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THIRD-PARTY TRIAL OBSERVERS:

A Proposal for Codification and Implementation of International Procedural Due Process in the Americas†

by Jay D. Terry*

I. THE PROBLEM

OVER TWENTY YEARS have passed now since Mrs. Franklin D. Roosevelt expressed the hope that the *Universal Declaration of Human Rights* "may well become the international Magna Carta of all men everywhere."¹ In the same breath, she recognized that the Universal Declaration did not "purport to be a statement of law or of legal obligation." But the members of the world community had unanimously enumerated the rights of men and all that remained was for men of good will to provide for the effective implementation of those rights.

That goal has been largely unmet on the worldwide level.² A discussion of the production of materials and setting of precedents at the level of the United Nations and its organs is not to be within the scope of this article. The proliferating snowfall of declarations, covenants and draft conventions is worthy of note, praise and extended examination, but that States have been loathe to track into that virginal landscape with steps of implementation is beyond cavil. Even in the event of the entry into force of the *International Covenant on Economic, Social and Cultural Rights*³ and the *International Covenant on Civil and Political Rights*,⁴ precious little implementation would be realized. The former instrument provides in Article 16 merely for reporting, while Article 41 of the *Covenant on Civil and Political* and the *Optional Protocol* thereto⁵ add the possibility of conciliation to the reporting provisions of Article 40.

If human rights are to become meaningful to the individual, if the

† The views expressed herein are those of the author and do not constitute any official position of the United States Air Force.

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¹ Address by Mrs. Franklin D. Roosevelt, U.N. General Assembly, Paris, December 9, 1948. In Dep't State Bull., at 751-752 (Dec. 19, 1948).

² See Section XI, *Montreal Statement of the Assembly for Human Rights, March 22-27, 1968*, reprinted in 9 *Journal of the International Commission of Jurists* 94, at 105. Compare the classifications and discussions of various methods and techniques in John Carey, *Procedures for International Protection of Human Rights*, 53 *Iowa L. Rev.* 291 (1967).

³ C.A. Res. 2200, 21 U.N. CAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

⁴ *Id.* at 52.

⁵ *Id.* at 59.

individual is to ever truly become a "subject" of international law rather than remain an "object,"⁶ the most effective mechanism would be compulsory third-party decision-making to settle disputes between individuals and States when those disputes sound in international law.⁷ But to say that "governments are not presently inclined to place a high priority on developing effective machinery on a global scale for implementing human rights"⁸ is to perhaps understate reality. The United States' fealty to the spirit of the Connelly Reservation remains hardened,⁹ the socialist States' refusal to internationalize the procedural and substantive law of human rights has scarcely been impaired by their ratifications of the *Supplementary Convention on the Abolition of Slavery*,¹⁰ and the Afro-Asian remembrance of things past offers, to their perception, little likelihood of impartial decision-making by nonregional referees.

It is submitted, then, that one must leave the world stage and search in the wings if meaningful implementation is to be found.

II. A MODEST POINT OF ATTACK FOR THE AMERICAS

It is proposed that there be an Inter-American codification of an "international minimum standard" of criminal procedural due process with a supplementary protocol establishing a body of trial observers in the Secretariat of the Inter-American Commission on Human Rights. The Commission would be open to petitions from nationals of Inter-American States who are being prosecuted in the courts of a State signatory of the protocol which *is not* the State of their nationality. An observer, legally trained and a national of a third State, would be assigned by the Commission to observe *all* public proceedings in the case. He would thereafter file with the Commission a report in regard to the degree in which the proceedings complied with the "international minimum standard." Similar reports would be filed in conjunction with any appellate proceedings. A possible developmental plan for enforcement procedures will be discussed in Section V, *infra*.

Having eschewed the more traditional technique of suspensefully saving the defined proposal for the last few paragraphs, my reverse

⁶ Regarding "subjects" and "objects" of international law generally, see I *Oppenheim's International Law*, 13-22, 636-639 (8th. ed. H. Lauterpacht 1955).

⁷ See Thomas M. Franck, *The Structure of Impartiality*, 31-43 (1968). The essential thrust of this paper, i.e. impartial observation in a regional setting of aliens' rights to procedural due process, found its genesis in the conceptualizations of this volume.

⁸ William Korey, *The Key to Human Rights—Implementation International Conciliation* 65 (November 1968).

⁹ Richard N. Gardner, *A Costly Anachronism*, 53 A.B.A.J. 907 (October 1967). For text of *United States Declaration Recognizing the Compulsory Jurisdiction of the International Court*, which reserved to the United States the determination of "domestic jurisdiction," see U.S. Dept. of State *Bulletin*, Sep. 8, 1946, 452-453.

¹⁰ John Carey, *Implementing Human Rights Conventions—The Soviet View*, 53 Ky. L.J. 115 (1964).

approach will allow me to now set forth the considerations engendering the proposal with somewhat clearer conceptual linkage. Subsequent Sections will be devoted to guidelines for a minimum standard and outlining a precedent for an institutionalized mechanism of international observation of "criminal" procedural due process in an alien's trial.

Justifications for Proposal

(A). *Regional Application.* As discussed in Section I, *supra*, "(t)he majority of U.N. members are clearly not prepared to permit their citizens to appeal over their heads to international judicial bodies."¹¹ State practice under at least one regional apparatus, however, has shown a striking lack of such constraint. During the eighteen years since the signing of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,¹² the European Commission on Human Rights has registered over 3,700 cases brought against member States by individuals or groups of individuals.¹³ Of these, 50 cases have been deemed by the Commission, after submission to the State concerned for its observations, sufficiently meritorious for reference to the Committee of Ministers or the European Court of Human Rights.¹⁴ The Court has decided three cases arising from individual or group complaints.¹⁵ Although, under Article 48¹⁶ of the Convention, individuals are not defined as a party before the Court, that body "has clearly treated the petitioner's interests as those of a party."¹⁷ All of the State Parties to the Convention who recognize the compulsory jurisdiction of the Court¹⁸ have undertaken to abide by the decision of the Court in any case to which they are parties.¹⁹

Although not possessing the structured organs for implementation as

¹¹ Richard N. Gardner, *In Pursuit of World Order*, 256 (1964). Mr. Gardner believes the international condition sufficiently bleak as to require shunting aside of hopes to implement by treaties with concentration solely on informal techniques for information and persuasion.

¹² Signed at Rome on 4 November 1950, 213 United Nations Treaty Series (U.N.T.S.) 222.

¹³ A. B. McNulty (Secretary to the European Commission on Human Rights), *The Establishment of Procedures and Institutions for the International Protection of Human Rights: The European Approach*, undated and unpublished, at 4.

¹⁴ *Id.*

¹⁵ *Lawless Case (Merits)*, European Court of Human Rights, Judgment of July 1, 1961, 4 *European Commission of Human Rights, Documents and Decisions* 438 (1961); *De Becker Case*, European Court of Human Rights, Judgment of March 27, 1962, 5 *European Commission of Human Rights, Documents and Decisions*, 320 (1962); *Belgian Linguistic Cases* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 2126/64), decided by European Court of Human Rights on July 23, 1968, no citation available.

¹⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 UNTS 222 at 246.

¹⁷ A. Luini del Russo, *International Law of Human Rights: A Pragmatic Appraisal*, 9 *Wm. & Mary L.R.*, 749, at 755.

¹⁸ Article 46, *Convention, supra*, note 16 at 246.

¹⁹ Article 53, *Convention, supra*, note 16 at 248.

are seen in Western Europe, the Inter-American region has haltingly begun the march. The Inter-American Commission on Human Rights, since its establishment in 1959,²⁰ has won a position of respect due to its insistent and impartial investigations into complaints from individuals.²¹ It reached this position through exerting extreme leverage on its own bootstraps rather than by virtue of the powers granted in its original Charter,²² but certain of the Commission's trail-blazing has been ratified by an amended Charter.²³

A highly significant current development in the Americas is the *Inter-American Convention on Protection of Human Rights* which was prepared by the Inter-American Commission on Human Rights, and concluded at the Inter-American Specialized Conference on Human Rights, held at San Jose, Costa Rica, November 1969.²⁴ Although structured on the European model of Convention, Commission, and Court, certain very important variations will be mentioned later in the article. It should be noted here, however, that only exuberant optimism would allow a prediction of early adoption throughout the OAS considering that an earlier draft languished for six years before the Second Special Conference in Rio in 1965 decided that the passage of time necessitated revision of the yet unconsidered draft.²⁵

It appears, then, that nations of a regional organization, though they be heterogeneous in economic development and cultural backgrounds, including a mixture of civil law and common law heritages, are sufficiently bound together in their social and political problems and aims to give common cause to the solution of violations of human rights.

(B). *Denationalization of the Dispute.* It is well-established in customary international law that a host State is responsible to the home

²⁰ Resolution VIII, Part 2, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959, OEA/SER.C/II.5.

²¹ See generally as to the jurisdiction and workings of the Commission, Durwood V. Sandifer, *Human Rights in the Inter-American System*, 11 How. L.J. 509 (1965) and Donald T. Fox, *Doctrinal Development in the Americas: From Non-Intervention to Collective Support for Human Rights*, 1 N.Y.U.J. Intl. L. & Pol. 44 (1968).

²² Article 9, *Statute of the Inter-American Commission on Human Rights*, approved by the Council of the OAS, May 25, 1960, as amended June 8, 1960, OEA/SER.L/V/II.4 Rev.

²³ Compare Article 9 (*bis*) of the Statute as amended by Res. XXII of the Second Special Inter-American Conference, April 19, 1966, OEA/SER.L/V/II.14, Doc. 33.

²⁴ The text of the Convention is reproduced in 9 *International Legal Materials* 673 (1970). On November 22, 1969, representatives of the following countries signed the Convention: Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela. The Convention was ratified by Costa Rica on April 8, 1970. Ratification or adherence by eleven states is required for the Convention to enter into force (Art. 74). Other documents pertaining to the Convention appear at 9 *International Legal Materials*, 123, 128, and 710 (1970).

²⁵ Fox, *supra*, note 21 at 54-55.

State when an alien has suffered injury or damage by an act or omission attributable to the host State, if such act or omission is wrongful under international law.²⁶ Without examining the bare rule in detail, let it suffice to note that the home State is the injured party, not the alien,²⁷ and the home State may not generally claim a wrong until the alien has "exhausted the local remedies."²⁸ The first condition is unjustly anachronistic while the second, when rigidly applied in the case of procedural due process, enervates the alien's claims with staleness.

The fiction of the wrong to the State should be quickly buried by the three grotesque burdens laid on it by definition and practice.

(1) It is logically unsound.²⁹ There could never be international culpability (beneath the level of Nuremberg) for a wrong to a stateless person. The illogic shines brightest in regard to the measure of damages. It never bears relationship to the worth of the alien to his home State but simply reflects the loss caused to the alien or his survivors.³⁰

(2) It tends to magnify the importance of the dispute by nationalizing the dispute and the remedy process. There occurs an unreasonable "heating" of the problem and makes possible an unnecessary chance that the States will identify the issues with their national economic or social interests rather than retaining the true perspective of an individual against a foreign State.³¹

(3) It subjects the remedy of the truly injured party to the whim, caprice and political interest of his home State.³² The home State is totally in control of the case. It may refuse to intervene, or it may even "waive" the injury. Its action may be motivated by many conditions between the two States completely extrinsic to the merits of the case. Such a condition is intolerable at a point in time twenty years after every then extant nation in this region proclaimed certain rights as *human* rights.

The general inability of the alien to seek assistance prior to exhausting the local remedies must obviously remain basically in effect. A plan whose object is to sponsor international cooperation and to instill trust in supranational agencies could scarcely survive meddling or

²⁶ I. Oppenheim, *supra*, note 6 at 336 ff.

²⁷ *Id.* at 339-340.

²⁸ *Id.* at 361-362. Note the exception if local remedies are substantially ineffective or there exists no likelihood of an effective remedy (362).

²⁹ At least to this Western perceiver, but *see* generally Carey, *supra*, note 10. Thus even my modest proposal would appear to be totally unacceptable to a Communist Cuba if they ever chose or were allowed to resume functioning within the OAS structure.

³⁰ Philip C. Jessup, *A Modern Law of Nations*, 99 (1952).

³¹ *See* generally on denationalization of disputes Franck, *supra*, note 7, Chapter 7, particularly in regard to the danger of "hot" disputes (218-219).

³² Frederick S. Dunn, *The International Rights of Individuals*, 1941 Am. Soc. Int. L. Proc. 14, at 18.

interference with the orderly and regulated workings of a national judicial system. But it is imperative that there be impartial observation and recording of factual data at the earliest possible stage in the proceedings. Otherwise, vacuity of the record may render meaningless and empty the best-laid structures of dispute settlement and implementation of rights. This point will be further discussed in reviewing the operation of the proposed observer system.

(C). *Amenability for Third-Party Decision-Making.* But though it be agreed wise to cease the fictional substitution of a “wronged” State in place of the truly injured person, why the seemingly arbitrary selection of criminal due process for aliens as the area proposed to be observed and implemented. Justification of the subject area is obviously crucial to the question of State acceptance of the plan. I believe that the following considerations support the plan’s feasibility for adoption.

(1) The home State has a genuine claim to interest in the settlement of the dispute. In the abstract, States are concerned with the treatment rendered their nationals in a foreign country. At the time of a given criminal prosecution this interest may be totally lacking, save for purely political reasons. But in considering adoption of the proposed plan, the possibility of a case arousing real and genuine concern should be apparent to the States. These are disputes then that States *want* to see settled. Similarly, by limiting the plan to rights of aliens, the subject area is removed from one of solely “domestic concern” to the forum state.³³ Thus the subject matter is singularly appropriate for third-party supranational settlement.

(2) The rights involved are nonpolitical and nonsubstantive, and are not joined to vital national interests. As mentioned previously, these are not “hot” disputes. Within the national frame of reference, they are conceptually understood as individual rights, as restraints on the State, and are not schematically joined with State interests. This ingrained belief as to how the rights exist and for whose benefit, should facilitate acceptance. Furthermore, and most importantly, in envisaging the prospect of its national *losing* (or at least not winning) a claim before an international decision-maker as to a violation of such rights, a State considering adoption of the proposed plan will not likely be apoplectic over the possibility. This is simply to say that disputants must be prepared to lose (or at least not to win) before they can be ready for third-party decision-making.³⁴ Although the proposal, of course, will oust the home State from the arena of disputation, we obviously cannot reach that stage without the home State being psychologically prepared to assent to its ejection.

³³ *Supra*, note 9.

³⁴ Franck, *supra*, note 7 at 300, 306.

(3) There is a tradition of national and international implementation of procedural due process rights and a wealth of material from which to draw perceivable standards.³⁵ It is far easier for one to accept a line of conduct outside his house if he has grown used to seeing the same procedure as part of the conduct of his in-group. Both civil-law and common-law States are *accustomed* to rights of procedural due process being treated as inherently belonging to the individual, acting as restraints on State conduct, and being susceptible to third-party settlement. Internationally, the members of the Inter-American community have traditionally provided for consular assistance to the alien,³⁶ enumeration of certain procedural rights³⁷ and third-party settlement of disputes relating thereto.³⁸

III. REASONS AND SOURCES FOR A CODIFIED INTERNATIONAL MINIMUM STANDARD

Prior to 1950, no multilateral convention had attempted to prescribe specific procedural safeguards to apply during the trial of an alien and the denial of which would constitute a violation of international law. As discussed previously [Sec. II (B) *supra*], the rule had long been established that an act or omission violative of international law and causing injury to an alien could result in the host State becoming responsible to the alien's home State. An example of a violative act would be a "denial of justice." The following will serve as a working definition:

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, *failure to provide those guarantees which are generally considered indispensable to the proper administration of justice*, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. (emphasis supplied)³⁹

The long wait for any specific delineation of the somewhat amorphic,

³⁵ See Sec. III, *infra*. As to the absolute necessity of perceivable standards to guide impartial third-party decision-makers, see Franck, *supra*, note 7 at 122.

³⁶ Article 1, *Inter-American Consular Agents Convention of 1928*, Treaty Series No. 843, 47 Stat. 1976, reprinted in H.P. de Vries and J. Rodriguez—Novas, *The Law of the Americas*, 265 (1965).

³⁷ e.g., *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua*. (Entered into force May 24, 1958). U.S.T. 449, 367 U.N.T.S. 3. In Article 3 thereof the Parties list prompt notification of the charges, speedy trial and right to selected counsel.

³⁸ *Id.* Article 24, para. 2, states that disputes as to interpretation or application of the treaty, lacking diplomatic resolution, shall be submitted by the Parties to the I.C.J., unless they agree to some other pacific settlement.

³⁹ Article 9, *Draft of Convention on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 Am. J. Intl. L. (Spec. Supp.) 133, 134 (1929).

“generally considered indispensable,” guarantees was caused by a basic disagreement between two sets of States—those favoring a “national treatment” and those espousing contrarily the application of a “minimum standard.”⁴⁰

The “national standard” was based on the theorem that customary international law provided no greater safeguards for aliens than for nationals and, therefore, an international wrong was committed only if the host State denied to an alien some procedural safeguard to which its nationals were entitled.⁴¹

On the other hand, the exponents of a “minimum standard” claimed a rule of customary international law providing for a minimum standard of procedural justice which nations had a duty to accord all aliens.⁴² Consequently, if a State violated this minimum standard in its treatment of aliens it would not be entitled to the defense that its nationals were similarly treated.⁴³ The classic statement of the standard was thusly:

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.⁴⁴

In considering the feasibility of the two theories, it may first be fairly said that neither ever assumed the binding character of international customary law.⁴⁵

The “national standard” relegates international law to a handmaiden of municipal law in that the State claims a perfect right to impose, across the board, a standard with as low quality safeguards as it sees fit.

But if we desire to guarantee a uniform standard to the alien, what is it we guarantee by the “minimum standard”? What is this standard,

⁴⁰ See generally Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, 62-111 (1944); Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 33 Am. Soc. Intl. L. Proc. 51-63 (1939).

⁴¹ Roth, *supra*, note 40 at 62; *Rosa Gelbtrunk Claim* (United States v. Salvador) Foreign Relations of the United States (1902) 877, 878.

⁴² Roth, *supra*, note 40 at 85-87.

⁴³ *Id.* at 82.

⁴⁴ Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 Am. Soc. Intl. L. Proc. 16, 21 (1910).

⁴⁵ Roth, *supra*, note 40 at 111. Also see generally Robert B. Ellert, *NATO “Fair Trial” Safeguards: Precursor to an International Bill of Procedural Rights* (1963), 16, 18, 55-58.

“very simple, very fundamental, and of such general acceptance”? It has been said that attempts to define the standard and give content to its vague terms “have resulted in the utmost confusion and vagueness.”⁴⁶ This very vagueness and lack of definition has been accepted and supported as desirable by the Assistant Legal Advisor, United States Department of State. She would recommend the minimum standard as to due process being left defined as a broad concept which would grow with the times.⁴⁷ In our search for perceivable standards,⁴⁸ it is granted that a broad ill-defined concept is subject to perception. But in the specific area of international due process implemented by observers of multi-national backgrounds, the lack of definition would be a severe drawback. Since the individual protectee would normally raise the issue by his own petition, it is imperative that the rights granted be knowable and understandable by the layman. There is no automatic international scrutinization in this scheme, analogous to automatic judicial review. Therefore, both for the benefit of the petitioner and the third-party observer, it would be highly desirable for the perceptibility of the standard to be as clear as possible.

Furthermore, in constructing a system based on a multilateral convention, it is necessary to avoid charges and suspicions that the guarantees of the convention are so broadly drawn that their undefined precepts could be the basis for unlimited and undesirable interference in the internal affairs of the signatory States. The establishment of specific criteria to be protected under the convention would be a healthy step along the road from intervention by diplomacy and military or economic force to doctrinal third-party decision-making.⁴⁹

Indeed, the observable practice of States since the *Universal Declaration of Human Rights* has been to specifically itemize procedural due process concepts. The various draft and effectuated instruments which have come into being since the Universal Declaration should now be examined with the aim of selecting the criteria most feasible for our Inter-American proposal.

(A). *The Declarations*. Historically, the nature of Declarations has been to lay the broad basis of hortative principles. The *Universal Declaration of Human Rights* stated the general right of the individual to recognition as a person before the law⁵⁰ and to equal protection of the law⁵¹ without regard to national origin or any other status.⁵² It declared

⁴⁶ Frederick Sherwood Dunn, *The Protection of Nationals* (1932), 141.

⁴⁷ Majorie M. Whiteman, 8 *Digest of International Law* (1967), 701.

⁴⁸ Franck, *supra*, note 7 at 122.

⁴⁹ See Fox, *supra*, note 21 at 56-60.

⁵⁰ Sohn, *supra*, note 3 at 169, Art. 6.

⁵¹ *Id.* Art. 7.

⁵² *Id.* at 168, Art. 2.

that in a criminal proceeding the accused is entitled to a presumption of innocence⁵³ during a fair and public trial.⁵⁴ Several months previously, the Inter-American community had approved the *American Declaration of the Rights and Duties of Man*.⁵⁵ This document had also asserted equality before the law without distinction as to any factor⁵⁶ and the right of an accused to an impartial and public trial with a presumption of innocence until proven guilty.⁵⁷ While antedating the Universal Declaration, it had broken further ground by declaring the individual's right to judicially test the legality of detention and to be accorded a trial without undue delay.⁵⁸ These provisions have been incorporated into and are presently implemented by Article 9 (*bis*) of the *Statute of the Inter-American Commission of Human Rights*⁵⁹ and Articles 53-57 of the Commission's *Regulations*.⁶⁰

(B). *The Multilateral Treaties.* Subsequent to those enunciations of basic principles, the first detailed enunciation of criminal due process guarantees was in Articles 5 and 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁶¹ This instrument incorporated the pattern of declaring in one Article the preliminary rights of prompt notification of the nature of the charges⁶² and of proceedings to judicially test the lawfulness of detention⁶³ and in a second Article setting forth the various procedures to be granted in the trial of the case. The following items were listed in Article 6 of the European Convention and most were included in the subsequent three conventions discussed *infra*:

- (1) presumption of innocence,
- (2) prompt and detailed information as to the nature and cause of the accusation against him,
- (3) right to a translator or interpreter,
- (4) adequate time and means for preparation of a defense,
- (5) right to defend personally or with the services of counsel who would be supplied without charge when required by the interests of justice,
- (6) trial without undue delay,

⁵³ *Id.* Art. 11.

⁵⁴ *Id.* Art. 10.

⁵⁵ Resolution XXX, Ninth International Conference of American States, Bogota, Colombia, March 30-May 2, 1948, OEA/SER. L/V/I. 4 Rev. (1963).

⁵⁶ *Id.* Art. 2.

⁵⁷ *Id.* Art. 21.

⁵⁸ *Id.* Art. 25.

⁵⁹ *Supra*, note 23.

⁶⁰ Reprinted in 1 *J. Intl. & Comp. L.* 149 (1968).

⁶¹ *Supra*, note 16 at 226-228.

⁶² *Id.* Art. 5(2).

⁶³ *Id.* Art. 5(4).

- (7) examination of adverse witnesses,
- (8) obtaining the attendance and examination of own witnesses,
- (9) public trial (as may be limited by the interests of justice).

Articles 6 and 7 of the 1961 *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*⁶⁴ iterated the foregoing rights except for presumption of innocence and public trial and, due to its specialized application, stated that an alien accused should have the opportunity to communicate with a representative of his State and to have such an individual present at his trial or hearing if allowed by the forum.⁶⁵

Two additional highly significant rights were raised in the *International Covenant on Civil and Political Rights*⁶⁶—the forbidding of compulsory self-incrimination⁶⁷ and the right of review of a conviction by a higher court.⁶⁸ All of the previously listed rights contained in the European Convention are included within Articles 9 and 14 of the Covenant.

Finally, the evolutionary development of specific rights of due process has culminated in the *Inter-American Convention on Protection of Human Rights*.⁶⁹ The same two preliminary rights and eleven standards of fair trial of the Covenant are delineated in Articles 6 and 7 of the Draft Convention.⁷⁰

Thus, through the progressive construction of these four instruments, it appears clear that a relatively settled consensus has been reached as to enumerated criteria of procedural safeguards. Further, it would not be unreasonable to assume that the overwhelming majority of the members of the Inter-American community can agree that the terms of Articles 6 and 7 of the Convention should be applied specifically to the trial of aliens. Given a set of procedural safeguards we can briefly examine the workings of an observer system.

IV. PRECEDENT FOR A SYSTEM OF TRIAL OBSERVERS

The *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces* (NATO SOFA) was signed in London on June 19, 1951 and eventually ratified by 13 nations.⁷¹ Article

⁶⁴ Draft No. 12, Apr. 15, 1961, 55 Am. J. Intl. L. (545, 549-555 (1961)).

⁶⁵ *Id.* Art. 7 (h) and (i).

⁶⁶ *Supra*, note 3 at 180.

⁶⁷ *Id.* at 185, Art. 14—3(g).

⁶⁸ *Id.* at 185, Art. 14—5.

⁶⁹ *Supra*, note 24.

⁷⁰ *Id.* at 677-78.

⁷¹ Entered into force for the United States, 23 August 1953, 4 U.S.T. 1792, 199 U.N.T.S. 67, The agreement is in effect between Belgium, Canada, Denmark, France, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Turkey, United Kingdom and United States.

VII of NATO SOFA is concerned with the exercise of criminal jurisdiction over visiting forces. Paragraph 9 of that Article lists certain "fair trial" safeguards similar to but lesser in scope than the safeguards specified in Section III, *supra*. In addition to those safeguards, a visiting member being prosecuted under the laws of the receiving State is entitled "to communicate with a representative of the Government of the sending State, and when the rules of the court permit, to have such a representative present at his trial."⁷² When the Senate of the United States gave its advice and consent to the ratification of NATO SOFA, it imposed on the "representative present at" the trial the specific duty of reporting any denial of the safeguards in paragraph 9.⁷³ The Senate Resolution further directs that any noncompliance with those safeguards are to be reported by military authorities to the Department of State with a request for appropriate action to protect the rights of the accused. It should be noted that the Senate Resolution is not a treaty reservation and in no manner alters or limits the terms and application of NATO SOFA. Specifically, as quoted above, the right of the representative is a qualified right. However, during at least the first twelve years of operation in NATO countries there was no instance of a representative being denied admittance to a trial.⁷⁴

In carrying out the terms of the Senate Resolution, it is the policy of the Department of Defense that the enumerated rights of United States personnel who may be subject to foreign criminal trial and imprisonment shall be protected to the maximum extent possible.⁷⁵ This policy means that although the Resolution applies only to prosecutions falling under the jurisdiction of NATO SOFA,⁷⁶ the same procedures thereunder will be applied, wherever practicable, in all overseas areas where United States forces are regularly stationed.⁷⁷ Through the end of 1965, a total of

⁷² *Id.* Art. VII, para. 9 g.

⁷³ *Resolution of Ratification, with Reservations, as Agreed to by the Senate on July 15, 1953*, T.I.A.S. 36. This resolution raised various problems such as reference to the procedural safeguards of the United States Constitution and requests for waivers of jurisdiction under the jurisdictional formulae of Section VII. These problems are outside the scope of this paper, but suffice it to say that they have not materially altered the operation of the observer system. For a detailed analysis of criminal jurisdiction problems under United States Status of Forces agreements generally, see Joseph M. Snee and Kenneth A. Pye, *Status of Forces Agreements and Criminal Jurisdiction* (1957).

⁷⁴ Jack H. Williams, *An American's Trial in a Foreign Court: The Role of the Military's Trial Observer*, 34 *Military L. Rev.* 1, at 28 (1966).

⁷⁵ Section III, United States Department of Defense Directive 5525.1, dated Jan. 20, 1966.

⁷⁶ This, of course, refers only to the situation of the United States being the sending State. Under the various provisions of NATO and other SOFA, the United States could naturally be the receiving State but the number of foreign personnel stationed in the United States has always been relatively insignificant. Therefore, although the "representative at trial" provisions apply to any State when it is a sending State, it is only with the United States trial observer system that we are concerned.

⁷⁷ Section IV, A., *supra*, note 75.

57,916 persons subject to United States SOFA had been tried in the courts of foreign countries.⁷⁸

The Department of Defense policies are implemented by a joint service regulation,⁷⁹ hereafter referred to as AFR 110-12. This regulation designates responsible officials, directs the production of "country law studies" for any State in which United States military personnel are subject to foreign criminal jurisdiction, sets forth procedures for requesting waivers of jurisdiction from the receiving State in appropriate cases, stipulates conditions for the payment of counsel fees and other expenses, discusses United States policy and appropriate action to be taken in regard to persons confined by a foreign State, and, in detail, provides for the requisite qualifications, duties, and reporting obligations of United States trial observers.

The trial observer must be a lawyer but this requirement may be waived for the trial of minor offenses.⁸⁰ Any offense resulting in serious injury or extensive property damage or which might normally result in a sentence to confinement, whether or not suspended, is not minor.⁸¹ The observer is not to be considered a member of the defense and is cautioned not to interject himself into the trial proceedings.⁸² His function is to observe the proceedings and make a detailed report on the conduct thereof.⁸³

While the observer's report is to contain a factual description of the proceedings, the observer's ultimate task is to conclude whether there has been any failure to comply with the procedural safeguards of the SOFA in effect with the receiving State⁸⁴ and to provide sufficient information to enable a reviewing official to determine whether the accused received a fair trial under all the circumstances.⁸⁵ This latter determination is required in deference to the spirit of the Senate Resolution which made reference to the "danger that the accused will not be protected because of the absence of or denial of constitutional rights he would have in the U.S."⁸⁶ This somewhat vague language together with the ambiguous application of the Resolution caused considerable problems for the services and observers during the first 13 years of NATO SOFA.⁸⁷ AFR

⁷⁸ See *Hearings Before a Subcommittee on the Operation of Article VII, NATO Status of Forces Treaty of the Senate Armed Services Committee*, 89th Cong., 1st Sess. (1965).

⁷⁹ Air Force Regulation No. 110-12, Army Regulation No. 27-50, SECNAV Instruction 5820.4 C, dated 28 June 1967.

⁸⁰ *Id.* para. 5 a.

⁸¹ *Id.*

⁸² *Id.* para. 5 b.

⁸³ *Id.*

⁸⁴ *Id.* para. 5 d.

⁸⁵ *Id.* para. 5 e.

⁸⁶ Resolution, *supra*, note 73.

⁸⁷ Williams, *supra*, note 74 at 16-17, 32-35.

110-12 now sets forth Department of Defense policy that the quoted language of the Resolution means "fair trial" safeguards or guarantees which are considered by the Supreme Court to apply to United States state court criminal proceedings by virtue of the United States Constitution's 14th Amendment. Seventeen of these safeguards are set forth in the regulation.⁸⁸ Six are duplicative of specific items in Article VII, paragraph 9 of NATO SOFA and only four—a requirement that criminal statutes be definite and specific as to standards of guilt and three prohibitions against unreasonable search and seizure, bills of attainder and *in absentia* trial—are not included as either substantive or procedural rights in the two most recent conventions discussed in Section III, *supra*. They are not deemed to be crucial procedural rights within the scope of this article.

What has been the value of the United States observer system? A detailed study of this question was done in 1966⁸⁹ by interviewing or obtaining questionnaires from forty-one observers who had been in official attendance at over 2600 trials in eighteen countries. The major conclusion of the study was that, although the report itself served the required purposes of collecting general data and of supplying specific information in those few cases when an opinion of denial of "fair trial" procedure was reached, the most important contribution of the observer was his actual presence at pre-trial proceedings and the trial itself.⁹⁰ He was, almost without exception, cordially received.⁹¹ Personnel of the receiving State acknowledged that he was fulfilling an international obligation and the observer felt that he was serving notice to the forum that the sending State was sufficiently concerned with its personnel to send a legal officer to the proceedings.⁹²

V. HOPES FOR IMPLEMENTATION IN THE AMERICAS

Compulsory submission to adjudication with binding judgments is not a *sine qua non* of my proposal. If it were, the writing of this article would serve little useful purpose. In my concluding next Section, I will iterate the various benefits, short of that dimly glimpsed panacea, which I feel would flow directly from limited third-party observation of criminal procedural due process rights. But a cursory look at current and proposed future implementation of human rights in the Americas will present a more rounded picture of the likely process through which the submitted observer's report will pass.

Under the current *Regulations of the Inter-American Commission on*

⁸⁸ AFR 110-12, *supra*, note 79, Attachment 2.

⁸⁹ Williams, *supra*, note 74.

⁹⁰ *Id.* at 45-49.

⁹¹ *Id.* at 48, note 225.

⁹² *Id.* at 48-49.

Human Rights,⁹³ under which the observer reports might be processed for the foreseeable future, the Commission may receive complaints of human rights violations from any person or group of persons or by associations that are legally established.⁹⁴ There will be no action on a communication prior to exhaustion of local remedies.⁹⁵ Accepted communications are forwarded to the government concerned so that information regarding the complaint can be obtained and forwarded to the Commission.⁹⁶ If the alleged violation is confirmed, a report on the case will be prepared and recommendations made to the government concerned.⁹⁷ If these recommendations are not adopted within a reasonable time, the Commission will present its report to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs.⁹⁸ If those bodies make no observations on the Commission's recommendations and if the government concerned has not yet adopted the recommendations, the Commission may publish its report.⁹⁹ In reference to techniques such as the Commission now employs, it has been said:

While a number of methods for international protection of individuals have demonstrated their usefulness, those which already have been of greatest benefit to the victims of oppression and which appear to hold the most potential for development during and immediately following the 1968 International Year for Human Rights are impartial investigation, followed by negotiation, and where necessary, publication.¹⁰⁰

Under Chapter VII of the *Inter-American Convention on Protection of Human Rights*¹⁰¹ the Commission would continue to operate in much the same manner except that it could additionally receive complaints from States Parties if the complaining and complained against States had both recognized the competence of the Commission in regard to such complaints.¹⁰² The Commission or States Parties would have the right to submit otherwise unresolved cases to an *Inter-American Court of Human Rights*¹⁰³ if the complained against State had recognized the binding jurisdiction of the Court.¹⁰⁴

The provisions for jurisdiction and operation of the Inter-American

⁹³ *Supra*, note 60.

⁹⁴ *Id.* Arts. 37 and 53, 154, 157.

⁹⁵ *Id.* Art. 54, 158.

⁹⁶ *Id.* Art. 42, 155.

⁹⁷ *Id.* Art. 56, 158.

⁹⁸ *Id.* Art. 57, 158.

⁹⁹ *Id.*

¹⁰⁰ Carey, *supra*, note 2 at 324.

¹⁰¹ Convention, *supra*, note 24 at 685-689.

¹⁰² *Id.* Art. 45, 687.

¹⁰³ *Id.* Art. 51, 589 and Art. 61, 691.

¹⁰⁴ *Id.* Art. 62, 691.

Commission and Court are closely related to the similar provisions of the European Convention regarding the matching organs of that system,¹⁰⁵ but several significant variances should be noted. The Inter-American Commission could receive complaints from a person, group of persons, or legally constituted association without the complained against State having declared that it recognized such competence in the Commission.¹⁰⁶ The Inter-American Court would be composed of seven members from as many States rather than a judge from each State Party.¹⁰⁷ If a judge were a national of a State which was a party in a case before the Court, he would not be recused, but any party not represented by a regular judge would have the right to appoint an *ad hoc* judge of its choice.¹⁰⁸

These evolutionary developments beyond the European system are distinct improvements. Granted that the individual would still not be given the status of a party enabled to bring cases directly to the Court, it should again be pointed out that the European Court has consistently "treated the petitioner's interests as those of a party."¹⁰⁹ Furthermore, the proviso that the Inter-American Commission would not be dependent on State Party approval before receiving complaints from individuals would likely result in the creation of an abundance of case law regarding the "fair trial" safeguards. Such has occurred as a result of the workings of the European Commission¹¹⁰ and in reference to that Commission it has been said that "it is not unreasonable to assume that the longer the Commission performs its functions, the more difficult politically it will be for individual governments to withhold renewal of their periodic acceptance of its jurisdiction. With time, adverse governmental reactions will therefore justify less cause for alarm and permit correspondingly greater judicial creativity."¹¹¹ The passage of time may prove these same comments to be true regarding the individual's status before the Inter-American Court and acceptance of that Court's compulsory jurisdiction.

¹⁰⁵ Convention, *supra*, note 16, Sections III and IV, 234-248.

¹⁰⁶ Convention, *supra*, note 24, Art. 44, 687. Compare with European Convention, *supra*, note 12, Art. 25, 236.

¹⁰⁷ Convention, *supra*, note 24, Art. 52, 690. Compare with European Convention, *supra*, note 12, Art. 38, 242.

¹⁰⁸ Convention, *supra*, note 24, Art. 55, 590. Compare this with the similar practice under Article 43 of the European Convention, *supra*, note 12, 244, of special procedures to insure that each State party to a case is "represented" by a national judge or one of its choice. Such court-stuffing by countervailing national judges as practiced under Article 31 of the *Statute of the International Court of Justice*, Louis B. Sohn, *Basic Documents of the United Nations*, 221-232, at 236 (1968), is severely criticized in Franck, *supra*, note 7 at 253-255.

¹⁰⁹ del Russo, *supra*, note 17.

¹¹⁰ For an excellent detailed analysis of the European Commission's case law regarding the safeguards of Article 6 of the European Convention see Thomas Bergenthal, *Comparative Study of Certain Due Process Requirements of the European Human Rights Convention*, 16 Buffalo L. Rev. 18 (1967).

¹¹¹ *Id.* at 53.

VI. CONCLUSION

The preceding Section indicated some very real shortcomings of the human rights implementation and enforcement procedures contained in existing and proposed systems. States shall not in a figurative twinkling of an eye renounce the benefits of deciding by pressure and power nor will they quiescently allow a rending of the shroud of sovereignty which has served as at least a theoretical barrier to extranational meddling and the unwanted intrusion of alien ideas or mores. But it is equally clear that the "sense" of the individual possessing certain rights which are enforceable within the international community is rapidly growing in acceptance. To deny the emergence of this strong "sense" is to deny much of the United Nations' production of resolutions, declarations, and draft conventions. Even more conclusive evidence of this feeling in the breasts of States and men are the achievements, halting as they may be, of regional organizations.

Therefore, notwithstanding the difficulties and shortcomings which would be inherent due to deeply inbred State hesitancy, I do not think it unrealistic to hope for a relatively early acceptance of the regime proposed by this article. To sum up the discussions and arguments of the preceding pages, I would suggest the following five factors as benefits which would flow from adoption and operation of the proposal.

It would serve as a limiting wedge into the concept of "domestic jurisdiction." If human rights are to become enforceable beyond the national level there must be beginnings and there must be acceptance of even narrow areas which ascend above purely national concern. The treatment of aliens is a singularly appropriate area.

Creation of international mechanisms to oversee certain alien rights would serve to lessen or eliminate the frictions and crises between States caused by diplomatic intervention and economic or military pressure. If an individual rather than a State were recognized as the real party in interest on one side of the dispute, the matter is placed more in its proper perspective and the entire area of contention is cooled down.

The insertion of observers at the level of initial criminal proceedings would obviate the major undesirable feature of the "exhaustion of local remedies" rule. Acts and events would be documented at the earliest possible moment and would be preserved for subsequent dispute settlement. This documentative presence of the observer would be totally passive while the national remedies are being pursued and would not unduly intrude on the orderly workings of the forum State's judicial system. No conclusion as to the protection or violation of the alien's rights would be made prior to the exhaustion of local remedies.

Agreement on definite "fair-trial" procedural safeguards would be of specific value regionally and would indirectly further the chances for

world-wide agreement on and codification of such safeguards. Absent supranational legislatures, the development of concrete perceivable standards by evolutionary multilateral conventions should be given a high priority. The Americas would do well to finally and absolutely bury the dichotomous "national treatment-minimum standard" argument. The value of making clear to the individual and the decision-maker what rights are to be protected should transcend any past advantages flowing from sanctification of varying local usages or from self-perceivable vagueness.

Lastly, and this is a fundamental tenet of the proposal, a real start would occur toward the development of a regional civil service. For the first time an impartial third-party would be injected into the earliest stages of dispute settlement. His presence would be highly visible to the administrators of national justice. Although not a decision-maker, he could be seen as evidence of international impartiality and it is imperative for any future widespread acceptance by States of third-party decision-making that this possibility for impartiality be apparent and recognizable.

It is submitted that the Inter-American community can make a tangible and consequential contribution to the protection of human rights and the rule of world law. There is a problem and there are precedents for attacking the problem. It is an opportunity for the nations of this hemisphere to reaffirm that they exist of humans, by humans and for humans.