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UNITED STATES PARTICIPATION IN INTERNATIONAL AGREEMENTS FOR THE PRESERVATION OF HUMAN RIGHTS

By: A. Hamilton Cooke

I. INTRODUCTION

The past two decades of international legal history have been characterized by an increased emphasis upon the importance of the individual as a proper subject of international law. Revolutionary changes have occurred in the area of human rights with the completion of various declarations, covenants, and conventions aimed at the preservation of specific rights within a framework of international law. The continuing importance and relevance of this general subject was symbolized by the designation of 1968 as the International Year for Human Rights in honor of the twentieth anniversary of the Universal Declaration of Human Rights.

This paper examines the general subject of individual rights and duties in international law and, specifically, seeks to determine the constitutional ability of the United States to participate effectively in the application of these international legal rules by ratification of human rights treaties.

II. BACKGROUND AND HISTORICAL DEVELOPMENT

A. Pre-World War I Development

International law consists of rules which govern the relations between states.[1] Traditionally, only states have had standing to sue or be sued in international tribunals, and individuals have had to rely upon the state of their nationality to redress grievances perpetuated by other states.[2] Nonetheless, individual has, to some

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[1]HACKWORTH, INTERNATIONAL LAW I (1940). The Soviet Union has remained one of the most adamant proponents of absolute sovereignty and has resisted most efforts to liberalize this concept. See A. LARSON et al, SOVEREIGNTY WITHIN THE LAW, ch. 17 (1964). See also 1964 DUKE L.J. 847 n.5.

[2]BISHOP, INTERNATIONAL LAW 267 (2d ed. 1962). An individual usually lacks procedural capacity to assert rights before any international tribunal, and thus there may well be doubts whether he has any rights under international law. It is only the state of which he is a national that may bring suit in an international court (or protest through diplomatic channels) against the state

extent, been considered a subject of international law, with rights and duties derived from it.

The development of Roman law was first characterized by the jus civile principles which applied only to Roman citizens.[3] Later, the Roman praetors developed the jus gentium, or the law of nations which applied to both public and private disputes and established definite substantive and procedural rights for individuals.[4] It was a flexible system which governed relations not only between states but also between individuals in different states.[5] With the advent of the feudal system and the resulting concept of sovereignty in the Middle Ages, the law of individual rights underwent a regression from the enlightened approaches of the Roman praetors.[6] This regression, which emphasized the relations between sovereign heads of state rather than individuals, formed the basis of modern international law.

Under these traditional concepts, the progress of establishing international law as a source of individual rights was painfully slow although it had long been recognized that individuals were subject to international legal duties. Piracy by an individual has historically been considered a crime against the law of nations for

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of whose conduct the individual complains; hence, the state is regarded as having the international legal right rather than the individual. Id. For extensive background information, see GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 17-23 (1966); EZEJIOFOR, PROTECTION OF HUMAN RIGHTS UNDER THE LAW 15-51 (1964).

[3] GORMLEY, supra note 2 at 19. Although these principles made some progress in extending legal personality to a greater number of citizens in the private law area, the system itself never developed into a world wide legal order since Roman citizens considered Jus Civile sacred and thus not applicable to alien peoples.

[4] The year 367 B.C. marked the creation of the office of praetor and with it the most significant development in Roman law. The praetor developed a flexible system of law intended to settle disputes quickly whether the litigants were Roman citizens or aliens. Indeed, the laws of alien peoples were often applied and over the years, were integrated into the older Roman law principles. A new system, the Jus Gentium, thus arose through the efforts of the praetor to find natural law solutions to pressing legal controversies.

[5] GORMLEY, supra note 2 at 21.

[6] Id. at 18.

which international tribunals could administer punishment.[7] Indeed, individuals have been held criminally responsible for violations of the international laws of war and humanity. Both the United States Supreme Court[8] and the International Military Tribunal at Nuremberg[9] have recognized that international law subjects individuals to certain defined duties. Although the international community, especially victors at war, have had little difficulty imposing these individual duties, sovereign states have been more hesitant to make the sacrifices necessary for the corresponding development of individual rights.

Nevertheless, some concern for the fundamental rights of man was shown at an early date. Grotius, the founder of the natural law theory as a basis for international law, recognized the international legal doctrine of humanitarian intervention,[10] which justifies intervention by one state into the affairs of another if the latter is committing abusive acts which are clearly outside the limits of justice and reason against its subjects. Because of its limited historical use, however, the doctrine never attained the status of a rule of international law.[11] Some early treaty provisions also demonstrated existing interest in certain basic rights of man. The Treaty of Westphalia of 1648, the Treaty of Nymegen

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[7]BISHOP, _supra_ note 2, at 265. In _United States v. Smith_, 5 Wheat. 153, 161-162 (U.S. 1820) it was stated that:

> The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations (which is a part of the common law) as an offense against the universal law of society, a pirate being deemed an enemy of the human race. . . .

[8]_Ex parte Quirin_, 317 U.S. 1 (1942).

[9]22 PROCEEDINGS IN THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-589.

[10]In his famous work published in 1625, DE JURE BELLI AT PACIS, translated by Rev. A. C. Campbell (1814), Grotius defended the doctrine as:

> the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.

STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921).

[11]EZEJIOFOR, _supra_, note 2 at 33-35.

of 1678, and the Vienna Congress Treaty of 1815 made provisions for basic religious liberty. The Treaty of Paris of 1856, the Treaty of Berlin of 1878 and the Treaty of Paris of 1898 undertook to protect minority groups, property rights and other individual civil and political rights.[12] While guaranteeing certain individual rights, the agreements nevertheless remained basically international obligations between states and they conferred no rights which the individual could enforce in an international court. The rights were limited, ill-defined, and susceptible to repudiation by a contracting state.[13]

There were, however, a few instances in which individuals could maintain an action before an international court. Some tribunals, such as the Court of the Commission for Navigation of the Rhine, the European Danube Commission, and the Central American Court of Justice (1907-1918), provided the "faint beginnings of an international legal personality for the individual."[14] In fact, the Central American Court of Justice was explicitly given jurisdiction to hear cases by individuals against states.[15]

B. <u>The Inter-War Period</u>

The early claims commissions, such as the United States-Mexican Mixed Claims Commissions,[16] the British-Mexican Commissions,[17]

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[12] _Id._ at 36-37.

[13] _Id._ at 38.

[14] Svarlien, _International Law and the Individual_, 4 J. PUB L. 147 (1955).

[15] GORMLEY, _supra_ note 2, at 33. The Convention establishing the court was concluded by five Central American States (Costa Rica, Honduras, Nicaragua, El Salvador and Guatemala), and although short lived, it heard ten cases, five of which were brought by individuals; and, of these, four were dismissed as inadmissable and one was decided in favor of the State against the individual. Since the Convention contained no provision for extension of life, Nicaragua, against whom two decisions had been rendered, gave a one year notice of intention to terminate and after unsuccessful attempts to forestall this action, the court ceased to exist in 1918. See EZEJIOFOR, _supra_ note 2 at 23 n. 16.

[16] This dates back to the United States-Mexican Claims Convention, July 4, 1868, and continues to be used by the two states as a device to resolve mutual disagreements such as in the Chamizal arbitration and the subsequent Convention between the parties which was an attempt to settle finally this continuing problem. Dep't. of State Press Release No. 448.

[17] _E.g._, 5 HACKWORTH, _supra_, note 1 at 481, 547 (1943).

the German-Mexican Commissions,[18] and the many commissions created by Latin American states and major powers,[19] not only allowed individuals to press claims indirectly against a sovereign state, but established a precedent for the various post World War I tribunals which gave judicial personality to nationals of the victorious powers. The Anglo-German Mixed Arbitral Tribunals allowed individuals to petition without the necessity of first obtaining the representation of their governments, which had been required by the majority of the prior Commissions. The Anglo-German Commissions gave individual rights some meaning in international law by providing procedures for their implementation.[20]

As a result of various post World War I peace treaties, the trend toward recognizing individual rights as proper subjects of international law continued. The Permanent Court of International Justice in the Advisory Opinion of Danzig Railway Case[21] held that, under the Danzig-Polish agreement of October 22, 1921, individuals were entitled to bring actions based on purely personal claims. Poland claimed that she was responsible only to the City of Danzig and not to individual railway employees and, further, that international agreements alone could not create direct rights and obligations between individuals and states. This position was rejected by the Court which declared that the treaty in question had conferred these rights and thus governed the case rather than general principles of international law.[22]

Another significant decision arose out of a case involving the Upper Silesian Convention of May, 1922 between Poland and Germany. The treaty provided for a tribunal which was given jurisdiction to hear claims brought by nationals of either party against their own states.[23] This provision, remarkable in view of past history, was upheld as valid and effective in Steiner and Gross v. Polish State,[24] an action brought against Poland by two Polish nationals. The tribunal found that the intent of the Convention was to protect private rights, and that the necessary jurisdiction had thus been conferred on the Court.[25]

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[18] Id. at 833.

[19] Spafford, International Arbitration: Certain Contemporary Developments, RECUEIL DES COURS (1964).

[20] GORMLY, supra note 2, at 38.

[21] P.C.I.J. Ser. B, No. 15 (1928).

[22] Id at 17.

[23] GORMLY, supra note 2 at 41.

[24] 1 Decisions of Upper Silesian Arbitral Tribunal at 1-36 (March, 1928).

[25] Cf. the decision of Chorzow Factory Case, P.C.I.J., Ser A, No. 17, 27-28 (1928) which held:

> International law does not prevent one State from granting to another the right to have recourse to international arbitral

Finally, to provide protection for some twenty-five million frequently abused members of various groups living in Central and Eastern Europe, the principal treaty at Versailles permitted the imposition of obligations with respect to the protection of minorities by separate treaty upon the new and enlarged states.[26] As a result, many Minorities Treaties were signed during the Peace Conference between the principal allied powers and Poland, Greece, Romania and several others.[27] The treaties contained general provisions for complete protection of life, liberty, religious freedom and other civil and political rights. While the scheme as a whole was ineffective, the treaties did provide striking evidence of the continued concern of international law for the basic rights of mankind.

C. Post World War II Developments

1. The Nuremberg Trials

The increased recognition of the applicability of international legal norms to the individual was advanced markedly at the Trial of Major War Criminals at Nuremberg. The genesis of the trial arose in the joint declaration of Roosevelt, Stalin and Churchill on November 1, 1943 warning that those German officers and Nazi leaders who had been responsible for the atrocious crimes and massacres of the war should be judged and punished at the conclusion of the war.[28] Following this declaration, the London Agreement of August 8, 1945, between the United States, Great Britain, France and the Soviet Union, established an International Military Tribunal to conduct the trial of the major war criminals or of those whose offenses had no particular geographical location. A part of this Agreement was the Charter of the Tribunal which defined its jurisdiction, applicable law and functions. Article 6 of this Charter gave jurisdiction to hear cases of specified crimes for which individual duties and responsibilities would attach and included Crimes Against Peace, War Crimes and Crimes against Humanity.[29] Twenty-two individual defendants were indicted under

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> tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State. . . .

See also GORMLEY, supra note 2 at 41 n. 27.

[26] EZIJIOFOR, supra note 2 at 39 n. 13.

[27] A complete list of these treaties is contained at Id at 40 and n. 16.

[28] See BISHOP, supra note 2 at 839.

[29] These provisions were stated as follows:

(a) Crimes against peace: Namely, planning preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements

Article 6; nineteen of these were found guilty on various counts.[30]

Because the Tribunal was required to apply the law as set out in the Charter,[31] the validity of the trial as a major precedent in the area of individual rights and duties depends on two questions: whether the Agreement and Charter correctly set out the principles of international law which had existed prior to the Agreement, and whether the Agreement itself was international law. As to the former, it is submitted that the Charter brought together in one document a collection of many offenses which had been crimes or illegal acts in prior international law and labeled

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> or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) War Crimes: Namely, violations of laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
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> (c) Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, art. 6.

[30] The following defendants were found guilty: Georing, Hess, Von Ribbentrop, Gen. Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Funk, Adm. Doenitz, Adm. Raeder, Von Schirach, Sauckel, Gen. Jodl, Seyss-Inquart, Speer, Von Neurath and Bormann (tried in absentia). The following defendants were acquitted: Schacht, Von Papen and Fritzsche. For complete chart showing exact findings, see BISHOP, _supra_ note 2 at 858-59.

[31] The Tribunal said: "These provisions (the provisions of Article 6 of the Charter) are binding upon the Tribunal as the law to be applied to the case." Judgment at 3; and

> the jurisdiction of the Tribunal is defined in the Agreement and Charter and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal. _Id_ at 38.

these acts under the three categories of Crimes Against Peace, War Crimes and Crimes Against Humanity. Thus, while the defendants may not have recognized the labels of the various offenses, their substantive nature had long been outlawed either by specific treaty provisions or under general principles of natural law or customary international law. For example, several authorities existing prior to World War II recognized the illegality of war as an instrument of international politics. The preamble of a declaration unanimously adopted by the League of Nations on September 24, 1927, stated, "a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime,"[32] and Article 1 declared, "all wars of aggression are, and shall always be prohibited".[33] Later in the General Treaty for the Renunciation of War of August 27, 1928, generally known as the Pact of Paris or the Kellogg-Briand Pact,[34] wars of aggression were specifically outlawed. This treaty was ratified by Germany, Italy and Japan.[35] Thus, substantive law concerning crimes against peace existed prior to the Nuremberg Charter.

No specific international norms concerning individual responsibility were recognized prior to the Charter. The Tribunal and prosecution staffs escaped this difficulty with an expression of common sense:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[36]

A similar analysis of the categories War Crimes and Crimes Against Humanity indicates that the Tribunal was attempting to prove that the Nuremberg Agreement was simply restating established law in a new form. All of the acts labeled War Crimes in Article 6(b) of the Charter had been outlawed in the Fourth Hague Convention of 1907 and the Geneva Convention of 1929, and individual responsibility had clearly been established in municipal jurisdictions. The lack of specific precedent for individual responsibility in international courts was given little significance, and in this regard the trial did in fact set forth a new principle.

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[32] LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 54 at 155 (1927).

[33] Id.

[34] 94 League of Nations Treaty Series 57 et seq. (1929).

[35] For partial text of treaty, see NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW 207 n. 87. The validity of this pact was strongly attacked by German defense lawyers at the Nuremberg Trial because it had never been enforced or followed by a majority of nations. Id at 207-08.

[36] Judgment at 41.

The Nuremberg judgment was most creative in finding retroactive law concerning crimes against humanity. The Tribunal limited itself in that regard to clearly illegal acts perpetrated in conjunction with War Crimes. While some prior authority on this count was advanced by the prosecution to the Court, i.e. municipal laws in all civilized nations against murder, the use of the doctrine of humanitarian intervention, etc., the Tribunal actually formulated for the first time this international crime and imposed individual responsibility for it.

The Charter and the Tribunal's judgment made a valuable contribution to international law by bringing together crimes already clearly established in the positivist theory of international law and by fixing responsibility upon the actual perpetrators. The solid rock of state sovereignty and the protection it affords international war crimes were resoundingly denounced when the Tribunal said:

> On the other hand, the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in persuance of the authority of the State if the State in authorizing action moves outside its competance under international law.[37]

In addition, the Tribunal and Charter, by establishing and enforcing the count on Crimes Against Humanity, recognized the existing natural law views regarding the basic worth and dignity of the individual. This latter step may not have had the support of clear legal precedent, but in view of the tragic results of genocide, it was both proper and necessary to attempt to establish these principles as rules of international law. Therefore, assuming the Charter was itself international law and that the Tribunal was international in name as well as in substance, this major event marked a tremendous advance in the resurgence of natural law principles as a method of insuring protection of basic human rights. The international community actively began to seek methods of insuring that such horrors would never again be allowed to occur.

2. The United Nations

a. Basic Principles

During World War II, various declarations such as the Atlantic Charter of August 12, 1941 between Roosevelt and Churchill stressed

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[37] Id.

the need for protection of basic human rights to insure the future of world peace. Many private organizations and individuals urged the promulgation of an International Bill of Rights by an international organization to be formed at the end of the war. The question of human rights received considerable attention at the Dunbarton Oaks meeting at Washington in 1944 where major Allied powers met to consider the formation of such an organization to insure peace in the world. The culmination of these many efforts came in the Charter of the new United Nations which emerged from the San Francisco Conference.

The preamble to the Charter emphasizes the determination of the people of the world

> . . .to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . .[38]

One of the major purposes of the Organization is

> . . .the achievement of international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex, language or religion.[39]

Futhermore, the General Assembly is bound to initiate studies and make recommendations "for the purpose of assisting in the realization of human rights and fundamental freedoms".[40] The United Nations, in order to create stability in economic and social fields, shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all".[41] Finally, in this connection, the Economic and Social Council of the Organization is authorized to make recommendations to the General Assembly and specialized agencies concerning respect for human rights[42] and to set up commissions for the promotion of human rights.[43]

Standing alone, these provisions, other than showing a central theme of the Organization, have dubious legal effect. It is clear that Article 55 requires that states shall promote respect for and observance of human rights. Article 56 strengthens this obligation in that

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

The Charter's effectiveness in insuring protection of rights, however, is hampered by two factors. First, there are no implementation

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38 U.N. CHARTER, Preamble
39 Id, art. 1(3).
40 Id, art. 13 (1)(b).
41 Id, art. 55(c).
42 Id, art. 62(2).
43 Id, art. 68.

provisions in the Charter; and second, these rights are not specifically defined and thus it is not certain what they are.

Another stumbling block has been the efforts of some to discount the United Nations' ability to take effective measures in this field. Article 2(7) of the Charter provides that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Using this provision, detractors of the United Nations' competence to effect the insurance of human rights argue that protection of human rights has traditionally been governed by domestic law and thus article 2(7) precludes any discussion by the General Assembly, Economic and Social Council or other organs concerning any alleged breaches by a state of its obligations to respect and promote human rights.[44] The resolution of this argument depends upon the interpretation of "intervention" and "matters essentially within the domestic jurisdiction of a state". Intervention has traditionally referred to dictatorial interference and not interference "pure and simple".[45] If the enforcement measures of Chapter VII are considered to be technical or dictatorial intervention involving the use of force, then they are specifically excluded by Article 2(7). Thus the enforcement measures of Chapter VII must be interpreted to mean something less than dictatorial interference.[46]

More important, under the second major guideline of Article 2 (7), human rights are probably not a matter "essentially within the domestic jurisdiction" of a state. Historically such matters have been handled domestically, but an accumulation of factors including the deep concern for human rights following World War II, the Charter provisions and other treaties which have made human rights the subject of international obligations, and the possibility that a policy or act committed by a state involving denial of human rights could cause repercussions threatening world peace, lend overwhelming support to the proposition that human rights are now an international concern. While most aspects of the subject will be handled domestically, the entire human rights movement has been a revolutionary step in the development of international law, and technical interpretation of Article 2(7) would neither harmonize with this trend nor allow

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[44] Kunz, 43 A.J. 317 (1949).

[45] OPPENHEIM, INTERNATIONAL LAW 305 (2d ed. 1962). See also EZEJIOFOR, supra note 2 at 60 n. 16.

[46] Gilmour, The Meaning of "Intervene" Within Article 2(7) of the United Nations Charter, 16 INT'L & COMP. L.Q. 330 (1967).

nations to participate effectively in this area. Certainly Article 2(7) is not meant to short-circuit the powers and obligations set forth in Articles 10, 13, 55 and 56 concerning discussions, studies and recommendations regarding human rights. Whatever the effect of Article 2(7) on other matters, it should not affect the competence of the United Nations in the field of human rights.

b. The Universal Declaration of Human Rights

The United Nations' first major achievement in the area of human rights came in 1948 when the Commission on Human Rights, a part of the Economic and Social Council, prepared a draft Declaration on Human Rights which together with a Covenant on Human Rights and Measures for Implementation, was to constitute the International Bill of Rights.[47] After extensive debate the Declaration was adopted and proclaimed unanimously on December 10, 1948.[48] Finally, there was an instrument defining the rights referred to in the Charter. The Declaration provided that everyone has the right to life, liberty and security of person; to recognition as a person before the law; to effective remedy by the competent national tribunals for acts violating fundamental rights; to be presumed innocent until proven guilty; to freedom of movement and to leave any country including his own, and to return to it; to seek and enjoy asylum; to nationality; to personal property; to freedom of opinion and expression; to peaceful assembly and association; and to take part in the government of one's country. In addition, it provided that no one shall be held in slavery or servitude, subjected to torture or cruel, inhumane or degrading treatment or punishment, to arbitrary arrest, detention or exile, or interference with his privacy, home or correspondence. The Declaration gave men and women of full age the right to marry and have a family. It entitled everyone to all the rights and freedoms set forth without distinction of any kind and to a fair and public hearing by an independent and impartial tribunal.[49]

Several articles also dealt with economic, social and cultural rights including the right of everyone to social security, to work under just and favorable conditions, to join trade unions for the protection of his interests, to rest and leisure, to an adequate standard of living, to education, to participation in the cultural life of the community, to enjoyment of arts and to share in scientific advancement and its benefits.[50]

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[47] EZEJIOFOR, supra note 2 at 85.

[48] Doc. A/777. It was submitted as "Universal Declaration on Human Rights", see U.N.Y.B. 465 (1948). Although no vote was cast against the Declaration, the following states abstained: Byelorussia, Czechoslovakia, Honduras, Poland, Ukraine, Soviet Russia, South Africa and Yugoslovia. Saudi Arabia was absent.

[49] Art. 1-21.

[50] Art. 22-27.

These provisions were the first step toward formal recognition of basic human rights and freedoms which all nations would strive to achieve. Although the Declaration was not intended to create binding legal obligations[51] it was evidence of world concern in this area. It also provided a political, though not a legal, tool to persuade all states to keep their own affairs in harmony with its principles.

c. U. N. Covenant on Civil and Political Rights

The U. N. Covenant on Civil and Political Rights (hereinafter referred to as CP Covenant), along with its companion Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ESC Covenant) and an Optional Protocol were adopted by the General Assembly on December 16, 1966, after twelve years of discussion, as the projected follow-up to the Universal Declaration.[52]

Although it had been contemplated originally that there would be only one covenant forming an International Bill of Rights, two covenants were prepared because of the varying nature of the rights involved. The ESC Covenant objectives will have to be achieved

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[51]Even though the document was hailed by Mrs. Roosevelt, American delegate and Chairman for the Commission on Human Rights, as possibly the "Magna Carta for all mankind" U.N. GEN. ASS. OFF. REC., 3rd Sess., Pt. 1 at 962 (1948), the American delegate at the Third Committee recognized that:

> The draft declaration was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations. Although it was not legally binding, the declaration would nevertheless have considerable weight. *Id*, 3rd Committee at 32

Indeed, Mrs. Roosevelt recognized this fact also:

> In giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations. 19 DEP'T STATE BULL. 751 (1948).

[52]G.A. Res. 2200 A,21 U.N. GEN. ASS. OFF. REC. Supp.16 at 49, U.N. DOC A/6316 (1966). *See generally* Starr, *International Protection of Human Rights and the United Nations Covenants*, 1967 WIS. L. REV. 863, at 889 n. 114.

slowly; legislation will not automatically bring them into fruition. The CP Covenant, in comparison, envisions rapid steps for enforcement of fairly specific civil and political rights through legislation.

d. Specific U. N. Treaties and Resolutions

The General Assembly has promulgated several significant treaties in the field of human rights. Among these was the Convention on the Prevention and Punishment of the Crime of Genocide (1948),[53] which was based on the principles of Nuremberg and which provided that persons committing the crime of genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals,"[54] by local tribunals in the jurisdiction where the acts occurred or by an international penal tribunal.[55] Other conventions promulgated by the General Assembly and now in force include those relating to the Status of Refugees (1954); Stateless Persons (1960); Political Rights of Women (1954); Nationality of Married Women (1958); Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964); International Right of Correction (1962); Slavery Convention of 1926 as amended (1955) and Protocol (1953); and Supplementary Convention on the Abolition of Slavery, Slave Trade, Institutions and Practices Similar to Slavery (1957). Additional conventions not yet in force include the Covenant on Economic, Social and Cultural Rights with Optional Protocol; Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on Reduction of Statelessness. The General Assembly is in the process of adopting Conventions on Elimination of Religious Intolerance and Freedom of Information. Furthermore, the General Assembly has investigated apartheid in the Republic of South Africa; and the Security Council imposed economic sanctions on Rhodesia in 1966.[56]

Using the right of individual petition, which exists under the Trusteeship Council,[57] UNESCO and the International Labor Organization (ILO) have also made great advances. UNESCO's Convention against Discrimination in Education in 1960 with its implementing Protocol (1962) provides for an investigatory and

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[53]For text, see Res. No. 260 (III)A, U.N. GEN. ASS. OFF. REC. 3rd Sess. (1), Resolutions at 174; U.N. Doc. no. A/810.

[54]Art. 4.

[55]Art. 6.

[56]56 DEP'T STATE BULL. 73 at 77-78 (Jan. 1967).

[57]For a good example of the controversies which can arise under this system, see the South West Africa Cases, I.C.J. Rep 319 (1962).

conciliatory commission to receive complaints from one state espousing the claims of a foreign national having no connection with the complaining state.[58] More significantly, the International Labor Organization has drafted more than one hundred and twenty conventions which impose legal obligations concerning human rights on the participating governments.[59] ILO member states may also file petitions on behalf of foreign nationals who otherwise have no effective means of redress through municipal fora because of their own local law.[60] This means that the traditional nationality test[61] of international law has been rejected by the ILO and the use of inter-state petitions has become a powerful weapon for human rights protection.

Individual petitions for redress are allowed indirectly by the ILO. While the ILO limits the right of petition to private groups and organizations who petition on behalf of individuals, an individual would have little trouble in finding a labor union to bring the suit for him. This has led to the assertion that "in reality, the individual is emerging as a subject under the case law of the ILO".[62] Of all truly international organizations, the ILO has made the greatest advances, especially in the procedural context of the protection of human rights.[63]

3. Regional Agreements

a. The European Convention of Human Rights

The most remarkable advances in the area of human rights protection have come at the regional level. The most important of these has been the formation in 1949 of the Council of Europe with its adoption in 1952 of the European Convention of Human Rights and Fundamental Freedoms.[64] The purpose of the Council was the achievement of greater unity among its members to safeguard and to implement

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[58] GORMLEY, supra note 2 at 51.

[59] See International Labour Standards 38-40 (1961) for a listing of conventions. See also GORMLEY, supra note 2, at 53 n. 31 and 32.

[60] Ghana v. Portugal XLV ILO Off. Bul. Supp II, April 1963.

[61] This relates to the traditional rule that a state may only press the claims of its own nationals in an international tribunal. See Nottebohm Case (Liechtenstein v. Guatemala) 1955 I.C.J. Rep. 4.

[62] GORMLEY, supra note 2 at 58.

[63] Id. at 61.

[64] For text, see 45 AM.J. INTL. L. SUPP. 25 (1951). The following nations are parties to the Convention and Protocol: Austria, Belgium, Denmark, German Federal Republic, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom. Information is found in EZEJIOFOR, supra note 2.

the ideals and principles including protection of human rights, which were the common heritage of the European states.

The strong influence and importance of the Universal Declaration of Human Rights is most evident in the rights and freedoms guaranteed in the European Convention. All of the substantive provisions of the European Convention, with one exception, are identical to those of the Declaration. The exception provides the right to seek an effective local remedy for the violation of any rights and freedoms set out in the treaty notwithstanding that the violation is committed by a person acting in official capacity.[65] Implementation machinery consists of the Commission, which is open to any party including an individual if the relevant state party has recognized its competency, and the Court of Human Rights.[66] The Court of Human Rights was established to insure that a final determination of the question of breach of obligations under the system did not rest with a political body which might render only political decisions.[67] The Court interprets and applies the Convention in cases referred to it by those contracting parties which have accepted jurisdiction or by the Commission.[68]

With the creation of these two important bodies, the parties to the European Convention have taken a remarkable step. By creating these supranational organs, separate and apart from the control of member states, these states have agreed to limit their absolute sovereignty by voluntarily accepting a minimum standard of human rights protection. The critical factor is that such action can and is being taken through cooperation and collaboration among governments. Procedural weaknesses, such as the highly restrictive tests for admissibility of private petitions,[69] still appear in the Convention machinery. Nevertheless, this effective step on the regional level serves as an encouraging illustration of what can be done through international cooperation.

b. Other Agreements

Outside of Europe, other regional steps have been initiated. Following the lead of the Council of Europe, the Foreign Ministers

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[65]Art. 13 (Convention); art. 5 (Protocol).

[66]Art. 19.

[67]EZEJIFOR, supra note 2 at 121.

[68]Art. 45.

[69]At present, the Commission has examined over 2,000 petitions and of these, only 30 have been considered on the merits. GORMLEY, supra note 2 at 93.1. But see, the Lawless Case, 3 YB Human Rights 492 (1961) where the Court of Human Rights held that an individual through the Commission, can now obtain a full hearing before the Court since the Commission is deemed a "party" just as States are.

of the Organization of American States (OAS) in 1959 authorized the drafting of an Inter-American Convention on Human Rights.[70] The draft, calling for the establishment of an Inter-American Commission and an Inter-American Court of Human Rights,[71] is still being considered.[72] The Council of the OAS has proceeded, however, to create an Inter-American Commission on Human Rights prior to approval of the draft. This Commission is restricted in implementation powers to investigation and publication of findings, but has, since its inception in 1960, received and registered more than five hundred communications concerning claims of violation of rights and has addressed a specific recommendation to the government of Cuba.[73] Since its effectiveness depends upon the willingness of the state parties to accept binding obligations through ratification of the draft Convention, the Commission is likely to fail unless the United States relaxes its opposition.[74]

Progress in other regions of the world has been even more limited although the idea of regional agreements has reached the planning stage in several areas.[75]

III. CONSTITUTIONAL AND POLICY CONSIDERATIONS OF UNITED STATES PARTICIPATION

A. The ESC Covenant

The constitutional and policy considerations of United States participation in international agreements for the preservation of human rights will be considered with respect to the ESC Covenant and the CP Covenant. But because there is a more realistic possibility and need for ratification of the CP Covenant, it will be discussed in detail and the ESC Covenant covered only briefly.

The ESC Covenant contains thirty-one articles which primarily define and amplify corresponding provisions in the Universal

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[70] Declaration of Santiago, Chile, (1959), OAS, Fifth Meeting of Ministers of Foreign Affairs.

[71] Id at Part II, art. 34.

[72] For full discussion of this Covenant and human rights in Latin America, see Cabranes, Human Rights and Non-Intervention in the Inter-American System 65 MICH L. REV. 1147 at 1164.

[73] Id. at 1169-71.

[74] Id. at 1179. From the beginning, the U.S. announced it would not be able to adhere to an American human rights convention or accept jurisdiction of a Human Rights Court. Fifth Meeting of Foreign Ministers, Final Act 18-19 (1959).

[75] The Organization of African Unity, in 1961, called for study of the possibility of adopting an African Convention of Human Rights. See 3 JOUR. INT'L COMM. OF JURISTS 9 (1961). Also, a suggestion has been made for the creation of a Commonwealth Court of Human Rights in Great Britain. See EZEJIOFOR, supra note 2, at 145.

Declaration.[76] In part it provides such rights as: the right to work under just and favorable conditions; the right to strike; the right to social security; protection and assistance for the family; an adequate standard of living; physical and mental health; education; and enjoyment of the benefits of science and culture. These rights are recognized only as goals for progressive achievement in light of a state's "available resources".[77] Implementation machinery is limited to a reporting obligation on the part of party states.[78]

While most of the rights enumerated in the ESC Covenant are not found in our federal or state constitutions they are largely covered by federal and state legislation; and because these broadly defined rights would probably be a legitimate federal concern, the constitutionality of entering this treaty might not be overly complex.

B. The CP Covenant

The CP Covenant contains basic "hard core" rights, and its adoption in the United States would involve the possibility of federal encroachment into areas of state concern. Consequently, an examination of the CP Covenant will reveal clearly the constitutional and policy considerations which would affect a decision by the United States to participate in international agreements for the preservation of human rights.[79]

1. The Substantive Provisions of the Covenant

The CP Covenant contains approximately twenty-four articles dealing with specified rights.[80] A majority of the rights enunciated are similar to those found in our federal and state constitutions.[81] There are, however, several substantive rights which find no counterpart in American Law,[82] and a few basic rights contained in the federal constitution are not included in the

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[76]For full text of ESC Covenant, see 8 JOUR OF INT'L COMM OF JURISTS 53 (1967).

[77]ESC Covenant, arts. 6-13, 15.

[78]Id, art. 16-21.

[79]Credit must be given to the following article which provided extremely thoughtful analysis and whose organizational format was so beneficial that it was adopted for this paper: Chafee, Federal and State Powers under the U.N. Covenant on Human Rights, 1951 WIS. L. REV. 389.

[80]Most of these rights are simply definitions and amplifications of corresponding provisions in the Universal Declaration.

[81]Articles 10, 7, 8, 9, 12(1), 12(2), 12(4), 26, 14, 15, 18, 19, 21, 22.

[82]Articles 1, 9(5), 14(6), 15, 20, 23, 27.

Covenant.[83] The document makes clear that its purpose is to set a minimum standard for basic human rights.[84]

Certain specific rights are accompanied by qualifications that allow general derogations or limitations when a question of protection of others' rights or of the national security, public order or public health and morals is concerned. In addition, Article 4(1) allows a general derogation in times of "a public emergency which threatens the life of a nation and the existence of which is officially proclaimed".[85]

Under tests used by the United States,[86] the CP Covenant is not a self-executing treaty. If it were self-executing, and therefore required no implementing legislation to give its provisions immediate internal effect, its ratification might nullify the many state and federal statutes dealing with human rights which are inconsistent. Self-execution also might fail to fill certain gaps in our system of rights protection. On the other hand, legislation which follows and implements the Covenant can better serve to eliminate specifically the injustices of past legislation. In addition, implementing legislation can, if so desired, provide even greater rights than those given by the treaty.

The Covenant creates a Human Rights Committee to implement the treaty provisions. This Committee, composed of eighteen members, has the major function of receiving reports from the State Parties regarding the measures taken to implement the treaty and the progress made for protection of the enumerated rights. The Committee can also receive complaints from parties who allege that another party is not fulfilling the obligations of the treaty. This can only be done, however, if both parties recognize the competence of the Committee. If so, the Committee can receive evidence, conduct investigations, make recommendations to the parties and submit a report of its findings.[87] If no solution is reached, the Committee can, with prior consent of the parties, appoint a Conciliation Commission whose members serve in a personal capacity. This Commission will submit a final report to the Committee with recommedations for a solution. The parties are not bound to accept this decision.

Following the lead of the European Convention, the Optional Protocol allows the right of individual petition contingent upon

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[83] _E.g._, Prohibition on taking private property without just compensation, U.S. CONST. amend. V: and right to jury trial in criminal cases. _Id._ amend. VI.

[84] CP Covenant, art. 5.

[85] _Id_, art. 4(2).

[86] _See_ _Foster v. Neilson_, 2 Pet. 253 (1829) which formulated the basic test that courts will look to the treaty itself to determine if it involves a promise to enact legislation. _See also_ Chafee, _supra_ note 79 at 397.

[87] C.P. Covenant, art. 41.

a prior declaration of the Committee's competence by the accused state having personal jurisdiction over the individual. These petitions must then meet certain basic requirements as to form and exhaustion of remedies.[88] If this Protocol enters into force, it will mark the first global recognition of the right of individual petition to protect violations of human rights and could mark a dramatic procedural step in this expanding area.

These implementation procedures are relatively weak and possess characteristics of compromise to insure wider acceptance. Many nations are uncertain of its effects and are thus naturally reluctant to surrender their sovereignty until there is some indication of how effective this revolutionary program will be. While this machinery is only a start, it is not worthless; conciliation is still one of the most effective ways of settling disputes in international law. The practical chances of a government's agreeing to "mend its ways" are more likely if the persuasion is sincere and well-reasoned and not forced upon a government against its will. In effect, the Committee and Conciliation Commission act as "Ombudsmen", a highly acclaimed method of settling disputes.[89] The two bodies serve as "readily accessible, professionally qualified, wholly detached critics, to inquire objectively into asserted administrative shortcomings; [they are] advisors, not commanders, who rely on recommendation, not on compulsion".[90] While this is not as attractive as a Court of Human Rights, it is an effective method and a good start toward the universal protection of human rights.

a. Present Status of United States Protection of Human Rights--Without The Covenant

In the absence of the treaty power, the Federal Government already has enormous power and jurisdictional control over many of the rights in the Covenant. To the extent of this present federal protection, the Covenant would in no way encroach on states' rights. The chief source of this power is section 5 of the fourteenth amendment which gives Congress the "power to enforce, by appropriate legislation, the provisions of this article", which include the portion of Section 1 which reads:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. (Emphasis supplied).

[88] Opt. Protocol, art. 1.

[89] See Newman, Ombudsmen and Human Rights: the New U.N. Treaty Provisions. 34 U. CHI. L. REV. 951 (1967).

[90] GELLHORN, OMBUDSMEN AND OTHERS 422, 436 (1966).

This provision clearly covers many of the substantive areas in the Covenant. Accordingly, Congress can pass a federal law forbidding state denial of "life" without due process (article 6) or of "liberty" which embraces a prohibition of torture or physical suffering (article 7); arbitrary arrest or detention (article 9), excluding the Covenant right to compensation; illegal expulsion of aliens (article 13); the fair trial provisions (article 14) and freedom of thought and religion (article 18); speech and press (article 19) and of peaceful assembly (article 21). In addition, the fourteenth amendment "equal protection" clause corresponds to article 26 of the Covenant. Thus, nine of the Covenant rights are plainly covered by the fourteenth amendment alone. Others, such as article 16 concerning recognition of everyone as a person before the law, are worded in general terms which could easily fit into the "liberty" or "equal protection" provisions.

Aside from the fourteenth amendment other rights of the Covenant are specifically covered by federal law. Article 8, abolishing slavery and compulsory labor, corresponds to the thirteenth amendment. Most of article 15 corresponds to the ex post facto provision in the Constitution.[91] The universal suffrage rights of article 25 are covered by the fifteenth and nineteenth amendments, and the provision of article 10 regarding the humane treatment of prisoners has a counterpart in the eighth amendment.

Other articles are indirectly covered by existing federal law. Article 12 provisions concerning freedom to enter or leave one's country and prohibiting arbitrary exile of a citizen from his nation are purely national matters which Congress has always regulated without need of a treaty.[92] The companion provision regarding liberty of movement within the country and freedom to choose a residence are protected by the interstate commerce clause.[93] Because of this clause, it is not proper for one state to forbid an individual or certain groups from coming into the state and settling down.[94] Most likely, state action restricting movement within a state would be deemed a denial of "liberty" under the fourteenth amendment and therefore invalid unless valid reasons existed such as public health, safety or morals requiring such restriction on freedom.[95] The Supreme Court has held, in addition, that state or local officials cannot attempt to segregate the residence of minority groups[96] or enforce racially restrictive

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[91] U.S. CONST. art. 1 §§ 9(3) & 10.

[92] _See_ 8 USC § 1101 (1953) _et. seq._ for federal laws on general subject of immigration, naturalization, aliens, etc.

[93] U.S. CONST. art. 1, § 8.

[94] _Edwards v. California_ 314 U.S. 160 (1941).

[95] _Of. Skinner v. Oklahoma_ 316 U.S. 535 (1942).

[96] _Buchanan v. Worley_ 245 U.S. 60 (1917); _Oyama v. California_, 332 U.S. 633 (1948).

covenants,[97] and Congress has, through use of the commerce power, recently approved open housing legislation[98] which will bring within federal control most violations which might occur under article 12.

Another right of the Covenant, that of freedom of association including the right to join labor unions, found in article 22, is federally protected through the commerce clause under which the Wagner Act was sustained.[99] That the connection with interstate commerce is miniscule will not prevent federal control.[100]

A majority of the provisions of the Covenant thus fall within the permissible scope of federal power. Others are not clearly within such scope. These provisions relate to privacy and defamation (article 17); imprisonment for debt[101] (article 11); self-determination (article 1); propaganda for war (article 20); right to marry (article 23); protection of children (article 24); and protection of minorities (article 27). While some of these rights are arguably either directly or indirectly within the scope of federal protection, the significance of this list is its brevity.

There is a decisive difference, however, between the Covenant and the Constitution. The Covenant relates to the type of violations which are outlawed and forbids violations by any person, but United States federal protection often extends only to certain rights which have been violated by state and local officials, i.e. "state action", since the power of the fourteenth amendment does not cover violations committed by private persons. For example, the Covenant requires a pledge to enact appropriate legislation if needed to implement and protect certain rights such as the right to "life". In the United States such right is protected by murder statutes in every state. However, with certain exceptions concerning murder of a president[102] and conspiracy to violate a person's civil rights,[103] there is no federal murder statute, which means that the federal government lacks the power to insure prosecution of private persons committing murder. At present, the federal government can only hope for state prosecution. Therefore, because of this lack of power, the federal government cannot technically meet the requirement of the Covenant concerning assurances of effective remedies and thus might violate the treaty if a state refused to prosecute a private person for murder. To correct this situation and to prevent the possibility of violating international law, the federal government might be forced to enact a federal murder statute if it chose to

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[97] Shelley v. Kraemer 334 U.S. 1 (1948).

[98] 18 USC § 801 et seq; Public Law 90-284. See also 36 U.S.L. WEEK 89.

[99] N.L.R.B. v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

[100] Wickard v. Filburn 317 U.S. 111 (1942).

[101] This probably would be a 14th amendment "liberty" and thus be covered, though this cannot be asserted absolutely.

[102] 18 USC §1751.

[103] 18 USC §241.

ratify the treaty. Many believe that, because such action may be necessary, ratification would require too much sacrifice and alteration of our system. This problem warrants serious study but is not of such nature as to foreclose categorically the desirability of ratification.

Actually, the gulf between the Covenant and Constitution with respect to private interference with human rights is not as wide as it appears. First, some of the rights enumerated can only be violated by governments or interfered with by legal agencies. These include the rights protected in article 26 on equal protection, and article 16 on recognition before the law. Second, other rights are of such nature that it is likely that only a government would be able to violate them. They include immunity from imprisonment for debt (article 14); freedom of movement, entry and departure (article 12); prohibition of ex post facto laws (article 15); and universal sufferage (article 25). These two groups do not require additional federal legislation since possible infringements will realistically occur only as a result of state action and thus come within the protection of the Fourteenth Amendment. A third group, however, contains rights which could be violated by both private persons and officials. It is only here that the Covenant would require new legislation insuring whatever protection does not presently exist. This third group, where protection against private interference is needed, includes rights to life (article 6); against torture or cruel punishment (article 7); against slavery (article 8); against arbitrary arrest or detention (article 9); to liberty of movement and change of residence (article 12); privacy and defamation (article 17); and to freedom of religion, speech, assembly and association (articles 18, 19, 21, 22). Practically, there is little probability of private interference with many of these rights. Most interference would be by police and government officials. But some rights, like life and privacy could quite possibly be violated by private persons.[104]

In conclusion, the domestic powers of Congress over human rights are already considerable, and the gap between present human rights protection and that called for by the Covenant is much narrower than would appear initially. Certain areas do, without doubt, lie outside the present scope of federal regulation.

On the other hand, the late Zecheriah Chafee, an eminent authority on the Constitution, contends that in most instances, because of the commerce clause, fourteenth amendment and other provisions, Congress has the power to legislate as to almost all rights in the Covenant and to cure any deficiences in state protection and prosecution.[105]

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[104]The present federal civil rights acts extend to many of these violations, especially when there is present the element of conspiracy to violate civil rights.

[105]Chafee, _supra_ note 81 at 412.

3. The Scope of the Treaty Power

The extent of federal power to protect human rights is impressive. Still, to meet the treaty obligations, the federal government must pass statutes which insure that all of the rights in the Covenant have ultimate federal protection even though day to day protection may remain with the states. The question, therefore, is whether the treaty power gives Congress the right to pass statutes insuring federal protection of the enumerated rights.

a. The Constitution

The Constitution itself is of relatively little help in defining this scope or providing insight into the nature of the treaty power. It expressly gives the power to the president in article II, section 2.

> He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur...

This provision indicates the concern of our founding fathers that the country present a united front when dealing in international relations, and it is reemphasized in article I, section 10's explicit denial of states' power to make treaties. While some exceptions to this latter provision have been made in cases of interstate compacts having Congressional approval,[106] it has always been the federal government, represented by the executive branch, which has negotiated and concluded treaties with foreign powers.

Furthermore, Congress has the power to implement non-self-executing treaties, such as the Covenant, by legislation. This is found in article I, section 8(18) which reads:

> The Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and <u>all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof</u>.
> (Emphasis supplied.)

The emphasized portion plainly includes the treaty power of the President and the Senate. In addition, treaties are included in the "supremacy clause" of article VI(2):

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[106] <u>Landes v. Landes</u> 153 N.Y.S. 2d 14 (1956); <u>Howell v. Port of New York Authority</u> 34 F. Supp. 797 (N.J. 1940); <u>Hazelton v. Murray</u>, 121 A.2d 1 (N.J. 1956); <u>But see Anthony v. Veatch</u>, 220 P.2d 493 rehearing denied 221 P.2d 575, <u>appeal dismissed</u> 340 U.S. 923 (1950).

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Emphasis supplied).

The Covenant, as a ratified treaty, would represent the supreme law of the land, nullifying any contrary state statutes or constitutions. Since it is not self-executing, it would require Congressional legislation to have binding domestic effect. Such implementing legislation would also be supreme as to state law.

4. Court Decisions and Other Authoritative Sources

The framers of our Constitution, providing for the prospect of changing conditions by keeping the document flexible, set no specific requirements as to the scope of the treaty power. Madison said:

> The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might and probably would be defective. They might be restrained by such a definition from exercising the authority where it could be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised so contingencies may arise.[107] (Emphasis supplied).

Consistent with this statement of policy, the treaty power has generally been regarded as sufficiently broad and flexible to cover all matters of genuine international concern, depending on the changing world situation.[108] The famous passage in Geofroy v. Riggs[109] is still the best summation of the nature of the power, though it was made nearly one hundred years ago.

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those

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[107] 3 ELLIOTS DEBATES 514 (2d ed. 1836-1866).

[108] McDougal and Leighton, The Rights of Man in the World Community: Constitutional Illusions versus Rational Action, 14 LAW & COMTEMP. PROB. 490, 516 (1949).

[109] 133 U.S. 258 (1890).

> restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory without its consent...But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country.[110] (Emphasis supplied).

The exceptions can be examined together. First, a treaty can do nothing which the "Constitution forbids". This has long been a recognized limitation on the power, although no treaty has ever been held unconstitutional.[111] The Covenant does not require such unconstitutional acts. It does not attempt to establish a religion, deny certain fundamental rights, or work a change in our representative form of government. Rather, the Covenant might change the relative powers of the two levels of governments in our system and take away control over an area which has long been within the jurisdiction of the states. This result, according to critics, would then come within the other major exception of "a change in the character of the government of the United States".

This position, however, is fallacious. First, it has been demonstrated that relatively few changes in control would be necessary to equate existing present federal control to that called for by the Covenant.[112] A few minimal changes certainly should not be classified as changes in the character of governments. The argument also fails under the leading case of Missouri v. Holland.[113] In that case, an act of Congress had been adopted under the "necessary and proper" clause to implement a treaty made with Great Britain for the protection of migratory birds traveling between the United States and Canada. Such protection had previously rested in the hands of the individual states. The Court held that the treaty power may be extended beyond the limits of the powers expressly delegated to the Congress, when those powers are too narrowly construed to permit effective action in matters of international concern. Justice Holmes summarized:

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[110] Id at 267.

[111] McDougal et al, supra note 108, at 516.

[112] See notes 89-105 and accompanying text.

[113] 252 U.S. 416 (1920).

> It is obvious that there may be matters of sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found.[114]

With this foundation established, Holmes then met the basic argument that control over this area was a reserved power of the states under the tenth amendment:

> The only question is whether it (the treaty) is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved...No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power...It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States if forbidden to act.[115] (Emphasis supplied).

This case speaks directly to the instant question. The main objection, that of imposing federal control over an area which has normally been within state control, is effectively removed by the holding of the case regarding the tenth amendment. Even if this power to control did rest in the states, a treaty could limit it.

Areas in which state regulation has been superseded by treaties imposing federal regulation include debts owed to foreigners,[116] title to land,[117] escheat and inheritance,[118] statutes of limitations,[119] local taxation,[120] administration of alien estates,[121] prohibitions against employment of foreign labor[122] and limitations of pawnbrokerage to citizens.[123] Ratification and implementation of the Covenant would add little to the already significant federal presence in human rights protection.

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[114] Id at 433-34.

[115] Id at 435.

[116] Regarding N.N. 187-194, see McDougal et al, supra note 108, at 519-20; Ware v. Hylton 3 D ll. 199.

[117] Fairfax's Devisee v. Hunter's Lessee 7 Cranch 603 (1913).

[118] Chirac v. Chirac, 2 Wheat 259 (1817); Havenstein v. Lynham 100 U.S. 483 (1879); Santovincenzo v. Egan, 284 U.S. 30 (1931).

[119] Hopkirk v. Bell 3 Cranch 454 (U.S. 1806).

[120] Neilson v. Johnson 279 U.S. 47 (1929).

[121] In re Faltosini, 67 N.Y. 1119 (Sup. Ct. 1900).

[122] Baker v. City of Portland, 2 Fed. Cas. 472, No. 777 (Ore. 1879)

[123] Asakura v. Seattle, 265 U.S. 332 (1924) AM. SOC'Y INT'L LAW at 195 (1929).

The words used by the Supreme Court to define the treaty power--"properly the subject of negotiations with a foreign country",[124] "properly pertain to our foreign relations",[125] and "national interest of very nearly the first magnitude"[126]--are all sufficiently broad to permit inclusion of this Covenant. These quotations establish basic guidelines. Whether certain subject matters fit within those guidelines is often a matter of emphasis or lack of emphasis. This appears to be the problem with the Covenant. While opponents stress the "local" aspect of human rights, such an approach should be rejected in view of the gravity of the question and the need for more positive action, as demonstrated dramatically by the troubling events of the last several years in our own country. State action or inaction is not enough, nor is pure federal action. Rather, the problem is global and requires global cooperation. Ratification of the Covenant realistically and legally presents an opportunity for such cooperation.

4. Policy Considerations of Ratification

Although much discussion has centered around the "legalities" of ratification, a more critical aspect involves basic policy decisions. Several policies militate against ratification. One relates to the fear that a step in this direction is dangerous to the essential framework of the United States federal system. This system has in recent decades been altered remarkably by supreme court decisions and liberal interpretations of the commerce clause and fourteenth amendment. If the treaty power is used as proposed here it could be fatal to future state effectiveness in major areas of government action. This would contradict the historic ideals and value judgments that were the keystone to the formation of our country.

Another negative policy argument is that there is simply no need for additional legislation in this area. And, even if there is greater need, it should be remedied by the people themselves through their elected representatives. This is preferable to reaching the same results by the indirect method of the treaty power which can be used with approval of only two-thirds of the Senate.

Another argument suggests that ratification would impose yet another level of adjudicatory machinery and enforcement upon an area where jurisdiction over serious civil rights problems is already confused. Moreover, there exists too much divergence in international political, moral and social ideals to insure compliance with the provisions of the treaty. The United States already insures these rights and thus most of the contents of the

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[124] Geofroy v. Riggs, supra note 110.

[125] Santovincenzo v. Egan, supra note 118 at 40.

[126] Missouri v. Holland, supra note 114.

treaty would be directed to other countries, many of which do not recognize or effectively protect the enumerated rights of the Covenant.

Finally, there is the fear that in this extremely political world, many Communist bloc countries would use United States adherance to the treaty as a means to embarrass this country by filing frivolous complaints in a process of constant harassment.

These negative policy considerations stem from the belief that what other states think of our failure to ratify is really irrelevant. In the end, they can see by our example that we are leaders in protecting human rights domestically. "We should use methods of persuasion, education, and example rather than formal undertakings which commit some other country to accept our standards."[127]

Most of the positive considerations relate to the position which the United States, as the leader of the free world, should take in an area of recognized international concern. The United States has been conspicuously vocal in championing such rights while, at the same time, conspicuously absent when called upon to enter binding legal obligations to protect such rights. If the United States wants to set the example and truly educate and persuade others, as the negative side suggests, what better way exists than to join this treaty? First, it would encourage the participation of other nations, tentatively reluctant because of the diminished chance of the Covenant's success without the major powers. This would, in turn, encourage others on a regional basis to enter into more human rights conventions for local protection. An example in point is the slow advancement of the Inter-American Covenant on Human Rights. Such drafts would undoubtedly be adopted and made effective were the United States to take the lead in urging participation in this type of activity.

Second, ratification would put the United States in a more effective legal and moral position to protest infringement of human rights by other countries. It took such a lead in the Nuremberg Trials and an equally consistent position in the Rhodesia question; but in other matters, its past reluctance to be legally bound on an international level has been of constant diplomatic embarrassment.[128]

IV. CONCLUSION

Analysis of the legal and policy aspects of ratification and recognition of the tremendous challenge which faces mankind to insure the protection of basic human rights demands the conclusion that the United States can and should ratify the Covenant on Civil and Political Rights along with the Optional Protocol. This is true even though the Covenant has no article

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[127] Duetche, Report of Standing Committee on Peace and Law Through United Nations, 1 INT'L LAWYER 600, 620 (1967).

[128] Gardner, A Costly Anachronism, 53 ABA JOUR 907 (Oct 1967).

on federal states which would reduce the problems involved in ratification. The lack of such a clause may not be critical to ratification because, if the Senate has serious doubts concerning possible unhealthy alterations of power in our federal system, such doubts could be expressed in the form of a reservation to the treaty given at the time of ratification. The reservation could express the United States' acceptance and adoption of the principles enumerated in the treaty and agreement to formulate such additional legislation as may be necessary to meet the obligations specified. Such legislation need not necessarily provide that the federal government take over all protection of these rights. Rather, backed by authority of the treaty power, it could take the form of a "federal reserve power" which would assure the rest of the world that, while most enforcement and protection would occur on the state level, the federal government would stand ready to insure compliance with the treaty in cases in which state action is withheld or mismanaged.

This suggestion meets the desires of both proponents and critics of ratification. First, there is nothing in the treaty which prohibits or discourages freedom of reservation to treaties in accordance with the general rules of international law. Second, such reservations would calm fears that the national government would automatically take over the functions of the state in protection of human rights. Third, the reservation would signify to the world that, while primary responsibility for human rights protection in this country will rest with the states, the federal government stands with reserve power through appropriate legislation to insure compliance with our international obligations. Finally, ratification with reservations would permit the United States to assume a role of leadership in the field of human rights and, at the same time, maintain the primary functions of domestic protection under state jurisdiction.

CONCLUSIONS OF THE EUROPEAN CONFERENCE ON THE INDIVIDUAL AND THE STATE--"THE ESSENTIAL ELEMENTS TO INSURE THE PROTECTION OF THE INDIVIDUAL"

The Conference of European Jurists met in Strasbourg on October 26-27, 1968, to consider legal means to protect the individual in his relations with his state. To supplement the Universal Declaration of Human Rights, this body published the Conclusions and General Recommendations of that Conference.

Even a casual reading of the document reveals that the Conference feels a substantial need for procedural safeguards to protect the individual against the arbitrary, capricious, or authoritarian acts of the state. The Recommendations suggest that the state limit its own power by creating or preserving independent institutions: an effective judiciary, an agency to check administrative abuses, and possibly international organizations. Specifically, it enumerates - as necessary safeguards - rights calculated to insure a fair trial, procedures designed to limit the power of administrative agencies, and controls planned to minimize the misuse of the state's emergency powers.

The Conference proposes that an individual be able to challenge government actions, especially infringements of his rights, by judicial proceedings. To make this remedy meaningful, it should be readily available, inexpensive, simple, and fast. Such standards as a fair hearing, appellate review, and an independent judiciary help insure just decisions. In some instances the Conference's standards are more stringent than those required in the United States. For example, the judge's appointment should be free from political influence or patronage.

To check abuse of administrative power, the Conference suggests the observance of certain minimum requirements when the government adjudicates the rights of individuals. These are quite similar to the requirements of due process in the United States including the right of adequate notice and access to evidence, the right to be heard, and the right to counsel. Furthermore, the agency should give its reasons for the administrative order. To insure that these safeguards are maintained without the expense or complications of judicial review, the administration itself should provide adequate remedies and appellate procedure. The Conference also suggests that there be within the administration an agency designed to challenge and correct errors and abuses in the system.[1] Such procedures would be in the state's own

[1]This institution would be similar to the "Ombudsmen" now operating to assist citizens in administrative processes in Denmark, Great Britain, Finland, Guyana, New Zealand, Norway, Sweden, and Tanzania.

self-interest, since the Conference would hold a state responsible to its citizens for injuries caused by its negligent or wrongful acts. The conference even implies that a state should be liable for acts which cast on an individual a burden which is unreasonable in relation to the rest of society. Since the Conference contemplates that such responsibility be secured by treaty, the resulting international obligation would be far more onerous than those imposed on states by current international law.

Nevertheless, the Conference recognizes that a state may suspend many of an individual's rights during periods when the executive must exercise its emergency powers. To prevent misuse of this authority, its exercise should be subject to the confirmation of the legislature and control of the judiciary. Unlike United States law, the Conference would not permit the executive to suspend judicial review of arbitrary confinement.

The General Recommendations offer various methods of implementing the above Conclusions. The Conference places primary emphasis on a knowledgeable citizenry: essentials to implementation are adequate education, a free press, elections by secret ballot, and periodic review of legislation. Though recognizing that responsibility rests squarely on the state, the Conference suggests the possibility of international supervision, especially on a regional basis. Final appeal could rest with the proposed United Nations High Commissioner for Human Rights. More immediately, the Conference urges every country to sign and ratify various international covenants dealing with human rights and to implement them with domestic legislation.

J. P. W.