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Patricia Ireland

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## INTERNATIONAL PROTECTION OF HUMAN RIGHTS

PATRICIA IRELAND\*

Few things are as important to international peace and stability as respect for human rights. When the basic rights and freedoms of a people are repeatedly violated, they eventually feel compelled to rise against their oppressors, choosing violence and possible death to an existence which denies their very humanity. In an interdependent world, denial of human rights and the resulting possibility of revolt have international repercussions.

The Second World War brought increased recognition by the world community that the protection of human rights could not be left to the discretion of individual nations. But even prior to World War II, inroads had been made in the doctrines which conflicted with international protection of human rights. These theoretical stumbling blocks in international law were the doctrines of legal personality, sovereignty and non-intervention.

The traditional concept of the state as the sole subject of international law and the sole possessor of sovereignty was not without exceptions. Individuals too had international duties and could commit offenses against the law of nations, for example, by piracy.<sup>1</sup>

Customary rules of war showed a concern for the rights of individuals as well, making distinctions between combatants and non-combatants and acknowledging that life should not be taken needlessly.<sup>2</sup> The widening of the concept of international personality in contemporary international law can be seen in the recognition of the individual as the fundamental element in the national and international communities and in the recognition of the right of individuals to determine their own political futures, the right of self-determination.<sup>3</sup>

Lauterpacht finds the decisive blow to the barrier between the individual and international law in the 1928 Advisory Opinion of the Permanent

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\*J.D., University of Miami; Assistant Editor, *Lawyer of the Americas*.

Court of International Justice on the *Jurisdiction of the Courts of Danzig*.<sup>4</sup> That case held that states could by international agreement make the individual the subject of international rights and duties enforceable at the individual's instance by national courts.<sup>5</sup>

The concepts of absolute sovereignty and independence of states were eroded by doctrines of state responsibility and humanitarian intervention. The customary doctrine of state responsibility allows interposition by a nation on behalf of its citizens abroad when they are denied a right recognized by civilized nations or secured to them by an international agreement. Humanitarian intervention was justified when morality demanded a state step into another's territory to stop cruel and oppressive treatment of its inhabitants.

The further evolution of the position of the individual and of state sovereignty in international law can be seen in the practice of the various supranational institutions for the protection of human rights.

### *United Nations*

Individual communications alleging violations of human rights are received by the United Nations. A list of these and other communications is forwarded to the Sub-Commission on Prevention of Discrimination and Protection of Minorities by the Secretary General along with any replies received from the governments concerned.

The Sub-Commission agreed in 1971 on the admissibility of complaints from individuals or groups of individuals who could reasonably be presumed to have been victims of or to have had direct and reliable knowledge of violations of human rights.<sup>6</sup> The Sub-Commission may request the text of the original complaint to study in addition to the government replies and any other relevant information.

If a particular situation appears to reveal a consistent pattern of gross and reliably attested violation of human rights, the Sub-Commission refers it to the Commission on Human Rights.<sup>7</sup>

In 1967, the U.N. Commission on Human Rights reversed its position of twenty years earlier by deciding that it did have power to take action in regard to complaints concerning human rights. That year it established a group of experts to investigate charges of torture and inhumane treatment of prisoners in South Africa.<sup>8</sup>

In addition to such action, the Commission makes reports and recommendations to the Economic and Social Council. Recommendations from

this Council are made to the General Assembly, one of whose functions is "assisting in the realization of human rights and fundamental freedoms."<sup>9</sup>

Under the Optional Protocol to the Covenant on Civil and Political Rights, states may agree to allow the Human Rights Committee to receive from individuals communications alleging violations of the rights set forth in the Covenant. The Commission would then notify the state involved which would have six months to submit a written explanation and a statement of any remedies which it had provided.<sup>10</sup> Neither the Covenant nor the Optional Protocol, both approved by the General Assembly in 1966, are yet in force.

Article 2(7) of the United Nations Charter provides that nothing in the Charter shall authorize the U.N. to intervene in matters which are essentially within the domestic jurisdiction of any state. In the Dumbarton Oaks Proposal, this provision had been included in the section on pacific settlement of disputes. It was shifted in the Charter to be included among the Organization's Principles and thus became a limitation on the entire organization rather than on the Security Council alone.<sup>11</sup>

In 1946, Art. 2(7) was the basis for the objection by the Union of South Africa to the General Assembly's consideration of South Africa's treatment of Indians in its country. The Indian delegation had charged that restrictions on the civil, political and economic rights of Indians in South Africa was contrary to the objectives of the Charter and in violation of the Capetown Agreement between the two countries. Since the Indians were South African citizens, the Union of South Africa claimed that under Art. 2(7) the matter was outside the competence of the U.N.

The resolution adopted by the General Assembly noted that relations between the two states had been impaired and were likely to be further impaired unless a satisfactory settlement was reached. It expressed the opinion that South African treatment of Indians should conform to obligations in force between the two governments and to relevant provisions of the Charter. It also requested the two governments to make reports at the next session.<sup>12</sup>

The extent to which U.N. recognition of the danger posed to international peace and security by denial of human rights has come to outweigh the doctrine of non-intervention in domestic affairs can be seen in its consideration of apartheid in South Africa and forced labor in East Europe. In 1952 in the General Assembly, fifty-eight of sixty members voted for one or both of the investigations into these matters which a

century earlier would have been considered to fall within the exclusive jurisdiction of the states involved. Only South Africa itself and Argentina voted for neither.<sup>13</sup>

### *Europe*

The European Convention on Human Rights and Fundamental Freedoms, which entered into force on Sept. 3, 1953, made the right of individual petition against a state conditional. Twelve of the fifteen states which signed the Convention have made the necessary separate declaration recognizing the jurisdiction of the European Commission on Human Rights to hear private complaints against them. These same states have also accepted the optional compulsory jurisdiction of the European Court of Human Rights.

Cases may be referred to the Court only after the Commission has made a preliminary ruling of admissibility and has acknowledged failure to reach a settlement. The referral may be made by the Commission, the state whose national is the alleged victim, the state complained against or the state which referred the case to the Commission. Thus, while individuals have no direct standing in the Court, they were given indirect access for the first time to an international judicial body for alleged violations of their human rights by the European system.

The European willingness to relinquish a portion of their sovereignty to a supranational organization resulted in part from the temper of the times in which the Convention was written. The European countries sought unity in response to the threat from Stalinist Russia and the memory of Nazi Germany. They felt that the first step toward dictatorship was the gradual suppression of human rights. If these rights were assured, democracy would be secure.<sup>14</sup>

Willingness to submit to the jurisdiction of an international body was also the result of the belief by the European countries that the body would be enforcing ideals which were part of their common heritage. They felt that their institutions were already in conformity with the requirements of the Convention or were willing to modify those that were not.<sup>15</sup>

### *The Americas*

The 1960 Statute of the Inter-American Commission on Human Rights was not originally intended to give the Commission competence to act on complaints by individuals.<sup>16</sup> However, the Commission was entitled

to adopt its own rules of procedure and from the beginning it interpreted its power under Art. 9 to prepare studies and reports on human rights and to secure information from governments on the measures adopted as including the power to receive individual communications as information and to request either further information regarding the complaint or permission to make an on the spot investigation.

The Commission's power to make recommendations to individual governments was also not clear initially. Art. 9 of its statute only authorized the Commission "[t]o make recommendations to the governments of member states *in general* . . . for the adoption of progressive measures in favor of human rights . . ." [emphasis added]. Nevertheless, if the charges were verified, the Commission made recommendations to the particular government involved. In 1965, the Second Special Inter-American Conference gave official approval to these practices.<sup>17</sup>

The Commission in its capacity as an advisory body on human rights to the OAS makes annual reports to the Organization. These reports include observations on communications received and on unsatisfactory responses of governments to requests or recommendations. Progress by members in the field of human rights and areas in which measures should be taken for more effective protection of these rights are also included.

In 1966 the Commission requested annual reports from every government on the effective exercise of human rights, on suspensions of human rights and the reasons therefore and on measures taken to adapt internal legislation to the American Declaration on the Rights and Duties of Man.<sup>18</sup>

The Inter-American Convention on Human Rights (which is not yet in force) goes further than the U.N. Covenants or the European Convention in its treatment of individual complaints. The right of individual petition against a state which has ratified will be automatic when the Convention enters into force. Interstate complaints, however, may not be received until a state has separately declared its recognition of the Commission's jurisdiction to hear them. Thomas Buergenthal feels that this reversal of the traditional formula should be more acceptable to the governments involved. For while individual complaints may be more frequent than interstate, they also have fewer political repercussions, are less unpredictable and generate less public attention.<sup>19</sup>

The doctrine of non-intervention has always been particularly strong in Latin America. These countries have feared intervention, first from European creditor states in the early nineteenth century, later from the

United States. The intense concern with guarding their sovereignty hindered the development of any program for international protection of human rights among the American states. In 1945, the majority of governments in Latin America rejected Uruguayan Foreign Minister Rodriguez Larreta's proposal for collective action in defense of democracy and human rights against domestic tyranny as unacceptable collective intervention.<sup>20</sup>

The 1948 Charter of the OAS incorporated absolute non-intervention in Art. 15-17. Article 15 prohibits all forms of intervention, direct or indirect, for any reason by a state or group of states. Under Art. 16 coercive measures of any kind, whether political or economic are forbidden. Absolute inviolability of a state's territory is guaranteed by Art. 17 which prohibits even temporary military intervention or any measure of force taken by another state directly or indirectly on any ground.

Ironically, violations of the doctrine of non-intervention have been the impetus for more recent concern with human rights in the Inter-American system. In 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs met in Santiago, Chile, to consider political tensions in the Caribbean. From its consideration of the Trujillo regime in general and of the charges that it had engaged in terrorist activities in Venezuela in particular, the Meeting was led to consideration of the disruptive effects violations of human rights might have on peace in the Americas.

After concluding that American peace could only be effective in so far as human rights, fundamental freedoms and the exercise of representative democracy were realities in each member state, the Meeting asked the Inter-American Council of Jurists to prepare a draft Inter-American Convention on Human Rights and an instrument creating an Inter-American Court for the Protection of Human Rights. An Inter-American Commission on Human Rights was created by the Meeting to promote respect for human rights and to develop an awareness of human rights among the peoples of the Americas.<sup>21</sup>

Again in 1965, a violation of the doctrine of non-intervention was the occasion for expansion of the protection of human rights in the Americas. On April 28, President Johnson responded to an urgent request from U.S. Ambassador Bennet for U.S. armed forces to be sent to the Dominican Republic to protect the lives of Americans and other foreigners during an uprising there.<sup>22</sup>

The Tenth Meeting of Consultation was convened at the request of Chile to consider the struggle in the Dominican Republic. Most of the

states present disapproved of the unilateral intervention by the United States as a violation of the OAS Charter and only agreed to internationalize the force (also a violation of the Charter) as the lesser of two evils. (Although the U.S. has pressed for creation of a permanent Inter-American force, subsequent revision of the Charter has not provided for one.)<sup>23</sup>

The purpose of the Inter-American force in the Dominican Republic was to be to maintain the security of the inhabitants and the inviolability of human rights and to establish an atmosphere of peace and conciliation which would permit functioning of democratic institutions. At the request of the Secretary General, the Inter-American Commission on Human Rights also went to the Dominican Republic to help.<sup>24</sup>

In its work in the Dominican Republic, the Commission clearly went beyond its statutory powers to study, report and recommend. It secured the agreement of both factions to respect the principles of the American Declaration on the Rights and Duties of Man and inspected places of detention of both factions; it arranged neutral zones of refuge and permission for some political figures to leave the country; and it gained permission for the unloading of food and medicine from ships.

The Second Special Inter-American Conference subsequently approved this expanded role of the Commission by commending it for its past service. This Conference also explicitly authorized the Commission's practice of receiving individual complaints, acting on those charging violations of basic rights and making recommendations to the particular state involved.<sup>25</sup>

The Commission carried on similar activities in 1969 when El Salvador and Honduras both invited it to investigate charges of violation of human rights during the so-called Soccer War.<sup>26</sup>

These events show the development of inter-American institutions for protection of human rights to be in fact an aspect of their adherence to the concept of non-intervention. In 1945, the Inter-American Conference on Problems of War and Peace expressed its preference for international protection of human rights to the traditional doctrine of state responsibility and the misuse of diplomatic protection of citizens abroad.<sup>27</sup>

In the same way, in the Dominican Republic the OAS preferred collective intervention in the name of human rights to unilateral intervention by the United States.

The issue of sovereignty may be one factor favoring the establishment of regional instead of global organizations to protect human rights. States may be more willing to submit to a supranational organization composed of neighboring countries with close ideological and economic ties. Perhaps voluntary submission to effective regional organizations will be an intermediate step in the development of eventual national willingness to grant a global organization the necessary power to effectively protect human rights.

In addition to increasing the probability that it will be empowered to act, the common interests and ideals within a regional organization may make it more likely to be able to reach consensus as to what action should be taken in a particular situation.

A comparison of the various international instruments for the protection of human rights will be helpful in evaluating the potential effectiveness of the U.N., European and American systems.

#### *U.N. Documents*

Under Art. 1 and 55 of the U.N. Charter, one of the main purposes and duties of the organization is to promote respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Each member state pledges under Art. 56 to take joint and separate action to achieve these purposes.

In a recent decision, the International Court of Justice made clear its view that the human rights provisions of the U.N. Charter are legal obligations of the member states.<sup>28</sup> A Canadian court has found conflict with the human rights provisions of the Charter to be an indication of violation of public policy.<sup>29</sup> However, the California Supreme Court specifically rejected the view that the Charter has become the supreme law of the land, citing a lack of mandatory quality and definiteness as proof of a lack of intent to create enforceable rights.<sup>30</sup>

Panama and other Latin American countries had proposed inclusion of a bill of human rights in the U.N. Charter itself.<sup>31</sup> Although this proposal was not adopted, Art. 68 of the Charter made mandatory the establishment of a commission for the promotion of human rights — the only functional commission expressly provided for in the Charter.<sup>32</sup>

In 1946, when the Commission on Human Rights was established, the first item on its agenda was the preparation of an international bill of rights. The Commission's recommendation, approved by the General

Assembly in 1948, was for this bill of rights to consist of a declaration of human rights, one or more conventions and the necessary means of implementation. The first step was taken when the General Assembly passed a resolution adopting the Universal Declaration of Human Rights on Dec. 10, 1948.<sup>33</sup>

The U.S. representative to the General Assembly stated at the time that the declaration was not a treaty or an international agreement and that it was not a statement of law or legal obligation.<sup>34</sup> But in 1949 in the Russian Wives case, the General Assembly found the Soviet Union guilty of violating the Charter by taking action contrary to Art. 13 and 16 of the Universal Declaration.<sup>35</sup>

Judge Ammoun in his separate opinion in the *Barcelona Traction Case* noted a trend in legal writings to consider declarations of the General Assembly as at least subsidiary sources of law and perhaps as the first step in the formation of a customary law binding on the states.<sup>36</sup>

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights were adopted by the General Assembly on Dec. 16, 1966. The thirty-five ratifications necessary for entry into force have not yet been received.

### *European Documents*

The Statute of the Council of Europe includes the maintenance of human rights not only in the general affirmations of faith, but also among the objectives of the Council. Acceptance of the principle is a condition of membership. The European Convention on Human Rights and Fundamental Freedoms, the first treaty of the Council of Europe, entered into force on September 3, 1953. Four Protocols to the Convention have also come into effect and a fifth has been concluded. Sixteen members of the Council of Europe have ratified the Convention, although Greece denounced its ratification in 1969. The Convention provides for a Commission on Human Rights and for the only Human Rights Court currently in operation.<sup>37</sup>

### *American Documents*

Although the Charter of the Organization of American States, adopted in 1948 affirms the fundamental rights of the individual without distinction based on race, nationality, creed or sex, and obliges member states to respect human rights, it makes no provision for the promotion or protection of these rights.

The Ninth International Conference of American States adopted the American Declaration of the Rights and Duties of Man in 1949. This was the first international declaration on human rights.<sup>38</sup> In addition to civil and political rights, it formulates broad economic and social rights which, while appropriate in a non-binding declaration, must be viewed as long term goals. The inclusion of the duties of man is a unique feature of the American Declaration.

The Ninth Conference also recommended that the Inter-American Juridical Committee prepare a draft statute for an Inter-American Human Rights Court, but the draft was not even scheduled for study by a ministerial conference for five years. Despite the existence of the American Declaration, the Committee reported that there was not a sufficient body of positive law to serve as the basis of such a statute.<sup>39</sup>

The next positive action taken toward the establishment of an institutional structure for protection of human rights in the Americas was taken in 1959 when the Fifth Meeting of Consultation of Ministers of Foreign Affairs requested the Inter-American Council of Jurists to draft an Inter-American Convention on Human Rights and to prepare an agreement for an Inter-American Court. The OAS Council was asked to prepare a statute for an Inter-American Commission on Human Rights to promote the rights listed in the American Declaration of the Rights and Duties of Man.

The draft convention prepared by the Council of Jurists was not considered by the OAS until 1965 when the Second Special Inter-American Conference referred it to the OAS Council along with drafts prepared by Uruguay and Chile. The Council was given one year in which to receive the views of interested parties and to complete revision of the draft.<sup>40</sup>

The Council's Committee on Juridical and Political Affairs did not begin work on the revised draft convention until May, 1967, more than a year after the Council was supposed to have completed its revision.<sup>41</sup> The American Convention was finally adopted in 1969 at the Inter-American Specialized Conference on Human Rights. Twelve of the nineteen countries present signed the Convention.<sup>42</sup> Of the eleven ratifications required for entry into force, only two, those of Costa Rica and Venezuela, have been received.<sup>43</sup>

The U.S., Mexico, Argentina and Brazil were among the states which did not sign the Convention. Argentina and Brazil had both main-

tained that work on the regional convention should be discontinued when the American states had been asked by the OAS Council in 1967 whether they would wish to establish a single universal system of regulation of human rights under the U.N. Covenants or to establish co-existing global and regional conventions. Although eight other states had agreed with the proposition of institutional means of protection at both levels, many of these states did not actively support a separate regional agreement on substantive principles. Among those who did support preparation of a regional convention was the United States.<sup>44</sup> However, when the time came to sign the Convention, the United States declined, expressing the belief that the question of individual rights is largely within the jurisdiction of the individual states in the U.S.

### *Substantive Provisions of the Documents*

The U.N. Covenants and the European and American Conventions provide immediate, concrete protection only to civil and political rights. Economic, social and cultural rights are treated as future goals to be attained by progressive development.

The European Convention, the only one currently in force, originally covered thirteen rights. Five more rights were added by the four Protocols. Luini del Russo groups the rights protected into the following seven classes:

(1) the right to life and physical integrity which covers the prohibitions of torture, inhumane treatment and slavery; (2) the right to personal liberty and security under civil and criminal due process; (3) the right to privacy and family life; (4) the right to intellectual freedoms — thought, conscience, religion and expression; (5) the right to peaceful assembly and association, to join a trade union and to vote in free political elections; (6) the right to property; (7) the freedom to travel within and without the national boundary, freedom from deportation or exclusion from national territory.<sup>45</sup> These basic rights are also protected under the U.N. and American documents.

The U.N. Covenant on Civil and Political Rights and the American Convention on Human Rights include some rights in common which are excluded from the European Convention. Both include the right to a juridical personality (American Art. 3; U.N. Art. 16), the right to equality before the law (American Art. 24; U.N. Art. 25), and in criminal proceedings, the right to appeal, the privilege against self-

incrimination and the prohibition of double jeopardy (American Art. 8; U.N. Art. 14). Both also include a statement that the essential aim of imprisonment shall be reform and social rehabilitation of the prisoner [American Art. 5(2); U.N. Art. 10(3)].

A unique guarantee of the U.N. Covenant on Civil and Political Rights is the right of all peoples to self-determination and to free disposal of their natural resources for their own means. Art. 1. The U.N. is also alone in its prohibition of propaganda for war and of advocacy of national, racial or religious hatred which would incite discrimination, hostility or violence. Art. 20. The Covenant has been criticized for its lack of protection of property rights and for a lack of provision for reservations, both of which are provided by the American and European Conventions.<sup>46</sup>

The American Convention on Human Rights extends protection to twenty-three general categories of rights. Several of the rights guaranteed are unique to the American Convention. These include the right of every person to a name (Art. 18) and a nationality (Art. 20). The U.N. Covenant guarantees these rights only to children. The right of political asylum (Art. 22) and the right of reply using the same means of communication to inaccurate or offensive statements (Art. 14) are also found only in the American Convention.

The basic rights common to the various agreements are more detailed and extensive in the American Convention. For example, the right to life applies from the moment of conception. Art. 4(1). Art. 4(2) on the death penalty goes beyond the usual restriction of its use only for the most serious crimes and pursuant to final judgment of a competent court. It also provides that capital punishment shall not be extended to crimes to which it does not currently apply and that it shall not be reinstated in countries which have abolished it. Art. 4(2), 4(3).

Such expressions of Latin American idealism may hinder ratification of the American Convention. The inclusion of so many extensive rights may reflect recognition of a great need for protection in the Americas. However, to the extent that the Convention attempts to create new rights rather than to compile existing ones, the governments will be less likely to accept it.<sup>47</sup>

It has been suggested that the Convention could still be useful as a source of law even if unratified.<sup>48</sup> The Inter-American Commission on Human Rights is charged with promoting and protecting human rights as set forth in the American Declaration of the Rights and Duties of Man.

However, that Declaration proclaims very general principles which Buergethal finds ill-suited to adjudicatory purposes. He suggests that the Commission may be able to refer to the Convention as a gloss on the Declaration to give precision and normative content to it.

Even this use of the American Convention would be ineffective to the extent that it failed to take into consideration the nature of law. Rules imposed from without a society may not be law, but mere formalism. It is especially true for international law, whose sanctions are limited to publicity of violations, economic coercion or war, that law must emanate from behavior. International law must be based on recognition by nations that they are bound by it and that obedience is essential to the realization of nations' self-interest in a world community.<sup>49</sup> Any use of the American Convention will be effective only in those countries which have reached this level of political maturity.

The question of U.S. ratification of either the American Convention or the U.N. Covenant raises some constitutional controversy, a detailed discussion of which is beyond the scope of this paper. However, one of the basic constitutional questions, whether human rights is a proper subject of an international agreement, must be mentioned.

The American Bar Association's Standing Committee on Peace and Law through the U.N. claims that the constitutional test of whether a matter is a proper subject for a treaty is whether it is of a domestic nature or is of international concern. The Committee concludes that the relationship between a state and its citizens is domestic.<sup>50</sup> Even using the Committee's test, the protection of human rights can better be viewed as an international concern and therefore as a proper subject for treaty. The disturbance which may start within a country due to the suppression of human rights seldom stays within its borders.

The Counsel for the ABA Section on International and Comparative Law rejects the Standing Committee's test. He finds the test in *Asakura v. Seattle*,<sup>51</sup> which held that the treaty power extends to all proper subjects of negotiation. If the subject of a treaty is properly a matter for international negotiation, the treaty is constitutional even though the subject matter is also domestic.<sup>52</sup>

Even if the constitutional issues are resolved in favor of ratification, certain of the substantive provisions of the two instruments will be problematical for the United States.

The International Covenant on Civil and Political Rights, which has no provision for reservations, conflicts with the United States' First Amendment guarantee of free speech by prohibiting propaganda for war and advocacy of national, racial or religious hatred which would incite to discrimination or hostility. (Such advocacy is also prohibited if it would incite to violence, but this limitation is often put on freedom of expression in the United States in the interest of preserving public order and safety.)

Buergenthal has suggested that the requirement that imprisonment be essentially for reform and social rehabilitation of the prisoner, found in both the U.N. and American documents, might be interpreted as outlawing life sentences.<sup>53</sup>

Other objections to the substantive provisions of the American Convention can be made. The application of the right to life from the moment of conception is contrary to current United States' law and would cause considerable controversy here.<sup>54</sup> The right to reply to inaccurate or offensive statements using the same means of communication has also been rejected by the United States Supreme Court as unconstitutional.<sup>55</sup> Recent legislation in more than half of the states attempting to formulate a constitutional death penalty would conflict with the Convention's prohibition of reinstatement of capital punishment in those countries which have abolished it.

The means of implementing the guarantees found in the conventions must also be considered.

The Inter-American Convention provides for a Commission and a Court as the means of protection of the rights prescribed. The Inter-American Commission for Human Rights would be empowered to consider complaints against any country party to the convention from individuals, groups and legal non-governmental entities, and, in the case of a complaint against a state which had specially declared recognition of the Commission's competence to do so, from other states parties to the convention. Only when effective domestic remedies had been exhausted would a petition be admissible. It would have to be filed within six months of notification of final domestic judgment and it could not be concerned with a subject pending in another international proceeding or which was substantially the same as one previously considered by an international organization. Art. 44-47.

The Commission would gather information, make an investigation and attempt to promote a friendly settlement of the matter. If a settlement were reached, the Commission would prepare a report of the facts and the solution for the petitioners and the states parties. If there had been no settlement, the Commission's report would contain a statement of the facts and the Commission's conclusions and would be transmitted only to the states concerned who would not be at liberty to publish it. The states parties or the Commission could then submit the case to the Inter-American Court of Human Rights if the state concerned had recognized the jurisdiction of the Court either for purposes of the particular case or for all cases.

If within three months the case were not submitted to the Court or settled, the majority of the Commission could set forth an opinion and conclusion on the matter, make recommendations and prescribe a period within which the state should remedy the situation. After the prescribed period, a majority vote of the Commission would decide whether a state had taken adequate measures and whether to publish its report. Art. 48-51.

If the case were submitted to the Court and it found a violation of a protected right or freedom, the Court could rule that the situation be remedied and that the injured party be fairly compensated. In cases of extreme gravity, to avoid irreparable damage to persons, the Court could adopt the necessary provisional measures. The Court would also be authorized to give advisory opinions on the request of member states or of OAS organs. Art. 61-65.

The U.N. Covenant on Civil and Political Rights relies on a Human Rights Committee and an ad hoc Conciliation Commission to provide protection of the rights listed in it. The Committee would be able to consider communications concerning states which had declared recognition of its competence to do so only if the communication were submitted by a state which had made a similar declaration. Like the American Convention, the Covenant requires that domestic remedies have been exhausted. The Committee's main duty would be to make available its good offices with a view to the friendly solution of the matter. Art. 41.

The Conciliation Commission would be appointed by the Committee with the prior consent of the states if no solution had been found within twelve months. It too would make available its good offices and submit a report to the Committee for communication to the states concerned within twelve months. If no solution had been reached during that time,

the report would consist of the Commission's findings of fact and its views on the possibilities of an amicable solution of the matter.

Arguments can be made favoring either a commission or a court as the final institution for implementation of human rights agreements. José Cabranes has suggested that Latin American history, the remains of American international law of non-intervention and the constitutional inhibitions of the United States may make it necessary to rely on the non-judicial and essentially non-political efforts of an agency like the Inter-American Commission on Human Rights.<sup>56</sup>

However, Cabranes acknowledges that political realities may not permit the Commission to operate even-handedly. In the past the Commission has received complaints from within the United States, but has hesitated to investigate them. The United States has been accused of reluctance to accept any international responsibility for alleged violation of the rights of its inhabitants. In view of this attitude, the Commission may feel that an unsuccessful confrontation with the United States would impair its future usefulness.<sup>57</sup>

To promote acceptance of the obligatory nature of an international law of human rights and to make the sanction of publicity more effective, Luis Kutner and others favor establishment of international tribunals. The creation of a common understanding of the obligation is felt by Kutner to be more easily attained by an institution that is both a focal point for debate and an authoritative source of decisions.<sup>58</sup> The decisions of a court would be made publicly and would perhaps be freer from political pressure which might have a significant influence on the outcome of confidential negotiations under a commission.

The problem of the promptness of the determination of individual rights under a convention is also raised by Kutner. He favors the introduction of an international writ of habeas corpus to ensure prompt, effective determination in each instance. The proposed international writ of habeas corpus could be used to obtain not only the release of persons illegally detained by the authorities, but also of persons held illegally in private custody or those no longer in actual custody but who are under the power of control of the respondent. Thus, Kutner sees this writ as applicable against any government that had or exerted physical domination over the race or persons of another government.<sup>59</sup>

A similar uniform precedural device to ensure judicial remedy for the violation of human rights in Latin America has been proposed by

Pedro Pablo Camargo. He suggests formulation of a model *amparo* similar to that in Mexico which may be used as a synonym for habeas corpus, as a means for protecting human rights recognized by the constitution and as a device for questioning the constitutionality of laws.<sup>60</sup>

Whether implementation is primarily by a court or a commission, the participation and cooperation of the United States will be essential to the success of an international system for the protection of human rights, especially within the Americas. Other nations would feel that a lack of confidence in their national institutions was implied if they were asked to give a portion of their sovereignty to such a system without the United States doing the same.

For an international system of protection of human rights to be effective, it seems necessary for the United States to abandon its traditional position and to set an example by opening itself to the investigations of an international commission or the adjudication of an international court and to welcome the opportunity to correct situations which may be found to violate human rights.

#### NOTES

<sup>1</sup>Friedmann, Lissitzn, Pugh, *International Law* 235 (1969).

<sup>2</sup>Lauterpacht, *Some Concepts of Human Rights*, 11 *Howard L. J.* 264, 268 (1965).

<sup>3</sup>*Id.* at 267, 269.

<sup>4</sup>Advisory Opinion No. 15: Series B, 17-21.

<sup>5</sup>*International Law*, *supra* n. 1 at 218, 219.

<sup>6</sup>Sohn and Buergenthal, *International Protection of Human Rights* 848 (1973).

<sup>7</sup>*Id.* at 842.

<sup>8</sup>Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 *Am. J. Int'l L.* 337, 343 (1972).

<sup>9</sup>Sohn and Buergenthal, *supra* n. 6 at 523.

<sup>10</sup>Luini del Russo, *International Protection of Human Rights* 44 (1971).

<sup>11</sup>Sohn and Buergenthal, *supra* n. 6 at 591, 592.

<sup>12</sup>*Id.* at 558-561, 582.

<sup>13</sup>Schwelb, *The United Nations and Human Rights*, 11 *Howard L. J.* 356, 363 (1965).

<sup>14</sup>Sohn and Buergenthal, *supra* n. 6 at 1001.

<sup>15</sup>José Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 *Mich. L. Rev.* 1147, 1176 (1967).

- <sup>16</sup>Ball, *OAS in Transition* 375 (1969).
- <sup>17</sup>Luini del Russo, *supra* n. 10 at 242.
- <sup>18</sup>OAS in Transition, *supra* n. 16 at 515.
- <sup>19</sup>Buergenthal, *The American Convention on Human Rights: Illusions and Hopes*, 21 Buffalo L. Rev. 121, 130 (1971).
- <sup>20</sup>OAS in Transition, *supra* n. 16 at 52.
- <sup>21</sup>*Human Rights and Non-Intervention in the Inter-American System*, *supra* n. 15 at 1164, 1165.
- <sup>22</sup>OAS in Transition, *supra* n. 16 at 471, 472.
- <sup>23</sup>*Id.* at 47.
- <sup>24</sup>*Human Rights and Non-Intervention in the Inter-American System*, *supra* n. 15 at 1172.
- <sup>25</sup>*Id.* at 1173.
- <sup>26</sup>Sohn and Buergenthal, *supra* n. 6 at 1339.
- <sup>27</sup>Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 Am. J. Int'l L. 889, 892 (1968).
- <sup>28</sup>*Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1971), [1971] I.C.J. Rep. 16; Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, *supra* n. 8 at 348.
- <sup>29</sup>*Re Drummond Wren*, [1945] O.R. 778, 4 D.L.R. 674 (Ontario High Court) cited in Kutner, *World Habeas Corpus: A Proposal for an International Court of Habeas Corpus and the United Nations Writ of Habeas Corpus* 40.
- <sup>30</sup>*Sei Fujii v. California*, 242 P.2d 617 (1952).
- <sup>31</sup>*The United Nations and Human Rights*, *supra* n. 13 at 359.
- <sup>32</sup>Sohn and Buergenthal, *supra* n. 6 at 505.
- <sup>33</sup>*Id.* at 515.
- <sup>34</sup>19 Dept. of St. Bull. 751 (1948) in *International Law*, *supra* n. 1 at 222.
- <sup>35</sup>*The United Nations and Human Rights*, *supra* n. 13 at 362.
- <sup>36</sup>[1970] I.C.J. Rep. 1 at 302-04.
- <sup>37</sup>Sohn and Buergenthal, *supra* n. 6 at 1000.
- <sup>38</sup>OAS in Transition, *supra* n. 16 at 504.
- <sup>39</sup>*Human Rights and Non-Intervention in the Inter-American System*, *supra* n. 15 at 1162.
- <sup>40</sup>*The Protection of Human Rights by the Organization of American States*, *supra* n. 27 at 901.
- <sup>41</sup>*Id.* at 902.
- <sup>42</sup>Sohn and Buergenthal, *supra* n. 6 at 1361.
- <sup>43</sup>Conversation with Garcia Amador, in Miami, Fla. March 8, 1974.

<sup>44</sup>*The Protection of Human Rights by the Organization of American States*, *supra* n. 27 at 903.

<sup>45</sup>*The Human Person and Fundamental Freedoms in Europe*, 11 *Howard L. Rev.* 420 (1965).

<sup>46</sup>MacChesney, *Should the U.S. Ratify the Covenants? A Question of Merits Not of Constitutional Law*, 11 *Howard L. Rev.* 913 (1965).

<sup>47</sup>*The American Convention on Human Rights: Illusions and Hopes*, *supra* n. 19 at 123.

<sup>48</sup>*Id.* at 134.

<sup>49</sup>L. Kutner, *Due Process of War: An Ad Hoc War Crimes Tribunal: A Proposal*, 43 *Notre Dame Lawyer* 481, 484 (1968).

<sup>50</sup>*Should the United States Ratify the Covenants? A Question of Merits, Not of Constitutional Law*, *supra* at 916.

<sup>51</sup>265 U.S. 332 (1924).

<sup>52</sup>*Id.* at 916.

<sup>53</sup>*The American Convention on Human Rights*, *supra* n. 19 at 127.

<sup>54</sup>*Roe v. Wade*, 93 S.Ct. 756 (1973).

<sup>55</sup>*Miami Herald Publ. Co. v. Tornillo*, 94 S.Ct. 2831 (1974).

<sup>56</sup>*Human Rights and Non-Intervention in the Inter-American System*, *supra* n. 15 at 1177, 1180.

<sup>57</sup>*Id.* at 1181.

<sup>58</sup>*Due Process of War: An Ad Hoc War Crimes Tribunal: A Proposal*, 43 *Notre Dame Lawyer* 481, 490 (1968).

<sup>59</sup>*World Habeas Corpus: A Proposal for an International Court of Habeas Corpus*, *supra* n. 29 at 34, 36.

<sup>60</sup>3 *Lawyer of the Americas* 191 (1971).