitoring the human rights situation for the purposes of the mandate of the Special Rapporteur, is cooperating with other international agencies in re-establishing confidence and facilitating the return of refugees and displaced persons and the rebuilding of civic society, and is implementing programmes of technical cooperation. The High Commissioner has presented a detailed operation plan for the human rights field operation in Rwanda and has participated in a consolidated appeal on Rwanda organized by the Department of Humanitarian Affairs in Geneva. As of January 13, 1995, some US$4.46 million dollars had been pledged to finance the field operation in Rwanda, but only US$1.80 million dollars had been paid in. The High Commissioner made an additional request for US$4.83 million dollars for a programme of technical assistance for the administration of justice.

The HRFOR is the first field operation ever undertaken by the High Commissioner for Human Rights. Its activities are comparable to those of the human rights components of the peacekeeping missions established in El Salvador, Cambodia, Haiti and Guatemala. The human rights components of these missions have been criticized for having been organized by New York without the participation of the Centre for Human Rights in Geneva. It will be an interesting exercise to evaluate

13. *Id.* at 19.

the performance of the first field operation undertaken by the High Commissioner and the Centre and to compare its achievements with those of the earlier four missions.

### PREVENTIVE ACTION IN BURUNDI

In neighboring Burundi, the High Commissioner established an office on June 15, 1994 to carry out a preventive human rights programme. This programme includes training and educational activities, particularly for the judiciary, police, gendarmerie and military; technical assistance for the Minister of Justice; human rights training for the Army; advisory services of experts on human rights; human rights education; human rights fellowships for the preparation of human rights experts; a system for the production and distribution of human rights documentation; development of promotional activities designed to create a culture of human rights; support for the Centre for Human Rights of Bujumbura; and assistance to national human rights NGOs. The High Commissioner, in the face of a deteriorating human rights situation in Burundi in early 1995, called on the international community to increase the deployment of human rights field officers in that country. The High Commissioner commented that an increased deployment of field officers would "play an especially useful deterrent role with respect to violations of human rights,"[14] stressing that "there is an imperative need to act so as to establish a climate of tolerance and mutual respect whereby each and every citizen of the Republic is not considered a Tutsi or a Hutu but a member of the Burundese nation."[15] In February 1995, in view of the deteriorating human rights situation, the Security Council decided to send a mission to Burundi.

In January and February 1995, the High Commissioner also turned his attention to the human rights situation in Chechnya and former Yugoslavia.

### ADVISORY SERVICES AND TECHNICAL ASSISTANCE IN HUMAN RIGHTS

Great attention in the High Commissioner's Report to the United Nations General Assembly is devoted to advisory services and technical and financial assistance. Assistance, pursuant to the Vienna Declaration, must be "at the request of Governments" and in the following areas:

---

14. *Report, supra* note 9, at 13.
15. *Id.*

helping States draft national plans of action for human rights that the United Nations could support; building democratic institutions; human rights aspects of elections; the administration of justice; the training of police and others; and areas involving the rights of children, minorities and indigenous populations.[16]

### ASSISTING COUNTRIES IN TRANSITION TO DEMOCRACY

In order to assist countries in "transition to democracy," the High Commissioner visited Cambodia, Estonia, Latvia, Lithuania, Malawi and Nepal. The Centre for Human Rights has opened an office in Cambodia, the purpose of which is:

> to manage the implementation of educational, advisory services and technical assistance programmes and to ensure their continuation; to assist the Government of Cambodia in meeting its obligations under the human rights instruments Cambodia has acceded to, including the preparation of reports to the relevant monitoring committees; to assist with the drafting and implementation of legislation to promote and protect human rights; to assist in training persons responsible for the administration of justice; to contribute to the creation and/or strengthening of national institutions for the promotion and protection of human rights; and to provide support to bona fide human rights groups.[17]

Although the Cambodia office provides advice and technical assistance to the Cambodian authorities, there are indications that these same individuals are reluctant to heed it.

The High Commissioner has also signed a Joint Declaration of Cooperation for the Development of Programmes for the Promotion and Protection of Human Rights in Malawi, which will run for two years beginning January 1, 1995. According to the High Commissioner's Report to the United Nations Human Rights Commission, the programme covers several areas of priority need, "such as constitutional reform, assistance to the judiciary, training of the police and the military, human rights education in primary and secondary schools, support to the civil society, and support to Parliament and to structures concerned with the administration of justice."[18] The High Commissioner for Human Rights opened an office in Lilongwe for the purpose of implementing the cooperation programme.

---

16. *Id.*
17. *Id.* at 13-14.
18. *Id.* at 15.

Regarding his visit to the Baltic Countries, the High Commissioner met with the Heads of State of Estonia, Latvia, Lithuania and discussed the development of national action plans in human rights, among other issues. In Eastern and Central Europe, the High Commissioner has several programmes dealing with the transition from authoritarian to democratic rule. They involve constitutional and legislative assistance; human rights training in the administration of justice, for teachers, police and prison administrators; assistance for parliamentarians, academic institutions and NGOs; and assistance in human rights aspects of the electoral process. The High Commissioner also visited Nepal to discuss a programme for technical assistance in the field of human rights.

## CONCLUSION

The idea of the post of High Commissioner is almost as old as the human rights movement itself. Mr. Ayala Lasso, in the face of great odds, must be given excellent marks for an extremely impressive first year on the job. The Rwanda operation is perhaps the High Commissioner's baptism by fire and while one may criticize certain aspects of his approach to the issues, one can only be pleased that he took on the big issues immediately.

While the High Commissioner for Human Rights is engaged in "restructuring" the United Nations Centre for Human Rights, perhaps he ought to rely on the regional organizations a bit more. The African Commission of Human Rights could have been assigned the role given the Special Rapporteur or the Commission in Rwanda. The High Commissioner should strengthen whatever regional mechanisms already exist and help to make these mechanisms more effective. The author would also like to see him convince the Secretary General of the Council of Europe that the admission of Russia and former Yugoslavia is all the more urgent given the terrible events in Chechnya and in Bosnia, rather than using these events as grounds to keep them out. Once the regional arrangements actively begin to concern themselves about the serious human rights violations in their regions, the High Commissioner can concentrate his efforts on creating a regional arrangement where one is still totally lacking—in Asia.