

Book Note: The Human Right to Individual Freedom: A Symposium on World Habeas Corpus

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BOOK NOTE

THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS. Edited by Luis Kutner. Coral Gables, Florida: University of Miami Press, 1970. Pp. 249.

In its classic and still primary sense, international law is just what the name implies: "law" concerning relations between states. It is made by the states through treaty or long continued practice (custom); it is followed by states; states are the primary judges of its breach; it is enforced by states, if it is enforced at all. With only very limited exceptions, human beings as such were not the concern of that law. Pirates, as the main exception, were considered enemies of all mankind, and were thus subject to capture, trial and condemnation by any state, whether or not that state's nationals had suffered loss or injury at the hands of the pirate. In part, this simply pointed up the norm: since the pirate's acts were on the high seas, no state had territorial jurisdiction over him, so any state capturing him could take action against him.

To the pirate, there has been added, in general consensus, the war criminal. He too may, in theory, be tried by any state with any real interest in his crimes though it may not have been affected directly by them.

In recent decades, there has been substantial demand by scholars and others in many countries to expand this short, "negative" list of people with whom international law has been directly concerned, to somehow make the law the guardian of individual human rights, at least rights of the most

basic kind. To some degree, international law has been made responsive to these demands, though in two different ways. On the one hand, in addition to post-World War II revision and expansion in the scope of coverage of the humanitarian conventions dealing with prisoners of war, the sick and injured, and with civilians in occupied territory, there is now, for example, a convention describing and proscribing "genocide" (though the United States is not yet a party). At the same time, however, proposals for an international criminal court to deal with war crimes and the like have received little favorable attention from the nations.

In addition to UN concern with human rights in specific countries at specific times, we find other broad expressions of interest. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, for example, provides for guarantees of life, liberty and security of person with effective judicial remedies and freedom from arbitrary arrest, detention and exile (Articles 3, 8, 9) and the Covenant on Civil and Political Rights, now open for ratification, has provisions to the same effect in Article 9. An Optional Protocol to the Covenant permits, for Parties, a very limited right of individual petition for redress of grievances.

On the other hand, it is also true that

institutions have occasionally existed in the past to which individuals would bring grievances, even against their own nations. The record is spotty however. The Central American Court of Justice, for example, permitted persons, in some cases, to bring actions against governments. The Court only lasted for 10 years (1907-1917) and in no actual case did an individual win.¹ An Arbitral Tribunal in Upper Silesia between the wars was far more successful in permitting individuals to bring actions against member states.² In more recent times, in Europe, more progress has been achieved. The European Convention for the Protection of Human Rights and Fundamental Freedoms came into force in 1953 for most of the Western European countries.³ It establishes a Commission of Human Rights and a Court of Human Rights and provides an impressive bill of rights for nationals of the member states. While a strict rule of exhaustion of local remedies is followed, individuals can bring claims against their own states in proper cases.⁴ While limited in their activities, these institutions do suggest that, in a region where states are friendly and more alike than unlike, limited international in-

stitutions with some power to rectify or at least to call attention to inroads on agreed human rights can be established.

Last fall, in the Introduction to his Annual Report,⁵ UN Secretary General U Thant, pointed out that, theoretically, the UN had little standing in situations concerning the violation of human rights within the frontiers of a country. He suggested that, while Members had done an "admirable" job on human rights and the "texts" existed, there was still no place where an individual or group of individuals could find recourse against oppression within his own country. He felt the time was ripe for governments in the UN to give justice a world-wide dimension.

We have thus a picture of mounting interest in some countries at least in the status of the individual as a "subject" of international law, together with the obviously disparate willingness of states to subject any of their internal problems to any form of international scrutiny. As one of a number of endeavors to make the states more responsive and more internationally responsible in matters of human rights, Luis Kutner, an American lawyer and legal educator, began some years ago to formulate proposals for the establishment of a formal international right of habeas corpus. The book under review, *The Human Right to Individual Freedom*,⁶ presents, in its own terms, "Essays on the Establishment of a World Court of Habeas Corpus." While some of the essays appear

¹ See M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, 52 (1943).

² See G. KAECKENBEECK, *INTERNATIONAL EXPERIMENT OF UPPER SILESIA* (1942).

³ See, e.g., Comment, *The European Commission on Human Rights*, 50 AM. J. INT'L L. 949 (1956); Note, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1958 BRIT. YRBK. INT'L L. 356.

⁴ The operations of the Commission and the Court have been the subject of a number of books and articles in recent years. See, e.g., A. H. ROBERTSON, *HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW* (1968).

⁵ UN Doc. A/8401/add. 1 (1971).

⁶ *THE HUMAN RIGHT TO INDIVIDUAL FREEDOM* (L. Kutner ed. 1970).

to have been written for this symposium, others are collected from other published sources. All are by established authorities in the field of international law, though the pieces are highly uneven in content. And at the end we are left with a plea, a call for action, which is readily acceptable as an aspiration, but which appears unlikely of realization on a global scale while the present international system remains largely in its present form.

As Arthur J. Goldberg, former Associate Justice of the United States Supreme Court and former U.S. Ambassador to the United Nations, points out in a brief foreword,⁷ habeas corpus, the "great writ," means to us a procedure whereby "official detention can be challenged and, if not justified on the basis of valid laws, terminated."⁸ As he notes, without a procedural mechanism of this type, many substantive rights remain mere aspirations. Yet from the outset, he suggests that there is, as yet, little universal "agreement on the content and extent of international rights, much less on the form of the necessary guarantees."⁹ He urges nevertheless that efforts go forward so that, hopefully, meaningful (and one must add, enforceable) standards for the protection of individual human rights may develop.

Is the concept embodied in the Anglo-American writ of habeas corpus foreign to the legal systems of other parts of the world? Brief essays on the laws of Italy,¹⁰

Uganda,¹¹ West Germany,¹² Cambodia,¹³ the Republic of China,¹⁴ Colombia,¹⁵ and Ecuador,¹⁶ and an interesting, lengthier exposition of the law in Islamic countries¹⁷ all suggest that the concept is entirely compatible with notions of domestic (and, presumably, international) order. Is it to some degree prophetic, no doubt, that no lawyers from Communist countries are included in this collection?

Several essays, often reprinted from other sources, are devoted rather more to the broader problem of protecting the individual through the development of international law and institutions than to habeas corpus in particular. Roscoe Pound presents a brief overview of the nature of the international legal system in an introduc-

of Cassation, Rome, *A World Court of Habeas Corpus*. *Id.* 31-35.

¹¹ Chief Justice Sir Udo Udoma, *Some Thoughts on World Habeas Corpus*. *Id.* 35-43.

¹² Chief Justice Gebhard Müller, Constitutional Court, Fed. Rep. of Germany, *Possibilities of the World Habeas Corpus Movement*. *Id.* 44-46. Justice Müller notes the difficulties of a world court of habeas corpus and argues for regional courts. *Id.* 45.

¹³ Chief of State Norodom Sihanouk, *Cambodia's Viewpoint of World Habeas Corpus*. *Id.* 47-48.

¹⁴ Ku Cheng-Kang, *The Chinese Constitution and the Habeas Corpus Principle*. *Id.* 49-50.

¹⁵ Samuel B. Restrepo, *The Idea of Habeas Corpus in Colombia*. *Id.* 51-54.

¹⁶ Gustavo Salgado, *World Habeas Corpus: The Ecuador View*. *Id.* 189-200.

¹⁷ M. Cherif Bassiouni, *Islam: Concept, Law, and Habeas Corpus*. *Id.* 98-116. Professor Bassiouni notes that for Islamic countries, "the limitations imposed by World Habeas Corpus on the absolute powers of the ruler for the maintenance of the inalienable rights of man as endowed by his Creator are wholly in communion with Islam." *Id.* at 101.

⁷ *Id.* 7-8.

⁸ *Id.* 6.

⁹ *Id.* 7.

¹⁰ Chief Justice Silvio Tavolaro, Supreme Court

tory essay.¹⁸ Justice William O. Douglas discusses well and at length the concern of international law in general and of the United Nations system with the needed interaction of states, their growing interdependency, and the developing concern for individual rights in the world and in western Europe especially.¹⁹ Another Supreme Court Justice, William J. Brennan, Jr., contributes a brief comment on the utility of procedural mechanisms in defense of human rights and suggests that American lawyers take the lead in pressing toward a world court of human rights.²⁰ Short essays discussing the feasibility and utility of international habeas corpus were also contributed by Professors Myres S. McDougal,²¹ Harold D. Lasswell,²² and Quincy Wright;²³ Egon Schwelb discusses human rights initiatives in and through the United Nations, especially the Commission on Human Rights;²⁴ Leonard v. B. Sutton, in a well-documented essay, describes the development of the writ in English and

American history and also goes into its adaptation to the international scene.²⁵ There is also a comparatively lengthy and rather confused article commenting on the development of an international penal law, written by Tran Tam.²⁶

The editor, Luis Kutner, the father of the notion of world habeas corpus, expresses his views in an introductory Editor's Comment²⁷ and in *The Legal Ultimate for the Unity of Mankind*,²⁸ a paper first presented at the Conference of the Inter-American Bar Association and the American Bar Association at San Juan, Puerto Rico, in May, 1965. In both, he describes other international efforts aimed at developing a standard of human rights and the origins and continuing development of world habeas corpus. In the article, Mr. Kutner also describes other national procedural remedies akin to habeas corpus, such as the Mexican "Amparo," and brings in analogies from other parts of the world. For international law, he proposes circuit courts of habeas corpus in nine regions of the world, each region, hopefully, made up of nations with more or less similar views of sovereignty and human rights (and "legal traditions, culture, religion, and history").²⁹ A supreme court, to hear appeals from the circuits, is also called for. Detained persons, having exhausted local remedies would seek redress before these circuit courts

¹⁸ Roscoe Pound, *A Forward Step Toward a Legal Order*. *Id.* 11-15.

¹⁹ Justice William O. Douglas, *The Rule of Law in World Affairs*. *Id.* 59-84.

²⁰ Justice William J. Brennan, Jr., *International Due Process and the Law*. *Id.* 85-89. He notes however that the State Department argued, in the 1950's, that "with the many deep seated political and ideological differences which exist among the various nations, it would not appear to be practical to seek meaningful agreement upon a statute for such a court on the part of most countries." *Id.* 88-89.

²¹ *A Practicable Measure for Human Rights*. *Id.* 90-93.

²² *The Bond Between Prescriptive Content and Procedure*. *Id.* 94-97.

²³ *Steps in the Realization of World Habeas Corpus*. *Id.* 159-69.

²⁴ *The United Nations and the Protection of Personal Liberty*. *Id.* 117-26.

²⁵ *Habeas Corpus—Its Past, Present, and Possible Worldwide Future*. *Id.* 170-83.

²⁶ *The Struggle for International Rule of Law*. *Id.* 127-58.

²⁷ *World Habeas Corpus and the Rule of Law*. *Id.* 17-28.

²⁸ *Id.* 201-40.

²⁹ *Id.* 215.

which could affirm the detention or order a release of the petitioner. Details of approach and procedure are described in this article and are worked out at length in a Treaty-Statute of the International Court of Habeas Corpus, which is included as an Appendix.³⁰ Mr. Kutner is not so naive as to believe that his proposals are likely to be adopted soon, or universally; he argues nevertheless that like-minded states could readily create a circuit court in a region and thus set the court system in motion.

It is easy to agree with the old maxim that, in any long journey, it is the first step which counts. To aid in the growing interest of many states, expressed in UN resolutions, proposed treaties, new European institutions, and elsewhere, in assuring at

least some international protection for individual human rights, efforts of this sort are important in indicating alternate routes which may, in time, be followed. While this reviewer is far less sanguine than Mr. Kutner in believing that many states, of any persuasion, will be willing, in the foreseeable future, to open their internal processes to any form of international scrutiny, it is necessary to keep developing and suggesting pathways that states may, at some point, be willing to try.

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³⁰ *Id.* 241-49.

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