LAW AND CONTEMPORARY PROBLEMS

VOLUME 14

AUTUMN, 1949

NUMBER 4

LEGAL PROBLEMS OF FREEDOM OF INFORMATION IN THE UNITED NATIONS

ZECHARIAH CHAFEE, JR.*

Without attempting to cover all the legal problems connected with freedom of information in the United Nations, this article will be mainly devoted to those presented by Article 17 of the Covenant on Human Rights while the author was participating in its formulation.

The promotion of fundamental human rights is repeatedly mentioned in the Charter as one of the chief purposes and functions of the United Nations,¹ and the Commission on Human Rights is, apart from the still unorganized Military Staff Committee, the only body lower than the Councils which is specifically required by the Charter.² The right to freedom of information, which corresponds to "freedom of speech and of the press" under the First Amendment in our Constitution, was made the object of special attention when the General Assembly in December 1946 called the International Conference on Freedom of Information. The Commission on Human Rights early in 1947 set up a Sub-Commission on Freedom of Information and of the Press. This devoted most of its first session, in May-June 1947, to planning the organization of the Conference.³ Soon afterwards, the Economic and Social Council settled that the Conference should meet at Geneva on March 23, 1948.

The Commission on Human Rights, at its second session, in December 1947 at Geneva, began drafting the International Covenant on Human Rights, and blocked out articles dealing respectively with most of the fundamental rights intended to be protected.⁴ However, it decided not to elaborate a final text of Article 17 on freedom of information until it had before it the views of the Sub-Commission and the Geneva Conference.⁵ Accordingly, the Commission referred to the Sub-Commission for its consideration two tentative drafts of Article 17, which had been laid

* Langdell Professor of Law, Harvard Law School.

¹ U. N. CHARTER, Preamble; Art. I, 3; Art. XIII, 1b; Art. LXII, 2; Art. LXVIII, 2; Art. LXXVI, c.

² U. N. CHARTER Art. LXVIII, 2.

³ REPORT OF THE FIRST SESSION OF THE SUB-COMMISSION ON FREEDOM OF INFORMATION AND OF THE PRESS, June 5, 1947 (E/441, pp. 3-16).

⁴ REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, Annex B, pp. 30-40).

⁵ *Id.* at 33.

before the Commission, one by its Working Group on the Covenant, the other by the Representative of the United States. (These are reprinted in Appendix I.)

The Sub-Commission began its second session at Lake Success on January 19, 1948, and gave the greater portion of its time to Article 17 of the Covenant. This body differs from the Commission on Human Rights in not being composed of representatives of governments. The twelve members of the Sub-Commission are appointed as experts from twelve different countries. Although each member's government must approve his serving, he does not act under orders from that government but is, for the time being, an official of the United Nations. He receives much help from the permanent officials of his own State Department or Foreign Office, and naturally pays considerable respect to the wishes of his government. Otherwise his work might come to naught when it is reviewed by bodies higher up in which his government is directly represented, like the Commission on Human Rights or the Economic and Social Council. In the end, however, he decides for himself what is best in the interest of the United Nations. This power of independent judgment possessed by the members of the Sub-Commission produced a strong sense of common responsibility. Most of us had been at the first session and so became accustomed to working together. We met each other often in pairs or small groups at lunch at Lake Success and at dinner in New York, where troublesome matters of phraseology were sometimes straightened out during the evening. Because of the general mastery of English, pieced out by tolerable French, linguistic barriers hardly existed. Simultaneous translation facilitated the exchange of views at the conference table. Several members had legal training, relevant to the task of drafting part of a treaty, including the chairman, G. J. Van Heuven Goedhart (Netherlands). He is now chief editor of a large Amsterdam newspaper. The members who were not lawyers were experienced in journalism. Regardless of some sharp differences of opinion the Sub-Commission was an admirable and enjoyable working unit.

As the starting point for the Covenant article, a choice was soon made of the tentative text from the Working Group of the Human Rights Commission (see Appendix I, Draft 1). During most of a fortnight the Sub-Commission hammered out the draft for Article 17 which is reprinted as Draft A in Appendix II. This, with only one or two negative votes, it decided to recommend to the Commission on Human Rights.⁶

Less than two months later, the United Nations Conference convened at Geneva on March 23, 1948. The task of drafting Article 17 of the Covenant was referred to Committee IV, on law and continuing machinery. The chairman, Sir Ramaswami Mudaliar (India), is prime minister of Mysore, and the rapporteur, Fernand Dehousse (Belgium), is Professor of International Law at the University of Liège and sits on the Commission on Human Rights. Many members of Committee IV were lawyers, and others were government officials with lawyerlike minds. The conditions

⁶ REPORT OF THE SECOND SESSION OF THE SUB-COMMISSION ON FREEDOM OF INFORMATION AND OF THE PRESS, Feb. 6, 1948 (E/CN. 4/80, p. 4).

of work were different than in the Sub-Commission. At Geneva we were delegates of our respective governments, bound to act in consultation with our co-delegates and the permanent officials in the national group, and subject to directives cabled from the home capital. Each nation tended to act as a separate unit. There was little opportunity (as in the Sub-Commission) for progress through informal meetings of a few men from diverse countries who had got to know each other intimately. At sessions, instead of twelve men sitting close together around a single table, forty or more delegates in Committee IV occupied at least half a dozen tables. (Each of the fifty-four nations present at the Conference had the right to attend the committee and speak, but only representatives of members of the United Nations could vote.) So one had the sense of addressing a mass meeting rather than trying to persuade individuals. Indeed, the speaker knew that there was little use in convincing his listeners, since the real decisions were usually not made by them but by hundreds of people outside the room. The necessity of a long interval for translating each speech broke the continuity of discussion, although it had the advantage of giving an opponent plenty of time to collect his thoughts for a reply. There was no danger of blurting out the first idea that came to mind, as with simultaneous translation. A final contrast to the atmosphere in the Sub-Commission was caused by the intervening *coup d'état* in Czechoslovakia, which produced a considerable strain right through the Geneva Conference. Despite all these obstacles, the members of Committee IV developed a notable *esprit de corps*. They wasted little time on eloquent and prolonged denunciations of other countries, but "made a noise like a lawyer" and kept steadily at work on rather tedious tasks with a common attitude toward problems of law and draftsmanship.

One significant observation at both the Sub-Commission and the Conference was how little embarrassment arose from the differences between the law of Continental Europe and the Anglo-American law. Lawyers were lawyers, in whichever system they had been trained. In the area of international freedom of information, at any rate, they understood each other and knew the same craftsmanship.

Committee IV used the Sub-Commission draft (A in Appendix II) as the basis of work on the Covenant. It made some improvements in phraseology, and several important changes in substance to all of which the writer found himself opposed. Still, he felt that the conference draft should be approved in principle, leaving modifications to be made by the Commission on Human Rights. The other members of his delegation took a different view, and the United States accordingly joined the Soviet bloc in a minority of 7, which opposed the committee's draft in plenary session.⁷ The majority adopted the work of Committee IV without change. This conference draft for Article 17 is reprinted as Draft B in Appendix II, and has for all practical purposes superseded the Sub-Commission draft.

⁷ REPORT OF THE UNITED STATES DELEGATES, UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION 6-8 (Dep't State Publication 3150, International Organization and Conference Series III, 5).

Nothing much has happened since to Article 17 of the Covenant. The Commission on Human Rights, in its third session at Lake Success in May-June 1948, finished the Declaration on Human Rights, subsequently adopted by the General Assembly. Article 19, on freedom of opinion and expression, continues (with minor changes) the draft made for the Declaration by the Sub-Commission and substantially approved by the Geneva Conference. The Commission did not have time to consider the Covenant in detail.⁸ At its recent fifth session at Lake Success in May-June 1949, the Commission revised many articles of the Covenant, but decided to postpone consideration of the text of Article 17 until its sixth session.⁹

Meanwhile, the Drafting Committee of the Commission has been considering three drafts, among which it has not yet made a choice. Besides the Conference draft, Appendix II reprints a French draft (Draft C), because it probably has strong backing and embodies a principle which was unsuccessfully urged by the United States at the Geneva Conference. This French draft will be mentioned later in connection with the problem of specific as against general limitations. The third text now before the Commission comes from the Soviet Union.¹⁰ It flatly denies protection to freedom of speech and press when "used for war propaganda for inciting enmity among nations, racial discrimination and the dissemination of slanderous rumours." Some of the ideas in the Soviet draft bear on the problem of the Indian Amendment, hereafter discussed.

This is the chronological framework within which the legal problems presented themselves. Unless otherwise indicated, only the author is responsible for the reflections which follow. There is reason to believe that some of them were shared by other members of the Sub-Commission, but the pressure of concrete issues of drafting was too great to allow accurate ascertainment of the extent of agreement on the theoretical matters here discussed.

First, some problems had to be answered about the Covenant as a whole in order to understand the effect of Article 17.

I

FOR WHAT SORT OF WORLD WOULD THE COVENANT BE IN FORCE?

A concept which dominated all the thinking in the Sub-Commission was that the Covenant on Human Rights was not getting drafted for this troublous period of settling down after a great war, but for the better years ahead. The nations are still playing the old game of territorial aggrandizement and competing armaments which has culminated twice in a world war. They must play the new game made possible by the United Nations before an international guaranty of freedom of speech and other human rights can work with the effectiveness of law. In past treaties, nation A has occasionally promised nation B to protect the rights of citizens

⁸ REPORT OF THE THIRD SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 28, 1948 (E/800, p. 5).

⁹ REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, p. 34).

¹⁰ *Id.* at 34-35.

of B who are sojourning within the borders of A, but this is the first time in history when it is seriously proposed that each of several nations shall obligate itself to protect the human rights of *its own citizens*. A start in this direction has already been made by the recent peace treaties with Italy, Hungary, and other nations, but these are defeated countries, whereas the Covenant is to apply inside victorious countries. Furthermore, the subsequent ill success of the guaranties of human rights in these peace treaties demonstrates the futility of such international obligations unless they are to be performed in a more orderly world than now exists.

The Sub-Commission never debated the desirability of the Covenant. That was a question for the Commission on Human Rights. The Commission had given us a job to do and we did it. "Theirs not to reason why . . ." But it was provided in Article 23 of the draft Covenant, as it was laid before the Sub-Commission in January 1948, that the Covenant should not come into force until two-thirds of the members of the United Nations had acceded to its terms.¹¹ Obviously an enormous change would have to take place in the attitudes of many nations toward liberty before over thirty-five countries would be willing to bind themselves by the Covenant. A good many years would elapse before the requisite number had been obtained. The Sub-Commission was planning Article 17 for the distant future and could ignore present stresses and strains.

This concept that we were drafting law to operate in a régime of international order and not in crises was shared, it is believed, by many members of the Sub-Commission. Though not made articulate at the conference table, it was constantly felt. The concept was strengthened by Article 4, which permitted the obligations of the Covenant to be lifted in time of war or other public emergency within a state.¹²

At the Geneva Conference, however, one sensed quite a different attitude. The intervening Czech crisis had focused the attention of delegates on wars and threats of wars, and on the possible need of protection from objectionable utterances within their respective countries. A proposed provision of Article 17 frequently seemed to evoke the question, "Would this prohibition of suppressive legislation hurt *my country now?*"

Although the writer strongly believes that such a feeling should not dominate the drafting of Article 17 or any other part of the Covenant, nevertheless so long as

¹¹ REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, *op. cit. supra*, note 4, at 35. Subsequent drafts of Article 23 in the Human Rights Commission may give the Covenant an earlier operation; they provide that it shall come into force when——member nations have deposited their instruments of accession with the Secretary-General. REPORT OF THE THIRD SESSION, *op. cit. supra*, note 8, at 34; REPORT OF THE FIFTH SESSION (E/1371, pp. 41, 60). Still, if the blank is filled with a large number, a more orderly world will be necessary before the required number of nations accede to it. And if only a few nations can bring the Covenant into force, its effect on the promotion of human rights is likely to be correspondingly small.

¹² The draft before the Sub-Commission reads: "In time of war or other public emergency, a State may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation." A state so derogating must inform the Secretary-General of the measures taken and the reasons therefor, and notify him when the measures cease to operate (E/600, pp. 30-31). Article 4 has been modified at later sessions of the Human Rights Commission, but the privilege of derogation remains (E/800, p. 16; E/1371, pp. 29, 56, 57).

this feeling prevails, it is unwise to put Article 17 into final form. At least, that action should be deferred until the peace treaties with Germany and Japan have been formulated and executed and successfully carried out. For one thing, the content of Article 17 (as will hereafter be argued) ought to depend greatly on the provisions for its implementation which will be established by later articles of the Covenant. No implementation provisions have yet been drafted, and the author ventures the opinion that it is impracticable to determine the precise nature of methods for enforcing human rights inside a nation's territory while the present disturbed condition of the world continues.

This position does not mean that work on Article 17 is now in vain. It is well worth while for carefully chosen groups of men and women to think ahead and write out the best possible free speech article they can make, so that it will be ready for use when the right time arrives for its adoption by many nations. That is far wiser than putting everything off. On the other hand, the draftsmen of today ought to contemplate the probability that their work will have to be revised in better times than ours. Whatever is done before the peace treaties are out of the way should be regarded as tentative and preparatory. The final formulation of the International Covenant on Human Rights ought not to be hurried. The most ardent supporters of that document would be wise to wait until they can be sure that there is a strong desire among officials and peoples to obey it. Otherwise, the Covenant may be just a piece of paper like the Kellogg Pact. And delay does not mean that the intervening time will be lost. Every opportunity for fruitful discussion of the provisions of any draft should be utilized. Thus their ultimate form will be improved, and widespread familiarity with the Covenant will build up a respect for it which will increase its prospects of effective operation when it does eventually go into force.

II

THE COVENANT COMPARED WITH OUR OWN BILL OF RIGHTS

The rights protected by the various articles of the Covenant are, for the most part, the same as those guaranteed by the first ten amendments to the United States Constitution, which are commonly thought of as our Bill of Rights. Reflection shows, however, that the Covenant has a very different function from these amendments. They were framed because the peoples of the states wished to restrict the powerful central government which had just been established by the main portion of the Constitution. The Covenant does not restrict the new central government established at San Francisco in 1945. The United Nations has very few governmental powers, and they are too weak to need much restraining. The only genuine parallel to our Bill of Rights¹³ is in the Charter. Article 2, paragraph 7, refusing

¹³ Another restriction on the United Nations is the veto power of any one of the five permanent members of the Security Council. Article 27, 3. But it would be hard to find a parallel to this in our Constitution. The Virginia and Kentucky Resolutions unsuccessfully sought to impose an even tighter restriction on the new central government, by giving a veto power to every state, no matter how small.

to authorize the United Nations to intervene in "matters which are essentially within the domestic jurisdiction of any state . . ." somewhat resembles the Tenth Amendment, which reserves to the states or to the people the powers "not delegated to the United States by the Constitution. . . ."

The Covenant is intended to restrict the powers of the member nations which choose to accede to it. Hence the true analogy to it will be found outside our original Bill of Rights in the limitations on the powers of the states in the main body of the Constitution, and in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments.

Here it is important to observe that our constitutional limitations on state powers fall into two types—those concerning interstate and foreign matters and those concerning the relations of a state with its own citizens.

In the original Constitution, restrictions of the first type predominate. The states are forbidden to engage in several activities which are appropriate only to the national government. These reach across state lines and national frontiers, by their very nature or by their immediate consequences. Many of these prohibited activities do not concern human rights, *e.g.*, coining money, levying import duties, etc., so only those relevant to our purposes will be mentioned. By implication, a state may not pass laws which burden interstate or foreign commerce.¹⁴ Hence it cannot interfere with freedom of residence within the United States by preventing persons from entering from another state.¹⁵ Again, the supremacy of treaties may result in protecting the fundamental rights of an alien against state interference.¹⁶ A provision that might have become significant for human rights, but has been little invoked for that purpose, is: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."¹⁷ Finally, the impartial enforcement of rights entitled to federal supervision is obtained by the establishment of United States courts, in which citizens of different states can sue each other, an alien can sue a citizen or *vice versa*, and anybody can assert claims under the Constitution or an Act of Congress or a treaty.¹⁸

In the foregoing situations, there is a considerable resemblance to international law as it was customarily regarded before the Second World War. The community of nations stood in somewhat the same position toward separate nations as the United States toward separate states. International courts, arbitration tribunals, and diplomatic negotiations ordinarily concerned themselves with affairs inside a state only when these affairs affected the subjects or the government of another state.

Not until we examine the second type of restrictions in our Constitution do we find anything closely like the Covenant. It is noteworthy, however, as Holcombe

¹⁴ U. S. CONST. ART. I, §8; *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824).

¹⁵ *Crandall v. Nevada*, 6 Wall. 35 (U. S. 1867); *Edwards v. California*, 314 U. S. 160 (1941).

¹⁶ U. S. CONST. ART. VI, §2; *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796), and many subsequent decisions.

¹⁷ U. S. CONST. ART. IV, §2.

¹⁸ *Id.* ART. III, §2.

points out in his useful book *Human Rights in the Modern World* (1948), that the Philadelphia Convention was very cautious about limiting the powers of a state over its own citizens. Again considering only provisions protecting human rights, we find that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,¹⁹ and that the United States (construed to mean Congress) shall guarantee to each state a republican form of government²⁰—a power fortunately never needed as yet. Apart from these two clauses, a state government before the Civil War could deal as oppressively as it pleased with its own citizens.

Of course, most states already had their own constitutional guaranties against such tyranny, but if a state chose to repeal or disregard these guaranties, the national government could do nothing about it under the original Constitution. It was equally powerless to interfere after the adoption of the first ten amendments in 1791. A state might abolish freedom of the press and jury trial in criminal cases, and do everything else which the Bill of Rights forbade the national government to do, and yet neither Congress nor the federal courts could interfere.

Perhaps this was just as well, when we remember the difficulty with which the young central government was established in the face of state jealousies. Chief Justice Marshall had his hands full to maintain strictly national interests against local opposition without also undertaking to interpose between one of the sovereign states and some individual within its borders, merely because his human rights were infringed. Think of the clashes which would have ensued if the Supreme Court of 1810 (in accordance with the decisions of our time) had upheld freedom of speech by releasing a Negro convicted in a Georgia court for urging blacks to demand the vote and had upheld freedom of religion by upsetting the centuries-old custom of Massachusetts towns to pay the Congregational minister's salary out of taxes. It is doubtful whether the Court would have been obeyed and whether the nation could have withstood such strains in its early years.

Can the much weaker central government of the United Nations afford to take on comparable tasks while it is just starting its life? Holcombe thinks not. It was not for nearly eighty years after its foundation, he recalls, that our central government, when greatly strengthened by the Civil War, obtained the power to protect inside the states those fundamental rights which the Covenant proposes to guarantee within a decade after the adoption of the Charter. The Thirteenth Amendment abolished slavery like Article 8 of the Covenant. The Fourteenth Amendment expanded the scope of the old privileges and immunities clause and made it include the citizens of an offending state, by providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; but this clause, though greatly beloved by laymen who write about constitutional law, has been little invoked by lawyers.²¹ Far more important for human

¹⁹ *Id.* Art. I, §10.

²⁰ *Id.* Art. IV, §4.

²¹ See *Edwards v. California*, *supra* note 15; *Hague v. C. I. O.*, 307 U. S. 496 (1939).

rights is the succeeding clause of the Fourteenth Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The word "liberty" is now interpreted by the Supreme Court to cover all the fundamental human rights which are protected against national action by the Bill of Rights of 1791, and consequently safeguards them against state governments as well. In the field of freedom of information, for instance, the prohibitions of the First Amendment are in effect applied to upset suppression under state legislation. Nevertheless, as Holcombe emphasizes, this result was not reached until 1925,²² sixty years after the adoption of the Fourteenth Amendment and a hundred and forty years after the Philadelphia Convention, when the power of the central government had become enormous in comparison with the power of the states which it thus restrains.

Holcombe's inference from our own experience is that the United Nations should, for some time to come, follow the analogy of the first type of restrictions on the states in our Constitution and confine its concern with human rights to those situations inside one nation which affect the interests of another nation or of the United Nations. As to the last point, Holcombe would make over a clause from the Fourteenth Amendment and have a treaty agreeing that no signatory state would abridge the privileges or immunities of a citizen of the United Nations. Since there is no easy way to tell what those privileges and immunities are and little help can be obtained from Supreme Court cases about the corresponding phrase in our Constitution,²³ the writer has nothing to say about this suggestion until it is embodied in some actual UN proposal. Then we can know exactly what we are discussing.

There is considerable force to Holcombe's main conclusion, that the best chances of immediate success are in tackling human rights problems which cross international boundaries and involve more than one country. When a treaty obligating one nation directly promotes the interests of another nation, as is usually the case, then this second nation has incentives to sign it and to complain if it be violated. Such a treaty is more likely to be faithfully carried out than a treaty like the Covenant, where outside nations may have no cause for objecting to violations beyond an abstract devotion to fundamental human rights. Furthermore, some agreements of the sort Holcombe envisages are badly needed. An example which occurs to the writer is an agreement among many nations that when a female citizen of one country marries a male citizen of another country, she has the right to leave her own land and join her husband at his home. It would be even better if he too were allowed to emigrate and live with his wife whenever they prefer her country to his.

In the area of freedom of information, great importance attaches to a much freer flow of news and ideas across frontiers. This was stressed by the General Assembly in calling the Geneva Conference. The most fruitful achievement of

²² *Gitlow v. New York*, 268 U. S. 652 (1925).

²³ See cases cited note 21 *supra*.

that Conference consisted of two draft conventions, one proposed by the United States to facilitate the gathering of news by foreign correspondents and its transmission to their own journals at home,²⁴ the other proposed by France to establish an international right of correction of statements of fact in news reports sent from one country to another.²⁵ These two conventions, after many vicissitudes, have been happily merged into one and put in final form by the General Assembly in May 1949.²⁶ If all goes well, this Convention on the International Transmission of News and the Right of Correction will be signed by many nations long before work is completed on the Covenant on Human Rights. Here is just the thing Holcombe desires.

Yet the United Nations cannot, as Holcombe urges, stop there. The Convention is excellent, but it will not be regarded as a reason for shelving Article 17 of the Covenant. Whether it be wise or not for the Human Rights Commission to concern itself with the relations of a government to its own citizens, the pressure to go on with the Covenant is too strong for work on it to cease now. And contrary to a common belief among American lawyers, this pressure does not come from the Soviet Union or its satellites. An examination of the votes in the Commission, the Sub-Commission, and the Geneva Conference will show that the Soviet bloc have almost always been against doing anything positive for freedom of information and other human rights, so long as their own extraordinary wishes could not be carried out. Thus they were about the only nations which did not vote for the Declaration of Human Rights in the General Assembly, but insisted on abstaining. The demand to do something notable for human rights has come from the freedom-loving nations of the West and from India and Australia.

A striking illustration of this demand was furnished by the Draft Convention on Freedom of Information, proposed by the United Kingdom at Geneva.²⁷ This instrument would enable any two or more nations to guarantee freedom of information within their own borders immediately, in the same terms as Article 17. There would be no delay while the Covenant is getting finished by the Human Rights Commission, or before it is signed by the large number of nations required by Article 23.²⁸ Thus this treaty undertakes to hasten the very type of UN activity which Holcombe says ought to be postponed. The writer was unable to understand the reasons why the British drafted this document. It seemed so un-English, in that it asserted general principles and did not meet any pressing concrete need as did the American and French conventions. It aroused speculations whether the Labor Government was carrying England back into the mental attitudes of the Commonwealth Period, the one epoch in English history when laws were urged for abstract

²⁴ UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, FINAL ACT (Annex A, p. 7).

²⁵ *Id.* at 11.

²⁶ A/876, May 16, 1949.

²⁷ UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, *op. cit. supra*, note 24, at 14.

²⁸ See note 11, *supra*.

reasons. Be this as it may, the important fact is that the British convention received widespread support at the Conference from other freedom-loving delegates, was overwhelmingly adopted at the plenary session, and seems likely to be signed by several nations whenever it is submitted by the General Assembly. It even led to the startling suggestion in the Human Rights Commission last June that Article 17 might be omitted from the Covenant as a useless duplication of the British convention.²⁹ A Bill of Rights which omitted freedom of speech and press would indeed be a novelty.

To summarize what can be learned for UN purposes from our own constitutional experience with human rights: It is useful because it indicates the probable areas for rapid success and because it warns against biting off more than you can chew. Yet this experience is not quite in point. There are at least two reasons why it may be neither necessary nor desirable for the United Nations to imitate our decades of delay before undertaking to establish human rights inside the states.

First, the Covenant requires less strength in the central agency than does the Fourteenth Amendment. Our federal courts have enough power behind them to let the victims of state oppression out of prison and sometimes to put the oppressors themselves into prison. Nobody contemplates any such drastic action by the Human Rights Commission or by any other UN body. Just how the rights in the Covenant are to be implemented is not yet decided, but we may reasonably expect measures like the receipt of complaints of violations with discussion in documents and UN meetings. Perhaps there will also be authorization for an impartial investigation and a report. Publicity will probably be the chief sanction for the Covenant. If we can only get the peace treaties out of the way and obtain a better international feeling than now prevails, "a decent respect to the opinions of mankind" may be enough to make the Covenant operate with as much compliance as many domestic statutes receive, even though the United Nations is given no power to proceed by force against violators.

Secondly, lawmakers in each epoch have to face the needs of that epoch. The practical men who met at Philadelphia in 1787 knew this well and did not undertake to impose restrictions on the states unless they were urgently required by existing conditions. There was no pressing reason then to guarantee human rights inside the states, because the states were doing a pretty good job at this themselves—apart from slavery, which it was impossible to touch. Whenever restrictions on the states were badly needed, for example to stop the issue of irredeemable paper money, the framers unhesitatingly wrote them into the Constitution, regardless of the danger of clashes with state governments. The lawmakers for the United Nations ought to show corresponding courage and resourcefulness in confronting the pressing needs of our time, and one of these is for some sort of restraints on nations to lessen the suppression of public discussion and attacks on other cherished human

²⁹ REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, *op. cit. supra*, note 9, at 34. This query was made by the representative of China.

values. There are few more potent causes of international ill-will than when a nation denies basic freedoms inside its boundaries. Such a nation becomes a plague-spot. When our own government is protesting the trial of a Hungarian Cardinal in Hungary and the trial of Bulgarian Protestant ministers in Bulgaria, it is no longer possible to regard religious freedom and a fair trial as purely domestic matters.

The examples just cited demonstrate the impossibility of rigorously maintaining the distinction, suggested by Holcombe's book, between a nation's denial of human rights to its own citizens and to foreigners. Despite what was previously said, the latter situation is not the only source of serious resentment in other nations. Many men who owe allegiance to different governments are united by strong emotional ties of race, blood, or religion, or by a common devotion to trade-unionism, science, or scholarship, and so feel deeply the sufferings of their fellows regardless of political divisions. Milton's sonnet *On The Late Massacre in Piedmont*, Secretary Hay's protest against Russian pogroms, the manifesto of the Faculty of the University of Amsterdam upon the fate of professors in Nazi Germany—these are only a few proofs that international concern is not confined to the rights and wrongs of resident aliens. Probably that is the best place to start, as in the French and American conventions at the Geneva Conference, but it is not the place to stop.

III

WOULD ARTICLE 17 BE PART OF AN UNCONSTITUTIONAL TREATY?

The two preceding paragraphs seem to take care of the objection raised by a distinguished lawyer, Carl B. Rix, in a recent address to the American Society of International Law, that the Covenant may be outside the treaty-making power of the President and the Senate³⁰ because of being domestic legislation.³¹ This objection rests on what Chief Justice Hughes said to the same Society in 1929 about possible limits on the treaty-making power:³²

[This] is a sovereign nation; . . . the nation has power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution . . . *But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States*, then . . . there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and *not to make laws for the people of the United States in their internal concerns*. . . .

One can imagine examples within Hughes' limitation, like a treaty with Eire providing that Boston should have a city-manager form of government with pro-

³⁰ U. S. CONST. ART. II, §2.

³¹ Rix, *Human Rights and International Law: Effect of the Covenant Under Our Constitution*, 35 A.B.A.J. 550, 554, 618 (1949).

³² PROC. AM. SOC'Y INT'L L. 195-196 (1929). (Italics supplied.)

portional representation or a treaty with Great Britain restoring primogeniture in Virginia. Nevertheless, as just shown, freedom of information is no longer a local concern. It is something which nations do now put into treaties. It is in several of the peace treaties already concluded since 1945, and most of the nations at the Geneva Conference approved the British draft convention, which dealt with nothing except freedom of information.

IV

IS ARTICLE 17 INVALIDATED BY THE "DOMESTIC" CLAUSE OF THE CHARTER?

This problem received no attention from the Sub-Commission or the Geneva Conference. We took it for granted that the Economic and Social Council and the Human Rights Commission knew their business when they undertook an International Bill of Rights and the Covenant. However, the Soviet member of the Sub-Commission and several prominent lawyers in the American Bar Association have argued that the UN is prevented from having any voice in the relations between the individual and his government by Article 2, section 7, of the Charter, which says:

Nothing contained in the present Charter shall authorize the United Nations to intervene in any matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .

If this important provision really bars any concern with human rights and fundamental freedoms, all the Charter clauses mentioned earlier as dealing with such matters would be meaningless. Yet they are just as much a part of the Charter as the provision about domestic matters. Consequently, we must apply the principle with which all lawyers are familiar, that when there is an apparent inconsistency between different portions of a constitution or statute, then it is necessary to read each provision in connection with the others and try to reach a mutual adjustment which makes sense and gives effect, if possible, to every part of the document. When the draftsmen at San Francisco wrote Article 68 ordering the Human Rights Commission, they certainly did not think that they were writing nonsense. They were well aware of the provision on domestic matters and obviously intended that the Human Rights Commission should be able to do *some* work which was not forbidden by Article 2.

It is true that there are difficulties about the precise limits of the "domestic" clause in this connection, but the work already undertaken by the UN in the field of freedoms seems plainly outside the scope of that clause. Much of it consists of the studies, reports, and recommendations which are expressly mentioned in other articles of the Charter. They are not intervening; they do not require the member nations to submit such matters to settlement. As for the Covenant and the Geneva draft treaties, these are to bind only nations which consent to be bound. Many existing treaties relate to matters within a nation, for example, by guaranteeing to citizens

of another government the right to inherit land on equal terms with native citizens. Of course it is no violation of national sovereignty for a nation to agree with another that it will make a desirable change in its own laws. One of the chief values of the UN is to act as a sort of clearing house for facilitating treaties which will remove or lessen local causes of international friction. The numerous labor conventions adopted under the auspices of the League of Nations and the UN are a conspicuous illustration of this, and the increase of freedom is an equally appropriate subject for future treaties.

V

SHOULD ARTICLE 17 BE SELF-EXECUTING?

Although the Sub-Commission and the Geneva Conference could do nothing about this question, which arises for all the rights in the Covenant and has been the object of earnest thought in the State Department, the importance of the problem became evident to the writer during the drafting of Article 17. The binding effect of its formulation of the right to freedom of expression depended on the overall obligations of the signatory nations, as set forth in Article 2. At the time we were working, in the early months of 1948, the critical portion of Article 2 had the following form:³³

"Every State, party hereto, undertakes to ensure:

- (a) that its laws secure to all persons under its jurisdiction, whether citizens, persons of foreign nationality or stateless persons, the enjoyment of these human rights and fundamental freedoms;"

It will be convenient to break down the problem into four parts: (1) the difference between self-executing treaties and other treaties; (2) whether a treaty has to be self-executing in the United States; (3) the undesirability of allowing the Covenant to be self-executing in the United States; (4) methods of preventing this.

A. The Difference between Self-Executing Treaties and Other Treaties

There are two aspects to the binding effect of a treaty. In the first place, it becomes internationally binding after the performance of certain acts. In many nations the consent of the executive alone is enough. By our Constitution ratification by two-thirds of the Senate is also required. In addition the treaty may itself provide for further acts before it becomes effective, for instance, the deposit of ratifications, but this element need not concern us. The point is that when the required acts have been performed, the good faith of each acceding government is pledged to the performance of the treaty. A violation of a treaty obligation may lead to diplomatic remonstrances and to stronger acts by the other parties to the treaty. Violation may also become the subject of a proceeding before an international tribunal. For present purposes it will be assumed that our government will take all the necessary

³³ SECOND REPORT OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, p. 30). The modifications of this text in later reports are set forth *infra* notes 63 and 64.

steps to make the Covenant on Human Rights binding upon it in the manner just described.

Secondly, a treaty such as the Covenant is intended to become binding upon the officials and private citizens of the signatory parties. Probably no treaty ever proposed was meant to affect private rights and duties within a country so extensively as the Covenant. It is contemplated that violations of its terms will give rise to actions in domestic courts by the victims against wrong-doing officials.³⁴ The main problem is to ascertain the method by which this domestically binding effect of the Covenant may most wisely be obtained.

This domestically binding effect of a treaty does not inevitably accompany its internationally binding effect. In some countries, notably the United Kingdom and the members of the British Commonwealth of Nations, most treaties do not have any effect upon private rights until they have been implemented by Act of Parliament or other appropriate domestic legislation. In a famous case in the Privy Council, *Walker v. Baird*,³⁵ treaties between Great Britain and France gave French fishermen certain rights on parts of the Newfoundland coast and provided that no lobster factories should be operated on these shores. The plaintiff ran such a factory. A British naval captain forcibly closed it up. Because no Act of Parliament had been passed to implement the treaty and make it affect the private rights of British subjects, the naval captain was held liable in damages to the owner of the factory. The fact that the captain's action was an enforcement of the treaty was no defense. The winning counsel argued:³⁶

No case can be found in which the Crown has attempted in time of peace to affect by treaty the private rights of its subjects. For that purpose an Act of Parliament is necessary . . . There is no authority for saying that State necessity will make a treaty binding upon subjects by force of the prerogative. Such a doctrine would extend the prerogative of the Crown so as to enable it to deprive the subject of his property and rights.

This British theory of treaties was recognized by Justice Miller.³⁷

Consequently, if the Covenant on Human Rights is ratified by the United Kingdom, it will not become binding on British subjects or in the British courts until implementing legislation is enacted by parliament. In other words, the Covenant will not be self-executing in the United Kingdom.

³⁴ *Ibid.* Article 2(c) and (d). These became (b) and (c) in Report of the Third Session (E/800, p. 15). They are now merged without substantial change into Article 2, §2. REPORT OF THE FIFTH SESSION (E/1371, p. 28): "Each State . . . undertakes to ensure that any persons whose rights or freedoms . . . are violated shall have an effective remedy before the competent national tribunals notwithstanding that the violation has been committed by persons acting in an official capacity."

There seems to be no ground for the fear, expressed by some American lawyers, that these clauses about court actions under the Covenant are self-executing regardless of the opening passage of Article 2. These clauses simply demarcate the consequences of the Covenant *after* it is made a part of domestic law, in accordance with the obligations of international good faith. Recall that these clauses will apply in nations like Great Britain, where treaties are never self-executing.

³⁵ [1892] A. C. 491.

³⁶ *Id.* at 494.

³⁷ *United States v. Rauscher*, 119 U. S. 407, 417 (1886).

In the United States, ordinarily, treaties are self-executing. Article VI of our Constitution provides that "all treaties . . . shall be the supreme Law of the Land. . . ." For example, if we make a treaty with France that when a French citizen dies in this country his property shall descend like that of American citizens, this treaty automatically nullifies as to the French heirs of a dead Frenchman a state law forbidding foreigners to inherit land in that state. No Act of Congress and no state statute is required to implement the treaty with France.

The doctrine was recently applied in *Bacardi Corporation v. Domenech*.³⁸ The Inter-American Trade Mark Convention of 1929 provided that every mark duly registered in one of the contracting states should be "legally protected" in the other contracting states. The plaintiff had a license to use registered Cuban trademarks in Puerto Rico, but a Puerto Rican statute made it illegal for him to do so. No Act of Congress implementing the Convention was mentioned, but the statute was held invalid to the extent that it conflicted with the Convention. Chief Justice Hughes said:³⁹ "This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective." Perhaps this result was somewhat aided by a clause in the Convention that its provisions should "have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs."

Subsequently, the Warsaw Convention for Unification of Rules as to International Transportation by Air was held to be self-executing for the purpose of limiting the amount of recovery in two damage actions arising out of airplane accidents.⁴⁰

B. Does a Treaty Have to Be Self-Executing in the United States?

Despite what has just been said, it is possible for the government of the United States to make treaties which are not self-executing but which must be implemented by Act of Congress. An obvious example is a treaty providing that our government shall pay a sum of money. Then nothing happens until Congress appropriates the money. This was pointed out nearly a century ago in *Turner v. American Baptist Missionary Society*.⁴¹ Even before this, Chief Justice Marshall had held, in *Foster v. Neilson*,⁴² that the treaty acquiring Florida from Spain was not self-executing as to its clause confirming Spanish land grants, but that such a grant must in addition be approved by a board of commissioners which had been established by Congress after the treaty. In short, the Act of Congress in this case implements the treaty just as an Act of Parliament implements a British treaty.

In the course of rejecting the plaintiff's claim under a grant which the commissioners had not confirmed, Marshall quoted the treaty provision that all the Spanish

³⁸ 311 U. S. 150 (1940).

³⁹ *Id.* at 161.

⁴⁰ *Indemnity Insurance Co. v. Pan American Airways*, 58 F. Supp. 338 (S. D. N. Y. 1944); *Garcia v. Pan American Airways*, 269 App. Div. 287, 55 N. Y. S. 2d 317 (1945).

⁴¹ 24 Fed. Cas. 344, No. 14,251 (C. C. Mich. 1852).

⁴² 2 Pet. 253 (U. S. 1829). *Accord: Ex parte Dove*, 49 F. 2d 816 (D. Minn. 1945).

grants "shall be ratified and confirmed to the persons in possession" to the same extent as if Florida had not been ceded, and asked:⁴³

Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.

Additional cases holding treaties not to be self-executing will be mentioned later, as well as several other treaties made by the United States which contemplate legislation before they become operative as domestic law.

C. Article 17 and the Rest of the Covenant Should Not Be Allowed to Be Self-Executing in the United States

At the outset it is important to observe that, so far as state law is concerned, the Covenant cannot be self-executing if Article 24 is retained substantially in its present form. This provides that in a federal nation like ours, matters which under the constitutional system are appropriate for state action shall be brought to the notice of the proper state authorities with a favorable recommendation from the federal government. Until the state government acts on such a recommendation, the Covenant will not impair existing or subsequent state laws.

The area of federal law, however, needs serious consideration. Here we must distinguish between Acts of Congress before the ratification of the Covenant and those after such ratification. A subsequent federal statute which violates an article of the Covenant will be a breach of our international obligation, but it will be valid. The Supreme Court has frequently held that an Act of Congress is the law of the land even though it is inconsistent with an earlier treaty.⁴⁴

What concerns us, then, is the effect of the Covenant on earlier federal statutes. Here again the later legal action prevails. In the event of inconsistency, the treaty is the law of the land and supersedes the earlier statutes.

Little confusion is caused by this doctrine when a treaty relates to a few clearly defined areas of domestic law. Then, a government official or a lawyer can tell pretty well what domestic statutes have been superseded by the treaty in question.

⁴³ 2 Pct. at 314.

⁴⁴ See 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 185-198 (1940).

The situation will be altogether different with respect to the Covenant, if it be self-executing. Its provisions are so numerous and so broad that they may apply very unexpectedly in all sorts of places. Furthermore, it is often difficult to say whether a particular federal statute is inconsistent with an article of the Covenant or not. For instance, several persons have thought that Article 17 as drafted by the Sub-Commission and the Geneva Conference is inconsistent with the present statutory power of the Securities and Exchange Commission to prohibit a prospectus which has not been approved by the SEC. My own opinion is to the contrary, but it would be very undesirable to leave this question in long uncertainty until it was settled by the Supreme Court.

If the Covenant is to be self-executing, an enormous and painstaking examination of the whole United States Code would be necessary. The situation would be something like that presented by the proposed Equal Rights Amendment to the Constitution. If women are to be guaranteed exactly the same rights as men, no more and no less, it is very hard to say how many existing laws will be changed and to what extent. For instance, if a statute allows boys to marry at 18 and girls at 16, which age applies to both under the Amendment? Will the crime of rape be abolished since it is applicable to one sex of offenders? The undesirable consequences of giving an unexpected and sweeping effect to international transactions in relation to domestic law is pointed out by Manley O. Hudson in his note on "Integrity of International Instruments."⁴⁵

Another consequence of a self-executing Covenant is that our government will naturally try to qualify many articles of the Covenant, in order to prevent their automatic operation from invalidating federal statutes which are considered to be very desirable. Thus the Covenant will be unduly lengthened because of the special situation of the United States.

In as much as the Covenant will not be self-executing in the United Kingdom and the British Commonwealth, it seems fair to place the United States on the same level as these other countries.⁴⁶ If our government insists on appropriate language to prevent the Covenant from becoming self-executing, no legitimate objection to this clause can be made by the other parties to the Covenant.

D. Methods of Preventing the Covenant from Being Self-Executing

It was by no means clear that Article 2, as it was drafted in December, 1947 and already quoted,⁴⁷ avoided the danger of being self-executing. The writer was inclined to think that the Supreme Court would construe it as merely pledging the good faith of the United States that Congress would repeal or amend any statutes inconsistent with the Covenant. Yet many persons took the opposite view. Any doubts on such an important matter were regrettable. Fortunately the State De-

⁴⁵ 42 AM. J. INT'L L. 105 (1948).

⁴⁶ As to the situation in other parts of the world, see Wright, *The Legal Nature of Treaties*, 10 AM. J. INT'L L. 706 (1916).

⁴⁷ See note 33 *supra*.

partment and the Human Rights Commission have grappled vigorously with this problem. Before presenting their later modifications of Article 2, the writer ventures a few observations on methods of preventing a treaty from automatically becoming domestic law, where such a result is undesirable.

Many American treaties have not made it plain whether they are self-executing or not. The decision may then somewhat depend upon the nature of the treaty. A treaty for the payment of money has been mentioned as not self-executing.⁴⁸ Justice Curtis in 1855 thought that a treaty relating to tariff duties was merely a contract to legislate.⁴⁹ On the other hand, material collected by Hackworth shows that the Department of State has recently regarded the most-favored-nation clause in provisions of commercial treaties as effective without the subsequent enactment of congressional legislation.⁵⁰ In the Florida land grant case, the fact that Congress had acted to implement the treaty with Spain made it easier for Chief Justice Marshall to declare that the clause about land titles was not self-executing.⁵¹ A decision by Judge Parker in 1929 holds that treaties about patents are not self-executing.⁵² The complexity of the patent law and the administrative machinery is said to call for congressional action. But the authority of this decision is somewhat shaken by the *Bacardi* case in the Supreme Court,⁵³ which holds that a trademark treaty is self-executing. Probably the two cases can be distinguished, but it is evident that one cannot rely on the subject-matter of a treaty as determinative of the question of its self-executing character. Furthermore, when we come to the Covenant on Human Rights, its extensive concern with domestic rights and duties would seem to make it *prima facie* self-executing in the United States so far as subject-matter goes.

Consequently, plain language will be necessary to prevent this undesirable result. Such language might be inserted in the Covenant itself or in our ratification of the Covenant. If it were in the ratification it would be a sort of reservation and it would require the consent of the other parties to the Covenant. Some such procedure has been followed at times,⁵⁴ but would be objectionable in this instance. Therefore it would seem that the Covenant itself should contain the necessary language to prevent it from being self-executing in the United States.

The most useful discussion of this problem is in an article by Edwin D. Dickinson, "Are the Liquor Treaties Self-Executing?"⁵⁵ He says:

Treaties not infrequently stipulate in terms that they shall be put into effect by legislative enactment. . . . Whatever the reason for proceeding by this avenue may be, if the treaty by its terms requires legislative action to make it effective, the result is clear. The treaty is not self-executing.

⁴⁸ See note 41 *supra*.

⁴⁹ *Taylor v. Morton*, 23 Fed. Cas. 784, No. 13,799 (C. C. Mass. 1855).

⁵⁰ HACKWORTH, *op. cit. supra*, note 44, at 179-183.

⁵¹ See note 42 *supra*.

⁵² *Robertson v. General Electric Co.*, 32 F. 2d 495 (C. C. A. 4th 1929), *cert. denied*, 280 U. S. 571 (1929). See 29 MICH. L. REV. 630 (1930).

⁵³ See note 38 *supra*.

⁵⁴ See the case of the Cuban Convention in HACKWORTH, *op. cit. supra*, note 44, at 203-204.

⁵⁵ 20 AM. J. INT'L L. 444, 448 (1926).

Dickinson lists four American treaties containing such express language.⁵⁶ One is an old treaty with Russia in 1824.⁵⁷ The Multipartite Convention of 1884 for the Protection of Submarine Cables said:⁵⁸

Article XII. The High Contracting Parties engage to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment, either by fine or imprisonment, or both, of such persons as may violate the provisions of articles II., V. and VI.

Article XIII. The High Contracting Parties shall communicate to each other such laws as may already have been or as may hereafter be enacted in their respective countries, relative to the subject of the Convention.

The fur seal treaty of 1911 with Great Britain, Japan, and Russia, declared:⁵⁹

Each of the High Contracting Parties agrees to enact and enforce such legislation as may be necessary to make effective the foregoing provisions with appropriate penalties for violations thereof.

The migratory bird treaty of 1916 with Great Britain read:⁶⁰

The High Contracting Powers agree themselves to take, or propose to the respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.

Congress enacted legislation to carry out each of these treaties.⁶¹

Professor Hudson has called the writer's attention to the Montreal International Labor Organization Convention of October 9, 1946, and also to the Multipartite Convention on Narcotic Drugs of 1931,⁶² which says in Article XV:

The High Contracting Parties shall take all necessary legislative or other measures in order to give effect within their territories to the provisions of this Convention.

These models are available for adaptation in the Covenant, but thus far the Human Rights Commission has taken a different course in revising Article 2 since the Geneva Conference. The draft of June, 1948, contained an undertaking "that such rights and freedoms where not now provided under existing rules and procedures be given effect in its domestic law through the adoption of appropriate laws and procedures."⁶³ This was still further improved in June 1949. The first section of Article 2 now reads:⁶⁴

⁵⁶ *Id.* at 448 n. 20.

⁵⁷ 2 WILLIAM M. MALLOY, TREATISES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1512, 1513 (1910). See 4 STAT. 276 (May 19, 1828).

⁵⁹ 37 STAT. 1542, Art. VI (July 11, 1911).

⁵⁸ *Id.* at 1954.

⁶⁰ 39 STAT. 1702, Art. VIII (Aug. 16, 1916).

⁶¹ Dickinson, *supra* note 56. See also *Missouri v. Holland*, 252 U. S. 416 (1920).

⁶² 5 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 1048 (1941).

⁶³ REPORT OF THIRD SESSION (E/800, p. 15).

⁶⁴ REPORT OF FIFTH SESSION (E/1371, p. 28).

Each State party hereto undertakes to ensure to all individuals within its jurisdiction the rights defined in this Covenant. Where not already provided by legislative or other measures, each State undertakes, in accordance with its constitutional processes and in accordance with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures to give effect to the rights defined in this Covenant.

This seems to solve the problem. At any rate, there is no reason for hostile critics of the Covenant to assume that it will be self-executing. If this draft does not prevent that effect, some better draft can be found to do the job. With the models at hand which were lately quoted from several American treaties, it must be possible for Article 2 to make it unmistakably plain that Congress must act before existing federal law is modified to conform to the Covenant.

The Covenant will be far more successful if it operates as an international obligation of good faith than if, in addition, it serves as an uncertain and dislocating factor in federal law, upsetting nobody knows what until costly litigation comes to an end.

VI

THE STRUCTURE OF ARTICLE 17

Before the Sub-Commission had worked many hours on the text of Article 17, we found that the main provisions were arranging themselves in our minds on three levels.

First. There must be an affirmative description of freedom of thought and expression, which the signatory nations were to obligate themselves to protect as a fundamental human right. In order to avoid any loopholes, we specifically mentioned various aspects of freedom of information and various modes of communication. This affirmative provision was framed by the Sub-Commission with great care, so as to be a firm and wide statement of the freedom which underlies all the other freedoms. In as much as the problems here encountered concerned style rather than law, only one will be discussed in these pages.

Second. Article 17 would have to contain permissive limitations on this broad freedom. In some form or other, we needed to define the types of objectionable language which a nation could control if it so desired. This portion of both the Sub-Commission and Conference drafts caused the most trouble and has aroused bitter attacks. Hence the problems involved will be the chief object of attention in the rest of what the writer has to say.

Third. Since there were obvious risks that the permissive limitations might be abused by a nation so as to stifle desirable discussion, safeguards against this ought to be established. This important point will be elaborated in the course of dealing with the permissive limitations.

VII

SHOULD FREEDOM OF INFORMATION BE PROTECTED AGAINST
ONLY GOVERNMENTAL INTERFERENCE?

This was the one serious legal problem which arose in the affirmative definition of the rights in Article 17. Most articles of the Covenant run against everybody. "It shall be unlawful to deprive any person of his life . . ." "No person shall be deprived of his liberty . . ." In this respect, the Covenant articles go beyond the Fourteenth Amendment, which protects human rights against only action by states, cities, etc., and their officials, and does not apply to private wrongs. For instance, it could not be used to punish the violent intimidation of Negroes by the Ku Klux Klan. Lauterpacht opposes such a distinction in the Covenant,⁶⁵ and the Human Rights Commission has been wise in abandoning it for rights like life, liberty, bodily safety, and a fair trial, which have long been protected by law against any sort of interference. It makes little difference whether this established protection is given by constitutions or by other parts of the law, such as criminal codes and the writ of habeas corpus. The point is that the Covenant does not obligate the United States or any other civilized nation to do anything novel in punishing murder or rescuing somebody from imprisonment by a gang of thugs. We do not want the nations which sign the Covenant to dodge responsibility for lynchings and other organized forms of violence, which often exist because of governmental connivance or inefficiency.

Freedom of speech, however, is in a somewhat different situation. Historically it grew up as an immunity against suppression by governments and government officials. Except in such matters as organizing labor unions, the law has done little to prevent one private person from imposing restrictions upon the utterances of another private person. Was it desirable to create an international grievance whenever a high school principal excluded a story from the students' magazine or a college professor was dismissed for heterodox ideas or a newspaper publisher refused to print an article prepared by a reporter? Serious evils are indeed created by deprivations of academic freedom and by the bias of some of the men who control newspapers, but attempts to end these evils by law are likely to put government officials in charge of private discussion. The proper remedy lies in public opinion and the development of a genuine professional spirit among all those concerned with an educational institution or a newspaper.⁶⁶

Therefore, the Sub-Commission draft of Article 17 begins: "Every person shall have the right to freedom of thought and expression *without interference by governmental action*. . ." and the italicized words were also used in the Conference draft.

⁶⁵ Lauterpacht, *Human Rights, the Charter of the United Nations, and the International Bill of the Rights of Man*, 19-20 (REPORT OF HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASS'N, BRUSSELS CONFERENCE, 1948).

⁶⁶ See A FREE AND RESPONSIBLE PRESS (COMMISSION ON FREEDOM OF THE PRESS, 1947), *passim*; ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS cc. 23 and 24 (1947).

Their omission in the French draft now before the Human Rights Commission raises serious questions.⁶⁷

VIII

THE NECESSITY OF SOME SORT OF LIMITATIONS

Several hostile American critics of the Sub-Commission among newspapermen have accused it of granting freedom of the press with one hand and snatching it away with the other. Thus Hugh Baille, the President of the United Press Association, said in part of a letter about Article 17:

It is my opinion its adoption would constitute a long step in the direction of bringing the American press under the government's thumb, in contravention of the First Amendment to the Constitution of the United States.

This is the very opposite of what I had in mind when the drive for greater freedom of information throughout the world was started.

I refer specifically to paragraph 2. Under subdivision (a), that penalties could be imposed upon the press for reporting "matters which must remain secret in the vital interests of the state," would not governments, with the blessing of the United Nations, be encouraged to draw up lists of classified subjects which shall be taboo in the press and to pass laws to enforce that taboo, thus bringing about a peacetime censorship?

Subdivision (b) says the press could be punished for "expressions which incite persons to alter by violence the system of government." Not long ago the United Nations Assembly called on all countries to withdraw their ambassadors from Spain. This certainly could be construed as an attempt to incite the Spanish people to overthrow Franco. In that case could we be charged with violating the Covenant for reporting an action by the United Nations and distributing it to newspapers throughout the world? How about reporting the speech of a Hyde Park orator who calls for the overthrow of the monarchy in Britain?

Subdivision (c) proscribes "expressions injurious to the fair conduct of legal proceedings": Judges even now try occasionally to muzzle the press by contempt proceedings against reporters or editors. Does not this provision in (c) condone such actions by judges which are resisted by the press whenever they arise, and invite an extension of censorship from the bench, sanctioned by the United Nations?

And other critics cried out, why not merely define the right and stop as the First Amendment does—

Congress shall pass no law abridging the freedom of speech, or of the press.

It does not bristle with limitations like Article 17.

It is true that the First Amendment does not mention any limitations, but they are there just the same. Newspapers can be made to pay for libels, sellers of obscene books can be punished, and men can be punished for improperly discussing pending court cases. The framers of the First Amendment and the corresponding provisions in state constitutions did not spell out such exceptions. They took them for granted because they were part of their legal background in familiar principles of our judge-made law and occasionally in legislation. Moreover, the First Amendment is con-

⁶⁷ See the three drafts in Appendix II.

strued by the Supreme Court in relation to the original Constitution, and limitations are read into it from the affirmative powers of Congress. Consequently, Eugene Debs was imprisoned for what he said about our entering the First World War, indecent books are barred from the mails or seized by the customs, and anarchists have been deported for what they merely thought.

Now, this device of judicially implied limitations upon an apparently absolute freedom is obviously impossible for an international treaty like the Covenant. It stands by itself; if it grants complete immunity for talk and printing, there is no underlying document like our original Constitution to cut down that immunity. And the framers of Article 17 cannot take anything for granted. They cannot assume a background of familiar law, because the Covenant is intended to bind many nations, each of which has its own sort of law. Every nation which signs the Covenant ought to be told plainly how much it promises and what it does not promise. Therefore, the limitations on freedom of speech, which are understood without being mentioned in a domestic constitution, need to be spelled out carefully in a treaty provision on free speech.

Furthermore, the twelve members of the Sub-Commission were not just describing an ideal situation in Utopia. We were preparing a treaty with the hope that it would be signed and ratified by two-thirds of the states in the United Nations. Otherwise, our work would not become law. Consequently, we had to frame the kind of promises which governments could reasonably be expected to sign. If we drafted a promise which left no opening for a government to punish a person who betrayed its secret plans of forts and airplanes, there was very little prospect that our government or the British government would sign it, to say nothing of others. So it was thought essential to permit governments to retain a reasonable power of control with regard to matters where serious danger from abuses of free speech has long been recognized and where some regulation of newspapers is customary in free societies like England and the United States.

The necessity of allowing some penalties on objectionable publications is plain. Freedom of speech is not the only purpose for which a society exists. It is a tremendously important purpose, but there are other important purposes like national safety, the administration of justice, and the protection of individuals from harm. Government leaders and many patriotic citizens would be outraged if our nation were asked to sign a treaty which pledged our federal and state governments not to take any action against a treasonable newspaper or a pornographic film and never to award damages for libels. Some areas had to be blocked out within which penalties might legitimately be imposed, if Congress or the state legislatures should wish. A similar attitude naturally exists in other nations, and ought to be constantly kept in mind.

The limitations in Article 17 take care of this situation, but they impose no restrictions whatever upon the press. They are merely permissive. "Penalties . . .

may . . . be imposed" against specified types of utterances. That is all. Nothing requires a government to punish the disclosure of state secrets or violent revolutionary talk or contempt of court. Article 17 simply says that if a government does choose to punish such matters, it will not be violating the Covenant.

There is absolutely no basis for any fears that our ratification of Article 17 would supersede the First Amendment. In the first place, if they did conflict, this would merely nullify Article 17 *pro tanto* as an obligation of the United States. Although the treaty-making power does affect the balance between nation and states by allowing the President and two-thirds of the Senate to do some things which a majority of both houses of Congress cannot do, *e.g.*, entitling aliens to inherit land within a state, nevertheless a treaty cannot validly disregard an express prohibition in the Constitution, such as the First Amendment. This was the position of Chief Justice Hughes in the address previously quoted,⁶⁸ and the writer knows of no Supreme Court authority to the contrary.

Secondly, no conflict exists between the First Amendment and the Sub-Commission draft of Article 17. The same proposition holds good for the Conference draft and for any other draft that is likely to be promulgated by the United Nations. Perplexities might indeed arise if the Covenant affirmatively undertook to compel our government to punish a type of utterance which was conceivably within the constitutional protection of the First Amendment. The Soviet draft already mentioned as now before the Human Rights Commission may present this difficulty,⁶⁹ but its adoption seems very improbable in view of the steadfast and overwhelming opposition of the Sub-Commission and the Geneva Conference to similar Soviet proposals flatly denying freedom of expression to vague categories like fascism and warmongering. Instead, the policy of merely optional limitations has always prevailed. The closest approach to trouble was caused by a different article (21) which appeared in the earliest draft of the Covenant: "Any advocacy of national, racial or religious hostility that constitutes an incitement to violence shall be prohibited by the law of the State."⁷⁰ Objectionable as such forms of hostility are, this was not the right way to deal with them and it raised grave constitutional questions for the United States. Fortunately, Article 21 is shelved in the June, 1949, draft and may perhaps be much changed. Article 17, at any rate, contains nothing compulsory except the obligation to grant freedom of thought and expression. The limitations leave Congress completely free to do nothing or to deal with the specified types of speech by enacting any laws it pleases within the scope of the First Amendment and other clauses of the Constitution. The same open choice is possessed by state legislatures, in so far as the states come within the Covenant at all (in view of the

⁶⁸ See note 32 *supra*. There is no need, in this connection, to worry about problems arising if the United States were terribly defeated in a war and then forced to sign a peace treaty contrary to constitutional prohibitions.

⁶⁹ See note 10 *supra*.

⁷⁰ REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, p. 35). Compare REPORT OF THE FIFTH SESSION (E/1371, pp. 39-40).

article on federal nations). It is also noteworthy that all the limitations in Article 17, with the possible exception of (h) in the Conference draft—the Indian amendment hereafter discussed—correspond with the types of objectionable utterances which the Supreme Court allows to be controlled under the First and Fourteenth Amendments. In short, Article 17 merely qualifies the broad promise to guarantee freedom of information by authorizing each signatory nation to have, if it wishes, certain kinds of suppressive laws in accordance with its own constitutional system.

IX

ONE BLANKET LIMITATION OR SEVERAL SPECIFIC LIMITATIONS?

This is the most complex and baffling of all the legal problems raised by Article 17. The method of specific limitations was chosen by both the Sub-Commission and the Geneva Conference (see Appendix II, Drafts A and B). The United States government, however, has always urged a single blanket limitation to the effect that

freedom of expression may be limited only to protect the rights of others and the freedom, welfare, and security of all.⁷¹

This resulted from the attitude of our government toward the Covenant as a whole. During the preparation of the original draft of the Covenant by the Human Rights Commission in December 1947, the United States wished to have no limitations at all in the articles defining the various substantive rights, but to deal with this essential matter by an overall article resembling in a general way the language just quoted.⁷² That was the plan followed in the Declaration of Human Rights.⁷³ After the Commission had decided otherwise as to the Covenant and inserted specific limitations in many articles, our government thought that it would still be desirable to use the idea of a blanket limitation in Article 17.

When this idea was suggested to the Sub-Commission, it took about ten seconds to show that nobody wanted it. In Geneva, the blanket limitation was thoroughly discussed and repeatedly voted down by irresistible majorities. Since the French draft now before the Human Rights Commission (Appendix II, Draft C) resembles the American proposal, the controversy will probably be renewed at its sixth session in 1950.

The main reason why the blanket limitation was rejected by the Sub-Commission and the Conference was because it makes nearly meaningless the affirmative right in the first paragraph of Article 17. Such terms as the "welfare and security of all" could be used to justify almost any restriction on freedom of expression which any official or legislature would be likely to want to impose. The most ardent advocates of suppression, like Pobedonotsev in Czarist Russia or the Lusk Com-

⁷¹ REPORT OF THE UNITED STATES DELEGATION, *op. cit. supra* note 7, at 6-8. This states the position of the Delegation and the writer's minority views.

⁷² E/600, p. 38; see Appendix I of the present article.

⁷³ The overall article in the Declaration is 29(2).

mittee in New York or the present Un-American Committee, always sincerely believe that drastic penal laws and censorship are necessary to preserve national security and promote the general welfare by heading off revolutions, social demoralization, and other calamities.

In view of the omission in the Conference draft of the prohibition of peace-time censorship, framed by the Sub-Commission, the substitution of the blanket limitation for the present second paragraph of Article 17 would give a very wide scope for restraints on freedom of speech. It is bad enough to have criminal laws directed against many types of supposed objectionable utterances, but it is far worse when a rigid censorship can be established to revise or forbid publications for any cause which is related to the "welfare and security of all."

If that sort of thing can be done without any violation of Article 17, then the obligation which the signatory nations assume to maintain freedom of thought and expression fails to operate in the very situations where toleration is needed.

Nevertheless, there is a good deal to be said on the other side. The case for the blanket limitation is forcefully presented by Herzel H. E. Plaine of the Department of Justice:⁷⁴

This idea would permit of a style of drafting of a single limitation summarizing the right of government to deal fairly and reasonably in limiting the rights set forth, but pursuant only to law and subject at all times to conformity with the article on equal protection of the law [Article 20].

In the view of the other school of thought, this was much too broad. [Specific limitations were urged instead.] Viewed abstractly the theory of specific limitations offers persuasive inducements. Why should not government claim now, and for all time, the legitimate, specific bases upon which it may deal with and restrict individual liberties, but only these and no more?

However, as the study of the sources and causes of legislative action progressed and the realization dawned upon many of the delegates that in one way or another all of these sources and causes infringe upon and subtract from the unfettered freedoms of man, it became clearer that there was a good deal of illusion in any attempt to be specific in dealing with the breadth and depth of reserved legislative power. The so-called specific limitations which were evolved, either *in toto* or individually, were no more specific than the proposed single limitation clause. . .⁷⁵

⁷⁴ *Forum on Draft Declaration and Covenant of United Nations Human Rights Commission*, in PROCEEDINGS OF THE A. B. A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW 24 (Seattle, Sept. 6-7, 1948). Mr. Plaine is the Adviser from the Department of Justice to the United State Delegation to ECOSOC and the Human Rights Commission, and held a similar position at the Geneva Conference.

⁷⁵ Mr. Plaine illustrates this statement by Article 16 on freedom of religion, which allows "such limitations as are prescribed by law and are necessary to protect public order and health, morals and the fundamental rights and freedoms of others." But this is really a blanket limitation, similar to what our government wants in Article 17. Hence this example gives little support to Mr. Plaine's objections against specific limitations.

A better argument for Mr. Plaine's position can be based on Article 16. If a blanket limitation was adopted for freedom of religion, why won't it work for freedom of speech too, in Article 17? The best reply is, that freedom of religion has strong and widespread support in free nations, and the limitations on it have caused trouble very rarely in law. Polygamy and the worship of poisonous snakes do not require detailed attention in the Covenant. By contrast, the limitations on freedom of speech need to be carefully blocked out, because the public at large is constantly concerned with the dangers from

Other articles like that on freedom of expression present the spectacle of attempting to saddle a minimum of twenty-two broad areas of limitation upon the individual's right to freedom of expression. And the enumeration is not yet complete.

The last paragraph of this quotation brings out the most serious difficulty with specific limitations in Article 17. At the Geneva Conference it became evident that the seven clauses framed by the Sub-Commission did not exhaust the possibilities of legitimate state control over speech. There are a good many other types of utterances which the governments of free countries are accustomed to suppress or regulate. These omitted situations tend to proliferate, and the list of possible additional limitations has now reached twenty-five.⁷⁶ This includes the disclosures of professional secrets contrary to law; fraudulent expressions; proper conduct of election campaigns, *e.g.*, the Hatch Act; profanity in public places; licensing of radio stations; and regulation of prospectuses of corporate securities, *e.g.*, by the SEC. And future deliberations or new inventions may turn up more items still.

Practically everybody agrees that the Covenant ought to permit laws on many of these matters, but the question remains—how can this best be done? To put them in the form of new specific limitations, besides the seven or eight already drafted, would make the tail wag the dog and render Article 17 absurdly long.

Another solution is to draft a "basket clause," which will take care of a large variety of situations ordinarily considered to fall outside the protection of constitutional guaranties of free speech. The express limitations could then be confined to the types of objectionable utterances which cause the most trouble, as in the Sub-Commission and Conference drafts. Article 8 on compulsory labor does something of the sort in its final paragraph permitting "minor communal services considered as normal civic obligations incumbent upon the members of the community. . . ." Yet when attempts were made at Geneva to produce a basket clause, it always turned out to resemble the United States proposal for a blanket limitation and aroused similar objections.

A third solution would be to list the main limitations, as now, and then require each nation to report to the Secretariat any old or new laws in other categories. Since these laws would always be within the spirit of Article 17, nobody would object to them. When, however, protests were made, they could be the subject of diplomatic negotiations, and consideration by the Sub-Commission or other appropriate agency of the United Nations.

No satisfactory solution has yet been reached, but the writer believes that one can be worked out.

In this connection, it is particularly important that the Covenant should not be self-executing in the United States, for then much less trouble will be caused by

publications, etc., and liable to forget in times of excitement the very great value of preserving open discussion.

⁷⁶ REPORT OF FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, pp. 36-38).

desirable existing statutes which fall outside the specific limitations in Article 17 or other articles. Suppose that such a statute does technically interfere with freedom of expression. It will not be automatically nullified by the Covenant, but Congress can decide whether international good faith requires the modification of this statute. If Congress fails to change a law which other signatory nations consider objectionable, then those countries may remonstrate with us and Congress can give the matter further consideration. Something of this sort will inevitably happen in the United Kingdom and other countries where treaties are not self-executing and it is only right that the United States should be on the same level.

This whole problem is aggravated by the decision of the Human Rights Commission to postpone provisions for the implementation of the Covenant until the substantive rights were defined. Here is a striking illustration of the validity of Lauterpacht's criticism of that policy:⁷⁷

These two questions [of the substance of the Bill of Rights and its enforcement] are interconnected. For the enforceability of the Bill must depend on the kind of human interests which it is to protect. On the other hand, the nature and scope of the rights which we include in it must be determined by the degree of enforcement which we decide to adopt in order to make it a reality.

The present situation is as if men had to draft a criminal law without knowing that there would be any criminal courts or sheriffs. In planning several parts of Article 17, one's choice of words would be greatly helped if he knew whether these words were to be interpreted by some UN court or agency, or only by the nation obligated. This is especially true of the controversy now under consideration—

“Where ignorant armies clash by night.”

For instance, one of the best arguments for a blanket limitation is that it could receive a definite content from a series of judicial decisions, just as the exceptions to the First Amendment have been blocked out by our Supreme Court. But this argument assumes that such a UN court (or other agency) will have power to construe Article 17. This is a delicate contention for the United States to make, in view of the rigid opposition of the American Bar Association to an International Court of Human Rights or to any UN agency with power to investigate violations of the Covenant except the International Court of Justice at the Hague.⁷⁸ The Hague Court would hardly have many cases under Article 17, and so the meaning of a blanket limitation would remain obscure for years.

The persistent refusal of our government to accept as a *fait accompli* the overwhelming decisions of the Sub-Commission and the Conference against a blanket limitation in Article 17 may win an improbable success in the end, but meanwhile

⁷⁷ LAUTERPACHT, *op. cit.* *supra* note 65, at 11.

⁷⁸ 73 A. B. A. REP. 360, 422-428 (1948). REPORT TO [A.B.A.] SECTION OF INTERNATIONAL AND COMPARATIVE LAW BY COMMITTEE ON UNITED NATIONS 2, 8. (Sept. 5, 1949.)

our opposition to every sort of specific limitations puts us in a weak position to influence the content of any particular specific limitation. The man who declares that he will never eat shellfish does not have much say as to how the lobsters shall be cooked. Two excellent opportunities to get rid of the Indian amendment, at Geneva and subsequently, were lost because our government was unwilling, in return, to abandon its die-hard stand for a blanket limitation.

X

SHOULD THE SPECIFIC LIMITATIONS BE PHRASED BROADLY OR NARROWLY?

As soon as the Sub-Commission decided to insert specific limitations in Article 17, we were confronted with a dilemma.

On the one hand, if we drew these limitations broadly, we might enable some tyrannical government of a signatory nation to punish desirable discussion without any possibility of being called to account for violating international obligations. There would be much less scope for interference with the press than under the blanket limitation already described, but still considerable abuses of governmental power might conceivably occur unless we demarcated the boundary of each limitation with precision so as to make it coincide exactly with the correct line between suppression and proper laws against speech.

The risk of abuses was especially serious in the first two limitations. The permission to control the disclosure of vital state secrets might be used by arbitrary officials to prevent newspapers from telling citizens what these officials were doing, and the permission to punish incitement to violent revolution could be stretched, as history shows, to embrace prosecutions for rather mild hostile criticisms of the policies and actions of the men in high places.

On the other hand, our tentative efforts to draft each limitation so as to cover desirable laws and nothing else ran us at once into great difficulties. For one thing, the precise boundary between good speech and bad speech in any area cannot be stated briefly. Courts have had to prick out the line by the process of inclusion and exclusion through a long series of decisions. To take the least controversial limitation—how could the Sub-Commission set out the whole existing law of libel and slander in one clause of one article of the Covenant on Human Rights? The danger that some legislature might repeal the defense of fair comment and thus cripple newspapers from expressing unfavorable opinions about officeholders and candidates had to be balanced against the fact that if the Sub-Commission undertook to deal with the details of defamation, it would spend the fortnight of its session on this point alone and Article 17 would read like a chapter of the *Restatement of Torts*. Remember, too, that the libel laws of over fifty countries would have to be mastered and reconciled. Even the Geneva Conference, with much more time and manpower at its disposal, shrank from such a colossal task, and referred it to a committee of jurists or an international organization.⁷⁹ All the other limitations, if narrowly

⁷⁹ See Resolution 25, FINAL ACT OF UN CONFERENCE ON FREEDOM OF INFORMATION 32-33.

phrased, would require a similar knowledge of comparative law. And even if the Sub-Commission succeeded in writing out with precision and accuracy the best existing conceptions about various restrictions on speech and press, we could not hope to allow for future developments. After all, the Covenant is intended to endure a long time. It cannot be given the exactness of an Income Tax Act for the next fiscal year.

In choosing the broad horn of the dilemma, the Sub-Commission was swayed by two further considerations, one relating to implementation and sanctions and the other to the express safeguards which we were putting into Article 17.

XI

IMPLEMENTATION AND SANCTIONS

It was important to frame the promises in Article 17 so they would not only be signed by many nations, but also kept after they were made. For that, they must be the sort of promises which a nation will be ashamed to violate. A breach of a treaty cannot be readily penalized like the breach of a private contract. Any external sanction necessitates some sort of cumbersome procedure like diplomatic representations, protests to a UN agency, a suit in an international court, economic pressures, and at the worst war. Here again the Sub-Commission was hampered by the failure of the Human Rights Commission to follow Lauterpacht's advice⁸⁰ and say how the limitations we were drawing were to be enforced. We do not yet know what implementation will be provided for the Covenant on Human Rights,⁸¹ but, so far as Article 17 is concerned, it seems unlikely that whatever international sanctions are thus established will be very effective in checking governmental breaches of the right of freedom of expression if those breaches occur very frequently or if they are caused by a strong feeling in the particular country that the treaty obligation endangers public safety. Recall the attitude of our own Southern states toward the Fifteenth Amendment. For forty years they ignored it with impunity.

Consequently, unless Article 17 allows room for a nation to adopt reasonable restrictions against utterances of an objectionable nature, its provisions may be little more than a pious hope. In a matter like this, it is unwise to induce a government to tie its hands very tightly. The result may be simply that it will untie them at any early opportunity when other nations will not care enough to raise a peep. When Hitler moved troops into the Rhineland in 1936, he violated the German treaty of peace with the United States. Yet President Roosevelt did nothing. No politician or editor, so far as the writer recalls, suggested that our government should

⁸⁰ See note 77 *supra*.

⁸¹ For a summary of the various implementation proposals in 1948, see Documents for Study in the 1949 Series of Regional Group Conferences of the American Bar Association, pp. 64-69. See also on implementation, REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS (E/600, pp. 65-71); REPORT OF THE THIRD SESSION (E/800, p. 36); REPORT OF THE FIFTH SESSION (E/1371, pp. 11-22, 61-100).

do anything. That was a far greater wrong than a violation of Article 17. If Ruritania, let us say, punishes an editor of a Ruritanian newspaper for suggesting that its Parliament is composed of nincompoops, will the governments of the United States, Great Britain, and France be more active than they were in 1936? The Rhineland march shows how undependable external sanctions can be.

Therefore, it is very important to place as much reliance as possible upon what Dicey calls *internal* sanctions.⁸² The Sub-Commission had to draw up the kind of promise which most good citizens within a country will want to carry out because they believe it to be a fair and desirable promise. One ought to take it for granted that the states which adhere to this Covenant will be countries with a reasonable amount of democratic government and devotion to personal freedoms of all sorts. Perhaps this assumption is mistaken, but, if so, measures from outside short of war are not likely to accomplish much in upholding Article 17 or any other article in the Covenant. Many other freedoms besides freedom of the press are likely to go by the board in a totalitarian state. Twelve men at Lake Success and a piece of paper cannot do very much to prevent a strong government from breaking promises which both its officials and its people intensely dislike. In short, the whole Covenant rests largely upon willingness to obey.

XII

EXPRESS SAFEGUARDS

The internal sanctions just described are the principal safeguard against abuses of broad limitations in Articles 17, but the Sub-Commission relied greatly on two other safeguards which it expressly wrote out in the text of this article and to which it devoted much thought and care.

A. Elimination of peacetime censorship

The first safeguard was the unequivocal repudiation of censorship of the press and of newsreels in paragraph 3 of the Sub-Commission draft (see Appendix II, Draft A). Even if a publication fell under one of the specific limitations, *e.g.*, advocacy of violent revolution or crime, it could only be punished but it could not be censored. (This provision would be suspended in war or a public emergency by virtue of Article 2). Since governmental censorship is the most powerful means of controlling and stifling public opinion, as Chief Justice Hughes pointed out in *Near v. Minnesota*,⁸³ the Sub-Commission regarded the elimination of peacetime censorship as one of its most notable achievements. The vote was ten to two; the minority comprised the Soviet and Czech members.

To the writers's great regret, the Geneva Conference struck out this prohibition of censorship. Since this action was supported by officials in Washington, although

⁸² A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 77-79 (8th ed. 1915).

⁸³ 283 U. S. 697 (1931).

not by the United States delegation at Geneva,⁸⁴ the restoration of this provision by the Human Rights Commission seems unlikely. This difference in attitude toward censorship between the Sub-Commission and the Conference was a sign of worsening international feeling after the Czech *coup d'état*. It was a conspicuous example of the tendency of the Conference, already mentioned, to plan the Covenant for the present troublous situation.⁸⁵ The partial recognition of censorship in the American Convention on the Gathering and International Transmission of News⁸⁶ was given in debate as a reason for not eliminating censorship entirely, but to the writer this argument was unsound because the Convention was intended to go into force as soon as possible whereas the Covenant ought to be designed for the better days to come.

B. The rule of law

The second safeguard valued by the Sub-Commission appears in its draft of the opening portion of paragraph 2, preceding the list of specific limitations:

Penalties, liabilities or restrictions limiting this right may therefore be imposed *for causes which have been clearly defined by law* . . .

The very important clause in italics originated with the Czech member, Sychrava, a student and associate of Masaryk.

This means that not even punishment or damages can be imposed for an utterance within a specific limitation unless the legislature of the particular country has passed a law clearly defining the wrong, or unless (as in the case of libel) the wrong has been solidly established by judicial precedents. For instance, a statute saying merely that it was a crime to disclose "matters which must remain secret in the vital interests of the state" would not comply with this safeguard. The statute must define the particular kind of state secret which it is a crime to reveal. There are now several Acts of Congress fulfilling this requirement. *A fortiori*, an official cannot justify his going after a publication by merely saying that it falls within a specific limitation. He must be able to point to a specific statute condemning such a publication.

No doubt, governments may conceivably abuse their powers under the specific limitations, but this cannot happen unless the legislature has plainly sanctioned such an abuse of power by a majority vote. Officials are prevented from running on the loose. The Sub-Commission relied on public opinion within each nation as a safeguard against misuses of the legislative power to create undesirable new kinds of criminal publications and speech within the limitations in Article 17.

Unfortunately, the Conference has seriously weakened this safeguard. In an attempt at brevity, it made the provision read "*penalties, liabilities or restrictions*

⁸⁴ In view of the attitude of the government in Washington, the United States abstained from voting on the censorship issue, but the writer spoke in Committee IV in favor of retaining paragraph 3 of the Sub-Commission draft.

⁸⁵ See page 549 *supra*.

⁸⁶ Art. 4. See FINAL ACT OF UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION 8.

clearly defined by law . . ." It is not enough to demarcate the punishment if the wrong itself be left vague. The Conference draft would permit a statute to impose a penalty of five years for the disclosure of "any matters which ought to remain secret in the interests of national safety."

Thus there are strong reasons why the Human Rights Commission should consider this point carefully. It is to be hoped that the Commission will restore the wording used by the Sub-Commission.

As Article 17 now stands, the only assurance against abuses of the specific limitations lies in the internal sanctions described.

XIII

THE INDIAN AMENDMENT

Something might be said about the seven limitations drafted by the Sub-Commission and somewhat modified by the Conference, but these caused no serious controversy within these bodies.⁸⁷ Although they have been attacked in the American press, it can easily be demonstrated that every one of the seven substantially describes either Acts of Congress passed by heavy majorities or time-honored restrictions under state statutes and judge-made rules.

The situation is entirely different for the eighth amendment, which was added by the Geneva Conference as proposed by the delegation from India, after a more sweeping Polish proposal of the same general nature had been rejected. The Indian amendment allows a signatory state to impose penalties, liabilities, or restrictions with regard to—

(h) The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States.

John B. Whitton of Princeton, in his very interesting article on the Geneva Conference, thinks that, in opposing this amendment, the United States Delegation showed itself unhealthily allergic to legal obligations as regards propaganda. Whitton writes:⁸⁸

This was a modest proposal; it did not purport to cover all war-mongering or subversive propaganda, but only that based on false or distorted reports . . . [Actually] the only effect of this amendment would be to add one more to the long list of restrictions

⁸⁷ The limitation as to state secrets was widely phrased by the Sub-Commission, so as to include crop reports, lists of persons on relief, and other matters not related to national safety. The Conference, by narrowing the limitation to secrets affecting national safety, increased the number of desirable laws for which there is now no provision in the specific limitations. The Conference wisely changed the copyright limitation, because France and some of her nations do not regard copyrights as property. The concluding phrase in clause (g), was inserted, at the writer's suggestion, to take care of tortious non-defamatory language, such as slander of title and disparagement of the quality of goods. See 1 ZACHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* c. 6 (1947). The phrase is rather obscure and should perhaps be omitted; the wrongs in question could then be handled like other omitted matters of comparatively slight importance.

⁸⁸ WHITTON, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT'L L. 73, 86-87 (1949).

already accepted at the Conference by states most devoted to the right of freedom of information . . . [To] cite Professor Hocking:⁸⁹

" . . . [A] cautious extension of penal law to deal with the most flagrant abuses of public confidence would be an increase of freedom for the legitimate press. To clear the highways of drunken drivers is not to limit but to increase the liberty of drivers who are not drunken."

A limitation is not just "one more" when there is no precedent in American common law or legislation for such a restraint on the discussion of important public questions. In this and other respects, the Indian amendment is wholly unlike the seven types of familiar restrictions allowed in the Sub-Commission draft. The only thing comparable to it in the United States is a few recent statutes against defaming racial or religious groups, of doubtful constitutionality and still more questionable wisdom. Indeed, the objections to group libel laws are much the same as those against the Indian amendment. These are presented elsewhere by the writer in a book which also discusses the difficulties of a still closer proposal, that legislation should be enacted to punish all sorts of inaccurate statements in the press which have harmful consequences, for instance, to good feeling among nations.⁹⁰ Rather than repeat the arguments there made, three reasons against the Indian amendment will be briefly stated.

First, lawmakers should be very reluctant to create novel crimes in the area of speech and press when it will be hard for the jury or other tribunal to distinguish between guilt and innocence. Neither Mr. Whitton nor Mr. Hocking seems aware of the great difficulties of proof in such cases. Since the proposal says "false" reports shall be punished, it is easy to assume that true reports will be left alone, but the trouble is that there is no litmus paper or yardstick to tell what is true and what is false. We never know that a statement is really false, but only that the tribunal decides it is false. Experience with suppressive statutes like the Espionage Act shows that juries and judges sometimes call political discussions false because they dislike what is said. Yet it is really a matter of differences of opinion. Nor can you take it for granted that only sensational papers will be prosecuted. The New York Times can cause great resentment by a calm dispatch. Moreover, where international controversies are involved in the prosecuted publication, the expense of getting evidence on a large scale from abroad and the language barriers make an accurate and dispassionate determination of what really happened almost impossible. It is a task for a historian and not for a law court.

So Mr. Hocking's analogy of punishing drunken drivers is not at all in point. The line between being drunk and not being drunk is familiar to ordinary men and can be established by eye-witnesses or, if necessary, by blood tests. Contrast the case of any report in a newspaper of nation A which is unfavorable to nation B in a period of strained relations, and hence can be readily held to undermine

⁸⁹ WILLIAM E. HOCKING, *FREEDOM OF THE PRESS IN AMERICA* 20 (Leyden Inaugural Address, 1947).

⁹⁰ CHAFEE, *op. cit. supra* note 87, c. 5 (on group libel), c. 7 (on inaccuracies generally).

friendly relations between peoples. The only issue left is truth or falsity. Witnesses must be brought over hundreds or thousands of miles to tell about the event in question. What they say will be warped by their national prepossessions either way, and the ultimate decision comparing the report with their testimony will be warped by the national prepossessions of the court or jury.

Second, such a law is not likely to do any good to offset this danger that it will suppress desirable discussion. In arguing against the Indian amendment at Geneva, the writer tried to avoid delicate ground by devising two imaginary countries which have such a statute—Looking-glass Country and Cloud-Cuckoodom. A newspaper in Looking-glass Country prints a dispatch from its correspondent in Cloud-Cuckoodom, that this nation is preparing death-dealing bacteria for use against Looking-glass Country. The government of Cloud-Cuckoodom denounces the report as false, and invokes the law. The peoples of both nations take violent sides. If the publisher is prosecuted in Looking-glass Country, he will almost surely be acquitted. If, instead, the correspondent is unlucky enough to be caught and tried in Cloud-Cuckoodom, his condemnation is just as certain. In neither event, will the people of the other country be convinced that the verdict was correct. It will be denounced as a travesty on justice in one nation and hailed in the other nation as a conclusive demonstration of its own claims. This controversy will drag on for years, and meanwhile the relations between the two countries will be made worse, not better, by the prosecution and its outcome.

The Indians felt that such a law might be of use in India or Pakistan to restrain Mohammedan newspapers from inciting pogroms against Hindus or *vice versa*, but this view presupposes governments of great integrity unswayed by local opinion; and in any event this is too isolated a situation to justify a treaty provision authorizing such a law in countries anywhere. It would be much better to omit mentioning it in the Covenant, and then, if India or Pakistan wants this sort of statute, it could be handled under the provision for unmentioned limitations which was discussed earlier in this article.

Finally, it seems highly probable that the main effect of the Indian amendment, if promulgated, would be to serve as a talking-point for the Soviet bloc. Every time "false and distorted reports" are mentioned in a UN document, they are constantly trying to push the thing farther and farther. They denounce anything unfavorable to them as "false and distorted," and seek to solidify what ought to be heartfelt moral obligations of truthfulness and accuracy into legal obligations which other countries are excoriated for not enforcing. Put those words into the Covenant, and their chief consequence will be to multiply tedious interruptions of important concrete tasks by the U.S.S.R. and its satellites. Before doing this, the Human Rights Commission ought to find very strong possibilities of fruitful accomplishment in the

Indian amendment. In view of what has been said above, such possibilities are far from obvious.

Article 17 raises still other problems, such as the desirability of inserting moral obligations to promote freedom of information⁹¹ into a legally binding treaty and the question of freedom of speech for foreigners in the final paragraph added at Geneva.⁹²

Enough has been said, however, to show the legal difficulties encountered by the Sub-Commission and the Conference, and the thought which was devoted to their solution. There is nothing here of the glamour which is often supposed to surround international affairs. But world government, like city or state or national government, is not glamorous. It is often tedious. Only through hard work and untiring patience is it possible to turn into facts our ideals of the way men ought to live together, at home or abroad.

APPENDIX I

Tentative Drafts of Article 17 in Second Session of Commission on Human Rights, 1947⁹³

Draft 1. Text proposed by the Drafting Committee.

1. Every person shall be free to express and publish his ideas orally, in writing, in the form of art or otherwise.

2. Every person shall be free to receive and disseminate information of all kinds, including facts, critical comment and ideas, by the medium of books, newspapers, oral instructions or any other lawfully operated device.

3. The freedoms of speech and information referred to in the preceding paragraphs of this Article may be subject only to necessary restrictions, penalties or liabilities with regard to: matters which must remain secret in the interests of national safety; publications intended or likely to incite persons to alter by violence the system of Government, or to promote disorder or crime; obscene publications; (publications aimed at the suppression of human rights and fundamental freedoms); publications injurious to the independence of the judiciary or the fair conduct of legal proceedings; and expressions or publications which libel or slander the reputations of other persons.

Note: Although the Report does not so state, the writer has been told that this was a British draft. Lord Dukeston (U.K.) was chairman of the Working Group on the Covenant. Without knowing the exact significance of the parentheses around "publications aimed at the suppression of human rights and fundamental freedoms," the writer assumes that the Working Group considered this limitation on freedom of information to be more dubious than the others. Light on this draft may probably be obtained from two documents which give the views of the members of the Working Group: its Report⁹⁴ and the summary records of its meetings.⁹⁵

Draft 2. Draft Proposed by the Representative of the United States (Mrs. Roosevelt).

Every one shall have the right to freedom of information, speech and expression. Every one shall be free to hold his opinion without molestation, to receive and seek

⁹¹ Par. 4 of Sub-Commission draft and Par. 3 of Conference draft (see Appendix II). This was proposed in the Sub-Commission by Pertinax, the member from France.

⁹² For the views of the Sub-Commission and the writer on this subject, see E/CN. 4/80, pp. 5-7.

⁹³ E/600, Dec. 17, 1947, p. 34.

⁹⁴ E/CN. 4/56.

⁹⁵ E/CN. 4/AC. 3/1 to 9. See E/600, p. 7.

information and the opinion of others from sources wherever situated, and to disseminate opinions and information, either by word, in writing, in the press, in books or by visual, auditive or other means.

Note: The absence of limitations in this draft article is a natural consequence of the wish of the Representative of the United States for one overall limitation article rather than spelling out every possible limitation in each article.⁹⁸ This problem is discussed by the writer, *supra* pages 570-574.

APPENDIX II

Three Significant Drafts of Article 17⁹⁷

Draft A, by the Sub-Commission on Freedom of Information and of the Press, Jan.-Feb. 1948.⁹⁸

Draft B, by United Nations Conference on Freedom of Information, Geneva, Mar.-Apr. 1948.⁹⁹

Draft C, submitted by the Representative of France at Fifth Session of the Commission on Human Rights, May-June 1949.¹⁰⁰

Note: The author has indicated by italics portions of the Conference Draft which differ from the Sub-Commission Draft. He has italicized the entire French Draft, which differs from both the others.

A

Sub-Commission

1. Every person shall have the right to freedom of thought and expression without interference by governmental action: this right shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices.

2. The right to freedom of expression carries with it duties and responsibilities. Penalties, liabilities or re-

B

Geneva Conference

1. Every person shall have the right to freedom of thought and *the right to freedom of expression* without interference by governmental action; *these rights* shall include [rest as in A].

2. The right to freedom of expression carries with it duties and responsibilities *and may, therefore, be sub-*

C

French Draft

1. *Speech is free. Every person shall be free to express and publish his ideas in any way he chooses.*

2. *Every person shall be free to receive and disseminate information of all kinds, including facts, critical comment and ideas, by the medium of books, newspapers, oral instructions or in any other manner.*

3. *The freedoms referred to in the preceding paragraphs may be subject only to the restrictions, penalties*

⁹⁸ E/600, p. 37.

⁹⁷ The Conference Draft is reprinted in REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, pp. 35-36). There are a few typographical changes. Arabic numbers are not in parentheses, small letters preceding subdivisions of paragraph 2 are not italicized, and the first word of each subdivision is not capitalized. "Government" is capitalized in subdivision (b) and "states" is not capitalized in subdivision (h). In paragraph 4, "article" is capitalized. An obvious error in subdivision (b) of the Commission's version is the substitution of "invite" for "incite." In (a), the Commission mistakenly says "interest."

⁹⁸ REPORT OF THE SECOND SESSION OF THE SUB-COMMISSION, Feb. 6, 1948 (E/CN. 4/80, pp. 4-5).

⁹⁹ FINAL ACT OF THE CONFERENCE, ANNEX B, pp. 19-20.

¹⁰⁰ REPORT OF FIFTH SESSION OF COMMISSION, June 23, 1949 (E/1371, p. 34).

<p>strictions limiting this right may therefore be imposed for causes which have been clearly defined by law, but only with regard to:</p>	<p><i>ject to penalties, liabilities or restrictions clearly defined by law, but only with regard to:</i></p>	<p><i>or liabilities provided by law for the protection of public order, national security, good morals, respect for law and the reputation or rights of other persons.</i></p>
--	---	---

A

- (a) matters which must remain secret in the vital interests of the State;
- (b) expressions which incite persons to alter by violence the system of government;
- (c) expressions which directly incite persons to commit criminal acts;
- (d) expressions which are obscene;
- (e) expressions injurious to the fair conduct of legal proceedings;
- (f) expressions which infringe rights of literary and artistic property;
- (g) expressions about other persons which defame their reputations or are otherwise injurious to them without benefiting the public.

Nothing in this paragraph shall prevent a State from establishing on reasonable terms a right of reply or a similar corrective remedy.

A

3. Previous censorship of written and printed matter, the radio and newsreels shall not exist.

4. Measures shall be taken to promote the freedom of information through the elimination of political, economic, technical and other obstacles which are likely to hinder the free flow of information.

[Immigration problems are covered by a Note in the Sub-Commission's Report.]

B

- (a) Matters which must remain secret in the interests of national safety;
- (b) Expressions [rest as in A];
- (c) Expressions [rest as in A];
- (d) Expressions [rest as in A];
- (e) Expressions [rest as in A];
- (f) *Infringements of literary or artistic rights;*
- (g) Expressions about other persons *natural or legal* which defame [rest as in A],
- (h) *The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States;*

A State may establish on reasonable terms a right of reply or a similar corrective remedy.

B

[*Paragraph on censorship struck out.*]

3. [Same as 4 in A].

4. *Nothing in this article shall be deemed to affect the right of any State to control the entry of persons into its territory or the period of their residence therein.*