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PROTECTION OF HUMAN RIGHTS: A NATIONAL OR INTERNATIONAL ISSUE ?

The question of human rights has assumed great importance in contemporary international relations. The concern for human rights may be said to have gained the form of a global movement in the sense that human rights have entered into the realm of valid international concern. Consequently, human rights today is the foreign policy objective of many nations and an important instrument of detente.[1]

As a foreign policy objective, the problem of human rights might act as a factor of international conflict situations or tensions. This happens mainly because there exists a wide divergence in theory and practice among states with regard to human rights obligations due to a number of factors, such as the nature and ideology of the political systems, state policy regarding recognition and enforcement of rights, lack of effective machinery for the enforcement of rights, etc. As a result of this, various groups of states, namely the western, the socialist and the developing countries, have formulated their own approach to this question. It is however, not surprising to note that the fundamental difference in opinion among these groups of states lies as regards implementation or enforcement of rights. Inspite of the

1. A.N. Shamsul Hoque (ed). *Human Rights, Principles and Practice*, Univ. of Rajshahi, 1984, p.1.

Universal Declaration of Human Rights, large number of conventions, covenants and protocols adopted by the UN and its specialised agencies, the question of human rights, in the absence of some effective enforcing machinery, remains tenuous. It can not be denied that the ultimate difficulty in maintaining and securing international human rights lies in the prosecution and enforcement of those rights against states[2].

It is often argued that the advances made at the international level in the promotion of human rights become real only when they are reflected in action at national and local levels. To achieve this objective a radical change has to be brought about in the legal relation between the state and the individual.[3] According to some lawyers, to bring about this change it becomes necessary, firstly, to declare a common standard of rights on which states can agree generally; secondly, to sign and ratify treaty or convention in which states undertake to provide specific human rights through their municipal laws, and thirdly to establish some judicial machinery by which both the rights of states against one another and rights of individuals against states under the treaty can be maintained.[4] The last of these measures unfailingly refers to what is known as the international protection of human rights, and it is on this point, that opinion of divergent groups of states differ widely. While some nations, mostly the western countries, favour international enforcement of human rights and consequently, international legal instrumentalities in case of violation of these rights[5], other nations hold the view, that human rights fall within the domain of municipal law and so enforcement and implementation of these rights and legal remedies in case of

2. Gerald J. Mangone. *The Elements of International Law*, Homewood, 111, 1967, p.255
3. A.N. Shamsul Hoque. *op. cit.* p.76
4. Gerald J. Mangone. *op. cit.* p. 255.
5. A. Robertson. *The International Protection of Human Rights*, Nottingham, 1970, pp.6-11.

their violation is primarily a question of domestic jurisdiction of the state concerned.[6]

The practice of human rights of the developing countries as a heterogeneous group is not characterized by uniformity in approach. Nevertheless, it is submitted, that ever increasing role of these newly independent countries in the development of contemporary international law warrants formulation of specific and clear concept with regard to protection of human rights. In this article, an attempt is made to examine the issues related to protection of human rights, taking into particular consideration the limits and compatibities of international instruments vis-a-vis national jurisdictions.

II

The formulation "International protection of Human Rights" denotes international cooperation among states, measures and steps of the UN to establish "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[7] It is not without reason that the UN Charter refers to "universal respect for human rights" and not' 'protection of human rights". As a matter of fact, documents of the San Francisco Conference reveal that this question was vividly discussed there. Thus, the delegate from Panama proposed to insert in the Charter the formulation of "protection of human rights" instead of the now existing "respect for human right." However, this proposal could not gain enough support and was set aside so that the UN could not interfere in the internal affairs of any state by technically applying this clause.[8]

The notion of human rights is unthinkable and does not exist without a state. Each individual exercises only those rights which

6. A.P. Movchan. *Human Right and International Relations.* (Pravo Chelovieka i Mezhdunarodnie Otnoschenia)—in Russian. Moscow, 1982, p.20
7. Article 55.C of the UN Charter.
8. See S.B. Krilov, *Material on the History of the United Nations Organization.* (Materialik Istorii Organizatsii Obiginionnikh Natsii)—in Russian. Moscow, 1949, vol. 1. p.109.

are proclaimed in the constitution and other laws of the state of his domicile. Moreover, legislation of every state defines the legal status, volume of rights and obligations, etc. of all persons living in that territory : firstly, nationals of this particular state, and also foreign nationals including apatrides.

It is well known that both the spectrum and nature of rights and freedoms are dependent on economic, social and national peculiarities of every individual state. One author has quite aptly remarked : "...rules of international law related to human rights undergo transformation through peculiarities of social and state system of a given country in the process of their application, and the scope of the implementation of human rights and freedoms is determined eventually by the character of the socio-economic system of the given state. Therefore, it is not surprising that despite the conclusion of the international agreement containing the necessary list of human rights and freedoms their real scope and guarantees of implementation in countries which are parties to the pacts often drastically differ".[9] This explains why in countries with different socio-economic systems the content, essence and limits of human rights are defined differently. This, of course, does not mean that countries with identical socio-political system will necessarily have similar human rights and freedoms.

One important point relevant to international protection of human rights is that at the moment of emergence of the UN, vast majority of the now called "developing countries" were under colonial rule and hence were not accorded at that time even elementary rights and freedoms. Therefore, an extra responsibility concerning establishment and procurement of promotion of respect for human rights in these newly independent countries was bestowed upon the UN. Enumerating the functions and powers of the UN it was clearly indicated in the Charter, that these will be confined

9. V.A. Kartashkin, "International Human Rights Pacts", *Soviet Year-book of International Law*, 1975, Moscow, 1977, pp. 165—166.

to promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all ... ..".[10]

The above mentioned formulation—"promotion of universal respect for"—is a clear indication to the fact that direct regulation and protection of human rights and freedoms in accordance with the socio-political system is always an internal affair of every state and so can be realized in that way and by that organ of the state which is legally empowered by the municipal laws of that given state. None is empowered, be it the UN, a group of states, any particular state or its high official, to interfere in this question of internal competence of the state. This, to our opinion, constitutes a generally accepted principle of contemporary international law—*jus cogens*—and has been repeatedly confirmed in various resolutions of the UN and other international organizations including the Conference on Security and Cooperation in Europe, 1975. Consequently, the question of protection of human rights is inseparable from such fundamental principles of international law as sovereignty and non-interference in internal affairs of another state. This principle was also made evident in the San Francisco Conference preceding the establishment of the UN. In the Protocols of the Conference it was specifically indicated that "Chapter IX (refering to Chapter IX of the UN Charter promulgating promotion of universal respect for human rights and fundamental freedoms for all) does not contain anything which can be interpreteted as granting the UN powers to interfere in the internal affairs of the member-states".[11] Thirty years later, the same view was reaffirmed in the Final Act of the Helsinki Conference. As regards the principle of sovereignty and non-interference in the internal affairs of another state, the Final Act provides : "State-parties to the Act irrespective of their mutual relation shall refrain from any interference, direct or indirect; individual or collective; in the internal

10. Article 55.c of the UN charter.
11. United Nations, San Francisco Conference. Doc. No. 567

or external affairs constituting domestic jurisdiction of another state-party".[12] Suffice it to say, that this basic principle is equally applicable to the delicate issue of protection of human rights.

Important international documents concerning human rights drafted under the auspices of the UN–Universal Declaration of Human Rights, International Covenants on Human Rights etc.–are based on the fundamental notion that guarantee of effective means of protection of human rights and realization of such protection constitutes internal affair of every state. This principle is manifest in Article 8 of the Universal Declaration of Human Rights : "Everyone has the right to an effective remedy by the *competent national tribunals* (emphasis by the author) for acts violating the fundamental rights granted by him by the constitution or by law". The last part of this article quite convincingly shows that not only protection of human rights, but also granting of them is realized by "the constitution or by law" i.e., strictly by national law.

Similar provision can be found in the International Covenant on Civil and Political Rights. Article 2 of this Covenant states : "Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant *to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant* (emphasis added)" In so doing, the state party to the Covenant is obliged :

"a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administra-

12. Cited in A. P. Movchan. *op cit.* p.22

tive or legislative authorities or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;

c). To ensure that the competent authorities shall enforce such remedies when granted."[13]

The above mentioned provisions of the UN Charter, Universal Declaration and Covenants sufficiently prove that regulation and protection of human rights in conformity with socio-political system of a state is essentially an internal affair of the state concerned and so, human rights can be protected only as much and by those means which are prescribed in the municipal law of that particular state. Assertions of this thesis can be traced in legal doctrine too. Oppenheim for example thinks, that the "right of a state to treat its own nationals and also apatrides by its own discretion" and the provision establishing the rule that "how a state treats them is not related to international law"[14] constitutes a generally accepted principle. Quite a similar view has been expressed by the famous American lawyer Hyde. He states : "It is common practice that every state exercises freedom in its attitude to establish national regime for its own nationals.....Generally it is considered to be a question of municipal law."[15]

Soviet lawyers seem to be more specific on this question. Prof. G.I. Tunkin, for example, notes : "Legal status of individuals is determined by municipal law and not by international law".[16]

13. For full text of the Covenants see, I. Brownlie. *Basic Documents in International Law*, Oxford, 1978, pp. 144-180.
14. Oppenheim. *International Law*, (Russian edition) vol. 1. part 2, Moscow, 1949, p.206
15. Ch. Hyde, *International Law, its Meaning and Application in the USA*, (Russian edition) Moscow, 1950. vol. 1. p. 349.
16. G. I. Tunkin. *Fundamentals of Contemporary International Law*. (Osnovi Sovrimiennovo Mezhdunarodnovo Pravo), in russian, Moscow, 1956, p.19 See also by the same author: *Theory of International Law*. (Teoria Mezhdunarodnovo Pravo), in russian. Moscow, 1970, pp. 91.

Another Soviet lawyer Prof. S.B. Krilov in his book on the birth of the UN indicates that "an individual is protected not directly by international law but only through national law....".[17]

The aformentioned statements clearly testify to the fact that the founding member-states of the UN took them into full consideration in the process of determination of the functions and powers of the UN in respect of human rights.

III

If regulation and protection of human rights is *per se* a matter of municipal law, one can well ask if there is any scope and need for international protection of human rights ? To us it seems that protection of human rights is both national and international concept. In the latter aspect it is essential in the following cases :

a. formulation of general recommendations as to which right and freedoms deserve universal respect and protection;

b. drafting and conclusion of international agreements (Treaties, Covenants, Conventions etc.) which legally bind a state to recognize, grant and guarantee effective protection of rights declared in those documents;

c. creation of specific international mechanism and procedure to examine and control the degree of realization by the state of its human rights obligations.

The above mentioned point is of utmost relevance to our discussion. This is where we actually confront with the practical implications of "international protection of human rights" vis-a-vis national regulation. As regards creation of special international mechanism it should be kept in mind that such mechanism may be applied only in relation to that state which has unequivocally given its consent to it. Contravention of this requirement, i.e. resort to international mechanism without prior consent of the state concerned

17. S. B. Krilov. *op. cit.* p. 255

would tantamount to interference in internal affairs of that state which is by itself a flagrant violation of one of the basic principles of international law.

Contemporary international law offers various forms through which a state can express its consent to application of international mechanism. Most widely used form is that of signing and ratification of international agreements or conventions on human rights. As an example thereof one can cite Article 40 of the Covenant on Civil and Political Rights in which "The state parties to the present covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized therein and on the progress made in the enjoyment of those rights.....". This means that the act of ratification itself signifies consent of the state to international mechanism of examination and control. Moreover, the Covenant contains some other provisions by which states are required to give a separate, special consent to the application of international procedure in case of violation of the Covenant. In this regard Article 41 of the Covenant on Civil and Political Rights states : "A state party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the present Covenant. Communications under this Article may be received and considered only if submitted by a state party which has made a declaration recognizing in regard to itself the competence of the committee.. ".[18]

In addition, it is within the "competence of the committee to receive and consider communications from individuals subject to its jurisdiction who claims to be victims of a violation by that state party (state party to the Covenant) of any of the rights set forth in the Covenant...".[19] However, the Committee derives this com-

18. A.P. Movchar, *op cit*, pp. 175-176

19. *Optional Protocol of the International Covenant on Civil and Political Rights*, Article 1. For text see, A. P. Movchan *op. cit.*, pp. 101-182

petence not from the Covenant itself, but from the Optional Protocol of the Covenant on Civil and Political Rights. Consequently, "no communications shall be received by the Committee if it concerns a state party to the Covenant which is not a party to the present Protocol".[20]

The above mentioned examples provide ample ground to state that it is now acclaimed to be a generally accepted principle of contemporary international law that application of "international mechanism" or "international procedure" to human rights issues is admitted in relation to those states only which have expressly given consent to it. This can be interpreted as a reflection of the contemporary state of international relations where states are sovereign, independent and equal[21].

This however, makes the question of international protection of human rights still more complicated. The logical question that arises is when can an international organ take measures against violations of human rights in a country, and when is it not admissible because that would tantamount to interference in internal affairs of that state ?

Provisions of the Declaration and Covenants discussed above permit us to construe that firstly, when a state gives her free consent allowing an international organ to consider human rights issues on her territory, naturally then no interference in the affairs of that state tekes place. We have already seen that this consent of the state may be expressed in various different forms. But the problem springs up when such a free consent is absent. In that situation, can the UN or any other international organ take up the issue of human rights in a given state ?

For an acceptable and well founded answer to this question we need to take help of various international documents and of the

20. *ibid*
21. A.P. Movchan, *op. cit.*, p. 30

experience and practice of the UN in this field of international cooperation. Back in the formative stage of the UN in a Report of one of the Sub-committees to the San Francisco Conference it was pointed out that "guarantee and protection of human rights is left to internal competence of every state", but however, "if these rights and freedoms are flagrantly violated in such a way that threats peace or hinders realization of the provisions of the Charter, then it ceases to be strictly a matter of a particular state".[22] The word "threat" here denotes threat to normal and peaceful relations among states i.e., a threat to international peace. The UN, which has been created "for prevention and removal of threats to the peace" is obliged in that situation to not only consider the "situations that may impair peace" but also to take various measures including enforcement measures by the Security Council for their settlement. This kind of situation affects interests of the international community as a whole and obviously so, can not be treated as a matter of one particular state alone. But neither the San Fransisco Conference materials nor the UN Charter contain provisions specifying which concrete human rights' violations would be treated as situations threatening internatioal peace and hindering realization of the provisions of the Charter or in other words, which acts of violation of human rights and freedoms can be considered to possess international as opposed to national character.

As a result of long practice and experience of the UN in the sphere of human rights this universal organization came to the conclusion that "massive and flagrant violation of human rights" should be treated as violations having international character. In various UN General Assembly Resolutions violations like Genocide, Apartheid, Colonialism, Foreign Domination and Occupation, Agression and threat to national sovereignty and territorial integrity, non-recognition of the right to self-determination and violations of the

22. United Nations, San-Francisco Conference, Document no. 73 New York, 1945.

right to permanent sovereignty over natural resources etc. have been defined as examples of violations transcending national boundaries of any particular state i.e. violations of international character.[23] The fact that these categories of violations have repeatedly been put on the agenda of various organs of the UN including the General Assembly and the Security Council, also supports the notion that they constitute violations transgressing national territories and thus acquiring international character.

It needs special mentioning that some kinds of "massive and flagrant violations of human rights" are considered by the UN to be "international crimes". Thus in 1948 the Convention on Prevention of the Crime of Genocide was adopted which came into force in 1951. Article 1 of this Convention clearly indicates that "Genocide independent of whether it takes place in peace time or during war is a crime which violates the norms of international law".

Likewise, in various resolutions of the UN General Assembly it was referred that the policy and practice of Apartheid which by nature contravenes the aims and principles of the UN Charter is an international crime. In 1973, the General Assembly adopted a special Convention on the Suppression and Punishment of the Crime of Apartheid. The Convention came into force in 1976. Article 1 of this Convention defines Apartheid as "a crime against humanity" which violates the basic principles of international law and thereby is a direct threat to world peace and security.[24] As a whole this Convention difines apartheid as an international crime.[25] The draftors of this Convention had no illusion about the gravity of this crime against humanity and world peace and so unequivocally declared that

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23. See: UN General Assembly Resolution no. 32/130 of 16th. Dec. 1977.
24. UN General Assembly Resolution 3068 (XXVIII) of 30th Nov. 1973. For an account of research on Apartheid from the viewpoint of internat ional law see: UN Doc. E/CN. 4/1075.
25. I. P. Blishchenko. "The Crime of Apartheid: International Crime" *Soviet Year-book of International law*, 1974. Moscow, 1976, p.113.

"practice of the policy of Apartheid under no circumstance can be treated as an internal matter of the accused state".[26]

Specific provisions of the above mentioned Conventions on apartheid, genocide, etc. provide enough ground to submit that the well-defined approach followed in these documents to define "massive and flagrant violations of human rights as "international crimes" can be very suitably applied to any future situations concerning grave human rights violations. What is needed to combat such violations (international crimes) is definitely international protection.

IV

Thus we see that international protection of human rights carries a very special connotation and relates only to cases of violations of rights having international character, i.e., violations constituting international crimes, and when they can not be defined as "internal matter" of any particular state. In all other cases, human rights is essentially a problem of municipal law of every state concerned and therefore, state liability in case of violation by her of human rights obligations can be determined only in accordance with the national laws of that particular state. In this respect we should always keep in mind that "one of the main purposes of international action in the field of human rights is to extend the limits of national protection".[27] This approach corresponds to the generally accepted principles of contemporary international law and also reflects the policy of the developing countries. It should however, be kept in mind that international protection of human rights necessitates cooperation of states in the field of promotion of respect for fundamental human rights and freedoms, which in its turn, is inseperably linked with the strengthening of peaceful and friendly relations among states. For this reason such type of a cooperation should, above all, be developed within the framework of universal international organizations.

26. UN Doc. E/CN.4/1123/AC, 6, pp. 2-3
27. United Nations. *The United Nations and Human Rights.* New York, 1984, p.189