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Ann Van Wynen Thomas

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HUMAN RIGHTS AND THE ORGANIZATION OF AMERICAN STATES†

Ann Van Wynen Thomas*

A. J. Thomas, Jr.**

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INTRODUCTION

The historical idealistic basis of an American community of nations is posited upon the belief that the New World was to be dedicated to liberty, democracy, and peace, in contrast to the monarchy, tyranny, and belligerency which prevailed in the old.¹ Since the earliest days of American independence, her leaders have called for respect for and protection of those complementary aspects of democracy—popular constitutional government and human rights. Henry Clay in 1820 and again in 1821 appealed for a hemispheric system to serve as “a rallying point of human wisdom against all the despotism of the Old World,” and as “a sort of counterpoise to the holy alliance . . . in favor of national independence and liberty.”² Bolivar, in the 1826 Treaty of Union, League and Perpetual Confederation, would sanction any state which deserted the republican form of government by expulsion from the proposed inter-American organization. A continental citizenship was also to be established, and slavery in the Americas was to be abolished.³ Pedro Felix Vicuña of Chile wrote in 1837 that a hemispheric union should be established to support popular revolutions against tyrannical governments.⁴ Later, Juan Bautista Alberdi, then a refugee in Chile from Argentine dictatorship, maintained that intervention should be utilized to promote democratic governments in the Americas.⁵

Despite these and other declarations for a continent of liberty, declarations which were to be made over and over again in the forthcoming years, demands for specific and clear-cut protection of human rights through the medium of Pan America were not to be heard until the end of World War II. Throughout most of the continent, dictatorship had become the rule, democracy the exception, and with dictatorship came a consequent drastic deprivation of fundamental rights and freedoms. This pattern had repeated itself over and over again in every age from Rosas, Lopez, and Santa Ana to the even bloodier regimes of Gomez, Ubico, and Trujillo down

¹ A. WHITAKER, *THE WESTERN HEMISPHERE IDEA* chs. I, II (1954).

² *Id.* at 32.

³ See Treaty of Perpetual Union, League, and Confederation between the Republics of Colombia, Central America, Peru, and the United Mexican States, July 15, 1826, in *INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928*, at xix-xx (J. Scott ed. 1931). Article 29 of this treaty provides for exclusion if any of the parties should change its present form of government. Since the nations were all ostensibly possessed of a republican form of government it follows that substantial departure from the republican form would mean exclusion.

⁴ *Id.* arts. 23, 24, 27.

⁵ R. Burr & R. Hussey, *DOCUMENTS ON INTER-AMERICAN COOPERATION, 1810-1881*, at Nos. 19, 23 (1955). Tabar of Ecuador and President Wilson were also advocates of multilateral protection of democracy in the hemisphere. See A.J. THOMAS, JR. & A.V.W. THOMAS, *THE ORGANIZATION OF AMERICAN STATES* 216-17 (1963) [hereinafter cited as THOMAS AND THOMAS].

to the present era. Today, we are presented with a spectacle of increasing numbers of military governments in leading South American states that should be well on the way to democracy.

Perhaps as a result of this dominance of military dictatorships, it was not until 1945 that human rights became of inter-American concern. At the Mexico City Conference on War and Peace, the Chapultepec Conference,⁶ Guatemala demanded that collective non-recognition be used as a weapon against anti-democratic governments on the ground that such regimes endangered the peace and solidarity of the hemisphere and were the primary cause for the denial of the rights of man.⁷ This proposal was sidetracked and ultimately forgotten.⁸ Collective action against the internal regime of a fellow American state would conflict with the most sacrosanct principle of the Americas—the doctrine of non-intervention. Instead of the Guatemalan proposal, the conference adopted a weak resolution on International Protection for the Rights of Man.⁹ It declared adherence to those international law principles for the safeguarding of essential human rights and vaguely supported a system of international protection for these rights. Strangely, the resolution was not really made for the enlightened purpose of protecting human rights as such. Rather, it rested upon the assumption that protection of human rights was needed to eliminate diplomatic protection of citizens abroad and the intervention which had resulted therefrom. Thus, human rights and their protection were again placed in an inferior position to principles of sovereignty and non-intervention.

After the Mexico City conference, a doctrine was formulated by Eduardo Rodriguez Laretta, Foreign Minister of Uruguay.¹⁰ He followed Emanuel Kant's theory by equating international peace with a republican form of government for all states.¹¹ Rodriguez

⁶ P.A.U. INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE, MEXICO CITY, REPORT SUBMITTED TO THE GOVERNING BOARD OF THE PAN AMERICAN UNION BY THE DIRECTOR GENERAL (Feb. 21-Mar. 8, 1945, Cong. and Conf. Series No. 47 1945).

⁷ See P.A.U. HANDBOOK FOR DELEGATES TO THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES 88-89 (1947).

⁸ Resolution XXXVIII, "Defense and Preservation of Democracy in America," P.A.U. *supra* note 6. On the conflict between intervention and human rights see M. Ball, *Issue for the Americas*, 15 INT'L ORG. 21 (1961).

⁹ Resolution XL, P.A.U., *supra* note 6.

¹⁰ P.A.U. CONSULTATION OF THE GOVERNMENT OF URUGUAY AND REPLIES OF THE GOVERNMENTS ON THE PARALLELISM BETWEEN DEMOCRACY AND PEACE, THE INTERNATIONAL RIGHTS OF MAN AND COLLECTIVE ACTION IN DEFENSE OF THOSE PRINCIPLES (May, 1946). [hereinafter cited as P.A.U.].

¹¹ Although Kant laid down a doctrine of non-intervention he qualified it by his statement that the civil constitution in every state shall be republican. Thus, he believed that world peace could only be maintained if and when the republican form of government had become universal. For a statement of this thesis of Kant, see K. LOWENSTEIN, *POLITICAL RECONSTRUCTION* 17-20 (1946). In A. HERSHEY, *ESSENTIALS*

Laretta called for collective intervention to assure democracy in the Americas. "Peace," he said, "is safe only where democratic principles of government prevail." He added that action to assure democracy "is really nothing more than the fulfillment of obligations freely assumed by the American republics, all of whom have proclaimed at inter-American conferences their devotion to democracy and the rights of man."¹² The Laretta Doctrine was rejected by the majority of American governments, although over one-third did express approval of its contents.¹³ Objections covered several points. It was argued that it was often difficult to categorize a particular government as democratic or non-democratic; and that no nation could ever live up to the utopian ideals of democracy; and that democracy could not always be equated with peace, for democratic governments had on occasion constituted major threats to peace.¹⁴

THE CHARTER OF THE OAS

When the American Republicans met in 1948 in conference at Bogotá to reconstitute the inter-American system, they had before them the previously accepted Inter-American Treaty of Reciprocal Assistance (The Rio Treaty). In its preamble, this treaty affirmed "as a manifest truth . . . that peace is founded on justice and moral order and consequently on the protection of human rights and freedom."¹⁵ This language can hardly be understood as creating a legal obligation on the part of the American republics to maintain essential human rights within their respective borders. Moreover, the treaty provided no sanctions or measures of enforcement to be taken against a state violating human rights.

There was strong sentiment at Bogotá to remedy this failure through the creation of an inter-American norm for the respect of human rights. Power would be granted to the inter-American system, now to be called the Organization of American States (OAS), to enforce the norm.¹⁶ An opposing view prevailed,¹⁷ however. Thus,

OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 243 n.18 (1935) the author claims that Kant in "Essay on Perpetual Peace" published in 1795 was first to state the principle of non-intervention. Hershey fails to mention the fact that Kant's prohibition of interventions might be considered as modified by his statement that the civil constitution in every state should be republican.

¹² P.A.U., *supra* note 10.

¹³ *Id.*

¹⁴ *Id.* Selte-Camaro Filho, *A Doutrina Larreta*, 3 BOLETIM DA SOCIEDADE DE DIREITO INTERNACIONAL 18 (1946).

¹⁵ On the Inter-American Treaty of Reciprocal Assistance see P.A.U., INTER-AMERICAN CONFERENCE FOR THE MAINTENANCE OF CONTINENTAL PEACE AND SECURITY, RIO DE JANEIRO, REPORT ON RESULTS OF CONFERENCE SUBMITTED TO THE GOVERNING BOARD OF THE PAN AMERICAN UNION BY THE DIRECTOR GENERAL (1947)

¹⁶ P.A.U. INTER-AMERICAN JURIDICAL COMMITTEE REPORT ON THE INTER-AMER-

the Charter, the basic constitutional instrument of the OAS, set forth rather general and idealistic statements as human rights. American solidarity was declared to be founded upon liberty and social justice.¹⁸ In a statement of principles, "the fundamental rights of the individual without distinction as to race, nationality, creed or sex" were proclaimed.¹⁹ Language of a legally binding character was used, however, in Article 13 of the Charter which reads as follows:

Each state has the right to develop its cultural, political and economic life freely and naturally. In this free development, the state *shall* respect the rights of the individual and the principles of universal morality.²⁰

Use of the word "shall" in Article 13 appears to impose a legal obligation upon the members, but the rights of the individual to be respected and maintained are not delineated, and the additional duty imposed to respect the principles of universal morality is vague indeed, smacking of natural law. Moreover, the organization was not empowered to see that each nation lived up to the obligation of Article 13.

States demanding inter-American protection of human rights were not content with these generalized proclamations. At their insistence, a resolution was adopted entitled the "American Declaration of the Rights and Duties of Man" which constituted the first comprehensive statement of continental human rights.²¹ Unfortunately, the declaration can be considered only as a statement of aims and hopes. It was not the intent of its authors to create a legally binding hemispheric bill of rights.

The rights listed in the declaration are extensive. Some are of a political nature while others are economic and social. Still others can hardly be classified as rights. They are ethical aspirations. As the title of the resolution indicates, the declaration also concerns itself with the "duties" of man, stating: "the fulfillment of duty by each individual is a prerequisite to the rights of all."²² "Rights and

ICAN COUNCIL OF JURISTS CONCERNING RESOLUTION XXXI OF THE CONFERENCE OF BOGOTÁ 2 (1949).

¹⁷ The opposing group argued that the Charter was in the nature of a constitutional instrument and should be confined to the establishment of the OAS and the functions of its organs. All other inter-American policies should be set up in separate agreements. NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, REPORT OF THE DELEGATION OF THE UNITED STATES WITH RELATED DOCUMENTS, DEPT. OF STATE PUB. 3263, at 13 (1948).

¹⁸ O.A.S. CHARTER preamble.

¹⁹ O.A.S. CHARTER art. 5(j).

²⁰ O.A.S. CHARTER art. 13. (Italics supplied)

²¹ Final Act, Resolution XXX, as contained in NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, *supra* note 17, at 260.

²² Preamble, American Declaration of the Rights and Duties of Man. For discus-

duties are interrelated in every social and political activity of man." The duties of man are roughly classified into social duties, political duties, and economic duties. Underlying the inclusion of duties is the thought that each individual should recognize that he owes certain responsibilities to the society in which he lives, and that stress should not be placed solely upon the responsibility of the state to secure human rights. Nevertheless, one may question the utility of including such a concept in an international declaration, for the whole basic theory of the protection of human rights on the international level is that individuals can be easily overwhelmed before the aggregate collection of power lodged in a state. A sovereign state, on the other hand, still retains its power to exact from all individuals the duties which are owed to it.²³

HUMAN RIGHTS AND COLLECTIVE SECURITY

No powers are given to the OAS to enforce respect for fundamental rights and freedoms in a state departing from the norm. Still, proposals have been made, and, in certain cases, collective action has been taken, which would, or did, permit the cat to be skinned. Inter-American protection of human rights through collective action rests upon the foundation that outrageous violations of human values by an American state will result in a threat to the peace of the hemisphere. By the terms of the Rio Treaty, collective measures may be taken against an American state which threatens or breaches the peace of the hemisphere or which commits an aggression so as to endanger the territory or the political independence of another American state.²⁴ Therefore, a state which violates human rights so as to threaten the peace of the Americas may be subjected to the collective enforcement measures of the Rio Treaty. Here is a return to the thought of Kant and Laretta—a parallelism is found between democracy and respect for human rights on the one hand and peace on the other.

This idea found expression again in 1959 at the Fifth Meeting of Consultation of Ministers of Foreign Affairs which was called to consider problems of political unrest in the Caribbean and the effective exercise of representative democracy in the hemisphere.²⁵ Attributes of a democratic regime were set forth by the meeting's

sion of the rights and duties delineated *see* THOMAS AND THOMAS, *supra* note 5, at 224-27.

²³ THOMAS AND THOMAS, *supra* note 5, at 226.

²⁴ Inter-American Treaty of Reciprocal Assistance at arts. 3, 6. *See also* THOMAS AND THOMAS, *supra* note 5, at ch. XV.

²⁵ *See* 41 DEPT. STATE BULL. 342-44 (1959). On the background of the Santiago Meeting, *see id.* at 279 *et seq.*

Declaration of Santiago.²⁶ These included freedom of the press, radio, television, and, in general, freedom of information and expression. The American governments were called upon to ensure a system of freedom for the individual and social justice based on respect for fundamental human rights. They were also asked to protect by effective judicial procedures those human rights contained in domestic legislation.²⁷

The declaration thus recognized the relationship between respect for human rights, fundamental freedom, and representative democracy on the one hand and inter-American peace and harmony on the other. It was noted that failure to adhere to the principles of democracy is "a source of widespread disturbance and gives rise to emigration that causes frequent grave political tensions between the state the emigrés leave and the state that receives them."²⁸

Political tensions and emigration are by no means new to Latin America. The common denominator of political life in the Latin American republics has long been the presence of internal revolutionary disturbances as rivals have competed for political power. Losing parties are the "outs" and the "outs" are not only out of power, but they are often also out of the country. This is frequently the healthier course of action inasmuch as the "ins" have, in many instances, found it convenient to put the remaining "outs" out of the way in such a manner as to constitute a gross denial of human rights. Once out of the country, the "outs" conspire to return so as to overthrow those in power, the "ins." Such conspiracies and movements aimed at the overthrow of the "ins" have on countless occasions boiled over to embroil the government of the state to which the "outs" have emigrated, either because the government of such state is in sympathy with the "outs" and aids them overtly or covertly in their endeavors to stir up civil strife, or because such government fails to use due diligence to prevent such rebellious activities. Thus, a threat or even a breach of the peace comes to pass in the form of an indirect or vicarious aggression—as called by Dr. Schwarzenberger, an aggression by proxy.²⁹

In 1960, the Inter-American Peace Committee followed the Declaration of Santiago by finding hemispheric tensions and threats to peace in the flagrant denial of human rights and lack of representative democracy by the despotic Trujillo regime in the Dominican Republic. After investigation of the situation in the Dominican Republic, the committee found in that country denial of freedom of

²⁶ *Declaration of Santiago*, 41 DEPT. STATE BULL. 343 (1959).

²⁷ *Id.*

²⁸ *Id.*

²⁹ G. SCHWARZENBERGER, *FRONTIERS OF INTERNATIONAL LAW* 155 (1962).

speech and assembly, arbitrary arrest, cruel and inhuman treatment of prisoners, and the use of intimidation and terror as political weapons.³⁰ International tensions in the Caribbean were said by the committee to be aggravated by these violations of human rights and it was believed that such tensions would continue to increase so long as these violations persisted.³¹

A short time later, U.S. Secretary of State Herter, taking his cue from the committee, sought application of the principle. The Sixth Meeting of Ministers of Foreign Affairs, acting under the Rio Treaty, was convened in August, 1960, to consider charges of aggression by the Dominican Republic against Venezuela.³² Finding complicity of the Trujillo regime in an attempt on the life of Venezuela's president, the meeting agreed that the enforcement measures of the Rio Treaty should be applied against the Dominican Republic. The measures authorized by the consultative meeting were an immediate and collective break of diplomatic relations and a collective partial interruption of economic relations.

Although agreeing that the Dominican Republic had committed serious acts against Venezuelan sovereignty warranting condemnation, Secretary of State Herter expressed doubt that sanctions were the best means to bring the Dominican Republic back into the inter-American fold. Harking back to the Inter-American Peace Committee's previous report which would link aggression and threats to the peace with denials of democracy and human rights, he sought OAS supervision of free elections in the Dominican Republic after a period of free expression and free assembly. If the OAS were refused the right to supervise by the Dominican Republic, then strong measures under the Rio Treaty could and should have been taken.³³ Here then was an effort to enforce democracy and human rights against a member state in violation of community principles. This OAS political trusteeship for an American nation received very little enthusiasm. Other American republics believed the OAS not to be so empowered and therefore viewed it as collective intervention of an illegal nature in the internal affairs of the Dominican Republic.³⁴ Immediate measures under the Rio Treaty were favored and voted.

³⁰ Case presented by Venezuela relating to violations of human rights in the Dominican Republic (February 1960), P.A.U. INTER-AMERICAN PEACE COMMITTEE, REPORT OF THE INTER-AMERICAN PEACE COMMITTEE TO THE SECOND SPECIAL INTER-AMERICAN CONFERENCE ON THE ACTIVITIES OF THE COMMITTEE SINCE THE TENTH INTER-AMERICAN CONFERENCE 1954-1965, at 24-26 (OEA/Ser.L.III.ii 10, English, 1965).

³¹ *Id.* at 26.

³² P.A.U. APLICACIONES DEL TRATADO INTERAMERICANO DE ASISTENCIA RECIPROCA 1948-1960, at 393 *et. seq.* (1960).

³³ 43 DEPT. STATE BULL. 355-58 (1960).

³⁴ See THOMAS AND THOMAS, *supra* note 5, at 236.

There is difficulty in upholding the legality of an imposed OAS political trusteeship upon an American Republic under existing OAS instruments. A state's free acceptance of such a trusteeship and supervision of elections would create no problem. Moreover, in an instance similar to the Dominican Republic case, when the delinquent nation has been found to have committed an aggression against which measures can be legally taken, those measures might be delayed or withheld on condition that the state would accept the offer of a political trusteeship. Through such trusteeship, democracy and human rights could be instituted and maintained in order more nearly to effectuate inter-American peace. Something of a sophistry is present in such reasoning, however, in that threat of measures which can legally be taken are held over the head of the delinquent to compel acceptance of a measure which could not otherwise be legally taken.

Real difficulty is encountered with legality if the derelict state has neither consented to the trusteeship nor committed a threat to the peace, breach of the peace, or act of aggression against another state. Assume a despotic state flagrantly violates the human rights of its inhabitants to such an extent that a large exodus of these inhabitants has occurred. The despotic state has engaged in no illegal acts or acts threatening or breaching the peace in relation to other states. Other states, however, are aiding and abetting the emigrés within their borders to overturn the tyrannical regime. Although this regime has contributed to the whole tense situation by creating conditions within its frontiers that cause the emigration, the immediate threats to peace or acts of aggression emanate from those states which are supporting the emigrés and rebels to overthrow the dictator. Action under the Rio Treaty should be taken against those states, not against the dictator. It must be remembered that the Rio Treaty does not permit collective action in the case of acts endangering the peace alone. Article 6 calls for measures in the case of aggression, not of armed attack nature, or extra or intra-continental conflicts, or other situations endangering the peace which at the same time affect the "inviolability or the integrity of the territory or the sovereignty or the political independence of an American State." It is difficult to conceive how an authoritarian regime, albeit denying all human rights to its inhabitants, is affecting the territorial integrity, sovereignty, or political independence of another state, even though its violation of human rights creates international tensions through the emigration of those inhabitants.

In addition to suspending diplomatic relations or attempting to impose trusteeships, collective protection of democracy and human rights also might be pursued by the exclusion of an offender state from the inter-American system. Bolivar would have excluded from

his American league any state which changed its form of government, i.e., from republicanism to some other form.³⁵ Brazil at the 1948 Bogotá Conference would have made membership under the Charter of the OAS conditional upon a state having a democratic form of government. The prerequisites of democracy were listed as plurality of political parties, freedom of the ballot, the opportunity of private enterprise, and the guarantee of the fundamental rights of man. Brazil's recommendation failed to be adopted, but the idea of isolating nondemocratic states from the OAS did not die. At the Seventh Meeting of Foreign Ministers of 1960, President Betancourt of Venezuela called for a treaty which would exclude from the organization those states with governments not freely elected by the people. Additionally, a duty to respect the fundamental rights of man, guarantee freedom of the press and information, and recognize the rights of minorities to organize political parties were also requirements, according to President Betancourt.³⁶

1. *Cuban Exclusion*

To some extent, President Betancourt's recommendations were to be followed at the 1962 Eighth Meeting of Ministers of Foreign Affairs. Despite the fact that the Charter of the OAS contains no mechanism to depose a non-conforming member, the eighth meeting—called to consider problems created by the intervention of international communism in the hemisphere through Cuba³⁷—ended up with a resolution which had the effect of expelling Cuba from the organization.³⁸ The ministers first approved, with only Cuba dissenting, a resolution which recognized that continental unity, democracy, human rights, and self-determination were jeopardized by the subversive offensive of communist governments, the purpose of which was to destroy democratic institutions and to establish totalitarian dictatorship in the Americas at the service of extracontinental powers. The principles of communism were declared to be incompatible with the principles of the inter-American system.³⁹ The principles were respect and preservation of the rights and freedoms of man, representative democracy, non-intervention, and a rejection

³⁵ See note 3, *supra*.

³⁶ See NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, *supra* note 17, at 15.

³⁷ N.Y. Times, Aug. 24, 1960, at 10, col. 3.

³⁸ On the Punta del Este Meeting, see P.A.U. FINAL ACT EIGHTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS SERVING AS ORGAN OF CONSULTATION IN APPLICATION OF THE INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE, Punta del Este, Uruguay, January 23-31, 1962 (OEA/Ser.C/II.8, 1962); THOMAS AND THOMAS, *supra* note 5, at 59-60, 238-39, 326-27.

³⁹ Resolution, "Communist Offensive in America," 2 P.A.U., INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE APPLICATIONS 69 (1964).

of alliances and agreements that may lead to American intervention by extra-continental nations.⁴⁰ A second resolution declared that by associating itself with the principles of Marxist-Leninism, by establishing a political, economic and social system based on such a doctrine and by accepting military assistance from extra-continental communist powers, including the threat of military intervention in America by the Soviet Union, the Government of Cuba had acted contrary to inter-American principles and had thus violated its OAS membership obligations so as to be incompatible with the OAS. It was further noted that no member of the OAS can claim the rights pertaining to its membership if it fails to recognize the corresponding obligations. It was therefore resolved that adherence by any member state to Marxist-Leninism is incompatible with the inter-American system. Since the government of Cuba had identified itself officially as a Marxist-Leninist government, it was incompatible with the principles and objectives of the OAS. This incompatibility therefore excluded the Castro regime from participation in the system.⁴¹

Following this resolution, it might be thought that an inter-American norm requiring adherence to democracy and respect for human rights is in being, enforceable by the OAS through the sanction of exclusion. This would be a doubtful conclusion. Stress was laid upon the actions of Cuba violative of inter-American principles which led to Cuba's incompatibility with those principles which in turn led to Cuba's automatic exclusion. In other words, Cuba by her own actions creating incompatibility had excluded herself. If Cuba's actions had led to self-exclusion, exclusion can hardly be considered as a collective measure by the organization to enforce respect for human rights or anything else. The exclusion order was simply a recognition of *fait accompli*. Actually, though, we have before us a speciousness. It is rather clear that the hope was that the resolution of exclusion of the government of Cuba would so isolate Cuba as to work hardship and disadvantage upon her so that she would be compelled to return to the fold, to return to legality, and to avoid new offenses.

Also opposed to any notion that democracy and human rights have suddenly become enforceable norms of the OAS through the exclusion of Cuba is the fact that the resolution of exclusion passed by only the bare two-thirds majority necessary for adoption. Cuba of course voted in the negative. Argentina, Bolivia, Brazil, Chile, Ecuador, and Mexico abstained.⁴² The abstainers were motivated in

⁴⁰ *Id.* at 75.

⁴¹ Resolution VI, "Exclusion of the Present Government of Cuba from Participation in the Inter-American System," 2 P.A.U., INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE APPLICATIONS 75 (1964).

⁴² See THOMAS AND THOMAS, *supra* note 5, at 60.

part by the fact that they believed the exclusion to be illegal under the Charter of the OAS, since no provision was made for this procedure in that document.⁴³ Since the order was illegal, it would result in an illegal intervention in Cuba's internal affairs. These countries did recognize the incompatibility of a Marxist-Leninist government with basic American principles, but by failure to agree to any enforcement measures against a state departing from these basic principles, which include respect for human rights, respect for human rights seems to be relegated by the abstainers to an "ought" rather than regarded as an "is."

Finally, the exclusion action was taken against a communist government committed to the spread of its ideology through subversive intervention—a gross disregard of the American principle of non-intervention, particularly as it relates to a prohibition of extra-continental intervention—a mainstay of hemispheric thought since the proclamation of the Monroe Doctrine. Thus, it would seem that the exclusion is directed toward a Marxist-Leninist government in violation of respect for human rights, democracy, and other inter-American principles such as that of non-intervention. Can this be considered as precedent for an enforceable norm which would be directed against a state in derogation of human rights and fundamental freedoms only? If exclusion is used to enforce representative democracy and respect for human rights in the Americas, there are other nations, in addition to Cuba, where neither is observed, and against which measures could and should be taken. Membership in the OAS would be considerably reduced—possibly to the breaking point—if all such transgressors were to be excluded.

2. Intervention in the Dominican Republic and the Inter-American Peace Force

Discussion has centered to this point upon the authority of the OAS to safeguard human rights in the American states, and thus international peace, through the collective security machinery of the Rio Treaty. OAS action during the 1965 crisis in the Dominican Republic illustrates that there may be other ways and means to maintain respect for human rights as a basic principle of the American community.⁴⁴ At that time, the Tenth Meeting of Consultation of Ministers of Foreign Affairs established an Inter-American Peace

⁴³ See 2 P.A.U., *supra* note 39, at 79-80 for statements of these states as to their votes.

⁴⁴ For discussion of the crisis see A.J. THOMAS, JR., AND A.V.W. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965 BACKGROUND PAPER AND PROCEEDINGS OF THE NINTH HAMMARSKJOLD FORUM* (J. Carey ed. 1967). For account of the Tenth Meeting of the Consultation of Ministers of Foreign Affairs see 1 O.A.S. CHRONICLE, Aug., 1965, at 1-10, 19-41.

Force composed of member-state armed forces for service in the Dominican Republic.⁴⁵ This force was not organized for use against an aggressor or to prevent threats and breaches of inter-American peace. The Tenth Meeting was not convoked under the Rio Treaty at all, but under Article 39 of the Charter of the OAS,⁴⁶ which authorizes Meetings of Consultation of Ministers of Foreign Affairs not only to serve as the Organ of Consultation under the Rio Treaty, but also "to consider problems of an urgent nature and of common interest to the American States." The Tenth Meeting was to consider the "[s]erious situation created by armed strife in the Dominican Republic."⁴⁷ This nebulous statement made no mention of armed attack against an American state, aggression which is not an armed attack, or threats to or breaches of extra-continental or intra-continental peace, one of which would be requisite for an application of the Rio Treaty. To the contrary, the Tenth Meeting was concerned with armed civil strife in the Dominican Republic.⁴⁸

Several Meetings of Consultation have been called under the urgent-nature-common-interest enabling clause, and from these meetings have come general resolutions and recommendations urging, requesting, or recommending certain courses of action on the part of the member states.⁴⁹ But unlike decisions for measures of collective enforcement under the Rio Treaty which, except for decisions made by the consultative organ to use armed force, are binding upon all member states, the resolutions and recommendations taken by the Meeting of Foreign Ministers to consider urgent and common interest problems are not usually thought of as creating obligations.⁵⁰ Moreover, the power of direct action under the Rio Treaty to prescribe a certain course of behavior by providing collective measures for the maintenance of hemisphere peace is exempt by the OAS Charter from the non-intervention principle of the Americas as well as the prohibitions against the use of force or military occupation.⁵¹ A Meeting of Consultation grounded upon the urgent-problem-common-interest faculty has broad powers to discuss, deliberate, resolve, and recommend, but its competency here is not exempted from the basic OAS interdiction on intervention and use of force. If the OAS as a jural personality is obligated to respect these principles,

⁴⁵ Resolution, "Inter-American Force," 1 O.A.S. CHRONICLE, Aug., 1965, at 23-24.

⁴⁶ "Convocation of the Tenth Meeting of Consultation of Ministers of Foreign Affairs," *id.* at 19.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See discussion of the various Meetings of the Ministers of Foreign Affairs and the powers of the meetings in THOMAS AND THOMAS, *supra* note 5, at 79-85 and ch. XVII.

⁵⁰ *Id.* at 86.

⁵¹ O.A.S. CHARTER arts. 15, 16, 17, 19.

it would be reasonable to assume, that in the absence of specific exception, any attempt by a Meeting called under the urgent-nature-common-interest power to impose the collective will of the OAS and its members against a state without that state's consent would be illegal intervention.⁵²

Yet, in the *Dominican Republic* case, the Tenth Meeting, acting under the urgent-common-interest power, authorized a use of armed force through the Inter-American Peace Force to restore democracy in the Dominican Republic and, to a lesser extent, protect human rights. This controversial "American Force resolution"⁵³ requested the governments of member states to make available to the OAS contingents of their armed forces to operate under the authority of the Tenth Meeting. Following this resolution, some United States military forces which had previously landed in the Dominican Republic upon the outbreak of civil strife were withdrawn, and the remainder were incorporated into the Peace Force under a unified command. Six Latin American nations supplied forces. With the exception of Brazil, their numbers were small.⁵⁴

The Peace Force resolution gave no hint that it was an instrument of inter-American collective security for hemispheric peace or a measure of enforcement of such inter-American peace. It was declared that since the OAS was charged with the responsibility of interpreting the *democratic will* of its members, and with safeguarding the principles of its charter, it was also empowered to adopt appropriate measures in the instance presented by the Dominican Republic to assure the reestablishment of peace and normal democratic conditions. Since the OAS was competent to assist member states in the preservation of peace and the reestablishment of normal democratic conditions, it was also "competent to provide the means that reality and circumstances require and that prudence compels as adequate for the accomplishment of such purposes." It was therefore legitimate to form the Peace Force for service in the Dominican Republic which would have:

as its sole purpose, in a spirit of democratic impartiality, that of cooperating in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the *inviolability of human rights*, and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.^{54a}

⁵² For discussion see THOMAS AND THOMAS, *supra* note 5, at 165.

⁵³ See note 45, *supra*.

⁵⁴ The peace force was composed of 1,115 men from Brazil, 21 from Costa Rica, 3 from El Salvador, 10,900 from the United States, 250 from Honduras, 164 from Nicaragua, and 183 from Paraguay. O.A.S. CHRONICLE, *supra* note 44, at 5.

^{54a} See note 45, *supra* at 24.

The venture aimed specifically to permit the functioning of democratic institutions and to maintain the inviolability of human rights of the Dominican people.

As discussed previously, inter-American instruments do not specifically empower the OAS to use coercive measures to enforce democracy or respect for human rights or the maintenance of such rights in a state where they have disappeared. Since no such prerogative is granted by existing treaties, an exception to the non-intervention principle can hardly be spelled out if the action of the Tenth Meeting is considered as intervention. A use of force which controlled and affected the outcome of a civil strife in an American state would appear to be coercive in nature, altering the condition of things in the Dominican Republic, and thus violative of Article 15 of the OAS Charter which prohibits intervention.⁵⁵

However, argument has been advanced that this forceful measure for democracy and human rights in the Dominican Republic falls outside the meaning of intervention. Some authorities distinguish collective intervention from collective action.⁵⁶ Any action taken by an international organization which is in the general interest of its members is technically not intervention. Providing the organization is acting within its constitutional competency, the action may be acceptable. The Secretary General of the OAS took this point of view. He stated:

The purpose of the Inter-American Force is clearly not one of intervention but rather one of rendering assistance to the people of a sister state.⁵⁷

A similar contention was advanced before the Security Council of the United Nations where the Peace Force was designated by the Malaysian representative as neither intervention nor enforcement action but a conciliatory function, a type of action permitted to all international organizations to foster peace and tranquility and to permit a "people to establish a democratic civil government of their own choosing, to heal the wounds and the bitterness of civil strife, and to begin the path of relief and reconstruction."⁵⁸

The debates before the Security Council were similar to those concerning the legality under the UN Charter of regional agency use of armed force against a member state within the region. Article

⁵⁵ See THOMAS AND THOMAS, *supra* note 5, at 164-68, for discussion of the O.A.S. and the principle of intervention.

⁵⁶ E.g., Lleras, *Report on the Ninth International Conference of American States*, 1 ANNALS OF O.A.S. 25-27 (1949).

⁵⁷ As quoted by Mr. Yost of the United States before the Security Council, U.N. SCOR, S/PV. 1220 June 3, 1965, at 57 (1965).

⁵⁸ U.N. SCOR, S/PV. 1222 June 9, 1965, at 67-68 (1965).

51 of the UN Charter permits member states to take measures including the use of armed force in the exercise of the right of individual or collective self-defense until such times as the Security Council takes the necessary steps to maintain peace. But in the *Dominican Republic* case, the OAS did not base its action on a collective right of self-defense. When states within a regional agency are not exercising a legitimate right of collective self-defense, the validity of regional measures taken without Security Council approval is doubtful. Article 53 of the UN Charter demands that enforcement action not be taken under regional arrangements without authorization by the Security Council. Thus, the validity of measures taken without such previous authorization appears to depend upon whether they fall within the meaning of "enforcement action."

The OAS has always maintained that non-forceful coercive measures permitted by the Rio Treaty do not fall within the meaning of "enforcement action" as the phrase is used in the UN Charter. The director general of the OAS has stated:

Enforcement action, with the use of physical force, is obviously the prerogative of the Security Council with a single exception: individual or collective self-defense. But the other measures . . . are not; it may even be said that it is within the power of any state—without necessarily violating the purposes, principles, or provisions to the Charter—to break diplomatic, consular, and economic relations or to interrupt its communications with another state.⁵⁹

Although issue has been taken with this viewpoint, in cases of hemispheric aggressions where the OAS has decided to take diplomatic or economic measures against an aggressor, Security Council authorization has not been sought nor thought to be required.⁶⁰

Measures involving physical force, according to the thought of the director general, would be enforcement action. Thus, use of the Inter-American Peace Force in the Dominican Republic would appear to be beyond the powers of the OAS, for such force was not authorized by the Security Council. OAS precedent does exist, however, for a use of OAS force without authorization. The armed naval quarantine in the *Cuban Missile Crisis* case was based on an OAS recommendation under the Rio Treaty that member states take measures, including the use of armed force, to prevent Cuba from continuing to receive military material which threatened continental

⁵⁹ INTER-AMERICAN CONFERENCE FOR THE MAINTENANCE OF CONTINENTAL PEACE AND SECURITY, *supra* note 15, at 41-42.

⁶⁰ For discussion of the various OAS cases in relation to the U.N. see MacDonald, *The Developing Relationship between Superior and Subordinate Political Bodies at the International Level. A Note on the Experience of the United Nations and the Organization of American States*, 2 CANADIAN Y.B. INT'L L. 21 (1964).

peace and security.⁶¹ A spokesman of the United States at the time denied this use of physical force was enforcement action. It was called an action for the maintenance of hemispheric peace taken under the co-jurisdiction of the OAS with the Security Council.⁶²

The International Court of Justice also seems to have restricted the meaning of enforcement action. In speaking of the United Nations armed operations in the Congo, the court construed the word "action" by saying such operations:

did not include a use of armed force against a state which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve "preventive or enforcement measures" against any State under Chapter VII and therefore did not constitute "action" as that term was used in Article 11.⁶³

This reasoning would support the legality of the Inter-American Peace Force. Its purpose was not to take action against an aggressor state or against a government which by its policies was threatening peace. The operations of the Peace Force were not preventive action or enforcement action against any aggressor state or peace-breaking or peace-threatening state. It was action taken against a "[a] civil disorder, political chaos, bloodshed and internecine war."^{64a} The action was called a conciliatory function, "a pacific settlement operation which may require a minimum use of force."^{64b} The OAS was preparing "the necessary conditions for the will of the people to find free expression so that it may ultimately prevail."^{64c}

If this line of thought is followed, the OAS can act legally to assure basic principles of democracy and respect for human rights in an American state undergoing civil strife by proceeding under its urgent and common interest power—even to the use of armed force to reestablish democracy and the inviolability of human rights in the strife torn land.^{64d} Can we take this a step further and say that such action can be taken to protect and assure respect for human rights in an American state where rights have disappeared, or do not exist, or have been extensively violated, when a state is *not* engaged in civil strife? If so, the OAS has its work cut out for it.

⁶¹ 2 P.A.U., *supra* note 39, at 112.

⁶² Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFFAIRS 550, at 554-56 (1963).

⁶³ *Advisory Opinion of 20 July 1962*, [1962] I.C.J. REPORTS, at 170-71.

^{64a} 20 U.N. GAOR Supp. 2 at 117, U.N. Doc. A/6002 (1965).

^{64b} U.N. SCOR, S/PV. June 9, 1965 at 66-68 (1956).

^{64c} *Id.*

^{64d} See THOMAS AND THOMAS, *supra* note 44, at 59 for further discussion of legality of the Peace Force.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

At the Fifth Meeting of Foreign Ministers in 1959, the highly debated issue of safeguarding human rights to protect the stability of the continent finally resulted in the creation of an Inter-American Commission on Human Rights, composed of seven members elected by the Council of the Organization.⁶⁵ The commission, an autonomous entity within the OAS, was to promote respect for human rights by preparing studies and recommendations on progressive measures in favor of human rights and also to serve the OAS as an advisory body.⁶⁶ The commission was established by mere OAS resolution. It has now become treaty-based. In 1967, the Protocol of Buenos Aires amended the Charter of the OAS and established the Inter-American Human Rights Commission as the consultative organ of the OAS on human rights.⁶⁷ The prime function of the organ was declared to be the promotion, observation, and protection of human rights. Moreover, the 1970 American Convention on Human Rights⁶⁸ recognizes the commission as one of the organs—the other being the Inter-American Court of Justice—with competence relating to the fulfillment of the obligations made under the convention. This convention continues the commission membership of seven. However, the members are to be elected by the General Assembly of the OAS from lists of candidates proposed by member states. The commission is also directed to prepare its own statute and regulations. The statute must be submitted to the General Assembly for approval. Since this convention is not yet operative due to a deficiency in ratifications, the old statute of the commission continues extant.⁶⁹

⁶⁵ Resolution VIII as contained in P.A.U., FIFTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, ACTAS Y DOCUMENTOS (OEA/Ser.F/II.5, 1961). See also, P.A.U. LA ORGANIZACION DE LAS ESTADOS AMERICANOS 1954-1962, at 12 (OEA/Ser.D/II.2, 1959).

⁶⁶ See functions and powers of the commission as contained in the Statute which was adopted in 1960 by the Council of the OAS and as amended by the Second Special Inter-American Conference. Comision Inter-americana de Derechos Humanos, Manual de Normas Vigentes en Materia de Derechos Humanos, p. 30 *et. seq.*, OEA/Serv. L/V/II.23, doc. 21, 1970; the statute of the commission is also contained in 1 REVUE DES DROITS DE L'HOMME—HUMAN RIGHTS JOURNAL 144 *et. seq.* (1968). For discussions of the work of the Inter-American Commission on Civil Rights see A. SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (1970); THOMAS AND THOMAS, *supra* note 44, at 59-74; Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AM. J. INT'L L. 889, at 893-908 (1968); Sandifer, *Human Rights in the Inter-American System*, 11 HOWARD LAW J. 508, 516-524 (1965); A.V.W. Thomas and A.J. Thomas, Jr., *The Inter-American Commission on Human Rights*, 20 S.W.L.J. 282 (1966). See also Van Boven, *The United Nations Commission on Human Rights and Violation of Human Rights and Fundamental Freedoms*, 15 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAL RECHT 374 (1968).

⁶⁷ P.A.U. CHARTER OF THE ORGANIZATION OF AMERICAN STATES AS AMENDED BY THE PROTOCOL OF BUENOS AIRES IN 1967 ch. XVIII, Treaty Series 1-c (OEA/Ser.A/2 Rev. 1968).

⁶⁸ *American Convention on Human Rights*, 5 REV. OF INT'L COMM'N OF JURISTS 44-62 (Mar. 1970).

⁶⁹ Authorities cited note 66, *supra*.

The first Statute of the Inter-American Commission on Human Rights was adopted by the Council of the OAS in 1960.⁷⁰ Article 9 described its functions and powers as follows:

- a) To develop an awareness of human rights among the peoples of America;
- b) To make recommendations to the Governments of the member states in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;
- c) To prepare such studies or reports as it considers advisable in the performance of its duties;
- d) To urge the Governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e) To serve the Organization of American States as an advisory body in respect to human rights.

Almost at once, controversy arose as to the scope of the commission's functions and the interpretation of the statute. Many of the members believed a function confined to the making of reports for the promotion of respect for human rights generally throughout the Americas was too narrow. In debating the extent of their authority, a majority of the members of the commission decided that Article 9(b), which declared that the commission was empowered to "make recommendations to the governments of the member states *in general*," should be interpreted as meaning to make *general* recommendations to member states.⁷¹ Despite the fact that the OAS Council had refused to grant individuals and groups the right to submit petitions to the commission, the commission resolved that it could accept written communications from individuals claiming violations of human rights because the commission was authorized to prepare studies and reports which it deemed advisable.⁷² Thus, the commission determined it could recommend the adoption of general measures for the promotion of human rights within the framework of the domestic law of each state as well as recommend to individual states that they take appropriate measures to assure faithful observance of human rights within their borders. Complaints from individuals could also be received and accused governments could be requested to give information to the commission regarding the steps taken to remedy violations the commission had called to the attention of the violator.⁷³

⁷⁰ *Id.*

⁷¹ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SESSION, OCT. 2-28, 1960, at 10 (OEA/Ser.L/V/II.1, doc. 32, 1961).

⁷² *Id.* at 13.

⁷³ *Id.* at 12.

1. *Commission's Experiences*

a. *Cuba.* The commission's conclusions regarding its power in this respect have failed to be accepted as correct by certain states, and collisions between such states and the commission have resulted. The commission's experiences with Castro's Cuba have been most unhappy and disheartening. In 1961, the commission, observing that it had received communications requesting commission action in Cuba to void irreparable violations of human rights, suggested to the government of that country that it respect the American Declaration of the Rights and Duties of Man, and requested that the commission be supplied a report on the measures Cuba was taking to maintain and advance human rights.⁷⁴ Cuba denied the commission's power to make such specific recommendations and requests and intimated that such was an illegal intervention in its affairs.⁷⁵ The commission replied that it was interpreting the legal precepts of its statute in their natural sense, implementing the statute's mandate to promote respect for human rights.⁷⁶

The commission subsequently prepared and published two reports, the first in 1962 entitled, "Report on the Situation Regarding Human Rights in the Republic of Cuba"⁷⁷ and the second, in 1963, "Report on the Situation of Political Prisoners and their Relatives in Cuba."⁷⁸ These reports were based on information, communications, and complaints received by the commission. The second report contained testimony from men who had participated in the Bay of Pigs invasion and who had been released and returned to the United States. The men told ugly tales of human rights violations in Cuba: Those accused of crimes against the Cuban revolution were denied a right to hearing and appeal. Death penalties were meted out to those designated enemies of the regime and counter-revolutionaries. Arbitrary arrests were reported as well as the tortures and cruelties occurring in Cuban prisons.

Despite Cuba's attitude, the commission persisted in its efforts. In 1964, the Cuban Government sent its last message to the commission, refusing to provide any information. It denied OAS jurisdiction because of Cuba's exclusion from the organization, which was, in turn, characterized as illegal. The commission replied declar-

⁷⁴ P.A.U. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORTS ON THE SITUATION OF POLITICAL PRISONERS AND THEIR RELATIVES IN CUBA ch. I (OEA/Ser. L/V/II.7, doc. 4, 1963).

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 6.

⁷⁷ P.A.U. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION REGARDING HUMAN RIGHTS IN THE REPUBLIC OF CUBA (OEA/Ser.L/V/II.4, doc. 30, 1962).

⁷⁸ See note 74, *supra*.

ing its continued competence, inasmuch as the present Cuban government had been excluded, not Cuba itself. Under the Commission's reasoning, Cuba as a state was still obligated to inter-America and its principles concerning human rights.⁷⁹

In 1965, the Cuban government refused to respond to a request of the commission to visit Cuba,⁸⁰ and in 1966, when the chairman of the commission sought once again to obtain human rights information from Cuba, he was rebuffed.⁸¹ Nevertheless, the commission did continue to issue damning reports on continued human rights deprivations in that unfortunate land, particularly as relating to death penalties for political prisoners, lack of fair criminal procedures and impartial trials, and the cruel treatment of persons in prisons.⁸²

b. *Haiti*. The commission has fared little better in the treatment it has received from other countries. After receiving complaints in Haiti and Nicaragua, the commission decided to request permission to hold part of its 1962 sessions in those nations. Haiti refused, stating the request was a form of interference in Haiti's internal affairs.⁸³ Nicaragua assented but left the date open pending further conversations. When dates were suggested in December, 1962, or January, 1963, the Nicaraguan Foreign Minister reported that a date during those two months would not be convenient because of circumstances of a national and international nature. The chairman of the commission in November, 1962, again sought permission to hold a part of its January special session in Nicaragua. A cable was received two months later stating it would be impossible to designate the current month of January for a commission session in Nicaragua. The commission concluded that Nicaragua had refused its assent for a Nicaraguan meeting for the purpose of ascertaining the obser-

⁷⁹ See P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS NINTH SESSION: OCT. 5-16, 1964, at 13 (OEA/Ser.L/V/II.10, doc. 21, 1965); P.A.U. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS TENTH SESSION 9-10 (OEA/Ser.L/V/II.11, doc. 19, 1965).

⁸⁰ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS TWELFTH SESSION: OCT. 4-15, 1965, at 17-18 (OEA/Ser.L/V/II.13, doc. 26, 1966).

⁸¹ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS THIRTEENTH SESSION: APRIL 18-28, 1966, at 17 (OEA/Ser.L/V/II.14, doc. 35, 1966).

⁸² P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT REGARDING THE SITUATION OF HUMAN RIGHTS IN CUBA (OEA/Ser.L/V/II.17, doc. 4, rev., 1967); O.A.S., INTER-AMERICAN COMMISSION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, SECOND REPORT ON THE SITUATION OF POLITICAL PRISONERS AND THEIR RELATIVES IN CUBA (OEA/Ser.L/V/II.23, doc. 6, rev. 1, 1970).

⁸³ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION REGARDING HUMAN RIGHTS IN HAITI 2-3 (OEA/Ser.L/V/II.8, doc. 5, 1963).

vance of human rights there.⁸⁴ In both the Haitian and Nicaraguan instances, the commission through press release widely publicized that these nations were accused of violating human rights.

In 1963, the commission requested and was again refused permission to study the situation regarding human rights in Haiti on Haitian territory.⁸⁵ Haiti stated that the commission's visit might be interpreted as a form of interference in its internal affairs. The commission made it clear that it respected Haiti's sovereignty, but that it was empowered by Article 11(c) of its statute to visit the territory of an American state with prior consent of the government. Unable to investigate further, and, in accordance with Article 9(c) of its statute, the commission then prepared and issued a report on the situation regarding human rights in Haiti. The report contained complaints indicating serious transgressions by the Haitian government in its abridgement of a whole spectrum of rights.⁸⁶ Violations of the right to life, liberty, and personal property, particularly in the arrest and disappearance of persons and the mass execution of political prisoners, were reported. Suppression of freedom of investigation, opinion, expression and dissemination through the closing of newspapers and the jailing, torture, and expulsion of newsmen, was reported. The complaints went on and on alleging: denial of a right to a fair trial, arbitrary arrest and lack of due process of law, the denial of the right to asylum, restrictions on the right to vote and to participate in government through the elimination of opposition parties, the suppression of the right of assembly and association, denial of the right to residence and movement, and the violation of a right to education and culture. Information refuting certain of the complaints was received by the commission from the Haitian government, although such information, according to the commission, did not relate to all of the complaints.

A second report on Haiti's violations of human rights was released in 1967.⁸⁷ This document concerned accusations that Haitian citizens who were returned to Haiti from the Dominican Republic had been executed or imprisoned arbitrarily. One instance reported was the case of the Beauvoir-Florez family. According to a com-

⁸⁴ On the Nicaraguan case see P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIFTH SESSION, SEPT. 24-OCT. 26, 1962, at 11-16 (OEA/Ser.L/V/II.5, doc. 40, 1963); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SPECIAL SESSIONS, JAN. 3-23, 1963, at 11 (OEA/Ser.L/V/II.6, doc. 18, 1963).

⁸⁵ P.A.U. *supra* note 83, at 4-6.

⁸⁶ *Id.* at 9 *et. seq.*

⁸⁷ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REQUESTS FOR INFORMATION TRANSMITTED TO THE GOVERNMENT OF HAITI ON THE CASE OF HAITIAN CITIZENS RETURNING TO THEIR COUNTRY FROM THE DOMINICAN REPUBLIC AND THE CASE OF THE BEAUVOIR-FLOREZ FAMILY (OEA/Ser.L/V/II.16, doc. 2, 1967).

plaint received, a secret military court sentenced two members of the family to death after arbitrary arrest. The Haitian government rejected requests for information regarding returned Haitian citizens, but related that the persons concerned in the Beauvoir-Florez episode had been sentenced to death for attempted murder and treason, that the president had pardoned them, and they were free to depart from Haiti.

Still another report on Haiti was communicated to the American governments by the commission in 1969.⁸⁸ This document again listed the rights allegedly violated, the denunciations which had been received, requests for information, and the replies of the Haitian government.

c. *Nicaragua*. In the Nicaraguan situation, the refusal of the government to receive the commission in 1963 made it impossible for the commission to monitor Nicaraguan presidential elections in 1963. The commission believed the delays and maneuverings of Nicaragua were carried on to prevent it from making a determination as to whether the elections were conducted freely, with observance of the rights of suffrage.⁸⁹

A report was prepared mentioning the denunciations against Nicaraguan authorities as to human rights, listing the rights which were held to have been violated, the commission's requests for information from Nicaragua, and the information that had been sent. This report was not made public.⁹⁰ Complaints in following years against Nicaragua were found to not constitute sufficient reason to continue commission study of deprivations of human rights in that country.⁹¹ But in 1966, numerous complaints of flagrant human rights abuse by Nicaraguan authorities began to pour in. Violations of rights of free suffrage were also denounced. Several of the cases had been placed before Nicaraguan judicial authority where no verdict had been forthcoming. The government offered to transmit the verdicts when handed down.⁹² The commission decided to con-

⁸⁸ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION REGARDING HUMAN RIGHTS IN HAITI (OEA/Ser.L/V/II.21, doc. 6 rev., 1969).

⁸⁹ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SPECIAL SESSION: JAN. 3-23, 1963, at 4-8 (OEA/Ser.L/V/II.6, doc. 18, 1963).

⁹⁰ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS SIXTH SESSION, APRIL 16-MAY 8, 1963, at 8-12 (OEA/Ser.L/V/II.7, doc. 28, 1963).

⁹¹ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FOURTEENTH SESSION, OCT. 3-21, 1966, at 12 (OEA/Ser.L/V/II.15, doc. 29, 1967).

⁹² P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIFTEENTH SESSION (SPECIAL) JAN. 9-20, 1967, at 9-10 (OEA/Ser.L/V/II.16, doc. 20, 1967).

tinue to study the Nicaraguan situation. Later, in view of a conflict between Nicaraguan military personnel and government supporters on the one hand and the supporters of the opposing presidential candidate on the other, the chairman of the commission offered to visit Nicaragua to ascertain what was transpiring. No invitation was extended although the government did report on the incident.⁹³

d. *Guatemala*. Complaints of denial of human rights by the government of Guatemala were received during the 1963-1966 tenure of the Peralta regime.⁹⁴ The complaints charged arbitrary arrests and executions, banning of political parties, suppression of free expression, forcing opponents of the regime into exile, and the terrorizing of the rural population. Requests for information by the commission were either ignored or answered in an unsatisfactory manner. The commission sought permission to make an on-the-spot examination of the situation. Permission was denied. The commission thereafter published a report based on the complaints received.⁹⁵

Some greater degree of cooperation came from Latin American governments in certain other instances. After preparation of a report kept confidential by the commission regarding human rights in Paraguay, the chairman of the commission and the Executive Secretary were permitted to visit that nation.⁹⁶ Paraguay, however, did not prove so cooperative in its supply of information on certain complaints received by the commission: it replied in a manner unsatisfactory to the commission. Conditions which brought allegations of civil rights violations after the acquisition of power by military authorities in Ecuador⁹⁷ and Honduras⁹⁸ also resulted in

⁹³ For report of this incident *see* Schreiber, *supra* note 66, at 74.

⁹⁴ P.A.U. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, SOLICITUDES DE INFORMACION TRANSMITADAS AL GOBIERNO DE GUATEMALA (OEA/Ser.L/V/II.15, doc. 5, 1966).

⁹⁵ *Id.*

⁹⁶ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS TWELFTH SESSION, OCT. 4-15, at 1965, 15-16 (OEA/Ser.L/V/II.13, doc. 26, 1966); P.A.U., REPORT ON THE WORK ACCOMPLISHED DURING ITS THIRTEENTH SESSION, APRIL 18-28, 1966, at 21-211 (OEA/Ser.L/V/II.14, doc. 35, 1966).

⁹⁷ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS SEVENTH SESSION, OCT. 7-25, 1963, at 16 (OEA/Ser.L/V/II.8, doc. 35, 1964); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS EIGHTH SESSION, APRIL 6-20, 1964, at 12-14 (OEA/Ser.L/V/II.9, doc. 24, 1964); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS NINTH SESSION, OCT. 5-16, 1964, at 20 (OEA/Ser.L/V/II.10, doc. 21, 1965); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS TENTH SESSION 8-9 (OEA/Ser.L/V/II.11, doc. 19, 1965). P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS ELEVENTH SESSION (SPECIAL), JULY 21-23, 1965, at 14 (OEA/Ser.L/V/II.12, doc. 10, 1965).

⁹⁸ Report of the EIGHTH SESSION, *supra* note 97, at 16.

complaints to the commission. In these two instances, the commission was invited to visit each of these countries, although the invitation was not accepted in either case.⁹⁹

e. *Dominican Republic.* The commission was most successful in its relations with the Dominican Republic. In 1961, the commission was granted permission by the Dominican government to visit and to investigate complaints alleging violations of human rights. The Dominican government granted permission on the understanding that the commission would restrict its investigations to violations occurring since the departure of the Trujillo family from the island. The members gathered information on the arrests and disappearances of persons, the restriction on freedom of expression, and on the problems of conflict between governmental authorities and students, and government and labor unions. The commission then submitted a report to the Dominican government urging it to take immediate steps to advance human rights.¹⁰⁰

Other visits were made by the commission to the Dominican Republic,¹⁰¹ but the most important action of the body in that country came in 1965, when the commission was invited by the opposing factions engaged in civil strife to enter and to investigate violations of human rights.¹⁰² The Secretary General of the OAS also believed that the commission should conduct the investigation.¹⁰³ Thus, the commission acted under Article 9(e) of its statute which permitted it to serve as an OAS advisory body on human rights. The commission demanded and received from both factions assurances that they would consider themselves obligated to respect and enforce human rights as contained in the American Declaration of the Rights and Duties of Man, and to extend to the commission those facilities needed for the fulfillment of its mission.¹⁰⁴ In carrying out its duties in the Dominican Republic, the commission requested the authorities of the two factions to halt alleged violations of human rights, visited prisons, and was instrumental in bettering the lot of and in freeing some political prisoners. Installation of boards

⁹⁹ *Id.* at 12-14; REPORT OF THE NINTH SESSION, *supra* note 97, at 19.

¹⁰⁰ See P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS THIRD SESSION, OCT. 2-NOV. 4, 1961, at 4-5 (OEA/Ser.L/V/II.3, doc. No. 32, 1961). P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION REGARDING HUMAN RIGHTS IN THE DOMINICAN REPUBLIC (OEA/Ser.L/V/II.4, doc. No. 32, 1962).

¹⁰¹ See PAN AMERICAN UNION SYMPOSIUM ON REPRESENTATIVE DEMOCRACY: SANTO DOMINGO, DOMINICAN REPUBLIC, DECEMBER 17-22, 1962, at 19 (1963); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS SIXTH SESSION, APRIL 16-MAY 8, 1963, at 14-18 (OEA/Ser.L/V/II.7, doc. 28, 1963).

¹⁰² P.A.U., *The Dominican Situation*, 1 O.A.S. CHRONICLE, Aug., 1965, at 6, 7.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 8.

of investigation and review was urged and reports of executions and inhumane treatment of prisoners were conveyed to the authorities. The commission also arranged for some persons to depart the country in safety and conducted others to political asylum in Latin American embassies.¹⁰⁵

A special committee of criminologists was called in to aid the commission in the investigation of a mass execution. The deed was confirmed, the criminologists placing the blame on the Government of National Reconstruction and stating that this revolutionary faction had sought to eliminate its adversaries through a policy of mass executions without trial.¹⁰⁶ The commission was also authorized to remain in the Dominican Republic until the elected government took office, in order to assure compliance with the rights of suffrage and the holding of free and democratic elections.¹⁰⁷

f. *El Salvador—Honduras.* A final case of commission activity worthy of note is that which arose from the 1969 conflict between El Salvador and Honduras. Previously the commission had concerned itself with situations primarily involving a violation of human rights of citizens of a state within the territory of that state by its government. No dispute between states was involved. But, in 1969, El Salvador accused Honduras of committing "genocide such as murders, persecution, outrages, personal injuries, damages to property and massive expulsions of Salvadorian citizens residing in Honduras, for the mere fact of their nationality . . ." On the same day, Honduras denounced acts in violation of human rights by sectors of the population of El Salvador against Honduran nationals with the tolerance of the authorities of El Salvador. These acts occurred after a soccer game between the two countries held

¹⁰⁵ P.A.U., TENTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, SITUATION REGARDING HUMAN RIGHTS IN THE DOMINICAN REPUBLIC (PRELIMINARY REPORT), (19 OEA/Ser.L/V/II.12, doc. rev., 1965). For summary of work done D. DUNSHEE DE ABRANCHES, A SPECIAL PROTECTION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC 3 (Washington World Conference on World Peace Through Law, T 7/6, Sept. 15, 1965). See also P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE ACTIVITIES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN THE DOMINICAN REPUBLIC, JUNE 1-AUG. 31, 1965 (OEA/Ser. L/V/II.13, doc. 14 rev., 1965); P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON ITS ACTIVITIES IN THE DOMINICAN REPUBLIC, SEPT. 1-JULY 6, 1966 (OEA/Ser.L/V/II.15, doc. 6 rev., 1966); See also Sandifer, *The Inter-American Commission on Human Rights in the Dominican Republic: June 1965 to June 1966* in *THE DOMINICAN REPUBLIC CRISES*, 1965, at 132 *et seq.*; THOMAS and THOMAS, *supra* note 44, at 59 *et seq.*

¹⁰⁶ P.A.U., TENTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, DOC. No. 231, at 5-18 (OEA/Ser.F. 11.10, 1965); SITUATION REGARDING HUMAN RIGHTS IN THE DOMINICAN REPUBLIC (PRELIMINARY REPORT), *supra* note 105, at 18.

¹⁰⁷ P.A.U. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON WORK ACCOMPLISHED DURING ITS ELEVENTH SESSION (SPECIAL), JULY 21-23, 1965, at 11 (OEA/Ser.L/V/II.12, doc. 10, 1965).

in El Salvador. Several Hondurans were alleged to have been injured in the *melée* and thousands of Hondurans attending the game suffered acts of violence against them. Both countries requested the Secretary General of the OAS to verify the fact of these violations of human rights in the territory of the other.¹⁰⁸ A subcommittee of the commission was formed to study the complaints on-the-spot. The governments of both countries were notified that a study of their denunciations was beginning.¹⁰⁹

On July 25, 1969, a second Honduran cable was received accusing the Salvadorian army of acting against Honduran civilians in towns illegally occupied in Honduras before and after a cease fire ordered by the Provisional Organ of Consultation. The cable charged that the Salvadorian troops had indiscriminately murdered, burned homes, and sacked and destroyed private property. Honduras requested an urgent visit by the commission to verify the violations.¹¹⁰ The commission gathered information on the alleged atrocities and notified both governments that a special meeting would be held to study violations of human rights in the two countries. El Salvador rejected the Honduran denunciation but declared that it would send proof of its innocence to the commission as rapidly as possible.

Thereafter, a confidential report issued by the commission on the first set of charges recommended that each government investigate "the responsibility of the authorities for acts of commission or omission in connection with deeds of violence" against the citizens of the other, to adopt those measures necessary to make amends for such violations, and to protect against future violations of human rights.

The commission continued to study the complaint filed by Honduras and other denunciations. The Honduran and El Salvadorian governments were requested to supply additional information for the preparation of the commission's report. The governments were warned that if they did not reply within the 180-day period allowed by the commission's regulations, the commission would be obliged to assume the events were true. The commission then terminated the activities of the on-the-spot subcommittee in the two countries, without prejudice to the continuation of work on the problem of human rights and to the reception of communications regarding violations of human rights there.¹¹¹

108 O.A.S., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS TWENTY-SECOND SESSION (FIRST AND SECOND PARTS) AUG. 5-7 AND NOV. 7-22, 1969, at 7-8 (OEA/Ser.L/V/II.22, doc. 15 Add. 1, 1970).

109 *Id.* at 9.

110 *Id.* at 11.

111 *Id.* at 34-41.

2. *Commission's Power*

Under its 1960 statute, the commission was limited to discussion, study, investigation and recommendations in general. As can be gleaned from certain of the above cases, some states contended that an exercise of this power—specifically through receipt of human rights complaints in an individual state and requests to that state for information about the violations—amounted to intervention in its internal affairs. An acceptance of this view would, of course, have seriously curtailed the commission's power, for it would then be bound by Article 15 of the Chapter of Bogotá which prohibits intervention. Ordinarily, discussion, investigation, or even recommendation would not amount to intervention.¹¹² Whether they are to be considered acts of intervention would depend on whether they are coercive attempts to maintain or alter existing conditions against the state's will.¹¹³ A discussion and investigation might result in loss of international prestige through mobilization of public opinion against a state, compelling the state to act in accord with the will of the commission even though no threat or other action was made. In such an instance, if the commission entered into a consideration, discussion, or investigation directed against a specific state with the purpose of coercing that state to follow the will of the commission, the acts would seem interventionary. The same may be said for a recommendation. A recommendation of a general nature suggesting a course or policy which all the states of the OAS should follow would clearly be within the statutory authority of the commission. But a specific censorious recommendation made against a state for the purpose of forcing that state's will would be an intervention.

Due to the controversy over the commission's interpretation of its powers and the charges of intervention, the OAS finally agreed at the Second Special Inter-American Conference in 1965 to modify the commission's statute to expand its powers and functions formally.¹¹⁴ The directives of the conference were placed in the 1966 amendment of the commission's statute. Article 9(bis)¹¹⁵ provided, in part, that in accordance with the wishes of the Second Special Inter-American Conference, the commission should give particular attention to observances of the human rights referred to in Articles

¹¹² For discussion of intervention and its definition see A.V.W. THOMAS AND A.J. THOMAS, JR., *NON-INTERVENTION, THE LAW AND ITS IMPORT IN THE AMERICAS* ch. IV (1956). For a discussion of investigation, discussion, and recommendation as intervention see THOMAS AND THOMAS, *supra* note 5, at 166-68.

¹¹³ THOMAS AND THOMAS, *NON-INTERVENTION*, *supra* note 112, at 71.

¹¹⁴ P.A.U., SECOND SPECIAL INTER-AMERICAN CONFERENCE, RIO DE JANEIRO, BRAZIL, NOV. 17-30, 1965, FINAL ACT, RESOLUTION XXII (OCEA/Ser.C/I.13, 1965).

¹¹⁵ Authorities cited note 66, *supra*.

I, II, III, IV, XVIII and XXVI of the American Declaration of the Rights of Man.

Included therein are the rights to life, liberty, and security of the person; equality before the law without distinction as to race, sex, language, creed, or other factor; freedom of religion, of speech, press, and opinion; free access to the courts to ensure respect for legal rights and equal protection of the laws; no deprivation of liberty without due process of law; speedy and public trial; no *ex post facto* laws; and no cruel and unusual punishment.

Special commission procedures were set up for the denunciations of violations of these rights, as well as for communications received threatening reprisals against signers of denunciations addressed to the commission or against any person mentioned as an injured party in such denunciation.¹¹⁶ Following Article 9(bis), paragraph d, it was further provided that consideration by the commission of complaints is dependent upon verified exhaustion of the internal legal procedures and remedies of the member states involved. The denunciation must be submitted to the commission within six months of the final domestic decision after the signer of the complaint has come to realize that recourse to the domestic remedy has been hindered arbitrarily or the final domestic decision unjustly delayed.¹¹⁷ If the violation is confirmed, the commission prepares a report and makes its recommendation to the government concerned. If the government does not adopt the measures recommended within a reasonable time, the commission makes such observations as it desires in its annual report to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs. If one or the other of these organs fails to respond to the commission's recommendations and if the government concerned still has not adopted them, the commission may publish the report.¹¹⁸

Paragraph b of Article 9 (bis) provides that the commission is empowered:

[t]o examine communications submitted to it and any other available information; to address the government of any American state for information deemed pertinent by the commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.

116 Art. 53 of the Regulations of the Inter-American Commission on Human Rights as set forth in *MANUAL DE NORMAS VIGENTES EN MATERIA DE DERECHOS HUMANOS* or *1 REVUES DES DROITS DE L'HOMME-HUMAN RIGHTS JOURNAL*, *supra* note 66.

117 Regulations, art. 55, *supra* note 116.

118 *Id.* at art. 57.

Thus, the commission's broad interpretation of its powers to take cognizance of the specific denunciations of human rights becomes *de jure*. Moreover, the powers of the commission are enlarged. Although the commission had examined complaints since 1960 and had sent them to the government concerned with requests for information, it had refrained from making decisions as to the validity of the charges made.^{118a} With this amendment to its statute, the commission could take another step, decision on the merits, in regard to the special category of human rights.

It should be stressed that the commission's only sanctioning power has been its power of revealing information to the public. For example, in the *Haitian* and *Cuban* cases where the governments refused to permit investigation and were deficient in supplying information, the commission published reports, hopeful that the power of publicity would bring about some rectification.¹¹⁹ In other instances, the commission would keep its report confidential if it thought that by so doing it could obtain cooperation from a government. At best, publication or threat thereof has been a weak sanction. Dictatorial governments have suppressed the reports within the borders of their own nation and have paid little heed to the adverse comments of the commission on the laws or practices and procedures within the nation. Under the revised special procedures, if its recommendations to a government are not accepted in a reasonable time, the commission makes its observations known to the Inter-American Conference or the Meeting of Consultation. The report still can be published if no action is taken by those organs and if the state does not adopt the commission's recommendations.

The new American Convention on Human Rights continues the commission and its functions.¹²⁰ The powers of the commission are specific and detailed as are their limits. Actually, these revised provisions read like a combination of the previous statute of the commission and its regulations. The power to study and report, request governments for information, and recommend corrective measures are continued.¹²¹ Persons, groups of persons, and legally recognized non-governmental entities may lodge petitions with the commission complaining of the violation of the human rights provisions of the convention by a state party.¹²² Communications by one state party alleging violations by another state party may be

^{118a} See SCHREIBER, *supra* note, 66 at 53.

¹¹⁹ See SCHREIBER, *supra* note 66, at 67-68; Thomas and Thomas, *The Inter-American Commission on Human Rights*, *supra* note 66, at 306.

¹²⁰ See note 68, *supra*.

¹²¹ Art. 41 of the Convention, *supra* note 68.

¹²² *Id.* at art. 44.

received and examined if the two parties have made declarations of acceptance of the competence of the commission.¹²³

If the new convention ever becomes operative through sufficient ratifications, the power of publication becomes somewhat restricted. The convention provides that if settlement is not reached concerning the violation of human rights, a report is transmitted by the commission to the concerned state, and the state is not at liberty to publish it. If, within three months, the matter has not been settled or submitted by the state or the commission to the proposed Inter-American Court of Human Rights, the commission may publish the report.¹²⁴

THE AMERICAN CONVENTION ON HUMAN RIGHTS

The Fifth Meeting of Consultation of American Ministers of Foreign Affairs not only established the seven man Inter-American Commission on Human Rights, but also directed the Inter-American Council of Jurists to prepare a draft convention on human rights. The Council of Jurists was also to prepare one or more conventions on the creation of an inter-American court and other appropriate organs for the protection and observance of such rights.¹²⁵ Within a short time, the Council of Jurists had prepared a draft convention, based in part on the Inter-American Declaration on the Rights and Duties of Man, which encompassed economic, social, and cultural rights, as well as political and civil rights.¹²⁶ The quick action of the Council of Jurists went for naught. The convention languished for seven years.

When the Second Special Inter-American Conference met in Rio de Janeiro in 1965, the draft was dusted off and placed on the agenda.¹²⁷ After some debate, the Council of the OAS was instructed to prepare a final version of the draft convention, taking into consideration alternative drafts which had been introduced by the Chilean and Uruguayan governments. The Council also was authorized to solicit and receive the views of the Inter-American Commission of Human Rights. The second special conference ordered the revision to be ready by November, 1966, to be submitted to members of the OAS prior to February, 1967, in preparation for

¹²³ *Id.* at art. 45.

¹²⁴ *Id.* at arts. 50-51.

¹²⁵ P.A.U. FIFTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, ACTAS Y DOCUMENTOS, (OEA/Ser. F/III.5 pp. 308-9 1961).

¹²⁶ P.A.U., INTER-AMERICAN COUNCIL OF JURISTS, FINAL ACT OF THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS (CIJ-43, at 48-75, 1959).

¹²⁷ P.A.U., SECOND SPECIAL INTER-AMERICAN CONFERENCE, RIO DE JANEIRO, BRAZIL, Nov. 17-30, 1965, FINAL ACT., RES. XXIV (OEA/Ser.C/I.13 (English), 1965).

an inter-American specialized conference on human rights tentatively set for March of 1967.¹²⁸ The Inter-American Commission on Human Rights, in April, 1966, began a thorough study of the three drafts and within a few months, transmitted to the Council of the OAS its suggestions and recommendations.¹²⁹

Despite the time table established, other events intervened to prevent fulfillment of the instructions of the second special conference. In 1967, an extensive reorganization of the inter-American system was authorized by the Protocol of Buenos Aires.¹³⁰ After this reorganization, the OAS Council finally began its consideration of the draft convention.

The Council, noting that the General Assembly of the United Nations in 1966 had adopted the International Covenants on Human Rights, which had been signed by a number of members of the OAS, and noting further that substantive provisions in the inter-American draft were similar to those contained in the UN covenants, decided to consult the members of the OAS before proceeding further.¹³¹ In the desire to avoid conflicts between universal and regional rules and institutions, two questions were submitted to member states. The first queried whether the governments of the American states desired a single universal system of regulation of human rights or whether they preferred "the coexistence and coordination" of world-wide and regional conventions covering the same rights. If the latter point of view were to prevail, a second question was asked, should the inter-American treaty be limited to the establishment of an inter-American institutional and procedural system which would include the Inter-American Commission on Human Rights and eventually an inter-American court of justice?¹³²

Argentina and Brazil advocated that the OAS stop work altogether on the regional convention, but most of the other responding nations were inclined to feel that there did exist a possibility for "the coexistence and coordination" of universal and regional conventions. Of these, only a few took the position that a regional

¹²⁸ *Id.*

¹²⁹ P.A.U., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, OPINION ON THE DRAFT CONVENTION ON HUMAN RIGHTS APPROVED BY THE INTER-AMERICAN COUNCIL OF JURISTS (OEA/Serv.L/V/II.16, doc. 8 (English) rev.) (April 24, 1967).

¹³⁰ O.A.S., COMMITTEE ON JURIDICAL-POLITICAL AFFAIRS, REPORT ON A CONSULTATION WITH THE MEMBER STATES REGARDING THE DRAFT CONVENTION ON HUMAN RIGHTS (Council Series, OEA/Ser. G/IV. c-i-787, at 2 (English) rev. 3, June 7, 1967). See also, Gros Espiell, *Le Processus de la Réforme de la Charte de l'Organisation des États Américains*, 14 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 139 (1968).

¹³¹ O.A.S., at 3, *supra* note 130.

¹³² *Id.* at 4.

convention should be limited to providing regional machinery for implementing substantive norms adopted in the United Nations Covenants.¹³³ The Council of the OAS instructed the Inter-American Council of Jurists to prepare a final version of the draft convention in 1968 to be submitted to the American governments for their observations,¹³⁴ and eventually for final approval at a specialized conference of the OAS to be called for that purpose in San José, Costa Rica, in November, 1969.¹³⁵

At the conclusion of this Inter-American Conference on Human Rights, twelve members signed the American Convention on Human Rights, to be known as the Pact of San José.¹³⁶ As soon as eleven states have ratified (and to date only Costa Rica has deposited its ratification), it will become effective. Consequently, this treaty marks the culmination of a process of drafting that has been under way for more than a decade, and it has been hailed as a consummative endorsement of inter-American concern for the rights of the individual. Although it was predicted that the new convention would have significant influence on future inter-American efforts to protect human rights,¹³⁷ some look upon such predictions with skepticism, pointing out that many of the basic values demanded by the convention are formulated on high levels of abstraction or are not legally precise. Furthermore, some of the standards are not acceptable to all members of the OAS.¹³⁸ Portions of the American treaty parallel the United Nations Covenant on Civil and Political Rights, while other provisions vary distinctly.

1. *The Rights Analyzed*

a. *Equality.* The OAS convention begins with a formal assertion that the ratifying states guarantee to ensure to all persons subject to their jurisdiction the free and full exercise of the rights established by the convention without discrimination for reasons of

¹³³ *Id.*

¹³⁴ O.A.S., OBSERVATIONS OF THE GOVERNMENTS REGARDING THE DRAFT CONVENTION ON HUMAN RIGHTS (Council Series, OEA/Ser. G/V, C-d-1519 (English) Add. 2 (Sept. 13, 1967), Add. 3 (Sept. 15, 1967), Add. 6 (Oct. 3, 1967), Add. 7 (Oct. 19, 1967), Add. 8 (Nov. 17, 1967).

¹³⁵ O.A.S., INTER-AMERICAN SPECIALIZED CONFERENCE ON HUMAN RIGHTS, SAN JOSÉ, COSTA RICA, NOV. 7-22, 1969, FINAL ACT (OEA/Ser. C/VI.18.1 (English) doc. 70, rev. 1, corr. 1).

¹³⁶ The signatory nations are El Salvador, Colombia, Ecuador, Honduras, Paraguay, Panama, Chile, Guatemala, Nicaragua, Uruguay, Venezuela, Costa Rica.

¹³⁷ A.L. DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 247 (1971); MacBride, *The European Court of Human Rights*, 3 N.Y.U.J. INT'L L. 1, 15 (1970); *American Convention of Human Rights*, 5 REV. OF INT'L COMM'N JURISTS 1 (1970).

¹³⁸ K. VASAK, LA COMMISSION INTERAMERICAINE DES DROITS DE L'HOMME 64 ff. (1968). Bilder, *International Promotion of Human Rights: A Current Assessment*, 58 AM. J. INT'L L. 728 (1964).

race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or other social condition—in other words, a right of complete and all encompassing equality.¹³⁹ This is similar to Article 2 of the United Nations Covenant on Political and Civil Rights,¹⁴⁰ and both treaties, throughout, have provisions re-enforcing this right of equality.¹⁴¹

Yet, of all animal species in the world, human beings are probably the least equal, differing in many ways, such as sex, intelligence, strength, ability, education, and achievement. Even the most ardent advocate of equality will recognize that there is a need for some acceptable basis for discrimination. Without reasonable or compelling classifications, serious injustice may result. These provisions have to be interpreted loosely or relatively, rather than in absolute terms, if they are to be a force in the development of international protection for the right of equality.

b. *Life*. The right to life, that is, the right not to be killed, is among the civil and political rights listed. The United Nations covenant makes no mention of the time for the attachment of this right,¹⁴² but the OAS convention clearly stipulates that the right to life shall be protected by law "from the moment of conception."¹⁴³ As religious dogma, this requirement may be open to attack in nations where there is separation between church and state. Furthermore, it will encounter opposition from nations that have legalized abortion.

In addition to the time of attachment requirement, the OAS convention stipulates that no one shall be "arbitrarily" deprived of his life.¹⁴⁴ But the word arbitrarily is not defined, and this has led to speculation as to its exact meaning.¹⁴⁵ In a legal context, "arbitrarily" can signify "not in accordance with law"—"illegally"—or it can mean "unreasonably" or "unjustly." In United States legal terminology, we speak of procedural due process or substantive due

¹³⁹ O.A.S., AMERICAN CONVENTION ON HUMAN RIGHTS, art. 1, para. 1 (OEA/Ser. K/XVI/I.1, English, doc. 65, rev. 1, corr. 2, Jan. 7, 1970) (hereinafter cited O.A.S. CONVENTION).

¹⁴⁰ United Nations Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR Supp. 16 at 49-60, U.N. Doc. A/6316 (1966) (hereinafter cited as U.N. CONVENTION).

¹⁴¹ O.A.S. CONVENTION, art. 24; U.N. CONVENTION art. 3, 26. The American convention does not include the United Nations treaty guarantees accorded to ethnic, religious, and linguistic minorities to enjoy their own culture, profess and practice their own religion and use their own language. U.N. CONVENTION, art. 27.

¹⁴² U.N. CONVENTION art. 6.

¹⁴³ O.A.S. CONVENTION, art. 4, para. 1.

¹⁴⁴ *Id.* See also U.N. CONVENTION, art. 6, para. 1.

¹⁴⁵ Hassan, *The International Covenants on Human Rights: An Approach to Interpretation*, 19 BUFF. L. REV. 35 (1969).

process—terms which because of their peculiar common law background are unacceptable in most civil law countries. If arbitrarily means illegally—lack of procedural due process—then deprivation of life by an oppressive government in accordance with the procedures of the municipal law, no matter how unjust, would not fall within the scope of the treaty. On the other hand, if it is claimed that a life is taken unreasonably—with lack of substantive due process—an unknown subjective element is brought into the treaty. It will be up to the interpreter to decide what is unreasonable. Ratifiers of the treaties must be aware that what is reasonable to one group of people, may be highly unreasonable to another.

Although the right to life is not construed to forbid capital punishment, the inter-American convention calls for its abolition and specifies that it may be imposed only for the most serious crimes, may not be imposed on persons below 18 or over 70 years of age, nor carried out on pregnant women, nor be inflicted for political offenses. Again, the vagueness of the term “political offenses” leads to possibilities of abuse.¹⁴⁶ Deliberate killing of law enforcement officers for political reasons may be viewed by some as murder, but by others as a political offense. In view of the debates which have ensued since heart transplants have taken place, it is surprising to find that neither treaty contains any specific stipulation as to when the right to life ends: that is, when death occurs.

c. *Humane Treatment.* The right to humane treatment established by the OAS treaty¹⁴⁷ involves the concept that no person shall be subjected to cruel and unusual punishment. But it goes even further by declaring that punishment shall not be extended to any person other than the criminal. This, of course, may be contra to the modern movement to impose penalties on parents for the delicts of their minor children. The treaty requires minors accused of crimes to be separated from adults and brought before specialized juvenile tribunals.¹⁴⁸ After the case of *In re Gault*,¹⁴⁹ where United States juvenile tribunal procedures were roundly condemned on the basis of legal and sociological studies, one may well wonder if such a stipulation in an international treaty may not be more detrimental than beneficial to the juvenile criminal.

d. *Slavery.* The freedom from slavery article of the OAS con-

¹⁴⁶ 6 M. WHITEMAN, INTERNATIONAL LAW 799-859 (1968); Evans *Reflections upon the Political Offender in International Practice*, 57 AM. J. INT'L L. 1 (1963); Green, *Political Offences, War Crimes and Extradition*, 11 INT'L AND COMP. L.Q. 329 (1962).

¹⁴⁷ O.A.S. CONVENTION, art. 5.

¹⁴⁸ *Id.* art 3, para. 5.

¹⁴⁹ *In re Gault*, 387 U.S. 1 (1967). See also Paulsen, *Juvenile Courts and the*

vention¹⁵⁰ goes a step beyond a similar article in the United Nations covenant¹⁵¹ in that it not only forbids slavery, slave trade, and involuntary servitude, but it also forbids "traffic in women." Some female liberation movement will surely label this as male chauvinism.

e. *Fair Trial*. The rights conceived to be incident to a fair trial are spelled out in the OAS convention in some detail.¹⁵² In addition to guarantees of an impartial tribunal, detailed notifications as to the charges against him, the presumption of innocence until proven guilty, adequate time and means for the preparation of his defense, and the right not to be compelled to be a witness against himself, an accused is given certain other rights. He has a right to be assisted, without charge, by a translator or interpreter if he does not understand or does not speak the language of the court.¹⁵³ He has the right to defend himself personally (which may be a dubious right under the United States attitude that only a fool would be his own lawyer) or to be assisted by legal counsel, either of his own choosing or provided by the state.¹⁵⁴ He is given the right to communicate freely and privately with his counsel, and the right to appeal the judgment to a higher court.¹⁵⁵ He also has the right to examine witnesses "present in court," a far more restricted right than the United States constitutional right of being "confronted with the witnesses against him."¹⁵⁶

The UN covenant declares that the person accused of crime shall "not be compelled to testify against himself, or to confess guilt."¹⁵⁷ The OAS changed this language, for the worse rather than for the better, by awkwardly stating that a person accused of a crime has "the right not to be compelled to be a witness against himself or to *plead guilty*."¹⁵⁸

Coerced confessions are banned, as is double jeopardy in cases where a person has been "acquitted by a non-appealable judgment."¹⁵⁹ Prior *conviction* apparently is no bar to subjecting the person to retrial for the same offense. If he has been acquitted in a

Legacy of '67, 43 IND. L.J. 527 (1968).

¹⁵⁰ O.A.S. CONVENTION, art. 6.

¹⁵¹ U.N. CONVENTION, art. 8.

¹⁵² O.A.S. CONVENTION, art. 8.

¹⁵³ *Id.* art. 8, para. 2(a).

¹⁵⁴ *Id.* art. 8, para. 2(d), (e).

¹⁵⁵ *Id.* art. 8, para. 2(h).

¹⁵⁶ *Id.* art. 8, para. 2(f); U.S. CONST. amend. VI.

¹⁵⁷ U.N. CONVENTION, art. 14, para. 3(g).

¹⁵⁸ O.A.S. CONVENTION, art. 8, para. 2(g).

¹⁵⁹ *Id.* art. 8, para. 4.

country where the state is given the right of appeal, either on basis of law or fact, apparently he cannot plead double jeopardy.

The right of public trial is not absolute, but is circumscribed by the restriction that criminal trials need not be public if "it is necessary to protect the interests of justice."¹⁶⁰ This, of course, gives a great deal of discretion to the judiciary as to when the public may be banned from a criminal trial. The UN covenant is even broader, for there it is stated that:

the press and the public may be excluded from all or part of a trial for reasons of morals, public order, or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹⁶¹

It is apparent from these two treaties that the desirability of a public trial is not widely revered.

In contrast, equality before the law and equal protection of the law are emphasized and re-emphasized in both instruments,¹⁶² and both give guarantees to establish effective, simple, and prompt recourse to a competent national court or tribunal against acts that violate the rights of the complainant.¹⁶³ Both guarantee to "develop the possibilities of judicial remedy"¹⁶⁴ and to ensure enforcement of such remedies when granted. Paragraph 3 of Article 2 of the UN covenant stipulates application in violation of the provisions of the covenant only, whereas Article 25 of the OAS treaty is more extensive in that it is applicable to acts that violate fundamental rights recognized by the constitution or laws of the state concerned as well as those recognized by the convention.

f. *Liberty.* The UN convention and the OAS convention endorse a right of personal liberty, but there are certain variations in the range of guarantees set forth by the two treaties.¹⁶⁵ Agreement is mutual that no one shall be subject to arbitrary arrest or imprisonment; that the accused shall enjoy a right to a speedy trial by a competent, independent and impartial tribunal; that the accused shall have the right to be informed of the nature and character of the charges against him; and that he shall have a right to a procedure closely akin to a *habeas corpus* proceeding.¹⁶⁶

¹⁶⁰ *Id.* art. 8, para. 5.

¹⁶¹ U.N. CONVENTION, art. 14, para. 1.

¹⁶² *Id.* art. 14, par. 1; art. 2, par. 1; OAS CONVENTION, art. 24.

¹⁶³ O.A.S. CONVENTION, art. 7; U.N. CONVENTION, art. 9.

¹⁶⁴ O.A.S. CONVENTION, art. 25; U.N. CONVENTION, art. 2, para. 3.

¹⁶⁵ O.A.S. CONVENTION, art. 7, para. 6; U.N. CONVENTION, art. 9, para. 4.

¹⁶⁶ O.A.S. CONVENTION art. 7, para. 6; U.N. CONVENTION, art. 9, para. 4.

In their constitutions, many Latin American countries provide for preventive detention when a president declares an *estado de sitio*.¹⁶⁷ This would create a potential conflict between treaty law and constitutional law if it were not that the OAS treaty itself recognizes the possibility of suspension of guarantees of the treaty. Under Article 27 it is stated:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation.

In spite of all the high sounding pronouncements on personal liberty, this broad exemption permits, without incurring international responsibility, almost the same power of preventive detention existing today in the internal laws of some nations. The limitation that a state availing itself of the right of suspension shall inform all other parties via the Secretary General of the OAS of the reasons given for suspension, the articles it has suspended, and the date set for the termination of such suspension would not seem to create a great deal of restraint on the right to suspend guarantees.¹⁶⁸

A unique provision in the OAS treaty specifies that states which permit an individual recourse to the courts if he feels his liberty about to be threatened may never restrict or abolish this right.¹⁶⁹ There is no similar provision in the UN covenant.

The OAS convention also abolishes imprisonment for debt, except those debts consisting of nonfulfillment of judicial orders of child or wife support.¹⁷⁰ This apparently was an answer to the UN convention statement that no person was to be imprisoned because

¹⁶⁷ Two typical examples can be found in the Constitutions of Honduras and Nicaragua. Art. 107 (ch. 7) of the 1965 Constitution of Honduras declares:

The guarantees established (in the preceding articles) may be suspended in the event of invasion of the national territory, serious disturbance of the peace, an epidemic, or other disaster, by the President of the Republic, by means of a decree. . . .

Articles 196 and 197 of the Constitution of Nicaragua (1962) declare:

The President of the Republic, whenever in his opinion the public tranquility is threatened, may order the detention of persons presumed responsible. . . .

The President of the Republic, in the Council of Ministers, may suspend or restrict, in all or a part of the national territory, the exercise of constitutional guarantees in any of the following cases: when the Republic becomes involved in an international or civil war; when there is danger that either of these may occur; in the case of epidemic, earthquake or other public disaster; whenever due to any other circumstances it is required for the protection, peace, or security of the nation or of its institutions or form of government.

¹⁶⁸ O.A.S. CONVENTION, art. 27, para. 3.

¹⁶⁹ *Id.* art. 7, para. 6.

¹⁷⁰ *Id.* art. 7, para. 7.

of inability to fulfill a contractual obligation.¹⁷¹ While the UN covenant provides that a victim of unlawful arrest or detention shall have an enforceable right to compensation,¹⁷² the OAS document waters this down by stipulating that the victim of a miscarriage of justice has a right to be compensated therefor "in accordance with the law."¹⁷³ If no internal law makes provision for such compensation, apparently the victim is without remedy.

A double guarantee is established by the OAS convention against *ex post facto* laws. Article 7 Paragraph 2, states:

No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

This is further elaborated in Article 9:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense, the law provides for imposition of a lighter punishment, the guilty person shall benefit therefrom.

Would this run contrary to recent Supreme Court of the United States decisions where the non-retroactivity doctrine has been accepted with reference to cases which redefine the rights of those accused of crime in the light of modern constitutional theories?¹⁷⁴

g. *Privacy*. When it comes to the right of privacy, the OAS treaty sets forth a right which is dear to the heart of all Latin Americans, but which can best be called an ethical aspiration whose importance is less of achievement than intent: "Everyone has the right to have his honor respected and his dignity recognized."¹⁷⁵ Is this command addressed to governments or to private individuals? What of persons who have no honor or no dignity? Does the treaty's subsequent statement that no one may be the object of an unlawful attack on his honor or reputation modify the preceding statement? Can you really equate an unlawful attack on honor and reputation with recognition of dignity and respect for honor?

"No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence

¹⁷¹ U.N. CONVENTION, art. 11.

¹⁷² *Id.* art. 9, para. 5.

¹⁷³ O.A.S. CONVENTION, art. 10.

¹⁷⁴ *Desist v. U.S.*, 394 U.S. 244 (1969); *Johnson v. New Jersey*, 384 U.S. 719 (1966).

¹⁷⁵ O.A.S. CONVENTION, art. 11, para. 1.

. . . . everyone has the right to the protection of the law against such interference."¹⁷⁶ Again, one can question the meaning of the word arbitrary and here the confusion is compounded by adding the word "abusive." Are these words to be interpreted as "unlawful" or do they have a wider connotation than contrary to law? For example, would the publication of a person's name on a list of tax delinquents (permitted in places by law) be considered an arbitrary or abusive interference with his private life? Would a listing as a bad credit risk in a merchant's retail credit association be considered an arbitrary or abusive interference with his private life?

h. *Religion*. The right to freedom of religion is conceded in both the UN declaration¹⁷⁷ and the OAS treaty,¹⁷⁸ but both then go on to admit this freedom may be subject to severe limitations by law necessary to protect public safety, order, health, morals, or the rights or freedoms of others.¹⁷⁹ The OAS broadly grants freedom to disseminate one's religion or beliefs, either individually or together with others in public or private.¹⁸⁰ There is no limitation on this broad grant, yet this surely must be illusory because even nations most protective of religious freedom resort to the police power of the state to regulate the dissemination of religious beliefs. One cannot, for example, disseminate one's religion in the middle of Times Square during the evening rush hour.

The apparently reasonable statement that parents have the right to provide for the religious and moral education of their children in accord with their own convictions,¹⁸¹ may be a strong deterrent to the ratification of the treaty by some nations. The Government of Mexico, for example, has required all parochial schools to utilize the same text books used in Mexican public schools, in the face of parental claims that these books present religious and moral views unacceptable to them.

i. *Freedom of Speech*. Freedom of speech and press provisions of the OAS treaty go an astonishing step beyond those of the United Nations or of the European Convention on Human Rights. The OAS document states these freedoms shall not be subject to prior censorship but shall be subject "to subsequent imposition of liability to ensure the protection of national security, public order, public

¹⁷⁶ *Id.* art. 11, para. 2.

¹⁷⁷ U.N. CONVENTION, art. 18.

¹⁷⁸ O.A.S. CONVENTION, art. 12.

¹⁷⁹ O.A.S. CONVENTION, art. 12, para. 3; U.N. CONVENTION, art. 18, para. 3.

¹⁸⁰ O.A.S. CONVENTION, art. 12, para. 1.

¹⁸¹ *Id.* art. 12, para. 4.

health and morals, and to ensure respect for the rights or reputation of others."¹⁸² In other words, the ban on prior censorship is absolute.

The UN convention stipulates that freedom of the press may be restricted by law for the same reasons,¹⁸³ but does not limit this restriction to subsequent liability. In other words, prior censorship is legitimate under the UN document in some cases. The European convention, also permits prior censorship for even a wider area of information:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁸⁴

Unquestionably, this article places limits on free speech and the press, limits which have been accepted by many nations. The OAS treaty permits no prior measures of restriction on freedom of the press or speech to protect the rights or reputation of others (which would include libel or slander), or in order to preserve the security, public order, or the public health or morals of the nation. In the United States, obscene speech—when so determined by the Supreme Court—is not given protection, thus it could be subjected to subsequent liability and also to previous restraint.¹⁸⁵ Although the older United States constitutional view would permit libel to be subject to previous restraint, the new view declares that such speech cannot be subject even to subsequent liability unless the words were uttered or written with actual malice. Malice imports knowledge that the words were false or that they were uttered with reckless disregard of whether false or not.¹⁸⁶

Under the OAS Convention, censorship by restraint is permissible for the regulation of public entertainment which has been

¹⁸² *Id.* art. 13, para. 2.

¹⁸³ U.N. CONVENTION, art. 19, para. 3.

¹⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, para. 2.

¹⁸⁵ *Freedom v. Maryland*, 380 U.S. 51 (1965), *Roth v. United States*, 354 U.S. 476 (1957). See also K. KUH, *FOOLISH FIGLEAVES: PORNOGRAPHY IN AND OUT OF COURT* (1967); R. Cancel Negron, *En Torno a la Obscenidad: Un Concepto Juridico Impreciso*, 29 REVISTA DEL COLEGIO ABOGADOS DE PUERTO RICO 169 (1969); W.F. Eich, *From Ulysses to Portnoy: A Pornographic Primer*, 53 MARQUETTE L. REV. 155 (1970).

¹⁸⁶ See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931).

determined to be morally detrimental to children or adolescents.¹⁸⁷ The words "public entertainment" are not defined in the treaty. Apparently, they were not designed to extend to reading material, for such would fall within a classification of private entertainment.

Both the OAS Convention¹⁸⁸ and the UN Convention¹⁸⁹ permit restrictions on war propaganda and on advocacy of national, racial, or religious hatred that constitute incitements to lawless violence. The UN document would permit subsequent or previous restraint by law, while under the OAS treaty, they are offenses punishable (subsequent liability) by law. This type of restriction would probably run afoul of the United States Constitution which permits citizens to express their views freely and fully on any subject no matter how obnoxious the views may be. A government may act only where speech is associated with and threatens imminently to lead to action against which the public has a right to be protected.¹⁹⁰

Query, would inciting Indians in certain South American nations to forceful illegal action against white rulers be prohibited by this portion of the treaty? Would propaganda for war among the African nations to force South Africa to change its *apartheid* policies fall within this type of ban?

Neither the OAS treaty nor the UN convention make provision for professional secrecy which is protected by the European convention.¹⁹¹ Apparently, in Europe it is believed that the press should have adequate sources of information, and that a journalist may not be called upon, even in the public interest, to disclose the source of information which he has received in confidence. In many jurisdictions of the United States refusal to reveal sources to the court can amount to contempt, if there is a proven compelling interest for such information.

The American treaty includes provisions guaranteeing to a person defamed in the press or other media the right to have a correction or reply published in the same medium.¹⁹² This right is not included in the UN instrument, probably because the UN convention on the International Right of Correction¹⁹³ covers this.

j. *Assembly*. The right of peaceful assembly is recognized by

¹⁸⁷ O.A.S. CONVENTION, art. 13, para. 4.

¹⁸⁸ Id. art. 13, para. 5.

¹⁸⁹ U.N. CONVENTION, art. 20.

¹⁹⁰ *Dennis v. U.S.* 341 U.S. 494 (1951). *But see* *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹⁹¹ See note 184 and accompanying text, *supra*.

¹⁹² O.A.S. CONVENTION, art. 14.

¹⁹³ Convention on the International Right of Correction, G.A. Res. 630, — U.N. GAOR Supp. 20, at 22, U.N. Doc. A/2361 (1959).

both documents¹⁹⁴ and both contain the extensive qualifying clause that this right may be restricted by the police power of the state. This ban is so broad that any government restraining right of assembly would naturally base it upon the exception. In dictatorial situations, the right could well be meaningless.

A different emphasis is placed on the right of association guaranteed by the United Nations. The UN declares that everyone shall have the right of freedom of association with others, including the right to form and join trade unions. The OAS states that everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.¹⁹⁵ Inasmuch as some Latin American nations ban the communist party, and Argentina bans all political activities and associations, this might well be a stumbling block toward the adoption of the Pact of San José. However, both treaties add the broad limitation that the police powers may be used to proscribe this right, and it can always be argued that the right of association has been restricted in the interest of national security, public safety, or public order.

Both treaties stipulate that imposition of legal restrictions, including total deprivation of the right of association, may be placed on members of the armed forces and the police.¹⁹⁶ With law enforcement officers demanding the right to organize, this additional restriction may lead to strong internal opposition in some areas.

k. *Family Law.* Despite certain sociological claims that the family is an anachronism, and that the commune is the wave of the future, it is somewhat reassuring to find that both treaties categorically state: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."¹⁹⁷

Both treaties recognize the right of men and women of marriageable age to marry and to raise a family,¹⁹⁸ but the OAS convention adds the qualification: "If they meet the conditions required by domestic laws insofar as such conditions do not affect the principle of non-discrimination established in this Convention."

Under this wording, could modern homosexuals claim that denial of their right to marry one another is discriminatory, and hence illegal? Would this be upheld under the OAS treaty?

¹⁹⁴ O.A.S. CONVENTION, art. 15; U.N. CONVENTION, art. 21.

¹⁹⁵ O.A.S. CONVENTION, art. 16; U.N. CONVENTION, art. 22.

¹⁹⁶ O.A.S. CONVENTION, art. 16, para. 3; U.N. CONVENTION, art. 22.

¹⁹⁷ O.A.S. CONVENTION, art. 17; U.N. CONVENTION, art. 23.

¹⁹⁸ O.A.S. CONVENTION, art. 17, para. 2; U.N. CONVENTION, art. 23, para. 2.

While the UN covenant states that parties to the treaty shall take "appropriate steps to ensure equality of rights and responsibilities of the spouses,"¹⁹⁹ the OAS treaty is more cautiously worded: "to ensure the equality of rights and the *adequate balancing* of responsibilities of the spouses"²⁰⁰ This reflects the Latin American attitude that marriage, under most Latin American legal systems, is based upon the principle of family authority resting with the husband, especially in connection with property rights. Marriage establishes a community of property between husband and wife, but it is the duty of the husband to administer this community.

In addition to spousal rights, the OAS treaty goes far beyond the universal treaty and even beyond the internal law of many western hemispheric nations when it declares that the law shall recognize equal rights for children born out of wedlock.²⁰¹

Both treaties stipulate that a child shall have the right to a name, and to such protection as is required, from his family, society, and the state.²⁰² In setting forth these rights, the treaties are necessarily vague in identifying those who are responsible for assuring that the child's rights are observed.

Treatment of the right to nationality is more detailed in the OAS treaty²⁰³ than in the UN convention, which states merely that every child has the "right to acquire a nationality."²⁰⁴ The OAS instrument separates the rights of the child from the rights of nationality, by declaring that every *person* has the right to a nationality, and if he does not have a right to any other nationality, he must be given the nationality of the state in whose territory he was born. Further, no one shall be arbitrarily deprived of his nationality or of the right to change it.²⁰⁵ Again, "arbitrarily" is not defined and this could lead to questioning. For example, in the *Nottebohm* case,²⁰⁶ many authorities believed the International Court of Justice "arbitrarily" deprived Nottebohm of his right to change his nationality.²⁰⁷

¹⁹⁹ U.N. CONVENTION, art. 23, para. 4.

²⁰⁰ O.A.S. CONVENTION, art. 17, para. 4. (emphasis added)

²⁰¹ *Id.* art. 17, para. 5.

²⁰² O.A.S. CONVENTION, arts. 18, 19; U.N. CONVENTION, art. 24.

²⁰³ O.A.S. CONVENTION, art. 20.

²⁰⁴ U.N. CONVENTION, art. 24, para. 3.

²⁰⁵ O.A.S. CONVENTION, art. 20.

²⁰⁶ *Nottebohm Case*, [1955] I.C.J. 4.

²⁰⁷ H.F. VAN PANHUYS, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* (1959); de Visscher, *L'Affaire Nottebohm*, 60 *REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC* 238 (1956); Glazer, *Affaire Nottebohm-A Critique*, 44 *GEORGETOWN LAW J.* 313 (1955-56); Jones, *The Nottebohm Case*, 5 *INT. AND COMP. LAW QUARTERLY* 230 (1956), Loewenfeld, *Der Fall Nottebohm* 5 *ARCHIV DES VOLKERRECHTS* 387 (1956).

1. *Property.* One right completely omitted in the universal convention is the right to property. Some societies recognize no private property rights, and others view foreign ownership of property within the nation as the result of an imposed system of exploitation.

Except for Cuba, all nations of the western hemisphere are operating under a controlled private property system, and consequently, it was thought important to include in the Pact that everyone has the right to use and enjoy his property.²⁰⁸ This right is not an absolute one. The treaty not only stipulates that such use and enjoyment may be subordinated to the interests of society, but that a person may be deprived of his property for reasons of public utility or social interest, according to the forms established by law. Considering the long battle between the United States and Latin America concerning international accountability in the taking of property of aliens, it is surprising to see in the treaty that just compensation must be paid for the deprivation of property. But the OAS treaty does not go as far as the European Convention on Human Rights which 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."²⁰⁹ The reference to general principles of international law was made to emphasize that regardless of the attitude of a government toward property rights of its own citizens, foreign owners whose property was taken for a public purpose were entitled to just, adequate, and prompt compensation.

The OAS treaty also prohibits "usury and any other form of exploitation of man by man"²¹⁰ The nature of usury varies from jurisdiction to jurisdiction, and no attempt was made to pinpoint the amount of interest considered to be usury. Nor is there a clear indication of other forms of exploitation. No government signing the treaty can be sure of the commitment it is making under this provision and the nature of implementing measures needed to fulfill it.

m. *Travel.* Both treaties establish a right of freedom of movement within a state, the right to leave any country freely, and the right to re-enter one's own country.²¹¹ But these rights are again curtailed by that extensive exception relating to "prevention of crime, protection of national security, public safety, public order, public morals, public health or the rights or freedoms of others."

²⁰⁸ O.A.S. CONVENTION, art. 21.

²⁰⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1 (Protocol No. 1, March 20, 1952).

²¹⁰ Q.A.S. CONVENTION, art. 21, para 3.

²¹¹ O.A.S. CONVENTION, art. 22; U.N. CONVENTION art. 12.

These rights, too, can mean as much or as little as the ratifying state wishes them to mean.

The drafters of the OAS treaty are short of memory or poor historians, for it seems impossible to rationalize in a Latin American context, the stipulation that "no one can be expelled from the territory of the state of which he is a national."²¹² After two incomprehensible decisions by the International Court of Justice in the Haya de La Torre asylum issue between Peru and Columbia,²¹³ the honor of both nations was preserved by the ingenious device of "expelling" Peruvian Haya de La Torre from Peruvian territory rather than granting him the customary safe conduct out of the country. Constitutional grants of power in certain Latin American constitutions permit expulsion or removal from the country.²¹⁴

The treaties stipulate that aliens lawfully in the territory of a treaty member state may be expelled only pursuant to a decision reached in accordance with law. The UN treaty adds that except where compelling interests of national security control, aliens may have a full review of expulsion decisions by competent authorities.²¹⁵ The OAS treaty declares that "collective expulsion of aliens is prohibited."²¹⁶ Query: does this apply only to aliens lawfully within a nation, or does it also apply to aliens unlawfully within a nation? One of the causes of the so-called "soccer war"²¹⁷ between Honduras and El Salvador was the collective expulsion of Salvadorans who had illegally squatted in Honduras. Does the adjective "collective" refer to *all* aliens from a certain nation, to all aliens, to a number of aliens, or to a group of aliens from a certain nation? Is the weekly round-up of wet-backs in the West and Southwestern part of the United States a collective expulsion of aliens?

The OAS treaty is additionally careful of the rights of aliens when it stipulates that an alien may not be deported or returned to

²¹² O.A.S. CONVENTION, art 22, para. 5.

²¹³ Colombian-Peruvian Asylum Cases, [1950] I.C.J. 266; [1951] I.C.J. 71; A.V.W. THOMAS, A.J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 393-398 (1956).

²¹⁴ PERU CONST. art. 68 provides:

No one may be banished from the territory of the Republic, nor removed from his place of residence, except by a writ of sentence or by application of the aliens law.

See also ARGENTINA CONST. art. 23 which provides:

But during such suspension the President of the Republic shall not convict or apply punishment upon his own authority. His power shall be limited, in such a case, with respect to persons, to arresting them, or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine Territory.

²¹⁵ O.A.S. CONVENTION, art. 22, para. 6; UN CONVENTION, art. 13.

²¹⁶ O.A.S. CONVENTION, art. 22, para. 9.

²¹⁷ Hewitt, *Honduras-El Salvador, Procedures under Rio Treaty of Reciprocal Assistance*, 63 AM. J. INT'L L. 769 (1969).

any country if in that country his right to life or personal freedom is in danger "because of his race, nationality, religion, social status, or political opinions."²¹⁸

Another aspect of freedom of movement mentioned only in the OAS treaty is that relating to the right of territorial asylum in foreign nations for "political offenses or related common crimes."²¹⁹ During the San José conference, El Salvador suggested that "political offenses" should be defined in the treaty as:

infractions against the organization or function of the state and against the political rights of citizens. The concept of political offense shall not be considered to include a crime that gives rise to a state of terror, an attempt on the life of a chief of state, or a crime inspired by base motives.²²⁰

Other nations objected to that particular definition and to the inclusion in the treaty of a precise definition of political offenses, since the Inter-American Juridical Committee had prepared a study of political offenses in 1959 which had not been acted upon by the OAS.²²¹ As a compromise, the conference requested the Council of the OAS to recommend to the Inter-American Commission on Human Rights that it prepare a study on political offenses. The commission was to consider the 1959 study, the draft presented by El Salvador, and the discussions that ensued at San José. The human rights commission was to submit its findings to a specialized conference for review and consideration.²²² Although this was probably the easiest way to skirt the issue, the exact nature of a political offense remains blurred. One might argue that, without adequate definition, it is possible to assert that war crimes, genocide, and crimes against the peace must fall within the category of "political offenses."

n. *Political Activity.* Except for certain restrictions in the inter-American treaty, both instruments have basically the same provision relating to the right to participate in government: every citizen has a right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected in genuine periodical elections which by secret ballot guarantee the free expression of the will of the voters; and to have access, under general conditions of equality, to public service.²²³ Since single

²¹⁸ O.A.S. CONVENTION, art. 22, para. 8.

²¹⁹ *Id.* art. 22, para. 7.

²²⁰ O.A.S., INTER-AMERICAN SPECIALIZED CONFERENCE ON HUMAN RIGHTS, FINAL Act 5-7 (OEA/Ser. K/SVI/I.1 (English) doc. 70, rev. 1, corr. 1, Jan. 7, 1970).

²²¹ *Id.* at 6.

²²² *Id.* at 7.

²²³ O.A.S. CONVENTION, art. 23; U.N. CONVENTION, art. 25.

party totalitarian nations which outlaw political opposition, such as Russia and Spain, have raised no objection to these stipulations, it might well be questioned whether the phrases "freely chosen representatives," "secret ballot," and "free expression of the will of the voter" are unequivocal legal terms on the international level. In addition, this section does not measure up to the 1959 Declaration of Santiago²²⁴ which particularly emphasized that perpetuation in power, or the exercise of power without a fixed term and with the manifest intention of perpetuation, is incompatible with the exercise of democracy in the Americas.

The restrictions on participation in government established by the inter-American treaty are those based on age, nationality, residence, language, education, civil and mental capacity, and sentencing by a competent court in criminal proceedings.²²⁵ Age and civil or mental incapacity, standard disqualifications in most nations, probably would create little furor on the international level. But the issue of nationality contains possible elements of denial of human rights. If resident aliens can never obtain nationality, their right to eventual participation in government is foreclosed. Language and education could also raise some very fundamental human rights issues. For example, a good percentage of the Indian population of Guatemala does not speak Spanish. If the Guatemalan government requires knowledge of Spanish for voter qualification, these Indians are effectively disenfranchised. And the educational qualification is exceptionally broad—obviously more must be meant than complete illiteracy, or the word "education" would not have been used. Does it imply that a nation can set definite educational requirements for voting? For example, "no one may vote without eight years of school attendance." If so, this qualification could disenfranchise a large segment of the potential voting population of the hemisphere.

2. *Implementation*

Since a number of the Western Hemisphere nations have a federal form of government, as opposed to a unitary form, the OAS treaty declares that in such states, the national government shall implement all the provisions of the convention over whose subject matter it exercises legislative and judicial jurisdiction. In accordance with its constitution and laws, the national government shall cooperate with its constituent units which in turn "may" adopt appropriate provisions for the fulfillment of the convention.²²⁶ No such

²²⁴ A.V.W. THOMAS & A.J. THOMAS, JR., *THE ORGANIZATION OF AMERICAN STATES*, 230-31 (1963).

²²⁵ O.A.S. CONVENTION, art. 23, para. 2.

²²⁶ *Id.* art. 28.

attempts at adjustment between federal-state relations appear in the UN convention, which flatly states the provisions of the treaty "shall extend to all parts of federal states without any limitations or exceptions."²²⁷

Under the guise of restrictions regarding the interpretation of the treaty, a very broad concept crept into the OAS treaty. There, it is stated that no provision of the treaty shall be interpreted as permitting any "State Party, group or persons" to suppress the enjoyment or exercise of the rights and freedoms recognized in the convention.²²⁸ Inasmuch as the treaty deals with the obligations of governments to persons within their jurisdiction and the rights of human persons as against the state, this appears to be a vast extension of the treaty to non-governmental groups and persons. If a non-governmental group or person not acting under color of law, denied one of the rights established in the treaty, would the nation be held responsible? If a newspaper editor refused to print a letter—no matter how innocuous—is he not denying to the writer freedom to express ideas in print, and thus violating freedom of expression? If a church refuses the use of its pulpit to an atheist is it not denying freedom to profess one's belief in public or in private? If a fraternal organization is selective in its membership, is it denying the right of everyone to associate freely for social or other purposes? What of a wife abusively interfering with her husband's extra-marital private life; would she be violating the treaty guarantee that no one may be the object of abusive interference with his private life?

3. *Duties*

The American Declaration on the Rights and Duties of Man adopted at Bogotá in 1948 concerned itself not only with the rights of individuals, but also with the duties that each individual owed to the society in which he lived. The long list of duties placed in that declaration was questioned because the theory of international protection of human rights is that the individual can be overwhelmed by the massive collective force of the state.²²⁹ Consequently, in the American Convention on Human Rights is a simple statement that every person has responsibilities to his family, his community, and mankind.²³⁰

In 1966, the UN divided the protection of human rights into two distinct spheres by adopting the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights.

²²⁷ U.N. CONVENTION, art. 50.

²²⁸ O.A.S. CONVENTION, art. 29.

²²⁹ See note 22, *supra*.

²³⁰ O.A.S. CONVENTION, art. 32.

In view of this action, the Inter-American Commission on Human Rights had suggested in 1966 that the proposed treaty should not include articles establishing binding legal obligations in the economic, cultural, and social fields. The commission had serious doubts about the appropriateness of including those rights in the future inter-American convention.²³¹ Instead, it suggested that the proposed convention contain a broad provision relating only to the "progressive development" of economic, social, and cultural rights in the hemisphere. This suggestion was adopted and the American treaty stipulates that the ratifying nations will undertake to adopt measures, both internally and through international cooperation with a view to achieving progressively the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the OAS, as amended by the Protocol of Buenos Aires.²³²

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

With the growing emphasis on human rights following World War II, the inter-American system recognized that if such rights were to be protected adequately there was a need for international machinery to enforce international guarantees. The Ninth Conference in 1948 resolved that the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, should give thought to a treaty providing for an "Inter-American Court to Protect the Rights of Man." After an investigation, the Juridical Committee reported that it was not feasible to create such a court because of the lack of substantive law on human rights and because the establishment of such a court would involve a radical transformation of the constitutional systems of some of the American states. This report was accepted and approved by the Council of Jurists and by the Council of the OAS.²³³

There the matter rested until the Fifth Meeting of Consultation in Santiago in 1959. Human rights again surfaced as a vital issue of inter-American affairs. To assure that the human rights activities of the OAS would not remain compromised at the lowest level of controversial principles—mere statements of rights without legal effect or effective implementation—some measure of enforcement was needed. The Fifth Meeting established the Inter-American Commission on Human Rights, and issued orders to the Inter-American Council of Jurists to prepare draft conventions on human rights. The

²³¹ O.A.S., INTER-AMERICAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS, ANNOTATIONS 35 (OEA/Ser.L/V (English) II. 19. doc. 53, Mar. 21, 1969).

²³² O.A.S. CONVENTION, art. 26.

²³³ THOMAS & THOMAS, *supra* note 224, at 227, 232-33, 400-401.

conventions were to include not only the human rights commission but also another supra-national mechanism to guarantee those rights—an Inter-American Court of Human Rights.²³⁴

This dual means of protection is continued in the present American Convention on Human Rights.

The commission on human rights is not a tribunal; its main functions are fact finding and seeking compromise. If the commission is unable to bring about a settlement, the new treaty establishes judicial machinery for implementation of the treaty, thereby attempting to remove human rights issues one step farther from the political arena and place them under the jurisdiction of an independent juridical organ. The court is to consist of seven judges elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights.²³⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms made no reference to possible conflict of interests between the judge's position in his home state and his position as an independent international jurist. In Europe, this oversight had to be remedied in the court's rules of procedure. No judge may be a member of a government or hold a post or practice a profession which is likely to affect public trust in his independent adjudication.²³⁶ With this precedent, the American treaty carefully stipulated that the position of judge of the court is incompatible with any other activity that might affect the court's independence or impartiality.²³⁷

The judges of the court are never to be held liable for any decisions or opinions issued in the exercise of their functions.²³⁸ Nonetheless, the treaty recognizes human frailty involving misfeasance or malfeasance in office by a judge or a member of the commission. The General Assembly of the OAS, at the request of the commission or the court, may determine sanctions against members of the commission or judges of the court when there are justifiable grounds for such action. A two-thirds majority vote of the member states of the OAS shall be required for a decision in the case of members of the commission. In the case of judges of the court, a two-thirds majority vote of the ratifying states is required.²³⁹

The judges of the court are to receive diplomatic immunities

²³⁴ P.A.U., FIFTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS, *Santiago, Chile, Aug., 1959* (OEA/Ser. C/II.5).

²³⁵ O.A.S. CONVENTION, ch. 8.

²³⁶ A.L. DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 107 (1971).

²³⁷ O.A.S. CONVENTION, art. 71.

²³⁸ *Id.* art. 70, para. 2.

²³⁹ *Id.* art. 73.

and diplomatic privileges and are to be paid a salary and provided with travel allowances.²⁴⁰ These financial arrangements are to be determined in the budget of the OAS, which also shall include the expense of the court and its secretariat. The court is to draw up its own budget which must be submitted to the General Assembly for approval.²⁴¹

No two judges may be nationals of the same state.²⁴² They are to be elected by ratifying states via a majority vote on a secret ballot. Each ratifying state may nominate three candidates, at least one of the three a national of another state.²⁴³ Judges are to be elected for six years with the possibility of re-election for an additional six year term. A judge who is a national of a state involved in a case before the court retains his right to hear the case. Presumably, if he has a personal interest in the case or has previously acted as counsel, prosecuting attorney, or judge in the case, judicial ethics would dictate his withdrawal, although the treaty makes no such stipulation. If another state is involved in the case, it may appoint a person to serve on the court as an *ad hoc* judge. If among the judges there are no nationals of the state or states involved in a case, each state may appoint an *ad hoc* judge. Five judges constitute a quorum for transaction of the business of the court.²⁴⁴

The court is given the power to appoint its own secretary, establish its secretariat, draw up its statute to be submitted to the General Assembly for approval, and adopt its own rules of procedure.²⁴⁵

Under the heading of "Jurisdiction and Functions,"²⁴⁶ the court's jurisdiction is limited to member states which have recognized the jurisdiction of the court as binding, *ipso facto*, on all matters relating to the interpretation or application of the convention. Such recognition may be made unconditionally, on the condition of reciprocity, for a specific period, or for a specific case.

The court also has a consultative function. Any organ of the OAS as well as any member state of the OAS (thus it is not limited to signatories of the convention) may request from the court an interpretation of the American convention or any other convention concerning the protection of human rights in the American states. This would include an interpretation of the UN covenants. A mem-

²⁴⁰ *Id.* art. 70, para. 1; art. 72.

²⁴¹ *Id.* art. 72.

²⁴² *Id.* art. 52, para. 2.

²⁴³ *Id.* art. 53.

²⁴⁴ *Id.* art. 55.

²⁴⁵ *Id.* arts. 58, 59, 60.

²⁴⁶ *Id.* ch. 8, § 2.

ber of the OAS may also request an opinion of the court regarding the compatibility of any of its domestic laws with these international instruments.

Would such consultation fall within the concept of "jurisdiction" of the court? The jurisdictional clause declares that ratifying states will accept as binding all decisions relating to the interpretation of the convention. Yet, the treaty clearly states that the court's jurisdiction covers only states party to the convention which have accepted the court's jurisdiction. If it is argued that this consultation is merely a "function" of the court and cannot be considered jurisdictional because there is no case or controversy, the logical conclusion must be that the opinion of the court in either case must be completely non-binding on members and non-members alike. It would be contrary to international law to demand that non-ratifying states be bound by an advisory opinion; nor could the court require that the United Nations accept its interpretation of the international covenants on human rights. Only when treaty interpretation falls within the context of a case or controversy would ratifying states be bound by the Court's interpretation.

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, the court established is given no consultative power.²⁴⁷ Therefore, questions of treaty interpretation are always binding on the accepting parties for they must arise in the context of the court's jurisdiction.

Unlike the European treaty, the OAS treaty contains no provision stating that a dispute as to whether the court has jurisdiction shall be settled by the decision of the court.²⁴⁸ In view of the role of questions relating to the court's jurisdiction in cases before the International Court of Justice, such an omission is incomprehensible.

After a state has accepted the court's jurisdiction, there must be submission of the dispute to the court either by the state or states involved or by the commission on human rights and an exhaustion of the proceedings before the commission as outlined in the treaty.²⁴⁹ The convention denies the individual petitioner direct access to the court; consequently, the court's decision making power is in the nature of appellate jurisdiction. The commission must first have investigated the merits of the case, made a preliminary adjudication

²⁴⁷ Although Protocol No. 2, opened for signature on May 6, 1963, would amend the treaty by permitting the European Court the right to render advisory opinions at the request of the Committee of Ministers on the interpretation of treaties, insufficient ratifications have been deposited to bring this into being.

²⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 49.

²⁴⁹ O.A.S. CONVENTION, art. 61.

as to the admissibility of the complaint, attempted, but failed to bring about a friendly settlement, and have drawn up a report of the commission's conclusions, proposals, and recommendations. Even if all of these prerequisites are fulfilled, apparently it is still within the commission's discretionary power to decide whether it will refer a case to the court. In this manner, the convention attempts to rebalance claims relating to this traditional sovereignty of nations against individual claims that sovereign nations are violating internationally protected human rights.

The European convention provides an alternative to judicial settlement by the European court.²⁵⁰ If the case is not referred to the court, the Committee of Ministers, the highest executive and the inter-governmental organ of the Council of Europe, is given a right by two-thirds vote to determine whether or not a violation of the treaty has occurred. If it finds that a state has violated the treaty, it shall prescribe a period of time during which the defendant state must take corrective measures.²⁵¹ This additional procedure was put into the convention because it was recognized that states might well ratify the convention but refuse to recognize the jurisdiction of the court. Disputes found admissible by the European Commission on Human Rights thus could reach a final decision through the Committee of Ministers.

The American treaty copies the European convention in that it requires the regional commission on human rights to appear in all cases before the court.²⁵² This method was adopted in the European convention as a compromise between those who advocated and those who were opposed to direct access to the court by an individual. Although neither treaty clarifies the commission's exact role here, obviously the commission cannot be considered a party to the dispute. The commission suffered no injury; it was the individual concerned who was injured by state action or inaction.

It would be violative of correct judicial procedure to designate the commission as a party to the suit, because much of the evidence before the court will be contained in the report of the commission based on its preliminary proceedings which are quasi-judicial and arbitral in nature. The role of the European commission before the European court was explained in the pleadings and in the decision on preliminary objections in the *Lawless* case. In the Pleading, it was stated:

²⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32.

²⁵¹ *Id.* art. 32, paras. 1, 2.

²⁵² O.A.S. CONVENTION, art. 57.

The Commission does not pursue any interest of its own but the public interest . . . in the maintenance of Human Rights and freedoms. The Commission is in no sense an antagonist of the States against which complaints are made before it. The Commission was intended to, and does act in all matters with complete impartiality, favouring neither the State nor the individual complaining against the State [T]he Commission, although not a party to the case, participates in the proceedings and stands in position intermediate between Government and the individual [W]hen it refers a case to the Court, it does so in order that the Court may give a decision as to whether or not the Convention has been violated. The Commission will, it is true, have expressed an opinion on that point . . . [b]ut that opinion has the character not of a legal decision, but of an expert opinion to provide the basis for a legally binding decision . . . by the Court. The function of the Commission before the Court . . . is not litigious—it is ministerial.²⁵³

In its decision of November 14, 1960, the European court agreed that individuals are vicariously represented before the court by the commission. As a defender of public interests, the commission's main function is to assist the court by placing before it all of the elements of the case.²⁵⁴ This practice is familiar through the common law concept of *amicus curiae*.

The court is required to give reasons for its judgment and judges may issue concurring or dissenting opinions.²⁵⁵ If the court finds there was a breach of the convention, it shall then rule that the victim of the violation be restored to his rights by the respondent state and, if appropriate, that he be paid a fair compensation for the denial of his rights. These compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.²⁵⁶

In case of a disagreement as to the meaning or scope of the court's judgment, a party may within ninety days following the judgment request an interpretation, and the court is required to hand down such an interpretation. With this exception, the judgment of the court is final and not subject to appeal.²⁵⁷

The treaty declares that "parties to the case shall be notified of the judgment of the court."²⁵⁸ A person complaining of violation of his human rights obviously has the greatest interest in the case's

²⁵³ "Lawless" Case, Hearing of Oct. 4, 1960 (Pleadings, Oral Arguments, Documents) European Court of Human Rights, pp. 245, 261 (1960-61).

²⁵⁴ "Lawless" Case, Judgment of Nov. 14, 1960 (Preliminary objections and questions of procedure) European Court of Human Rights, pp. 11-16 (1960-61).

²⁵⁵ O.A.S. CONVENTION, art. 66.

²⁵⁶ *Id.* art. 68, para. 2.

²⁵⁷ *Id.* art. 67.

²⁵⁸ *Id.* art. 69.

outcome, yet is he a "party to the case?" He is not entitled to bring the case before the court and must be vicariously represented by the commission. Until the court comes into being, there is no way of determining whether he may appear before the court if the commission believes that it would be beneficial. Nor is there any indication in the treaty that he may, after the commission has brought the case to the court, make submission through an attorney of his own choice.

A major weakness in the OAS treaty is its failure to include measures for implementing the court's decision. Even though nations may agree to abide by all future judicial decisions, when the moment of truth arrives it is not unknown in the international sphere that judicial decisions are ignored. The OAS treaty provides no mandatory sanctions for the explicit purpose of enforcing the court's judgment. Coercive community measures could be used only if the failure to fulfill the judgment is such that the majority of the nations of the OAS feel it falls within the Rio Treaty's provision relating to a fact or situation that might endanger the peace of the Americas. But, even then, member-states may fail to implement such OAS decisions or fail to do so fully. Even with a judicial determination of a denial of human rights, there is no assurance that the injured party will receive reparation or that the guilty state will cease and desist.

As soon as eleven states have deposited their instruments of ratification or adherence, the Inter-American Convention shall come into force. States ratifying may not denounce the treaty for five years; thereafter, upon a year's notice in advance, the state may indicate it will no longer be bound by the instrument. The treaty points out that such denunciation will not release the state from treaty obligations with respect to any violation that took place prior to the effective date of denunciation.²⁵⁹

CONCLUSION

When it is realized that listed among the non-signatories of the American convention on Human Rights are such states as Argentina, Brazil, Mexico, Peru, and the United States—the largest and most powerful nations in the hemisphere—the outlook for acceptance of a binding international obligation by all members of the OAS to respect human rights seems rather bleak. And even though twelve nations did sign the Pact of San José, one cannot be sanguine about a quick collection of the eleven ratifications required to bring the treaty into force.

²⁵⁹ *Id.* art. 78.

Some will be reluctant to ratify the convention because they fear the issue of human rights may become a tool of power politics. When political animosity exists between governments, attacks based on the high plane of alleged denial of human rights have considerable propaganda effect which is often hard to overcome. On the other side of the coin, a government may wish to close its eyes to gross repressions of human rights by other nations for reasons of political expediency, particularly if such repressions occur within the territory of friendly powers.

The signing of the convention may, on the part of some, have been a cynical thing, prompted by the recognition that the propaganda effect emanating from being on the side of the angels—in the front line battling for human rights—comes at the time of signing the treaty, not at some later ratification date.

A signatory of a human rights convention may be vocal in support of the need for international protection of human rights in neighboring states. But these same nations when faced with the realization that ratification will make the proclaimed human rights available to their own citizens via international action within their own boundaries, quickly revert to that most powerful emotional appeal in the Americas, the ban on non-intervention in internal and external affairs. Ratification is thus forgotten.

An introspective study of the magnitude of human rights problems within a country may bring reluctance on the part of that country's rulers to ratify what has been signed because knowledge that their human rights problems are so interwoven into the country's political and social patterns brings with it knowledge that any solution of these problems can be obtained only by a revolutionary shake up in the existing power structure. Ratification would then be the equivalent to signing one's own death warrant—something most ruling elite are reluctant to do.

Moreover, some nations of this hemisphere have experienced disruptive encounters with broad grants of civil and political rights, and the leaders have become wary. In the present stage of their political and economic development, the scales of wisdom tip in favor of internal order and peace as against extensive popular participation in the political process as demanded by the OAS human rights treaty.

Realistic statesmen find—with a tinge of regret perhaps—that, on the whole, citizens of one nation are not vitally interested in the human rights problems of other nations. Only where there is a very intensive and concerted effort to arouse the populace on behalf of repressed foreigners do international human rights issues ever be-

come imperative issues in internal affairs. Faced with such apathy, most statesmen prefer to let sleeping dogs lie.

In spite of this pessimistic outlook, one should not be completely disheartened. It may take decades before a binding agreement is widely accepted throughout the hemisphere, but the fact that the rights have been agreed upon in principle must radiate some pressure on all American governments to indulge in self-analysis. And self-analysis may bring about improvement in human rights endeavors internally.

The brightest spot in the hemispheric human rights picture is undoubtedly the American Commission on Human Rights. Its members have shown a dedication far beyond the call of duty. Their impartiality and independence is unquestioned. They have combined the innovative rationalizing legal skills of a John Marshall, the personal courage of a Simon Bolivar, and the high integrity and far-sightedness of a Don Pedro Segundo. They are undeterred by the recognition that the attainment of a reasonable protection of major human rights in every hemispheric nation is probably unachievable in their lifetime. In their unending prodding, pleading, and persuading, they may not have immediate success, but they are sowing for the future. They are creating throughout the hemisphere—particularly among its youth—an awareness of the dangers inherent in continual denial of human rights.

As this awareness spreads within the borders of each of the American nations, it may in the long run be the most productive protector of human rights. For, as has so often been reiterated, human rights protection at the international level can never be as effective as the insistent and widespread demands of citizens domestically that governmental oppression must be ended.