

The African Charter on Human and Peoples' Rights: A Legal Analysis

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The Eighteenth Assembly of Heads of State and Government of the Organization of African Unity (OAU) made an historic step toward the protection of human rights in Africa by adopting the African Charter on Human and Peoples' Rights in Nairobi, Kenya in 1981.¹ The Charter represents the culmination of a two-year drafting process.²

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1. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, reprinted in Report of the Secretary General on the Draft African Charter on Human and Peoples' Rights, O.A.U. Doc. CM/1149 (XXXVII) (Annex II) (1981); 21 I.L.M. 58 (1982) [hereinafter cited as African Charter.]

There has been, and still is, considerable confusion regarding the title of the Charter. The Charter originally was called "The African Charter on Human and Peoples' Rights," however, at the Thirty-Seventh Session of the Council of Ministers, many States felt that the title would lead to confusion with the Charter of the Organization of African Unity. O.A.U. Diary No. 6, June 21, 1981. The Heads of State and Government took notice of this recommendation and subsequently changed the name of the Charter to the "Banjul Charter on Human and Peoples' Rights," as Banjul, The Gambia, was the site of the two Ministerial Conferences that resulted in the final draft of the Charter that was presented to the Council of Ministers during the 1981 summit in Nairobi, Kenya. Yet despite this recommended change, a recent reprint of the Charter published by the OAU has retained the original title, and hence this article will use the title "African Charter."

2. At its Sixteenth Ordinary Session in Monrovia, Liberia in 1979, the Assembly of Heads of State and Government called for the preparation of "a preliminary draft of an 'African Charter on Human and Peoples' Rights' providing for the establishment of organs and for the promotion and protection of human and peoples' rights." Decision 115 (XVI) Rev. 1, O.A.U. Doc. AHG/115 (XVI) (1979).

From November 28 to December 8, 1979, a gathering of African experts met in Dakar, Senegal to prepare the first draft of the proposed African charter.³ The stated objective of the experts was to prepare an African charter on human rights based upon an African legal philosophy and responsive to African needs.⁴ In the opinion of the experts assembled at Dakar, problems unique to Africa justified a departure from such regional models as the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)⁵ and the American Convention on Human Rights (American Convention).⁶

In order to promulgate a truly African convention, a Ministerial Conference comprised mainly of African Ministers of Justice and other legal experts met in Banjul, the Gambia from June 8-15, 1980, to continue and complete consideration of the Draft Charter. Lengthy debate slowed their work, and at the conclusion of the Conference only eleven articles had been approved. With an African human rights document so near completion, however, the OAU Council of Ministers requested at a meeting the following week that the Ministerial Conference reconvene in Banjul "as soon as

The OAU procedurally operates on two lower levels that channel an issue toward final determination at the Assembly of Heads of State and Government. In the normal course of events, after an issue is raised within the OAU, a council of experts will gather to provide a framework for future discussion. The issue is then addressed at a ministerial conference attended by the appropriate ministers of the various countries. For example, the ministerial conference that discussed the draft African Charter in Banjul was attended by African ministers of justice and other legal experts. After the ministerial conference reaches a consensus, it passes the results to the Council of Ministers, which is made up exclusively of the foreign ministers of the member States. The Council of Ministers meets biannually and is responsible for preparing the agenda for the Assembly of Heads of State and Government which meets annually in June or July. The Council of Ministers serves a vital role in narrowing the various issues for the Assembly of Heads of State and Government. See Charter of the Organization of African Unity, done May 23, 1963, arts. 9, 11-13, 479 U.N.T.S. 39, reprinted in 2 I.L.M. 766 (1963) [hereinafter cited as OAU Charter].

3. African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3/Rev. 1 (1979) (draft prepared by a Meeting of Experts of the Organization of African Unity, Dakar, Senegal, Nov.23-Dec. 8, 1979) [hereinafter cited as Dakar Draft].

4. Réunion des experts pour l'élaboration d'un avant-projet de Charte Africaine des droits de l'homme et des peuples 1-2 (mimeo 1979) (on file with the International Human Rights Law Group, Washington, D.C.) [hereinafter cited as Discussion Document].

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 1953 Gr. Brit. T.S. No. 71 (Cmd. 8969) (entered into force Sept. 3, 1953) [hereinafter cited as European Convention].

6. American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36 at 1, O.A.S. Doc. OEA/ser. L/V/II.23 doc. 21 rev. 6 (entered into force July 8, 1978), reprinted in 9 I.L.M. 99 (1970) [hereinafter cited as American Convention].

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possible" to finish the Charter.⁷

The second session of the OAU Ministerial Conference on the Draft Charter convened on January 7-19, 1981. Forty of the fifty member States of the OAU took part in the conference, and consideration of the Draft Charter was completed on schedule.⁸ With its task accomplished, the Ministerial Conference passed the Charter to the next level of discussion, the Thirty-Seventh Ordinary Session of the Council of Ministers. On June 10, 1981, the Secretary-General of the OAU presented before the Plenary of the Council of Ministers the Report of the Secretary-General on the African Charter on Human and Peoples' Rights.⁹ Surprisingly, despite pre-Summit support given the Charter, early discussion by the Council cast grave doubts as to its future.¹⁰ It decided, however, to take note of the Draft Charter and to submit it with no amendments to the Assembly of Heads of State and Government for the Assembly's consideration.¹¹

On June 17, 1981, the Eighteenth Assembly of Heads of State and Government convened to discuss the Charter. The Assembly took note of the Council of Ministers' recommendations and adopted the Charter with no amendments. As of September 1982, twelve countries have signed the Charter¹² while two others—Mali and Guinea—have deposited with the General Secretariat instru-

7. O.A.U. Doc. CM/Res. 792 (XXV) (1980). The Council of Ministers met at its Thirty-Fifth Ordinary Session in Freetown, Sierra Leone from June 18-28, 1980.

8. Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights, O.A.U. Doc. CM/1149 (XXXVII) at 2 (1981) [hereinafter cited as Report of the Secretary-General].

9. Id.

10. The delegates raised several points. First, the Draft Charter was vague and, if adopted, could create conflicts over the differences in the interpretation of the Charter. O.A.U. Diary No. 6, June 21, 1981. Second, the instrument could conflict with the constitutions or laws of member States especially as article 45 of the Draft Charter establishing the African Commission on Human and Peoples' Rights (the African Commission or the Commission), did not make it clear that the Commission does not have the authority to interfere with the internal affairs of the OAU member States. O.A.U. Doc. CM/Plen. Draft Rpt. Rpt. (XXXVII) at 60 (1981). Third, the Draft Charter did not protect certain rights such as the right of peoples to independence and the rights of women or rights of wives, nor did it enumerate sufficiently certain duties such as the respect due the constitution, the laws, and the attributes of a State. Id. Fourth, the Charter did not make it clear that the sole right of interpretation should be invested entirely with the Assembly of Heads of State and Government. O.A.U. Diary No. 6, June 21, 1981 at 1. See also OAU Ministers Not So Keen on Rights Charter, The Nairobi Times, June 21, 1981 at 1, col. 3.

11. O.A.U. Doc. CM/Plen. Draft Rpt. Rpt. (XXXVII) at 61 (1981).

12. These countries are the Congo, Egypt, Gabon, Mauritania, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, and Togo.

ments of ratification with no reservations. The Charter will enter into force three months after the twenty-sixth State has deposited its instrument of ratification in Addis Ababa.¹³

This article will examine the Charter in relation to human rights instruments. Part I places the Charter within its historical perspective. Part II discusses selected provisions of the Charter, including those that distinguish it from other human rights documents. Part II also analyzes the application of Charter rights in light of existing international human rights instruments. Part III explains briefly the proposed African Commission on Human and Peoples' Rights.

I. HISTORICAL BACKGROUND

The history of the African human rights movement is beyond the scope of this article. Brief mention of it is necessary, however, to place the African Charter and its drafting process within the perspective of the African human rights movement as a whole.

Discussion leading ultimately to the formulation of the Charter began as early as 1961 when the International Commission of Jurists convened the African Conference on the Rule of Law in Lagos, Nigeria.¹⁴ The Conference consisted of "194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents."¹⁵ The resulting resolution of the Conference, the "Law of Lagos," makes clear the responsibility of the world legal order to devise a regime for the protection of individuals.¹⁶

13. African Charter, *supra* note 1, art. 63(3). The Charter enters into force upon ratification by a simple majority, or twenty-six of the fifty African member States of the OAU. Several countries attempted to raise the requirement to two-thirds of the member States, but the Council of Ministers rejected this standard as being unnecessarily high. See O.A.U. Doc. CM/Plen. Draft Rpt. Rpt. (XXXVII) at 61 (1981).

History indicates that even the simple majority requirement is a formidable barrier to enactment of a human rights treaty. The International Covenant on Civil and Political Rights required ratification by only thirty-five of the 135 member States of the United Nations yet nevertheless did not come into force until ten years later. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), reprinted in 6 I.L.M. 368 (1967). The American Convention entered into force nine years after its original signature at San Jose, Costa Rica. See American Convention, *supra* note 6.

14. See Int'l Comm'n of Jurists, African Conference on the Rule of Law, Lagos, Nigeria, Jan. 3-7, 1961: A Report on the Proceedings of the Conference 11 (1961) [hereinafter cited as *Law of Lagos*].

15. *Id.*

16. *Id.*

In 1969, the United Nations Division of Human Rights, in cooperation with the Government of the United Arab Republic, organized a seminar in Cairo to study the possibility of the establishment of regional commissions on human rights with special reference to Africa.¹⁷ In an introductory statement at the seminar, the Zambian representative explained that an important objective in establishing a human rights commission was to make the masses in non-independent Africa aware of their rights, "thereby giving impetus to their aspirations to free themselves."¹⁸ Of equal concern to many Africans at the seminar was the view that the Universal Declaration of Human Rights¹⁹ was a document adopted when most of the members of the United Nations were States with "white populations with largely European and Christian traditions."²⁰ Many felt that the principles expressed therein did not necessarily reflect African values or problems embodied in peculiarly African solutions.²¹

In addition to the Lagos Conference and Seminar on Regional Commissions, other colloquia, seminars, and conferences have discussed the implementation of human rights protection mechanisms in Africa.²² These discussions culminated in the Monrovia Seminar

17. Seminar on the Regional Commissions on Human Rights with Special Reference to Africa, U.N. Doc. ST/TAO/HR/39 (1969) (held in Cairo, United Arab Republic, Sept. 2-15, 1969) [hereinafter cited as *Cairo Seminar*].

18. *Id.* at 4. This statement illustrates the importance placed upon decolonization in early discussion concerning the function of an African human rights commission.

19. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (1948) [hereinafter cited as *Universal Declaration*].

20. *Cairo Seminar*, *supra* note 17, at 6.

21. *Id.*

22. See Int'l Comm'n of Jurists, *The Rule of Law and Human Rights* 67-68, app. D (1966). For reports on some of the more important discussions that followed the Conference, see First International Conference on Human Rights in South Africa (Cape Town, South Africa, Jan. 22-26, 1979), reported in Faculty of Law of the University of Capetown, *Human Rights: The Capetown Conference (1979); Human Rights and Economic Development in Francophone Africa (Butare, Rwanda, 1979)*, discussed in Hannum, *The Butare Colloquium on Human Rights and Economic Development in Francophone Africa*, 1 *Universal Hum. Rts.* 63 (1979); Seminar on Human Rights in a One-Party State (Dar-es-Salaam, United Republic of Tanzania, Sept. 23-28, 1976), discussed in Int'l Comm'n of Jurists, *Human Rights in a One-Party State (1978); Third Biennial Conference of the African Bar Association: Human Rights in Africa (Freetown, Sierra Leone, Aug. 1-5, 1978)*, reported in African Bar Ass'n, *Third Biennial Conference, Programmes and Proceedings (1978); Seminar on the New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa*, U.N. Doc. ST/TAO/HR/48 (1973), (Dar-es-Salaam, United Republic of Tanzania, Oct. 23-Nov. 5, 1973); Report on the Conference of African Jurists on African Legal Process and the Individual, U.N. Doc. E/CN/14/521 (1971) (Addis Ababa, Ethiopia, Apr. 19-23, 1971); Seminar on Human Rights in Developing Countries, U.N. Doc. ST/TAO/

on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa organized in 1979 under the auspices of the United Nations.²³ The seminar's final product was the Monrovia Proposal for the Setting up of an African Commission on Human Rights.²⁴

This proposal was to serve as a model for an African Convention on Human Rights. Yet instead of enumerating specific rights to be protected as does the subsequent African Charter, the Monrovia Draft set out proposed applicable standards in two articles that merely referred to rights already embodied in a plethora of international covenants and declarations.²⁵ Only three of the listed in-

HR 25 (1966) (Dakar, Senegal, Feb. 8-22, 1966). For additional conferences, see E. Kannyo, *Human Rights in Africa: Problems and Prospects* 25 nn.42-43, 27 nn.46 & 48-49, 29 n.54 (1980) (report prepared for the International League for Human Rights).

23. Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, U.N. Doc. ST/HR/SER. A/4 (1979) (Monrovia, Liberia, Sept. 10-21, 1979) [hereinafter cited as *Monrovia Seminar*]. On March 1, 1968, the United Nations Human Rights Commission requested the Secretary-General "to consider the possibility of arranging suitable regional seminars under the programme of advisory services . . . where no regional commission on human rights exist [sic] at present." 44 U.N. ESCOR Supp. (No. 4) at 152, U.N. Doc. E/4475 (1968). This request was reiterated by the Human Rights Commission in resolution 24 of March 6, 1978. 64 U.N. ESCOR Supp. (No. 4) at 132, U.N. Doc. E/1978/34 (1978). The result of these resolutions was the Monrovia Conference.

24. Monrovia Proposal for the Setting Up of an African Commission on Human Rights, reprinted in *Monrovia Seminar*, supra note 23, at 17 (Annex I).

25. Article 2 states:

The Commission shall be guided by the international law of human rights, including the provisions of specific African instruments on human rights which may be concluded, such as a declaration, a charter or a convention, the provisions of the United Nations Charter, the Charter of the OAU and the Universal Declaration of Human Rights and the provisions of other United Nations and African instruments in the field of human rights, especially the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the United Nations Convention and Protocol Relating to the Status of Refugees, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the OAU Convention on the Elimination of Mercenarism in Africa, as well as the provisions of instruments adopted within specialized agencies of the United Nations, such as ILO, UNESCO, FAO, and WHO.

Id. at 18.

Article 3 states:

The Commission shall also have regard to other international conventions, whether general or particular, establishing rules expressly recognized by the States members of the OAU; to African practices consistent with international human rights standards evidencing customs generally accepted as law; and to the general principles of law recognized by African nations, judicial decisions

struments—the Charter of the Organization of African Unity,²⁶ the OAU Convention on the Elimination of Mercenarism in Africa,²⁷ and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa²⁸—could be considered truly African in origin. In light of earlier statements,²⁹ it is not surprising that the experts meeting in Dakar in 1979 would reject the substantive provisions of the United Nations-sponsored Monrovia Proposal and attempt to create a uniquely African document more responsive to African needs.³⁰

II. ANALYSIS OF THE CHARTER

A. Structure of the Charter

The African Charter is divided into three parts. The two chapters of part I deal with rights and duties: chapter I sets out the human and peoples' rights³¹ to be protected under the Charter,³² while chapter II sets out the individual's duties toward "his family and society, the State and other legally recognised communities

and the teachings of authoritative authors as subsidiary means for the determination of rules of law.

Id.

For an interesting study recommending adoption of the principles contained in the Monrovia proposals rather than those in the Dakar Draft, see Commission to Study the Organization of Peace, *Regional Protection and Promotion of Human Rights in Africa* (Twenty-Ninth Report) (Dec. 1980). The Commission's argument rested on the fact that the Monrovia proposal was a "means" oriented document; that is, it focused on form rather than substance, while the Dakar Draft, as an "ends" oriented document, focused on substance over form. Since much of the substance of the African Charter is highly controversial, it may take considerable time for the necessary parties to agree upon an acceptable convention. Id. at 7.

26. OAU Charter, supra note 2.

27. OAU Convention on the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/817 (XXIX) Annex II Rev. 3 (1977).

28. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, done Sept. 10, 1969, reprinted in 8 I.L.M. 1288 (1969).

29. See supra note 18 and accompanying text.

30. For the stated purposes and objectives of the Dakar Draft, see Discussion Document, supra note 4, at 1-6.

31. The term "peoples' rights" was included at the insistence of the socialist States, the most vocal of which were Ethiopia and Mozambique. They maintained that the individual had no greater rights than that of the society as a whole. See infra text accompanying notes 44-50.

32. See African Charter, supra note 1. Articles 1-18 detail the various rights of individuals: articles 1-14 relate to civil and political rights while articles 15-18 deal with economic, social, and cultural rights. Articles 19-26 delineate rights of "peoples."

and the international community."³³

Part II of the Charter, composed of four chapters, elaborates on the measures to safeguard the rights articulated in part I. Chapter I calls for the establishment of the African Commission on Human and Peoples' Rights and lays out the structure of the Commission in detail.³⁴ Chapter II concerns the functions of the Commission³⁵ while chapter III deals with the procedure of the Commission.³⁶ The final chapter of part II indicates the applicable principles by which the Commission will secure the protection of human rights in Africa.³⁷ Finally, part III establishes general provisions concerning the commencement of the African Commission on Human and Peoples' Rights.³⁸

B. Comparison of African Charter With Other International Instruments

The preamble to the African Charter on Human and Peoples' Rights differs dramatically from the preambles to other regional conventions for the protection of human rights and merits close examination because it reflects the significant themes of the Charter. As previously noted, the intent of the framers was to create a charter inspired by African legal philosophy and responsive to African needs.³⁹ The preamble indicates that the Charter draws its inspiration from the Charter of the OAU which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples."⁴⁰ The preamble reaffirms

the pledge . . . made in Article 2 of the [OAU] Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify . . . cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the

33. Id. art. 27. See id. arts. 27-29.

34. Id. arts. 30-44.

35. Id. art. 45.

36. Chapter III is divided into articles dealing exclusively with communications from States, id. arts. 47-54, and with communications from other sources, such as individuals or non-governmental organizations, id. arts. 55-59.

37. Id. arts. 60-63.

38. Id. arts. 64-68.

39. Discussion Document, supra note 4, at 1.

40. OAU Charter, supra note 2, preamble, cl. 3.

Charter of the United Nations and the Universal Declaration of Human Rights.⁴¹

In keeping with its peculiarly African inspiration, the Charter relies upon "historical tradition and the values of African civilization"⁴² and reminds member States of their duty to "eliminate colonialism, neocolonialism, apartheid, zionism and to dismantle aggressive foreign military bases."⁴³

Thus, one respect in which the Charter differs from the American and European Conventions is its reliance on principles primarily African in nature. Yet the distinct African nature of the principles recited in the preamble do not alone indicate the extent to

41. African Charter, supra note 4, preamble, cl. 3. The eminent Nigerian jurist T.O. Elias has argued that the language of the OAU Charter "having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights" demonstrated "not only the adherence of the Member States to the Principles of the Charter, but also their awareness of the need to realise the goal of international co-operation in practical terms." Z. Cervenka, *The Organization of African Unity and its Charter 109* (1968) (quoting Dr. Elias). Dr. Cervenka has refuted this view. He grants credibility to Elias' view, however, by stating that "[t]here is no legal provision in the O.A.U. Charter which indicates the kind of relationship that is to exist between the O.A.U. and the U.N." Id. at 110. The African Charter offers little assistance on the subject. The applicable standards of the Charter incorporate both African documents and U.N. documents while creating no preference. The resolution of this issue will depend on how the Commission chooses to interpret the conflicting provisions.

42. African Charter, supra note 1, preamble, cl. 4.

The scope of this paper does not permit a detailed discussion concerning the effects of traditional African values upon human rights. The abundant literature indicates that traditional African values encompass most human rights norms; however, some traditional values serve as an obstacle for a few contemporary rights. For a discussion of the influence of traditional African societies on modern human rights concepts, see Hannum, supra note 22, at 64-69.

43. African Charter, supra note 1, preamble, cl. 8.

The text of the Dakar Draft used the following language: "Conscious of the duty to achieve the total liberation of the African territories that are not yet independent." Dakar Draft, supra note 3, preamble, cl. 9. The added reference in the African Charter to neocolonialism, apartheid, zionism, and the dismantling of aggressive foreign military bases demonstrates the magnitude of concern the drafters had for foreign intervention. As mentioned above, the principle aim of the OAU Charter was to free the African continent from the grip of colonialism. Z. Cervenka, supra note 41, at 13.

The inclusion of the term "zionism" in the Charter has created considerable controversy. The author was told by a high OAU official that the Libyans introduced the term during the first drafting session in Banjul and that it was immediately placed in brackets in the text. As soon as it was introduced, however, Foreign Minister Mogwe of Botswana protested that zionism was not an African problem. He further argued that it would be a dangerous precedent to import non-African problems into an African organization. No one responded to Mr. Mogwe, and it was assumed that the phrase would be omitted from the Charter unless the Assembly of Heads of State and Government voted to retain the term in Nairobi. OAU records do not reveal such a vote was ever taken, however, and the term "zionism" has inexplicably been included in the final draft.

which the African Charter stands apart from the European and American Conventions. The sixth clause of the preamble illustrates that the Charter embodies a concept of duty different from that contained in the European and American Conventions. It provides that "[t]he enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."⁴⁴ In other regional human rights instruments the concept of "duties" refers only to the obligation of a State toward its citizens or toward citizens of another State coming within its jurisdiction.⁴⁵ Occasionally, obscure references are made concerning the individual's responsibility to the community.⁴⁶ The African reference, as the Charter makes clear, imposes an obligation upon the individual not only toward other individuals but also toward the State of which he is a citizen.⁴⁷ The notion of individual responsibility to the community is firmly ingrained in African tradition and is therefore consistent with historical traditions and values of African civilization upon which the Charter relied. The inclusion of this far-reaching clause has roots, however, in factors other than mere tradition and to a large extent explains the various tensions throughout the Charter.

The socialist States such as Mozambique and Ethiopia had a difficult time reconciling traditional human rights conventions with socialist philosophy. The notion of "individual" in a socialist State differs markedly from the notion in a capitalist State. As a result, to ensure the eventual adoption of the Charter by all States, the drafters in Dakar stated that if the individual is to have rights "recognized" by the State, he also must have obligations flowing

44. African Charter, supra note 1, preamble, cl. 6.

45. For a more comprehensive view of the limitations of an individual's duties to the community see E. Daes, Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, U.N. Doc. E/CN.4/Sub. 2/432 Rev. 1, Add. 1-6 (1979).

46. The American Convention does mention the individual's obligation to his family, community, and mankind. See American Convention, supra note 6, art. 32. The Universal Declaration of Human Rights also provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible." Universal Declaration, supra note 17, art. 29(1). It is an open question, however, as to whether "community" equals "State."

47. Neither the European Convention nor the American Convention mentions such an obligation by the individual to the State. The American Convention starts with a completely different premise: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality . . ." American Convention, supra note 6, preamble, cl. 2. See also International Covenant on Civil and Political Rights, supra note 13, preamble, cl. 2 ("Recognizing that these rights derive from the inherent dignity of the human person").

back to the State. The drafters believed that references in extant international instruments to an individual's obligations⁴⁸ were so vague as to be meaningless.⁴⁹ For this reason, the African Charter attempts to rectify this concern by enumerating those obligations imposed upon the individual.⁵⁰ In addition, the preamble stresses the importance of economic, social, and cultural rights:

[I]t is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁵¹

The African Commission⁵² is charged with the responsibility of interpreting this clause;⁵² however, its language indicates the possibility that deference will be given to economic and social programs where they collide with civil and political rights. The extent to which this reading of the provision is correct will have to await practical application by the Commission.

In summation, the African Charter's preamble serves as a guide for the significant themes that run throughout the entire Charter. First, the African Charter relies heavily upon African documents and traditions rather than upon United Nations declarations and covenants. Second, while individuals enjoy certain rights under the Charter, they also are obligated to fulfill certain duties toward other individuals as well as toward the State of their citizenship. Finally, economic, social, and cultural development is a top priority. The extent to which the right to development supersedes civil and political rights is not clear, however, and must await future clarification. The following subsections will examine substantive provisions of the Charter that evidence these major principles.

1. *Self-Determination*

Article 20(1) of the African Charter states that "[a]ll peoples shall have the right to existence. They shall have the unquestion-

48. See supra notes 45-47.

49. See Discussion Document, supra note 4, at 4.

50. See African Charter, supra note 1, arts. 27-29.

51. Id. preamble, cl. 7.

52. Id. art. 45(3).

able and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."⁵³ Article 20 thus addresses both political and economic self-determination.

a. *Political Self-Determination*

Political self-determination concerns the right of all peoples freely to determine, without external interference, their political status.⁵⁴ This right has been well-recognized in the United Nations. It finds early expression in article 1(2) of the United Nations Charter;⁵⁵ however, the legal status of the provision has raised much controversy. In 1970, after a seven-year drafting process, the U.N. General Assembly adopted by consensus resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.⁵⁶ The Declaration stressed that "subjection of peoples to alien subjugation, domination and exploitation constitutes violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights" and that peoples resisting such subjugation, domination or exploitation are "entitled to seek and to receive support in accordance with the purposes and principles of the Charter [of the United Nations]."⁵⁷ The question still remains, however, to whom the term "peoples" refers and under what circumstances they may exercise the above right.

During the drafting process of the International Covenant on Economic, Social and Cultural Rights⁵⁸ and the International Covenant on Civil and Political Rights⁵⁹ in 1955, the United Kingdom delegate indicated that the word "people" necessarily meant sover-

53. *Id.* art. 20(1).

54. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 123, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations].

55. One of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. Charter, art. 1, para. 2.

56. Declaration on Friendly Relations, *supra* note 54, at 124.

57. *Id.*

58. 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

59. See *supra* note 13.

eign State.⁶⁰ In contrast, the Chairman of the Working Party from El Salvador disagreed and offered two examples in describing what the word meant to him: one being a tribe in Tanganyika (now Tanzania) being deprived of its ancestral land, requiring the resettlement of the "people" against its will, and the other being the prospective need to resettle the Island of Nauru's population because of the unwise overexploitation of that people's only source of natural wealth, its phosphates.⁶¹

Clearly the term "peoples" in the African Charter is not limited to the British representative's definition. It is equally clear, however, that the term is not intended to be so widely interpreted as to include secessionist movements. In 1970 U.N. Secretary-General U. Thant said that "the United Nations attitude is unequivocal. . . . [T]he United Nations has never accepted . . . the principle of secession of a part of its Member State."⁶² The Declaration on Friendly Relations likewise does not authorize the impairment of the territorial integrity or national unity of a sovereign State.⁶³

Under the African Charter, "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."⁶⁴ There is no reason to assume that the Charter is not consistent with the U.N. view and arguably the view under international law. Confirmation of this proposition is found in article 23 of the Charter which states that "[t]he principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of Afri-

60. Hyde, Permanent Sovereignty over Natural Wealth and Resources, 50 Am. J. Int'l L. 854, 859 (1956).

61. *Id.*

62. Secretary-General's Press Conferences, 7 U.N. Monthly Chron., No. 2, at 34, 36 (Feb. 1970).

63. The Declaration states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at partial or total disruption of the national unity and territorial integrity of any other State or country.

Declaration on Friendly Relations, *supra* note 54, at 124.

64. African Charter, *supra* note 1, art. 20(2).

can Unity shall govern relations between States."⁶⁵ As a means to strengthen solidarity, the article prohibits subversive activities by an individual against his country of origin and prohibits the use of State territories as bases for subversive activities.⁶⁶ In other words, colonized and oppressed peoples have a right to free themselves from the bonds of domination but only so long as such action is consistent with current OAU notions of sovereignty.

According to this view, the right of self-determination is being violated in regard to probably no more than three peoples in Africa today.⁶⁷ All other groups or "peoples" have either successfully exercised their right to self-determination and have thus become a sovereign State, such as the Republic of Zaire, or are a people not qualified to be included under the rubric "people" permitted to exercise the right of self-determination.⁶⁸

b. *Economic Self-Determination*

Distinct from the issue of political self-determination is the issue of economic self-determination. Whereas most African States have successfully exercised their right of political self-determination and have become independent sovereign States, the same cannot be said of their right to economic self-determination.

The African Charter's provisions are best understood in comparison with previous efforts during the 1950's, 1960's, and 1970's on the part of the lesser-developed countries to gain international recognition for the concept of permanent sovereignty over natural re-

65. Id. art. 23(1).

66. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

- (a) any individual enjoying the right of asylum . . . shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
- (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Id. art. 23(2).

67. Those peoples who arguably have yet to exercise the right of self-determination are the people of Namibia, the non-white population of South Africa, and the Sahraoui people of the Western Sahara. For a discussion of the growing demand for self-determination world-wide, see Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 Va. J. Int'l L. 779 (1976).

68. An appropriate example are the Katanganese people of the Shaba region of Zaire. As members of a self-admitted secessionist group, they are not entitled to the right of self-determination.

sources. General Assembly resolution 626,⁶⁹ adopted in December, 1952, stated in part "that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty."⁷⁰

Since the 1950's, no less than nine General Assembly resolutions have referred to the concept of permanent sovereignty over natural resources.⁷¹ In 1974, the U.N. General Assembly adopted the Charter of Economic Rights and Duties of States.⁷² Under article 2(1), "[e]very State has and shall fully exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."⁷³ The Charter of Economic Rights specifically recognizes the right of a State to nationalize and expropriate foreign-owned property "in which case appropriate compensation should be paid by the State adopting such measures."⁷⁴

Although the African Charter avoids the use of the phrase "permanent sovereignty over natural resources," it employs equally strong language that makes clear the intent of State parties. Article 21(1) proclaims that "[a]ll peoples shall freely dispose of their wealth and natural resources."⁷⁵ Since articles 21(4) and 21(5) specifically refer to the rights of States as opposed to peoples,⁷⁶ it

69. 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1952).

70. Id. The United States voted against the resolution on the ground that it did not recognize the rights of private investors under international law. Hyde, *supra* note 60, at 854.

71. See G.A. Res. 3202, 6 Special Sess. U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9559 (1974); G.A. Res. 3201, 6 Special Sess. U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973); G.A. Res. 3016, 27 U.N. GAOR Supp. (No. 30) at 48, U.N. Doc. A/8730 (1972); G.A. Res. 2692, 25 U.N. GAOR Supp. (No. 28) at 63, U.N. Doc. A/8028 (1970); G.A. Res. 2626, 25 U.N. GAOR Supp. (No. 28) at 39, U.N. Doc. A/8028 (1970); G.A. Res. 2386, 23 U.N. GAOR Supp. (No. 18) at 24, U.N. Doc. A/7218 (1968); G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/6316 (1966); G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962).

This concept has encountered stiff opposition however. For example, in 1955 during the drafting of the International Covenants, the United Kingdom, Denmark, and the United States vigorously opposed a draft provision that proposed that the right of peoples to self-determination should include permanent sovereignty over their natural wealth and resources. The major concern of the Western countries was that the proposed provision would be implied as endorsing the right to expropriation without compensation. As a result, that particular draft provision was not adopted. Hyde, *supra* note 60, at 856-60.

72. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

73. Id. at 52.

74. Id.

75. African Charter, *supra* note 1, art. 21(1) (emphasis added).

76. Both paragraphs begin with the language "States parties to the present Charter." Id.

must be assumed that the drafters intended a distinction.

Two interpretations of the term "peoples" are possible within the context of economic self-determination. In the first instance, "peoples" can refer to all peoples including tribal groups residing within a sovereign State. Under such an interpretation, the Katangese people residing in the copper rich Shaba province in the southern part of Zaire⁷⁷ have the right to develop the mineral deposits located in their part of the country. A second and more realistic interpretation is that for purposes of economic self-determination the term "peoples" refers to exactly the same people that are entitled to political self-determination. As a practical matter, however, the exercise of economic self-determination is contingent upon the realization of political self-determination. The notion of permanent sovereignty over natural resources, furthered by the developing countries in the United Nations, supports this view.⁷⁸

The Charter does not directly address the issue of compensation upon nationalization or expropriation. Article 14 may be nevertheless disquieting to the private investor seeking protection against such actions. It states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."⁷⁹ It is only in cases of spoliation that the "dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation."⁸⁰ The presence of the term "people" in this section of article 21 makes it highly unlikely that adequate compensation was intended for multinational corporations losing their property from violence during armed conflict. Similarly, under article 21(5), State parties are encouraged to "undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources."⁸¹ The strong language against foreign exploitation is somewhat tempered by the recognition in article 21(3) of the "obligation of promoting international economic cooperation based on mutual respect, equitable exchange

arts. 21(4)-(5) (emphasis added).

77. See supra note 68.

78. See U.N. resolutions, supra note 71.

79. African Charter, supra note 1, art. 14.

80. Id. art. 21(2).

81. Id. art. 21(5).

and the principles of international law."⁸²

2. *Non-Discrimination*

Under article 2 of the Charter, individuals are entitled to the protection of the Charter's provisions "without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."⁸³ Article 1 of the American Convention⁸⁴ and article 2 of the Universal Declaration of Human Rights⁸⁵ contain similar nondiscrimination provisions. Neither the American Convention nor the Universal Declaration, however, includes "ethnic group" within the categories to be protected from discrimination.

The reference in the African Charter is very much in keeping with the concept of peoples' rights. By including "ethnic group," the drafters are emphasizing the principle of the Charter of the Organization of African Unity "to promote understanding among our peoples and co-operation among our States . . . in a larger unity transcending ethnic and national differences."⁸⁶

The express prohibition in the African Charter against discrimination according to ethnic group constitutes a major step for the continent as a whole because the realization of this right will lead to greater economic opportunity for those peoples not of the same kinship as the head of State or government. Currently, the situation where leaders demonstrate excessive favoritism to members of their own ethnic group is the rule rather than the exception in Africa.⁸⁷ Under article 2, it is conceivable that Citizen A of Country X could bring before the African Commission a complaint alleging that the President of X is discriminating against a certain group of people. While it is unreasonable to assume that the discriminatory system would stop overnight, African leaders could be forced to modify such abuse to escape public rebuke from the Commission.⁸⁸

82. Id. art. 21(3).

83. Id. art. 2.

84. American Convention, supra note 6, art. 1.

85. Universal Declaration, supra note 19.

86. OAU Charter, supra note 2, preamble, cl. 4.

87. Zaire is one example. See Mobutu's Empire of Graft, Africa Now, Mar. 1982, at 12, 18.

88. For a discussion of the workings of the Commission, see infra text at notes 221-50.

3. Other Provisions of Interest

Certain provisions of the Charter deal with individual civil rights. Article 3 protects the individual's right to equality before the law and his right to equal protection of the law, while article 4 protects the right of every "human being" to life—a right recognized in the American Convention as well.⁸⁹ In that document, however, a qualifying sentence added a new dimension to this right that is notably missing in the African Charter. The American Convention's controversial provision reads: "This right [to life] shall be protected by law and, in general, from the moment of conception."⁹⁰ Absent the American Convention's qualifying sentence, the African Charter can be interpreted as permitting each State party to define for itself the term "human being," thereby leaving the issue of abortion to each State's individual determination.

Another provision dealing with individual rights is article 5 that protects the individual's right to dignity and legal status. To bolster the protection of these rights, the Charter prohibits "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment."⁹¹ The provision prohibits degrading treatment of individuals as well as torture and cruel, inhuman punishment in order to provide added protection for the individual missing in other human rights conventions. For example, if the European Convention had not prohibited inhuman treatment, the European Court would not have been able to find the "five interrogation techniques" employed by the United Kingdom against IRA suspects violative of the Convention.⁹² The inclusion of the sanction against cruel, inhuman treatment protects the individual in a much broader range of situations. Yet article 5 does not contain a clause prohibiting involuntary servitude as does the American Convention,⁹³ the European Convention,⁹⁴ and the International Cove-

89. American Convention, supra note 6, art. 4.

90. Id. art. 4(1) (emphasis added).

91. African Charter, supra note 1, art. 5. Similar prohibitions can be found in the American Convention, supra note 6, art. 5(2); European Convention, supra note 5, art. 3; Universal Declaration, supra note 19, at 71.

92. See Ireland v. United Kingdom, [1978] Eur. Ct. of Human Rights, ser. A, no. 25, at 66-67 (judgment of Jan. 18, 1978); infra notes 210-11 and accompanying text.

93. American Convention, supra note 6, art. 6(1).

94. European Convention, supra note 5, art. 4(1).

nant⁹⁵ and as recommended by the International Labour Office.⁹⁶ Such a provision was excluded as a concession to the socialist countries that objected to its inclusion.⁹⁷

Under article 7 of the Charter, an individual has the right to have his cause heard.⁹⁸ This right is comprised of the rights to appeal,⁹⁹ to be presumed innocent until proven guilty,¹⁰⁰ to defense (including the right to be defended by counsel of choice),¹⁰¹ and to be tried within a reasonable time by an impartial court or tribunal.¹⁰² Article 7 also prohibits the prosecution of or imposition of fines on individuals under *ex post facto* laws.¹⁰³ All of the above rights are likewise contained in the European and American Conventions.¹⁰⁴ The European and American Conventions, however, contain some additional rights that are vital to protect the individual. For example, both conventions refer to the right of the accused to aid where language is a problem.¹⁰⁵ Additionally, both conventions require prior detailed notification of charges against the accused.¹⁰⁶ Both conventions also require the State to provide counsel if the accused does not defend himself or is unable to pay for counsel,¹⁰⁷ and grant the accused the right to request witnesses;¹⁰⁸ however, the right to choose not to incriminate oneself

95. International Covenant on Civil and Political Rights, supra note 13, art. 8(2).

96. The International Labour Office criticized the Charter for this lack of a provision prohibiting forced labor. International Labor Office, Comments on the Draft African Charter on Human and Peoples' Rights (undated) (available at International Human Rights Law Group, Washington, D.C.).

97. At the June 1981 OAU Summit, the fact was brought to the author's attention that Ethiopia and Mozambique were insistent upon the exclusion of the involuntary servitude clause. For additional discussion of the position taken by the socialist countries, see supra text at notes 47-50.

98. African Charter, supra note 1, art. 7(1).

99. Id. art. 7(1)(a).

100. Id. art. 7(1)(b).

101. Id. art. 7(1)(c).

102. Id. art. 7(1)(d).

103. Id. art. 7(2).

104. See European Convention, supra note 5, arts. 6-7; American Convention, supra note 6, arts. 8-9.

105. European Convention, supra note 5, art. 6(3)(e); American Convention, supra note 6, art. 8(2)(a).

106. European Convention, supra note 5, art. 6(e)(a); American Convention, supra note 6, art. 8(2)(b).

107. European Convention, supra note 5, art. 6(3)(c); American Convention, supra note 6, art. 8(2)(e).

108. European Convention, supra note 5, art. 6(e)(d); American Convention, supra note 6, art. 8(2)(f).

and the right to confess only absent coercion are uniquely part of the American Convention.¹⁰⁹

Clearly the Charter provides some protection to an individual accused of either a crime or a violation of a civil obligation, although many areas remain in which the Charter is ineffective in substantively protecting the individual's rights. For instance, the lack of a requirement of notification to the accused of the charges against him could lead to unredressable abuse, especially considering the weakness of article 6, the right to liberty.¹¹⁰ Without the ability to request witnesses, the accused will be severely constrained in his attempt to defend himself. Finally, while the right to defense is protected, no provision exists for the appointment of counsel if the accused cannot afford legal representation. This omission leaves open the question of what will happen if the accused cannot afford counsel and the court refuses to appoint representation for him. Whether he has a complaint to the Commission based upon article 7(1)(c) will in large measure depend upon whether the Commission has extensive interpretive powers.

In defense of article 7, one should note that this provision—more than any other article—is affected and will continue to be affected by the growth of the various judicial systems in Africa. To a large degree some of the “absent” provisions of article 7 relate to judicial machinery. Currently the African continent is suffering from a paucity of legally trained judges, advocates, and clerks. In addition, available funding sufficient to create the kind of judicial establishments that exist in Europe and much of the Americas is lacking.¹¹¹ In this regard, therefore, it is somewhat understandable, even if not totally defensible, that provisions for translators, free counsel, and subpoena power over witnesses are not incorporated into the African Charter. Hopefully with the maturity of the judicial system's structure in Africa, these “absent” rights will come to be included.¹¹²

109. American Convention, *supra* note 6, arts. 8(2)(g), 8(3).

110. See *infra* note 193 and accompanying text.

111. See Hannum, *supra* note 22, at 77.

112. Some of the inherent problems of article 7 could be remedied through attention to the obligations imposed upon State parties in article 26, involving the duty to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.” African Charter, *supra* note 1, art. 26. The improvement of the judicial system to the extent that the “absent” rights in article 7 are included would be a natural outgrowth of surveillance by non-governmental organizations and subsequent implementation of article 26.

This maturity could be fostered by an increase in education. The Butare Colloquium on Human Rights in Rwanda noted that human rights in Africa was stymied by a lack of education; people were not aware of their rights.¹¹³ In this regard, the Commission to Study the Organization of Peace suggested that one of the jobs of the African Human Rights Commission should be to confront this problem and make people more aware of these rights by educating and teaching human rights, disseminating information, and encouraging national and local human rights organizations.¹¹⁴ While the Commission to Study the Organization of Peace is entirely correct, such educational efforts that serve not only to inform people of their rights but also to raise their expectations of protection must be closely coordinated with efforts under article 26 to establish some sort of legal aid. The establishment of such a service-oriented institution would serve to fill one of the larger gaps in the protection offered by article 7.

Articles 15-18 catalogue those rights that are properly referred to as economic, social and cultural rights.¹¹⁵ Given the realities of economic development in most African countries today, these rights must be considered merely promotional and not protective.¹¹⁶ Although the preamble to the Charter unequivocally states that “it is henceforth essential to pay particular attention to the right to development . . . and that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights,”¹¹⁷ an African Commission undoubtedly will grant a State great latitude if economic and social rights are promoted at the expense of civil and political rights as it is the Commission's aim to strike a healthy balance between the two.

113. Hannum, *supra* note 22, at 83.

114. Commission to Study the Organization of Peace, *supra* note 25, at 21-24.

115. These articles mandate the following: article 15, the right to work under satisfactory conditions with equal pay for equal work; article 16, the right to the provision of necessary health care by the State; article 17, the right to an education, freedom to participate in the cultural life of the community, and the promotion and protection of morals; article 18, rights of the family, elimination of discrimination against women, and the care of the aged and disabled. See African Charter, *supra* note 1, arts. 15-18.

116. “Many students of human rights believe that civil and political rights are generally suitable for protection. Economic, social and cultural rights are by contrast often deemed suitable only for promotion.” Commission to Study the Organization of Peace, *supra* note 25, at 26.

117. African Charter, *supra* note 1, preamble. See *supra* text accompanying note 41.

C. *Legal Effect of the African Charter: Binding v. Non-Binding*

An important aspect of a human rights document is its legal effect. While the African Charter could be interpreted as a non-binding instrument, an argument could be made that it was nevertheless designed to be of a binding nature.

Member States of the OAU who are parties to the African Charter have an obligation to "recognize the rights, duties and freedoms enshrined" in it and to "undertake to adopt legislative or other measures to give effect to them."¹¹⁸ This language varies substantially from the American Convention and also from prior drafts of the present African Charter. According to Buergenthal, under article 1 of the American Convention a State party has the negative obligation "not to violate an individual's rights" and may also have the obligation to adopt "affirmative measures necessary and reasonable under the circumstances 'to ensure' the full enjoyment of the rights the American Convention guarantees."¹¹⁹ It is not clear that the African Charter requires an equally strong obligation from member States. The earlier Dakar Draft required that State parties "shall recognize and shall *guarantee* the rights and freedoms stated in the present Convention [sic] and shall undertake to adopt, in accordance with their constitutional provisions, legislative and other measures to *ensure* their respect."¹²⁰ The elimination of the vital words "guarantee" and "ensure" from the final draft deprive the Charter of much of its force. This language was eliminated apparently to make the Charter more acceptable to those States concerned about the effect of a human rights covenant upon national sovereignty.¹²¹

The recognition of rights absent a guarantee of their implementation could allow one to interpret the Charter as merely a set of

118. African Charter, *supra* note 1, art. 1.

119. Buergenthal, *The Inter-American System for the Protection of Human Rights*, in *Teaching International Protection of Human Rights* (T. Meron ed.) (publication forthcoming).

Article 1 of the American Convention reads: "The States Parties to this Convention undertake to *respect the rights and freedoms* recognized herein and to *ensure* to all persons . . . the free and full exercise of those rights and freedoms . . ." American Convention, *supra* note 6, art. 1 (emphasis added).

120. Dakar Draft, *supra* note 3, art. 1 (emphasis added). This language may originally have been based upon the language of the American Convention, *supra* note 6, art. 1 (possibly explaining the mistaken reference to "Convention").

121. This reason for the subsequent omission was suggested to the author by several OAU sources.

rights to be promoted, rather than protected.¹²² This argument is contradicted, however, by the article 1 clause that obligates member States to "undertake to adopt legislation or other measures to give effect to [the rights, duties and freedoms enshrined in the Charter]."¹²³ Unfortunately, the deletion of the express guarantee and obligation to ensure may serve as historical evidence to support the proposition that the Charter is of a non-binding, non-protective nature.

Not all human rights systems, however, began with a legally binding charter or convention. The inter-American human rights system, for example, began with the American Declaration of the Rights and Duties of Man adopted in 1948.¹²⁴ As a declaration, the document imposed no binding obligation upon States but merely constituted a "promotional" . . . statement of goals for States to achieve progressively.¹²⁵

Like the American Declaration in the Americas, the African Charter will lay the foundation for a human rights system in Africa and in this respect appears to be designed as a binding instrument. Not only does the Charter establish a duty on States to enact legislation to give effect to the Charter's provisions, but it also establishes a commission to oversee the protection of enumerated rights, implying that States are bound to respect these rights. To declare otherwise would ignore the function of the Commission to "[e]nsure the *protection* of human and peoples' rights under conditions laid down by the present Charter."¹²⁶ This interpretation of the Charter as a binding document would have nevertheless been even more persuasive had the original language of the Dakar Draft been retained—language guaranteeing rights and ensuring their implementation at the State level.¹²⁷

122. As the language of the Charter reveals, there is no express guarantee of rights: States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

African Charter, *supra* note 1, art. 25.

123. *Id.* art. 1.

124. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6.

125. Commission to Study the Organization of Peace, *supra* note 25, at 9.

126. African Charter, *supra* note 1, art. 45(2) (emphasis added).

127. Compare Dakar Draft, *supra* note 3, art. 1 ("guarantee" and "undertake . . . to ensure") with the African Charter, *supra* note 1, art. 1 ("recognize" and "undertake to adopt"). Several of the drafters expressed to the author the view that the African Charter is

D. *The Charter's Limitations of Granted Rights*

1. *Relevant International Instruments Protecting Individuals Against State Abuse*

The existence of an international human rights regime protecting the individual against state abuse is no longer a precatory concept but rather a "political fact."¹²⁸ The cornerstone of this developing system is the Universal Declaration of Human Rights which was passed as a non-binding U.N. General Assembly resolution in 1948.¹²⁹ Since that time States have assented to participation in a global venture to regulate State behavior with regard to individuals within a State's own territory. Such expression is manifested in the International Covenant on Civil and Political Rights¹³⁰ and the Optional Protocol¹³¹ as well as in the European Convention,¹³² the American Convention¹³³ and the African Charter.¹³⁴ Professor Louis Henkin points out that the foregoing instruments do not create rights but merely recognize rights already in existence "in some other moral or legal order."¹³⁵ By ratifying a human rights instrument, a State is recognizing the existence of these rights and, more importantly, is agreeing to incorporate this standard into its own domestic legal system.¹³⁶ To the contrary exhortations of many States, after ratifying such an international instrument, a State is estopped from refusing to permit the international community to discuss alleged breaches of the instrument on the ground that such discussion violates the breaching State's sover-

a well-balanced compromise between recognized legal norms and political reality.

128. Henkin, Introduction, in *The International Bill of Rights* 1 (L. Henkin ed. 1981).

129. See Universal Declaration, *supra* note 19.

130. See International Covenant on Civil and Political Rights, *supra* note 13.

131. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

132. See European Convention, *supra* note 5.

133. See American Convention, *supra* note 6.

134. See African Charter, *supra* note 1.

135. Henkin, *supra* note 128, at 15.

136. International human rights conventions or covenants that are binding upon member States contain provisions similar to article 1 of the African Charter which provides: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them." African Charter, *supra* note 1, art. 1 (emphasis added). See American Convention, *supra* note 6, art. 2; European Convention, *supra* note 5, art. 1; International Covenant on Civil and Political Rights, *supra* note 13, art. 2.

eignty. Under the basic principle of *pacta sunt servanda* a State is bound by its treaty obligations.¹³⁷ Where a treaty, as in the present case, imposes external constraints upon a State's actions toward persons within that government's territorial jurisdiction, a State may not avoid the treaty obligation because it entered into a consensual agreement to permit such interference; therefore, any alleged violation of the treaty becomes an issue of international concern. This concept is fundamental to human rights in general and to the derogation question in particular.¹³⁸

2. *Derogation Clauses, Clawback Clauses, and the African Charter*

The African Charter contains no specific provision entitling a State to derogate from its obligations—to temporarily suspend a right guaranteed under the Charter. Many of the provisions, however, contain "clawback" clauses¹³⁹ that entitle a State to restrict the granted rights to the extent permitted by domestic law.¹⁴⁰ As the following discussion will demonstrate, such protection is substantively questionable.

Clawback clauses are not the same as derogation clauses¹⁴¹ and do not provide the individual the same degree of protection pro-

137. The principle of *pacta sunt servanda* has long been a recognized rule of customary international law and was codified in the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, U.N. Doc. A/Conf. 39/27, at 289 (1969) (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679 (1969).

138. In effect, a State is agreeing to permit the international community to protect the State's citizens and anyone else coming within the State's territory from abusive action and derogation from basic fundamental guarantees.

139. Rosalyn Higgins defines the term "clawback" as a clause "that permits, in normal circumstances, breach of an obligation for a specified number of public reasons." 48 Brit. Y.B. Int'l L. 281, 281 (1978). She distinguishes the clawback clause from derogations *stricto sensu* which "allow suspension or breach of certain obligations in circumstances of war or public emergency." *Id.* See also Norris & Reiton, *The Suspension of Guarantees*, 30 Am. U.L. Rev. 189, 193 n.24 (1981).

140. See African Charter, *supra* note 1, arts. 8-14.

For example, the rights granted in these provisions are only guaranteed: "subject to law and order" (art. 8); "within the law" (art. 9); provided an individual "abides by the law" (art. 10(1)); "subject only to the necessary restrictions provided for by law . . ." (art. 11); and "in accordance with the provisions of the law" (art. 13). See *infra* notes 145-85 and accompanying text.

141. Compare Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 Harv. J. Int'l L. 1, 5-6 (1981) (interpreting derogation clauses as being a restrictive type of clawback clause) with Higgins, *supra* note 139 (distinguishing clawback from derogation clauses).

vided by derogation clauses contained in other covenants and conventions.¹⁴² Derogation clauses restrict a State's conduct in two important ways. First, they limit the circumstances in which derogation may occur. For example, under the European Convention, derogation can occur only "[i]n time of war or other public emergency threatening the life of the nation."¹⁴³ Second, derogation clauses define rights that are non-derogable and must be respected, even when derogation is permitted. The effect of derogation clauses, therefore, is to carefully define the limits of State behavior toward its nationals during times of national emergency—a time when States are most apt to violate human rights.¹⁴⁴

While derogation clauses permit the suspension of previously granted rights, clawback clauses restrict rights *ab initio*. As a result, clawback clauses tend to be less precise than derogation clauses because the restrictions they permit are almost totally discretionary. The granted right may be restricted according to local law or to the existence of a national emergency—two very vague and limitlessly broad standards. By virtue of these vague standards, clawback clauses do not provide the external control over State behavior that derogation provisions provide as evidenced by an examination of specific rights provided for in the African Charter.

a. *The Right to Liberty*

Under article 6 of the Charter, "[e]very individual shall have the right to liberty and to the security of his person."¹⁴⁵ Furthermore, "no one may be arbitrarily arrested or detained."¹⁴⁶ Yet the Char-

142. See American Convention, *supra* note 6, art. 27; European Convention, *supra* note 5, art. 15; International Covenant on Civil and Political Rights, *supra* note 13, art. 4.

143. European Convention, *supra* note 5, art. 15(1).

144. The American Convention contains the most extensive list of non-derogable rights. See American Convention, *supra* note 6, art. 27(2); *infra* note 214. These rights are explicitly not suspended by the American Charter derogation provision:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

American Convention, *supra* note 6, art. 27(1).

145. African Charter, *supra* note 1, art. 6.

146. *Id.*

ter qualifies these guarantees with a clawback clause: "[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law."¹⁴⁷ The Charter contains, however, no definition of these reasons and conditions.

A comparison with the European and American Conventions demonstrates the deficiency of the African Charter provision. The American Convention closely parallels the African Charter;¹⁴⁸ however, the American Convention lays out additional minimum procedural safeguards to ensure that the right to liberty is not a mere "paper" right. The American Convention provides that the detained be brought promptly before a judge, that he be entitled to a trial within a reasonable time or be released, and that such release may be conditioned upon certain guarantees to ensure his appearance for trial.¹⁴⁹ In addition, anyone deprived of his liberty is guaranteed recourse to a competent court to determine the lawfulness of his detention.¹⁵⁰ Furthermore, in those countries that permit one threatened with arrest to petition to the court for a ruling on the lawfulness of such a threat, that right is one from which derogation is not permitted.¹⁵¹

The European Convention addresses the right to liberty from a different perspective¹⁵² but the result is similar. It provides for comprehensive protection of individual rights as well, yet the European Convention proclaims that no one shall be deprived of his liberty except in certain situations.¹⁵³ The European Convention

147. *Id.*

148. Provisions similar to those in the African Charter read:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

American Convention, *supra* note 6, art. 7.

149. *Id.* art. 7(5).

150. *Id.* art. 7(6).

151. *Id.*

152. See European Convention, *supra* note 5, art. 5.

153. Article 5 of the European Convention provides:

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

also sets out procedural safeguards by requiring the accused to be promptly informed of the reason for his arrest in a language he understands.¹⁵⁴ Finally, the European Convention allows the victims of any violations of these provisions the right to compensation.¹⁵⁵

By providing comprehensive procedural safeguards regarding the right to liberty, both the European Convention and the American Convention seek to provide external restraints upon governmental behavior. These external restraints serve two separate purposes. First, they ensure that a State's laws conform to the minimum safeguards provided for by the convention or charter. Second, they ensure that governmental activity, if violative of both national law and the convention, is reviewed in a forum more sympathetic to the victim than the courts of the breaching State party.

In light of these safeguards, the African Charter is woefully deficient with regard to the right to liberty. As that right is subject to national law,¹⁵⁶ the Charter is incapable of supplying even a scintilla of external restraint upon a government's power to create laws contrary to the spirit of the right granted. Even the African Commission's ability to provide some external restraint in situations where governmental activity contravenes a national law is highly questionable. Without precise legal guidelines, the Commission will be severely handicapped in dealing with such situations.

Thus the absence of such protection seriously undermines the effectiveness of article 6 and the individual is given no greater protection than he would have under domestic law. Even if such protection is adequate in most situations, the Charter does not exist to cover most situations; its purpose is to deter the occasional abuses a government imposes upon its citizens. This problem could be averted if the Charter—modeling itself on the European Conven-

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or . . . to prevent his committing an offence or fleeing after having done so;

. . . .

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

European Convention, supra note 5, art. 5(1).

154. Id. art. 5(2).

155. Id. art. 5(5).

156. African Charter, supra note 1, art. 6.

tion—expounded on and clarified the situations in which deprivations of liberty are permissible by enumerating a specific list of exceptions to the right to liberty and by setting forth appropriate procedures to be followed.¹⁵⁷

b. *The Right to Receive and Disseminate Information*

A second provision in the Charter subject to a clawback clause is article 9, the freedom of information provision. Freedom of information has been a very sensitive issue throughout Africa. The Western concept of this right varies markedly from the African perception of what an individual has a right to hear or read, or more importantly, to express or disseminate. Taking this difference into consideration, the text of article 9 of the African Charter simply states that "[e]very individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinion within the law."¹⁵⁸

Once again, the American and European Conventions provide a much more detailed explanation of this right.¹⁵⁹ The American Convention, for example, defines freedom of thought and expression by stating that it is a right that will "not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established *to the extent necessary* to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals."¹⁶⁰ The article continues by restricting a State's use of abusive controls over disseminating mechanisms to manipulate indirectly this freedom of thought and expression.¹⁶¹

The African Charter's freedom of information provision is much simpler in structure yet more complicated in application. Article 9(1) unqualifiedly protects the individual's right to receive information. Article 9(2) protects the individual's right to express and disseminate his opinion, but qualifies the right by declaring that it must be exercised "within the law."¹⁶² The effect of this clawback

157. See supra note 153.

158. African Charter, supra note 1, art. 9.

159. American Convention, supra note 6, arts. 12-14; European Convention, supra note 5, arts. 9-10.

160. American Convention, supra note 6, art. 13(2) (emphasis added).

161. Id. art. 13(3).

162. African Charter, supra note 1, art. 9(2).

clause raises some interesting issues.

Consider Country X, which has no laws regarding the dissemination of information. Citizen A of Country X speaks out against the government's policy of taxation. If the president of X places A in jail, does A have a redressable grievance under article 9 of the Charter? Consider alternatively that X has a law that states: "No citizen will speak out against the government nor express any idea that *could be remotely understood* as being contrary to governmental policy." Does Citizen A, or newspaper B, or radio station C have any ground upon which to challenge the law of Country X?

In the first situation brought before the Commission, A arguably would be successful in charging that Country X had violated article 9 since Country X has no laws limiting the right granted therein. Much less certain is the result in the second scenario. A literal reading of the Charter would indicate that since Country X had a law—presumably valid in the domestic context—restricting A's right to disseminate information, the Commission would be forced to decide against A. Thus, the effect of this clawback clause absent the above-mentioned external safeguards may be to foster the enactment of restrictive laws by the individual states.

c. *Freedom of Assembly*

Article 11 protects the individual's right to assemble freely with others. Freedom to assemble may only be restricted where "provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."¹⁶³ In contrast to other clawback clauses in Charter provisions, the restriction here is more limited in that it defines the parameters of permissible State behavior. A law restricting the right to assemble because the security of the nation is at stake will occur only in specifically recognizable instances. In principle, then, a law interpreted to protect a policy of the government would be void under the Charter to the extent it went beyond the interests of "national security."

"National security," however, is a much broader concept than "in conformity with . . . a democratic society," which is the language of article 15 of the American Convention and article 11(2) of the European Convention, both dealing with the right to assem-

163. Id. art. 11.

ble.¹⁶⁴ It has been persuasively argued that "[t]his phrase [in conformity with a democratic society] exerts a qualifying and narrowing influence on open-ended criteria such as national security and public order, which might otherwise lend themselves to repression."¹⁶⁵ Despite this observation, the qualifier "national security" inserted in article 11 does seemingly provide a degree more restraint on governmental activity than the usual clawback clause phrase "in accordance with the law."

d. *Freedom of Movement*

Another provision of the Charter restricted by local law is article 12(1) that protects the individual's right to freedom of movement and residence within the borders of a State. The right to freedom of movement implies, however, that the individual must be lawfully within that State's borders before being protected; article 12(4) gives the once lawfully admitted non-national the protection of the Charter.¹⁶⁶ Additionally, the individual may not be expelled from the country except where such expulsion is in accordance with the law.¹⁶⁷ Article 12(2) protects the individual's right to travel, and is thus similar to article 11 as the restrictions upon this right are limited to situations "provided for by law for the protection of national security, law and order, public health or morality"¹⁶⁸ and hence not subject to the vagaries of local law.

The right of the individual to seek and obtain asylum when persecuted is protected under article 12(3),¹⁶⁹ a provision closely resembling article 22(7) of the American Convention.¹⁷⁰ Yet whereas the American Convention limits the right to situations where the national is "being pursued for political offenses or related common

164. See American Convention, *supra* note 6, art. 15; European Convention, *supra* note 5, art. 11.

165. Hartman, *supra* note 141, at 6 n.24.

166. See African Charter, *supra* note 1, art. 12.

167. "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law." Id. art. 12(4).

168. Id. art. 12(2).

169. "Every individual shall have the right, *when persecuted*, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions." African Charter, *id.* art. 12(3) (emphasis added).

170. "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, *in the event he is being pursued for political offenses or related common crimes.*" American Convention, *supra* note 6, art. 22(7) (emphasis added).

crimes,"¹⁷¹ the Charter recognizes more extensively the numerous and varied situations that give rise to a national leaving his own country by using the less restrictive qualifier, "when persecuted."¹⁷² The recognition of this right to asylum in both conventions is nevertheless far-reaching in light of the earlier attitude of the international community that individuals had no such right of any legal significance.¹⁷³ Undeniably, the provisions adopted in the American Convention and the African Charter indicate a departure from this view. The right to asylum is now indelibly etched in the human rights instruments of the two regions of the world that can best benefit from such provisions.

Additionally, the African Charter, like the American Convention, invokes the protection of relevant international covenants such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁷⁴ The refugee issue in Africa is one of the continent's greatest problems with respect to the potential for individual abuse and suffering. Article 12(3) is the most comprehensive provision of the Charter in terms of protecting these individuals' rights in a foreign land and article 12(5),¹⁷⁵ like the American Convention,¹⁷⁶ prohibits the mass expulsion of non-nationals.

e. *The Right to Participate Freely in Government*

Subject to yet another clawback clause is the right to participate freely in government as provided for in article 13 of the Charter:

1. Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all

171. *Id.*

172. See *supra* note 169.

173. S. Prakash Sinha, *Asylum and International Law* 91 (1971).

174. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 28.

175. "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic, or religious groups." African Charter, *supra* note 1, art. 12(5).

176. See American Convention, *supra* note 6, art. 22(9).

persons *before the law*.¹⁷⁷

Importantly, the African Charter includes a provision granting individuals, including non-citizens, the right to access to public property and services—a right limited in both the American Convention¹⁷⁸ and the International Covenant on Civil and Political Rights.¹⁷⁹ Yet both the American Convention and the Covenant expressly guarantee the right of citizens to vote¹⁸⁰—a guarantee the African Charter fails to provide.

f. *Right to Property*

Article 14 of the Charter attempts to balance the relationship between property ownership and eminent domain.¹⁸¹ Under this provision individuals have a right to property; however, eminent domain subrogates the right "in the interest of public need or in the general interest of the community."¹⁸² In the American Convention, the only other major international instrument granting this right, payment of just compensation must be awarded to any individual who has his property taken "for reasons of public utility or social interest."¹⁸³ The African Charter, however, provides for no such protection and leaves the question of compensation to each individual State, except in reference to a protected peoples' right. In that regard, the Charter states: "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of

177. African Charter, *supra* note 1, art. 13 (emphasis added).

178. American Convention, *supra* note 6, art. 23(1)(c) (right to have access only to "the public service of his [a citizen's] country").

179. International Covenant on Civil and Political Rights, *supra* note 13, art. 25(c) (right to have access only to "public service in his [a citizen's] country").

180. The provisions are virtually identical. The American Convention provides that "[e]very citizen shall enjoy [the right] . . . to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters." American Convention, *supra* note 6, art. 23(1)(b). The International Covenant states that "[e]very citizen shall have the right . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." International Covenant on Civil and Political Rights, *supra* note 13, art. 25(b).

181. "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." African Charter, *supra* note 1, art. 14.

182. *Id.*

183. American Convention, *supra* note 6, art. 21.

its property as well as to an adequate compensation."¹⁸⁴ Yet overall, by not restricting the State's ability to call virtually anything in the "public need," nor setting forth guidelines clarifying the situations in which a government may exercise eminent domain, the Charter allows a State to take property absent local law to the contrary.¹⁸⁵

3. *The Effect of Domestic Law and International Instruments Upon the African Charter's Limitations on Granted Rights*

The preceding discussion of clawback clauses in the African Charter has demonstrated the need to search outside the Charter itself for interpretation of such phrases as "in accordance with the law" and "by the law."¹⁸⁶ In light of the Charter's inclusion of clawback clauses and omission of a derogation provision, an examination of other international instruments and relevant domestic law provisions suggests alternative safeguards to protect Charter-given rights from governmental abuse. Separate analyses of these intentional inclusions and omissions in the African Charter reveal the distinct effects of each.

a. *Clawback Clause Interpretation*

Under a narrow interpretation of a phrase such as "in accordance with the law," the African Commission could confine itself to considering only domestic law, thereby granting a right to the extent that that right conforms to local law. Yet an examination of the derogation provision of the Constitution of the Republic of Zaire illustrates the inadequacy of such a domestic law interpretation. The Zaire Constitution states:

If serious circumstances imminently threaten the Nation's independence or integrity or cause an interruption in the regular functioning of the organs of the Popular Movement of the Revolution or jeopardize vital State interests, the President of the Popular Movement of the Revolution, the President of the Republic, may proclaim a state of emergency, with the consent of the Political

184. African Charter, *supra* note 1, art. 21(2).

185. See *supra* text at notes 79-82.

186. See African Charter, *supra* note 1, arts. 6, 9(2), 10(2), 11, 12(4), 13(1), 14; *supra* note 140.

Bureau.

He shall so inform the Nation by message.¹⁸⁷

The Zairean Constitution nowhere defines the phrase "serious circumstances imminently threaten[ing] the Nation's independence or integrity." Additionally, the event triggering a state emergency may be any occurrence that merely "jeopardize[s] vital State interests." The lack of a definition of the type of action deemed to jeopardize a vital state interest renders this phrase dangerously vague. Furthermore, the Zairean Constitution permits the suspension of guarantees during a state of emergency.¹⁸⁸ It empowers the President "to take all measures required by the circumstances," specifically permitting him to "restrict the exercise of individual liberties and certain fundamental rights."¹⁸⁹

Although the consent of the Political Bureau is required before the President can declare such a state of emergency and suspend guarantees, it is not clear that the requirement of consent will serve as an effective check on the President. As the President has the power to appoint and dismiss Political Bureau members,¹⁹⁰ the Bureau could consist of parties dependent on the President and consequently in line with his views. Hence as the Zairean Constitution provides insufficient guidelines for interpretation of its provisions permitting derogation from guaranteed rights, domestic law can be viewed as an inadequate tool for construing the provisions of the African Charter.¹⁹¹

Under a second and broader interpretation of the Charter, the Commission need not restrict itself to domestic law but may inter-

187. Zaire Const. art. 48 (1974, amended 1978).

188. The Constitution of Zaire provides:

When military law or a state of emergency has been proclaimed, the President of the Popular Movement of the Revolution, the President of the Republic, shall be empowered to take all measures required by the circumstances.

In particular, he may restrict the exercise of individual liberties and certain fundamental rights under conditions determined by this Constitution and by law.

In addition, he may suspend in all or in part of the national territory, and for the duration and infractions which he may determine, the repressive action of ordinary jurisdictions and substitute that of military jurisdictions. However, he may not infringe upon rights to defense and to appeal.

Id. art. 49.

189. *Id.*

190. See *id.* art. 40.

191. This system contrasts with that provided for in the International Covenant. See *infra* text accompanying note 201.

pret the clawback clauses in light of international law. The Commission is empowered to use as applicable principles, *inter alia*, provisions of the Charter of the United Nations and other instruments adopted by African countries in the field of human and peoples' rights, as well as provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the African Charter are members.¹⁹² Conceivably, therefore, when faced with the task of determining whether an act is "within the law" or "in accordance with the law," the Commission can refer to instruments and principles outside the Charter that restrict government behavior to a greater degree than the Charter itself. In this way the Commission would be able to draw upon more definite provisions contained in other international instruments in order to provide an interpretive base for the Charter's broad provisions.

Article 6 of the Charter, the right to liberty, provides a suitable example. Article 6 provides that "no one may be arbitrarily arrested," yet an individual "may be deprived of his freedom . . . for reasons and conditions previously laid down by law."¹⁹³ Article 9 of the International Covenant on Civil and Political Rights contains a similar provision.¹⁹⁴ Yet the Covenant continues where the Charter leaves off and carefully describes the limits within which domestic law must remain, thereby guaranteeing the continuance of certain rights.¹⁹⁵ Article 6 of the Charter contains none of the specificity of

192. African Charter, supra note 1, art. 60.

193. *Id.* art. 6.

194. "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." International Covenant on Civil and Political Rights, supra note 13, art. 9(1).

195. Article 9 provides in pertinent part:

(2) Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the deten-

article 9 of the Covenant. Since the Commission is charged with the interpretation of the Charter,¹⁹⁶ it could thus adopt article 9 as an interpretation of article 6. The attractiveness of this procedure lies in the flexibility given the Commission. Where political reality collides with an unpopular judicial determination, a mutually acceptable compromise can be worked out through the Commission's broad interpretive powers—a solution that would greatly facilitate the acceptance of Commission decisions by the Assembly of Heads of State and Government. Ideally, judicial decisions could increasingly become less dependent upon political considerations.

In many cases, the Commission will not need to "interpret" Charter provisions in light of Covenant provisions but may directly apply the appropriate article of the Covenant or other international instruments as controlling law. For example, article 6 of the Charter allows arbitrary arrest for reasons and conditions.¹⁹⁷ When party to the Covenant, a country has a contractual obligation under *pacta sunt servanda*¹⁹⁸ to abide by the Covenant, hence its provisions conceivably constitute "condition[s] previously laid down by law" as required in article 6 of the Charter. Article 9, therefore, may be directly applied by the Commission as an interpretation of the Charter's article 6.

If the Commission is willing and able to adopt the above interpretive procedure, article 6 (the right to liberty), article 9 (the right to information), article 10 (the right to free association), article 11 (the right to assembly), article 12 (the right to freedom of movement), article 13 (the right to participate in government), and article 14 (the right to property) will provide a greater amount of substantive protection for the individual than the provisions standing alone. The Commission's autonomy in its interpretive powers is therefore imperative and Commission members must be chosen to serve in personal rather than official, governmental capacities.¹⁹⁹ A Commission that is able to maintain autonomy from

tion is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id. art. 9(2)-(5).

196. African Charter, supra note 1, art. 45(3). See *infra* notes 221-50 and accompanying text.

197. *Id.* art. 6.

198. See *supra* notes 136-38 and accompanying text.

199. The Dakar Draft contained an article that stated: "The office of a member of the Commission shall be incompatible with that of a Government member or of a member of

political forces will be able to put forward solutions that not only follow the rule of law but also are politically acceptable.

b. *Interpretation of the Omission of a Derogation Clause*

Just as the African Commission could interpret the clawback clauses through recourse to other international instruments as a means of providing greater protection for the individual, the Commission also could look to the derogation provision of the International Covenant on Civil and Political Rights²⁰⁰ to prevent governmental abuses during a state of emergency.

The scope and limitations of permissible state derogation are set out in article 4 of the Covenant:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-

the diplomatic corps." Dakar Draft, *supra* note 3, art. 32. This provision was the subject of a two-day debate and was not adopted because of a lack of consensus. In one of the only votes taken concerning the provision, its inclusion in the Charter was defeated fifteen votes to twenty. While the members of the Commission are to serve in their individual capacities, the defeat of this provision indicates that the contrary may prove to be true. The make-up of the Commission is of obvious importance. It was conceded by one of the Charter drafters that a Commission interpreting the Charter narrowly could construe such phrases as "in accordance with the law" or "within the law" to preclude any action by the Commission where local law contrary to the Charter was sanctioned by national security—regardless of how tenuous the claim.

200. International Covenant on Civil and Political Rights, *supra* note 13.

General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.²⁰¹

The second clause of article 4(1) indicates that any public emergency will permit derogation as long as it threatens the life of the nation. Currently no case law exists interpreting article 4 of the Covenant; however, the substantially similar article 15 of the European Convention has received some attention.²⁰² For example, in the *Greek Case*,²⁰³ the European Commission on Human Rights articulated four elements that constituted a "public emergency threatening the life of the nation"²⁰⁴ under the European Conven-

201. *Id.* art. 4.

The term "public emergency" corresponds to "war, public danger, or other emergency" in the American Convention. American Convention, *supra* note 6, art. 27. The corresponding language of the European Convention reads "war or other public emergency." European Convention, *supra* note 5, art. 15(1).

Yet as Dean Thomas Buergenthal points out, the omission of the word "war" in the Covenant was no accident. Article 2(4) of the U.N. Charter prohibits any member State from resorting to the use of force against the territorial integrity of any other State; thus the inclusion of the word "war" in article 4 of the Covenant would symbolically weaken the U.N. concept of the illegality of war, even though war is most definitely a public emergency within the contemplation of article 4 in that all wars threaten the life of the nation. "While it was recognized that one of the most important public emergencies was the outbreak of war, it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war." Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations, in The International Bill of Rights*, *supra* note 128, at 72, 79 (quoting the *travaux preparatoires*).

202. (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed on the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

European Convention, *supra* note 5, art. 15.

203. *Greek Case*, 12 Y.B. Eur. Conv. on Human Rights 72 (1969) (Eur. Comm'n on Human Rights).

204. (1) In time of war or other public emergency threatening the life of the nation

tion. These elements were:

1. An actual or imminent emergency;
2. involving the whole nation;
3. threatening the continuance of the organized life of the community;
4. for which the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.²⁰⁵

The second element should properly be read to include insurrections that threaten only a portion of the country.²⁰⁶ It should be added, however, that proportionality or "the extent strictly required by the exigencies of the situation"²⁰⁷ mandates that where a government decides to derogate, it may do so only in those areas affected by the emergency. It would therefore be improper for a State to suspend the right of freedom from arbitrary detention in areas where there was absolutely no emergency or threat of emergency.²⁰⁸ Finally, other situations threatening disaster constitute emergencies and would trigger the right to derogate.²⁰⁹

Who is to determine whether a situation constitutes a public emergency threatening the life of the nation and whether the particular government response was "strictly required by the exigencies of the situation?" In interpreting the derogation provision of the European Convention, the European Court in *Ireland v. United Kingdom*²¹⁰ stated:

It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to deter-

any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

European Convention, supra note 5, art. 15(1).

205. Greek Case, 12 Y.B. Eur. Conv. on Human Rights 72 para. 153 (1969) (Eur. Comm'n on Human Rights).

206. Compare Buergenthal, supra note 201, at 80 (public emergency need not threaten entire nation) with Hartman, supra note 141, at 16 (entire state must be threatened).

207. European Convention, supra note 5, art. 15(1).

208. See Norris & Reiton, supra note 139, at 201. ("Inasmuch as the legitimacy of a state of exception is derived from its necessity, there is an implied restriction to the geographical area affected by the special circumstances.")

209. Buergenthal, supra note 201, at 79.

210. *Ireland v. United Kingdom*, [1978] Eur. Ct. of Human Rights, ser. A, no. 25 (judgment of Jan. 18, 1978).

mine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. . . . In this matter Article 15 §I leaves those authorities a wide *margin of appreciation*.

Nevertheless, the States do not enjoy an unlimited power in this respect. . . . The domestic margin of appreciation is thus accompanied by a European supervision.²¹¹

This language indicates that international bodies maintain reviewability over a State's determination of not only what actions are required by the exigencies of the situation but also what constitutes a public emergency.²¹² The African Commission, therefore, should have no difficulty in reviewing state discretion (the margin of appreciation) where the State concerned is a party to the International Covenant and is thereby bound by the restrictions therein. Yet, the extent of reviewability is not clear where the State concerned is not a party to the Covenant. In the interest of consistent judicial determination, the Commission should apply, as in the case of the clawback clauses, the same reviewability standards to those countries not party to the Covenant. This solution is possible particularly where the State concerned has a derogation provision in its constitution similar to the Covenant.²¹³

Derogation clauses do not authorize the suspension of all rights granted under the instrument. Under article 4(2) of the Covenant,

211. *Id.* at 78-79 (emphasis added).

212. See Buergenthal, supra note 201, at 81-82.

213. For example, the derogation provision in the Nigerian Constitution provides:

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 30 [right to life] or 32 [right to personal liberty] of the Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorise any derogation from the provisions of section 30 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 33(8) [freedom from ex post facto laws] of this Constitution.

(3) In this section, a "period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President

Nig. Const. art. 4(2)-(3). See supra text at note 187 for the derogation provision in the Zairean Constitution.

the following articles may not be derogated from notwithstanding the existence of a public emergency: article 6 (right to life), article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment), article 8(1) and (2) (freedom from slavery and servitude), article 11 (freedom from imprisonment for failure to fulfill a contractual obligation), article 15 (freedom from *ex post facto* laws), article 16 (right to recognition as a person before the law) and article 18 (freedom of thought, conscience and religion).²¹⁴ While the Covenant explicitly forbids a State to derogate from the above rights,²¹⁵ some vital rights are derogable under certain Covenant provisions: article 9 (freedom from arbitrary arrest or detention),²¹⁶ article 14 (right to a fair trial),²¹⁷ and article 17 (freedom from arbitrary or unlawful interference with privacy, family, house, or correspondence).²¹⁸

Does this mean, then, that derogable rights (as opposed to nonderogable ones) are automatically suspended when a State declares a state of emergency? The answer is an emphatic no. As described earlier, a state of emergency in only one sector of the country will not authorize a nation-wide state of emergency unless the "exigencies of the situation" warrant such a move.²¹⁹ A right may be derogated from only when it is necessary in order to deal with the emergency and then only to the extent that it is proportional to the emergency, in other words, to the extent strictly required by the exigencies of the situation.²²⁰

214. International Covenant on Civil and Political Rights, *supra* note 13, art. 4(2). The European Convention contains only four non-derogable rights: the right to life, freedom from slavery, freedom from torture, and freedom from *ex post facto* laws. European Convention, *supra* note 5, art. 15. The American Convention possesses the most extensive list of non-derogable rights. It includes the seven of the International Covenant—with the exception of freedom of conscience—and in addition includes the rights of the family, the right to a name, the rights of a child, the right to nationality, and the right to participate in government. American Convention, *supra* note 6, art. 27(2). The American Convention also provides that the judicial guarantees essential for the protection of such rights are non-derogable. *Id.*

215. International Covenant on Civil and Political Rights, *supra* note 13, art. 4(2).

216. *Id.* art. 9(1).

217. *Id.* art. 14(1).

218. *Id.* art. 17.

219. See *supra* notes 206-09 and accompanying text.

220. The individual safeguards within a single provision should also be retained subject to the limitations of necessity and proportionality. For example, article 14 of the Charter dealing with the right to a fair trial contains specific procedural safeguards such as article 14(2)'s presumption of innocence, article 14(3)(a)'s right to be informed promptly of the charged offense, article 14(3)(d)'s right to be present at trial, and article 14(7)'s double jeop-

In conclusion, the importance of looking to both domestic law and other international agreements to interpret the African Charter is crucial as a means to safeguard individual rights during a state of emergency. The Commission's use of other legal instruments, particularly the International Covenant on Civil and Political Rights, would enable it to implement the Charter-given rights seemingly undermined by the included clawback clauses and omitted derogation provision. In addition, an understanding of the structure and procedures of the Commission aids in predicting its effectiveness in implementing the Charter.

IV. ESTABLISHMENT AND ORGANIZATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

This final section will briefly describe the provisions of the Charter relating to the African Commission.²²¹ As the Commission is the entity charged with interpreting the Charter,²²² an examination of its structure and procedures is fundamental to any Charter analysis.

A. Election of Members

The African Commission on Human and Peoples' Rights shall consist of eleven members²²³ serving in their personal capacity.²²⁴ Four months prior to elections, the Secretary-General of the OAU will invite State parties to the present Charter to nominate up to two candidates.²²⁵ A State may nominate a candidate from its own State, but if a State nominates two candidates, one may not be a

ardy provision. See African Charter, *supra* note 1, art. 14. These enumerated rights should not be derogated from even in emergency situations as they provide vital protection to the individual and impose only minor burdens on a State—if any at all. Even the inability to impose procedural safeguards on a government intent upon depriving its citizens of all civil and criminal guarantees does not in itself invalidate this principle.

221. Part II (arts. 30-63) of the Charter deal with the Commission's establishment and organization (chapter I), mandate (chapter II), procedures (chapter III), and applicable principles (chapter IV). Part III (arts. 64-68) concerns general enactment provisions. See African Charter, *supra* note 1, arts. 30-68.

222. *Id.* art. 42(3).

223. *Id.* art. 31(1).

224. *Id.* art. 31(2).

225. *Id.* arts. 34 and 35(1). Under the American Convention, candidates are nominated by the governments of member States of the Organization of American States. American Convention, *supra* note 6, art. 36(1).

national of that State.²²⁶ In any case, a candidate may not be nominated if he is not a national of a State party to the present Charter.²²⁷

As soon as the Secretary-General has compiled the list of candidates, he is required to make an alphabetical list and submit it to the Heads of State and Government at least one month prior to elections.²²⁸ The members of the Commission are then elected by secret ballot by the Assembly of Heads of State and Government at its annual Summit.²²⁹ Each member of the Commission serves a six-year-term and is eligible for re-election.²³⁰ The Commission, once elected by the Heads of State and Government, elects its own officers²³¹ and establishes its own rules of procedure.²³² The Commission will meet "whenever necessary" but will be convened by its Chairman at least once a year.²³³

B. General Procedure of the Commission

1. State Communications

The Charter creates two types of communications, each of which is considered by means of a different procedure. The first classification concerns communications from States.

A State party that has good reason to believe that another State party has violated the provisions of the Charter may bring the matter by written communication before that State²³⁴ or before the Commission.²³⁵ In either case, the communication shall be addressed to the Secretary-General of the OAU, the chairman of the Commission, and the accused State. This provision indicates that by becoming a State party to the African Convention, a State automatically recognizes the competence of the Commission to hear complaints against it. As a result, this provision will greatly facili-

226. African Charter, *supra* note 1, art. 34.

227. *Id.* The American Convention allows candidates to be a national of any member State of the Organization of American States. American Convention, *supra* note 6, art. 36(2).

228. African Charter, *supra* note 1, art. 35(2).

229. *Id.* art. 33.

230. *Id.* art. 36.

231. *Id.* art. 42(1).

232. *Id.* art. 42(2).

233. *Id.* art. 64(2).

234. *Id.* art. 47.

235. *Id.* art. 49.

tate the authority and usefulness of the Commission.²³⁶

The State party against whom the communication is addressed has three months to respond to the enquiring State.²³⁷ Such explanation "should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available."²³⁸ The objective of the Commission in such State-to-State dealings is to encourage the parties to reach an amicable settlement between themselves. If, however, the States cannot reach a mutually satisfactory agreement, either party may submit the matter to the Commission and notify the other State of such action.²³⁹ The Commission will only consider the matter after all domestic remedies have been exhausted.²⁴⁰

Once the matter is before the Commission, that body is given broad investigatory powers under article 46 that states in part: "[t]he Commission may resort to any appropriate method of investigation."²⁴¹ While the Charter expressly states that the Commission may request all relevant information from the States concerned in either written or oral form,²⁴² there is no express indication as to whether the Commission can undertake fact-finding missions. Article 46, which applies to the procedure concerning communications from States as well as from those not parties to the Charter, could be interpreted as allowing fact-finding missions.

Once the Commission has gathered sufficient information about a State-communicated matter, and has determined that an amicable solution is impossible, it shall write a report stating the facts and its findings.²⁴³ The report is then submitted to the Assembly of Heads of State and Government.²⁴⁴ Article 53 provides that "[w]hile transmitting its report, the Commission may make to the

236. The American Convention provides that a State party to the Convention may file an additional communication against another State party only if both States have deposited declarations recognizing the competence of the Commission to examine such communications. American Convention, *supra* note 6, art. 45(2). The European Convention requires recognition of the competence of the Commission. European Convention, *supra* note 5, art. 25(1).

237. African Charter, *supra* note 1, art. 47.

238. *Id.*

239. *Id.* art. 48.

240. *Id.* art. 50.

241. *Id.* art. 46.

242. *Id.* art. 51(1).

243. *Id.* art. 52.

244. *Id.*

Assembly of Heads of State and Government such recommendations as it deems useful."²⁴⁵ Although vague, this language indicates that the recommendations of the Commission are to be made to the Assembly of Heads of State and Government and are not to be incorporated into the report. The importance of this provision rests in article 59 that states that the report of the Commission (regardless of whether it concerns a communication brought by a State, an individual, or a non-governmental organization) will be published only when the Assembly decides it should be.²⁴⁶ Under no circumstances will the recommendations of the Commission be made public without the prior approval of the Assembly of Heads of State and Government.

2. *Other Communications*

Under article 55 there is no limit as to who may file a communication before the Commission as long as article 56 is followed. Article 56 states that communications, other than those of State parties, will be considered if they: are compatible with the Charter of the OAU and the African Charter; are not written in disparaging or insulting language; are not based exclusively on reports disseminated through the news media; are sent within a reasonable time after exhausting local remedies; and do not deal with cases already settled by those States in accordance with various international instruments.²⁴⁷ While an individual may bring a petition before the Commission, it is unclear whether individual petitions will be considered independently or will be considered only "after deliberations of the Commission [in which] one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights."²⁴⁸ Where such a situation exists, the Assembly of Heads of State and Government may, at its discretion, then request the Commission to undertake an in-depth investigation.²⁴⁹

The fact that the Assembly must authorize the Commission to issue a report on non-state reported communications suggests that the Commission merely functions as a sub-committee of the As-

245. *Id.* art. 53.

246. *Id.* art. 59(1).

247. *Id.* art. 56.

248. *Id.* art. 58(1).

249. *Id.* art. 58(2).

sembly with no independent authority of its own. Hopefully, this question will be resolved when the Commission writes its own rules of procedure, which it is empowered to do under article 42(2).²⁵⁰

V. CONCLUSION

Like all human rights instruments, the African Charter is as much a political document as it is a legal one. Several of the delegates in Nairobi expressed the view that although the standards of the Charter were vague, the Commission was given sufficient flexibility to interpret the Charter in a manner consistent with other international instruments, and that despite the unique concept of peoples' rights and the firm obligation imposed upon individuals by their States, the Commission's decisions would closely parallel those of similar international organizations charged with the protection of human rights. This view seems reasonable and if realized will provide not just Africa but the entire world with a valuable mechanism for furthering the cause of individual rights.

The steps from espoused aspirations to practical reality are difficult. The OAU might do well to consider the possibility of creating a temporary African Commission charged solely with the task of promoting the principles embodied in the Charter prior to the actual commencement of the Commission provided for in article 30. In addition to providing an immediate promotional institution, a temporary Commission could lay the groundwork for resolution of some of the major problems that will confront the permanent Commission. The two most pressing issues deal with restriction on rights granted by the Charter. First, the lack of a derogation provision places on the Commission the unenviable task of determining when a government has acted improperly during a declared state of emergency. Second, the presence of clawback clauses requires the Commission to determine what applicable standards should be used in defining the phrase "in accordance with the law."

The satisfactory resolution of these issues necessitates a broad interpretation of the Charter so as to apply external norms to the vague Charter provisions. This result will be possible only if the Commission is permitted to carry out—with a minimum of interference from the Assembly of Heads of State and Government—its Charter-given mandate to interpret all Charter provisions. An au-

250. See *id.* art. 42(2).

tonomous Commission with members represented in their personal capacity is a fundamental requirement for the successful operation of the Commission and the subsequent implementation of the substantive protective safeguards of the African Charter on Human and Peoples' Rights.



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