LAWRENCE J. LeBLANC

THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

MARTINUS NIJHOFF THE HAGUE

THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

by

LAWRENCE J. LEBLANC

MARTINUS NIJHOFF—THE HAGUE—1977

ISBN 978-94-011-8695-7 ISBN 978-94-011-9514-0 (eBook)
DOI 10.1007/978-94-011-9514-0

CONTENTS

LIST OF FIGURES AND TABLES

PREFACE

This book is a product of my long-standing interest in international action on human rights, an interest which I developed as a graduate student and which I have maintained as a teacher and researcher. I am indebted to Professor Vernon Van Dyke of the University of Iowa for stimulating my interest in the subject and for guiding the preparation of my Ph.D. thesis, of which this book is a greatly revised and expanded version. I should also like to express my appreciation to Professor A. Glenn Mower, Jr., of Hanover College, and to my colleague Glenn N. Schram, both of whom read the thesis and made many helpful suggestions when I began to revise it for publication. The book is improved as a result of their efforts, though I alone remain responsible for any errors of fact or interpretation.

Most of the research on the book was done at the Columbus Memorial Library of the OAS in Washington, D.C., and I am grateful to the librarians there for kind and efficient assistance. The Marquette University Committee on Research provided me with a research grant for the summer of 1974 and supplementary grants in 1975 and 1976 which facilitated the completion of the manuscript; I am grateful for this assistance. I have endeavored to include all material available to me as of the end of March, 1976.

I should like to thank Mary Scopp and Peggy Schaus for their expert secretarial assistance. Finally, I should like to express my appreciation to my wife, Mary, without whose help I would never have been able to complete the manuscript. This book is fondly dedicated to her.

Milwaukee, Wisconsin

CHAPTER ONE

INTRODUCTION

International action to protect what we today call "human rights" has occurred through the centuries. Agitation to suppress the slave trade, for example, dates back to the seventeenth century—though it was not until the nineteenth and twentieth centuries that treaties were adopted to suppress the traffic and ultimately to abolish slavery itself. During the same period conventions on the law of war were adopted and laid down rules on such matters as the treatment of prisoners of war and civilian populations. Peace treaties concluded at the close of World War I as well as various provisions of the Covenant of the League of Nations had implications for the treatment of minorities. Immediately after World War I the International Labor Organization was created; and it has devoted itself to reducing hours of work, ensuring health and safety standards, promoting collective bargaining, and other programs for workers.

These as well as other developments prior to World War II were to have important implications for human welfare. Moreover, they led to an alteration of the conception of international law held by some international lawyers. As Evan Luard has observed, "Nearly all nineteenth-century lawyers, whether or not they followed positivist doctrines ..., would have denied that governments were under any special obligations concerning the treatment of their own subjects within their own jurisdiction". In the 1920's and 1930's however, "the opinion of some international lawyers changed on this point. It began to be held that individuals, as well as states, were the subjects of international law".[1] Nevertheless, such measures as were adopted on human rights prior to World War II, as the examples cited above suggest, were adopted sporadically and usually were directed towards the elimination of specific practices such as slavery and maltreatment of minorities. It is mainly since World War II that efforts have been made to provide comprehensive protection to *all* individuals against *all* forms of injustice.

[1] Evan Luard (ed.), *The International Protection of Human Rights* (New York: Frederick A. Praeger, 1967), p. 20. See generally the essay by Luard, "The Origins of International Concern Over Human Rights," pp. 7–21.

Interest in providing comprehensive protection to all persons in all nations in the post World War II period was stimulated by the disregard for human rights by Nazi and Fascist regimes. Atrocities committed under those regimes demonstrated that governments which disregard the rights of their own citizens are not likely to treat the citizens of other states differently; more broadly, they led many to see a relationship between respect for human rights and peace. This relationship was stressed in various wartime declarations and proposals. The Atlantic Charter, for example, expressed the hope that the destruction of Nazism would make it possible for all nations to exist in peace with one another, and that all peoples within all nations would be able to live their lives in freedom from fear and want. These aspirations were incorporated in the United Nations Declaration of January, 1942. In addition, the Dumbarton Oaks proposals on the United Nations anticipated a role for the organization in the promotion of respect for human rights; the drafters of the Charter followed through by listing the promotion of respect for human rights among the purposes and principles of the United Nations in Article 1 (3). Article 55 of the Charter goes further to state that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, language or religion." In Article 56, "all members [of the United Nations] 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 drafters of the charters of the major regional international governmental organizations created at the close of World War II also manifested an interest in taking action on behalf of human rights. Article 3 of the Statute of the Council of Europe establishes respect for human rights as a condition of membership, providing in part that "Every Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . . ." Numerous references to human rights were included in the Charter of the Organization of American States (OAS), including one (Article 13 of the original Charter; Article 16 of the revised Charter) which provides that "Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality."

The states who have ratified the United Nations Charter, the Charter of the OAS, or the Statute of the Council of Europe have, by virtue of provisions such as those discussed above, recognized that human rights are a matter of international concern and have assumed international obligations on them. But the obligations are vague; nowhere do these instruments clearly identify the rights which are to be promoted or respected. It was for this reason that those who advocated international action on human rights pressed hard in the post-war years for the adoption of declarations, covenants, and conventions

which would give greater meaning to obligations already assumed, or would create new, more meaningful obligations.

Many have been adopted. The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. In the ensuing years it has adopted, and thus opened for ratification, numerous conventions and covenants, some of which deal with specific subjects such as racism and the rights of women, and two of which, adopted in 1966, are of a more general nature: the International Covenant on Civil and Political Rights (and an Optional Protocol to it), and the International Covenant on Economic, Social, and Cultural Rights. In 1950 the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, and it has since been ratified by the great majority of member states and has entered into force. The European Social Charter, which has also entered into force, affirms a group of rights commonly referred to as economic, social, and cultural rights. In 1948 the American states adopted the American Declaration of the Rights and Duties of Man; in 1969 the American Convention on Human Rights was adopted and thus opened for ratification by member states of the OAS.

Numerous international human rights agencies have also been created, though they differ from each other in terms of their structure, functions, and the degree of independence and objectivity with which they have performed their tasks. Examples include the United Nations Commission on Human Rights created by the Economic and Social Council in 1946; the European Commission and Court of Human Rights which function as organs of implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms; and the Inter-American Commission on Human Rights (IACHR), created by resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. (To these one could add a number of well known non-governmental organizations which have been active in the field of human rights, e.g., the International Commission of Jurists and Amnesty International.) Still others might be created. The International Covenant on Civil and Political Rights, if it enters into force, would lead to the creation of a Human Rights Committee; a commission and a court would function as organs of implementation of the American Convention on Human Rights if it enters into force.

International action on human rights is thus not confined to either the global or regional levels of international relations. Instead, there has occurred a broad attack in defense of human rights on both levels, with the activities of various agencies in the United Nations, the Council of Europe, and the OAS complementing, reinforcing, and sometimes conflicting with one another. These activities could have important implications for human welfare. They also raise important foreign policy questions for states. Is it enough to declare human rights a matter of international concern and to proclaim the rights

which ought to be respected, or should extensive obligations, such as those embodied in conventions and covenants, be assumed? To what extent should measures be taken to hold other states accountable to internationally proclaimed or affirmed human rights standards? Should resolutions condemning their human rights policies and practices be supported? Should they be denied trade rights or foreign aid if they fail to live up to those standards? Should cooperation be extended to international human rights agencies in the conduct of investigations? Should the right to petition such agencies be established? If so, should it be granted to individuals? To groups and associations? To states?

These questions have not all required urgent attention, but when they have arisen they have frequently led to considerable controversy. A recent case in point in the United States was the proposed Jackson Amendment to the United States-Soviet trade pact, an amendment which proposed to condition granting the Soviet Union most-favored-nation status on its willingness to permit Jewish emigration; the argument here was that the restrictions on emigration violated international human rights standards. The amendment was not adopted, but the United States exerted diplomatic pressure on the Soviet Union to at least relax restrictions on emigration. More recently, the Ford Administration has expressed its displeasure with human rights violations in Chile, though whether it will take any actions in this case, for example, to deny military aid to the Chilean junta or to support a resolution in the OAS condemning the violations, is yet to be seen. Many members of the United States Congress have recently called upon the administration to deny military aid to states whose human rights policies and practices do not conform to internationally proclaimed human rights standards. All indications are that human rights issues are likely to become more, not less, important in the future.

This is not to say that the human rights movement has not encountered serious difficulties and obstacles. To the contrary, numerous issues and problems arose in drafting the various declarations, covenants, and conventions identified above, and others have arisen or are likely to arise in undertaking efforts to secure adherence to their provisions. Scholarly interest in these issues and problems—in how they have been resolved, and in how they have affected or are likely to affect international action on human rights—has increased in recent years. More research has been done on the activities of the United Nations and the Council of Europe than of the OAS. This book deals with how the issues and problems have been resolved and with how they have affected or are likely to affect OAS action in the field of human rights.

The questions to be dealt with in this book fall into three main categories. The first category of questions concerns inter-American obligations on human rights: What obligations on human rights have the American states assumed by ratifying the OAS Charter? Is the American Declaration of the

Rights and Duties of Man legally binding? What obligations on human rights would a party to the American Convention on Human Rights assume, and what are the prospects for its entry into force?

The second category concerns the broad question, what are human rights? Specifically, what are proclaimed as human rights by the American states? What is the relative importance of the newer body of economic, social, and cultural rights as opposed to the traditional civil and political rights?

The third category of questions concerns the Inter-American Commission on Human Rights. Various agencies and commissions of the OAS have been and are concerned with matters in one way or another related to human rights. The Inter-American Commission on Human Rights is, however, the only organ of the OAS explicitly charged with "promoting respect" for human rights. What considerations gave rise to the creation of the Commission? What issues and problems arose in drafting its statute, and how were they resolved? How, and how well, has it been able to fulfill its mandate?

The questions which concern inter-American obligations on human rights are dealt with in Chapter 2. "What are Human Rights?" is the subject of Chapter 3. Chapter 4 traces the origins of the IACHR, and deals with a large number of issues and problems related to its organization which arose when its statute was drafted. The activities the Commission has engaged in to "promote" and "protect" human rights are discussed in Chapters 5 and 6 respectively. Chapter 7 is the conclusion.

CHAPTER TWO

INTER-AMERICAN OBLIGATIONS ON HUMAN RIGHTS

The questions raised in this chapter concern existing and proposed inter-American obligations in the field of human rights. What obligations on human rights have the American states assumed by ratifying the OAS Charter? Is the American Declaration of the Rights and Duties of Man legally binding? If not, what is its status? What obligations would a party to the American Convention on Human Rights assume, and what are the prospects for its entry into force?

I. THE OAS CHARTER

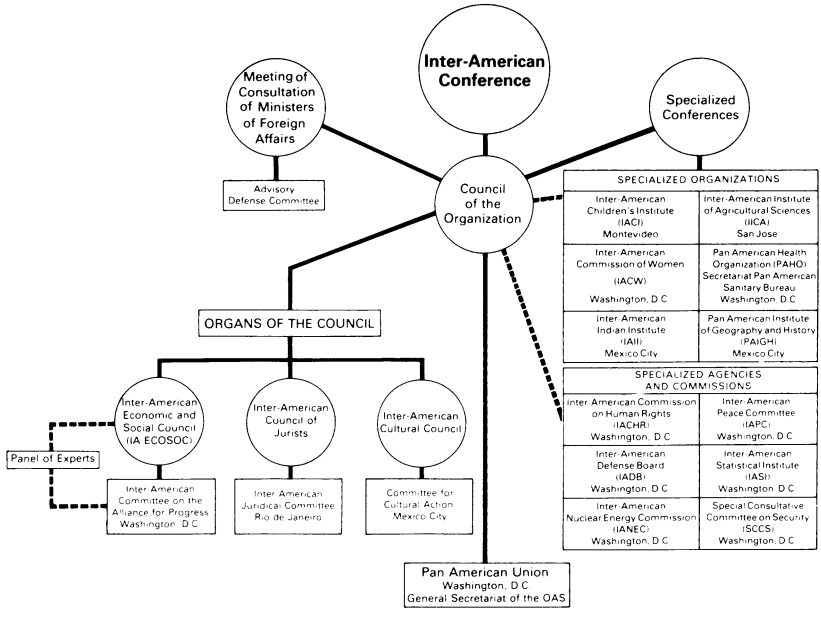
The OAS Charter was adopted at the Ninth International Conference of American States in 1948 and entered into force when two-thirds of the signatory states had deposited their instruments of ratification (December, 1951). It has since been amended in accordance with the Protocol of Buenos Aires, which was adopted at the Third Special Inter-American Conference held at Buenos Aires, Argentina, in 1967, and entered into force in 1970. Figures 2.1 and 2.2 reflect the structure of the OAS as it was from 1951 to 1970, and as it has been since the Protocol of Buenos Aires entered into force.

Membership in the OAS is open to all the states of the western hemisphere, and 25 of them have ratified its charter. Only 24 of these could be considered active member states, however, since Cuba has been excluded from participation since 1962, an event which we shall discuss shortly.

The Charter may be considered the basic constitutional document of the Organization of American States inasmuch as it grants and defines the functions and powers of the Organization.[1] Its statements and provisions on human rights can for our purposes be divided into two categories: those, such as the principles of the Organization, which refer to human rights in a general way; and those, such as the chapters on economic, social, and cultural stan-

[1] Two other principal treaties of the inter-American system are the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), adopted in 1947, and the Inter-American Treaty on Pacific Settlement (Pact of Bogotá), adopted in 1948. For an exhaustive study of the original and revised OAS Charters see Margaret Ball, *The OAS in Transition* (Durham: Duke University Press, 1969).

Figure 2.2 Structure of the Organization of American States (1970–Present).



Source: OAS, Annual Report of the Secretary General, 1967.

dards, which aim to establish obligations in those specific fields. We are concerned at this point only with those provisions of the Charter which fall into the first category; several parts of the chapters on economic, social, and cultural standards are discussed in Chapter 3.

A. The Charter and Respect for Human Rights

Among the principles of the OAS "reaffirmed" by the drafters of the Charter in Article 5 (now Article 3) is the following:

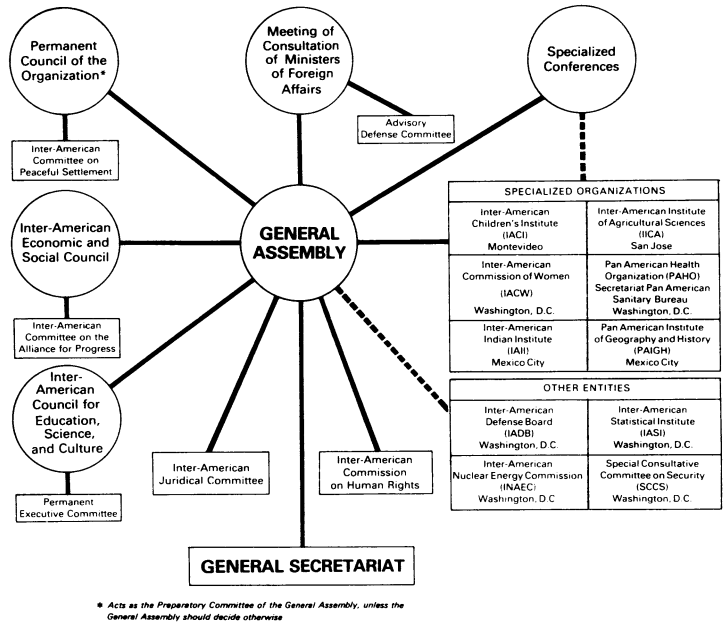
j The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex;

A related principle also reaffirmed in the same article is:

d The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy;

The use of the word "reaffirm" at the beginning of Article 5 was intended by the drafters of the Charter to emphasize that they were thereby merely

Figure 2.2 Structure of the Organization of American States (1970–Present).



Source: OAS, Annual Report of the Secretary General, 1967.

reiterating principles which had already been affirmed in various resolutions and declarations adopted at previous inter-American conferences and meetings.

In addition, Article 13 of Chapter III (Fundamental Rights and Duties of States) of the original Charter (now Chapter IV, Article 16) stated:

Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

What obligations on human rights have the American states assumed by ratifying a treaty which contains provisions such as those cited above? The question has been raised by many who have written on the Charter. There is widespread agreement that Article 16 does create a legal norm. As Thomas and Thomas have stated:

It can be demonstrated that the final sentence of Article [16] establishes a legal duty on the part of the states. Grammatically speaking, "shall" when used in the third person expresses an obligation, a command. If the authors of Article [16] had desired to express simple futurity, the article would have read "the state will . . ." The word "shall" is here equivalent to the word "must." It is imperative, not merely directory. Consequently Article [16] can be interpreted to declare that each state has a legal

right to develop its own way of existence, but in so doing it has the legal duty to respect the rights of individuals.[2]

So far as the references to human rights and representative democracy among the principles of the OAS are concerned, however, there have been differences of opinion. Some have argued that the principles "merely proclaim general aspects of inter-American conduct and are not to be considered as legally binding norms. They are broad policy expressions upon which legal norms may be constructed in the future."[3] Others have taken a somewhat different stand. Thomas and Thomas, for example, have argued that the "Charter is a legal instrument, and, to the extent that it creates obligations, these obligations are intended to have legal force," although the "creation of such obligations is largely dependent upon the wording" used.[4] They interpret the language of Article 3 (j) as being merely declaratory, that is, non-binding language. Nevertheless, the same idea expressed in Article 3 (j) is repeated elsewhere in the Charter, in Article 16, and there it does create a legal norm.[5] Yet another view was expressed on the principles by the Inter-American Juridical Committee (IAJC) in an opinion dated 1960. The Committee asserted that the chapter on principles establishes as much a legal obligation as any other part of the Charter.[6]

Whichever interpretation is correct—and there is much to be said for the one advanced by Thomas and Thomas—two problems remain. First, Articles 5 and 13 of the original Charter did not identify the human rights to which they made reference. In fact, nowhere else in the Charter were the rights identified. This raises the questions whether the American Declaration of the Rights and Duties of Man, also adopted at the Ninth International Conference of American States in 1948, was intended to constitute an authoritative list of the rights to which Articles 5 and 13 referred, and, if not, whether it has since acquired the force of customary law on the subject. We shall return to these questions in the second main section of this chapter.

The second problem concerns more specifically the enforcement of the obligations assumed under either Article 5 or 13 of the original Charter, or under both of them together. Stated somewhat differently, the question is whether the OAS or its members could take enforcement measures against a member state who fails to respect human rights. The question was put to the Inter-American Juridical Committee as regards the related principle of representative democracy in Article 5 (d), and its conclusions are worthy of attention. The Committee asserted that "there is not only a possible, there is a

[2] Ann Van Wynen Thomas and A. J. Thomas, Jr., *The Organization of American States* (Dallas: Southern Methodist University Press, 1963), p. 223.

[3] *Ibid.*, p. 142.

[4] *Ibid.*, 142–143.

[5] *Ibid.*, p. 143.

[6] Inter-American Juridical Committee, *Study of the Juridical Relationship Between Respect for Human Rights and the Exercise of Democracy* (Pan American Union: Washington, D.C., May, 1960), pp. 13–14.

clear, relationship between respect for human rights and the effective exercise of democracy. A democratic regime must necessarily be based upon certain essential rights and freedoms."[7] The Committee also asserted that the American states had on repeated occasions proclaimed human rights as a matter of international concern, citing the American Declaration of the Rights and Duties of Man, Articles 5 and 13 of the original Charter, the preamble of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and other instruments, regional and world-wide in scope. Nevertheless, as regards the question of whether the OAS had any competence to "sanction in any way a member state whose political regime [did] not completely correspond to the ideal design of representative democracy," the Committee had this to say:

> The Juridical Committee feels that it would be in vain to search in the Charter of the Organization for any such competence, and it believes that it may be excused from giving a detailed basis for this interpretation through the perfectly simple but very prolix review that would have to be made of the attributes assigned to each of the organs of the Organization by its constitutional Charter. In any case, and especially in so serious a matter as this, one cannot speak of implicit faculties; they should be stated expressly.
>
> Of course, the inter-American system does not lack sanctions, but those that it authorizes, which in no case may go beyond the limits of legitimate defense, cannot be taken except in cases in which the peace and security of the Hemisphere is involved, in the situation foreseen in the Inter-American Treaty of Reciprocal Assistance. The American governments have not desired, so far, to go beyond this: and even in these cases, when a dispute arises between American states, there must first be, under Article 7 of the Rio Treaty, what has accurately been called pacifying consultation and what could also be called fraternal correction, before collective measures to be taken against the aggressor as a last resort are agreed upon.[8]

In taking this position the Juridical Committee rejected "*ad cautelam* and most energetically any inference" that it was "denying legal value to the principles that guide" the OAS.[9] To the contrary, the Committee asserted that the chapter of the Charter which lists the principles of the Organization establishes a legal obligation just as does any other part of the Charter. Nevertheless, it advanced an interesting interpretation of Article 5 (d) in particular, namely, that it meant that "the solidarity of the American states will never actually be as complete as [the] term [implied] unless it is based on the effective exercise of representative democracy, since in the long run, cordial and fruitful relationships can exist only among States in which both human rights and basic freedoms are respected equally."[10] The same reasoning was to be applied to the other principles listed in Article 5—as "governing law" of the OAS they would be "strengthened or weakened in exact proportion to the degree to which" they are respected or violated. Under each heading alone,

[7] *Ibid.*, p. 2.
[8] *Ibid.*, p. 10.
[9] *Ibid.*, pp. 13–14.
[10] *Ibid.*

the Charter would not authorize collective action for enforcement; a failure to respect human rights, for example, would also have to result in a threat to the peace of the hemisphere.[11]

B. The Principle of "Non-Intervention"

Greatly complicating enforcement of respect for human rights, and implicit in the opinion of the IAJC cited above, is another of the "fundamental rights and duties of states" affirmed in the OAS Charter. Article 15 of the original Charter (Article 18 of the revised Charter) affirmed the principle of "non-intervention":

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

That this principle and the one affirming a need to respect human rights (Article 16) conflict is evident. Whenever a choice has had to be made between the two, the American states have placed more emphasis on the principle of "non-intervention." The choice of a form of government has historically been assumed to be a matter of internal concern. Dictatorships have thus had a right to exist—but they have not had a right to intervene in the internal affairs of other states. Should they do so, collective sanctions could be imposed, as they were in 1959–1960 against Trujillo's dictatorship in the Dominican Republic.[12] Nevertheless, dictatorships, such as that which existed in the Dominican Republic, have not thusfar been deprived of their right to participate in OAS activities, even if they flagrantly violated the principles of the Charter. There would, of course, be no reason to expel a genuine democracy from the Organization, since by definition they are in compliance with the avowed principles. However, the same rule of adherence to the principle of "non-intervention" has traditionally applied to democracies as well: they could not take action against a dictatorship in order to overthrow it. Should they do so, they are apparently also subject to the application of sanctions.

A communist dictatorship is presumably to be treated differently. The Cuban case is the most celebrated one. In that case the American states went on record (by a bare two-thirds majority vote) resolving that Marxism-Leninism is incompatible with the principles of the inter-American system, and that any government which identifies itself as Marxist-Leninist *excludes itself* from participation in the inter-American system.[13] The Castro *govern-*

[11] *Ibid.*

[12] For a general discussion of this problem see Thomas and Thomas, *The Organization of American States*, Chapter XIV.

[13] *Ibid.*, pp. 236–239; pp. 58–60.

ment was thus excluded (officially, excluded itself) from participation in the OAS in 1962. The *state* of Cuba, however, remains to this day a member state of the OAS, and, by implication, bound by the provisions of the Charter. As we shall see in Chapter 6, the Inter-American Commission on Human Rights has used this argument (with no success) in attempting to secure information about as well as the release of political prisoners in Cuban jails.

The application of the rule of self-exclusion to Cuba but not to other dictatorships equally as offensive raises a question of how evenhanded the American states are (or could be) in demanding that all the member states of the OAS live up to its principles. To be sure, there is abundant evidence that gross violations of human rights have occurred in Cuba. But they have occurred in a number of other American states at one time or another under control of dictators, e.g., Trujillo in the Dominican Republic and Duvalier in Haiti, and none of them was deprived of their right to participate in OAS activities. Nor was the rule of self-exclusion applied to Chile when Allende was in power, despite the fact that he was an avowed Marxist.

In sum, then, by ratifying the OAS Charter the member states have assumed an obligation to respect human rights. It is doubtful whether this obligation was expected to be taken seriously, however, in view of the all-embracing provision on "non-intervention" inserted in the Charter. As José Cabranes has stated the case, there is no evidence to support the view that the promotion of human rights was to be a "goal value" of the OAS; and a rigid interpretation of the principle of "non-intervention" in the internal affairs of states was to be, at least for the first decade of the Organization's existence, a major stumbling block to taking any effective measures on behalf of human rights.[14] The principle continues to plague the Organization's human rights effort, but actions taken since 1959 suggest that it has declined in importance. The crisis in the Caribbean area in 1959 which led to the adoption of sanctions against Trujillo's dictatorship in the Dominican Republic also led to the creation of the Inter-American Commission on Human Rights. The Commission was initially established as a special commission of the OAS and charged merely with "promoting" respect for human rights. As we shall discuss fully in Chapters 4, 5, and 6, it has since been elevated to the status of an "organ" of the OAS by amendment of the Charter in 1970, and even before then its competence had been expanded to include the "protection" of human rights. Moreover, at the same time that the Commission was established, a declaration on the attributes of a democratic state (the Declaration of Santiago) was adopted; and the Inter-American Council of Jurists was called upon to draft a convention on human rights, a decision which culminated in the adoption of the American Convention on Human Rights in 1969. These actions suggest that the vague provisions of the Charter as regards respect for human rights

[14] José Cabranes, "Human Rights and Non-Intervention in the Inter-American System," *Michigan Law Review* (Vol. 65, No. 5), March, 1967, 1147–1182.

have become the foundations upon which to build a more effective role for the OAS in the field of human rights.

II. THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The American Declaration of the Rights and Duties of Man went through various drafting stages before it was adopted in its present form at the Ninth International Conference of American States in 1948. The first two drafts of the Declaration were prepared by the Inter-American Juridical Committee, which had been charged with the task by resolution (Resolution XL) of the Inter-American Conference on Problems of War and Peace, held in Mexico in February-March, 1945. Delegations from several American states (Cuba, Mexico, Uruguay, and Brazil) in attendance at the Conference presented proposals on a declaration of the "rights of man," and Resolution XI, which assigned the task of drafting the Declaration to the IAJC, was based on these proposals. Accordingly, the Committee completed the first draft in December, 1945, and transmitted it to the governments of the American states for their comments and observations:[15] it then prepared the second draft in time for the Ninth International Conference in 1948.[16] The second draft was revised further in a committee of the Conference before it was adopted in a plenary session.

A. Is the Declaration Binding?

The Declaration was not adopted as a legally binding inter-American instrument on human rights. While this decision was formally made at the Ninth International Conference of American States in 1948, the legislative history of the Declaration clearly reveals that it was made even before the Conference convened.

It will be recalled that the IAJC was called upon to prepare a draft of the Declaration by Resolution XL of the Inter-American Conference on Problems of War and Peace held in 1945. In this resolution, the American states also proclaimed their "adherence . . . to the principles established by international law for safeguarding the essential rights of man" and declared their "support of a system of international protection" of those rights. In fact, the resolution stated that the Declaration was ultimately to be considered for adoption as a convention by the American states.[17] In addition, in another

[15] For the first draft, see Pan American Union, Inter-American Juridical Committee, *Draft Declaration of the International Rights and Duties of Man and Accompanying Report,* Washington, D.C., March, 1946. (Hereafter cited as *First Draft of the Declaration.*)

[16] For the second draft, see Pan American Union, Inter-American Juridical Committee, *Project of Declaration of the International Rights and Duties of Man,* Washington, D.C., 1948. (Hereafter cited as *Second Draft of the Declaration.*)

[17] IAJC, *First Draft of the Declaration,* pp. 13–14.

resolution of the Conference on Problems of War and Peace, Resolution IX, the American states called upon the Governing Board of the Pan American Union to prepare a draft charter for the OAS which was to proclaim "the recognition by the American Republics of international law as a rule of their conduct, together with a pledge to observe the standards set forth in" the Declaration referred to in Resolution XL. According to Resolution IX, the Declaration was "to appear as an annex to the charter, so that, without amending the charter," it could be "revised from time to time according to need."[18] The resolution referred to the proposed declaration as a "definition of the fundamental principles of international law."[19]

The IAJC set to work in 1945 drafting the Declaration on the basis of its interpretation of the two resolutions of the Conference on Problems of War and Peace. The resolutions could, of course, have led to different conclusions. On the one hand, the Declaration could be adopted in "conventional form;" on the other, it could be adopted as an annex to the OAS Charter. The IAJC opted for the "conventional form," though it relied on the provisions of both resolutions in asserting that it was "clear that the enforcement of the provisions" of the Declaration "must form a very intricate part of the national legislation and administration of each separate state."[20] It recognized that "under present conditions ... the obligations assumed under such a Declaration must be carried out by the organs of each separate state acting in pursuance of its own constitution."[21] Nevertheless, in "order to ensure the more effective enforcement of the Declaration in accordance with the provisions of domestic law," the Committee suggested "that an article be added to the convention contemplated in Resolution XL of the Mexico City Conference more or less to the following effect:"[22]

> The provisions of this Declaration shall be a part of the law of each individual state, to be respected and enforced by the administrative and judicial authorities in the same manner as all other laws of the state.
>
> The provisions of this Declaration shall not be abrogated or modified except in accordance with the terms of an inter-American Agreement or an agreement of the United Nations binding upon the American States.

The IAJC in fact included this article (as Article XX) in its first draft of the Declaration. In addition, it "ventured to suggest" that an inter-American Consultative Commission on Human Rights with "advisory functions in respect to the protection of fundamental rights within each state" also be created.[23] We shall return to the proposed Consultative Commission in Chapter 4.

[18] *Ibid.*, p. 58.
[19] *Ibid.*
[20] *Ibid.*, p. 59.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

The IAJC's rationale for proposing the article on the incorporation of the Declaration into the domestic law of each state was stated in its report which accompanied the first draft of the Declaration.

> While the rules of international law constitute a direct obligation for all states, . . . the relation of these rules to the domestic law of the individual state is a matter for separate adjustment by each state in accordance with its national constitution. In some states international law becomes automatically part of the law of the land, so that the national courts must give effect to it in the same manner in which they give effect to the acts of the national legislature. In other states a special act of the national legislature may be necessary to bring the rule of international law into effect. In either case, however, the rule of international law, once it has come into effect, is of paramount obligation, and no state may plead the provisions of its national constitution or laws as an excuse for failure to carry it out. Attention may be called here to Resolution XIII of the Conference on Problems of War and Peace, in which the need is proclaimed for all states to strive toward the incorporation of the essential principles of international law into their constitutions and other municipal law.[24]

The American states took issue with this stand, and when the IAJC prepared the second draft of the Declaration it "agreed to eliminate" the controversial article.[25] The Committee's justification for doing so was curious in light of its earlier comments. It observed that the first part of the article contained a provision which was "obvious, for if [the] Declaration [was] incorporated into a Treaty, it [would become] *ipso facto* the law of each State, without need for the Declaration itself to prescribe it as such."[26] The second part of the article was also "considered unnecessary, since it is a universal principle of law that obligations contracted by agreement of the parties cannot be abrogated except by another agreement."[27]

The second draft of the Declaration was assigned to a committee of the Ninth International Conference of American States for study and revision, and there the question of whether it should be adopted as a treaty was raised again. In fact, the two principal options identified earlier were discussed: first, whether the Declaration should be adopted as an annex to the OAS Charter, as envisioned in Resolution IX of the Inter-American Conference on Problems of War and Peace; or second, whether it should be adopted as a separate treaty and opened for ratification by the American states, as envisioned in Resolution XL. The first option was rejected by a vote of six in favor, 10 against, and one abstention.[28] The second option was rejected by a vote of eight in favor and 12 against.[29] It was then decided by a vote of 12 in favor and two against that the Declaration should be adopted as a simple

[24] *Ibid.*, pp. 58–59.

[25] IAJC, *Second Draft of the Declaration*, p. 12 of the "Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man."

[26] *Ibid.*

[27] *Ibid.*

[28] Ninth International Conference of American States, *Acta* (Comision VI, 3ª. Sesion, Doc. CB-287-c, c. VI-13), April 21, 1948, p. 4.

[29] *Ibid.*

declaration of the Conference, with Columbia and Guatemala, who favored a treaty, explaining that they preferred the adoption of a simple declaration over nothing at all.[30]

Since the Declaration was adopted as a simple declaration it did not, of course, establish a contractually binding obligation. Furthermore, the terms of the resolution in which the Declaration was embodied suggest that the Declaration did not proclaim rights already recognized by international law. In part, the resolution states that the "international protection of the rights of man *should* be the principal guide of an *evolving* American law;" and that the "affirmation of essential human rights . . . together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they would increasingly strengthen that system in the international field as conditions become more favorable." (emphasis added)

It should also be emphasized that no case whatsoever could be made that the Declaration constitutes (or was intended to constitute) an authoritative list of the "fundamental rights of the individual," respect of which was proclaimed as a principle of the OAS in Article 5 (j) (now Article 3) of the Charter. So that no such interpretation might subsequently be made, it was specifically agreed at the Ninth International Conference that the Declaration did not constitute such a list. For its part, the United States went further and inserted in the record of the Conference a statement to the effect that it did not consider Article 5 (j) of the Charter to refer to "*any other* specific document on the subject."[31] (emphasis added)

What accounted for the emasculation of the IAJC's drafts of the Declaration? Why should the American states adopt resolutions in 1945 which gave the impression they intended to establish an international obligation in the field of human rights, then, in 1948, adopt instead a simple declaration? The reasons are not hard to find. The American states met in 1945 amidst international chaos brought on by World War II, and atrocities of the nature committed by the Hitler regime were fresh in everyone's mind. In the wake of such atrocities, it was natural that the American states should resolve to commit themselves to take such measures as would prevent their recurrence. Making states accountable internationally for the ways in which they treated their own citizens, traditionally a matter of domestic concern, was thought to be one way of accomplishing this objective. Indeed, this view was rather widespread during World War II. The IAJC, for example, in commenting on the factors which it thought contributed to the breakdown of international law and order prior to World War II suggested to the American

[30] *Ibid.*, pp. 4–5.

[31] U.S., Department of State, *Ninth International Conference of American States: Report of the Delegation of the United States with Related Documents*, Washington, D.C., 1948, p. 36.

states in a report in 1942 that one way in which a "fanatical spirit of nationalism was able to make its propaganda of racial supremacy effective [was] by shutting off the sources of public information through a rigorous censorship of the press and a government monopoly of broadcasting."[32] In this way, the Committee argued, the "very wells of thought were poisoned," and "political leaders who were promoting false theories of nationalism were able to strengthen their hold upon the loyalty of the people thus deceived as to the true attitude of other countries."[33] Among the social factors contributing to the breakdown of law and order, the IAJC "pointed out the relation between economic insecurity and the susceptibility of a people to propaganda in favor of the use of force as a means of remedying a desperate situation when other less drastic remedies appeared inadequate."[34] Similar attitudes on the relationship between respect for human rights and peace were expressed in other international documents of the period. The Atlantic Charter of 1941 and the United Nations Declaration of 1942 made references to human rights and fundamental freedoms. The Dumbarton Oaks Proposals of 1944 called for the creation of a general international organization for the maintenance of peace and security (the United Nations), and the promotion of respect for human rights was to be one of its tasks. Several Latin American states were to work, unsuccessfully, for the adoption of an international human rights declaration as an annex to the United Nations Charter.

It was against this background that the American states were to adopt resolutions pertaining to human rights at the Inter-American Conference on Problems of War and Peace in 1945. By 1948, however, the emergence of the Cold War was beginning to frustrate efforts to take meaningful international action on human rights at the global level. Among the American states, a preoccupation with the principle of "non-intervention" in the internal affairs of states—a preoccupation not totally unjustified in view of their historic relations with the United States—further complicated matters. Under such conditions, the best that could be achieved was the adoption of a simple declaration. Political conditions were not yet right for the adoption of a convention.

B. The Status of the Declaration

Since the Declaration was not adopted in conventional form, and since it was not considered declaratory of existing inter-American law on human rights, what is its status? Specifically, has it come to acquire the force of *customary* inter-American law on human rights? The question is important, for custom is as much a source (or evidence) of international law as is a treaty. The

[32] IAJC, *First Draft of the Declaration,* pp. 14–15.
[33] *Ibid.*, p. 15.
[34] *Ibid.*

answer to the question, however, is more difficult to arrive at. Customary law is derived from the practices of states, whereas treaties are either ratified or not ratified; and to ascertain the practices of a large group of states on a particular issue is difficult. It is even more difficult to say precisely at what point customary law is established. The debate which has occurred over the status of the Universal Declaration of Human Rights adopted by the United Nations in 1948 illustrates the problem; various points-of-view have been expressed on the issue.[35]

In the case of the American Declaration, it seems clear that it has not since its adoption acquired the force of customary law. It is specifically referred to in Article 2 of the statute of the Inter-American Commission on Human Rights, which reads as follows:

> For the purpose of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man.

This provision should not be understood to mean, however, that the Declaration thereby acquired a legally binding character which it did not previously have. To be sure, the Commission, as we shall see in Chapter 6, has argued that the member states of the OAS are obliged to respond to its inquiries concerning alleged human rights violations, and many of them do. But this does not necessarily mean that the member states recognize the Declaration as being a source of law: they may respond because they recognize that it is a statement of ideals which they should respect; because they would prefer to avoid publicity which would shed an unfavorable light on their human rights practices; or because they recognize that the Commission *is* an organ of the OAS which virtually all of them voted to create, and that it is endowed by its statute with the competence to make such inquiries.

It thus seems clear that the Declaration has not, since its adoption, acquired the force of customary law. It has nevertheless become a document of great importance, of moral force. It has sometimes been referred to as a "sacred" instrument of ideals which the member states of the OAS should respect. It is clearly the most important inter-American instrument on human rights. Individuals, groups, and associations may petition the IACHR concerning alleged violations of the provisions of the Declaration; and the Commission has, as we shall see in more detail in Chapter 6, on occasions "presumed confirmed," or judged "confirmed," such allegations. Nevertheless, there has been a widely recognized need for a convention on human rights.

III. THE AMERICAN CONVENTION ON HUMAN RIGHTS

Interest in the adoption of an inter-American convention on human rights

[35] For a summary of different positions on the matter see Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970), pp. 120–125.

dates back to 1945. It was anticipated, as noted above, that the declaration drafted by the Inter-American Juridical Committee in keeping with Resolution XL of the Inter-American Conference on Problems of War and Peace would eventually be adopted as a convention. This was not done at the Ninth International Conference of American States in 1948, however, and the matter was dropped. The next time the possibility of adopting a convention was discussed was at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. The Meeting was convened to consider serious disturbances in the Caribbean area which involved the Dominican Republic, Cuba, and Venezuela—disturbances which demonstrated to some the close relationship which exists between peace in the hemisphere and respect for human rights. Accordingly, the foreign ministers unanimously adopted Resolution VIII (Part I), which called upon the Inter-American Council of Jurists (IACJ) to prepare a convention on the protection of human rights.

The IACJ prepared its draft convention before the end of 1959: in addition, the governments of two states, Chile and Uruguay, prepared draft conventions for the consideration of the American states. These conventions were placed on the agenda of the Second Special Inter-American Conference in 1965. Action on them was postponed, the view being that the Inter-American Commission on Human Rights should study them and present its opinions on them to the OAS Council: ultimately, an inter-American specialized conference on human rights was to be convened in order that a convention could be adopted.[36]

The IACHR devoted much of its time between 1965 and 1968 to comparative analyses of the draft conventions, the International Covenants on Human Rights adopted by the United Nations General Assembly in 1966, and the European Convention on Human Rights and the European Social Charter. At the conclusion of its work, the Commission prepared a draft convention which was in turn adopted by the OAS Council as the "working draft" for the Inter-American Specialized Conference on Human Rights. The "working draft" reflected insight the Commission had gained from its studies as well as from its experience in dealing with human rights matters between 1960 and 1968.[37] The Commission had also solicited the views and advice of the American states and other interested parties: some responded, the length and substance of their comments depending on their interest in the conclusion of a convention.

A. The Inter-American Specialized Conference on Human Rights

The Inter-American Specialized Conference on Human Rights was held at San José, Costa Rica, from November 7 to 22, 1969. Delegations from 19 of

[36] IACHR, *The Inter-American Commission on Human Rights: Its Powers, Functions, and Activities* (OEA/Ser. L/V/II.22, Doc. 9 (English)), August, 1969, pp. 24–25.

[37] *Ibid.*, pp. 27–28.

the then 23 active member states of the OAS attended the Conference; Barbados, Bolivia, Haiti, and Jamaica did not send delegations. In addition, the Conference was attended by observers from several non-member states, including Canada and Israel, and several experts on human rights invited by the OAS, including René Cassin, principal author of the Universal Declaration on Human Rights adopted by the United Nations in 1948, and Mr. Arthur Robertson, long active in the human rights movement of the Council of Europe.

The Conference was organized into two principal committees: Committee I dealt with the substantive articles of the Convention; Committee II dealt with the articles pertaining to organs of implementation as well as with various miscellaneous articles. Each committee established "working groups" as the need arose to work out particularly difficult and complex problems. Their proposals were in turn subject to the approval of the respective committees. According to the regulations of the Conference, a majority vote (10) of all the delegations in attendance was required for the adoption of an article. Amendments were freely introduced in committee as well as in plenary session. Many of the articles of the Convention were adopted by narrow majority votes, although the Convention as a whole was adopted at the final plenary session by the affirmative vote of delegations from 18 of the states in attendance (Peru abstained).[38]

B. Legal Effect of Ratification

Article 2 of the Convention provides:

> Where the exercise of any of the rights or freedoms referred to in Article 1 [The civil and political rights affirmed in the Convention] is not already ensured by legislation 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 article aims to clarify the legal effect of ratification of the Convention. It was *not*, it should be emphasized, included in the "working draft" of the Convention prepared by the IACHR, mainly because the Commission was concerned that such an article might confuse rather than clarify the legal effect of ratification. In most American states treaties are incorporated into domestic law by virtue of ratification, and the Commission was concerned that if an article such as Article 2 were adopted, a state party might argue that it was not obligated to "respect one or more rights defined in the Conven-

[38] The Convention may be found in IACHR, *Handbook of Existing Rules Pertaining to Human Rights* (OEA/Ser. L/V/II.23, Doc. 21 (English) Rev.), December, 1970.

tion but not covered by domestic legislation," that it "would be so obliged only after passage of a special law on such right or rights."[39]

However, several American states, particularly Chile, Ecuador, Guatemala, and the United States, argued strongly for the adoption of an article such as Article 2, though for different reasons. Chile, for example, pointed out that while it was true that treaties are incorporated into the domestic law of the American states by virtue of ratification, it was "nonetheless certain that in certain instances it [would] be necessary to adopt measures of a domestic nature to give effect to the rights" affirmed in the Convention, "particularly in those cases" in which the Convention itself so indicated.[40] Various articles of the "working draft" of the Convention (subsequently adopted) provided that the "law shall regulate" the exercise of the rights in question. Thus, Chile maintained that the "argument that [the] inclusion [of Article 2 in the Convention] might warrant an allegation by a State that it was not obligated to respect one or more rights not contemplated in its domestic legislation [was] not supported by the terms" of the draft; "and it [was] even less likely to find support if the scope of the Convention [were] expressly established at the" Inter-American Specialized Conference on Human Rights.[41]

The United States, also favoring the adoption of Article 2, inserted a statement on what it understood the article to mean in the record of the Inter-American Specialized Conference on Human Rights. According to the United States, the article would permit states who ratify the Convention an option *either* to make its substantive provisions "effective *ipso facto* as domestic law . . ." *or* "to rely solely on domestic law to implement the articles of the treaty." So far as the United States was concerned, it understood Article 2 as authorizing it to follow the latter course. In other words, if the United States should ratify the Convention it would be able to "apply, where appropriate," its constitution, legislation, court decisions, and administrative practices in "carrying out its obligations" under the Convention; it would also be able to adopt any additional necessary legislation. In short, the United States interpreted all the substantive articles of the Convention as being "non-self-executing."[42]

In view of the fact that different interpretations of Article 2 are possible, its practical implications have been the subject of some debate among those who have written on the Convention. Thomas Buergenthal, for example, is highly critical of the article. He suggests that it may have a "pervasive detrimental"

[39] IACHR, *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights and the Draft Inter-American Convention on Human Rights* (OEA/Ser. L/V/II.19, Doc. 18 (English)), 1968, p. 26.

[40] Inter-American Specialized Conference on Human Rights, *Observations of the Governments of the Member States on the Draft Inter-American Convention on Protection of Human Rights: Chile* (OEA/Ser. K/XVI/1.1, Doc. 7), November, 1969, p. 1. (Documents of this Conference hereafter cited as IASCHR, title, document number, and page.)

[41] *Ibid.*

[42] IASCHR, *Acta de la segunda sesion plenaria (resumida)*, Doc. 86, p. 5.

effect on the implementation of the Convention, because in all states that apply the non-self-executing doctrine "the attempt to invoke 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 legislation envisaged by Article 2, an individual can derive no rights directly from the Convention."[43] If his interpretation is correct, the Convention would have no "significant impact on the day-to-day administration of justice even in those American countries that might eventually ratify it."[44] Buergenthal doubts that many "domestic courts would accept [the] proposition" that Article 2 established an obligation to enact legislation.[45] Donald Fox takes a different stand. He maintains that if a "non-self-executing provision [was] necessary to gain adherence to the [Convention] of states like the United States," it was a price that had to be paid.[46]

It is not yet clear whether Article 2 will have a pervasive detrimental effect on the implementation of the Convention. Perhaps parties to it will consider themselves bound in good faith to adopt whatever legislation is necessary. Even if they do not, in view of the positions taken on the matter by Chile and the United States as well as other states, it is clear that, as Fox maintains, a non-self-executing provision was a price that had to be paid.

C. Prospects for the Convention

Although the Convention was adopted by the affirmative vote of representatives of 18 of the member states of the OAS, it was actually signed by representatives of only 12 member states. Moreover, it has since been ratified by only two member states, Costa Rica and Columbia. These facts alone do not bode well for the Convention's eventual entry into force (ratification by 11 member states is required), especially when one considers that notable among those who have not signed the Convention are the United States, Brazil, Mexico, and Argentina. Signature would not in itself bind the states to observe the provisions of the Convention; it would, nevertheless, tend to indicate agreement in principle with what it provides.

Why has the Convention not attracted more support? There are various reasons. The Convention affirms a very large number of civil and political rights in great detail; it also contains provisions on the creation and competence of a Commission on Human Rights and a Court of Human Rights

[43] Thomas Buergenthal, "Commentary on the American Convention on Human Rights: Illusions and Hopes," *Buffalo Law Review* (Vol. 21, No. 1), 1971, pp. 128–129.

[44] *Ibid.*

[45] *Ibid.*, n. 21.

[46] Donald T. Fox, "Evolution of the American Convention on Human Rights and Prospects for its Ratification by the United States," (unpublished, 1972), p. 21.

which would function as organs of implementation. Although it is a non-self-executing treaty, in view of the fact that many of the substantive articles of the Convention were adopted by very narrow majorities, one might expect that the states who opposed their adoption would now be reluctant to ratify the Convention. To be sure, reservations to specific provisions are permissible, but for some states a very large number of reservations might be perceived as necessary; and experience suggests that the more reservations to a treaty are required the less likely it is to be ratified. Other states might oppose ratifying the Convention in principle. Stated somewhat differently, some states might be willing to proclaim human rights a matter of international concern but be unwilling to ratify a convention on them. This position is unfortunately taken by some American states, such as Mexico, who have had good records on human rights. The United States has also traditionally had a conservative attitude as regards the ratification of human rights instruments, and it has thusfar taken no action which suggests that it would ratify the American Convention on Human Rights. In view of the importance of the United States in the western hemisphere, support for the Convention by the United States is probably crucial, for the United States could not expect Latin American states to assume a conventional obligation on human rights while it does not. Finally, several American states have for some time been under the control of dictatorships of one sort or another, and, given their past records on human rights, it is clear that they are in no position to ratify a convention such as the American Convention on Human Rights.

For all these reasons, prospects that the Convention will enter into force in the foreseeable future are not good, and we shall therefore not deal extensively with its provisions in this study. We might note, however, that, despite the dim prospects for its entry into force, the Convention is not necessarily doomed to languish in the archives of the OAS. Many have worked for years to secure the adoption of a convention which they hoped would be widely ratified by the American states, and they are not likely to relent in their efforts. Moreover, the Convention was adopted by the affirmative vote of a substantial number of American states, and it may therefore be assumed that it reflects the "most accepted doctrine" of the American states on human rights, regardless of whatever shortcomings it might be perceived to have. In fact, much could be done by the presently existing Inter-American Commission on Human Rights to secure respect for various principles affirmed in the Convention. There are signs the Commission has this in mind. In a report it prepared in late 1974 after it conducted a mission to Chile to investigate alleged violations of human rights by the junta which overthrew the government of the late Salvador Allende, the Commission cited Article 27 of the Convention (the Suspension of Guarantees).[47] The Allende government had

[47] IACHR, *Report on the Status of Human Rights in Chile* (OEA/Ser. L/V/II.34, Doc. 21), October, 1974.

not ratified the Convention; the junta was therefore not legally bound by its provisions. Nevertheless, in view of statements made by the junta to the effect that it intended to suspend constitutional guarantees indefinitely, the Commission pointed out that Article 27 of the Convention expressly states that such guarantees may be suspended only for such time as required by the exegencies of the situation; and that even if the Convention is not in force, Article 27 represents the "most accepted doctrine" of the American states on the suspension of constitutional guarantees. The Commission could, of course, invoke numerous other articles of the Convention in the future for the same reason. Should it do so, the Convention could assume considerable importance in future years although it currently lacks the substantial support necessary for its entry into force.

IV. CONCLUSION

The American states have proclaimed human rights a matter of international concern. They have done this in the OAS Charter, and in numerous resolutions, declarations, and treaties. In addition, they have assumed an obligation to respect human rights by ratifying the OAS Charter, but the obligation, at least as embodied in the original Charter, was quite vague: among other things, the Charter did not identify the rights which were to be respected, leaving states essentially free to make their own decisions in this regard; and the principle of "non-intervention" in the internal affairs of states was to virtually preclude any action by the Organization in this field. Actions taken in more recent years, however, give reason for hope. The American Declaration of the Rights and Duties of Man, though not adopted as a legally binding instrument, has acquired considerable importance; and the creation of the Inter-American Commission on Human Rights in 1959, and its elevation to the status of an organ of the OAS by amendment of the Charter in 1970, have given greater meaning to the obligations embodied in the Charter.

It has been widely assumed by the American states for many years that only a convention on human rights—one which would be ratified by the great majority of them—could establish meaningful obligations in this field. This is what the American Convention on Human Rights aims to do. It is, however, a non-self-executing treaty. While the prospects that the Convention will enter into force in the near future appear remote, it may be used as a basis upon which to build a customary inter-American human rights law.

CHAPTER THREE

WHAT ARE HUMAN RIGHTS?

There is no universally accepted classification scheme for human rights. It is reasonable to distinguish, however, between two categories of rights: civil and political rights; and economic, social, and cultural rights. The former includes the historic "rights of man", such as the rights to life and liberty; the latter includes a number of rights which have come into prominence in more recent years, such as the rights to work and social security. The American Declaration of the Rights and Duties of Man, which proclaims the human rights which ought to be respected by the American states, makes no formal distinction between the two bodies of rights. However, for reasons which will become apparent, we shall make such a distinction in this chapter.

I. CIVIL AND POLITICAL RIGHTS

The category of civil and political rights includes a large number of rights which have traditionally been considered the "rights of man", for example, the rights to life, liberty, and free expression and dissemination of ideas. The theory underlying these rights was well stated by the Inter-American Juridical Committee when it prepared the first draft of the American Declaration of the Rights and Duties of Man.

> The state is not an end in itself, it is only a means to an end; it is not itself a source of rights but the means by which the inherent rights of the individual person may be made practically effective. Man is, indeed, by his very nature a social being: he finds in the state the opportunity for the development of his moral and material interests: but he does not thereby endow the state with a mystical personality of its own which justifies it in promoting its own power and prestige at the expense of the rights which are fundamental to the maintenance of the dignity and worth of the individual man himself. . . . Not only, therefore, are particular governments bound to respect the fundamental rights of man, but the state itself is without authority to override them. The individual man is the ultimate basis of law, and he may claim his essential rights against the state itself as well as against the particular officers of the government.[1]

Having laid this philosophical base, the Committee proposed numerous ar-

[1] For the first draft of the Declaration see Pan American Union, Inter-American Juridical Committee, *Draft Declaration of the International Rights and Duties of Man and Accompanying Report,* Washington, D.C., March, 1946. Reference here is to p. 21. (Hereafter cited as *First Draft of the Declaration.*)

ticles on civil and political rights for inclusion in the Declaration. Most of the articles were adopted; as we shall see below, however, they were substantially revised before being adopted.

A. The Rights Proclaimed

The articles of the Declaration which proclaim civil and political rights are the following: the rights to life, liberty, and personal security (Article I); the right to equality before the law (Article II); freedom of religion (Article III); freedom of expression (Article IV); the right to participate in government (Article XX); the rights to assembly and association (Articles XXI and XXII); the right to petition the government (Article XXIV); the rights to be free from arbitrary arrest and to a fair trial (Articles XVIII, XXV, and XXVI); the right of every person "to the protection of the law against abusive attacks upon his honor, reputation, and his private and family life" (Article V); the right of every person "to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will" (Article VIII); the right of every person to the inviolability of his home and correspondence (Articles IX and X); and the right to a nationality (Article XIX). Finally, the Declaration proclaims a right to property (Article XXIII), which has traditionally been considered among the historic rights of man, but which in more recent years has either been denied the status of a right or has come to be regarded as falling within the category of economic, social, and cultural rights.

As regards the exercise of these rights, the Declaration expressly states in Article XXVIII that "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." Two other articles proclaim specific duties as regards specific rights, namely: "the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so" (Article XXXII); and "the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien" (Article XXXVIII).

Few would object, at least in principle, to a proclamation that rights such as those identified above are human rights; nor would many take issue with a simultaneous proclamation that the exercise of rights entails duties, particularly a duty to respect the rights of others. Indeed, civil and political rights such as those cited above are affirmed in the constitutions of virtually all states. While one finds widespread agreement in principle on such matters, disagreement occurs when discussion turns to defining the substantive content of the rights. There is also disagreement on the question of whether the rights should be ranked in some order of priority.

B. The Problem of Priority

The problem of priority is one of determining which rights deserve more emphasis, more attention. The problem is a difficult one, for one might argue that all rights are of equal importance, that they should all be respected and that no distinctions should be made among them in terms of their *relative* importance. It is also true that the exercise of one right is often associated in practice with the exercise of another. Thus, it becomes difficult to achieve agreement on the relative importance of particular rights. Nevertheless, the agencies which have been created to deal with human rights matters at the international level, such as the Inter-American Commission on Human Rights, have sometimes been endowed with limited competence, and they have therefore faced the question of which rights should be given greater attention.

The IACHR faced this issue at its First Session in October, 1960. The Commission was created to promote respect for the rights proclaimed in the Declaration. Its statute, as originally adopted, did not specify that certain civil and political rights were worthy of special attention; nor did it stipulate that the Commission was to give more attention to the civil and political rights as a group as opposed to the economic, social, and cultural rights. When the Commission met for its First Session in October, 1960, however, it recognized that it would more likely be able to successfully fulfill its mandate if it focused its attention on a small group of rights of "fundamental" importance.[2] For historical reasons, the Commission felt that civil and political rights should be given priority; and within that group certain rights, such as the rights to life, liberty, and free expression naturally came to mind. Experience further narrowed down the number of rights deserving special attention. Even before the Commission met for its First Session in 1960 it received petitions which alleged the arbitrary arrest and detention of persons, physical and psychological abuse of prisoners, and denials of rights regarding fair trials. Since the Commission was established with very limited competence to deal with abuses of this sort, it felt that it was more important for it to devote most of its attention to seeking to prevent them rather than to concerning itself with whether individuals were denied a right to, say, an education.

The IACHR thus began its work in 1960 determined to secure respect in the American states for the most basic civil and political rights proclaimed in the Declaration. As we shall see in Chapter 6, between 1960 and 1965 the Commission brought pressure to bear on the governments of various American states, particularly Cuba, Haiti, and the Dominican Republic, to secure respect for basic rights and freedoms. Most American states were favorably impressed with the Commission's work and they resolved, at the

[2] IACHR, *Report on the Work Accomplished During its First Session, October 3 to 28, 1960* (OEA/Ser. L/V/II.1, Doc. 32), March, 1961.

Second Special Inter-American Conference in 1965, to amend its statute in order to expand its competence to include the "examination" of petitions it might receive which alleged violations of certain "fundamental" civil and political rights proclaimed in the Declaration. These rights are identified in Article 9 (bis) of the Commission's statute and are the following:[3]

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 of Ideas
Article XVIII	Right to a Fair Trial
Article XXV	Right to Protection from Arbitrary Arrest
Article XXVI	Right to Due Process of Law

While this list does not include some rights which many would consider equally important, it is a fact that, with the exception of the article on religious freedom, it does include those rights which have most frequently been the subject of petitions lodged with the IACHR. They were most probably selected for this reason.

C. The Problem of Definition

The problem of definition is an important problem. It involves defining the substantive content of rights, the claims a person can make against the state as well as the restrictions or limitations which the state might impose on the exercise of the rights. What does it mean, for example, to say that all persons have a right to life? Is the right unqualified? Or could the state impose, say, the death penalty for the commission of certain crimes?

Whether questions such as these should be dealt with in human rights instruments is subject to debate. Some feel the rights should merely be enumerated; others feel the rights should be defined. Each approach has advantages and disadvantages, which have been well summarized by A. H. Robertson. The main advantage of the "enumerative" approach is that it entails only the proclamation or assertion of principles on which agreement might be easier to reach. States might also find it easier to accept international obligations on such principles if they are permitted some discretion in interpreting or defining them. The widely recognized disadvantages of the approach, however, are that some states might subject the principles to abusive interpretation; others might find it difficult to know whether their domestic laws comply with the intended meanings. The "definitional" approach is thus resorted to in an effort to overcome both problems: since it aims to set forth in detail the nature of the obligations assumed, it could generally make possi-

[3] The statute is in IACHR, *Handbook of Existing Rules Pertaining to Human Rights* (OEA/Ser. L/V/II.23, Doc. 23 (English, Rev.), December 17, 1970.

ble more effective implementation. The adoption of this approach, however, is not without disadvantages. As Robertson notes, any "attempt to exhaustive definition always carri[es] with it the danger of unintentional omissions which may later be construed as deliberate exclusions."[4] In such cases protocols or amendments might clarify the issues, but it is sometimes difficult to secure their adoption.

Whatever may be the advantages and disadvantages of either approach, experience suggests that the definitional approach is preferred in drafting conventions and covenants on human rights. It was employed in drafting the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenants on Human Rights adopted by the United Nations, and the American Convention on Human Rights. In contrast, the enumerative approach appears to be preferred in drafting declarations on human rights: it was employed in drafting the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. It should be noted, however, that when the IAJC prepared the first two drafts of the American Declaration, it employed the definitional approach. The draft articles not only affirmed basic principles, they also specified in some detail the permissible limitations or restrictions which states could impose on the exercise of the rights. In response to critical comments by various governments, however, the Committee was forced to make substantive alterations in various articles when it prepared the second draft of the Declaration. In general, the Committee sought to omit details and confine the articles to statements of "fundamental principles."[5] In doing so, the Committee noted that the "simple enunciation of very general standards, which are unanimously accepted in theory without being actually put into effect in practice, would not respond to the generous aspiration of the Pan American Assemblies to guarantee in this Hemisphere the rights and freedoms of the human individual, which are today the true expression of a representative system."[6]

While the IAJC made important concessions in preparing the second draft of the Declaration, the delegates who attended the Ninth International Conference of American States in 1948, where the Declaration was adopted, were not satisfied. They further revised the second draft, omitting even more details. In addition, they agreed to confine the Declaration to a "statement of the rights and duties of individuals," eliminating references to the duties of states, and to include a separate chapter on the "duties of man" which had

[4] A. H. Robertson, *Human Rights in Europe* (Dobbs Ferry, New York: Oceana Publications, Inc., 1963), pp. 17–18.

[5] For the second draft of the Declaration see Pan American Union, Inter-American Juridical Committee, *Project of Declaration of the International Rights and Duties of Man*, Washington, D.C., 1948. (Hereafter cited as *Second Draft of the Declaration.*)

[6] *Ibid.*, 14 of the "Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man."

not appeared in either of the two drafts prepared by the IAJC.[7] In short, the delegates who attended the Ninth International Conference of American States opted for the enumerative, and not the definitional, approach when they adopted the Declaration. The effect of this decision is reflected in the following articles of the Declaration here cited as examples:

Article I	Every human being has the right to life, liberty and the security of his person.
Article III	Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.
Article IV	Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.
Article XXI	Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.
Article XXII	Every person has the right to associate with others to promote, exercise and protect his legitimate interest of a political, economic, religious, social, cultural, professional, labor union or other nature.

These articles proclaim important principles, but they raise more questions than they answer. Must the death penalty be abolished? If not, under what conditions may it be imposed? Is the right to practice a religious faith unqualified? Or can the state establish restrictions on the exercise of this right to uphold, say, public morals? To what extent is a person free to express and disseminate his ideas? Can the state impose restrictions on the exercise of this right in defense of public morals as regards, for example, obscene publications or films? Numerous other questions could be raised, but these are some of the most important ones, and they are frequently the subject of legislation within states.

The articles of the Declaration provide few if any guidelines on questions such as these. In contrast, the articles drafted by the IAJC defined the rights in great detail. Some of the details were highly controversial, although the Committee attempted to harmonize the draft articles with legislation then in force in most of the American states. The draft article on the right to life, for example, affirmed the right "from the moment of conception;" it made allowances for the death penalty, but "only on the ground of conviction of the gravest of crimes."[8] The draft article on freedom of expression stated that the right included freedom "to form and to hold opinions and to give expression to them in private and in public, and to publish them in written or printed form;" to "use whatever means of communication are available;" to have "access to the sources of information, both domestic and foreign;" and to

[7] U.S., Department of State, *Ninth International Conference of American States: Report of the Delegation of the United States with Related Documents,* Washington, D.C., 1948, pp. 80–81.

[8] IAJC, *First Draft of the Declaration,* Article I; *Second Draft of the Declaration,* Article I. The phrase used in the second draft was "crimes of exceptional gravity."

"freedom of the press." It went on to state that the "only limitations which the state may impose" on freedom of expression were "those prescribed by general laws looking to the protection of the public peace against slanderous and libelous defamation of others, and against indecent language or publications, and language or publications directly provocative of violence among the people." It sought to ban censorship of the press "whether by direct or indirect means."[9]

The decision to strip the Declaration of such details, and thus to confine its articles to relatively brief proclamations of principles, was not without practical consequences. The lack of detailed guidelines has left room for substantial discretion in interpreting the provisions of the Declaration by individual states, complicating somewhat international measures to secure respect for its provisions. Nevertheless, the problems of interpretation have not been insurmountable. The IACHR has been pragmatic in attempting to interpret the articles. The Commission has not, for example, concerned itself so much with whether legislation in any particular state permits the imposition of the death penalty for the commission of certain crimes as it has with whether persons are subjected to arbitrary arrest and execution, seeing such practices as clear violations of the right to life. It has taken similarly pragmatic stands in interpreting other articles of the Declaration, recognizing legitimate expectations of states, but insisting on adherence to fundamental principles. Moreover, given the fact that the Declaration was adopted as a simple resolution rather than as a convention, the mere enumeration of the rights was probably more appropriate; it should be recalled in this connection that the IAJC had employed the definitional approach mainly because it anticipated that the Declaration would be adopted in conventional form. The enumeration rather than the definition of the rights thus made the principles proclaimed in the Declaration easier to grasp, and has permitted some desirable flexibility in interpreting them. In any case, the articles on civil and political rights are relatively clear and unequivocal. The same is not true of the articles on economic, social, and cultural rights.

II. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The traditional conception of human rights has been confined mainly to civil and political rights. In more recent years, however, especially since World War II, claims to economic, social, and cultural rights, such as the rights to work, to social security, and to the preservation of one's health and well-being, have been asserted. These rights have provoked a debate different from that which has occurred over civil and political rights. Agreement in principle on most civil and political rights as human rights is widespread; disagreement

[9] IAJC, *First Draft of the Declaration*, Article III; *Second Draft of the Declaration*, Article III.

has occurred—and is likely to continue to occur—primarily over their precise meaning. In the case of economic, social, and cultural rights, however, there has been—and is likely to continue to be—disagreement in principle. Here, questions are raised concerning the authenticity of the rights themselves. Are such rights as the right to work "rights" at all? Or are they "standards" which governments should strive to meet for the *benefit* of their citizens? Is governmental action toward the realization of these "rights" or "standards" imperative or merely desirable?

A. The Philosophy of Economic, Social, and Cultural Rights

The Inter-American Juridical Committee took a stand in favor of the view that economic, social, and cultural rights should be considered human rights when it prepared the first draft of the American Declaration of the Rights and Duties of Man in 1945. The Committee recommended several articles on these rights for inclusion in the Declaration. It justified doing so on the ground that various documents previously adopted by several public and private international organizations reflected a trend toward proclaiming "not only the traditional political rights already recognized in the national constitutions of the great majority of states," but also the newer body of economic and social rights which had "come to be recognized ... *as a necessary inference from the conception of the democratic state as a co-operative commonwealth* seeking the general welfare of all its members."[10] (emphasis added) According to the IAJC, the "theory underlying the newer body of economic and social rights" was the "broad principle of distributive justice." The Committee noted:

> A generation or more ago states had but a limited understanding of the obligation of the community to promote the welfare of its individual citizens. The rights of the individual were rights against the interference of the state, not rights to the active assistance of the state. But within more recent years, it has come to be understood that the individual can not always by his own efforts attain the standards of living adequate to the development of his human personality, [and the] relation between spiritual development and standards of material welfare has come to be more generally recognized. ... Thus the fundamental rights of the individual may be regarded as growing with the growth of civilization, taking on new forms with the newer ideals of social justice.[11]

The committee recognized an important difference between the newer body of rights and the more traditional civil and political rights. It could see no "substantial obstacles" to putting into effect civil and political rights, since they were generally recognized in constitutions and need not "call for any effort on

[10] IAJC, *First Draft of the Declaration*, p. 20.
[11] *Ibid.*, pp. 21–22.

the part of the state which is not already within its reach."[12] Respect for civil and political rights could be achieved largely by non-interference of a state in the normal activities of its people, except where interference might be necessary to protect the rights of one individual against another. In contrast, respect for economic and social rights would call for the *active assistance* "of the state in bringing its material resources to the aid of those . . . unable to enjoy their rights by their own unaided efforts."[13] Consequently, the IAJC did not expect that the "objectives proclaimed by a declaration of rights and duties [could] be attained by the mere passage of social legislation of the most advanced character."[14] Time would be required in all cases before the "ideal of social justice" would be reached. International assistance for those states unable to "raise the social conditions of their people up to the level contemplated" was to be expected.[15]

Despite the difference between the two kinds of rights, and the difficulties involved in implementing the economic, social, and cultural rights in particular, the IAJC was contending that all individuals should be able to make claims against the state with regard to such matters as work and the preservation of their health and well-being. The conception of the democratic state as a "cooperative commonwealth" seeking the general welfare of all its members implied the elevation of matters which had not traditionally been considered rights to the status of "human rights." This position was only beginning to attract support in the immediate post World War II period, and the IAJC's defense of it was undoubtedly quite progressive in the context of the times, but it has in more recent years come to enjoy fairly widespread support. Numerous prominent international and national figures have taken strong stands in favor of expanding the traditional conception of rights to include economic and social rights. Pope John XXIII, for example, deduced a host of economic and social rights from the fundamental right to life. In his encyclical *Pacem in Terris* he stated:

> Man has the right to life. He has the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest, and, finally, the necessary social services. In consequence, he has the right to be looked after in the event of ill-health; disability stemming from his work; widowhood; old-age; enforced unemployment; or whenever through no fault of his own he is deprived of the means of livelihood.

Within states, prominent politicians frequently endorse one or another of the controversial rights. In the United States, for example, Senator Edward M. Kennedy speaks of a "right" of all Americans to an adequate standard of health care in proposing health insurance legislation in the United States Congress. On the international level, there is considerable interest in adopting

[12] *Ibid.*, p. 57.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

statements on such matters. In fact, some statesmen, particularly from socialist and some third world countries, would reverse the traditional order of priority of rights, placing more emphasis on economic, social, and cultural rights, than on the traditional civil and political rights.

Debate over expanding the traditional conception of rights to include economic, social, and cultural rights nevertheless continues. There seems nothing "inherently wrong," as Richard Bilder points out, "in either changing concepts or expanding the list of human rights" to include economic, social, and cultural rights, for as "our society, technology, problems, attitudes, and expectations change, there is bound to be a corresponding change in the claims we view as basic, in the order of importance in which we rank these claims, or in the things we expect governments to do or not to do." "Moreover," he suggests, "there is perhaps something to be said for an increase alone in the number and types of broadly humanitarian claims we are prepared to call human rights, since this will hopefully increase the pressures for their practical achievement."[16] Balanced against these considerations, however, an expansion of the list of human rights to include economic, social, and cultural rights "may involve certain penalties." The usefulness of "human rights" as an ordering concept in solving "crucial and recurrent conflicts between competing values" may be diminished; "trivial or highly specialized claims" may depreciate the "dignity and status of the human rights concept;" and if "claims to economic, social, and cultural benefits that clearly cannot be achieved by most present societies, and which are difficult to practically embody within a framework of legal rights and sanctions" are included, unrealistic and popular expectations may be raised, and the "entire human rights idea" may be moved to the level "of utopian aspiration, to which governments need feel little present obligation."[17]

The British scholar, Maurice Cranston, takes a stronger stand against expanding the traditional conception of rights, seeing no merit in the trend toward doing so. Cranston maintains that to consider both kinds of rights "equally authentic" is a "slovenly and muddled way of thinking about the subject," because a human right "*by definition is a universal moral right*, something of which no one may be deprived without a grave affront to justice; something which is owing to every human being simply because he is human."[18] Consequently, such rights as the right to leisure, holidays with pay, etc., cannot be considered rights in the same sense "in which the historic natural rights—the rights, for example, to life and liberty—are rights." For Cranston, a claim must meet two tests to qualify as a human right. First, is it practicable? Or, can it be secured by legislation? In Cranston's view, the

[16] Richard B. Bilder, "Rethinking International Human Rights: Some Basic Questions," *Wisconsin Law Review* (Vol. 1969, No. 1), p. 176.

[17] *Ibid.*, pp. 175–176.

[18] Maurice Cranston, *Human Rights To-Day* (London: Amepersand Books, 1962), pp. 39–40. See also his more recent, *What are Human Rights?* (London: the Bodley Head, 1973).

mere fact of differences in economic development among states means that economic, social, and cultural rights cannot be secured through legislative action everywhere for everyone. Second, is the right of paramount importance? For Cranston, rights such as the right to life and liberty are of paramount importance, but rights such as the right to leisure are not.[19]

Disagreement on the fundamental issue of whether economic, social, and cultural rights are human rights is likely to continue for a long time to come. Before meaningful progress can be made, agreement on what criterion or criteria are to be used in determining whether a claim is a human right is needed. Are human rights only the historic natural rights? If so, the economic social, and cultural rights should properly be regarded as "standards" which governments should strive to meet but are not necessarily obligated to do so. Are human rights determined by international consensus—those which come to be "widely recognized," to use the words of the Inter-American Juridical Committee? If so, there is theoretically no limit to the number of claims which could be considered human rights. It is clear, however, that for economic, social, and cultural rights to be considered human rights there must be a corresponding duty or obligation on the part of the state to see to it that they are respected. Those who champion economic, social, and cultural rights, as the IAJC did when it drafted the American Declaration of the Rights and Duties of Man, assert a duty of the state with regard to them.

B. Recommendations of the IAJC

The IAJC made several important recommendations with regard to economic, social, and cultural rights when it drafted the Declaration. Consider, for example, a portion of the first draft of the article on the "right to life": "Every person has the right to life. . . . It includes the right to sustenance and support in the case of those unable to support themselves by their own efforts; and it implies a *duty* of the state to see to it that such support is made available."[20] (emphasis added) Consider, further, a portion of the article on the "right to work": "Every person has the right to work as a means of supporting himself and of contributing to the support of his family. . . . The state has a *duty* to assist the individual in the exercise of his right to work when his own efforts are not adequate to secure employment: *it must make every effort* to promote stability of employment and to insure proper conditions of labor, and it must fix minimum standards of just compensation."[21] (emphasis added)

[19] *Ibid.*

[20] IAJC, *First Draft of the Declaration*, Article I, p. 1. In the second draft this provision was shifted to the article on the "Right to Work." See *Second Draft of the Declaration*, Article XIV, p. 8.

[21] IAJC, *First Draft of the Declaration*, Article XIV, p. 9. The provision was retained in the second draft; see *Second Draft of the Declaration*, Article XIV, p. 8.

The rationale for emphasizing the duty of the state in this article was stated succinctly by the Committee in its report which accompanied its first draft of the Declaration.

> [I]n more recent years the existence of cyclical unemployment upon a vast scale has led to the assertion of a fundamental right of man to work as the basis of a duty on the part of the state to regulate private industry so as to avoid as far as possible the recurrent business cycles with mass unemployment in times of depression, and at the same time the duty on the part of the state itself to provide opportunities of labor which will enable persons to earn a livelihood by their own efforts. It is beneath the dignity of the human person to be continuously the object of charity and state aid; and at the same time it is demoralizing for him to remain in idleness.[22]

Though some revisions were made in preparing the second draft of the Declaration, the IAJC maintained a similar stance. Both drafts of the Declaration were decidedly liberal in their proclamation of the duties of states with regard to economic, social, and cultural rights—e.g., the duty of the state "to cooperate in assisting the individual to attain a minimum standard of private ownership of property;"[23] the duty "of the state to assist parents in the maintenance of adequate standards of child welfare within the family circle;"[24] the duty of the "state to assist the individual in the exercise of his right to work when his own efforts are not adequate to secure employment;"[25] the duty of the state "to assist all persons to attain social security;"[26] and the duty of the state "to assist the individual in the exercise of the right to education."[27]

The Committee made references to the duties of the individual in some of its articles—e.g., the duty to work,[28] and the duty "to cooperate with the state according to his powers in the maintenance and administration of the measures taken to promote his own social security"[29]—and proposed one article which emphasized that "rights and duties are correlative." The latter, however, was intended merely to "repeat an obvious and necessary condition

[22] IAJC, *First Draft of the Declaration*, p. 46.

[23] IAJC, *First Draft of the Declaration*, Article VIII, pp. 5–6; *Second Draft of the Declaration*, Article VIII, pp. 5–6.

[24] IAJC, *First Draft of the Declaration*, Article X, p. 7; *Second Draft of the Declaration*, Article X, p. 6.

[25] IAJC, *First Draft of the Declaration*, Article XIV, p. 9; *Second Draft of the Declaration*, Article XIV, p. 8.

[26] IAJC, *First Draft of the Declaration*, Article XVI, p. 10: *Second Draft of the Declaration*, Article XVI, p. 9.

[27] IAJC, *First Draft of the Declaration*, Article XVII, p. 10; *Second Draft of the Declaration*, Article XVII, p. 10.

[28] IAJC, *First Draft of the Declaration*, Article XIV, p. 9; *Second Draft of the Declaration*, Article XIV, p. 8.

[29] IAJC, *First Draft of the Declaration*, Article XVI, p. 10; *Second Draft of the Declaration*, Article XVI, p. 9.

of law and order without which claims of rights would have no meaning," not to qualify the more explicitly stated duties of states.[30]

C. Revisions of the IAJC Draft

The American states were less enthusiastic than the IAJC about economic, social, and cultural rights: their reserve was reflected in the ways in which they altered the various articles proposed by it when the Declaration came up for adoption at the Ninth International Conference of American States in 1948. Several examples should illustrate the point.

Article XIV of the Declaration (The Right to Work) proclaims in part that "Every person has the right to work ... insofar as existing conditions of employment permit." There is no indication that governmental action aimed at the creation of conditions making possible full employment is desirable, let alone imperative. In fact, the Declaration stresses the reverse: Article XXXVII provides that "It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community." In contrast, the Juridical Committee's article, while proclaiming the "duty to work as a contribution to the general welfare of the state," proclaimed simultaneously the duty of the state "to assist the individual in the exercise of his right to work when his own efforts are not adequate to secure employment."

Article XI of the Declaration states:

> Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

The last clause significantly qualifies the alleged right. Nonetheless, the United States inserted for the record a statement to the effect that Article XI should not "be interpreted as implying any preference as between private and public control over health and sanitation facilities."[31] This interpretation raises the question whether a person can claim a right to the preservation of his health and well-being if health and sanitation facilities are in private hands, and the statement typifies the United States' pronouncements on such matters.

An additional, and very fundamental, alteration of the Juridical Committee's draft made by the statesmen who adopted the Declaration deserves mention: they adopted a separate chapter which contains ten articles on the

[30] IAJC, *First Draft of the Declaration*, Article XIX, p. 11; *Second Draft of the Declaration*, Article XIX, p. 11.

[31] U.S. Department of State, *Ninth International Conference of American States: Report of the Delegation of the United States of America with Related Documents*, Washington, D.C., 1948, p. 81.

"Duties of Man;" and at the same time, they deleted every reference to the "duties of states" which were given more emphasis by the Judicial Committee. The "Duties of Man" are: the duty of "every person to aid, support, educate and protect his minor children" (Article XXX); the duty of "every person to acquire at least an elementary education" (Article XXI); the duty of "every person to cooperate with the state and the community with respect to social security and welfare" (Article XXXV); and the duty of "every person to work" (Article XXXVII). In short, the statesmen who adopted the Declaration placed the burden of the enjoyment of the economic, social, and cultural rights proclaimed in it on the *individual*, not on the *state*, precisely the reverse of what the Juridicial Committee proposed.

D. Related Inter-American Instruments

We cannot look to two other inter-American instruments also adopted in 1948—the OAS Charter, and the Inter-American Charter of Social Guarantees—for more explicit statements on the alleged rights. The original Charter contained three separate chapters on economic, social, and cultural standards. Article 29 (a), for example, provided in part that "All human beings . . . have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security." This provision, however, was "understood as being 'without prejudice to the provisions of the laws of each country relative to the exercise of specific professions or activities or any other type of work.' "[32] With regard to the "right to work" in Article 29 (b), it "was likewise agreed for insertion in the record" that the provision did "not imply that the state is obligated to 'provide work to all but rather that it should attempt to promote adequate economic conditions in order that all persons may have work.' "[33] The relevant chapters of the original Charter were greatly expanded by the Protocol of Buenos Aires which is now in effect. In most cases, however, the member states have "pledged themselves" to cooperate to achieve certain basic *objectives*—"so far as their resources may permit and their laws may provide."[34]

Nor can we look for unequivocal statements on the matter in the Inter-American Charter of Social Guarantees.[35] This Charter on the rights of workers is staggering in its detail (it contains 39 substantive articles), but it fails to take a clear stand on what is expected of the state in the realization of the rights it purports to proclaim. Even then, the United States opposed the project of the Charter of Social Guarantees, and voted against its adoption

[32] *Ibid.*, p. 39.
[33] *Ibid.*
[34] For more extensive analysis see Margaret Ball, *The OAS in Transition* (Durham: Duke University Press, 1969), Chapter XIII.
[35] Ninth International Conference of American States, *Final Act* (Resolution XXIX), pp. 29–38.

"for reasons particularly related to the specific nature of the proposal and the fact that, under the legal system of the United States, detailed questions regarding such matters as working conditions, social insurance, vacations for workers, etc., fall more often within the jurisdiction of the individual States than of the Federal Government or are matters for collective bargaining between employers and employees."[36] In addition to its negative vote, the United States attached a "reservation" to the Charter, which reads:

> In view of the negative vote of the United States and of the reasons for which it was given, the United States, although firmly adhering to the principle of appropriate international action in the interests of labor, does not regard itself as bound by the specific terms of the Inter-American Charter of Social Guarantees.[37]

In more recent years the American states have adopted numerous other instruments relevant to economic, social, and cultural rights: indeed, the OAS is not an organization known for modesty when it comes to adopting statements in this field. Examples include the Charter of Punta del Este—the Alliance for Progress—(1961): the Protocol of Buenos Aires—revisions of the OAS Charter—(1967): and the Declaration of the Presidents of America (1967). None of these instruments, however, aim to affirm or define economic, social, and cultural rights. Rather, they proclaim objectives of governmental policy which, if pursued vigorously, would lead to the creation of conditions making possible the realization of the rights.

III. CONCLUSION

Of the two categories of rights proclaimed as human rights in the American Declaration of the Rights and Duties of Man, it is clear that the civil and political rights are considered more important. The Declaration does not define these rights in detail, but they are set forth clearly. The same is not true, however, of the articles of the Declaration which purport to proclaim economic, social, and cultural rights. In each case the rights are highly qualified. In fact, as a whole the Declaration places the burden on the individual as regards the exercise of these so-called rights, not on the state.

All indications are that civil and political rights will continue to be regarded as the more important–if not the only—rights in the future. Numerous civil and political rights are affirmed in the American Convention on Human Rights. The Convention does not, however, affirm economic, social, and cultural rights. Its failure to do so should not be understood to mean that the American states are not concerned with the economic and social well-being of their peoples. What government could survive for long if it cared not at all, es-

[36] *Report of the United States Delegation to the Ninth International Conference of American States*, p. 72.

[37] Ninth International Conference of American States, *Final Act*, "Reservation of the Delegation of the United States" to Resolution XXIX.

pecially at a time when demands for "social justice" are increasing? Nevertheless, the enjoyment of these rights depends on the active assistance of the state, and many states are clearly not in a position to provide the required assistance. Any progress in this field, then, shall have to be made on the domestic level. To the extent that the vast body of existing and proposed legislation in the various American states is vigorously applied, the enjoyment of the rights shall eventually obtain. In turn, this may open the way for assuming duties in this field on the international level.

CHAPTER FOUR

THE IACHR: ITS ORIGINS AND ORGANIZATION

The member states of the OAS have declared human rights a matter of international concern and they have proclaimed the rights which ought to be respected. They have also devoted considerable attention to the creation of inter-American organs to promote and protect these rights, and it is to the issues and problems related to the creation and operation of these organs that we shall now turn our attention.

The issues and problems have been complex and very difficult to resolve. There arose first a question as to whether inter-American human rights organs *should* be created. Were they necessary, or even desirable? Second, if they were to be created, how should they be *organized?* How large should they be? What criteria of eligibility for election to them should be established, etc? Third, and most controversial, precisely what *competence* should they have to deal with human rights matters? Should the right to petition be established? If so, to whom should it be extended? To individuals? To groups and associations? To states?

Progress toward the resolution of these issues has been difficult, but some progress has been made. The Inter-American Commission on Human Rights was created in 1959, and its competence to deal with human rights matters was officially expanded in 1965. The American Convention on Human Rights was opened for ratification by member states of the OAS in 1969, and it contains provisions on the organization and competence of a commission and a court. Since prospects for the entry into force of the Convention in the near future are, as noted earlier, remote, we shall not deal extensively with its provisions which concern the commission and the court. Instead, we shall concentrate our attention on the Inter-American Commission on Human Rights. Specifically, in this chapter we are interested in the considerations which gave rise to the creation of the Commission. In addition, we are interested in the issues and problems related to its organization which arose when its statute was drafted, and with how the provisions adopted have been interpreted and applied. In Chapters 5 and 6 we shall concentrate on the activities which the Commission has engaged in to "promote" and "protect" human rights.

I. THE ORIGINS OF THE IACHR

The Inter-American Commission on Human Rights was created by resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. The question of whether a commission on human rights should be created, however, had been raised more than a decade earlier, when the Inter-American Juridical Committee (IAJC) prepared the first draft of the American Declaration of the Rights and Duties of Man in 1945.[1]

The IAJC had been charged by Resolution XL of the Inter-American Conference on Problems of War and Peace with drafting the Declaration. A literal interpretation of the resolution could have led to the conclusion that the Committee's mandate was limited to drafting the Declaration, "without reference to the part which it [was] to play in the inter-American system," but the Committee concluded instead that "the administrative aspects of the problem of protecting human rights [came] properly within its competence."[2] This opinion was based on the fact that another resolution of the Conference on Problems of War and Peace, Resolution IX, called for the drafting of the OAS Charter, and it was anticipated that the Declaration would be adopted as an annex to the Charter.[3] The two resolutions thus led the Committee "to consider the ways and means by which the Declaration could be made practically effective."[4] As stated by the Committee:

> The American Republics have indicated in [Resolution IX] that the principles of the proposed Declaration are to become 'the effective rule of their conduct.' Does this imply anything more than that the principles are to be incorporated into the domestic law of the individual states and that they are to be administered upon the same basis as the enactments of national legislatures? The Declaration is referred to in [Resolution IX] as a 'definition of the fundamental principles of international law.' Resolution XL, which deals specifically with the proposed Declaration, proclaims the adherence of the American Republics to the principles established by international law for safeguarding the essential rights of man and declares their support of a system of international protection of these rights. What meaning is to be ascribed to the words "international protection"? Does the phrase imply that a violation of the principles set forth in the Declaration becomes a matter of concern for the inter-American community as a whole?[5]

The IAJC adopted the most liberal interpretation of the two resolutions, arguing that it was "clear that the enforcement" of the Declaration "must

[1] For the first draft of the Declaration, see Pan American Union, *Draft Declaration of the International Rights and Duties of Man and Accompanying Report* (Formulated by the Inter-American Juridical Committee in accordance with Resolution IX and XL of the Inter-American Conference on Problems of War and Peace held in Mexico City, February 21—March 8, 1945), Washington, D.C., March 1946.

[2] *Ibid.*, pp. 57–58.

[3] *Ibid.*, p. 58.

[4] *Ibid.*

[5] *Ibid.*

form a very intricate part of the national legislation and administration of each separate state."[6] This could be accomplished in two ways: first, the Declaration could be adopted in "conventional form," and thereby incorporated into the municipal law of each state;[7] second, "an inter-American body with advisory functions in respect to the protection of fundamental rights within each state" could be created.[8] The Committee in fact suggested that such a body be created, that it be "designated as the Inter-American Consultative Commission on Human Rights, and that it be constituted as a subsidiary body of the Inter-American Economic and Social Council."[9]

A. The Proposed Consultative Commission on Human Rights

The IAJC spelled out the very limited competence of the Consultative Commission on Human Rights in some detail.

> The functions of this Consultative Commission . . . would be the promotion of respect for human rights and fundamental freedoms in accordance with the provisions of the Declaration to be adopted by the American States. It should serve as a central agency for the study of the practical problems involved in the protection of human rights. It should be competent to submit recommendations on the basis of reports sent to it by the Economic and Social Council or on the basis of its own direct investigations. The recommendations of the Commission should be submitted *not* to particular governments but to the American Governments *as a body* through the intermediation of the Economic and Social Council. *Only* with the *consent* of the Council should the Commission address itself to a particular government in connection with a specific case.[10] (emphasis added)

The Commission would also be expected to "maintain contact with the Commission on Human Rights to be established by the Economic and Social Council of the United Nations," so that "conflicts both in respect to the principles to be applied and the measures for the promotion of rights" taken by each organ could be prevented.[11]

In sum, the Consultative Commission envisioned by the Juridical Committee was to be limited mainly to study and the preparation of reports on human rights. The Commission was not to have any enforcement powers within the individual states, for the Juridical Committee had "not found it desirable to enter into the question of the measures to be taken to assure the fulfillment by each state of the obligations contained in the Declaration."[12] Since the Declaration was to be "part of the municipal law of each state," it was "to be put into effect by the executive and judicial organs of each

[6] *Ibid.*, p. 59.
[7] *Ibid.*, Article XX of the first draft of the Declaration, pp. 11–12.
[8] *Ibid.*, p. 59.
[9] *Ibid.*
[10] *Ibid.*, p. 60.
[11] *Ibid.*
[12] *Ibid.*

state."[13] The Committee did not propose that the Consultative Commission have competence to deal even with "grave and persistent" violations of the Declaration. As the Committee noted:

> The possibility of grave and persistent violations of the Declaration by a particular government is . . . not to be dismissed; and it is obvious that if such violations of fundamental rights were systematic in character, indicating a fixed policy on the part of the legislative or administrative officers, rendering recourse to the courts ineffectual and making popular resistance impossible, they could not be overlooked by the other members of the community without bringing the whole inter-American system into disrepute. Such an extreme situation, if unhappily it should arise, would be beyond the competence here assigned to the Commission on Human Rights. The American States have accepted the principle of common consultation in the presence of threats to the peace; and it would be for them to determine whether the violations of the Declaration were of such a character as to disturb their friendly relations and to *amount in fact* to a threat to the peace, and hence to justify recourse to the procedure accepted for such situations.[14]

However limited the competence of the Consultative Commission on Human Rights was to be, the IAJC had good reasons for proposing its creation. The effective implementation of the resolutions pertaining to human rights which were adopted at the Conference on Problems of War and Peace entailed at least the adoption of the Declaration in conventional form. It was a short step from this to proposing that an inter-American supervisory organ be created. Stated somewhat differently, even though the implementation of the Declaration was to be *primarily* a matter of domestic concern, it should not be considered *exclusively* a matter of domestic concern. International scrutiny of the human rights practices of the individual states was desirable, if not necessary, and the Consultative Commission on Human Rights could well perform this function.

The Juridical Committee's proposals to adopt the Declaration in conventional form and to create the Consultative Commission on Human Rights were not well received by the American states. They interpreted (or reinterpreted) the two resolutions of the Conference on Problems of War and Peace cited by the IAJC in a different way, and their interpretations undermined the Committee's recommendations, as evidenced by the second draft of the Declaration. When the IAJC prepared the second draft of the Declaration in 1948, in time for consideration at the Ninth International Conference of American States, it "agreed to eliminate" the article on its incorporation into the municipal law of each state.[15] Having conceded this, it dropped its

[13] *Ibid.*

[14] *Ibid.*

[15] See p. 12 of the "Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man," in the report on the second draft of the Declaration in Pan American Union, *Project of Declaration of the International Rights and Duties of Man* (Formulated by the Inter-American Juridical Committee for consideration by the Ninth International Conference of American States), Washington, D.C., 1948.

proposal on the creation of the Consultative Commission on Human Rights, not mentioning it in its report which accompanied the second draft of the Declaration.[16] Subsequently, at the Ninth International Conference the delegates agreed not to adopt the Declaration as an annex to the OAS Charter or as a treaty, but rather as a resolution;[17] and the possibility of creating the Consultative Commission on Human Rights was not under active consideration. For all practical purposes these decisions had been made even before the Ninth International Conference convened; they were implicit in the comments and observations of various American states on the IAJC's first draft of the Declaration.

The reasons for this change of stance on human rights are not hard to find. As noted in Chapter 2, due principally to the nature of the times when they met in 1945, the American states had adopted sweeping resolutions on what was to be done about human rights in the future. With war atrocities on everyone's mind, it was natural that they should make some commitment to the international protection of human rights. As times returned to normal, however, their preoccupation with the principle of "non-intervention" in the internal affairs of states led them to abandon any meaningful commitment to the international protection of human rights. Political conditions were not yet right for the adoption of a human rights instrument in conventional form, or for the creation of an inter-American human rights organ, regardless how limited its competence to deal with human rights matters was to be.

All this is not to say that the delegates to the Ninth International Conference completely rejected the idea that an organ in the field of human rights might be desirable. A cynic might conclude, however, that their proposal on the subject was hardly to be taken seriously. They resolved (Resolution XXXI) to have the IAJC draft a statute for an inter-American court of human rights. The draft was to be transmitted to the American governments for their comments, then submitted to the Tenth Inter-American Conference "for study, if it [was] felt that the moment [had] arrived for a decision thereon."[18]

The IAJC, however, rejected the charge given to it by Resolution XXXI of the Ninth International Conference.[19] The Committee argued that drafting a statute for a court would be "premature." It pointed out, among other things,

[16] *Ibid.*

[17] The options were discussed in Committee VI of the Ninth International Conference of American States. On the question whether the Declaration should be adopted as a treaty, the vote was: 8 for, 12 against; as an annex to the OAS Charter: 6 for, 10 against, 1 abstention; as a simple declaration: 12 for, 2 against. See Ninth International Conference of American States, *Acta* (Comision VI, 3ª. Sesion, Doc. CB-287-C, C. VI-13), April 21, 1948, pp. 4–6.

[18] Pan American Union, Ninth International Conference of American States, *Final Act* (Resolution XXXI), p. 45.

[19] For the report, see Inter-American Council of Jurists, *Inter-American Court to Protect the Rights of Man* (Department of International Law, Pan American Union, Washington, D.C.), January, 1953.

that the lack of "positive substantive law" on human rights constituted a "serious obstacle" to drafting a statute for a court "that would be established to act upon violations of such law."[20] The topic of the court was therefore not put on the agenda of the Tenth Inter-American Conference.[21] It was not until the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959, when the IACHR was created, that the possibility of creating a court was discussed again. At that time the foreign ministers called upon the IACJ to draft a convention which would include provisions for a court (Resolution VIII, Part I). Finally, when the American Convention on Human Rights was adopted at the Inter-American Specialized Conference on Human Rights in 1969, provisions on a court were included in it. The Inter-American Court of Human Rights would thus function as the second organ of implementation of the Convention if it enters into force.

B. The Creation of the IACHR

No further action toward the creation of an inter-American organ charged with the promotion or protection of human rights was taken until the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. During the period 1948 to 1959, the proposed court, referred to above, was the subject of occasional discussion; but the matter was dropped because it lacked the substantial support necessary for its creation. Human rights organs were therefore not actively under consideration during this period.

The situation was somewhat different at the Fifth Meeting of Consultation in 1959. The meeting was convened to consider a situation of general political unrest and instability in the Caribbean area, and particularly the accusation of the Dominican Republic that Cuba and Venezuela had assisted conspirators who were attempting to overthrow its government. The Trujillo dictatorship in the Dominican Republic was one of the few remaining at the time, and its gross violations of human rights and fundamental freedoms were well known. The regime was particularly offensive to Cuba's Fidel Castro, who had fundamentally different ideas about the nature of Latin American political, economic, and social institutions; it was also offensive to Venezuela's democratic President Betancourt, who had been the target of an assassination attempt apparently encouraged by the Trujillo dictatorship.

The crisis brought on by the attacks and counterattacks of these governments against each other dramatically illustrated the relationship between respect for human rights and peace in the hemisphere. Thus, the question raised for the foreign ministers at the Fifth Meeting of Consultation was whether, and if so, to what extent, the American states could take collec-

[20] *Ibid.*, p. 5.

[21] OAS, Second Special Inter-American Conference, *Handbook for Delegates* (OEA/Ser. E/XIII.1, Doc. 4), March, 1965, pp. 28–29.

tive action against dictatorships on behalf of human rights without endangering the principle of "non-intervention" in the internal affairs of states. At the meeting, Cuba and Venezuela took a strong stand in favor of collective denunciation of all dictatorships. The Venezuelan foreign minister proposed further that collective action to end "dictatorial abuse of democracy and human rights" should not be considered "intervention."[22] The majority of foreign ministers rejected this position, implying that dictatorships were to be preferred over any action which might severely weaken the principle of non-intervention in the internal affairs of states.[23] They did, however, adopt a two part resolution (Resolution VIII) of great importance for future inter-American action on human rights.[24]

In Part I of Resolution VIII the foreign ministers called upon the Inter-American Council of Jurists (IACJ) to prepare a convention on human rights, and a convention or conventions on the "creation of an Inter-American Court for the Protection of Human Rights and of other organizations appropriate for the protection and observance of those rights." This part of the resolution was adopted unanimously, suggesting that no foreign minister objected in principle to drafting a convention. The IACJ completed its draft before the end of 1959; parts of it eventually found their way into the American Convention on Human Rights, adopted in 1969.

In Part II of Resolution VIII the foreign ministers resolved to create the Inter-American Commission on Human Rights. This part of the resolution reads as follows:

> To create an Inter-American Commission on Human Rights, composed of seven members elected, as individuals, by the Council of the Organization of American States from panels of three presented by the governments. The Commission, which shall be organized by the Council of the Organization and have the specific functions that the Council assigns to it, shall be charged with furthering respect for such rights.

This part of Resolution VIII was not adopted unanimously: the vote was 15 for: four against (Brazil, the Dominican Republic, Mexico, and Uruguay): and two abstentions (Bolivia and the United States).[25]

The lack of unanimity among the foreign ministers on the creation of the IACHR resulted from their disagreement on the proper role of the OAS in matters related to human rights. Some adhered to a strict interpretation of the principle of "non-intervention;" others were prepared to adopt a more liberal interpretation of the principle for the sake of "furthering respect" for human rights. Uruguay felt strongly enough about the issue to attach a reservation to

[22] Ann Van Wynen Thomas and A. J. Thomas, Jr., *The Organization of American States* (Dallas: Southern Methodist University Press, 1963), p. 230.

[23] *Ibid.*

[24] For the full Resolution, see OAS, Fifth Meeting of Consultation of Ministers of Foreign Affairs, *Final Act* (OEA/Ser. F/II.5, Doc. 89 (English) Rev. 2), October, 1959, pp. 10–11.

[25] OAS, Council, *Acta de la sesion ordinaria celebrada el 6 de abril de 1960* (OEA/Ser. G/II c-a-366), April, 1960, p. 68. (Hereafter cited as *Acta* 366)

Part II of Resolution VIII, expressing the view that the Commission called for in Part II should be created by a convention, not by a resolution, and that the

> functions of [the] Commission should be determined after a careful study has been made, so that, in performing the task for which it is created, the Commission cannot endanger the principle of non-intervention, the strict observance of which is recommended by this Meeting of Foreign Ministers; a study that [Uruguay] believes should be made by the same technical bodies charged with the preparation of the draft conventions referred to in Part I of Resolution VIII.

Argentina voted for both parts of Resolution VIII, but made "an explicit reservation with regard to the structure and the powers of the international agencies whose creation is contemplated, because of the constitutional provisions and positive domestic law in force in the Argentine Republic." For its part, the United States attached a "statement" reserving its "position with respect to its participation in the instruments or organisms that may evolve" as a result of the adoption of the entire resolution. The United States attached this statement because of the "structure of its Federal Government," which it argued made it impossible for it to "enter into multi-lateral conventions with respect to human rights."[26]

Despite the lack of unanimity, the resolution of the Meeting of Consultation had created the IACHR. The OAS Council was entrusted with drafting and adopting a statute so that the Commission could begin operating. In keeping with the resolution, the Council appointed a Special Committee on September 10, 1959, to draft the statute; final approval would rest with the Council itself.[27] The Special Committee was composed of representatives of seven states: Chile, Cuba, Columbia, Ecuador, El Salvador, Honduras, and the United States. It quickly became apparent that the Special Committee was dominated by proponents of vigorous action by the OAS in the field of human rights. The first draft of the statute called for the creation of a full-time commission with extensive powers, including the examination of petitions which alleged violations of human rights.[28] Opposition in the Council, however, led to many important compromises. The statute was revised three times over a period of nine months before it was finally adopted by a vote of 20 in favor and one abstention (the Dominican Republic) on May 25, 1960.[29]

Opposition in the Council to the Special Committee's work was voiced chiefly by the Dominican Republic and the United States, though their opposition was based on different grounds. The Dominican Republic's represen-

[26] See Resolution VIII cited in n. 24.

[27] OAS, Council, *Acta de la sesion extraordinaria celebrada el 10 de septiembre de 1959* (OEA/Ser. G/II c-a-342), September, 1959, p. 33.

[28] The first draft of the statute is in OAS, Council, *Acta de la sesion ordinaria celebrada el 29 de octubre de 1959* (OEA/Ser. G/II c-a-348), October, 1959, pp. 167–180. (Hereafter cited as *Acta* 348)

[29] OAS, Council, *Acta de la sesion ordinaria celebrada el 25 de mayo de 1960* (OEA/Ser. G/II c-a-371), May, 1960, pp. 39–68. (Hereafter cited as *Acta* 371)

tative sought to prevent the creation of the Commission by calling attention to the lack of unanimity at the Meeting of Consultation as six of the 21 foreign ministers had *not* voted *for* the creation of the IACHR; by pointing out that the member states of the OAS could not make reservations to the statute, despite the fact that the Special Committee's drafts contained some elements normally included only in conventions on human rights; by challenging the authority of the Meeting of Consultation to direct the Council to draft the statute; and by maintaining that Part II of Resolution VIII contradicted Part I.[30] These arguments were refuted point by point by several representatives on the Council, most notably those of Ecuador and El Salvador. It would be fair to say, however, that the Dominican Republic's objections were dismissed by virtually everyone as a desperate attempt to sabotage the work of the Special Committee.[31] The Dominican Republic's representative had evidently correctly interpreted Part II of Resolution VIII as being directed primarily against his own government. Put another way, while the foreign ministers had not been willing to openly condemn the Trujillo dictatorship at the Fifth Meeting of Consultation, they had not at the same time been willing to associate themselves too closely with it. The creation of the IACHR was a convenient way for them to express their concern with the dictatorial abuse of human rights, and it was the creation of this commission which the Dominican Republic's representative on the Council hoped to prevent.

The objections voiced by the United States to the Special Committee's draft statutes were not dismissed as easily as were those of the Dominican Republic. It should be emphasized, however, that the United States did not oppose the creation of the Commission. Rather, it opposed the adoption of specific provisions in the drafts which pertained to the organization and competence of the Commission. In both cases, the United States' objections were decisive in shaping the final statute.

The foreign ministers had established certain guidelines with regard to the organization of the Commission. It was to be composed of seven members, who were to be nominated in panels of three persons by the member states of the OAS, and elected by the Council. The problem for the Council was that there were details yet to be worked out within the guidelines, and that the guidelines themselves did not cover the full range of organizational matters. They said nothing, for example, about the internal organization of the Commission or the length of its sessions. Thus, the Council had to make important decisions on how the Commission was to be organized. Including those matters covered by the guidelines, decisions had to be made on the following:

A. The status of the Commission
B. The size of the Commission

[30] OAS, Council, *Acta* 366, pp. 69–76.
[31] *Ibid.*, pp. 63–84.

C. Eligibility for election to the Commission
D. The nomination procedure
E. The election procedure
F. Conditions of service on the Commission
G. The sessions and meetings of the Commission
H. The seat of the Commission

In the remainder of this chapter we are concerned with how the issues raised in regard to each of these matters were resolved. We are also concerned with how the Commission's statute has since been applied in practice.

With regard to the Commission's competence, the foreign ministers had stipulated only that it be charged with "furthering respect" for human rights. Interpreting this phrase in the Council led to a great deal of debate. Did it mean that the Commission should be authorized to examine petitions which alleged violations of human rights? Or did it mean that it should be restricted to engaging in academic activity? It was here that a challenge to the principle of non-intervention, at least where human rights are concerned, was most apparent. We shall return to the resolution of this issue in Chapter 5. For the moment, we are interested in the resolution of the issues which arose in connection with the organization of the Commission.

II. THE ORGANIZATION OF THE IACHR

A. The Status of the Commission

A very important matter which had to be dealt with in the Council was the status of the Inter-American Commission on Human Rights within the Organization of American States. The Special Committee proposed, and the Council agreed, that the Commission be established as an "autonomous" entity of the Organization.[32] Basically, this means that the IACHR was established as an internal commission of the OAS but designed to function autonomously. It was not established as a subsidiary body of one of the councils of the OAS such as the Inter-American Economic and Social Council.

The Commission has since been elevated to the status of an organ of the OAS under the terms of the Protocol of Buenos Aires (amendments to the OAS Charter), which entered into force in 1970. This apparently strengthens its autonomous status. Prior to its becoming an organ of the OAS the Commission could presumably have been abolished by an act of an Inter-American Conference or a Meeting of Consultation of Ministers of Foreign

[32] Article 1 of the statute. The statute is in IACHR, *Handbook of Existing Rules Pertaining to Human Rights* (OEA/Ser. L/V/II.23, Doc. 21 (English, Rev.), December, 17, 1970, pp. 30–35. (Hereafter cited as *Handbook of Existing Rules Pertaining to Human Rights*). For comments on the status of the Commission by one of its former members see IACHR, *European Commission on Human Rights and the IACHR: Similarities and Differences* (A Lecture Delivered by Dr. Daniel Hugo Martins at the University of Chile Law School, October, 1963) (OEA/Ser. L/V/II.8, Doc. 12), March, 1964.

Affairs. Now it could only be abolished by the adoption of an amendment to the OAS Charter, which is considerably more difficult to do.

The Council took various steps to insure the autonomy of the Commission. This is not to say, however, that its freedom of action is unlimited or that its autonomy cannot be checked by other organs of the OAS. Indeed, any commission created by an international organization is in one way or another dependent on that organization for the accomplishment of its mission, if not for its survival, and the IACHR is no exception. Its budgets must be approved; it also needs a staff so that it can perform its mission. Consequently, there are unavoidable controls over the operation of the IACHR which are exercised by other organs of the OAS. The question is therefore not whether such controls exist, but whether they are abused or are only potentially troublesome.

Electing Commissioners as Individuals

One way in which the Council sought to insure the autonomy of the IACHR is reflected in the principles it selected for guiding the behavior of the commissioners during their terms of office. According to Article 4 (a) of the statute, the commissioners are elected in their personal capacity, not as representatives of their governments. Furthermore, according to Article 3 (b) the Commission "shall represent all the member countries of the Organization of American States and act in its name." Taken together, these provisions at once isolate the commissioners from their governments *and* legitimize the actions of the Commission as actions of the OAS itself.

There is, of course, a problem of how to insure in practice that members of a commission elected in their "personal capacity" will act as such, especially when decisions are made which concern their own governments. For their part, governments might be expected to nominate only persons who are in basic agreement with their stands on human rights, and no commissioner, once elected, could be completely unaware of his (her) government's position. Thus, there is a problem of how to avoid a nationalistic bias. In addition, there is a problem of how to avoid an organizational bias, of how to prevent a commission from questioning the human rights practices of one or a group of governments while ignoring those of others.

At least two institutional safeguards might be employed to overcome the possibility of either a nationalistic or organizational bias, though the effectiveness of either one is doubtful. The first is to require all commissioners to take an oath pledging their impartiality upon their assumption of office. A provision to this effect was first adopted by the Council as part of the Commission's statute,[33] then deleted once it was decided not to authorize the

[33] OAS, Council, *Acta* 371, pp. 41–45 (Article 7 of the third draft of the statute).

Commission to examine petitions which alleged violations of human rights.[34] This decision was reversed in 1965, and since that time the Commission has been authorized to examine petitions. Nevertheless, the Commission has not adopted on its own a regulation which requires each of its members to take an oath pledging his impartiality upon the assumption of office; nor, it is important to add, has the Commission adopted a regulation which prohibits any member from participating in any case which involves his own government.[35] The Commission does not, however, normally appoint as rapporteur for a petition a national of the state against which the complaint is lodged.

The second institutional safeguard would be the application of sanctions (including removal from office) against commissioners, especially against those who are found to exhibit a nationalistic bias. The danger here, of course, is that sanctions could be used to purge commissioners for political reasons. Whatever the advantages or disadvantages of sanctions, the Special Committee which drafted the statute did not propose any and the Council did not adopt any.

In the final analysis, it may well be that whether individuals elected to a commission like the IACHR will be truly impartial in their work depends first and foremost on their individual integrity; institutional safeguards are of secondary importance. The detailed minutes of the IACHR's deliberations on the petitions it receives are kept secret in order to protect claimants from any harrassment from their governments for having lodged the complaint. It is therefore impossible to say whether (and how often) an individual commissioner might have tried to defend his own government. The published reports of the Commission have generally indicated only that "the Commission decided," and occasionally that "the Commission unanimously decided", how to deal with a specific case. Individual commissioners are permitted to include explanations of their votes in the files, but the details of these, as noted above, are kept secret. It is only in the last few years that the Commission has named in its reports on its sessions the individual commissioners who took certain stands, and that they had inserted explanations of their votes in the files. Based on these reports, it is clear that the Commission has reached conclusions on some complaints lodged against the Brazilian government which were at variance with the position taken by the Brazilian national on the Commission.[36] The presumption must be, in the absence of concrete evidence to the contrary, that the votes of Dr. Carlos A. Dunshee de Abranches, the Brazilian national, did not constitute a nationalistic bias, since all the commissioners cast their votes in their personal capacity. Even if his votes did

[34] OAS, Council, *Acta de la sesion ordinaria celebrada el 8 de junio de 1960* (OEA/Ser. G/II c-a-373), June, 1960, pp. 21–28. (Hereafter cited as *Acta* 373)

[35] The regulations are in IACHR, *Handbook of Existing Rules Pertaining to Human Rights*, pp. 36–45.

[36] See, for example, IACHR, *Report on the Work Accomplished During its Twenty-Eighth Session* (Special) (OEA/Ser. L/V/II.28, Doc. 24, rev.1), August, 1972, pp. 8–27.

reflect such a bias, it is important that the Commission reached different conclusions. Had it not done so on any petition, the reputation for impartiality which it has come to enjoy among American statesmen could have been called into question, especially since the Brazilian government has been charged with serious violations of human rights in recent years (particularly torture and abusive treatment of political prisoners), and many of these allegations have been presumed confirmed by international humanitarian organizations other than the IACHR.

On balance, the evidence available suggests that if nationalistic bias has been a problem in the Commission's deliberations or in its actions, it has not been serious enough to warrant vigorous criticism. In the past, as we shall see, most commissioners were repeatedly re-elected:[37] there would more than likely have been a much greater turnover in membership had nationalistic bias become the basis upon which the Commission reached its decisions. The past practice of repeatedly re-electing the commissioners, however, might well have come to an end. We shall return to this point later.

There is likewise no evidence to suggest that the Commission as a whole has singled out any government or group of governments for attention while ignoring human rights violations in others. To be sure, the Commission has been prudent in fulfilling its mandate, always willing to offer the reward of no publicity for cooperation, and it has given more publicity to human rights violations in Cuba, Haiti, and on occasion the Dominican Republic, than to other American states. This is due, however, to the extraordinary situations which have prevailed in those countries, not to an attempt by the Commission to deliberately single them out for criticism. The annual reports which the Commission has submitted to the OAS General Assembly show that it will report on any human rights violations which it feels should be called to the attention of all the governments, regardless of the country in which they are alleged to have occurred.

Amending the Statute

The IACHR must function in accordance with the provisions of its statute. The adoption of amendments to the statute is therefore one of the most important ways in which the Commission's competence to deal with human rights matters could either be expanded or contracted. In other words, the Commission's dependence on other organs of the OAS for the adoption of amendments to its statute is one of the most important checks on its autonomy. This is an unavoidable, but nevertheless crucial, control over the activity of the Commission.

The OAS Council adopted the Commission's statute and assumed the authority to adopt any amendments to it (Article 16). The Council adopted

[37] See Table 4.1.

the first set of amendments in June, 1960, only two weeks after it adopted the statute. The purpose of these amendments was to delete one article and provisions of two others which were thought unnecessary in view of the fact that the Council had determined on May 25 by a very narrow majority not to authorize the Commission to examine petitions which alleged violations of human rights. By amendment of the statute the Council therefore repealed the article which provided that the commissioners were to take an oath pledging their impartiality upon assumption of office. It also repealed provisions of two other articles—one which would have prohibited the Chairman from holding any other office or engaging in any profession while serving on the Commission; and another which provided that the Chairman would serve full-time.[38]

The Council amended the statute a second time, prior to the fifth election of the Chairman and Vice-Chairman of the Commission in 1968. The amendment was adopted on request of the Commission itself; its purpose was to limit the Chairman and Vice-Chairman to being elected for only two terms.

The statute was amended a third time in 1965. On this occasion, however, the purpose of the amendments was to expand the Commission's competence so that it could examine petitions which allege violations of human rights, and these amendments were adopted by an Inter-American Conference, not by the Council. The Commission had fought for these amendments since its First Session in 1960, and had first proposed them to the Council.[39] The Council assigned the amendments to its Committee on Juridical-Political Affairs for study, and there opposition to their adoption developed.[40] The Commission eventually withdrew its amendments from consideration,[41] and then took its case to the Second Special Inter-American Conference, held in 1965, where they were adopted.[42] We shall return to the substance of these amendments in Chapter 6. For the moment, suffice it to say that the Council was not completely successful in blocking the expansion of the Commission's competence to deal with human rights violations by its refusal to adopt the amendments. At its First Session in 1960 the Commission had decided to "take cognizance" of petitions it might receive,[43] and by 1965 it was for all practical purposes examining them. Consequently, the effect of the adoption of the amendments by the Second Special Inter-American Conference in 1965 was more to approve what the Commission was already doing rather than to ex-

[38] OAS, Council, *Acta* 373, pp. 21–37.

[39] IACHR, *Report on the Work Accomplished During its First Session* (OEA/Ser. L/V/II.1, Doc. 32), March, 1961, pp. 10–12. (Hereafter cited as *Report on the First Session*)

[40] IACHR, *Report on the Work Accomplished During its Sixth Session* (OEA/Ser. L/V/II.7, Doc. 28), August, 1963, pp. 18–19.

[41] IACHR, *Report on the Work Accomplished During its Ninth Session* (OEA/Ser. L/V/II.10, Doc. 21), February, 1965, pp. 31–32.

[42] OAS, Second Special Inter-American Conference, *Final Act* (OEA/Ser. C/I.13), Resolution XXII.

[43] IACHR, *Report on the First Session*, pp. 8–10.

pand its powers. The adoption of the amendments nevertheless formally expanded the Commission's competence, which the Council had tried to prevent.

The Rules and Regulations

As is customary, the IACHR is authorized by its statute to prepare and adopt its own Rules and Regulations (Article 15). Since it came into existence in 1960, the Commission has developed an elaborate set of Regulations. Some merely repeat provisions of the statute, such as the procedure to be followed in the election of the officers, the number of sessions, etc. Others concern such matters as the duties of the Chairman, the dissemination of reports and studies, and the establishment and operation of subcommittees. The Commission has established one standing subcommittee which receives and examines petitions while the Commission is in recess and makes recommendations to the Commission as a whole. Other subcommittees may be established at the Commission's headquarters or in the territory of any American state when necessary, the latter requiring the consent of the government concerned.

The most important Regulations adopted by the IACHR relate to the procedure it is to follow in processing petitions it receives. They have been revised and expanded from time to time, especially since the adoption of amendments to the statute in 1965, and are discussed in Chapter 6.

Election of the Officers

The autonomy of the IACHR is strengthened by the fact that it may elect its own officers (Article 6 (c and d) of the statute). Initially, the statute provided that the Chairman and Vice-Chairman of the Commission were to be elected by absolute majority vote for a period of two years, with the rights of re-election. There was thus no limitation on the number of times the officers could be re-elected, and Professor Manuel Bianchi of Chile and Dr. Gabino Fraga of Mexico were elected Chairman and Vice-Chairman respectively for three terms (1962, 1964, and 1966). In fact, Professor Bianchi performed the duties of Chairman for more than six years, for he was elected Vice-Chairman in the first election in 1960, and the Chairman, Mr. Rómulo Gallegos, was not able to attend may of the meetings between 1960 and 1962 for reasons of health. (The Vice-Chairman temporarily replaces the Chairman in the event he cannot perform his duties.) In the case of the death or resignation of a Chairman, which has not occurred, the Vice-Chairman would automatically become the Chairman, and at the next session the Commission would elect a new Vice-Chairman.

At its Fourteenth Session in October, 1966, the Commission requested that

the Council adopt an amendment to its statute which would limit the re-election of the officers to only one re-election, thus limiting the number of years they could serve as officers to only four years.[44] The Council adopted the amendment, which became effective before the fifth election of the officers in 1968.

The role of the Chairman has developed into an important one: he can take action on petitions when the Commission is not in session; he can initiate the process whereby the Commission requests information from the governments; and he can request permission from the governments to conduct an investigative mission. An aggressive Chairman can act decisively in cases of gross violations of human rights, including establishing the presence of the Commission in crisis situations, which Professor Bianchi, Chairman of the Commission at the time, did during the crisis in the Dominican Republic in 1965–1966. One of the amendments to the Commission's statute adopted by the Second Special Inter-American Conference, Article 7 (bis), served to recognize the important contribution to the cause of human rights a Chairman could make in a crisis or emergency situation. It provides:

> The Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his function.

The Secretariat

When the Commission was first established the Secretary General of the OAS was required to "appoint the necessary technical and administrative personnel to serve as the Secretariat of the Commission" from the permanent personnel of the Pan American Union (Article 14 of the statute). In the past the Secretaries General have been favorably inclined toward the Commission's work, and, in any case, were required by the statute to make available the necessary personnel. Nevertheless, this arrangement was somewhat less than satisfactory. The IACHR was deeply involved in classified work and continuity of attention to various kinds of problems was necessary. Consequently, as part of the amendments to the statute in 1965, the Commission was provided with a "specialized functional unit" which is part of the General Secretariat of the OAS but is organized in such a way "as to have the resources required for performing the tasks entrusted to it by the Commission" (Article 14 (bis)). This has enabled the Commission to have its own offices with a staff headed by an Executive Secretary.

The Budget

With regard to the Commission's budget, Article 8 of the statue provides:

> During their terms of office, the Chairman and the members of the Commission shall

[44] IACHR, *Report on the Work Accomplished During its Fourteenth Session* (OEA/Ser. L/V/II.15, Doc. 29 (English)), March, 1967, p. 45.

receive the emoluments and travel expenses provided for in the budget of the Pan American Union, under such terms and conditions as the Council of the Organization determines, with due regard to the importance of the Commission's tasks.

It is clear that the meager budget of the Commission has been a problem, especially as regards the full implementation of some aspects of its General Work Program. (The Commission's budget for the 1974–76 biennium is $622,400; it had requested $774,500.) In the past, meager resources have meant that the Commission has not been able to implement to the extent desirable the various programs it has designed to promote respect for human rights, such as fellowships, scholarships, and seminars on human rights, programs to which we shall return in Chapter 5. Meager resources have also led the Commission to complain that it is handicapped in processing of petitions it receives and in conducting investigative missions; though in emergency situations, such as the extended stay of various members of the Commission in the Dominican Republic in 1965–66, the necessary funds have been made available to the Commission by the OAS.

B. The Size of the Commission

The foreign ministers stipulated in their resolution that the IACHR was to be composed of only seven members. This figure could not be changed by the Council and was adopted in Article 3 (a) of the statute with no controversy. The ministers gave no reason why they selected the figure seven. However, we know that they were determined not to create an inter-governmental commission, and the smaller figure was apparently thought more appropriate for this reason. Furthermore, they may have thought that a larger commission would simply become unwieldy.

From a practical standpoint, the decision to create a commission with only seven members meant that not all the member states of the OAS would be guaranteed a seat on it. It is noteworthy that no attempt has been made since the Commission was created to enlarge it.

C. Eligibility for Election to the Commission

Part II of Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs stipulated that the commissioners were to be nominated by the governments of the member states of the OAS. It established no criteria for the governments to follow in selecting individuals for nomination. When the Commission's statute was drafted, however, two questions were raised. Must nominees for election to the Commission be nationals of the member states of the OAS? Should they be required to have had any special educational or professional training? Both questions were resolved without controversy.

Nationality

With regard to the question of nationality, the Special Committee of the Council recommended that membership on the Commission be restricted to "nationals of the member states of the Organization." This was easily approved in the Council and included in Article 3 (a) of the Commission's statute. In effect, this provision made legally impossible what was already politically improbable. In a field as sensitive as human rights, the member states of the OAS were not likely to nominate, let alone elect, nationals of a state not a member of the Organization to a human rights commission. The drafters of the IACHR's statute, however, were interested in laying down explicit rules on eligibility for election to the Commission, not relying on political improbabilities, and Article 3 (a) makes only nationals of the member states of the OAS eligible for election.

Prior Special Training

The second consideration concerning eligibility for election to the Commission was whether the nominees should be required to have had any special educational or professional training. Prior training in a field such as law might have been considered an important criterion of eligibility, especially if the Commission was to be authorized to examine petitions which alleged violations of human rights and to have required, as a condition precedent, that all domestic legal remedies had been exhausted. However, the Council did not impose any criterion as specific as this when it adopted the Commission's statute. Article 3 (a) of the statute simply provides that the members of the Commission "shall be persons of high moral character and recognized competence in the field of human rights." As a check on the nominees, Article 4 (b) of the statute requires governments making nominations to submit biographical data for each candidate. The biographical sketches submitted in the past have listed the positions held by the nominees and their relevant publications or activities on the subject of human rights.

While the governments have thus been free to nominate *any* national of a member state of the OAS of "high moral character and recognized competence in the field of human rights," without regard to any previous special training or professional activity, individuals who have had training in law have clearly been favored for election. Practically all those who have served on the Commission have had legal training. Most have had long and distinguished careers before being elected to the Commission—either as jurists, diplomats, or teachers, or in more than one of these fields. Some have held ministerial posts in their countries.

D. The Nomination Procedure

The resolution of the Meeting of Consultation stipulated that the governments nominate candidates for election to the IACHR in "panels" of three. Did this mean that all governments must nominate three persons? Could they nominate only their own nationals? To whom should the panels be submitted? What procedure should be followed in nominating candidates to fill vacancies on the Commission? These problems were worked out in the Special Committee of the Council which drafted the Commission's statute, and its recommendations were accepted by the Council.

The Use of Panels

Article 4 (b) of the Commission's statute permits the governments to nominate either their own nationals or nationals of any other member state of the OAS. Furthermore, it appears to require that all governments propose a panel of three persons when the regular elections are held. Article 4 (b) reads:

> Each of the said governments [the governments of the member states] shall propose a panel of three persons, on which it may include not only its own nationals but also those of other member states of the Organization. The proponent governments shall submit with their panels biographical data for each candidate.

The question here is whether the second sentence of this article qualifies the first. The first states that "each" of the governments "shall propose a panel of three persons." The second states that the "proponent governments shall submit ... biographical data for each candidate." Whatever the intention, in practice it is clear that Article 4 (b) has not been understood as establishing a requirement that all governments submit a panel, or that three persons be named on each one. For past elections some governments have failed to nominate any candidates; others have nominated only one of their own nationals. This practice has had the effect of narrowing the range of choice when the commissioners were elected. This is not to say, however, that the Council has been forced to choose from among less qualified individuals: political considerations could be expected to influence the outcome of the elections no matter how long the list of nominees would be.

The Role of the Secretary General

According to Article 5 (b) of the Commission's Statute, the names of the persons nominated are to be arranged in alphabetical order by the Secretary General of the OAS and transmitted directly to the Council (since 1970 to the Permanent Council). The Secretary General has no discretion in deciding which names are to be placed on the list, nor is he authorized to make recommendations on who should be elected.

Since the first election in 1960, it has been the responsibility of the Secretary General to invite the governments through their representatives in the Council (now the Permanent Council), six months prior to the election, to submit their panels of nominees at least three months before the election is to be held. This has provided the governments with ample opportunity to advance the candidacies of their nominees.

Nominating Candidates to Fill Vacancies

Article 7 of the statute sets forth the procedure to be followed for nominating candidates to fill vacancies on the Commission. This procedure differs from that followed for the regular elections. In the event a commissioner dies or resigns, the Chairman of the Commission is required to immediately notify the Secretary General, who in turn notifies the governments. The governments may then "propose a candidate within a period of one month." Again, the Secretary General prepares an alphabetical list of the nominees and transmits it to the Council. If the term of office of a commissioner who dies or resigns is due to expire within six months of the next regular election the vacancy is not filled.

E. The Election Procedure

The procedure to be followed in electing the members of the Commission is set forth in Article 4 of its statute. In keeping with the resolution of the Meeting of Consultation, the OAS Council is designated as the electoral organ. Since the OAS Charter was amended in 1970, the Permanent Council has elected the commissioners. An absolute majority vote is required for election.

No two nationals of any one member state of the OAS may be elected to serve on the Commission at the same time. This insures broader representation on it.

Length of Term

According to Article 6 (a) of the statute, the commissioners are elected for a four year term; according to Article 4 (e), they may be re-elected. Their terms run concurrently and there are no limitations on how many times they may be re-elected. The fact that their terms are not staggered would make possible the election of a completely new group of commissioners at each election, thereby disrupting the work in progress of the Commission. In the past, however, this has not occurred. To the contrary, commissioners who desired to serve were continuously re-elected.

As Table 4.1 shows, two of the commissioners elected in the first election in

1960, Professor Manuel Bianchi of Chile and Dr. Gabino Fraga of Mexico, were still serving in 1975, having been re-elected three times. In fact, up to the last election in 1972, four of the original commissioners were still serving—Prof. Bianchi and Dr. Fraga, Mrs. Angela Acuña de Chacón of Costa Rica and Dr. Durward Sandifer of the United States. The only major change in the composition of the Commission thus occurred in 1972, twelve years after it was created, when three new commissioners were elected.

TABLE 4.1 Members of the IACHR 1960–1975

Name	*Nationality*	*Year Elected*			
		1960	*1964*	*1968*	*1972*
Dr. Rómulo Gallegos	*Venezuela*	×			
Prof. Manuel Bianchi	*Chile*	×	×	×	×
Mrs. Angela Acuña de Chacón	*Costa Rica*	×	×	×	
Dr. Gonzalo Escudero	*Ecuador*	×	×		
Dr. Gabino Fraga	*Mexico*	×	×	×	×
Dr. Reynaldo Galindo Pohl	*El Salvador*	×			
Dr. Durward V. Sandifer	*U.S.*	×	×	×	
Dr. Daniel Hugo Martins	*Uruguay*		×		
Dr. Carlos A. Dunshee de Abranches	*Brazil*		×	×	×
Dr. Mario Alzamora Valdez	*Peru*			×	
Dr. Justino Jiménez de Aréchaga	*Uruguay*			×	×
Dr. Robert F. Woodward	*U.S.*				×
Dr. Genaro R. Carrió	*Argentina*				×
Dr. Andrés Aguilar	*Venezuela*				×

Source: Compiled from various *Reports* of the Inter-American Commission on Human Rights.

The past practice reflected in Table 4.1 may soon end. An election is scheduled by the Permanent Council of the OAS in June, 1976, and major changes in the composition of the Commission could occur because it has come under heavy fire for a report it published in late 1974 on an investigative mission to Chile. We shall deal with this case in more detail in Chapter 6. For the moment, what is important to note is that in the wake of repeated attacks by the Chilean junta against the Commission and its Executive Secretary (Dr. Luis Reque) for the highly critical report, three commissioners resigned in March, 1976: Dr. Genaro R. Carrió of Argentina, Dr. Justino Jiménez de Aréchaga of Uruguay, and Dr. Robert Woodward of the United States.[45] Their resignations were unprecedented in the history of the Commission. Who will replace them, and, indeed, whether an entirely new group of commissioners will be elected in 1976, is of great importance. Moreover, there has been some concern expressed that changes other than in the composition of the Commission—alterations in its statute to weaken its competence—might occur. Substantial changes in the composition of the

[45] *The Washington Post*, March 5, 1976, p. A 16.

Commission and/or its statute would be most unfortunate and would raise a serious question about how strong a commitment the American states are willing to make to international action on human rights.

Elections to Fill Vacancies

Vacancies on the Commission caused by the death or resignation of a commissioner are filled only if the unexpired portion of his (her) term is six months or more. Between 1960 and 1974 only one special election to fill a vacancy was necessary. In May, 1963, Mr. Rómulo Gallegos of Venezuela resigned for reasons of health, and in July the Council elected Dr. Daniel Hugo Martins of Uruguay to fill the vacancy. Dr Martins was then elected to a full term in 1964 (Table 4.1).

F. Conditions of Service on the Commission

As we have seen, neither the Special Committee nor the Council was in favor of specifying any prior special training as a condition of eligibility for election to the Commission. It was agreed that any national of a member state of the OAS who possessed "high moral character and recognized competence in the field of human rights" could be elected. However, some differences of opinion were expressed on the question of whether, once elected, the commissioners should be permitted to be gainfully employed outside the Commission.

The Special Committee of the Council which drafted the IACHR's statute first proposed that the commissioners, once elected, be prohibited from being either politicians, administrators, or practitioners of any other profession.[46] This ban was proposed because the Special Committee anticipated that the Commission would be in session almost continuously and endowed with substantial powers, including the examination of petitions which alleged violations of human rights. Either one of these could have made outside employment impractical, or even undesirable, for the Special Committee was concerned with the possibility that conflicts of interest might develop, especially if the commissioners were dependent on their own governments as their primary source of income.

In the second draft of the statute the Special Committee proposed that the ban on outside employment be limited to the Chairman of the Commission, who would have a full-time post.[47] This was an attempt to reach a compromise; strong opposition had developed in the Council to the Commission being in session almost continuously, and to authorizing it to examine petitions which alleged violations of human rights. Accordingly, when the

[46] See Article 18 of the first draft of the statute, OAS, Council, *Acta* 348, p. 179.

[47] The second draft of the statute is in OAS, Council, *Acta de la sesion ordinaria celebrada el 16 de mayo de 1960* (OEA/Ser. G/II c-a-363), March, 1960, pp. 57–75. See Article 8, p. 67.

Council adopted the statute on May 25, 1960, Article 8 provided that the Chairman could not exercise any other public function or dedicate himself to any profession,[48] but the provision was repealed on June 8, 1960. The reason was that most representatives on the Council felt that it would be pointless to pay an estimated $20,000 per year to a full-time Chairman when the Commission would not meet on a full-time basis.[49]

The commissioners, including the Chairman, have thus been free to pursue their own chosen professions while serving on the Commission, and many of them have held politically appointive posts while serving on it. In fact, the decision not to classify any outside activity as incompatible with service on the Commission made possible the election of two ambassadors to the Council when the first election was held, Mrs. Angela Acuña de Chacón of Costa Rica and Dr. Gonzalo Escudero of Ecuador. Both had advocated the creation of a powerful Commission during debate in the Council, and there is no evidence that conflicts of interest later influenced their decisions in any way.

In the final analysis, it was best not to prohibit any of the commissioners from actively engaging in their chosen professions. The Commission does not meet on a full-time basis, and to have prohibited the commissioners from engaging in their professions would in all probability have severely restricted the number of highly qualified individuals willing to serve.

G. The Sessions and Meetings of the Commission

The resolution of the Meeting of Consultation said nothing about the sessions and meetings of the Commission, leaving decisions on these matters up to the Council. The Council adopted provisions on the length and types of sessions the Commission may hold, but it established only a few guidelines on the conduct of its meetings. The Commission has itself adopted regulations pertaining to the conduct of its meetings, and these, along with the relevant provisions of the statute, are discussed in the second section below.[50]

Sessions of the Commission

All the representatives on the Council agreed that the Commission should be authorized to hold special sessions, but they disagreed on the length of the or-

[48] The third draft of the statute is in OAS, Council, *Acta de la sesion ordinaria celebrada el 11 de mayo de 1960* (OEA/Ser. G/II c-a-370), May, 1960, pp. 71–84. The Council voted on the statute on May 25, 1960. See OAS, Council, *Acta* 371, Article 8, p. 44.

[49] OAS, Council, *Acta* 373, pp. 21–37.

[50] I have adopted the common distinction between "meetings" and "sessions" (a group of "meetings") in this section. The Commission's statute and regulations do not make this distinction. In practice, however, the Commission distinguishes between the two. It issues reports on its "sessions," describing what occurred at its individual "meetings."

dinary sessions. Some representatives wanted the Commission to be in session almost continuously. The first draft of the statute prepared by the Special Committee contained an article which provided that the Commission would meet for 10 months of ordinary sessions, plus additional special sessions called by the Chairman or by a majority of the commissioners.[51] In marked contrast, other representatives wanted the Commission to meet in ordinary sessions of four to six weeks each year, plus additional special sessions if necessary.[52]

The United States was the leading opponent of the 10 months of ordinary sessions, arguing that the financial implications as well as other factors had to be taken into consideration in reaching a decision on the matter.[53] So far as the financial implications of the decision were concerned, the Secretary General submitted a report to the Council on the estimated cost of maintaining the IACHR for 10 months of full-time work and for two months of part-time work. The estimated cost of the 10 month option came to roughly $230,000; the cost of the two month option was estimated at roughly $60,000. In view of the financial crisis which then prevailed in the Organization, some representatives expressed concern over the larger figure, and it was no doubt one reason for the final decision to reduce the 10 months to only eight weeks.[54]

In addition to the financial implications of the decision, the other factors which the United States called attention to were important in reducing the 10 months to eight weeks. The Special Committee recommended the 10 months of ordinary sessions because a majority of its members hoped the first draft of the statute would be adopted intact. Had it been, the Commission would have been endowed with substantial powers to "further respect" for human rights including, as some were to argue in the Council, the "protection" of human rights. It was to these powers that the United States and others were opposed, and we shall return to the resolution of this issue in the next chapter. For the moment, suffice it to say that as the statute was revised to create a Commission with very limited competence to deal with human rights violations, it became clear that there would be no need for 10 months of ordinary sessions. Thus, the compromise to emerge was to agree on ordinary sessions of a maximum of eight weeks per year, in either one or two sessions, which the Commission could decide for itself. The Commission was also authorized to hold special sessions called by the Chairman or by a majority of its members (Article 11 of the statute).

In practice, the Commission has met in the shorter sessions, thus convening twice each year. It has also held a number of special sessions: in 1963

[51] See Article 20 of the first draft of the statute in OAS, Council, *Acta* 348, p. 179.
[52] *Ibid.*, p. 38.
[53] *Ibid.*
[54] *Ibid.*, pp. 184–185.

to consider the situation regarding human rights in Cuba;[55] in 1965 with respect to the crisis in the Dominican Republic;[56] in 1967 to complete a study of various draft conventions on human rights;[57] in 1968 to prepare a preliminary draft of the American Convention on Human Rights;[58] in 1969 (in two parts) to study the situation regarding human rights in Honduras and El Salvador which resulted from border clashes that year, and to provide technical advisory services to the Inter-American Specialized Conference on Human Rights;[59] in 1972 to give special consideration to several cases of alleged violations of human rights in various American states;[60] and in 1974 to examine on-the-spot alleged violations of human rights in Chile.[61]

Meetings of the Commission

The statute establishes a few guidelines with regard to the Commission's meetings. Article 12 provides that an absolute majority of the Commission shall constitute a quorum; Article 13 provides that decisions are to be made by an absolute majority vote, except in the case of procedural matters, which are to be made by a simple majority vote. Both provisions were incorporated into the regulations adopted by the Commission.

The basic provisions of the statute have been augmented by several regulations adopted by the Commission. The Secretary General and Assistant Secretary General of the OAS are permitted to participate with voice but without vote in the Commission's meetings. The Commission may take oral testimony from claimants or others who can provide information concerning allegations made in petitions it receives. Outside "observers," however, are not permitted to attend the Commission's meetings. It received several requests from non-governmental organizations to accredit observers to its meetings but decided not to do so because of the highly classified nature of its work.[62]

[55] IACHR, *Report on the Work Accomplished During its First Special Session* (OEA/Ser. L/V/II.6, Doc. 18 (English)), April, 1963. (Hereafter cited as *Report on the First Special Session*)

[56] IACHR, *Report on the Work Accomplished During its Eleventh (Special) Session* (OEA/Ser. L/V/II.12, Doc. 10 (English)), September, 1965.

[57] IACHR, *Report on the Work Accomplished During its Fifteenth Session (Special)* (OEA/Ser. L/V/II.16, Doc. 20 (English)), July, 1967.

[58] IACHR, *Report on the Work Accomplished During its Nineteenth (Special) Session* (OEA/Ser. L/V/II.19, Doc. 51 (English)), February, 1969.

[59] IACHR, *Report on the Work Accomplished During its Twenty-Second Session* (First and Second Parts) (OEA/Ser. L/V/II.22, Doc. 15 (English) Add. 1), April, 1970.

[60] IACHR, *Report on the Work Accomplished During its Twenty-Eighth (Special) Session* (OEA/Ser. L/V/II.28, Doc. 24, rev. 1), August, 1972.

[61] IACHR, *Report on the Work Accomplished During its Thirty-Third Session (Special)* (OEA/Ser. L/V/II.33, Doc. 15, rev. 1), February, 1975.

[62] IACHR, *Report on the Work Accomplished During its Seventh Session* (OEA/Ser. L/V/II.8, Doc. 35 (English)), March, 1964, pp. 29–30. See also IACHR, *Report on the Work Accomplished During its Eighth Session* (OEA/Ser. L/V/II.9, Doc. 24 (English)), August, 1964, pp. 25–26.

H. The Seat of the Commission

The location of the seat of the IACHR was the subject of some dispute when its statute was drafted. Should the seat be fixed permanently in one location, or should there be a permanent seat with an option to transfer it temporarily to the territory of any member state of the OAS? If a transfer of the seat was to be permitted, what conditions would have to be met?

An Option to Transfer the Seat

The Special Committee of the Council which drafted the Commission's statute proposed in the first draft that the Commission's permanent seat be located at the Pan American Union (now the General Secretariat of the OAS) in Washington, D.C., but that it be permitted to transfer its seat temporarily by an absolute majority vote for the purpose of seeking a "friendly settlement" in cases in which violations of human rights occurred. The consent of the governments would *not* have been required.[63]

In Council debate many representatives expressed the view that this proposal would allow entirely too much discretion to the Commission, perhaps leading to intervention in the internal affairs of the member states without their express consent. At the same time, many representatives felt that it would be impractical to fix the seat of the Commission permanently in one location with no right of transfer. Transferring the seat temporarily would allow the Commission to observe firsthand the situation regarding human rights in any member state. This could be especially useful in cases in which a state wanted to prove that charges brought against it were unfounded or that corrective measures were being taken. Furthermore, a member state might in the future want to invite the Commission to hold one of its sessions within its territory. The compromise which emerged from the different points-of-view was to agree that the permanent seat would be located at the Pan American Union, but that it could be transferred temporarily to the territory of any member state by an absolute majority vote of the Commission *and* with the consent of the government concerned (Article 11 (c) of the statute).

Transferring the Seat in Practice

In practice, the Commission has held the great majority of its sessions at its permanent seat in Washington, D.C. It has, however, temporarily transferred its seat on a number of occasions. The governments of Costa Rica, Mexico, and Columbia have each invited the Commission to hold one or more of its

[63] See Article 20 of the first draft of the statute, OAS, Council, *Acta* 348, p. 179.

sessions in their respective territories; the government of Chile also invited the Commission to hold one of its sessions in Chile in 1963. In each case the invitations were voluntarily extended by the governments as gestures of goodwill toward the Commission. Normally, the opening meetings were addressed by high ranking officials of the governments including presidents and foreign ministers. All necessary facilities were put at the disposal of the Commission. Accepting these invitations has been good public relations for the Commission. By holding its sessions in various American states it can spread awareness of its existence and of the services it can provide.

Temporarily transferring the seat for the purpose of conducting an investigation into alleged violations of human rights is a different matter: consent of the government concerned is required, and the Commission has encountered considerable resistance. There have, of course, been exceptions. The government of the United States readily gave its consent for the Commission to temporarily transfer its seat to Miami, Florida to hold hearings on the plight of Cuban political prisoners.[64] In this case, however, it was human rights violations in Cuba, not in the United States, which were being investigated. The hearings were merely being held within the territory of the United States. In addition, the Commission has visited the Dominican Republic on three different occasions;[65] and the governments of Honduras and El Salvador both requested its presence so that it could investigate alleged violations of human rights during border clashes in 1969.[66]

Transferring the seat of the Commission to the territory of any American state is not only difficult, it is expensive. The Commission has therefore developed interesting alternatives—alternatives which are not explicitly authorized by its statute. These are to request permission of a government for a subcommittee, a rapporteur for a particular complaint, or for the Executive Secretary to visit its territory for the purpose of conducting an investigation. The advantages of these alternatives deserve emphasis. For the Commission they are a more efficient means of collecting information, since not all commissioners can always be available at the same time to conduct an investigation. They are also considerably less expensive than actually transferring the seat. For the governments the alternatives mean that the Commission can collect information without much fanfare. Despite these advantages, however, exercising the alternatives still requires the consent of the government concerned, and there has been some resistance.

Since conducting investigations is one of the most important ways in which the Commission can try to protect human rights, we shall return to a more detailed examination of its experiences in doing so in Chapter 6.

[64] IACHR, *Report on the First Special Session.*

[65] The missions were in 1961, 1963, and 1965–1966. These missions are discussed in Chapter 6.

[66] See IACHR, *Preliminary Report of the Subcommittee on Violations of Human Rights in Honduras and El Salvador* (OEA/Ser. L/V/II.22, Doc. 2 (English)), July, 1969.

III. CONCLUSION

It was not until a sufficiently large number of American states were willing to adopt a more flexible position on the principle of "non-intervention" in the internal affairs of states that it was possible to take positive action toward the creation of an inter-American human rights organ. An exceedingly rigid interpretation of this principle in the immediate post World War II period precluded the creation of the Consultative Commission on Human Rights proposed by the Inter-American Juridical Committee. A somewhat different attitude prevailed at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959, resulting in the creation of the IACHR, although the foreign ministers were not unanimous in the view that the Commission should be created. Different interpretations of the principle of "non-intervention" were responsible for the lack of unanimity. In fact, a lingering concern for this principle was evident in the debate over the Commission's statute in the OAS Council, both as regards its organization and its competence to deal with human rights matters. We have dealt in this chapter with how the issues which arose in connection with the organization of the Commission were resolved in the Council and with how the statute has since been applied in practice. We shall deal with the Commission's competence in the next two chapters.

Most of the issues which arose in connection with the organization of the Commission were relatively easy to resolve. To be sure, decisions were made which were a serious blow to champions of vigorous action by the Commission: it was permitted to meet for only eight weeks as opposed to ten months in ordinary sessions, and it was required to secure the consent of any government concerned before it could conduct an investigative mission. Still, in practice neither one of these decisions has proven fatal to the Commission. It has been able to meet in special sessions when necessary. In addition, the role of the chairman was expanded under Article 7 (bis), an amendment to the statute adopted in 1965. An aggressive chairman could exploit this role. The secretariat, too, can initiate action on petitions for the Commission when it is not in session.

CHAPTER FIVE

THE IACHR AND THE PROMOTION OF HUMAN RIGHTS

The competence of the Inter-American Commission on Human Rights to deal with human rights matters was the subject of extensive debate in the OAS Council when it drafted the Commission's statute. The reason was the vagueness of a key phrase in Part II of Resolution VIII of the Fifth Meeting of Consultation by which the American foreign ministers resolved to create the Commission. The foreign ministers stipulated that the Commission was to have the "specific functions" which the Council assigned to it: but that, specifically, it was to be charged with "furthering respect" for human rights.

For the representatives on the Council, "furthering respect" for human rights raised a question of meaning. Did the foreign ministers intend to say that the Commission should engage primarily in academic activity, or rely essentially on moral force, to secure greater respect for human rights in the American states? Or did they also want the Commission to examine and take action on petitions which alleged violations of human rights? Put another way, the question was whether the foreign ministers wanted the Commission to engage solely in the promotion of human rights, or in the promotion *and* protection of human rights.

How this issue was to be resolved in the Council was of great importance for future inter-American action on human rights, and it is beyond doubt that the representatives on the Council considered it the most important of all the issues which arose in drafting the Commission's statute. It was here that the tension between human rights on the one hand, and non-intervention in the internal affairs of states on the other, was evident. In this chapter we shall therefore concern ourselves first with how the issue was resolved in the Council. Then we shall discuss the various activities which the Commission has engaged in to promote respect for human rights. The Commission's efforts to protect human rights are discussed in Chapter 6.

I. TO PROMOTE OR PROMOTE AND PROTECT HUMAN RIGHTS?

The question of whether the Commission should be authorized only to

promote or to promote and protect human rights was joined in the Council when the Special Committee charged with drafting the statute presented its first draft. In the articles which concerned the competence and procedure of the Commission, the Special Committee recommended that the Commission be authorized to develop an awareness of human rights among the peoples of America; recommend appropriate legislation in the field; prepare studies and reports; assist the Council on human rights matters; *and* examine and take action on petitions which alleged violations of *any* of the human rights proclaimed in the American Declaration of the Rights and Duties of Man. Several articles of the draft statute set forth the procedure the Commission would follow in processing the petitions it received.[1]

The debate in the Council focused on the examination of petitions; the question was whether this activity could legitimately be considered within the scope of "furthering respect" for human rights. The representatives divided into two groups on the issue.

A. The Strict Interpretation of "Furthering Respect" for Human Rights

The United States led the opposition to the proposed competence and procedure of the Commission, advancing a strict interpretation of "furthering respect" for human rights. The United States served on the Special Committee of the Council which drafted the statute and signed the report of the first draft so that the "project could move on to its next stage of consideration in the Council."[2] In Council meetings, however, the United States vigorously opposed authorizing the Commission to examine and take action on petitions which alleged violations of human rights.

According to the United States, since the OAS was "entering a new field in inter-American relations" by creating the IACHR, it was highly important that its "first step . . . be a genuine success in order that . . . a real contribution to the achievement of a better respect for human rights" would result.[3] The United States did not feel this would be accomplished if the first draft of the statute were approved by the Council. Specifically, the United States maintained that "furthering respect" for human rights, as used in Part II of Resolution VIII of the Fifth Meeting of Consultation, meant essentially a reliance on "moral force." It involved the "dramatization of the problem, public education, and the extension of appropriate advice and assistance to governments in working out their own methods of *promoting* respect for human rights."[4] The draft statute, however, went beyond this, authorizing the

[1] The first draft of the statute is in OAS, Council, *Acta de la sesion ordinaria celebrada el 29 de octubre de 1959* (OEA/Ser. G/II c-a-348), October, 1959, pp. 172–180. (Hereafter cited as *Acta* 348)

[2] *Ibid.*, pp. 36–37.

[3] *Ibid.*

[4] OAS, Council, *Acta de la sesion ordinaria celebrada el 6 de abril de 1960* (OEA/Ser. G/II c-a-366), April, 1960, p. 49. (Hereafter cited as *Acta* 366)

Commission to examine and take action on petitions which alleged violations of human rights; this, according to the United States, involved the *protection* of human rights. The *promotion* of human rights could be authorized by a statute adopted by the Council, but the *protection* of human rights could only be authorized by a convention. The United States maintained that this distinction had been made in the two parts of Resolution VIII adopted by the foreign ministers at the Fifth Meeting of Consultation.[5]

The United States reiterated its opposition to authorizing the Commission to protect human rights on several occasions during the nine months of intermittent debate which preceeded the adoption of the statute, repeatedly indicating that it would not be able to approve "the articles under which the Commission would be given the authority to review individual cases."[6] Curiously, of all the American states the United States emerged as the most vigorous champion of the principle of non-intervention, suggesting that the question of how the OAS might "justifiably and constructively" enter the field of human rights demanded a "reconciliation between the principle of non-intervention on the one hand and the promotion of respect for human rights and representative democracy on the other."[7] The United States insisted that if the Commission were given the authority to "intervene in the internal affairs" of the member states, serious problems with respect "to [its] future operation" would develop; and the "whole initiative of the Organization in the field" of human rights would "in the last analysis be hindered rather than advanced" in an attempt to put the provisions of the statute into effect.[8]

The United States wanted only those provisions which enjoyed broad support among the American states included in the Commission's statute. Had the Commission been endowed with powers which a large number of American states did not support, its future effectiveness would undoubtedly have been hindered. There was, however, another reason why the United States took a strong stand against petitions. During the 1950's a great deal of opposition had developed in the United States Congress and elsewhere to the ratification of human rights conventions. In response to this opposition the Eisenhower Administration expressed interest only in the promotion of human rights on the international level.[9] Of course, the statute was not a convention; but the United States was opposed to the international protection of human rights in principle. To be consistent, the same arguments used against

[5] *Ibid.*

[6] *Ibid.*, pp. 49–50.

[7] *Ibid.*, p. 49.

[8] *Ibid.*, p. 50. The United States representative on the Council made comments on various drafts of the statute in Council meetings on October 6, 1959 (*Acta* 348); April 6, 1960 (*Acta* 366); and May 11, 1960 (OAS, Council, *Acta de la sesion ordinaria celebrada el 11 de mayo de 1960*, OEA/Ser. G/II c-a-370, May, 1960. Hereafter cited as *Acta* 370.)

[9] See Vernon Van Dyke, *Human Rights, the United States, and World Community* (New York: Oxford University Press, 1970), pp. 129–141.

ratification of conventions would also have to be used against the controversial provisions of the IACHR's statute.

B. The Liberal Interpretation of "Furthering Respect for Human Rights"

A large bloc of states, constituting almost a majority in the Council, joined in a view opposing that of the United States. Led by the representatives of El Salvador, Ecuador, Costa Rica, and Venezuela, these states maintained that it was essential for the Commission to be authorized to examine petitions in order for it adequately to "further respect" for human rights. According to their view, the principle of "non-intervention" was a cornerstone principle of the OAS and could hardly be ignored; but there should be no great concern that the Commission would intervene in the internal affairs of the member states because it would have no power to coerce them into behaving in a certain way. In other words, coercion would be intervention but discussion would not.[10]

In sum, the bloc of states in favor of authorizing the Commission to examine petitions wanted action, not just academic activity. The only significant points on which they disagreed among themselves were: whether the right to petition should be extended to individuals, groups, associations, *and* governments, or whether governments should be excluded; and whether violations of *any* of the rights proclaimed in the American Declaration of the Rights and Duties of Man, or only certain specified ones, should be subject to petition.

C. Efforts to Compromise

The Special Committee revised the first draft of the statute in the hope of resolving the disagreements between those states adhering to the strict and liberal interpretations of "furthering respect" for human rights. The second draft was also revised after another period of debates in the Council.[11] Several compromises were reached but the content of the third draft was a clear indication that those states who held to the liberal interpretation of "furthering respect" for human rights were a major force to contend with. Indeed, they dominated the Special Committee. To facilitate comparisons on the matter, the article of the statute which was finally adopted, Article 9, is quoted below:

> In carrying out its assignment of promoting respect for human rights, the Commission shall have the following functions and powers:
> a To develop an awareness of human rights among the peoples of America;

[10] See OAS, Council, *Acta* 366, pp. 81–82; see also *Acta* 370, pp. 38–45.

[11] The second draft of the statute is in OAS, Council, *Acta de la sesion ordinaria celebrada el 16 de mayo de 1960* (OEA/Ser. G/II c-a-363), March, 1960, 65–75. (Hereafter cited as *Acta* 363) The third draft is in OAS, Council, *Acta* 370, pp. 71–84.

b To make recommendations to the Governments of the member states in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;
c To prepare such studies and reports as it considers advisable in the performance of its duties;
d To urge the Governments of the Member States to supply it with information on the measures adopted by them in matters of human rights;
e To serve the Organization of American States as an advisory body in respect of human rights.

The limitations on the exercise of these functions and powers were stipulated in Article 10 of the statute:

> In performing its assignment, the Commission shall act in accordance with the pertinent provisions of the Charter of the Organization and bear in mind particularly that, in conformity with the American Declaration of the Rights and Duties of Man, the rights of each man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

The major difference between Article 9 and the one proposed in the third draft of the statute (as Article 11) is that the article in the third draft contained one additional paragraph. Paragraph "f" concerned the examination of petitions and contained two options: one would authorize the Commission to examine petitions received from individuals, groups, associations, and governments (Option I); the other would exclude governments (Option II). The Council could decide which option to adopt when it voted on paragraph "f".

The articles on the procedure the Commission would follow in processing petitions it might receive were also revised. According to the third draft of the statute, petitions which alleged violations of only certain specified rights proclaimed in the Declaration would be subject to active examination. These included:

Article I	The Right to Life, Liberty, and Personal Security
Article IV	The Right to Freedom of Investigation, Opinion, Expression and Dissemination of Ideas
Article XVIII	The Right to a Fair Trial
Article XXV	The Right to Protection from Arbitrary Arrest
Article XXVI	The Right to Due Process of Law

Petitions which alleged violations of any other rights proclaimed in the Declaration would not, according to the third draft of the statute, have been admissible for examination; they would have been treated as secret documents and restricted for use by the Commission only.[12]

The options contained in the proposed paragraph "f" and the revisions made in the articles which would regulate the examination of petitions were

[12] OAS, Council, *Acta* 370, Article 15 of the third draft of the statute.

doubtlessly intended to attract more support in the Council for authorizing the Commission to examine petitions. These revisions were not likely, however, to attract the support of those states, such as the United States, who were opposed to petitions in principle, or those who felt that such a major innovation in inter-American relations should be approved by domestic political organs, not by a majority vote in the Council of the OAS. The Special Committee therefore proposed a special voting procedure for paragraph "f."[13]

According to a transitory article, the statute would enter into force when approved by the Council, but the special procedures relating to petitions would *not* be applicable until January 1, 1961, for those member states whose representatives in the Council voted *ad referendum* on paragraph "f." An *ad referendum* vote would mean that a state could agree to the proposal pending its approval by relevant domestic political organs. Clearly, the bloc of states in favor of authorizing the Commission to examine petitions had nothing to lose by proposing the special voting procedure. It might enlist the support of those states who favored petitions in principle, but who felt that whether the Commission should be authorized to examine them should be determined by domestic political organs. There was, however, one weakness in the strategy. There was no guarantee that the domestic political organs of any state whose representative in the Council voted *ad referendum* on paragraph "f" would then give their consent by January 1, 1961, or, for that matter, at any time thereafter. If such a situation should develop, what could the Organization do? Furthermore, the United States put the other member states on notice that it was opposed to petitions regardless what voting procedure was used.[14]

Table 5.1 illustrates how the votes were cast in the Council on whether paragraph "f" could be voted on *ad referendum*, and also how the votes were then cast on the two options contained in that paragraph. The table reveals the existence of a large bloc of states who were in favor of authorizing the Commission to examine petitions received from individuals, groups, and legally constituted associations, but not from governments, on certain specified rights and in accordance with the special procedures established in other articles of the draft statute. Only four of the 21 member states voted for Option I, indicating very little support for a system whereby governments would also be able to submit petitions to the Commission. However, eight member states voted in favor of both the *ad referendum* voting procedure and Option II. Costa Rica would have joined this bloc, for a total of nine votes, had the transitory article on *ad referendum* voting on paragraph "f" been adopted. The Costa Rican representative had been instructed by her government to vote for the transitory article, and when it failed of adoption (and

[13] OAS, Council, *Acta de la sesion ordinaria celebrada el 25 de mayo de 1960* (OEA/Ser. G/II c-a-371), May, 1960, pp. 83–87. (Hereafter cited as *Acta* 371)

[14] *Ibid.*, p. 86.

lacking new instructions from her government) she abstained from voting on either option.

Table 5.1 also shows that pushing for an *ad referendum* vote on the proposed paragraph "f" met with only a measure of success. Guatemala

TABLE 5.1 Votes cast in the Council of the OAS on the special voting procedure proposed for Article 9 (f), and on both options proposed in that paragraph

Member States	*Ad Referendum Proposal*			*Option I*			*Option II*		
	For	*Ag.*	*Ab.*	*For*	*Ag.*	*Ab.*	*For*	*Ag.*	*Ab.*
Argentina			×			×			×
Bolivia			×		×			×	
Brazil			×			×			×
Chile		×			×		×		
Columbia	×				×		×		
Costa Rica	×					×			×
Cuba	×			×			×		
Dominican Republic			×			×			×
Ecuador	×			×			×		
El Salvador	×			×			×		
Guatemala	×					×			×
Haiti			×			×			×
Honduras	×					×	×		
Mexico	×					×	×		
Nicaragua			×			×			×
Panama			×			×			×
Paraguay			×			×			×
Peru	×					×	×		
Uruguay			×			×			×
United States		×			×			×	
Venezuela	×			×			×		
Totals	10	2	9	4	4	13	9	2	10

Source: OAS, Council, *Acta de la sesion ordinaria celebrada el 25 de mayo de 1960.* OEA/Ser. G/II (c-a-371), p. 39, 49–50.

joined the bloc of nine states in favor of petitions and voted for the proposal, but when it failed of adoption abstained from voting on either option. The Commission was thus denied the authority to examine petitions (from individuals, groups and associations) by only one vote; 11 votes would have constituted a majority. Cnile could have provided the necessary vote, but voted *for* Option II and *against* the transitory article. Apparently Chile was concerned that representatives who voted *ad referendum* on paragraph "f" might then not be able to secure approval of the provisions from their relevant domestic political organs, creating problems for the operation of the Commission in the future.

The other paragraphs of Article 9 were adopted almost unanimously. In each case the vote was 19 in favor, two abstentions, and none against.[15] The representatives of Costa Rica and the Dominican Republic abstained. The Costa Rican representative's reason for abstaining was explained above. The Dominican Republic's representative abstained once it became obvious that his efforts to sabotage the Commission would not succeed. The final vote on the statute as a whole was 20 votes in favor and one abstention (the Dominican Republic).

D. The Establishment of a "Study Group"

The decision not to invest the Commission with authority to examine petitions was a diplomatic victory for the United States—for its position that a sharp distinction should be drawn between the promotion and protection of human rights, and that both could not legitimately be considered essential to "furthering respect" for human rights. The United States' interpretation of the phrase probably reflected the real intention of the majority of foreign ministers when they adopted Resolution VIII (Part II) at the Fifth Meeting of Consultation in 1959. The vagueness of the phrase, however, gave the Council an opportunity to adopt a broader definition. The vociferous and unyielding opposition of the United States appears to have been the main reason why the Council did not do so.

The United States and the other member states who constituted the narrow majority may have assumed that they had succeeded in merely establishing, in the words of José Cabranes, one more "study group" when they defeated the provisions of the draft statute which pertained to the examination of petitions.[16] The Commission itself, however, was not prepared to accept that status. At its First Session in 1960 it adopted a liberal interpretation of its competence, and this, along with amendments to its statute in 1965, made it possible for it to develop into a commission engaged in both the promotion and protection of human rights.

II. THE PROMOTION OF HUMAN RIGHTS

The Council had intended to create a commission whose competence was to promote respect for human rights. When the Commission itself devoted several meetings of its First Session in October, 1960, to a discussion of Article 9 of its statute, however, some important differences of opinion were expressed. Specifically, the commissioners held to two fundamentally different interpretations of Article 9 (b). (The Commission did not feel it necessary to

[15] *Ibid.*, pp. 45–49; 68.

[16] José Cabranes, "The Protection of Human Rights by the Organization of American States," *American Journal of International Law* (Vol. 62, October, 1968), p. 894.

"examine in detail" paragraphs "a," "c," "d," and "e" of Article 9, "since its competence in regard to these was clearly defined.")[17]

Some commissioners asserted that Article 9 (b) authorized the Commission to make recommendations to the member states of the OAS "in general," not to the member states "in particular."[18] There is little room for doubt that this is what the Council had intended. Others argued, however, that Article 9 (b) authorized the Commission "to direct itself to one or several of the American states, as well as to all of them together, according to whether the violations in question were of a general or particular nature."[19] Despite the clear intention of the Council, after considering both points-of-view the Commission decided that Article 9 (b) should be interpreted as authorizing it "to make general recommendations to each individual member state, as well as to all of them."[20] The Commission assumed that the Council would consent to this interpretation.

The assumption was not totally unjustified. The articles of the third draft of the statute which pertained to the examination of petitions had been defeated by a narrow majority in the Council, and two of the most vigorous advocates of the adoption of these articles had been elected to the Commission, Dr. Gonzalo Escudero of Ecuador and Mrs. Angela Acuña de Chacón of Costa Rica. Others on the Commission held similar views. The Commission could therefore expect some support in the Council in the event its interpretation of Article 9 (b) should be challenged.

A second important decision the Commission made at its First Session in 1960 with regard to Article 9 (b) was that it was thereby authorized to "take cognizance" of petitions addressed to it. Furthermore, it decided to propose to the Council that it adopt amendments to its statute so that it could examine petitions it received.[21] We shall return to these amendments in Chapter 6.

The implications of the Commission's interpretations of Article 9 (b) deserve emphasis. The Commission was assuming competence to make recommendations to particular states on the basis of petitions it would "take cognizance" of. While this fell short of assuming competence to make decisions on the merits of individual complaints, it laid the foundation for eventual expansion of the Commission's competence to include the examination of petitions on their merits. Article 9 (b) has thus been the foundation upon which the Commission has built for itself a role in the *protection* of human rights. In Chapter 6, we shall discuss the expansion of the Commission's competence to include the protection of human rights and its efforts

[17] IACHR, *Report on the Work Accomplished During its First Session, October 3 to 28, 1960* (OEA/Ser. L/V/II.1, Doc. 32), March, 1961, p. 9. (Hereafter cited as IACHR, *Report on the First Session*)

[18] *Ibid.*, pp. 9–10.

[19] *Ibid.*, p. 10.

[20] *Ibid.*

[21] *Ibid.*, p. 13, pp. 10–12.

to do so. The other provisions of Article 9 authorize the Commission to engage in various promotional activities, and it is with these that we are concerned in the remainder of this chapter.

A. Developing an Awareness of Human Rights

According to Article 9 (a) of its statute, the Commission is charged with developing an "awareness of human rights among the peoples of America." Various projects which the Commission has discussed and attempted to implement since it was created can be considered as directed toward achieving this goal. These include the creation of national committees on human rights, fellowships and scholarships, radio and television programs, seminars and symposia, contests, and publications.

National Committees on Human Rights

The Commission has expressed an interest in the creation of a national committee on human rights in each of the member states of the OAS since its First Session in October, 1960. Upon the initiative of Dr. Gonzalo Escudero, the Commission "discussed at length the possibility of organizing in the respective member states groups of qualified citizens who might cooperate" with it in stimulating an awareness of human rights.[22] The national committees were to be "composed of representatives of the member countries, who were persons of moral integrity and independent judgement, and who had identified themselves with the cause of human rights." Their main function would be to

> cooperate with the Commission in the task of stimulating an awareness of human rights among the American peoples, taking advantage of all the cultural and educational means available to them; and [to] suggest to the Commission ways of promoting human rights and guaranteeing their protection through the legislation of the American states.[23]

Individual members of the Commission were to attempt to organize national committees in their respective countries, and the Commission requested the secretariat to obtain information on persons and institutions who might be able to organize committees in the other member states.[24]

Matters related to the creation of the national committees were discussed again at the Third, Fourth, and Fifth Sessions of the Commission, all held in 1962.[25] At the Third Session the Commission reviewed various United

[22] *Ibid.*, p. 15.
[23] *Ibid.*, p. 16.
[24] *Ibid.*
[25] For a summary of decisions made at these sessions see IACHR, *Report on the Work Accomplished During its Twenty-First Session, April 7 through 17, 1969* (OEA/Ser. L/V/II.21, Doc. 27 (English)), February, 1970, pp. 50–53. (Hereafter cited as IACHR, *Report on the Twenty-First Session*)

Nations resolutions pertaining to the proposed creation of national committees on human rights. At the Fourth Session it approved a set of rules of procedure for the establishment of national committees in the American states, by which it agreed "to invite representative persons from the various Latin American countries to establish the national committees;" to "inform the organizations in the various American countries that [were] interested in the promotion or protection of human rights that the Commission would welcome any cooperation they might offer for the more effective performance of its functions;" and to have the secretariat obtain from the United States Department of State "a list of organizations or associations concerned with human rights" so that their assistance and cooperation might be solicited.[26] The Chairman and the secretariat thus proceeded to contact various individuals and organizations, but "these representations did not produce positive results, since the vast majority of those consulted either did not reply or declined to cooperate."[27] In short, the Commission found that the "idea of national committees on human rights was not favorably received in the American countries."[28] Only two national committees were created through efforts of individual commissioners, in Costa Rica and Venezuela, and both functioned for only short periods of time.[29] Consequently, at its Fifth Session the Commission agreed that it would "henceforth request the cooperation of already-established institutions and associations."[30]

For several years after 1962 the Commission did not devote much attention to the creation of national committees, primarily "because of its duty to attend to other urgent tasks, such as studying the situation regarding human rights in various American countries and carrying out its General Work Program."[31] The matter was finally raised again at the Twentieth Session in 1968 in connection with a reorganization of the Commission's General Work Program. It was then decided to postpone discussion of the national committees until the Twenty-First Session in 1969.[32] At the Twenty-First Session "the view prevailed that the Commission should renew its efforts for the establishment of national committees on human rights."[33] However, several important questions were raised. Should the national committees act as advisors to the individual governments? Should they act as advisors to the IACHR?

[26] *Ibid.*, p. 52.

[27] *Ibid.*, p. 53.

[28] IACHR, *Report on the Work Accomplished During its Twenty-Third Session, April 6 through 16, 1970* (OEA/Ser. L/V/II.23, Doc. 27 (English)), December, 1970, p. 33. (Hereafter cited as IACHR, *Report on the Twenty-Third Session*)

[29] *Ibid.*

[30] IACHR, *Report on the Twenty-First Session*, p. 53.

[31] *Ibid.*

[32] IACHR, *Report on the Work Accomplished During its Twentieth Session, December 2 through 12, 1968* (OEA/Ser. L/V/II.20, Doc. 33 (English)), August, 1969, p. 49. (Hereafter cited as IACHR, *Report on the Twentieth Session*)

[33] IACHR, *Report on the Twenty-First Session*, p. 54.

What kinds of activities should they engage in, and how should their activities be coordinated with those of the IACHR? In an effort to resolve these problems, the Commission appointed Dr. Justino Jiménez de Aréchaga as rapporteur for the subject and charged him with drafting standards which could be made applicable to the creation of the national committees.[34]

The draft standards were discussed at the Twenty-First Session, but differences of opinion on various proposed standards necessitated postponing a final decision to another session. It was not possible to make a decision at the Twenty-Second Session in 1969. The first part of that session was held in Washington, D.C., to consider the situation regarding human rights in Honduras and El Salvador as a result of border clashes that year; the second part was held in Costa Rica where the Commission provided technical advisory services to the Inter-American Specialized Conference on Human Rights, at which the American Convention on Human Rights was adopted. Therefore, at the Twenty-Third Session in 1970 the Commission devoted two of its meetings to a discussion and revision of the draft standards, and they were adopted.[35]

The standards call for the establishment of "autonomous" national committees whose "decisions shall be taken entirely upon their own responsibility." The committees "shall be governed by their own regulations or statute" which, during an initial period, must be approved by the IACHR. Initially, the officers of the national committees shall be appointed by the IACHR, giving due regard to adequate representation of all "sectors of the national community," and to individuals who are distinguished in their personal devotion to human rights. The standards call specifically for adequate representation of women and youth. When the IACHR deems that the organization of a "National Committee has been sufficiently consolidated in a given state, it may decide that it shall henceforth have the right to appoint its own officers."

The standards also enumerate the kinds of activities which the national committees would be expected to engage in. These would be primarily promotional activities—disseminating information on human rights and the attributes of the IACHR; organizing lectures, seminars, and courses on human rights; and "promoting technical studies on human rights and on means for their protection." The standards reserve the protection of human rights to the IACHR; one of the functions of the national committees, however, would be to disseminate information on the procedures to be followed when lodging a petition with the Commission. The national committees might themselves lodge a petition with the Commission.

With regard to finance, the standards provide that each national committee should "obtain from private institutions, in such a manner as not to limit [its]

[34] *Ibid.*, pp. 54–55. See also IACHR, *Report on the Twenty-Third Session*, pp. 34–35.

[35] See *ibid.*, pp. 36–40 for the standards adopted.

freedom of action ... in any sense, the necessary means and resources for performing its work and the expansion of its activities."

Since the standards provide that the Commission shall initially appoint the members of the national committees, it decided at its Twenty-Fourth Session in 1970 to authorize the Chairman to "request such entities as the Supreme Courts of the member states of the OAS, law schools, bar associations or special groups interested in human rights to provide names of persons" who in their opinion were qualified to be members of the national committees.[36] This decision was modified somewhat at the Twenty-Fifth Session in 1971 to encourage individual members of the Commission to initiate on their own contact with interested persons.[37] At the Twenty-Sixth Session in 1971 the Commission received reports from various commissioners on their efforts to establish national committees. It also "considered the advisability of providing the national committees that might be set up with a minimum secretarial staff" which would be needed for them to carry out their functions,[38] the cost of which was later estimated at $50,000 to $60,000.[39]

For all its efforts, by 1972 the Commission was able to report that only one national committee had been established (in Costa Rica), although "measures for their establishment and operation [were] in a very advanced stage" in Bolivia, Mexico, and Peru.[40] The situation remained essentially unchanged in 1974. The Commission reported to the OAS General Assembly in 1974 that "despite the understandable difficulties of a project of this type," it continued "to be optimistic in its efforts to establish a national committee on human rights in each American country."[41] It does not appear, however, that the Commission has been able to make much progress. Lack of interest on the part of the individuals and associations contacted continues to be a problem. Lack of funds is also a problem, and it might be expected that the Commission will find little enthusiasm in the Organization for appropriating the funds

[36] IACHR, *Report on the Work Accomplished During its Twenty-Fourth Session, October 13 through 22, 1970* (OEA/Ser. L/V/II.24, Doc. 32 (English) Rev. Corr.), April, 1971, pp. 51–53. (Hereafter cited as IACHR, *Report on the Twenty-Fourth Session*)

[37] IACHR, *Report on the Work Accomplished During its Twenty-Fifth Session, March 1 through 12, 1971* (OEA/Ser. L/V/II.25, Doc. 41 Rev.), November, 1971, pp. 43–45. (Hereafter cited as IACHR, *Report on the Twenty-Fifth Session*)

[38] IACHR, *Report on the Work Accomplished During its Twenty-Sixth Session, October 27 through November 4, 1971* (OEA/Ser. L/V/II.26, Doc. 37 Rev. 1), March, 1972, pp. 60–61. (Hereafter cited as IACHR, *Report on the Twenty-Sixth Session*)

[39] IACHR, *Report on the Work Accomplished During its Twenty-Seventh Session, February 28 through March 8, 1972* (OEA/Ser. L/V/II.27, Doc. 42 Rev. 1), May, 1972, pp. 63–64. (Hereafter cited as IACHR, *Report on the Twenty-Seventh Session*)

[40] IACHR, *Report on the Work Accomplished During its Twenty-Eighth Session (Special), May 1 through 5, 1972* (OEA/Ser. L/V/II.28, Doc. 24 Rev. 1), August, 1972, pp. 36–37. (Hereafter cited as IACHR, *Report on the Twenty-Eighth Session*)

[41] OAS, General Assembly, Fourth Regular Session (1974), *Report of the Inter-American Commission on Human Rights for the Year 1973* (OEA/Ser. P AG/doc. 409/74), March, 1974, p. 157. (Hereafter cited as IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*)

which would be needed to provide the national committees with the minimal secretarial services they would need.

Fellowships and Scholarships on Human Rights

The Commission also agreed at its First Session in 1960 that "to facilitate the interchange of technicians, information, and up-to-date knowledge on human rights" a fellowship or scholarship program should be established.[42] The Commission therefore resolved to request the Secretary General of the OAS "to prepare a project for the establishment of a fellowship program on human rights, specifying the kinds of studies that might be useful, and indicating the cost of the program."[43] At the Second Session in 1961 the Commission discussed a report prepared by the OAS Secretariat on the steps being taken to implement the fellowship program. Two facets of the project were outlined. The first was to provide fellowships for Latin American postgraduate students to engage in one year of specialized study at a university in the United States; the second was to provide fellowships for six or eight week seminars in Latin American universities.[44]

The fellowship project was revised at subsequent sessions, and the Commission succeeded in making arrangements with the Institute de Investigaciones Juridicas of the National University of Mexico for a course on human rights. An item was included in the budget of the Pan American Union for 1963–64 to finance the course,[45] but because of financial stringencies the funds were not appropriated.[46] The Commission continued to press for the implementation of its program, and funds for the course were appropriated in 1968. It was held in Mexico (January–March, 1969) in connection with the IACHR's celebration of International Human Rights Year, proclaimed by the General Assembly of the United Nations for 1968. The OAS Fellowship and Professorship Program, the Mexican government, and the National University of Mexico provided several fellowships. Thirty-five students, chosen from among almost 200 candidates, participated in the course. René Cassin, the distinguished French jurist who was one of the main authors of the Universal Declaration of Human Rights and winner of the

[42] IACHR, *Report on the First Session*, p. 6.

[43] *Ibid.*, p. 7.

[44] IACHR, *Report on the Work Accomplished During its Second Session, April 10 to 26, 1961* (OEA/Ser. L/V/II.2, Doc. 24), August, 1961, pp. 7–8. (Hereafter cited as IACHR, *Report on the Second Session*)

[45] IACHR, *Report on the Work Accomplished During its Sixth Session, April 16 to May 8, 1963* (OEA/Ser. L/V/II.7, Doc. 28 (English)), August, 1963, p. 19. (Hereafter cited as IACHR, *Report on the Sixth Session*)

[46] IACHR, *Report on the Work Accomplished During its Seventh Session, October 7 to 25, 1963* (OEA, Ser. L/V/II.8, Doc. 35 (English)), March, 1964, p. 29. (Hereafter cited as IACHR, *Report on the Seventh Session*)

Nobel Peace Prize in 1968, was guest professor. The Mexican jurist and then Chairman of the IACHR, Dr. Gabino Fraga, delivered a series of lectures.[47]

While there has been little success in establishing national committees because of lack of interest and organizational problems, the Commission is of the view that the fellowship and scholarship project is feasible. The sole obstacle to its implementation has been lack of funds.[48] The Commission has therefore continued to work toward the implementation of a fellowship program. A major step was taken in this connection at the Twenty-Sixth Session in 1971, when the Commission decided to establish the "Rómulo Gallegos Fellowship." The fellowship, named in honor of the distinguished Venezuelan politician and first Chairman of the Commission who died in 1969, was established to "offer to the governments of the member states of the Organization technical advice in the field of human rights, by extending to experts in the matter and/or public officials who by reason of their position deal with questions relating to the exercise and/or protection of these rights, an opportunity to engage in specialized studies in this field."[49] The fellowships are to have a maximum duration of one year, and they "shall provide, at most, a round-trip low-fare air ticket for travel between the recipient's place of residence and the place of study, as well as tuition, study and work materials, room and board, and hospitalization insurance covering sickness or accidents during the period of the fellowship." The fellows are to be selected by the "Commission's standing subcommittee, with the advice of the Executive Secretary of the Commission," and they must assume a number of obligations, such as reporting to the Commission on the relevance and application of their research to problems within their own countries. The fellowships may be forfeited or cancelled under certain circumstances such as "misconduct or behavior incompatible with the aims and principles underlying the work" of the IACHR.

At its Twenty-Seventh Session in 1972 the Commission decided to circulate among universities in the American states the standards it would apply in selecting a fellow.[50] At its Thirty-First Session in 1973 it awarded the first fellowship to Mr. Oscar María Garibaldi, an Argentine citizen; at its Thirty-Second Session in 1974 it awarded the second fellowship to Mr. Thomas McCarthy, a citizen of the United States.[51] Whether the Commission will be

[47] IACHR, *Work Accomplished by the Organization of American States in the Field of Human Rights in 1969* (OEA/Ser. L/V/II.23, Doc. 3 (English)), March, 1970, pp. 3–4.

[48] IACHR, *General Work Program of the Inter-American Commission on Human Rights: Summary and Recommendations* (OEA/Ser. L/V/II.20, Doc. 8), December, 1968, p. 24.

[49] For the standards applied to the selection of fellows see IACHR, *Report on the Twenty-Sixth Session*, pp. 56–60.

[50] IACHR, *Report on the Twenty-Seventh Session*, p. 61.

[51] OAS, General Assembly, Fifth Regular Session (1975), *Annual Report of the Inter-American Commission on Human Rights* (OEA/Ser. P AG/doc. 520/75), March, 1975, p. 142.

able to award fellowships on a regular basis will, of course, depend on the availability of funds.

Radio and Television Broadcasts

One of the most effective ways in which the IACHR could develop an awareness of human rights among the peoples of America would be through the extensive use of radio and television broadcasts on the subject. The Commission first discussed the possibility of initiating such broadcasts in 1968, and agreed to explore whether it could secure the "collaboration of non-governmental specialized bodies, such as national or Inter-American radio and television associations," in this regard.[52] The Commission had in mind short, ten minute, broadcasts which might "make known, in a more rapid and dynamic way, the importance of human rights in the political, social, and economic development" of the American states;[53] and which would "promote knowledge of human rights, the manner of guaranteeing them, and the activities of the Commission in the performance of its mandate."[54]

The Commission appointed one of its members, Dr. Justino Jiménez de Aréchaga, to explore the possibility of broadcasts with the Inter-American Association of Broadcasters (IAAB). The Board of Directors of the IAAB unanimously agreed "in principle" to cooperate with the Commission in disseminating information on human rights and appointed a committee to study the request. Dr. Jiménez de Aréchaga was appointed the liason officer between the IAAB committee and the IACHR.[55] Despite the initial enthusiasm, and despite the fact that broadcasts of this nature would most likely be an effective way of developing an awareness of human rights and of the Commission's work, there has been no further report concerning them.

Seminars and Symposia

When the Commission reorganized its General Work Program in 1968, it discussed the "possibility and desirability of holding seminars and symposia on certain human rights that because of their great significance should be studied with the completeness and care that may be necessary for effective exercise and defense of them."[56] The topic of "Trade Union Freedom" was selected for the first seminar.[57] The topic was well chosen; a large number of the

[52] IACHR, *Report on the Twentieth Session*, p. 47.
[53] *Ibid.*
[54] IACHR, *Report on the Twenty-First Session*, pp. 39–41.
[55] *Ibid.*, p. 40.
[56] IACHR, *Report on the Twentieth Session*, p. 47.
[57] OAS, General Assembly, Third Regular Session (1973), *Annual Report of the Inter-American Commission on Human Rights* (OEA/Ser. P AG/doc. 305/73 rev. 1), March, 1973, p. 92. (Hereafter cited as IACHR, *Report to the Third Regular Session of the OAS General Assembly, 1973*)

petitions the Commission has received in recent years from various American states have denounced the arbitrary arrest, detention, and harrassment of trade union leaders and members.

At its Twenty-Sixth Session in 1971 the Commission adopted a set of standards which would govern its seminars in general, as well as the projected seminar on "Trade Union Freedom" in particular.[58] The purpose of the seminars is to "offer the member states of the Organization of American States an opportunity to study specific aspects of the human rights set forth in the American Declaration of the Rights and Duties of Man, assembling for a short period of time experts on the subject matter or government officials who, by reason of their positions, deal with questions relevant to the exercise and/or protection of these rights." The seminars are to be organized by the IACHR, and it shall determine their topics, approve their agendas, fix their location, and select the participants from among candidates nominated by each government. Interested observers may be invited to attend the seminars. Each participant "shall receive from the General Secretariat of the OAS a round-trip low-fare air ticket for travel between his city of residence and the city in which the seminar is held, as well as a per diem allowance for each day of participation."

The seminar on "Trade Union Freedom" was held in Caracas, Venezuela, November 6–10, 1972, with participants from 15 of the 23 active member states of the OAS and observers from three additional ones, as well as observers from other states and international governmental and non-governmental organizations.[59] Again, as in the case of the fellowship program, whether the Commission will be able to organize additional seminars will depend on financial support from the Organization.

Contests

A novel way in which the Commission has decided to develop an awareness of human rights is in the establishment of an essay contest. The suggestion that the Commission might conduct such a contest was made by Dr. Carlos A. Dunshee de Abranches, the Brazilian national on the Commission, at the Twenty-Sixth Session in 1971. The Commission approved the proposal in principle and appointed Dr. Abranches to draft standards for the competition.[60] The standards were approved at the Twenty-Seventh Session in 1972.[61]

The "object of the essay competition on human rights is to develop among the peoples of the American states an awareness of human rights by

[58] For the standards, see IACHR, *Report on the Twenty-Sixth Session*, pp. 49–56.

[59] See "Report of the Seminar on Trade Union Freedom," OEA/Ser. L/V/IV, LS/doc. 29 rev. 1, November 10, 1972.

[60] IACHR, *Report on the Twenty-Sixth Session*, p. 62.

[61] See IACHR, *Report on the Twenty-Seventh Session*, p. 62.

publicizing such rights, especially among the youth of the Americas." Any citizen of a member state "who is enrolled in a university, classified as such under the laws of the country in which it is located," and who writes his essay on the selected topic and in the form stipulated, is eligible to participate. The competition is supposed to be conducted annually, with prizes for the three best essays being "established periodically, according to the budgetary possibilities of the Commission," and they are to be "publicized for the information of those interested in the contest."

At is Thirtieth Session in 1973 the Commission decided to name the contest the "Angela Acuña de Chacón Contest," in honor of the former member of the Commission and ambassador to the OAS Council from Costa Rica. The Commission also selected the topic of "The Relationship Between the Rights and Duties set forth in the American Declaration of the Rights and Duties of Man" as the topic for the first contest, and to award $300, $200, and $100 respectively for the three best essays.[62] Different prizes may be awarded in the future, depending on the availability of funds. Since this contest was only recently established, there is no way of evaluating its success.

Publications

The wide dissemination of publications on human rights is another way in which the Commission could develop an awareness of human rights. Accordingly, it has published a number of documents such as the "Inter-American Commission on Human Rights—What it is and How it Functions," which is written in simple language in a question and answer format. Another, a "Handbook of Existing Rules Pertaining to Human Rights," was designed primarily for specialists. In more recent years, the Commission has published yearbooks on human rights. The first covered the period 1960–67, and was published in 1972. The second, covering the year 1968, was published in 1973. Both contain selected reports and studies prepared by individual commissioners and other important documents on human rights. In addition, the Commission publishes reports on each of its sessions and these are distributed as widely as possible to libraries and interested persons.

Cooperation of the Governments

The Commission has not been satisfied with the results of its various projects designed to develop an awareness of human rights among the peoples of America. Lack of funds, lack of interest, and organizational problems have all been obstacles to the effective implementation of the Commission's projects. As it observed in its report to the OAS General Assembly in 1971:

[62] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, p. 156.

A matter that is as serious as the crisis confronting human rights in the hemisphere is the ignorance on the part of many millions of men and women of the content and limits of those rights and of the measures afforded by municipal and international law for their adequate protection. The Inter-American Commission does everything in its power to help overcome these deficiencies, by preparing studies on the various human rights for use in secondary schools, universities, and so on, and by preparing pamphlets or handbooks for distribution in schools, institutions of secondary education, labor unions, professional associations, and the like. Unquestionably, however, the resources available to it do not permit the Commission to disseminate these publications as widely as would be desirable. The support of the governments for these purposes would be of the highest importance, especially regarding the inclusion of regular or short courses at all levels of public education, dealing with human rights and protection of them.[63]

Therefore, the Commission requested the General Assembly to recommend to all "the governments that they take measures to publicize and make known the inter-American instruments on human rights, as well as the studies and informational materials prepared by the Commission."[64] The General Assembly adopted a resolution which endorsed some of the Commission's recommendations, but not those which called upon the governments to disseminate the Commission's publications or to institute courses on human rights.[65]

B. Preparing Studies and Reports on Human Rights

The Commission is authorized by Article 9 (c) of its statute to prepare "such studies and reports as it considers advisable in the performance of its duties." Since its statute was amended in 1965, the Commission has been required to also prepare an annual report (Article 9 (bis) (c)).

General Studies and Reports

In keeping with Article 9 (c), the General Work Program adopted by the Commission at its First Session in 1960 included the study of various topics relating to human rights. Individual members of the Commission were assigned the task of researching and reporting on these topics for the consideration of the Commission as a whole.[66] The list of topics has been revised

[63] OAS, General Assembly, First Regular Session (1971), *Annual Report of the Inter-American Commission on Human Rights to the General Assembly* (OEA/Ser. P AG/doc. 128), March, 1971, pp. 24–25. (Hereafter cited as IACHR, *Report to the First Regular Session of the OAS General Assembly, 1971*)

[64] *Ibid.*, p. 24.

[65] OAS, General Assembly, Second Regular Session (1972), *Annual Report of the Inter-American Commission on Human Rights* (OEA/Ser. P AG/doc. 227), March, 1972, pp. 79–80. (Hereafter cited as IACHR, *Report to the Second Regular Session of the OAS General Assembly, 1972*)

[66] IACHR, *Report on the First Session*, pp. 7–8.

and expanded from time to time as individual members of the Commission completed their research, or as new problems were brought to its attention. Examples of the kinds of topics which have included on the list are the following: "Human Rights and the Effective Exercise of Representative Democracy;" "Measures to Perfect and Implement the Right to Freedom of Investigation, Opinion, Expression and Dissemination of Ideas;" "Human Rights and the 'State of Siege;' " "The Right to Education in Latin America;" "Human Rights and the Development of Science and Technology;" and "The Right to Petition."

It has taken some commissioners several years to complete their research and prepare their reports on assigned topics because the demands of their own professions are great, and when the Commission meets in regular sessions attention to other pressing matters leaves little time for research and discussion of the topics. Nevertheless, the evidence gathered in some of the studies and reports has been useful to the Commission in fulfilling its mandate. For example, some of the reports provided valuable information when the Commission prepared the preliminary draft of the American Convention on Human Rights.

The Annual Report

As noted above, the amendment of the Commission's statute in 1965 called for the preparation of an annual report. Article 9 (bis) (c) of the statue requires the Commission:

> To submit a report annually to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs, which should include: (i) a statement of progress achieved in realization of the goals set forth in the American Declaration of the Rights and Duties of Man; (ii) a statement of areas in which further steps are needed to give effect to the human rights set forth in the American Declaration; and (iii) such observations as the Commission may deem appropriate on matters covered in the communications submitted to it and in other information available to the Commission;

The Commission did not prepare an annual report until 1971, and presented it to the First Regular Session of the OAS General Assembly in keeping with Article 52 (f) of the amended Charter. The second (1972), third (1973), fourth (1974), and fifth (1975) annual reports were also submitted to the General Assembly. To inform the governments of its activities between 1965 and 1969 the Commission prepared a special report and submitted it directly to them.[67]

In preparing its annual reports the Commission has generally followed the outline of the paragraph quoted above—citing progressive legislation in

[67] See IACHR, *Activities of the Inter-American Commission on Human Rights (1965–1969)* (OEA/Ser. L/V/II.23, Doc. 11 (English) Rev.), February, 1971.

various American states which would lead to achieving the goals proclaimed in the Declaration; areas in which further steps are needed; and "observations" on communications received. The latter have consisted of descriptions of specific complaints brought against particular governments, as well as the action taken by the Commission on them.

The Commission needs the cooperation of the governments in preparing its annual reports, for it is only authorized by its statute (Article 9 (d)) to urge them to supply it with information. Their cooperation thusfar has been somewhat less than desirable. For the first annual report, only six governments responded to the Commission's request for information on their legislation in the area of human rights for the period 1969–1970, and four of the six responded after the Commission had made a second request.[68] This led the Commission to complain in its report that the failure of many governments to supply it with information placed it in "the distressing position of having to present an incomplete statement," and that its report therefore contained "omissions that [were] no less annoying because they [were] involuntary."[69] Despite the efforts of the commissioners and the staff, it was "extremely difficult . . . to fill the gap in direct information regarding new constitutional, legal, or administrative provisions, or new judicial decisions handed down" in the member states who had not responded.[70] For the second report, eight governments provided the requested information, five of them after the second request.[71] The Commission again urged that the General Assembly recommend to the member states that they supply it with the information it requests.[72] For the third annual report, eight governments provided the information requested.[73] For the fourth annual report, five governments provided the information requested.[74] The Commission has thus been compelled to rely on its staff for collecting the necessary information, an effort which has been partially successful since the Commission includes material on nonresponding states in its annual reports. But experience suggests that many governments do not consider the Commission's request for information as deserving attention.

[68] Chile and Costa Rica responded to the first request; Guatemala, Mexico, Nicaragua, and the United States responded to the second request. See IACHR, *Report to the First Regular Session of the OAS General Assembly*, 1971, pp. i–ii.

[69] *Ibid.*, pp. 25–26.

[70] *Ibid.*, p. 25.

[71] Chile, the Dominican Republic, and Ecuador responded to the first request; Argentina, Columbia, Mexico, the United States, and Uruguay responded to the second request. See IACHR, *Report to the Second Regular Session of the OAS General Assembly, 1972,* p. ix.

[72] *Ibid.*, p. 79.

[73] Argentina, Barbados, Brazil, Costa Rica, Mexico, Panama, Peru, and the United States. See IACHR, *Report to the Third Regular Session of the OAS General Assembly, 1973,* p. 1.

[74] Argentina, Costa Rica, Jamaica, Mexico, and the United States. See IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974,* p. 1.

C. Advising the OAS in Respect of Human Rights

The IACHR is charged with serving the OAS as an "advisory" body in respect of human rights (Article 9 (e) of the statute). The most important advisory function the Commission has thusfar performed has been in drafting the American Convention on Human Rights. Its work on the Convention was discussed fully in Chapter 2.

III. CONCLUSION

The various kinds of academic activity discussed in this chapter were what most representatives of the OAS Council expected of the IACHR when they adopted its statute. Establishing national committees on human rights, preparing studies and reports, holding seminars, and drafting conventions on human rights do not entail direct intervention by the Commission on behalf of individuals, groups, and associations who might be victims of violations of human rights. Rather, the primary purpose of these activities is to promote human rights, and perhaps to create conditions under which a respect for them could flourish.

The Commission has faced numerous obstacles in its efforts to implement its promotional programs—a lack of funds; a lack of interest on the part of the individuals, groups, and associations contacted; and a lack of cooperation on the part of the governments. The Commission has clearly not been satisfied with the fruits of its labor to this point in time. Nevertheless, despite the problems and the lack of significant results, the Commission has devoted some of its time to its promotional activities. But more important, the Commission has done the unexpected: through liberal interpretations of its statute it has become involved in the protection of human rights, the subject of the next chapter.

CHAPTER SIX

THE IACHR AND THE PROTECTION OF HUMAN RIGHTS

Resolutions and declarations on human rights often do not make a clear distinction between the promotion and protection of human rights. In practice, however, a rather sharp distinction between the two is understood. Briefly stated, the promotion of human rights implies the inculcation of a greater respect for the value and meaning of human rights among peoples and governments. The protection of human rights implies taking specific measures to secure respect for them. This distinction closely corresponds to the one drawn by the United States in debate in the OAS Council on the competence of the Inter-American Commission on Human Rights. The United States maintained that if the Commission were authorized to engage in essentially academic activity it would be able only to promote respect for human rights; if, on the other hand, it were authorized to examine and take action on petitions it might receive from individuals, groups, and associations, it would be able to protect human rights.

The distinction between the two is, of course, very important to states. States are not likely to object so strongly to the creation of an international agency charged solely with the promotion of human rights as they are to one charged with their promotion *and* protection. The reason is that, traditionally, international law had relatively little to say about the ways in which states treated their own citizens. Traditionally, individuals (save aliens) were not regarded as subjects of international law. Thus, for states to create an international agency charged with the protection of human rights implies a recognition that individuals have at least some degree of international legal personality. It is largely for this reason that the protection of human rights has become so controversial. Many states have been (and continue to be) reluctant to recognize a right of their citizens to appeal to an international agency for redress of grievances.

The reluctance of some American states to authorize the Inter-American Commission on Human Rights to protect human rights was clearly revealed in debate over the Commission's competence in the OAS Council. The main issues in the debate were discussed in Chapter 5. As we have seen, a narrow

majority of American states, led by the United States, voted to deny the Commission authority to examine and take action on petitions it might receive. However, beginning with its First Session in October, 1960, the history of the Commission has been one in which its competence to deal with human rights matters has gradually expanded to include the protection of human rights; and, in 1965, the American states voted to amend its statute in order to officially authorize it to do so.

I. TO "TAKE COGNIZANCE" OF AND "EXAMINE" PETITIONS

The gradual process through which the IACHR became involved in the protection of human rights began at its First Session in October, 1960. Even before the Commission met for its First Session it began to receive petitions alleging violations of human rights.[1] During that session additional petitions were addressed to it. The Commission was not authorized to "examine" these petitions, for the Council had only a few months earlier voted to deny it authority to do so. However, if the Commission ignored the petitions, or returned them to the claimants, it would have been reduced to nothing more than a "study group," and most commissioners did not want to accept that status. At the same time, most commissioners were not prepared to defy the Council. The Commission thus sought to reach the middle ground between these extremes with two important decisions—one with regard to the petitions already received, and another with regard to petitions which might be received in the future. Both decisions laid the foundation upon which the Commission would build for itself a role in the protection of human rights.

A. To "Take Cognizance" of Petitions

With regard to the petitions already received, the Commission decided that it would "take cognizance" of them in fulfilling its mandate under Article 9 (b and c) of its statute, that is, in making recommendations and preparing studies and reports.[2] The language was carefully selected. To "take cognizance" of petitions meant that the Commission would stop short of making a decision on the merits of any particular claim (which it could have done had it been able to "examine" petitions); but that it would use the information contained in petitions it received in making recommendations and preparing studies and reports.

This decision was more important than it might at first appear. It will be recalled that the Commission also interpreted Article 9 (b) of its statute as

[1] IACHR, *Report on the Work Accomplished During its First Session, October 3 to 28, 1960* (OEA/Ser. L/V/II.1, Doc. 32), March, 1961, p. 14. (Hereafter cited as IACHR, *Report on the First Session*)

[2] *Ibid.*, p. 13.

authorizing it to make general recommendations to *any* member state of the OAS or to all of them collectively. And Article 9 (d) authorized the Commission to urge the member states to supply it with information on "measures adopted by them in matters of human rights." Thus, aggrieved parties would know that they could take their case to an inter-American body which would at least "take cognizance" of their plight and perhaps try to influence their governments to adopt measures more suitable to the faithful observance of human rights. The Commission adopted a set of regulations which set forth the procedure it would follow in "taking cognizance" of petitions it received.[3]

B. To "Examine" Petitions: Proposed Amendments to the Statute

The Commission was not satisfied merely to "take cognizance" of petitions. Any government might be persuaded to adopt general measures in respect of human rights but violate the rights of particular individuals. If so, the Commission would not be able to protect those individuals. Thus restricted by its statute, the Commission felt that it would not be able to "fulfill the mission in defense of human rights that the American peoples [could] expect from it."[4] The Commission viewed "taking cognizance" of petitions as within the realm of promoting respect for human rights; and it argued that its "obligation should not be restricted to promoting respect" for human rights, that it should be "obliged to see to it" that they were "not violated."[5] Thus, in order to be able to deal more effectively with petitions it might receive in the future, the Commission decided to draft amendments to its statute and request the Council to adopt them. If adopted, the amendments would authorize the Commission to examine and take action on petitions it might receive.[6]

The first set of amendments, proposed as paragraphs "f" and "g" of Article 9 of the Commission's statute, provided as follows:

f To examine communications directed to it by any person or groups of persons, or by any associations having legal status in the respective country, with regard to serious violations of human rights, as defined in the American Declaration.

g To request the government whose authorities are accused of acts being examined by the Commission to provide any pertinent information.

In addition, the Commission proposed two new articles. The first, to be adopted as Article 9 (bis), provided:

The Commission will make reports on the matters examined and will submit them to the respective governments at a time that it deems opportune.

In its reports, the Commission may make such recommendations as it considers suitable, the implementation of these being subject to their compatibility with the constitutional provisions of the country to whose government they are directed.

[3] *Ibid.*, p. 14.
[4] *Ibid.*, p. 11.
[5] *Ibid.*
[6] *Ibid.*, p. 12.

If the government accused of the acts examined by the Commission fails to adopt the recommended measures within a reasonable time, the Commission may publish a report on the matter. This, however, may be done only in the most serious cases and by decision of an absolute majority vote.

The second, a new article to follow Article 9 (bis), provided:

The Commission shall be authorized to organize itself in whatever way it deems necessary to carry out the attributes and powers established in paragraphs f) and g) of Article 9 and in Article 9 (bis).

The Commission transmitted these amendments to the Council in October, 1960. It expressed its "well-founded" hopes that they would be adopted, but indicated that if for "any reasons" the Council failed to adopt them it would "take the liberty" of submitting them to the "Supreme Organ of the Organization"[7] (the Inter-American Conference).

The Council assigned the amendments to its Committee on Juridical-Political Affairs for study. The Committee discussed the advisability of adopting the amendments at several meetings between 1960 and 1964. However, despite repeated appeals by the Commission, and despite a resolution of the Eighth Meeting of Consultation of Ministers of Foreign Affairs (Uruguay, 1962) recommending that the amendments be adopted, the Committee failed to report them out with a favorable recommendation. It was clear that the Committee on Juridical-Political Affairs would continue to study the amendments indefinitely. The IACHR therefore requested, in June, 1964, that the Committee defer further consideration of the amendments.[8]

It is not hard to find the reason why the Council failed to adopt the amendments. For all practical purposes, the IACHR was requesting that the Council approve what it had disapproved only a few months earlier when it adopted the original statute. The American states had not yet had sufficient experience with the operation of the Commission, at least not by October, 1960, to warrant their expanding its competence to include the examination of petitions. By the end of 1965, however, they had had considerable experience with the Commission, and they approved several amendments at the Second Special Inter-American Conference (Rio de Janiero, November, 1965). The operative part of Resolution XXII of the Second Special Inter-American Conference reads:[9]

The Second Special Inter-American Conference RESOLVES:

1 To request the Inter-American Commission on Human Rights to conduct a continuing survey of the observance of fundamental human rights in each of the member states of the Organization.

[7] *Ibid.*, pp. 11–12.

[8] IACHR, *Report on the Work Accomplished During its Ninth Session, October 5 to 16, 1964* (OEA/Ser. L/V/II.10, Doc. 21 (English)), February, 1965, pp. 31–33. (Hereafter cited as IACHR, *Report on the Ninth Session*)

[9] OAS, Second Special Inter-American Conference, *Final Act* (OEA/Ser. E/XIII.1, Doc. 150 (English) Rev.), November, 1965.

2 To request the Commission to give particular attention in this survey to observance of the human rights referred to in Article I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.
3 To authorize the Commission to examine communications submitted to it and any other available information, to address to the government of any American state a request for information deemed pertinent by the Commission, and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights.
4 To request the Commission to submit a report annually to the Inter-American Conference or Meeting of Consultation of Ministers of Foreign Affairs. This report should include a statement of progress achieved in realization of the goals set forth in the American Declaration.
5 In exercising the functions set forth in paragraphs 2 and 3 of this resolution, the Commission shall first ascertain whether the domestic legal procedures and remedies of a member state have been duly pursued and exhausted.
6 That the Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his function.
7 That the secretariat services of the Commission shall be provided by a specialized functional unit. which shall be part of the General Secretariat of the Organization and shall be organized so as to have the resources required for performing the tasks entrusted to it by the Commission.
8 That the statute of the Inter-American Commission on Human Rights shall be amended in accordance with the provisions of this resolution.

The adoption of this resolution (especially paragraphs 2 and 3) represented a reversal of the stand taken by a majority of American states in the Council in 1960. In 1960 they had voted to deny the Commission authority to examine petitions it might receive; by adopting this resolution they would henceforth authorize it to do so. The favorable experience of most American states with the operation of the Commission during the period 1960 to 1965 was the key factor motivating them to reverse the position they had taken in 1960. By November, 1965, it had become clear to most American states that the Commission could provide valuable services in the field of human rights. It had held hearings on the plight of Cuban political prisoners in 1963. It had undertaken two investigative missions to the Dominican Republic—one in 1961, the other in 1963. At the time of the Second Special Inter-American Conference the Commission was in the midst of its third mission to the Dominican Republic—a mission which began in June, 1965, and was to last until July, 1966. In its relations with various other American states during the period 1960 to 1965 the Commission had demonstrated prudence, shielding them from unfavorable publicity in exchange for their cooperation, and foregoing detailed investigations of their human rights practices of its own initiative. We shall discuss more fully the Commission's work during this period in later sections of this chapter. For the moment, suffice it to say that, while there had been setbacks along the way, by 1965 the Commission had proven by its actions that many of the fears expressed about petitions in the Council in 1960 were unfounded. It was against this background of experience that

the American states voted to adopt Resolution XXII at the Second Special Inter-American Conference in 1965.

The resolution was adopted almost unanimously. Haiti abstained on the grounds that the "protection of human rights" was a "function of a sovereign state," and that as a practical matter the "intervention" of the Commission led to the "introduction of an emotional factor unlikely to favor the interests of the very people it [was] designed to protect."[10] Between 1962 and 1965 the Commission had repeatedly raised questions about the Haitian government's treatment of its own citizens. That government had refused to cooperate in any significant way; its abstention on Resolution XXII was not doubt intended to show its displeasure with the Commission.

Joining the other American states in voting in favor of the resolution was the United States. In fact, in direct contrast to its vigorous opposition to authorizing the Commission to examine petitions in the Council in 1960, in 1965 the United States moved to the forefront in favor of authorizing it to do so. President John F. Kennedy had set the tone for this change in policy. He advocated that the United States should decide whether to ratify human rights conventions on their merits, a somewhat more liberal attitude than that of the Eisenhower Administration discussed in Chapter 5. In 1963 President Kennedy transmitted to the United States Senate, and recommended ratification of, three conventions related to human rights. Further action on these conventions was stalled in the Senate, and hearings on them were not held until 1967. Nevertheless, the President had set the tone for a change in policy. The Johnson Administration, which pressed hard for the adoption of sweeping civil rights legislation in the United States in the mid 1960's, maintained the Kennedy stance on human rights and voted to adopt the resolution on amendments to the Commission's statute. The support of the United States may have persuaded other American states to vote for the resolution.[11]

C. The Amendment of the Statute

Paragraph 8 of Resolution XXII of the Second Special Inter-American Conference cited above authorized the amendment of the Commission's statute. At its Thirteenth Session (held in Mexico City) in April, 1966, the Commission therefore incorporated the provisions of the resolution into its statute.[12] It did so by inserting three amendments. Two of these were based on paragraphs 6 and 7 of Resolution XXII and were discussed in Chapter 4: one expanded the role of the Chairman (Article 7 (bis)); the other pertained to

[10] *Ibid.*, p. 61.

[11] See Anna P. Schreiber, *The Inter-American Commission on Human Rights* (Leyden: A. W. Sijhoff, 1970), pp. 55–56.

[12] IACHR, *Report on the Work Accomplished During its Thirteenth Session, April 18 to 28, 1966* (OEA/Ser. L/V/II.14, Doc. 35 (English)), September, 1966, pp. 22–24. (Hereafter cited as IACHR, *Report on the Thirteenth Session*)

the establishment of the specialized secretariat (Article 14 (bis)). The third, and most important amendment, Article 9 (bis), pertains chiefly to the examination of petitions. Based on paragraphs 2, 3, 4, and 5 of Resolution XXII, it reads as follows:

> The Commission shall have the following additional functions and powers:
> a To give particular attention to observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
> b To examine communications submitted to it and any other available information; to address the government of any American state for information deemed pertinent by the Commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights;
> c To submit a report annually to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs, which should include: (i) a statement of progress achieved in realization of the goals set forth in the American Declaration; (ii) a statement of the areas in which further steps are needed to give effect to the human rights set forth in the American Declaration; and (iii) such observations as the Commission may deem appropriate on matters covered in the communications submitted to it and in other information available to the Commission;
> d To verify, as a condition precedent, in exercise of the powers set forth in paragraphs b) and c) of the present article, whether the internal legal procedures and remedies of each member state have been duly applied and exhausted.

At its Thirteenth Session the Commission also adopted additional regulations to set forth the special procedure it would follow in examining petitions under Article 9 (bis).[13] This special procedure was intended to apply primarily to petitions which allege violations of the human rights proclaimed in the American Declaration which are identified in Article 9 (bis) (a); the Commission decided, however, to also apply the procedure to petitions "in which reprisals against signers of [petitions] addressed to the Commission or against any persons mentioned as injured parties in such [petitions] are denounced."[14] Other petitions were presumably to be processed in accordance with the older, already established regulations.

The formal regulations of the Commission thus give the impression that it has *in effect* two sets of regulations—one which it applies when it examines petitions under Article 9 (bis) of its statute; the other when it takes cognizance of petitions under Article 9 of its statute. In practice, there has been little distinction between the two. However, in one particular case concerning Brazil, discussed later, a serious debate occurred within the Commission as to whether the two procedures actually exist; and the decision was that they do.

[13] *Ibid.*, pp. 24–29.

[14] The regulations of the IACHR can be found in IACHR, *Handbook of Existing Rules Pertaining to Human Rights* (OEA/Ser. L/V/II.23, Doc. 21 (English) Rev.), December, 1970, pp. 36–45.

II. PROCESSING PETITIONS RECEIVED FROM INDIVIDUALS, GROUPS, AND ASSOCIATIONS

Virtually all the petitions acted upon by the IACHR have been submitted to it by individuals, groups, or associations. There are no provisions in the Commission's statute or in its regulations which pertain to its taking cognizance of or examining petitions which might be submitted to it by governments. However, the Commission has been prepared to do whatever it can in defense of human rights, including acting upon complaints lodged by governments, and it has done so in one case, when Honduras and El Salvador lodged formal complaints against each other in 1969. We shall return to this case later.

The Commission's regulations, as they have been revised and expanded from time to time, and especially since 1966, establish the procedures it is to follow with regard to petitions it receives. As noted earlier, a formal distinction is made in the regulations between those petitions which are to be examined and those which are to be taken cognizance of. The regulations do not explicitly identify different stages through which the Commission is to proceed in either case, but four rather distinct ones are discernible:

A. Stage I: Screening Petitions
B. Stage II: Transmitting Petitions to Governments
C. Stage III: Fact-Gathering
D. Stage IV: Disposition of Petitions

The Commission does not necessarily proceed through each stage in all cases; a petition might, for example, be filed upon receipt without further action. There is also some overlap from one stage to the other; a government might provide information requested in Stage II, which thus could be considered a fact-gathering stage. Nevertheless, under normal circumstances the Commission generally follows this four-stage procedure. It will therefore be useful in the following sections to discuss in some detail the characteristics of each stage. We shall then appraise the Commission's experience with several American states.

A. Stage I: Screening Petitions

The Commission's secretariat is charged with screening all petitions addressed to the Commission. It first examines them to ascertain whether they contain the names, addresses, and signatures of the claimants, and an account of the "act or acts denounced and the name or names of the victims of the supposed violation." A victim does not himself have to sign the petition. If a petition is submitted by an association, it must be signed by "those who

represent it." Should any of this information be missing, the secretariat may request that it be provided.[15]

All petitions of which the Commission takes cognizance must be submitted "within a reasonable period of time . . . from the date of the occurrence of the supposed violation." What constitutes a reasonable period of time is determined by the Commission itself.[16] In contrast, petitions which the Commission examines must be submitted within six months following the date on which the final domestic decision has been reached, or within six months following the date on which the claimant has become "aware that his recourse to domestic remedy has arbitrarily been hindered or the final domestic decision has been unjustly delayed."[17] In practice, the Commission determines in two ways whether these conditions have been met. If the petition does not indicate whether recourse to domestic legal remedies has been exhausted, or arbitrarily denied, the Comission will request that the evidence be provided. If the claimant does provide evidence in this regard, or if the Commission is in doubt, the petition will be transmitted to the government concerned, along with a request that it provide information upon which the Commission could decide if recourse to domestic legal remedies has been exhausted.

Since the victims do not themselves have to sign the petitions, the Commission has been able to take cognizance of or examine large numbers of petitions which have alleged general violations of human rights in various American states. The Commission has also been able to act upon petitions submitted to it by relatives and friends of political prisoners and others who have been prevented from communicating personally with it, as in the case of exiled communities of Cubans and Haitians.

It is also to the advantage of the claimants that the Commission can act upon petitions when there is reason to believe that they are being denied access to domestic legal remedies, or that their access to them is being arbitrarily hindered or delayed. In fact, many of the petitions addressed to the Commission are cases of this type.

The rule of the exhaustion of domestic legal remedies is important: it is only if claimants are unable to settle their grievances domestically that they may take their case to the IACHR. The rule is defended on the ground that it recognizes an essential and necessary prerogative of a sovereign state: primary responsibility for the protection of human rights rests with the individual states, not with the IACHR. It may also be defended on practical grounds: if individuals could choose for themselves whether to take their case to domestic agencies or to the IACHR, the latter could be inundated with trivial claims which should be processed domestically, perhaps rendering ineffective the action it could take on the most important claims. Adherence to

[15] Regulations, Article 38.
[16] Regulations, Article 40.
[17] Regulations, Article 55.

the rule should therefore protect both the states and the IACHR. However, the rule is not interpreted in such a way as to make it possible for states to abuse their prerogative; a claimant whose access to domestic legal remedies is arbitrarily being hindered or denied to him has recourse to the IACHR.

Preliminary Declarations of Inadmissibility

The screening by the secretariat may result in certain petitions being declared inadmissible. If, for example, a petition is "anonymous or written in disrespectful or abusive language," it is placed in the confidential files of the Commission and receipt of it is not acknowledged. A petition may also be declared inadmissible if it is "substantially the same" as one previously studied by the Commission, is "incompatible with the provisions of the Statute, or the Regulations, or obviously unfounded," or "refers to events or situations that bear no relation to a disregard of human rights by the government against which it is directed." However, in the latter cases the secretariat would inform the claimant(s) that the petition is inadmissible.[18] If the secretariat is in doubt, the matter is resolved by the Commission if it is in session, or by the Chairman if the Commission is in recess.[19]

There is no way of knowing how many petitions have failed to pass the initial screening of the secretariat. The Commission has published no statistics on how many petitions were not signed, did not contain the name or names of the supposed victims, were written in abusive language, etc. The secretariat could not declare petitions inadmissible arbitrarily, however, because the Commission itself exerts ultimate control over all petitions. One week before the Commission meets a standing subcommittee reviews all petitions received during the recess, the initial action taken on them, and makes recommendations to the Commission as a whole. It is possible that the subcommittee or the Commission has disagreed with the initial action taken by the secretariat, especially since there has been some confusion in the application of the regulations.

B. Stage II: Transmitting Petitions to Governments

Preliminary declarations regarding the inadmissibility of petitions might be made in Stage I. As noted above, petitions are declared inadmissible if they are written in abusive language, etc. But it is in Stage II that the Commission attempts to reach a decision on the admissibility or inadmissibility of petitions. The Commission may do this by directing the secretariat to transmit the pertinent parts of petitions to the government(s) concerned along with a request for information. Only the pertinent parts of the petitions, i.e.,

[18] Regulations, Articles 39 and 46.
[19] Regulations, Article 41 (2).

the substance of the allegations, are transmitted to the governments. The Commission does not disclose the identity of the claimants, unless they expressly give their consent, in order to protect them from reprisals by the governments for having lodged complaints.[20]

It should be emphasized that when the Commission requests information it makes it clear to the governments that the "mere fact of a request for information . . . does not constitute in and of itself a judgement in advance of the admissibility of the denunciation."[21] The Commission thus makes it explicit to all governments that they can expect as impartial and objective a hearing as can the claimants; the Commission's primary function is to reach a friendly settlement to disputes.

In emergency situations while the Commission is in recess, the Chairman of the Commission may direct the secretariat to transmit parts of petitions to the governments and request that they provide the necessary information, enabling the Commission to take action at all times.[22] And although the statute and regulations do not explicitly authorize the Commission to do so, it has on a few occasions referred petitions to entities other than the governments concerned, such as the OAS Council and the United Nations High Commissioner for Refugees, when it considered this course of action to be more appropriate or more effective.

The requests for information are normally addressed to high ranking government officials such as foreign ministers. Frequently, they are transmitted to the governments through their representatives to the OAS; the responses, if any, are in turn frequently transmitted to the Commission through the OAS representatives of the respective governments.

According to the formal regulations, there is a difference in the kind of information the Commission can request when it transmits petitions to the governments, depending on which procedure is being followed. When the Commission is taking cognizance of petitions, the requests are to be for information of a general nature, i.e., inquiries with regard to the kinds of measures the government or governments may be taking with respect to human rights. In contrast, when the Commission examines petitions under Article 9 (bis) of its statute, it may request specific information on a particular case, i.e., the Commission may inquire whether a certain individual is in fact being detained without trial, or being denied access to legal procedures and remedies, or whether his access to domestic legal remedies is being unjustly delayed.

It is impossible to say precisely how many petitions processed by the Commission are referred to the governments with requests for information. It is clear, however, that not all of them are. There are several reasons why this is so. In the first place, the Commission tries to classify the petitions it receives

[20] Regulations, Article 44.
[21] Regulations, Article 42 (2).
[22] Regulations, Article 42 (1).

according to the human rights alleged to have been violated, and it is clear that the Commission has been more concerned about violations of very basic rights, such as the right to life and the right not to be arbitrarily arrested and detained without trial. Second, as a practical matter the Commission could not risk annoying the governments by referring to them all the petitions it receives, thereby reinforcing the concern of some states that it would give vent to petty or unjustified claims. Third, some petitions, after having passed the initial screening, have been declared inadmissible for having no relation to the human rights practices of the governments, or for any of the other reasons previously discussed. And last, the Commission has considered some petitions to be primarily of informational or supplementary value, and these have been kept on file for use in the preparation of reports and studies.

Cooperation by the Governments

The governments are not bound to provide the Commission with information it requests; the Commission is merely authorized to urge them to do so (Article 9 (d)). However, the Commission *expects* the governments to cooperate, and it has adopted a regulation which provides that the "occurrence of the events on which information has been requested will be presumed to be confirmed if the government referred to has not submitted such information within 180 days of the request, provided always, that the invalidity of the events denounced is not shown by other elements of proof."[23] The Commission may extend the 180 day period, but it may also not wait for the expiration of the period before reiterating a request for information (or for permission to visit the territory of a state) if it feels that to do so would make the action it could take ineffective. The purpose of the time period is to place the governments on notice that the Commission expects them to supply the information it requests *promptly*, and 180 days is a reasonable period of time *within* which they should do so.

C. Stage III: Fact-Gathering

The third stage in processing petitions could best be described as fact-gathering combined with efforts to reach a friendly settlement. It could of course be maintained that findings of fact are concluded in Stage II. Information provided by the government(s) may result in petitions being declared inadmissible, or filed without prejudice to further investigation in the future if need be. But if the government(s) refuse to provide information, or if the Commission feels that the substance of an allegation made by a claimant warrants greater attention, the Commission may try to gather the facts and find a friendly settlement. This stage in processing the petitions is normally

[23] Regulations, Article 51 (1).

handled by one member of the Commission who is appointed rapporteur for one or a small group of petitions. Members of the Commission are not appointed rapporteurs for petitions which allege violations of human rights in their own countries. This practice helps to reduce the possibility of bias on the part of the rapporteurs; perhaps more important, it makes it less likely that claimants could find cause for charging the Commission as a whole with lack of objectivity. The reports and recommendations of the rapporteurs are, of course, subject to the approval of the Commission as a whole.

Methods of Fact-Gathering

The Commission (or the rapporteurs acting on behalf of the Commission) may attempt to gather the facts on a particular claim in a number of ways. These are identified in Article 50 of the regulations and include reiterating requests for information from the governments concerned; examining their official records and documents if available; acquiring more evidence from the claimants in substantiation of their allegations (or from others who could testify orally or in writing as to the validity of the allegations); or by observation *in loco*, i.e., by conducting on-the-spot investigations.

All of these methods can be useful in certain circumstances, and they are no doubt supplemented with informal contacts and negotiations. In serious cases, of course, an on-the-spot investigation could be a very effective fact-gathering method. However, the Commission needs the consent of the government concerned in order to conduct such an investigation. The requirement of prior consent is, like the rule of the exhaustion of domestic legal remedies, defended on the ground that it is a prerogative of a sovereign state whether to permit an investigation within its territory by an international agency. Nevertheless, to permit the investigation suggests that a state has nothing to hide, that the allegations are unfounded; whereas, not to permit the investigation suggests that there is truth in the allegation. The requirement can, therefore, be an obstacle to the effective international protection of human rights. As we shall see later in this chapter, the IACHR's experience in securing the consent of the American states to conduct on-the-spot investigations has been mixed.

D. Stage IV: Disposition of Petitions

The Commission as a whole examines all the evidence gathered in Stage III of processing the petitions and reaches decisions on their disposition by an absolute majority vote. Any dissenting member has the right to explain his reasons for doing so and to have his opinion included with the decision.[24] The

[24] Regulations, Article 23.

reports published by the Commission indicate that some decisions are not unanimous, and there have also been some cases in which the recommendations of rapporteurs assigned to report on the status of particular petitions have not been accepted by the full Commission. Ultimately, the files on all petitions received seem to be closed, and they are kept confidential for use of the Commission only.

The Commission may reach one of several conclusions on petitions it receives. They may be *filed*, which indicates that the petitions will not be further processed because the allegations contained in them were not proven, that the national authorities took appropriate steps either to take corrective measures or to prevent the violations from continuing to occur; or that the petitions were declared inadmissible for reason of bearing no relation to a disregard for human rights on the part of the government concerned, that they were written in abusive or disrespectful language, that they were substantially the same as one previously considered by the Commission, or that they were incompatible with the provisions of the Commission's statute or regulations. Alternatively, petitions may be *filed without prejudice*, which indicates that the Commission would consider reopening the case in the future if more convincing evidence relative to the merits of the claim would be provided. More serious, the Commission may decide that it *presumes the allegation confirmed*, particularly if it receives convincing evidence from the claimants which the governments are unable or unwilling to refute.[25] In a few extreme cases the language used by the Commission has had the effect of *declaring the allegation confirmed.* Of the last two, the second is more serious than the first, but both indicate that the Commission has been unable to reach a friendly settlement to a case.

Recommendations and Reports

In addition to adopting resolutions as discussed above on the petitions it receives, the Commission may make recommendations and publish reports. If it has taken cognizance of a petition, the Commission may make the recommendations it deems advisable in accordance with Article 9 (b) of its statute, i.e., to the member states in general or to particular member states, but "without prejudice to the preparation and publication of the reports that the Commission may consider proper, in accordance with Article 9 (c) of its Statute."[26] In practice, this means that the Commission may make general recommendations to any particular member state or to all the member states collectively, or it may publish reports on a particular member state or on the member states collectively, or both.

In contrast, if the allegations contained in petitions the Commission

[25] Regulations, Article 51 (1).
[26] Regulations, Article 52.

examines are proved, or presumed confirmed, the Commission may make appropriate recommendations to the government concerned on specific cases. If the government does not adopt the measures recommended by the Commission within a reasonable time, the Commission may make the observations it considers appropriate in its annual report.[27]

The Commission has been flexible in the application of these regulations. It appears that it is reluctant to publish reports on individual countries, preferring instead to withhold unfavorable publicity in exchange for cooperation. It has in recent years prepared annual reports for the OAS General Assembly, and in these reports it has included summaries of action taken by it on petitions received from various member states. The effect of these reports is to give favorable publicity to those states who cooperate, and unfavorable publicity to those who do not. To this point in time, however, the General Assembly has for the most part merely expressed its thanks to the Commission for its reports, and has declined to discuss in detail the situation regarding human rights in any particular member state of the OAS.

III. THE IACHR'S RELATIONS WITH THE AMERICAN STATES

The IACHR has reported receiving petitions which have alleged violations of human rights in all the member states of the OAS except Trinidad and Tobago, Jamaica, and Barbados, three states which have been members of the Organization for only a few years. At first, most of the petitions alleged violations in small Caribbean and Central American states such as Cuba, Haiti, the Dominican Republic, and Nicaragua. In more recent years the Commission has been receiving petitions which allege violations in larger countries as well, including Argentina, Brazil, Chile, and the United States.

It is impossible to say precisely how many petitions the Commission has received. In one report published in 1969 the Commission stated that it had taken cognizance of 1,525 petitions between October, 1960, and May, 1967; between May, 1967, and the end of 1968 it had examined 90 petitions.[28] Another report stated that from the adoption of Article 9 (bis) in 1965 to 1969 a total of 1,297 petitions had been received "denouncing specific acts in violation of the rights set forth in the American Declaration."[29] However, these figures apparently do not include the petitions the Commission received which alleged violations of human rights in Cuba (1,350 between 1960 and 1964, and more than 1,200 others between 1963 and 1967),[30] or the com-

[27] Regulations, Article 57.

[28] IACHR, *The Inter-American Commission on Human Rights: Its Powers, Functions and Activities* (OEA/Ser. L/V/II.22, Doc. 9 (English)), August, 1969, pp. 17–18.

[29] IACHR, *Activities of the Inter-American Commission on Human Rights (1965–1969)* (OEA/Ser. L/V/II.23, Doc. 11 (English) Rev.), February, 1971, p. 7.

[30] IACHR, *Report Regarding the Situation Regarding Human Rights in Cuba* (OEA/Ser. L/V/II.17, Doc. 4 (English) Rev.), June, 1967, pp. 1–2. (Hereafter cited as IACHR, *Report on Cuba, 1967*)

plaints (1,724) submitted to it during its mission to the Dominican Republic in 1965–66.[31] More recently, in its annual reports to the OAS General Assembly for the years 1971–75, the Commission has reported receiving a total of 1,047 petitions which have alleged specific violations of human rights (1971, 217; 1972, 83; 1973, 52; 1974, 69; 1975, 626), plus a usually unspecified number of general complaints. The large figure cited in the 1975 report includes the hundreds of petitions which alleged violations of human rights during 1974 in the wake of the military coup which ousted the Allende government in Chile.

While the volume of petitions received might appear to be small, the mere citation of statistics is misleading. To be sure, the relatively small volume suggests a lack of awareness of the existence of the Commission as well as the services it can provide, especially among the poor. Nevertheless, the raw statistics reveal nothing about how many individuals have been the subjects of the petitions or how many might have been affected by action taken by the Commission. Petitions have been submitted by or on behalf of individuals, groups, and associations such as labor unions and political parties. Violations of the rights of a very large number of individuals might therefore be alleged in one petition. Moreover, the Commission has undertaken several investigative missions, e.g., to the Dominican Republic, Honduras and El Salvador, and Chile, and in each case it took action on behalf of countless persons. Since 1960, then, it would be accurate to say that by acting upon the petitions it has received the Commission has taken measures which have touched directly or indirectly upon the lives of many thousands of citizens of the American states.

This is not to say that the Commission has always achieved the results it desired. To the contrary, the Commission's relations with the various American states have been characterized by great diversity. At one extreme, some states, such as Cuba and Haiti, have declined to cooperate in any way or have provided information on some petitions which has been deemed unsatisfactory; in general, their attitude toward the Commission has been one of open defiance and hostility. At the other extreme, some states, such as the United States, Costa Rica, Mexico, and Venezuela, have been cooperative; serious problems as regards their relationship with the Commission have not yet developed. Between these two extremes, dramatic and very important, but not necessarily long-lasting, accomplishments have characterized the Commission's relations with the Dominican Republic. In the case of Brazil and Chile, strained relations have recently developed, and they are likely to become more seriously strained in the future.

[31] IACHR, *Report of the Inter-American Commission on Human Rights on its Activities in the Dominican Republic (September, 1965 to July 6, 1966)* (OEA/Ser. L/V/II.15, Doc. 6 (English) Rev.), October, 1966. Table at the end of the report. (Hereafter cited as IACHR, *Report on the Dominican Republic, 1966*)

The great diversity in the Commission's relations with the American states precludes any rigid classification scheme or a thorough discussion of its relations with all of them. In fact, the diversity demands that we focus our attention on selected states. Therefore, in the sections which follow we shall discuss in some detail the Commission's relations with Cuba, Haiti, the Dominican Republic, Brazil, the United States, and Chile. These states were selected for discussion for two reasons: first, the serious nature of the alleged human rights violations, especially in Cuba, Haiti, Brazil, Chile, and at times in the Dominican Republic; and second, the fact that in dealing with the petitions received regarding all the states selected for discussion the Commission frequently faced important procedural issues, necessitating that it interpret provisions of its statute and regulations. Overall, the Commission's relations with these states have revealed its strengths and limitations.

A. Cuba

Cuba stands at one extreme in the experience of the IACHR in its attempt to protect human rights in the American states. For years the attitude of the Castro government has been one of total non-cooperation. It is ironic that this should have been so. The Castro government was in large measure responsible for setting in motion the processes which culminated in the creation of the IACHR; it joined forces with Venezuela in bringing violations of human rights in the Dominican Republic to the attention of the OAS in 1959, and the foreign ministers who attended the Fifth Meeting of Consultation of Ministers of Foreign Affairs, at which the complaints were aired, resolved to create the Commission.[32] Moreover, the Cuban representative on the OAS Council championed the creation of a powerful commission when the IACHR's statute was debated in 1959–60, voting to endow the Commission with competence to examine petitions it might receive from individuals, groups, associations, *and* governments.[33] Rather than being a model for other governments to follow in the field of human rights, however, the Cuban government's practices have stimulated numerous, very serious, complaints.

Petitions alleging violations of human rights in Cuba have been received by the IACHR almost continuously since it held its First Session in October, 1960. Between 1960 and 1963, the Commission took cognizance of 1,350 such petitions, and between 1963 and 1967 an additional 1,200.[34] Countless others have been received since 1967.

Virtually all of the petitions received by the Commission have alleged violations of the most fundamental human rights, usually accusing Cuban authorities of arbitrary deprivations of life, execution by firing squads without

[32] For a more extensive discussion of this point see Chapter 4, Section I.B.
[33] See Table 5.1.
[34] IACHR, *Report on Cuba, 1967*, pp. 1–2.

fair trials, arbitrary deprivations of liberty, gross and inhumane treatment of political prisoners, etc.

The Commission has processed these petitions in accordance with its regulations. As we discussed earlier, it is authorized by its statute to *request* governments to provide it with information concerning alleged violations of human rights. Accordingly, between 1960 and 1963 the Commission repeatedly requested information from the Cuban government concerning the petitions it had received. In fact, during this period the Commission addressed a total of 48 notes to the Cuban government, but it received replies (unsatisfactory) to only 12 of them.[35] In view of the fact that the allegations were very serious, the Commission, in accordance with Article 11 (c) of its statute, requested, in September, 1962, permission to visit Cuba for the purpose of observing for itself whether the allegations were in fact true.[36] There was no reply to this request. The Commission was therefore left with no alternative but to seek to gather the facts on the cases at hand in other ways, e.g., by referring to public sources of information, such as news accounts, and by conducting interviews with persons in a position to provide information on the allegations. The latter was accomplished by requesting the permission of the United States government to conduct hearings on the plight of Cuban political prisoners in Miami, Florida. It was necessary for the Commission to request the permission of the United States government to conduct these hearings because it is only authorized by its statute to meet at its headquarters in Washington, D.C., or in the territory of any member state who grants it permission to do so. To conduct hearings in Miami therefore required the consent of the government of the United States. Its consent was easily obtained, and the hearings were held in Miami in January, 1963.[37]

However, the serious nature of the allegations of human rights violations in Cuba demanded almost constant attention, and the Commission continued to request information of the Cuban government on various petitions. Thus, between 1963 and 1967 the Commission sent an additional 32 notes to the Cuban government requesting information.[38] The manner in which the Commission processed these petitions suggests that it was in fact doing more than merely taking cognizance of them; it was for all practical purposes examining the petitions even though it was not officially authorized to do so by its statute. Again during this period the Cuban government refused to respond to the Commission's inquiries. It responded only to the last note, dated October

[35] *Ibid.*, p. 1.

[36] IACHR, *Report on the Work Accomplished During its Fifth Session, September 24 to October 26, 1962* (OEA/Ser. L/V/II.5, Doc. 40 (English)), February, 1963, p. 10. (Hereafter cited as IACHR, *Report on the Fifth Session*)

[37] IACHR, *Report on the Work Accomplished During its First Special Session, January 3 to 23, 1963* (OEA/Ser. L/V/II.6, Doc. 18 (English)), April, 1963, p. 10. (Hereafter cited as IACHR, *Report on the First Special Session*)

[38] IACHR, *Report on Cuba, 1967*, p. 2.

22, 1964, in which the Commission reiterated its requests for information, citing its previous requests. The response, however, did not contain any information relative to the petitions. Instead it was an attack against the Commission, and, more broadly, against the United States and the OAS. The response, by Raul Roa, the Cuban foreign minister, dated November 4, 1964, and addressed to Dr. Manuel Bianchi, then Chairman of the IACHR, read:

> Merely as a matter of courtesy, I acknowledge receipt of your letter of October 20, 1964.
>
> As you know, and as everyone knows, Cuba was arbitrarily excluded from the Organization of American States through pressure exerted by the imperialistic Government of the United States, and therefore, there is no occasion for providing the information you request. The Organization of American States has no jurisdiction or competence, legally, factually, or morally, over a state that has illegally been deprived of its rights.
>
> Accept, Sir, the assurance of my highest consideration.[39]

Dr. Bianchi responded to this note on behalf of the Commission on April 6, 1965, as follows:

> I have the honor to refer to your kind note of November 4, 1964, which this Commission received on December 28, 1964.
>
> You affirm in that note that the State of Cuba has been deprived of its rights by the Organization of American States. This affirmation is *not* in accordance with the facts, because, as you are aware, the Eighth Meeting of Consultation of Ministers of Foreign Affairs excluded "the present Government of Cuba" from participation in the inter-American system. As you can see, the measure of exclusion *was directed towards the present Government of Cuba and not towards the State.*
>
> During its Fourth Session, the Inter-American Commission on Human Rights made a careful study of the scope of Resolution VI of the Eighth Meeting of Consultation *and declared that it could not in any event renounce its unavoidable obligation to promote respect for human rights in all the member states of the Organization.* Consequently, the Commission decided to continue to concern itself with the situation regarding human rights in Cuba and to continue, in accordance with its regulations, to consider and process the communications or claims received with respect to this matter. It is for this reason, in accordance with the provisions of Article 9, paragraph (b) and (d) of its Statute, that the Commission has transmitted to the Government of Cuba, through you, the communications or claims directed to it with respect to your country, with a request for the pertinent information.
>
> Through you, I request your government to give this note its most careful attention and to be good enough to furnish this Commission with any information that it deems pertinent regarding the facts described in the Commission's note of October 22, 1964, and in the notes sent to you that are appended thereto.
>
> Accept, Sir, the assurance of my highest consideration.[40] (emphasis added)

From a purely legal point-of-view there was more to be said for the reasoning of the Commission than that of the Cuban foreign minister. It was

[39] IACHR, *Report on the Ninth Session*, pp. 15–16.

[40] IACHR, *Report on the Work Accomplished During its Tenth Session, March 15 to 26, 1965* (OEA/Ser. L/V/II.11, Doc. 19 (English)), July, 1965, pp. 9–10. (Hereafter cited as IACHR, *Report on the Tenth Session*)

the Castro government of Cuba, not the state, which was excluded from participation in the OAS, beginning in February, 1962, on the ground that adherence to Marxism-Leninism is incompatible with the principles and objectives of the inter-American system. The state of Cuba thus remained a member state of the OAS, as indeed it does to this day. Had the IACHR not stressed the legal interpretation of the exclusion, it would have undermined any basis it had for requesting information from the Cuban government.

From a practical point-of-view, of course, whether it is a state or a government which is excluded from participation in an international organization makes no difference. The effect is the same so long as the government in question remains in power. The Cuban foreign minister clearly perceived the issue of the exclusion of the Cuban government from participation in the OAS in this way. And it was convenient for him to do so: it provided an excuse for not cooperating with the IACHR.

The adoption of the purely legal interpretation of the issue by the IACHR provided it with a basis for continuing to take action on petitions it received which alleged violations of human rights in Cuba. Again in October, 1965, it requested permission to visit Cuba for the purpose of conducting an on-the-spot investigation, but it received no reply.[41]

The note of the Cuban foreign minister dated November 4, 1964, is the last communication the IACHR received from the Cuban government. Since then, however, the Commission has continued to receive petitions alleging serious violations of human rights in Cuba, particularly inhumane treatment of political prisoners and their families. The Commission has examined these petitions and transmitted pertinent parts of some of them to the Cuban government along with requests for information; there have been no replies. It should be noted that the question of whether the Commission has competence to request such information from the Cuban government was raised again (internally) in 1971–72; the Commission reaffirmed its earlier position that it was competent to do so and that it "could not under any circumstances renounce its obligation to promote respect for human rights in each and every one of the member states of the Organization."[42] However, "in view of the systematic silence" of the Cuban government as regards the Commission's requests for information, the Commission decided that "it would serve no practical purpose" for it to continue to make recommendations to that government of the type envisaged in Article 9 (b) or Article 9 (bis) (b) of its statute, and that it would therefore be appropriate for it to adopt a "special *ad*

[41] IACHR, *Report on the Work Accomplished During its Twelfth Session, October 4 to 15, 1965* (OEA/Ser. L/V/II.13, Doc. 26 (English)), March, 1966, pp. 17–18. (Hereafter cited as IACHR, *Report on the Twelfth Session*)

[42] IACHR, *Report on the Work Accomplished During its Twenty-Eighth Session (Special), May 1 through 5, 1972* (OEA/Ser. L/V/II.28, Doc. 24, Rev. 1), August, 1972, pp. 27–28. (Hereafter cited as IACHR, *Report on the Twenty-Eight Session*)

hoc procedure to process and examine denunciations concerning Cuba. . . ."[43] This has entailed examining the claims and reporting on the decisions reached relative to their merits in the annual reports to the OAS General Assembly.[44]

In view of the total lack of cooperation on the part of the Cuban government through the years, the Commission has been left with no alternative but to rely on unfavorable publicity in an effort to call attention to the very serious violations of human rights which have occurred in Cuba. The Commission has issued press releases, addressed notes directly to the governments of the American states, and published three special reports (1963, 1967, 1970), two of which dealt specifically with the status of Cuban political prisoners and their relatives. The reports have contained excerpts from some of the petitions received, the conclusions reached, and the recommendations made to the Cuban government. The Commission has also included decisions it reached on the merits of petitions regarding human rights violations in Cuba in its reports on its sessions and to the OAS General Assembly. There is no evidence, however, that the abundant unfavorable publicity has affected the attitude or policies of the Cuban government.

The Commission's relations with Cuba illustrate that it is not only statutory limitations on the Commission which hamper its efforts to protect human rights. To be sure, the statute limits the Commission in certain respects: it may only *request* information; it may only *request* permission to conduct an on-the-spot investigation; and it may only make *recommendations*. One could not expect more than this, however, especially since the Commission functions under a statute and not a convention. Despite the Commission's statutory limitations, however, it can achieve results on human rights issues when the governments involved cooperate with it. In other words, the attitude of a government towards international action on human rights is of paramount importance, and it is the attitude of the Cuban government which has been the primary obstacle as the Commission has sought to bring about greater respect for human rights in Cuba. The Cuban government's failure to respond to the Commission's requests for information or to adopt its recommendations—its "systematic silence" to use the words of the Commission—has left the Commission with no alternative but to rely on unfavorable publicity as a tool to enforce compliance with its recommendations. As the case of Cuba illustrates, unfavorable publicity can have little

[43] IACHR, *Report on the Work Accomplished During its Thirtieth Session, April 16–27, 1973* (OEA/Ser. L/V/II.30, Doc. 45, Rev. 1), August, 1973, p. 25. (Hereafter cited as IACHR, *Report on the Thirtieth Session*)

[44] See for example OAS, General Assembly, Fourth Regular Session (1974), *Report of the Inter-American Commission on Human Rights for the Year 1973* (OEA/Ser. P AG/doc. 409/74), March, 1974, pp. 81–87. (Hereafter cited as IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*) See also OAS, General Assembly, Fifth Regular Session (1975), *Report of the Inter-American Commission on Human Rights for the Year 1974* (OEA/Ser. P AG/doc. 520/75), March, 1975, pp. 68–73. (Hereafter cited as IACHR, *Report to the Fifth Regular Session of the OAS General Assembly, 1975*)

or no effect. It may be, of course, that the exclusion of the Cuban government from participation in the OAS in 1962 precluded any possibility of cooperation with the Commission; its exclusion appears to have at least reinforced its determination not to cooperate with the Commission. Nevertheless, it remains to be seen whether active participation in the OAS would result in any significant change in attitude.

B. Haiti

As in the case of Cuba, the IACHR's relations with Haiti have left much to be desired. The Commission began examining alleged violations of human rights in Haiti at its Second Session in April, 1961. Petitions alleging very serious violations of human rights in Haiti are still received. The failure of the Haitian government to cooperate with the Commission through the years suggests that the attitude toward human rights of the late Haitian dictator François Duvalier, and his son who succeeded him, does not differ in any significant way.

The petitions received by the Commission have alleged repeated and serious violations of the most fundamental rights proclaimed in the American Declaration of the Rights and Duties of Man, e.g., the rights to life, to freedom from arbitrary arrest and detention, and to a fair trial. A particularly important aspect of the Haitian problem has been the alleged summary execution of Haitian exiles who were forced to return to their country from the Dominican Republic.

The IACHR, as noted above, began examining the situation regarding human rights in Haiti at its Second Session in April, 1961. On the basis of information provided to it by Haitian exiles, the Commission decided to request permission of the Haitian government to conduct an on-the-spot investigation. In a note addressed to the Haitian foreign minister, René Chalmers, on September 26, 1962, Dr. Manuel Bianchi, then Chairman of the Commission stated:

> I have the honor to inform your excellency that, in accordance with the authority vested in it by Article 11.c of its statute, the Inter-American Commission on Human Rights has proposed going to the Republic of Haiti for the purpose of holding part of its current session in that country. In strict observance of this same statutory article, the Commission has entrusted me with the pleasing task to request of the Government of Haiti, through your office, its prior consent to this visit. I take this opportunity to renew to you the assurances of my highest consideration.[45]

The Haitian government chose to ignore this request, but the situation was obviously urgent and the Commission reiterated its request only two weeks

[45] IACHR, *Report on the Fifth Session*, p. 8.
[46] *Ibid.*

later, on October 9, 1962.[46] The Haitian foreign minister responded to the second cable, on October 11, 1962, as follows:

> I have the pleasure to acknowledge receipt of your cablegram of October 9 regarding the request of the Inter-American Commission on Human Rights for permission to hold a part of its current session in the Republic of Haiti. I wish to point out that the Commission *has not laid the basis for the request which can be interpreted as a form of interference in the internal affairs of the Republic of Haiti that affects its sovereignty*. I regret to inform you that my government, after due cognizance of the matter, *does not consider that it has the duty* to authorize the requested permission. I wish to express my highest consideration.[47] (emphasis added)

This response raised important questions for the Commission to consider: first, it questioned the basis for the request to conduct an investigation; second, it asserted that an investigation could be considered a form of "interference" in the internal affairs of a sovereign state; and third, it denied any duty on the part of a sovereign state to consent to an investigation. These questions were entirely different from those raised later, in November, 1964, and discussed above, when the Cuban government questioned the competence of the Commission merely to *request information* of it on the ground that it had been arbitrarily excluded from participation in the OAS. The Haitian government's response was in fact the first time that an American state questioned the competence of the Commission to conduct an on-the-spot investigation.

The Commission faced the issues squarely and responded to the Haitian cable on October 16, 1962. As regards the basis for the request to conduct an investigation, the Commission decided "respectfully to remind [the Haitian government] that it [was] granted the power to go to the territory of any American state, with the prior consent of the respective government, in conformity with Article 11.c of its Statute . . . ;" and that it had so requested this permission in order "to facilitate its examination of the subject of human rights in an impartial and highly reasonable spirit. . . ."[48] As regards the question of whether an investigation could be viewed as a "form of interference" in the internal affairs of Haiti, "affecting its sovereignty," the Commission expressed its "regret" that the Haitian government should perceive an investigation in that way, especially in view of the fact that the Haitian representative on the OAS Council in 1960 had voted for the Commission's statute, which included Article 11. The Commission went on to say: "Furthermore, the fact that the Commission has requested the consent of your Government in itself indicates its respect for the sovereignty of the Republic of Haiti."[49] Finally, as regards the question of whether a sovereign state had a duty to consent to an investigation, the Commission indicated that it "cannot insist on its request when a Government has denied its con-

[47] *Ibid.*, p. 9.
[48] *Ibid.*, p. 10.
[49] *Ibid.*, p. 11.

sent . . . ;" and in view of the fact that it could not, the Commission indicated that it was "closing the matter at this time."[50] The Commission thus skirted the issue of whether a government has a duty to consent to an investigation; the language used, however, gave the impression that the Commission felt that if a government had nothing to hide, it would give its consent.

The Commission continued to study the situation regarding human rights in Haiti, transmitting pertinent parts of petitions received with requests for information to the Haitian government. It also interviewed Haitian exiles, and kept files on news accounts relative to human rights violations in that country. Again in May, 1963, the Commission requested permission to visit Haiti, emphasizing its competence to make such requests, but it was again denied permission to enter.[51]

As in the case of Cuba, the Commission has made extensive use of unfavorable publicity in an effort to bring about more respect for human rights in Haiti. It has issued numerous press releases on its exchange of cables with the Haitian government; it has addressed notes to the American states and to the OAS Council; it has published special reports on Haiti; and it has included excerpts of petitions it has received and the measures it has tried to take on them in its reports on its sessions and to the regular sessions of the OAS General Assembly. In some cases the Commission has indicated that the allegations were either confirmed or presumed confirmed.[52]

Unlike Cuba, however, the Haitian government has not ignored the unfavorable publicity. It has fought back vigorously and defiantly, attacking the claimants as well as the Commission. The Haitian government has tended to perceive itself as a victim of a "true international conspiracy" engaged in by exiles and elements of the continental press to destroy its reputation abroad.[53] It abstained from voting on the resolution of the Second Special Inter-American Conference in 1965 which expanded the IACHR's competence to examine petitions it received, on the grounds that such action would not likely serve the interests of those it sought to protect and that it could lead to "intervention" in the internal affairs of states. Haiti's abstention on the resolution, as suggested earlier, was no doubt intended to express its displeasure with the Commission for already having made numerous requests for information as well as for permission to conduct investigations. It also refused to respond to certain requests for information concerning the summary execution of exiles who were forced to return to their country from the Dominican Republic. And finally, in 1967, in response to the Commission's requests for information concerning allegations that many Haitians had been forced to

[50] *Ibid.*, pp. 10–11.

[51] IACHR, *Report on the Work Accomplished During its Sixth Session, April 16 to May 8, 1963* (OEA/Ser. L/V/II.7, Doc. 28 (English)), August, 1963, p. 13. (Hereafter cited as IACHR, *Report on the Sixth Session*)

[52] IACHR, *Report on the Thirtieth Session*, pp. 49–53.

[53] IACHR, *Report on the Sixth Session*, pp. 12–14.

seek asylum in several embassies of Latin American states in Haiti, the Haitian government at first objected to the requests for information on the grounds that they were "improper" and couched in "vague terms," then proceeded to denounce four inter-American conventions on asylum which it had ratified (Convention on Asylum, 1928; Convention on Political Asylum, 1933; Convention on Diplomatic Asylum, 1954; and the Convention on Territorial Asylum, 1954).[54] The denunciation of these conventions prompted the IACHR to note, in a special report it published in Haiti, that:

> While any State Party may in the proper exercise of its rights denounce these conventions, to the extent that their respective provisions so indicate, *the Commission bore in mind the circumstances* that the Government of Haiti had taken this step at a time when there was a situation of insecurity in its territory which had compelled various citizens to seek asylum, *all of which raised a presumption that the denunciations of these conventions bore a close relationship to the situation of human rights in the country*. Taking into account the connection between the right of asylum and the fundamental human rights, such as the right to life, liberty and personal security, the Commission was of the opinion that the denunciations of the . . . conventions affected the degree of respect in that country for the basic rights asserted in the American Declaration of the Rights and Duties of Man . . . , the promotion and protection of which constitutes the Commission's mandate under Articles 1 and 2 of its Statute as approved by the Council of the Organization in 1960, with the affirmative vote of Haiti.[55] (emphasis added)

It could hardly be maintained that the Commission's efforts on behalf of the unfortunate Haitian victims was counterproductive, that by pressuring the Haitian government for information through its requests and unfavorable publicity the Commission set the stage for the Haitian government to renounce the conventions. Rather, the decision to renounce the conventions was more on the order of a calculated act of defiance by a government which was not in the first place to be restricted in its actions by anything the conventions purported to do. The act of renunciation could therefore properly lead to the conclusion of a presumption of guilt.

The Haitian case illustrates again that the attitude of a government toward human rights is of great importance. Along with Cuba, Haiti has declined to submit its human rights practices to any meaningful international scrutiny and refused to hold itself accountable to others for the ways in which it treats its own citizens. In such a situation, the Commission can achieve very little. Both states, however, stand at one extreme in a spectrum ranging from total non-cooperation to the achievement of effective results.

C. The Dominican Republic

In contrast to Cuba and Haiti, the IACHR's relations with the Dominican

[54] IACHR, *Haiti and the Right of Asylum* (OEA/Ser. L/V/II.19, Doc. 6 (English) Rev.), June, 1968, pp. 1–4.

[55] *Ibid.*, pp. 4–5.

Republic have been characterized by very dramatic and at times very successful efforts to protect human rights. The Commission has visited the Dominican Republic for the purpose of conducting investigations on three different occasions, in 1961, 1963, and 1965–66. The last mission remains on record as the most ambitious *and* successful the IACHR has ever undertaken, a mission during which the Commission became, in the words of Anna Schreiber, an "action body,"[56] investigating charges of violations, negotiating with governmental authorities, assisting victims, and observing developments which had a bearing on respect for human rights.

The Commission's achievements in the Dominican Republic on various occasions have not all been long-lasting, as the need for several missions, in fairly rapid succession, attests. Moreover, as we shall see below, petitions alleging violations of human rights in the Dominican Republic are still occasionally received by the Commission. It is interesting, nevertheless, that the Commission should have been as successful as it has been on several occasions in its relations with the Dominican Republic. Indeed, the fact that the Commission has been successful at all is ironic. As discussed in Chapter 4, repeated and gross violations of human rights which had occurred for years under the dictatorship of Raphael Trujillo in the Dominican Republic and their presumed threat to peace and stability in the Caribbean area in general motivated, at least in part, the foreign ministers who attended the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 to create the IACHR, a decision which was opposed by the Dominican Republic. Furthermore, the Dominican Republic's representative on the OAS Council when the IACHR's statute was debated in 1959–60 attempted to prevent the creation of the Commission and, failing that, expressed his disapproval by abstaining from voting on every article of the Commission's statute individually and on the statute as a whole. After the assassination of Trujillo in May, 1961, however, the attitude of succeeding governments of the Dominican Republic, for different reasons, was generally to cooperate with the Commission.

At its first two sessions in October, 1960, and April, 1961, respectively, the Commission was preoccupied with claims of alleged violations of human rights in Cuba, though it did begin to study various communications pertaining to the Dominican Republic. At its Third Session (October through November, 1961), however, "the Commission weighed the possibility of a visit to the Dominican Republic, considering that there was good reason to enlarge its study of the situation regarding human rights in that country with an on-the-spot analysis of facts denounced in numerous communications."[57] The Dominican dictator Trujillo had been assassinated on May 30, 1961, and

[56] Anna P. Schreiber, *The Inter-American Commission on Human Rights*, p. 119.

[57] IACHR, *Report on the Work Accomplished During its Third Session, October 2 to November 4, 1961* (OEA/Ser. L/V/II.3, Doc. 32 (English)), November, 1961, p. 4. (Hereafter cited as IACHR, *Report on the Third Session*)

the Commission had received various communications which alleged the arbitrary arrest, torture, and murder of numerous individuals in the wake of his assassination. Consequently, on October 3, 1961, the Commission requested permission to go to the Dominican Republic between October 22 and 29 for the purpose of examining the situation.[58] The foreign minister of the Dominican Republic, Dr. Alvarez Aybar, responded promptly to the Commission's request. The Commission received the following cable on October 17, 1961:

> In reply to your message of October 13, I am pleased to inform you that the President of the Republic and the Ambassador of Ecuador, Dr. Gonzalo Escudero, have had occasion to discuss the matter and that the Government of the Dominican Republic will welcome the Commission on Human Rights, *so long as its mission* is restricted to events that took place in the country after July 1 of this year, on which date, as pointed out by the President in his address to the Sixteenth Session of the General Assembly of the United Nations, he assumed control over the grave situation that arose in this country following the tragic demise of Generalissmo Rafael Leonidas Trujillo Molina. Our Government further believes that any action with reference to the past administration would only serve to aggravate an already explosive situation, and to no avail, since those who might be held responsible for the acts have disappeared from the national scene and no longer have the slightest connection with the public life of the Dominican Republic.[59] (emphasis added)

The Commission voted on the question of whether it should accept the conditions specified in this cable, and agreed to do so by a vote of five in favor and one against.[60] (The Chairman of the Commission, Dr. Rómulo Gallegos of Venezuela, did not attend the Third Session.) The one negative vote was cast by Ambassador Gonzalo Escudero of Ecuador, referred to in the cable as having engaged in discussions of the matter with President Joaquin Balaguer of the Dominican Republic. Dr. Escudero felt that the Commission would "be handicapped in fulfilling its duties if it were not permitted to examine events prior to July 1, 1961, especially since . . . President Balaguer had been exercising the duties of his office since August 5, 1960."[61] The other commissioners, however, were apparently motivated to accept the condition in order to avoid any undue delay in undertaking the mission which further negotiations with the government of the Dominican Republic might have entailed. Moreover, they may have felt, with some justification, that a limited investigation would be better than none at all. Whatever their motives, in responding to the foreign minister's cable, the Commission informed him that it would travel to the Dominican Republic on October 22, "to carry out its duties pursuant to its statute, taking into account the period of time mentioned" in his cable of October 17. It further stated that Ambassador Escudero would not accompany the other members of the Commission,

[58] *Ibid.*
[59] *Ibid.*, pp. 4–5.
[60] *Ibid.*, p. 5.
[61] *Ibid.*

"owing to official duties that [could not] be postponed making it necessary for him to remain in Washington."[62]

The Commission held meetings in the Dominican Republic from October 23 through 27 and returned to Washington on October 28. During these meetings the Commission interviewed President Balaguer and various ministers in his government, including the ministers of foreign affairs, justice, and the attorney general. It also interviewed other civil as well as religious officials, and various groups and private individuals "who made verbal and written denunciations with reference to violations of human rights in the Dominican Republic." In addition, it interviewed leaders of political parties, labor unions, student federations, and various professions. Finally, it conducted a trip to several cities in the interior of the country, visiting the "respective provincial governors and political organizations that had requested an audience," hearing "personal testimony regarding cases of violations of human rights" and receiving "written denunciations."[63] The Commission did not restrict its investigation to the period following July 1, 1961, but rather received petitions which referred to events prior to that time if brought to it.

The Commission's activities in the Dominican Republic made it possible for it to gather copious, documented information on the status of human rights in that country on the basis of which it could prepare a study and address a note to the Dominican government.[64] On leaving the Dominican Republic, the Commission gave a list of persons whose whereabouts were unknown to the foreign minister,[65] and apparently urged that appropriate action be taken. As a preliminary measure, the Commission issued a press release on its mission to the Dominican Republic soon after it returned to Washington, and it also addressed a note to the Dominican government. In the press release and the note, the Commission referred to "the many arrests and disappearances of persons in the Dominican Republic, to the activities of the 'stick men' (paleros), to the conflicts between authorities and students, to the limitations put upon freedom of expression, to the banishment of Dominican citizens, and to the problem of freedom of labor unions."[66] However, the press release and the note to the government of the Dominican Republic were merely preliminary measures. In May, 1962, the Commission published a report on its mission in which it described in detail the conditions relative to the status of human rights which it had observed. The report concluded in part:

It can be deduced that the most flagrant violations of human rights in the Dominican Republic were perpetrated during the time of the regime headed by Generalissimo

[62] *Ibid.*
[63] *Ibid.*, p. 6.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*, p. 7.

Rafael Leonidas Trujillo. While the situation with respect to human rights improved after July 1, 1961, and new legislation was passed containing reforms designed to bring this about during the government of President Balaguer, serious violations continued.[67]

Balaguer was obviously determined to institute some measure of democratic reform in the Dominican Republic and to improve the image of the country abroad. In October, 1962, one year after the Commission had conducted its first investigative mission to the Dominican Republic, it received an invitation to return to that country in order to observe the "progress achieved by the Dominican people in the important field of human rights."[68]

The Cuban missile crisis, however, led the Dominican government to suspend its invitation;[69] and subsequent events made such a mission unnecessary. In December, 1962, five members of the IACHR participated in the "First Symposium on Representative Democracy," which was held in Santo Domingo from December 17 to 22; and during that time, on December 20, they had had an opportunity to observe the national elections in which Juan Bosch was elected president. The Commission thus felt that it had had sufficient opportunity to observe the progress made by the Dominican people in the field of human rights and that an additional mission would not be necessary. Consequently, in January, 1963, the Commission expressed its thanks to the government of the Dominican Republic for its invitation and "placed on record [its approval of] the exemplary conduct observed by the authorities, police power, and citizens in general during the elections. . . ."[70]

It would not be long, however, before the Commission would conduct another investigative mission to the Dominican Republic. In April, 1963, leaders of four political parties in that country alleged in a cable to the Secretary General of the OAS that agents of the police had attacked a television station during a news program in which opponents of President Juan Bosch were participating, injuring two persons and endangering the lives of numerous others.[71] The Secretary General referred the cable to the IACHR. Several days later, a report on the cable and the Secretary General's referral of it to the IACHR appeared in *El Caribe*, a newspaper published in Santo Domingo. The government of the Dominican Republic, apparently anxious to maintain a respectable image abroad, was prompted by the news account to instruct its representative to the OAS to extend an invitation to the IACHR to visit the Dominican Republic for the purpose of conducting an investigation of the events which had occurred.[72]

[67] IACHR, *Report on the Situation Regarding Human Rights in the Dominican Republic* (OEA/Ser. L/V/II.4, Doc. 32), May, 1962, p. 33.
[68] IACHR, *Report on the Fifth Session*, p. 28.
[69] *Ibid.*
[70] IACHR, *Report on the First Special Session*, p. 11.
[71] IACHR, *Report on the Sixth Session*, pp. 14–15.
[72] *Ibid.*, p. 15.

The Commission decided to accept the invitation, and all members visited the Dominican Republic from May 5 to 9, 1963. During this mission, the Commission interviewed President Bosch and various other Dominican authorities. In addition, it "heard the testimony of the persons who signed the report, and received written and tape-recorded versions of the charges made."[73] After considering all the information it could gather on the case, the Commission decided to "refrain from qualifying the acts denounced" in the cable it received, particularly the political aspects of such acts, "because of the conviction that the clarification of [the] acts properly belonged to the administration of justice of the Dominican Republic, and also because the Attorney General of the republic had informed the Commission that the investigation . . . was in the stage of preliminary court proceedings."[74] In a note informing the government of the Dominican Republic of this decision on May 20, 1963, the Commission concluded:

> The Commission understands quite clearly the full significance of the trust shown by the Dominican government in inviting it to meet again in Santo Domingo. The Commission hopes that the Dominican people will continue to enjoy the benefits of representative democracy recently reestablished, and of the human rights upon which the existence of democratic government depends.[75]

In effect, the Commission declared the petition of the leaders of the political parties inadmissible on the ground that they had not exhausted domestic legal remedies in the Dominican Republic prior to lodging their complaint. It apparently did so, however, because it felt that the then existing government of the Dominican Republic would actively investigate the case, and that the leaders of the political parties could expect to have recourse to domestic legal remedies. In such a situation, it was best that the Commission not intervene.

However, the Commission's hopes for the survival of representative democracy in the Dominican Republic were shattered in September, 1963, when President Juan Bosch was overthrown by a right-wing coup. Furthermore, in April, 1965, a civil war broke out in the Dominican Republic with two principal factions, the Government of National Reconstruction and the Constitutionalist Government, fighting for control. In the period between these two events the Commission received numerous petitions alleging violations of human rights. It transmitted many of them to the government of the Dominican Republic with requests for information and received information relative to some of them.[76] The Commission did not request permission

[73] *Ibid.*, p. 16.
[74] *Ibid.*
[75] *Ibid.*, p. 18.
[76] IACHR, *Report on the Work Accomplished During its Seventh Session, October 7 to 25, 1963* (OEA/Ser. L/V/II.8, Doc. 35 (English)), March, 1964, pp. 15–16. (Hereafter cited as IACHR, *Report on the Seventh Session*) See also IACHR, *Report on the Work Accomplished During its Eighth Session, April 6 to 20, 1964* (OEA/Ser. L/V/II.9, Doc. 24 (English)), August, 1964, pp. 15–16. (Hereafter cited as IACHR, *Report on the Eighth Session*) See also IACHR, *Report on the Ninth Session*, p. 19; *Report on the Tenth Session*, p. 5.

to visit the Dominican Republic for the purpose of conducting an investigation during this period. The outbreak of the civil war in April, 1965, however, created a serious problem as regards human rights violations.

The extraordinary situation required prompt action. Accordingly, Dr. Manuel Bianchi, then Chairman of the Commission, travelled to the Dominican Republic with the consent of both factions on June 1, 1965, without waiting for the full Commission's authorization. From that point on, at least one member of the Commission was present in the Dominican Republic until July, 1966. During his initial visit, the Chairman was able to secure pledges of cooperation by both contending factions; he also quickly surveyed the situation in order to report to the full Commission on what it might do in the Dominican Republic. A special session of the Commission was held in July, 1965, in order to review actions already taken by the Chairman and to plan for the future. At various times during the 12 month period the Commission was represented in the Dominican Republic. Various members received individual complaints, requested information from the authorities on the complaints, visited prisons and communities throughout the country where acts in violation of human rights had allegedly occurred, negotiated the release of many prisoners, assisted persons to leave the country, and made recommendations to the contending factions as well as to the Provisional Government which was established in September, 1965. The president of the Provisional Government, Dr. Hector Garcia Godoy, requested that the Commission remain in the Dominican Republic until the new government, which was to be elected on June 1, 1966, had been installed.[77] The Commission agreed to do so, and remained in the Dominican Republic until July 6, 1966, having had an opportunity to observe the election on June 1.[78] The Commission noted in its report on the mission that it was "able to verify the correct form in which balloting was conducted, in an atmosphere of perfect order and full freedom."[79]

A major characteristic of the mission to the Dominican Republic in 1965–66 was the objectivity the Commission demonstrated in its relations in the early stages of the mission with both factions contending for control of the government. This placed the leaders of both factions in a position of being compelled to project themselves in the most favorable light in respect to human rights. Thus, the Commission was able to act on behalf of specific individuals, saving countless lives.[80] In this respect, the Commission's mission was a tremendous success, and it was against this background that the

[77] IACHR, *Report on the Thirteenth Session*, pp. 11–15.

[78] IACHR, *Report on the Work Accomplished During its Fourteenth Session, October 3 to 21, 1966* (OEA/Ser. L/V/II.15, Doc. 29 (English)), March, 1967, pp. 9–11. (Hereafter cited as IACHR, *Report on the Fourteenth Session*)

[79] IACHR, *Report on the Dominican Republic, 1966*, p. 30.

[80] For a more detailed discussion of this mission see Anna P. Schreiber, *The Inter-American Commission on Human Rights*, pp. 119–146.

American states were moved to approve amendments to the Commission's statute at the Second Special Inter-American Conference in November, 1965, which would henceforth authorize it to examine and act upon the merits of individual petitions it might receive.

In more recent years, the Commission has received relatively few petitions alleging violations of human rights in the Dominican Republic. One problem which has arisen has been the arrest and deportation of Haitian refugees who have fled to the Dominican Republic in the hopes of escaping from the Duvalier regime. Several of these cases have been handled by the United Nations High Commissioner for Refugees.[81] In the main, very serious problems as regards the relationship between the Commission and the Dominican Republic have not developed in recent years.

The various situations in which the IACHR acted in the Dominican Republic were unique. Upheavals, particularly of the nature which occurred in 1965–66, are not common. Moreover, during each of the missions the authorities either in power or contending for power were under peculiar international pressures, pressures which made them more amenable to being influenced by an agency such as the IACHR. Nevertheless, what matters in the last analysis is accomplishments, and in each case the accomplishments were substantial. In short, the IACHR has demonstrated dramatically in its activities in the Dominican Republic through the years what it can do in defense of human rights if governments are willing to cooperate with it. The Commission is prepared to exploit every opportunity, though it is prudent: it will shield governments from unfavorable publicity, as it did in the case of Juan Bosch, if the circumstances demand that it do so; on the other hand, it will not relax its efforts in response to cooperative attitudes, but rather will use its influence in such circumstances to gain even greater leverage if necessary, as it did during its first and third missions. Either strategy, depending on the circumstances, can produce the desired results.

D. Brazil

The IACHR's relations with the Brazilian government have become seriously strained in recent years. Many of the petitions received by the Commission have alleged repeated, gross violations of human rights, especially torture and inhumane treatment of political prisoners, including, in some cases, Roman Catholic clergy. Some of the petitions have been filed because the claimants had not exhausted domestic legal remedies;[82] some have been filed without

[81] IACHR, *Report on the Work Accomplished During its Twenty-Sixth Session, October 27 through November 4, 1971* (OEA/Ser. L/V/II.26, Doc. 37, Rev. 1), March, 1972, pp. 39–40. (Hereafter cited as IACHR, *Report on the Twenty-Sixth Session*)

[82] IACHR, *Report on the Work Accomplished During its Twenty-Fifth Session, March 1 through 12, 1971* (OEA, Ser. L/V/II.25, Doc. 41, Rev.), November, 1971, p. 18. (Hereafter cited as IACHR, *Report on the Twenty-Fifth Session*)

prejudice and subsequently not further processed because the claimants failed to provide further information;[83] and some have been declared inadmissible because they were found to have no relation to a disregard for human rights on the part of the Brazilian government.[84] In several very important cases, such as those discussed below, however, the attitude of the Brazilian government has, from the perspective of the Commission, left much to be desired; and in processing these petitions, the Commission has been compelled to resolve important procedural issues.

One petition, received in December, 1970, alleged the arbitrary arrest and detention of three Brazilian lawyers in November, 1970. The Commission appointed Dr. Durward Sandifer, the United States national on the Commission, rapporteur for the case. He recommended at the Twenty-Fifth Session in March, 1971, that the pertinent parts of the petition be transmitted to the Brazilian government with a request for information. The Commission agreed, and the request was transmitted to that government in May, 1971. A response was received by the Commission in August, 1971, well within the 180 day period established in Article 51 (1) of the Commission's regulations. The response, however, raised a very important question concerning the exhaustion of domestic legal remedies.

In its response the Brazilian government denied that the alleged acts were committed by governmental authorities. Furthermore, it pointed out that the lawyers had presented their case to the Bar Association of Brazil and subsequently to the Council for the Defense of Human Rights. The functions of this Council were asserted to include, among others: "to receive communications that contain denunciations of violations of human rights, to consider their admissibility or justification, and to adopt measures designed to put an end to the abuses committed by individuals or the authorities responsible for such acts." The Brazilian government asserted that this Council constituted "an internal legal procedure that excludes the concurrent activity of an international organization" such as the IACHR, citing Article 9 (bis) (d) of the Commission's statute. The Brazilian government was therefore of the view that "the denunciation should be filed, as it did not satisfy the requirements for admissibility and, *furthermore*, because it did not pertain to a violation of human rights that could be imputed to the authorities of that country."[85] (emphasis added) In subsequent notes dated November, 1971,

[83] IACHR, *Report on the Twenty-Sixth Session*, p. 13; IACHR, *Report on the Work Accomplished During its Twenty-Seventh Session, February 28 through March 8, 1972* (OEA/Ser. L/V/II.27, Doc. 42, Rev. 1), May, 1972, pp. 11–12. (Hereafter cited as IACHR, *Report on the Twenty-Seventh Session*)

[84] IACHR, *Report on the Twenty-Fifth Session*, p. 22; IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, pp. 108–109.

[85] OAS, General Assembly, Third Regular Session (1973), *Annual Report of the Inter-American Commission on Human Rights* (OEA/Ser. P AG/doc. 305/73, Rev. 1), March, 1973, p. 52. (Hereafter cited as IACHR, *Report to the Third Regular Session of the OAS General Assembly, 1973*)

and January, 1972, the Brazilian government again denied any responsibility for the acts, asserted that "there were no proceedings against the attorneys in any Brazilian court and that they were completely free," and reiterated its view that internal legal remedies had not been exhausted.[86]

The Commission, in conformity with its established practice, notified the claimants of the initial response of the Brazilian government in a note dated November, 1971. The claimants provided additional information in December, 1971, which challenged the position of the government. Specifically, they argued that the Commission could not be barred from examining the case on the ground that domestic legal remedies had not been exhausted when "such remedies do not exist;" that "the Council for the Protection of Human Rights in Brazil *could not* be considered a means of exhausting internal legal remedies for various reasons, including the fact that it is *not a judicial organ but a governmental agency with advisory functions*, . . . only competent to formulate suggestions and recommendations and not to hand down a decision that could bring an end to alleged violation or to provide redress from the act that is the object of the complaint;" and that "the Council does not function permanently inasmuch as, since its creation, it has met only twice."[87] (emphasis added) In short, the *only* "recourse available to the parties was to appeal to the competent international body, that is, the Inter-American Commission on Human Rights."[88]

The conflicting points-of-view on the case raised two important issues for the Commission to consider: (1) could the Commission examine a claim which had been submitted to a governmental agency which is not a court, or, more precisely, do governmental agencies which are not *explicitly* judicial bodies fall within the meaning of the term "domestic *legal* remedies" referred to in Article 9 (bis) (d) of the Commission's statute; and (2) if the Commission *was* competent to examine the claim, did it have any merit?

The issues were discussed by the Commission at its Twenty-Eighth Session in May, 1972. Dr. Sandifer presented a report on the case, indicating that in his opinion "sufficient evidence did not exist to impute the acts upon which the complaint was based to the Government of Brazil" and recommended that the case be "filed without prejudice on its merits."[89] However, he also argued that he was "certain that the Council for the Protection of Human Rights in Brazil was *not* a part of the *judicial branch* of that country and that, consequently, it was not a court for the exhaustion of the internal legal remedies and thus the IACHR *was competent* to examine the case."[90] (emphasis added) Debate in the Commission centered primarily on this issue. Dr. Carlos A. Dunshee de Abranches, the Brazilian national on the Commis-

[86] IACHR, *Report on the Twenty-Eighth Session (Special)*, p. 9.
[87] *Ibid.*, p. 10.
[88] *Ibid.*
[89] *Ibid.*, pp. 10–11.
[90] *Ibid.*, p. 11.

sion, expressed disagreement with the view of Dr. Sandifer. He maintained that the provisions of the Commission's statute and regulations which precluded its examination of a case until domestic legal remedies had been exhausted "covered not only recourse to judicial organs but to *all* those provided under the jurisdiction of the state," and that the "proceedings being conducted before the Council for the Protection of Human Rights in Brazil relative to the subject matter of [the case] implied the existence of internal legal remedies which had not been exhausted and that, consequently, the IACHR *should not* examine the case in question."[91] (emphasis added)

In general, most commissioners took a position on the issue that "favored the recommendations and opinions of the rapporteur. . . ." The Chairman of the Commission, for example, argued that "in conformity with the doctrine and practice generally accepted in international law, 'internal legal remedies' are those brought before judicial agencies, and that the Commission should apply this interpretation to the provisions of article 9 (bis) *d* of its Statute and the corresponding article of the Regulations. . . ."[92] Further, he argued that "the terms 'internal legal procedures and remedies' cannot imply that the plaintiff would have to exhaust *all* remedies available under the jurisdiction of the state (as maintained by Dr. Abranches) before having recourse to an international body, but rather it would be enough to exhaust all *judicial means* and obtain a final judgement before submission of the case to an international body, except in the case of an unjustified refusal or delay in the administration of justice."[93] "In conclusion," as the report stated:

> the Chairman was of the opinion that the fact that the Council for the Protection of Human Rights in Brazil was dealing with the case did not bar the IACHR from examining it, *inasmuch as the Council could not be considered a judicial body for the exhaustion of internal legal remedies* and, as *no other recourse was available*, the parties could avail themselves of the appropriate international body.[94] (emphasis added)

There was something to be said for what the rapporteur and the Chairman of the Commission had to say on the issue. Clearly, the Commission cannot be expected to decline to examine a case if claimants have no access to domestic legal remedies, are being denied access to them, or if their access to them is arbitrarily being hindered or delayed. Nevertheless, in some states, such as the United States, quasi-judicial governmental agencies, at the federal, state, and local levels, frequently "adjudicate" cases in such areas as discrimination. To be sure, the decisions of such agencies can be overturned by courts, and the individuals may in the first place decide to take their case to court rather than to such agencies. Nevertheless, agencies of this sort could be considered part of the internal "legal" remedies of a state. Why, then,

[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*, p. 12.
[94] *Ibid.*

should the Commission take a stand to the effect that *no* governmental agency could be considered part of "internal legal remedies" in any state? Why should it not adopt instead a position that it would determine *in each case* whether access to the agency in question could be considered a "domestic legal remedy?" In this particular case, the Brazilian Council for the Protection of Human Rights was apparently not a *quasi*-judicial body. Moreover, there was evidence, as the Chairman, quoted above, noted, that the claimants did not have access to *judicial* bodies.

Other members of the Commission, particularly Dr. Gabino Fraga (Mexico) and Mrs. Angela Acuña de Chacón (Costa Rica), were concerned that a strong and inflexible position on the matter, as favored by the rapporteur and the Chairman, would undermine the important role that "national entities" other than courts could play in promoting and protecting human rights;[95] and in the process of debate they were successful in securing a revision of the rapporteur's recommendation. The operative part of the resolution adopted on the case reads as follows:

1 That the Government of Brazil be informed that the fact that this case has been submitted to the consideration of the Council for the Defense of Human Rights of Brazil does not bar its examination on the part of the Commission, in light of the provisions of its Statute.
2 That the case be filed without prejudice on its merits.
3 That this decision be transmitted to the Government of Brazil and the claimants.[96]

The first paragraph of this resolution leaves open the possibility that at some point in the future a governmental agency which is not explicitly a judicial body could be considered to constitute part of the "domestic legal remedies" of a state. In this specific case, however, the Commission rejected the contention of the Brazilian government that the Council for the Defense of Human Rights constituted a "domestic legal remedy." It therefore laid the basis for its examination of the claim, and decided to file it "without prejudice on its merits."

The Brazilian government did not respond to the IACHR's decision, apparently satisfied with that part of the decision which indicated that the Commission had filed the case "without prejudice on its merits;" and the case has not been reopened. The Brazilian government has, however, vigorously contested judgments reached by the Commission in other cases which raised other important issues concerning the exhaustion of domestic legal remedies. The two cases discussed below illustrate how the issues were resolved.

The two petitions were received by the Commission in June, 1970: one pertained to numerous individuals and alleged violations of their rights to life, liberty and personal security, protection from arbitrary arrest, and due

[95] *Ibid.*
[96] *Ibid.*

process of law; the other pertained to one individual, the late Mr. Olavo Hansen, and alleged that he had been a victim of arbitrary arrest, torture, and murder while imprisoned in May, 1970. The Commission decided to request information from the Brazilian government on both petitions, and did so in notes dated June (in the case of Mr. Hansen) and September, 1970.[97] In view of the urgency and seriousness of the complaints, however, the Commission did not wait for the expiration of the customary 180 day period before reiterating its request for information from the Brazilian government; in addition, it appointed Dr. Durward Sandifer rapporteur for both petitions (though they were to be processed separately), and decided to request the permission of the Brazilian government for Dr. Sandifer and the Executive Secretary of the Commission to visit Brazil. Notes containing these requests were sent to the Brazilian Ministry of Foreign Affairs in October and again in December, 1970.[98]

The Brazilian government responded to the Commission's notes in January, 1971. It provided voluminous documentation related to the accusations made in the petitions, asserted that the charges were false, and denied Dr. Sandifer and the Executive Secretary permission to visit Brazil for the purpose of gathering facts relative to the claims. In fact, as regards the request for permission to visit Brazil, the government stated that it was "most surprised" to receive the request, "inasmuch as there was no indication of the reason for such a decision nor had there been an explanation of why—prior to the expiry of the period for provision of information—the Commission, suddenly and without awaiting completion of the term established in the Regulations, wished to send a representative to Brazil." The government added that it considered the sending of an observer to Brazil an exceptional measure "that should only be used when the Commission has no other means to verify the facts."[99]

The response of the Brazilian government indicated that it was obviously not pleased that the Commission should attempt to take measures on behalf of numerous political prisoners—who have been subjected to torture and other forms of inhumane treatment while imprisoned according to reports which have appeared in the press of various countries throughout the world in recent years, and which have attracted the attention of various international humanitarian organizations—and it thus hoped to at least delay action by the Commission. Brazil's objections to the Commission's actions failed to take into account the fact that the Commission has, in serious and urgent cases, not waited for the expiration of the 180 day period established in Article 51 (1) of its regulations before reiterating its requests for information. Moreover,

[97] IACHR, *Report on the Work Accomplished During its Twenty-Fourth Session, October 13 through 22, 1970* (OEA/Ser. L/V/II.24, Doc. 32 (English) Rev. Corr.), April, 1971, pp. 16–17. (Hereafter cited as IACHR, *Report on the Twenty-Fourth Session*)

[98] IACHR, *Report on the Twenty-Eighth Session (Special)*, pp. 13–14.

[99] *Ibid.*, p. 14.

it may request permission to conduct an investigation at *any* time, though it is prudent in making such requests. The Commission therefore addressed another note to the Brazilian government (January, 1971), thanking it for the information it had provided, but noting at the same time that it wished to "state for the record that it regretted that the request" for permission to visit Brazil had been denied.[100] Moreover, it stated:

> That the Commission, in accordance with its Statute and Regulations, as well as by established practice, requests approval for representatives to visit the territory of an American state, bearing in mind exclusively the gravity and urgency of the events, such as have been described in the denunciation, and . . . that this did not imply any prejudgement by the Commission.[101]

Even though the two petitions were substantively similar in that they both alleged acts of torture, they raised different procedural issues; and for this reason they are discussed separately below.

The petition relating to the late Mr. Olavo Hansen, as noted above, alleged that he had been subjected to torture while imprisoned which culminated in his death. In response to this allegation, the Brazilian goverment stated that Mr. Hansen, a labor leader who had been arrested while "distributing subversive pamphlets" at a sports arena, was taken to the headquarters of the "Political and Social Police Force (DOPS)" in San Paulo, "where he became ill and was therefore taken to the Army Military Hospital where he died."[102] An autopsy performed at the "Institute of Legal Medicine resulted in the finding that the cause of death was unknown;" but a police investigation had concluded that Mr. Hansen had commited suicide by ingesting parathion, a substance used in the manufacture of fertilizers and insecticides and handled by the late Mr. Hansen at his place of work before his arrest.[103] Finally, the Brazilian government pointed out that the police investigation had been submitted to the judicial branch, but that the latter had filed the case because "there was no objective evidence that death was the result of criminal action."[104]

Following receipt of the Brazilian government's interpretation of the events, the Commission carried on an exchange of correspondence with the claimants and the government over a period of approximately two years. The delay in reaching a decision in the case was due in large measure to the refusal of the Brazilian government to permit Dr. Sandifer, rapporteur for the case, to go to Brazil in order to conduct an on-the-spot investigation. In their various notes to the Commission the claimants maintained that the "suicide thesis" should be rejected, that Mr. Hansen's death should be considered a

[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*, p. 23.
[103] *Ibid.*
[104] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, p. 40.

"political trade union crime." The Brazilian government, on the other hand, consistently maintained that the cause of death was suicide. In the meantime, Dr. Sandifer prepared several reports on the case. With all the evidence it could reasonably expect to gather at hand, the Commission discussed the case at its Twenty-Eighth Session in May, 1972.

Since the Commission was to examine this case under Article 9 (bis) of its statute, there arose the question of whether all domestic legal remedies had been exhausted. For his part, Dr. Sandifer "arrived at the conclusion that, despite the police investigation ("inquest") and the filing of the case by judicial decision, 'the illusory nature of any possibility of appeal should not obscure the fact that the Commission [was] able to reach conclusions in this case on the basis of information already in its possession.' "[105] Other commissioners shared Dr. Sandifer's view. The Chairman of the Commission, for example, Dr. Justino Jiménez de Aréchaga of Uruguay, observed that the decision of the military magistrate "was not definitive," that it could be "reviewed—which indicated that the internal remedies had not yet been exhausted." On the other hand, however, "he noted that thus the related problem arose of determining upon whom the duty of exhausting such remedies devolved: The claimants? The Public Ministry? Other interested parties? And there was still another question: Were the claimants who presented the case to the IACHR in a position to do so?"[106] He expressed doubt that the claimants could appeal the decision "because, in accordance with Brazilian legislation, it did not appear that they would have legal standing to file an appeal."[107] Thus, in his view "the trial was closed, and there was no assurance that it could be reopened. For the purposes of the work of the Commission, the internal remedies had already been exhausted and, consequently, [it] could now take a decision regarding the substance of the matter."[108]

The only commissioner to express serious disagreement with the views expressed above was Dr. Abranches of Brazil. He objected to Dr. Sandifer's characterization of the existing internal legal remedies in Brazil as "illusory;" and he argued that the "internal legal remedies had not yet been exhausted in [the] case, inasmuch as neither the claimants nor other persons or institutions in Brazil had filed any appeal against the judicial finding of the military magistrate."[109] He therefore urged that the Commission postpone its examination of the case, and that it request additional information from the Brazilian government.[110]

The Commission voted on the question of its competence to examine the

[105] *Ibid.*, p. 43.
[106] IACHR, *Report on the Twenty-Eighth Session (Special)*, p. 25.
[107] *Ibid.*
[108] *Ibid.*, p. 26.
[109] *Ibid.*, p. 25.
[110] *Ibid.*

case and decided, by majority vote (Dr. Abranches dissented), that it was competent to do so.[111] Furthermore, after a discussion of the evidence at hand, the Commission adopted, again by majority vote with Dr. Abranches dissenting, a resolution on the case, the operative part of which reads as follows:

1 To make known to the Government of Brazil that, by virtue of the information that the Commission has at its disposal, the acts reported in the record of this case constitute *prima facie*, in its opinion, a very serious case of the violation of the right to life.
2 To request that distinguished government that it impose on those persons found guilty of this death the punishment provided by law in such a case and offer to the family of Olavo Hansen the reparation due to them by law.
3 To forward to the Government of Brazil a copy of the report of the rapporteur as well as this resolution; and to inform the claimants of the contents of this resolution.[112]

The Commission informed the government of Brazil of this decision in a note dated May 5, 1972, and the claimants on May 12, 1972.[113]

The resolution quoted above was virtually unprecedented in the history of the Commission; indeed, it is the only case cited in recent reports in which the Commission took such a strong stand on the basis of evidence at hand. The Commission was able to do so only because of the outstanding investigative job of Dr. Sandifer. He had uncovered important discrepancies in the Brazilian government's interpretation of the events which occurred, virtually compelling the conclusion that Mr. Hansen had not committed suicide, but had died as a result of wounds inflicted by torture.[114]

The Brazilian government expressed its great displeasure with the resolution adopted by the Commission; and in a note dated April 3, 1973, it "petitioned the Commission to reconsider [its] resolution and alleged, in summary, errors of procedure and substance in the examination of the case."[115] At its Thirtieth Session in April, 1973, the Commission conducted a general debate on the Brazilian government's petition "in order to decide, as a preliminary question, its admissibility due to the fact" that the Commission did not have "statutory provisions regarding petitions requesting the reconsideration of resolutions or decisions taken on cases submitted to it."[116] Various points were considered: whether the Commission had a "right" *or* "duty" to reconsider its own decisions, "taking into account the fact that there does not exist—in the OAS—a higher body in the field of human rights to which the interested parties, be it the government or the claimant, could

[111] *Ibid.*, p. 26.
[112] *Ibid.*, pp. 26–27.
[113] *Ibid.*, p. 27.
[114] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, p. 43.
[115] IACHR, *Report on the Thirtieth Session*, p. 11.
[116] *Ibid.*

appeal" a decision of the Commission; whether the "petition for reconsideration must be presented within an opportune time;" and whether the petition for reconsideration must be based "on new facts or evidence that would justify reconsideration of the decision taken and which could not have been presented to the Commission during the examination of the case."[117]

The Commission adopted a position on each of these issues. In the first place, it decided that neither its statute nor its regulations establish a "right of review," and that, since this right does not exist, "requests for review that are presented can only be considered as a simple exercise of the right of petition for which there is no obligation to reconsider the case."[118] Consequently, the Commission determined that it would have to "discretionally decide" whether any petition for review "satisfies the minimum elements to justify a new study of the case."[119] Among those "minimum elements, which are the same as those of a legally established appeal, figure ... the *period within which* the request for review should be presented, *since the resolutions can not remain indefinitely exposed to refutation, which would result in the lessening of the firmness they should have and of their value as an exercise of the powers legally granted by the Statute*" of the Commission.[120] (emphasis added) The Commission agreed that the period of time within which petitions for review must be submitted must be "reasonable," "taking into account the degree of complexity of the case involved and the difficulties that must be overcome in order to obtain new evidence."[121] The Brazilian petition for review in the case of Mr. Hansen was deemed to have failed this test, i.e., it had *not* been submitted to the Commission within a "reasonable" period following the initial decision, it being received by the Commission some 11 months after that decision.[122]

The Commission therefore adopted another resolution, in April, 1973, in which it recommended that the Brazilian government comply with the terms of its previous resolution, i.e., that it punish the persons responsible for Mr. Hansen's death in accordance with the law, and that it make reparation to his family. In view of the fact that the Brazilian government had indicated in its petition for review that because of the political-administrative system in Brazil it was difficult to determine "which authority should impose the punishment and which party or parties might be entitled to reparation," the Commission requested in its second resolution that it "be informed if any problem is encountered, within the domestic legislation, for the awarding of reparation. . . ."[123]

[117] *Ibid.*, pp. 11–12.
[118] *Ibid.*, pp. 12–13.
[119] *Ibid.*, p. 13.
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*

The Brazilian government reacted more vigorously against the terms of the second resolution; and in October, 1973, in a note transmitted to the Commission through its ambassador to the OAS, the Brazilian government reiterated once again that Mr. Hansen had committed suicide, and that it could not "accept the accusations that [had] been made against it nor much less the suggestion that it indemnify the Hansen family."[124] The note went on to say:

> Moreover, the Government of Brazil is astonished by the attitude of the Inter-American Commission on Human Rights, since it is totally out of keeping with the facts and with the results of the investigations of the same case made by the International Labour Organization, which refused to condemn the Brazilian authorities.[125]

Finally, Brazil questioned the Commission's stand that petitions for review be submitted within a "reasonable" period, on the ground that the rule would "constitute an undue extension of domestically applicable procedural standards and would place Brazil in the position of a criminal, thus . . . creating a figure that has no place in international law."[126]

The Commission appointed Dr. Genaro Carrió of Argentina rapporteur to study once again the status of the case, bearing in mind the Brazilian government's note of October, 1973. In his report on the matter, which was endorsed by the Commission at its Thirty-First Session in October, 1973, the rapporteur argued that once a case had been resolved and the petition for a new examination declared inadmissible, it would "not be proper" for the Commission again to consider the merits of such a case; that the Commission's stand on the "reasonable" period within which petitions for review had to be submitted was not an "undue extension" of standards of domestic law, but rather involved the elementary principle that the Commission's resolutions could not "remain indefinitely exposed to refutation;" and that the Commission's establishment of a time limit "did not in any way imply placing the Government of Brazil in 'the position of a criminal.' "[127] In this connection, Dr. Carrió noted: "It is not only criminals who make belated or untimely presentations."[128]

The Commission therefore adopted its third, and final, resolution on the Hansen case. Invoking Article 9 (bis) of its statute, the Committee reiterated its position that the circumstances surrounding the death of Mr. Hansen constituted *prima facie* a very serious case of a violation of the right to life; and it decided to include a complete report on the case in its annual report to the Fourth Regular Session (1974) of the OAS General Assembly, indicating in

[124] IACHR, *Report on the Work Accomplished During its Thirty-First Session, October 15 to 25, 1973* (OEA/Ser. L/V/II,31, Doc. 54, Rev.1), June, 1974, p. 22. (Hereafter cited as IACHR, *Report on the Thirty-First Session*)

[125] *Ibid.*

[126] *Ibid.*, p. 23.

[127] *Ibid.*, pp. 23–24.

[128] *Ibid.*, p. 23.

that report that the Brazilian government had refused to adopt the measures recommended by the Commission.[129]

The other petition mentioned earlier which concerned numerous victims of torture and inhumane treatment, became, as Dr. Sandifer, rapporteur for the case, noted, "one of the most extensive and involved cases ever presented to the Commission, judging by the number of persons and organizations acting as claimants and the number of alleged victims of violations of human rights as well as the amount of material that [was] received. . . ."[130] At one point during the processing of the petition (February, 1972), "the Commission received a petition signed by over 150 persons in 13 countries, of which nine [were] member states of the OAS, reiterating that the IACHR should insist that an international body carry out an on-the-spot investigation of the situation of human rights in Brazil."[131] The original claimants themselves provided supplementary information; the Brazilian government provided voluminous documentation on the claim.

The extraordinary complexity of the case raised a serious procedural issue. As discussed earlier in this chapter, a strict interpretation of the IACHR's statute and regulations leads to the conclusion that it is authorized to examine only certain types of petitions, specifically those which allege violations of the human rights specified in Article 9 (bis) (a) of its statute; alleged violations of other human rights proclaimed in the American Declaration are presumably only to be taken cognizance of in accordance with Article 9 of the statute. Moreover, the formal regulations definitely give the impression that the Commission is to follow one of two procedures in processing the petitions it receives, depending on whether it is examining (individual cases) or taking cognizance (general cases) of them. While in practice the distinction between these two procedures has become blurred, and the Commission, especially in recent years, appears to have examined all petitions addressed to it, adherence to the formal distinction between the two procedures could have important implications. The standards to be applied in individual cases are somewhat more rigorous than are those to be applied in general cases; the former require the exhaustion of domestic legal remedies as a condition precedent to their examination, but the latter do not. There are, however, no recorded instances when the Commission engaged in serious debate as to whether these two rather distinct procedures actually exist—until this case arose.

In presenting his report on the case to the Commission as a whole at the Twenty-Eighth Session in May, 1972, Dr. Sandifer, as rapporteur, with the assistance of Dr. Aréchaga, Chairman of the Commission, recommended

[129] *Ibid.*, p. 26; see also IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, pp. 38–52.

[130] IACHR, *Report on the Twenty-Eighth Session (Special)*, p. 16.

[131] *Ibid.*, p. 15.

that the petition be classified as a general case. They were no doubt motivated to do this because of the unusually large number of individuals alleged to have been victims of serious violations of their rights; the large number of claimants; the fact that specific individuals were named in the petition in order to call attention to a serious problem which affected many others who were not identified; and the unwillingness (and apparent inability) of the Brazilian government to provide convincing evidence in refutation of the allegations. Thus, in the opinion of Drs. Sandifer and Aréchaga, the petition should be classified as a general case and processed under Article 9 of the Commission's statute, thereby eliminating the requirement of the exhaustion of domestic legal remedies under Article 9 (bis). The Commission could nevertheless, invoking Article 9 of its statute, make recommendations on the case to the Brazilian government.[132]

The proposal to classify the petition as a general case was extensively debated in the Commission at various meetings during the Twenty-Eighth Session. In addition, other issues involved in the case were raised. Dr. Gabino Fraga (Mexico), for example, argued that the Commission should consider the issue of the "equality of the parties" in cases it examined, especially in view of the fact that in this case the Brazilian government "protest[ed] its being treated on an equal footing with a group of agitators."[133] He emphasized in this connection that the IACHR is "an *international* and not a *supranational* body," and that "greater consideration and trust should be accorded the word of a member state, without prejudice to the Commission's receiving evidence demonstrating the veracity of claims."[134] Moreover, he disputed the claim that the Commission could make a distinction between individual and general cases, and opposed such an interpretation of Article 9 (bis) of the statute.[135] Dr. Abranches (Brazil) also opposed classifying the petition as a general case, suggesting instead that it should be considered a "combination of 'individual' cases," and agreed with Dr. Fraga that a claimant should not be considered to be "on an equal footing" with a member state. Furthermore, he disputed various statements and conclusions made in the rapporteur's report, arguing that some accusations were "vague and imprecise," and that some documents presented to the Commission by the claimants had not been "duly authenticated."[136]

The rapporteur and the Chairman defended their positions, insisting that a distinction could be made between general and individual cases, and that, while the views of the member states were important, in accordance with its established practice the Commission had to give "equal consideration" to the

[132] *Ibid.*, p. 16.
[133] *Ibid.*, p. 17.
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*, pp. 19–20.

"allegations of all the parties concerned."[137] A vote was therefore taken on the question of whether the petition should be classified as a general or individual case, and by a majority vote it was decided that it should be considered a general case.[138] Having reached a decision on this preliminary issue, after some discussion of the case the Commission adopted a resolution by majority vote (Drs. Acuña de Chacón, Abranches, and Fraga dissented), which reads in part as follows:

[The Inter-American Commission on Human Rights decides:]

1 To declare that, because of the difficulties that have hindered the carrying out of the examination of this case, *it has not been possible to obtain absolutely conclusive proof* of the truth or untruth of the acts reported in the denunciations. However, *the evidence collected in this case leads to the persuasive presumption* that in Brazil serious cases of torture, abuse and maltreatment have occurred to persons of both sexes while they were deprived of their liberty.

2 To exercise the power granted to it by Article 9, paragraph b) of its Statute and *recommend* to the government that it carry out a thorough investigation, the results of which the Commission would like to be able to examine at its next regular session, in charge of independent judges, not subject to military or police influence, with a view to determining, with all the guarantees of due process,

a) Whether acts of torture, abuse and maltreatment have been carried out against persons detained in any of the places of incarceration indicated in Chapter IV of this report; and

b) Whether acts of torture, abuse and maltreatment of prisoners have been carried out by any of the military or police authorities whose names are included in Chapter IV of this report.

3 To *request* the Government of Brazil that, once the investigation is completed,

a) It inform the Commission of the results (Statute, Article 9, paragraph *d*) and forward to it a copy of the basic parts of the report, and

b) It punish, to the full extent of the law, those persons that the evidence proves to have been responsible for violations of human rights.

4 To forward to the Government of Brazil a copy of the report of the rapporteur and the Chairman of the Commission as well as this resolution; and to inform the claimants of the contents of this resolution.[139] (emphasis added)

The Commission informed the government of Brazil of this decision in a note dated May 5, 1972.[140]

The Commission's decision on the merits of the case illustrates once again that it would not declare an allegation confirmed in the absence of "absolutely conclusive proof;" nevertheless, if the evidence at hand is overwhelming, and leads to a "persuasive presumption" of truth, the Commission will not hesitate to so indicate regardless of how large or powerful a state might be. Moreover, it will exercise its option to make recommendations in such cases. The recommendations in this particular case were set forth with sufficient

[137] *Ibid.*, p. 18.
[138] *Ibid.*, p. 20.
[139] *Ibid.*, pp. 21–22.
[140] *Ibid.*, p. 22.

detail so as to convey the Commission's conviction that the allegations demanded urgent attention.

The Commission awaited the response of the Brazilian government. Since the 180 day period within which the Brazilian government was expected to respond had not expired when the Commission met for its Twenty-Ninth Session in October, 1972, the Commission postposed consideration of the case until its Thirtieth Session.[141] In April, 1973, the Brazilian government responded to the Commission's resolution (as it did in the case of Mr. Hansen, discussed earlier), objecting to it and requesting a re-examination of the case. The matter was discussed by the Commission at its Thirtieth Session in April, 1973.[142]

In objecting to the resolution and requesting a re-examination of the case, the Brazilian government argued, among other things, that the case should have been examined in accordance with Article 9 (bis) of the Commission's statute (as an individual case) which requires the exhaustion of domestic legal remedies; that it "considered the bases for the *presumption* that violations of human rights had occurred in Brazil to be both *insufficient* and *fragile*;" that it "strenuously rejected the insinuation that some judges in [Brazil] might not be independent;" and that it could not "appoint a commission of 'independent judges'" to conduct an investigation of the alleged violations because it had already appointed a "high-level commission, under the supervision of the Minister of Justice," which had "declared that such acts had not occurred," and that to appoint a commission of "independent judges" as the IACHR suggested would violate the "constitutional principles of separation and independence of powers."[143]

The Commission considered as a preliminary issue whether the request of the Brazilian government to re-examine the case was *timely*. It will be recalled that the question of the timeliness of a petition for review had been discussed in connection with the Brazilian government's request for a review of the Hansen case. In this case also, the question of the timeliness of the request was important, for, as in the Hansen case, the request was made approximately 11 months after the Commission had reached its decision. In view of the extraordinary complexity of the case, however, the Commission decided, by majority vote, that it should admit the Brazilian petition, but *not* in order to re-examine the case; rather, it would examine "the points covered" in the Brazilian government's petition.[144] Dr. Aréchaga was appointed rap-

[141] IACHR, *Report on the Work Accomplished During its Twenty-Ninth Session, October 16–27, 1972* (OEA/Ser. L/V/II.29, Doc. 40, Rev. 1), December, 1972, p. 25. (Hereafter cited as IACHR, *Report on the Twenty-Ninth Session*)

[142] IACHR, *Report on the Thirtieth Session*, p. 14.

[143] *Ibid.*, p. 15; see also IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, p. 74.

[144] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly*, 1974, p. 75.

porteur for the petition. His report was discussed at the Thirtieth Session; and the Commission adopted, by majority vote (Dr. Abranches dissented and Dr. Fraga abstained), a resolution in which it "confirm[ed], in all its parts," its previous resolution on the case, "with the clarification" that what it had requested was "an investigation under an administrative authority independent of the police or military" of Brazil, and that it had requested that it "be informed of the measures" that would be adopted in accordance with the text of its resolution.[145] The Commission transmitted copies of this second resolution on the case to the Brazilian government on June 15, 1973, and to the claimants on June 21, 1973.[146]

The adoption of the second resolution prompted the Brazilian government to reply again, in October, 1973, through its ambassador to the OAS. In this communication, the government of Brazil informed the Commission that "the competent investigation of the facts was carried out in detail by means of 'inquest' held within the Brazilian juridical order and under the direct supervision of the Minister of Justice, which means that, in that way, all the applicable measures [had] been taken, to which no other could be added;" and that for "that reason" the "Brazilian Government consider[ed] inadmissible the impugnation of jurisdiction that result[ed] from the decision of the Inter-American Commission on Human Rights."[147] The Commission considered this communication at its Thirty-First Session in October, 1973, and appointed Dr. Genaro Carrió of Argentina rapporteur for the case. In his report, Dr. Carrió pointed out that on the basis of the information at hand it seemed clear that the Brazilian government had no intention to adopt the measures recommended by the Commission, and that it would therefore be appropriate for the Commission to "make the observations" it deemed appropriate on the case in its annual report to the General Assembly.[148] The report, which was included in the Commission's annual report to the Fourth Regular Session (1974) of the General Assembly, included excerpts from numerous communications regarding the alleged violations, citing by name specific victims and describing the various methods of torture employed, and a comprehensive history of the Commission's processing of the case, including the various exchanges of correspondence between the Commission and the Brazilian government as well as the texts of the various resolutions adopted.[149]

The cases discussed above serve as illustrations of the kinds of issues, substantive as well as procedural, which the Commission has faced in processing

[145] IACHR, *Report on the Thirtieth Session*, p. 17.
[146] *Ibid.*
[147] IACHR, *Report to the Fourth Session of the OAS General Assembly, 1974*, p. 77.
[148] IACHR, *Report on the Thirty-First Session*, pp. 27–32.
[149] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, pp. 52–81.

petitions relative to the status of human rights in Brazil. Clearly, the attitude of the Brazilian government has left much to be desired. It has not challenged the competence of the Commission to act upon petitions it receives, thus acknowledging that it considers its human rights practices and policies to be a matter of international concern. Nevertheless, it had consistently disclaimed any responsibility for the acts which have allegedly occurred; and it has sought to delay action by the Commission, repeatedly raising procedural issues (particularly as regards the exhaustion of domestic legal remedies), perhaps expecting that in time the Commission would relent in its efforts. Some cases have therefore been in process for as long as two or three years.

The amount of time consumed in processing some of the petitions has clearly rendered ineffective any action the Commission might have been able to take on very pressing claims. But the Commission has not relented. Despite its inability to take effective measures on specific cases, the Commission has not lost sight of the possible long-range effects of the decisions it could reach on the merits of the petitions it has received; and in the case of Brazil, the decisions in some important cases *declare*, for all practical purposes, the allegations confirmed. The Brazilian government has taken these decisions seriously, as its appeals for reconsideration attest, though it has ultimately refused to accept the Commission's recommendations.

E. The United States

The IACHR has received several petitions alleging violations of human rights in the United States. Most of the petitions have been received since 1970. It is interesting to note that virtually all of the petitions have been submitted by or on behalf of Spanish-speaking persons; none has alleged discrimination against blacks; and none has concerned prison conditions in the United States.

Despite the fact the volume of petitions received by the Commission relative to the status of human rights in the United States has been very small, several of them have raised very important procedural issues for the Commission to resolve, particularly as regards the exhaustion of domestic legal remedies. The conclusions reached, as illustrated in the two cases discussed below, are important.

One petition, received by the Commission in February, 1971, was submitted on behalf of two Cuban refugees who had been tried and convicted of acts of terrorism and other crimes and were at the time serving prison sentences in federal prisons in Georgia and Florida. The Commission decided at its Twenty-Fifth Session in March, 1971, to declare that part of the petition which referred to the prisoner in Georgia inadmissible on the ground that it dealt "with events or situations not related to a disregard of human rights" by

the United States (Article 39 (d) of the Commission's regulations);[150] but to declare that part of the petition which pertained to the prisoner in Florida admissible, "reserving, however, the right to apply at a later date the provisions of Article 54 of its Regulations"[151] (the rule of the exhaustion of domestic legal remedies). In substance, the petition alleged that Mr. Orlando Bosch, the prisoner in Florida, had been imprisoned for 40 months; the final decision in his case had not yet been handed down. The question for the Commission, therefore, was whether Mr. Bosch had experienced *unjustified delay* in having the final decision handed down in his case.

On the basis of the information at hand, the Commission decided, as noted above, to declare Mr. Bosch's case admissible, leaving open the possibility that on the basis of further information received on the case it could declare it inadmissible on the ground that domestic legal remedies had not been exhausted. Accordingly, the Commission decided to request the claimant to provide a copy of the verdict of the federal district court in Miami which heard the case, *and* to transmit the pertinent parts of the claim to the government of the United States *if* it could be "established that unjustified delays in the administration of justice had taken place in the case of Mr. Bosch."[152] If, in fact, the Commission were to request information from the United States government, it would indicate that the "admissibility of the denunciation had been limited to the question of ascertaining whether there had been a unjustified delay in deciding the appeal from the verdict of the Federal District Court of Florida."[153]

In April, 1971, the claimant provided the Commission with an "official notification" of the decision of the federal district court, but indicated that "he had not been able to secure a true copy of the sentence or decision, as the Commission had requested."[154] The Commission therefore requested, in December, 1971, that the claimant "provide information as to whether, in the opinion of Mr. Bosch's defense attorney, it could be construed that there had been" an unjustified delay in the administration of justice. The claimant responded in January, 1972, that an appeal of the conviction had been denied, but was being further appealed to the United States Supreme Court, and that Mr. Bosch, who had been imprisoned for 40 months, had not yet been paroled. At that point the Commission's secretariat requested the opinion of the Chairman of the Commission as to what procedure should be followed in the case, particularly whether information should be requested

[150] IACHR, *Report on the Twenty-Fifth Session*, p. 19.

[151] IACHR, *Report on the Twenty-Sixth Session*, p. 31.

[152] *Ibid.*

[153] OAS, General Assembly, Second Regular Session (1972), *Annual Report of the Inter-American Commission on Human Rights to the General Assembly* (OEA/Ser. P AG/doc. 227), March, 1972, p. 62. (Hereafter cited as IACHR, *Report to the Second Regular Session of the OAS General Assembly, 1972*)

[154] IACHR, *Report on the Twenty-Seventh Session*, p. 36.

from the United States government. In part, the Chairman responded as follows:

> From an examination of all documents pertaining to this case it seems evident to me that it should be concluded that the Commission has no evidence or proof that could allow it to maintain that an *unjustified* delay had occurred. The claimant has not provided all the documents that had been requested of him and that could have helped the Commission to form an opinion on that fundamental point. Moreover, it seems highly suggestive that in the documents signed by Dr. Bosch's attorney no reference is made to an *unjustified* delay nor to anything unusual, if you will, about the slowness in deciding upon the appeal, which the claimants impute to the court.[155]

The Chairman went on to say that, in view of the lack of evidence, the "most prudent course" to follow would be to request of Mr. Bosch's defense attorney that *he* provide copies of the decision handed down by the various courts, copies of the appeals, and other documents, including a report in which he would state whether in his opinion there had been an *unjustified* delay in the administration of justice in Mr. Bosch's case.[156]

The request for information was transmitted to the defense attorney (and to the claimant) in February, 1972; but the Commission received no reply. At its Twenty-Eighth Session in May, 1972, the Commission reviewed the case. It discussed the opinions and recommendations of the Chairman. The rapporteur for the case, however, Dr. Carlos A. Dunshee de Abranches of Brazil, disagreed with the opinion expressed by the Chairman; and he insisted that information on the case be requested of the United States government. The Commission decided instead, by majority vote (Dr. Abranches dissented), to *hold in abeyance* the case and so to notify the parties.[157] This is the first recorded instance in which the Commission reached a decision of this nature. Normally, as discussed earlier, the Commission may reach a decision to file a petition, file it without prejudice, or indicate that it presumes the allegation confirmed. To hold a case in abeyance means that the issue cannot be determined or settled and is awaiting proof. It is therefore similar to a decision to file a case without prejudice, which means that no conclusion can be reached on the basis of the evidence at hand, but that the case could be reopened in the future if information subsequently provided warrants such action. Whether the Commission intended to say anything fundamentally different from this by deciding to hold the case of Mr. Bosch in abeyance is not clear. Whatever it intended, no further action has been taken on the case since 1972.

A second petition, to which we shall now turn our attention, required the Commission to deal with a different, but very important matter: the claimants

[155] *Ibid.*, p. 37.

[156] *Ibid.*

[157] IACHR, *Report on the Twenty-Eighth Session (Special)*, p. 31; IACHR, *Report to the Third Regular Session of the OAS General Assembly, 1973*, pp. 75–76.

had exhausted all domestic legal remedies, and now they were petitioning the IACHR to examine and take action on their case.

The petition concerned Spanish-speaking citizens of the United States, residents of the state of New Mexico, who were members of the Alianza Federal de Mercedes, an organization concerned with asserting a variety of political and land grant claims.[158] The petition, received by the IACHR in September, 1972, alleged that violations of the rights of the claimants had occurred in 1967. Specifically, they charged that one of the claimants (a leader of the organization) had been arbitrarily arrested and detained; that the law enforcement authorities of New Mexico had taken measures to deny the members of the organization their right to gather peacefully and to "associate with others to promote, exercise, and protect" their common interests; that various members of the organization were treated inhumanely after their arrest; and that the homes of the claimants had on various occasions been illegally searched.[159] The claimants *had exhausted* all domestic legal remedies in an effort to secure redress of their grievances, the matter having been taken to a federal court in New Mexico, the United States Court of Appeal (Tenth Circuit), and by writ of *certiorari* to the United States Supreme Court, where it was denied in March, 1972.[160]

The claimants had sought damages of $3,000 for each of them, but a jury trial in the district court resulted in a decision to award damages in that amount to only one petitioner. The other issues in the case, the "illegal" searches, etc., were also not settled to the satisfaction of the claimants. On appeal, the circuit court upheld the decision of the district court, concluding in part as follows:

> In sum, our study of the voluminous record convinces us that the plaintiffs have now had their day in court and that the varied issues were properly submitted to the jury under instructions that are without the defects now suggested by the several plaintiffs.[161]

Since the United States Supreme Court denied *certiorari*, the claimants took their case to the IACHR, requesting that the "Commission examine the individual cases of the victims of the alleged violations and, in the second place, that it study the general situation of human rights for Spanish-speaking citizens of the United States living in the southwest of the United States of America."[162]

Never before had the IACHR received a petition of this nature regarding an alleged violation of human rights in the United States. For the first time the

[158] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, pp. 132–138.

[159] IACHR, *Report on the Twenty-Ninth Session*, pp. 15–16.

[160] *Ibid.*, p. 16.

[161] IACHR, *Report to the Fourth Regular Session of the OAS General Assembly, 1974*, p. 135.

[162] IACHR, *Report on the Twenty-Ninth Session*, p. 17.

Commission was faced with a claim which could ultimately require that it request information of the United States government on a case which had actually been taken to the United States Supreme Court. The initial decision on the case is difficult to comprehend, and suggests that the Commission would have preferred never to have received the petition. The Commission first requested additional information from the claimants, and it was provided. It appointed Dr. Gabino Fraga (a Mexican national) rapporteur for the case; he submitted a report which was discussed at the Twenty-Ninth Session in October, 1972.

In discussing this case, the Commission considered, "as a preliminary issue, whether in accordance with its authority it was competent to receive and examine claims in which definitive judicial decisions within a member state had been submitted" to it.[163] It is interesting that the Commission should have raised this question; it clearly is authorized to examine such claims under Article 9 (bis) of its statute. It is not, of course, authorized to overturn definitive judicial decisions, though it could make recommendations on such cases which may or may not be accepted by the member state concerned. What is more interesting is the answer the Commission provided to the question:

> On this matter the Commission was of the opinion that it was competent in such cases, *provided* the claimants allege that the violation of the human right or rights which are the subject of the claim *occurred as a consequence or result of a specific judicial verdict or judgement, as such.*[164]

"Using this criterion," the Commission decided to declare the petition *inadmissible* because it was incompatible with Article 39 (c) of its regulations, i.e., it was "incompatible with the provisions of the Statute, of the Regulations, or obviously unfounded;" to file the case without further action; and to make the decision known to the claimants. The actual resolution on the case was adopted by the Commission at its Thirtieth Session in April, 1973. The operative part of the resolution stated:

> That in view of the fact that there has been a judicial decision that has examined the evidence presented by the complainants and taking into account the fact that the denunciation was not made against that decision, alleging its illegality, the Commission cannot nor should not enter into an examination of the acts denounced and, therefore, in accordance with article 39 c) of the Regulations of the Commission, the complaint of the members of the Alianza Federal de Mercedes is rejected.[165]

The claimants were notified of this decision on May 15, 1973.

It is impossible to say precisely what motivated the Commission to adopt this position on the case. What is clear, however, is that its interpretation of its competence to act was, as the claimants later argued, unnecessarily restric-

[163] *Ibid.*
[164] *Ibid.*
[165] IACHR, *Report on the Thirtieth Session*, p. 46.

tive. Had not the claimants exhausted all domestic legal remedies as required by Article 9 (bis) (d) of the Commission's statute? Was it not implied in the fact of lodging the petition that the claimants denounced the domestic judicial decisions? If so, why should the Commission not examine the case on its merits? If, after such an examination, it agreed with the judgments of the courts, the Commission could have declared the petition inadmissible on the ground that it bore no relation to a disregard for human rights by the United States, in accordance with Article 39 (d) of its regulations: if it disagreed with the judgments of the courts, the Commission could have ultimately made recommendations on the case. An examination of the case on its merits would surely have been a better course to follow, for had the Commission's decision not been later reversed, it would have established a dangerous precedent which other states could have cited, conceivably rendering the Commission impotent in the future in important cases brought to its attention.

The claimants appealed to the Commission to reopen their case in September, 1973. The core of their argument, quoted in part in the Commission's report on its Thirty-First Session in October, 1973, was as follows:

> Implicit in the denunciation as articulated in our petition is the denunciation of the entire judicial procedure which petitioners herein were required to exhaust. Had petitioners been satisfied that the domestic judicial determination was fair and just, the need for filing the petition would not have existed. It is petitioner's position that by its very nature, the petition inherently denounces the judicial decision rendered in the case as well as the failure of the United States Supreme Court to act in the matter.
>
> Petitioners failed to realize that the Commission would interpret their implicit denunciation of the judicial procedure as no denunciation whatsoever. This is incorrect and for the record petitioners wish to clarify the matter as follows: The acts complained of by petitioners in their original complaint impliedly include the denunciation of the domestic judicial decisions rendered. Petitioners feel the decision is contrary to fact when viewed in light of the American Declaration and the human rights protected thereunder.[166]

As discussed earlier in the case of Brazil, prior to 1973 the Commission had not given any consideration to the question of whether it might review any of its decisions. However, in response to the Brazilian government's requests, which were received by the Commission in April, 1973, that it reconsider two of its decisions pertaining to Brazil, the Commission adopted criteria it would follow in doing so. The "reasonableness' of the period within which requests for review were received was stipulated as a very important criterion. In the case of the members of the Alianza Federal de Mercedes, the Commission felt that the request was made within a reasonable period inasmuch as only four months had elapsed between the time when the Commission notified the claimants of its decision (May, 1973) and the date when they filed an appeal for review (September, 1973). Therefore, the Commission resolved "to admit the possibility" of revising the resolution it adopted in

[166] IACHR, *Report on the Thirty-First Session*, p. 48.

April, 1973, and also to request information from the government of the United States on the case.[167] A note was addressed to the government of the United States in December, 1973; the claimants were informed of this action in January, 1974.[168] The United States responded to the IACHR's inquiry in June, 1974, but there has been no reported final disposition of the case.[169] The Commission has also not indicated in any of its reports whether it plans to conduct a study of the alleged discrimination against Spanish-speaking persons as requested in the initial petition.

The feeling that Spanish-speaking persons in the United States are discriminated against in various ways is apparently widespread. The matter was brought to the attention of the IACHR in another case, in August, 1973, and concerned specifically discrimination on the ground of *language* in regard to the acquisition of citizenship in the United States.[170] The petition, which was signed by over 300 Spanish-speaking aliens plus representatives of various organizations endorsing their claim, requested that the IACHR "recommend that the government of the United States, in application of the rights contained in the American Declaration of the Rights and Duties of Man, eliminate the English literacy requirement (for citizenship) in order to afford social and economic equality to the some 1,600,000 Latins Resident in the United States."[171] The claimants had legally resided in the United States for more than five years and had met all other requirements demanded by the law of the United States in order to be naturalized, "except that of speaking English fluently;" and they felt that the language requirement should be abolished.[172] As stated in the Commission's summary of this case: "The petitioners claim that their position is just because they pay taxes and contribute to the progress of the community in the same manner as others who have been naturalized simply because they speak English."[173]

In dealing with this case, the Commission did not concern itself at first with whether the claimants had exhausted all domestic legal remedies in the United States prior to lodging their petition. Instead, it decided to transmit to the United States government the pertinent parts of the claim and to request information relative to the case. It did so in a note dated December, 1973. At various times in the ensuing months the United States government, through its representative to the OAS, provided information on the case. Initially, the United States pointed out that there was no evidence that the claimants had

[167] *Ibid.*, p. 49.
[168] *Ibid.*
[169] IACHR, *Report to the Fifth Regular Session of the OAS General Assembly, 1975*, p. 101.
[170] IACHR, *Report on the Thirty-First Session*, p. 13.
[171] IACHR, *Report to the Fifth Regular Session of the OAS General Assembly, 1975*, p. 105.
[172] *Ibid.*
[173] *Ibid.*

exhausted internal legal remedies in the United States. Rather than challenging the Commission's processing of the petition on this basis, however, the United States chose to provide the Commission with information relative to the history and development of its naturalization laws; copies of court decisions which could have had a bearing on the case (had it been brought before United States courts); and information pertaining to legislation then pending before the United States Congress. As regards the possibly relevant court decisions, the United States provided a copy of a federal district court decision in which the court held that the "English literacy requirement for citizenship is not a violation" of the United States Constitution, and that in the United States "there exists no 'right' to citizenship through naturalization."[174]

The United States also took issue with various specific points in the petition. The petitioners argued that the elimination of the "English literacy requirement would . . . be consistent with the pattern followed by other countries in the Western hemisphere, including Canada and Mexico, none of which require written and spoken fluency in the national language before citizenship will be granted."[175] The United States argued that this statement was misleading because at least ten other states in the hemisphere, including Argentina, Brazil, Venezuela, Columbia, Ecuador, and Peru, whose laws it cited, have some sort of language requirement for naturalization. As stated by the United States:

> The fact that at least ten other countries in the hemisphere have established some sort of local-language fluency requirement as a condition for citizenship is not in itself conclusive as to whether such a requirement is inconsistent with the provisions of the American Declaration of Human Rights. However, this fact plainly indicates that literacy requirements are considered reasonable and appropriate elsewhere in the hemisphere. In this respect, we would suggest that nothing contained in Articles I, II, V, VI, XIV, XIX, or XX of the American Declaration prohibits reasonable conditions on the attainment of citizenship by naturalization. Moreover, Article XIX by its terms recognizes that nationality is regulated by law, and that no country has the obligation of granting it.[176]

The United States also pointed out that "there are extensive facilities, including publicly funded adult education programs across the country, for the achievement by Spanish-speaking aliens of the modest competence in English necessary for naturalization."[177]

The Commission examined the merits of the petition of the Spanish-speaking aliens at its Thirty-Fourth Session in October, 1974. On the basis of the information provided by the claimants and the United States government, the Commission reached its conclusion. It declared the petition *inadmissible*

[174] *Ibid.*, p. 108.
[175] *Ibid.*
[176] *Ibid.*, p. 109.
[177] *Ibid.*, pp. 109–110.

because the claimants had not exhausted domestic legal remedies as required by Article 9 (bis) (d) of its statute and Article 54 of its regulations. In this connection, the Commission noted that aliens in the United States who are denied naturalization have recourse to administrative as well as judicial bodies.[178] The Commission was therefore justified in declaring the petition inadmissible. However, the Commission went further, in effect evaluating the claim on its merits. It asserted that the argument of the claimants that the literacy requirement of the naturalization law of the United States violated Articles II and XIX of the American Declaration of the Rights and Duties of Man "cannot stand" because:

> one cannot confuse the 'right to the nationality to which he is entitled by law' [in Article XIX of the Declaration] with the right of a person to change his nationality for that 'of any other country that is willing to grant it to him.' Thus there exists no right of naturalization against a state because, in principle, this is a faculty whose requisites each sovereign state may regulate in its internal laws.[179]

Furthermore, the Commission asserted that the use of the word "language" in Article II of the Declaration "concerning equality before the law does not apply to the qualifications that a candidate must meet for naturalization. Legislation in at least ten American States requires a literacy test in the national tongue."[180]

By going beyond merely declaring the petition of the Spanish-speaking aliens inadmissible on the ground that they had not exhausted domestic legal remedies in the United States, the Commission reached a decision of broader applicability. Should it receive substantially similar claims in the future regarding the naturalization laws of other American states, it would have a basis for declaring them inadmissible on the ground that they refer to "events or situations that bear no relation to a disregard of human rights by the government against which" they are directed, in accordance with Article 39 (d) of its regulations. It should also be noted that similar claims could not be supported by reference to Article 20 of the American Convention on Human Rights. That article establishes a "right" to a nationality, but not of the nature claimed by the Spanish-speaking aliens in the United States.

The petitions discussed above relative to the status of human rights in the United States, when compared to some concerning other American states, have not alleged especially gross violations of human rights. This is not to say that such violations have not occurred; but if they have, they have not been brought to the attention of the IACHR. If they were, it would appear that, judging on the basis of past experience, the attitude of the government of the United States would be to cooperate with the Commission. The fact that the government of the United States has provided information to the Commis-

[178] *Ibid.*, pp. 110–111.
[179] *Ibid.*, p. 110.
[180] *Ibid.*

sion, explaining its practices and policies, is in itself interesting. It suggests that the United States does, at least in some circumstances, consider itself accountable internationally as regards human rights despite its traditionally conservative attitude on such matters.

The record thusfar suggests that the Commission, with some justification, has not considered the situation regarding human rights in the United States as demanding urgent attention. Clearly, problems in other states are more pressing. Nevertheless, in the main the Commission has treated the United States the same as the other American states as regards publicity, including in its reports on its sessions and to the regular sessions of the OAS General Assembly summaries of the complaints, the action it took on them, and the decisions it has reached. Overall, the effect has been to reward the United States with generally favorable publicity.

F. Chile

The IACHR's relations with governments of Chile can be divided into two periods: first, the period prior to September, 1973, when a military coup brought to an end the government of Salvador Allende; second, the period following the coup. During the first period, especially during the administration of Eduardo Frei, the Commission received very few petitions alleging violations of human rights in Chile, and none of a serious nature. During Allende's administration (September, 1970 to September, 1973) the volume of petitions received increased somewhat, but "neither the number nor the seriousness of the complaints or denunciations received by the Commission ... were considered as grounds making it necessary to request the consent" of that government "to conduct an 'on-the-spot' examination of the situation."[181]

In the wake of the military coup which ousted the Allende government from power, however, an entirely different situation developed. Soon after the coup the Commission began to receive petitions alleging very serious violations of human rights. The volume of petitions increased almost daily in the weeks and months following the coup. The Commission processed these petitions in accordance with its statute and regulations, addressing notes to the junta regarding specific cases as well as the general situation as it was developing. The first notes the Commission addressed to the junta were dated September 17 and 20, 1973.[182] At first, it is clear that the Commission hoped that the reportedly grave situation in Chile would be shortlived, and that whatever complaints it would receive could be processed at its headquarters without having to conduct an on-the-spot investigation, which it traditionally

[181] IACHR, *Report on the Status of Human Rights in Chile* (OEA/Ser. L/V/II.34, Doc. 21), October, 1974, p. 1. (Hereafter cited as IACHR, *Report on Chile, 1974*)

[182] *Ibid.*, pp. 5–6.

has requested permission to conduct only in the most extreme circumstances. It quickly became apparent, however, that the situation was serious enough to warrant more aggressive measures. Accordingly, on September 26 the Commission addressed another note to the Chilean junta, noting that it would be holding its Thirty-First Session in Columbia in October, 1973, during which time it considered that it would be appropriate to have its executive secretary, Dr. Luis Reque, to travel to Chile "for the purpose of collecting . . . information on the status of human rights."[183] Permission was granted for this purpose and Dr. Reque traveled to Chile from October 12 to 17, 1973.[184] He submitted a report on his activities to the Commission on October 21 while it was in session in Cali, Columbia[185] (the Thirty-First Session).

During his brief stay in Chile, Dr. Reque held interviews with the Undersecretary of Foreign Affairs, the Minister of Interior, the Minister of Justice, the President of the Supreme Court, and representatives of the United Nations High Commissioner for Refugees and the International Red Cross. He also visited various arsenals and detention centers, including the national stadium. He called to the attention of various authorities specific cases about which the Commission was interested in acquiring information.He collected statements and depositions from numerous persons held at detention centers. He visited various cities where persons had allegedly been murdered and was able to see for himself that evidence tending to substantiate the allegations existed.[186]

In making "general comments" on the information he had gathered, Dr. Reque observed that it could be "stated that a number of prisoners were subject[ed] to harrassment, abuses, maltreatment, and, in some cases, torture," but that it appeared that "reports appearing in the international press on maltreatment and torture [were] exaggerated." According to the information he had received, "such maltreatment took place, but usually in the police stations immediately after arrest and during interrogation."[187] In addition, Dr. Reque stated that a number of foreigners had been subjected to persecution, a situation apparently caused by inflammatory statements made in radio and television broadcasts which resulted in "both foreign extremists and non-extremists being denounced."[188] As far as asylum in embassies was concerned, Dr. Reque stated that "it is general knowledge that Chile is complying with the conventions on asylum."[189] Finally, regarding the reported summary

[183] *Ibid.*, p. 7.

[184] *Ibid.*, p. 9.

[185] IACHR, *Report on the Work Accomplished During its Thirty-Third Session (Special)* (OEA/Ser. L/V/II.33, Doc. 15, Rev. 1), February, 1975. (Hereafter cited as IACHR, *Report on the Thirty-Third Session (Special)*)

[186] IACHR, *Report on Chile, 1974*, pp. 10–21.

[187] *Ibid.*, p. 20.

[188] *Ibid.*, p. 21.

[189] *Ibid.*

executions, Dr. Reque stated that it was not possible for him to obtain conclusive information, but that the newspaper *El Mercurio*, published in Santiago, had carried news accounts of such events.[190] In conclusion, he suggested that the Commission "must consider the possibility of establishing a sub-commission to visit the territory of Chile, in light of the statement [made to him by] the Minister of the Interior, General Oscar Bonilla, . . . to the effect that there would be no objection whatsoever for a sub-committee to visit Chile."[191] In Dr. Reque's opinion:

> The visit of a sub-committee to Chilean territory would be of major importance, not only to examine on the spot the events mentioned in this report and others, but also to study fully the status of human rights. It would be of great importance, for example, for the Commission to observe the procedures that are going to be followed in military courts for persons accused of crimes.[192]

The Commission discussed Dr. Reque's report while it was meeting in Cali, Columbia, and decided that it should "immediately contact the Government of Chile to request information on certain cases which, because of the special characteristics," required the "most expeditious action."[193] Accordingly, it addressed a note to the Chilean minister of foreign affairs on October 24, 1973. The note read in part as follows:

> Examining Dr. Reque's report, as well as a number of denunciations or complaints that have been submitted concerning the situation prevailing in Chile, we feel that, in order to establish our conclusions, it would be most helpful if your distinguished government would provide us with reports concerning two kinds of subjects: those considered to be so urgent that we have debated whether we should use the mail or the telegraph service to gather information on them; and others that, although not less important, are not as urgent.
>
> This note will deal exclusively with the cases that we feel are most urgent. And it is for this reason that we wish to request your distinguished government to demonstrate once again its intent to collaborate with the high purposes of our Commission and remit as soon as possible the information requested, taking into consideration the possibility that the Commission may have to meet at its headquarters in Washington in three weeks. We would appreciate it if you could at least foward to us the substantive contents of your reply, either by telex or by cable.[194]

The Commission requested information on 43 persons, Chileans and foreigners, who had allegedly either disappeared, been executed or tortured, or been imprisoned and not informed of the reasons for their detention.[195] In each category, the Commission requested detailed information. For example, as regards those persons who had allegedly disappeared, the Commission requested information as to their whereabouts; their state of health; where

[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*, p. 22.
[193] *Ibid.*
[194] *Ibid.*, p. 23.
[195] *Ibid.*, pp. 24–27.

they were detained, if they were; whether they have been brought to trial, and if so, what charges had been made against them; and whether they had defense counsel, and if so, "his name and postal address."[196] In addition to requesting this information, the Commission agreed to authorize "the Chairman . . . to request the Government of Chile's consent for the Commission to visit that country, in order to make an on-the-spot investigation of the facts, *if* it were considered desirable in accordance with the developments regarding the status of human rights and the replies that the Chilean government might give" to the requests for information.[197] (emphasis added)

The information requested would require the Chilean authorities to engage in lengthy and complex investigations if they were to cooperate fully with the Commission. The minister of foreign affairs responded, but he was not able to do so until March 27, 1974, and he was not able to provide information on all cases. In some cases information was simply not available, as might have been expected given the nature of the situation, and in others it was difficult to determine precisely the circumstances under which some persons had died.[198]

Meanwhile, between the date of the Commission's initial note requesting information (October 24, 1973) and the date on which the foreign minister responded (March 27, 1974), the Commission addressed additional notes to the Chilean government requesting information on specific cases as well as on matters of general importance. For example, in October, 1973, the Commission requested a complete text of the "decree-laws and other acts promulgated by the Government Junta, which affect, or might affect, human rights."[199] In addition, it raised questions such as: "Are all or any of the general guarantees on human rights referred to in the decree-laws . . . still suspended?" "Are civilians brought—or can they be brought—to trial before military courts in some cases or in general?" "Is there a system of censorship, suspension or closure affecting the press, the radio and television, or any other media?" "Is it possible to shut down any of these media or cancel their license, without recourse to independent courts of equity?" "Are persons deprived of their freedom for political reasons or for reasons of public security, subject to the same living conditions and discipline as those detained, indicted, or sentenced for common crimes?" "Have steps been taken to avoid abuse or maltreatment of prisoners?"[200]

The junta provided the Commission with a complete text of its decree-laws and responded to various questions raised by the Commission in January, 1974. In his response, the foreign minister explained Chilean laws on the "state of siege" and "state of emergency," and pointed out that Decree-Law No. 5 of September 12, 1973, "declared that the state of siege decreed

[196] *Ibid.*, p. 25.
[197] *Ibid.*, p. 43.
[198] *Ibid.*, pp. 30–32.
[199] *Ibid.*, p. 34.
[200] *Ibid.*, pp. 34–35.

because of internal disturbance, in the circumstances prevailing in the country, must be understood as '*a state or time of war*' for the purpose of the application of wartime penalties established in the Code of Military Justice and other penal laws, and in general, for all other purposes of such legislation."[201] (emphasis added) The decree-law obviously granted extraordinary powers to the military authorities. Moreover, the foreign minister cited various decisions of the Chilean Supreme Court handed down soon after the coup. In one case, the Court decided that the state of seige permitted "the imprisonment of persons in places other than jails or intended for the detention of imprisonment of common criminals;"[202] in another, "it declared itself incompetent to hear appeals against decisions of military courts, since, inasmuch as the country was in a state of war, such remedies were the responsibility of the commanding general of the particular territory, who had all-embracing authority to implement, revoke or modify his sentences."[203] As regarded the question of censorship, the foreign minister had this to say:

> The goals sought by the Government Junta . . . require constant vigilance, which has resulted in a certain degree of control over all types of information media. Those that were recognized Marxist propagandists or that did not follow instructions given by the Supreme Government . . . were closed down.
>
> The Junta is desirous of gradually diminishing these controls as the circumstances of national activities permit. At the present time, all press organs are distributed without prior censorship and a number of radio stations have been authorized to issue their own information bulletins independently, subject to the general standards of responsibility for abuses of publicity.[204]

Using the information it had been able to gather on the numerous allegations of human rights violations in Chile, the Commission continued to study the situation and to request information from the Chilean government during the first few months of 1974. The Chilean government endeavored to cooperate and was able to provide information on some cases. However, in April, 1974, the Commission agreed that, "while some denunciations on individual cases might be clarified through an exchange of notes with the Government of Chile, no decision on the general situation, that is to say, on the repeated denunciation that serious and massive violations of human rights occurred in Chile, [would be possible] without resorting to the procedure of examination '*in loco*' of the situation, as provided for in Article 50" of its regulations.[205] Accordingly, on April 18, 1974, the Commission requested permission to visit Chile. The note read in part as follows:

> We have already had the opportunity to acknowledge formally—and we are pleased to repeat it on this occasion—that the Government of Your Excellency has

[201] *Ibid.*, p. 39.
[202] *Ibid.*, p. 40.
[203] *Ibid.*
[204] *Ibid.*, p. 42.
[205] *Ibid.*, p. 53.

endeavored to offer ample information on the majority of the questions which the Commission has formulated. Likewise, we expressly acknowledge the facilities accorded to the Executive Secretary of the Commission during his visit in mid-October 1973.

During this session, the study of the present situation of human rights in Chile has taken a great part of our time. On the one hand, we have examined those individual cases, clearly determinable, in which the violation of certain fundamental rights of one or several specified persons has been denounced. But, in addition, it has been necessary to analyze separately that which we might call a "general case," that is, the aggregation of charges from different sources according to which there is a policy in Chile which would imply, according to the claimants, the systematic disregard of fundamental human rights.

The Commission still lacks important evidence that would permit it to form a definitive opinion on many of the individual cases under examination; but it is especially in relation to that which we call a "general case" that greater contradictions appear—still unsolvable by us—between the allegations of the claimants and the information furnished by the Government of Your Excellency.

The imperative necessity to carry out the duties that the American states have imposed on the Commission in approving its Statute, leads us in this case, after a very careful consideration of the surrounding circumstances, to exercise the faculty conferred by Article 11 of the Statute and Article 50 of the Regulations, precepts that, constituting one of the normal means by which we do our work, foresee that we might request authorization of a government in order to examine in its territory the situation of human rights, for the purposes contemplated in Article 150 of the Charter of the Organization of American States, amended by the Protocol of Buenos Aires of 1967 and Article 9 (bis) *b* of the Statute of the Commission.

The Commission believes that only working in such a manner can it take a decision with full knowledge of the facts with respect to the situation of human rights in Chile, whether it be to recommend the measures that it deems necessary for their complete protection or whether it be to be able to affirm, on the other hand, that the violations denounced did not take place.

The ample understanding shown to date by the Government of Your Excellency leads us to believe that the request for authorization will be granted; and, in such case, we wish to say in advance that the Commission considers next June 1st would be the best date for commencing its work.[206]

The Commission felt that this note, "as indicated expressly in its text," recognized "the incontrovertible right of the Government of Chile to grant or deny the consent requested of it;" and it did not expect that "it would give rise to certain erroneous interpretations."[207] There were, however, "eroneous interpretations." The initial reply, dated May 15, 1974, was addressed to the Commission by the acting foreign minister of Chile, who indicated that the foreign minister and the president of the junta were on an official visit to Paraquay, and that the Commission's note of April 18 had not been received by the Chilean Department of State.[208] (The note had been called to his attention by the Chilean ambassador to the OAS on May 14, which indicates that

[206] *Ibid.*, pp. 54–55.
[207] *Ibid.*, p. 55.
[208] *Ibid.*, p. 56.

the Commission had engaged in discussions of the matter with him in Washington.) In view of these circumstances, the acting foreign minister informed the Commission that a decision on the request would have to await the return of the foreign minister, but that it appeared to him that the date of June 1 appeared "premature."[209]

In reply, on May 16, 1974, the Commission expressed its "sincere regrets" that the Chilean government might consider June 1 a "premature" date upon which to start its investigation, and reiterated once again that in its view it was necessary to conduct such an investigation and that its request for permission to do so did not "constitute a judgment in advance" on the merits of the petitions it had received.[210] In addition, the Commission decided to issue a press release on its exchange of notes with the Chilean government. It did so because "there was great interest in the press to know the status of these actions," and because it felt that the issuance of a press release, a practice it had followed in similar cases, would have the effect of making any "information published" on the matter "true and objective."[211] Clearly the Commission was using the press release as a tool to pressure the Chilean government to give its consent to an investigation. However, there were still some "erroneous interpretations" of the Commission's intentions. The foreign minister replied to the Commission's request on May 23, 1974, in part as follows:

> I must express my surprise at the text of your cable dated May 16, in which you state that the Commission . . . 'holds to its firm intention to visit Chile as soon as possible to study *in loco* denunciations which allege violations of human rights.' It seems that you are forgetting that to do this, according to both the statutes and the regulations of your Commission, it is necessary to have the prior consent of the Government of Chile.
>
> It seems you also are forgetting the terms of your own previous communication of April 18, in which you expressly recognize that my Government has furnished ample information on most of the questions submitted by the Inter-American Commission on Human Rights and also expresses appreciation for the assistance given to the Commission's Secretary during his visit to Chile late last year.
>
> However, in consideration for the work of the Commission, I have no objection to giving my Government's consent for the Commission to visit Chile, provided the date is previously agreed upon by my Government.
>
> The visit could take place in the month of July, which would be appropriate for the undersigned, who wishes to give personal attention, as is fitting, to members of the Commission.[212]

This note contained "some passages that might have merited a reply by the Commission, but it was decided to overlook them. These passages sought to place the Commission in the false position of proposing to deny to the State to whom the request was made the right to grant or withhold consent for the

[209] *Ibid.*
[210] *Ibid.*, pp. 56–57.
[211] *Ibid.*, p. 57.
[212] *Ibid.*, p. 58.

conduct of an '*in loco*' investigation."[213] The Commission overlooked the objectionable passages in order to "maintain the highest level of cordiality" in its relations with the government of Chile.[214] Subsequent negotiations made it possible for the Commission's executive secretary to go to Chile to work out the details of the Commission's visit; July 22, 1974 was set as the date on which the mission would begin.[215]

The Commission was present in Chile from July 22 to August 2, 1974, where it held its Thirty-Third Session (Special). Two members of the Commission, Drs. Gabino Fraga (Mexico) and Andrés Aguilar (Venezuela), had established unavoidable commitments prior to the mission and were therefore unable to participate. The Commission was assisted in its work by various members of its secretariat. In view of the fact that the Commission had a great deal of work to do in a relatively brief period of time, it divided its workload among the various members participating.[216]

The Commission began its work by conducting interviews with various high ranking governmental and religious authorities. It also attended a meeting of the Chilean Commission on Constitutional Reform, a meeting which the Commission noted in its report on the mission was opened "with a vigorous speech primarily devoted to a critical analysis of the previous political regime."[217] The Chairman of the IACHR was prompted to make a "brief reply, stating that any consideration of Chile's internal policies was forbidden to the Commission, since it devolved upon the citizens of Chile alone to resolve, in the exercise of their free will, their own internal problems."[218]

The work plan of the Commission during its stay in Chile consisted essentially of the following: studying the legal system in effect as of September 11, 1973; visiting jails and detention centers in and outside of Santiago for the purpose of taking direct testimony from persons detained; taking testimony from persons who wished to report violations of human rights or appeal for assistance from the Commission; and observing the operation of the Chilean judicial system as well as the "war councils."[219] Carrying out this work plan was to keep all members of the Commission fully occupied during their stay in Chile.

As soon as the Commission had established its headquarters at the Hotel Crillon in Santiago, "a continuous procession of persons of all ages and social conditions filed in virtually 12 hours a day to formulate complaints and denunciations." The total number of petitions received in this way eventually reached 576. Many of the persons who came to the Commission with com-

[213] *Ibid.*, p. 59.
[214] *Ibid.*
[215] *Ibid.*, pp. 59–60.
[216] IACHR, *Report on the Thirty-Third Session (Special)*, pp. 1–2.
[217] IACHR, *Report on Chile, 1974*, p. 62.
[218] *Ibid.*
[219] *Ibid.*, p. 64.

plaints expressed fear that their doing so was being recorded by the police; nevertheless, they were motivated to assist their friends and relatives in whatever way they could. The Commission called many of the petitions to the attention of the government and was successful in obtaining speedy reponses in some, but not all, cases.[220]

Visits to various detention centers were a very important aspect of the Commission's work in Chile. By making these visits the Commission was able to examine the conditions under which thousands of persons were detained, and to conduct interviews with a very large number of them. In some cases the interviews were tape recorded. It should be noted, however, that the Commission encountered some difficulties in conducting these visits. When the Commission first arrived in Chile it was agreed that the individual members of the Commission would be "furnished an identification document to authorize [them] to visit freely, within normal hours, the official bureaus that [they] considered necessary to examine in carrying out [their] task."[221] However, the identification cards were never provided, and this made it "impossible to conduct surprise visits."[222] Moreover, it was necessary for the members of the Commission to conduct their visits "in the company of military authorities." This procedure, however, did not "hamper free communication with the detained persons in any way,"[223] in fact, in its report on the mission the Commission repeatedly emphasized that the accompanying officials "always stayed discreetly apart while the Commission members interrogated the prisoners, who therefore could speak more freely."[224] Still, the Commission was not able to move about the detention centers with as much freedom as it would have liked. During the interrogations of prisoners, in Santiago and elsewhere, it was repeatedly called to the attention of the Commission that "torture was *not* applied in the establishments where they were or had been detained, *but in certain places where they were taken for that purpose.*"[225] (emphasis added) Five particular locations, including a navy ship, a section of the military hospital, and the Air Force War Academy, were repeatedly identified by prisoners as places where the torture occurred. When the commissioners involved in the investigation "expressed their intention to visit those installations, they were told that such a visit could not be made, because the installations had recently been declared 'military areas.' "[226]

This refusal prevented completing a task of utmost importance, namely, comparing the descriptions, which agreed with each other, of the alleged torture rooms, with the various locations in the buildings mentioned.

[220] *Ibid.*, pp. 65–66.
[221] *Ibid.*, p. 61.
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*, p. 137.
[225] *Ibid.*
[226] *Ibid.*, p. 138.

The Commission is absolutely certain that a high-level and completely independent investigating commission designated by the Government of Chile would not have the slightest difficulty in making the checks that the Commission members were prevented from carrying out.

This is the only—but serious—reservation that must be made regarding cooperation given to the Commission to enable it to perform its duties.[227]

The Commission was also able to observe the operation of the Chilean judicial system and the "war councils." As regards both systems, the Commission discovered a "notorious weakening . . . in the action of justice as the natural defender of human rights."[228] For example, of the "more than 800 *habeas corpus* pleas presented to the Santiago Court of Appeals between September 1973 and early July 1974, only one had been accepted, and all the others had been denied."[229] Similarly, the trials conducted by the war councils mocked due process of law. In observing one such trial which involved 67 defendants, the Commission "did not see any parents or friends of the accused in the room," despite the fact that they lived in the area.[230] In stating the charges against the first defendant, the prosecutor "antedated the 'state of war' to September 4, 1970, despite the provisions of Decree-Law No. 5," dated September 12, 1973, according to which the circumstances prevailing in the country were to be regarded as a "state of war." Moreover:

According to the statements made to the Commission by lawyers whom it interviewed, defense counsels have a great deal of difficulty in contacting their clients sufficiently in advance of the trial and have very little time to examine the dossier, so that they usually prefer to tape record the contents of the dossier and work on the recording later.

The Commission was informed from the same sources, that, while the Prosecutors usually comment extensively on the net political content of the case in their accusations, this is absolutely forbidden to the defense. In one of the trials attended by the Chairman and Vice Chairman of the Commission, this prohibition reached the following extreme: When a defense counsel had stated that the offense of his client was without any doubt a "political offense," the Chairman of the War Council reminded him in severe terms that defense counsels were forbidden to "speak of politics."[231]

It is clear that the Commission was very disturbed by what it observed in the conduct of the "war councils." It noted:

It cannot be predicted when a sentence may be rendered in these trials. The judgment may take months, during which time the Prosecutor's request for capital punishment hangs over the accused and their families.

It must also be borne in mind that the War Council's sentence may be reviewed by the Commander in Chief of the region, who may, without being required to give the reasons for his decision, decrease or increase the penalty. . . . It therefore follows that

[227] *Ibid.*
[228] *Ibid.*, p. 145.
[229] *Ibid.*
[230] *Ibid.*, p. 140.
[231] *Ibid.*

the defense can concentrate all of its efforts on showing that circumstances have not occurred permitting the imposition of a life sentence, where this was the sentence for the offense alleged by the Prosecutor, only to find that in the end his client had received the death penalty, for reasons or circumstances that were not analyzed in the course of the proceedings.[232]

In sum, in the view of the Commission the declaration of a "state of war" by the military officers who ousted the Allende government had a deleterious impact on respect for human rights in Chile. In studying this legal system, the Commission discovered that none of the "articles of the Chilean Constitution refer to a 'state of war,' and still less to a 'state of internal war.' "[233] Nevertheless, "the Military Penal Code," which obviously had been "conceived for application in situations of actual war," i.e., "in a confrontation of forces contending for the domination of a territory," was being applied.[234] The Commission was of the view that at a minimum the decrees relative to the "state of war" should not have been applied retroactively as they were.[235]

Near the completion of its mission to Chile, on July 29, 1974, the Commission transmitted a note to the government of Chile in which it made such specific recommendations as it considered necessary until it could prepare a full report. The Commission urged that Chilean authorities take steps to: make it possible for families of detained persons to communicate with them; modify the "conditions of detention of minors of both sexes;" eliminate torture and punish those who inflict it; establish "reasonable time limits" for deprivations of liberty; recognize "fully the right of the normal professional activities of lawyers;" adopt standards which would prohibit "the application of the provisions dictated under the 'state of war' to any act that occurred prior to September 11, 1973;" establish, "by means of constitutional interpretation or other equally effective means, that, under all circumstances, the remedy of *amparo* obligates the administrative authority to carry out the judicial order to present before the competent court the person in whose benefit the remedy has been presented, with a precise indication of the reasons and place of detention;" etc.[236]

The Chilean minister of foreign affairs responded promptly to the Commission's note, on August 2, 1974, indicating that most of the points made in the Commission's note were being "fully complied" with, and that should the Commission have specific information about cases in which they had not been complied with, it should bring them to his attention.[237]

The Commission transmitted its final report on its mission to Chile to the Permanent Council of the OAS on October 31, 1974. The report is the most

[232] *Ibid.*, p. 142.
[233] *Ibid.*, p. 139.
[234] *Ibid.*
[235] *Ibid.*, p. 147.
[236] *Ibid.*, pp. 163–164.
[237] *Ibid.*, pp. 165–167.

extensive one the Commission ever published on any member state, and the conclusions reached in it are highly critical of the Chilean military regime.

In preparing the report the Commission was guided by two principal considerations. In the first place, it decided not to compare the situation regarding human rights under the military regime with the situation as it existed during Salvador Allende's administration, *or* to "count as violations of human rights the loss of life that occurred on both sides in the first few days" of the coup.[238] The Commission decided to restrict its evaluation in these ways because it felt that it was not for it "to decide whether the present political regime is more or less desirable than the previous one," which only the citizens of Chile, "acting freely," could "validly pass judgment on;"[239] and because it realized "the exceptional circumstances which resulted in the advent" of the military regime, and it wished to avoid any consideration of the "legality or illegality and the justice or injustice" of the actions of the previous regime.[240] Thus, the Commission was declaring itself incompetent to pass judgment on "political" conditions. This was a wise course to follow, and strengthens the force of the Commission's conclusions; the decision was obviously intended to discredit in advance any argument that the Commission was motivated by any "political" considerations.

The second principal consideration which guided the Commission in the preparation of its report was Article 27 of the American Convention on Human Rights. The Commission asserted that this article on the "Suspension of Guarantees" must be taken into account as the "most accepted doctrine" on the "state of seige" applicable to the American states *even* if the Convention has not yet entered into force.[241] Article 27 permits the suspension of *certain* rights (not including such rights as the rights to life, to humane treatment, to freedom from *ex post facto* laws) affirmed in the Convention in "time of war, public danger, or other emergency that threatens the independence or security of a State Party," provided that the other parties to the Convention are notified immediately of the provisions which have been suspended, "the reasons that gave rise to [their] suspension, and the date set for the termination of such suspension." As regarded the proclaimed "state of war" in Chile, the Commission had this to say:

> During the Commission's stay in Chile, it did not observe anything resembling a "state of war," notwithstanding what might have occurred previously. Neither in Santiago nor outside Santiago—and members of the Commission traveled between Antofagasta and Talcahuano—did the Commission observe street disorders, acts of violence committed by groups of civilians, attacks against the armed forces, insubordination against their orders, or anything of the kind. Some of the Commission members witnessed numerous operations carried out by the police, in which groups

[238] *Ibid.*, p. 168.
[239] *Ibid.*, p. 1.
[240] *Ibid.*, p. 168.
[241] *Ibid.*, pp. 2–3.

of persons in recreation areas in the center of the city were detained. Excessive presence of political or military elements or an exaggerated show of arms in the streets of the cities and towns was not noted. A normal observer would not have imagined that he was in a country in a "state of war." The curfew, which was in effect only from one to six A.M. is hardly a problem for anyone besides "night owls" and a very few workers.

It must be added that, while the Commission did not ascertain the existence of acts characteristic of a "state of war," it was obvious that the country was not in an entirely normal situation. A political system that was considered by many Chileans as violating human rights had been overthrown by force of arms. A new "de facto" regime, which was obviously not supported by the majority of the followers of the regime that was replaced, was undertaking the task of consolidating a new order.

Such circumstances are not the most propitious for fully respecting human rights: governments, whether those of regular origin that are attacked, or those that reach power through a revolutionary movement, are forced in such convulsive periods to suspend certain guarantees, and this is inevitably detrimental to the rights that such guarantees are intended to protect.[242]

However, invoking Article 27 of the American Convention on Human Rights, the Commission went on to say:

these exceptional situations [nevertheless] do not authorize deprivation of life, torture, retroactive application of the more severe penal law, the establishment of "crimes of opinion," the disregard of the right of minors to special protection and treatment appropriate to their age, nor the adoption of measures that result in making it impossible to exercise for years such basic political rights as suffrage.

In addition, measures involving suspension of the guarantees of basic rights may in no case last longer than the actual, real, and provable situations that determine their adoption. Hence, for example, a "state of war" which is in fact nonexistent, or which in fact has ceased to exist, cannot be invoked to justify, under international law, the suspension of such guarantees.[243]

The Commission recognized that it may have "involuntarily . . . commited some mistake" in preparing its report on Chile, since it could not have observed everything of relevance and since much of the testimony it had gathered was "conceivably colored by passion."[244] Nevertheless:

after having examined the events subsequent to the consolidation of the Government, determined the content of the measures issued by the Junta, visited the jails and detention camps for political prisoners, had access to mass communication media, interrogated hundreds of persons of all social levels and political affiliation, reviewed judicial files, attended War Councils, contacted various national and international agencies aiding many people during those months, and after having traveled in the performance of its duties, to widely separate places in the territory of Chile, *the Commission has arrived at the firm conviction* that on some occasions by action of the Government of Chile through its official measures, and on other occasions by action of its agents (in the latter cases it is not possible to determine whether the actions of such agents are in response to orders received from their superiors) *very serious*

[242] *Ibid.*, p. 2.
[243] *Ibid.*, pp. 3–4.
[244] *Ibid.*, p. 4.

violations have been committed in Chile—by acts of commission or omission of the present Government. . . .[245] (emphasis added)

Specifically, the Commission concluded that "the right to life could not be considered adequately protected in the proceedings of War Councils, which had handed down and repeatedly were handing down, death penalties in circumstances that do not satisfy requirements of due process;" that the right to personal security "had been and was directly and seriously violated by the practice of psychological and physical abuse in the form of cruel and inhuman treatment;" that ten months after the coup some 5,500 persons remained deprived of liberty, a situation made more serious by the fact "that there were also many persons regarding whom it was not known whether they were free or imprisoned, or even whether they were living or dead;" that "the remedy of *amparo* had been rendered absolutely ineffective" (in this connection, the Commission placed much of the blame on the judiciary); that the guarantees of due process "were found to be seriously affected" inasmuch as the right "to be tried by a court established by law prior to the alleged offense, and in general the right to a regular trial had been violated and was being violated;" that none of the mass media of communication were "free to disseminate thought or inform the public;" that the right of assembly "was virtually suspended;" that "political parties, agencies, organizations and movements had been dissolved or declared 'in recess,' . . . which meant "the prohibition of any kind of political activity in the broad sense;" that, as a result of Decree-Law No. 77 Marxism was "generally considered a felony," with the term itself "used as though it were a label for a crime;" and that there was "no possibility of a fairly rapid return to normalcy" in the operation of representative bodies owing to the fact that their operations had been suspended and the voters' register had been destroyed and would require years to reconstruct.[246] In sum, then, the Commission concluded:

It can be asserted . . . that the Commission's on-the-spot findings show that under the regime instituted on September 11, 1973, in Chile, repeated violations have occurred of the rights set forth in Articles I, II, IV, VIII, XXVIII, XX, XXI, XXV, and XXVI of the American Declaration of the Rights and Duties of Man.[247]

Based on these findings, the Commission made several recommendations to the Chilean government. Most of its specific recommendations were aimed at eliminating violations of the articles of the Declaration cited above.[248] More broadly, the Commission recommended that "an exhaustive, detailed, speedy, and impartial investigation" of various acts, especially the reported torture, be conducted, and that:

[245] *Ibid.*, p. 168.
[246] *Ibid.*, pp. 168–170.
[247] *Ibid.*, p. 170.
[248] *Ibid.*, pp. 171–173.

such an investigation should be carried out so that: (a) unity of viewpoint may be ensured in establishing and evaluating the facts, for which purposes the persons performing this task should be able to take action throughout the territory of the country, and (b) any reasonable possibility of suspicion that those responsible for the investigation do not have the essential independence and resources to properly carry out their mission may be excluded *a priori*.[249]

In a prologue to its report, the Commission noted that subsequent to its having sent its preliminary observations on the situation to the Chilean government on July 29, 1974, "there was news in the press during the months of August and September that some steps had been taken to correct certain excesses and to restore the general situation to normal in some degree."[250] It was reported, for example, that some members of the police had been "discharged and even indicted because it was found that they had participated in acts of torture against detained persons."[251] The Commission felt that these actions "*confirm[ed] the truth of the denunciations*" regarding torture which had frequently been made to it during its mission to Chile.[252] (emphasis added) It had also been reported that some minors had been released or transferred to special centers, and that some prisoners had apparently been permitted to go into exile. Finally, the "state of war" was proclaimed terminated in September, 1974, although its cessation "apparently did not involve cessation of the activities or the proceedings of the War Councils."[253] Still, the Commission was distressed by news to the effect that the president of the junta had stated that "it would not be possible to re-establish suffrage until a new generation," educated in principles that the junta considered desirable, had replaced the present generation of Chilean youth. The Commission observed that if that news was correct "it would reveal the intent" of the junta to "disregard for many years the political rights of the Chilean people," rights which are proclaimed as human rights in Article XX of the American Declaration of the Rights and Duties of Man. However, because the Commission did not "have official and unequivocal information" on all the reported developments, it "was not able to take them into consideration in drawing up its conclusions and recommendations. . . ."[254]

It was hoped by many that the Commission's report on Chile would be thoroughly discussed at the Fifth Regular Session of the OAS General Assembly in March, 1975. In an article in the *Washington Post* on March 5, 1975, shortly before the Assembly convened in Atlanta, Georgia, Mrs. Rita Hauser, who served as a United States representative to the United Nations

[249] *Ibid.*, p. 171.
[250] *Ibid.*, p. 174.
[251] *Ibid.*
[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*

Human Rights Commission from 1969 to 1972, argued that if the report were discussed "most experts" believed "that virtually all OAS members [would] feel obliged to support a resolution calling upon Chile to change its practices."[255] It was decided, however, to postpone discussion of the report, a decision which was supported by the United States because the Chilean junta indicated that it would permit a further investigation of alleged human rights violations by members of the United Nations Commission on Human Rights. In July, 1975, however, the junta reversed its stand and denied representatives of the UN body authorization to conduct an investigation. (A report was nevertheless prepared, and subsequently denounced by the junta, on the basis of interviews held with persons outside of Chile.)[256] As a result, United States-Chilean relations are reported to have become seriously strained. The Ford Administration has proposed denying Chile military aid while providing such aid to 15 other hemispheric countries;[257] moreover, it has apparently conditioned its acceptance of the junta's offer to host the Sixth Regular Session of the OAS General Assembly in 1976 on its willingness to cooperate with international investigations of the alleged human rights violations.[258]

Apparently in an effort to prevent any OAS action on the IACHR's report, the junta launched an aggressive compaign of attacks against the Commission and more particularly its Executive Secretary, Dr. Luis Reque, claiming that he has not been impartial as regards the alleged violations. The campaign has in large measure been a success. In March, 1976, disheartened by the treatment their report on Chile had received in the OAS, three members of the Commission resigned: Dr. Justino Jiménez de Aréchaga of Uruguay, Dr. Genaro R. Carrió of Argentina, and Dr. Robert Woodward of the United States. The three had actively sought to investigate alleged violations of human rights in various countries.[259]

It would, of course, have been a significant step toward giving greater meaning to inter-American human rights instruments if the General Assembly in 1975 had adopted a resolution calling upon the military government of Chile to change its human rights practices. In view of the historic reluctance of the American states to adopt measures of this sort, however, it is not surprising that they failed to do so. After all, if a resolution is to be adopted on Chile, why not adopt one on, say, Brazil as well?

In dealing with the Chilean junta the Commission made every effort to be prudent and objective: it demonstrated by its actions that it would not pressure a government into giving its consent to an on-the-spot investigation unless there are compelling reasons to do so; it repeatedly emphasized its ap-

[255] *The Washington Post*, March 5, 1975.
[256] *The New York Times*, October 13, 1975, p. 9; October 19, 1975, p. 3.
[257] *The New York Times*, November 19, 1975, p. 5.
[258] *The New York Times*, October, 13, 1975, p. 9.
[259] *The Washington Post*, March 5, 1976, p. A 16.

preciation to certain officials who endeavored to cooperate; and it refused to pass judgment on questions of a purely political nature. At the same time, the Commission also demonstrated that it will not hesitate to make use of every tool at its disposal to bring about more respect for human rights when necessary: it engaged in formal and informal negotiations; it issued press releases and reports in an effort to pressure the government; and it conducted an on-the-spot investigation, taking action when it could on behalf of specific individuals.

The junta unfortunately perceived the Commission as acting too aggressively. To be sure, various officials of the Chilean government endeavored to cooperate with the Commission; the extent to which they were able to do so was undoubtedly limited by the extraordinary situation which prevailed. It is certain, however, that there were limits to what the government would allow: it prohibited the Commission access to certain installations, installations where the Commission had every reason to believe acts of torture were occurring; and it failed to provide information or to take remedial measures in many cases which the Commission felt it could have. Thus, while the Commission was able to take action on behalf of some individuals, it was not possible for it to do anything on behalf of many others. In the end the Chilean government stands guilty as charged.

IV. COMMUNICATIONS FROM GOVERNMENTS

The possibility of authorizing governments as well as individuals, groups, and associations to petition the Inter-American Commission on Human Rights on alleged violations of human rights was discussed in the OAS Council when the Commission's statute was drafted in 1959–60. A proposal to this effect, however, was rejected by a substantial margin; it was supported by only four states, including Cuba and Venezuela, who had brought charges of human rights violations against the Dominican Republic to the OAS in 1959.[260] The failure of the proposal to attract more support reflected the concern of most American states for the principle of "non-intervention" in their internal affairs. Most states felt that to permit one or a group of governments to complain about the human rights practices of another would constitute—or at least open the way for—"intervention." However, many states felt that the same reasoning should not apply in such cases where individuals complained about the human rights practices of their *own* government, and the proposal to permit individuals to petition the IACHR was therefore narrowly rejected.

The subject remains a very controversial one. In fact, whenever the possibility of permitting governments to complain about the human rights practices of others has been raised, the word "communication" has been preferred; in contrast, "petition" has been used to refer to complaints lodged

[260] See Table 5.1.

by individuals, groups, and associations. (This distinction between the two classes of complaints is made in the American Convention on Human Rights.)

The IACHR has thus never been officially authorized to act upon "communications" submitted to it by governments. However, it has been prepared to do whatever it can in defense of human rights, including acting upon such "communications;" and in 1969 in visited Honduras and El Salvador after both governments requested its presence.

A. The Honduras–El Salvador Case

On June 25, 1969, the government of El Salvador submitted a communication to the IACHR charging that violations of human rights "constituting genocide" had been committed against Salvadorian citizens residing in Honduras. It requested that the IACHR or a subcommittee thereof be convened in the "Republic of Honduras and also in points along the border with El Salvador and in refugee camps, in order to verify acts in violation of human dignity and to seek to bring an end to the serious situation that has caused this petition."[261] On the same day, the government of Honduras addressed the Secretary General of the OAS requesting that he bring to the attention of the Commission "a formal denunciation" of violations of human rights committed by "large sectors of the population of El Salvador, with the toleration of the authorities of the Republic of El Salvador," against Honduran citizens in El Salvador. Honduras requested the presence of the Commission to "determine the facts," and to "verify that the many Salvadorian families residing in the national territory [of Honduras] enjoy full guarantees in respect of their lives and property and are not, and never have been, the object of persecution or brutality of any sort."[262]

The occasion for lodging the complaints was the outbreak of violence which occurred after soccer teams from El Salvador and Honduras played games in the capital cities of both countries. As both governments were quick to point out, however, the roots of the problems between them were much deeper than a mere sports event, extending far back in time and resulting from border disputes and the migration of thousands of Salvadorians into Honduras.[263] Nationals of both countries, with the complicity of the authorities in both, had used the occasion of the outcome of the sports event for the violence. As a result, the Commission estimated that some 14,000 Salvadorians were driven out of Honduras.[264]

[261] IACHR, *Preliminary Report of the Subcommittee on Violations of Human Rights in Honduras and El Salvador* (OEA/Ser. L/V/II.22, Doc. 22 (English)), July, 1969, p. 1.

[262] *Ibid.*, p. 2.

[263] *Ibid.*, Appendices, statements of foreign ministers of Honduras and El Salvador, pp. 17–34.

[264] *Ibid.*, p. 13.

In response to the requests of both governments, the IACHR appointed a subcommittee composed of two members of the Commission and the Executive Secretary to visit both countries in early July, 1969. Both governments cooperated fully with the subcommittee, providing it the facilities necessary to collect testimony in the capital cities and at points along borders.[265] Interestingly, the subcommittee found that "enormous responsibility for the events that took place" in both countries fell to the press and radio which "stirred up the people and kept them in a state of excitement even with false reports."[266] The problem was serious enough for the subcommittee to issue a communiqué while in Guatemala *en route* to Washington on July 11, 1969. Addressing the "persons in charge of the operation of the principal media of communication," the subcommittee reminded them of the "grave responsibility incumbent" on them in the "preservation of good international relations and the internal peace of the states." Further, the communique stated:

> This Subcommittee believes that no individual right is more directly related to the consolidation and improvement of the system of representative democracy than the right to freedom of expression of thought.
>
> However, the exercise of this right, as of any human right, carries with it grave responsibilities. It is not wise to exercise it in such a manner that important values such as peace, security of the individual, and personal honor are compromised or injured. It must be by the decision of the press and radio men themselves—to the extent of making unnecessary the preventive intervention of public authority—that the essential standards should be established to secure that these fundamental means of public education and information fulfill, in the present serious circumstances, a function truly useful for the affirmation of the most just and peaceful coexistence of the peoples of Central America.[267]

The subcommittee reported its findings to the Commission and made recommendations. Certain findings were set forth as "beyond reasonable dispute." These included a verification of the Honduran charge that "large numbers" of Salvadorians had been "abandoning their country to settle in Honduras," mostly because of lack of work opportunities in El Salvador, especially in agricultural occupations. The subcommittee also found that a "substantial portion" of these Salvadorians had settled in Honduras "without complying with the basic legal requirements," but that the Honduran authorities, "in most cases, [had] not shown the least concern for seeing to it that such requirements were complied with." The subcommittee also found that the government of El Salvador "had not adopted effective measures that would render unnecessary [the] population shift of" Salvadorians into Honduras, and that as a consequence the Honduran government had become "extremely concerned about the significant increase in the rate of natural

[265] *Ibid.*, pp. 3–8.
[266] *Ibid.*, p. 13.
[267] *Ibid.*, p. 9.

growth of its population."[268] A study of the Latin American Demographic Center had found that Honduras ranked first among the Latin American states in natural population growth.[269]

Other findings of the subcommittee were set forth as "sufficiently established." The subcommittee generally felt that it was "impossible to state" whether the authorities of both countries had prompted or stimulated the acts of violence which had occurred, but that it appeared that both governments failed to take effective action to stop the violence.[270]

The subcommittee included in its report to the Commission a series of recommendations, most of which were adopted by the full Commission. The subcommittee recommended that both governments "call upon the press and radio to cease all propaganda susceptible to leading both peoples into a more serious conflict, or that might incite the commission of acts of persecution, or that might give rise to a fear that such acts may take place." If the media failed to cease "of their own accord propaganda activities ... then each government should adopt measures toward this end as may be authorized by the constitutional provisions in force." The subcommittee also suggested that the Commission recommend to each government that they conduct investigations "into the responsibility of the authorities, whether for acts of commission or omission," for the acts of violence which had occurred. These recommendations, along with the findings of fact, were accepted by the full Commission.[271] However, the subcommittee also recommended that the victims of the violence had "a right to be compensated for the damages suffered—including non-material damages—to the extent that they show such damages to be the consequence of deliberate or culpable actions or omissions on the part of the authorities."[272] The full Commission adopted a weaker version of this, and decided to "request those governments to adopt all necessary measures to ensure effective remedies and to make amends to those violations and to provide adequate protection against future violations of human rights."[273]

There is no indication in the reports of the Commission how successful it was in protecting individual victims during this mission. In contrast to the reports published on the mission to the Dominican Republic in 1965–66, the Commission has not indicated what assistance it gave to individual victims in Honduras and El Salvador. It appears that the mission was undertaken primarily to gather facts and make recommendations toward a friendly settlement. In this respect, the Commission was not successful, for armed

[268] *Ibid.*, pp. 10–12.
[269] *Ibid.*, p. 30.
[270] *Ibid.*, pp. 12–14.
[271] *Ibid.*, pp. 14–15.
[272] *Ibid.*, p. 15.
[273] IACHR, *Activities of the Inter-American Commission of Human Rights, 1965–1969*, p. 24.

hostilities broke out between the two countries a few days after the subcommittee returned to Washington, necessitating the convocation of the Thirteenth Meeting of Consultation of Ministers of Foreign Affairs.[274] By official count, 2,000 persons died during a four-day war, and an estimated 65,000 Salvadorians were compelled to leave Honduras.[275] There have been no signs that Honduras and El Salvador have managed to work out their problems peacefully.

The Honduras-El Salvador case provided the IACHR with an opportunity to take action on the basis of communications submitted to it by governments. This was possible, however, because *both* governments requested the Commission's presence. The Commission may take action in similar situations in the future; however, the Commission has still *not* been authorized to take action in a different kind of situation, one in which the allegation of human rights violations is not mutual. It is, of course, this kind of situation which the American states would perceive as giving rise to a possibility of "intervention" in the internal affairs of a state, and which no doubt explains why the IACHR's statute has not been amended.

V. CONCLUSION

The IACHR could have ruled out any effective role for itself in the protection of human rights at its First Session in October, 1960, when it took up the question of the "proper interpretation" of its competence under Article 9 of its statute. The Commission could have declined to take any action on petitions submitted to it which alleged violations of human rights. Such a decision would have been consistent with the OAS Council's clear intention when it adopted the Commission's statute. Instead, the Commission decided to "take cognizance" of the petitions it received, and to use the information contained in them in preparing studies and reports and making recommendations to the member states of the OAS collectively as well as individually. On the basis of Article 9, the Commission sought to influence some governments to change their human rights policies and practices between 1960 and 1965.

During this period, the Commission was aggressive in interpreting and applying the provisions of its statute and regulations, but it was careful not to abuse its powers. Pleased with the way in which the Commission had gone about its work, the American states were persuaded to officially authorize it to "examine" petitions it received. Thus, Article 9 (bis) was adopted at the Second Special Inter-American Conference in 1965.

[274] OAS, General Assembly, First Regular Session (1971), *Annual Report of the Inter-American Commission on Human Rights* (OEA/Ser. P AG/doc. 128), March, 1971, p. 21.

[275] "Feud in Central America Renewed by New Regime", *The Milwaukee Journal*, Sunday, July 30, 1972, Part 5, p. 3.

Prudence has dictated that the Commission proceed with caution in its relations with the American states. As our discussion of its relations with several American states has revealed, the Commission has not launched detailed investigations of human rights practices in the American states on its own initiative, but rather has put off such investigations until petitions have brought violations to its attention; it has tried to maintain the most cordial relations with all governments; it has requested permission to conduct on-the-spot investigations only in the most extreme cases; and it has consistently declined to pass judgment on matters of a purely political nature. In short, the Commission has demonstrated by its actions that it considers the protection of human rights to be *primarily* a matter of domestic concern. At the same time, the Commission has demonstrated by its actions that it does not consider the protection of human rights to be *exclusively* a matter of domestic concern. It therefore requests information from the American states in some cases; it requests permission to conduct on-the-spot investigations; it makes recommendations; and it passes judgment on alleged violations. While it has not been able to secure the desired results in all cases, the Commission has not relaxed its efforts. In time, the force of its resolutions could have important consequences.

It also seems clear that the Commission as a whole has been as impartial and evenhanded in its actions as one could reasonably expect, though there are individual cases in which suspicion of a lack of impartiality on the part of particular commissioners is warranted. The reputation for impartiality which the Commission has enjoyed in the past has depended to a great extent on the integrity of most of its members. Indeed, who serves on the Commission is of paramount importance.

The question for the future is whether the increasingly aggressive actions of the Commission, as demonstrated in the Brazilian and Chilean cases, will seriously hamper its effectiveness. In view of the fact that many of the complaints brought to the Commission's attention concerning Brazil and Chile have been verified by numerous international bodies, governmental as well as non-governmental, any action on the part of the American states to further weaken the Commission could only lead to more cynicism regarding their commitment to human rights.

CHAPTER SEVEN

CONCLUSION

The American states long ago declared human rights to be a matter of international concern, but progress in translating declarations into meaningful commitments has been slow.

The Inter-American Conference on the Problems of War and Peace (1945) called for a convention on human rights. By 1948, however, at the Ninth International Conference of American States, optimism with regard to future inter-American action on human rights gave way to pessimism and cynicism as the principle of non-intervention became the overriding issue. The OAS Charter proclaimed respect for human rights as a principle of the Organization, and ratification of the Charter entailed the assumption of an obligation to respect human rights. But nowhere did the Charter identify the rights to be respected, and the adoption of the all-embracing provision on non-intervention in Article 15 (now Article 18) of the Charter raises serious doubts whether the promotion and protection of human rights was to be taken very seriously. Reinforcing this view is the fact that after giving some consideration to adopting the American Declaration of the Rights and Duties of Man as a treaty, the delegates to the Ninth International Conference of American States adopted it as a resolution without any contractually binding force. Actions taken at subsequent inter-American conferences and meetings have, however, elevated human rights to a level of importance not envisioned by the drafters of the Charter. Especially since the creation of the Inter-American Commission on Human Rights in 1959, the promotion and protection of human rights is one area in which the inter-American system has shown some degree of development and strengthening.

The American Declaration of the Rights and Duties of Man is the basic inter-American instrument which proclaims human rights. These rights, as discussed in Chapter 3, can be divided into two categories: the traditional civil and political rights; and the newer economic, social, and cultural rights. It seems clear that of these two categories of rights the former is considered more important. The American states have thusfar failed to adopt categorical statements on the economic, social, and cultural rights, and the Inter-

American Commission on Human Rights has not devoted much of its attention to them. The enjoyment of these rights of course depends on the active assistance of the state, and some states are clearly not in a position to provide this assistance. There is much to be said for these rights, and perhaps in time they will be considered more important.

The creation of the Inter-American Commission on Human Rights by resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 marked a turning point for the OAS in the field of human rights. The Commission was born amidst much controversy. Debates in the Council when the Commission's statute was drafted in 1959–60 revealed sharp differences of opinion among the American states on whether the Commission should be authorized only to "promote" or to "promote" and "protect" human rights. The "promotion" of human rights was understood to entail essentially academic activity; the "protection" of human rights was understood to mean taking action on petitions submitted by individuals, groups and associations who might be victims of violations of human rights. While the Commission was specifically denied any authority to "protect" human rights, it proceeded nevertheless to exploit its powers to the fullest in order to do so. Whatever progress has been achieved in the international protection of human rights in the Americas is due in no small measure to the Commission's liberal interpretation of its statute, and the subsequent expansion of its powers by acquiescence and official action of the American states.

The Commission has functioned as independently as any commission of its type could realistically be expected to function. It has undertaken a variety of activities to "promote" human rights. Examples include attempts to establish national committees on human rights, the holding of seminars and symposia, and efforts to develop radio and television programs to spread knowledge and awareness of human rights. The Commission's efforts to implement these programs have been handicapped, however, by a lack of funds and lack of interest.

More important have been the Commission's efforts to "protect" human rights. Its most spectacular success was achieved in the Dominican Republic; its most glaring failures are its experiences with Cuba and Haiti. The case of Cuba is an exceptional one, for it could hardly be maintained that Cuba's exclusion from participation in the OAS does not effectively preclude any desirable response by the Cuban government to an appeal from the Commission. Between these extremes, the Commission's experience with other American states has been mixed. There are obvious limitations to what the Commission can do. It cannot, for example, conduct an investigation within the territory of any member state without prior consent; it can only urge the member states to supply it with information; and it can only urge that the governments take corrective measures in cases of violations brought to its attention. Voluntary compliance has nevertheless worked in some cases, and

experience suggests that the principle of non-intervention is not to be interpreted too rigidly in the field of human rights, at least with regard to the activities of the IACHR. The American states have themselves established the precedent of recognizing the Commission's competence to make inquiries and recommendations. Whether other organs of the OAS could or would go so far as to apply sanctions against a government for violations of human rights, however, is another matter. Traditionally, the Organization has been reluctant even to discuss reported human rights violations in particular member states.

Moreover, recent events suggest that the Commission might well have reached a critical point in its history. The attacks against the Commission for the highly critical report it published on its investigative mission to Chile, the failure thusfar of the OAS to take any action on the report, and the resignation of three members of the Commission because of this, are not encouraging signs. To be sure, it would be difficult for the American states to abolish the Commission, for this would require the adoption of amendments to the OAS Charter. Short of such an extreme measure, however, the Commission's competence to examine and take action on petitions could be weakened, persons less dedicated to the cause of human rights than those who have heretofore served on it could be elected, and more meager financial resources could be put at its disposal. Any one or a combination of these things could result in a serious blow to the human rights movement. Continued operation of the Commission as it has in the past appears essential, for prospects that the American Convention on Human Rights would enter into force in the coming decades appear remote. The IACHR can in fact serve as a model for other regional organizations whose member states are also not prepared to accept a conventional obligation in the field of human rights.

APPENDIX

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

WHEREAS:

The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness;

The American states have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality;

The international protection of the rights of man should be the principal guide of an evolving American law;

The affirmation of essential human rights by the American states together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American states as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable,

The Ninth International Conference of American States

AGREES:

To adopt the following

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Preamble

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.

Since culture is the highest social and historical expression of that spiritual

development, it is the duty of man to preserve, practice and foster culture by every means within his power.

And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

CHAPTER ONE

Rights

Article I. Every human being has the right to life, liberty and security of his person.

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article III. Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Article VII. All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Article VIII. Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

Article IX. Every person has the right to the inviolability of his home.

Article X. Every person has the right to the inviolability and transmission of his correspondence.

Article XI. Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

Article XII. Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

Article XIII. Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

Article XIV. Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.

Article XV. Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

Article XVI. Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XIX. Every person has the right to the nationality to which he is entitled by law and change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XXI. Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Article XXII. Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

Article XXIII. Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Article XXIV. Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws, and not to receive cruel, infamous or unusual punishment.

Article XXVII. Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

Article XXVIII. The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

CHAPTER TWO

Duties

Article XXIX. It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.

Article XXX. It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.

Article XXXI. It is the duty of every person to acquire at least an elementary education.

Article XXXII. It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

Article XXXIII. It is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.

Article XXXIV. It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation, and, in case of public disaster, to render such services as may be in his power.

It is likewise his duty to hold any public office to which he may be elected by popular vote in the state of which he is a national.

Article XXXV. It is the duty of every person to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances.

Article XXXVI. It is the duty of every person to pay the taxes established by law for the support of public services.

Article XXXVII. It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.

Article XXXVIII. It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

INDEX