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Article abstract

Si l'institutionalisation de la protection des droits humains est relativement récente, les auteurs classiques que l'on considère comme les « pères » du droit international reconnaissaient l'existence de ces droits. Leurs écrits sont significatifs sur ce point. Parlant de ces derniers, l'auteur retrace les grandes étapes de la protection institutionnelle des droits humains et fait le bilan des réalisations accomplies d'abord par la Société des nations et ensuite, sous l'égide des Nations unies.

L'efficacité des organismes internationaux consacrés aux droits humains

Institutional Protection of Human Rights

L.C. GREEN *

Si l'institutionalisation de la protection des droits humains est relativement récente, les auteurs classiques que l'on considère comme les « pères » du droit international reconnaissaient l'existence de ces droits. Leurs écrits sont significatifs sur ce point. Parlant de ces derniers, l'auteur retrace les grandes étapes de la protection institutionnelle des droits humains et fait le bilan des réalisations accomplies d'abord par la Société des nations et ensuite, sous l'égide des Nations unies.

International institutions are comparatively modern in the history of international law and doctrinal writings have only become concerned with the issue of human rights in a general way since the turn of the century. However, it must not be thought that the classical writers were ignorant of this problem, even though one may look in vain for such an entry in the index

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of their writings. While it is true that these "fathers" of international law wrote of the law of and between nations, they nevertheless recognized that individual human beings possessed certain rights by virtue of natural and divine law and that, in certain circumstances, these rights fell to be protected by others than their own sovereigns and even against such sovereigns.

1. Human Rights in the Doctrine of the "Fathers" of International Law

For our purpose it is perhaps sufficient to draw attention to but a few of these commentators and to note how they tended to support such intervention when carried through in a multilateral fashion.

Grotius, for example, argued that

> kings and peoples may rightly wage war on account of things done contrary to the law of nature, although not against them or their subjects... The fact must be recognized that kings, and those who possess rights equal to those of kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever... Truly it is more honourable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind... Kings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society ... [and] the ... most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient ground for rendering assistance. [1]

Pufendorf, too, showed concern for non-nationals, but he was not prepared to go so far as Grotius and advocate military intervention, and while he spoke of "the common duties of humanity", springing from

> common sociability ... [and the fact that] Nature has established a kind of kinship among men ... [so that] benevolence may be fostered among men,

he warned that

> any man who is not our fellow-citizen, or one with whom we live in the natural state, is to be regarded, not indeed as an enemy, but still as an inconstant friend ... so the cautious man who is devoted to his own welfare, believes all men his friends with the possibility, however, of presently becoming his enemies... [N]evertheless, with all men, even those who live outside of [his own] society, he should cultivate universal peace as far as they may allow him to, and he should exhibit the service of humanity which he can conveniently... [O]n the basis of the

1. *De Jure Belli ac Pacis*, 1625, Lib. III, cap. XX, ss. xl, xliv, cap. XXV, s. vi (Carnegie tr., 1925, 504-5, 508, 582).

> law of humanity, any one whatsoever is bound, when not under an equal necessity, to the extent of his power to come to aid of a second person in an extreme necessity, and necessity creates the power of claiming the aid in very much the same manner as we claim the things to which we have a right. [2]

Although he did not support the contention that a monarch could go to the support of aliens persecuted by their own ruler, he did say that

> if an absolute prince should assume a mind utterly hostile towards his subjects, and openly seek their destruction without the pretence of a cause which has at least the appearance of justice, his subjects can rightly employ against him also the means customarily used against an enemy, for the sake of defending their own safety ... [and] we cannot lawfully undertake the defence of another's subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superior. [3]

Pufendorf also recognized that by the law of humanity all men had certain rights in common and

> it is highly inhuman to wish to deny a native of our world the use of those good things which the common Father of all men has poured forth, provided that by this act the right which we have secured over them for our own personal ends, is not diminished... [W]e do not seem to be bound by any law to share with others, things which are not absolutely essential to human life, or minister only to its pleasures. And if we ourselves are threatened with a lack of such things, we are within our right in keeping them for our own good. [4]

Not even the early Catholic writers on international law were prepared to recognize common rights that imposed a duty upon all to defend all. They were concerned rather with the propagation of the faith, even though this might appear under the guise of respect for the rights of others, and since "'Nature has established a bond of relationship between all men'[5], ... it is contrary to natural law for one man to dissociate himself from another without good cause"[6]. For this reason it was open to the Pope, at that time the nearest to a world authority in existence, to authorize the Spaniards to act against the barbarian aborigines of the New World even by resort to war, for it is incumbent upon princes to "deliver the poor and needy, rid them out of the hand of the wicked"[7]. The right to wage war

2. *De Officio Humanis et Civis*, 1682, Lib. I, cap. VIII, Lib. II, cap. I (Carnegie tr., 1927, 45, 90, 92; *Elementorum Jurisprudentia Universalis*, 1672, Lib. II, Obs. IV, ss. 5-6 (1931, 242-3).
3. *Ibid.*, Obs. V, ss. 21-2 (292-3); *De Jure Naturae et Gentium*, 1688, Lib. VIII, cap. VI, s. 14 (1934, 1307).
4. *Ibid.*, Lib. III, cap. III, s. 11 (369).
5. JUSTINIAN, *Digest*, 1, 3.
6. VITORIA, *De Indis Novis Inventis*, 1580, Sect. III, Proposition II, Proof 5 (1917, 153).
7. Psalm 82.

> comes from the end and aim and good of the whole world. For there would be no condition of happiness for the world, nay, its condition would be one of utter misery, if oppression and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent, and these latter could not in turn retaliate on them. [8]

However, war may be waged on behalf of those not nationals of a prince

> only on condition that the friend [upon whose behalf it is sought to wage such a war] himself would be justified in avenging himself and actually propose to do so. Assuming, however, that these conditions exist, my aid to him is an act of co-operation in a good and just deed ; but if (the injured party) does not entertain such a wish, no one else may intervene, since he who has committed the wrong has made himself subject not to every one indiscriminately, but only to the person who has been wronged... [Moreover,] a Christian prince may not declare war save either by reason of some injury inflicted or for the defence of the innocent ... [which latter] is permissible in a special sense to Christian princes. [9]

The ideological character of Suarez's arguments is even clearer in his *Defensio Fidei*. Thus,

> a Christian king (that is, one subject to the Church by virtue of baptism) may be deprived of his power and domination over his vassal; and therefore, the ground (of defence for the subjects) is in itself sufficient to endow the Pope with power to punish such Christian princes, lawfully depriving them of their kingdoms and employing for this purpose the sword of other princes, so that sword shall thus be under sword, for the sake of mutual aid in *defending and protecting the Church*. [10]

Protestant writers, such as Textor, were not prepared to concede such power to the Pope [11], although Vattel went far towards recognizing a common obligation upon all in respect of the maintenance of the welfare of all :

> The general law of [natural] society is that each member should assist to others in all their needs, as far as can do so without neglecting his duties to himself — a law which all men must obey if they are to live comfortably to their nature and to the designs of their common Creator... Since the universal society of the human race is an institution of nature itself, that is, a necessary result of man's nature, all men of whatever condition are bound to advance its interests and to fulfill its duties. No convention or special agreement can release them from the obligation. When, therefore, men unite in civil society and form a separate State or Nation they may, indeed, make particular agreements with others of the same State, but their duties towards the rest of the human race remain unchanged ; but with this difference, that when men have agreed to act in common, and have

8. *De Indis Sive De Jure Belli*, 1580, Prop. I, Proof 7 (169).
9. SUAREZ, *De Triplici Virtute Theologica*, 1621, De Charitate, Disputatio XIII, s. iv, para. iii, s. v, para. iii (Carnegie, *Selections From three Works*, 1944, 817, 824).
10. 1613, Lib. III, Cap. XXIII, ss. xxi-xxii (700-2, italics added).
11. *Synopsis Jure Gentium*, 1680, cap. XVII, s. xiii (Carnegie tr., 1916, 176).

given up their rights and submitted their will to the whole body, as far as concerns their common good, it devolves thenceforth upon that body, the State, and upon its rulers, to fulfill the duties of humanity towards outsiders in all matters in which individuals are no longer at liberty to act, and it peculiarly rests with the State to fulfill these duties towards other States... This [political] society is therefore obliged to live with other societies or States according to the laws of the natural society of the human race, just as individual men before the establishment of civil society lived according to them. The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all nations is likewise that of mutual assistance in order to perfect themselves and their condition. The *first general law, which is to be found in the very end of the society of Nations*, is that each Nation should contribute to the happiness and advancement of other Nations... [W]hen the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk... [I]f a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without, however, exposing themselves to scarcity. To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so... A Nation should not limit its good offices to the preservation of other States, but in addition it should contribute to their advancement according to its ability and their need of its help... Every nation should give its aid when the occasion arises, and according to its ability, not only to enable another nation to enjoy those advantages [which it enjoys], but to put it in a way to procure them itself... But while a Nation is bound to futher, as far as it can, the advancement of others, is has no right to force them to accept its offer of help... A Nation has, [however,] only an imperfect right to offices of humanity; it cannot force another Nation to perform them... No foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct, nor force him to make any change in his administration. If he ... treats [his subjects] with severity it is for the Nation to take action; no foreign State is called on to amend his conduct and to force him to follow a wiser and juster course... But if a prince, ... by his insupportable tyranny, brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid... To give help to a brave people who are defending their liberties against an oppressor by force of arms is only the part of justice and generosity... But this principle should not be made use of so as to authorize criminal designs against the peace of Nations. It is in violation of the Law of Nations to call on subjects to revolt when they are actually obeying their sovereign, although complaining of his rule... [However,] as for those monsters who, under the name of sovereigns, act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man of courage may justly purge the earth. [12]

12. *Le Droit des Gens*, 1758, Intro., ss. 10–13, Liv. II, ch. 1, ss. 3–8, 10, ch. IV, ss. 54–6, 62 (Carnegie tr., 1916, 5-6,, 14-6, 130-1, 134).

It is interesting to note that, while Vattel bases himself to a great extent on the teachings of his fellow-Protestant Wolff, and speaks of a common responsibility to preserve humanitarian principles, he did not accept the latter's view that all nations are part of a "supreme state" in which all are united. It is in Wolff's comments that one perhaps first sees the concept of a possible institutionalized protection of human rights:

> In this supreme state the nations as a whole have a right to coerce the individual nations, if they should be unwilling to perform their obligation, or should show themselves negligent in it... [S]ince all nations are understood to have combined into a state, of which the individual nations are members, and inasmuch as they are understood to have combined in the supreme state, the individual members of this are understood to have bound themselves to the whole, because they wish to promote the common good, since moreover from the passive obligation of one party the right of the other arises; therefore the right belongs to the nations as a whole in the supreme state also of coercing the individual nations, if they are unwilling to perform their obligation or show themselves negligent in it. [13]

Since Wolff started from the premise of the "supreme state", it is perhaps not surprising to find that he asserts that a foreigner has, by the law of nations, the same rights as does a citizen. Having condemned the rule that an alien's property on death should be forfeit to the local treasury and postulated that aliens have equal rights of inheritance and succession [14], he stated that

> [f]oreigners should be allowed to stay in our schools and academies for the purpose of study, without giving any consideration to their religion. For whatever a learned and cultivated nation can contribute, to make barbarous and uncultivated nations learned and cultivated, that it ought to do, consequently it ought not to prevent the sciences and liberal arts and virtues from flourishing among other nations. Therefore, since in schools and academies those things are learned which are necessary and useful for wisdom and knowledege, and if entrance to them is open to foreigners also, by that very fact it would be brought about that the sciences also and liberal arts and virtues would be increased among outside nations, as is self-evident, and since the right to stay in our land for the purpose of study is a right of harmless use, not to be denied to outside nations, certainly foreigners must be allowed to stay in our schools and academies for the purpose of study... [States are also under an obligation to allow] foreigners ... to stay with us for the purpose of recovering health, without giving any consideration to a difference in religion, ... [S]ince every one is bound to do his best to recover his health, consequently he has the right to do the acts without which he cannot recover his health, and since this is a perfect right, there undoubtedly is reasonable cause for staying in alien territory or in lands subject to the ownership of another nation for the purpose of recovering health... [13]

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13. *Jus Gentium Methodo Scientifica Pertractatum*, 1749 — the quotation comes from the 1764 ed., Prolegomena, s. 13 (Carnegie tr., 1934, 14).

Although Wolff regards such rights as those mentioned as belonging to all men, and although he considers the "supreme state" to possess a right, and perhaps even a duty, to ensure that nations recognize the existence of these rights, he does not indicate how this "supreme state" is to ensure observance of these duties, other than by conceding the right of unilateral action to individual states against the wrongdoer. It was not until the Congress of Vienna, 1815 [16], and the establishment of the new Germanic Confederation that any attempt was made to create any international guarantee in regard to human rights, the right in question being that of religious freedom. This principle soon became regarded as a fundamental principle of European international law and by the Treaty of Berlin, 1878 [17], obligations to this effect were imposed on the successor principalities of the Ottoman Empire, as well as upon the whole of that Empire. By now it was clear to the European Powers that some means of supervision would be necessary to ensure observance of this obligation. The method chosen was by granting the right of official protection to the diplomatic and consular agents of those Powers in Turkey. While this system might have lacked any form of sanction, it did open the way to protest or even humanitarian intervention on the basis of treaty law.

It is inherent in any unilateral action taken by way of what is alleged to be humanitarian intervention that this is nothing but the ideological cover for political or territorial expansion and many of the nineteenth century writers of international law therefore looked upon this "doctrine" with suspicion or even aversion:

> It appears that Intervention by one Christian State on behalf of Religion has, ... in certain circumstances, been practised and cannot be said, in the abstract, to be a violation of International Law. But what kind of Intervention? By remonstrance, by stipulation, by a condition in a Treaty concluding a war waged upon other grounds. It may, perhaps, be justly contended that the principle might be pushed further; and that in the event of *persecution* of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be warrantable by International Law, as an armed intervention to prevent the shedding of blood and protracted internal hostilities. It is, however, manifestly unsafe to contemplate these extreme cases of exception from the sound general rule of non-interference in the domestic legislation of Foreign States. The duty of such non-interference is clear; it should not be turned into a doubt. Therefore it is that no writer of authority

14. *Ibid.*, ch. III, ss. 328, 330 (167, 169).
15. *Ibid.*, ss. 344-5 (176-7).
16. 65 C.T.S. 259.
17. 153 C.T.S. 172.

> upon International Law sanctions such an intervention, except in the case of a positive *persecution* inflicted avowedly upon the ground of religious belief. [18]

Hall, too, was aware of the abuses to which this doctrine might be put, but the acknowledged the possibility that interventions of this kind might be tolerable if "authorised by the whole body of civilised states":

> International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war [19], or religious persecution [20] are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them at all? It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a moral scandal, which *the body of states, or one or more states as representative of it*, are competent to suppress. The supposition strains the fiction that states which are under international law form a kind of society to an extreme point, and some of the special grounds, upon which intervention effected under its sanction is based, are not easily distinguishable in principle from others which modern opinion has branded as unwarrantable... [I]ntervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious oppression, short of cruelty which would rank as tyranny, has ceased to be recognized as an independent ground of intervention, but is still used between Europe and the East as an accessory motive, which seems to be thought by many persons sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral... [S]entiment has been allowed to influence the more deliberately formed opinions of jurists ... [who] have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law; of which the principle is not even intended to be equally applied to the cases covered by it; and which by the readiness with which it lends itself to the uses of selfish ambition becomes as dangerous in practice as it is plausible in appearance. It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or *unless the whole body of civilised states has concurred in accepting it*. Intervention, whether armed or diplomatic, undertaken either for the reason or upon the pretexts of cruelty, or oppression, or the horrors of a civil war, whatever the reason put forward, supported in reality by the justification which such facts offer to the public mind, would have had to justify themselves, when not authorised *by the whole body of civilised states accustomed to act together for common purposes*, as measures which, confessedly illegal in themselves, could only be expressed in

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18. PHILLIMORE, *International Law*, 1879, vol. 1, 622-3 (italics in original); see, also, MACKINTOSH, *History of England*, 1853, 127.

19. See, now, *Protocol II relative to Humanitarian Law in Non-International Armed Conflicts*, (1977) 16 *Int'l Legal Materials* 1443.

20. See, now, *Declaration on Elimination of All Froms of Intolerance and Discrimination Based on Religion or Belief*, 1981, Gen. Ass., Res. 36/55 (21 *ibid.*, 205).

> race and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity and motives of the intervening state. [21]

2. The League of Nations and the Institutional Protection of Human Rights

The reaction of the majority of states towards the abuses committed by the Nazi government of Germany against its own people shows how unwilling states were, either individually or as a collective body, to act in the name of humanity. In fact, in 1938, Professor H.A. Smith of the University of London complained that

> in practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in fact, that we have abandoned the old distinction between civilised and uncivilised states. [22]

Smith's statement leads one to enquire whether the creation of the League of Nations had any effect upon the institutional protection of human rights. It is perhaps opportune, therefore, to examine the role of the League in this matter. Since it is primarily concerned with the maintenance of peace, understood as the preservation of the status quo established by the Treaty of Versailles, of which the Covenant formed the opening chapter, it is perhaps not surprising that the Covenant makes no express reference to the issue of human rights. However, it should not be ignored that the Covenant was largely based on the principles promulgated in Wilson's Fourteen Points [23] which clearly advocated recognition of self-determination [24], a matter also advocated by Lloyd George [25]. In pursuit of these proposals, the Covenant authorised the admission of "any fully self-governing State, Dominion or Colony" [26]. It would appear that the term "self-governing" was intended to indicate "democratic", in the sense of "responsible to the people" [27]. In

21. *Treatise on International Law*, 1880, Higgins ed. 1924, 342-4 (italics added).
22. *The Listener*, 26 Jan. 1938, 183.
23. 5 WHITEMAN, *Digest of International Law*, 42-3.
24. *E.g., Points III, VI, X, XII, XIII.*
25. TEMPERLEY, *A History of the Peace Conference*, 1920/24, vol. 2, 277-8).
26. Art. 1(2).
27. HUNTER MILLER, *The Drafting of the Covenant*, 1928, vol. 1, 164-7, 239-40, vol. 2, 262, 303, 427-8, 473.

practice, it soon became clear that the term indicated "independence" regardless of the form of government, or whether the inhabitants of the country concerned enjoyed any human rights or were under an autocracy or dictatorship. The difficulty inherent in defining self-government exists today in relation to self-determination.

The concern with self-government was in some ways the counterpart to the rejection of colonialism which found expression not in independence but in the establishment of the mandates system. In contrast with previous wars the Allied and Associate Powers did not annex the colonial possessions of their former enemies, but introduced instead a mandatory system to be applied

> to those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, [based on] the principle that the well-being and development of such peoples form a sacred trust of civilisation and securities for the performance of this trust should be embodied in this Covenant. The best method of giving effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League. [28]

For those territories regarded as most politically advanced, the task of the Mandatory was to assist them to achieve independence, while the choice of Mandatory was to be determined in the light of the wishes of the community concerned [29] — although this latter principle was rather honoured in the breach than the observance. As to peoples not in this "advanced" political condition, the Mandatory was to observe

> conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic ...,

although from the economic point of view it was not so much the rights and interests of the inhabitants which were to be respected as undue benefit to the Mandatory was to be prevented, for the latter was obliged "to secure equal opportunities for the trade and commerce of other Members of the League" [30].

Supervision of the system on behalf of the League was placed under a Permanent Mandates Commission with the possibility that disputes as to the

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28. Art. 22, paras., 1, 2.
29. *Ibid.*, para. 4.
30. *Ibid.*, paras. 5, 6.

operation of any Mandate agreement could be referred to the Permanent Court of International Justice. The Commission only enjoyed a supplementary critical or advisory function, and its comments upon reports submitted to it tended to be at least a year late:

> the supervision exercised by it was essentially *supplementary*; since during the actual course of the year supervision had already been exercised by the national government and parliament of the mandatory power as in the case of any normal dependency. Not even the outbreak of a world war could deflect the Commission from its rule that it was precluded from enquiring into the events of the current year unless the accredited representatives chose to supply data in advance of the annual report. The Commission's report to the League on its last session in December 1939, ... states: "The Commission has deliberately refrained from anticipating the events of 1939 by examining the situation created by the present war in connection with territories placed under the mandate of the belligerent Powers. It will do so in the light of the information with which these mandatory Powers supply it when they give an account of their stewardship during 1939." Nothing could demonstrate better than this how far back from events the Commission stood, how much it was a spectator on the sidelines, and how little its function could be that of a government, or a court actively intervening to help its wards in the fate that had befallen them. For the fact that war, with all its far-reaching legal, political, and economic consequences, had enveloped the mandated territories, was without question the most decisive event in their history. In defining its own functions in the past the Commission had repeatedly emphasised its desire to act "as collaborators who are resolved to devote their experience and their energies to a joint endeavor ... [It would strive] to assist the mandatory Governments in carrying out the important and difficult tasks which they are accomplishing on behalf of the League of Nations. Yet in the supreme crisis of general war it felt unable to do more than ask the accredited representatives a legal question: whether in their opinion the state of belligerency in which they were themselves involved extended to the territories under mandate. Professor Rappard, expressing a view which seemed to be shared by several members of the Commission, doubted whether this should or could be the case, since "the belligerent Powers ... administered them in the name of the League of Nations which was not at war".[31]

The artificiality of this reasoning may be seen in the fact that both mandatories and Axis Powers regarded the mandated territories as zones of war. A senior member of the League Secretariat has said of the Commission.

> In practice its main role tended to be of an Old Testament character. It was the keeper of the Ten Commandments of Article 22 of the Covenant. It looked on itself as charged with bringing to light breaches and urging their rectification. It was zealous, though very diplomatic, in the exercise of its legal powers. But it was reluctant to step outside these powers and to offer positive suggestions to the mandatory powers as to how the territories should be administered and developed. In short, its attention was fixed mainly on judging past events and

31. HALL, *Mandates, Dependencies and Trusteeship*, 1948, 49-50.

> particular situations, rather than upon prescribing future action... [F]ew, if any, of many important positive developments that took place in Africa in the way of increasing self-government, health measures, sanitation, education, the application of science to the problems of the African environment, labour legislation, and many others ... were due to any direct initiative on the part of the Mandates Commission. [32]

The practical effect of the role of the Permanent Court in so far as the status of the mandated territory or the rights of its inhabitants and the obligations of the mandatory towards them was even less significant [33]. As we will see later, the role of the International Court of Justice has been somewhat more substantial.

Because of the fears aroused by the example of the Bolshevik Revolution in Russia, it was generally accepted that provision had to be made in the Covenant for the recognition of social justice [34]. In accordance with Article 23 the Members

> will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;
>
> undertake to secure just treatment of the native inhabitants of territories under their control; will entrust the League with the general supervision over the execution of agreements with regard to the trade in women and children, and the traffic in opium and other dangerous drugs; ...
>
> will endeavour to take steps in matters of international concern for the prevention and control of disease.

To this end, a series of treaties dealing with the traffic in women and children, the slave trade, the traffic in drugs and the control of epidemics was entered into under the auspices of the League. More important, perhaps, is Part XIII of the Treaty of Versailles establishing the International Labour Organization to give effect to the commitment to the improvement of labour conditions mentioned in Article 23. Examination of the Preamble to the relevant part of the Treaty explaining the purpose underlying the Organization reflects the fear that disastrous working and economic conditions could easily result in revolution, and this fear can still be read into the Preamble of the Organization's Constitution as amended [35]:

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32. *Ibid.*, 51-2.
33. The dispute between Greece and the United Kingdom considered by the Court in relation to the *Mavrommatis Concessions* (1924/1925) Ser. A., Nos. 2, 5 (1 Hudson, *World Court Reports*, 297, 355) dealt with the compatibility of British obligations under a bilateral agreement with those under the Mandate for Palestine.
34. See, e.g., KEETON, *Making International Law Work*, 1946, 108.
35. 2 PEASLEE, *International Governmental Organizations*, 1961, 1233.

> Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are threatened; and an improvement of these conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;
>
> Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries...

While the Organization is committed to the betterment of labour conditions, the Declaration of Philadelphia of 1944, which is annexed to the Constitution, indicates the close relation between labour and human rights:

> The [International Labour] Conference recognizes the solemn obligation of the I.L.O. to further among the nations of the world programs which will achieve:
>
> (a) full employment and the raising of standards of living;
>
> (b) the employment of workers in occupations in which they can have the satisfation of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
>
> (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;
>
> (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
>
> (e) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
>
> (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
>
> (g) adequate protection for the life and health of workers in all occupations;
>
> (h) provision for child welfare are and maternity protection;
>
> (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
>
> (j) the assurance of equality of educational and vocational opportunity.

To achieve the ends desired the constitution of the International Labour Organization differed from the traditional institutional format. Instead of

comprising only representatives of the member states, it was organized on a tripartite basis giving representation to employers and workers alike[36]. To achieve its objectives the Organization has sponsored more than 100 conventions known generically as the International Labour Code. These Conventions do not, however, fall within the usual definition of that term, for they constitute pieces of draft municipal legislation which are submitted to national legislatures for "ratification" as part of the national legal system. The parties to the conventions must submit annual reports which are examined by committees of experts who may raise questions with the governments concerned, while any member state may complain to the International Labour Office about another state's observance of a convention to which it is a party, and this complaint may be referred to a commission of inquiry and ultimately to the World Court. Although the present Court has not been called upon to interpret the validity or extent of any labour convention, the Permanent Court did rule upon such matters as the proper selection of workers' representatives[37], competence respecting agricultural labour and production[38], competence to regulate the personal work of employers[39], and the employment of women during the night[40]. At the present time, the I.L.O. has been called upon to consider such matters as the right of association particularly when claimed by civil servants and the right of a member state, or a constituent part thereof, to forbid strikes by such workers[41]. In this connection it should be noted that no state likes to be condemned as in breach of its international obligations and it will endeavour, therefore, to comply with recommendations made to it by a commission of enquiry. Withdrawal or expulsion from the Organization does not serve to protect the rights of those intended in any way, for it is self-destructive enabling the country concerned to act in any way it pleases, without being subject to control, supervision or criticism.

Two other fields in which the League played a role in so far as the institutional protection of human rights was concerned related to the

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36. See, however, GREEN, "The International Labour Organisation Under Pressure", (1957) 10 *Current Legal Problems* 57.
37. *Nomination of the Netherlands Workers' Delegate to the International Labour Conference* (1922) Ser. B/1 (1 Hudson, *World Court Reports*, 115).
38. *Competence of the I.L.O. with regard to Agricultural Labour and Production* (1922) Ser. B/2, 3 (*ibid.*, 124, 138).
39. *Competence of the I.L.O. to Regulate, Incidentally, the Personal Work of the Employer* (1926) Ser. B/13 (*Ibid.*, 746).
40. *Interpretation of the 1919 Convention concerning Employment of Women during the Night* (1932) Ser. AB/50 (3 *ibid.*, 100).
41. See, e.g., *Re Alberta Union of Public Employees and the Crown in Right of Alberta* (1980) 120 D.L.R. (3rd) 590.

protection of minorities and of refugees. As a result of the break-up of the Austro-Hungarian Empire, the restoration of Poland and the redrawing of boundaries after 1919, numerous ethnic minorities found themselves in alien territory and treaties were drawn up to provide for their protection, generally speaking guaranteeing them equal treatment and protection against adverse discrimination. The draftsmen of the treaties sought to ensure that the guarantees would be effective by placing them under the guarantee of the League, with ultimate recourse to the Permanent Court for interpretation. To this end the League Council accepted that the "guarantee"

> means, above all, that the provisions for the protection of minorities are inviolable, that is to say, they cannot be modified in the sense of violating in any way rights actually recognized, and without the approval of the majority of the Council of the League of Nations. Secondly, this stipulation means that the League must ascertain that the provisions for the protection of minorities are always observed.
>
> The Council must take action in the event of any infraction, or danger of infraction, on any of the obligations with regard to the minorities in question. The Treaties in this respect are quite clear. They indicate the procedure that should be followed.
>
> The right of calling attention to any infraction or danger of infraction is reserved to the Members of the Council. This, in its way, is a right and duty of the Powers represented on the Council. By this right, they are in fact asked to take a special interest in the protection of minorities.
>
> Evidently this right does not in any way exclude the right of minorities themselves, or even of States not represented on the Council, to call the attentioon of the League of Nations to any infraction or danger of infraction. But this act must retain the nature of a petition, or a report pure and simple ; it cannot have the legal effect of putting the matter before the Council and calling upon it to intervene.
>
> Consequently, when a petition with regard to the question of minorities is addressed to the League of Nations, the Secretary-General should communicate it, without comment, to the Members of the Council for information. This communication does not yet constitute a judicial act of the League or of its organs. The competence of the Council to deal with the question arises only when one of its Members draws its attention to the infraction or danger of infraction which is the subject of the petition or report. [42]

Since the procedure indicated above involved an accusation by one member against another, the Council appointed a small committee to which petitions should normally be presented in the first instance. From an early date, however, some of the countries subjected to the minorities regime protested at the manner in which all League members were being informed of

42. AZCÁRATE, *The League of Nations and National Minorities*, 1944, 178.

alleged breaches and, gradually for political reasons, especially after the rise of National Socialism in Germany. France, for example, was increasingly prepared to support such allies as Czechoslovakia or Poland in their defiance of minority obligations, and this problem became more serious as Germany began protesting at the treatment of its own minorities in the successor states. For political reasons, therefore, it soon became clear that the League's role in regard to the protection of minorities could hardly be described as a great success [43]. However, there were occasions on which the Permanent Court had been called upon to interpret both the significance of particular minorities treaties and even what became known as the minorities regime [44], derived from the fact that all the minorities treaties tended to include the same provisions and were directed to the same end. Perhaps the most important contribution made by the Court is to be found in its definition of the term "equality". At the same time the Court's comments on the purpose of a minorities regime may well serve as guidance for any institutional protection of human rights. The purpose was to

> secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs. In order to attain this object, two things were regarded as particularly necessary... The first is to ensure that nationals belonging to racial, religious or linguistic [or other] minorities shall be placed in every respect, on a footing of perfect equality with the other nationals of the State. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority [45]... The main objective of the [regime] is to assure respect for rights of the minorities and to prevent discrimination against them by any act whatsoever of the State. It does not matter whether the rights the infraction of which is alleged are derived from legislative, judicial or administrative act... [46] [T]he members of minorities who are not citizens of the state enjoy protection — guaranteed by the League of Nations — of life, liberty and the free exercise of their religion, while minorities in the narrow sense, that is, minorities the members of which are citizens of the State, enjoy — under the same guarantee — amongst other rights, equality of rights in civil and political matters, and in matters relating to primary instruction... [47]

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43. See, e.g., ROBINSON, *Were The Minorities Treaties A Failure?*, 1943.
44. *Minority Schools in Albania* (1935) Ser. A/B, 64 (3 Hudson, *World Court Reports*, 496).
45. *Ibid.*, 17 (496).
46. *German Settlers in Poland* (1923) Ser. B/6 (1 *Ibid.*, 219).
47. *Treatment of Polish Nationals in Danzig* (1932) Ser. A/B/44, 39-40 (2 *Ibid.*, 814-5).

It may well be that a particular minority possesses a language different from that of the majority among whom it lives, and may also possess a different history and worship a different religion. This may mean that, if they are to enjoy their heritage, complete identity of treatment as between the members of the minority and of the majority may be impossible, as would have been the case if the Court had upheld the Albanian government's desire to have all children, including those of the Greek minority, educated in the same state schools. The purpose of minority protection is to guarantee

> to racial minorities the *same treatment and security "in law and fact"* as to other nationals. The fact that no racial discrimination appears in the text of the law ... makes no substantial difference... *There must be equality in fact as well as ostensible equality in the sense of discrimination in the words of the law*[48]... It is perhaps not easy to define the distinction between the notions of equality... *Equality in law precludes any discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations.* It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact... The *equality between members of the majority and of the minority must be an effective, genuine equality*...Far from creating a privilege in favour of the minority, ... [a] stipulation [in favour of, for example, minority schools] ensures that the majority shall not be given a privileged situation as compared with the minority... The expression "equal right" is that *the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other ... nationals.* In other words, the members of the *minority must always enjoy the right stipulated ..., and, in addition, any more extensive rights which the State may accord to other nationals.* The right provided ... is in fact the *minimum necessary to guarantee effective and genuine equality* as between the majority and the minority; but if the members of the majority should be granted a right more extensive than the right which is provided, the principle of equality of treatment would come into play and would require that the more extensive right should be granted to the members of the minority.[49]

This principle of "preferential" treatment may be seen in the practice adopted by some states in what has become known as "affirmative action", or in the rejection by the United States of the "separate but equal" doctrine established by *Plessy v. Ferguson*[50] which has been replaced by that of "separate and therefore unequal" as expounded in *Brown v. Board of Education*[51]. On the international level, too, we find acknowledgement of the fact that "formal inequality" may be the only means of ensuring "real

48. *Supra*, note 46 above, 24 (218, italics added).
49. *Supra*, note 45, 19-20 (498-500, italics added).
50. 169 U.S. 537 (1896).
51. 347 U.S. 483 (1954).

equality". Thus, in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination[52] adopted under the auspices of the United Nations, and to which over 120 states are parties, Article I(4) provides:

> Special measures taken for the *sole purpose of securing adequate advancement of certain racial or ethnic groups of individuals requiring such protection* as may be necessary in order *to ensure* such groups or individuals *equal enjoyment or exercise of human rights* and fundamental freedoms *shall not be deemed racial discrimination, provided*, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that *they shall not be continued after the objectives for which they were taken have been achieved.*

As to the problem of refugees, while the "fathers" of international law had recognized that individual refugees might need asylum from their home countries[53] for various reasons, it was not until the Russian Revolution that the issue became sufficiently pressing for it to require attention on an international scale, for there were now some two million poverty-stricken persons needing some sort of help. In 1921 the League established a Refugee Organization with Nansen as its High Commissioner. In 1922 the "Nansen passport" — an identity card for refugees — was introduced which more than fifty governments accepted as an authority for travel, and after Ataturk's assumption of power in Turkey the same document became available to Armenian refugees. As time passed, the rights of refugees under the protection of the League's High Commissioner were gradually widened and in 1933 the first Convention on the International Status of Refugees was adopted[54]. The parties undertook to issue one-year Nansen passports and during their validity holders were to be free to leave and return. They also undertook not to refuse entry to refugees at the frontier of the country from which they were fleeing, while regulations were introduced concerning personal status, religious rights, access to courts, welfare and educational eligibility, and employment restrictions were relaxed. While provision was made for denunciation, there was nothing by way of enforcement or supervision. With the rise of Nazism in Germany the problem of refugees became more intense, but to all intents and purposes the sole function of the League was to pass resolutions, indulge in sympathetic statements and organize conferences. In fact, the Refugee Office

> was always regarded as temporary, and the Assembly did not fail to remind it each year that it had only a few more years to live. It was an unpopular

52. 660 UNTS 195.

53. See, e.g., GREEN "Refugees and Refugee Status — Causes and Treatment in Historico-Legal Pespective", (1983) 13 *Thesaurus Acroasium* (Thessaloniki) 529.

54. 159 LNTS 199.

> institution. The refugees themselves were naturally conscious above all of its limitations. Britain, the Dominions, and overseas countries in general were apprehensive of being asked to contribute to the solution of a problem for which they admitted no responsibility. Most European countries blamed the Organization for giving them less help than they felt entitled to expect. Italy, after Mussolini took power, was consistently hostile, fearing lest protection might be extended to those who had fled from Fascist persecution; Germany after 1933 and Russia after her entry into the League tried to put an end to it for similar reasons. The United States, then taking special measures to restrict immigration, refused to participate in its work. Its only warm support came from France, the one country which offered welcome and fair treatment to immigrants, and from the Scandinavian countries, for Nansen's sake. In these circumstances, it was not surprising that no efficient and well-defined organization was ever built up. The High Commissioner had a small staff in Geneva, first attached to the League Secretariat, then transferred to the International Labour Office, and later brought back to the Secretariat. He appointed representatives in about fifteen European capitals: these men were usually government officials and only in a secondary degree agents of the League. He convoked a number of conferences in the hope of securing a common policy on the subject: but, with the important exception of the general introduction of the Nansen passport, the results were small. For the most part, his action was carried on by direct negotiation with individual governments. Each year he demanded and received the approbation of the Assembly, and the funds to keep his staff in being: he never received from the League any greater support than this[55]

The pressure of refugees from Germany led a number of European powers to adopt a further Convention in 1938[56] dealing with the status of German refugees, and extended in 1939 to Austrians[57]. Refugees were defined as those who possessed or had possessed German or Austrian nationality and were able to prove that they did not possess the protection of those governments, and it also applied to stateless persons. However, persons who had left for personal convenience were not covered, so that many political refugees remained unprotected. In some ways, this Convention was a step backwards, for it enabled the country of "refuge" to return a refugee to German territory, provided he had been warned and refused "without just cause" to make the necessary arrangements to proceed elsewhere or to take advantage of arrangements made for him to this end. This, for example, enabled the United Kingdom to refuse German refugees entry into Palestine and to force them to return to German-occupied territory or to be interned in camps in Africa or elsewhere, without any formal breach of the Convention.

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55. I WALTERS, *A History of the League of Nations*, 1952, 189.
56. 192 LNTS 59.
57. 198 LNTS 141.

3. The United Nations and the Institutional Protection of Human Rights

After the Second World War the problem of refugees was more serious than ever, before and under the auspices of the United Nations an International Refugee Office was established in 1946[58] and a New Convention on the Status of Refugees was adopted in 1951, with its scope extended by Protocol in 1967[59]. Moreover, efforts were also made to provide some rights and protection for stateless persons and to reduce statelessness as such[60], although the number of parties to these conventions is relatively infinitesimal. To a great extent these agreements, which are of general application, grant to the persons affected rights that are almost the equivalent of those enjoyed by local nationals, and this is particularly so for those parties to the Convention which are also parties to the International Covenants of Human Rights[61]. From the point of view of the refugee, perhaps the most significant provision is that providing for *non-refoulement*, forbidding return to a country where the refugee's life or freedom would be endangered because of race, religion, nationality, etc. However, although the United Nations High Commissioner is available to oversee the operation of the Convention, its application is to a great extent controlled by national law and there is no provision for any sanction in case of breach, other than the possibility that one party might object to the breach of the Convention by another party. It should be remembered, however, that the International Court of Justice has ruled that there is no scope for an *actio popularis*, and while a party might have the *locus standi* to bring an action, it has no standing to secure a remedy unless it is itself the victim of some damage as a result of the breach[62].

The record of the United Nations in regard to the protection of refugees in practice has been no better than that of the League of Nations. Perhaps it is sufficient to quote from the 1982 Annual Report of the High Commissioner[63]. He drew attention in the Introduction to the fact that the problem of refugees in Africa, Central America, Asia and Latin America was as serious as ever. He pointed out that states consistently declare their support for the principle of *non-refoulement*, which is described as a "fundamental norm"[64]:

58. 18 UNTS 13.
59. 189 UNTS 137; 606 UNTS 267.
60. 360 UNTS 117; 989 UNTS. 175.
61. Economic, Social and Cultural Rights, 993 UNTS 3; Civil and Political Rights 999 UNTS 171.
62. *South West Africa Cases*, [1962] I.C.J. 319; [1966] I.C.J. 6.
63. 14 May 1982, Doc. E/1982/29.
64. See, also, e.g., decision of Supreme Court, Israel, *Kurtz and Letushinsky v. Kirschen*, (1967) 47 I.L.R. 212.

> It is therefore disappointing to record that during the reporting period asylum-seekers were forcibly returned to countries where they were in danger of persecution or even in risk of their lives. A number of measures of *refoulement* ... involved asylum-seekers who were fleeing conflict or civil disorder in their home countries. In one region, agreement between the military forces of neighbouring countries of asylum and origin resulted in repeated measures of *refoulement* involving individuals and small groups of asylum-seekers. In the same region, some 2000 asylum-seekers were returned to their strife-torn country while efforts were made to ascertain the validity of their claims for asylum... Refugees were forcibly returned because they did not have documents attesting to the fact that their asylum request was under consideration or, if asylum had already been granted, to their legal status as refugees...

The High Commissioner was highly critical of the manner in which immigration and other officials examined claims for asylum or refugee status, and

> there are indications that the practice of detaining asylum-seekers, sometimes for indeterminate periods of time, is on the increase. This development is a matter of grave concern, as is the practice adopted by several States ... to detain refugees in order to deter others from seeking asylum in their territory. It is hoped that States will refrain from resorting to such measures of deterrent and that in future refugees will only be detained in clearly exceptional circumstances...

It is clear that the United Nations, despite its sponsorship of the relevant Conventions, is not really concerned with the welfare or care of refugees and, in fact, it makes no effort to condemn any state for its conduct in this matter. It would also appear that states are not over-impressed by the High Commissioner's recommendations as to the manner in which regulations should be applied :

> Asylum requests should not be excluded from consideration under asylum procedures because of mere non-compliance with formal requirements...
>
> States should pay particular attention to the need for avoiding situations in which refugees lose their right to reside in or return to the country of asylum without having acquired the possibility of taking up residence in another country.
>
> ... States, if constrained in exceptional cases to adopt exceptional measures against a refugee, should give due consideration to whether or not the refugee has the possibility of being admitted to a country other than his country of origin.
>
> In applying internal legislative or administrative provisions concerning the loss of the right of residence of a refugee, or also generally in the case of departure or prolonged absence, States should have particular regard to the need for avoiding situations in which refugees find themselves without a country in which they can lawfully reside.

> States ... should continue to extend the validity of, or to renew refugee travel documents until the refugee has taken up residence in the territory of another ... State.
>
> Where a refugee has already been granted asylum in one State requests asylum in another State on the grounds that he has compelling reasons for leaving his present asylum country, e.g., danger to physical security or freedom, the authorities of the second State should give favourable consideration to his asylum request.

It is all very well for the High Commissioner to make these recommendations, but until his Office has a power of sanction or the United Nations is prepared to take up issues with a view to positive recommendations — although it should be borne in mind that recommendations of the General Assembly lack any obligatory force — there is no true institutional recognition or protection of the human rights of refugees.

From the point of view of the public and most commentators it would appear that institutional recognition of human rights relates to the activities of the United Nations commencing with the Universal Declaration of 1948 [65], intended to spell out the content of the human rights and fundamental freedoms which the Members of the United Nations had undertaken to promote and encourage respect. However, the Declaration is in itself somewhat self-contradictory in that it seeks to protect all mankind against any discrimination of any kind based upon "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", and guarantees protection against torture, arbitrary arrest, detention or exile, and at the same time provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution" — which, of course, could not possibly arise if the guaranteed rights prescribed in the Declaration were respected. Moreover, although rights, including that of asylum are granted, there is no obligation imposed upon any state to grant the rights so claimed, nor is there any provision for sanction in so far as any state fails to grant such rights. The fact that the General Assembly has chosen on occasion to condemn such practices as the denial of married couples' right to live in a country of their choice or such practices as apartheid [66] does not mean that the Declaration is declaratory of general principles of law recognized by civilized nations and thus part of the *jus cogens* of international law, for resolutions to this effect are purely political [67], while the practice of states

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65. G.A. Res. 217 (III)A.

66. See, e.g., *International Convention on the Suppression and Punishment of the Crime of Aparthied*, 1015, UNTSS 244, which by the end of 1986 has only some 84 parties.

67. See, e.g., GRIEN, "Human Rights and the General Principles of Law", (1955) 8 *Current Legal Problems* 162.

condemned by such bodies as Amnesty International or the International Commission of Jurists makes it clear that states do not regard themselves as bound to respect the provisions of the Declaration. This view of the Declaration as lacking any formal legal authority is supported by Judge Tanaka in his dissenting opinion in the 1966 *Southwest Africa* decision [68], and even Judge Ammoun, the only member of the bench in the *Namibia* opinion mentioning the Declaration is only prepared to describe it as perhaps amounting to custom or a general principle accepted as law, but even he states that "one right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which *by common consent has ever since the remotest times been deemed inherent in human nature*" [69] — hardly a basis for regarding the Declaration as having had any real legal significance, other than perhaps to spell the right out in greater detail! The nearest one gets to a formal declaration of legal significance for the Declaration is a casual reference in the Court's judgment concerning *United States Diplomatic and Consular Staff in Tehran*[70] that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights", and one might add with the traditional views concerning the minimum standards relating to the treatment of aliens, which long antedate either instrument.

In an attempt to give substance to the Universal Declaration, the United Nations drew up the two International Covenants of Human Rights [71] which, like any other treaty, are creative of international law imposing obligations upon their parties. Neither of these Covenants possesses any sanction in respect of breaches, although both contain provisions which enable criticism of the conduct or parties to be levied, and it must be remembered that no state will happily submit to being condemned as a lawbreaker, so that there is the inherent *voeu* that criticism will lead to reform. In the case of the Covenant on Economic, Social and Cultural Rights the procedure is by way of parties reporting on "the progress made in achieving the observance of the rights recognized herein", and the Economic and Social Council "may submit to the Commission on Human Rights for study and general recommendation or as appropriate for information the reports" thus submitted, and the Council is authorized to submit "the General Assembly reports with recommendations

68. *South West Africa (Judgement)*, [1966] I.C.J. 4, 293.
69. *Namibia Opinion*, [1977] I.C.J. 16, 76 (italics added).
70. [1980] I.C.J., 3, 42.
71. *Supra*, note 61 above.

of a general nature and a summary of the information received ... on the measures taken and the progress made in achieving general observance of the rights recognized." The position with regard to the Covenant on Civil and Political Rights is somewhat more realistic. An elected Human Rights Committee to which reports are to be submitted has been established and the Committee "shall transmit its reports, and such comments as it may consider appropriate to the States Parties" to the Covenant. It may also submit these reports and the comments made thereon to the Economic and Social Council. Moreover, parties may, if they choose, agree to grant the Committee authority "to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations" under the Covenant, which may then seek a satisfactory solution, if necessary by way of a Conciliation Commission. If, however, this proves impossible, there is no effective way in which a lawbreaker can be brought into conformity with its obligations. Finally, for those parties signing an Optional Protocol the Committee is given competence "to receive and consider communications from individuals subject to [the] jurisdiction [of the party concerned] who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant." Once again, however, there is no ultimate effective sanction. Moreover, as already pointed out[72], the World Court has taken the line that no remedy will lie to a state pleading a breach of treaty in the absence of proof of injury from that breach.

What has been said of the lack of effective sanctions in the two International Covenants is equally true of the various treaties of a potentially universal character that have been prepared under the auspices of the United Nations with reference to specific human rights or the human rights of specific groups. It is submitted that, in the absence of any such sanction, institutional protection of human rights through the medium of the United Nations remains somewhat artificial. This criticism is not affected by the fact that provision exists for states to be reprimanded or criticised, or that states seek to avoid such criticism or to rectify a situation which has been the occasion for such criticism. Any such action depends on the goodwill of the state and, as may be seen from the example of South Africa, may equally easily be ignored. Further, it is noticeable that the United Nations, including its sub-organs responsible for the supervision of human rights, are extremely selective as to the countries whose records they are prepared to examine with a critical eye.

On the other hand, on the regional level there is far more reality in as far as supervision is concerned. Of the regional arrangements relating to human

72. *Supra*, note 62 above.

rights, perhaps the most significant is the European Convention on Human Rights, 1950[73], together with its supplementary Protocols. This Convention seeks to give real meaning to the rights set out in the Universal Declaration and has established a machinery to ensure their observance, and it is this element of the Convention which makes it so important. The parties to the Convention, "to ensure the observance of the engagements undertaken" by them, have established a Commission and, for the first time, a Court of Human Rights. Moreover, they have even gone so far as to accept even in time of public emergency a restriction upon their absolute sovereign discretion. Not only do they have to report to the Secretary-General of the Council of Europe any declaration of emergency, but even when they have done so and seek to derogate from their obligations under the Covenant, they are unable to derogate from Articles 2, 3, 4(1) and 7[74]. Even the question of the validity of other derogations in emergencies may be scrutinised by the Commission and the Court[75]. Not only are parties able to protest at breaches of the Convention when they affect their own nationals as is the normal rule of international law[76], but they possess the competence to complain of any breach committed regardless of the nationality of the victim, even though the complaining state has itself suffered no damage[77]. In addition, the Commission "may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, *provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions.*"[78] In order not to disrupt established rules of international law even more than such a procedure inherently does, the Commission's competence only arises after all local remedies have been exhausted. While it has the prime task of seeking a friedly settlement, the Commission has also the right to initiate a case before the Court, and it is through this medium that individual rights are most usually protected, for it is only the Commission or a High Contracting Party that has the right to initiate

73. 213 UNTS 222.

74. See, e.g., GREEN, "Derogation of Human Rights in Emergency Situations", (1978) 16 *Can. Y.B. Int'l Law* 92.

75. See *Ireland v. United Kingdom*, (1978) 58 I.L.R. 188.

76. See, e.g., BROWNLIE, *Principles of Public International Law*, 1979, 398-401; see, also, *Nottebohm* case, [1955] I.C.J. 4.

77. See, e.g., *Denmark, Norway, Sweeden, Netherlands v. Greece*, (1968-1970), SOHN and BUERGENTHAL, *International Protection of Human Rights*, 1973, 1059-1090; *France, Norway, Denmark, Sweden and Netherlands v. Turkey*, (1985) 6 HRLJ 331.

78. Art. 25 (italics added).

proceedings. The Parties to the Convention have undertaken to carry out the decisions of the Court and these have dealt with a variety of issues which would normally be regarded as falling within the domestic jurisdiction of a state and as such outside the competence of international law. Because of the activities of both the Commission and the Court many parties have amended their legislation either on receipt of the Commission's recommendation or subsequent to a judgment by the Court.

A similar effort to protect human rights on the regional level has been made by the Organisation of American States, and as a result of the American Convention on Human Rights of 1969 [79] an Inter-American Court of Human Rights was inaugurated in late 1979. It is, however, still too early to put forward any estimate of the extent to which this Court will prove a true guarantee of human rights in Latin America or to compare its jurisprudence with that of the European Court. The African Charter on Human and Peoples' Rights, 1981 [80], differs somewhat from its European and American precursors. Unlike them there is no Court, but only a Commission which "may resort to any appropriate method of investigation ; it may hear from the Secretary-General of the Organization of African Unity or *any other person capable of enlightening it.*" Moreover, the sources on which the Commission is directed to base its activities are interesting [81] :

> The Commission shall draw inspiration from international law of human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the fieds of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.
>
> The Commission shall also take into consideration, as subsidiary means to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

This is the only instrument that clearly recognizes the Universal Declaration as a "source" of law and which enables the Commission, when established, and if composed of strong personalities, to develop the law concerning human rights in a fashion far exceeding that of either of the other two regional

79. 9 I.L.M. 673.

80. 21 I.L.M. 59, Art. 46 (italics added).

81. Arts 60, 61.

courts. But since this body is only a Commission and not a judicial tribunal, it lacks the authority of a Court and its findings do not possess the same obligatory character. A further difference lies in the fact that the African Convention imposes duties upon individuals as well as granting them rights which states are obliged to recognize.

In addition to the European Court of Human Rights there is also the Court of the European Communities established in accordance with the Treaty of Rome[82]. Although the European Community is essentially intended as an economic institution, in many ways it has perhaps done more for the institutionalised recognition and enforcement of human rights than any other organization. In the modern world, as was already indicated by the adoption of the International Covenant on Economic, Social and Cultural Rights, economic is an important as political welfare, while the conventions of the International Labour Organization were intended to establish fair labour standards and practices. Going far beyond any of these instruments, the Rome Treaty seeks to establish a common standard for all residents of the Community members. Moreover, not only states, but individuals and industrial organizations also have the right of access to the Court. In addition, there may be an appeal from national tribunals, even of the highest rank, to the European Court whose decisions are final. Also, there is an obligation upon national courts, if they consider an issue affected by the Treaty to be in question, to refer that issue to the European Court and they are then bound to apply the judgment that is rendered as part of their own national jurisprudence. Since many of the issues raised relate to the right of movement, establishment, equality and the like, one cannot ignore the European Court and its contribution to the development and protection of human rights.

Conclusion

In the light of what has been said, it is submitted that despite the role played by the United Nations in proposing documents devoted to the promotion of human rights, the contribution made by that institution — consuming less than one per cent of the annual budget[83] — and the International Labour Organization to the institutional development and protection of human rights is not as substantial as general repute would have it[84]. Moreover, there is little doubt that the Universal Declaration, which was

82. 1957, 298 UNTS 11; see, also, *Sweet & Maxwell's European Community Treaties*, 1972.
83. *The Times* (London), 22 May 1986.
84. This assessment is not affected by the fact that the latest issue of the *Human Rights Law Journal*, 7 HRLJ 1986, 127-54, lists 59 non-regional arrangements affecting human rights.

no more than the lowest common multiple or highest common factor of 1948, would not be accepted today. The ten members of the UN had a sense of communality based on Judaeo-Christian principles. This is no longer true, as sun be seen from a statement made by the Iranian representative to the Human Rights Committee in 1982 : "Our people have decided to remain free, independent and Islamic[85] and not to be fooled by the imperialist myth of human rights"[86]. This is not to deny that public reporting and public opinion, as well as the use that may be made of such instruments by national pressure groups, may well influence the conduct of a particular state and lead to amendments of its national law. However, real legal protection of such rights is more likely to result from the activities of the regional Courts of Human Rights. Bearing in mind the fact that the members of the European Community have subjected their own legal systems to the "overseeing" of the European Court, it may well be that it is through the instrumentality of an institution of this character that we will see the most significant practical realization of human rights through their institutionalization.

85. Islamic concepts of punishment, including flogging, amputation and stoning are contrary to western concepts of torture and the rule of law.

86. *The Times*, 2 June 1986.