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Book Review: The Human Right of Individual Freedom, A Symposium on World Habeas Corpus

THE HUMAN RIGHT OF INDIVIDUAL FREEDOM

A SYMPOSIUM ON WORLD HABEAS CORPUS

EDITED BY LUIS KUTNER

Coral Gables, Florida: University of Miami Press, 1970. Pp. 249
\$12.50

CONCERN with international protection of human rights is one of the most significant developments in recent history, especially in the post-World War II period. Perhaps the most dramatic advancement in this realm is the growing recognition of the individual as a subject of international law.¹

Since its inception, the United Nations has led the movement to initiate and further this development.² Even the U.N. Charter refers to human rights in its preamble and in several articles as well.³ Secretary-General U Thant has recently stated that in

a very real sense, the promotion and protection of human rights form the very essence, and provide the deepest meaning and motivation, of the United Nations as an international and inter-governmental Organization. For, in the last analysis, a recognition of the "dignity and worth of the human person," in the words of the Charter, is a symbol of all the other activities and purposes entrusted to and pursued by the world Organization: peace, the security of future generations from the scourge of war and the promotion of social progress and better standards of life in larger freedom.⁴

The U.N. record in enumerating and defining human rights is impressive. Since 1948, the year the Universal Declaration of Human Rights was adopted by the General Assembly without dissent, various declarations, resolutions, and conventions embodying such rights have been formulated at the United Nations.⁵ Of special importance are those legally binding multi-

¹ See generally P. JESSUP, *A MODERN LAW OF NATIONS* (1948); Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701 (1962); Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956).

² See generally Rolz-Bennett, *Human Rights, 1945-1970*, U.N. Office of Public Information, OPI/407 (May 1970); *The United Nations and Human Rights*, U.N. Office of Public Information (1968); McDougal & Bebr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603 (1964).

³ See E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 78-81 (1964).

⁴ U Thant, *Foreword to The United Nations and Human Rights*, *supra* note 2.

⁵ See generally sources cited note 2 *supra*.

lateral treaties embodying these rights, such as the International Covenant on Economic, Social and Cultural Rights,⁶ the International Covenant on Civil and Political Rights,⁷ and the Optional Protocol to the Covenant on Civil and Political Rights,⁸ all adopted by the General Assembly in 1966.

Despite this notable legislative fervor which is invariably accompanied by expressions of lofty idealism, state conduct nonetheless reflects little enthusiasm to provide and support adequate implementation machinery. There is a general apathy toward ratifying the two Covenants and the Optional Protocol, all of which contain measures for implementation. Equally significant, both the U.S. and the U.S.S.R. are politically unresponsive toward the entire U.N. human rights program.

As a result, widespread practices denying human rights persist, which the U.N. Under-Secretary-General for Special Political Affairs has recently termed as "matters of grave concern to the international community."⁹ Without further state action to ratify and implement these covenants and other U.N. human rights instruments, one may be apprehensive that these measures might remain mere empty rhetoric.

Luis Kutner, the editor of *The Human Right to Individual Freedom*, and president of the Commission for International Due Process of Law, offers world habeas corpus as a device to implement the right to individual freedom contained in article 9 of the Universal Declaration on Human Rights,¹¹ and reaffirmed in article 9 of the Covenant on Civil and Political Rights.¹² In Mr. Kutner's words: "World Habeas Corpus is a proposed legal remedy suggesting that the security of the individual against arbitrary detention or imprisonment is a paramount concern in a world public order embodying the optimum and maximum for human dignity. It is a competent remedy that prevents or corrects wrongful individual detention."¹³

It has been over 40 years since Mr. Kutner first proposed this concept. Ever since, he has persistently and vigorously ad-

⁶ The Covenant is reprinted in 61 AM. J. INT'L L. 861 (1967).

⁷ *Id.* at 870.

⁸ *Id.* at 887.

⁹ Rolz-Bennett, *supra* note 2, at 11.

¹⁰ THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS (L. Kutner ed. 1970) [hereinafter cited as Kutner].

¹¹ The article reads: "No one shall be subjected to arbitrary arrest, detention or exile." The text of the Declaration is reprinted in E. SCHWELB, *supra* note 3, at 81-86.

¹² See 61 AM. J. INT'L L. 874 (1967).

¹³ Kutner at 18-19.

vocated its adoption. Moreover, on various occasions, he has had opportunity to put the idea into practice. For instance, in 1952, he served the "U.N. writ of habeas corpus" upon Czechoslovakia which tried and convicted the Associated Press correspondent in Prague.¹⁴ Earlier, he had written a brief in behalf of Cardinal Mindszenty.¹⁵ And in 1967, he filed a petition for world habeas corpus with the U.N. Commission on Human Rights in behalf of Madame Ruth Tshombe, acting for her husband Moise Tshombe, former Prime Minister of the Congo. In the Tshombe case, Algeria was the principal respondent, since it was there that Tshombe was detained and ordered for extradition to the Congo, where he had already been tried in absentia and sentenced to death for treason.¹⁶

Mr. Kutner has found enthusiastic response, as "some 90 presidents or chief judges of the courts of the signatory states [to the U.N.] have endorsed and are sponsoring the structuring of World Habeas Corpus as a permanent institution."¹⁷ The Symposium contains essays by several eminent jurists and lawyers from all over the world who support the world wide acceptance of habeas corpus or similar procedures to protect individual freedom. It should also be noted that at the U.N. a committee of the Commission on Human Rights undertook a study of the "right of everyone to be free from arbitrary arrest, detention and exile." The committee submitted its revised draft to the commission in 1962. The commission is expected to take action on that draft this year,¹⁸ and the recommendation should eventually be adopted by the General Assembly in the form of a resolution.

The foreword by former Justice Arthur Goldberg,¹⁹ the introduction by late Dean Roscoe Pound,²⁰ and an essay by Mr. Kutner, "World Habeas Corpus and the Rule of Law"²¹ comprise the introductory part of the symposium and should provide the reader adequate background to understand and appreciate the desirability and necessity of the implementation of the concept by adequate universal and regional measures.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 168.

¹⁷ *Id.* at 24.

¹⁸ See U.N. ECOSOC, Commission on Human Rights, *Note by the Secretary-General*, U.N. Doc. E/CN. 4/1055, 4 Feb. 1971, Annex 1, at 6.

¹⁹ Kutner at 7.

²⁰ *Id.* at 11.

²¹ *Id.* at 17.

Part I of the Symposium includes expressions of endorsement by the Chief Justice, Supreme Court of Cassation, Italy;²² the Chief Justice of Uganda;²³ the Chief Justice, Constitutional Court, Federal Republic of Germany;²⁴ Prince Norodom Sihanouk;²⁵ and Jurists from Taiwan,²⁶ Columbia²⁷ and Tunisia.²⁸

In Part II Justice William Brennan forcefully argues for the obvious utility of world habeas corpus as a tool for the avoidance of the dangers of the police state, and its great promise as a contribution toward preserving and furthering world peace by repudiating, through an enforceable international rule of law, systematic and deliberate denial of human rights. The plan requires no surrender of national sovereignty to a supranational state²⁹

Professors Myres McDougal³⁰ and Harold Lasswell³¹ eloquently provide a policy-oriented analysis of the concept. McDougal concludes: "For the larger community of mankind genuinely aspiring toward improved implementation of human rights the proposal for internationalizing habeas corpus would appear to offer plausible hope for remedying the greatest defect in its present armory of institutional practices."³² Dr. Egon Schwelb, a pioneer in initiating international protection of human rights as a regular law school course, discusses the U.N. efforts in the protection of personal liberty.³³ In a reprint from the *Denver Law Journal*, Leonard v. B. Sutton, former Chief Justice of Colorado Supreme Court, offers a comprehensive survey of the past, present, and future of habeas corpus.³⁴ He predicts that "regional international courts of world habeas corpus are within reach, and once created and obeyed, will permit those who in good faith adhere to the precepts of the U.N. Charter to see to it that at least in their countries there is protection against arbitrary arrest and unlawful detention."³⁵

In a meticulously researched and well documented essay, Professor Cherif Bassiouni demonstrates the applicability of the

²² *Id.* at 31.

²³ *Id.* at 35.

²⁴ *Id.* at 44.

²⁵ *Id.* at 47.

²⁶ *Id.* at 49.

²⁷ *Id.* at 51.

²⁸ *Id.* at 55.

²⁹ *Id.* at 88.

³⁰ *Id.* at 90.

³¹ *Id.* at 94.

³² *Id.* at 92-93.

³³ *Id.* at 117.

³⁴ *Id.* at 170.

³⁵ *Id.* at 180.

concept to Islamic countries.³⁶ Among other contributors are the late Professor Quincy Wright,³⁷ Professor Gustavo Salgado from Ecuador,³⁸ Dean Andrew Lee from Taiwan,³⁹ and Tran Tam,⁴⁰ Secretary-General of the International Association of Criminology.

Although the essay by Justice William Douglas⁴¹ is only peripherally related to habeas corpus, it provides good reading on the rule of law in world affairs. Concluding the Symposium is Mr. Kutner's succinct and incisive summation of the history and evolution of the concept, "The Legal Ultimate For the Unity of Mankind."⁴² In his essay Mr. Kutner compares habeas corpus with a similar procedural remedy, *amparo*,⁴³ and deals with questions pertaining to the structure and procedure of the proposed international court of habeas corpus and of the proposed regional courts,⁴⁴ standards against which the detention should be tested,⁴⁵ and the enforcement of the decisions of the proposed tribunal.⁴⁶ He also addresses himself to the practical question of how to establish such a court. He urges the United Nations to

exercise vigorous leadership to persuade member nations to accept a treaty establishing an international court of habeas corpus. Once a sufficient number of states have adopted the treaty so as to institute the circuit courts in three arenas, the international court of habeas corpus system should become effective, and the established circuit courts may begin to function.⁴⁷

Mr. Kutner is under no illusion that his proposal for an international court of habeas corpus will "offer ideal protection of human rights immediately."⁴⁸ However, he believes that "its structure would permit the different peoples of the world, each in its own fashion, to work toward the maximization of values and ultimate goals of all humanity."⁴⁹

The Appendix⁵⁰ contains the proposed treaty-statute of the international court of habeas corpus, which Mr. Kutner had

³⁶ *Id.* at 98.

³⁷ *Id.* at 159.

³⁸ *Id.* at 189.

³⁹ *Id.* at 184.

⁴⁰ *Id.* at 127.

⁴¹ *Id.* at 59.

⁴² *Id.* at 201.

⁴³ *Id.* at 212-15.

⁴⁴ *Id.* at 215-20.

⁴⁵ *Id.* at 220-23.

⁴⁶ *Id.* at 223-26.

⁴⁷ *Id.* at 227.

⁴⁸ *Id.*

⁴⁹ *Id.* at 228.

⁵⁰ *Id.* at 241-49.

originally presented before the American Bar Association in 1959.

It is obviously impossible to do justice in a short space to the rich material presented in this volume. However, it should be noted that almost all contributors realize the practical difficulties in the creation of the proposed international and regional courts of habeas corpus or equivalent machinery. They also realize that, even if such a machinery were to be established by agreement, compliance with the decisions of the proposed tribunals would still be principally on a voluntary basis.

It should also be mentioned that there are perhaps two subjects which should have been given a more thorough treatment in the symposium. The first pertains to the evaluation of state responses, especially that of non-Western, developing states, to the nature of the right to individual freedom. States with differing ideologies, for example, may have a different perception of the extent to which the right is inalienable. In some countries "collective rights are stressed, rights intended to strengthen state power to permit governmental modernization programs."⁵¹ Thus, if there is no universal consensus on the content or extent of the right to individual freedom, it will be exceedingly difficult to arrive at an international agreement to devise adequate procedures to implement it.

The second subject that requires further exploration is the analysis of the various remedies presently available in different countries to protect the individual right to freedom. For instance, a 1962 U.N. "Seminar on Amparo, Habeas Corpus and Other Similar Remedies,"⁵² provides some excellent insights on various approaches to accomplish the goal of protection of individual freedom.

Mr. Kutner deserves credit for advocating this worthwhile cause. The Symposium should provoke further discussion on human rights, especially on the question of protection and

⁵¹ E. HASS, *HUMAN RIGHTS AND INTERNATIONAL ACTION* 15 (1970).

⁵² *Seminar on Amparo, Habeas Corpus and Other Similar Remedies*, Mexico, D. F., 15-28 August 1961, U.N. Doc. ST/TAO/HR/12 (1962).

implementation,⁵³ and should accelerate the acceptance, regionally in the first instance, then universally, of habeas corpus or similar such practical remedies.

Ved P. Nanda*

⁵³ There is extensive literature on human rights. See generally Schwelb, *The International Protection of Human Rights: A Survey of Recent Literature*, 24 INT'L ORGN. 74 (1970). For selected recent writing in the area, see Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171; Buergenthal, *Proceedings Against Greece Under the European Convention of Human Rights*, 62 AM. J. INT'L L. 441 (1968); Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AM. J. INT'L L. 889 (1968); Carey, *Procedures for International Protection of Human Rights*, 53 IOWA L. REV. 291 (1967); del Russo, *International Law of Human Rights: A Pragmatic Appraisal*, 9 WM. & MARY L. REV. 749 (1968); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 205 (1969); MacChesney, *Should the United States Ratify the Covenants? A Question of Merits, Not of Constitutional Law*, 62 AM. J. INT'L L. 912 (1968); McDougal, Lasswell, & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969); Newman, *Ombudsmen and Human Rights: The New U.N. Treaty Proposals*, 34 U. CHI. L. REV. 951 (1967).

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