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THE PROTECTION OF PROPERTY RIGHTS IN THE INTER-AMERICAN SYSTEM:

Banco de Lima Shareholders v. Perú

VICTOR M. MARROQUIN-MERINO*

SUMMARY

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I. INTRODUCTION

The security that national and foreign investors have that their property will not be arbitrarily expropriated, and that the state will compensate them for the loss incurred in case it decides to expropriate their property, is a *sine qua non* of their decision to invest.¹ In most developing nations, especially in Latin America, this sense of security has often been lacking, notwithstanding the pressing need for extensive private investment to fuel industrialization and

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¹ "A primary concern of transnational investors is to protect themselves against the risk of expropriation . . . [and] although a coherent and predictable legal system is no longer a guarantee in itself, it remains a *sine qua non* for foreigners." Amado, *Free Industrial Zones: Law and Industrial Development in the New International Division of Labor*, 11 U. PA. J. INT'L BUS. L. 140 (Winter 1989). See also Bradley, *Managing Against Expropriation*, 55 HARV. BUS. REV. 75, 81 (JUL.-AUG. 1977).

economic development.² Even democratic governments have exercised their sovereign power to expropriate, sometimes arbitrarily, the property of their own citizens.³

Scholars have dealt extensively with the themes of expropriation and nationalization of property in the context of the law of state responsibility for the treatment of aliens.⁴ It is now a settled principle of international law that a state incurs international responsibility when it expropriates the property of aliens in violation of international law.⁵ However, little has been said about the international responsibility that a state may incur when it decides to expropriate the property of its own citizens.

An explanation for this dearth of commentaries can perhaps be found in the notion that international law governs relations among states. Indeed, expropriation of foreign nationals' property has long been thought to give rise to state responsibility only because of the widely embraced Vattelien conception that "an injury to the alien is an injury to the state,"⁶ for which the state may seek redress under international law. And the result is paradoxical: Whereas aliens have long enjoyed protection against arbitrary expropriation under international law, nationals have been restricted to whatever remedies they may have available under the domestic laws of their respective states.

This older, more limited conception of state responsibility is obsolete today. The post-War era has witnessed the rise of a body of international

² For instance, at the turn of the century the most important American investors considered the Peruvian market a great financial risk. U.S. diplomatic presence was limited to a small legation whose lack of influence in the high circles of political power was unable to provide the sense of security that investors needed in order to commit themselves to commercial operations of significant import. North American investment in Perú did not become significant until President Augusto B. Leguía took power on July 4, 1916. Leguía mastered the English language, admired U.S. capitalist expansion, and believed in "manifest destiny." A portrait of President James Monroe decorated his office in the Presidential Palace. Americans felt that their investments were guaranteed by president Leguía. And powerful financial institutions, like the National City Bank of New York, soon became the leading investors and financiers of the Peruvian Government. See J. CAREY, *PERÚ AND THE UNITED STATES: 1900-1962* 67-89 (1964).

³ For example the Mexican government, which in 1982 nationalized the country's banking industry. See Mitchell, *Privatization of Mexican Banks*, N.Y.L.J., Sep. 26, 1990, at 3, col. 3.

⁴ See, e.g., F.V. GARCÍA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* (1974); I. FOIGHÉL, *NATIONALIZATION, A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW* (1957); S. FRIEDMAN, *EXPROPRIATION IN INTERNATIONAL LAW*, (1953); E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915); Bindschedler, *La Protection de La Propriété Privée en Droit International Public*, 90 RECUEIL DES COURS (1956).

⁵ There is a clear and well-established obligation in traditional international law to respect the vested rights of aliens. See GARCÍA-AMADOR, *supra* note 4, at 268. Recognition of the principle is reflected in international jurisprudence. See, e.g., *Affaire David Goldenberg*, (Germany v. Rumania) (1928), II R. Int'l Arb. Awards, at 909. "Respect for private property and the acquired rights of aliens undoubtedly forms part of the general principles recognized by the law of nations."

⁶ "Whoever illtreats a citizen indirectly injures the state, which must protect that citizen." III CLASSICS OF INTERNATIONAL LAW 136 (Translated by Ch. G. Fenwick, 1916).

human rights law grounded on the premise that "every nation has an [international] obligation to respect the human rights of its own citizens."⁷ Both the United Nations (UN) and the Organization of American States (OAS) embraced the concept of human rights shortly after World War II. The UN Charter expressly committed all member states to "universal respect for, and observance of human rights and fundamental freedoms;"⁸ to "fulfill in good faith the obligations assumed by them in accordance with [the Charter];"⁹ and "to take joint and separate action in cooperation with the Organization for the achievement of [universal respect and observance of human rights]."¹⁰ Similarly, the OAS Charter bound its members to "[reaffirm] the fundamental rights of the individual without distinction as to race, nationality, creed or sex;"¹¹ and "to promote the observance and protection of human rights."¹² Moreover, on December 10, 1948, the UN General assembly signed the Universal Declaration of Human rights declaring that,

Everyone is entitled to all the rights set forth in this declaration, without distinction of any kind, such as . . . national origin . . . [and] no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs¹³

On that same year, the Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man, declaring that, "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality," therefore deserving international protection.¹⁴

⁷ R.B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3 (H. Hannum ed. 1984).

⁸ Charter of the United Nations, June 26, 1945, 59 Stat 1031, T.S. No. 993, 3 Bevans 1153, entered into force Oct. 24, 1945. Article 55(c).

⁹ *Id.* Article 2(2).

¹⁰ *Id.* Article 56.

¹¹ Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, entered into force Dec. 13, 1951; Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324, entered into force Feb. 27, 1970. Article 3(j).

¹² *Id.* Article 112.

¹³ Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

¹⁴ American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, adopted by the Ninth International Conference of American States, Bogotá (1948): Novena Conferencia Internacional Americana, 6 *Actas y Documentos* 297-302 (1953) [hereinafter American Declaration].

These declarations, though not considered legally binding at the time of their adoption, expressly provided protection for property rights. The Universal Declaration provided in Article 17(2) that, "No one shall be arbitrarily deprived of his property."¹⁵ And the American Declaration declared in Article XXIII that, "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."¹⁶ Today, both declarations are treated by most commentators as binding law.¹⁷ Subsequent developments in international law have confirmed this of property rights. Article 21 of the American Convention on Human Rights provides that, "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."¹⁸ Similarly, Protocol No. 1 of the European Convention on Human Rights provides that "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."¹⁹ Furthermore, Article 14 of the African Charter on Human and Peoples' Rights establishes that the right to property "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."²⁰ Indeed, many countries have enacted domestic legislation for the

¹⁵ See Universal Declaration, *supra* note 13.

¹⁶ See American Declaration, *supra* note 14.

¹⁷ The Inter-American Commission on Human Rights has consistently held that the American Declaration has binding force. See, e.g., Inter-American Commission on Human Rights, Res. No. 23/81, Case 2141 (U.S.), of Mar. 6, 1981, IACHR, Annual Report, 1980-1981, OEA.Ser.L/V/II.54, doc. 9 rev. 1, at 25, paras. 16-17 (1981), reprinted in 2 T. BUERGENTHAL & R. NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, booklet 21, at 6, paras. 16-17 (1983). The American Declaration of the Rights and Duties of Man has arguably been incorporated by reference into the OAS Charter and therefore binds all OAS members. See Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 8 (1985). See also GARCÍA-AMADOR, LA COMPETENCIA DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS Y LAS OBLIGACIONES DE CUBA EN LA MATERIA 38 (Monograph No. 1984-2, Institute of Inter-American Studies, Graduate School of International Studies, University of Miami)(Countries which are not parties to the American Convention have an international obligation to respect the rights set forth in the American Declaration).

¹⁸ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L/V/II.23 doc. rev. 2 entered into force July 18, 1978 [hereinafter American Convention].

¹⁹ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sept. 3, 1953; as amended by Protocol No. 3, entered into force Sept. 9, 1970, and Protocol No. 5, entered into force Dec. 21, 1971.

²⁰ African [Banjul] Charter on Human and Peoples' Rights, adopted June 21, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. A common element to these three regional instruments is the requirement of public need or public/social interest. The precise meaning of the terms "public need" and "social interest" may vary slightly according to how they are developed in different jurisdictions. In Brazil, for example, the term "social interest" has been defined to involve expropriatory measures destined to "solve . . . social problems, that is, those pertaining directly to the poor, to the workers, and to the populace in general for the improvement of their living conditions; for a more equitable distribution of wealth, [and] finally,

implementation of these property-related provisions.²¹

The Latin American states, however, have seldom respected the property rights of their own nationals. Even in countries where the right to property has been given constitutional ranking, states have trampled over the constitution to confiscate their own nationals' property. Such was the case of the government of Perú, which in 1987 attempted to expropriate the country's banking industry without any justification in the public interest, without prior payment of just compensation, and without following the procedures set forth in the Peruvian Constitution. Surprisingly, this arbitrary use of state power was impliedly condoned at the international level by the Inter-American Commission on Human Rights. In a patently unreasonable ruling, the Commission failed to protect a group of Peruvian bank shareholders against the arbitrary expropriation, alleging it could not assert subject matter jurisdiction over the rights of anyone but natural persons. The Commission reasoned that, since banks are not natural persons, and the American Convention protects only the rights of human beings, the case was not within its jurisdiction. In fact, the Commission's reasoning dehumanized the shareholders and declared that they did not have any human rights.

This article analyzes the Commission's failure. It seeks to determine its main causes and to offer a solution to the problem. In the course of the analysis it addresses relevant questions of exhaustion of local remedies and examines the critical role that the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights should play in the protection of property rights. Part II examines the development of the right to property in the Inter-American system. Part III gives a general background on the Commission's work and examines the Commission's jurisprudence in property cases. Part IV sets forth the facts of the Peruvian case and evaluates the implementation of constitutional protection of property rights in Perú, emphasizing the effectiveness of *amparo*²² actions in civil law jurisdictions as the last remedy available to the national prior to the assertion of his claim under international law. Part V critiques the Commission's ruling on both substantive and procedural grounds. And finally, Part VI makes a proposal for a new regional mechanism capable

for the attenuation of social inequities." See S. Fagundes, *Da Desapropriação no Direito Constitucional Brasileiro*, 14 REVISTA DE DIREITO ADMINISTRATIVO 3 (1948).

²¹ For example, the constitutions of Brazil and Perú, where the right to property is characterized, respectively, as "garantido" and "inviolable." See CONSTITUCIÓN POLÍTICA DEL PERÚ, Art. 125 (1979); CONSTITUIÇÃO FEDERAL DO BRASIL, Art. V, § XXII (1988).

²² The *amparo* action is a constitutional guarantee that protects all individual rights not covered by the action of *habeas corpus stricto sensu*. The term *habeas corpus* comes from a Latin expression which means, roughly, "bring the body," or "let the body be brought here." Therefore, it refers exclusively to the physical integrity of the individual and to his right not to be arbitrarily arrested or detained. The *amparo* action complements the action of *habeas corpus*. In our case, it is the action that protects, *inter alia*, the right to the enjoyment of property. See E. CHIRINOS SOTO, *LA NUEVA CONSTITUCIÓN AL ALCANCE DE TODOS* 351-353 (1980).

of providing effective protection for property rights in the Inter-American system.

II. BACKGROUND ON THE RIGHT TO PROPERTY

In the Inter-American system, every individual - whether a corporate shareholder, a member of a peasant community, or a simple home or store owner - has the right to the use and enjoyment of his property. This right is established in Article 21 of the American Convention. The Inter-American Commission on Human Rights, however, disagreed with this basic principle in the case of *Banco de Lima*. Thus, before we set out to analyze the case in more detail, it is important that we examine what transpired at the meeting where the text of Article 21 was studied, debated and perfected, in order to determine whose rights it was intended to protect.

A. *The American Convention*

The idea of drafting an Inter-American Convention for the protection of human rights originated at the Fifth Advisory Meeting of the Organization of American States, held in Santiago de Chile in 1959 - eleven years after the signing of the American Declaration of The Rights and Duties of Man. At this meeting, the delegates approved the Declaration of Santiago, charging the Inter-American Council of Jurists (IACJ) with drafting an American Convention on Human Rights. The members of the IACJ set out to work on the project immediately, producing a Draft Convention in short order.²³ This draft, dated September 8, 1959, contained a provision on the right to property that read:

1. Everyone has the right to private property, but the law may subordinate its use and enjoyment to the public interest.
2. No one shall be deprived of his property, except upon payment of just compensation, for reasons of the public interest, and in the cases and according to the forms established by law.²⁴

Consideration of the Draft Convention was postponed for ten years until the delegates of the American States met again on November 7, 1969 at the Inter-American Specialized Conference of San José, Costa Rica. The provision on the right to property, Article 19 of the Draft Convention, was submitted for

²³ For a brief history of the OAS meetings leading to the signing of the American Convention see *Manual de Normas Vigentes en Materia de Derechos Humanos*, OEA/Ser.L/V/II.23 doc.21 rev.5, 8 de Junio 1977. For a more detailed background to the American Convention see I OAS GENERAL SECRETARIAT, *THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS 19-51* (F.V. García-Amador ed. 1983) [hereinafter *THE INTER-AMERICAN SYSTEM*].

²⁴ *The Legislative History of the American Convention*, in 2 T. BUERGENTHAL & R. NORRIS, *supra* note 17, booklet 12, at 108.

consideration in its original form. Upon the opening of the session, the delegates of Brazil and Colombia submitted two different proposals to amend the original text. The Brazilian delegation suggested that the text include a third clause stating:

In case of expropriation in the public interest of undeveloped lands, the law may provide for the payment of the compensation by means of the delivery of official bonds, redeemable by term and containing a protection clause against devaluation.²⁵

The Brazilian delegate, Mr. Carlos Dunshee de Abranches, stated that this addition was offered as a "response to those who criticize the inclusion of the right to the use and enjoyment of property or of the right to private property, as representing an obstacle to agrarian reform."²⁶ The government of Brazil was of the opinion that,

the text that prevailed in the preparation of the Draft Convention under study did not take into consideration the recent constitutional and legal changes that have been approved in most of the American states for the purpose of making possible *agrarian reform and other measures . . . indispensable for the attainment of economic and social development* in this hemisphere (emphasis added).²⁷

The measures to which Mr. Dunshee de Abranches alluded were the expropriation of land holdings for purposes of agrarian reform and the nationalization of industries involved in the exploitation of key natural resources. These land holdings and industries are usually owned by foreign and national corporations. The IACJ text required that payment of just compensation be made prior to the expropriation, imposing a potentially heavy burden on the developing American states. The purpose of the amendment proposed by the

²⁵ *Id.* at 108-109. The proposal submitted by the Colombian delegation did not provide protection against arbitrary expropriation and, therefore, was rejected by an overwhelming majority of the delegates. Only the Colombian delegate voted for its passing. The proposal read:

1. All peoples have the right to self-determination. By virtue of this right they freely establish their political organization and likewise provide for their economic, social and cultural development.
2. For the achievement of their objectives, all peoples may freely dispose of their natural riches and resources without prejudice to the obligations derived from international economic cooperation based upon the principle of reciprocal benefit as well as of international law. In no case shall a people be deprived of its own means of subsistence.

²⁶ *Minutes of the Eleventh Session of Committee I*, Nov. 17, 1969, in 2 BUERGENTHAL & NORRIS, *supra* note 17, booklet 12, at 108-10 (summary minutes of the Inter-American Specialized Conference of San José, Costa Rica).

²⁷ *Observations of the Governments of the Member States Regarding the Draft Inter-American Convention on Protection of Human Rights*, in 2 T. BUERGENTHAL & R. NORRIS, *supra* note 17, booklet 13, at 93 (Amendments to the Draft Inter-American Convention proposed by the Government of Brazil, presented to the Secretariat on November 10, 1969).

Brazilian delegation was to enable states in financial trouble to compensate the individual shareholders of the expropriated corporations in government bonds. These bonds would be guaranteed against currency devaluations, and therefore would also be negotiable, constituting an effective payment of compensation as required by the original text.

The delegates of the other nations, however, thought that amending the draft to provide for payment in bonds was unnecessary. The general sentiment that prevailed among the delegates at the session was that a set of minimal guarantees would be preferable to detailed provisions on expropriation, and this sentiment found final expression in the text approved as Article 21 of the American Convention.²⁸ As finally adopted, Article 21 was virtually identical in substance to the IACJ's proposal:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.²⁹

Like the IACJ's draft, the final text set forth three minimal guarantees against arbitrary expropriation. First, property can only be taken for reasons of public utility or social interest. Second, although states have some limited discretion as to the precise *mode* of compensation, payment of just compensation must be made *prior to* the expropriation. Third, an expropriation can only be carried out in the cases and according to the forms established by the laws of the American States.³⁰ Furthermore, the rationale of the amendment proposed by the Brazilian delegation, and the discussion that took place thereafter, clearly shows that these guarantees were not only intended to protect the rights of home and store owners, but also those of individual corporate shareholders. Indeed, Professor García-Amador, former Legal Counsel to the OAS from 1962 to 1977, reaffirmed the intent of Article 21 stating that,

Article 1 of the First Protocol to the European Convention on Human Rights, and Article 21 of the 1969 American Convention on Human Rights, recognize that every person, *natural or legal*, has the right to the use and enjoyment of his property, without

²⁸ See *Minutes of the Eleventh Session of Committee I*, *supra* note 26.

²⁹ See American Convention, *supra* note 18. A third paragraph was added stating that usury as well as any other form of exploitation of man by man shall be prohibited by law.

³⁰ See *Minutes of the Eleventh Session of Committee I*, *supra* note 26, at 108-9.

regard to the nationality of such persons (emphasis added).³¹

Although the American Convention mentions "everyone," and the European Convention reads "every natural or legal person," Professor García-Amador makes no distinction as to whose rights each instrument is intended to protect. That is only a natural conclusion, for no human being ceases to be human upon becoming member of a corporation.

B. The American Declaration

The provisions of Article 21 can only be invoked against state parties to the American Convention. The only Inter-American instrument applicable to cases involving states that have not ratified the American Convention is the American Declaration of the Rights and Duties of Man. Unlike the Convention, however, the American Declaration was not drafted as a treaty, nor did the conference that adopted it intend it to be a binding legal instrument. Nevertheless, subsequent developments in the Inter-American system appear to have given the Declaration binding force for all OAS members by means of its implied incorporation into the OAS Charter.

In 1967, the OAS General Assembly signed the Protocol of Buenos Aires, which amended the OAS Charter and enlarged the powers of the Inter-American Commission on Human Rights. From this revision to the Charter, Professor Thomas Buergenthal, a former judge of the Inter-American Court, concluded that the Protocol of Buenos Aires, "changed the legal status of the [American] Declaration to an instrument that, at the very least, constitutes an authoritative interpretation and definition of the human rights obligations binding on all OAS member states under the Charter of the Organization."³²

³¹ F.V. GARCÍA-AMADOR, *EL DERECHO INTERNACIONAL DEL DESARROLLO* 137, n.6 (1987). The original Spanish text reads:

El artículo 1 del Protocolo [núm. 1 de 1952] a la Convención [europea] sobre la Protección de los Derechos Humanos y las Libertades Fundamentales (1950) y el artículo 21 de la Convención Americana de Derechos Humanos de 1969, reconocen a toda persona, natural o jurídica, el derecho al uso y el disfrute de sus bienes, cualquiera que sea la nacionalidad de dichas personas.

³² Buergenthal, *supra* note 17, at 3. In fact, Article 1 of the Statute of the Inter-American Commission on Human Rights - adopted by the General Assembly in 1979 pursuant to the amended OAS Charter - declares that the Commission is an "organ" of the OAS and further provides that,

For the purposes of the present Statute, human rights are understood to be:

- a. The rights set forth in the American Convention on Human Rights, in relation to the States parties thereto;
- b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

For the text of the Commission Statute see HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.60, Doc. 28, rev. 1, at 107 (1983), reprinted in 9 I.L.M. 673 (1970), 1 THE INTER-AMERICAN SYSTEM, *supra* note 23, pt. 2, at 98. See also BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser. L/V/II.71, Doc. 6, rev. 1, at 65 (1988).

The Inter-American Commission on Human Rights is in complete agreement with Professor Buerghenthal's position. The Commission has consistently held that the American Declaration has binding force on all OAS members as a result of the Protocol of Buenos Aires, and that all OAS members have an international obligation to abide by its provisions. For instance, in case 2141 the Commission held that,

The international obligation of the United States of America [not a state party to the American Convention], as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of [the] OAS (Bogotá, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, ratified by [the] United States on April 23, 1968 As a consequence of articles 3j, 16, 51 e, 112 and 150 of this Treaty, *the provisions of other instruments and resolutions of the OAS on human rights acquired binding force*. Those instruments and resolutions approved with the vote of [the] U.S. Government, are the following: [the] *American Declaration of the Rights and Duties of Man* (Bogotá, 1948); [the] Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965) [and the] Statute and Regulations of [the] IACHR of 1979-1980 (emphasis added).³³

Aside from its status as a part of, or interpretation of, the OAS Charter, the American Declaration likely represents customary law in the Americas. Dr. Carlos García Bauer, a former member of the Inter-American Commission who headed the Guatemalan delegation to the Conference that prepared the draft of the Protocol of Buenos Aires, has stated that, "considering the evolution that human rights have undergone since the adoption of the American and Universal Declarations, it is my opinion that they have acquired the status of international obligations."³⁴ Furthermore, even for a country like Cuba, which, in addition to not having ratified the American Convention, has persistently denied the competence of the Inter-American Commission to receive complaints against the state, "'human rights' are understood to be those 'consecrated in the American Declaration' of 1948 . . . [and] the obligation to respect the rights of the human person, established since the original [OAS] Charter of 1948, retains full validity for all [OAS] members."³⁵

Having recognized the normative status of the American Declaration, the

³³ See Case 2141, *supra* note 17.

³⁴ See C. GARCÍA BAUER, *infra* note 61, at 109.

³⁵ See F.V. GARCÍA-AMADOR, *supra* note 17. The original Spanish text reads: "[L]a obligación de respetar los derechos de la persona humana, consignada desde la carta original de 1948, conserva su plena validez para todos los Estados miembros, sean o no Partes en la carta reformada."

critical question for our purposes becomes whether its provisions can effectively protect an individual against arbitrary takings of his property. The American Declaration protects all fundamental rights provided in the constitutions of the American States, and among these rights is the right to property. Most Latin American constitutions are very explicit and precise in protecting property as a fundamental right. For example, Article 5, Clauses XXIV and XXV of the Brazilian constitution provide, respectively, that,

The law shall establish the procedure for expropriation on the grounds of public necessity or utility, or in the interest of society, against fair indemnification made in advance and in cash In the event of imminent public danger, the appropriate authority may use private property and the owner is assured of subsequent indemnification if damage occurs.³⁶

Article 19, Clause 24 of the Chilean constitution provides even more specific protection, establishing that,

In no case may anyone be deprived of his property . . . except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the [legislature]. The expropriated party may protest the legality of the expropriation action before the ordinary courts of justice and will, at all times, have the right to indemnization for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said tribunals in accordance with the law In the absence of an agreement, the indemnization shall be paid in cash. Material possession of the expropriated property will take place following total payment of the indemnization³⁷

Provisions like these - which are even more strict than those contained in Article 21 of the American Convention - are at the heart of most Latin American constitutions. Nationals of states not parties to the American Convention can therefore claim international protection of their constitutional right to property by denouncing the violation of Article XVIII of the American Declaration before the Inter-American Commission on Human Rights. Article XVIII provides that,

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby *the courts will protect him from acts of*

³⁶ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A.P. Blaustein & G.H. Flanz eds. 1990) [hereinafter CONSTITUTIONS], Vol. III, at 2.

³⁷ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, in CONSTITUTIONS, *supra* note 36, Vol. III, at 13.

authority that, to his prejudice, violate any fundamental constitutional rights (emphasis added).³⁸

If the constitution of an American state protects property as a fundamental right, the state is bound to protect the individual against arbitrary takings of his property. Any member state of the OAS engaging in arbitrary expropriations in violation of its own constitutional provisions, would make itself liable under international law for violating Article XVIII of the American Declaration.³⁹

C. The Right to the enjoyment of Property in Customary International Law

Before it was established in numerous multilateral treaties and declarations, the right to property evolved throughout the centuries into a recognized principle in the practice of states. This evolution had its early beginnings in the law of ancient Romans, who developed a rudimentary system for the protection of property rights.⁴⁰ The Romans exercised their right of eminent domain mainly to demolish old private dwellings and erect new public buildings.⁴¹ In all cases of expropriation, they compensated the affected owners. Later in the twelfth century, the English Magna Charta established a principle of procedure for the protection of patrimonial rights proclaiming in Article 39 that no man could be deprived of his property "without a prior judgment by his peers and according to the law of the land."⁴² This procedural safeguard was the precursor of modern judicial protection against arbitrary exercises of the state's right of eminent domain.

Centuries after, when the ideas of the enlightenment were sweeping throughout Europe, the Baron de Montesquieu advanced the principle of just

³⁸ See American Declaration, *supra* note 14.

³⁹ The International Court of Justice has recognized the principles expressed in the Universal Declaration of Human Rights as having the force of an international obligation, even in the absence of supplementary conventional instruments. See M. Schreiber, *La Pratique Récente des Nations Unies dans le Domaine de la Protection des Droits de l'Homme*, 145 RECUEIL DES COURS 322 (1976); E. Schwelb, *The International Court of Justice and The Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 348 (1972). Article 17(2) of the Universal Declaration provides specific protection against arbitrary expropriation establishing that, "No one shall be arbitrarily deprived of his property." See Universal Declaration, *supra* note 13.

⁴⁰ See Scalvanti, *La Espropriazione per Pubblica Utilità*, in IV PRIMO TRATTATO COMPLETO DI DIRITTO AMMINISTRATIVO 3 (1904). Although not a system in the true sense of the word, the Roman concept contemplated a forced "sale" of the property in question. Thus, the owner was compensated, either in valuables, fungible goods, or privileges. See O. MEDAUAR, *DESTINAÇÃO DOS BENS EXPROPIADOS* 33 (1986).

⁴¹ See Giaquinto, *Espropriazione per Pubblica Utilità*, in V NUOVO DIGESTO ITALIANO 650 (1938).

⁴² M. DUVERGER, *CONSTITUTIONS ET DOCUMENTS POLITIQUES* 442 (1974).

compensation.⁴³ Familiar with Roman laws and customs, the great French thinker wrote in his influential book, *The Spirit of the Laws*, that "When the public needs the property of a private individual . . . to erect a new public building, [or] to construct a new public road, it must indemnify [the owner]." ⁴⁴ He denied the State had any superior right over private property beyond the bare essentials of eminent domain. Having forced the individual to "sell his inheritance," the state could do no less than compensate him for the taking.⁴⁵

The ideas of Montesquieu and other great French thinkers of his time found their highest expression in the Declaration of the Rights of Man and of the Citizen, promulgated by the French National Assembly in August 26, 1789. Article 17 of the Declaration provided that, "property, being a sacred and inviolable right, cannot be taken away, unless evidently required by public necessity, legally verified, and after payment of just compensation."⁴⁶ This provision established three rigorous requirements, strikingly similar to those set forth in the American Convention: Before the state could legally expropriate the property of an individual, (1) it had to prove the existence of a public necessity, (2) such necessity had to be legally verified (implying judicial determination), (3) and payment of just compensation had to be made prior to the expropriation.⁴⁷

On September 3, 1791, the principles contained in this Declaration were embraced by the framers of the French Constitution who, mindful of the importance of protecting the right to property, sternly declared: "The Constitution guarantees the inviolability of the right to property, or that prior payment of just compensation be made in cases where a public necessity, legally verified, demands that [the right to property] be sacrificed."⁴⁸ That same year, the Bill of Rights was adopted as part of the American Constitution. The Fifth Amendment provided that "No person shall be . . . deprived of life, liberty or

⁴³ The concept of compensation was known to the Glossators of the first university in Bologna, Italy. Statutes of the time contain certain provisions for the payment of compensation. However, the idea of providing "just" compensation was developed later in the Modern Age by jurists and theologians who associated it with concepts of natural law. See U. Nicolini, *Espropriazione per Pubblica Utilità*, in XV ENCICLOPEDIA DEL DIRITTO 804-5 (1966).

⁴⁴ MONTESQUIEU, XXVI DE L'ESPRIT DES LOIS ch. XV (1748).

⁴⁵ "It is enough that [the state] can force the individual to sell his inheritance and that he be deprived of such great principle of the civil law that he cannot be forced to alienate his property." *Id.*

⁴⁶ M. DUVERGER, *supra* note 42, at 10. The original French text reads: "La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité."

⁴⁷ See O. MEDAUAR, *supra*, note 40.

⁴⁸ M. DUVERGER, *supra* note 42, at 11. The original French text reads: "La Constitution garantit l'inviolabilité des propriétés, ou la juste et préalable indemnité de celles dont la nécessité publique, légalement constatée, exigerait le sacrifice."

property, without due process of law; nor shall private property be taken for public use, without just compensation."⁴⁹

Both the American and French constitutions had great influence in the development of the law and of the legal institutions of many nations in the Western world. Indeed, the right to property has become a universal right, thoroughly protected by almost all the constitutions of the world, including those of diverse countries such as Germany⁵⁰, Italy,⁵¹ Argentina,⁵² Japan,⁵³ Portugal,⁵⁴ Switzerland,⁵⁵ Spain,⁵⁶ Chile⁵⁷ and Brazil.⁵⁸ Moreover, the practice of protecting the individual against arbitrary takings of his property has been plainly consistent with prevailing international law. An essential purpose of the law of international claims has been to provide for such protection. And the State's obligation to compensate aliens for the taking of their property has long been recognized as a basic principle of customary international law.⁵⁹ Indeed, protecting the right to property has been the concordant practice of states for such a considerable period of time that, the old age of the principle, coupled with its widespread practice and international recognition, fulfills all the requirements set by the law of nations for the establishment of a rule of customary international law.⁶⁰

⁴⁹ U.S. CONST. amend. V.

⁵⁰ See THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (1949) Art. 14-15, in CONSTITUTIONS, *supra* note 36, vol. VI.

⁵¹ See CONSTITUTION OF THE REPUBLIC OF ITALY (1947) Art. 42, in CONSTITUTIONS, *supra* note 36, vol. VII.

⁵² See CONSTITUCIÓN DE LA REPÚBLICA ARGENTINA (1853) Art. 17, in CONSTITUTIONS, *supra* note 36, vol. I.

⁵³ See THE CONSTITUTION OF JAPAN (1947) Art. 29, in CONSTITUTIONS, *supra* note 36, vol. VII.

⁵⁴ See CONSTITUTION OF THE PORTUGUESE REPUBLIC (1982) Art. 62, in CONSTITUTIONS, *supra* note 36, vol. XV.

⁵⁵ See THE FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION (1982) Art. 22, in CONSTITUTIONS, *supra* note 36, vol. XVII.

⁵⁶ See CONSTITUCIÓN DE ESPAÑA (1979) Art. 33, in CONSTITUTIONS, *supra* note 36, vol. XVI.

⁵⁷ See *supra* note 37.

⁵⁸ *Id.*

⁵⁹ See *supra* note 4.

⁶⁰ The UN International Law Commission has set the following elements as necessary for the establishment of a norm of customary law:

- a) A concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- b) A continuation or repetition of the practice over a considerable period of time;
- c) A conception that the practice is required by or consistent with prevailing

III. THE INTER-AMERICAN COMMISSION AND THE PROTECTION OF PROPERTY RIGHTS

A. Brief Background on the Inter-American Commission⁶¹

One of the most important conferences in the history of human rights in the Inter-American System took place at the Fifth Advisory Meeting of the Organization of American States, held in Santiago de Chile in August, 1959. At that meeting, the delegates of the American States decided to create an Inter-American Commission on Human Rights, charged with "promoting" human rights within the Inter-American system. Six years later, in November, 1965, the Second Extraordinary Inter-American Conference of Río de Janeiro adopted Resolution XXII, broadening the powers originally granted to the Inter-American Commission at the Fifth Advisory Meeting. The resolution empowered the Commission, *inter alia*,

- a. To give particular attention to observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
- b. To examine communications submitted to it and any other available information; to address to the government of any American State a request for information deemed pertinent by the Commission; and to make recommendations, when it deems appropriate, with the objective of bringing about more effective observance of fundamental human rights.⁶²

Only two years later, in 1967, the Protocol of Buenos Aires amended the OAS Charter, changing the status of the Commission from that of an autonomous entity to that of an "organ" of the organization by which the OAS was to accomplish the protection of human rights in the Inter-American system. This salutary change from a role of promotor to that of protector of human rights was only the first step toward the significant enlargement of the

international law;

- d) General acquiescence in the practice of other states.

II Y.B. INT'L L. COMM'N 26 (1950). Needless to say, all these requirements are met by the right to the enjoyment of property.

⁶¹ The purpose of this section is to provide a brief general background to the functions and procedures of the Inter-American Commission. Thus, it is by no means exhaustive. For more comprehensive accounts see, e.g., R. Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in H. HANNUM ED., *supra* note 7; C. GARCÍA BAUER, *LOS DERECHOS HUMANOS EN AMÉRICA* (1987); NEWMAN & WEISBRODT, *INTERNATIONAL HUMAN RIGHTS* (1990); and F.V. GARCÍA-AMADOR, *supra* note 17.

⁶² The Commission itself incorporated the provisions of Resolution XXII into its Statute under the heading of Article 9(bis). See C. Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, in NEWMAN & WEISBRODT, *supra* note 61.

Commission's powers that took place after the entry into force of the American Convention.

The Convention allows any person, or group of persons, or any nongovernmental entity legally recognized in one or more member states of the OAS, to file individual petitions with the Commission alleging violations of the Convention by a state party. If a petition is admitted, the Commission may request that the respondent state provide any information related to the petition as quickly as possible, within 90 days after the date on which the request is sent. Even at this stage of the proceedings, the Commission may request that the respondent state take provisional measures to avoid irreparable damage in cases where the denounced facts are true. If the government does not respond to any one of the allegations set forth in the complaint, or fails to challenge the facts, its silence may provide the basis for a presumption of the truth of the allegations. The Commission's regulations further state that a request for precautionary measures, and their adoption by the respondent state, does not prejudice the final decision made by the Commission.

Once this first procedural stage is completed, the Commission examines the petition to determine whether the grounds for it still exist. If they do, the Commission proceeds to examine the merits. At this point, the Commission may opt for a friendly settlement between the parties. If such settlement is not reached, and the respondent state is not party to the American Convention, the Commission issues a final decision in a confidential report which is transmitted to the parties. If the government fails to implement any of the Commission's recommendations set forth in the confidential report, the Commission may then publish it as part of its *Annual Report* to the OAS General Assembly.

In cases involving states parties to the American Convention, however, the procedure does not end at the reporting stage. Within three months from the issuance of the confidential report, either the Commission, or the respondent state, can submit the case to the Inter-American Court. The decisions of the Court are binding on all states under its jurisdiction. However, since the Commission is not required to submit a case to the Court, a problem crucial to our analysis arises in this context. The Commission has wide discretion to restrict the Court's jurisdiction, and to deny the affected individual access to enforceable judicial remedies. This is the case even where the respondent state has accepted the Court's jurisdiction. This situation can only be considered as highly unfortunate, for, as we will see in the section discussing the case of *Banco de Lima*, the Inter-American Court is, in many instances, better qualified than the Commission to engage in sophisticated interpretation of the American Convention.

B. Commission's Rulings on Property

An examination of the Commission's jurisprudence reveals at least six cases dealing with the protection of property rights. Of these six cases, only

two merit consideration for the purposes of this paper.⁶³ The first case involved the nationalization of all Peruvian private newspapers decreed by the military Government of General Juan Velasco Alvarado on July 23, 1974.⁶⁴ According to the text of the Commission's Resolution, the expropriating decree affected also the rights of shareholders in the enterprises which distributed the newspapers, the stock they issued, and the movable and immovable property of third persons in possession of these enterprises.

The Commission took up the case and placed itself at the disposal of the parties. The text of the resolution shows that the Commission was concerned with protecting the right to freedom of expression, rather than the property rights of the newspapers' shareholders. However, the only way that freedom of expression could have been preserved was by protecting the newspapers against the arbitrary expropriation. Now, did the newspapers have human rights? By taking up the case, the Commission recognized that, even if newspapers are not human beings, their arbitrary expropriation was affecting the rights of journalists and owners. The real issue was not whether the newspapers were human beings. Clearly, they were not. The issue was whether the Peruvian government, by expropriating the newspapers, was violating the human rights of those human beings who stood behind the corporate name of each newspaper. Again, the Commission was concerned with preserving freedom of expression. Thus, it was concerned with the rights of those who wrote the ideas expressed in the newspapers, that is, the journalists, and with the rights of those who made possible the expression of the journalists' ideas, that is, the publishers and owners of each of the newspapers.

In 1979, the Commission had the opportunity to decide an even more interesting case involving the arbitrary expropriation of corporate shares in a

⁶³ In two of the other four cases, the Commission admitted petitions filed by "juridical beings." See Case 9642 (PARAGUAY) INTER-AM C.H.R. 111, Resolution No. 14/87, March 28, 1987 (Resolving that the government of Paraguay should equitably indemnify the *company*, "Radio Nanduti," and its employees, for losses incurred as a result of a government-ordered shutdown and subsequent bankruptcy. Although no direct expropriation was carried out, the resolution was based, *inter alia*, on the property clause of the American Declaration of the Rights and Duties of Man); Case 9250 (PARAGUAY) INTER-AM C.H.R. 70, Resolution No. 6/84, May 17, 1984 (Admitting a petition filed by "Diario ABC Color," a Paraguayan newspaper, and declaring that the government had violated Articles IV (freedom of expression) and XXVI (due process) of the American Declaration of the Rights and Duties of Man. The Commission resolved to recommend that the government of Paraguay should allow the printing and free circulation of "Diario ABC Color," a Paraguayan corporation, and leave without effect the resolution of the Paraguayan Ministry of Interior which suspended its publication). See also Case 3519 (HAITI) Resolution No. 46/82 OEA/Ser.L/V/II.55, doc. 70, 9 March 1982; and Case 3405 (HAITI) Resolution No. 41/83 OEA/Ser.L/V/II.63, doc. 10, 24 September 1984. In Resolution 15/83 (Haiti) Inter-Am C.H.R. (1983), the Commission resolved to recommend that the government of Haiti should return the company, "Imprimerie Serge Bissainthe," a printing business, to its legitimate owners).

⁶⁴ For the full text of the Commission's ruling see Case 1866 (PERU), INTER-AM. C.H.R., OEA/Ser.L/V/II.49, doc. 21, 11 April 1980. The facts are taken from this document.

Nicaraguan corporation.⁶⁵ On June 20, 1979, the government of Nicaragua decreed the nationalization of several national industries. Among these industries was Empresa Cereales de Centroamérica S.A. (CERSA). The government confiscated the shares of this corporation without payment of just compensation. One of CERSA's shareholders, Mr. Carlos Martínez Rigueiro, filed a petition with the Inter-American Commission alleging that the government had violated his right to private property as set forth in Article 21 of the American Convention. The Commission agreed, and on April 18, 1986, resolved,

1. To declare that the government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights *by confiscating the dividends earned on shares owned by Mr. Carlos Martínez Rigueiro in the Empresa Cereales de Centroamérica S.A. (CERSA).*
2. To recommend to the Government of Nicaragua that it take steps to reimburse, in accordance with the law, Mr. Carlos Martínez Rigueiro *for the amounts owed to him as unpaid dividends . . . (emphasis added)*

The Government of Nicaragua submitted several observations on the case. But the Commission again rejected the government's arguments. Mr. Martínez Rigueiro, in his answer to the government's observations, asked the Commission to amend its prior resolution because, although it had mentioned the confiscated dividends, it had not rendered a decision on the shares themselves. Again, the Commission agreed, and on March 27, 1987, issued Resolution No. 2/87, resolving,

1. To declare that the Government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights *by not giving Mr. Carlos Martínez Rigueiro adequate compensation for shares he owned in the Empresa Cereales de Centroamérica S.A. (CERSA) and dividends earned on those shares.*
2. To recommend to the Government of Nicaragua that it proceed to reimburse Mr. Carlos Martínez Rigueiro *for the amounts owed to him for his shares in the Empresa Cereales de Centroamérica S.A. (CERSA) and dividends thereon . . . (emphasis added)*

⁶⁵ For the full text of the Commission's ruling and resolutions, including the observations made by the parties, see Case 7788 (NICARAGUA) OEA/Ser.L/V/II.71, Doc. 9, rev. 1, 22 Sept. 1987. The facts are taken from these documents.

In the view of the Commission, Mr. Martínez Rigueiro had not lost his humanity upon purchasing his shares in Cereales de Centroamérica. By taking up the case and protecting the rights of Mr. Martínez Rigueiro, the Commission recognized that Article 21 was fully applicable to corporate shareholders.

IV. THE PERUVIAN CASE: *Banco de Lima Shareholders v. Perú*

For the nations that have ratified the American Convention, Article 21 constitutes a binding international obligation to respect the property of every individual within their territories, including that of their own nationals. Such is the case of Perú. Nevertheless, domestic law is relevant to the inquiry here in two respects. First, as is true with any other international agreement, the American Convention can become a source of domestic legal rights for nationals of a state party only through its incorporation in some manner into that nation's own internal law. Second, individuals affected by an arbitrary expropriation can avail themselves of their international standing before the Inter-American Commission, only when all local remedies have been exhausted or when a denial of justice has been shown. It is therefore fitting that, before we set out to analyze the interlining of the Peruvian case, we examine how the Peruvian legal order has attempted to give constitutional force to the human right to the enjoyment of property.

A. *Perú: The Constitution and Human Rights*

The Peruvian Constitution of 1979 is perhaps the most prominent example of the importance that human rights acquired in the Latin American legal order during the post-War era.⁶⁶ In their zeal for giving maximum legal force to human rights treaties, the members of the constitutional assembly went beyond signing and ratifying the American Convention. They incorporated the Convention norms and proceedings into the very text of the constitution. Article 105 and the Sixteenth General Disposition of the Constitution provide, respectively:

- 105: The provisions in a treaty relative to human rights have constitutional ranking. They cannot be modified except by the procedure which applies for the reform of the Constitution.

⁶⁶ Here we must distinguish the theoretical legal order from the practical application of the norms contained in it:

[I]t is one thing to have an in force-Constitution, solemnly promulgated; it is another thing to have an effective Constitution, one that can be applied, that can be invoked as having the force of an obligation; and finally, it is another thing to have an *applied* Constitution, one that is effectively enforced in our political, administrative, economic and social life. Y.J. DE MIRANDA GUIMARÃES, *COMENTARIOS À CONSTITUIÇÃO: DIREITOS E GARANTIAS INDIVIDUAIS E COLETIVAS* 107 (1989).

- 16: The American Convention on Human Rights of San José, Costa Rica is . . . ratified, including articles 45 and 62 relative to the competence of the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

Article 105 represents a revolutionary step in Peruvian constitutional history. It gives nationals the right to invoke in local courts the provisions of the American Convention through *habeas corpus* or *amparo* actions.⁶⁷ This right of treaty self-execution has no parallel in any other Latin American jurisdiction. As a constitutional provision, it prevails over any other legal norm, including laws enacted by the Congress of the Republic and acts of the executive and judicial branches.⁶⁸ It follows that a Peruvian national can invoke Article 21 of the American Convention in domestic courts, with full constitutional authority, whenever the government violates, or attempts to violate, his human right to the enjoyment of property.

The Sixteenth General Disposition ratified the American Convention and recognized the competence of the Inter-American Commission on Human Rights to hear complaints against the state and to act upon them. Furthermore, it also recognized the contentious jurisdiction of the Inter-American Court of Human Rights, committing the state to abide by the principles set forth in the American Convention and to obey the Court's rulings in any case duly submitted to the Court. No fuller protection could have been given to human rights by an American state within the framework of the Inter-American System.

B. Perú: The Constitution and Property Rights

In matters of property, the framers decided to go beyond ratifying the American Convention. They enshrined the right to property as a fundamental right of the individual, specifying the cases in which property can be expropriated and going further than Article 21 of the American Convention in establishing the mode of compensation. The framers wrote:

⁶⁷ See E. Chirinos Soto, *supra* note 22, at 116. Commenting the article, Dr. Chirinos Soto wrote,

Perfecto. Inobjetable. En el capítulo de derechos humanos, la Constitución de 1979 tiene la máxima amplitud posible. Puede invocarse la violación, en el Perú, de la Declaración Universal de Derechos Humanos o del Pacto de San José de Costa Rica, para ejercitar, ante nuestros tribunales, acción de *habeas corpus* o de *amparo*.

⁶⁸ Article 87 provides that "The Constitution prevails over any other legal norm." See CONSTITUCIÓN POLÍTICA DEL PERÚ (1979).

Property is inviolable. The state guarantees it. No one may be deprived of his property except for reason of public utility or social interest, declared in accordance with law, and after payment *in cash* of just compensation (emphasis added).⁶⁹

Like the Brazilian delegate to the American Convention, the framers of the Peruvian Constitution felt that requiring that payment of just compensation be made only in cash in every instance exacted a potentially heavy obligation from the state. Mindful that this requirement could prevent expropriations designed to counter a national emergency or to effect social reforms, the framers decided to lessen the burden on the state by providing that payment could be made in bonds or installments. This provision, however, was drafted to apply in only five specific cases: (1) war, (2) public disaster, (3) agrarian reform, (4) urban renewal, and (5) energy exploration.⁷⁰ In all other cases, the framers decided to uphold the cash requirement, probably as a deterrent to expropriations not truly based in the social interest.

In the following subsection, we examine the facts of the Peruvian case and the response of the Inter-American Commission. In making this brief case study, we hope to illustrate why a new mechanism is needed in order to ensure that international human rights, and the constitutional guarantees we have examined thus far, be given practical effect under international law.

C. Banco de Lima: The Facts

On July 28, 1987, a date curiously coinciding with the anniversary of the Peruvian Independence, President Alan García appeared on television screens across the country to announce what he called a "revolutionary measure." His government had declared that it was in the social interest that the activities of the banking, investment, and insurance industries be placed under the exclusive ownership and control of the state.⁷¹ Therefore, his government was

⁶⁹ *Id.* Article 125.

⁷⁰ *Id.* The third paragraph of Article 125 provides:

In the case of expropriation due to war, public disaster, agrarian reform, urban renewal, or energy exploration, the payment of just compensation may be made in cash, by installments, or in obligatory acceptance bonds of free disposition, only redeemable in currency. In these cases, the law determines the amount of the issue, adequate terms of payment, periodically readjustable interest rate, as well as the portion of the compensation that must be paid in cash and in a pre-established manner.

⁷¹ President García made the announcement during his state of the nation address before the National Congress. See *Peru's García Proposes To Nationalize Banks*, Reuter Library Report, Jul. 28, 1987, AM Cycle; *Peru President Urges Bank Nationalization: Banks See Isolation*, Reuter Library Report, Jul. 29, 1987, PM Cycle; *Peruvian Bank Takeover Dismays Investors*, United Press International, Jul. 29, 1987, AM Cycle. For a transcript of President García's address see British Broadcasting Corporation, Summary of World Broadcasts, Part 4D, Latin America and Other (continued...)

proceeding to expropriate all of the shares of the Peruvian banks, investment firms, and insurance companies remaining in private hands.⁷²

To Peruvians at large, who had not heard of expropriation since the years of General Velasco's dictatorship, the news came as a shock.⁷³ To bank shareholders, small as well as great, the announcement meant that the state was seizing their property in an act of pure and simple kleptocracy, pickpocketing disguised as law. However, at least for the time being, there was little they could do to challenge the measure.

The President's announcement left the shareholders in a very uncomfortable situation. The bill which set forth the expropriatory scheme in all its details could take months before being approved by both houses of Congress. It was expected that the magnitude and nature of the proposed expropriation - which if enacted would give absolute control of all sources of credit to the executive branch - would elicit long and emotional congressional debates.⁷⁴ Moreover, the actual forced transference of corporate control from the banks'

⁷¹(...continued)

Countries, Jul. 30, 1987. García called the nationalization "the most revolutionary measure ever taken in the history of Peru." See *Peru Takes Control of 10 Banks, Financial Institutions*, Washington Post, Jul. 30, 1987, at E3.

⁷² According to official figures, at the time of the announcement the government controlled a majority of banking operations, giving 82 per cent of all credit and holding 70 per cent of all deposits. See Washington Post, *supra* note 71. The nationalization affected 10 private banks, 7 investment firms and 17 insurance companies. It did not include six foreign banks with subsidiaries in Perú. These banks were Bank of Tokyo Ltd., Citicorp, BankAmerica Corp., Bank of London and South America Ltd., Banco Central de Madrid, and Chase Manhattan Bank. See United Press International *supra* note 71; *Bank Nationalization Seen Increasing Peru's Isolation*, Reuter Business Report, Jul. 28, 1987, BC Cycle; *Foreign Bank Status in Perú*, New York Times, Jul. 30, 1987, at 6, col. 6.; and *Peru Proposes State Ownership of Banks*, Financial Times, Jul. 29, 1987, at 1.

⁷³ The military government of General Velasco - which lasted from 1968 to 1975 - engaged in widespread nationalization of many of the country's economic sectors. Velasco sent the army to take over the installations of the International Petroleum Company (IPC) - a subsidiary of Standard Oil - nationalized several important American mining concerns, and expropriated all newspapers, magazines, radio and television stations. For an account of General Velasco's government see A. BAELEA, *EL PODER INVISIBLE* (1978). The IPC filed an action of *habeas corpus* against the government challenging the nationalization. A dismissal of the action was affirmed by the Supreme Court. See Resolución de la Corte Suprema de 3 de Enero de 1969, 96 INFORMATIVO LEGAL RODRIGO 243 (Opinion of the Supreme Court).

⁷⁴ Indeed, internal debates had already started. The bank takeover was secretly planned by an inner circle of officials, two weeks before President García's speech before Congress, and approved by the Cabinet after an 11-hour debate without prior consultation with party leaders. The announcement took the leaders by surprise. See Washington Post, Jul. 29, 1987, at F1. For instance, Vice-President Luis Alberto Sánchez learned of the proposed nationalization from former President Fernando Belaúnde, on the senate's floor, only two hours before García's state of the nation address. Mr. Ramiro Prialé, President of the Senate and prominent leader of the President's party publicly declared that he opposed the idea of the state having an exclusive say on economic matters. And congressman Alfredo Barnechea simply resigned his membership in the President's party. Of the 60 voting members of the Senate, 32 belonged to President García's party. Of those 32, only 18 vowed to vote unconditionally in favor of the nationalization. But President García knew that Senators and Congressmen from the United Left Coalition would support the measure. See *Parches de Cámara*, Revista Sí, Aug. 10, 1987, at 6-7.

shareholders and administrators to the Ministry of Finance -which would consummate the violation of their right to property - could not take place until the bill was approved and enacted as law. From a procedural standpoint, and even though the injury was almost sure to occur, they could not challenge the measure through an *amparo* action in the courts of Lima because no actual injury had taken place or become imminent within the meaning of the *amparo* law.

Later in his televised speech, however, President García made the injury more than imminent, giving the perplexed shareholders the ammunition they needed to begin their judicial battle. Alleging that the entire banking industry was in great and severe danger, and that his government had developed an immediate need to "democratize" credit, President García announced that he had issued an executive decree ordering the immediate intervention of all banks, investment firms and insurance companies.⁷⁵ The decree fired the bank's boards of directors and ordered state management teams to take immediate control of the banks.⁷⁶ Employees were threatened with administrative action and prosecution if they did not cooperate with the interventors.⁷⁷ The President warned that police and army forces would be used against employees and shareholders if they tried to oppose any resistance.

D. Exhausting local Remedies in Peruvian Courts

The day after the President's announcement, the government froze all banking operations and ordered paramilitary police to surround the banks' buildings. Government officials ushered by heavily armed riot police took over the administration of the banks and began auditing their records behind closed doors.⁷⁸ Confident of his authoritarian power, and fully backed by the power of the army, President García expected a smooth transfer of control. But shareholders' reaction to the forceful intervention was swift and unexpected.

The legal order was ruptured by the unconstitutional use of force and the armed imposition of the interventors. The time came to put to the test the ambitious system for the protection of property rights that the framers of the constitution had so carefully designed. Shareholders of many banks and corporations filed *amparo* actions challenging the unconstitutionality of the

⁷⁵ "I hereby announce that while the bill is discussed at the national congress, and in accordance with the constitutional right that allows the state to temporarily take control of all economic activities . . . the government through a supreme decree issued today has decided on an immediate state action." See British Broadcasting Corporation, *supra* note 71 (President García's state of the nation address).

⁷⁶ See Chicago Tribune, Jul. 30, 1987, at C5.

⁷⁷ See United Press International, *supra* note 71.

⁷⁸ See *Peruvian Banks Do Not Open on First Day of State Control*, Reuters Library Reports, Jul. 30, 1987.

expropriation before several judges of first instance. Judge Eduardo Raffo Otero was the first to rule on an *amparo* action filed by the shareholders.⁷⁹ Holding for the claimants, Judge Raffo issued an injunction ordering the executive to immediately suspend all interventory measures. His ruling came on a late Friday evening, only hours after a smiling and triumphant President García, with constitution in hand, had told foreign reporters that the takeovers were legal.⁸⁰

The Court's ruling enraged President García, who angrily defied judicial authority, declaring that the nationalization was "irreversible" and stating that the unconstitutional takeovers would proceed no matter what the opposition.⁸¹ Armed with the Court's injunction, bank managers and owners returned to their offices on the morning of Monday August 3, and employees at the Banco Mercantil began holding a small rally in support of the Court's ruling.⁸² Faithful to his promise to take over the banks despite judicial opposition, President García sent riot police to break the peaceful protest. Police aboard an armored car mounted with a water cannon fired tear gas and doused some 200 protesters who had done nothing more than exercise their legal rights.⁸³

The violent incident turned public opinion against President García, compelling the government to obey the court's order and to withdraw from the banks. On August 7, more than a week after the court declared that the nationalization was unconstitutional, the President announced his decision to lift the illegal intervention.⁸⁴ Right after the announcement, however, the Attorney

⁷⁹ The action ruled upon by judge Raffo was filed by Guillermo Wiese, the owner of Banco Wiese (Perú's second largest private bank). See *Peru Going Ahead With Bank Takeovers Despite Judge's Ruling*, The Reuter Library Report, Aug. 1, 1987. Other judges followed. Among them were Judges José Rodríguez Ayma and Jaime Morán Cisneros. See *La Batalla Judicial*, Caratas, Sept. 14, 1987, at 18.

⁸⁰ See *Judge Suspends Takeover of Banks in Peru*, United Press International, Aug. 1, 1987, AM Cycle. Waving a copy of the Peruvian Constitution, García had ironically declared "I do not go about armed, this is my only weapon." See *Peru Ready For Clash With Bankers*, Financial Times, Aug. 3, 1987, at 18.

⁸¹ See *Peru Ready for Clash With Bankers*, Financial Times, Aug. 3, 1987, Sec. I, at 18. The Minister of Finance, Gustavo Saberbein, declared that the government would proceed with the state takeover despite the injunction issued by Judge Raffo. See *García Says Peru's Bank Nationalization Irreversible*, Reuter Business Report, Aug. 3, 1987, BC Cycle.

⁸² See *Owners Return to Banks in Peru*, United Press International, Aug. 3, 1987, AM Cycle.

⁸³ See *Foreign News Briefs, Lima, Peru*, United Press International, Aug. 4, 1987, AM Cycle. (Meanwhile, President García convened an extraordinary Cabinet session to discuss resistance to the nationalization).

⁸⁴ See *García Suspends Government Administration of Private Banks*, Reuter Library Report, Aug. 8, 1987, PM Cycle; *Peru Pauses On Way to Bank Seizure*, Washington Post, Aug. 8, 1987, at A26; *Peru Suspends Bank Takeover*, New York Times, Aug. 10, 1987, at D2, col. 4. President García declared he had decided to lift control of the banks to avoid giving bankers "a victory so they can knock on other doors, saying we have violated the constitution and caused the rupture of the democracy." The very same day he demanded that Congress approve his nationalization bill. See *Peru Lifts Control of 10 Banks But García Seeks Power To Seize Financial Institutions*, Chicago

(continued...)

General filed an appeal before the Second Civil Chamber of the Superior Court of Lima challenging Judge Raffo's ruling. The chamber affirmed. Still unhappy with the Court's ruling, the government attempted to impeach Judge Raffo by filing an action against him before the Internal Organ of Control of The Judiciary. The Organ found that Raffo's conduct had been correct and dismissed the government's claim.⁸⁵ The Peruvian judiciary, in an historical show of power, was affirming its independence.

The President, however, had his own reasons for being obedient. At the time of Judge Raffo's ruling, he was facing mounting popular opposition to his project of expropriation. Writer Mario Vargas Llosa had aroused the middle classes and was holding political rallies denouncing the takeovers all across the country.⁸⁶ Even within his own political party García faced strong dissent.⁸⁷ It was only as a matter of strategy that he decided to obey the *amparo* rulings and to wait patiently for the expropriation law to be approved.⁸⁸ Shouting from a balcony of the Presidential Palace in the style of Benito Mussolini, a wrathful President García thundered: "I want to warn the imbeciles and those that fall into demagoguery that lifting the intervention does not mean to reverse this process. There will be no reversal of the will to make the financial and credit organisms

⁸⁴(...continued)

Tribune, Aug. 11, 1987, at C3. The "other doors" to which President García alluded were either the Constitutional Guarantees Court or the Inter-American Commission on Human Rights.

⁸⁵ See *Hora Cero*, Caratas, Sept. 28, 1987, at 16-18. The Government filed a criminal action against Judge Juan Rodríguez Ayma accusing him of acting against the executive, the senate, and the state. Judge Rodríguez, ruling in favor of the bankers, had issued an injunction similar to Judge Raffo's.

⁸⁶ See *A Literary Lion Growls at State Power*, Financial Times, Sept. 7, 1987, at I4. Mr. Vargas Llosa led mass rallies against the takeovers, while the ruling party launched a blitz of television commercials to denounce him as a political opportunist. Upon announcing his opposition to the measure, he received threatening phone calls and was forced to put tight security around his home. Many other prominent political figures were also campaigning against the nationalization. For instance, Luis Cáceres Velásquez, the mayor of the city of Arequipa (Perú's second largest city), ordered all flags on public buildings in the city to be flown at half-staff and called on workers to begin an indefinite strike to battle the measure. See United Press International, *supra* note 71.

President García also had influential supporters, like President François Mitterrand of France, who announced he would visit Lima in October to solidarize with President García. See *Vargas Llosa Gives Peru Dangerous Plot for Democracy*, Los Angeles Times, Sept. 28, 1987, part 2, at 7, col. 1.

⁸⁷ See *Revista Sí*, *supra* note 74.

⁸⁸ President García said on a Lima radio station that his decision to lift control of the banks, rather than a step backwards in the seizure of the banking sector, was a temporary "tactical strategy" because [his government] "would nationalize the banking sector regardless of cries, complaints and come what may." See *Peru's García on Suspension of Intervention in Private Banks*, British Broadcasting Corporation, Summary of World Broadcasts, Aug. 11, 1987, Part 4D, Latin America and Other Countries.

belong to the people and serve national interests."⁸⁹ Comparing his scheme to a game of chess, President García declared at a press conference the following day: "There are times in which you have to let the other eat a pawn, but we will take the banks from the right wing."⁹⁰ The President was not playing the good citizen; he was looking for the check mate.

While debate over the expropriation bill continued in both houses of Congress, President García devised a statutory scheme to block the *amparo* actions that the shareholders were bound to file as soon as the bill became a law. To this end, his party introduced an amendment to law 23506 - the law of *amparo* - which was approved by the House of Representatives, where his party had an absolute majority.⁹¹ According to this amendment, no *amparo* action

⁸⁹ President García further declared "I am not interested in the intervention, what interests me is the nationalization of the banks of Perú. The bankers have filed a plea before a judge, but we have filed one before the people of Perú and we will defend it." He also contradicted himself declaring that he was "certain that the Superintendency of Banks and Insurance is an autonomous organization [that] will have the means to oversee the functioning of the banks to prevent irregularities while the law is under discussion." See *García Suspends Government Administration of Private Banks*, Reuter Library Report, Aug. 8, 1987, PM Cycle. García had previously declared that the principal aim of the intervention was to prevent those irregularities, implying that the Superintendency could not do so. See Washington Post, *supra* note 71.

Since July 28, 1987, when President García announced the arbitrary nationalization, the Peruvian media began to portray him as a folkloric neo-Hitler. News pictures showed him shouting from his balcony in the Presidential Palace with the words "Heil Hitler" at the bottom. See Revista OIGA, No. 347, Sept. 14, 1987, at 52. On August 11, 1987, the government of President García ordered all elementary and secondary schools to create "Basic Units for the Youth Military Commandos of Perú." These commandos were to receive instruction in martial arts. At the same time, the government started a literacy program in which children and illiterate adults were taught to recognize the vowels by reciting political slogans. In one book prepared for such purposes, students learned to read and write by memorizing and writing the slogan "Only God will save my soul and only APRISMO [President García's political ideology] will save Perú." See Revista OIGA, No. 348, Sept. 26, 1987, at 36-37.

⁹⁰ See *Jaque al Rey: El Presidente Ajedrecista Ante Una Nueva Partida*, Revista Sí, Aug. 10, 1987, at 3. As a presidential candidate, President García had conclusively asserted that he would not attempt to nationalize the banking industry because "[a] nationalization of the banks is carried out in a capricious way . . . it only increases the financial difficulties of the State . . . the State already controls 70% of the system and I do not know if it does so in an efficient way." See Petition Presented to the Inter-American Commission on Human Rights by the Shareholders of Banco de Lima, Mar. 11, 1988, at 3-4. President García had categorically asserted: "We will not nationalize."

⁹¹ See *Abuso y Amparo*, Revista Sí, Aug. 24, 1987, at 23. As noted above, the purpose of the *amparo* action is to prevent the violation of any constitutional right not protected by the action of *habeas corpus* and to re-establish the status quo prior to the violation or threat or violation. Before President García introduced his amendment in the lower house, Article 6 of law 23506 provided that an *amparo* action would not proceed in only three situations:

1. In cases where the violation or threat of violation of a constitutional right ceases to exist, or when the violation has become irreparable.
2. Against a judicial resolution emanating from a regular proceeding. [against res judicata]
3. When the injured party decides to file an ordinary suit [instead of an action of guarantee such as an *amparo* action].

For a brief overview of the law of *amparo* see J.E. BIAGGI GÓMEZ, *EL HABEAS CORPUS EN EL PERÚ: LEY, DOCTRINA Y JURISPRUDENCIA* (1984). For a more detailed study of the law of *amparo* containing a concordance and judicial opinions construing its different aspects see A.J. BALBIN GUADALUPE, *LEY DE HABEAS CORPUS Y AMPARO (ACCIONES DE GARANTÍA): CONCORDANCIAS,*

would be allowed to proceed in any of the following two situations:

1. When, for reasons of public necessity or social interest, declared in accordance to law and in compliance with the provisions of article 125 of the Constitution, the state reserves for itself any production or service activity.
2. When in situations of grave crisis or emergency, the state intervenes into economic activities with transitory measures of an extraordinary character.

The first part of the amendment was intended to prevent the filing of *amparo* actions in cases of expropriation. Thus, the shareholders were being deprived of a pre-established jurisdiction in violation of article 2 of the Constitution, and of the only action of guarantee that they could exercise to defend their legal rights.⁹² The second part of the amendment was intended to prevent the filing of *amparo* actions to challenge interventory measures (like the actions ruled upon by Judge Raffo) whenever the government claimed to be acting in a crisis or an emergency. Like the initial decree of intervention, this amendment was also unconstitutional

On Monday, September 28, Francisco Pardo Mesones, President of Banco Mercantil, announced that he would physically resist the takeover. Mr. Pardo brought a bed to his bank, and began to sleep in his office. Addressing Mr. Pardo's challenge, Attorney General Hugo Denegri warned bankers against defying the imminent takeover even if the nationalization law was "manifestly [and] radically unconstitutional." According to Mr. Denegri, "anarchy" would result if the bankers disobeyed.⁹³ Mr. Pardo disagreed and kept the vigil in his bank.

That same day, after four weeks and 150 hours of heated debate, the senate approved the unconstitutional takeover. The lower house held a marathon all-night session to give its final approval to the senate's draft on the early

COMENTARIOS, JURISPRUDENCIA (1985). For an in-depth study of the origins, history and development of the *amparo* action see D. GARCÍA BELAÚNDE, *EL HABEAS CORPUS EN EL PERÚ* (1979) (although the text deals with the action of *habeas corpus*, that action served the purposes of the *amparo* action prior to the signing of the 1979 Constitution).

⁹² Article 2(20)(L) reads in relevant part : "No person may be deprived of a jurisdiction previously established by law nor be subject to procedures different from the ones already established." See CONSTITUCIÓN POLÍTICA DEL PERÚ (1979).

⁹³ See *Defiance of Bank Takeover would 'ignite anarchy' Peru Says*, United Press International, Sept. 30, 1987, BC Cycle.

morning of September 29.⁹⁴ Ignoring, however, the swiftness displayed by his party-controlled Congress in the passage of the bill, the President postponed signing it into law for two weeks in order to avoid embarrassing protests during the overnight visit of French President François Mitterrand, scheduled to take place on Saturday, October 10. But as soon as President Mitterrand's plane took off from Lima's International Airport on Sunday 11, President García rushed to sign the unconstitutional takeover into law and to order the forceful and immediate taking of the banks.⁹⁵

Upon learning that the President had signed the bill, Mr. Pardo Mesones announced that he was ready to defend his property to the end. Mr. Pardo declared that if President García wanted him to leave his office, he would have to drag him out.⁹⁶ Other bankers, following Mr. Pardo's example, began to sleep in their offices and hired professional security forces to oppose any governmental attempt to invade their office buildings. Employees rallied around their bosses and locked themselves inside the buildings in support of the resistance.⁹⁷ The atmosphere became tense, and people felt the winds of war.

Shortly after Mr. Pardo's declaration, an angry President García ordered hundreds of paramilitary forces to surround and take the main office buildings of Banco de Crédito and Banco Wiese, Perú's two largest banks. Hurling tear gas and using tanks and rifle butts, the forces bashed their way into the banks, where shareholders and employers were opposing the expropriation, and installed new teams of interventors sent to take control.⁹⁸ Helmeted riot police

⁹⁴ See *Peru's Bank Takeover Law is Passed*, Financial Times, Sept. 30, 1987, § 1, at 4; *Peruvian Congress Approves Takeover of Banks*, Reuter Business Report, Sept. 29, 1987, BC Cycle; *Peru is Closer to Bank Law*, New York Times, Sept. 30, 1987, at D28, col. 3 (late city final ed.). The senate's draft declared the banks in a "situation of emergency" and ordered their immediate seizure before the courts could finish the relevant appraisals and determine compensation. See *Brief United Press International*, Sept. 30, 1987, PM Cycle.

⁹⁵ See *Peru's Banks Nationalization Law Comes Into Effect*, Reuter Business Report, Oct. 12, 1987, BC Cycle; *Peru's Banks Nationalized*, New York Times, Oct. 12, 1987, at D8, col. 6 (late city final ed.).

⁹⁶ Mr. Pardo challenged the unconstitutional expropriation announcing: "My bank is not for sale and I will not leave voluntarily. They will have to carry me out." Durr, *Peru's Nationalization of Banks Shakes Business Confidence*, Christian Science Monitor, Oct. 13, 1987, at 11. Right after starting his vigil on the eve of the bill's passage, Mr. Pardo became the center of national attention, a folkloric new kind of "pin-striped freedom fighter" who fascinated his country. His grandfather, José Pardo, had been President of Perú from 1904 to 1908 and from 1915 to 1919, when pro-American President Augusto B. Leguía ousted him from office on the fourth of July. Young Mr. Pardo announced that he would also enter politics "because it's the only way to fight." *Pin Striped Rebels Defy Takeover of Peru's Banks*, Financial Times, Oct. 19, 1987, § 1, at 46.

⁹⁷ See *Peruvian Police Break Down Bank Doors*, Reuter Library Report, Oct. 15, 1987, PM Cycle.

⁹⁸ See *Peru Seizes Banks With Tanks*, Financial Times, Oct. 16, 1987, § 1, at 1; *Reuter World News Highlight*, Reuter Library Report, Oct. 15, 1987; *Peruvian Police Break Down Bank Doors*, Reuter Library Report, Oct. 15, 1987.

smashed teller windows and swung rubber clubs at terrified employees.⁹⁹ Several reporters, employees, and shareholders were injured in the process, and news pictures of the tanks smashing through the bank's doors appeared in newspapers and on television screens all over the world.

On October 22, eight days after the violent bank seizure, Judge Jaime Morán Cisneros issued an injunction declaring that the expropriation was unconstitutional and ordering state interventors and paramilitary forces to immediately withdraw from the banks.¹⁰⁰ In a show of judicial power, Judge Morán left his chambers and, with his own Court order in hand, forced police to leave the banks. The Supreme Court, accusing Judge Morán of indecorous behavior, summarily dismissed him and replaced him with another judge. The new magistrate immediately declared Judge Morán's injunction null and void.¹⁰¹

At this point, prospects for relief from the Peruvian courts appeared dim. Of the five judges who made up the Second Civil Chamber of the Supreme Court, four were conspicuous supporters of President García's party.¹⁰² These judges were expected to overrule the *amparo* rulings that had favored the shareholders. Even if the case ended up in a different chamber of the Supreme Court, and a favorable ruling was obtained, President García could still appeal that decision to the Constitutional Guarantees Court, where six of its nine members were also keen supporters of his party.¹⁰³

D. Violating the Peruvian Constitution

President García's initial decree of intervention was unconstitutional on its face. At no time had the framers contemplated that the executive could engage in an actual, selective, and *de facto* expropriation of the whole banking industry prior to the enactment of the corresponding law in accordance with the constitution. Allowing such kind of expropriation would contradict article 125,

⁹⁹ See British Broadcasting Corporation, Summary of World Broadcasts, Part 4D, Latin America and Other Countries, Oct. 16, 1987; *Peru Nationalizes Banks*, American Banker, Oct. 14, 1987, at 3.

¹⁰⁰ See *Ruling Challenges Peru's Grip on Banks*, Chicago Tribune, Oct. 23, 1987, at C11; *Judge Overturns Peru Bank takeovers*, United Press International, Oct. 22, 1987.

¹⁰¹ See *Setback for Peru Bankers as Key Judge is Dismissed*, Financial Times, Oct. 29, 1987, § I, at 5.

¹⁰² See Caretas, *supra* note 79. The members of the chamber were Chief Justice Eloy Espinoza Saldaña and associate justices Carlos Castañeda Lafontaine, Edmundo Manrique Díaz, and Javier Urquiza Vargas. The only justice considered to be independent was José Antonio Silva Vallejo.

¹⁰³ *Id.* The high magistrates were Chief Justice Mario Peláez Bazán and associate justices Héctor Centurión Vallejo, Héctor Díaz Valdivia, Jorge León Seminario, Alfredo Corso Macías, and Luis Angel Valenzuela.

which requires the existence of a clearly proven social interest behind any expropriatory measure and that payment of just compensation be made prior to any transfer of control.¹⁰⁴ Furthermore, although the Constitution allows for interventory measures in certain cases, expropriation is not one of them. In providing for interventory measures, the framers had intended to grant the state in general - not the executive in particular - authority to intervene the economic activity in cases of grave crisis or national emergency. President García argued first that his aim was to protect and ensure the integrity of the banking industry - which, according to him, was in a state of grave emergency - while the bill of expropriation was debated in the Congress. But the banking industry was far from being in a state of emergency. By the end of the prior fiscal year, all private banks had shown profits, and President García himself had praised the excellent state of the economy during his July 28 state of the nation address.¹⁰⁵ Even if the banking industry were in a state of grave emergency, it would have been the government's responsibility that precipitated it, for at the time the bill was introduced, the state already controlled 75 per cent of all banking operations.¹⁰⁶ The President simply could not explain why his government was unable to "democratize" credit notwithstanding its near monopoly of the country's banking industry.

President García also argued that the intervention was necessary both to prevent a flight of foreign currency and to protect savings. Those concerns, however, could have been easily addressed. The Superintendency of Banks and Insurance (an independent government agency) could issue the necessary regulations in order to protect them. The framers had empowered the Superintendency with full authority to regulate all banks, investment firms and insurance companies.¹⁰⁷ Indeed, no arbitrary expropriation was needed.

Furthermore, the measure created an unconstitutional state monopoly over the banking and insurance industries. Dr. Chirinos Soto, one of the most influential framers of the constitution and also a prominent member of the President's party, stated in his annotations to the constitution that the intent of the framers had been to prevent a state monopoly of the banking industry. Commenting Article 153, which prohibits the establishment of monopolies, Dr.

¹⁰⁴ See CONSTITUCIÓN POLÍTICA DEL PERÚ (1979), Article 125.

¹⁰⁵ See British Broadcasting Corporation, *supra* note 71 (President García's state of the nation address).

¹⁰⁶ See Chicago Tribune, Aug. 24, 1987, Sec. 1 (News), at 5. (García accused of being greedy for wanting control of the 25 per cent of the banking industry remaining in private hands); United Press International, Aug. 1, 1987, AM Cycle (Government's control of 75 per cent of banking activity makes a takeover of private banks unnecessary); Wise, *Peru: Economic Wonders, Political Ills*, XXI NACLA Report on the Americas, May-June 1987, at 8 "[E]ven before the bank takeovers, the government controlled 80% of all credit"; See also Washington Post, *supra* note 71 and accompanying text.

¹⁰⁷ See CONSTITUCIÓN POLÍTICA DEL PERÚ (1979) Article 155.

Chirinos wrote: "The day the state takes over the banking industry we will easily descend into a totalitarian state . . . The day it becomes necessary to obtain state approval even for an overdraft, the government will have all of us on our knees."¹⁰⁸ Indeed, no constitutional provision could justify the establishment of a state monopoly and the arbitrary taking of the banks.

In mid-November, 1987, the Courts sent to each of the shareholders of Banco de Lima a notice of expropriation informing them that expropriation proceedings had been initiated and summoning them individually to appear in Court. The notice was not accompanied of any appraisal of the value of the shares, and the shareholders challenged the validity of the proceedings because of the lack of such appraisal. By this time, with a government-proposed amendment to the *amparo* law which deprived them of the last and only remedy they had in the internal jurisdiction, international law appeared to be the sole remaining source of protection for the shareholders.

COMPLAINT BEFORE THE INTER-AMERICAN COMMISSION

On March 11, 1988, 105 individual shareholders of the Banco de Lima filed a petition against the Peruvian Government before the Inter-American Commission on Human Rights.¹⁰⁹ The petition requested that the Commission issue a resolution declaring that the Peruvian Government had violated:

1. Articles 8, 24 and 25 of the American Convention "by selectively denying petitioners and others prompt, simple and effective recourse to the courts of Perú as previously established by law" [that is, by modifying the *amparo* law to deprive the shareholders of a pre-established jurisdiction].¹¹⁰
2. Article 21 [The human right to the enjoyment of property], "by wrongfully decreeing the intervention of Banco de Lima and taking action to expropriate the shares of Banco de Lima without any justification in the social interest as defined in the convention and in the [Peruvian] Constitution."¹¹¹

¹⁰⁸ See E. CHIRINOS SOTO, *supra* note 22, at 156-7.

¹⁰⁹ The Commission's resolution in the case of Banco de Lima was not published in the Inter-American Commission's 1989 *Annual Report* to the OAS General Assembly. See Case 10,169 (PERU), Resolution No. 16/89, OEA/Ser.L/V/II/75 Doc.33, April 14, 1989. All references made in the text to the shareholders' complaint are contained in this single resolution, which is cited in full in the appendix to this article.

¹¹⁰ See, Revista Sí, *supra* note 74, and accompanying text.

¹¹¹ There was no social interest justification for the expropriation. President García was using the concept to polarize the society into a war between bankers and the poor.

3. Article 21, "by wrongfully decreeing the intervention of Banco de Lima and taking action to expropriate the shares of Banco de Lima in other than in the cases and according to the forms provided in Peruvian law."
4. Article 21, "by wrongfully threatening to take the shares of Banco the Lima after selectively changing the rules for determining compensation to the detriment of Banco de Lima shareholders,"¹¹²

The petition asked the Commission to resolve that the Peruvian Government:

1. "immediately comply with all outstanding court orders relating to the decreed intervention of Banco de Lima and the threatened expropriation of its shares; and
2. it "cease and desist from expropriating the shares of Banco de Lima."

After initial screening, the Commission's Secretariat sent a request of information on the facts of the case to the Peruvian Government. The Peruvian Government transmitted its answer to the Commission, *without challenging the facts*. The government's answer stated in essence that the expropriation law was in accordance with the Peruvian Constitution and with article 21 of the American Convention.

More than a year after the shareholders presented their petition, and having denied their repeated requests for precautionary measures to protect their rights until the case was decided, the Commission declared their petition inadmissible, stating that it could not assert subject matter jurisdiction over the rights of juridical beings: "The Commission considers that what is at issue here are not the individual property rights of the individual shareholders, but rather the collective rights of the company, the Banco de Lima, and that this case is not within the jurisdiction of the Inter-American Commission on Human Rights." Since corporations do not have human rights, the Commission reasoned, there was no jurisdiction.

With the stroke of a pen, and without analyzing the provisions of the American Convention upon which it was relying to dismiss the complaint, the Commission left the shareholders without a remedy and at the mercy of high local tribunals utterly controlled by President García's party. Moreover, since the Peruvian Government had not even bothered to challenge the facts set out

¹¹² A government's initial appraisal was done on purpose on the basis of the financial statements that had been issued the prior year. Since at the time the devaluation index was nearing one hundred per cent per year, the government's method of appraisal virtually confiscated half of the banks' assets.

in the complaint, the Commission was obliged by its statute and regulations to presume them as true.¹¹³ Why, then, did it dismiss the complaint?

V. CRITIQUE OF THE COMMISSION'S RULING

A. On Procedural Grounds

Many hypotheses can be built around this contradictory Commission resolution in a case that clearly required its swift and forceful intervention. First and based on the chronology of the case as set out by the Commission itself, it could be asserted that the dismissal of the shareholders' claim was motivated by political considerations. The Commission's reasoning was simplistic and devoid of analysis. If Article 1(2) of the American Convention was applicable to the case in such a direct and clear way, it is difficult to understand why the Commission took more than one year to pronounce itself on the admissibility of the claim.¹¹⁴

The initial request for information was sent to the Peruvian Government on March 17, 1988. The first request for precautionary measures made by the shareholders at a hearing before the Commission *en banc* was denied on the grounds that the Peruvian Government had not yet filed an answer to the shareholders' complaint and that an order for precautionary measures would involve an examination of the merits, which the Commission was not allowed to do as of that moment. At no time was a jurisdictional barrier even mentioned by the Commission, even though such an observation did not require an examination of the merits of the case.

In fact, the Commission could have issued the precautionary measures requested by the shareholders at the very beginning of the proceedings. According to Commission Regulation 29(2) and well settled principles of international law, the granting of precautionary measures does not imply a decision on the merits of the case. Their purpose is to act as a temporary injunction to protect the rights set forth in the Convention while the case is decided. Indeed, the Inter-American Court, acting on a petition submitted by a group of journalists, recognized this principle in a case involving the Peruvian government.¹¹⁵ In that case, the request for precautionary measures was made

¹¹³ See Article 42, Regulations of the Inter-American Commission on Human Rights, Approved by the Commission at its 660th Meeting, 49th Session, April 8, 1980, and amended on March 7, 1985, at the Commission's 64th Session.

¹¹⁴ Indeed, Article 1(2) of the American Convention is a simple and straightforward provision. It reads: "For the purposes of this Convention, 'person' means every human being."

¹¹⁵ See Order of Aug. 8, 1989, on the granting of Precautionary Measures by the Inter-American Court in the Case of Peruvian journalists Hugo Bustíos Saavedra and Eduardo Rojas Arce (Available from the Inter-American Commission on Human Rights, Washington, D.C.)

together with the initial petition. The Court did not wait until the government responded. Furthermore, the International Court of Justice recognized the same principle, holding that a decision on provisional measures "in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the cases or any questions relating to the merits themselves."¹¹⁶

After refusing even to consider precautionary measures until the government of Perú responded to the shareholders' complaint, the Commission then stood with folded arms for seven months following the filing of the government's answer. Again, if Article 1(2) seemed so clear in defining that shareholders of a corporation were not humans and therefore did not have any human rights, why did the Commission fail to raise its jurisdictional objection either at the outset of the proceedings or at the *en banc* hearing where mention to the nature of the shareholders' claim was repeatedly made by the attorney of record?¹¹⁷

B. On Substantive Grounds

Giving the Commission the benefit of the doubt, it could be asserted that its performance in the Peruvian case is an example of its incapacity to deal with cases involving careful analysis and interpretation of the American Convention. As Professors Newman and Weissbrodt affirm regarding the work of the Commission,

Cases requiring sophisticated interpretation of rights in human rights instruments . . . are not typical of the work pursued by the Inter-American Commission . . . most individual petitions filed with the Commission allege conduct that applicable instruments clearly prohibit such as torture or arbitrary arrest and imprisonment. In the typical case the main issue for the Commission to decide is whether the alleged ill-treatment actually took place. If the Commission establishes the truth of the allegations, it can easily find violations of human rights provisions.¹¹⁸

¹¹⁶ See Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 23 I.L.M. 468, 477 (1984).

¹¹⁷ The hearing was held on September 14, 1988. At this hearing, the shareholders requested the granting of precautionary measures. The Commission denied their request on the grounds that, "no such decision may be taken without reference to the merits of the complaint, and such decision would be premature since the Government of Perú has yet to present its response on the matter." The Government filed its response soon thereafter, and its answer was transmitted to the shareholders on September 21, 1988, only seven days after the hearing of September 14.

¹¹⁸ See Newman & Weissbrodt, *supra* note 61, at 272.

Not so in the Peruvian case. This typical approach presents a severe contrast with the unusual situation involving the shareholders' claim, where the Peruvian Government did not dispute the facts but challenged the meaning of Article 21. Determining whether the affected shareholders' had human rights within the meaning of Article 1(2) of the American Convention required the kind of sophisticated treaty interpretation and analysis which the Commission was neither qualified nor experienced to perform. It was a task more proper to the stature and qualifications of the Inter-American Court of Human Rights. Indeed, the Commission itself so concluded and decided to submit the case to the Inter-American Court for its interpretation on the question of admissibility. In a letter dated January 19, 1989, the Commission informed the shareholders that it had decided to transfer the case to the Court.¹¹⁹ In early April, however, the staff of the Commission informed the shareholders that the Commission had decided not to submit the case to the Court and that it was proceeding to declare the petition inadmissible. What occurred in the interim? What caused the Commission's radical change of mind?

Furthermore, the Commission's absurd reading of Article 21 penalized the shareholders for exercising one of the fundamental rights guaranteed by the Convention. Article 16 protects the right of association establishing that, "Everyone has the right to associate freely for . . . economic . . . purposes"¹²⁰ That is precisely what the shareholders had done by creating a corporation. They had pulled their resources together and associated with each other to create a bank. Now, the Commission was telling them that, because they had exercised their right of association, because they had decided to become shareholders, they had ceased to be humans and, therefore, did not have human rights. Indeed, the Commission's reasoning could not have been more flawed.

Had the case reached the Court, what would the Court had done with it? Perhaps we could venture a little on the analysis that the Inter-American Court would probably have made of Article 1(2) of the American Convention. First, it would probably have read the article in question in conjunction with Article 21 and other relevant provisions on treaty interpretation in order to determine whose rights was Article 21 intended to protect. Under Article 29, no provision of the American Convention, such as Article 1(2), can be interpreted to restrict "the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party." The Peruvian Constitution recognized the right to the enjoyment of property as applicable to every individual under its jurisdiction.

¹¹⁹ See Letter of January 19, 1989, sent to the shareholders' attorney by Mr. Edmundo Vargas Carreño, Executive Secretary of the Inter-American Commission on Human Rights. In this letter, Mr. Vargas Carreño stated: "The Commission did . . . agree, in principle, to seek an advisory opinion from the Inter-American Court of Human Rights on the matter raised in your petition . . . The outcome of this process will be communicated to you once the court has responded." The Commission did not have jurisdiction to dismiss the case, for it had already decided to seek an advisory opinion from the Inter-American Court and had duly notified the parties.

¹²⁰ See American Convention, *supra* note 18.

By denying that right to the Shareholders of Banco de Lima, the Commission was violating this cardinal rule of interpretation. Article 1(2) and Article 21 could not be interpreted to restrict the right to property to those who fit the Commission's cryptic definition of a "human being."

Furthermore, in several of its opinions, The Inter-American Court, "has used the rules of interpretation in the Vienna Convention as its sole guide for construing the American Convention."¹²¹ The Vienna Convention provides that recourse may be had to the preparatory work of the treaty whenever direct interpretation "leads to a result which is manifestly absurd or unreasonable."¹²² The simplistic interpretation undertaken by the Inter-American Commission led it to an absurd and unreasonable result. The Commission either did not consult the preparatory work of the American Convention or did consult it but decided to ignore it. Predictably, the Court would have resorted to the *travaux préparatoires* of the American Convention before jumping on its tracks and declaring that there was no jurisdiction.

1. The *Travaux Préparatoires*

A careful examination of the *travaux préparatoires* of the American Convention would have revealed to the Court that the drafters of Article 21 intended to protect collective property rights such as those of the shareholders in the case of Banco de Lima. As may be recalled, the amendment proposed by the Brazilian delegation contained a clause specifying that payment of cash compensation should not be required from the expropriating state in cases of land reform. In a subsequent amendment proposal the Brazilian government alluded to other measures such as the expropriation of large national industries engaged in the exploitation of key natural resources. As is revealed in practical experience, large land holdings and key national industries are rarely owned by a single individual. Even for the sake of an individual owner's convenience, a corporation is sometimes formed. A strict and simplistic interpretation of Article 1(2), such as the one made by the Inter-American Commission, would lead to an absurd result. It would amount to conclude that the Brazilian delegate, and his colleagues in Costa Rica, intended that payment of just compensation, in whatever form was contemplated, be made only to individual property owners and not to corporations, therefore discriminating against the latter's shareholders. Such conclusion, beyond presenting a serious contradiction with the Commission's jurisprudence, is clearly illogical and contrary to the spirit of the American Convention.

¹²¹ Newman & Weissbrodt, *supra* note 61, at 290-91.

¹²² Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980. Article 32(b).

Indeed, if Article 21 was not intended to protect the rights of corporate shareholders, why was the Brazilian delegate proposing an amendment to provide for payment in bonds? Why did he say that his proposal was intended to be a response to those who criticized the right to property as representing an obstacle to agrarian reform? The very purpose of agrarian reform is to eliminate high concentration in the ownership of lands in the hands of national and foreign corporations. Such is the case of Guatemala, where the United Fruit Co. owns large portions of the country. The Brazilian delegate's proposal revealed a deep concern about a potential financial hardship that payment of cash compensation could impose on the developing states. This concern could not have originated in a fear of not being able to pay cash compensation to small farmers. In comparison, if the Government of Guatemala were to nationalize the holdings of United Fruit today, it would probably be unable to pay cash compensation. In such an event, payment in bonds would provide the government with a reasonable means of meeting its international obligation to compensate the expropriated corporations.

2. *The European Commission*

Since the Peruvian Case was a case of first impression, the Inter-American Court, in addition to examining the *travaux préparatoires* of the American Convention, would also have reviewed the experience of more developed human rights systems in order to ascertain how they had coped with the issue presented by the shareholders' claim. Such review would in all probability have taken it to relevant decisions made by the European Commission on Human Rights, where the argument made by the Inter-American Commission to dismiss the shareholders' claim had long been rejected. As early as 1962, the European Commission had held that a shareholder in a corporation may, at least if he holds a substantial majority of the shares, be regarded as a 'victim' of alleged breaches of Article I (the right to property) in respect of the corporation:

[E]ven if under Austrian law only the company as such would be entitled to take legal action in regard to the applicant's complaint . . . the Applicant is to be considered a victim, within the meaning of Article 25 . . . of the alleged violations of Article 1 of the Protocol; . . . in this respect the Commission has had particular regard to the fact that about 91% of the shares in the company were held by the applicant.¹²³

Furthermore, the Brazilian delegate to the American Convention, like Professor García-Amador, had linked Article 21 of the American Convention to Article 1 of the First Protocol to the European Convention, without making any

¹²³ Application 1706/62 (1962).

distinction whatsoever between legal and natural persons.¹²⁴ The delegate's reference to Article 1 of the European Convention is indeed illuminating, for it further shows that the delegates to the American Convention intended to protect the rights of corporate shareholders. Article 1 of the First Protocol of the European Convention explicitly states that,

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹²⁵

The text of the article begins with a statement of entitlement to *legal* as well as *natural* persons. The Brazilian delegate was well aware of this basic principle. He linked the European and American provisions in the context of a comparative study. Corporations are legal or juridical persons. Clearly, their shareholders have a right to the peaceful enjoyment of their property within the meaning of the European Convention. Indeed, in 1982, there were at least nine cases involving corporations before the European Commission on Human Rights.¹²⁶ These cases had arisen out of the 1977 nationalization of the Shipbuilding and Aerospace industries in the United Kingdom. Nearly all the petitioners were British corporate shareholders complaining against their own state. Their complaints were not dismissed.¹²⁷ They were all humans, despite their status as shareholders. Now, if these shareholders were to change their nationality to become Peruvian citizens, would they still have the same "human"

¹²⁴ See *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Convention on Human Rights*, INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS (1968), at 200. (prepared by the Rapporteur for the subject, Dr. Carlos Dunshee de Abranches, Member of the Inter-American Commission on Human Rights) Mr. Dunshee de Abranches stated,

Protection of the individual right of private property . . . against possible abuses by the State or its agencies, continues to be an international as well as a domestic need. The European Convention took up such protection under the formula that each individual has the right to his property, except in cases of expropriation for a public use or in those cases provided for by legislation concerning the use of property in accordance with the interest of all (article 1 of the First Protocol, paragraph 1).

¹²⁵ See European Convention, *supra* note 19.

¹²⁶ See R. Higgins, *The Taking of Property by The State: Recent Development in International Law*, 176 RECUEIL DES COURS 364 (1982).

¹²⁷ See, e.g., Application No 9266/81, 30 EUROPEAN COMMISSION ON HUMAN RIGHTS: DECISIONS AND REPORTS 155 (1983). Evaluating the applicants' standing, the Commission held: The applicants submit that where a company is deprived of its possessions, then its shareholders, collectively and individually, must also have been deprived and therefore are "victims" . . . The Commission has already held in application No. 1706/62 that shareholders can be considered victims of wrongs done to their companies. The applicant in that case held about 91% of the shares in the company, but the proportion of the shareholding could only affect the operation of the principle if it was at a level that could be regarded as *de minimis*. The substance of the three applicants' rights is no less affected here than in the previous case.

rights? No scientific genius is needed to realize that a shareholder, or any other human being for that matter, does not cease to be human because of his nationality. The most basic principle underlying international human rights law is that human rights have no nationality. They go with the individual wherever he goes. Why then did the Inter-American Commission dismiss the Peruvian shareholders' claim?

3. *The International Court of Justice*

An examination of the general principles of international law, as recently interpreted and developed in the jurisprudence of the International Court of Justice, would also have taken the Inter-American Court to a more enlightening conclusion. In the recent decision in the case of *Elettronica Sicula v. Raytheon* (Italy v. United States), a special chamber of the Court led by President Ruda changed its long held position regarding claims made by states on behalf of corporations, which it had asserted in the celebrated *Barcelona Traction Case*.¹²⁸

In *Barcelona*,¹²⁹ the court denied standing to the United States, which was asserting a claim on behalf of American shareholders in a Belgian corporation who were suffering deprivation of their property rights by the Government of Spain. The Court reasoned then that, since a corporation is a juridical being, and the one in question had been incorporated under the laws of Belgium, the United States could not attempt to exercise diplomatic protection on behalf of the American shareholders because the entity whose rights were being affected was not an American citizen but a Belgian corporation. The American shareholders, like the Peruvians in their own country, were left without a remedy under an anachronistic but analogous principle.

In *Elettronica Sicula*, however, the United States filed a claim with the Court on behalf of a group of American shareholders in two corporations, Raytheon and Machlett, whose Italian subsidiary was being affected by a requisition ordered by the Government of Italy. A chamber of the court ignored

¹²⁸ See Case Concerning Elettronica Sicula S.p.A. (U.S. v. Italy) 1989 I.C.J. 15, reprinted in 28 I.L.M. 1109 (1989). In his separate opinion, Judge Oda noted that, in initiating the proceedings, the United States had espoused the cause of its nationals (Raytheon and Machlett) as shareholders in an Italian corporation, ELSI, whereas the Court itself had determined in *Barcelona*, the rights of shareholders as such lie beyond the reach of diplomatic protection under general international law. For an analysis of the admissibility of the claim in the ELSI Case, see Palenzuela, *The International Court of Justice and the Standing of Corporate Shareholders Under International Law: Elettronica Sicula v. Raytheon* (U.S. v. Italy), 1 U. MIAMI Y.B. INT'L L. (infra this issue); See also Stern, *La protection diplomatique des investisseurs internationaux: De Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l'analyse*, 4 JOURNAL DU DROIT INTERNATIONAL 897 (1990).

¹²⁹ See Case Concerning Barcelona Traction, Light, and Power Company, Ltd. (New Application: 1962) (Belg. v. Spain), 1970 I.C.J. 3 (Second Phase).

the holding in *Barcelona*, acknowledging by implication that, when a majority of the shares is owned by shareholders on whose behalf a nation is exercising its right of diplomatic protection, the shareholders - not the corporation - are to be regarded as the victims of the expropriation. In granting standing to the U.S. and its American shareholders, the ICJ Chamber was embracing a principle analogous to the one applied in the human rights context by the European Commission of Human Rights.

A. The Inter-American Court: A Possible Solution

Undoubtedly, the case would have come out differently had the Commission decided to submit the case to the Court. And this realization poses another critical question in our analysis. Did the case really require so sophisticated an interpretation that the Commission was in fact unable to perform? Article 34 of the American Convention requires that Commission members be "persons of high moral character and recognized competence in the field of human rights."¹³⁰ While the reference to "recognized competence" creates a broad and perhaps flexible standard, it also implies that Commission members must have at least the capacity to engage in careful analysis of basic human rights instruments such as the American Convention. It is possible that the Commission, acting in good faith, might have seriously mistaken the terms in which the right to property is established in the American Convention. The evidence we have examined thus far, however, sadly leads us to a different conclusion.

The rejection of the claim presented by the shareholders of Banco de Lima shows one of the most serious deficiencies of the Inter-American Commission: its vulnerability to external political considerations. The Commission evidently lost its objectivity at some point in the proceedings, or perhaps even before that. A prominent member of President García's party stated in an interview with the Peruvian magazine *Caretas*, long before the shareholders petition was filed, that the Commission had already decided that it would not give course to an action presented by the shareholders.¹³¹ The Commission's Secretary made similar statements to the attorneys on the case on numerous occasions during the proceedings. Indeed, it seems that the case was decided even before it was filed.

The decision in the Peruvian case raises serious doubts about the impartiality of the Commission in future cases. If this unjust ruling is not questioned and measures are not taken to correct the problem, the only thing the Commission would have to do to rid itself of a petition not in tune with its

¹³⁰ See American Convention, *supra* note 18.

¹³¹ See *Reflexiones Sobre la Banca*, *Caretas*, Sept. 28, 1987, at 26 (Interview with Senator Javier Valle Riestra).

political wave would be to declare it inadmissible on some unreasonable ground. The high level of abstraction present in every article of the American Convention empowers the Commission with the means to misinterpret its provisions with relative impunity. At first glance, the Commission's reasoning seems to be reasonable: The Convention protects human beings, banks are not human beings, therefore the convention does not protect banks. But there is more to human rights than simple syllogisms. Unless we are willing to tolerate such shoddy reasoning, we must suggest that changes be made to eliminate the possibility of future injustices such as the one evidently committed against the shareholders in the Peruvian case.

It has already been suggested that the Commission itself should improve its legal analysis.¹³² The suggestion, however, implies the Commission's willingness to undertake such improvement. The shareholders' case shows that the Commission does not possess that will. That it does not becomes even more evident when we realize that Perú had recognized the compulsory jurisdiction of the Inter-American Court. At the very least, the Commission, had it had the will to do justice, would have submitted the case to the Court. It did not have to undertake difficult analysis of legal issues by itself. The record shows that there had been some difference of opinion at the heart of the Commission on the issue of admissibility. The Commission initially decided to submit the case to the Court but then opted to reject the petition. As unfortunate as it may seem, the decision shows that if improvement in the analysis of the American Convention is to take place, it must come from the Inter-American Court, not from the Commission.

B. Towards a New Mechanism

One of the most important powers entrusted by the American Convention to the Inter-American Court is that of interpreting all of its provisions. Article 64 of the Convention provides in relevant part that,

1. The Member states of the Organization may consult the Court regarding *the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States* (emphasis added).¹³³

The reference to "other treaties" suggests the pervasive scope of the Court's advisory jurisdiction. For instance, Professor Buergenthal has argued that the Court "might look to the catalog of rights found in the principal

¹³² See D. Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 AM. J. INT'L L. & POL'Y 323 (1988).

¹³³ See American Convention, *supra* note 18.

international and regional human rights instruments and in the constitutions of the states constituting the Inter-American System" in order to define the meaning of "human rights."¹³⁴ This argument has important implications for the Peruvian case, for it would probably have led the Court to examine the property provisions of the European Convention in order to determine whose rights was Article 21 of the American Convention intended to protect. Moreover, the Court itself has held that it possesses authority to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, holding that "the fact that the Declaration is not a treaty does not thus import the conclusion that it lacks legal effect, nor is the Court prevented from interpreting it" ¹³⁵

Individuals like the Peruvian shareholders, however, do not have access to the Court. Furthermore, the Commission is not required to submit a case to the Court, even when the case presents difficult legal issues. The problem lies at this precise stage of the proceedings. If the Commission finds the case to be contrary to its political opinion, it has wide discretion to reject it as it did in the Peruvian case. On the contrary, if the Commission had the obligation to submit to the Court (for interpretation purposes only) all cases requiring *interpretation* - as opposed to *direct application* - of provisions in the American Convention, or in the American Declaration, the possibility of the Commission's political considerations affecting its analysis of important legal issues would be greatly reduced, if not eliminated. Granting individual petitioners the right to request that specific treaty provisions be submitted to the Court for its interpretation in an advisory opinion would strengthen the protection of human rights within the system without violating the principle that individual petitioners must not be given direct access to the Court. Furthermore, it would provide the judges of the Court, seldom consulted under the present regulations, with the opportunity to clarify the meaning of the American Convention in well supported advisory opinions. Finally, it would probably create the need for a full time Inter-American Court, eliminating the undesirable image of an ad-hoc judicial body that the present Court has as a result of its statute.

A final suggestion we could make, but nevertheless an important one, is that the Commission should be required by the General Assembly to publish all its resolutions, as unimportant as they might seem, in the Commission's *Annual Report* to the General Assembly. This report should in turn be made available to the public. Undoubtedly, publication of all its resolutions will increase the Commission's accountability to the people of the American States in the fulfillment of its mandate and will deter the issuing of patently unreasonable

¹³⁴ Buergenthal, *supra* note 17, at 4.

¹³⁵ Interpretation of the American Declaration of the Rights and Duties of Man in the context of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (1989)(translated from Spanish).

rulings such as the one we have studied in this article. For obvious reasons, the Commission did not include its resolution in the Peruvian case in its 1989 *Annual Report* to the General Assembly. It waited two years, till February 22, 1991, to publish the resolution, originally titled "Resolution 16/89," as "Report 10/91." The Commission excused itself in a footnote claiming that it had decided to publish the resolution "in light of the fact the petitioners in this case desisted in their request for a reconsideration of the decision." There should be no more skeletons in the Commission's closet.

VII. CONCLUSION

Three years after President Alan García made his unfortunate announcement on Perú's Independence Day, President Alberto Fujimori, during his July 1990 inaugural address, announced that his party would submit a bill to abrogate the infamous nationalization law enacted by the government of President García.¹³⁶ President Fujimori declared that the law had only "helped to create a pointless atmosphere of confusion and instability," and that he and the members of his party would "study means and ways truly to democratize credit mechanisms, but without saddling the state with additional agencies and bureaucracy." For three consecutive years, President García had purposefully failed to repeal the law, waiting perhaps for a future opportunity to enforce it.

Indeed, the shareholders of Banco de Lima were not saved by the Commission, nor by President Alberto Fujimori. The Damocles sword of expropriation remained suspended over their heads for those three consecutive years. They were saved by the fierce and decisive opposition to the unconstitutional deprivation of their rights made by bankers like Mr. Francisco Pardo, by the courageous action taken by the judges of the lower courts of Lima, and by the many people who rose their voices to defend them in the streets of Perú under the banner of liberty. President García, although in control of both chambers of Congress and fully backed by the power of the army, was unable to defeat the will of the Peruvian people. Powerless to enforce his dark intentions without resorting to tyranny and to the violence of the tanks, President García was forced to abandon his nationalization plans and to concede defeat.

It should not have been that way. Perú had a constitution that protected the shareholders against arbitrary takings of their property. That constitution should have been enforced. Unfortunately, it was not. Deprived of constitutional protection and facing the awesome power of the army, the shareholders went to the Inter-American Commission asking for the protection

¹³⁶ See British Broadcasting Corporation, Summary of World Broadcasts, Part 4D, Latin America and Other Countries, Jul. 31, 1990 (President Alberto Fujimori's State of the Nation Address, given at the National Congress on July 28, 1990).

the framers of the constitution had granted to all Peruvian citizens when they ratified the American Convention. It was their last chance. The Commission was their "court" of last resort. Ignoring the most basic precepts of its mandate, the Commission rejected their petition, condoning the injustice of President García. This, the Commission should not have done. The future protection of human rights in the Inter-American system demands that a new mechanism be implemented in order to prevent injustices like the one done in the Peruvian case from occurring again. Feasible measures can be undertaken. It is to be hoped that the General Assembly of the OAS and all lawyers in the Americas press firmly for the implementation of these measures. As human beings, they can do no less.

*Appendix*¹³⁷

ORGANIZATION OF AMERICAN STATES
Inter-American Commission on Human Rights
Resolution No. 16/89
CASE 10.169 (PERU)
OEA/Ser.L/V/II/75, Doc. 33, April 14, 1989

BACKGROUND:

1. On March 11, 1988, Mr. David Westin of the law firm Wilmer, Cutler and Pickering filed a petition with the Inter-American Commission on Human Rights (hereinafter the "Commission") on behalf of 105 named petitioners, all individual shareholders of the Banco de Lima, against the Government of Peru. The petition alleges violations of Article 8, 21, 24 and 25 of the American Convention on Human Rights (hereinafter the "Convention") by the Government of Peru. The case arises out of President Alan Garcia's announced plan to expropriate "all of the shares of the Peruvian Banks remaining in private hands." (Complaint, p.4).

2. The complaint alleges that the government expropriation plan consisted of two parts: 1) the executive had introduced legislation in Congress to approve its decision to expropriate the Banks' shares, and 2) the executive, while the legislation was pending, announced that his government would move to intervene¹³⁸ the Banks. The bill was enacted into law on October 9, 1987 and in mid-November 1987 the court sent to the shareholders a notice of expropriation filed October 23, 1987, informing the shareholders that the expropriation proceedings had been commenced and summoning the shareholders to respond in court. The expropriation notice did not include any appraisal of the value of the shares and consequently, the shareholders responded to the court's notice of expropriation by challenging in court the validity of the proceedings because of the lack of any government appraisal. The complaint states that "the Banco de Lima shareholders are under the constant threat of forcible intervention and expropriation." (Complaint, p. 11).

3. The complaint requests that the Commission issue a Resolution declaring that the Peruvian Government: 1) has violated Articles 8, 24 and 25 of the Convention "by selectively denying petitioners and others prompt, simple and effective recourse to the Courts of Peru as previously established by law for vindication of their fundamental rights in connection with the decreed intervention

¹³⁷ The text of the resolution in the case of Banco de Lima is cited in full for the convenience of the reader.

¹³⁸ The term "intervention" as defined by the petitioners means "the government's wrestling of control of a Bank from its owners and managers."

of Banco de Lima and expropriation of the Banco de Lima shares; 2) has violated Article 21 of the Convention by wrongfully decreeing the intervention of Banco de Lima without any justification in the social interest as defined in the Convention and in the Constitution; 3) has violated Article 21 of the Convention by wrongfully decreeing the intervention of Banco de Lima and taking action to expropriate the shares of Banco de Lima other than in the cases and according to the forms provided in Peruvian Law; 4) has violated Article 21 of the Convention by wrongfully threatening to take the shares of Banco de Lima after selectively changing the rules for determining compensation to the detriment of Banco de Lima shareholders and resolving that the Peruvian Government 5) "immediately comply with all outstanding court orders relating to the decreed intervention of Banco de Lima and the threatened expropriation of its shares;" and that it 6) "cease and desist from expropriating the shares of Banco de Lima." (Complaint, pp. 36-38).

4. The Commission transmitted the pertinent parts of the complaint to the Government of Peru on March 17, 1988 with a request for information on the facts referred to and for any observations on the question whether domestic remedies had been exhausted in this case.

5. By note dated June 10, 1988, the Government of Peru sent the Commission a copy of the disputed law and requested an extension of time of 90 days to respond to the complaint due to the "importance of this law and its application." By note dated August 8, 1988, the Government of Peru informed the Commission that it would not have all the information necessary for a response by August 15th, and it requested a second extension of 30 days, beginning on that date. The Commission informed both parties that the requested extension had been granted.

6. During the 74th period of sessions of the Commission, held from September 6-16, 1988, the petitioners, at a hearing on the case held on September 14, 1988, requested the application of precautionary measures pursuant to article 29 of the Regulations of the Commission maintaining that irreparable damage to the shareholders in the complaint could occur. The Commission resolved to deny the application of provisional measures requested by petitioners on the grounds that "no such decision may be taken without reference to the merits of the complaint, and such a decision would be premature since the Government of Peru has yet to present its response in this matter."

7. The response of the Government of Peru, transmitted to the petitioners on September 21, 1988, stated, in essence, that the law in question was in conformity with the Peruvian Constitution in so far as the Constitution provides that "financial and banking activity must fulfill a social function of helping the Peruvian economy in its different regions and assist all sectors of activity and of the population in conformity with development plans." The Government of Peru added that this law is also in conformity with the American Convention, which provides in Article 21 that the right to property may be

limited "for reasons of public utility or social interest."

8. By letter dated January 9, 1989, the petitioners reiterated their request for precautionary measures in this case, arguing that the shareholders of the Banco de Lima were facing "creeping expropriation" of their assets and were being denied access to effective judicial remedies. The petitioners again asked the Commission to resolve "that the Government of Peru shall not take any action directly or indirectly to expropriate or substantially impair the value of the property interests at stake in this proceeding until such time as the Commission has ruled upon the pending petition or until further order of this Commission."

CONSIDERING:

1. That the Preamble of the American Convention on Human Rights as well as the provisions of Article 1 (2) provide that "for the purposes of this Convention, 'person' means every human being," and that consequently, the system for the protection of human rights in this hemisphere is limited to the protection of natural persons and does not include juridical persons.

2. That the petitioners base their claim on Article 21 which provides in relevant part as follows:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

Consequently, in the Inter-American system, the right to property is a personal right. The Commission is empowered to vindicate the rights of an individual whose property is confiscated, but is not empowered with jurisdiction over the rights of juridical beings, such as corporations, or as in this case, banking institutions.

3. That in the judgment of the Commission, the named shareholders of the Banco de Lima, although individuals, have presented this action alleging that the Government of Peru has taken actions to affect the rights of the Banco de Lima. The Commission considers that what is at issue here are not the individual property rights of the individual shareholders, but rather the collective property rights of the company, the Banco de Lima, and that this case is not within the jurisdiction of the Inter-American Commission on Human Rights.

4. That for the above reasons the Commission considers that it does not have to examine the specific factual questions as to whether there has been a deprivation of property of the shareholders of the Banco de Lima, or whether there is only the threat of a possible deprivation.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To declare inadmissible the complaint presented by Mr. David Westin of Wilmer, Cutler and Pickering on behalf of the 105 named shareholders of the Banco de Lima against the Government of Peru pursuant to Article 41 (b) of the Regulations of the Commission.

CDH/3541-I