Denver Journal of International Law & Policy

Volume 8
Number 2 *Spring*

Article 2

May 2020

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Denver Journal
OF INTERNATIONAL LAW AND POLICY

MYRES S. McDOUGAL DISTINGUISHED LECTURE

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This is the third annual Myres S. McDougal Distinguished Lecture in International Law and Policy presented at the University of Denver College of Law in the Spring of 1978. Sponsored by the International Legal Studies Program, the International Law Society, the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY, *and the Student Bar Association, the lecture series presents eminent jurists and scholars addressing significant issues of international law and policy.*

I have a particular pleasure in having the opportunity of speaking here tonight at this conference on human rights. There have been many such conferences recently, which I can only applaud, for I can remember the period, which you might call the Kissinger era, where the very subject of human rights was not one to be mentioned in polite company. My remarks tonight will be a lawyer's perspective on Global Human Rights—Challenges and Perspectives.

First, we might turn to the two basic theoretical problems in global human rights; and turn to them not so much because they are particularly interesting from a theoretical standpoint, but because they relate to the principal unfinished business of international human rights, which is effective implementation.

The first of these problems is simply whether or not there is a global basis for a consensus on human rights as appears,

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for example, in the Universal Declaration of Human Rights. What strikes one about the Declaration is its unparalleled proclamation that these are, in fact, universal rights which exist on a global leval and which, by implication, exist solely by virtue of fact that these rights attach to human beings simply because they are human.

One of the major theoretical difficulties in this field is whether or not there is a basis for universality. An academic colleague of mine has been looking for some years at the ethical and religious dimensions of human rights as they appear in the Universal Declaration and in some seventeen United Nations instruments. Searching for a commonality among the major religious systems in the world, she has unfortunately concluded, in a forthcoming book, that she can find no such common theme in the major religious systems that would serve as a consensual basis for the rights which are put forth in the Universal Declaration, in the covenants, and in other international human rights instruments. This finding is rather disheartening because it certainly runs counter to what we hear from the religious establishment, and to what we want to believe.

This conclusion, of course, may not be so dire a finding, for we rarely pay much attention to history; however, what is made of the past may be crucial. Therefore, the ethical basis of human rights might turn out to be of some use. The fact remains, however, that it is not easy to say that, on an ethical dimension, there exists uniformly around the world a global consensus which would support those declarations of rights included in the Universal Declaration and in other United Nations instruments.

There is a second, more critical problem which also has political overtones: the question of whether or not the very nature, form, and definition of these universal rights are essentially a reflection of the North Atlantic Basin (using the North Atlantic Basin in the sense to include not only the products of the Enlightenment, principally of Locke, but to include the doctrine of Marxism, which is also an emanation of the North Atlantic Basin, Western Europe, and North America). In other words, the very definition of these rights may be so culturally biased that it is impossible to find a consensual basis in other cultures and other philosophies that would make effective implementation possible.

From the lawyer's perspective, we look at international law as a system, as possibly the basis upon which the structure of internationally recognized and implemented rights might rest. Unfortunately, my own work in this field leads me to rather pessimistic conclusions. First, in terms of traditional international law, it appears certain that there is no global consensus which would support declarations of human rights.

In traditional international law, prior to the developments in the U.N. system, there existed some restricted areas of fundamental rights, limited though they may be to protection by a sovereign. For example, the whole passport system rests on the doctrine of one sovereign asking another, "Please do not do anything terrible to my citizen while he is in your territory." If you read a passport you will see that a vestige of this doctrine remains where the Secretary of State says, "To whom it may concern, please give protection to my citizen while he sojourns in your land:" that is, rudimentary recognition of an obligation but based on request. This system has now become very, very much subject to erosion—erosion mainly because of the United States' attempt to use a passport system to deal with protection of certain political interests. Thus, there are the prohibited countries: you cannot go to Cuba; you cannot go to Vietnam; you cannot go to Albania. This erosion of traditional international law has made this doctrine suspect in the rest of the world, for the doctrine has been twisted by those who issue passports to serve the political purpose of keeping citizens of one country from having any contact with citizens of another country who have different ideological views.

More critical has been the problem of protection of property. Out of the North Atlantic Basin, and principally based on Locke, property protection has been an essential element of the conception of basic human rights in the Western world. For example, Locke starts with the conception that a man owns property in himself and in his labor. An extension follows from this basic assumption to all of the rights and freedoms that were established during the Enlightment: the rights and freedoms that had so much to do with the formulation of the Declaration of Independence and the Bill of Rights.

The conception that the property of foreigners is protected by an international system, by an international regime of law, however, is under attack, especially from the Third World. This attack revolves around the disputes about permanent

sovereignty over natural resources. The Third World has said that every state has permanent sovereignty over its own natural resources. The First World and the Second World agree, but there the agreement with the Third World ends. That is, the Third World says, "If we take ownership of our natural resources away from alien owners and nationalize it, or transfer it to citizens of our state, we will compensate you under domestic law." But the First World answers, "That cannot be. This property is protected; it is a right protected internationally, and international law says you have to give us prompt, adequate, and reasonable compensation for any taking. Consequently, you are violating a fundamental human right if you nationalize under domestic law."

The Third World, however, takes the position that there is no such international law, traditional or otherwise. First, they say that these rules grew up at a time when most of the Third World were not members of the international community; therefore, anything that they did not participate in making is not binding. Consequently, there is a rejection of the basis for an international consensus reflected in law for very rudimentary human rights, that is, one of property in one's person and out of one's person. Second, there is the argument that, in fact, international law is severely flawed. If you read any international law text published before 1940, the introductory paragraph will open by saying that international law is the distillation of practice among Christian sovereigns. Given the structure and nature of the world today, the objection to the substantive context of international law is that this law essentially represents the views of the North Atlantic Basin.

There was a doctrine which provided for protection of human rights in traditional international law called the Doctrine of Humanitarian Intervention. The theory was that if a sovereign so mistreated its citizens that it shocked the conscience of Christian sovereigns, every sovereign not only had a right, but had a duty to intervene to protect those subjects against tyranny. As formulated, it was obviously an enormous advance before the U.N. era in terms of minimum protection of basic human rights. But what happened? It is alleged that humanitarian intervention, in many cases, really masked intervention for economic and political reasons. For example, the French intervened in the Middle East, in what is now Syria and Lebanon, allegedly to protect Christian communities against oppression, harassment, and massive violations of

fundamental human rights. It took almost a hundred years to get the French out.

Consequently, there has been a feeling in many quarters of the world that this distortion of the very substance and nature of what purports to be universal international law, again appears to be, upon examination, an emanation from the North Atlantic Basin. Therefore, to rely upon those doctrines of classic international law as a foundation for this new superstructure of rights generated by the United Nations is a reliance on false premises. This premise is a fundamental, theoretical problem of whether or not there is a basis for a global consensus on human rights. We do not find it in religion; we do not find it in traditional international law; we do not find it in the historical origins of the period of the Enlightenment. The problem is, what possible substitute exists for this lack of consensus (since as a lawyer one looks to a certain kind of consensus that would make effective implementation possible)?

Absent a global consensus, one might say that implementation of recognized international human rights may very well appear to be impossible. But, as I suggested earlier, the uses of history are many.

History is purposeful, and it would appear that what we say about the past, even though it may be inaccurate, may very well perform a useful function of legitimizing what we have now. We must look to another factor when we consider from a legal perspective the problem of whether or not there is indeed a consensus.

We have heard very much in the words of Ambassador Andrew Young of the problem of the rising tide of hope, which I think accurately describes what is happening in the world community in regard to human rights. But one must see this hope in a particular context: the rising tide of hope is the hope of people, not the hope of the sovereign entities we call nation states and governments. This distinction, however, exposes a very crucial problem: Our whole international system is based on relations among states. As late as 1946 the classic texts in international law stated that individuals have no place in international law; international law is what one sovereign talks about to another sovereign. Therefore, if we have a system in which one sovereign only talks to another sovereign about what they want, they obviously do not talk about what they are doing to their subjects. Thus, the rising tide of hope focuses on

what is really one of the most hopeful signs in this whole field of internationally protected human rights, that is, in several areas, the sovereign is being bypassed. And for my mind, this is a very good development.

For example, the complaint procedures adopted by the United Nations, imperfect though they may be, recognized that human beings on this planet have a right to talk to someone in the international community—the U.N.—about the inequities perpetrated by their sovereign. This certainly has provided courage, for example, to Soviet citizens to complain about their sovereign and to American citizens to complain about their sovereign to the international community. This procedure is the beginning of something very, very new: It is the beginning of the recognition that an individual has certain inalienable rights, and that even his sovereign cannot forbid him from making a complaint — a startling revelation given the background of traditional international law and traditional international relations where the sovereigns could only talk to each other. The origin of this right is mainly the result of a particular factual situation, the problem of South Africa. What South Africa has contributed is the political will for sovereigns to break through these old boundaries, these old theoretical constructs.

The sovereigns, however, have not been passive. Opposition has shown up as resistance to the United Nations in its lawmaking function. This resistance can be seen historically; for example, the Western powers in the early years of the U.N. insisted that the Universal Declaration be merely a statement of goals and aspirations. Clearly, it was not to be international law but merely a recommendation to the nation states for the shaping of their policies. The erosion of this concept now has reached the point that most lawyers at least assert that the Universal Declaration is, in and of itself, international law. But, remember the resistance of all the sovereigns: the Soviet Union abstained on the Universal Declaration; Saudi Arabia abstained because they could not conceive of women having equal rights with men; the United States voted for the Declaration but made clear that it was only a statement of aspirations.

We have come, however, a long way in recognizing that there is an irreducible minimum of rights which attach to one as a human being, and that sovereigns do not have the power to derogate or to say that these rights are granted to them by

virtue of their sovereignty. This conclusion, however, leads us to a number of technical problems. These problems inhere in the covenants and several other instruments in which there is an ascertainable tension between the claim of the sovereign as being the fountain of all rights and the claim of individuals that there are certain rights inherent in being human.

There is a second theoretical problem, relative to the organizing principle, in declaring the substance of these rights which are to attach to humans. This problem is sometimes phrased in terms of the principle of individuality against the authority of the state, that is, the problem of defining the rights of individuals as opposed to the rights of groups. We have seen this conflict historically. For example, the first serious international effort to deal with protecting rights on an international scale grew out of Wilson's fourteen points in which he dealt with the question of protection of minorities as one of the causes of war. On an international level, one protected the rights of people by looking to the group characteristic, and looking to the group characteristic required an understanding of a certain level of conduct pertaining to the group. A prime example is the Polish convention of 1919 in which rights were looked at in terms of group characteristics, as opposed to a second principle, that of individuality. This principle is embedded in the U.N. Charter.

The tensions generated by group-individual problems remain. For example, in the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), there is a theoretical inconsistency which demands concern for the individual and for the individual's protection from having his skin color or race used as a basis for disparate treatment; yet, in the center of the Race Convention is a provision which states that if one is a member of a group which has been subject to racial discrimination in the past, the government is obligated to take special measures in order to make reparation for that damage. This clause is a group characteristic.

Thus, in terms of organizing principles, we also have to return to the problem of the difference between civil and political rights, as they are specified in the Covenant and in the first twenty articles of the Universal Declaration, and the problem of economic, cultural, and social rights. The classic analysis, contributed mainly by political scientists, is that there are some inherent differences between these two classes of rights.

Civil and political rights classically have grown up as limitations on the power of sovereigns, limits on what a government can do or cannot do to you, but not in terms of bestowing a right on an individual because he is an individual. It reminds me, for example, of the formula by which my university confers J.D. degrees on our graduates. The president says to the graduate, "You are now qualified to go practice those wise restraints which make men free." This statement reflects the civil and political arenas. The president does not say to a graduate anything about being "now qualified to go advise the government on policies of allocation of economic resources, which might make society more equitable." Consequently, when we look to that linkage between economic rights and civil and political rights, the problem of the relationship between these two sets of rights is really not the crucial issue. Rather, the crucial issue is the relationship between both sets of rights, civil and political rights and economic, social, and cultural rights, as they appear in the covenants and in the demands for the new international economic order. If one examines these economic specifications, one finds that what split the United States from the Soviet Union in the era of the Cold War is reflected in the Universal Declaration: the first twenty articles are civil and political, while the next nine are economic, cultural, and social. Nonetheless, when one examines economic, social, and cultural rights, one finds that the drafters assumed that they were dealing with an industrial society. Every single one of these rights — from the most explicit, that is, the right to days off, the right to leisure, the right to paid vacations — indicates that the Declaration was talking about an industrial society. It was not talking about a subsistence society where a farmer knows nothing about days off. Therefore, what you are dealing with, really, is a distinction that those in the industrial world can argue about, relative to the conflict of East against West, without addressing the problems of 90% of the world's populations, which are in a subsistence economy. In this sense, the demands for the new international economic order, which is a blueprint for a new world order, become highly relevant to the question of human rights.

What kind of a global economic system is going to evolve that will make it possible to enjoy these particular rights? What is the world going to evolve into after this era of "Pax Americana"? Is there room within a global model for this North

Atlantic conception of rights which attach to humankind simply by being humankind? These being the theoretical problems, I would like to discuss some of the problems of strategy within this context, particularly as they relate to the Carter Administration.

First, the Administration certainly has put human rights on the global agenda. That, in and of itself, is a first step in moving eventually toward some system of implementation. For example, I examined every speech in the general debate of the past U.N. General Assembly looking for human rights and found, for the first time, that every speaker in the general debate devoted some time to human rights, even though many of them stated: "My country has no problems, but those others have a few human rights problems." Even to this extent, an enormous advance in putting human rights on the global agenda has been achieved.

However, one of the responses which greatly troubles me is the Administration's submission of four treaty conventions to the Senate for ratification: the two covenants on human rights, the Race Convention, and the Inter-American Convention. The problem is that lawyers have riddled them with reservations: "these are things we will not accept." Therefore, the conventions, as presented, are filled with the resurrection of discarded doctrines that were used a hundred years ago. For example, the so-called State-Federal Clause: "We are the United States but we are not Texas or Colorado, and therefore we cannot make them do anything; we will use our best efforts to tell them, please do not violate people's human rights, but you must recognize we are a federal system." I am greatly troubled by this attitude, primarily in terms of the credibility of the Administration.

To take one example of a reservation, there is an article in the political covenant which says you cannot undertake to execute pregnant women or people under eighteen. The United States reservation says that we reserve the right to impose capital punishment on pregnant women and people under eighteen in present or future law. Can you imagine the incredulity of someone reading this reservation and then saying, "We are promoting human rights?" The same thing is true throughout the other conventions. For example, the United States says we do not accept any obligations under the Race Convention, which is really a replication of the Civil Rights Act

of 1965 (the reason being that some people who were drafting the Civil Rights Act of 1965 were also drafting the Race Convention). In technical lawyer's language, the Race Convention is not self-executing. To accept those obligations, then, Congress essentially has to re-pass the Civil Rights Bill. In other words, the Administration has stumbled into an incredibly disastrous position in terms of its credibility and its leadership in the world. In prior instances, there were challenges to Taiwan's ratification of the Conventions from the People's Republic of China; there were challenges to the Federal Republic of Germany's ratifications of the Conventions because they were extended to West Berlin. Now, the United States has put itself in the position that if it does ratify these Conventions, it is clear that the United States, the leader of human rights, is going to be challenged on the ratification on the basis of bad faith.

Another problem is the treaty-making power as a way of making domestic law in the United States under our Constitution. However, it seems that we leave ourselves open in this context because the United States and the Administration have put themselves into the position of saying that they will not take this route for the improvement of the human rights condition, which appears to be a remnant of the old Bricker Amendment days.

Finally, in terms of strategies, there is the problem of what to do about South Africa. Certainly, it is easy to describe conditions there in terms of massive, consistent, persistent patterns of gross, outrageous violations of human rights. Here, there is some disappointment in the Administration's handling of the South African situation.

Briefly, the first problem is the National Security Advisor who keeps pointing out that we are trying to settle Zimbabwe (Southern Rhodesia). Therefore, a constraint on our South African policy arises from the fact that we need South Africa's help to settle the Rhodesian question. This policy is not effective human rights leadership because the problem in southern Africa is really South Africa; and South Africa must be dealt with on its own terms. However, looking now to the real problem of effective implementation, we have already seen that the recognition of the right of an individual to file complaints with the U.N. system is beginning to erode. In the interim, until we achieve "Utopia," when in fact we might have international jurisdiction to deal with human rights violations such as we

had at Nuremburg, perhaps the problem is an effective national implementation of these international rights. To its credit, the Carter Administration, under the leadership of Congress, has begun to fashion some effective national remedies for the violation of human rights: a necessary measure until there exists an international jurisdiction.

The problem is how, and what forces you use, to get nation states to react properly. Certainly, we could use the carrot and stick approach, as is being used in our aid legislation. We also should not overlook the problem of international publicity. We have seen some power there, even with the most recalcitrant of regimes. Once word reaches the people, you have created pressure on nation states to do something. Therefore, just the publication of information becomes crucial to implementation.

I will conclude by saying that obviously there are enormous problems, both theoretical and practical. Some lawyers fear that maybe we are on the way to world government, that sovereigns are no longer the be-all and the end-all. Nonetheless, looking back ten or fifteen years, there is an enormous basis to justify the feeling that this rising tide of hope in the world is indeed going to make a difference.