

HUMAN RIGHTS ENFORCEMENT MECHANISM: TOWARD BACK LAUTERPACHT'S CONCEPTION

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Annotation. *The article aims to reflect the historical prerequisites for establishing the human rights protection mechanism and identify points that were not taken into account during the Second World War, which led to the fact that the international legal order turned out to be ineffective in resisting violence and adequately guaranteeing of human rights protection.*

The article analyzes the scientific concepts of Professor Hersch Lauterpacht regarding the human rights enforcement mechanism and look over the limits of state sovereignty and the principles of human protection in the international legal system. Separate questions raise further discussions regarding the protection of victims of atrocities in relation to the value of the individual in the system of international law.

The main research methods were anthropological, historical, comparative-legal, hermeneutic, systemic-structural, formal-logical.

The main results of the research are related to the point of effectiveness of the international legal order in terms of the protection of human rights and the grounds that revealed its failure. The researcher is aimed to show, it is important to return to the historical aspects of the creation of this mechanism and, in the context of the cyclical principle, try to formulate a new idea of an effective human rights enforcement mechanism that will meet the requirements of the time and will oppose inhumane actions, which for the third time in history are continued due to its invalidity.

Researching the concept of the proposed mechanism for the protection of human rights during the Second World War and the procedure for the operation of the human rights enforcement body, proposed by Professor Hersh Lauterpacht, we can conclude that any such mechanism should be based on international agreement between states, as it is in this way that he can be given the most effective powers and guarantees of effectiveness in the light of the sovereignty.

Keywords: *Professor Hersh Lauterpacht, human rights enforcement mechanism, the International Bill of the Rights of Man, High Commission on Human Rights.*

1. Introduction.

The effectiveness of a legal norm is determined by its enforcement. This axiom is an integral part of the whole legal science. Human rights reflected in international legal documents have the value when their effectiveness is determined by an appropriate protection mechanism.

Currently, we are trying to criticize the international legal order for its ineffectiveness to response atrocities and support effective accountability mechanism for human rights protection. As the time shows, history has its cycle and it repeats itself. That is why we consider it necessary to turn to the works of Professor Lauterpacht, which once became the foundation of the creation of international institutions and were laid down in the foundation of the UN Charter, articles of the Nuremberg Tribunal, the Convention for the Protection of Human Rights and Fundamental Freedoms. [4, 23]. The message is not complicated – the document of human rights protection (International Bill of the Rights of Man) is based on the assumption that it will be adopted, not as a mere declaration of international policy embodying a statement of principles, but as an instrument creating legal rights and obligations. [2, 194].

The legal views of Professor Hersh Lauterpacht have already attracted considerable attention of scientists, namely the works of Professors Ph. Sands, S. Murphy, P.Rabinovych.

Professor Hersh Lauterpacht raised the issue of human rights enforcement mechanism after the Second World War, affirming the unique principle - individual human being as an 'ultimate unit of all law'. Unfortunately, as the present and the war in Ukraine show, the world community has not yet managed to create such a proper and effective body that would guarantee the observance of human rights and establish effective sanctions for their violation. The question of the sovereignty of the state and the competence of international institutions is a cornerstone for almost 80 years.

However, in order to understand why the international legal system created in the period after the Second World War showed its ineffectiveness, we consider it necessary to turn to the works that became the foundation of its creation and find scientific concepts there, analyzing them in the light of our time.

2 The aim of this research is to reflect the historical prerequisites for establishing the human rights protection mechanism and identify points that were not taken into account during the Second World War, which led to the fact that the international legal order turned out to be ineffective in resisting violence and adequately guaranteeing of human rights protection.

The applicable research methods were anthropological, historical, comparative-legal, hermeneutic, systemic-structural, formal-logical.

3. The main results of the research are related to the point of effectiveness of the international legal order in terms of the protection of human rights and the grounds that revealed its failure. The researcher is aimed to show, it is important to return to the historical aspects of the creation of this mechanism and, in the context of the cyclical principle, try to formulate a new idea of an effective human rights enforcement mechanism that will meet the requirements of the time and will oppose inhumane actions, which for the third time in history are continued due to its invalidity.

4. Review and discussion

General points regarding the international machinery for securing the observance of the human rights

The international machinery for securing the observance of the human rights, according to Lauterpacht, must be of two kinds—of supervision, in its widest sense, and of enforcement. By "supervision in its widest sense" is meant all activity calculated to ensure the observance of the human rights short of actual enforcement by political or physical means of compulsion. It includes the collection and publication of information, the receipt of petitions from private sources and representations from States, the communication with governments concerning such petitions and representations, the submission to the highest international political authority of periodical reports on the operation and observance of the human rights, and, finally, the transmission to that authority of cases of infraction of the Bill sufficiently serious to call for further investigation, for negotiation by the political authority, and, if necessary, for collective enforcement. For the fulfilment of all these functions it is proposed that there shall be established a special agency which may be provisionally described as the High Commission of the Rights of Man. [2, 196].

Articles of the International Bill of Human Rights, drafted by Professor H. Lauterpacht, convincingly testify that it was based primarily on the idea, unknown at that time, that the legal obligation to ensure and guarantee the rights applies not only to those states that it was signed as an international treaty, as well as by the UN itself. H. Lauterpacht called this bill "part of the Law of Nations" [2, 194, 195]. From this, he made a radical conclusion that the UN not only has the right, but also the duty to control states – to sign the Bill on the observance and non-violation of fundamental human rights [2, 196].

Such ideas, of course, were at that time (as directly emphasized in the book by H. Lauterpacht) truly revolutionary and radical, since they for the first time resulted in the right of an individual to complain about the state to a certain international institution in the event of a state violation of those rights claimed by the complainant. which were recorded in Bill [2, 78, 82, 94-95]. International human rights law as a new, most humanistic branch of modern international law began to grow from such an innovative fundamental idea. These include the right and the duty of enforcement. Reasons have already been given why a Bill of Rights deprived of provisions for its enforcement would hardly merit description as part of the international legal order and why it would constitute a retrogressive event out of keeping both with the solemn pronouncements of the United Nations and with the requirements of international peace.

Pro and cons re enforcement by way of international judicial review.

A method, which on the face of it would appear to be both logical and simple, of securing the observance of the International Bill of the Rights of Man would be to provide for the eventual jurisdiction of an international tribunal accessible to individuals who have been unable within their State to find a remedy against a violation of their rights under the Bill. This, to mention the most outstanding example, is the way in which the Supreme Court of the United States ensures the observance of the articles of the Constitution, of the Bill of Rights, and of other amendments of the Constitution in the matter of the fundamental rights of the individual. The International Bill of the Rights of Man may be violated by the enactment of laws contrary to its clauses; by judicial decisions interpreting it in a manner amounting to a denial of its benefits; or by executive or administrative action. The establishment of an international machinery of judicial review would mean that an international court would have jurisdiction to review and to nullify any of these acts as contrary to the International Bill of the Rights of Man. [2, 173].

This system of regular international review which would open to individuals the right to appeal against the laws, decisions and acts of the legislative, judicial, and administrative authorities of their State has been discarded from the present draft of an International Bill of the Rights of Man as unsound and impracticable. This is so not only because of the technical difficulties, which appear insurmountable. Of these the principal is that an international court acting in that capacity would draw upon itself an amount of litigation so vast that not one tribunal would be required, but many tribunals. This would be so even if its jurisdiction were conditioned by the previous exhaustion of the legal remedies available within the State. Even in that case the international court would be faced with a formidable volume of business from many parts of the world and touching upon all aspects of the Bill of Rights. Such volume of business, to be transacted with thoroughness and requisite authority, would require a great number of courts. Unless a still higher judicial international agency were to be superimposed upon a multiplicity of tribunals, this subdivision of the business of the court would be likely to result in a divergence of interpretation of the Bill of Rights and in an absence of an authoritative and continuous jurisprudence on its various aspects.

However, these technical difficulties are of minor importance when compared with the fact that international judicial review raises problems immeasurably more complex than does judicial review within the State. The latter has been subjected to widespread and emphatic criticism in the United States, the principal country which has adopted judicial review, and elsewhere as constituting a denial of the sovereignty of the legislature and of the people. Can it be expected that countries in which opinion is sharply divided as to the merits of review of their legislation by their own tribunals will acquiesce in such review by an international tribunal in matters touching practically all manifestations of their national life? Can it be expected that countries which have no judicial review within their borders and in which legal opinion and legal tradition have resisted it vigorously and successfully, will entrust it to an international tribunal? This is not a matter of the desirability or otherwise of surrender of sovereignty on a large and unprecedented scale. It is a question of the inherent merits of the system of judicial review both in the national and in the international sphere. This, one of the most baffling problems of law and government, cannot be solved by an International Bill of the Rights of Man. [2, 174].

The additional difficulties – other than those of the merits of judicial review in general and of the surrender of part of national legislative sovereignty to a foreign tribunal – of enforcement of the International Bill of the Rights of Man through international judicial review are obvious. The Bill of Rights is necessarily a document of great generality. Its details must be filled in by the mass of legislation and judicial precedent within the various States. Any Bill of Rights must be subject to two fundamental exceptions – the welfare of the State and the legally recognized rights of the members of the community. The way in which these

exceptions operate in various States is the result of a variety of factors which must necessarily differ from State to State. The law of libel, which is a restriction upon the freedom of speech and opinion, differs in various countries; so does the law of sedition. The same applies to the safeguards which States have adopted for securing the liberty of the person as well as the procedural safeguards in the matter of criminal trials. What is regarded as a sufficient measure of protection in one State may be utterly inadequate in another. The fact is that within the orbit of fundamental rights there is room for a wide divergence of law and practice and, with regard to most of the rights guaranteed in the International Bill of the Rights of Man as here proposed, the law and the judicial practice of States have evolved their own solutions and their own procedures. It is possible – though highly improbable – that at some distant date the laws of States will merge into one world law in this and in other matters. The International Bill of the Rights of Man cannot attempt to introduce such a world law. On the contrary, it must be enforced through the law of States, suitably adapted, if need be, to the fundamental requirements of the Bill of Rights. That municipal law of States cannot be administered by international courts possessing no requisite knowledge of the law, of the legal tradition, and of the social and economic problems of the individual States. [2, 175].

The objections to regular international judicial appeal and review as a means of implementing an International Bill of the Rights of Man are so overwhelming that it may not be profitable to consider in detail suggestions for softening the radicalism of any such proposal. But they may be mentioned. One of them is that when the international tribunal or a subdivision thereof considers an appeal from the highest court of a State it should include a substantial number – possibly a majority – of judges who are nationals of the State concerned. A modification of that nature would to some extent meet the two principal objections outlined above. Alternatively, there might be set up in every State a division of the International Court composed of a majority of the nationals of that State. There might exist, in addition, a central division of the International Tribunal for resolving questions of particular difficulty and for introducing a measure of uniformity and continuity in the application of the more general provisions of the Bill of Rights. These modifications of the idea of international judicial review answer to some extent the objections arising on account of the great number of cases, of considerations of the sovereignty of States, and of the necessity of enforcing the Bill of Rights in the first instance as part of the municipal law of the States concerned. There is, indeed, some attraction in the idea that the international character of the Bill of Rights and the universal nature of the rights of man should be given expression by being applied and enforced by national tribunals including foreign judges. It is also arguable that some such modification of the idea of international judicial review might prove an acceptable transition to the idea of full international review. However, it is not believed that the time is ripe even for that transitory stage.

It must be noted that in any scheme providing for regular international judicial review there would still remain, as in other schemes, the question of measures for the enforcement of the findings of the international court—unless the view is adopted that the authority of the decision of the international tribunal will be such as to render unnecessary any machinery for enforcement. There is no such machinery with regard to the decisions of the Supreme Court of the United States, where, in fact, the theory has prevailed that the Federal Government will not lend its assistance for the enforcement of the decisions of the Supreme Court against States of the Union either in disputes with other States or otherwise. There remains, of course, the question whether the forces operating within the United States in substitution for the physical power of the Federal Government are to be found in the less integrated community of nations.

Combination of national and international functions of supervision and enforcement.

The preceding review of the three principal possible methods of protecting the rights of individuals suggests the following guiding principles for giving effect to the International Bill of the Rights of Man:

– The State must be the normal agency for implementing the Bill of Rights, which must, for that purpose, contain provisions enabling and obliging the States to act in that capacity. The Bill of Rights must, with regard to the personal rights of freedom formulated in Part I of the present draft, be made part of their municipal law and partake of the character of a constitutional enactment. States must confer upon their courts the power and impose upon them the duty to pass judgment or to express an opinion upon the conformity of the acts of the legislative, judicial, and administrative authorities with the clauses of the Bill of Rights.

– The international guarantee of the Bill of Rights must be of a general character. This means that it must be concerned not only with persistent and grave violations of its clauses but also with the normal supervision of its observance. It follows that there must exist a permanent international authority, neither judicial nor political in character, charged with that task of general supervision, of investigation of complaints, and of initiation of intervention by the political international authority in case of disregard of the safeguards of the Bill of Rights on a scale warranting international action for their enforcement.

– There must reside in the political international authority the ultimate and effective power to enforce the observance of the Bill of Rights. [2, 177].

The political international authority the ultimate and effective power to enforce the observance of human rights.

H. Lauterpacht named the body for monitoring universal and permanent observance of human rights (as he himself expressed, “conditionally”) “High Commission on Human Rights”. It was to be formed by the UN Council as a permanent body consisting of independent specialists selected by it with the highest business (whether managerial or legal) and moral qualities [2, 196]. The nature of this Commission, conditioned by its main functions, should have, according to the author, a complex character, combining “political, legal and administrative” [2, 198] powers in relation to influencing states that have committed violations of the International Bill of Human Rights. H. Lauterpacht envisioned this Commission as “a symbiosis of a state affairs management body and a judicial approach” to ensure that all states respect fundamental human rights.

The right to appeal to the High Commission was granted not only to individuals and their organizations, but also to states; and the first two types of subjects would get such an opportunity only after exhausting all national legal means of human rights protection. H. Lauterpacht clearly warned that for the applicants the High Commission is neither an appeal nor a cassation (fourth) instance in relation to national courts or other human rights bodies. And although, he noted, the decisions of the highest national court “should be the last word in the state, they cannot, in connection with international control over the implementation of the Bill of Human Rights, be endowed with absolute finality” [2, 199].

Having received information about the violation of the Bill, the High Commission should enter into communication with the “accused” state in order to find out the position of the latter regarding the claims made against it.

The conclusions of the High Commission regarding the applications and appeals considered by it should also determine the nature of its reaction to the latter, the content of which could be quite diverse: these are, for example, recommendations and proposals to the relevant state regarding its taking certain actions, and in the case of serious and frequent violations of human rights – her appeal to the UN Council with a request to take the necessary diplomatic, political, economic or even (if necessary) coercive (forceful) measures.

All the main characteristics of the High Commission proposed to be created by H. Lauterpacht can be, somewhat conditionally, divided into three groups: institutional-organizational (structural), functional (competent) and procedural-procedural. Let’s briefly consider each of them. The Secretariat, which will ensure its activities, should become a constituent part of the High Commission. Moreover, its functions would not be limited to the performance of only technical and auxiliary tasks, but would also cover the solution of, so to speak, “substantial” and meaningful issues. Therefore, according to the designer, the composition of the Secretariat should be determined by the High Commission itself, avoiding any political factors and influences. Its staff must possess the appropriate competence and impartiality normally required of international civilian bodies.

H. Lauterpacht also expressed certain considerations regarding the procedure of the High Commission. Assuming that the number of applications and appeals to it would be quite large, he believed that all of them should be previously considered by its Secretariat, which would be allowed to “cut off” those of them that would be “manifestly unfounded, frivolous or of little significance” [2, 202]. Moreover, such a preliminary examination should not be carried out by one of the employees of the Secretariat, but by a panel of them consisting of at least three members, at least one of whom should have judicial experience.

Applications or appeals which have passed such examination will be referred for detailed examination to a committee (or committees) composed of “senior members of the Secretariat”. Such a committee will prepare a report and recommendations for decision-making by the High Commission. According to this report, and after receiving the explanations and reasoning of the government of the “respondent” state, the High Commission has to perform “the most difficult and delicate aspect of its task”. It may conclude that the application or submission is well founded because a breach of the Bill has indeed occurred. However, if this violation is, in her opinion, insignificant, then she will have the opportunity not to adopt and not to publish any of her serious conclusions. Nevertheless, in the opinion of H. Lauterpacht, it would be appropriate to establish a political mechanism of coercion on the part of international executive authorities, which will be put into effect only in cases of serious and permanent violations of the Bill of Human Rights.

In case of disagreement between the State Government and the High Commission regarding the interpretation of the Bill, the latter should give preference to the interpretation followed by the legislative, judicial or executive authorities of the respective State. H. Lauterpacht expressed special reservations regarding the consideration by the High Commission of possible violations of socio-economic and cultural rights (Articles 9–14 of the Bill). In these cases, the task of the High Commission “will be particularly responsible and delicate”. After all, the state’s obligations regarding the provision of such human rights must be “necessarily flexible and conditioned by internal conditions and the general economic development of the state”. The author even suggested that specialized sections of the Secretariat of the High Commission should be created to constantly study progress in the implementation of the specified group of human rights. It will be possible, of course, to consult, in particular, with the International Labor Organization. However, in the end, the responsibility for initiating any international action against states that have failed to fulfill their obligations to ensure social rights will lie with the High Commission.

As for the main functions of the High Commission, they will consist of: a) general supervision, in the broadest sense, of compliance with the International Bill of Human Rights and b) its application of this act in order to adopt, in accordance with the powers granted to it, decisions regarding violator states. H. Lauterpacht distinguished two types of sources of information of the High Commission regarding the state of compliance with the Bill by various states. First, it should itself – on its own initiative – collect such information, relying, *inter alia*, on publications, petitions from private sources and from state representatives, on communications with state governments, and on its periodic reports on compliance with the Bill (such reports, as mentioned, it should submit annually to the UN Council).

In addition, the information needed for the High Commission will include, H. Lauterpacht believed, not only relevant national legislation and court decisions, but also such materials as private letters, articles in the press, reports on parliamentary debates, reports on the activities of human rights organizations, etc. According to H. Lauterpacht, such proactive and independent collection of information will allow the High Commission to “act independently of the requests of individuals and representations of states”. (So, for example, it would be its duty to act on its own initiative if any state, say, were to change its constitution in such a way that the freedom of the individual would be clearly restricted as a result.)

The second main source of information support for the High Commission’s performance of its tasks should be, as H. Lauterpacht noted, individual statements, as well as submissions by states. Moreover, he emphasized, the High Commission should not limit itself to passive collection and accumulation of such information. The main thing in her work is “active participation in the implementation of human rights enshrined in the Bill”. It must organize (through negotiations and the implementation of its conclusions) the elimination of any violations of the Bill and transfer to the highest international authoritative bodies information about such violations, which the High Commission itself is unable to eliminate only by its own efforts and means.

Professor H. Lauterpacht assumed that the mentioned statements (complaints) to the High Commission are most likely to take place due to legislative measures that violate the International Bill of Human Rights, or as a result of non-implementation of national legislation, which is intended to prevent and stop such violations. Moreover, he believed that the main part of the applications received by the High Commission would be considered even regardless of whether the relevant provisions of the Bill acquired the status of part of the constitutional law of the state (and, therefore, so to speak, “imposed” on the courts), but only because they will relate to the political, cultural and social human rights recorded in Part II of the Bill.

H. Lauterpacht emphasized in one of the chapters of his book that the right of individuals and organizations to appeal to the High Commission regarding compliance with the International Bill of Human Rights cannot be prohibited or limited. Also unusual was his statement that each state that signed the Bill should have not only the right, but also - in view of Art. 18 of the Bill – the obligation “to bring to the attention of the High Commission information about any violation of the Bill”. (And this does not exclude the fact that - according to Article 20 of the Lauterpacht’s project - any state can submit to the consideration of the Council or the General Assembly of the UN the question of violation of the International Bill of Human Rights.)

Be that as it may, the High Commission should become — according to the author of its project – the body on which the center of gravity of the entire human rights protection system rests. This is how the “pioneering”, truly revolutionary Lauterpacht’s project of a specialized UN control body for the universal and permanent observance of the basic human rights stipulated in the Bill looked like.

Undoubtedly, not all of H. Lauterpacht’s proposals described above were later put into practice. The following historical events, significant social changes and other various factors could not but affect the practical solution of many human rights problems at the international level. But also what Professor H. Lauterpacht was able to construct in this direction for the first time in the history of mankind deserves the highest appreciation and respect, since it did not remain unclaimed or unused at all, and therefore could not but influence, to one degree or another, the actual creation and functioning international human rights institutions both at the UN level and in various regions of the world (primarily Europe).

We do hope that modern specialists in the international protection of human rights, analyzing the project of H. Lauterpacht, highlighted in this article, regarding an international body for worldwide control over the observance of fundamental human rights, will be able to draw conclusions about which of the provisions of this project were later reflected in the structure and order activities of international human rights institutions created after the Second World War. But even a cursory comparison of the above ideas of Professor H. Lauterpacht with international regulatory sources, in which the specified issues were later regulated, allows us to state the following.

5. Conclusions.

The Lauterpacht’s fundamental ideas include, in particular, the following:

- giving each person the status of a subject of international law (in particular, the possibility to complain to such an institution about violations of fundamental human rights by “their” state);
- establishing the obligation of the state, so to speak, to report to this body for its actions regarding human rights and to implement its decisions and recommendations;
- providing a person (or organization) with a specified right only after he has exhausted all national means of human rights protection;
- the structuring of the mentioned body into two parts for the possibility of preliminary screening of certain types of applications (complaints) of people and organizations and the formulation of certain criteria for such screening;
- recognition as subjects of an appeal to the projected international body not only of individuals and various organizations, but also of any of those states that have signed the International Bill of Human Rights.

Almost all of these ideas were, to one degree or another, reflected in the subsequent international legal regulation of the creation and activity of either global or regional human rights institutions that still exist today. And even if far from all the drafters of international legal acts, which implemented such regulation, were familiar with the book published in 1945 by Professor H. Lauterpacht “The International Bill of Human Rights”, even the fact of the conceptual and substantive overlap of some provisions of these acts with its author’s proposals are all the more evidence of the unique power of the intellect, thoroughness and foresight of the ideas of this classic of international law. After all, it was thanks to him that the further revolutionary development of this right took place in a humanistic, human-centered direction.



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