

REFLECTIONS ON STATE RESPONSIBILITY FOR VIOLATIONS OF EXPLICIT PROTECTORATE, MANDATE, AND TRUSTEESHIP OBLIGATIONS

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William Bishop's high standards of personal ethics, factual accuracy and scrupulous honesty marked his relationships with his colleagues, and his scholarly work. I knew him first through his written work and later as a colleague on the Board of Editors of the *American Journal of International Law*. As a person, he was unfailingly courteous (it is impossible to imagine him otherwise); as a scholar, he was rigorous and thorough; as Editor-in-Chief of the *Journal*, he was demanding and discriminating, but always tolerant and fair. He accepted my first article. Because he was not a member of the New Haven School, I awaited his editorial comments with a certain trepidation — needlessly. His comments were pertinent and challenging. The result was a better article, a transformation he seemed to effect in everything he did. He was a superior man.

Given his personality and personal principles, it was not surprising that Professor Bishop should have chosen the area of State Responsibility as his field of special concentration. Anyone who dealt with him encountered a person who appreciated the benefits of civil exchange and who comported himself in all exchanges according to high standards. Those two impulses, of course, animate State Responsibility. I should like, in his memory, to explore in a most tentative way some possible applications of the law of State Responsibility for violations of undertakings by stronger states to weaker states during the colonial period.

The general question of responsibility for colonialism *per se* is extremely complex. On the one hand, the injuries done to people subjected to colonization were not characterized as delictual in terms of the law and morality prevailing at the time. Hence retroactive ascription of responsibility runs the danger of intellectual anachronism, no less than a violation of fundamental legal principles. On the other

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hand, the authoritative condemnation of colonialism has been sweeping and, at least in matters of territory, has not recoiled from retroactive prescription. Even assuming that a consensus on liability for colonialism *per se* could be forged, daunting problems regarding measure of compensation would remain. Using supple equitable doctrines of unjust enrichment to establish the injury of the former colony, one would presumably be obliged to set off against proven injuries the long-term benefits which enured to the colony, e.g. in infrastructural investment, and possibly subsequent aid contributions. Such calculations would be no easy task.

Where, however, a colonial state violated an *explicit* undertaking that constituted, at the time, an international obligation under intertemporal principles, the primary issue of responsibility may be explored and resolved according to traditional and universally accepted legal principles. The assessment of an appropriate remedy, while always extraordinarily complex in international law, may also be accomplished according to accepted criteria. It is this "easier" problem that I wish to address.

I

The "Law" is frequently referred to as a unitary code of general and equal application. But many domestic legal systems have developed alternative, contingent regimes with entirely different configurations of rights and responsibilities, e.g. trusts, custodianships, guardianships, and so on. These regimes come into operation when the power relationship between the parties concerned is manifestly asymmetrical. The usual legal regime regulates relationships between parties who are in a rough state of parity of power and are operating at arm's length; the exceptional and contingent regime regulates relationships in which there is an explicit or implicit relationship of trust, or in which one party is considerably more powerful than the other or operates with a formal or implicit authority over it. Behavior that might be permissible under the regime regulating one set of relationships is impermissible in the other and will generate liability. Liability is established either by explicit rules or the imposition of obligations by "implied" contracts or "quasi-contracts."

The formal system of international law presupposes the sovereign equality of all states and would appear to preclude the category of lawful asymmetrical power relationships we have considered. Where power disturbs this presumed equality, it is often the subject of claims, such as "unequal treaties" and, more generally, leonine agreements. There are, however, several lawful subordinations of one internation-

ally recognized entity to another, which involve substantial surrenders of decisionmaking competence. Some of these factual subordinations — for example, protectorates, mandates, and trusteeships — were based on treaties. In addition to explicit treaty obligations, there is evidence that customary law obligations operated on the superordinated or protecting state in these relationships.¹

There is, of course, a rich body of law dealing with breach of treaty, its consequences and the procedural options it gives to the complying party. But violations of treaty obligations by a protecting state are procedurally different from violations between states in legal and political parity and negotiating at arm's length. The protected state or state under protectorate has, by definition, a restricted if not completely suspended competence to operate at the international level and hence is unable to protect its interests against violations by the erstwhile protector. Thus, it should be no surprise that international decision has suspended the operation of laches for failure to prosecute violations of interest, when the party that failed to protect its own rights was in a subordinate position and was unable to operate in its own name at the international level.² In contrast, the claims we will consider are based upon violation of explicit international obligations under the law that prevailed at the time of their inception and operation.

II.

The phenomena to which these claims relate are widespread. One early one was the protectorate. Protectorates were deemed part of the colonial and imperial periods of international politics. The term protectorate is now considered pejorative, and is no longer used; but functional equivalents of protectorates, operating with international legal sanction, are to be found in the institution of the "associated" state and in some ostensibly federated arrangements.³

In international law, protectorates were established by agreements between two international legal subjects. While the terms of the agreement might have varied from case to case, the common core of all protectorate agreements was the subordination of one party (the protected) to the other (the protector), and the assignment by the former to the latter of some or all of the plenum of international rights to

1. See, e.g. M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 323 (1926).

2. See *Cayuga Indian Claims*, 20 AM J. INT'L L. 574, 575 (1926).

3. See generally W.M. REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* (1975).

which it was entitled by virtue of its international legal status. Though the protected state continued to “exist” as an international subject, it was procedurally dormant and could not act on its own behalf. Protectorates were terminated by the reestablishment of the plenary international legal personality of the protected state, by the total absorption of the protected state by its erstwhile protector, or by its association with or incorporation in another state.

In some cases, protectorates were imposed by a stronger state on a weaker one, then organized and rationalized by a protectorate agreement. In other cases, a relatively weak state, threatened by its neighbors, voluntarily put itself under the protection of a stronger power — trading a reduction in its own power for assurance of its own continuity. Thus, to cite only one example, the Kingdom of Lesotho, threatened by Boer power expanding northward in the 19th century, itself solicited protectorate status from the United Kingdom.⁴

The normative relations between the protector and the protected state derived both from the protectorate agreement and from customary international law. The relevance of the treaty needs no illumination, but the operation of customary international law is not quite as obvious. The construction of the treaty and, in particular, the assumptions about what was actually assigned to the protector, involve customary rules of interpretation. In particular, the canon that an agreement not be construed to give what is not explicitly given, would generally benefit the protected state, as would the general principles of *pacta sunt servanda* and interpretation in good faith. Thus, Lindley would appear to be correct in concluding that “advanced Governments do recognize sovereign rights in less advanced peoples with whom they come into contact, and do, in general, deal with such peoples on a treaty basis when acquiring their territory.”⁵

At the beginning of the twentieth century, the drafters of the Covenant of the League of Nations established a modified form of internationally lawful superordination — the mandate. Article 22 of the Covenant reads:

1. To those colonies and territories which as a consequence of the later war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that

4. See generally L. THOMPSON, SURVIVAL IN TWO WORLDS: MOSHOESHOE OF LESOTHO, 1786-1870, at 297-311 (1975).

5. M. LINDLEY, *supra* note 1, at 46 (1926).

securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuse such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure legal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Under this system, so-called A-Mandates were established for Iraq, Syria, Lebanon, Palestine and Trans-Jordan. So-called B-Mandates were established for Tanganyika, Ruanda-Urundi, Cameroon, and Togo. C-Mandates were established for Nauru, New Guinea, West-Samoa, Southwest Africa and the northern Pacific Islands. The

Permanent Mandate Commission went into operation in 1920 and, with the Permanent Court of International Justice, performed a supervisory function for the mandatory system.

The innovation of the League was carried over to the United Nations system in both an optional "Trusteeship" arrangement and an automatic non-self-governing arrangement. Article 73 of the Charter sets forth the obligations applying automatically to members of the United Nations with responsibilities in non-self-governing territories:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(c) to further international peace and security;

(d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

This peremptory language represented a radical departure from prior international law: administration of non-self-governing territories *automatically* imposed on the superordinated party specific obligations for the welfare of the inhabitants of the territory. While Article 73 would not appear to be applicable retroactively (in the absence of a demonstration that, in whole or in part, it no more than codified customary norms), it would appear to operate automatically after 1945 for all original members of the United Nations and from the moment of accession for states which subsequently became U.N. members. In most general terms, the Charter established a contingent regime of obligations for the welfare of subordinated states that came into opera-

tion for any state controlling non-self-governing territory, without regard to any explicit undertaking of such an obligation.

Article 75 of the Charter also established an international trusteeship system, akin to the mandatory arrangements of the League, "for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements." Article 77 established three categories of trusteeship, based on their provenance, but avoided the invidious developmental distinctions of the Covenant. Territories held under mandate, territories detached from enemy states as a result of World War II, and territories voluntarily placed under the system by states responsible for their administration could all become trusteeships. The obligations of a trustee are set out in Article 76:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- (a) to further international peace and security;
- (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- (d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Thus international law, like many domestic systems, imposes, as a general matter, special obligations on legal actors who exercise authority over other legal actors that are unable to protect their own interests.

III.

There are several cases of clear violation by a protecting state of treaty rights accorded to the protectorate. One will suffice to demonstrate the type of issue with which we are concerned. Between 1884 and the end of the century, the British government concluded a large number of protectorate agreements with the chiefs of the Somali tribes

in the Horn of Africa.⁶ A number of forms of agreement were used. One, used by the British East Africa Company, provided:

[Name of Chief] hereby declares that he has placed himself and all his territories, countries, peoples, and subjects under the protection, rule and government of the Imperial British East Africa Company, and has ceded to the said Company all its sovereign rights and rights of government over all his territories, countries, peoples and subjects, in consideration of the said Company granting the protection of the said Company to him, his territories, countries, peoples, and subjects, and extending to them the benefit of the rule and government of the said Company.⁷

The agreement with the Habr-awal of July 14, 1884, commences:

Whereas the garrisons of His Highness the Khedive are about to be withdrawn from Berbera and Bulhar, and the Somali Coast generally, we, the undersigned Elders of the Habr-awal Tribe, are desirous of entering into an agreement with the British Government for the maintenance of our independence, the preservation of order, and other good and sufficient reasons.⁸

The agreement with the Gadabursi of December 11, 1884, commences:

We, the undersigned Elders of the Gadabursi Tribe, are desirous of entering into an Agreement with the British Government for the maintenance of our independence, the preservation of order, and other good and sufficient reasons.⁹

Most of the agreements involve a commitment by the tribes not to cede their territory to any other alien without the agreement of the United Kingdom. No agreement conveys a power to the United Kingdom itself to convey the territory involved. Most of the agreements, as stated in the excerpts above, state expressly that they are animated by a concern for the maintenance of the independence of the pertinent tribe.

During the Mahdist Revolt in the Sudan, Britain was anxious to gain Ethiopian Emperor Menelik's neutrality. Menelik's price was territory. James Rennel Rodd, Chief Secretary of the British Agency in Cairo, arrived in Addis Ababa in April, 1897, and concluded a treaty and an exchange of notes ceding territory by delimiting the border between the British Somali protectorate and Ethiopia.¹⁰ The territory ceded was Somali. Indeed, as late as 1909, the British War Office

6. Texts of the Agreements may be found in BRITISH AND FOREIGN STATE PAPERS vols. 75-82 [hereinafter STATE PAPERS]; and in 18 HERTSLET'S COMMERCIAL TREATIES (1893) [hereinafter HERTSLET'S].

7. STATE PAPERS, *supra* note 6, at vol. 76 app. IV.

8. STATE PAPERS, *supra* note 6, at vol. 76 p. 101; HERTSLET'S, *supra* note 6, at vol. 18 p. 69.

9. STATE PAPERS, *supra* note 6, at vol. 76 pp. 102-03; HERTSLET'S, *supra* note 6, at vol. 18 p. 71.

10. S. TOUVAL, SOMALI NATIONALISM 156 (1963).

was describing the ceded territory in an official map as "Abyssinian Somaliland."¹¹ The only acknowledgement of Great Britain's treaty obligation to protect the Somalis appeared in two clauses of the treaty with Ethiopia, one requiring the Ethiopian Government to provide the Somalis with "equitable treatment" and orderly government, the other guaranteeing the tribes pasturage on either side of the new frontier.¹²

The treaty was not published nor was the boundary demarcated at the time, and Ethiopian rule appears not to have been felt at all. It was only in 1934 that the Somalis became aware of the 1897 treaty. One student of the subject writes:

It would appear plain that the British secret agreement with Ethiopia was a violation of its treaty commitments to the Somali tribes. The fact that these treaties were concluded in treaty form, drafted by the British and published in *British and Foreign State Papers* as treaties makes it difficult to escape the conclusion that they were so viewed by the United Kingdom Government.¹³

IV.

A right without a remedy, Holmes said, is no right at all. What can be done when a state which is effectively superordinated over another has violated one of the obligations deriving either from customary or conventional international law? The rather dismal experience of the *actio popularis* in international law makes it seem most unlikely that some variant on it will prove more effective. Remedies for violations of protective obligations cannot be derived from general international remedy theory without certain adjustments.

The very nature of the asymmetrical relationship between the two parties and the usually restricted international options of the subordinated and injured party result in those features of these cases which are common within the class, but quite different from other violations of international law. First, because foreign affairs competence has been assigned to the superordinated party and is performed secretly through the metropolitan, the protected party is often unaware of the action that has caused the injury. In the case of British transfer of Somali territory to the Ethiopian Empire, for example, the Somalis were unaware of the transfer for almost four decades. Second, even if the protected state is aware of the action, its lack of international standing prevents it from lodging a protest or initiating an ac-

11. *Sketch Map of Somaliland*, [British] War Office, (July, 1909) (Copy on file in Library of Congress Map Division).

12. See HERTSLET'S, *supra* note 6, at vol. 18 pp. 428-29.

13. See I. LEWIS, *THE MODERN HISTORY OF SOMALIA* 107 (1980).

tion for remedy. The continuation of the subordinated status means, additionally, that the injury is likely to become a settled state of affairs long before the subordinated party acquires sufficient independence to press the claim on its own behalf.

Under the circumstances, it would appear lawful for the former protected state to press the claim against the former superordinated state. A claim would have to be pressed within a reasonable time after the former protected state had emerged from its subordinated status, taking account of the disruptions attendant on state successions of this sort.

Remedy theory in international law has expressed a preference for specific performance or *restitutio in integrum* when it is feasible, and substituted performance when it is not. Some treaty violations between superordinated and subordinated states, such as spoliation of national treasures in violation of the protectorate agreement, lend themselves to specific performance; but other violations, such as alienation of territory of the protected state to a third state in violation of a protectorate agreement, often can not be repaired by the former protecting state. Indeed, subsequent absorption of the illegally transferred territory could well be irremediable, if the population of the latter territory has been totally replaced and/or has come to freely identify itself with a new sovereign. In cases such as these, liquidated damages would appear appropriate.