

Human Rights and the Individual as Subject of International Law: A Soviet View

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The restructuring (*perestroika*) of internal affairs in the Soviet Union has been accompanied by the development of new thinking in the area of external relations as well; new thinking which responds to the rapidly changing world of the late 20th century. In this world, while there hangs over humanity the threat of self-destruction either in the holocaust of a nuclear war or in the process of ecological destruction, yet there has emerged the hope that faced with these new threats humanity will more speedily become aware of its unity, of the interdependence of the fates of all peoples of the world, and unite to combat these threats.

The basic social contradiction in this world can no longer be the opposition between capitalism and socialism, the resolution of which would be that one social system would either bury the other or leave it on the rubbish heap of history. Rather, the major contradiction of the contemporary world, the resolution of which must, for the foreseeable future, be the dynamic force in the development of civilization, the basis for an awareness of unity, has become the contradiction between the need for survival and global threats to that survival. The rejection of the dogmas aimed at setting East and West, socialism and capitalism, against each other, the search not for what divides us but what unites – that is what is most important today.

In the light of the new political thinking, a review of many international law concepts is also taking place in the USSR. One of the most important issues requiring reconsideration is our approach to the role of the individual both in a given society and in the world as a whole. I feel that we have hitherto over-emphasized the role of the state, of the nation, and particularly of the classes, forgetting about the human being and humanity. In these times our primary concern should be the interest of humanity as a whole in connection with the global threats to its existence, as

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well as the rights and freedoms of each human being, for there can be no free society unless every human being who is a member of that society is free.

I therefore think that it is particularly appropriate for an article in the first issue of a *European Journal of International Law*, devoted to helping build the "common European home", to describe these new developments of Soviet doctrine on international law in respect of the place and role of the individual in international law. This does not, of course, mean that my point of view is generally accepted among our scholars. The present stage in the development of Soviet legal scholarship is characterized by increasing pluralization of opinions on these issues.

The relationships arising in connection with the protection of the rights and freedoms of individuals are mainly relationships between state and individual, that is, intra-state relationships. But obviously not all relationships in the human rights field are internal ones. Thus, the connections arising between individuals and a corresponding international body (the Human Rights Committee, the European Commission and Court of Human Rights) undoubtedly stretch beyond the limits of the state. But with these exceptions, relationships in the area of protection of human rights are basically intra-state relationships, and these rights and freedoms are guaranteed mainly by the state, making use of norms of national law and internal mechanisms and procedures.

Accordingly, when we come to speak about the international protection of human rights, about international cooperation in this area, questions inevitably arise of the correlation between international and domestic law, between international standards on human rights and domestic jurisdiction of the state, and of the possibility for the individual to be a subject of international law. It should be stressed that these issues are by their nature very dynamic. They cannot be solved once and for all. Changes in the world as a whole, the development of international law, and international cooperation in the area of human rights, are constantly introducing new elements to the solution of these problems.

International law traditionally was, and to a considerable extent continues to be, inter-state law. But even the appearance of inter-state organizations and of various state-like entities (free cities, the Vatican, West Berlin), and of national liberation movements has somewhat distorted the "purity" of the inter-state character of norms of international law.

The tendency is emerging to move away from purely state-centered international law. States are more frequently starting to create norms which rather than regulate their interrelationships are addressed to other entities and individuals: legal persons, including traditional corporations, international non-governmental organizations (NGOs), responsible individuals in international organizations and individuals as such. And though frequently norms aimed at defining the legal position of individuals and legal persons are not applied to them directly, a transcription instead requir-

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ing implementation through norms of domestic law, the individual is nevertheless starting to come directly into contact with international law.

This has been the case in the capacity of officials of international organizations or subjects of norms of private international law contained in international agreements which are, because of the way they are created, norms of public international law.¹ However, the individual is appearing more frequently with an active role in the implementation and enforcement of human rights standards rather than a passive beneficiary of rights and freedoms guaranteed by states in accordance with international norms.

For example, the final document of the Vienna meeting of states participating in the Conference on Security and Cooperation in Europe (CSCE) obliges states to respect "the right of their citizens to contribute actively, individually or in association with others, to the promotion and protection of human rights and fundamental freedoms" and "the right of persons to observe and promote the implementation of CSCE provisions and to associate with others for this purpose."²

Soviet legal scholars long rejected, unanimously, the notion of the individual as subject of international law. It is only very recently that the position has started to change. That rejection was, it would seem, to a considerable extent the result of a statist, state-centered approach that was not confined to international law and international relations. In our country there was an exaggeration of the role and significance of the state both within society and in the international arena. The new political thinking, by setting the human being at the center of our concerns and calling for the humanization of international relationships, cannot refrain from taking a new approach both to the role of the human being in international relations and of the individual's relationship to international law.

Soviet legal doctrine traditionally regarded as subjects of international law only entities possessing not only rights or obligations arising on the basis of international law, but also able to create such norms and participate in ensuring compliance with them. Thus, G.V. Ignatenko and D.I. Feldman define the subjects of international law as entities independent of each other, not subject in the area of international relations to any sort of political power, and possessing legal capacity for the independent realization of the rights and duties established by international law.³

The individual is obviously excluded from such a definition. However, it is entirely possible to define as a subject of international law any person or entity possessing rights and obligations arising from norms of international law.

¹ For a detailed analysis see Mullerson, 'Public and Private International Law', in W. Butler (ed.) *International Law and the International System* (1987) 11-84.

² Printed in 10 *HRLJ* (1989) 270, paras. 13.5, 26.

³ See G.I. Tunkin (ed.) *International Law* (1982) 82.

In this case, the range of subjects of international law becomes considerably wider. Definite rights and obligations under international law are held, for instance, not only by inter-state organizations themselves but also by their organs and responsible persons, and by a number of international economic organizations and non-governmental organizations. Even though they do not participate directly in the creation of the norms of international law nor in ensuring compliance with them (though they may of course participate indirectly both in creating international law, like the International Law Commission, and in ensuring observance of the principles and norms of international law, as does for instance, Amnesty International), they nevertheless have definite rights and obligations, albeit limited in scope, arising directly out of norms of international law.

In my view, there exist at least two categories of subjects of international law. On the one hand are those subjects that not only have rights and obligations under international law but also themselves create its norms and take measures to ensure compliance with them (for instance by acting as a party before the International Court, or in arbitration, or by adopting sanctions). And here states emerge as the sovereign and primary subjects of international law. On the other hand are those persons and entities whose conduct is directly regulated by norms of international law, but do not have the law-making and enforcement capabilities of the first group.

The question remains, however, of the capacity of individuals to be legal subjects in relation to international standards in the field of human rights. On the one hand, these norms undoubtedly speak specifically about the rights of the individual. But on the other hand, international documents on human rights oblige states to guarantee individuals these rights. And the rights themselves that are provided for are guaranteed *vis-à-vis* a specific individual most frequently indirectly through domestic law and internal state procedures. Is it possible in this case to speak of the individual's capacity to be a subject of international law in respect of international norms on human rights and freedoms?

The majority of international norms in the area of human rights are so-called non-self-executing norms. They cannot themselves guarantee the individual his rights and freedoms without domestic implementing legislation. Accordingly, many instruments, such as the International Covenant on Civil and Political Rights, speak directly about this obligation on the state to guarantee individuals particular rights, where appropriate through national legislation. Consequently, these norms alone cannot regulate the legal position of persons directly and immediately.

Even in cases where a domestic court takes a decision based on international standards of human rights, it is guided not only by international law but also by domestic law sanctioning the application within the country of international law (for instance, Article 55 of the French Constitution or Article 6 of the US Constitution).

For instance, the Italian Constitutional Court, in its decision of 6 February 1978 on the application of individual provisions of the 1966 Covenant on Civil and Po-

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litical Rights, which was by Law Number 891 of 25 October 1977 given force of law in Italy, refused to apply the corresponding provisions of the Convention because "the law specifically implemented only the self-executing provisions of the Covenant."⁴ In Britain, in the course of debates in the House of Lords, a government representative declared in connection with the Convention and Protocol on Refugees that "the language of international agreements applying to countries with different legal and administrative systems rarely permits these agreements to be directly incorporated into the law of the United Kingdom..."⁵

But does this indicate that the human being himself has no direct relationship to international standards in the area of human rights, and receives all of his rights only from the state through norms of national law? I do not think so. This sort of alienation of the person from norms of international law is, as I already noted, a reflection of a statist approach to international law and to social relationships as a whole. In my view, norms of international law in the area of human rights that bind the state to ensure the individual certain rights at the same time provide the individual with the right to call upon the state to carry out its international obligations. Thus, by agreeing to international norms on human rights the state is taking upon itself an obligation not only *vis-à-vis* other States Parties to the international instrument concerned, but also towards all natural persons who find themselves under its jurisdiction, above all its own citizens.

Practical difficulties can and do arise if the legal system of the state does not provide for the effectiveness of the international agreements themselves on the state's territory (for instance Britain, the Scandinavian Countries, etc.⁶). In such cases, courts and other law enforcement agencies usually will not take the international standards on human rights themselves as a guide in deciding a specific case. And even in countries where international agreements are, according to the constitution, directly applicable within the country, part of the country's law, treaty provisions in the area of human rights may be and are declared by the courts to be non-self-executing and consequently not applied when deciding a specific case.

Accordingly, without denying the importance of the effectiveness of the norms of international law themselves on the territory of a state, the implementation of international standards on human rights is impossible without the assistance of corresponding national legislation.

However, even where an international norm cannot itself guarantee the rights and freedoms established in it, it is able where it has been declared effective within a

⁴ See *Italian Yearbook of International Law* (1978-1979) 187.

⁵ See *British Yearbook of International Law* (1978) 336.

⁶ In the Soviet Union, in many fields of legal regulation, the international agreements may be applied *per se*, directly creating rights and obligations for individuals. This comes about by virtue of the presence in many acts of a norm referring to international law. Unfortunately, however, in the area of the protection of civil and political rights, no such norm as yet exists.

state to prevent the application of rules of internal legislation that are in conflict with it. For instance, if the legislation of some country does not guarantee the right of peaceful assembly provided for in Article 20 of the Covenant on Civil and Political Rights, then the Covenant article itself may be taken as a basis for demanding the ensuring of this right. Individuals can, both separately and in association with others, call on the state to comply with its obligations, including the amending of domestic legislation. International standards act in this case as a legal basis for individual demands.

All this in my view testifies to the steady growth in the scope of the individual's capacity to be a subject of international law, to the strengthening of the direct connection between the individual and international law. And here, in defining the individual's capacity to be a subject of international law, no significance attaches, it seems to me, to the fact that international standards and human rights themselves are most frequently given effect through norms of domestic law. For example, many provisions in state constitutions that relate to human rights are similarly not able to guarantee these rights. Other laws, or even administrative rules, have to be applied. But this does not mean that the individual is not a subject of constitutional law.

Additionally, the development of international mechanisms and procedures aimed at promoting compliance with human rights and freedoms, and the access of individuals to these international agencies, testify to the fact that the individual is increasingly coming to be involved directly with international law.

The fact that intra-state relationships are not as a rule a direct object of regulation through international law does not mean that all questions concerning the way they are legally regulated belong to the domestic jurisdiction of the state. It would be wrong to assert that the regulation of intra-state relationships lies within the domestic jurisdiction of the state whereas the decision of all international cases falls outside the limits of such jurisdiction.

The correlation between cases which fall within the domestic jurisdiction of the state and cases which do not is not a mirror image of the spheres of regulation corresponding to national and international law. The sphere of domestic jurisdiction and the sphere of effectiveness of internal state law is not one and the same thing. The fact that any sort of relationships whatever are regulated only or mainly through internal state law does not automatically mean that their legal regulation is an internal affair of the state concerned. On the other hand, the decision of many international questions falls within the state's domestic jurisdiction. S.V. Chernichenko, for instance, notes that "the external matters that essentially fall within the domestic jurisdiction of the state are matters affecting the activity of the state in the international arena which it decides in unilateral fashion"⁷ and conversely. In regulating relationships within the state (even if the legal regulation of them is directly con-

⁷ Chernichenko, 'Subjective Limits to International Law and the Competence of the State', *Sovetskiy Ezhegodnik Mezhdunarodnogo Prava* (1985) 109.

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trolled through norms of national law) the state has to take account of its own international obligations. Here it has only a relative freedom of discretion.

The question of whether issues concerning the protection of human rights fall within the state's domestic jurisdiction or not cannot be given a single answer. The crudest and most massive breaches of human rights, such as apartheid, genocide, racial discrimination and the denial to whole peoples of the right to self-determination, are international crimes and naturally cannot belong to the state's domestic jurisdiction. Here it is irrelevant whether this or that state is a party to the corresponding international agreements. The majority of authoritative international lawyers assert, and justifiably, that at least the ban on such actions as slavery and slave-trading, genocide, apartheid, torture, mass killing, prolonged arbitrary detention or systematic race discrimination has become a customary norm of international law.⁸

When lesser infringements, which do not threaten international peace and security, are involved, then the protection of human rights is among the matters which largely fall within the domestic jurisdiction of the state. To the extent to which states bind themselves through international agreements to ensure the persons under their jurisdiction a particular package of rights and freedoms, these rights and freedoms, to the extent and within the limits provided for in those agreements, are no longer an internal matter for the state.

Consequently, if direct regulation of human rights protection is as a rule brought about through norms of a state's internal law, then within certain limits the procedural aspects of the regulation of these questions may also fall outside the domestic jurisdiction of the state, since it must conform its law-making in this area with the corresponding international obligations.

The domestic jurisdiction of the state is a rather flexible category. On the social and political level, there is a shift in the boundaries of the state's domestic jurisdiction, brought about by the internationalization of various areas of the life of society, the strengthening of interdependence in the world, and by its development in the direction of integration. At the juridical level, the extent of domestic jurisdiction depends directly on the development of international law. "*That which is governed by international law or agreement is ipso facto and by definition not a matter of domestic jurisdiction*", writes L. Henkin.⁹ This position must be conceded with, though a few clarifications are called for.

Firstly, if some area of social relations becomes an object of regulation by international law, this does not yet mean that all questions arising in this area are fully removed from the domestic jurisdiction of the state. Thus, questions of human rights do not fall within domestic jurisdiction to the extent and within the limits in

⁸ See Schachter, 'International Law in Theory and Practice' 178 *RCDI* (1982) 326; A. D'Amato, *International Law: Process and Prospect* (1987) 145.

⁹ Henkin, 'Human Rights and "Domestic Jurisdiction"' in T. Buergenthal (ed.) *Human Rights, International Law and the Helsinki Accords* (1979) 22 (emphasis in original).

which they have become an object of international agreements or of customary norms of international law. Many aspects of human rights and freedoms continue to fall within the domestic jurisdiction of the state, while the system for ensuring even international standards of human rights continues to remain mainly an internal matter for the state. For international law does not as a rule lay down how the state has to fulfil the obligations it has taken on.

Secondly, the international obligations of various states in the area of human rights are not identical. While generally accepted customary norms on human rights are, as already noted, binding on all states, things are different for specific treaty obligations. They bind only the States Parties to the specific agreement.

Even for parties to agreements, questions of ensuring rights and freedoms covered by the agreements do not entirely fall outside the limits of domestic jurisdiction. Isolated infringements of these rights not constituting evidence of a clearly illegal state policy (from the viewpoint of international law) are as a rule dealt with by the state itself. Such individual cases of infringement of international standards by the state become an object of international juridical consideration only in cases where the state has assumed obligations regarding the corresponding international legal procedures and mechanisms, concerning the rights of individuals to bring complaints against the state as provided in the agreements, and only once all internal remedies have been exhausted. Accordingly, the conclusion may be drawn that the fight against isolated infringements of international standards, neither massive nor systematic, basically falls within the domestic jurisdiction of the state.

It is well known that many international agreements on human rights set up special procedures for implementing them. Thus, the Human Rights Committee has been mandated to collaborate in securing the application of the International Covenant on Civil and Political Rights. It considers state reports, and individual complaints against states that have associated themselves with the Optional Protocol to the Convention. The Committee may also consider declarations by one state about another, if both these states are parties to the Convention and have made a corresponding declaration on the basis of Article 41.

However, one question arouses dispute: does the presence of such procedures and mechanisms exclude other means open to states? For instance, may a State Party to the Covenant protest against breaches of human rights covered in the Articles of the Covenant to other States Parties, or can they, for instance, approach the International Court, if both states have recognized the Court's jurisdiction?

Schachter considers that these means are hardly possible in such cases, since "the parties to the agreement evidently intended to restrict these means to those provided for in the agreements themselves."¹⁰ However, Henkin states that "unless the agreement provides otherwise, any special machinery provided for implementing its human rights obligations does not replace but merely supplements the usual reme-

¹⁰ Schachter, *supra* note 8, 334.

dies for breach of international agreement.”¹¹ Similarly, Sassoli considers that “no one has adduced any demonstration whatever that compliance with agreements on human rights is insured only through the special mechanisms.”¹²

It would seem that the latter viewpoint is the correct one. For a special mechanism of implementation is not set up in order to circumvent other means of insuring international agreements. On the contrary, special mechanisms and procedures are brought in as an additional guarantee of compliance by states with their international obligations, but not to replace traditional means – protests, judicial and arbitration proceedings and in essential cases even collective means of coercion. Most likely, in normal situations, and as a rule, states ought to endeavour in the first instance to use these special mechanisms and procedures. But nothing prevents them from turning to other means too. This is also indicated by Article 44 of the Covenant on Civil and Political Rights, which states that “The provisions for the implementation of this Convention ... shall not prevent States Parties to it from having recourse to other procedures for solving disputes on the basis of the general and special international agreements operating between them.”

When questions of the protection of human rights do not fall within the domestic jurisdiction of a state, concern by international organizations or other states over compliance with them is not interference in the state’s internal affairs. At the same time, in order for it not to turn into impermissible interference, this concern must be manifested in forms that are in line with the requirements of international law. Thus, an international organization may deal with questions of human rights violation in any state only within the limits of the competence of that agency or organization.

In Western literature dealing with questions of non-interference in internal affairs, it is most frequently only so-called “dictatorial interference”,¹³ i.e., interference associated with the use or threat of coercive measures, that is regarded as impermissible interference.

This position is difficult to maintain, because it is not rooted in any norm of international law, nor does it logically follow from existing norms. For instance, the UN General Assembly Resolution of 21 December 1965 on the inadmissibility of interference in the internal affairs of states and on the safeguarding of their independence and sovereignty speaks not only of the condemnation of armed intervention but also of the prohibition of other forms of interference and threats of all kinds directed against the state’s capacity as a legal subject or against its political, economic and other cultural elements. Were the principle of non-interference to involve only the prohibition of violent, dictatorial interference, then the prohibitions contained in

11 Henkin, *supra* note 9, 25.

12 Sassoli, ‘Mise en œuvre du droit international humanitaire et le droit international des droits de l’homme: une comparaison’ 43 *Annuaire suisse de droit international* (1987) 39.

13 See H. Kelsen, *The Law of the United Nations* (1950) 770; Henkin, *supra* note 9, 25.

it would in essence coincide with the prohibitions contained in the principle of abstention from the use or threat of force. Consequently, interference can involve any measures of an economic, political or other nature directed at coercing another state in the exercise of its sovereign rights or at securing from it any sort of advantage.

It should not be forgotten, however, that questions of safeguarding human rights are today no longer totally an object of the state's sovereign discretion. Consequently, these questions may be considered by other states and corresponding international agencies, within the limits of the competence of the latter. Above all, they may take measures permitted by international law with the aim of securing compliance by the state with its international obligations in the area of the protection of human rights and freedoms. Obviously, all armed interference is forbidden, including so-called "humanitarian intervention" (I am not here considering the possibility or even the necessity of intervention under UN aegis and by UN decision in the case of, for instance, such gross violations of human rights as genocide). Measures of economic or political pressure aimed not at securing the termination of breaches of international standards of human rights but at changing the social or political structure of another state are forbidden.¹⁴

It is of course difficult and indeed practically impossible to define beforehand the criteria enabling one to judge in every specific case whether this or that action constitutes a breach of the principle of non-interference. It is not, of course, appropriate to regard as interference in internal affairs any statements, even by official persons, on the state of human rights in another state, especially if these statements are in line with reality. Equally, it is hardly possible to regard as interference in internal affairs questions and approaches by leaders of one state to the leadership of another state in connection with the fate of specific individuals. This is particularly so where such approaches are of a confidential nature and are not undertaken for propaganda purposes.

Nor, of course, can use of the special mechanisms set up on the basis of international human rights agreements be regarded as interference in internal affairs. Protests and declarations actually directed at the defence of rights and freedoms of the person are admissible, where systematic breaches of particular rights are taking place and individual cases prove to be not random excesses but evidence of a definite policy by a state. At the present time, in the framework of the UN Human Rights Commission, breaches of human rights in various states are considered and if systematic violations of generally accepted international standards are actually taking place, then this consideration does not constitute interference in internal affairs. Also in the framework of the Commission is the "1503 procedure", whereby complaints

¹⁴ It should in general be noted that the cases concerned are where definite breaches of international standards of human rights are in fact taking place. If one state accuses another of violating human rights without any foundation, this is interference or attempted interference in internal affairs.

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by private persons testifying to systematic massive human rights infringements can be considered.

However, it is interference to organize propaganda campaigns leading to a deterioration in inter-state relationships, with the aim of discrediting the policy of a particular state, where systematic breaches of human rights in that state are not present. Consequently, one of the necessary conditions for the legality of interference by other states, or also by corresponding international agencies, in questions of the safeguarding of human rights in another state, is the presence of actual and systematic breaches of human rights.

As far as isolated, random, breaches by a state of international standards in the area of human rights are concerned, where these are not evidence of a definite illegal policy by the state in a given area, then in my view these breaches may be the object of international consideration only in cases directly covered by corresponding international procedures (for instance, in the Human Rights Committee, the European Commission of Human Rights and other agencies).

On the whole, an expansion of various forms of international protection of human rights is taking place, and as a consequence, there is a corresponding narrowing of the sphere of the domestic jurisdiction of the state in this area.

It must be acknowledged that the reserved attitude of the Soviet Union in the past towards control mechanisms in the area of human rights protection, the neurotic reaction to the slightest criticism, regarding it as, if not a slight on our sovereignty, then at least interference in internal affairs, was not only the result of ideological dogmatism but also testified to the fact that in the area of human rights there are things to hide in our country, that there is a gap between the idea and the reality.

The democratization and strengthening of legality in our country are processes brought about by internal causes, which have internal motive forces. As far as international collaboration in the human rights field is concerned, the Soviet Union in no way takes part in it only to "cramp" other countries in respect of generally accepted standards, nor from any sort of propaganda goals. I see our participation in international agreements on human rights, and in the recognition of corresponding international mechanisms and procedures, primarily as additional guarantees of the protection of the rights of Soviet citizens. It may even be said that it is a mandatory external factor in the building of a state based on the rule of law in the USSR.