

RECONCEPTUALIZING SOVEREIGNTY IN THE AMERICAS: HISTORICAL PRECURSORS AND CURRENT PRACTICES*

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I. INTRODUCTION

The Americas in the 1990s are witnessing a gradual, possibly irreversible, transformation of sovereignty on the issues of human rights and democracy.¹ In this essay, I discuss this transformation and reconceptualization of sovereignty, and argue that it is consistent with a long tradition of Inter-American legal thought and political action. Although the regional legal tradition is primarily associated with a strong defense of sovereignty and non-intervention, Latin American legal scholars, policy makers, and activists have long been at the forefront of the struggle for international

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1. See Fernando R. Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, in *BEYOND SOVEREIGNTY* 29, 36 (Tom Farer ed., 1996) (noting changing notions of state sovereignty since the 1940s resulting from human rights interventions). See generally Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 *INT'L ORG.* 411 (1993) [hereinafter Sikkink, *Human Rights*] (analyzing the role of transnational non-state actors in changing notions of sovereignty resulting from human rights policies and practices).

human rights and democracy.² It is important to keep these precursors in mind when considering the current situation regarding the promotion of human rights and the defense of democracy in the hemisphere. In this sense, we can see the developments of the 1990s not as an unusual break with the past, but rather a resurrection of ideals and concerns present in Inter-American debates for many years, but without majority support.

II. HISTORICAL DEVELOPMENT OF SOVEREIGNTY

Traditionally, the doctrine of state sovereignty espoused that the state has complete and exclusive power within its jurisdiction, subordinate to no law other than its own.³ Thus, international activities to promote human rights and democracy contradict a core premise of traditional sovereignty which states that “how a state behave[s] toward its own citizens in its own territory [is] a matter of ‘domestic jurisdiction,’ *i.e.*, not any one else’s business and therefore not any business for international law.”⁴ Sovereignty is a set of forceful claims concerning the extent of state authority, and “represent[s] shared understandings and expectations that are constantly reinforced both through the practices of states and the practices of nonstate actors.”⁵

As the preceding paragraph suggests, I write as a political scientist, not as a student of international law. As a social scientist, I am less concerned about what the law says, *per se*, and more concerned about what states and non-state actors say and do. Their statements and actions in the area of human rights, democracy, and non-intervention are the basis of my discussion. Contrary to some social scientists, however, I take law very seriously, as both a crystallization of state expectations and a vehicle for transforming state understandings and practice. Human rights law offers a concrete example of the power of law to transform state behavior. Neither the practice nor the doctrine of internal sovereignty has ever been absolute—state political leaders have always faced some international constraints on how they can treat their own subjects.⁶ Nevertheless, shared

2. See, e.g., Kathryn A. Sikkink, *Nongovernmental Organizations, Democracy, and Human Rights in Latin America*, in *BEYOND SOVEREIGNTY*, *supra* note 1, at 150, 154 [hereinafter Sikkink, *Nongovernmental Organizations*] (discussing the emergence of non-governmental Latin American human rights groups between 1973–1981).

3. See Sikkink, *Human Rights*, *supra* note 1, at 413; see also JAMES MAYALL, *NATIONALISM AND INTERNATIONAL SOCIETY* 19 (1990) (stating that sovereigns negotiate agreements based on their equal status, despite unequal terms of the actual agreements).

4. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 228 (2d ed. 1979); see also MAYALL, *supra* note 3, at 19–21.

5. Sikkink, *Human Rights*, *supra* note 1, at 412 (footnotes omitted); see also Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *INT’L ORG.* 391, 412 (1992) (“[S]overeignty . . . exists only in virtue of certain intersubjective understandings and expectations; there is no sovereignty without an other.”).

6. See Sikkink, *Human Rights*, *supra* note 1, at 413.

understandings, expectations, and practices of states and non-state actors concerning the protection of human rights and the promotion of democracy have changed significantly in the last two decades when compared to traditional understandings of sovereignty.

The time period of World War II demonstrated a moral flaw in the concept of sovereignty. That is, in cases where the state itself posed the primary threat to the well-being of citizens, the citizens had nowhere to turn for recourse or protection.⁷ This flaw has long been recognized by Latin American government leaders.⁸ Orestes Ferrara y Marino, a member of the Cuban delegation to the Sixth International Conference of American States in 1928, warned “[i]f we declare in absolute terms that intervention is under no circumstances possible, we will be sanctioning all the inhuman acts committed within determined frontiers”⁹ In the Americas, this moral flaw became glaringly apparent during the repressive military regimes many Latin American countries experienced in the 1970s and 1980s.¹⁰

III. THE EMERGENCE OF HUMAN RIGHTS LAW

If sovereignty is understood to be a shared set of understandings and expectations about the authority of the state, and is reinforced by practices, then a change in sovereignty will inevitably occur by transforming these understandings and practices. In this sense, the expansion of human rights law and policy in the post World War II period represents a conscious, collective attempt to modify this set of shared understandings and practices.¹¹ The combination of changing international norms, compelling

The Treaty of Augsburg and the Peace of Westphalia, for example, limited the discretion of the monarch in controlling the practice of religion of his subjects, and the campaign for the abolition of slavery in the nineteenth century made clear that certain extreme practices would be an object of international concern and action. But until World War II, in the widest range of issues the treatment of subjects remained within the discretion of the state; no important legal doctrine challenged the supremacy of the state’s absolute authority within its borders.

Id.

7. *See id.*

8. *See* Domingo E. Acevedo & Claudio Grossman, *The Organization of American States and the Protection of Democracy*, in *BEYOND SOVEREIGNTY*, *supra* note 1, 132–35.

9. *Id.* at 366 n.11.

10. *See, e.g.,* Sikkink, *Human Rights*, *supra* note 1, at 423–25 (detailing Argentine abuses).

11. *See id.* at 414.

Although the idea of internationally protected human rights was placed on the international agenda when the United Nations (U.N.) General Assembly adopted the Universal Declaration of Human Rights in 1948, that idea was not initially translated into a modification of sovereignty in practice or to effective protection of human rights. The only exception was in Europe, where the European Convention on Human Rights and the practices of the European human rights system began to have a gradual but profound impact on modifying state sovereignty.

information, and institutional procedures for action through nongovernmental organizations (NGOs) and inter-governmental organizations (IGOs), created awareness and led states, in many cases, to change their human rights practices.¹² State legitimization of international human rights interventions, and resultant changes in domestic human rights practices, transformed the relationship between the state, its subjects, and international actors.¹³

Within the new political and legal context, current bilateral, regional, and international action for the protection of human rights and the promotion of democracy can no longer be considered violations of the doctrine of non-intervention.¹⁴ Viewing the current practices of states with regard to human rights policies and the promotion of democracy, as well as existing international law on the topic, it becomes difficult to argue that basic human rights pressures¹⁵ constitute an intervention into the essentially domestic affairs of the state. While the limits of such policies can be discussed, such as the most effective or appropriate means or channels for promoting human rights and democracy, it cannot be disputed that human rights practices within states have become the legitimate concern of the international community. Evidence for this position is that almost all of the countries of Western Europe and the United States now retain a human rights policy as an integral part of their foreign policy.¹⁶

There are two related but analytically separate issues which form part of a comprehensive human rights policy. The first requires international review of domestic internal human rights practices.¹⁷ For example, many human rights treaties codify international human rights norms and require international supervision mechanisms.¹⁸ The second part of a comprehen-

To become effective, the means had to be found to translate the human rights ideals of the declaration and treaties of the postwar period into widely shared understandings and practices.

Id. (footnote omitted).

12. See Sikkink, *Nongovernmental Organizations*, *supra* note 2, at 153.

13. See Sikkink, *Human Rights*, *supra* note 1, at 414–15.

14. See, e.g., Tesón, *supra* note 1, at 33 (“The proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable.”).

15. Basic human rights pressures can be multilateral or bilateral, involving documentation, denunciation, and cut-offs or conditioning of military or economic aid, or training programs.

16. See Kathryn Sikkink, *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, in *IDEAS AND FOREIGN POLICY* 139, 143–44 (Judith Goldstein & Robert O. Keohane eds., 1993) (comparing timing, objectives, and methods of implementing human rights policies in the United States and Western Europe after World War II).

17. See *id.* at 142.

18. See *id.* This multilateral human rights policy permits multilateral supervision of internal human rights practices. See *id.*

To be categorized as having a multilateral human rights policy, countries must have either ratified the optional protocol to the Covenant on Civil and Political Rights or accepted compulsory jurisdiction of the relevant regional human rights court. These

sive human rights policy uses external human rights policy to project human rights values internationally.¹⁹ An external human rights policy involves the incorporation of human rights into foreign policy through human rights legislation or foreign policy.²⁰

The selective or inconsistent enforcement of human rights policy has led some to conclude that unless human rights considerations are enforced consistently, there is in reality no human rights policy at all.²¹ This criterion seems unreasonably stringent. I use a more limited definition of external human rights policy, realizing that a variety of considerations govern foreign policy decisions, and no single criterion can be controlling. Therefore, it is possible for a country to have an external human rights policy when explicit mechanisms exist to integrate human rights issues into foreign policy.²²

Another indication of changing understandings and practices concerning human rights issues is the recent organization and integration of human rights IGOs and NGOs.²³ States, IGOs, and NGOs support human rights

criteria are important because they give teeth to a supranational institution to oversee internal practices.

Id.

19. *See id.* at 143.

20. *See id.* This does not require that human rights be considered in all bilateral foreign policy decisions. *See id.*

21. *See id.*

22. *See id.* Among the United States and Western Europe, only Denmark, the Netherlands, Sweden, and Norway have both an external and a multilateral human rights policy. *See id.* at 144 fig.1.

The historical pattern behind this situation shows a clear progressive trend toward the adoption of human rights policies. . . . Before World War II, no country had a human rights policy; by 1988, the United States and all the countries of Western Europe had some kind of human rights policy. This movement, however, occurred gradually. By 1960, a few European countries [adopted a multilateral policy] as they accepted the compulsory jurisdiction of the European Court of Human Rights. But it was not until the late 1960s that the first [countries started adopting external human rights policies].

Id. at 143–44 (footnote omitted). By the mid-1990s, these policies were increasingly commonplace, and had become the norm in the European and Inter-American systems. *See id.* at 144 fig.1. The United States is alone in having an external policy but not a multilateral policy. *See id.* at 144. Because the United States has ratified neither the optional protocol to the Covenant on Civil and Political Rights nor the American Convention on Human Rights, and has not recognized the jurisdiction of the Inter-American Court, it can not be said to have a comprehensive human rights policy. *See id.* at 144 fig.1 & n.a.

23. *See* Sikkink, *Human Rights*, *supra* note 1, at 419.

Although some human rights organizations have existed for many years, in the 1970s and 1980s human rights NGOs proliferated and increased in diversity (38 in 1950, 72 in 1960, 103 in 1970, 138 in 1980, and 275 in 1990). This explosion of NGOs is indicated not only by the increasing number of organizations but also by the formation of coalitions and communications networks designed to link those groups together. In turn, these international human rights organizations developed strong links to domestic human rights organizations in countries experiencing human rights violations. This

and democracy mainly through documentation, denunciation, redirecting assistance (both military and economic), and education and training programs. These activities underscore alternative understandings of classic doctrines of sovereignty and non-intervention.

Some legal and political commentators find a profound contradiction between Latin America's support for both sovereignty and nonintervention on the one hand, and their support for the promotion of human rights and democracy on the other.²⁴ Yet, a survey of the history of Latin America's legal and political thought, considering the region's advancements in democracy and human rights, reveals that this contradiction is not as severe as it is often portrayed. Early Latin American jurists and politicians, renowned for their spirited defense of non-intervention, did not intend for the doctrine to serve as a shield for violations of human rights. In this essay, I will use a historical survey of the writings of Latin American jurists on this topic as a backdrop for reconsidering current human rights policies and for analyzing recent developments within the Inter-American system.

IV. THE INTER-AMERICAN TRADITION OF SUPPORT FOR HUMAN RIGHTS AND DEMOCRACY

Latin American political leaders sometimes suggest that human rights are analogous to an "Anglo-Saxon" export inappropriate to their countries' political systems. For example, when an Amnesty International report criticized the Panamanian government's decision to pardon almost one thousand human rights offenders from the dictatorship of General Manuel

growth in human rights organizations parallels a more general growth in international NGOs in the postwar period.

. . . Latin America has more domestic human rights NGOs than do other parts of the Third World. A 1981 directory of organizations concerned with human rights and social justice in the developing world indicated 220 such organizations in Latin America, compared with 145 in Asia and 123 in Africa and the Middle East. An updated listing published in 1990 lists over 550 human rights groups in Latin America. Of all the countries of Latin America and the Caribbean, only Grenada does not have a domestic human rights organization, while some countries have 50 to 60 such groups. An international demonstration effect was at work in Latin America during the 1980s as the work and successes of the original human rights organizations in the region inspired others to follow their example.

Id. 418-19 (footnotes omitted).

24. See, e.g., Susan Kaufman Purcell, *A Flaw in the Latin Plan*, N.Y. TIMES, Aug. 12, 1987, at A23 (commenting on Latin American refusal to endorse a U.S.-sponsored U.N. human rights resolution regarding Cuba); cf. Alan Riding, *In Latin America, Noriega is a Principle*, N.Y. TIMES, Apr. 24, 1988, § 4, at 3 (noting that Latin American political factions often ignore policies of nonintervention to gain United States support). *But see* Roberto Eisenmann, *For a Panamanian, Hope and Tragedy*, N.Y. TIMES, Dec. 21, 1989, at A31 (noting modern Latin American acceptance of intervention for human rights purposes); *Hamlet in Central America*, N.Y. TIMES, Mar. 2, 1988, at A23 (noting that even the Soviet Union now supports government interference based on human rights issues).

Antonio Noriega, a prominent Panamanian government party legislator said that Amnesty International was “brazenly and shamelessly at the service of Anglo-Saxon imperialism.”²⁵ This type of statement ignores recent developments in international relations and law, as well as the history and tradition of the region. For example, Panama was an early advocate for international human rights standards in the creation of the United Nations.²⁶

In Latin America, there exists a strong tradition of support for international law as a vehicle for preventing war, and a means by which weaker countries could find refuge from the interventions of more powerful states, especially the United States.²⁷ Legalism had primarily been identified with support for doctrines of sovereignty and nonintervention, but the legalist tradition of support for democracy and human rights also has a long history in Latin America.²⁸

Pedro Felix Vicuza of Chile published a plan in 1837 to promote a Great American Congress to oppose tyrannical governments and promote democracy.²⁹ Juan Bautista Alberdi, the principal framer of the Argentine constitution of 1853, and a supporter of Vicuza’s plan, proposed an American Court with the right of collective intervention.³⁰ Alberdi was an ardent advocate of individual liberty, and believed that the omnipotent state could be the main rival of liberty.³¹ In 1907, Ecuadoran diplomat Carlos Tobar proposed a group policy to deny recognition of governments established through non-democratic means.³² After WWI, most Latin American states joined the League of Nations³³ which included acceptance of the International Court of Justice. Despite these early precursors to modern debates about human rights and democracy, the international

25. Larry Rohter, *Panama Amnesty Plan For Abuses Draws Fire*, N.Y. TIMES, May 14, 1996, at A6 (quoting Miguel Bush, a prominent Panamanian legislator).

26. See L.B. Sohn, *A Short History of United Nations Documents on Human Rights*, reprinted in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 505, 510–11 (Louis B. Sohn & Thomas Buergenthal eds., 1973); see also Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT’L L. 503, 505 n.4 (1990) (recalling Panama’s sponsorship of a proposal to include a bill of rights in the U.N. Charter).

27. See G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 214 (2d ed. 1989).

28. See *id.* at 228.

29. See *id.*

30. See *id.*

31. See PABLO ROJAS PAZ, EL PENSAMIENTO DE ALBERDI 35 (1943).

32. See ATKINS, *supra* note 27, at 228.

33. Original Latin American members of the League of Nations were Argentina, Bolivia, Colombia, Cuba, Panama, and Uruguay. See 1 F.P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS app. at 64–65 (1952). Original members who withdrew later were Brazil (withdrew June 1926), Paraguay (February 1935), Guatemala (May 1936), Nicaragua (June 1936), Honduras (July 1936), Chile (June 1938), Venezuela (July 1938), Peru (April 1939), and Haiti (April 1942). See *id.* Joining after the initial Covenant were Costa Rica (December 1920, withdrew January 1925), Dominican Republic (September 1924), Mexico (September 1931), and Ecuador (September 1934). See *id.*

promotion of human rights did not truly begin to enter international scholarly discourse until the inter-war period.³⁴ The Covenant of the League of Nations contained no mention of human rights, aside from brief references in Article 23 to labor conditions and the treatment of persons in dependent territories.³⁵ Furthermore, while some human rights issues were raised during the drafting of the Covenant, they did not receive widespread support and thus were not incorporated into the document.³⁶

Lawyer-diplomats were responsible for first introducing and promoting the idea of internationally recognized human rights.³⁷ Chilean jurist Alejandro Alvarez, Russian jurist and diplomat André Nicolayévitch Mandelstam, and Greek jurist and diplomat Antoine Frangulis, first drafted and publicized declarations on the international rights of man as part of their work concerning NGOs, the American Institute of International Law, the International Law Institute, and the International Diplomatic Academy.³⁸ In 1917, a draft text on the “International Rights of Individuals and International Associations” was submitted by Alejandro Alvarez to the American Institute of International Law.³⁹ Alvarez refers to his draft as the first attempt to proclaim the rights of man in an international context.⁴⁰ In 1923, he presented the same draft to the Fifth Pan American Conference in Santiago, Chile.⁴¹

André Nicolayévitch Mandelstam also drafted a text of a Declaration of the International Rights of Man, which the plenary session of the

34. See Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 450–54 (1992). This entire section draws heavily on Burgers’ article and an interview with Burgers in The Hague, Netherlands (Nov. 13, 1993).

35. League of Nations Covenant article 23 provides in pertinent part:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

- (a) will endeavor to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;
- (b) undertake to secure just treatment of the native inhabitants of territories under their control

LEAGUE OF NATIONS COVENANT art. 23.

36. See Burgers, *supra* note 34, at 449. An illustrative example was a rejected Japanese proposal to prohibit race or national origin discrimination by League member states against foreigners of member states. See *id.*

37. See *id.* at 450–51.

38. See *id.* at 450–52.

39. See ALEJANDRO ALVAREZ, *EL NUEVO ORDEN Y LA RENOVACIÓN SOCIAL* 97, 248–49 (1943) [hereinafter ALVAREZ, *EL NUEVO ORDEN*]; Burgers, *supra* note 34, at 450. [Editor’s Note: The Alejandro Alvarez works *EL NUEVO ORDEN Y LA RENOVACIÓN SOCIAL* and *LA RECONSTRUCCIÓN DEL DERECHO DE GENTE* are separate books which appear in the same bound volume. They are cited as individual books.]

40. See ALVAREZ, *EL NUEVO ORDEN*, *supra* note 39, at 249.

41. See *id.* at 458.

International Law Institute adopted in October of 1929.⁴² Mandelstam later publicized his Declaration, publishing related articles and a book, and teaching human rights courses in Geneva and the Hague.⁴³ Two separate networks of NGOs, the International Federation of Leagues for the Defense of the Rights of Man and of the Citizen, and the International Union of Associations for the League of Nations, endorsed the principles of the Institute Declaration in 1931 and 1933 respectively.⁴⁴

Antoine Frangulis, serving as the delegate from Haiti, introduced an international human rights resolution in the League of Nations in 1933,⁴⁵ but the resolution received scant support from countries already in the midst of the crisis leading to German withdrawal from the League.⁴⁶ In contrast to the work of these individuals, the concept of human rights received virtually no political attention in Europe during the pre-WWII period.⁴⁷ Although many were deeply concerned with democracy and freedom, they did not frame these issues in the language of human rights, or call for international protection of these rights.⁴⁸

It is quite interesting that Chilean, Greek, and Russian jurists, from countries at the periphery of the international system, were responsible for inserting the idea of human rights into global debates in the early twentieth century. Moreover, both Frangulis and Mandelstam were political refugees, the former from a Greek dictatorship, the latter from a Bolshevik regime, which saw human rights as a means of protecting individuals from the repressive practices of their own governments.⁴⁹ Mandelstam was motivated by the massacre of Armenians in Turkey in 1915, which he observed in his capacity as a Russian diplomat, while Frangulis was concerned with the persecution of Jews in Nazi Germany.⁵⁰

Alejandro Alvarez was a prominent intellectual leader of juridical Pan Americanism,⁵¹ as were other noted Latin American jurists such as Carlos Calvo and Luis M. Drago, authors of the Calvo and Drago doctrines respectively, which sought to use law to limit intervention in the region.⁵² The regional legalist tradition found expression in the American Institute

42. See Burgers, *supra* note 34, at 452.

43. See *id.* at 453.

44. See *id.* at 453–54.

45. See *id.* at 457 & n.24. This resolution was identical to a resolution adopted by the International Diplomatic Academy in 1928 on the basis of a document submitted by Mandelstam. See *id.* at 452.

46. See *id.* at 458–59.

47. See *id.* at 464.

48. Burgers surveyed European political thought in this period and was surprised by the failure of intellectuals and opinion leaders to reassert the human rights idea or adopt or respond to the political messages of the human rights declarations and resolution of Frangulis and Mandelstam. See *id.* at 459–64.

49. See *id.* at 451.

50. See *id.* at 455.

51. See ATKINS, *supra* note 27, at 203.

52. See *id.* at 215–16.

of International Law, founded in 1912 by Alvarez and James Brown Scott, among others.⁵³ The Institute consisted of representatives of the international law societies of countries of North and South America.⁵⁴ The primary goals of the Institute were the codification of existing international law and the promotion of new principles of international law, especially the principle of non-intervention. By 1926 the Institute had adopted thirty draft projects on international law.⁵⁵ The main accomplishment of the Institute was ultimately the creation of the Declaration of the Rights and Duties of Nations.⁵⁶ Although one of the most important rights of nations outlined in the Declaration was “the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein,”⁵⁷ it cannot be said that the Institute members disregarded questions of human rights and democracy. Indeed, the preamble to the Declaration states:

[according to] the universal practice of the American Republics, nations or governments are regarded as created by the people, deriving their just powers from the consent of the governed, and are instituted among men to promote their safety and happiness and to secure to the people the enjoyment of their fundamental rights⁵⁸

A version of the Declaration was later drafted as a treaty, signed at the Inter-American Conference in Montevideo in 1933, and ratified by the United States in 1934.⁵⁹ The Treaty, which did not mention human rights, had at its heart an article which stated “[n]o state has the right to intervene

53. See George A. Finch, *James Brown Scott, 1866–1943*, 38 AM. J. INT’L L. 183, 207 (1944); Frederic L. Kirgis, *The formative Years of the American Society of International Law*, 90 AM. J. INT’L L. 559, 581 (1996); James Brown Scott, *The American Institute of International Law*, 10 AM. J. INT’L L. 121, 122, 123 (1916). Scott was a trustee and secretary of the Carnegie Endowment for International Peace, which financially assisted the movement. See Kirgis, *supra*, at 563, 587.

54. See Scott, *supra* note 53, at 122–23.

55. See Kirgis, *supra* note 53, at 581.

56. *Declaration of the Rights and Duties of Nations*, The American Institute of International Law (Jan. 6, 1916), reprinted in Scott, *supra* note 53, at 124–26. The principle of nonintervention is stated in the Article 2 of the Declaration.

Every nation has the right to independence in the sense that, it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.

Id. art. 2, at 125.

57. *Id.* art. 4, at 126.

58. *Id.* pmb., at 125.

59. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

in the internal or external affairs of another.”⁶⁰ For the United States, this was a repudiation of the Roosevelt Corollary to the Monroe Doctrine.⁶¹

This suggests a conflict regarding the international protection and promotion of human rights. Indeed, human rights are rarely mentioned in the proceedings of the American Institute. Yet, Alvarez did not see a contradiction between his work, such as the Declaration of the Rights and Duties of Nations, and individual liberties. In a series of lectures delivered at U.S. universities, Alvarez said, “[i]nternational law in the future will realize the beautiful maxim ‘Above all nations is humanity.’”⁶² He also argued that Latin Americans gave an even broader meaning to individual liberty than did persons in the United States or Western Europe.⁶³ In one of his most important texts, the Declaration on the Fundamental Bases and Great Principles of Modern International Law,⁶⁴ the section on Rights of States was followed by a section entitled the “Duties of States,” which included the duty to “maintain a political and legal organization which permits all the people residing in its territory to exercise the rights and enjoy the benefits that the sentiment of international justice impose today on all civilized people.”⁶⁵ This section was in turn followed by a section on the “International Rights of the Individual,” which included the “right to life, liberty, and property, without distinction of nationality, sex, race, language, or religion.”⁶⁶ In 1945, Alvarez presented a much more complete “Draft

60. *Id.* art. 8, 49 Stat. at 3100, 165 L.N.T.S. at 25.

61. In the annual message of the President to Congress in 1904, President Theodore Roosevelt emphasized his belief that the United States may intervene in Latin America:

It is not true that the United States feels any land hunger or entertains any projects as regards the other nations of the Western Hemisphere save such as are for their welfare. All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. . . . Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.

39 CONG. REC. 19 (1904). For a discussion of the Monroe Doctrine, see generally ALEJANDRO ALVAREZ, *THE MONROE DOCTRINE* (1924) (including a compilation of Latin and North American opinions regarding the Monroe Doctrine).

62. ALEJANDRO ALVAREZ, *INTERNATIONAL LAW AND RELATED SUBJECTS FROM THE POINT OF VIEW OF THE AMERICAN CONTINENT* 37 (1922).

63. *See id.* at 27.

64. Alejandro Alvarez, *Declaración Sobre las Bases Fundamentales y los Grandes Principios del Derecho Internacional Moderno* [hereinafter Alvarez, *Grandes Principios*], reprinted in ALEJANDRO ALVAREZ, *LA RECONSTRUCCIÓN DEL DERECHO DE GENTES* 85 (1943) [hereinafter ALVAREZ, *LA RECONSTRUCCIÓN*].

65. *See id.* art. 25(b), at 89–90.

66. *See id.* art 28, at 91.

“Draft Declaration on International Rights and Duties of the Individual” to the Fourth Inter-American Lawyers conference in Santiago.⁶⁷

When the American Institute of International Law attempted to codify existing International Law, it adopted thirty draft projects on international law topics.⁶⁸ Included was a draft on the International Rights and Duties of Natural and Juridical Persons, which listed the rights to meet and associate, and freedom of the press, conscience, and worship.⁶⁹

As mentioned previously, early Latin American jurists and politicians did not intend for the doctrine of non-intervention to serve as a shield for human rights violations. To the contrary, stated by Alvarez: “[i]n the carrying out of its duties, as well as in the exercise of its rights, States should be inspired by the idea that their mission is to obtain, in solidarity with others, the progress of humanity.”⁷⁰ Clear in this conception is that international law, concepts of non-intervention, and the rights and duties of states were perceived as vehicles to contribute to a greater end: the progress of humanity.

According to Scott, the purpose of the American Institute of International Law was to allow more democratic control of foreign policy.⁷¹ “They believed that in democratic countries a knowledge of international law is essential, in order that the people may see to it that a foreign policy be adopted in strict accord with the duties as well as the rights of their countries, under the law of nations.”⁷²

In this sense, the way in which repressive regimes have frequently used the doctrine of non-intervention to protect themselves from international criticism runs counter to the original spirit and purposes of the doctrine. Indeed, it can be said that the legacy of Pan-American judicialism was cynically distorted by policy makers in repressive regimes as a blanket excuse for protection against any form of international scrutiny.

The original spirit of the doctrine of non-intervention was the use of international law to prevent illegitimate interventions, mainly by the United States. It did not necessarily see non-intervention as an end value in and of itself, but more as a means to secure other desired goals. The Uruguayan foreign minister, Alberto Rodriguez Larreta, demonstrated this in 1945 when he said: “‘non-intervention’ cannot be converted into a right to invoke one principle in order to be able to violate all other principles with immunity.”⁷³ He argued instead that non-intervention, as one of the

67. See ALVAREZ, *EL NUEVO ORDEN*, *supra* note 39, at 249.

68. See Kirgis, *supra* note 53, at 581 & n.159.

69. See Am. Inst. of Int'l L., *International Rights and Duties of Natural and Juridical Persons*, 20 AM. J. INT'L L. supp. 326 (1926).

70. See Alvarez, *Grandes Principios*, *supra* note 64, art. 26, reprinted in ALVAREZ, *LA RECONSTRUCCIÓN*, *supra* note 64, at 91.

71. See Finch, *supra* note 53, at 207.

72. *Id.*

73. Alberto Rodriguez Larreta, Note from Uruguayan Foreign Minister to Secretary of State, in DEP'T ST. BULL., July 1945, at 864, 866.

important principles of the Inter-American system, needed to be “harmonized” with the other principles:

The principle of non-intervention by one State in the affairs of another, in the field of [I]nter-American relations, constitutes in itself a great advance achieved during the last decade; this principle was inspired by noble and just claims. We must maintain and affirm that principle whenever the need arises. It must, however, be harmonized with other principles

. . . .
 . . . Therefore a multilateral collective action, exercised with complete unselfishness by all the other republics of the continent, aimed at achieving in a spirit of brotherly prudence the mere reestablishment of essential rights, and directed toward the fulfillment of freely contracted juridical obligations, must not be held to injure the government affected, but rather it must be recognized as being taken for the benefit of all, including the country which has been suffering under such a harsh regime.

. . . .
 . . . “[N]on-intervention” is not a shield behind which crime may be perpetrated, law may be violated, agents and forces of the Axis may be sheltered, and binding obligations may be circumvented.

Otherwise, at the very time when, since Mexico and after San Francisco, we should be creating a new international and humanitarian conception, we would find ourselves tolerating a doctrine capable of frustrating and destroying that very conception.⁷⁴

This legal tradition also led Latin Americans to draft and pass an American Declaration on the Rights and Duties of Man just months before the United Nations (U.N.) passed the Universal Declaration of Human Rights.⁷⁵ It should be noted that most Latin American countries were present at the San Francisco Conference and also became charter members of the newly formed U.N.

Another, more practical issue united the concern of Latin American diplomats for non-intervention and internationally protected human rights. In the past, a major justification for U.S. military intervention in the region was that states were required to protect the rights of their citizens residing abroad. Thus, it can be seen that the demand for equality of jurisdiction over nationals and aliens had long been a part of Latin American legal and diplomatic discourse. The application of an International Declaration of Rights would, in the language of the Mexican delegation, eliminate “the

74. *Id.* at 865–66.

75. See GORDON CONNELL-SMITH, *THE INTER-AMERICAN SYSTEM* 289 & n.49 (1966).

only tenable objection that may have been made by the most ardent proponents of diplomatic protection”—that it is necessary to guarantee an alien living abroad a “‘minimum standard of civilized justice.’”⁷⁶ Through an international declaration of rights, “that standard would be fully assured; its guarantee would be an international guarantee and not dependent upon the wishes of the Government of the State of origin.”⁷⁷

In late 1945 and early 1946, the proposal of Uruguayan Foreign Minister Rodriguez Eduardo Larreta was considered by the American States.⁷⁸ The proposal advocated the use of collective intervention to oppose dictators and promote democracy and human rights.⁷⁹ The Uruguayan plan was motivated in part by fear of intervention from Argentina, however it generated broad debate in the region.⁸⁰ The United States and six Latin American governments endorsed the plan, while the remaining States rejected it.⁸¹

A number of Latin American nations, especially Uruguay, Panama, and Mexico, championed the inclusion of human rights language in the Charter. At the San Francisco Conference where the Charter was drafted, the Uruguayan delegation introduced a proposal suggesting that the U.N. should promote human rights “without distinction as to race, sex, belief or social status.”⁸² Likewise the Uruguayan delegation proposed that the Charter contain a “[d]eclaration of rights,” and “a system of effective international juridical guardianship of those rights.”⁸³ The Uruguayan delegation also urged that the U.N. should be based on the principle of “rights inherent in [members’] full sovereignty.”⁸⁴ In other words, they did not see a contradiction between “a system of effective international juridical guardianship of . . . rights,”⁸⁵ and the practice of full sovereignty.

The Chilean delegation to the San Francisco conference made the relationship even clearer. Under the heading “The Concept of Sovereignty,” it argued that “[s]tates are sovereign and all equal before the law. The State is lord of its territory, can grant itself whatever democratic form of government it may desire within standards which respect the inalienable rights of man”⁸⁶

76. *Opinion of the Department of Foreign Relations of Mexico Concerning the Dumbarton Oaks Proposals for the Creation of a General International Organization*, Doc. 2, G/7 (c), 3 U.N.C.I.O. Docs. 54, 69–70 (1945) [hereinafter *Mexico Opinion*].

77. *Id.*

78. See ATKINS, *supra* note 27, at 229.

79. See *id.*

80. See *id.*

81. See *id.*

82. *New Uruguayan Proposals on the Dumbarton Oaks Proposals*, Doc. 2, G/7 (a)(1), 3 U.N.C.I.O. Docs. 34, 34 (1945) [hereinafter *Uruguayan Proposals*].

83. *Id.* at 35.

84. *Id.*

85. *Id.*

86. *Additional Amendments and Proposals by the Delegation of Chile*, Doc. 2, G/7 (i)(1), 3 U.N.C.I.O. Docs. 292, 293 (1945).

The Mexican delegation, known for its spirited defense of the doctrine of non-intervention,⁸⁷ nevertheless argued that the Dumbarton Oaks proposals “contain a serious hiatus in regard to the International Rights and Duties of Man, respect for which constitutes one of the essential objectives of the present war”⁸⁸ and gave an almost complete history of the process by which countries had moved toward the adoption of an international bill of rights and a system to obtain the application of those rights.⁸⁹ In their survey of the origins of the concept of international bill of rights, the Mexican delegation mentioned Mandelstam, the resolution of the International Diplomatic Academy, the work of the International Law Institute, the French League of the Rights of Man, and the Committee of Lord Sankey in England, as well as the Declaration of Principles for Peace, approved in 1943 by several churches in the United States.⁹⁰ The report then went on to mention the Draft Declaration of the American Institute of Law, the report of the Commission to Study the Organization of Peace, and the Second and Third Conferences of the Inter-American Bar Association.⁹¹ The resolutions passed at the Third Conference in Mexico City emphasized the “necessity” of a Declaration of the Rights of Man, and the importance of the establishment of “appropriate international machinery and procedures to guarantee the practical application of the general principles contained in the Declaration.”⁹² What was striking about the Mexican presentation is how widely circulated and known each of these different international efforts to promote a declaration of human rights within Latin American diplomatic circles was. Also significant was the degree to which key Latin American delegations embraced and furthered the human rights cause in the mid-1940s.

The Latin American states were joined by a strong NGO lobby at the San Francisco meeting. The U.S. delegation included over forty NGO “consultants” who were among the most active lobbyists for human rights.⁹³ The record of the success of the NGO lobbying effort and the Latin American delegations in favor of human rights find testimony in the Charter itself. Although the original Dumbarton Oaks proposal had only one reference to human rights, the final U.N. Charter contained seven references to human rights. Moreover, the promotion of human rights is listed as one of the basic purposes of the organization.⁹⁴ The Economic and

87. See Denise Dresser, *Treading Lightly and Without a Big Stick: International Actors and the Promotion of Democracy in Mexico*, in *BEYOND SOVEREIGNTY*, *supra* note 1, 316, 318.

88. *Mexico Opinion*, *supra* note 76, at 63.

89. See *id.* at 70–73.

90. See *id.* at 71.

91. See *id.* at 71–72. The Second Inter-American Bar Association Conference was held in Rio de Janeiro in 1943, and the Third Conference in Mexico City in 1944. See *id.* at 72.

92. *Id.*

93. See DOROTHY B. ROBINS, *EXPERIMENT IN DEMOCRACY, THE STORY OF U.S. CITIZEN ORGANIZATIONS IN FORGING THE CHARTER OF THE UNITED NATIONS* 129–32 (1971).

94. See U.N. CHARTER art. 1, para. 3.

Social Council is called upon to set up a human rights commission, the only specifically mandated commission in the Charter.⁹⁵

Despite the success that human rights advocates had in securing human rights language in the Charter, they also experienced several failures. A number of delegations had originally urged that the U.N. safeguard or guarantee respect for human rights, that it be instructed to make a declaration of rights, and that it establish a system of effective judicial international guardianship of rights.⁹⁶ The demand for a bill of rights was supported by the delegate from Panama, the jurist Dr. Ricardo J. Alfaro, and by amendments proposed by Mexico and Uruguay.⁹⁷ The final language merely called upon the U.N. to promote and encourage respect for human rights.⁹⁸ Although the promotion of human rights is listed in the purposes and principles of the U.N.,⁹⁹ similar language is curiously absent from Article 2 which determines the obligations imposed on members.¹⁰⁰ The Uruguayan delegation made a concerted effort to ensure that human rights language and obligations were included in the principles section, and it was said that the proposal would be supported by all the delegates from the Americas, because they had expressed "identical" ideas only a short time before at the Third Inter-American Bar Association conference in Mexico.¹⁰¹ The delegate from Uruguay argued that "[t]he right to and respect for life constitute[s] *the essence* of the whole system of universal juridical order."¹⁰² Other states that offered amendments to include human rights in the discussion of principles in the Charter were Colombia, Cuba, Ecuador, India, New Zealand, Norway, Panama, the Philippines, and the Union of South Africa. Brazil offered a joint proposal with the Dominican Republic and Mexico.¹⁰³ It is important to note the strong representation from the Latin American states.

Delegates had previously included in the section on suspension of membership, a clause which allowed for the expulsion of a member against which the Security Council had instituted an enforcement action.¹⁰⁴ Examining the legislative history of the section on membership, it is clear that some Latin American delegates presumed that new membership might be denied to states that did not respect human rights, and that existing members might be suspended if they established dictatorships or otherwise

95. See *id.* art. 68.

96. See *Statement of Uruguayan Delegation on its Position with Reference to Chapters I and II of the Charter as Considered by Committee I/1*, Doc. 995, I/1/45, 6 U.N.C.I.O. Docs. 627, 628 (1945) [hereinafter *Statement of Uruguayan Delegation*].

97. See *id.*

98. See U.N. CHARTER art. 1, para. 3.

99. See *id.* arts. 1–2.

100. See *id.* art. 2.

101. See *Statement of Uruguayan Delegation*, *supra* note 96, at 631, 633.

102. *Id.* at 630.

103. See *id.* at 631.

104. See U.N. CHARTER art. 5; *Uruguayan Proposals*, *supra* note 82, at 38.

violated the rights of their citizens. Omitting human rights from the section on principles and obligations made this unlikely, as the Uruguayan delegation recognized at the time.¹⁰⁵

The record of the United States at San Francisco was mixed. On the one hand, it supported the effort to include human rights language in the Charter, but at the same time it also resisted attempts to include references to economic human rights, and expressed concern over possible U.N. intrusion into domestic jurisdiction. The two other key governmental actors, the Soviet Union and Great Britain shared the U.S. concern to limit possible infringement on domestic jurisdiction.¹⁰⁶ Although the human rights provisions did not carry any teeth at this early stage, states were extremely wary of the implications imposed by the concept of sovereignty on the human rights issue.¹⁰⁷

As a result, the Charter mandate on human rights ended up being much less firm than many NGOs and Latin American states had desired, in that it merely called for the promotion and encouragement of human rights,¹⁰⁸ rather than the protection or safeguarding of those rights. The subcommittee which considered the stronger language held that “assuring or protecting such fundamental rights is primarily the concern of each state.”¹⁰⁹ It recognized, however, that if “such rights and freedoms were grievously outraged so as to create conditions which threaten peace or to obstruct the application of provisions of the Charter, then they cease to be the sole concern of each state.”¹¹⁰ This point was the compromise that characterized U.N. human rights work from 1945 until 1973. The U.N. was expected to promote human rights but not protect them, unless such violations could be seen to threaten the peace. What is important to point out is that alternative visions were presented and articulated at the San Francisco Conference, and that a number of Latin American states advocated this alternative vision.¹¹¹ The alternative position would have to wait another forty years to be realized. Nevertheless, the Charter, by assigning institutional responsibility for human rights to the General Assembly and the Economic and Social Council, and by specifically recommending the creation of a human rights commission, paved the way for later human rights actions within the U.N. system.

Latin American states were also heavily involved in promoting the very first human rights treaty adopted by the U.N.: the Convention on the Prevention and Punishment of the Crime of Genocide, passed on December

105. See *Statement of Uruguayan Delegation*, *supra* note 96, at 632–33.

106. See RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 901–02 (1958).

107. See *id.* at 905.

108. See U.N. CHARTER art. 1, para. 3.

109. *Report of Rapporteur, Subcommittee I/1/A (Farid Zeineddine, Syria), to Committee I/1, June 1, 1945*, Doc. 723, I/1/A/19, 6 U.N.C.I.O. Docs. 696, 705 (1945).

110. *Id.*

111. See Burgers, *supra* note 34, at 475.

9, 1948,¹¹² one day before the U.N. approved the comprehensive Universal Declaration of Human Rights.¹¹³ The countries of Panama, Cuba, and India were the sponsors of the original resolution calling on the U.N. to draft a treaty on genocide.

The American states had long recognized the exercise of representative democracy as one of the basic principles of Pan-Americanism. In fact, the countries of the Americas experimented with the idea of democracy as a basis for regional order well before the European Union first conceived of itself as a treaty-bound association of democratic states. The Declaration of Principles of Inter-American Solidarity and Cooperation, adopted in 1936, was “the first multilateral recognition of the need for ‘a common democracy throughout America.’”¹¹⁴ But in Europe in the 1950s, democracy and respect for the rule of law and human rights were actually made a condition of membership in a regional organization, while in the Americas, these early sentiments had to wait over fifty years to find legal expression. The Charter of the Organization of American States (OAS) decrees that 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,”¹¹⁵ but this “requirement” was never made a condition for membership in the organization.¹¹⁶

Despite this impressive past, the issue of human rights and the promotion of the democracy dropped out of Inter-American debates. This was due largely to the fact that in the U.S. human rights foreign policy agenda from 1953 to 1973, human rights issues were “collapsed into its anti-communist policy.”¹¹⁷ During this period, U.S. policies contributed to the perpetuation of dictators through the moral and material support it provided to those regimes.

Realizing this, some Latin American states feared that Inter-American proposals to promote democracy or human rights would be used as “instruments of pressure and undue interference.”¹¹⁸ Therefore, democratic promotion was opposed, not because it was intrinsically flawed or inap-

112. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

113. Universal Declaration on Human Rights, G.A. Res. 71, U.N. GAOR, 3d Sess., 183d mtg., U.N. Doc. A/810 (1948).

114. See Acevedo & Grossman, *supra* note 8, at 134.

115. See Charter of the Organization of American States, Apr. 30, 1948, art. 5(d), 2 U.S.T. 2394, 2418, 119 U.N.T.S. 3, 52. For a more recent integrated text of the OAS Charter, see Charter of the Organization of American States, *as amended by* the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena in 1985, and by the Protocol of Managua in 1993, OAS Permanent Council, OEA/ser. G CP/INF.3964/96 (prov. ed. 1996) (entered into force Jan. 29, 1996).

116. See Charter of the Organization of American States art. 2, 2 U.S.T. at 2417, 119 U.N.T.S. at 50 (“All American States that ratify the present Charter are Members of the Organization.”).

117. DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 104 (2d ed. 1989).

118. JORGE CASTANEDA, MEXICO AND THE UNITED NATIONS 185 (1958).

appropriate, but because of fear concerning how it would be used in the political context of the Cold War. One leading scholar of Mexican foreign relations concluded in 1958: “[w]hile this fear exists, while the present situation does not change, the cornerstone of the [I]nter-American system, its guiding principle, will not be democracy, but intransigent non-intervention.”¹¹⁹ Note that “intransigent non-intervention” is defended, not as an end in and of itself, but as a necessary, and perhaps temporary principle in a particular international and regional context.

U.S. foreign policy in the 1970s finally began to recognize the importance of human rights, unlike the policies of self-containment of communism that characterized U.S. policy toward the developing world in the 1950s and 1960s.¹²⁰ From the mid-1960s to the early 1970s, a number of members of Congress began to express concern for human rights.¹²¹ In this sense, the change in U.S. policy toward the region, signaled by the emergence of human rights policy, was a precondition for realizing the regional tradition of support for human rights and democracy. In essence, a viable regional approach for the multilateral promotion of human rights could emerge only after governments in the region were reassured that the United States would not misuse such a policy for its own purpose.

Latin Americans have also played an important role in contributing to the adoption of more recent human rights policies. The role which political exiles from Argentina, Brazil, Uruguay, and especially Chile played in encouraging governments in the United States, Europe, and Latin America to think about human rights and to adopt human rights policies should not be underestimated. Some Latin American human rights activists originally had trouble reconciling their work on behalf of human rights with their allegiance to nationalism and the doctrine of non-intervention. Eventually, many arrived at the same conclusion that Orestes Ferrara y Marino articulated in 1928 when he said that an absolute ban on intervention would sanction inhuman acts: the doctrine of nonintervention did not mean, and indeed could not mean, international silence in the face of torture and political imprisonment.

With two landmark decisions, the OAS has regained its pre-WWII role in the forefront of international efforts to promote human rights and democracy. The Declaration of Santiago (Resolution 1080) of 1991 created an automatic procedure for convening a meeting of foreign ministers in the event of an interruption of democracy,¹²² and with this the OAS created a clear set of signals and disincentives to military coups in the region. In the Protocol of Washington, states overwhelmingly voted to modify the OAS Charter, giving the General Assembly the power to suspend membership

119. *Id.*

120. See FORSYTHE, *supra* note 117, at 104–05.

121. See *id.* at 107–08.

122. See VIRON P. VAKY & HERALDO MUÑOZ, *THE FUTURE OF THE ORGANIZATION OF AMERICAN STATES* 23 (1993).

by a two-thirds vote, a government which overthrows a democratic regime.¹²³ If ratified, the Protocol will move the OAS in the direction of the European Union as a collection of democratic states.

The process of reconceptualizing sovereignty and non-intervention has been underway for quite some time in the Inter-American system. Rather than view the reconceptualization as an attack on American ideals of non-intervention, it seems appropriate to use the thoughts of Latin American jurists like Alejandro Alvarez and Rodriguez Larreta to remind ourselves that the doctrine of non-intervention was originally seen as a vehicle to promote human progress and not as a shield to justify the violations of rights.

123. See Protocol of Amendments to the Charter of the Organization of American States, Dec. 14, 1992, art. 1, 33 I.L.M. 1005.