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INTERNATIONAL LAW OF HUMAN RIGHTS: A PRAGMATIC APPRAISAL

A. LUINI DEL RUSSO*

The quest for Human Rights coincides with the quest for recognition of the individual *qua* individual in international law.¹ It does not purport to affect or be affected by nationality ties between man and the State having jurisdiction over him, but rather it sets forth the principle that recognition and protection of individual freedoms, while primarily implemented at the national level, are a matter of international concern as the foundation of the political stability of nations under law and thus of the peace of the world.

This collective interest in the respect and preservation of Human Rights can only be secured through the establishment of an effective system of international control over State action in the area of fundamental freedoms. Thus, to be fully effective it requires a surrender by sovereign States of the traditional concept of their exclusive sovereign powers over individuals within their jurisdiction; it carves the issue of human rights out of that domain of exclusive domestic jurisdiction.

There are two revolutionary concepts inherent in the international law of Human Rights: the recognition of the individual as a subject of relevance to international law regardless, or even in spite of, nationality ties; and, as a natural corollary, the establishment by conventional international law of a real system of control on States' compliance with Human Rights obligations as to all persons within their jurisdiction, aliens, stateless and nationals.

THE INDIVIDUAL AND INTERNATIONAL LAW

Over two decades have passed since the first historic achievement in the recognition of the individual as a subject of relevance to the law of

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1. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); LADOR-LEDERER, *The Individual and His Access to International Jurisdiction*, ISRAELI REPORTS TO THE SIXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, at 113 (1962).

nations. The Nuremberg trials demolished the traditional principle that the "act of state" doctrine would clothe individuals committing war crimes in pursuance of the authority of the State with the protection of sovereign immunity.² The pioneering activity of the International Labor Organization greatly contributed to world society's growing awareness of the fundamental rights of individuals.³

The Charter of the United Nations proclaimed the dignity of man and pledged its members to the respect and observance of Human Rights for all individuals everywhere without discrimination,⁴ and the adoption of the Universal Declaration of Human Rights set forth the dimensions and relevance of the concept of fundamental freedoms referred to in the Charter.⁵ It defined the common standards to be used in the future, both nationally and internationally. Although deprived of any binding force when approved (as it is not conventional international law), the Declaration nevertheless has exercised such wide and deep moral influence on old and young nations alike that it has permeated the substantive law of the world community,⁶ and its principles have become accepted in the practice of states as international customary law.⁷

Even though the urgency of the issue had become relevant to the nations of the world and the standards of the fundamental freedoms of man had been defined, the individual found no improvement in his position vis-à-vis the State as to the implementation of those standards. This would remain true so long as there was no institutionalized protection of his rights at the international level and the member States did

2. Individual responsibility to mankind for war crimes was proclaimed in the language of the Nuremberg Court: "individuals have international duties which transcend the national obligations of obedience imposed by the individual state."

3. This was achieved not only through the Declaration of Philadelphia, but particularly in establishing a tripartite system of representation at international conferences and a machinery of control over national compliance with international standards of Human Rights in the field of labor relations, open to States and individuals. See WEAVER, *THE I.L.O. AND HUMAN RIGHTS* (1967).

4. U.N. CHARTER preamble, arts. 55, 56.

5. *The Universal Declaration of Human Rights: A Standard of Achievement*, UN Doc. 62.I.9 at 13. See also Cassin, *La déclaration universelle et la mise en oeuvre des droits de l'homme*, II *Recueil des cours* 237 (1951) ff; SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 47 (1964).

6. Treaties have been concluded to implement specific provisions of the Declaration. The constitutions of 17 emerging countries have incorporated basic rights proclaimed for the first time in the Declaration.

7. See Waldock, *Human Rights in Contemporary International Law*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 15 (British Institute of International and Comparative Law, Series 5, 1965).

not assume a firm international obligation as to any of the rights defined in the Declaration.

The two Human Rights Covenants approved by the General Assembly and opened for signature on December 16, 1966,⁸ bear the scars of the ideological conflicts which create such formidable barriers to success and progress in the field of Human Rights.⁹ It is interesting to compare the provisions of the Covenants with the original 1948 text of the Covenant on Human Rights drafted by the Human Rights Commission of the United Nations which included the Australian proposal¹⁰ for an International Court of Human Rights open both to states and to individuals for the adjudication of violations of fundamental freedoms.

The present Covenants, which will come into force three months after ratification by 35 states, will not provide any international procedural redress to individuals, either before a tribunal or before any adjudicating body empowered to hear the case or pass on any allegation of Human Rights violations. The effort to reach a compromise has whittled away the effectiveness of the original proposal to a point of illusory consistency. The issue of Human Rights has remained a purely political question to be settled by sovereign States only; thus, it is still fraught with emotional charges and deprived of the impassive atmosphere of legal proceedings.

The preambles to both Covenants not only refer initially to the principles proclaimed in the Charter and to the ideals laid down in the Declaration, but close with a novel reference to the involvement of the individual in the Human Rights struggle: "Realizing that the individual having duties to other individuals and the community to which he belongs, is under a *responsibility to strive for promotion and observance of the rights recognized in the present Covenant. . .*"¹¹

The language would be of extraordinary importance in a theoretical sense, as to the recognition of the relevance of the individual to international law, were it not for the fact that, in practice, according to the provisions of the Covenants, he is still abandoned to his sole efforts in the fulfillment of such new duty.

In the Covenant on Economic Social and Cultural Rights the contracting parties merely commit themselves "to take steps . . . with a view

8. U.N.G.A. RES. 2200 (XXI) (1966).

9. JENKS, *LAW, FREEDOM AND WELFARE*, 14 (1963).

10. PARIS PEACE CONFERENCE, *CONFER. DOC. (GEN.) I.B. 13* at 444-45 (1946).

11. COVENANT ON ECON. SOC. & CULT. RIGHTS; and COVENANT ON CIVIL & POL. RIGHTS; U.N.G.A. RES. 2200 (XXI) (1966).

to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.”¹² Not only will this Covenant, when effective, not be self-executing, but it will entail a mere initiation of progressive steps leading in the future to the recognition and protection of the rights defined in the Covenant.¹³ Developing countries are even held to a lower degree of compliance, as they will be permitted to “determine to what extent they would guarantee the economic rights . . . to non-nationals.”¹⁴ The only firm obligation of ratifying states will be to submit to the Economic and Social Council reports on progress achieved. No remedy is provided for a breach of the Covenant.

The other Covenant, on Civil and Political Rights, does expressly commit each member state “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”¹⁵ and to take steps to conform its legislation to the implementation of the Covenant. This inclusion among “individuals” of nationals, stateless and aliens truly recognizes the direct interest of international law in man *qua* man. However, after the detailed definition of protected rights, the Covenant again limits institutional control to the establishment of an elective eighteen-member Human Rights Committee to which the States undertake to submit reports on the measures adopted to implement the principles of the Covenant.¹⁶

Only two optional measures are contemplated to provide some much needed control. Under Article 41, if at least ten States parties to the Covenant declare that they recognize such competence, the Committee may have the power to receive States’ “communications” as to the breach of obligations under the Covenant by another State party who has also submitted such a declaration. But in that event, the Committee’s function would be merely to receive both States’ submissions, attempt a friendly settlement at a meeting *in camera* and thereafter prepare a report on the results reached. If no settlement is reached the Committee may, with the consent of the States concerned, appoint an *ad hoc* Conciliation Commission of five members to consider the matter, attempt

12. COVENANT ON ECON. SOC. & CULT. RIGHTS, art. 2(1).

13. See Statement by United Kingdom Delegate in the Third Committee, U.N. Doc. A/C.3/SR.1396, at 11 (1966).

14. *Supra* note 12 at art. 2(3).

15. COVENANT ON CIVIL & POL. RIGHTS, art. 2(1).

16. *Id.* at art. 40.

a solution and report its findings to the Committee on questions of fact relevant to the issues and its views on the possibility of a friendly solution. The individual has no access to any international body under this provision.

The optional protocol appended to the second Covenant is the only measure in both treaties which contemplates a direct recourse by the individual to the Human Rights Committee, although any legal term such as "petition" or "application" has been deleted and the neutral word "communication" is used.¹⁷ The Committee shall examine *in camera* the communications. There is no provision for adjudication of the dispute or for specific remedies. The end result of the Committee's investigation will be limited to the forwarding of views to the State and the individual concerned, and to the inclusion of the matter in the annual report to the General Assembly on all of the activities and functions entrusted to it.

The adoption of the two Covenants will be, nevertheless, an important step toward transposing the issue of Human Rights into the realm of legal concepts. It appears impossible to forecast how long the total process will take as only fourteen States to date have signed the two Covenants and no ratification has yet been deposited.

AN EFFECTIVE PATTERN OF INTERNATIONAL CONTROL

Having observed the long delayed performance and the minimal results achieved by the world organization in the two decades following the approval of the Universal Declaration, one might be tempted to agree with wary politicians and critics of international law that it is impossible to reach a consensus as to international control of Human Rights. Nothing could be farther from the truth. There have been two specific areas of achievement which can be used as encouraging evidence of the feasibility of the project.

A first important step has been the conclusion in the past twenty years of twenty-one international conventions in specific areas of Human Rights, under the sponsorship of the United Nations, the ILO and

17. There was extensive debate in the Third Committee on the final draft of the Protocol as to the merits of the right of individual petition. The representative of the Soviet Union emphasized his position that "the right of individual petition was wrong in principle because it would subvert the rule of contemporary law that only subjects of international law were States." U.N. Doc. A/C.3/SR.1439, at 11 (1966). See also U.N. Doc. A/C.3/SR.1418, at 4 (1966).

UNESCO.¹⁸ The device of breaking down the overwhelming question of protection of all fundamental freedoms into a flexible sequence of narrow and well defined issues has revealed that, where the commitment was more limited, the consensus of nations could be more readily secured.¹⁹ This device was used successfully in formulating the Conventions on Abolition of Slavery and Forced Labor, on Genocide, on Refugees, on Stateless Persons, on Discrimination in Education, on Political Rights of Women, on Consent to Marriage and on Discrimination in Employment, all of which are now in force in a large number of nations.

Another even more effective achievement in the international protection of fundamental freedoms is the European Convention on Human Rights²⁰ which has been in force for fifteen years and, today, is binding in sixteen European States. This includes all of the members of the Council of Europe except France and Switzerland. Under the terms of the Convention, member States not only assumed a formal international obligation to recognize and protect at the domestic level the individual rights defined in the text, as to citizens, stateless and aliens, but they also submitted to a system of international control as to their compliance through the creation of the European Commission of Human Rights and submission to the Committee of Ministers. In addition, eleven States²¹ have also accepted the compulsory jurisdiction of the European Court of Human Rights created by the Convention to adjudicate any alleged violation of fundamental freedoms, and the jurisdiction of the Commission to receive, hear and pass upon petitions filed by individuals alleging violations of their fundamental rights by one of the eleven States.

18. U.N. Press Release, Ref. Paper No. 6, June 1967.

19. del Russo, *Dimensions and Relevance of Human Rights Under the Rule of Law*, Washington World Peace Through Law Conference (1965).

20. For a complete current bibliography on the EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS [hereinafter referred to as the CONVENTION] see the YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS [hereinafter cited as YEARBOOK], vols. 1-8 Nijhoff, The Hague (1955-1965).

The Convention was signed in Rome on November 4, 1950, by all of the Member States of the Council of Europe; it came into force on September 3, 1953, upon ratification by the tenth State, Luxembourg. 1 YEARBOOK 96, 102 (1955). It is now binding upon sixteen countries: Austria, Belgium, Cyprus, Denmark, The German Federal Republic, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, The Netherlands, Norway, Sweden, Turkey and the United Kingdom.

21. Austria, Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Sweden and the United Kingdom. Council of Europe B(67)47, July 31, 1967.

The Commission exercises conciliatory and adjudicating functions,²² holds hearings and receives evidence, including the statement and witnesses of the petitioner. The petitioner has right to counsel of his choice or, if needed, is assigned counsel at the expense of the Council of Europe. The fact that the Commission may refer to the Court individual applications found admissible and meritorious, confirms the extraordinary precedent established by this system in international law. For the first time it has been possible for an individual, regardless of nationality, to summon before an international judicial body a sovereign State for a breach of international law and to obtain a remedy for such breach. It is extremely significant that as of December 1967 over 3,300 individual petitions have been filed with the European Commission by individuals of thirty-six different nationalities and by stateless persons. The seven cases²³ referred to the European Court of Human Rights have all been cases of individual petition.

It is true that, at first blush, the Court appears to be an international tribunal in the traditional sense: Article 44 of the Convention defining the parties entitled to bring a case before the Court makes no reference to individual petitioners who are vicariously represented in the Court proceedings by the Commission as public defender of Human Rights. After further analysis, however, it appears that the Court has granted special consideration to the individual petitioner. First, in drafting its rules of procedure it stipulated that it may hear as a witness or expert or in any other capacity "any person whose statements may appear to be useful to the fulfillment of its function."²⁴ In addition, in its first two decisions the Court revealed at once its particular concern to protect fully the interests of the individual petitioner. In the case of *Lawless v. Ireland*,²⁵ the Commission, in its memorial filed with the Court on June 27, 1960, had requested leave to insert in the file of the proceedings the written observations submitted by the petitioner on the Commission's report at the conclusion of its hearings. The Irish Government in its counter-memorial attacked the validity of the request as "an attempt to introduce into the proceedings in this Court the individual with at

22. See CONVENTION arts. 25-29.

23. *Lawless v. Ireland*, 4 YEARBOOK 430 (1961); *DeBecker v. Belgium*, 5 YEARBOOK 320 (1962); and five cases now pending before the Court: *The Belgian Linguistic Cases*, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64; *Wemhoff v. Federal Republic of Germany*, 2122/64; *Neumeister v. Austria*, 1936/63, *Stogmüller v. Austria*, 1602/62, *Matznetter v. Austria* 2178/64, 7 YEARBOOK 330 (1966).

24. EUROPEAN COURT OF HUMAN RIGHTS, rule 38(1).

25. Cases cited note 23 *supra*.

least some of the attributes of a party,"²⁶ although it granted that if it should think fit, the Court certainly would have the power to call an individual applicant as a witness. The Court in its preliminary judgment found that the Commission was entitled to make known the applicant's views to the Court and stated in language of historic moment:

An applicant, although he is not entitled to bring the case before the Court . . . is nevertheless directly concerned in the proceedings before the Court; . . . it must be borne in mind that the applicant instituted the proceedings before the Commission and . . . would be directly affected by any decision on the substance of the case.

. . . .

The Court must bear in mind its duty to safeguard the interests of the individual who may not be a Party to any Court proceedings; . . . accordingly it is in the interest of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration the applicant's point of view . . . and the Court may also hear the applicant in accordance with Rule 38 of the Rules of Court . . .²⁷

The inferences of this language are clear and stringent not only as to the peculiar nature of a Human Rights proceeding but also as to the real role of the individual before the Court.

A specific study of the jurisprudence of the Court, the Commission²⁸ and of the two hundred decisions of domestic courts of member States applying and interpreting the Convention would fully reveal the effectiveness of this protection of fundamental freedoms vis-à-vis the State. We have to limit ourselves here to the highlights. As a result of the second case which came before the Court, *De Becker v. Belgium*,²⁹ the Belgian Parliament in 1961 amended the legislation which had been successfully challenged by petitioner before the Commission and thus afforded De Becker the relief requested in his application.

In 1962 the Austrian Code of Criminal Procedure was amended³⁰ to provide equal representation to prosecution and defense at the appellate level, as a result of the filing with the Commission of a large number of individual petitions by prison inmates who alleged a violation of Article

26. The *Lawless Case*, Series B EUROPEAN COURT OF HUMAN RIGHTS 277 (1960 61).

27. *Id.* at 278.

28. See YEARBOOKS and COLLECTED DECISIONS OF THE COMMISSION vols. 1-22.

29. 5 YEARBOOK 320 (1962).

30. Act of July 18, 1962, B.G.B.L. Bundesgesetzblatt, No. 229, 5 YEARBOOK 344 (1962).

6 of the Convention. By subsequent Austrian legislation,³¹ the applicants whose cases were found admissible by the Commission were entitled to a rehearing within six months after the law came into force.

In other instances, through the good offices of the Commission, the petitioner obtained redress from the respondent State either in monetary compensation for miscarriage of justice as in the case of *Boeckman v. Belgium*,³² or by conditional release and probation through a measure of pardon as in the case of *Porschke v. Germany*³³ which involved unlawful length of detention.

The international control on State compliance with the individual protection of fundamental freedoms operates also as an effective deterrent at the domestic level. The statistics of the Council of Europe as of December 1965³⁴ make reference to over 165 State Court decisions interpreting and applying provisions of the Convention. Under the language of Article 1, the member States have in fact recognized *ipso facto* to everyone in their jurisdiction the rights and freedoms defined in the Convention. The English text "shall secure" finds corroboration in the French "reconnaissent"³⁵ which conveys the self-executing immediacy of the present tense. The intent of the drafters that Article 1 be self-executing and directly enforceable by individuals in the national courts is confirmed by the preparatory works and debates where it transpired that the present language was the result of a specific amendment.³⁶ Mr. Rolin, author of the amendment, after the Convention came into force stated on the floor of the Consultative Assembly:

According to Article 1 . . . the States did not "agree to recognize" in their legislation, they "recognized:" there is all the difference. After this Convention is approved by our Parliaments and ratified, there follows that without the passing of further legisla-

31. Act of March 27, 1963, B.G.B.L. No. 66 (1963).

32. Appl. 1727/62, 6 YEARBOOK 371.

33. 21 COLLECT. DECISIONS OF THE COMMISSION 84 (March, 1967).

34. Council of Europe Releases H(65)7, H(66)10, H(67)2 of 1965-67.

35. See del Russo, *The European Bill of Rights*, 4 SANTA CLARA LAWYER 8, 12, n.16 (1963). On the self-executing nature of Art. 1, see Süsterhenn, *L'application de la Convention sur le plan du droit interne*, LA PROTECTION INTERNATIONALE DES DROITS DE L'HOMME DANS LE CADRE EUROPÉEN 303, 305 (1961); Comte, *The Application of the European Convention on Human Rights in Municipal Law*, 4 JOURNAL OF THE INTERNATIONAL COMMISSION OF JURISTS 94 (1962); Buergethal, *The Domestic Status of the European Convention on Human Rights*, 13 BUFFALO L. REV. 354 (1964).

36. CONSULTATIVE ASSEMBLY REPORTS 2d Sess. 915 (1950).

tion our Courts are fully empowered to enforce the provisions of the Convention.³⁷

In its decision on admissibility of the petition in *Austria v. Italy* in 1961, the European Human Rights Commission stated:

It follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character being designed rather to protect the fundamental rights of individual human beings from infringement by any of the . . . Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.³⁸

The jurisprudence of the national courts has corroborated this principle. In November 1966 the Brussels Court of First Instance in a case of language discrimination found a Belgian law incompatible with Articles 10 and 14 of the Convention and stated in part:

. . . The Convention seeks in principle to safeguard the rights of any individual acting in a private capacity . . . the said Convention having established rights of a higher order which individuals are entitled to invoke and exercise . . .

It must be allowed that the international convention confers subjective rights on the nationals of the contracting states and guarantees their exercise, therein overriding and disregarding any other conflicting rules established even subsequently by national legislation.³⁹

The Federal Constitutional Court of Germany in December 1965⁴⁰ held that deprivation of personal liberty in the case of an individual suspected of a crime could be permitted only in exceptional cases. Ordinarily, the principle of presumption of innocence would forbid it. Such a principle is not expressly set forth in the German Basic Law, but has been generally accepted as a corollary to the rule of law and has been introduced into the positive law of the Federal Republic of Germany through Article 6(2) of the Human Rights Convention. The German Supreme Court, the Federal Court of Justice, in three separate cases

37. *Id.* 5th Sess. 341 (1953).

38. Appl. No. 788/60, 4 YEARBOOK 116 (1961).

39. Council of Europe Release H(67) 4 at 74-75 quoting from REVUE DE DROIT PENAL ET DE CRIMINOLOGIE at 89 (1966).

40. *Id.* at 27.

on unlawful detention dealing with Article 5(5) of the Convention as a basis for an individual right of compensation for violation of fundamental rights, stated in 1960 that the Convention "deliberately confers in many of its provisions directly enforceable rights on individuals."⁴¹

In a speech in the Dutch Parliament in support of the adoption of the optional clause conferring jurisdiction on the Commission to receive individual petitions, the statement was made by Mr. Van Rijckevorsel that:

. . . I regard the recognition of a right of individual petition as a welcome extension of the Convention on Human Rights as we approved it in 1954. I welcome it because it establishes beyond doubt that international law is concerned also with individuals . . . The Convention lays down individual rights. So that individuals become the subject of international law in opposition to the most commonly held theory that international law concerns States and relations between States alone.⁴²

HUMAN RIGHTS AND DOMESTIC JURISDICTION

Fifteen years of testing of the international law of Human Rights in the proving ground of the operations and institutions of the European Convention should bear evidence that the only hope of effectiveness in the international control of Human Rights is to be found outside the political sphere of international relations, in the objective order of legal proceedings established by conventional law.

One of the first reactions in United Nations debates to the provisions of the 1948 Draft Covenant on Human Rights was an attitude of stern rejection as against "intervention in the internal affairs of a State . . . undermining the sovereignty and independence of particular States."⁴³ The first debates on the treatment of Indians in South Africa⁴⁴ and the later ones on apartheid,⁴⁵ brought out intermittently the defense that the issue was one of exclusive domestic jurisdiction as it related to the treatment of nationals by their own State. The same objection was raised in the Security Council in 1956⁴⁶ as to the Soviet intervention

41. *Id.* at 17, 33 and 44.

42. 3 YEARBOOK 584 (1960).

43. Statement by the Soviet Delegate, U.N. Doc. E/CN4/154 (1948).

44. See Report of the Commission on Racial Situation in South Africa, 8 U.N. GAOR, Supp. 16 at 22, U.N. Doc. A/2505 (1953).

45. U.N. Docs. A/C.4/SR.76 and A/2475 sec. 14.

46. 9 U.N. SCOR, 754th meeting. Supp. Nov. 14, 1956 at 125; 9 U.N. GAOR (Emer. Sess. II) at 2.

in Hungary and the repression of fundamental freedoms of the Hungarian people. This defense was also raised in a number of other instances.⁴⁷

This approach to the establishing of a conventional law of Human Rights would undoubtedly prove to be a fatal error, mainly for two reasons. First, it is the consensus of States that the issues of fundamental freedoms and of peace are so closely interwoven that the preservation of our civilization rests on their recognition and protection. In addition, the power and competence of international law in the subject of Human Rights is no longer open to question after half-a-century of agreements concluded by States on protection of minorities, on outlawing of slavery, on treatment of war prisoners and civilian population, on genocide, on freedom of education, marriage and employment, and other areas which are fit and proper subjects for conventional international law. With all their delays, weaknesses and faults, we must admit that international organizations have explored and defined a number of specific areas of Human Rights and, in the last two decades, concluded a number of conventions which are now in force. Today, it is therefore not only unrealistic, but tragic, for any lawyer who has the interest and image of his own country at heart, to recommend withdrawal from participation in any world community's effort to establish international control on Human Rights obligations of States, on the ground that the treatment of citizens by a State is solely a subject for domestic jurisdiction.

Human Rights treaties by their very nature are substantially different from any other form of conventional international law as States therein do not protect and further their interests, do not seek to establish their rights, but only undertake duties for the benefit of the individual human being. There is no *quid pro quo* to be evaluated, only compliance to be measured and accepted. In the language of the International Court of Justice in its advisory opinion on reservations to the Genocide Convention:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose . . . since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles

47. One of the latest examples is provided by the debates in the Third Committee on the Optional Protocol to the draft Covenant on Civil and Political Rights. See statements of representatives of the Soviet Union and of Ethiopia, U.N. Docs. A/C.3/SR. 1439, at 4, 10 (1966).

of morality. In such a Convention the contracting States do not have any interests of their own; they merely have one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.⁴⁸

In his dissenting opinion on the South West Africa Case, Judge Tanaka discussed at length the question of the international validity of Human Rights and state obligations in the international sphere corresponding to those in the domestic sphere:

The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element.

A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory. . . .

Human rights have always existed with the human being. They existed independently of, and before, the State. Alien and even stateless persons must not be deprived of them.⁴⁹

Classifying the protection of human rights as belonging in the international field to the *jus cogens*,⁵⁰ the imperative law, not susceptible of being changed by agreement, he added:

To sum up, the principle of the protection of human rights has received recognition as a legal norm under three main sources of international law, namely (1) international conventions, (2) international custom and (3) the general principles of law. Now, the principle of equality before the law or equal protection by the law presents itself as a kind of human rights norm. Therefore, what

48. Reservations to the Genocide Convention Case, [1951] I.C.J. 15.

49. South West Africa Cases [1966], I.C.J. 61 AM. J. INT'L L. 116, 159 (1967).

50. See Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58-60 (1966).

has been said on human rights in general can be applied to the principle of equality. . . .⁵¹

State sovereignty need not be shattered by agreement to Human Rights Conventions as any effective form of international control also contemplates the necessary protection of States. This is amply corroborated in the operations of the European Convention, where there are provided rights of derogation of States,⁵² certain rights of reservation,⁵³ specific limitations to most of the rights in the interest of national safety and the prerequisite of exhaustion of domestic remedies⁵⁴ for admissibility of a petition before the European Commission.⁵⁵ Further, the non self-executory nature of certain provisions implies State action prior to the enforceability of the treaty in the domestic order as national law.

This protective bulwark has emerged with regard to compliance by the United States with the fundamental international obligation under the United Nations Charter to conform our own legal order to the principles and provisions of any agreement to which we would be a party. In his concurring opinion in *Oyama v. California*, Justice Black stated in 1947:

We have recently pledged ourselves to co-operate with the United Nations to "promote . . . universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." How can this nation be faithful to this international pledge if State laws which bar land ownership by aliens on account of race are permitted to be enforced?⁵⁶

Even stronger was the language of Justice Murphy's concurrence:

The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States is but one more reason why the Statute must be condemned.⁵⁷

51. See *supra* note 49 at 161.

52. EUROPEAN CONVENTION ON HUMAN RIGHTS art. 15.

53. *Id.* art. 64.

54. *Id.* arts. 2, 4, 6, 8, 9 and 11.

55. *Id.* art. 26.

56. 332 U.S. 633, 649-50 (1947).

57. *Id.* at 673.

But a few years later the same provision of Article 55 of the Charter, found to be the supreme law of the land by the California Court of Appeals,⁵⁸ was defined by the Supreme Court of that state as "non self-executing" on the following grounds:

The provisions of the Charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness, which would indicate an intent to create justifiable rights in private persons immediately upon ratification. Instead they are framed as a promise of future action by the member nations.⁵⁹

Another extremely important procedural protection of State sovereignty in case of individual petitions has been provided in the structure and operation of the European Convention. It was a matter of deep concern to all States during debates at the Consultative Assembly and in Committee hearings on the drafting of the Convention, that the right of individual petition to the Commission, if granted, might lend itself to abuse for political propaganda or that persons affected by psychopathic complexes or with totally unfounded claims may involve a State in proceedings amounting to embarrassment or indignities.

The first task entrusted to the Commission under Articles 26-27 of the Convention and Article 45 of its Rules is to screen admissibility of individual petitions in a preliminary examination by a three-member Sub-Commission, without any notice to the State concerned. Only after a *prima facie* evidence of admissibility of the petition has been established, notice of the pending application is served upon the defendant State and its submissions solicited as to the preliminary question of admissibility of the petition. A judicial hearing is then held by the Commission, written and oral testimony is taken and a final decision is issued on the question of admissibility of the case. After the application is accepted a seven-member Sub-Commission is set up to hear the merits of the case and a hearing is conducted to determine whether or not

58. *Fuji v. State of California*, 217 P.2d 481 (Cal. App. Ct. 1950). *But see* Wright, *National Courts and Human Rights: The Fuji Case*, 45 AM. J. INT'L L. 62 (1951).

59. 242 P.2d 617 (Cal. Sup. Ct. 1952). *See also* *Camacho v. Rogers*, 199 F. Supp. 155 (S.D. N.Y. 1961), *Rice v. Sioux City Memorial Park Cemetery*, 60 NW 2d 110 (Iowa Sup. Ct. 1953). *But see* as to Art. 104 of the Charter *Balfour, Guthrie and Co. v. United States*, 90 F. Supp. 831, 832 (N.D. Cal. 1950) "As a treaty ratified by the United States the Charter is part of the supreme law of the land . . . No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States."

there has been a breach of the Convention. Very few petitions reach the third stage; the majority are found inadmissible and rejected at the first stage, even before the summoning of the State.⁶⁰ The experience of the European Convention and its jurisprudence reveal the advantages of such screening procedure and will be of great help in the setting up of operations of Regional Human Rights Conventions in other continents.

In 1967 three Human Rights Conventions were pending before the Senate of the United States for advice and consent to ratification: the Supplementary Convention on Slavery, in force since 1957 and to which sixty-nine States are parties; the Convention on the Abolition of Forced Labor, ratified by seventy-eight States and in force since 1959; and the Convention on Political Rights of Women, ratified by fifty-three States and in force since 1954. In forwarding the three Conventions to the Senate on July 22, 1963, President Kennedy had stated:

United States law is, of course, already in conformity with these Conventions, and ratification would not require any change in our domestic legislation. However, the fact that our Constitution already assures us of these rights does not entitle us to stand aloof from documents which project our heritage on an international scale. The day-to-day unfolding of events makes it even clearer that our welfare is interrelated with the rights and freedoms assured the peoples of other nations.

These Conventions deal with human rights which may not yet be secure in other countries. . . . There is no society so advanced that it no longer needs periodic recommitment to human rights.

The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concepts of government from all forms of tyranny. . . .⁶¹

Attorney General Ramsey Clark, speaking before the American Bar Association House of Delegates on August 9, 1967, supported a motion for adherence to the three Conventions.⁶² However, the Chairman of the American Bar Association Standing Committee on Peace and Law

60. As of May 1, 1967 out of 3,128 applications filed since 1955 with the Commission 2,322 had been rejected *de plano* at the preliminary stage and 82 after communication to the Respondent Government. See COUNCIL OF EUROPE RELEASE B(67)47 of July 31, 1967 at 19.

61. 49 *Department of State Bulletin* 322 (1963).

62. 2 *INT'L LAWYER* 18 (1967).

Through the United Nations, Mr. Eberhard Deutsch, presented the adverse report of his Committee on all three treaties and vigorously urged adoption of the Committee's recommendation to oppose ratification by the United States of those treaties as "international covenants on Human Rights having no direct relationship to the external affairs, and lying essentially within the domestic jurisdiction, of the United States."⁶³ In its lengthy report, Mr. Deutsch's Committee had stated in part:

It is the view of the Committee that international relations have not yet reached the stage at which the United States should surrender its exclusive jurisdiction over the regulation of its own internal order and the relations between its own national and local governments and their citizens. It is submitted that the cause of Human Rights neither justifies nor requires participation in treaties which would prejudice the domestic jurisdiction of the United States and the federal/state structure.⁶⁴

The main thrust of the argument opposing ratification was that the Conventions deal primarily with matters of internal rather than international concern and as the separate statement of four Committee members reveals:

In the United States . . . in many instances a treaty, once ratified, becomes the "supreme law of the land." So, as this country is concerned . . . it is appropriate to consider whether the benefits of having Human Rights law formulated by international organizations outweigh the principle that a citizen is entitled to expect that the law governing the domestic relations between himself and his own government is formulated, debated, and enacted by representatives chosen by himself and his fellow citizens in accordance with the constitutional processes of his own society.⁶⁵

After extended debate a substitute resolution, submitted by the Section of International Comparative Law of the American Bar Association under the chairmanship of Edward D. Re, was adopted by the House of Delegates by a vote of 115 to 96 favoring accession to the Slavery Convention and recommending no action and opposition, respectively,

63. 1 INT'L LAWYER 625.

64. *Id.* at 616.

65. Statement by Messrs. Folsom, Haight, Maxwell and Ray, *Id.* at 650, 659.

on the Forced Labor Convention and on the Convention on Political Rights of Women. In accordance with the American Bar Association Resolution submitted, and testimony given in September 1967 to the Senate Committee on Foreign Relations, the Senate transmitted to the Chief Executive its advice on ratification of the Slavery Convention only and tabled consideration of the other treaties. On December 6, 1967 the United States' ratification was deposited on the first United Nations Human Rights Convention ever ratified by the United States. Thus, of the original fifty-one United Nations members, only Spain and South Africa have failed to ratify any of the Human Rights Conventions.⁶⁶

The position taken by our American Bar Association in this matter has been a source of grave concern to many lawyers in this country and abroad. It is possible to visualize that there may still be differences of opinion as to the wisdom of creating supranational institutions with power to settle economic and political problems over which national States alone should be arbiters in the protection of national interests. But, today, in the field of Human Rights it is beyond dispute that respect for the individual, his dignity and his fundamental freedoms is well above the collective interest of any State. Given the world of reality, one must admit that the reason of State is a temptation lurking behind the power of any government, even in a democracy; thus, effective protection for those fundamental freedoms can only be secured by the control of international institutions.

The argument often advanced in our country is that our democratic system of government under law already furnishes more freedom and more opportunity to all individual citizens, more protection and respect of the rights of man than any other people in the world enjoys; and that our Supreme Court is the guardian of our great constitutional principles as a living force protecting liberties. Hence, because we ourselves have nothing to gain for our own system, we should not submit ourselves to any international control on Human Rights. The great Judge John Parker gave his answer to such argument a decade ago:

It is not enough for the defense of freedom, that we preserve it in this country. Liberty is endangered throughout the world and we cannot preserve it here without securing its foundations on a worldwide basis. . . . Whether we like it or not, the leadership of the free world has devolved upon us; and the future of our own

66. Gardner, *The Three Human Rights Treaties: Good Law and Good Policy*, 1 INT'L LAWYER 633, 635.

liberties as well as the liberties of free men elsewhere depends upon how we exercise that leadership.⁶⁷

Other democratic countries have gone through similar pangs of doubts and rejection in the area of Human Rights. The United Kingdom was the first member of the Council of Europe which ratified, in March 1951, the European Convention, but it was not until January 1966 that it recognized the compulsory jurisdiction of the European Court of Human Rights and the right of individual petition before the European Commission. Time and time again during those ten years while a British jurist, Lord McNair, presided over the European Court, the question was raised in the British Parliament as to the delay in filing the declarations of acceptance. The Government's position would consistently be stated as taking the view

... that States are the proper subject of international law and if individuals are given rights under international treaties, effect should be given those rights through the national law of the States concerned.⁶⁸ The reason why we do not accept the idea of compulsory jurisdiction of a European Court is because it would mean that British Codes of common and statute law would be subject to review by an international court.⁶⁹

Today, however, the United Kingdom has modified its views without suffering any earthshaking experiences; and this is a much greater step than the one involved in the mere ratification of the three Human Rights Conventions by the United States.

Any international lawyer deeply committed to Human Rights has felt distressed in discovering among the leaders of the legal profession in the United States such astounding limited vision of the pressing urgency for effective international protection of fundamental freedoms. The lesson of history has passed them by. On the other hand the threat of totalitarianism has taught the European nations the need for unity and mutual assistance to avoid a new Nazi tragedy. Very appropriately,

67. Parker, *Our Great Responsibilities: We Must Lead the World to Freedom and Justice*, 44 ABAJ 17, 20 (1958).

68. The ratification of the Convention had already brought upon Great Britain the international obligation to conform its laws to the treaty, but the individual cases would be tried under national laws and procedures.

69. House of Commons *Weekly Hansard*, No. 438 Nov. 26, 1958, col. 333. See also *Id.* No. 462, June 25, 1959 col. 1546-1556.

a distinguished British jurist, the director of Human Rights at the Council of Europe, quotes Mr. Spaak's remark that the man who did most to bring about the union of Western Europe was Josef Stalin.⁷⁰

Thus the first legal instrument to emerge from the deliberations of the Council of Europe was the cornerstone of the union, the European Convention of Human Rights, which in Robert Schuman's words, "provides foundations on which we can base the defense of the human personality against all tyrannies and against all forms of totalitarianism."⁷¹ Fifteen years of successful operations of that Convention, which bears the stamp of universality, have proved to the world that the recognition of the individual in international law may be achieved under the rule of law without undermining the sovereignty and independence of the States parties to the treaty. Thus while the institutions of the Convention have been writing the first international case law of Human Rights, the pattern of effective international control has found many followers among nations in other continents seeking solutions to common issues of Human Rights, whether in Africa, in the Americas or in Southeast Asia.⁷²

If a total commitment to Human Rights by all nations of the world is presently utopian, and the ideological cleavage is too great to permit agreement, the successful implementation of the European Convention most certainly shows that a regional approach to the international protection of Human Rights is the immediate answer to the problem. States closely connected geographically, culturally, historically and traditionally, share common political and social problems and are inclined to join more promptly in a system of mutual obligations and control for Human Rights protection within their boundaries. The Inter-American Convention of Human Rights, now in the last drafting stage, provides for the right of individual petition and for the creation

70. Robertson, *The Political Background and Historical Development of the European Convention on Human Rights*; THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 26 (Supp. 11, 1965).

71. *Id.*

72. The Constitutions of Sierra Leone, Uganda and with some modifications those of Kenya, Malawi and Zambia have incorporated the principles and language of the European Convention. As to the Nigerian Constitution, see Amachree, *Fundamental Rights in Nigeria*, 11 How. L.J. 463, 479 (1965). See statements at first Congress of African Jurists in Lagos, Nigeria, *The Law of Lagos*, INTERNATIONAL COMMISSION OF JURISTS 9 (1961). See also Sandifer, *Human Rights in the Inter-American System*, 11 How. L.J. 508 (1966) and Declaration of Bangkok, Thailand, in *Dynamic Aspects of the Rule of Law in the Modern Age*, INTERNATIONAL COMMISSION OF JURISTS 175, 191 (1965).

of a Court of Human Rights. The Inter-American Commission has been in existence since 1959 with jurisdiction extended in 1965 to include receiving and investigating individual complaints of violation of certain fundamental rights by OAS States. Since 1967 it has been recognized as one of the official organs of the Organization of American States.

In this International Year of Human Rights it is hoped that thoughtful people everywhere will direct their attention to the problem of international protection of fundamental freedoms and explore it in all of its aspects. Clearly the task of an enlightened Bar and of the law schools and universities is to provide leadership to and awareness to public opinion in all countries of the world on the individual and collective interest in establishing a system of international control on State compliance with their Human Rights obligations. Then governments will be easily persuaded and encouraged to an escalation of efforts toward a world order of peace and justice under law.