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Conclusion

THE NEED FOR INTERNATIONAL LAW

James C.N. Paul

After reviewing at length Uganda's "violent and bloody history" of "flagrant abuse of human rights" by successive despotic regimes, a specially constituted Commission of Inquiry recommended major reforms in the future structure and governance of that country's ISFs.¹

The reforms proposed were envisioned as an integral part of a broader effort to reconstitute the Ugandan state. The basic objective stressed was the need to put all security forces under a new rule of law. To that end the mission, organizational structure and management of each force should be elaborated in carefully crafted legislation. Further, the plenary, powers of the legislature to monitor, regulate, abolish and reorganize all ISFs should be confirmed. The "internal security" role of the army should be limited to the pacification of "insurgency or rebellion." The basic obligation of all security forces to protect and promote "the constitution, human rights and humanitarian law" should be made clear - and confirmed by a solemn, personal commitment of all members of these forces.

A number of other recommendations - dealing with such subjects as recruitment, gender and ethnic composition, training, codes of conduct, systems of discipline and the accountability of all levels of the force, oversight, and the power of civil societies to monitor ISFs and take appropriate action to prevent and resist human rights violations - paralleled those proposed by the *Code of Universal Principles* (to govern ISFs) set out elsewhere in this volume.

More recently, across the continent, Olusegun Obasanjo, in his inaugural address as Nigeria's newly elected president, reviewed the "bleak, very bleak indeed" social condition of that country. The incursion of the military into government "has been a disaster," he said, and "a great deal of reorientation has to be undertaken,"

¹ The "Recommendations" (Chapter 13) of the "Report" of the "Ugandan Commission of Inquiry Into the Violations of Human Rights" were recently published in 3 EAST AFRICAN J. OF PEACE AND HUMAN RIGHTS 140 (1996).

including "a redefinition of the roles [and] retraining and re-education."²

The challenges of reconstruction confronting Nigeria and Uganda are illustrative of a broader regional crisis which has been analyzed in a notable Report to the UN Security Council (on "The Current Situation in Africa") by Kofi Anan.³ That document bluntly attributes the growth of internal conflicts, humanitarian catastrophes, worsening poverty and environmental degradation to the failure of states.

Indeed, "failed states" have now become a focus of much scholarly literature.⁴ States fail when the ruling regime no longer meets the minimal, legitimate expectations of their people. In these states the existing constitutional order has, in effect, been embezzled by predatory elites and ISFs, and governance has been converted into a despotic system increasingly geared to private gain or other illegal purposes. Some of these regimes have inflicted - or tolerated infliction of - international crimes upon their peoples. They have also produced internal conflicts which, in turn, have led to equally lawless insurgencies, and sometimes the phenomenon of "warlord" organizations which, living through plunder, take over the governance of whole regions of the state.⁵

Starting with a discussion of colonial and other historical legacies, the *Secretary General's Report* offers explanations for state failures. The *Report* notes themes more fully treated in the now voluminous scholarly literature on this subject. These include: the pathologies of the basic institutions of governance, and of competitive politics (e.g. parties, electoral contests and institutions); the opportunity and temptations to use the state's power over the economy for private purposes and, in that context, the tendency of political elites to equate "democracy" with a form of "majority rule" which, in effect, licenses the suppression of opposition; and the inherent weaknesses of civil society and the temptations of governing regimes to divide and disempower it.

² See Excerpt from President Obsanjo's February 27, 1999 Address, 10 J. OF DEMOCRACY No. 3, 1985-86 (1999).

³ See A/52/871-5/1998/318 (April 13, 1998).

⁴ See e.g., L.A. VILLALON AND P.A. HUXTABLE (EDS.) *THE AFRICAN STATE AT A CRITICAL JUNCTURE: BETWEEN DISINTEGRATION AND RECONSTRUCTION* (1998).

⁵ See WILLIAM RENO, *WARLORD POLITICS AND AFRICAN POLITICS* (1998).

These and other themes suggest that, from their colonial origins onwards, states (viewed as systems of governance) have not only been quite authoritarian, but extraordinarily autonomous from the citizens they are supposed to serve: there is no organic unity between them.

Kofi Anan's Report - and the scholarly literature - suggest that the crisis confronting Africa - notably the crisis confronting so many disempowered and increasingly impoverished peoples of that region - is, first and foremost, political in nature. Unless states can be reconstructed to establish modes of governance which provide for more mutually beneficial interactions and relationships with people, attempts to rehabilitate economies will lack sustainability.

Towards that end - reconstituting states so that they exist for the purpose of serving people instead of ruling them, the *Secretary General's Report* emphasizes three interrelated themes as both goals and the means of governance of states.

The first of these is "human development" - a term of art, a holistic concept which, taken seriously, requires a profound rethinking of the functions, structure and governance of basic organs of the state, and the creation of new institutions and processes of governance. Human development envisions the capacitation and empowerment of civil society as an essential element of poverty alleviation, delivery of basic services, attention to women's roles and needs, rehabilitation of environments and other community - and people - centered goals. Human development, taken seriously requires basic reforms and innovations enabling new forms of participation, as well as new standards of transparency and accountability at all levels of governance. Human development calls for the incorporation of human rights of all categories into the design and management of governmental activities - notably those which directly impact on people. Many specific constitutional and other legal reforms are clearly necessary to enable these fundamental changes in the concept and primary functions of the state and the ways in which it governs.⁶ Such changes would seem to be essential if the vast groups between

⁶ See Note 28, in this author's "introduction" to this volume. For a detailed elaboration of the constitutional and legal reforms necessary to implement "human development" objectives, see James Paul and Clarence Dias, *Incorporating Human Rights into Human Development Strategies* (International Center for Law in Development 1999).

peoples and their states is to be closed - if states and civil societies are to exist as organic units.

“Democratization” and the progressive entrenchment are, obviously, complementary to the goal of human development; indeed these terms take on a new meaning, especially relevant to the crisis of state failure, when they are integrated to development imperatives.

Kofi Anan’s *Report* on this crisis elaborates reasons why the International Community - operating through the UN system and other intergovernmental organizations (e.g. the World Bank) and through non-governmental coalitions - must be mobilized to aid this transformation of states.

International law can, obviously, be used to pursue this goal. The Charter of the United Nations requires that organization to promote peace, development (notably human development) and the progressive “realization of universal human rights” as interdependent goals, and the steady expansion of international law is clearly envisioned as one means to pursue them.⁷ Despite the many failures and weaknesses in the UN system, it remains important to appreciate just how far earlier notions of state sovereignty have now been modified by the establishment of constitutional standards of governance which all states must respect through their legal orders and political systems.

Within the past decade a new International Law of Development (ILD) has been established which complements International Human Rights Law and also impacts on the constitutional ordering of states. The ILD clearly calls for a new, more holistic concept of human development whereby poverty-alleviation, sustainability, participation, human rights, and democratized and good governance are seen as essential, integrated, interdependent tasks of the state. The ILD calls (in the words of “Commitment No. 1” of the Copenhagen Summit) for the creation of an “environment” of “law” and “administration” which will “enable” realization of these goals. It reflects a significant evolution in international law from a focus on setting standards to a focus on their implementation, from elaboration of rights to elaboration of institutional and processual reforms necessary to

⁷ On this point see Boutros Boutros-Ghali, *The United Nations Family: Challenges of Law and Development*, 36 HARVARD INT’L LAW JOURNAL 267 (1995) (“peace,” development,” “human rights” and “international law” are the “four cornerstones” of the Charter”).

promote and protect rights. The ILD calls for new structures enabling devolution of powers of governance to the lowest possible levels in order to enable self-determined, participatory development; it calls for participatory institutions and processes to assess the "human rights and social impacts" of programs and monitor the progressive realization of all rights through development and through the provision of all essential services including "security." The ILD calls for processes to assure public access to, and transparency, disclosure and "due process in the administration of all spheres of governance including" security"). It calls for measures and institutions to provide codes of conduct and human rights training for officials, and it calls for processes to promote functional civic education and rights awareness.⁸

These new international norms reflect the fact that institutional reform and innovation is the new frontier of both international development and international human rights law. Thus, within recent years, there has been renewed attention on the development of Human Rights Commissions as basic organs of government. Striking, too, has been the development of universal principles to govern the structure, operations and powers, independent courts, legal professions and the prosecutorial organs - reforms which are seen as essential to implement the obligation of governments to establish independent institutions to enforce human rights. The reforms required by these international instruments and by the UN *Code of Conduct* for all law enforcement agencies have been repeatedly reaffirmed by the General Assembly; they are now said to be "essential" to the "processes of democracy and sustainable development."⁹

Quite recently the UN Commission on Human Rights adopted a resolution on the "Promotion of the Right to Democracy." It, too, reaffirmed the centrality of the "rule of law," and "independence of the judiciary" and "transparent and accountable government institutions" as core elements of the "rights of [all people to] democratic governance," and it called for an expansion of [UN system] activities"

⁸ See James C.N. Paul, *The United Nations and The Creation of an International Law of Development*, 36 HARVARD INT'L LAW J. 307 (1995).

⁹ See e.g., "Human Rights in the Administration of Justice, A/Res/48/137, March 4, 1994. This Resolution cites and reaffirms the universality of the instruments discussed above. These instruments are collected in a volume, COMPENDIUM OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND JUSTICE (United Nations Centre For Social Development and Humanitarian Affairs 1992).

to develop "appropriate measures" to support "democratic governance" in all states.¹⁰

Pressuring and using the UN system to establish a code of universal principles to govern ISFs is surely a project deserving the attention of coalitions of human rights NGOs. Indeed, without concerted efforts by international civil society, it is doubtful that such a code could be brought into existence, and, conversely, as recent experience shows (e.g. the Convention on land mines), the mobilization of international pressure can now be a powerful force to create new international instruments.

Of course, adoption of such a code would create only a "soft" species of international law. But all international human rights law is essentially hortatory. It gains force to the extent its existence is consistently reaffirmed by the international community, and as it is used by progressive states, international organizations and aggressive coalitions of civil society groups, to press and shame governments.

In Africa, the case for a universal code should be put in the larger context of the effort to promote the reconstitution of states and implementation of transitions to democracy. The existence of a publicized international instrument on the governance of ISFs would call attention to this sadly neglected, but critically important task of constitutional ordering. It would help change the terms of debate by, in effect, calling upon governments to justify their failure to subscribe to principles now internationally prescribed. An international code of principles would provide a carefully considered blueprint for reform of constitutions and legal systems - reforms which are indeed necessary to implement the Covenants, the Womens Convention and a number of other rights instruments.¹¹ It would legitimate popular demands for action, and the application of pressure by UN agencies and other international organizations.

The case for reform of ISFs seems compelling, not only in light of past experience, but in the context of promoting democratization and human development. The positive roles which ISFs must play to promote realization of these goals deserves more emphasis.

¹⁰ This Resolution on "Promotion of the Right to Democracy" was adopted by a vote of 51-0 (Cuba and China abstaining) on April 27, 1999. Its text is reprinted in 10 J. OF DEMOCRACY 182 (No. 3) 1999.

¹¹ See the discussion of these points in my paper on Ethiopia in this volume.

Commentators have pointed out that many parts of Africa are now awash with weapons; controlling the flow of arms, and their use by insurgent groups and criminal elements, presents a difficult task, and much may depend on the ability of governments to establish conditions of personal security by establishing new relations of trust and confidence with communities.¹²

Just as the creation of despotic governments has led to new forms of communal violence and depressing poverty among communities, so it has led, apparently in many countries, to the growth of violent crime; and, where the security of persons and property deteriorates, so do the conditions for human development and democratization.

As papers in this volume show, from colonial times onward African ISFs have not been notably effective as protectors of ordinary people from crime. The security of the ruling regime - rather than the security needs of civil society - has been seen as their fundamental mission, and brutal or lawless methods of enforcement have so often been prevalent. Incompetence in controlling crime is exacerbated when police and civil society are estranged and mutually mistrustful. Therefore, the commentators have emphasized, the need for a wholly new model of the essential functions and methods of policing, and police-civil society relations.¹³

So, too, the processes of democratization require new functions for law enforcement. ISFs, must play critical roles to assure the integrity of electoral processes, and to protect peaceful public assemblies and other modes of organized, popular participation. If new methods of peaceful crowd control are to be employed, fundamental changes in the conception of the essential mission of ISFs, as well as new kinds of operational training, must be put in place. A new approach would also seem necessary to address the problems of institutionalized corruption.

¹² A subject discussed in the Secretary General's Report to the Security Council *supra* note 3. See also Stephanie Neuman, *Arms Trade, Military Assistance and Recent Wars*, 541 ANNALS 47 (1995). "In Uganda AK-47s are so plentiful they can be obtained for the price of a chicken." *Id.* at 67.

¹³ See, e.g. E. A. Brett, *Neutralizing the Use of Force in Uganda: The Role of the Military in Politics*, 33 J. OF MODERN AFRICAN STUDIES, 129 (1995); Chris Alden, "The UN and the Resolution of Conflict in Mozambique," *id.* at 103; Jakkie Cilliers, *Security and Transition in South Africa*, 6 J. OF DEMOCRACY 35 (1995) all discussing the crucial roles of the police in the reconstruction of these states. E.A. Brett, *supra* and Alice Hills (in *Towards a Critique of Policing and National Development in Africa*, 34 J. OF MODERN AFRICAN STUDIES 271 (1996)).

In many countries, if reports in this volume are indicative, the police and military are regarded more as enemies than as servants of the people. This deplorable condition, the Uganda Commission noted, not only creates public alienation, but police ineffectiveness. In the struggle to establish a new political culture of enhanced participation, tolerance, respect for rights and confidence in law, the ISFs, especially those assigned regular law enforcement tasks, must seek to become positive forces - practicing civility, transparency and scrupulous respect for codes of conduct designed to protect rights. This is always a difficult, but surely not impossible task: the political as well as military success of insurgent "liberation" forces in Ethiopia, Eritrea and (to some extent at least) Uganda were built on the forging of new relationships of respect between those forces and the peoples of liberated territories — on adherence to strict codes of conduct imposed on soldiers and mobilization of public participation in the tasks of local policing. A general in Ethiopia's liberation army has publicly recorded in his view that these policies must be carried over into policing by the post-liberation regime within the military if a civic culture favorable to democracy and the rule of law are to take root.¹⁴

Thus ISFs, by the very nature of their contacts with people, exercise profound educational and political roles in shaping the character of the state and its relationships to civil society. If "human development," democratized governance and respect for rights are to define the purposes of that relationship, the governance of ISFs can no longer be entrusted to the discretion of the executive and his and his subordinates, or simply to more professionalization of the officer corps. It must be rooted in and controlled by law derived from, and designed to implement, international human rights law.¹⁵

¹⁴ Tsadkin Gebre Tensae, "A Vision of a New Army in Ethiopia" a paper presented at the Symposium on the Making of the New Ethiopian Constitution" sponsored by the Inter-Africa Group, May 17-21, 1993. See also E.A. Brett, *supra* note 13.

¹⁵ This paper has not argued the case for developing a universal code in the context of other regions of the world, but surely that subject deserves consideration. Cf. Zoltan Barany, *Controlling the Military: A Partial Success*, 10 J. OF DEMOCRACY No. 2 54 (1999), suggesting that "the Russian military remains a large, uncontrolled, unreformed and improbably poor institution responsible for guarding 10,000 nuclear warheads. In many respects this scenario is a textbook case for a military coup."