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International Human Rights and Sovereignty of States: Role and Responsibility of Lawyers

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Abstract

Speech given at Session 4: The Legal Profession and Human Rights. Fali Nariman discusses the history of lawyers in the context of past fifty year history of international human rights.

INTERNATIONAL HUMAN RIGHTS AND SOVEREIGNTY OF STATES: ROLE AND RESPONSIBILITY OF LAWYERS

*Fali Nariman**

Mr. President, Mr. Under-Secretary-General, my colleagues on the panel, ladies and gentlemen: Many of you will recall the Twentieth Biennial Conference of the International Bar Association, held in Vienna, in September 1984. You may remember that in his opening address, the then President of Austria, Herr Kirschlager, said that the extent of freedom which a lawyer is guaranteed by his country's laws and of which he can actually avail himself in his day-to-day practice, faithfully reflects the freedom enjoyed by each individual in that country. This was a significant remark — the extent of a citizen's freedom in the State is measured by the extent of the lawyer's freedom within that State to practice his profession. It was a reflection of the growing consciousness about the responsibility of the modern lawyer to the public he or she is meant to serve.

It was not always so. Two centuries before, in a place not far from Vienna, Frederick William I, the soldier King of Prussia, had decreed that lawyers in his kingdom should wear their official black gowns always wherever they went, so that, "the rogues can be recognized from afar and people may be aware of them."

When I related this recently to a friend, he rather unkindly said, "ah, now I know why they called him Frederick the Great!" But there has been a vast transformation in the public perception about the role and utility of lawyers since the time of the Prussian King.

The most memorable contributor to this change in perception was the great democrat Edmund Burke. It was he who spoke about lawyers who "augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze."¹

I like to believe that it is in recognition of this uncanny quality, of "sniffing the approach of tyranny in every tainted breeze,"

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1. Edmond Burke, Second Speech on Conciliation with America. The Thirteen Resolutions (Mar. 22, 1775).

that the General Assembly of the United Nations, whilst endorsing unanimously, in December 1990, the Basic Principles on the Role of Lawyers,² took care to stress the importance of the legal profession's responsibility in protecting human rights and fundamental freedoms recognized by national and international law.

The fundamental freedoms recognized by national and international law has grown, over the last half century into what has come to be known by the compendious expression "International Human Rights Law." Fifty years ago, there was no such law in existence, and there were very few human rights norms.

In fact, the term "international law" itself did not exist in ancient times, nor even in the Middle Ages. The expression owes its existence to a Dutch Lawyer, Hugo Grotius, whose work on the Law of War and the Law of Peace in 1625³ became the foundation of a systematized body of rules of universal application.

By reason of the well-entrenched doctrine of State sovereignty, ever since 1625, one proposition remained unchallenged for more than three centuries: That international law, or the Law of Nations as it was then called, did not recognize rights of any individual against *any* sovereign State.

In the nineteenth century, it was again a lawyer, John Austin, in his then-famous (but now almost unreadable) *Lectures on Jurisprudence*,⁴ who provided a theoretical basis, a legal rationale, for the doctrine of State sovereignty.

Austin defined law as a body of rules for human conduct set and enforced by a sovereign political authority. It followed from this definition that the law of nations could not be called "law" since international law was a body of rules governing relations of sovereign States between one another, and there was no sovereign political authority above sovereign States which could enforce such rules.

The Austinian theory of sovereignty was eagerly seized upon by autocratic and despotic regimes. Individuals were regarded only as symbolic representatives, as capital assets of their States.

2. G.A. Res. 121, U.N. GAOR, 45th Sess., U.N. Doc. A/conf.144/2b (1990).

3. HUGO GROTIUS, *GROTIUS ON THE RIGHTS OF WAR AND PEACE: AN ABRIDGED TRANSLATION* (1853).

4. JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (1875).

Sovereign States were at liberty to treat their citizens as they liked; they were beyond the reach of international law.

It was World War II, and the Holocaust (where six million people were killed), which became the catalyst for new developments. In August 1945, with the dropping of the atom bomb on Hiroshima and Nagasaki, came the prospect of a different kind of holocaust — the beginning of the end of humankind.

The entire theoretical basis of international law transformed because it now had to adapt itself to a new world order. Bad times, with the possibility of worse times to come, make for fertile and innovative legal thinking. Legal thinking was never more prolific nor more productive than in the immediate aftermath of the end of World War II.

The United Nations Charter of 1945 signified recognition, for the first time in an international treaty, of a wide generality of rights for individuals. A major achievement of those who drafted it — and many of them were lawyers — was the emphasis on the importance of social justice and human rights as the foundation of a suitable international order. The Charter imposed legal obligations not only upon Member States of the United Nations, but upon the United Nations as a whole. Article 55(c) laid down that the United Nations *shall* promote “universal respect for, and observance of, human rights and fundamental freedoms. . . .”⁵

Then, in 1946, the judgment of the Nuremberg Tribunal broke new ground. It recognized, also for the first time, that victims of crimes against humanity committed even by their own governments were entitled to the protection of international criminal law.

About a year later, in 1948, Member States agreed at an International Convention that genocide (acts committed with the intent to destroy in whole or in part, national, ethnic, racial, or religious groups) would be punishable on trial by national courts or by an International Criminal Tribunal.⁶

In just five years since the end of the World War II, the indi-

5. U.N. CHARTER art. 55(c) (discussing principles of international economic and social cooperation).

6. *See* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951) (declaring criminality of genocide under international law).

vidual citizen of a State had become a subject of concern to international law.

In 1950, a great lawyer and jurist Hersh Lauterpacht (later a judge of the International Court of Justice) wrote in felicitous prose, “[t]he individual has now acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right.”⁷

Lauterpacht was one of the pioneers of what came to be known as the “Modern View” of international law, which was that States, though still primarily the subject of international law, were not exclusively so. He got the opportunity of widely disseminating this view when editing the first volume of the 8th Edition of Oppenheim’s classic treatise on International Law, published in 1955.⁸

The 1945 post-World War II United Nations Charter, the 1946 judgment at Nuremberg,⁹ the 1948 Genocide Convention,¹⁰ and the December 1948 Universal Declaration of Human Rights,¹¹ were determined bids to shake off the doctrine of “Absolute State Sovereignty.” The legal theory of sovereignty now stood modified, in two crucial aspects. First, how a State treated its own subjects had now become the legitimate concern of international law; and second, a superior international standard, established by common consent, could now be used for judging domestic law, and also for judging the actual conduct of a sovereign State within its own territory, and in the exercise of its internal jurisdiction.

During the past fifty years, there has been a sustained effort at the United Nations to set superior international standards. At the center of this endeavor stands the system of human rights treaties, legally binding norms that apply to all ratifying States. To a large extent, the standards are in place, and broad legal responsibility by Member States has been assumed. Human rights instruments, international and regional, have proliferated.

7. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950).

8. L. OPPENHEIM, *INTERNATIONAL LAW* (1992).

9. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/236 (1947).

10. See *supra* note 6.

11. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

They now run into a thousand pages in print. But the value of all these instruments rests on their continued recognition by a large number of States. They are accepted as "declaratory of broadly accepted human rights norms" within the international community.

Probably at no other time in the history of human kind have more people believed that they are entitled to the enjoyment of human rights than today, which incidentally, is a tribute to the power of words and the ideas conveyed by them. Words do have an impact and help shape events. I recall the eloquent speech made by Jose Diokno at a meeting of the Law Association for Asia and the Pacific ("LAWASIA") in 1979 in Sri Lanka. He was the noted Philippine human rights activist. President Jayawardene was present on that occasion, and Desmond Fernando later told me that Jayawardene was most impressed. After this, he never again said that human rights was a Western concept. In the following year, in 1980, Sri Lanka ratified the ICCPR,¹² principally due, it is widely believed, to the impact of Diokno's speech.

The role of judges, national and international, is critical to an understanding, and to the advancement, of modern international human rights jurisprudence. It lies not so much in what judges say, but in what judges do in the cases that come before them. As the celebrated Justice Holmes once said, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."¹³

It was a widely recognized rule of international law and practice that individuals had no standing to challenge a violation of international treaties in the absence of a protest by the sovereign State involved. This rule had survived the legal documentation of the post-1945 period, and was firmly established by decisions of national courts, first in Israel in the *Eichmann* case, in 1962,¹⁴ and then in the U.S. in the *Noriega* case, in 1990.¹⁵ These cases held that rights under international common law belong

12. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (reaffirming obligation of Member States under U.N. Charter to promote universal respect for human rights and freedoms).

13. Oliver Wendell Holmes, Jr., *The Path of the Law* (1897).

14. *Attorney General v. Eichmann*, 36 I.L.R. 5 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).

15. *U.S. v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990).

only to the Sovereigns, not to individuals, and this statement of the law was approved in all leading textbooks right down to 1994.

But no longer. In a judgment delivered, in October 1995, in the case of *Prosecutor v. Tadi*,¹⁶ the International Criminal Tribunal at the Hague, trying cases of crime against humanity in the former Yugoslavia, has held that even the State's sovereign power to establish its own courts for punishment of crimes committed within its own territory must give way in the face of offences that "do not affect the interest of one State alone but shock the conscience of mankind."¹⁷

Where a conflict had both internal and international aspects, then, regardless of the type of conflict, an International Tribunal set up by the Security Council had jurisdiction and authority to adjudicate offenses committed by a citizen of a State, even though the offenses were general criminal offenses, like murder and rape, committed within the territory of the State.

As to the judgment in the *Eichmann* case and in the *Noriega* case — that individuals in a State had no right to challenge violations of international treaties to which the State was a party—the President of the Court brushed aside these decisions in a single sentence. He explained that pronouncements of this kind do not carry in the field of international law the weight they may bring to bear in national judiciaries.

In January 1985, whilst accepting on behalf of the International Commission of Jurists ("ICJ") the award to that body of the Wateler Peace Prize, my good and wise friend Nial MacDermott, then Secretary General of the ICJ, explained that lawyers did not serve mankind well when they formulated the concept, or rather, the fiction of the sovereign nation State. He further elaborated that the great obstacle to peace is the immense concentration of power in the nation State especially when fed by fanatical nationalism; and the task before us is to find ways to diffuse that power.

Fortunately, ways are being found. It is somewhat paradoxical-

16. *Prosecutor v. Duško Tadi*, Case No. IT-94-1-AR72, reprinted in, 35 I.L.M. 32 (1996) (denying Tadi's appeal based on illegal foundation of International Criminal Tribunal of the Former Yugoslavia ("ICTY"), wrongful primacy of ICTY over national courts, and lack of jurisdiction *ratione materiae*).

17. *Tadi*, 35 I.L.M. at 51 (discounting Tadi's argument that ICTY is unlawfully usurping national court's power).

cal that the once-impregnable walls of the sovereign State, so carefully constructed by the jurists of the nineteenth century, are now being dismantled by the innovative and ingenious techniques of the jurists of the twentieth century.

But, the omnipresent ogre of State sovereignty still looms large. Much remains to be done.

The great violators of the most basic human right, the right to peace, are sovereign governments obsessed with national security. Although we do have an impressive body of international law, with scores of international covenants and conventions, in the end they do not add up to much.

Whenever a sovereign State chooses to be a law unto itself, there is simply no effective power to stop it, particularly if it has, and is known to have, a sufficient arsenal of weapons. Although the threat of a universal war has been contained, sporadic regional warfare is far too frequent, reaching new depths of savagery. The civilian population is attacked and decimated by powerful groups within a State, at times with the use of chemical weapons, outlawed way back in 1925, under the Geneva Convention.¹⁸

The sovereignty of the State, as opposed to the concept of the comity of nations, continues to be the single gravest threat to the human right to world peace, and there is no sustained and dedicated effort to make the peoples of the world aware of this important fact.

Mere reduction of the world's arsenal of nuclear weapons is not enough. The Chairman of the Communist Party of China made this point in an interview with *Time Magazine* some years ago. When asked to comment on the proposal between the then Union of Soviet Socialist Republics ("USSR") and the United States to reduce their nuclear armory by fifty percent, he went on record to say, "[when each has the power to] destroy the world ten times . . . even if there is a fifty percent reduction they still have the ability to destroy the world five times."¹⁹

Attempting to enforce disarmament is also not enough. We

18. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

19. *An Interview with Deng Xiaoping: 'You should give them the power to make money.'*, *TIME*, Nov. 4, 1985, at 39.

lawyers must help create better legal structures for worldwide law enforcement.

World peace is just not possible if we still hold fast to the concept and practice of unlimited sovereignty of nations. Throughout history, absolutely sovereign countries have proved incapable of keeping the peace, since nationalism has always been one step behind history. Some form of limited world government, with relinquishment of external sovereignty, is more effective if the cataclysm is to be avoided.

Exactly fifty years ago, in the year 1947, Dr. Albert Einstein, in a letter to the members of the Academy of Sciences of the then USSR, gave his reasons for advocating limited world government. He wrote, "I advocate world government because I am convinced that there is no other possible way of eliminating the most terrible danger in which man has ever found himself. The objective of avoiding total destruction must have priority over any other objective."

About the same time, the other famous physicist, Dr. Robert Oppenheim, the man who invented the atom bomb (and lived to regret it), was called to testify before the U.S. Senate Award Services Committee. He was asked the following question, "Doctor, is there any defense against a nuclear weapon?" He promptly replied, "Yes – PEACE."

Dr. Oppenheim knew, and after fifty years of freedom of expression and an increasing dissemination of information, we all know that there is no other defense.

In the preamble to the Constitution of UNESCO, one of the agencies of the United Nations, there is a poignant sentence. It reads, "[s]ince wars begin in the minds of men, it is in the minds of men [and women] that the defenses of peace must be constructed."²⁰

This, then, is the task for the lawyers of the twenty-first century: to help build with their expertise better defenses for peace.

Universally, lawyers are privileged members of society. They have access to, and often fill, positions of high authority in national and international bodies. Much is expected from them.

There is a beautiful passage in the New Testament which reads, "[f]or unto whomsoever much is given, of him shall be

20. United Nations Educational, Scientific, and Cultural Organization, Nov. 16, 1945, T.I.A.S. 1580.

much required: and whom men have committed much, of him they will ask the more."²¹

On this fiftieth anniversary of the International Bar Association, I would remind all its members to be prepared to respond to these ancient words of wisdom.

Thank you very much.

21. *Luke* 12:48.