

RECONCEPTUALIZING SOVEREIGNTY IN THE AMERICAS: HISTORICAL PRECURSORS AND CURRENT PRACTICES¹

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In the 1990s in the Americas, we are witnessing a gradual and probably irreversible transformation of sovereignty around the issues of human rights and democracy.³ In this paper, 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 strong defense of sovereignty and non-intervention, Latin Americans legal scholars, policy makers, and activists have also long been at the forefront of the struggle for international human rights and democracy. It is important to keep these precursors in mind when considering the current situation of 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 that had been present in Inter-American debates for many years, but had not yet received majority support.

Traditionally, the doctrine of state sovereignty has meant that the state "is subject to no other state, and has full and exclusive powers within its jurisdiction...."⁴ Thus, international activities to promote human rights and democracy contradict a core premise of traditional sovereignty that "how a state

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3 See Sikkink, Kathryn, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America", *International Organization* 47:3 (Summer 1993), pp. 411-442; *Beyond Sovereignty: Collectively Defending Democracy in the Americas*, edited by Tom Farer, Baltimore, Johns Hopkins University Press, 1996; and *Peacekeeping and Democratization in the Hemisphere: Multilateral Approaches*, edited by Tommie Sue Montgomery, forthcoming.

4 The classical definition of sovereignty given by the World Court in the Wimbledon case, as cited in Hoffmann, Stanley, "International Systems and International Law," in Richard A. Falk and Saul H. Mendlovitz (eds.), *The Strategy of World Order: Vol. II: International*, New York, World Law Fund, 1966, p. 164.

behaved toward its own citizens in its own territory was a matter of domestic jurisdiction, i. e., not any one else's business and therefore not any business for international law."⁵ But sovereignty is a series of claims about the nature and scope of state authority that are forceful because they represent *shared* understandings and expectations that are constantly reinforced through the practices of states,⁶ and by the practices of non-state actors.

As this 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 for my discussion of this subject. 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. The shared understandings, expectations, and practices of states and non-state actors about the protection of human rights and the promotion of democracy have transformed significantly in the last two decades leading to a major erosion of traditional understandings of sovereignty.

Neither the practice nor the doctrine of internal sovereignty has ever been absolute.⁷ National political leaders always have faced some international constraints on how they could treat their own subjects. 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 19th century made clear that certain extreme practices would be objects of international concern and action. But until the Second World War, 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. The moral flaw that became glaring during World War II was that if the state itself posed the primary threat

⁵ Henkin, Louis, *How Nations Behave: Law and Foreign Policy*, 2nd Edition, New York, Columbia University Press, 1979, p. 228. Also see, Mayall, James, *Nationalism and International Society*, Cambridge: Cambridge University Press, 1990, p. 20; and Newcomb Haanstad, Nancy, "Compulsory Jurisdiction Over Human Rights and Domestic Jurisdiction", Ph. D. Dissertation, University of Utah, 1984, pp. iv.

⁶ Alexander Wendt stresses that sovereignty is an institution that exists "only in virtue of certain intersubjective understandings and expectations; there is no sovereignty without an other." He argues that sovereignty norms are now so taken for granted, that "it is easy to overlook the extent to which they are both presupposed by and an ongoing artifact of practice". "Anarchy Is What States Make of It: The Social Construction of Power Politics", *International Organization* 46, Spring 1992, pp. 412-413.

⁷ Krasner, Stephen, "Westphalia," in Judith Goldstein and Robert O. Keohane (eds.), *Ideas and Foreign Policy*, Ithaca, Cornell University Press, 1993.

to the well-being of citizens, these citizens had nowhere to turn for recourse or protection. This flaw has long been recognized by some Latin American scholars and politicians. Orestes Ferrara y Marino, a member of the Cuban delegation to the Sixth International Conference of American States in 1928, warned, "If we declare in absolute terms that intervention is under no circumstances possible, we will be sanctioning all the inhuman acts committed within determined frontiers..."⁸ In the Americas, this moral flaw became glaringly apparent during the repressive military regimes many countries experienced in the 1970s and 1980s.

If sovereignty is a shared set of understandings and expectations about state authority that is reinforced by practices, then changes in these practices and understandings should in turn transform sovereignty. The expansion of human rights law and policy in the postwar period represented a conscious, collective attempt to modify this set of shared understandings and practices. Although it was placed on the international agenda when the General Assembly adopted the Universal Declaration of Human Rights in 1948, the idea of internationally protected human rights did not immediately produce changes in human rights practices. The exception was in Europe, where the European human rights regime promoted norms and practices that soon began to produce a gradual but profound impact on state sovereignty.⁹

To become effective, the human rights ideals in the declaration and treaties had to penetrate shared understandings and practices. The combination of changing international norms, compelling information, institutional procedures for action, and targeted lobbying and pressure campaigns, created awareness and led states in many cases to change their human rights practices. When a state recognizes the legitimacy of international interventions on human rights grounds, and changes its domestic human rights practices in response to these international pressures, it reconstitutes the relationship between the state, its citizens, and international actors.

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-in-

⁸ As cited in Acevedo, Domingo E. and Claudio Grossman, "The Organization of American States and the Protection of Democracy", *Beyond Sovereignty: Collectively Defending Democracy in the Americas*, edited by Tom Farer, Baltimore, Johns Hopkins University Press, 1996, ft. 11, p. 366.

⁹ Sieghart regards the European Convention on Human Rights as "a substantial retreat from the previously sacred principle of national sovereignty", Sieghart, Paul, *The Lawful Rights of Mankind: an Introduction to the International Legal Code of Human Rights*, Oxford, Oxford University Press, 1985, pp. 67-68; and Higgins, Rosalyn, "The European Convention on Human Rights", in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press, 1984, p. 538.

tervention.¹⁰ 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 is simply no longer possible to argue that basic human rights pressures, be they multilateral or bilateral, involving documentation, denunciation, cut-offs or conditioning of military or economic aid, or training programs, constitute an intervention into the essentially domestic affairs of the state. We can discuss the limits of such policies, the more and less effective or appropriate means or channels for promoting human rights or democracy, but I think it is untenable to dispute the fact that human rights practices within states have become the legitimate concern of the international community.

One piece of evidence for this position is that all of the countries of Western Europe, and most of the countries in the Inter-American system now have a human rights policy as an integral part of their foreign policy.¹¹ There are two related but analytically separate issues that form part of a comprehensive human rights policy. The first is the willingness to surrender a certain degree of sovereignty and submit internal human rights practices to some international review. This is the essence of a number of human rights treaties, since they involve not only the international codification of human rights norms, but also specific mechanisms for the international supervision of domestic human rights practices. I call this a multilateral human rights policy because it allows for multilateral supervision of internal human rights practices. 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 criteria are important because they give teeth to a supra-national institutions to oversee internal human rights practices.

The second part of a comprehensive human rights policy involves the projection of human rights values internationally through an external human rights policy. An external policy exists when explicit human rights legislation or executive policy regulate aspects of foreign policy making so that human rights are incorporated in the foreign policy calculus. This does not imply that human

¹⁰ This is also the emerging consensus of legal scholars. Fernando Teson, for example, in a recent chapter, argues "The proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable. Changing Perceptions of Domestic Jurisdiction and Intervention", in *Beyond Sovereignty: Collectively Defending Democracy in the Americas* edited by Tom Farer, Baltimore, Johns Hopkins University Press, 1996, p. 33.

¹¹ On Europe and the United States, see Sikkink, Kathryn, "The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe", in *Ideas and Foreign Policy* edited by Judith Goldstein and Robert Keohane, Ithaca, Cornell University Press, 1993.

rights issues are taken into account in all bilateral foreign policy decisions. Human rights policy is frequently criticized for being applied in a selective or inconsistent manner. Some critics contend that a human rights policy does not exist unless human rights considerations are given priority in all cases. This is an unreasonably stringent criteria to use to judge any foreign policy. All foreign policy decisions involve the balancing of number of considerations. No single consideration, even a geo-strategic one, always wins out. For this reason, I use a more limited criteria for defining the emergence of an external human rights policy. A country can be said to have an external human rights policy when explicit mechanisms exist for integrating human rights concerns into foreign policy, which have modified foreign policy decisions in some cases.

Only a few countries, such as Denmark, the Netherlands, Sweden and Norway, have both an external and a multilateral human rights policy. But if we consider either a multilateral or an external policy, then all the countries of Western Europe and most of the countries in the Inter-American system have one form of human rights policy or another.¹²

Prior to the mid-1960s, no state had a human rights policy. The historical pattern shows a clear progressive trend towards the adoption of human rights policies. By the 1960s, a few European countries adopted a multilateral policy, with the acceptance of the compulsory jurisdiction of the European Court of Human Rights. But it was not until the late 1960s and early seventies that countries starting adopting external or bilateral human rights policies. But by the mid-1990s, these policies were increasingly commonplace, and had become the norm in the European and Inter-American systems.

The U. S. is alone in having an external policy but not a multilateral policy. Because the United States has neither ratified the Optional Protocol to the Covenant on Civil and Political Rights, nor ratified the American Convention on Human Rights with the resulting compulsory jurisdiction of the Inter-American Court, it can not be said to have a comprehensive human rights policy.

The second recent phenomena to note as evidence of changing understandings and practices on issues of human rights is the recent dramatic increase in the number, size, and sophistication of inter-governmental and non-governmental human rights organizations. Prior to 1948, no intergovernmental organizations dedicated to the issue of human rights existed. By 1990, twenty

¹² In the Inter-American system, the ratification of the American Convention of Human Rights and the recognition of the binding jurisdiction of the Inter-American Court, serves as an indicator of an external human rights policy, while support for the process set in motion by the Santiago Declaration would constitute one element of an external policy.

seven human rights intergovernmental organizations were functioning.¹³ These international organizations are important as bodies that supervise adherence to human rights norms, and as arenas where non-governmental organizations came together and a focal point for their work.

Although some non-governmental human rights organizations have existed for many years,¹⁴ in the 1970s and 1980s human rights NGOs proliferated and increased in diversity. 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 these groups together.¹⁵ In turn, these human rights organizations developed strong links to domestic human rights organizations in countries experiencing human rights violations. This growth in human rights organizations parallels a more general growth in international nongovernmental organizations in the post WWII period.¹⁶ Latin America has more domestic human rights NGOs than do other parts of the developing world. A 1981 directory of organizations in the developing world concerned with human rights and social justice discussed 220 such organizations in Latin America, compared to 145 in Asia and 123 in Africa and the Middle East. A similar directory 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 50-60 human rights groups.¹⁷ An international "demonstration effect" was at work in Latin America during the decade of the 1980s, as the work and successes of the original human rights organizations in the region inspired others to follow their example.

13 *Yearbook of International Organizations* 1948, and 1990. These numbers include only organizations, excluding the Treaties, Conventions, and Declarations that are also listed in the Yearbook.

14 The oldest of human rights organizations, the Anti-Slavery Society, was founded in 1839, but most human rights INGOs have emerged since WWII. For a discussion of Non-governmental Organizations in the areas of human rights, see Weissbrodt, David, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights", in *Human Rights in International Law: Legal and Policy Issues* edited by Theodor Meron, Oxford, Clarendon Press, 1984.

15 Wiseberg, Laurie S. and Harry M. Scoble, "Monitoring Human Rights Violations: The Role of Nongovernmental Organizations", in *Human Rights and American Foreign Policy* edited by Donald P. Kommers and Gilbert D. Loescher, Notre Dame, University of Notre Dame Press, 1979, p. 183-184.

16 Skjelsbaek, Kjell, "The Growth of International Nongovernmental Organizations in the Twentieth Century", *International Organization* 25, Summer 1971.

17 Domestic groups refers to groups that work on human rights in their base country. Human Rights Internet, *Human Rights Directory: Latin America, Africa, and Asia* edited by Laurie S. Wiseberg and Harry M. Scoble, Washington, D. C., 1981. "Human Rights Directory: Latin American and the Caribbean", *Human Rights Internet Reporter*, Vol. 13 (2-3) Special Issue (January 1990). Although the definition used by these directories is broader than many discussions of human rights groups in Latin America, the comparison of the 1981 and 1990 figures gives an idea of the dramatic growth in the Latin American human rights network, and the wide range of groups working on diverse human rights issues throughout the region.

The numerous activities of states, inter-governmental organizations, and NGOs in the area of human rights and democracy mainly involve documentation, denunciation, redirecting military and economic assistance, and education and training programs. These activities accumulate to underscore an alternative understanding to classic doctrines of sovereignty and non-intervention.

Legal and political scholars always assume that there is a profound contradiction at the heart of the legalist tradition in Latin America between support for sovereignty and nonintervention and the promotion of human rights and democracy. Yet a survey of the history of legal and political thought and action in Latin American on the topic of democracy and human rights reveals that this contradiction is not as severe as it is often portrayed. The early Latin American jurists and politicians renowned for their spirited defense of non-intervention did not intend the doctrine to serve as a shield for the violations of human rights. In this paper, I will use a historical survey of the writings of Latin American jurists on this topic as a backdrop for resituating current human rights policies and recent developments within the Inter-American system.

The Inter-American tradition of support for human rights and democracy

Sometimes Latin Americans political leaders suggest that human rights are an "Anglo-Saxon" export inappropriate to their countries. For example, recently the *New York Times* reported that when an Amnesty International report criticized the Panamanian government's decision to pardon nearly 1,000 of the worst human rights offenders during the dictatorship of General Manuel Antonio Noriega, a prominent Panamanian government party legislator said that the organization was "brazenly and shamelessly at the service of Anglo-Saxon imperialism."¹⁸ These kinds of statements both ignore both recent developments in international relations and international law, and the history and tradition of the region. It seems particularly ironic that a Panamanian would make such a statement because Panama was one of the most eloquent spokesmen for international human rights standards at the early work on the United Nations.

In Latin America, there was a strong tradition of support for international law as a vehicle for preventing war, and a means by which weaker countries might find refuge from the less lawlike interventions of the more powerful, especially the United States. Legalism had primarily been identified with support for doctrines of sovereignty and nonintervention, but the legalist tradition

¹⁸ Rohter, Larry, "Panama's Plan to Pardon Human Rights Abusers Draws Fire", *New York Times*, Tuesday, May 14, 1996, p. A4.

of support for democracy and human rights also has a long history in Latin America.

The Chilean, Pedro Felix Vicuña published a plan in 1837 calling for a "Great American Congress" to support democratic governments and oppose tyrants. Juan Bautista Alberdi, framer of the Argentine constitution of 1853, supported Vicuña's idea, and further proposed an American Court, with the right of collective intervention to oppose tyranny.¹⁹ Alberdi was an ardent advocate of individual liberty, and believed that the omnipotent state could be the negation or the main rival of liberty.²⁰ Ecuadorean diplomat, Carlos Tobar proposed in 1907 a policy of collective non-recognition of governments coming to power by other than democratic means.²¹ After WWI, most Latin American states joined the League of Nations with its acceptance of the International Court of Justice. Despite these early precursors to modern debates about human rights and democracy, the international promotion of human rights actually began to enter international discourse in the inter-war period. The Convention of the League of Nations contained no mention of human rights, although it does mention "fair and humane conditions of labour" and "just treatment" of native inhabitants of dependent territories. Some delegates had raised human rights issues during the drafting of the Convention, but they did not receive widespread support and were not incorporated into the document.²²

Lawyer-diplomats first introduced and promoted the idea of internationally recognized human rights. Chilean jurist Alejandro Alvarez, Russian jurist and diplomat Andre Mandelstam, and Greek jurist and diplomat Antoine Frangulis, first drafted and publicized declarations on international rights of man, as part of their work with the non-governmental legal organizations, the American Institute of International Law, the International Law Institute, and the International Diplomatic Academy. Mandelstam drafted a text of a Declaration of the International Rights of Man, which the plenary session of the International Law Institute adopted in October of 1929. Mandelstam later publicized his Declaration, publishing articles and a book on the subject, and teaching human rights courses in Geneva and the Hague. Two networks of non-governmental organizations, the International Federation of Leagues for the Defense of the

¹⁹ Atkins, G. Pope, *Latin America in the International Political System*, 2nd ed., Boulder, Westview Press, 1989, p. 228.

²⁰ "La Omnipotencia del Estado es la Negacion de la Libertad Individual", *El Pensamiento de Alberdi*. Buenos Aires, Editorial Lautaro, 1943, pp. 11-35.

²¹ Atkins, G. Pope, *op. cit.*, p. 228.

²² Burgers, Jan Herman, "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century", *Human Rights Quarterly* 14, 1992, p. 449.

Rights of Man and of the Citizen, and the International Union of Association for the League of Nations, endorsed the principles of the Institute Declaration in 1931 and 1933. Frangulis, as the delegate from Haiti, introduced a international human rights resolution in the League of Nations in 1933, but it received scant support from countries already in the midst of the crisis leading to German withdrawal from the League.²³ Aside from the work of these handful of individuals, the concept of human rights received virtually no attention from policy makers and intellectuals in the pre-war period. Although many were deeply concerned with democracy and freedom, they did not frame these issues in the language of human rights, nor call for international protection of these rights.²⁴

It is quite interesting that it was a Chilean, a Greek, and a Russian jurist responsible for inserting the idea into global debates in the early 20th century. These individuals from countries at the periphery of the international system saw in human rights as a means of protecting individuals from the repressive practices of their own governments. Both Frangulis and Mandelstam were political refugees, the former from the Greek dictatorship, the later from the Bolshevik regime. Mandelstam was also motivated by the massacre of Armenians in Turkey in 1915, where he had been posted as a Russian diplomat, and Frangulis was concerned about the persecution of Jews in Germany.²⁵

Alejandro Alvarez was one of the main intellectual leaders of juridical Panamericanism, as were other noted Latin American jurists like Carlos Calvo and Luis Drago, authors of the Calvo and Drago doctrines, which sought to use law to limit intervention in the region.²⁶ The regional legalist tradition found expression in the American Institute of International Law, founded in 1915 by Alvarez and James Brown Scott, a trustee and secretary of the Carnegie Endowment for International Peace, which sponsored and financially assisted the movement. The Institute consisted of representatives of the international law societies of countries of North and South America. The primary goals of the Institute were the codification of existing international law and the promotion of new principles of international law, especially regarding the principles of non-intervention. The Institute met at irregular intervals until 1938,

23 This entire section draws heavily on Burgers, "The Road to San Francisco", pp. 450-459, as well as on an interview with Jan Herman Burgers, The Hague, Netherlands, November 13, 1993.

24 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 pick up on the political messages embodied in the human rights declarations and resolution that Frangulis and Mandelstam produced, pp. 459-464.

25 Burgers, p. 455.

26 Atkins, G. Pope, *op. cit.*, p. 203, 215-216.

eventually adopting 30 draft projects on international law topics. The main accomplishment of the Institute was the "Declaration of the Rights and Duties of Nations". Although one of the most important "rights of nations" enthroned 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 within", this did not mean that Institute members disregarded questions of human rights and democracy. Indeed, the preamble to the Declaration states that, 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 rights."²⁷ A version of this Declaration was later drafted as a Treaty, which was signed at the Inter-American Conference in Montevideo in 1933, and was ratified by the United States in 1934. The Treaty, which did not mention human rights, had at its heart an article which stated "No state has the right to intervene in the internal or external affairs of another," which for the United States constituted a repudiation of the Roosevelt Corollary to the Monroe Doctrine. Another key document of the inter-war period, the Declaration of American Principles, while forceful in its emphasis on peaceful settlement of differences and the rule of international law, made no mention of human rights.

This language suggests a conflict with the idea of the international protection and promotion of human rights, and indeed human rights are rarely mentioned in the proceedings of the American Institute. Yet Alvarez did not see a contradiction between his main work for the "rights of nations" and the subject of individual liberties. In a series of lectures delivered at U. S. Universities, Alvarez said that "International law in the future will realize the beautiful maxim "Above all nations is humanity," and argued that Latin Americans gave an even broader meaning to individual liberty than did people in the United States or Western Europe.²⁸ In one of his most important texts, the "Declaration on the Fundamental Bases and Great Principles of Modern International Law," the section on "Rights of States" was followed by on "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

²⁷ "Declaration of the Rights and Duties of Nations", adopted by the American Institute of International Law, Washington, D. C. 1916, which appears verbatim in James Brown Scott, "Editorial Comment," *10 American Journal of International Law*, 1916, p. 125.

²⁸ Alvarez, Alejandro, *International Law and Related Subjects From the Point of View of the American Continent*, Washington, D. C., The Carnegie Endowment, 1922, p. 27, 37.

enjoy the benefits that the sentiment of international justice impose today on all civilized people". 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, and the rights to freedom of religion and belief".²⁹ When the American Institute of International Law attempted to codify existing International Law, it adopted 30 draft projects on international law topics, including one on the "International Rights and Duties of Natural and Juridical Persons", which listed the rights to meet and associate, freedom of the press, of conscience, and of worship.³⁰

The early Latin American jurists and politicians did not intend for the doctrine of non-intervention to serve as a shield for the violations of human rights. To the contrary, in the words of Alvarez, "In 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."³¹ What is quite clear in this conception is that international law and the whole concepts of non-intervention and the rights and duties of states were perceived as vehicles to contribute to a greater end: that of the progress of humanity.

According to one of the co-founders of the American Institute, James Brown Scott, the purposes of the founders was to allow more democratic control of foreign policy. "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."³²

In this sense, the way that 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 we can say that 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.

29 Alvarez, Alejandro, "Declaracion sobre Las Bases Fundamentales y los Grandes Principios del Derecho Internacional Moderno", *La Reconstruccion del Derecho de Gentes*, Santiago de Chile, Editorial Nascimento, 1943, p. 89-91.

30 *American Journal of International Law* 20 (Special Supplement for October 1926), pp. 326.

31 Alvarez, "Declaración", p. 91.

32 As cited in Finch, George A., "James Brown Scott, 1866-1943", *American Journal of International Law*, Vol. 38, April, 1944, p. 207.

It did not necessarily see non-intervention as an end value in and of itself, but as a means to secure other desired goals. The Uruguayan foreign minister, Alberto Rodriguez Larreta, recognized 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."³³ He argued instead that non-intervention was one of the important principles of the Inter-American system which had to "harmonized" with the other principles.

The principle of non-intervention by one State in the affairs of another, in the field of inter-American relations, constitutes in itself a great advance achieved during the last decades; 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.³⁴

This legal tradition also led Latin Americans to support human rights language in the U.N. Charter, and to draft and pass an American Declaration on the Rights and Duties of Man at the Bogota Conference in 1948, months before the United Nations passed the Universal Declaration of Human Rights. Most Latin American countries were present at the San Francisco Conference and became charter members of the new United Nations Organization.

Another, more practical issue united the concern of Latin American diplomats for non-intervention and for internationally protected human rights. One of the major justifications for U.S. military intervention in the region in the past had been the argument that states had to protect the rights of their citizens

³³ As cited in Gordon Connell-Smith, *The Inter-American System*, Oxford, Oxford University Press, 1966, p. 142.

³⁴ Rodriguez Larreta, Alberto, "Inter-American Solidarity: Safeguarding the Democratic Ideal: Note from Uruguayan Foreign Minister to Secretary of State", United States Department of State, *Bulletin*, November 25, 1945, p. 865-866.

residing abroad. Thus 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 only tenable objection that may have been made by the most ardent proponents of diplomatic protection....”—the argument that it is necessary to guarantee an alien living abroad a ‘minimum standard of civilized justice’. 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....”³⁵

In late 1945 and early 1946, the American states considered a proposal by Uruguayan Foreign Minister Rodriguez Larreta calling for collective intervention to oppose dictators and promote democracy and human rights. The Uruguayan plan was motivated in part by a fear of intervention from Argentina, then under Peron, but generated a broad debate in the region. The U.S. endorsed the plan, and six Latin American governments supported it with some reservations. The remaining States rejected the plan.³⁶

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 Meeting where the Charter was drafted, the Uruguayan delegation put forward a proposal first suggesting the language that the U. N. should promote human rights “without distinction as to race, sex, belief or social status”. This would later be modified in the Charter, and would appear in Article 1, as “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Likewise the Uruguayan delegation proposed that the Charter should contain a “Declaration of Rights,” and “a system of effective international juridical guardianship of those rights”.³⁷

In the next paragraph, the Uruguayan delegation urged that the U. N. should be based on the principle of “rights inherent in their full sovereignty”. In other words, they did not see a contradiction between “a system of effective

³⁵ “Opinion of the Department of Foreign Relations of Mexico Concerning the Dumbarton Oaks Proposals for the Creation of a General International Organization”, April 23, 1945, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Vol. III. Dumbarton Oaks Proposals: Comments and Proposed Amendments, English Text, New York, United Nations Information Organizations, 1945, p. 70.

³⁶ The following paragraph draws from Atkins, p. 228-229.

³⁷ *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Vol. III: Dumbarton Oaks Proposals, Comments, and Proposed Amendments, New York, United Nations Information Organizations, 1945, p. 34. “New Uruguayan Proposals on the Dumbarton Oaks Proposals”, May 5, 1945.

international judicial guardianship of rights”, and the practice of full sovereignty.

The Chilean delegation to the San Francisco conference made the relationship clearer. Under the heading “the concept of sovereignty” it argues that “States 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...*” (emphasis added).³⁸

The Mexican delegation, known for its spirited defense of doctrines of non-intervention, nevertheless argued that the Dumbarton Oaks proposals “contains 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....” and then preceded to give an almost complete history of the process through which countries had moved toward the adoption of an international bill of rights and a international system to obtain application of those rights.³⁹ 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, and the work of the International Law Institute, the French League of the Rights of Man, and the Sankey Committee in England, as well as the Declaration of Principles for Peace, approved in 1943 by churches in the United States. The report then mentioned the Draft Declaration of the American Institute of Law, and the report of the “Commission to Study the Organization of Peace, and the Second and Third conferences of the Inter-American Bar Association” held respectively in Rio de Janeiro in 1943, and Mexico City in 1944. The resolutions passed at the third conference in Mexico City emphasized the “necessity” of a Declaration of Rights of Man, and the importance of “appropriate international machinery and procedures to guarantee the practical application of the general principles contained in the Declaration.” What is striking about the Mexican presentation is that it makes clear how widely circulated and known each of these different international efforts to promote a declaration of human rights within Latin American diplomatic circles, and the degree to which key Latin American delegations embraced and furthered the human rights cause in the mid 1940s.⁴⁰

³⁸ “Additional Amendments and Proposals by the Delegation of Chile”, May 6, 1945, *Documents of the United Nations Conference*, p. 293.

³⁹ “Opinion of the Department of Foreign Relations of Mexico Concerning the Dumbarton Oaks Proposals for the Creation of a General International Organization”, April 23, 1945, *United Nations Conference on International Organization*, p. 63, 71-73.

⁴⁰ “Opinion of the Department of Foreign Relations Concerning the Dumbarton Oaks Proposals for the Creation of a General International Organization”, pp. 71-73.

The Latin American states were joined by a strong NGO lobby at the San Francisco meeting. The U. S. delegation included over 40 NGO "consultants," and these consultants were among the most active lobbyists for human rights. The record of the success of the NGO lobbying effort and the efforts of Latin American delegations in favor to human rights find testimony in the Charter itself. The original Dumbarton Oaks proposal had only one reference to human rights; the final U. N. Charter has seven references to human rights, promotion of human rights is listed as one of the basic purposes of the organization, and ECOSOC is called on to set up a human rights commission, the only specifically mandated commission in the Charter.

Despite the success that human rights advocates had in securing human right language in the Charter, they also experienced some failures. A number of delegations had urged that the language state that the United Nations safeguard or *guarantee* respect for human rights, that it be instructed to make a declaration of rights, and to establish a system of effective judicial international guardianship of rights. The demand for a bill of Rights was supported by the delegate from Panama, the jurist Dr. Ricardo J. Alfaro, and supported by amendments proposed by Mexico and Uruguay. The final language only called upon the U. N. to promote, encourage, and assist respect for human rights. Although the promotion of human rights is listed in the preamble and the purposes of the United Nations, the words are curiously absent from Article 2, which sets out the principles that members should follow, which determines the obligations imposed on members. The Uruguayan delegation made a concerted effort to ensure that human rights language and obligations were included in the principles section, and said that it was certain 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 conference in Mexico. The delegate from Uruguay, Dr. Hector Paysse Reyes, argued that "The right to and respect for life constitute *the essence* (emphasis in original) of the whole system of universal juridical order."⁴¹ Other states that offered amendments aimed at including human rights in the discussion of principles in the Charter included Colombia, the Philippines, Cuba, Ecuador, India, Panama, Brazil, the Dominican Republic, and Mexico, Norway, and New Zealand. The strong representation from Latin American states is noteworthy.

Previously delegates had included in the section on "suspension" of membership the clause that a member which persistently violated the Principles in

41 "Statement of Uruguayan Delegation on Its Position with Reference to Chapter I and II of the Charter as Considered by Committee I/1", *Documents of the United Nations Conference on International Organization*, p. 630.

the Charter could be expelled from the organization. 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 began violating 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.⁴²

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 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 U. S. S. R and the U. K., shared the U. S. concern to limit possible infringement on domestic jurisdiction.⁴³ Although the human rights provisions did not carry any teeth at this early stage, states were very wary of the sovereignty implications of the human rights issue.

As a result, the Charter mandate on human rights is less firm than many NGOs and Latin American states desired, calling only for the promoting and encouraging respect for human rights, rather than protecting or safeguarding rights. The subcommittee which considered the stronger language held that "assuring or protecting rights is primarily the concern of each state". It recognized, however, the "if such rights and freedoms were grievously outrages 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".⁴⁴ This then was the compromised that characterized United Nations human rights work from 1945 until 1973. The United Nations was expected to promote human rights but not protect them, unless such violations could be seen to threaten peace. What is important to point out is that alternative visions were presented and articulated at the San Francisco Conference, and that a handful of Latin American states were among the most eloquent spokespeople for that alternative vision. The alternative vision would have to wait another forty years to begin 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

⁴² "Statement of Uruguayan Delegation of its Position with Reference to Chapters I and II of the Charter as Considered by Committee I/1", June 15, 1945, *Documents of the United Nations Conference on International Organization*, Vol. 6, p. 628-633.

⁴³ Johnson, M. Glen, "Contributions of Eleanor and Franklin Roosevelt", p. 24.

⁴⁴ "Report of Rapporteur, Subcommittee I/1/A (Farid Zeineddine, Syria), to Committee I/1", June 1, 1945, *Documents of the United Nations Conference on International Organization*, p. 705.

creation of a human rights commission, paved the way for all of the later human rights actions within the U. N. system.

Latin American states were also involved in promoting the very first human rights treaty adopted by the United Nations: the Convention on the Prevention and Punishment of the Crime of Genocide, passed on December 9, 1948, one day before the U. N. approved the comprehensive Universal Declaration of Human Rights. Panama, Cuba, and India sponsored the original resolution calling on the United Nations to draft a treaty on Genocide.

The American states had long recognized the exercise of representative democracy as one of the basic principles of the Pan Americanism. The countries of the Americas innovated 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 "Declarations 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'".⁴⁵ 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.⁴⁶ The Charter of the OAS states 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", but this "requirement" was never made a condition for membership in the organization.

Despite this impressive past, the issue of human rights and the promotion of the democracy dropped out of Inter-American debates largely because in the U. S. human rights foreign policy agenda from 1953 to 1973 the human rights issue was "collapsed into its anti-communist policy".⁴⁷ During this period, U. S. policies contributed to the perpetuation of dictators through the moral and material support it provided to those regimes.

In this situation, 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. So, democracy promotion was opposed, not because it was intrinsically flawed or inappropriate but because of the fear of how it would be used in the political context of the Cold War. One

45 As cited in Acevedo, Domingo E. and Claudio Grossman, "The Organization of American States and the Protection of Democracy", in *Beyond Sovereignty*, p. 134.

46 Robertson, *Human Rights in Europe*, 2nd ed., Manchester University press, 1977, on the comparison of Europe and the Americas, see Laurence Whitehead (ed.), *The International Dimensions of Democratization: Europe and the Americas*, Oxford University Press, 1996.

47 Forsythe, *Human Rights and World Politics*, p. 104.

leading scholar of Mexican foreign relations concluded in 1958: "While this fear exists, while the present situation does not change, the cornerstone of the inter-American system, its guiding principle, will not be democracy, but intransigent non-intervention."⁴⁸ 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. human rights policy emerged in the 1970s exactly as a protest and protection against the moral and material support to dictators that characterized U. S. policy toward the developing world in the 1950s and 1960s. From the mid 1960s to the early 1970s, a number of members of Congress began to be concerned with human rights. The invasion of the Dominican Republic, the Vietnam war, the situation in Rhodesia, South Africa, and in East Pakistan, the coups in Brazil, Greece, and later in Chile all focused attention on the issue of human rights.

In this sense, the change in U. S. policy toward the region signaled by the emergence of human rights policy was a precondition for recovering the regional tradition of support for human rights and democracy. A viable regional approach for the multilateral promotion of human rights could emerge only after governments in the region were reassured that the U. S. would not misuse such a policy for its own purposes.

Latin Americans also played an important role in contributing to the adoption of modern human rights policies. The role of political exiles from Brazil, Argentina, Uruguay, and especially Chile played in encouraging governments in the United States, Europe, and in Latin America to think about human rights and to adopt human rights policies can not be underestimated. Some Latin American human rights activists originally had to search their consciences about their whether their allegiance to nationalism and the doctrine of non-intervention prevented them from urging states to adopt sanctions against violators of human rights. 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, indeed could not mean international silence in the face of summary execution, disappearance, torture and political imprisonment.

With two landmark decisions the OAS has regained the role it played before WWII in the forefront of international efforts to promote human rights and democracy. With the "Declaration of Santiago" (Resolution 1080) of 1991 creating an automatic procedure for convening a meeting of foreign ministers

⁴⁸ Castañeda, Jorge, *Mexico and the United Nations*, Westport, CT, Greenwood Press, 1958, p. 185.

in the event of an interruption of democracy, the OAS created a clear set of signals and disincentives to military coups in the region. In the Protocol of Washington of 1993, states overwhelmingly voted to modify the OAS Charter, giving the General Assembly the power to suspend from membership by a two-thirds vote a government that overthrows a democratic regime.⁴⁹ If ratified, the Protocol will move the OAS in the direction of the European Union as a club of democratic states.

The process of reconceptualizing sovereignty and non-intervention has been underway for quite a while in the Inter-American system. Rather than see 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 seen as a vehicle to promote human progress and never as a shield to justify the violations of rights.

Sovereignty is not going to disappear. The sovereign state is still the dominant force in protecting and violating human rights. But states are altering their understandings of the scope and limits of sovereign authority. Sovereignty is being reconstituted by an accumulation of practices, many as ordinary as writing a letter on behalf of a prisoner of conscience, others as path-breaking as international court decisions against a government for "disappearing" its citizens. How is it possible that such activities reshape sovereignty? Because sovereignty is a set of intersubjective understandings about the legitimate scope of state authority, reinforced by practices, the mundane activities of states, international organizations and non-governmental organizations can accumulate to question the idea that it is nobody else's business how a state treats its subjects. Every report, conference, or letter, the network underscores an alternative understanding: the basic rights of individuals are not the exclusive domain of the state, but are a legitimate concern of the international community. The evidence of this new understanding can be found not only in the statements made by states, but more importantly in their changing actions.

⁴⁹ Vaky, Viron P., "The Organization of American States and Multilateralism in the Americas", *The Future of the Organization of American States*, New York, The Twentieth Century Fund Press, 1993, p. 23.