

# A BRITISH VIEW OF THE COVENANT\*

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## I

The Human Rights Covenant is an eloquent witness to the vitality of the Law of Nature. It speaks of human rights in international terms and is a new affirmation of the old union of *ius gentium* and *ius naturale*; "Nam ad *ius gentium* pertinent," says Thomas Aquinas,<sup>1</sup> "ea quae derivantur ex lege naturae, sicut conclusiones ex principiis . . . sine quibus homines ad invicem convivere non possunt."

Already Grotius<sup>2</sup> had abandoned the position that natural law is coordinate with divine law, since he believed it could be found by the exercise of right reason, that is, human reason; while over against natural law stands the law imposed by the legislative will, either human or divine; and we find Locke declaring not only that we are born free but also that we are born rational.<sup>3</sup> It is but a short step to the belief that any act contrary to the natural law is null and void; that neither contract<sup>4</sup> nor legislation<sup>5</sup> can impair rights and duties grounded in the natural law as determined by human reason; and that natural or innate rights are separate from and superior to civil or acquired rights. It is these beliefs which have given the Law of Nature its dynamism, for they generate protest and struggle against the dictates of princes and governments.

We shall find that much of this thinking underlies the Human Rights Covenant.

The common law of England has conceived human rights differently. Though it too has felt the purifying influence of the Law of Nature,<sup>6</sup> it has regarded the individual not as the grantee of a number of precisely defined rights but rather as a person whose rights and freedoms are presumed to be unlimited—and therefore undefined—until and to the extent that his contacts with his fellowmen make their

\* This article has been prepared by the writer upon his own responsibility and does not necessarily represent the views of the Government of the United Kingdom on the Human Rights Covenant.

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<sup>1</sup> *SUMMA THEOL.* ii 19. 95 art. 4.

<sup>2</sup> HUGO GROTIUS, *DE JURE BELLI ET PACIS*, Bk. I, c. I, par. 10.

<sup>3</sup> JOHN LOCKE, *OF CIVIL GOVERNMENT: TWO TREATISES*, c. 6, §61.

<sup>4</sup> So the Virginian Declaration of Rights of June, 1776: "All men are by nature equally free and independent and have certain inherent natural rights of which, when they enter a society, they cannot by any compact deprive or divest their posterity."

<sup>5</sup> ZASIUS (1461-1535) had clearly stated this principle in the civil law: "Quamvis princeps possit mutare leges particulares, et eis derogare, tamen hoc non potest ubi lex in naturam fundatur." Compare the principle enunciated in *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803).

<sup>6</sup> Sir Edward Coke, one of the greatest masters of the common law, called it "the perfection of reason" and was ready even to argue that a Parliamentary statute contrary to the common law was a nullity.

limitation and definition necessary for the social good. The common law has therefore concerned itself not with the formulation and attribution of rights but with the grant of remedies, and the diminution of arbitrary power whether exercised by the King, the government, or the ordinary citizen. Civil liberties enjoy the protection not of a basic constitutional statute but of the strong restraining hand laid by the courts on those who would take them away.

## II

The Declaration of Human Rights adopted by the General Assembly of the United Nations in Paris in December 1948 is described in its preamble as "a common standard of achievement for all peoples and all nations," and it was the clear understanding of the General Assembly and those who took part in drafting the declaration that it did not import legal obligations upon the states which subscribed to it. It was in the second part of the International Bill of Rights—the Human Rights Covenant—that states were to make binding commitments.

Now those brought up in the common law tradition cannot, when they read the latest draft of the Covenant,<sup>7</sup> escape certain doubts. The Declaration may perhaps be regarded as a political and social manifesto, elaborating the principles declared in Article 55 of the U.N. Charter;<sup>8</sup> but if the Covenant is to be a legally binding instrument, can all the rights, which it attributes to human beings, be legally enforced and are not some of them unenforceable altogether? Does the Covenant not appear at least to be granting rights without remedies? To answer these basic questions we may now look over the draft Covenant from the following points of view: the character of the rights recognized in or granted by the Covenant; the problem of implementation; and the principle of domestic jurisdiction laid down in Article 2(7) of the U.N. Charter.

<sup>7</sup> Completed by the Human Rights Commission on June 20, 1949. It will be reconsidered with comments by governments at the next session of the Human Rights Commission in April, 1950, and the draft covenant will then be submitted to the Economic and Social Council and finally to the General Assembly.

<sup>8</sup> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

YEARBOOK OF THE UNITED NATIONS 1946-1947 837 (Dep't of PUBLIC INFORMATION, Lake Success, New York, 1947).

The Lebanese delegation in UN debates upon the Declaration and Covenant and related instruments such as the Freedom of Information Conventions have argued with some force that the Declaration is a gloss upon the U.N. Charter and an integral part of it, that is to say, the Declaration is an expression at length of the ideas contained, in condensed and elliptical form, in paragraphs (a) and (c) of Article 55; the Lebanese delegation sought therefore to give the Declaration the same binding force as the Charter itself.

## III

On reading the Covenant we are struck by the variety of rights and the differences, even of kind, among them. First, there are certain rights which may be fairly described as inalienable and fundamental—inalienable because there are no circumstances in which we could justify a denial of them, and fundamental because a persistent denial of them will undermine and finally destroy the community itself; an ordered society, dedicated to the goals which civilized man has set himself, does not confer such rights on the individual, it presupposes them. Into this class fall, in the opinion of the writer, Article 6 and to some extent the related Article 7;<sup>9</sup> Articles 8 (1) and (2); and Articles 14, 15,<sup>10</sup> and 20 (1). These are provisions to which there can be no exception, whatever social or economic policies are being pursued and whatever emergency may arise.<sup>11</sup> Secondly, there are rights which arise because individuals live in communities; they presuppose an ordered society, are protected by that society, but are subject to qualifications and even restrictions where the interests of the community so require; the principle underlying such restrictions seems to be that each individual shall, so far as is practicable, have an equal enjoyment of his rights and freedoms with every other individual in the community; this equality can perhaps never be fully attained but it is the measure by which the rights and freedoms of each are limited for the benefit of all. Into this class fall, for example, Articles 5, 9, 13, and 16, and certain related articles. The restrictions upon the enjoyment of such rights are or should be rarely applied, and then only when subject to precise legal definition and control.<sup>12</sup> Thirdly, there are rights which are derived from the general economic and social objectives of the community; it is permissible to ask whether these are rights at all in the same sense as those falling into the first two classes, and not rather a dramatized and pseudo-legal way of describing those objectives. They become rights and so legally enforceable only when the social and economic objectives have been actually attained; until that time they are political demands of individuals or groups within the community. Into this class would appear to fall some of the proposed additional Articles—Article II (1) and possibly Article 19 (1).

<sup>9</sup> Physical mutilation and torture can never be justified; the plea that they may be used, for example, to obtain information of vital importance to the community can be shown to be specious. Some medical or scientific experimentation may of course be quite harmless, and it is partly for this reason that the Commission decided to consult the W.H.O.

<sup>10</sup> This Article seems both unnecessary and obscure. Under English law all human beings are legal persons though they may differ in their legal capacity: thus peers, lunatics, bankrupts, felons, minors, and others have various legal disabilities, but they are none the less legal persons. Further, there seems to be some overlap with Article 20 (1). Finally, the expression "a person before the law" is obscure; does it mean legal person or does it refer to the right of access to the courts?

<sup>11</sup> Article 4(2): "No derogation from Articles. . . can be made under this provision," allows this principle. It is an interesting question whether certain of these rights are exclusively human, or are not also enjoyed by animals. Animals do have in some countries certain legal protection.

<sup>12</sup> There is of course room for argument whether particular rights fall into the first or second class. For example, the United Kingdom representative on the Human Rights Commission suggested that Article 5 should be included among the provisions to which Article 4(2) applied. Article 5 will be discussed below.

We may summarize this brief review by saying that the Covenant has to do with certain basic rights, enjoyed by all human beings as such, which are or should be legally enforceable; with other rights, which are normally legally enforceable but are subject to restriction at the will of the community in special circumstances;<sup>13</sup> and finally with certain so called rights, which are rather political demands, which have an appropriate place in the Human Rights Declaration but not in the Covenant, which is a legal instrument.

Let us now look at Articles 5<sup>14</sup> and 9 a little more closely. In some ways the rights set out in these Articles lie behind all the others, for if these are denied or abused, there is little hope for continued enjoyment of the rest. The prime issue in Article 5 is, of course, whether the Human Rights Covenant should go forward to outlaw capital punishment. Opinion in the United Kingdom is sharply divided; a bill presented recently in Parliament, which would have abolished the death penalty<sup>15</sup> for an experimental period of five years, was passed in the House of Commons upon a "free" vote, the Government having expressed itself against the measure; but it was rejected by the House of Lords, where a great weight of judicial authority<sup>16</sup> was brought to bear against it. A compromise measure also failed of adoption in either House. The United Kingdom would not therefore be able at the present time to subscribe to an international agreement which obliged it to dispense with the death penalty. Certain other countries take the same position.

Failure to reach agreement on the abolition of capital punishment has led the drafters of the Covenant, perhaps understandably, to distort Article 5. Apart from the first paragraph, the Article is entirely concerned with the death penalty and ignores the exceptions which must be made to the principle established in the first paragraph; this principle is far too broadly stated.<sup>17</sup> In England there are several kinds of homicide. Two are permissible on grounds which there seems no good reason to abandon: homicide is deemed to be justifiable where it is done in self-defense<sup>18</sup> or in the advancement of public justice;<sup>19</sup> it is excusable where it is done

<sup>13</sup> In several Articles the Covenant itself defines these circumstances and the restrictions which may be imposed.

<sup>14</sup> The drafting is faulty. The notion of intention should be added to the first paragraph, which is a pallid legalistic statement of the tremendous command: Thou shalt not kill. Further, the first paragraph is flatly contradicted by the second.

<sup>15</sup> The offences for which sentence of death may be pronounced in England are murder; piracy on the high seas; treason; and certain other criminal offenses tainted with treason, such as arson of a naval dockyard.

<sup>16</sup> Lord Simon (former Lord Chancellor) and Lord Goddard (present Lord Chief Justice of England) led the attack upon the Bill.

<sup>17</sup> At its third session in June 1948 the Human Rights Commission proposed a better draft: "No one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law." Here again the element of intention was left out, but to the draft article were to be added a number of limitations on the principle, which are discussed below.

<sup>18</sup> This includes defense of one's immediate family, but the means of defense must not be disproportionate to the attack.

<sup>19</sup> If *necessary* for the arrest of a felon, suppressing a riot, or preventing a violent crime. Where, in 1804, a person dressed up as a ghost and was shot dead, the slayer was convicted of murder on the ground that to masquerade as a ghost is not a crime of violence but only the misdemeanor of nuisance.

by misadventure, that is, where the act causing the death is itself lawful and is not negligent, and the death is not intended. At the third session of the Human Rights Commission the United States representative suggested two further exceptions to the principle: a killing by surgical operation in the absence of gross negligence or malpractice, and a killing which is an act of war. The first exception is clearly a case of what would in England be called excusable homicide, but the second, which was also proposed by the United Kingdom representative at the fifth session of the Human Rights Commission,<sup>20</sup> is a grave exception to introduce into the Covenant, for many people might consider war as itself the greatest of all violations of human rights.

Nevertheless, if Article 5 is to be internally consistent and to express a right falling into the second class described above, then some or all of these exceptions must be written into the Article as limitations upon the principle.

There is much confusion in Article 9, caused perhaps by lack of agreement in the Commission on the real purpose of the Article. Paragraphs 1 and 2 overlap and are to some degree alternative ways of saying the same thing; and there is too much procedural detail, paragraphs 1 and 5 being the core of the Article and sufficient in themselves.<sup>21</sup> On the first point it may be argued that the word "arbitrary" is adequate to express the central idea of the Article, if it is interpreted as meaning "not subject to independent review." It is not sufficient that the process of arrest or detention should be in accordance with the law, for the law itself may be oppressive, or enacted by a bad government or a corrupt legislature; and it will be oppressive if it does not provide that everyone, whether he be a servant of the state or a private citizen, who arrests or detains another, shall justify that act before an independent body and preferably a court of law; here "independent" means, on the one hand, disinterested, and, on the other, capable of reversing the act of arrest or detention, both elements being essential. Now if "arbitrary" means all of this, then, it is submitted, paragraphs 1 and 5 would together make a satisfactory article, the first paragraph stating the principle and the fifth its application.

The second paragraph goes off on a different tack. It uses the notion of deprivation of liberty, which seems to embrace both arrest and detention and also such conditions as "house arrest" or confinement to a particular town or region.<sup>22</sup> But the defect of the paragraph has already been noted; the grounds and procedure "established by law" may be no protection at all.<sup>23</sup> This of all rights is the one that must

<sup>20</sup> The United Kingdom representative proposed that "deaths resulting from lawful acts of war" should not be regarded as a derogation from Article 5 for the purposes of Article 4.

<sup>21</sup> There are other minor defects. The expression "other officer authorised by law to exercise judicial power," if not tautologous with "judge," might have sinister implications. Further, the word "enforceable" in paragraph 6 adds nothing though it is perhaps a subconscious admission by the drafters that some of the rights in the Covenant are not enforceable.

<sup>22</sup> Though paragraph 6, by bad drafting, suggests that deprivation of liberty is equivalent to detention.

<sup>23</sup> It has often been suggested on the Human Rights Commission and in the General Assembly that particular Articles should operate "subject to the laws of the State concerned." If accepted systematically, such amendments would destroy the Covenant.

be set out most clearly; it is the great bulwark against tyranny and oppression, for if it is breached all other rights are gone, and every country has known centuries of bitter struggle around it. It is precisely because the state is the most likely author of wrongful arrest and detention<sup>24</sup> and may bend the laws its way, that we must rely not only upon the law as it is, but also upon the principle that everyone who deprives another of his liberty shall be called upon to justify it.

## IV

While the formulation of the rights which are to be protected by the Covenant presents great difficulties, its implementation presents greater; in fact, it is *the* problem of the Covenant. A little thought will show that implementation means two things: first, the execution of the Covenant, and second, its enforcement. A state, party to the Covenant, will have executed it when that state has brought the Covenant into force throughout its territories and ensured that its system of law recognizes and protects the rights set out in the substantial part of the Covenant. The enforcement of the Covenant is the bringing home to any state-party its failures to fulfill its obligations thereunder. Some confusion has been caused where these two senses of implementation are not distinguished; for example, some of the proposals for implementation placed before the Human Rights Commission<sup>25</sup> are concerned only with enforcement and overlook execution, while the Soviet observations<sup>26</sup> seem to treat the two as one and the same process. We will now consider them in turn.

## V

Closer attention shows that the execution of a covenant of this kind involves two steps: bringing municipal law into line with the Covenant where there is divergence; and formally acceding to or ratifying the Covenant under Article 23. Which step must be taken first? Article 2, adopted provisionally by the Commission, allows a state to become a party to the Covenant upon a mere promise to take the first step.<sup>27</sup>

<sup>24</sup> Instances of arrest and detention by private individuals are in comparison insignificant.

<sup>25</sup> REPORT OF THE FIFTH SESSION OF THE HUMAN RIGHTS COMMISSION, ANNEX III (E/1371).

<sup>26</sup> *Id.* at 78: The Soviet representative, having studied the drafts and proposals placed before the Commission, said: "All these drafts and proposals interpret implementation to mean *not a system of measures for ensuring that human rights are implemented and guaranteed* in every country by the State and society, but rather, a system of international methods of pressure to be exercised through special organs established for this purpose (*e.g.*, an international court, international committee or a United Nations public prosecutor, etc.) and intended to *force individual states to take particular steps connected with execution of the Convention on Human Rights*. It is clear therefore that such 'implementation' may become a means of interfering in the internal affairs of a State party to the Convention. . ."

Two comments may be made on this statement: (a) if a State becomes a party to the Covenant, it will or should legally have already taken "particular steps connected with its execution" so far as its municipal law does not already recognize and protect Covenant rights, but only so far; of course it cannot be forced to become a party to the Covenant; (b) if however by "particular steps" the Soviet representative meant steps to remedy a breach of the obligations assumed by a State under the covenant, it is difficult to know what he meant by "a system of measures for ensuring, etc."; if this is to be internal to the State, then the Covenant would cease to have any international purpose or function.

<sup>27</sup> ". . . each State undertakes in accordance with its constitutional processes and in accordance with provisions of this Covenant, to adopt within a reasonable time such legislative or other measures to give effect to the rights defined in this Covenant." Compare the earlier draft by the Commission con-

This procedure greatly weakens the Covenant; it means that a state may acquire credit at home and abroad by becoming a party to the Covenant but without being compelled to take any steps to give effect to it until that state sees fit to do so; and it would make enforcement of particular rights often difficult if not impossible. The United Kingdom has always taken the position that no state should become a party to the Covenant, by ratification or accession, until the constitutional process is complete by which its municipal law is, where necessary, brought into line. This would no doubt delay—perhaps very considerably—the entry into force of the Covenant, at least on a wide basis; on the other hand, there are a number of countries such as those in Western Europe and the members of the Commonwealth, in which the law and practice relating to human rights is homogeneous enough to make possible early participation in the Covenant. In any case, a slow but firm growth of the Human Rights Covenant is to be far preferred to the swift conclusion of an empty pact.

Another question arises on execution. If a state becomes a party to the Covenant, to which of the state's territories does it apply? In the case of unitary states this is simply answered; but in the case of federal states and states having dependent territories in the form of colonies, protectorates, or trust territories, it is not so simple, and the draft Covenant propounds various solutions to be considered by governments.<sup>28</sup> The problem is this: in federal states power is distributed between the federal government and the component states, and whether the federal government can execute such an international agreement as the Covenant depends upon whether all the matters dealt with by the Covenant are within its competence or are reserved by the constitution to the states. The relationship of the United Kingdom to its dependent territories<sup>29</sup> is not very different. Many of its dependent territories are virtually self-governing, except in matters of foreign policy and defense, and it is a

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tained in United Nations Document E/800 which calls for "a solemn declaration . . . that full and complete effect to the provisions of Part II of the Covenant is or *is about to be* given by the law" of the acceding State.

<sup>28</sup> See Articles 24 and 25. YEARBOOK OF THE UNITED NATIONS 834 (Dept. of Public Information, Lake Success, N. Y. 1947).

<sup>29</sup> A short note on the composition of the Commonwealth may be useful at this point. The Commonwealth consists of Australia, Canada, Ceylon, India, New Zealand, Pakistan, South Africa, and the United Kingdom and its dependent territories. All members of the Commonwealth, except the dependent territories of the United Kingdom, are independent sovereign States and as such are all, except Ceylon, members of the United Nations. (Ceylon's admission to the United Nations has been approved by the majority of the Security Council by nine votes to two, but as the Soviet Union was one of the two opposed her vote barred Ceylon's admission); they are in no way subordinate to one another, but are freely associated, recognizing King George VI as "Head of the Commonwealth." This title means that he is not necessarily King of each of its parts; for example, in Canada he appoints the Governor General to be his representative and to perform the same functions in relation to the Government of Canada as the King himself does in relation to the Government of the United Kingdom. We have therefore His Majesty's Government in the U.K., His Majesty's Government in Canada, and so on; however, India does not acknowledge him as King of India, and though a continuing member of the Commonwealth she is formally a republic.

The dependent territories of the United Kingdom are, as their name implies, entirely distinct from the members of the Commonwealth already described; they comprise over fifty colonies and protectorates at various stages on the road to independence.

very long time indeed since the United Kingdom Government gave directions to the governments of such territories or overruled their decisions. In fact, the practice of consulting the governments of the dependent territories before an international agreement is concluded on their behalf or made applicable to them, has been consistently followed for a generation or more and may be now fairly described as a convention of the constitution. This practice is reflected in international agreements by the insertion of a clause known as a "colonial application clause," which provides that the agreement shall not be applicable in the dependent territories of a participating state until the state gives due notice to that effect.

The Soviet representative for the Human Rights Commission opposed the insertion of a colonial application clause in this form in the Covenant, arguing that the recognition and protection of human rights in colonies, protectorates, and trust territories cannot conceivably be denied and that they should be enforced in these territories, above all, as soon as possible. This is at first sight an attractive argument, but it rests on misconceptions. First, it assumes that the state concerned will use the clause to delay or even prevent the application of the Covenant to its dependent territories. As far as concerns the United Kingdom, the opposite is the case; as soon as consultation has taken place and the government of each territory has made its own decision to participate, the United Kingdom will put in train the process of accession on behalf of that territory. This is demonstrated by the fact that the dependent territories of the United Kingdom are at the present time participating widely in all manner of international agreements and international organizations, far more widely indeed than the territories forming the Soviet Union; and it is odd that the Soviet Union does not extend to its own territories the benefits of international agreements which it so vehemently demands on behalf of colonial territories.

Second, the argument assumes that, if something is good for a dependent territory, then the metropolitan government must force it down the territory's throat. But such a practice would strike at the very root of the self-government growing in the dependent territories; if these territories are capable of self-government, they are capable of choosing the good where they see it.

The United Kingdom would therefore require the insertion in the Covenant of a colonial application clause.<sup>30</sup> On the other hand, it would have great difficulty in accepting the federal application clauses in the forms suggested by the Commission on page 42 of its report.<sup>31</sup> The essential flaws in these drafts are that not only do they leave the application of the Covenant in the discretion of the federal government,<sup>32</sup> but also since in some federal states only the courts can determine whether

<sup>30</sup> For texts in the draft Covenant, see E/1371, page 44. That proposed by the United States expresses the principle very well. It will be noticed that those proposed by the Soviet Union and the Philippines provide the exact opposite, namely, that the Covenant shall apply to the dependent territories of a State *ipso facto* upon that State becoming a party to the Covenant. Compare a similar provision in Article 37 of the French proposals for implementation (E/1371 at p. 73).

<sup>31</sup> E/1371.

<sup>32</sup> Since it would be bound by particular provisions of the Covenant only to the extent that it regards them as "appropriate, under its constitutional system, for federal action"; there is nothing here to exclude political considerations from its decision.



or not a given course of action is within the federal power, uncertainty would reign for a long time as to what provisions of the Covenant applied and in what parts of the federal state. Under the colonial application clause this uncertainty cannot arise since, once the Covenant has been extended to a dependent territory, it applies *in toto* and without qualification. While a federal state cannot be required to override the wishes or powers of its constituent states or provinces, the obligations it assumes under such an instrument as the Covenant must be precise, known to the other contracting parties, and not more or less burdensome than those assumed by them.

## VI

By whom are human rights to be enforced? To this crucial problem there are two possible solutions and upon which is chosen depends the *mode* of enforcement.

The first solution would leave the enforcement of human rights to states and in particular to the states parties to the Human Rights Covenant. This would be adequate in cases where the national of one state suffers a denial of human rights in another state; but these cases are already covered by existing rules of international law concerning claims. It would not be adequate where the nationals of a state suffer a denial of human rights within that state; and it is mainly to protect these rights that the Declaration laid down its standards and the Covenant seeks to impose obligations. States on friendly terms or in close political association will be unwilling to use any machinery, which may be set up under the Covenant, to protect the rights of each other's nationals; they would fear that "good relations" might be compromised. On the other hand, the machinery would be likely to be often used between states engaged in political warfare; in the Declaration and the Covenant are many propaganda weapons ready to hand, as United Nations debates have already shown, and it would be utterly retrograde and demoralizing for human rights to be thus abused. Finally, it is wrong to derive the recognition and protection of human rights from a compact between states, and to render their denial irremediable unless a breach of the Covenant can be shown. If the purpose of the Covenant is to enforce certain parts of the Declaration, then the undertakings by the states parties to the Covenant are to that extent unilateral; they do not or should not require consideration in the form of identical contractual undertakings by the other parties to the Covenant. There is no reason then, in principle, why states not parties to the Covenant should not rely upon it to protect human rights against those states which are.

The second solution would allow individuals to make claims against states parties to the Covenant. These might take the form of individual petitions, or of claims on behalf of individuals or groups by organized societies. Lauterpacht, with characteristic learning and idealism, has demonstrated that the days are over when only states could be regarded as the subjects of the law of nations.<sup>33</sup> Many fissures and faults can now be found in this monolithic principle, and human rights will

<sup>33</sup> Lauterpacht, *The Subjects of the Law of Nations*, 64 L. Q. REV. 97 (1948).

perhaps be the field in which it will be finally demolished. The draft Covenant may be still primitive, and efforts at enforcement may for a long time meet with every kind of difficulty and obstruction; but the transfer to the international plane of rights, which have so far been national and domestic, can mean only one thing, that every man<sup>34</sup> has two fatherlands, his own and the world community, and to the latter he may look for protection. So at some time, late or soon, the right of individual petition must come.

We can now consider, in the light of these two possible solutions, some of the modes of enforcement of the Human Rights Covenant which have been suggested. It is interesting to look first at the proposal for a European Court of Human Rights made at the Congress of Europe at The Hague.<sup>35</sup> Now the countries of Western Europe, being familiar with the principles of freedom and the rule of law, and being further few in number and culturally similar, should find it easier to conclude among themselves a covenant of human rights which would be not merely an interstate compact but also an act of international legislation. Yet the draft convention is disappointing. The International Executive Committee, which prepared it, concluded that "since it is obviously impossible to define with legal precision the human rights which it is desired to protect, the Court will necessarily have to build up for itself a system of international case law." In consequence, Part I of the Convention makes no attempt to formulate exactly, on the lines of the Human Rights Covenant, the rights which are to be recognized and protected,<sup>36</sup> and contains a clause<sup>37</sup> of general exceptions, which though smooth and easy to draft, has dodged the great and critical difficulties which the need to provide for exceptions raises.

Part II of the draft Convention would establish a "European Human Rights Commission" of seven members "independent of any government," and a "European Court of Human Rights" of nine members "chosen from among persons of high moral and professional character." Infringements of Part I of the Convention may be brought before these bodies only by states parties to the Convention. The Commission has the task of supervising generally the operation of the Convention, may

<sup>34</sup> This means, of course man, woman, and child. It has been observed that the Covenant is not very carefully drawn to take account of the differences between children and adults and their respective rights. But the United Nations is giving separate attention to the formulation of the rights of children.

<sup>35</sup> This Congress established the Council of Europe, which had its first meeting at Strasbourg in August, 1949. The Congress proposed, amongst other things, that a Charter of Human Rights should be prepared and that a European Court should be established to enforce these rights; but the subsequent Declaration of Human Rights by the United Nations General Assembly made a separate European Charter superfluous, and the International Executive Committee (of the Council of Europe) confined its work on human rights to a draft convention to create a European Court of Human Rights.

<sup>36</sup> Thus Article 1 provides: "Every State adhering hereto shall assure to its citizens the rights set out in the universal Declaration of Human Rights proclaimed by the United Nations"; the drafters here overlook the essential differences between the Declaration and the Covenant.

<sup>37</sup> Article 2 (ii): "The rights specified in Article 1 shall be subject only to such limitations as are in conformity with the general principles of law recognized by civilized nations and as are prescribed by law for:

- (a) protecting the legal rights of others;
- (b) meeting the just requirements of morality, public order (including the safety of the community), and the general welfare."

conduct inquiries, and may publish its findings. It is responsible to the Council of Europe, which would apparently stand in the same relation to the European Court of Human Rights<sup>38</sup> as the Security Council does, under the United Nations Charter, to the International Court of Justice. Such a scheme would give vast powers to the Court of Human Rights; if it were to hand down broad interpretations of Article 2(ii) favourable to states, then little progress would be made at all; strict interpretations might on the other hand involve gross interference by the Court with domestic legislation, which it might declare inconsistent with human rights. Proud though the United Kingdom may be of its case law, it is inconceivable that its Parliament would accept a convention which would require it to abdicate some of its essential legislative functions in favor of a Court of nine judges engaged in constructing a system of international case law.

The Human Rights Commission did not at its fifth session come out in favor of any one mode of enforcement of the Covenant but embodied in Annex III of its report a number of proposals: a draft statute of an International Court of Human Rights, modeled on that of the International Court of Justice;<sup>39</sup> a scheme<sup>40</sup> for a special commission on human rights, with extensive functions, including that of hearing "petitions submitted by any of the States parties to the Covenant, a non-governmental organization, or a private person, or a group of private persons"; and the establishment of a United Nations "panel" from which Human Rights Committees might be selected to hear complaints between states parties to the Human Rights Covenant.<sup>41</sup>

The only sanction which such committees or commissions can wield is that of publicity. This is not to be despised as a weapon of enforcement, since most countries would be unready to face an unfavorable report upon the position of human rights in their territories; nevertheless some countries would not be deterred, and, in any case, publicity is no substitute for legal enforcement, which must remain the goal. The proper tribunal for the enforcement of human rights is the International Court of Justice; its judges have all the qualifications which the various proposals demand of the members of human rights committees or commissions; it has a well-founded tradition and a wide jurisdiction; it has authority to establish chambers for the hearing of special cases, and none would be more adaptable than those concerning human rights; finally, employment of the Court would avoid the further proliferation of committees.<sup>42</sup> The International Court of Justice would, of course,

<sup>38</sup> Article 14: "In the event of failure to comply with a recommendation of the Commission or a judgment of the Court, the matter may be brought before the Council of Europe, and the Council of Europe after any further investigation and after calling upon the party concerned to comply, shall, in the event of continued non-compliance, decide upon such measures as may be appropriate."

<sup>39</sup> Submitted by Australia: E/1731, page 61.

<sup>40</sup> Submitted by France: *id.* at 70. A similar but more succinct scheme was proposed by India, *id.* at 77, and a less radical scheme by Guatemala, *id.* at 75.

<sup>41</sup> Joint proposal of the United States and United Kingdom: *id.* at 80.

<sup>42</sup> It is at least doubtful whether suitable people could be found to serve on human rights committees or to have their names inscribed on the panel contemplated in the U. S.-U. K. proposal. Indi-

be competent to hear only cases between states and in the first instance between states parties to the Human Rights Covenant. This is a serious disadvantage for the reasons already given. It is not practicable at the present time to attempt amendment of the Statute of the Court to permit access to it by individuals, and the best alternative is that the Court should give judgment on cases arising between states upon breaches of the Human Rights Covenant and so declare or formulate the rules of international law to be applied; the International Law Commission might take up the task here and codify these rules. Upon this groundwork, a Human Rights Commission of the United Nations could then be established to hear individual petitions direct.<sup>43</sup>

## VII

The third question, how far the promotion by the United Nations of the observance of human rights<sup>44</sup> may cause conflict with the rule that the United Nations may not intervene in matters which are "essentially within the domestic jurisdiction" of States,<sup>45</sup> has already been answered in part. It is also interesting to notice the attitude of the General Assembly at its third session to this question. In discussion of two items placed on the Assembly's agenda—the treatment of Indians in South Africa, and the trial and conviction of religious leaders in Hungary and Bulgaria—it was argued that the General Assembly was by reason of Article 2(7) not competent to take action or even discuss<sup>46</sup> these items. It is not necessary to consider here the arguments on each side, but what is significant is that the General Assembly proceeded to discuss these items without either referring the question of its competence under Article 2(7) to the International Court of Justice for an advisory opinion, which was surely the proper course, or making any express decision on that question. The implication is that the United Nations will not allow itself to

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individuals of the calibre required are not likely to be ready to go at short notice to United Nations headquarters or some other place abroad, there to remain perhaps for months hearing and determining human rights cases.

<sup>43</sup> The receivability of individual petitions would have to be rather carefully defined and the following tentative rules are suggested. Indeed rules on these lines might well be embodied in the Human Rights Covenant to govern the reference of breaches of it to the International Court of Justice:

(a) no petition should be receivable until the State against which complaint is made has had an opportunity to comment upon it;

(b) each petition must allege a specific breach of the Covenant and must show that all *national* means of redress have been exhausted;

(c) petitions may not impugn the judgments of competent national courts, nor the application in particular cases of national legislation; but they may impugn as contrary to the Covenant the law applied in either case;

(d) petitions should not normally be receivable from anonymous sources.

Other rules might be prescribed but these appear to be basic.

<sup>44</sup> As required by Article 55(c) of the United Nations Charter. *YEARBOOK OF THE UNITED NATIONS* 1946-1947 837 (Dept. of Public Information, Lake Success, N. Y. 1947).

<sup>45</sup> Article 2(7) of the United Nations Charter. *Id.* at 831.

<sup>46</sup> Is *discussion* of a particular subject matter in the General Assembly or other organs of the United Nations intervention within the meaning of Article 2 (7)? The effect of United Nations debates in forming public opinion suggests that it is.

be easily diverted by Article 2(7) from what it conceives to be its duty in enforcing the Charter.<sup>47</sup>

How far the Human Rights Covenant would of itself remove human rights from domestic jurisdiction on to the international plane is not entirely clear;<sup>48</sup> but, since it is plainly the purpose of the Covenant to give international protection to those rights, it would be difficult for any state party to the Covenant to plead Article 2(7) if a case involving human rights were urged against that state in the General Assembly, whether or not the case came within the ambit of the Covenant.

### VIII

The following conclusions may now be drawn:

(1) The substance of the draft Covenant is at present ineffective in that it does not properly distinguish those rights which are truly fundamental and inalienable or are legally enforceable from those which represent political or social demands; further, Articles 5 and 9 which, from a practical point of view are the core of the Covenant, are in their present form imprecise and inadequate.

(2) At the present time it seems that the enforcement of the Covenant must be left to states, and, if this is done, the International Court of Justice is the proper tribunal to hear and determine cases arising on the Covenant; at the same time the ground should be prepared for individual petitions.

<sup>47</sup> The rather similar attitude of the Security Council in the Indonesian Case to the Netherlands plea that, under Article 2(7), the situation in Indonesia was essentially within its domestic jurisdiction, suggests that that paragraph may well be already a dead letter where human rights or national aspirations are in issue.

<sup>48</sup> The advisory opinion of the Permanent Court of International Justice on the Tunis Nationality Decrees is not a conclusive authority on the point; for then the Court was interpreting the provisions of the League Covenant and declared that any matter which has been made the subject of an international agreement cannot be regarded as being any longer "*solely* within the domestic jurisdiction." The Court's reasoning would not necessarily apply in interpreting Article 2(7) which concerns itself with matters "essentially within the domestic jurisdiction" of states.