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The American Convention on Human Rights: Illusions and Hopes

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COMMENTARY

THE AMERICAN CONVENTION ON HUMAN RIGHTS: ILLUSIONS AND HOPES

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I. INTRODUCTION

On November 22, 1969, the Inter-American Specialized Conference on Human Rights came to a close with the signing of the American Convention on Human Rights. The Conference, which had been convened in San José, Costa Rica, on November 7, 1969, was attended by nineteen Member States of the Organization of American States.[1] Only twelve of these states actually signed the Convention.[2] Conspicuous by their absence from the list of signers were the "big four" of the American Continent—Argentina, Brazil, the United States and Mexico—as well as the Dominican Republic, Peru, and Trinidad-Tobago. Thus culminated, on this hardly encouraging note, a ten-year drafting effort by the Organization of American States[3] which was

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1. Barbados, Bolivia, Haiti and Jamaica did not send representatives to the Conference. Cuba, whose government has been barred from participation in the activities of the Organization of American States, was also not represented.

2. The states which signed the Convention at the Conference are: Colombia, Costa Rica, Chile, Equador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

3. This drafting process began in 1959 with a draft convention prepared by the Inter-American Council of Jurists. That instrument was in turn extensively revised by the Inter-American Commission on Human Rights in the three years which preceded the San José Conference. For an analysis of the drafting history of the American Convention on Human Rights preceding the San José Conference, see K. VASAK, LA CÔMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME 175-200 (1968). *See also* Cabranes, *The Protection of Human Rights by the Organization of American States,* 62 AM. J. INT'L L. 889, 897-904 (1968); Garcia-Bauer, *Protection of Human Rights in America,* in 1 RÉNE CASSIN AMERICORUM DISCIPULORUMQUE LIBER 75 (1969).

The proceedings of the San José Conference are discussed by Camargo, *The American Convention on Human Rights,* 3 REVUE DES DROITS DE L'HOMME 33 (1970); Liskofsky, *Report on the American Convention on Human Rights,* in A.J.C. INSTITUTE OF HUMAN RELATIONS (mimeo 1970).

designed to give credence and legal dimensions to the lofty rhetoric of the American Declaration of the Rights and Duties of Man, which had been proclaimed at Bogota in 1948.[4]

The American Convention on Human Rights is a massive instrument consisting of 82 articles.[5] It guarantees a plethora of civil and political rights, besides providing in article 26 that

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The Convention envisages the establishment of an Inter-American Commission and Court on Human Rights. These institutions are modelled, in part at least, on the European Commission and Court of Human Rights.

Of the eleven ratifications that are necessary to bring this instrument into force,[6] only one—by Costa Rica—has been deposited thus far. Political realities being what they are in the Western Hemisphere, it would probably take a long time to obtain eleven ratifications for any human rights convention. It will take much more time in the case of the American Convention on Human Rights, for it seems to have been drafted in a form calculated to discourage its ratification. For this reason alone it is premature to embark upon a thorough analysis of this instrument. Instead, the short comment that follows is intended merely to call attention to some aspects of the American Convention that provoked this writer's critical reaction.

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4. The American Declaration of the Rights and Duties of Man was proclaimed by the Ninth International Conference of American States, which met in Bogota, Colombia, in 1948. For the text of the Declaration, see INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS, app. I, OAS Official Records, OEA/Ser.L/V./II.23, Doc. 21 (English) (rev. 1970) [hereinafter cited as HANDBOOK].

5. OAS Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (English) (1970). The text of the American Convention is reprinted in HANDBOOK, app. VI, and 65 AM. J. INT'L L. 679 (1971).

6. American Convention on Human Rights, art. 74(2) [hereinafter cited as American Convention]. For an article-by-article analysis, see U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE INTER-AMERICAN CONFERENCE ON PROTECTION OF HUMAN RIGHTS, SAN JOSÉ, COSTA RICA, NOVEMBER 9-22, 1969 (mimeo 1970).

II. The American Convention and What is Wrong With It

A. *In General*

The American Convention on Human Rights guarantees 23 broad categories of rights and freedoms. By contrast, the European Convention of Human Rights,[7] as originally adopted, proclaimed merely 13 rights. Two possible hypotheses suggest themselves to explain this difference between the two instruments. The first is that the draftsmen of the European Convention were more realistic than their American colleagues about governmental attitudes towards international protection of human rights and, to assure its ultimate entry into force, kept its provisions to a bare minimum while leaving the door open to its enlargement by subsequent protocols. The second hypothesis is that the inhabitants of the American Continents urgently need international protection for many more rights than did their European brethren. Both hypotheses are probably valid and that does not bode well for the speedy entry into force of the American Convention.

It is not necessary to be a specialist in North and South American affairs to know that Latin America, with its immense poverty, vast illiteracy, widespread corruption, economic exploitation, and social backwardness, is the breeding ground of totalitarian regimes, whether of the right or the left, who are the very antithesis of ideals of human rights.[8] And while the United States of America has made tremendous progress in the last decade in its struggle against the political, economic and social inequities of almost two centuries of governmentally sanctioned racial discrimination, much remains to be done in this sphere.[9] The peoples of the Americas, North and South, could consequently benefit substantially from an effective in-

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7. The European Convention of Human Rights was signed in Rome on November 4, 1950 and entered into force on September 3, 1953. For the text of the Convention, its additional protocols and various other documents relating to it, see Council of Europe, European Convention on Human Rights: Collected Texts (6th ed. 1969). *See generally* J.E.S. Fawcett, The Application of the European Convention on Human Rights (1969).

8. For a general survey, see Human Rights and the Liberation of Man in the Americas (L. Colonnese ed. 1970).

9. *See* National Advisory Commission on Civil Disorders, United States Riot Commission Report (1968).

ternational system for the protection of human rights guaranteeing the 23 rights—and many more—that are set out in the American Convention.

But the very fact that such an extensive catalog of rights is needed, suggests that it was most unwise to include all of them in the Convention. Elementary common sense should have told the proponents of the American Convention that the more burdensome the obligations imposed by the treaty, the less likely it becomes that eleven American states will be willing or able in the foreseeable future to ratify that instrument. This proposition is not rebutted by the Convention's liberal policy on reservations.[10] Experience teaches that the more reservations a state has to make in order to adhere to an international agreement, the less likely it is that it will become a party to it.

It is noteworthy, in this connection, that the draft Inter-American Convention on Protection of Human Rights, which was prepared by the Inter-American Commission on Human Rights and served as the basic working paper of the San José Conference,[11] merely required seven ratifications for the entry into force of the Convention.[12] The decision to increase the required number of ratifications must have been dictated by the fear of the opponents of the Convention that seven American states might be able and willing to adhere to the instruments.[13] This development alone should have prompted the libertarians attending the Conference to pare down the Con-

10. The American Convention, article 75, reads as follows: "This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969." Article 19 of the Vienna Convention on the Law of Treaties provides:

Formulation of reservations

A state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875, 881 (1969).

11. Inter-American Specialized Conference on Human Rights, OAS Official Records, OEA/Ser.K/XVI/1.1, Doc. 5 (English) (1969).

12. *Id.* art. 66 (2).

13. See the revealing explanation in U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE INTER-AMERICAN CONFERENCE ON PROTECTION OF HUMAN RIGHTS, SAN JOSÉ, COSTA RICA, NOVEMBER 9-22, 1969, at 59 (mimeo 1970).

vention's catalog of rights to one consisting only of those that are most essential, thereby enhancing the likelihood of its eventual entry into force. But, and this is symptomatic of what ails the Americas, many of the true proponents of human rights attending the Conference succumbed to the intoxicating effect of the dream world created by their own rhetoric and urged the inclusion of more and more rights,[14] while the opponents of human rights must have been gloating at their lack of political sophistication.

B. *Some Particulars*

The American Convention guarantees the following rights: the right to juridical personality (article 3); right to life (article 4); right to humane treatment (article 5); freedom from slavery (article 6); right to personal liberty (article 7); right to a fair trial (article 8); freedom from *ex post facto* laws (article 9); right to compensation for miscarriage of justice (article 10); right to privacy (article 11); freedom of conscience and religion (article 12); freedom of thought and expression (article 13); right of reply (article 14); right of assembly (article 15); freedom of association (article 16); rights of the family (article 17); right to a name (article 18); rights of the child (article 19); right to nationality (article 20); right to property (article 21); freedom of movement and residence (article 22); right to participate in government (article 23); right to equal protection of the law (article 24); and right to judicial protection (article 25).

Many of the foregoing articles contain a large number of provisions refining even the most basic rights to a degree that effectively waters down the fundamental character of the very right that is being guaranteed. Article 4 (right to life), for example, consists of six separate sections which, in addition to providing that "[n]o one shall be arbitrarily deprived of his life,"[15] introduce some highly controversial issues relating to capital punishment and abortion. The latter problem is raised in article 4 (1), which reads as follows: "Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception.* No one shall

14. *See, e.g.,* Camargo, *supra* note 3.
15. American Convention, art. 4 (1).

be arbitrarily deprived of his life."[16] Too many people are arbitrarily deprived of their lives in many an American republic to justify the weakening of the basic principle—the right not to be arbitrarily deprived of one's life—by complicating it with an issue that has difficult religious and ideological implications and which, furthermore, raises complex questions of civil and criminal law.

Article 4 (2) proclaims a very important principle. It stipulates:

> In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

But the authors of the Convention are not satisfied to leave that principle stand as is. They add a further clause: "The application of such punishment shall not be extended to crimes to which it does not presently apply." The folly of including this latter provision results from the fact, among others that are more obvious, that states which are not prepared to subscribe to it fully may not be able to formulate an appropriate reservation without at the same time tampering with the "serious crimes" concept. This would, of course, weaken the entire paragraph.

Article 4 (3) was intended presumably to encourage the abolition of capital punishment. It provides: "The death penalty shall not be reestablished in states that have abolished it." This provision could well be counter-productive of its intended aim, for it would prevent the abolition of capital punishment on an experimental basis, which is usually the first step on the slow road to its permanent repeal. But that is not the major objection to this provision. It and the other stipulations of article 4, which have been singled out, suffer from a much more basic defect: they provide those governments which need a pretext to justify their refusal to recognize even the most basic of human rights with a respectable excuse for not doing so.

What has been said about article 4 is equally applicable to article 5. Even its title—right to humane treatment—disguises the very basic right "not to be subjected to torture or cruel and

16. *Id.* (emphasis added).

degrading punishment or treatment." That important principle is buried in a provision consisting of six sections. These are for the most part either extremely vague or penologically too doctrinaire for the primitive conditions that prevail in various American republics. Thus, article 5 (1) provides that "every person has the right to have his physical, mental, and moral integrity respected." This very lofty but by no means self-explanatory provision is followed by article 5 (2). It consists of two sentences. The first stipulates that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." The second sentence unnecessarily refines this very important principle by adding the ambiguous exhortation that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Articles 5 (4) and 5 (5) require the separation, in penal institutions, of convicted persons from those awaiting trial, and provide that minors shall be tried in "specialized tribunals" and be "treated in accordance with their status as minors." Finally, article 5 (6) proclaims that "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." One possible interpretation of this latter provision might be that the American Convention outlaws life imprisonment. But whether that was the intention, and it probably was not, we are here nevertheless dealing with a clause whose far-reaching penological implications many states might, at this stage of their development, be unable to accept. Enough has been said about article 5 to indicate that a government which would be prepared to assume the important international undertaking not to subject any one "to torture or to cruel, inhuman, or degrading punishment or treatment," might refuse to do so because of the many reservations that it would have to attach to article 5.

Other clauses of the American Convention could be cited in which very basic human rights are intertwined with rights of a lesser order. The foregoing examples are particularly telling, however, once it is recognized that no derogation whatsoever from provisions of articles 4 and 5 is permitted.[17] Moreover, the right of derogation established by article 27 of the American Conven-

17. *See* American Convention, art. 27 (2).

tion indiscriminately lumps together highly important rights with many less significant ones. Thus, article 27 (2) reads as follows:

> The foregoing provision [establishing the right of derogation] does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

An individual given to espouse a conspiratorial view of history would assert, after reading article 27 (2), that this provision was intentionally drafted in its present form to make it impossible for many states to ratify the American Convention. What other credible explanation is there, he would ask, for providing that in time of war,[18] for example, a state may not limit the right of some or all of its citizens to participate in government?[19]

Finally, one clause of the American Convention on Human Rights deserves special attention because of its pervasive detrimental effect. The provision in question is article 2. It reads as follows:

> Where the exercise of any of the rights or freedoms referred to in Article 1 [the rights and freedoms recognized in this Convention] is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

This provision, which corresponds to article 2 (2) of the International Covenant of Civil and Political Rights,[20] makes the American Convention non-self-executing in all those countries which apply this doctrine. That is to say, the attempt to in-

18. The American Convention, article 27 (1), recognizes the right of derogation "in time of war, public danger, or other emergency that threatens the independence or security of a State Party."

19. The "right to participate in government" includes the right "to vote and to be elected in genuine periodic elections." American Convention, art. 23 (1b).

20. G. A. Res. 2200 (XXI), 21 GAOR Supp. 16, at 52-58, U.N. Doc. A/6316 (1966).

voke the Convention in a national court, in order to assert a right guaranteed by it that is in conflict with or not recognized by existing domestic legislation, will be rejected on the ground that without the additional domestic legislation envisaged by article 2, an individual can derive no rights directly from the Convention. If this interpretation of the effect of article 2 is valid,[21] then the American Convention will not have a significant impact on the day-to-day administration of justice even in those American countries that might eventually ratify it.[22] That, at least, has been the experience in those states which, while they have ratified the European Convention, do not accord it the status of domestic law.[23]

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21. While it could be shown that the purpose of article 2 was not to make the Convention non-self-executing, *see* note 22 *infra,* but to make clear that states had an obligation to enact legislation, if necessary, to give effect to its provisions, it is doubtful that many domestic courts would accept this proposition.

22. It should be noted, in this connection, that the draft Inter-American Convention on Human Rights did not contain a provision comparable to article 2, because the Inter-American Commission on Human Rights feared that its use might make the American Convention non-self-executing. *See* D. DE ABRANCHES, COMPARATIVE STUDY OF THE UNITED NATIONS COVENANTS ON CIVIL AND POLITICAL RIGHTS AND ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND OF THE DRAFT INTER-AMERICAN CONVENTIONS ON HUMAN RIGHTS, OAS Official Records, OEA/Ser.L/V/II.19, Doc. 18 (English), at 26 (1968), who sounded the following warning:

> Under the constitutional system prevailing among the American States, the provisions of treaties are incorporated into municipal law through ratification, . . . without the need for a special law. Consequently, this paragraph [article 2 (2) of the Covenant] is not needed in the Inter-American Convention. On the contrary, if it were placed in the Convention, it could justify the view that any State Party would not be obliged to respect one or more of the rights defined in the Convention but not covered by the domestic legislation; but would be so obliged only after passage of a special law on such right or rights.

Relying on this statement by Dr. Dunshee de Abranches, which it apparently misunderstood, the Government of Chile strongly urged the inclusion of a provision modelled on article 2 (2) of the International Covenant on Civil and Political Rights, lest its absence be misconstrued not to require a state to adopt additional legislation, whenever necessary, to give effect to the rights guaranteed by the American Convention. Inter-American Specialized Conference on Human Rights, OAS Official Records, OEA/Ser.K/XVI/1.1, Doc. 13 (English), at 2-3 (1969). The United States, always eager to transform an international human rights document into one that is a non-self-executing instrument, threw its support behind the move by Chile which prevailed. *Id.* at 13. *See also,* U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE INTER-AMERICAN CONFERENCE ON PROTECTION OF HUMAN RIGHTS, SAN JOSÉ, COSTA RICA, NOVEMBER 9-22, 1969, at 16-17 (mimeo 1970).

23. *See generally* Buergenthal, *The Domestic Status of the European Convention on Human Rights: A Second Look,* 7 JOURNAL OF THE INT'L COMM'N OF JURISTS 55 (1966).

III. The Institutional Strength and Weakness of the American Convention

The American Convention contains one very important institutional innovation that deserves to be noted. It reverses the traditional formula employed in other international human rights instruments and makes the right of private petition to the Inter-American Commission immediately applicable against a state which has ratified the Convention.[24] Interstate applications, on the other hand, are not receivable unless the applicant and respondent states have each deposited an additional declaration recognizing the jurisdiction of the Commission to hear such communications.[25]

Leaving aside the question whether a state could ratify the American Convention with a reservation to the right of private petition,[26] the approach of the American Convention has the great advantage of substantially depoliticizing the entire mechanism for the enforcement of human rights. For that very reason it should be more acceptable to governments, provided they can be persuaded to examine this question free from all stereotype misconceptions[27] that have prompted them in the past to prefer a facultative right of private petition. It is true, of course, that states are less likely than individuals to institute an action against another state charging violation of human rights. But the political repercussions of interstate litigation, their unpredictability, and the much greater public attention they generate, all would seem to suggest that in the long run it would be in the interest of states to accept an obligatory right of private petition coupled with an optional right of interstate petitions. The fact that the draftsmen of the American Convention have opted for such a system will hopefully prompt governments generally

24. American Convention, art. 44.

25. *Id.* art. 45.

26. The liberal reservation provision of the American Convention does not exclude that possibility entirely, *see* American Convention, art. 75, *supra* note 10, particularly since the American Convention assigns to the Commission a number of other functions in addition to those involving the adjudication of private and interstate applications. *See* American Convention, art. 41.

27. Dr. Schwelb has aptly characterized these misconceptions as "the myth that the granting of the right of individual petition is a more serious infringement of the sovereignty of States than the granting of the right of complaint to other States." Schwelb, Book Review, 1 Revue des Droits de l'Homme 626, 630 (1968).

to reexamine their preference for arrangements making the right of private petition non-obligatory.

The weakness of the enforcement machinery provided for by the American Convention, which also envisages the establishment of an Inter-American Court of Human Rights,[28] is to be found in the fact that no institution comparable to the Consultative Assembly of the Council of Europe—a body consisting of elected national parliamentarians—exists within the framework of the Organization of American States.[29] The important role which the Consultative Assembly has played from the very beginning as the democratic conscience of the Council of Europe has no doubt contributed much to the effectiveness of the European Convention.[30] The absence, within the institutional framework of the OAS, of a similar human rights lobby with strong domestic political influence, must be viewed as a factor that cannot but have a negative influence on the entire Inter-American human rights effort.

IV. The American Convention as a Possible Source of Nonconventional Law

No critical discussion of the American Convention should neglect to explore the legal impact that this instrument can have even if it does not enter into force for some time to come. Whether the unratified Convention will in fact play a significant role in shaping the emerging human rights law of the Inter-American system depends in large measure on the astuteness of the Inter-American Commission on Human Rights and the extent to which it will continue to consolidate and expand the functions it has obtained for itself in the past decade.

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28. The Inter-American Court of Human Rights will be established as soon as the American Convention enters into force. *See* American Convention, arts. 81-82. The jurisdiction of the Court does not, however, vest immediately upon the entry into force of the Convention. Instead, a special declaration recognizing its jurisdiction is a condition precedent to the submission of a case to it. American Convention, arts. 61-62.

29. *See generally* A.H. Robertson, The Council of Europe 41-61 (2d ed. 1961).

30. For an example of the important watchdog role which the Consultative Assembly performs in the Council of Europe system, *see* Buergenthal, *Proceedings Against Greece Under the European Convention of Human Rights*, 62 Am. J. Int'l L. 441 (1968).

The Commission was established in 1959 by the Organization of American States[31] (OAS) as "an autonomous entity" of the OAS.[32] The entry into force on February 27, 1970, of the "Protocol of Buenos Aires," which amended the OAS Charter, transformed the Commission into one of the principal organs of the OAS, thereby ending both the ambiguity and constitutional uncertainty inherent in its prior status.[33] The Commission is composed of seven members, who are to be "persons of high moral character and recognized competence in the field of human rights";[34] they are elected to a four-year term and serve in their "personal capacity."[35] The function of the Commission is "to promote respect for human rights,"[36] which, for purposes of its statute, are defined as the rights "set forth in the American Declaration of the Rights and Duties of Man."[37]

In the years following its establishment, the Commission has skillfully and imaginatively expanded its powers.[38] It has succeeded in transforming itself from an organ ostensibly charged only with the task of preparing studies and promotional reports[39] to an institution that has successfully asserted the power to investigate charges of human rights violations directed against various American governments and which, in some instances, has been surprisingly effective in deterring or

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31. *See* Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 1959, Records and Documents app. V, Res. VIII, OAS Official Records, OEA/Ser. F./III.5, at 308 (1960).

32. Statute of the Inter-American Commission on Human Rights, art. 1 [hereinafter cited as Statute]. The Statute, which was promulgated by the OAS Council in 1960, is reprinted in HANDBOOK, app. II, at 30.

33. *See* OAS Charter, *as amended* arts. 51, 112 & 150.

34. Staute, art. 3 (a).

35. *Id.* arts. 4 (a) & 6 (a).

36. *Id.* art. 1. Under article 112 of the OAS Charter, as amended, the Commission's "principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."

37. Statute, art. 2. For the text of the American Declaration of the Rights and Duties of Man, which was proclaimed in Bogota, Colombia, in 1948, *see* HANDBOOK, App. I. On the ideological impact of the American Declaration on the Inter-American System, *see* Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147 (1967); FOX, *Doctrinal Development in the Americas: From Non-Intervention to Collective Support for Human Rights*, 1 N.Y.U.J. INT'L L. & POL. 44 (1968).

38. On this subject generally, *see* A. SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 31-56 (1970); VASAK, *supra* note 3, at 46-62.

39. *See* Statute, art. 9.

putting an end to such violations.[40] Moreover, in 1965, after repeated prodding by the Commission,[41] it was formally authorized to receive and act upon complaints by individuals charging violations of certain basic rights proclaimed in the American Declaration.[42] Singled out for this special protection are the following provisions of the American Declaration: article I (right to life, liberty and personal security); article II (right to equality before the law); article III (right to religious freedom and worship); article IV (right to freedom of investigation, opinion, expression, and dissemination); article XVIII (right to a fair trial); article XXV (right of protection from arbitrary arrest); and article XXVI (right to due process of law).[43]

The experience of the Inter-American Commission on Human Rights indicates that an inter-governmental institution charged with the protection and promotion of human rights need not be significantly handicapped in the performance of its functions merely because the standards it seeks to enforce are not embodied in a legally binding human rights charter. Much more

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40. On the Commission's investigation of human rights violations committed by Cuba, Haiti, the Dominican Republic, and other American states, *see* Report submitted by the Organization of American States to the International Conference on Human Rights, U.N. Doc. A/Conf. 32/L.10, at 46-58 (1968), and the country reports cited therein. More recently, during the 1969 military conflict between El Salvador and Honduras, the Commission performed valuable on-the-spot protective functions. *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS 22ND SESSION, FIRST AND SECOND PARTS, AUGUST 5-7, AND NOVEMBER 7-22, 1969, OAS Official Records, OEA/Ser.L/V/II.22, Doc. 15 (English), Add. 1, at 5-20, 34-40 (1970). For a discussion of the juridical arguments advanced by the Commission to justify its transformation into an "action body," see Sandifer, *Human Rights in the Inter-American System,* 11 How. L.J. 508, 517-23 (1965); Scheman, *The Inter-American Commission on Human Rights,* 59 AM. J. INT'L L. 335, 337-40 (1965). *See also* INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, THE INTER-AMERICAN SYSTEM 43-44 (1966).

41. *See, e.g.,* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS FIRST SESSION, OCTOBER 3-28, 1960, OAS Official Records, OEA/Ser.L/V/II.I, Doc. 32, at 10-11 (1961).

42. This power was conferred on the Commission by Resolution XXII of the Special Inter-American Conference, held in Rio de Janeiro, Brazil, November 17-30, 1965. *See* OAS Official Records, OEA/Ser.E. XIII.I (1966). Article 9 (*bis*) of the Commission's Statute implements Resolution XXII.

For the procedure which the Commission follows in dealing with individual complaints, see Regulations of the Inter-American Commission on Human Rights, arts. 48-54, HANDBOOK app. III.

43. For reports on the Commission's handling of private petitions, *see, e.g.,* THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE WORK ACCOMPLISHED DURING ITS 23RD SESSION, APRIL 6-16, 1970, OAS Official Records, OEA/Ser.L/V/II.23, Doc. 27 (English), at 9-23 (1970).

important than the binding or non-binding character of the standards is the existence of rules capable of application and, because of their status, of legitimating the conduct of such a body. The American Declaration of the Rights and Duties of Man is a non-binding declaration and yet, as we have seen, it has served as a source of law and the terms of reference of the Inter-American Commission. That instrument, however, proclaims very general principles which are ill-suited for adjudicatory purposes. The Commission may find it useful, therefore, to draw on the language of the American Convention of Human Rights to give juridical precision and normative content to the American Declaration. In dealing with private petitions in particular, where for all practical purposes it is increasingly being called upon to exercise adjudicatory functions, the Commission can be expected to rely more and more on the Convention. Initially, it might have to justify this action by characterizing the Convention as a quasi-authoritative gloss on the meaning of the preferred provisions of the American Declaration (articles I–IV, XVIII, and XXV–XXVI).[44] The resulting practice may in due course lead to the acceptance of the Convention, or at least some of its provisions, as an authoritative codification of the principles embodied in that document. This process, which is not without precedent in the human rights field,[45] could transform the Convention into an important source of non-conventional human rights law applicable to the Inter-American system. Unfortunately, it will take many, many years and an imaginative, courageous and politically astute Commission to achieve this result.

V. Conclusion

Whatever the ultimate fate of the American Convention, it is too late to remedy the errors that were committed in San José. But other human rights conventions are being contemplated for geographic regions facing problems similar to those of the Americas. It may well be useful, therefore, to devote a few sen-

44. The preamble to the American Convention on Human Rights provides some support for this proposition.

45. *See, e.g.*, L.B. Sohn, The United Nations and Human Rights, Eighteenth Report of the Commission to Study the Organization of Peace 67-74, 168-69 (1968).

tences to the question of what might be a realistic strategy for bringing such efforts to fruition.[46]

One obvious approach is to limit the number of rights to be guaranteed to those that are most basic and to avoid being too innovative by introducing juridical conceptions that have not found even theoretical acceptance among the majority of states in the particular region. A regional convention for regions facing problems similar to those found in Latin America, for example, should initially merely recognize the right to juridical personality,[47] the right to life, the right not to be tortured, freedom from *ex post facto* laws, the right to a fair trial, the right not to be deprived of one's liberty arbitrarily, freedom from slavery, freedom of speech, conscience and religion. It should contain a sweeping nondiscrimination clause of the type found in the American Convention[48] as well as soundly drawn reservation and derogation clauses.[49] And, of course, care must be taken to draft the convention in such a form that most of its provisions would be deemed to be self-executing in those states that apply this doctrine. Such a convention, it is submitted, would be much easier to sell to many more governments than is the American Convention or, at least, it would not provide them with respectable excuses for nonadherence. Once such a rudimentary human rights charter has been accepted and tied to an enforcement machinery which individuals may effectively invoke—and that obviously should be one indispensable prerequisite of any regional system for the protection of human rights—

46. For a more extensive discussion of this subject, see Lalive, *The Protection of Human Rights within the Framework of Existing Regional Organizations,* in A.H. ROBERTSON, HUMAN RIGHTS IN NATIONAL & INTERNATIONAL LAW 330 (1968). *See also* the provocative suggestions in van Boven, *Some Remarks on Special Problems Relating to Human Rights in Developing Countries,* 3 REVUE DES DROITS DE L'HOMME 383 (1970); Korey, *The Key to Human Rights—Implementation,* in INTERNATIONAL CONCILIATION (No. 570, 1968).

47. The American Convention, article 3, provides that "[e]very person has the right to recognition as a person before the law."

48. The American Convention, article 24, provides that "all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." Under article 1 (1) of the American Convention, the Contracting Parties undertake to ensure the rights guaranteed in the Convention "to all persons subject to their jurisdiction . . . without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

49. *See, e.g.,* European Convention, arts. 15 & 64. The comparable clauses of the American Convention are much too sweeping in their scope and possible reach.

it will become much easier as time goes on to engraft additional rights onto the original instrument. And even if that should prove to be a much slower process than one might wish for, it is plainly better to have some protection rather than none at all.

If it could be honestly asserted today that the elementary human rights enumerated above are for the most part being respected by a substantial majority of governments, I would be the first to advocate more advanced and comprehensive conventions. But, unfortunately, this is hardly the case in many parts of the American Continent, in Africa, in much of Asia and the Middle East, or in Eastern Europe. As long as present conditions exist, we must resist the temptation to build castles in the sky. Instead, we should concentrate our efforts on establishing either universal or regional systems for the protection of human rights capable of saving human lives, emptying the concentration camps, and removing the torture chambers and the sadists from jails, from police stations and from military interrogation centers. That, after all, is still the first and most important item on the human rights agenda.[50]

50. For a thoughtful assessment of the political realities that affect the success or failure of international human rights efforts, see Bilder, *Rethinking International Human Rights: Some Basic Questions,* 2 REVUE DES DROITS DE L'HOMME 557 (1969).