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SYMPOSIUM ON THE FUTURE OF HUMAN RIGHTS IN THE WORLD LEGAL ORDER

INTRODUCTION: HUMAN RIGHTS AND JURISPRUDENCE

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Like the men of fable who observed the elephant differently from different vantage points, scholars who write about human rights commonly, and sometimes most inaccurately, observe mere fragments of a total context. Some critics of recent developments in the international law of human rights can, thus, see only an Hobbesian-global community process in which reified, isolated nation-states are the principal, if not the sole, actors and inter-actors.¹ The enormous and accelerating increase, since Westphalia in 1648, in the intensity of interaction of individual human beings, through multiple and diverse associations, private as well as governmental, with a near total compression of time and space

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1. The impetus for this *Symposium on the Future of Human Rights in the World Legal Order* was, in part, articles written by Professors James S. Watson and Eric Lane. See Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978); Lane, *Mass Killing by Governments: Lawful in the World Legal Order?*, 12 N.Y.U. J. INT'L L. 238 (1979); Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60 (1977); Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609. In sum, Professors Watson and Lane claim that a jurisprudential basis for vindicating human rights does not exist under the Westphalian legal order. *Ed.*

in a continuing universalization of science and technology, escapes their attention. From their walled-state perspectives, they are able to perceive neither the rising, common demands of peoples about the globe for a greater production and wider sharing of all values nor the inescapable interdetermination and interdependence of all peoples in securing demanded values. Hence, noting only a fantasied tail of an imaginary elephant, these critics are able to come to the astonishing conclusions that how one state treats its citizens has no important impact upon the citizens of other states and that there is no shared, common interest among the peoples of the world in promoting and securing human rights.

The perception of the global process of effective power, an integral component of the larger community process, achieved by the critics of the human rights developments, partakes of no greater realism. The principal bearer of effective power in transnational interaction is, once again, observed to be the nation-state, and the structures of interaction of states are described as "horizontal," in a vast diminution of the increasingly important roles of international governmental organizations, political parties, pressure groups, and private associations of all kinds. Neither the rising demands of peoples for a greater production and wider sharing of values, nor the constraints of interdependence, nor the expectations of peoples about authority and control which, in fact, transcend state lines are regarded as relevant bases of effective power. The sole possible source of sanction for violation of human rights prescriptions, as for other prescriptions, is imagined to reside in the coercive application of the military instrument by one state to another state.

The conception of international law that inspires critics of the human rights developments is that of a preexisting body of rules whose exclusive function is regulating the interrelations of nation-states. A simplistic distinction is made between "international law" and "supranational law" which is alleged to be necessitated by some mysterious dichotomy between a "community of states" (the Westphalian conception) and world government. The vast continuum, between these two extremes, of the contemporary, pluralistic transnational process of authoritative decision, remains to blush unseen. Particular preexisting rules of international law can be changed, it is argued, only with the specific consent of states, and the very nature of "sovereignty," "domestic jurisdiction," "independence," and so on, precludes even a consensual change of the rules toward a greater protection of human rights. The only source of authority transcending state lines, it is sometimes asserted, must

be found in the law of nature, which is often obscure. It is apparently not recognized that particular rules, whatever their subject, find empirical meaning only in their use in an ongoing, comprehensive process of authoritative decision in which they are continuously being made and remade, to serve the purposes of the living.

Other writers upon human rights have, happily, been able to achieve a more comprehensive and realistic picture of the larger context.² For some observers human rights are most appropriately conceived, in a designative reference, in terms of the shaping and sharing of values by individual human beings in community process. From this perspective, the whole of humankind today constitutes a single global or earth-space community, however inadequately organized, in the sense of a complete interdetermination in relation to the shaping and sharing of all values. This most comprehensive process operates through, and has impacts upon, all the lesser communities, both territorial and functional, and these lesser communities in turn both reciprocally affect each other and shape the character and quality of the most comprehensive process. In this larger context, the individual human being, as the ultimate actor in all social interaction, identifies and affiliates with, and makes demands upon, and in behalf of, a whole range of groups and associations. These include not merely nation-states, but lesser and larger territorial communities, international governmental organizations, political parties, pressure groups, tribes, families, and private associations of all kinds; like other associations, even the nation-state is but a patterning of the perspectives and operations of the individual human beings who constitute it. The most obvious outcome of this comprehensive process of interaction, it is emphasized, is the pervasive and ineradicable interdependence of individuals everywhere, both within any particular value process and as between value processes, in the shaping and sharing of all values: The human rights that any one individual or community can achieve and protect is a function of the human rights that other individuals and communities can achieve and protect.

Observers of the larger global-community process are able to note within it a process of effective power in which the rising demands of individuals for a greater production and wider sharing of values, the constraints of the interdependences that envelop all individuals and communities, and the expectations about authority

2. The themes here developed are documented in M. MCDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

and control which, in fact, transcend the boundaries of particular states all serve as important bases of power in establishing and maintaining transnational authoritative decision. The nation-states of the world, though still the most conspicuous wielders of effective power, are no longer observed to be, if ever they were, impermeable and isolated entities; nuclear and other weapons may be making such entities as obsolete as the cannonball made walled cities. International governmental organizations and other groupings are breaking the monopoly of the nation-state as a source of authority, and a great host of private associations is widely diffusing both control and expectations about control.

The conception of international law that inspires many observers of the human rights developments is not that of a mere body of rules, but that of a comprehensive process of authoritative decision, in which rules are continuously made, remade, and applied, in an effort to clarify and secure the common interests of the peoples of the world, with rejection of all claims of special interest. It is observed that the contemporary world arena exhibits an increasingly viable constitutive process of authoritative decision which, though it has not achieved the high stability in expectations about authority or degree of effective control over constituent members that characterizes the more mature national communities, offers in increasingly democratic and effective form all the basic features of decision process essential to the making and application of law. A most significant feature in this global development of constitutive process is the emergence, in response to the intensifying demands of peoples everywhere, of an immense body of prescriptions—beginning with the United Nations Charter and extending through the Universal Declaration of Human Rights to the two major international covenants and numerous more specialized and ancillary formulations—which have taken on both the substance and form of the basic bills of rights long established and maintained in national communities. In substance, this new global bill of human rights, it may be noted, embraces the whole spectrum of values contemporarily cherished by humankind, beginning with collective political emancipation and moving to greater participation by all individuals in the shaping and sharing of all values. The structures and procedures for applying and sanctioning these human rights prescriptions, as for other prescriptions, remain imperfect, but continuous improvement is being made in such structures and procedures, and the basic prescriptions cannot reasonably be expected to become desuetudinous so long as the values they embody continue to fire

the demands of peoples, and peoples retain a realistic understanding of the conditions under which their values can be achieved.

It is in wise insight that the Editors of the *Hofstra Law Review* perceive that differences in jurisprudence, in theories for inquiry about law, cause very great differences in the conception and understanding of human rights. Elsewhere we have sought to document that one of the factors affecting the slow development of appropriate institutions and procedures for protecting human rights has been simple intellectual confusion.³ Scholars have neither adequately clarified the common interests of all individuals in the greater production and wider sharing of human rights values nor created among individuals the appropriate perceptions of such common interests. It may be recalled that a natural law frame of reference, though historically affording an important appeal from naked power to higher authority, offers a conception of human rights in terms of absolutes, buttressed by transempirical justifications both theological and metaphysical, and employs intellectual procedures that can be made equally to support either human dignity or human indignity. Similarly, an historical frame of reference, though it has the advantage of locating interaction in social process, defines human rights in terms of the values in fact demanded by the members of a community, both ignoring that the community may be totalitarian and expressing a fatalistic minimization of the possibilities of change by deliberate decision. A positivistic or analytical frame of reference, further, as is illustrated by contemporary critics of human rights, defines authority exclusively in terms of the demands of the officials of nation-states and human rights as the rights actually protected by nation-states; in totalitarian states this perspective is carried to its logical extreme of insisting that human rights belong, not to the individual, but to the state. The sociological and realist frames of reference, exhibiting a melange of conceptions of authority, offer little by way of emendation. The emerging challenge to contemporary scholars is, thus, to create a theory for inquiry about human rights, as for all problems, which merely postulates, rather than seeks to justify, the goal values of human dignity; which recognizes that there are human rights dimensions in all social interaction and in all authoritative decision; and which provides a comprehensive map of the context of global social interaction as well as intellectual procedures designed to aid in relating particular decisions to fundamental policies.

3. *Id.* at 63-82.

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In his *The International Law of Human Rights: A Reply to Recent Criticisms*,⁴ Professor Louis B. Sohn offers a concise summary of the anachronistic character of the conceptions, if ever they were realistic, of global social process, and its processes of effective power and authoritative decision, that are put forward by contemporary critics of the human rights developments. In modest understatement he points out that "the world of 1980 is quite different from the world of 1939, 1856, or 1648."⁵ He stresses the many limitations that states have over the years imposed upon their "sovereignty." His statement is brief but powerful, and it hits the jugular.

Professor Lowell F. Schechter, in *The Views of "Charterists" and "Skeptics" on Human Rights in the World Legal Order*,⁶ presents a more comprehensive picture of the global social process, including its processes of authoritative decision, and a more comprehensive conception of human rights. He refutes the contemporary critics point by point. In answer to the critics' emphasis upon the disparities between prescription and application, he notes that "it is relatively easy to find violations that have occurred," but that "it is much more difficult" to produce evidence of the "violations that have not occurred or have taken a milder form because of the existence of international standards and enforcement machinery."⁷ He might have added documentation of the tremendous increase in the protection of human rights which has in fact been achieved during the last 200 years.

In *Some Thoughts on the Decline of International Law and Future Prospects*,⁸ Professor Richard Falk makes a very moving statement of the intimate interdependences of human rights and security, whether security be considered in the minimum sense of mere survival or the optimum sense of the greater production and wider sharing of all values. He finds that efforts to suppress "national revolutions" are comparable to efforts to contain the eruption of volcanoes, such as Mt. St. Helens. "It is," he writes, "the world's dissidents, the resistance movements, and the human rights actors, especially those independent of state power, that are creating possibilities for change and the basis for hope."⁹ This per-

4. 9 HOFSTRA L. REV. 347 (1981).

5. *Id.* at 355.

6. 9 HOFSTRA L. REV. 357 (1981).

7. *Id.* at 363.

8. 9 HOFSTRA L. REV. 399 (1981).

9. *Id.* at 406.

spective might carry more comfort if all "national revolutions" were genuinely dedicated to human rights and self-determination, rather than to the expansion of an external totalitarian imperialism. The future prospects envisaged by Professor Falk are grim and have aspects of realism, but it is possible that he overestimates the gap between a "state system" and "other levels of organization," and underestimates the potentialities of incremental change in transnational "codes" and other legal institutions.

In *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*,¹⁰ Professor Covey T. Oliver presents, from the perspective of a strong proponent, an interesting account of some of the early controversies concerning international human rights in this country. He describes and occasionally exhibits some of the very great difficulties and complexities in the internal application and sanctioning of human rights within a mature, developed state. Fortunately, as he demonstrates, the internal constitutive process of the United States is undergoing considerable change. The reader of this piece may be pardoned for recalling the dictum by the bard of Avon that a rose by any other name smells just as sweet.

In his reflective *Objections to Western Conceptions of Human Rights*,¹¹ Professor Cornelius F. Murphy, Jr., finds no "preexisting social inheritance which can serve as a foundation for the substantive human rights norms which a supranational legal system would implement," and seeks "to identify some of the major reasons for the lack of a general agreement over the content of universal human rights."¹² He appears to be searching for some "single moral position" or "objective validity," and observes that there are intractable difficulties in interpreting and accommodating human rights prescriptions, allegedly deriving from competitive Western Liberalism and Marxian Socialism. One may applaud his emphasis that a primary "intellectual task is to attain a deeper understanding of the nature and purpose of human rights"¹³ without agreeing that a "greater concentration" upon philosophical premises and derivation is the best modality for pursuing such understanding. For many observers Professor Murphy may appear tremendously to undercut both humankind's great heritage in human dignity values

10. 9 HOFSTRA L. REV. 411 (1981).

11. 9 HOFSTRA L. REV. 433 (1981).

12. *Id.* at 433.

13. *Id.* at 444.

and the degree of contemporary consensus about such values, wholly independently of either Western Liberalism or Marxian Socialism.

Professor Ved. P. Nanda, in *World Refugee Assistance: The Role of International Law and Institutions*,¹⁴ deals with an important and growing problem in human rights about which states most obviously do share a common interest. Underscoring the critical needs of the individual refugee, he summarizes the available legal protection and denounces it as highly inadequate. He concludes by recommending measures for enhanced protection, including an expansion of the technical concept of refugee, "universal acceptance" of the international instruments relating to the protection of refugees, and strengthening the present structures of authority, including especially the Office of the United Nations High Commissioner for Refugees. It is an eloquent and timely plea.

In their joint article on *Human Rights and the Emerging International Constitution*,¹⁵ Professors Howard J. and Rita Falk Taubenfeld make important contributions to the understanding of the global constitutive process of authoritative decision. They find "a largely unwritten international constitution" in the "complex of rules for the creation and existence of international law,"¹⁶ and explore some of the features of this constitution, drawing parallels with both federal and unitary national systems. Though perhaps overemphasizing both the absence of writing and the role of rules at the expense of observable institutional features, they note the drastic contemporary shrinking of the concept of "domestic jurisdiction," and offer an interesting legislative history of the emergent global bill of human rights. To develop and illustrate their themes, they effectively employ a case study of human rights issues concerning "crimes against humanity," notably the crime of apartheid. "The quest for international legal protection of human rights," they observe, "has evolved into a process of attempting to make ever more explicit—and hence more legally enforceable—an already broadly delineated set of constitutional-type international guarantees to individuals and groups against which their own governments purportedly may not legally transgress."¹⁷ In answer to critics who deplore the disparities between prescription and practice,

14. 9 HOFSTRA L. REV. 449 (1981).

15. 9 HOFSTRA L. REV. 475 (1981).

16. *Id.* at 475.

17. *Id.* at 497.

they write: "[I]mperfect performance and de facto multiple standards of achieved justice exist within all legal systems; this has never been taken as an excuse for instituting anarchy or jungle law."¹⁸

Professor (former Secretary) Dean Rusk, in *A Personal Reflection on International Covenants on Human Rights*,¹⁹ points to the paradox that, while the United States is looked upon by many as "the 'citadel' of human rights in the world," one "finds no heading for 'human rights' or 'civil rights'" in examining "the rather detailed table of contents of the most recent Treaties in Force, published annually by the Department of State."²⁰ Hence, he poses the question: "How does it happen that the United States, which has played such a major role in promoting human rights on the world scene, has been so reluctant to ratify central international covenants in the same field?"²¹ With the insight of one who was present during times of critical decisionmaking, he explores various conditioning factors, including Senatorial opposition to the federal government intruding itself at all into civil rights, reluctance to offer other nations any role in our own "travail," skepticism about lip-service to human rights in other parts of the world, imagined incompatibilities of the content of the human rights prescriptions with our own constitution, and reservations about the federal government encroaching upon matters hitherto regarded as within state competence. As wise statesman, he concludes that "the United States should play a forthright role in promoting human rights on the world scene,"²² and urges the Senate to give advice and consent to the Genocide Convention and to the four major human rights treaties submitted by President Carter: The International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights, and the American Convention on Human Rights.

In their final report on *The Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*,²³ Professors M. Cherif Bassiouni and Daniel H. Derby, coming seriously to grips

18. *Id.* at 511.

19. 9 HOFSTRA L. REV. 515 (1981).

20. *Id.* at 515.

21. *Id.* at 516.

22. *Id.* at 521.

23. 9 HOFSTRA L. REV. 523 (1981).

with the problem of implementation, propose a very specific modality in connection with the crime of apartheid. A "mandate to implement the *Apartheid Convention*," they insist, "constitutes a mandate to create more than the mechanisms necessary to set in motion a new criminal process."²⁴ Hence, while underscoring all the difficulties, they focus upon a specific proposal—the creation of an international criminal court—and offer both a draft statute and a comprehensive and useful set of commentaries.

It is to be hoped that the Editors of the *Hofstra Law Review* have succeeded in stimulating still further debate about the fundamental policies which underlie all law in any community which genuinely aspires toward the values of human dignity.

24. *Id.* at 534.