ARTICLE

AFTER HUMAN RIGHTS STANDARD SETTING, WHAT'S NEXT?

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In answer to the question of whether human rights is still an effective language for producing social change, we need to inquire whose "voice" is the loudest and most persistent. That voice, at the United Nations Human Rights Council in Geneva, for example, is of the governments of the States Parties to multilateral international human rights treaties. However, the voice of victims is less vocal and heard indirectly through civil society groups with the relevant standing at this international forum. There is little doubt that the international human rights system is state-centric. There can be no improvement on the past grand scholarly exchanges on state practice, from Louis Henkin's view, articulated thirty-five years ago, that most States observe international law and undertake their legal obligations most of the time (HENKIN, 1979) to Koh's treatise on the subject that sought to explain the behavior of States (KOH, 1997). Apart from the time that has elapsed since, not much has changed in the record of obligations of some States under international human rights law. That indicates that social change is pedestrian at best if total reliance is placed on the international mechanisms.

Some of loudest voices of States are usually the ones who point to the violations of human rights of other States while ignoring their own practices on the international conventions to which they are a party. These multilateral treaties are usually the product of negotiation some might describe as "horse trading" amongst the various States, including those which frequently make the loudest noise. As a result the language contained in these treaties cannot be assessed for consistency in the same way one would assess domestic legislation, the latter usually crafted accurately by well-trained lawyers whose business is the making of sound law. Indeed, some States have adopted the strategy of contributing language that is deliberately unclear and vague during the negotiation process, so as to create ambiguity to avoid the enforcement of their obligations under that multilateral treaty.

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The voice less heard, or perhaps suppressed, is that of the beneficiaries of human rights, which is totally absent at the point of negotiation of the treaties. It is trite that the system of international human rights law was established to benefit the marginalised, vulnerable and indigent people of the world who appear to be voiceless in their own States and outside. The clear impetus for this was found in World War II, when millions of the voiceless were slaughtered in the name of Germany's policies, or their national self-interest. This is not exceptional. Under some principles of international relations, States Parties are expected usually to act in their self-interest, often couched in the benign language of "national interest". That national interest may not always be compatible with human rights norms and is sometimes referred to as *real-politik*. Indeed, national interest is sometimes the recipe for undermining laws and re-establishing the view that might is right by so-called "civilized nations".

Today, there is little doubt that some States have a tendency to interpret their obligations under international human rights law with fluctuating inconsistency because of national self-interest. International human rights law grew from public international law in which certain principles were accepted by States from the outset. There is the orthodox view that a State could not have obligations under public international law where that State had not consented. Indeed, the principle of *pacta sunt servanda* has been cited by a number of States to deny that an obligation can arise, for example, over the fluxion of time for a non-ratifying State to a treaty. A long-standing practice of all States created international customary law as evidence of a general practice accepted as law, we are informed.[1]

1 States Parties' non-enforcement: ICESCR and ICCPR

When one examines the States Parties to the International Bill of Rights, however, it is clear that there is a contradiction of the well-established principle of *pacta sunt servanda* when it comes to some States Parties' non-enforcement of their obligations under the International Covenant for Economic, Social and Cultural Rights (ICESCR). This international treaty has nearly the same number of ratifications of States Parties as the International Covenant for Civil and Political Rights (ICCPR), and opened for ratification on the same day and year, 16 December 1966.[2] Yet in the enforcement of the obligations contained therein, the ICCPR outstrips the ICESCR in the number of States that interpret the norms as legally binding, and has often become a part of domestic legal systems. From an international customary law perspective, this is confounding, as there appears to be a deliberate practice not to enforce the obligations arising from the ICESCR by States Parties. This appears to have created a "customary practice" of some States avoiding their obligations that have been freely entered into.

There are various reasons for this, we are told. A number of States Parties regard civil and political rights as the only real rights, despite being a party to the ICESCR. If one applies the principle of *pacta sunt servanda* as a cardinal rule of public international law, then a number of States Parties have either misunderstood their obligations or ignored them. This is a clear violation of international human

rights because an omission of one's obligations incurs the same liability as an act. A few reasons have been posited for this practice.

One is that some of the wording in the ICESCR is vague and unclear; therefore State Parties cannot enforce them, it is alleged, as they would with domestic legislation. Indeed, State Parties are not expected to enforce the exact language contained in the ICESCR. Instead each is expected to enact legislation that will enable the enforcement of the rights in their domestic jurisdiction under this international treaty. The strategy of avoidance of obligations by some States Parties is to point to the language of the ICESCR, a product of negotiation amongst states anyway, as unenforceable because it was alleged to be vague and unclear. This approach clearly shows a lack of understanding of the purpose of that international treaty, or is simply disingenuous, because the articulations of numerous General Comments by the Committee on Economic, Social and Cultural Rights have clarified many of the states' obligations under this treaty. However, the suspicious states do not want to acknowledge these General Comments because doing so might imply that they accept the articulations of a non-law-making authority, which might be binding on them. Most flaws in the language in the ICESCR are capable of being corrected at the stage of domestic legislation, in any case. Indeed, some regard this type of unilateral interpretation as a violation of the Vienna Convention on the Law of Treaties, which provides that every treaty is binding on the States Parties and there is a duty on them to perform the obligations therein in good faith.

The other reason is historical, in a selective understanding, as it was the US President Roosevelt who stated in 1944 that "necessitous men are not free men" when he spoke about economic security for all (ROOSEVELT, 1944). The ICESCR in the Cold War period was regarded as anti-capitalist and accepted as such, without a full interrogation of President Roosevelt's utterance. Despite the fact that the Cold War ended around 1986, there has been slow movement from the various State Parties to enforce their obligation under the ICESCR through the enactment of domestic legislation. Until the Optional Protocol on Economic, Social and Cultural Rights came into force in May 2013, some 37 years after ICESCR had entered into force, there was no individual complaints' mechanism for citizens whose social, economic and cultural rights were violated. In contrast, the ICCPR came to force also in 1976, with the Optional Protocol on ICCPR in that same year. These lapses in time are indicative of States' failure to observe their legal obligations and therefore undermine the value of public international law and international human rights law.

2 States' Self-Interest: Right to Protect, Right to Development and Migrant Workers' Rights

Occasionally, a "right" emerges not from the language of treaties or international human rights law, but from the indignation of a group of States at some rights that have been violated in some States. At this stage, the absence of consent via a ratified multilateral treaty, all objections to unenforceable language of rights, any reference to a customary practice accepted by all States Parties, or any other that

might be seen as a bar to their intervention in other states are dismissed or not even raised. The innocuously named "Right to Protect" seeks to protect the rights of citizens of a State that violates their rights. One would have thought the accepted objective of *all* human rights was indeed to protect, perhaps through persuading rogue States through good practice to uphold their human rights obligations all the time. After all, that objective underpinned the creation of the International Bill of Rights. It turns out, however, that this is not the case.

The "Right to Protect" purportedly protects such citizens where there are human rights violations such as genocide, ethnic cleansing war crimes and crimes against humanity, but not other human rights violations. It is argued that these are gross violations of human rights and require intervention from other States, ostensibly to protect the victims. The reason for this action lies in the realisation by some States that they have a responsibility to protect in such cases, and only in these cases. It is doubtful that this can be labeled a "human right" because the "right" justifies the invasion by one State of another State perceived to be violating the human rights of its citizens. In that act of invasion, all casualties, usually the very victims the act sought to protect, might be dismissed as "collateral damage". Thus it fails to protect the marginalised, vulnerable and indigent. This is a very reactionary course of action, one which might be regarded as "uncivilized" in the language of the United Nations Charter, and simply underscores the collective self-interest of the invaders. The practice of apartheid in South Africa for 46 years, however repugnant, never led to the exercise of the "Right to Protect" by any State. The Right to Protect, also, has never been invoked by protagonists against States violating the social, economic and cultural rights of their citizens.

In contrast to this rapid development of the "Right to Protect", the Right to Development is not acknowledged as a right by many of the supporters of the former, despite the celebration of twenty-five years of the Declaration on the Right to Development by the United Nations Office of the High Commissioner for Human Rights. All the well-trod arguments denying this as a right emerge from the opposition: a declaration cannot give rise to a right; there is no convention on this right to bind states; nor is there any international customary practice to this effect, we are informed.

Another clear indicator of the national or continental self-interest of State Parties is the International Convention on the Protection of the Right to All Migrant Workers and Members of their Families, adopted twenty-four years ago by the United Nations General Assembly, which has no European State Party (UNITED NATIONS, 1990). The website of the United Nations High Commission for Refugees states: "…economic migrants choose to move in order to improve the future prospects of themselves and their families".[3] That definition would appear to fit any European colonial leader, from Columbus to Rhodes, because they left Europe to improve their future prospects, ostensibly on behalf of their countries. But they are not called "economic migrant" but "pioneers". They also had the might of their States to back up their ambition. On that logic, again not much has changed today. Today, it appears to be the practice of some European States not to rescue refugees in sinking vessels because caring for them will be an

economic burden on the rescuing State. National self-interest, not the saving of lives, appears to be the emerging norm.

Notwithstanding history, today more proactive steps are necessary for the nurturing of all international human rights by all States Parties so that a predictable course of action can be realised for all violators through an understanding of a common language of international human rights law. After all, the international standards have already been set, even though some might be contested.

One justification of the emergence of the "Right to Protect" might lie in the weak enforcement measures against violating States, the only means being to cause embarrassment for them. Where, for example, the Optional Protocols to ICESCR and ICCPR granting individual petitions to aggrieved citizens have not been acceded to, the violating state is "named and shamed" in the oversight bodies of the various multilateral human rights treaties. Indeed, this is the full extent of enforcement of State obligations today for all international human rights treaties. The effect is not always salutary, nor is it immediate. It is also possible that frequent violators are accepting of their tags as violators and thereafter disregard the language and consequences of embarrassment. The result is that the violation of human rights continues. In these circumstances some indignant States might take on the self-appointed role and language of enforcers of human rights. If one examines the composition of which potential or frequent enforcers might be, against their own human rights records, it is likely that the States' rhetoric might not match their purported human rights record. It is at this stage that international human rights appear to be remote and disconnected from the very persons they seek to protect. Their voice is therefore silenced while deference to the State continues.

3 Multinational Corporations

Apart from States or their citizens, another entity with a very powerful influence, and, some may argue, many proxy voices, are multinational corporations, who are not subjects of public international law. Their influence on all decisions of States is immense and labyrinthine. They resist all attempts to make them accountable under international human rights law despite making huge profits that exceed the national budgets of many UN States Parties. At best multinational corporations are cajoled into upholding some principles of good practice, which are not based on human rights norms. Others embark on massive public relations exercises, in the guise of corporate social responsibility, that conceal their real practice of making profit at all costs.

The oil company British Petroleum, while responsible for one of the largest degradations of marine life in the Gulf of Mexico, continued its advertisement campaigns of being a source of corporate good practice. Any attempt at regulating them is met with much outrage and financial threats, as profit appears to be sacrosanct and valued above human rights. The British Prime Minister complained that any compensation British Petroleum might have to pay, eventually $4.4 billion, would erode the shareholders' profit. Another example was the mayhem that unregulated banking created in the northern hemisphere, and all of the

planned reaction at the time has slowly receded from the legislative plans of the European Union or the United States. Rather than setting binding standards for multinational corporations, who are not subjects of public international law, they are coaxed into behaving better.

Some States are the defenders of multinational corporations because they are purported to be the source of taxation. A close study of this assertion may expose the fact that with the various tax breaks, and a plethora of laws that support the non-location of such a corporation in any one country, including the repatriation of profits to the incorporating state, most multinational corporations pay a lower percentage of tax than individual taxpayers in that State. The duty to regulate the behavior of multinational corporations to ensure that they do not violate human rights lies with the State. In fact few do, because the corporation threatens, and sometimes follows through on that threat, to relocate their enterprise.

4 Public Interest Litigation

Ten years ago I wrote in the first volume of this journal that when regional and international human rights were subsumed into the domestic law, either through legislation or through enactment in the constitution of a country, fertile grounds existed for public interest litigation (JAICHAND, 2004). It is here that the voice of the victim is heard, because domestic courts are the only sites of this struggle. Since then, more States have taken this route, but their numbers are limited. Even when they had not taken this route, civil society with the legal NGO community sought accountability in any forum they could find. Indeed, civil society megaphoned the concerns of the disadvantaged, marginalized and vulnerable beyond their own borders. With the changing pace of technology, it is possible to publicise a local issue as an international one within seconds of its occurrence.

However, grand victories cannot be claimed here because not all States appear to be held sufficiently accountable. Some might say the larger, more powerful States and their allies are untouchable and continue to operate outside any set of standards. While many creative legal solutions have been found, including the principle of universal jurisdiction in international criminal law as one example, some States have participated in the development of the emerging norms but are not bound, as they do not ratify the resultant convention. These gambits are then imitated by others. Some gains are rendered nugatory when a killing is aided by remote technology, such as drones, and the pulling of the trigger is not even undertaken on the territory of those killed. The standard-setting bodies of international humanitarian law are left helpless as the weapons technology outstrips any standards. Multilateral treaties on these new approaches to killing are absent and all other sources of international law are impotent.

5 Conclusion: Towards a International Human Rights Court?

Perhaps it is the time for us to focus on the enforcement of human rights because the current limited progress being made by States on implementation of their human

rights obligations is costing thousands of lives daily. The main contribution of the international human rights system has been standard setting that has preoccupied everyone since inception. However, there is rigidity in the approach of some States to their obligations that is proving time-consuming to overcome. The glaring absence of enforcement of those standards is the weakness of the system. About the time the Universal Declaration of Human Rights was mooted, two enforcement mechanisms were suggested. One has been established after much debate at the then UN Human Rights Commission: the establishment of the Office of the High Commissioner for Human Rights. The other has not: the establishment of an International Human Rights Court. It is time now to revisit that notion.

One of the strongest proponents of the establishment of such a court over the years has been Professor Manfred Nowak, who maintained that this is a key institution for ensuring that States Parties met their obligations under human rights treaties, which in 2009 he called the World Court of Human Rights (NOWAK; KOSMA, 2009). The main features of this system provide for a permanent court to be established through a treaty. States Parties to this treaty will establish domestic systems to enforce all human rights treaties on the basis of complementarity, as established under the Rome Statute for international criminal justice. The Court will become a part of the UN structure and be funded by that body. This court will have jurisdiction over non-state actors such as multinational corporations and the UN Office of the High Commissioner for Human Rights will oversee the judgments of the Court (NOWAK; KOSMA, 2009, p. 8).

While this will go a long way to addressing the gap in implementation of State obligation, it is important to note that this can only be implemented in a country where that State Party has ratified such a multilateral treaty. That means those States who do not can only be "named and shamed". While this is a move in the right direction, the consent of States is vital. The alternative to this would be a replication of the domestic system with a police force. At the international level, that might add to our dilemma because only the more powerful States are capable of fulfilling that role. That might present us with new set of problems that we might regret in the future.

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NOTES

1. Article 38 (1) of the Statute of the International Court of Justice, annexed to the UN Charter, which cites what might constitute the sources of public international law. They include international treaties, international custom, the general principles of laws and the teaching of the leading scholars in the field. Available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. Last accessed on: 15 Aug. 2014.

2. ICCPR has 167 state parties and ICESCR has 161 state parties. Available at: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. Last accessed on: 9 March, 2014.

3. Available at: <http://www.unhcr.org/pages/49c3646c125.html>. Last accessed on: 15 Aug. 2014.