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The O.A.U. and Human Rights: Towards a New Definition

by CLAUDE E. WELCH, Jr*

A FUNDAMENTAL dilemma has long lain at the heart of the Organisation of African Unity. Two contradictory principles have helped it maintain solidarity: the first recognises that domestic jurisdiction rests at the foundation of sovereign equality, while the second stresses that national policies such as *apartheid* have international consequences. These principles clash directly in the broad area of human rights.

The racist policies of South Africa have, since the inception of the Organisation, provided a continuing basis for resolutions. Condemnations of *apartheid* have marked almost every session of the Assembly of Heads of State and Government, the supreme body of the O.A.U. The denial of majority rule continues to draw sharp and continuing protests, claims of domestic jurisdiction notwithstanding. Discrimination on the basis of race knows no boundaries: practised within a single state, it is recognised as an international threat. Speaking more broadly, protection of human rights within individual countries has been established on the basis of international conventions, international customs, and 'general principles of law'.[1] On the other hand, there has been a reluctance to question the policies on human rights pursued by member states. Domestic sovereignty and equality have been used as arguments against the O.A.U. becoming involved in internal matters: 'non-interference' figures prominently in the Charter, and has been invoked on occasions when the O.A.U. ventured into new territory. Investigations have rarely made any progress into violent changes of government or widespread killings of opponents of those in power. A gap thus appears to exist between detailed attention to racist practices in Southern Africa and potential infringements of human rights north of the Zambesi.

In recent years, however, this seeming gap has narrowed. The

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[1] One of the most forceful expositions of this view comes in the dissenting opinion of Judge Tanaka in the 1966 decision of the International Court of Justice regarding South Africa's exercise of a mandate over Namibia: *Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice* (The Hague, 1966), pp. 254–316. The salient sections are reprinted in Ian Brownlie (ed.), *Basic Documents on Human Rights* (Oxford, 1971), especially pp. 461–75.

member states of the O.A.U. have looked increasingly at each others' records in fostering basic liberties. What was broached in 1975, with Tanzanian criticisms of Ugandan practices, was broadened by the 1979 O.A.U. summit to a unanimous resolution urging that a committee of legal experts be convened, in order to draft both an African Charter of Human Rights and Rights of Peoples, and the framework for an African Commission on Human Rights. These are significant steps to which this article is devoted. At this point, however, it would be inappropriate to expect any major initiatives. Similar Commissions have had gestation periods of 20 years or more, and major obstacles remain in the path of implementing their recommendations.

DOMESTIC JURISDICTION: PRINCIPLE AND RECONSIDERATION

As commentators on the O.A.U. have frequently noted, its founders laid great stress on safeguarding recently won independence against infringements of any sort. Few of the Heads of State and Government who attended the inaugural 1963 Addis Ababa Conference were willing, despite the urgings of Kwame Nkrumah, to support direct O.A.U. involvement in the internal affairs of member states. Newly gained international sovereignty was to be protected, and through adherence to the O.A.U. Charter, each Government accepted the principle of 'non-interference in the internal affairs of [member]states' – Article 3(2).[1]

This noted phraseology is reinforced by several related principles in the O.A.U. Charter. Sovereign equality of all member states; respect for sovereignty, territorial integrity, and the inalienable right to independent existence of each member; unreserved condemnation of political assassination and subversive activities: all testify to the founders' concern for achieving and maintaining uncontested government control. O.A.U. practice suggests a high sensitivity to any potential weakening of sovereignty. For example, the Commission on Mediation, Arbitration, and Conciliation, spelled out in elaborate detail in a Protocol to the Charter, has never been called into action. When member states have espoused sharply antagonistic positions, the O.A.U. has temporised, overlooked, or soft-pedalled the awkward issues. Gross violations of

[1] In this respect the O.A.U. Charter follows the general line of the Charter of the United Nations. Article 2(7) precludes the Organisation from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. For a discussion of the limitations to such jurisdiction, see Virginia Leary, 'When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State?', in James C. Tuttle (ed.), *International Human Rights Law and Practice* (Philadelphia, 1978), pp. 15–21.

human rights, such as the Hutu-Tutsi murders in Burundi, passed without comment, though not necessarily without notice, at summit meetings, for at least the first decade of the Organisation's existence.

Yet O.A.U. practice indicates that claims of absolute sovereignty in domestic affairs belie the historic record. Under certain circumstances, member states have worked directly with the Organisation to resolve domestic issues of significance beyond the bounds of the individual state. First and obviously foremost, the Government(s) concerned must be willing to accept O.A.U. involvement, in preference to 'going it alone' or seeking non-African assistance. Secondly, any successful O.A.U. settlement requires trusted Africans – most notably, Heads of State – able to attempt to mediate.

The absence of either of these two conditions precludes effective African action. For example, in 1973 an eight-member commission headed by the O.A.U. Chairman, then Colonel Yakubu Gowon of Nigeria, could not resolve the Ethiopia–Somali dispute over the Ogaden to the satisfaction of both parties; and the bitter conflict over the Western Sahara, particularly Morocco's strong stance, proved immune to the efforts of the special five-member commission that was established at the July 1978 summit meeting. On at least one occasion, however, the O.A.U. decided to intervene despite protests from the member state most concerned. The 1964 commission on the Congo, intended 'to help and encourage the efforts of the Congolese Government in national reconciliation... and to help normalize the relations between the Congo (Zaïre) and its neighbors',[1] was forced to conduct its efforts against the opposition of the Prime Minister, Moïse Tshombe, and his Ministers, who believed that only force could terminate the 'second independence' rebellions that had spread throughout the country.

An indirect challenge to domestic sovereignty surfaced early in the O.A.U. as a result of *coups d'état*. After all, one of the most politically sensitive matters is a change of government personnel – seemingly a decision under the exclusive aegis of an individual state. The repercussions of unconstitutional changes have been cited to preclude participation at O.A.U. Assembly and Council meetings, however. The 'non-interference' clause notwithstanding, the forcible ousters of Heads of State and Government have drawn occasional protests and some action within the O.A.U.[2] For example, attempts were made at the 1963

[1] Berhanykun Andemicael, *The OAU and the UN: relations between the Organization of African Unity and the United Nations* (New York and London, 1976), p. 68.

[2] Claude E. Welch, Jr, 'The OAU and International Recognition: lessons from Uganda', in Yassin El-Ayouty (ed.), *The Organization of African Unity After Ten Years: comparative perspectives* (New York, 1975), pp. 103–17.

summit to prevent the attendance of the new Prime Minister of Togo, Nicolas Grunitzky, owing to lingering suspicions over his predecessor's assassination. The representatives of five states walked out of the 1966 meeting of the Council of Ministers when the delegation arrived from the Ghanaian National Liberation Council that had recently removed Kwame Nkrumah. The O.A.U. Council of Ministers did not agree in February 1971 to seat the delegation sent by the new régime of Uganda, headed by General Idi Amin, but changed its stand when the session was resumed four months later. After the intervention of mercenaries in the Comoros, the newly installed régime was expelled from the 1978 O.A.U. session, albeit reinstated early in 1979.

Thus it is fair to say that – save under the most provocative of circumstances – efforts to limit participation at O.A.U. sessions have failed. They ran foul of a general belief that internal political changes could not, and should not, be regulated by the O.A.U. With a substantial portion of African governments headed by successful leaders of *coups d'état*, the means by which any had been installed clearly was not an item that participants were eager to approach! Military intervention *per se* was insufficient ground for O.A.U. involvement, the members apparently accepting the arguments advanced by Uganda in 1971:

> the question of a change in government in one country is purely an internal matter which is not the concern of the OAU. Twenty member states of the OAU which are now taking their seats in the OAU conference have had changes of government through coups and counter-coups. We strongly feel that if the OAU tries to involve itself in the internal affairs of member states, it is going to destroy itself.[1]

In April 1980 the Government of Nigeria prohibited the Foreign Minister of the new Liberian régime from attending the O.A.U. economic summit, thereby reflecting widespread distaste for the public execution of the O.A.U. Chairman, President William Tolbert, and many other members of his Government. President Léopold Sédar Senghor of Senegal took over the reins as temporary Chairman prior to the election of President Siaka Stevens at the Freetown summit in July 1980, which Master Sergeant Doe agreed not to attend, thereby defusing a possible confrontation.

To what extent has concern for sovereignty affected the involvement or non-involvement of the O.A.U. in alleged infractions of human rights? The judgement of U. O. Umozurike reflects attitudes prevalent in the early stages of the O.A.U.: 'with regard to breaches of human

[1] *Africa Research Bulletin. Series A: political, social, and cultural* (Exeter), February 1971, col. 2008A.

rights, even of a grave nature such as genocide, it has been bogged down by the domestic jurisdiction clause'.[1] Lacking for at least the first decade in the Organisation's history was the political desire to delve into the domestic practices of member states, even in instances of egregious violations of human rights. This changed as a result of post-1971 practices in Uganda and increasingly sharp criticisms from Tanzania.

The 1975 O.A.U. meeting in Kampala, scheduled after growing evidence of Amin's brutality, became the basis for extensive, if unsuccessful, protest. The impending succession of President Amin as Chairman of the O.A.U. – a hitherto automatic process, given the longstanding practice of according the position to the Head of State hosting the annual summit – led Botswana, Mozambique, Tanzania, and Zambia to boycott the meeting. They urged other member states not to attend owing to

> General Amin's apparent disregard for the sanctity of life, and his exhortation to the armed forces in Botswana, Tanzania and Zambia to overthrow their elected governments, because of their participation in attempts to find a peaceful settlement of the Rhodesian dispute.[2]

By far the sharpest protest came from the Government of Tanzania, and the statement issued on 25 July 1975 by the Ministry of Information and Broadcasting is worth close examination:

> The justification for both freedom and unity is the dignity, the well-being and the development of the people of Africa. The Organization of African Unity was set up in 1963 to promote this objective. It is an organization of States but its purpose is the service of the people of Africa – all the people... It is not surprising therefore that the whole of Africa cries out against the atrocities of the colonial and racist States. Individually as Africans, and through the OAU, we condemn the murderous acts of these regimes on every possible occasion and in every possible forum... But when massacres, oppression and torture are used against Africans in the independent States of Africa there is no protest anywhere in Africa. There is silence even when such crimes are perpetrated by or with the connivance of African Governments and the leaders of African States... the OAU never makes any protest or criticism at all. It is always silent. It is made to appear that Africans lose their right to protest against State-organized brutality on the day that their country becomes independent through their efforts. For on all such matters the OAU acts like a trade union of the current Heads of State and Government, with solidarity reflected in silence if not in open support for each other.
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> ...Africa is in danger of becoming unique in its refusal to protest about the crimes committed against Africans, provided such actions are done by African leaders and African Governments... This refusal to protest against African

[1] U. O. Umozurike, 'The Domestic Jurisdiction Clause in the OAU Charter', in *African Affairs* (London), 78, 311, April 1979, p. 202.

[2] Sir Seretse Khama, *Africa Research Bulletin*, June 1975, col. 3664B.

State crimes against African people is bad enough. But until now Africa has at least refrained from giving public support to the worst perpetrators of such crimes. Now by meeting in Kampala, the Heads of State of the OAU are giving respectability to one of the most murderous administrations in Africa. For this meeting will be assumed to have thrown the mantle of OAU approval over what has been done, and what is still being done, by General Amin and his henchmen against the people of Uganda...

The reasons given by African leaders for their silence about these things is the non-interference clause in the OAU Charter. This agreement not to interfere in the internal affairs of another State is necessary for the existence of the OAU. A similar condition is accepted by members of the UN. But why is it good for States to condemn apartheid and bad for them to condemn massacres which are committed by independent African Governments? Why is it legitimate to call for the isolation of SA because of its oppression but illegitimate to refuse co-operation with a country like Uganda where the Government survives because of the ruthlessness with which it kills suspected critics?...

We have come to our decision [to boycott the meeting in Kampala] because we are convinced that the Organization of African Unity will deserve the condemnation of the world and of the peoples of Africa as an organization of hypocrites if it acquiesces, or appears to acquiesce, in the murders and massacres which have been perpetrated by the present Uganda Government. For these murders and massacres have not been a temporary aberration; they are its style and its means of existence. This is the style of Government of every fascist regime in the world. Tanzania cannot accept the responsibility of participating in the mockery of condemning colonialism, apartheid and fascism in the headquarters of a murderer, an oppressor, a black fascist and a self-confessed admirer of fascism.[1]

As events in 1975–6 clearly demonstrated, however, the protests of the four states had far less weight than a long-standing principle of group action. Amin served his term as Chairman; the boycott had little practical effect.

What had been set forth in Tanzania's 1975 condemnation was reinforced by later reports of brutality in the Central African Empire. Shock waves spread around the world in May 1979, when Amnesty International alleged that over 100 imprisoned students had been executed in Bangui, the capital. Fragmentary information linked the killings directly to Emperor Jean-Bedel Bokassa, long an embarrassment to many of his fellow African leaders. His ostentatious December 1977 coronation – mounted at an estimated cost of £14 million in a country whose annual income *per capita* of £85 placed it among the world's lowest – was grotesquely out of place. The hundreds of cases of champagne, the white horses and carriages imported from France, the

[1] Reprinted in Colin Legum (ed.), *Africa Contemporary Record, 1975–76* (London, 1976), pp. C22–4.

£2·75 million imperial crown studded with more than 2,000 diamonds: such opulence shocked outside observers.[1] Although the French Government continued to supply more than half the recurrent revenues of the C.A.E., its support of such profligate expenditures became increasingly costly in political terms.

Internal repression mounted as the Emperor's policies aroused popular resentment. In January 1979, several hundred students in Bangui protested against a new requirement that they should wear 'uniforms' – allegedly to be distributed and controlled by a relative of the Emperor – since their cost, as great as a teacher's salary, put them far beyond the reach of most families.[2] Peaceful demonstrations turned into bloody confrontations. Vigorous, indiscriminate police suppression resulted in a death toll, according to Amnesty International, of up to 500.[3] In early April, further arrests of students took place. Bokassa claimed that those imprisoned were 'grown up' youths, allegedly members of 'a military type campaign carried out by Marxist students following orders from a foreign power'.[4] The reality was quite different, however. Many of those arrested had no political aspirations whatsoever, but were caught in an indiscriminate police round-up. Though justifiably angered by the uniform issue, they were responding not to external, but to internal, concerns. The Emperor saw differently. The Bangui prison became the scene of beatings, tortures, suffocations, and shootings.

Notable about the affair was the concern and initiative of French-speaking states. The May 1979 Kigali franco-African summit, which opened a week after Amnesty International had publicised reports of the murders, brought direct conflict with Bokassa. Concerns over domestic jurisdiction notwithstanding, the states gathered at the meeting decided to send a team of five African jurists to investigate the situation. The rôle of the jurists was central to later events. As Warren Weinstein has noted: 'the commission's 133-page report and annexes constituted a precedent in African diplomacy'.[5] Its mid-August report implicated the Emperor in the deaths, and led to an immediate suspension of French economic aid. Within a month, the Emperor had been ousted by a *coup d'état* orchestrated by France. Despite understandable concern in Africa about this renewed evidence of the influence of Paris in

[1] *Africa Research Bulletin*, December 1977, cols. 4668BC.
[2] Ibid. January 1979, col. 5130A.
[3] Amnesty International, 'Recent Human Rights Violations in the Central African Empire', London, 26 June 1979.
[4] *Africa Research Bulletin*, May 1973, col. 5263C.
[5] Warren Weinstein, 'Human Rights in Africa: a long-awaited voice', in *Current History* (Philadelphia), 78, 455, March 1980, p. 131.

internal matters, the installation of ex-President David Dacko was greeted with some relief. African condemnation of Bokassa had reached a breaking point, providing a rationale, in the absence of internal means, for forcing government change.

The toppling of President Amin provided further grisly evidence of flagrant violations of human rights. The Tanzanian invasion corroborated what had been documented earlier by the International Commission of Jurists,[1] press reports, and revelatory books about Amin's rule.

Finally, the overthrow and execution of the President of Equatorial Guinea removed a ruler whose brutality had gained increasing international censure,[2] not least as a result of reports of maltreatment by Nigerian labourers who had been repatriated from the cocoa plantations during 1975–6. Macias Nguema's downfall occurred after the brutal activities of his henchmen had been brought to the attention of the Heads of State and Government at the O.A.U. summit in 1979.

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The scene was thus set for an O.A.U. response to various initiatives – including not only those taken by Senegal and the Gambia, but also the recommendations of a series of previous meetings. It is appropriate at this point to provide further details about the specific proposals for a new O.A.U. rôle in human rights.

TOWARDS AN AFRICAN COMMISSION ON HUMAN RIGHTS

The resolution unanimously endorsed at the 1979 O.A.U. summit was general in nature. While urging 'better international cooperation to protect human rights', it called for a restricted meeting of experts 'to prepare a preliminary draft of an African Charter on Human Rights'. Few guidelines were thus provided to the specialists; what they suggested, after all, would likely be debated for many years thereafter within the Organisation.

The intent of the resolution was quickly carried out. Less than two months later a United Nations seminar was convened in Monrovia to produce a working document,[3] while in December 1979 a group of legal specialists met in Dakar to prepare the draft Charter. The most

[1] International Commission of Jurists, 'Uganda and Human Rights: reports to the UN Commissioner on Human Rights', Geneva, 1977.

[2] Fernando Volio Jimenez, 'Study of the Human Rights Situation in Equatorial Guinea', report submitted to the Commission of Human Relations, U.N. Document E/CN. 4/1371, New York, 12 February 1980; and Susan Cronje, *Equatorial Guinea, the Forgotten Dictatorship* (London, 1976).

[3] 'Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa', 10–21 September 1979, New York, U.N. Document ST/HR/Ser. A/4.

important recommendation of both sessions aroused little controversy: namely, that an African Commission on Human Rights be established. As will be noted below, this suggestion had been broached in several similar gatherings. What differentiated the 1979 meetings was the direct encouragement of the O.A.U.; previous efforts had been mounted within the framework of the United Nations, or had urged O.A.U. involvement prior to widespread support being expressed by the Heads of State and Government. As a result of many earlier efforts, both sessions came to a reasonably speedy agreement on the chief areas of controversy – leaving the implementation of their recommendations, to be certain, to the far more politicised framework of the O.A.U.

The jurists at Monrovia and Dakar confronted four basic issues concerning the proposed African Commission on Human Rights: (1) responsibility, (2) powers, (3) organisation, and (4) composition. To whom should the Commission report? This issue was resolved from a relatively early point. Long before the 1979 summit, African spokesmen had stressed their desire for an O.A.U.-linked emphasis. A regional approach from below, rather than an international intervention from above, evoked strong support. African conditions – particularly embittering experiences with colonialism, low levels of economic development, and concerns with external pressures – appeared to necessitate an approach based on the particular needs of the continent. African spokesmen frequently expressed a greater ease at working within an organisation that was created by the states concerned.

In the words of a 1968 *ad hoc* study group of the U.N. Commission on Human Rights, a regional human rights commission 'could only be established on the direct and exclusive initiative of the states comprising a given region'; there could be 'no question of any such body being initiated from outside the region or of the United Nations imposing its establishment on the states concerned'.[1] The time was not then ripe, it seemed, for any African initiative. The O.A.U. was not represented during February–March 1968 at the 24th session of the Commission on Human Rights that considered this report, not did it respond to a request for comments. Further, the O.A.U. prepared no documentation for the international conference held in Tehran in April 1968 to mark the International Year for Human Rights. It seems fair to deduce, accordingly, that the O.A.U. lacked the political will, or at least the organisational capacity, five years after its founding to become involved in a regional commission.

Only in the late 1960s did evidence start to appear in Africa of

[1] U.N. Document E/CN. 4/966, 26 January 1968.

concern for regional protection of human rights. The first initiative came in a September 1969 seminar held in Cairo,[1] when participants requested the U.N. Secretary-General to distribute their report to the O.A.U. and its member states, so that the Organisation might consider appropriate steps towards an African regional human rights commission. Eighteen months later, 26 representatives of African governments and 16 eminent African jurists recommended in Addis Ababa that a regional human rights commission be established, and that an African convention on human rights be drafted.[2] A seminar convened in Dar es Salaam by the United Nations in October and November 1973 concluded that such an African convention should be prepared under O.A.U. rather than U.N. auspices.[3] Finally, the U.N. Commission on Human Rights adopted, in February 1978, a Nigerian resolution that the U.N. Secretary-General 'take appropriate steps to give the Organisation of African Unity, if it so requests, such assistance as it may require in facilitating the establishing of a regional commission on human rights for Africa'.[4] The July 1979 summit resolution, passed unanimously and almost without debate, indicated the willingness of the O.A.U. to take its first major step, following several years of urging by other groups.

If a Commission were to be responsible to the O.A.U., what human rights would it protect? More specifically, how would it supplement – if at all – human rights that, 'by convention, practice, or other recognition, have entered the general corpus of international law, while respecting factors particular to Africa'? The experts who met in Monrovia and Dakar adopted significant proposals, especially given the complexities of defining and guaranteeing rights. Central to their proposal was the establishment of an African Commission on Human Rights. A brief review of basic ideas is in order.

The Commission would consist of 16 experts 'chosen from among persons of high moral character, integrity and recognized confidence in the field of human rights' (Monrovia draft); 11 members 'chosen

[1] 'Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa', 2–15 September 1969, U.N. Document ST/TAO/HR/38.

[2] 'Report of the Conference of African Jurists on African Legal Process and the Individual', 5 July 1971, U.N. Document E/CN. 14/521.

[3] 'Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa', 23 October–5 November 1973, U.N. Document ST/TAO/HR 48.

[4] This resolution, it should be noted, came a decade after Nigeria introduced a resolution in the Commission on Human Rights, passed 28–0–3, establishing an *ad hoc* group to 'study in all its aspects the proposal to establish regional commissions on human rights within the United Nations family', 26 January 1968, U.N. Document E/CN. 4/966. The Democratic Republic of the Congo, Nigeria, and the United Arab Republic served as members.

among African personalities with the highest consideration for their high morals, integrity, impartiality and competence in matters of human rights' (Dakar draft). They would exercise responsibilities far more in the areas of promotion and research than in enforcement. According to the Monrovia draft, the Commission would:

(1) conduct studies and research on African issues in the field of human rights...;

(2) study situations of alleged violations, their causes and manifestations, provide its good offices to any state member of the Organization of African Unity...and make reports with appropriate recommendations thereon to the OAU;

(3) formulate and elaborate basic standards to serve as bases for adoption of legislation by African governments...;

(4) co-operate with other African or international institutions and intergovernmental or nongovernmental organizations concerned with the promotion and protection of human rights; [and]

(5) perform such other tasks as may be entrusted to it.[1]

A major addition to these tasks was made by the specialists who met in Dakar, however. They called upon the proposed Commission to 'ensure the protection of human and people's rights under conditions laid down by the present convention', conditions that permitted direct petition to the Commission. As will be shown below, extensive controversy preceded the establishment of the right of direct petition to the Inter-American Commission on Human Rights, and a similar division of opinion may be expected to mark any major attempts by the proposed African Commission on Human Rights to become involved in areas of domestic jurisdiction.

The applicable standards or principles in both drafts include the U.N. and O.A.U. Charters, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. That is not all. Instruments from U.N. specialised agencies, such as the I.L.O., Unesco, F.A.O. and W.H.O., also figure in the charge. Even further, according to the Monrovia draft, the Commission shall 'have regard' (1) to other international conventions establishing rules expressly recognised by O.A.U. members, (2) to African practices 'consistent with international human rights standards evidencing customs generally accepted as law', (3) to general principles of law recognised by African nations, and (4) to 'judicial decisions and teachings of authoritative authors'. Ample scope thus exists for introducing or broadening basic principles for consideration.

[1] U.N. Document A/34/359/Add. 1, Annex 1, p. 2, 5 November 1979.

Recognising political reality, the experts at Monrovia and Dakar wrote in a major rôle for the O.A.U. Each member state has the right of nomination; members of the Commission, serving in their individual capacity, are to be elected for renewable six-year terms by the Assembly of Heads of State and Government. The Monrovia specialists suggested that principles of equitable geographic distribution and representation of different legal systems in Africa should figure among the *desiderata*. Should a position fall vacant through death, resignation, or assumption of incompatible responsibilities, the O.A.U. Chairman would appoint another expert for the unexpired term (Monrovia), or the Assembly of Heads of State and Government would elect a new member (Dakar). Recognising the vital importance of staff, the experts recommended that facilities and personnel costs be borne by the O.A.U.

Irrespective of the form to be taken by the African Commission on Human Rights, the members will be able to draw upon a considerable number of prior instruments, notably two International Covenants which entered into force in January 1976 – on Civil and Political Rights, and on Economic, Social, and Cultural Rights – that flowed logically, if not speedily, from the goals proclaimed by the 1948 Universal Declaration of Human Rights.[1] The Covenant on Civil and Political Rights sets forth 11 rights, 8 types of freedom and 3 miscellaneous rights, as follows:

right to life; right to liberty and security; right of detained persons to be treated with humanity; right to a fair trial; right to recognition as a person before the law; right to privacy; right of assembly; right to marry and found a family; right of the child; political rights; and rights of minorities.

freedom from torture and inhuman treatment; freedom from slavery and forced labour; freedom from imprisonment for debt; freedom of movement and choice of residence; freedom of aliens from arbitrary expulsion; freedom of thought, conscience, and religion; freedom of opinion and expression; and freedom of association.

protection against retroactivity of criminal law; prohibition of propaganda for war and incitement to national, racial, or religious hatred; and equality before the law.

In acceding to this Covenant, states agree to submit annual reports on civil and political rights, and by accepting an optional protocol they recognise that private individuals alleging personal violation of any rights may directly petition the U.N. Commission on Human Rights.

The influence of the International Covenant on Civil and Political

[1] These documents are reprinted in Brownlie (ed.), op. cit. pp. 199–232. For the text of the Optional Protocol to the International Covenant on Civil and Political Rights, see ibid. pp. 233–7.

Rights can be readily discerned in the Dakar draft. Chapter I enumerates a long list of rights and freedoms that are to be guaranteed and recognised, 'without distinction of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status':

equality before the law and equal protection;
respect for life and physical and moral integrity;
respect inherent in human dignity, including the prohibition of slavery, torture, and cruel, inhuman, or degrading treatment;
liberty and security of person;
right to have a cause heard (including the rights to be presumed innocent, to defence, and to a speedy, impartial trial);
freedom of conscience;
right to objective information and right to express opinions 'subject to the respect of others' honour and reputation';
freedom of assembly, though potentially restricted for national security, other people's safety, health, ethics, and people's rights and freedoms;
choice of residence, with right to leave and return, and prohibition of mass expulsion of non-nationals;
participation in direction of public affairs, 'either directly or through freely chosen representatives';
property rights granted by law may be encroached upon 'only for public need or in the general interest of the community';
right to work under equitable and satisfactory conditions, with equal pay for equal work;
right to enjoy 'the best attainable state of physical and mental health';
education and free participation in cultural life;
protection of the family, with women and children enjoying the 'right to special measures of protection in accordance with the requirements of their physical and intellectual wellbeing (a protection also given the aged and disabled);
equality of all people, in which 'nothing shall justify the domination of a people by another';
self-determination, including the right of colonized or oppressed peoples 'to free themselves from the bonds by domination by resorting to any means recognized by the international community';
free disposal of wealth and natural resources 'in the exclusive interest of the population', including elimination of all forms of foreign economic exploitation, particularly that practised by international monopolies;
economic, social, and cultural development 'in strict respect of their freedom and identity, and in the equal enjoyment of the common heritage of mankind';
national and international peace and security;
a satisfactory environment;
promotion of these rights by states through teaching, education, and publication; and
independence of the judiciary.

Finally, the draft African Charter of Human and People's Rights enumerates the duties that individuals carry towards family, society, the state, and other communities:

> to respect and consider fellow beings without discrimination; to preserve the harmonious development of the family; to serve the national community through physical and intellectual abilities; not to compromise the security of one's state of nationality or residence; to preserve and strengthen national solidarity; to preserve and strengthen national independence and territorial integrity; to work and pay taxes; to preserve and strengthen African cultural values; and to subscribe to the promotion of African unity.

The Dakar proposals called upon each subscribing state to report on steps taken to implement the rights and freedoms guaranteed by the Convention every two years. In this respect, the jurists developed further a procedure to which some African countries had already voluntarily acceded. A 1971 resolution by the Economic and Social Council invited U.N. member states periodically to examine the implementation of their rights and freedoms, and to transmit this information to the United Nations.[1] The first documentation on civil and political rights was submitted in 1972, and included reports from Egypt, Ghana, Kenya, the Malagasy Republic, Tunisia, and Zambia. Two years later, Benin, Egypt, the Malagasy Republic, and Rwanda were among the 35 states that reported on economic, social, and cultural rights.

In terms of adherence to the two U.N. Covenants, 13 African states had (as of September 1979) ratified both: the Gambia, Guinea, Kenya, Libya, the Malagasy Republic, Mali, Mauritius, Morocco, Rwanda, Senegal, Tunisia, Tanzania, and Zaïre. As regards the Optional Protocol on the International Covenant on Civil and Political Rights, only four African states – the Malagasy Republic, Mauritius, Senegal, and Zaïre – had accepted this obligation to enable private individuals directly to petition the Human Rights Committee, should the state have violated their rights as guaranteed by the Convenants.[2] Has such adherence made a difference in domestic practice? There is no conclusive evidence at this point.

Far more African states have ratified or acceded to other major international treaties. As of 1980, the International Convention on the

[1] Economic and Social Council, Res. 1596 (L), New York, 21 May 1971.

[2] Edward Kannyo, 'Human Rights in Africa: problems and prospects', International League for Human Rights, New York, 1980, p. 34 fn. A convenient table of these and other international human rights instruments, as of January 1978, appears in the Report of the Secretary-General, A/33/1949, 19 September 1978, and is reproduced in Warren Weinstein, 'African Perspectives on Human Rights', Council for Policy and Social Research, Washington, D.C., Appendix II.

Elimination of All Forms of Racial Discrimination had gained 35 signatory states from Africa; the Convention Relating to the Status of Refugees, 32; the Convention on the Political Rights of Women, 21; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 26; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 24.[1] Conventions drafted by United Nations specialised agencies had by 1978 been ratified by the following number of African states: the Forced Labour Convention, 29; the Discrimination (Employment and Occupation) Convention, 18; and the Convention Against Discrimination in Education, 16.[2]

This evidence of extensive international discussion and ratification makes it clear that human rights had engaged the attention of a number of African leaders before the 1979 O.A.U. summit. But it was not until the confluence of the Bangui killings, the removal of Amin, and the initiative of Senegal and the Gambia in mid-1979 that the Heads of State and Government felt able or willing to take the first steps towards the creation of an African Charter and Commission on Human Rights. Exhortation by external leaders or institutions was not enough; awareness and initiatives had to come from within Africa.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: A COMPARISON

Evidence from other developing areas underscores the complexity of implementing supra-national entities devoted to human rights. If a single lesson can be drawn from analogous regional commissions, it is that their effective establishment requires time, dedication, and strong support from influential countries.

The creation and functioning of the Inter-American Commission on Human Rights illustrate this lesson. More than a decade was required to move from a general declaration of rights to a specific Convention and to the creation of a Commission for the Western Hemisphere; close to a quarter of a century elapsed before the Commission developed a significant number of cases. Since the draft African Charter of Human and People's Rights has several parallels with related documents from the Americas, a brief review of the Inter-American Commission is in order.

[1] 'Human Rights International Instruments: signatures, ratifications, accessions, etc., 1 January 1980', U.N. Document ST/HR/4/Rev. 2.

[2] William B. Cubberley, 'Promotion and Protection of Human Rights in Africa: regional arrangements', Commission to Study the Organisation of Peace, New York, 1980, pp. 13–14.

The story begins in 1945, with the drafting of the Charter of the Organisation of American States, continues in 1959 with the drafting of the Convention on Human Rights, and is marked at present by a dramatic increase in the level of activities of the Commission itself, notably with the submission of petitions from individuals seeking redress.

The Organisation of American States was both a product of Western Hemisphere co-operation in World War II, and an extension of earlier activities by the Pan-American Union. Concern with human rights emerged early in the history of the O.A.S.: the Mexico City conference of February 1945 resolved that member governments should observe the standards of a proposed 'Declaration of the International Rights and Duties of Man'. The Bogota conference of May 1948 – instrumental in creating the O.A.S. itself – also adopted the 'American Declaration of the Rights and Duties of Man'.[1] Signatory states pledged themselves to uphold a list of 26 rights of persons (e.g. life, liberty and personal security, equality before the law, religious freedom and worship, fair trial); a companion list of 10 duties (e.g. 'acquire at least an elementary education', 'obey the law and other legitimate commands of the authorities of his country', 'pay the taxes established by law for the support of public services') set obligations for individual citizens.

The O.A.S., like the O.A.U. several years later, confronted issues of domestic jurisdiction. The enforcement of the rights and duties noted in the American Declaration rested on individual states – for, as all students of international law know, governments provide the means of execution. National sovereignties are compromised if supra-national authorities are provided with opportunities to enforce their findings. In this conflict between national and international interest, the former triumphed. The Declaration espoused general principles, but lacked direct means of enforcement. Most American governments were 'very reluctant to compromise their sovereignty'.[2] Conditions in the 1950s did not permit the drafting, let alone the ratification, of a convention binding member states to carry out actions decided by international bodies. The United States strongly opposed any derogation of sovereignty. Its reluctance was paralleled by several other governments, and precluded action for more than a decade. In 1953, for example, a discussion item on 'Human Rights: measures tending to promote human rights *without detriment* to national sovereignty and the principle

[1] Brownlie (ed.), op. cit. pp. 389–95.
[2] Anna P. Schreiber, *The Inter American Commission on Human Rights* (Leyden, 1970), p. 14.

of non-intervention' could not even be placed on the agenda of the Tenth Inter-American Conference.[1]

The O.A.S. decision to draft a convention on human rights and to create an Inter-American Commission reflected changes of position by several member states. The victory of Fidel Castro lent urgency to efforts by the United States to contain this brand of socialist change, and the enforcement of basic rights seemed to be one avenue. The fall of Perez Jiménez and Manuel Odría, the military dictators of Venezuela and Peru respectively, lessened opposition to the expansion of human rights. The members of the O.A.S. unanimously accepted the draft of the Convention, and the establishment of the Commission was agreed with only four negative votes, thereby providing 'a sharp contrast with the reluctance of a majority of American states between 1948 and 1959 to give the inter-American system any meaningful role in the protection of human rights'.[2]

The powers of the Commission, as might be expected, generated a great deal of debate. The first set of proposals called for it to meet for ten months annually; the second draft reduced this to a maximum of eight weeks.[3] Participating states explicitly rejected any right for the Commission to receive or to act upon petitions or communications arising from individuals, groups, or organisations: with 11 votes required for adoption, only 10 could be mustered in favour of having the Commission 'act upon' communications relating to certain human rights.[4] The United States was particularly opposed to the inclusion of a right of petition, thereby reflecting longstanding concern about potential external involvement in domestic matters. Controversy raged as well as regards Article 9, which gave the Commission the right 'to make recommendations to the governments of the member states in general, if it considers such action advisable, for the adopting of progressive measures in favor of human rights within the framework of their domestic legislation'. Several states held that the phrase 'in general' limited action to proposals affecting all members. A wider interpretation emerged, however, and recommendations were prepared for individual governments.

Most important, the right of petition was gradually expanded. In 1960 the United States had campaigned actively against giving the Inter-American Commission the opportunity to receive and examine petitions touching the actions of member states; none the less, the Commission declared it would 'take cognisance' of all communications

[1] Ibid. p. 24, my emphasis.
[2] Ibid. pp. 29–30.
[3] Ibid. p. 32.
[4] Ibid. p. 36.

received, in order to make recommendations and prepare reports. The American position shifted under Presidents Kennedy and Johnson. In 1965 the powers of the Commission were expanded by permitting it 'to examine communications submitted to it, and any other available information',[1] while 'particular attention' was to be given a series of enumerated rights. Specifically noted are the following rights:

to life, liberty, and security of person;
to equality before the law without distinction of race, sex, language, creed, or any other factor;
to free profession and practice of religious faith;
to freedom of investigation, opinion, and expression and dissemination of ideas;
to be able to resort to the courts to ensure respect for legal rights;
not to be deprived of liberty, save by procedures of pre-existing law, to have legality of detention ascertained without delay by a court, and to be tried without undue delay;
to be presumed innocent until proven guilty, to have an impartial and public hearing in previously established courts, and not to receive cruel, infamous, or unusual punishment.[2]

Obviously, the Inter-American Commission could not be effective without staff and cases. Initially, both were modest because, as noted already, the seven members served for only a few weeks each year, while until 1977 they were backed by a permanent staff of only four lawyers and an executive secretary. The Commission's budget rose sharply from approximately $338,000 in 1977 to $890,000 in 1978,[3] and nine legal specialists are now employed full-time. The work load has also increased dramatically. In 1968 the Commission opened 14 new cases and had 18 pending; in 1973 the respective figures were 26 and 24. By 1977, however, the number of new cases had leaped to 358, and of those in process to 260 – an increase, as has been noted elsewhere, of 1,377 per cent in four years![4] The permanent staff is thus stretched thin, while the limited time available for the Commission to sit reduces its overall effectiveness.

The exponential increase in the communications addressed to the Commission, and the attention given to its regular reports on individual countries, suggest that international protection of human rights may have reached a 'take-off' point in the Western Hemisphere. The Commission remains dependent on individual governments to provide

[1] Ibid. p. 51; and Tom J. Farer and James P. Rowles, 'The Inter-American Commission on Human Rights', in Tuttle (ed.), op. cit. p. 56.
[2] Articles I–IV, XVIII, XXV and XXVI of the 'American Declaration of the Rights and Duties of Man', 1948.
[3] Farer and Rowles, loc. cit. p. 52.
[4] Ibid, p. 58.

certain information and to carry out requisite actions, however. Power clearly remains with the member states, whose reluctance to act delayed for more than 20 years the establishment of the right of petition to an understaffed supra-national organisation that can press governments to act 'only in a limited number of instances'.[1]

The Inter-American Commission on Human Rights represents more the embodiment of an 'ideal' that has relevance to Africa, rather than a powerful body that is capable of enforcing its own decisions. That the Commission is weak should not be surprising, for it embodies, in attempting to uphold international norms, a direct challenge to domestic jurisdiction and national sovereignty.

CONCLUSION

There is no guarantee that the resolutions passed to date by the O.A.U., nor the accessions to international instruments, will lead to significant enforcement. Zaïre's acceptance of the Optional Protocol did not, for example, delay the execution of Pierre Mulele in 1978, after he returned on the basis of a promised amnesty; pressures on refugees have mounted in several states, despite their acceptance of the relevant Convention. One is reminded of the observation of Thomas Hobbes that covenants without swords are but words. What has been created at the moment can best be described as a *climate* in which domestic, civil, economic, political, and social rights in many African states can be examined *as a result of African volition.* No longer are external voices pressing for awareness and action; no longer are concerned Africans confined to a handful of lawyers. The Head of States and Governments have collectively taken official notice of human rights and freedoms, and have taken the first steps forward, admittedly on the basis of internationally trumpeted excesses. Thus, though optimism would be premature, total pessimism is equally out of place. Human rights in Africa as a whole have gained a hearing inside the Organisation of African Unity, its longstanding stress on domestic jurisdiction having been in some respects superseded.

The compromises that went into the Monrovia and Dakar drafts inevitably meant fuzzy language and some ambiguity when controversial issues were confronted. If the proposed African Commission on Human Rights is in fact created, the extent of its jurisdiction remains both unclear and untested. To what extent, for example, can states be compelled to provide information? The Dakar draft says the Commission

[1] Ibid. p. 70.

'may ask' them to provide it with all relevant information – presumably leaving to the states the judgement of relevance. The laws of most African states include provisions that appear to contravene the rights listed in the draft Charter. For example, preventive detention statutes, broadly phrased sedition laws, unrestricted censorship, special courts for political offences, and licensing requirements that curtail the right of association, are common throughout the continent. Might the Commission have any impact through its publicity? Can it require domestic legal changes?

Even if significant statutory protection of rights exists, other weaknesses in African legal systems could vitiate this protection. The functioning of civil and political rights is affected by the dearth of lawyers, by the weaknesses and dependence of the judiciary, by conflicting legacies from colonialism, and by populations with little experience in the maze of modern courts. Widespread poverty, worsening terms of trade, serious imbalances in development, and the 'revolution of rising aspirations' influence the application of economic, social, and cultural rights. Informed populaces and non-governmental organisations able to bring effective pressure on governments are rare. The socio-economic context, in other words, puts few obstacles in the way of régimes giving scant heed to human rights.

Finally, the Organisation of African Unity is a political entity whose decisions can be significantly influenced by the actions of a small number of states. The unanimity reached in 1979 might be attributed to the relatively vague nature of the Senegal–Gambia proposals. Far more controversy has already arisen as the details are debated. For example, the June 1980 meeting of the O.A.U. in Banjul, called to discuss the Dakar draft, reportedly reached agreement on only 11 articles; some sessions were hamstrung by Libyan insistence that Arabic be named an official language of the O.A.U.[1] Might other states emerge as strong opponents of the Dakar proposals? Can the Commission, if established, establish a significant degree of independence from authoritarian governments that give scant heed to human rights? Can moral suasion – 'covenants without swords' – really affect the actions of individual states? These are questions best answered with the clarity of hindsight. At this point, the auguries are not too promising.

[1] *Africa Research Bulletin*, July 1980, col. 5734A.