a realization by the United States that failure on its part to live up to those responsibilities might well have the effect of making it impossible for the United States to fulfill its obligations already assumed under the Rio Treaty.

CHARLES G. FENWICK

THE UNITED NATIONS DECLARATION OF HUMAN RIGHTS

At midnight of December 10, 1948, the General Assembly of the United Nations adopted at its Paris Session the Declaration of Human Rights.[1] Now that the first achievement in this field has been reached, it is time to consider the legal situation theoretically, historically, critically, and to look at the more important and more difficult task that remains to be done.

The struggle for the "rights of man" was first waged within the states. The democratic Greek city-state, which was at the same time the Church, knew no rights even of the full citizens as against the state. Even less were there rights for all men. Even Aristotle speaks of men who are by nature slaves. True, the Stoics opposed slavery, and Roman jurists later took over the Stoic natural law; but they never doubted that the positive law of slavery prevailed.

In the "age of reason" the struggle for the rights of man was based on a natural law of revolutionary character. To say that the "rights of man" are inherent, inalienable, preëxisting to the state which the state has to protect, but cannot bestow, was a formidable weapon in the political battle against tyranny. There is no doubt that many formulations of the "Bill of Rights" are drawn in the ideological language of the eighteenth century.

But however great the influence of the "age of reason" was in this respect, it would be a mistake to believe that the idea of "rights of man" was unknown to the Middle Ages. Two more sources must not be forgotten. First, Christianity which brought this idea. The Catholic natural law as expressed by St. Thomas of Aquinas and by the Spaniards, Francisco de Vitoria[2] and Suárez, teaches the equality of all men. It is the Catholic natural law which emphasizes the dignity of man as a rational creature, participating in the *lex aeterna,* made to the image of God and having an eternal destiny. It is the Catholic natural law which knows no discrimina-

[1] Universal Declaration of Human Rights, U.N. Doc. A/811, Dec. 16, 1948; Department of State Publication No. 3381 (International Organization and Conference Series III, 20).

[2] In his *Relecciones de Indis* (1539), Vitoria states that the rights of the Indians are based on the fact that they are human beings and as such they have all the rights which are inherent in the human person and its dignity. Being natural rights, they precede the state and stand above the power of the state. Man is one, without any distinction of race, color, religion or culture. Every man is a brother, because he is a child of God.

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tions as to race and color. St. Thomas of Aquinas, so to speak, centuries in advance rejected the totalitarian ideologies of today.[3]

Second, the "rights of man" have a history in positive law. The "rights of Englishmen" are positive law which has historically come into existence in political struggles against the King. And the English settlers brought their "rights of Englishmen" with them to North America; these rights were guaranteed in the colonies, in the charters of the settlements, as early as 1606 in Virginia, 1629 in Massachusetts. From the time of the French Revolution on, the "Bill of Rights" has become a standard part in most constitutions. But long ago attempts were also made to protect the individual against tyranny by international law.[4] The experience of two world wars, the appearance of the totalitarian régimes, the unheard-of cruelties of the National Socialist dictatorship have rendered these endeavors more urgent.[5] During the whole second World War proposals were made in this field.[6] It was only natural that this problem should be taken up by international organizations.

Within Pan America, the Mexico City Conference of 1945 charged the Inter-American Juridical Committee to formulate a Declaration of Rights and Duties of Man. The new Bogotá Charter proclaims in Article 5.(j) "the fundamental rights of the individual without distinction as to race, nationality, creed or sex," and the Bogotá Conference adopted also the "American Declaration of the Rights and Duties of Man." The Charter of the United Nations deals with human rights seven times. The Peace Treaties of 1947 impose upon the ex-enemies the legal obligation to take all measures to secure to all persons under their jurisdiction the enjoyment of human rights and of fundamental freedoms. Analogous norms are contained in the Organic Statute of the Free Territory of Trieste. Here we have norms of positive law. True, the obligation consists in coresponding municipal legislation, administration and justice; but this municipal law is ordered by international law. Any failure in municipal law constitutes a treaty violation.

Entirely different is the character of the corresponding articles in the United Nations Charter.[7] They do not constitute legal norms, but only

[3] "*Homo non ordinatur ad communitatem politicam secundum se totum et secundum omnia sua . . . sed totum quod homo est ordinatur ad Deum*" (I–II, qu. XXI, 4, 3), written as if to reject National Socialist "*Gleichschaltung.*"

[4] *E.g.*, the battle against the slave trade, the League of Nations efforts against slavery, the system of an international protection of national, religious and linguistic minorities, created after World War I.

[5] Even in 1929 the *Institut de Droit International* adopted a Declaration of the International Rights of Man (*Annuaire, Session de New York*, pp. 298–300).

[6] See President Roosevelt's "Four Freedoms," point 8 of the Atlantic Charter; Essential Human Rights ("The Annals," 1946); Commission to Study the Organization of Peace, Bill of Human Rights (International Conciliation, 1946, No. 426).

[7] For an excellent, sober and strictly legal analysis see Jacob Robinson, Human Rights and Fundamental Freedoms in the Charter of the U. N. A Commentary (New York,

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guiding principles. The United Nations "shall promote and encourage," "assist in the realization," "make recommendations," "promote universal respect and observance" of human rights; it cannot protect them,[8] it cannot take action, apart from the case that the violation of human rights constitutes a danger to peace. Further, under Article 2, paragraph 7, which contains the prohibition to intervene in matters which are essentially within the domestic jurisdiction of any state (Member or not), any action by the United Nations is precluded, for, under positive international law, these matters undoubtedly fall under domestic jurisdiction. When the treatment of the Hindus in the Union of South Africa came up, even a man like Smuts immediately raised the barrier of lack of jurisdiction. Notwithstanding Jessup's opinion,[9] we have the authority of the Director of the Division of Human Rights in the United Nations Secretariat that it was primarily on account of the alleged violation of an agreement, not on account of the alleged violation of human rights, that the Assembly accepted jurisdiction.[10] In any event, the result up to now has been nil.

As the corresponding articles of the United Nations Charter contain only a program of principles, not legal norms, and as they do not define these rights and fundamental freedoms, it is obviously necessary to create legally binding norms, defining these rights, taking them out of the matters essentionally within domestic jurisdiction and establishing a machinery of international enforcement.

As an amendment to the Charter has no chance and as Article 68 envisages a special Commission of Human Rights, the way of resolutions and draft treaties has been chosen. In nearly three years of work this Commission, under the chairmanship of Mrs. Franklin D. Roosevelt, has elaborated the Declaration of Human Rights which now has been adopted, and is working on a Covenant on Human Rights and a Protocol of Implementation. All three documents together will constitute the "International Bill of Rights." The drafting has been followed with interest by the American Bar Association.

The Declaration now adopted constitutes obviously a maximum program. The 31 articles of the Declaration proclaim the political rights, then the traditional human rights of liberal democracy, the intellectual rights and

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1946). See also: René Brunet, *La garantie internationale des droits de l'homme d'après la charte de San Francisco* (Geneva, 1947); Karl J. Partsch, "*Internationale Menschenrechte?*" in *Archiv des öffentlichen Rechts*, Vol. 74, No. 2 (July, 1948), pp. 158–190.

[8] That the members of the U. N. already have a certain legal obligation under the preamble and Arts. 1 and 55 of the Charter was stated by Judge J. M. MacKay, Superior Court of Ontario, in the case Re Drummond Wren (1945, Ont. R. 778). See also P. Sayre, "Shelley *v.* Kraemer and United Nations Law," Iowa Law Review, Vol. 34, No. 1 (Nov. 1948), pp. 1–11.

[9] Philip C. Jessup, A Modern Law of Nations (New York, 1948), Ch. IV (pp. 68–93), at pp. 87 ff.

[10] John P. Humphrey, in "The Annals," January, 1948, pp. 15–16.

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finally the economic rights. All the rights stem from the cardinal axiom that all human beings are born free and equal, in dignity and rights, and are endowed with reason and conscience. All the rights and freedoms belong to everybody, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Declaration of Human Rights raises many philosophical, theoretical, legal and political problems. Human rights have played a great rôle in natural law, both the Scholastic natural law and the "law of reason." On the other hand, since we have a genuine science of law, it has been shown that human rights are rights legally only because they have been granted by positive law.[11] Against positivism a new renaissance of natural law, born out of the crisis of our Western-European culture, has set in, and particularly in the field of human rights. Lauterpacht[12] has had recourse to natural law, and Verdross[13] stated recently that human rights "stand and fall with the recognition of natural law." But it seems to us that they, exactly to the contrary, stand and fall with positive law guaranteeing them and giving an effective remedy against their violation in independent and impartial courts. No talk about natural law has saved the Jews from Hitler. What Lauterpacht and Verdross themselves want, is not mere natural law, but positive norms of municipal and international law. The whole dispute about "natural law" seems to this writer to be only a terminological quarrel. We men of the Christian Western culture firmly believe in the basic dignity of the human person. These ethical and religious convictions are sources which contribute to the contents of the positive, man-made law; but "natural law" is not law, but ethics.[14] The Declaration, it is true, is couched in some places in terms of natural law, but the whole contents of the Declaration tend toward the "rule of law," *i.e.*, of positive law. And the proposed Covenant and the Protocol of Implementation make this tendency crystal clear.

The Declaration also raises legal and political problems. The rights referred to in this Declaration are conceived out of the spirit of Western democracy. But a growing part of the world is not democratic in this sense. Every "transpersonalist" conception, and, especially every totalitarian régime, whether Fascist, National Socialist or Bolshevist, is incompatible with "human rights"; the latter necessarily presuppose exactly a non-totalitarian régime. It is, therefore, perfectly clear that the Soviet Union,

[11] H. Kelsen, General Theory of Law and State (Cambridge, Mass., 1945), pp. 266–267.

[12] H. Lauterpacht, An International Bill of Rights (New York, 1945); *idem*, "International Protection of Human Rights," Hague Academy of International Law, *Recueil des Cours*, 70 (1947), Vol. I.

[13] A. Verdross, "*Die Internationale Anerkennung der Menschenrechte,*" in Moser, *Weltbild and Menschenbild* (1948), pp. 229–234.

[14] In this sense now Legaz y Lacambra, Jules Dabin, E. Brunner, Coing.

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which stands on the side of Marx, according to which personal freedom is possible only in the collective, which does not recognize human rights within its own state, obstructed the deliberations of the United Nations Commission on Human Rights, and sees in the Western formulations only hypocrisy and capitalistic propaganda. The Soviet Union, therefore, abstained from voting and did not accept the Declaration and was followed by all the states of the Soviet Bloc.

In the field of human rights as in other actual problems of international law it is necessary to avoid the Scylla of a pessimistic cynicism and the Charybdis of mere wishful thinking and superficial optimism. The regrettable fact that a growing part of the world has replaced the legal individualism of nineteenth-century liberalism with collectivistic-totalitarian legal orders cannot be simply ignored. There are, apart from National Socialist cruelties and sufferings brought about by the war, international and national developments even since the end of actual fighting, which are in no way compatible with the concern for human rights: the fact that millions of Russians, Germans and others are being held in the Soviet Union in concentration camps under conditions of forced labor, the fact that millions of Germans have been made refugees by the fiat of the victors, and the way in which it was done, the widespread civil wars of today and the terrible conditions of millions, the engulfing of more and more European states by totalitarian régimes, the increasing inhumanity of total war.

Even in the democracies not all is perfect. The case of the discrimination against the Hindus in the Union of South Africa is an example; it is characteristic that, along with the Soviet Bloc and Saudi Arabia, the Union of South Africa, too, has abstained from voting and not approved the United Nations Declaration. Even in this free and democratic country, severe shortcomings—discrimination against negroes, or against Asiatics or Mexicans, anti-semitic prejudices—are admitted and remedies proposed.

That human rights are enumerated in a constitution is no proof in itself that they exist. There are cases where such articles remain only on paper. And in all cases it is superficial to quote only the corresponding articles of the constitutions; [15] it is necessary to investigate how these general, abstract norms are being made concrete in simple statutes, administrative ordinances, regulations and decisions, judicial decisions and even private contracts. There is often a remarkable discrepancy between constitution and practice. There are further difficult inherent problems: how effectively to reconcile protection of individual honor and reputation with freedom of the press, how to reconcile human rights with their suspension, the declaration of a state of siege or analogous measures: how to reconcile freedom of political opinion with discrimination against members of a "subversive" party and so on.

[15] For a survey, see Year Book on Human Rights for 1946 (Lake Success, N. Y.: United Nations, 1948).

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In general, the human rights proclaimed in the Declaration correspond broadly to those enumerated in our own First, Fourth, Fifth, Sixth, Seventh and Eighth Constitutional Amendments. Human rights, as they were understood in English historical development, in natural law and in political development since the French Revolution, were directed against political tyranny: hence, political rights and human rights to secure the person from political oppression dominated. Human rights were the expression of nineteenth-century liberalism, of political democracy; the right to vote was considered the most important right. In the economic field free competition seemed to be the ideal. Economic inequality seemed fully compatible with the *égalité* of the *droits de l'homme*. But here a new, socialistic trend has recently entered into the doctrine of human rights, not only under Communist or socialist, but also under democratic régimes: the tendency to "socialize" the law, the idea of the "century of the common man" have led to economic human rights which also occupy an important place in the United Nations Declaration. Here new problems arise: How to reconcile liberty with a state which shall guarantee to every one social security "from the cradle to the grave,"[16] not to speak of the practical problem of how it can be done; how, for instance, to guarantee the fundamental rights to rest and leisure to the more than one billion Asiatics and many others.

Even with regard to traditional human rights, criticism in this country concerning the United Nations Declaration has not been lacking. It has been asserted that the Declaration, contrary to our First Amendment, does not expressly guarantee freedom of the press. Objections have been raised to the expression in Article 16 of equal rights at the "dissolution" of marriage, the word "divorce" being avoided. All the economic rights are open to objections in this country.

First of all, the United Nations Declaration is in its basic character

> not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms to serve as a common standard of achievement for all peoples of all nations.[17]

It is only a resolution, needs no ratification; it may have the effect of moral persuasion, but it is not law, has no legally binding effect. Consequently its non-binding quality explains the maximum program proclaimed. Even so, Andrei Y. Vishinsky made a strong effort to prevent its adoption. The document, he said, "seems to support the view that the conception of

[16] There are economic thinkers like Hayek (London) and Röpke (Geneva) who firmly believe that any "planned economy" is necessarily the "road to serfdom." See, on this problem, recently Albert Lauterbach, Economic Security and Individual Freedom. Can We Have Both? (Ithaca, N. Y.)

[17] Statement by Mrs. Franklin D. Roosevelt on Dec. 9, 1948, Department of State Bulletin, Vol. XIX, No. 494 (Dec. 19, 1948), pp. 751–752.

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sovereignty of governments was outdated." The Soviet Union, the states of the Soviet Bloc, Saudi Arabia and—very significantly—the Union of South Africa abstained from voting. Notwithstanding its legally non-binding character, Mrs. Franklin D. Roosevelt emphasized that certain provisions are stated in such broad terms as to be acceptable only because of the limitations of Article 29. This article allows only such limitations "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This latter phrase is an elastic one and subject to interpretation by each state. Mrs. Roosevelt gave an example by stating that, under Article 29, the exclusion from public employment of persons holding subversive political beliefs and not loyal to the basic principles and practices of the Constitution, would in no way infringe upon the right of equal access to the public service. Mrs. Roosevelt made another interpretative reservation: The United States Government does not consider that economic, social and cultural rights imply an obligation on governments to assure the enjoyment of these rights by direct governmental action.

The United Nations Declaration is the first and easiest step leading to the International Bill of Rights. It implements the Charter by defining human rights in a maximum program of a legally non-binding character.

The proposed Covenant will have to make the second and more important step: to create legal norms in this field, legally binding upon the states which have ratified it. Consequently, the Covenant will be more restricted and conservative and will probably only contain the rights traditionally guaranteed by British and American law. Even so, the adverse attitude of the Soviet Bloc can be taken for granted.

Still more difficult will be the last step: enforcement, to be contained in the Protocol of Implementation, especially if this Protocol envisages not only supervision by the United Nations, not only the right of individuals to complain and petition, but also the right of individuals unilaterally to bring an action against their own state in an international tribunal. Up to now, treaties have only very rarely authorized individuals to bring an international action against a foreign state, but never against their own state. Only the Covenant and the Protocol, translating the maxims of the Charter into binding norms of positive international law, granting to individuals an international right of action against their own state, and providing effective sanctions against states for violation of the international law of human rights, will be the real test for the United Nations in this field.

The acceptance and effective enforcement of such treaties would certainly be of a revolutionary character and would tend to transform the international community into a World Federal State, to transform international law into global law. Whether the time is already ripe for that, remains

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to be seen. The Bogotá Conference recommended in its Resolution XXXI[18] that the Inter-American Juridical Committee prepare a draft statute providing for the creation and functioning of an Inter-American Court to guarantee the rights of man. Such a draft, after examination and comment by the governments of all the American states, shall be transmitted to the Tenth Inter-American Conference "for study," as the resolution cautiously says, and even that only, as the resolution still more cautiously adds, "if it is felt that the moment has arrived for a decision thereon."

JOSEF L. KUNZ

LEGAL BASES AND CHARACTER OF MILITARY OCCUPATION IN GERMANY AND JAPAN *

Both by their prolonged duration and by their special objectives, or the activities undertaken with these objectives in view, the cases of military occupation in Germany and Japan raise interesting and important questions concerning their legal bases and character. Other cases of military occupation following World War II—as in Italy and Austria—have not exhibited these same characteristics to the same degree and do not call for consideration here. Likewise we may confine our attention to the American share of the occupation in Germany and Japan inasmuch as the situation is substantially the same for all the Powers involved therein.

The law of military occupation as it stood in 1939 was largely based upon practice and usage, of course, supplemented to some degree by convention. And, as in other branches of the law of war, while the activities of the belligerents in World War I had raised serious questions concerning the rules of military occupation, virtually nothing had been done between 1919 and 1939 to revise the law or to give it greater clarity and firmness.

Nevertheless it may be asserted without hesitation that still in 1939 the two most salient characteristics of the law of military occupation were its assumptions that such occupation was a temporary phenomenon, and the holding that it did not and must not interfere with the constitutional and permanent aspects of the life of the country. If the latter aspects of the situation were to be dealt with, this must follow upon a disposition of matters whereby juridical authority over the territory in question would be confirmed and perfected by transfer of sovereignty or something closely approaching thereto, and the law was very uncertain in regard to any conversion of the one type of situation into the second by any step less explicit and formal than an international agreement.

It may still be assumed, probably, that the occupations in Germany and Japan are intended to be temporary, or not to be permanent, not to merge

[18] Final Act, p. 48.

* See review of work by von Turegg below, p. 397, which came to the writer's attention after this comment was completed.

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