

## REGIONAL HUMAN RIGHTS MODELS IN EUROPE AND AFRICA: A COMPARISON

### I. INTRODUCTION

There seems to be universal acceptance of the abstract concept of human rights as rights or entitlements which societies ought to recognize, and which exist even when there is no positive recognition or legal enforcement of them within any given society.<sup>1</sup> Human rights are championed by nearly everyone in the abstract; however, concrete human rights issues almost inevitably become the subject of bitter controversy.<sup>2</sup> If one begins with the concept of a basic human right to life, when does that right begin? Does the right to life include a right to mental equilibrium as well as physical integrity? Do human rights also include political and civil rights to participate in the function of the state? What about social and economic rights? Are the rights, however defined, absolute?<sup>3</sup> The fact of cultural diversity in our world makes answering these questions about the specific content and scope of human rights a monumental, and perhaps insurmountable, problem.<sup>4</sup>

There is a common sense logic which informs us that, however difficult to define, there are some core values which

---

1. Philosophers differ in their analyses of how one can know that such rights exist. Intuition, reason, religion, and utility have all been offered as the basis for human rights. For a discussion of the conceptual problems of human rights, see Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143 (1978-79).

2. The subject of human rights is highly charged with emotion. Throughout history both secular and religious groups have committed atrocities in a spirit of righteousness. The fifteenth century Spanish inquisition serves as an example of moral outrage against those who affirmed a different religious heritage. Christian Bay discusses the potential development of a universal notion of human rights based on a fundamental humanist premise and an understanding of human biological and psychological needs. See Bay, *Universal Human Rights Priorities: Toward a Rational Order*, in INTERNATIONAL HUMAN RIGHTS: CONTEMPORARY ISSUES 5 (J. Nelson & V. Green eds. 1980).

3. The meanings and foundations of human rights have been diversely interpreted. For contemporary philosophical perspectives on the conception, meaning, and application of human rights, see the collection of essays in THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES (A. Rosenbaum ed. 1980).

4. There are enormous variations in the specific customs, religions, moral norms, and political practices of the world's peoples, as well as differences in the degrees to which societies tolerate such traits as individualism or violence. For a discussion of these factors in the context of human rights, see Nickel, *Cultural Diversity and Human Rights*, in INTERNATIONAL HUMAN RIGHTS, *supra* note 2, at 43.

should be respected by all organized societies. This is illustrated by the European reaction to Nazi leaders who, during World War II, deported millions of civilians to slave labor and death camps, where these innocent people were treated with barbaric cruelty, and where many were eventually murdered.<sup>5</sup> An outraged public declared that these actions constituted crimes against humanity, and spurred an unprecedented legal proceeding which brought Nazi leaders and their subordinate officials to account before an international tribunal at Nuremberg.<sup>6</sup>

Assuming that a fundamental humanist premise permits us to acknowledge the existence of some basic human rights, questions abound regarding their practical implications in national and international policy. Through what structures should they be protected? How can a state's interest in protecting human rights worldwide be reconciled with its interest in preserving exclusive jurisdiction over its own local affairs?<sup>7</sup> Are there universally accepted procedural rights which could substitute for a consensus on substantive human rights?<sup>8</sup>

Human rights protections are influenced by political realities. The well-established notion of the supremacy of the sovereign

---

5. For documentation of the Nazi acts regarding slave labor, concentration camps, and persecution of the Jews, see U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, *I NAZI CONSPIRACY AND AGGRESSION* 875-1022 (1946).

6. On August 8, 1945, the governments of the United Kingdom, the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics, entered into an agreement establishing the International Military Tribunal for the trial of war criminals. An annexed charter invested the Tribunal with power to try and punish persons who had committed crimes against peace, war crimes, and crimes against humanity. The legal developments and considerations which underlie this agreement are discussed in S. GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* (1946). Information about the trial and judgments can be found in B. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977). For an analysis of the relationship of the Nuremberg principles to emerging international law, see A. KLAFFKOWSKI, *THE NUREMBERG PRINCIPLES AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1966).

7. Systematic abuses of human rights are almost always associated with repressive features of the governing process, particularly in authoritarian regimes. Effective approaches to world order and human rights cannot neglect the internal life of sovereign states. For an analysis of this problem, see R. FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* (1981).

8. One writer has searched the municipal laws of various sovereign states for some general principles of human rights which would be recognized by all nations. Her thesis is that if a state recognizes *any* human rights, it must recognize some prerequisite procedural laws in order to protect them. She would use a procedural guarantee, such as freedom from arbitrary arrest and detention, as a starting point for the development of international human rights. See Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CALIF. W. INT'L L.J. 272 (1980).

state<sup>9</sup> has often permitted those states which are powerful enough to impose their will on their own people to do so. This idea of sovereignty can shield abuses of human rights committed within state territory.<sup>10</sup>

Because, in fact, there are gross inequalities between states, patterns of external control over states also exist.<sup>11</sup> Such external control was clearly manifested during the colonial period, when European nations decided the destinies of African peoples through imperial patterns of control.<sup>12</sup> Although most countries are now free of colonial rule,<sup>13</sup> the supposition still exists that some implicit correlation between power and virtue gives powerful states a mandate to impose their will on weaker states.<sup>14</sup>

Recognizing that the traditional ordering of sovereign states

9. Jean Bodin's analysis of political authority, published in 1606, was the first to express the concept of the supremacy of the state, and the state's right to make its own laws. His analysis still fits our modern political structures, and his concept of sovereignty survives as a central feature of Western political thought. J. BODIN, *THE SIX BOOKES OF A COMMONWEALE passim* (McRae ed. 1962).

10. The belief in political order through sovereign states requires that one accept each government's own interpretation of its obligations in relation to its own citizens. Where human rights abuses arise, domestic challenges to the repressive regime can result in new political arrangements. Interference from other sovereign states is not sanctioned. Those who defend this political order point out that outside intervenors, whatever their humanitarian motivation, are also oriented around selfish ends, such as increased power, wealth, or prestige. Intervention, motivated at least in part by self-interest, all too often leads to yet another state taking counterintervention measures which are intended to neutralize the first intervention. In fact, each state wants to prevail over—rather than neutralize—the other, and either direct intervention or support via arms or capital escalates the original problem and multiplies the abuses. Falk refers to this ordering of political life as "statist logic." R. FALK, *supra* note 7, at 35-38.

11. Imperial patterns of control were formally upheld in both the conquest of the New World and the colonization of Africa. These patterns were often justified by humanitarian or civilizing claims. Although the doctrinal support for such patterns has eroded, strong states still frequently attempt to influence weaker ones through diplomatic pressures or by covert means. *Id.* at 38-42.

12. Colonial rule in Africa lasted from approximately 1830-1962. For an anthology of primary resources which reflects both European and African viewpoints during that period, see *COLONIAL RULE IN AFRICA* (B. Fetter ed. 1979).

13. By May 1980, only Namibia remained under foreign domination.

14. Falk refers to this ordering of political life as "hegemonial logic." Hegemonial logic still exists in informal patterns and covert forms. For example, the United States' proclamation of human rights diplomacy, under the Carter administration, entailed a hegemonial attitude toward the internal affairs of foreign countries to the extent that they could be controlled by diplomatic pressures, the withholding of aid or credits, or the giving of aid or comfort to dissident elements in the society. A human rights rationale can be used as a rallying cry to engender support for waging geopolitical struggles which have goals unrelated to human rights. See R. FALK, *supra* note 7, at 38-42.

makes it difficult to deal effectively with human rights problems, some modern states have encouraged the creation of supranational organizations which have the protection of human rights as their goal.<sup>15</sup> Supranational organizations, made up of representatives from member states, are frequently constrained, however, by the individual will of their dominant states, by their lack of financial independence and sanctioning capabilities, and by a lack of consensus as to the content and scope of the rights to be protected.<sup>16</sup>

Regardless of a state's legal authority or political autonomy, significant abuses of human rights can arouse the conscience of private citizens, who may seek to marshal world public opinion to pressure the political actors to change their behavior.<sup>17</sup> Private citizens have organized into such bodies as Amnesty International<sup>18</sup> and the International League for Human Rights<sup>19</sup> to work regularly for the advancement of human rights. Such groups have the advantage of relative freedom from political influence, and exert a selective but important informal pressure on states.

---

15. The first significant international human rights effort was the anti-slavery movement of the nineteenth century. The League of Nations and the International Labour Organization both emerged in the post World War I period while the United Nations and the European Convention on Human Rights were organized at the end of World War II. Human rights concerns have been kept alive in recent decades by increasing number of international declarations and resolutions, multilateral treaties, and regional conventions. See, Bilder, *The Status of International Human Rights Law: An Overview*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 1 (J. Tuttle ed. 1978).

16. For example, with respect to human rights, the main global arena of supranational activity has been the General Assembly of the United Nations. The General Assembly, which is dominated by governments concerned with protecting their state sovereignty, is the forum in which the principal concerns of world public opinion are given expression. This frequently results in contradictory signals, with strong human rights rhetoric, but selective moral perception. See R. FALK, *supra* note 7, at 45-49.

17. The loud cries to topple the Ugandan regime under Idi Amin serve as a recent example. In effect, the contention was that the regime in place was so bad by objective moral standards that the only appropriate question was whether it was possible for an outsider to intervene effectively. See R. FALK, *supra* note 7, at 43.

18. Amnesty International, founded in 1961, is a worldwide movement, independent of any government, which focuses concern strictly upon the plight of prisoners. It seeks the release of prisoners of conscience, fair and early trials for political prisoners, and the elimination of the death penalty and torture, or any cruel or degrading treatment, for all prisoners. It is organized in 37 countries, and has individual members in an additional 74 countries, with its headquarters in London.

19. The International League for Human Rights has concerned itself with human rights violations for more than 35 years. It has headquarters in the United States and at the United Nations, and has 40 affiliates throughout the world. See 3 HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 1639 (J. Joyce ed. 1978).

This establishes a climate of concern over particular patterns of abuse, and builds popular support for taking human rights seriously.<sup>20</sup>

Neither sovereign states, which are autonomous, nor supranational human rights organizations, which depend upon voluntary patterns of compliance, nor private organizations, which lack resources and enforcement mechanisms, however, can adequately protect human rights. A protective mechanism is needed which will function at an intermediate level, exercising authority which is broader than the sovereign state yet closer to the affected communities than a global supranational organization. This can be achieved through regional human rights organizations.<sup>21</sup>

In our increasingly complex and interrelated world, sovereign states perceive that many important economic, environmental, and security needs can best be met through cooperation. Many states already pool their administrative controls and resources in order to meet political, economic, and defense objectives.<sup>22</sup> States working in concert to perform mutually important tasks are likely to experience a decrease in political antagonisms which would be difficult to achieve directly.<sup>23</sup> Thus, the recognition of interdependence and the negotiation of international obligations are

20. The notion that certain rights inhere in human nature gives rise to what Falk terms "naturalistic logic." The appeal to naturalistic logic is an appeal to the conscience of the political actor, and of the world community. See R. FALK, *supra* note 7, at 42-45.

21. During the September 1967 proceedings of the Seventh Nobel Symposium in Oslo, some opposition to the regional approach to human rights was expressed. Concern centered around the potential for (1) overlapping procedures and institutions, (2) inconsistencies in substantive law, and (3) the diversion of attention away from efforts to achieve a universal forum. However, the consensus of the speakers was that regional systems offer a desirable grassroots beginning for human rights protection, and should coexist with universal systems. See INTERNATIONAL PROTECTION OF HUMAN RIGHTS 292-97 (A. Eide & A. Schou eds. 1968).

22. For example: defense (North Atlantic Treaty Organization, the Warsaw Pact), political influence (Council of Europe, Organization of American States, Organization of African Unity), and economic cooperation (European Economic Community and its Soviet analogue COMECON, the Latin American Free Trade Association, and the Organization for Economic Cooperation and Development). For an introduction to the regional approach to human rights, see R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 547-663 (1979).

23. When states cooperate in this way they transfer small pieces of their sovereignty to the entrusted central authority. Over time this accumulation of partial transfers shifts some of the allegiance of the citizens of the participating states to the organization through which they are achieving, or at least working toward, their goals. Ideological or political cohesion, which is difficult to achieve directly, evolves in this process. R. POLLACK, THE INDIVIDUAL'S RIGHTS AND INTERNATIONAL ORGANIZATION 55-59 (1966).

functional ways to diminish the sovereignty principle. Economic and diplomatic sanctions will also be more effective where there is genuine interdependence.<sup>24</sup>

Regional cooperation can both facilitate the development of mechanisms to protect human rights and help to transform universal proclamations of human rights into specific realities.<sup>25</sup> This Note will compare the development and organization of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), the oldest regional human rights structure, with the Charter of Human and Peoples' Rights (African Charter), the newest regional human rights structure.

## II. THE EUROPEAN CONVENTION

### A. BACKGROUND

Europe was shattered into a political vacuum by World War II. The European Convention was created in 1950 by a generation of Europeans scarred by the atrocities perpetrated by the Axis powers, particularly the Nazis,<sup>26</sup> and faced with a growing ideological conflict between East and West.<sup>27</sup>

Historically, Europe developed the concept of the nation state, with its concomitant notion of state sovereignty.<sup>28</sup> At the

---

24. As a genuine interdependence is achieved, the expectations of the several states will converge into more or less identical aims. Consequently, states are likely to respect the diplomatic stance of the cooperating states. When this is not the case, however, the socio-economic ties which were part of the integrative process insure that economic sanctions will have a direct impact on the uncooperative state. *Id.*

25. For a discussion of the geopolitical realities which make regionalism in the context of human rights protections viable, and for an overview of the various regional human rights mechanisms, see Pinto, *Regionalisme et Universalisme dans la Protection des Droits de L'homme*, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, *supra* note 21, at 177.

26. Sohn discusses this post World War II development of theories designed to protect human beings on the international level, and responds to criticisms of these international efforts to protect human rights which have been made by a younger generation, born after the holocaust. Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347 (1981).

27. The events of history had made European countries especially conscious of the value of democracy. The communist threat was very real to Europeans at the close of World War II. In the year between the Hague Congress (May 1948) and the signing of the Statute of the Council of Europe (May 1949), Europe witnessed the seizure of Czechoslovakia, civil war in Greece, and the Berlin Blockade. A. H. ROBERTSON, HUMAN RIGHTS IN EUROPE 1-14 (1963).

28. In the medieval age, laws were considered to be static, consonant with the laws of God and nature, and the concept of social change was largely absent. Jean Bodin, a sixteenth century political philosopher, developed the concepts of the sovereignty of the state,

same time, European states were culturally identifiable units with the cause of individual human rights firmly rooted in their past: The Magna Carta (1215),<sup>29</sup> the English Bill of Rights (1689),<sup>30</sup> and the French Declaration of the Rights of Man (1793)<sup>31</sup> all emphasized a liberal attitude toward individual rights. Consequently, when faced with a growing communist threat, post-war European states, bound by their common ideologies, were ready to delegate some of their sovereign powers to protect those ideologies.<sup>32</sup> This willingness to transfer sovereignty is the key to a workable international organization.<sup>33</sup>

A variety of post-war organizations sprang up to foster European unity.<sup>34</sup> The Brussels Treaty,<sup>35</sup> signed in March 1948, created a Consultative Council composed of the foreign ministers of the signatories. The French Foreign Minister, M. Bidault, proposed to

---

and emphasized the state's fundamental power to make laws. He believed that the sovereign was absolute, and that the duty of a subject was to obey the sovereign without question. Bodin relied upon natural law as a foundation for two limitations upon the sovereign: he was bound to keep his promises and to respect private property. J. BODIN, *supra* note 9.

29. The Magna Carta granted individual liberties to all free men throughout the English realm. It also confirmed general liberties of the church, and freedom of elections. For a history of the Charter and its text, see J. HOLT, *MAGNA CARTA* (1965).

30. The Bill of Rights removed the power of any monarch to suspend the operation of law, and gave Parliament the sole power to levy taxes. This climaxed a long struggle between the English monarch and Parliament, and finally established the supremacy of Parliament. D.C.M. YARDLEY, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW* 29 (3d ed. 1969).

31. In this document, the ancient doctrine of natural law, based on reason, found expression as a theory of rights. It remains as a classic formulation of the inviolable rights of the individual vis-à-vis of the state. For a brief history of the relationship between natural law and human rights, see Castberg, *Natural Law and Human Rights, An Idea-Historical Survey*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, *supra* note 21, at 13.

32. They were seeking to protect their way of life through a peaceful association of democratic states, however, not through a military alliance. See A. H. ROBERTSON, *supra* note 27, at 4.

33. R. POLLACK, *supra* note 23, at 55-59.

34. The United Europe Movement, the Economic League for European Co-operation, the French Council for United Europe, the European Union of Federalists, *Nouvelles Equipes Internationales* and the Socialist Movement for the United States of Europe, along with some other groups, united in 1948 to form the International Committee of the Movements for European Unity. R. BEDDARD, *HUMAN RIGHTS AND EUROPE* 17 (1980).

35. Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 152 (effective Aug. 25, 1948). This treaty was signed in Brussels by Belgium, France, Luxembourg, the Netherlands and the United Kingdom. (This treaty and many of the other statutes and materials cited in this Note are reprinted in a single volume collection of documents relating to the United Nations and to regional international organizations. See *INTERNATIONAL ORGANISATION AND INTEGRATION* (H.F. VanPanhuys, L.J. Brinkhorst, H.H. Maas eds. 1968)).

this body that a European Parliament be created.<sup>36</sup> His proposal ultimately led to the signing of the Statute of the Council of Europe on May 5, 1949.<sup>37</sup>

The concepts of democracy and human rights emerged as the fundamental elements in the Council's overall plan for the unification of Europe.<sup>38</sup> References to human rights in the Statute were not mere affirmations of faith—they were made conditions of membership.<sup>39</sup> European leaders feared any encroachment on individual liberty, believing that dictatorships and the gradual suppression of human rights were the root causes of war.<sup>40</sup>

The first international treaty to mention human rights was the Charter of the United Nations,<sup>41</sup> signed in 1945. The Universal

---

36. The Council set up a five-power Committee for the Study of European Unity. The United Kingdom proposed a purely intergovernmental consultative organ, but the continental countries wanted a European Assembly. At one point the talks broke down, and the possibility of creating a European Assembly without British participation was debated. The United Kingdom ultimately agreed to the idea of an Assembly. R. BEDDARD, *supra* note 34, at 18.

37. The Statute of the Council of Europe was signed in London by Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Denmark, Ireland, Italy, Norway, and Sweden. Its aim was to achieve a greater unity of European states. The protection of human rights was both a declared purpose of the Council and a condition for membership. Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103 [hereinafter cited as Council Statute]. The Council met for the first time in August 1949, and set as its first task the development of a European convention on human rights. L. MIKAELSEN, EUROPEAN PROTECTION OF HUMAN RIGHTS 11 (1980).

38. The Preamble of the Statute declares that the contracting parties are "[r]eaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy. . . ." Council Statute, *supra* note 37, preamble, para. 2.

39. "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . ." Council Statute, *supra* note 37, art. 3. "Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights or representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine." *Id.* arts. 7-8.

40. Many of the leading European statesmen of the postwar epoch had been in the resistance or in prison, and they were acutely conscious of the need to prevent any recurrence of dictatorship in Western Europe. See A.H. ROBERTSON, *supra* note 27, at 5-6.

41. Signed in San Francisco on June 26, 1945, it declared that "[w]e the peoples of the United Nations, determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . have resolved to combine our efforts to accomplish these aims." U.N. CHARTER preamble, para. 1-3.



Declaration of Human Rights (Universal Declaration),<sup>42</sup> proclaimed by the U.N. General Assembly three years later, enumerated general human rights principles which each member government was expected to implement in accordance with its own law.<sup>43</sup> This document had moral value and authority, but no practical legal effect.

In August 1949, following a general debate on the subject of human rights at the first session of the Council of Europe, M. Pierre-Henri Teitgen of France made a formal proposal<sup>44</sup> for the establishment of an organization to ensure the collective guarantee of human rights. The Committee<sup>45</sup> assigned to report on this proposal relied for its input upon both a document submitted to the Council by the International Juridical Section of the European Movement<sup>46</sup> and the Universal Declaration. The Committee Report,<sup>47</sup> adopted on September 8, 1949, recommended that the Council of Europe members bind themselves to respect such fundamental principles of democracy as free elections, universal suffrage, and secret ballot.<sup>48</sup> In addition, the Committee recom-

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

43. The Universal Declaration of Human Rights includes the right to life, liberty, and the security of person; to recognition as a person before the law, with equal protection of the law; and to a fair and public hearing in the determination of any criminal charge. It includes freedom of thought, conscience, and religion; freedom of expression, peaceful assembly, and association; and freedom from slavery, torture, cruel or degrading treatment, arbitrary arrest, detention or exile, and arbitrary interference with private matters. It includes freedom of movement, the right to own property, and the right to participate in one's government. It also enumerates the right to freely choose one's work, and to be assured of an adequate standard of living, an education, and freedom to participate in the cultural life of the community. *Id.*

44. Motion of M. Teitgen, Sir David Maxwell Fyfe, and others, Eur. Consult. Ass'n., 1st Sess., Doc. No. 3 (1949).

45. The Committee on Legal and Administrative Questions, presided over by Sir David Maxwell Fyfe, with M. Antonio Azara (Italy) as vice-chairman and M. Pierre-Henri Teitgen (France) as reporter. A.H. ROBERTSON, *supra* note 27, at 9.

46. The International Juridical Section of the European Movement wanted to see the establishment of a European Convention through which parties would undertake to uphold the fundamental liberties of their citizens, and of a European Court which would adjudicate alleged violations of those liberties. In July 1949, they had submitted a draft proposal for such a convention to the Council of Europe, and had requested that the matter be placed on the agenda for the Council's first session. Although the matter was not placed on the agenda for the first session, the draft proposal later played a significant role in the committee deliberations. *Id.* at 7-9.

47. Report of the Committee, Eur. Consult. Ass'n., 1st Sess., Doc. No. 77 (1949).

48. Recommendation 38, *Texts Adopted by the Assembly* 49 (1949).

mended that member states and *private individuals and associations* be permitted to bring any alleged breach of these principles before a European Commission on Human Rights.<sup>49</sup>

### B. THE EUROPEAN CONVENTION

After extended negotiations over the next several months, the European Convention was drafted in its final form and signed in Rome on November 4, 1950.<sup>50</sup> Unlike the Universal Declaration, which merely enumerated human rights,<sup>51</sup> the European Convention stated precise definitions of the rights to be safeguarded, and of the permitted limitations on those rights.<sup>52</sup> This clear statement, which eased the task of determining whether a state had violated its obligations under the Convention, reflects one of the strengths of a regional declaration, wherein a greater consensus can be achieved than is possible in a global declaration.<sup>53</sup> The European Convention thus defined the scope of the guaranteed rights and established both the European Commission of Human Rights<sup>54</sup> and the European Court of Human Rights<sup>55</sup> as the machinery for insuring the continued observation of these rights.

---

49. The institution of an effective remedy for the citizen whose rights were infringed by a sovereign state was thus proposed for the first time. A.H. ROBERTSON, *supra* note 27, at 10.

50. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221 [hereinafter cited as European Convention]. For background material on the many committees, meetings, and drafts leading up to the signing of the final text, see A.H. ROBERTSON, *supra* note 27, at 10-12.

51. Universal Declaration, *supra* note 42.

52. For example, article 5 of the European Convention states that everyone has the right to liberty and security of person. It then delineates six circumstances under which, following procedures prescribed by law, the right to liberty can be curtailed. Finally, for those whose liberty is curtailed, it lists specific rights which must be allowed, and provides for compensation for any victims of arrest or detention in contravention of the article. European Convention, *supra* note 50, art. 5.

53. One danger of this increased clarity is that unintentional omissions can later be construed as deliberate exclusions. This problem can be met by additions to the original document, and in fact several Protocols have been added to the European Convention. See *infra* text accompanying notes 96-106.

54. Articles 20-37 of the European Convention set out the provisions for the Commission. Article 24 provides that any party to the Convention can refer any alleged breach of the Convention to the Commission. Article 25 permits any individual or non-governmental organization to petition the Commission, provided the party against which the complaint is lodged has recognized the competence of the Commission to receive such petitions. European Convention, *supra* note 50, arts. 20-37.

55. Articles 38-56 of the European Convention set out the provisions for the Court. Article 44 provides that only parties to the Convention and the Commission shall have the right to bring a case before the Court. Article 52 provides that the decision of the Court is

The European Convention itself, including its Commission,<sup>56</sup> its Court, and its body of case law<sup>57</sup> and procedure,<sup>58</sup> constitutes a relatively complete legal system. The Convention is also an international agreement between states which are sometimes reluctant to have their freedom impaired by a supranational body. Some of the European states have incorporated the European Convention into their domestic law.<sup>59</sup> In those states where it has not been incorporated, the Convention can still be cited as a persuasive source of law before domestic courts.<sup>60</sup>

In recent years, the Court of Justice of the European Communities<sup>61</sup> has made increasing references to the European Convention. Some legal scholars have argued that the Convention has thereby been incorporated into the body of European Community law.<sup>62</sup> If this view is accepted, the European Convention's provisions would have to be applied when European community law is applied, even where the Convention has not been formally incorporated into the internal law of the state.<sup>63</sup> For example, in Great Britain, where the Convention has not been incorporated into

final, and article 54 provides that the Committee of Ministers shall supervise its execution. *Id.* arts. 38-56.

56. For a recent work on the practice and procedure of the Commission on the Admissibility of application, see L. MIKAELSEN, *supra* note 37.

57. Reasons must be given for the judgments of the Court, and any judge is permitted to deliver a separate opinion. European Convention, *supra* note 50, art. 51.

58. The Court is required to draw up its rules and determine its procedure. *Id.* art. 55. The Rules of Procedure of the European Court of Human Rights, drawn up in Strasbourg on September 18, 1959, are reprinted in INTERNATIONAL ORGANISATION AND INTEGRATION, *supra* note 35, at 945 [hereinafter cited as Rules of Procedure].

59. Six of the founding member states of the European Communities have incorporated the Convention into their domestic law: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. See Drzemczewski, *The Domestic Application of the European Human Rights Convention as European Community Law*, 30 INTL & COMP. L.Q. 118, 119 (1981).

60. The remaining three founding member states, Denmark, Ireland, and the United Kingdom, have not incorporated the Convention into their legal systems. *Id.*

61. The Court of Justice of the European Communities came into existence in 1952 to ensure the observance of law in the interpretation and implementation of the Treaty establishing the European Steel and Coal Community. The functions of the Court was enlarged to include the European Economic Community and the European Atomic Energy Community as they were formed. Background on the jurisdiction and procedure of this Court can be found in E. WALL, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (1966).

62. The treatment of international obligations in domestic law is constitutionally uncertain, incredibly complex, and constantly evolving in European Community law. See Opsahl, *Human Rights Today: International Obligations and National Implementation*, 23 SCANDANAVIAN STUD. IN LAW 149 (1979).

63. Drzemczewski, *supra* note 59, at 119.

domestic law, the courts have developed a presumption that Parliament does not legislate contrary to the United Kingdom's international commitments. This presumption has been used by British courts to interpret ambiguous legislation in accordance with the European Convention.<sup>64</sup>

The Council of Europe bears the expenses of the Commission and the Court.<sup>65</sup> The Committee of Ministers, the executive decision-making body of the Council of Europe, is responsible for the election of members to the Commission.<sup>66</sup> When a question is referred to the Court and a judgment is handed down, the Committee of Ministers must supervise the execution of that judgment.<sup>67</sup> When a question is not referred to the Court, the Committee of Ministers decides whether or not there has been a human rights violation.<sup>68</sup>

The overwhelming amount of work under the European Convention is done by the Commission, which has final and unreviewable say on the issue of the admissibility of applications made by individuals.<sup>69</sup> When an application is admitted, the Commission initially takes the role of the factfinder, with wide powers of investigation,<sup>70</sup> and then acts as mediator, seeking a friendly settlement between the state and the applicant.<sup>71</sup>

---

64. On a number of occasions, English courts engaged in statutory interpretation have referred to the European Convention. Lord Denning, M.R. said that "if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity or uncertainty, seeking always to bring them into harmony with it." [1976] 3 ALL E.R. 843, 847f; [1976] 1 W.L.R. 979, 989G. For a comprehensive look at the relationship between English law and the European Convention, see Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585 (1980).

65. European Convention, *supra* note 50, art. 58.

66. The Committee of Ministers elects the Commission members by an absolute majority of votes. The number of Commission members must equal the number of contracting parties, and no two members can be nationals of the same state. *Id.* arts. 20-21.

67. *Id.* art. 54.

68. *Id.* art. 32.

69. Between 1955 and 1979 the Commission decided on the admissibility of 8100 formally registered cases. This represents only a fraction of the cases brought to the attention of the Commission, however, since nearly 2000 provisional files are opened annually. Thus, only one in eight cases are ever formally registered. Of those cases that were registered during the 1955-1979 period, only 200 were accepted by the Commission. L. MIKAELSEN, *supra* note 37, at xiii.

70. In the event of the acceptance of a petition, the Commission, together with the representatives of the parties, can undertake an investigation. The states concerned are required to furnish all necessary facilities for the effective conduct of that investigation. European Convention, *supra* note 50, art. 28.

71. If a settlement is reached, the Commission must draw up a report confined to a

If settlement is not reached, the Commission must draw up a report and make a finding as to whether a violation of the European Convention has occurred.<sup>72</sup> This report is submitted to the Committee of Ministers and the states concerned, but is not published at that time.<sup>73</sup> During the next three months, an appeal to the Court can be made by either the Commission or the states,<sup>74</sup> assuming the state either consents or has accepted the Court's compulsory jurisdiction.<sup>75</sup> Court proceedings constitute not merely an appeal on a point of law, but an entirely new hearing.<sup>76</sup> The Commission, acting in the public interest, represents the applicant before the Court.<sup>77</sup>

If neither the state nor the Commission brings the case before the Court, the Committee of Ministers can make a final determination.<sup>78</sup> When the Committee of Ministers finds a violation, it specifies corrective measures which the offending state must take within a prescribed time.<sup>79</sup> If these measures are not followed, the Committee may determine what effect shall be given to the original decision of the Commission and then publish its final report.<sup>80</sup>

The substantive content of the human rights protected by the European Convention and their permitted restrictions, contain no innovations: they are equivalent to those rights already found in the majority of the member states' constitutions. Included are the

---

brief statement of the facts and the solution. This is sent to the states concerned and the Committee of Ministers, and to the Secretary-General of the Council of Europe for publication. *Id.* art. 30.

72. *Id.* art. 31.

73. *Id.* art. 32.

74. *Id.* art. 48.

75. *See supra* note 59.

76. Rules 37-42 of The Rules of Procedure of the European Court of Human Rights direct themselves to the conduct of oral hearings. Rules of Procedure, *supra* note 58, at 954-55.

77. At this stage, the complaining party has no control over her case. She can neither appeal to the Court nor have standing as a party. She may appear as a witness, but only if one of the parties or the Court seeks her testimony, not as a right. Even if she wishes to drop the matter entirely, the Commission can ignore her wishes and continue the case if it deems that course to be in the public interest. R. LILICH & F. NEWMAN, *supra* note 22, at 562.

78. The decision that there has been a violation of the Convention requires an affirmative vote by two-thirds of the Committee members. European Convention, *supra* note 50, art. 32, § 1.

79. *Id.* art. 32, § 2.

80. *Id.* art. 32, § 3.

right to life,<sup>81</sup> freedom from torture or degrading punishment,<sup>82</sup> freedom from slavery,<sup>83</sup> liberty and security of person,<sup>84</sup> fair and public trial,<sup>85</sup> freedom from liability for acts not crimes when committed,<sup>86</sup> respect for privacy,<sup>87</sup> freedom of thought, conscience, and religion,<sup>88</sup> freedom of expression,<sup>89</sup> freedom of association and peaceful assembly,<sup>90</sup> and freedom to marry and raise a family.<sup>91</sup>

The European Convention both protects the individual from discrimination on any ground,<sup>92</sup> and guarantees an effective

---

81. The right to life is qualified by permitting the deprivation of life following the conviction of a crime for which that penalty is provided by law. Nor is the article contravened if death results from the use of no more force than is necessary to defend any person from unlawful violence, to effect a lawful arrest, to prevent the escape of any person lawfully detained, or, in action lawfully taken, to quell a riot or insurrection. *Id.* art. 2.

82. No one shall be subjected to torture or to inhumane or degrading treatment or punishment. *Id.* art. 3.

83. Slavery and forced or compulsory labor are prohibited. Work required during lawful detention, compulsory military service, service exacted in the face of an emergency or calamity threatening a community, and normal civil obligations, however, are excluded from the term "forced or compulsory labor." *Id.* art. 4.

84. The right to liberty and security of person is guaranteed. *Id.* art. 5. For the limitations on that right, see *supra* note 52.

85. The definition of a fair and public hearing includes a reasonable time period, an impartial tribunal, a presumption of innocence, information as to the charge, time and facilities for preparing a defense, legal assistance, and the opportunity to examine witnesses. European Convention, *supra* note 50, art. 6.

86. One cannot be found guilty of a criminal offense for any act or omission which is not an offense at the time committed; one cannot have any heavier penalty imposed than the one applicable at the time a crime was committed. *Id.* art. 7.

87. One's private and family life, home, and correspondence must be respected. Interference with one's privacy is permitted only in accordance with law, and shall be limited to those occasions where it is necessary in the interests of national security or economic well-being, or to protect public safety, health, morals, or the freedom of others. *Id.* art. 8.

88. Freedom of thought, conscience, and religion are protected. The freedom to change one's belief and to manifest one's belief, so long as this does not interfere with society's interest in safety, health or morals, or the freedom of others, is also protected. *Id.* art. 9.

89. Freedom of expression is protected, including the right to receive and impart information. Conditions, restrictions, or penalties can be prescribed by law as necessary to preserve a democratic society, prevent disorder and crime, protect health or morals, prevent disclosure of confidential information, or maintain the authority and impartiality of the judiciary. *Id.* art. 10.

90. The right to peaceful assembly and freedom of association are protected, including the right to form and join trade unions. Restrictions can be prescribed by law in order to protect the interests of society. *Id.* art. 11.

91. The right of men and women of matrimonial age to marry and establish a family according to national laws is protected. *Id.* art. 12.

92. The enjoyment of the rights and freedoms set forth in the Conventions shall be secured without discrimination on any ground, including sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. *Id.* art. 14.

remedy before a national authority to anyone whose rights have been violated.<sup>93</sup> Within specified limits, however, states are permitted to derogate from their obligations under the Convention during times of emergency.<sup>94</sup> Additionally, the Convention may be applied to international territories whose foreign policy is essentially controlled by member states.<sup>95</sup>

The First Protocol to the European Convention was signed in Paris on March 20, 1952.<sup>96</sup> It added to the protected freedoms the peaceful enjoyment of individual possessions,<sup>97</sup> the right to education,<sup>98</sup> and the right to free elections.<sup>99</sup> A Second Protocol, signed in Strasbourg on May 6, 1963,<sup>100</sup> conferred upon the Court competence to give advisory opinions.<sup>101</sup> A few months later, on September 16, 1963, a Fourth Protocol<sup>102</sup> expanded the protected rights and freedoms. The right to liberty despite inability to fulfill

93. Those whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity. *Id.* art. 13.

94. Limited derogation of a state's obligations under the Convention are permitted during war or other emergencies that threaten the life of the nation. This does not include any derogation from article 2 (except in respect to death from lawful acts of war), or from articles 3, 4, or 7. *Id.* art. 15.

95. This is the so-called "colonial clause." European Convention, *supra* note 50, art. 63. There had been debate over whether the Convention should automatically apply to overseas territories of the member states, unless specifically excluded by the member state. Instead, it was decided that the Convention would apply to those territories only by the express declaration of the member state. R. BEDDARD, *supra* note 34, at 26.

96. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, 213 U.N.T.S. 262 [hereinafter cited as Protocol 1]. The recommendations to include the right of property, the right of parents to choose the education of their children, and the right to free elections, had first been made in August 1950, prior to the acceptance of the European Convention. Consensus was not reached on these proposals, however, and rather than defer signing the Convention, the decision was made to include a Protocol at a later date, should agreement be reached. A.H. ROBERTSON, *supra* note 27, at 12-13.

97. No one shall be deprived of possessions except in the public interest and subject to conditions provided for by law. Protocol 1, *supra* note 96, art. 1.

98. The state, in exercising its function of education, shall respect the right of parents to ensure teaching in conformity with their religions and philosophical convictions. *Id.* art. 2.

99. Free elections shall be held at reasonable intervals by secret ballot. *Id.* art. 3.

100. Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963, Europ. T.S. No. 44 [hereinafter cited as Protocol 2].

101. The Court is permitted, at the request of the Committee of Ministers, to give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols, but not on the content or scope of the protected rights and freedoms. *Id.* art. 1.

102. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, September 16, 1963, Europ. T.S. No. 46 [hereinafter cited as Protocol 4].

a contract,<sup>103</sup> liberty of movement and choice of residence,<sup>104</sup> and freedom from expulsion for nationals<sup>105</sup> as well as from collective expulsion for aliens,<sup>106</sup> were all included in the Fourth Protocol.

The most unique feature of the European Convention is the right of an individual to petition an international tribunal directly.<sup>107</sup> Although this right is severely limited by the admissibility requirements of the Convention,<sup>108</sup> there are few places in international law where the *locus standi* of individuals has been recognized at all. It is the European Convention which has demonstrated the feasibility of that course of action for the future.<sup>109</sup>

### III. THE AFRICAN CHARTER

#### A. BACKGROUND

European and African socio-political structures followed very different paths of development. The state as an institution emerged relatively early in Europe.<sup>110</sup> Citizens in these emerging states lack-

103. *Id.* art. 1.

104. Freedom of movement and choice of residence are protected, and the right to leave any country, including one's own, is conferred. However, this right can be restricted by law if that is necessary for the protection of the public interest in a democratic society. *Id.* art. 2.

105. No nationals, as individuals or as a group, can be expelled from or denied the right to enter the state of which they are a national. *Id.* art. 3.

106. *Id.* art. 4. It should be noted that many states consider the Fourth Protocol to be poorly drafted, and only Denmark, Iceland, Luxembourg, Norway, and Sweden have ratified it. See INTERNATIONAL ORGANISATION AND INTEGRATION, *supra* note 35, at attached Table Showing the Deposit of Ratifications of Council of Europe Conventions and Agreements.

107. Any person, non-governmental organization, or group of individuals claiming to be a victim of a violation of the Convention by one of the contracting parties may petition the Commission through the Secretary-General of the Council of Europe. European Convention, *supra* note 50, art. 25.

108. The Convention requires, as a prerequisite, the exhaustion of local remedies and that the petition be submitted within six months of the final domestic decision. The petition may not be anonymous. It may not duplicate a matter already examined by the Commission, nor can it have been subject to examination by other international organizations. It cannot be incompatible with the Convention, manifestly ill-founded, or an abuse of the right of petition. *Id.* arts. 26-27. Ninety percent of all petitions are ruled inadmissible because they do not meet these requirements. R. LILLICH & F. NEWMAN, *supra* note 22, at 561.

109. It is debatable whether the European Convention should be looked upon *primarily* as a source of relief for the individual. Perhaps the individual is the catalyst which reveals where the state falls short of the Convention standard. Because application to the Commission can create a great deal of publicity, mere involvement in the procedure serves to bring the alleged shortcomings of the state to the attention of the world and concomitantly sensitizes states to the quality of life of their citizens. See R. BEDDARD, *supra* note 34, at 172-74.

110. See *supra* note 29.



ed personal intermediary relationships with their rulers, and were quick to demand institutional guarantees of justice.<sup>111</sup> Consequently, Western constitutional governments focused their attention on such concepts as individual worth, personal autonomy, and private ownership of property.<sup>112</sup>

Most Africans, in the pre-colonial period,<sup>113</sup> lived in family, clan, or kinship groups. For them, survival against nature and hostile tribes depended upon internal social harmony and political equilibrium, with communal responsibility for protecting and maintaining the life of the group.<sup>114</sup> Thus, the Western hero, fighting to preserve his domain against the oppressive forces of society, was alien to the African, whose culture tended to be egalitarian and anti-heroic in nature.<sup>115</sup>

European law, introduced into Africa during the colonial period, failed to meet the needs of the average African.<sup>116</sup> Only a small percentage of the African elite ever engaged in legal transactions. The majority of Africans were alienated from Western law because of its professionalized processes and institutions, as well as the language, literacy, demographic and cultural barriers.<sup>117</sup> Nor did African state boundaries, drawn by the Euro-

111. See *supra* notes 30-32.

112. *Id.*

113. Pre-colonial Africa encompasses the period before 1830, when European holdings consisted primarily of Portuguese enclaves, slave-trading operations, and provision posts along the coast. The French annexation of Algeria in 1830 was the first European claim to densely populated African lands. See COLONIAL RULE IN AFRICA, *supra* note 12, at 3.

114. The communal nature of pre-colonial Africa is discussed in Mojekwu, *International Human Rights: The African Perspective*, in INTERNATIONAL HUMAN RIGHTS, *supra* note 2, at 85. For a table comparing the general features of official state legal systems to traditional community legal systems, see Paul, *Human Rights and Legal Development: Observations of Some African Experiences*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 23, 33-35 (J. Tuttle ed. 1978).

115. Economic and political distributive justice is exhibited in a rich variety of forms in African cultures. See Legesse, *Human Rights in African Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 123 (K. Thompson ed. 1980).

116. Rural people, living at subsistence levels and engaging in barter modes of economic life, regulated their affairs by custom. Normally, their contact with colonial law was limited to sanctions involving tax and agricultural regulations. Paul, *supra* note 114, at 25.

117. A result of this separation between Africans and the law introduced by their colonial rulers is the simultaneous existence of several legal orders in modern African states. Customary law survives among many of the rural people; colonial laws are embedded in the inherited legal order; and new laws are being created by the independent states. The interplay of these legal systems, and the role they play in African economic development, are

pean powers in order to administer their territories, consider African cultural and ethnic identities.<sup>118</sup> Consequently, European law was generally perceived by Africans as an authoritarian device used primarily to coerce, regulate, and tax them.<sup>119</sup> The European presence in Africa, therefore, was widely resented.<sup>120</sup> In the course of this century, the African drive for independence has achieved significant success.<sup>121</sup>

The period of European domination left many of the newly independent African states internally linked by a common language, a uniform educational structure, and a national administrative system capable of nurturing democratic political conditions.<sup>122</sup> The Africans, however, with little experience and few skills in legislative decision-making, were also left to face grave economic problems<sup>123</sup> and divided tribal loyalties.<sup>124</sup> In an effort to exercise

---

examined in Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999.

118. During a fifty-year period, African political entities, which had little connection with the shape or organization of preexisting societies, were created by the arbitrary decisions of the European Colonial powers: Britain, France, Belgium, Portugal, and Spain. Burundi, Rwanda, Lesotho, and Swaziland are the few exceptions whose present boundaries bear a resemblance to the pre-colonial political units. KANNYO, HUMAN RIGHTS IN AFRICA: PROBLEMS AND PROSPECTS 10-11 (May 1980) (Report prepared for the International League for Human Rights) [hereinafter cited as KANNYO, PROBLEMS AND PROSPECTS].

119. See *supra* note 116.

120. In the early years of colonial rule, few Africans possessed the combination of administrative skill and self-confidence necessary to organize a nationalist movement. The spread of nationalism is associated with improved transportation and communication, as well as with the desire of African people to gain control of their political destiny and economic resources. COLONIAL RULE IN AFRICA, *supra* note 12, at 139.

121. World War II destroyed the notion of colonial invulnerability and hastened the move toward independence. After the War, the Allies found that the humanitarian rationalizations for their imperial patterns of control were discredited. The European Powers were constrained to obey the legal system which they had formerly manipulated to the disadvantage of their charges. While many regimes yielded only when faced with political insurrections by the African majority which they had formerly kept under control, other governments made arrangements for an orderly transfer of power to the African states. Independence was virtually completed in the years between 1957-1962, after which only the oldest white settlements in southern Africa remained in control of the indigenous population. *Id.* at 163.

122. Paul, *supra* note 114, at 23.

123. Africa has the lowest gross national product and the lowest per capita income in the world, with the highest underemployment and unemployment rates. At the same time, Africa is experiencing an explosive population growth. Gopal, *Africa's Evolving Political "Club"*, 27 WORLD PRESS REV. 49 (Dec. 1980).

124. Millions of men, women, and children are driven across borders by wars between tribes, regions, and countries. The number of refugees in recent years has risen from one

effective control of their citizens, African leaders, almost without exception, renounced democracy in favor of one-party political systems.<sup>125</sup> Many of these governments were soon seized by strong executives, military cabals, or dictators. The erosion of human rights, in this respect was usually not far behind.<sup>126</sup>

In this context of political instability,<sup>127</sup> the Organization of African Unity (OAU) was created in 1963.<sup>128</sup> According to the Preamble to the Charter of the OAU, its purposes include promoting solidarity among the independent African countries,<sup>129</sup> safeguarding their independence, sovereignty, and territorial integrity,<sup>130</sup> and fighting against neo-colonialism in all its forms.<sup>131</sup> Although the OAU Charter affirms the adherence of the OAU to the Charter of the United Nations and to the Universal Declaration of Human Rights,<sup>132</sup> it does not specifically mention the promotion of human rights as one of its goals. Thus, the primary objective of the OAU has been African solidarity, just as the primary objective of the Council of Europe was European unity.<sup>133</sup>

The OAU is a fragile political entity,<sup>134</sup> and human rights

million in 1975 to five million in 1981. *Africa's Legions of Refugees Ask the World for Help*, N.Y. Times, Apr. 7, 1981, at A2, col. 3.

125. For a discussion of the problems encountered in the transition from colonial rule to independence, and of the trend toward one party rule, see Ebiasah, *Africa: New Masters, New Slaves*, 8 HUM. RTS. 10 (Summer 1979).

126. When citizens live in a perpetual state of emergency, facing economic and political instability, human rights may be infringed upon in an effort to maintain an orderly, if not a representative, government. *Id.* at 13.

127. In 1958, when Ghana organized a Conference of Independent African States, there were only nine such states: South Africa (not represented at the Conference), Ghana, Liberia, Egypt, Tunisia, Ethiopia, Libya, Sudan, and Morocco. Two years later, by the time of the Second Conference, there were fifteen independent African states. Three years later, in 1963, there were thirty-two independent African states. *Id.* at 11-12.

128. The heads of thirty African states signed the Charter of the OAU in Addis Ababa, Ethiopia. Charter of the Organizations of African Unity, May 25, 1963, 479 U.N.T.S. 39 (effective Sept. 13, 1963) [hereinafter cited as OAU Charter].

129. The Preamble speaks of the inalienable right of all people to control their own destiny. *Id.* preamble, para. 4. At that time, a large number of African states were not yet independent, and a major impetus for the OAU was the desire to complete the process of decolonization. KANNYO, PROBLEMS AND PROSPECTS, *supra* note 118, at 15.

130. OAU Charter, *supra* note 128, preamble, para. 6.

131. *Id.* preamble, para. 6.

132. *Id.* preamble, para. 8.

133. See *supra* note 33 and accompanying text.

134. Sharp rivalries often exist among the OAU members, who represent widely different states. African nations are significantly disparate with respect to size, population, ethnic structure, and ideological pretensions. Gopal, *supra* note 123, at 49.

violations among its members present one of its most delicate challenges.<sup>135</sup> Over the years, the OAU has issued strongly worded resolutions urging the severance of diplomatic ties with colonial and racist regimes.<sup>136</sup> The OAU, however, has virtually ignored violations in independent African states.<sup>137</sup> One of the major justifications for this silence has been the principle, found in the OAU Charter, of non-interference in the internal affairs of member states.<sup>138</sup>

During the past decade, notorious abuses of human rights in Uganda,<sup>139</sup> Equatorial Guinea,<sup>140</sup> and the Central African Empire<sup>141</sup> placed OAU member states in the dilemma of having to choose between condemning those regimes, possibly to the detriment of the organization's fragile unity, or appearing to acquiesce in the atrocities. The first major public challenge to the OAU stance was posed in 1975, when Tanzania objected to the convening of the Twelfth Assembly of the OAU in Kampala, Uganda, on grounds of President Amin's human rights violations.<sup>142</sup> Although this attempt to block the meeting failed, Tanzania, Zambia, and Botswana boycotted the Assembly, and the proceedings showed

135. For a criticism of the OAU's reluctance to take a firm stand against human rights violations in independent African states, see Hall, *The Curious Blindspot of the OAU*, 9 HUM. RTS. 11 (Summer 1981).

136. Intense OAU concern was focused on racial strife in Rhodesia during the period from 1963 until that country gained independence as Zimbabwe in 1979. Strong OAU resolutions have similarly consistently condemned South Africa's apartheid policy urging that comprehensive sanctions be employed against that country. *Id.* at 34-35.

137. The OAU failed to take any significant action in response to human rights violations in Rwanda and Burundi. Although some OAU member states criticized the Ugandan government, the OAU as a body never forced Amin to answer for his atrocities. *Id.* at 36-37.

138. "The Member States . . . solemnly affirm and declare their adherence to the following principles: . . . (2) non-interference in the internal affairs of States . . ." OAU Charter, *supra* note 128, art. III, no. 2.

139. President Idi Amin's rule in Uganda from 1971-1979 was described as a "reign of terror" by Amnesty International. According to evidence given to the United Nations, an estimated 250,000 people were killed, many with incredible cruelty, and thousands fled into exile. See Weinstein, *Human Rights in Africa: A Long-Awaited Voice*, 78 CURRENT HISTORY 97 (March 1980).

140. Under President Macias Nguema's rule in Equatorial Guinea from 1972-1979, an estimated one-third of the population either fled or was killed. *Id.* at 130.

141. Jean Bedel Bokassa's rule in the Central African Empire from 1965-1979 evidenced no respect for fundamental rights. The worst scandal associated with his regime was an allegation that he participated in the massacre of more than 100 schoolchildren in April 1979. *Id.* at 130-31.

142. Kannyo, *Human Rights in Africa*, 37 BULL. OF THE ATOMIC SCIENTISTS 14, 16 (Dec. 1981) [hereinafter cited as Kannyo, *Human Rights in Africa*].

that some of the participating states felt uneasy about the Amin regime.<sup>143</sup>

Other events likewise pressed the OAU for action on human rights issues.<sup>144</sup> In the 1969 United Nations seminar on the desirability and prospects for the establishment of an African human rights commission,<sup>145</sup> the participants requested the OAU states to convene a preparatory committee as a step toward the establishment of a regional commission for human rights for Africa.<sup>146</sup> In 1979, at a second United Nations seminar,<sup>147</sup> experts produced a fifteen-article draft for an African human rights commission,<sup>148</sup> and submitted it to the OAU for its consideration as a model for an African Commission on Human Rights.<sup>149</sup>

The International Commission of Jurists<sup>150</sup> and the Institute of International Law and Economic Development,<sup>151</sup> among other organizations,<sup>152</sup> also sponsored conferences and seminars concerning human rights in Africa. More importantly, the wanton destruction of human life in Uganda, Equatorial Guinea, and the Central African Empire<sup>153</sup> ultimately gave the OAU the political will to

143. *Id.*

144. Some of the international pressures for the establishment of a regional African human rights mechanism are discussed in KANNYO, PROBLEMS AND PROSPECTS, *supra* note 118, at 24-30.

145. Representatives from twenty African countries were brought together in Cairo, Egypt. *Id.* at 25.

146. United Nations, *Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa*, Cairo, UAR, September 2-15, 1969, Doc. ST/TAO/HR/38.

147. Representatives from thirty African countries were brought together in Monrovia, Liberia. KANNYO, PROBLEMS AND PROSPECTS, *supra* note 118, at 27-28.

148. United Nations, *Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa*, Monrovia, Liberia, September 10-21, 1979, Doc. ST/HR/SER. A/4.

149. Weinstein, *supra* note 139, at 131.

150. The International Commission of Jurists (ICJ) is a nongovernmental organization with headquarters in Geneva, Switzerland. It has organized a number of conferences and seminars in different parts of Africa on the subject of the rule of law.

151. The Institute of International Law and Economic Development has its headquarters in Washington, D.C. The Institute and Faculty of Law of the National University of Rwanda organized a colloquium of human rights and economic development held in Butare, Rwanda, in 1978.

152. For example, concern for human rights dominated the third general meeting of the African Bar Association, held in August 1978. Also, the 1979 Pan-African Conference on Refugees, initiated by the All Africa Conference of Churches, concluded that human rights violations are the root cause of Africa's refugee problem. See Weinstein, *supra* note 139, at 99.

153. See *supra* notes 139-141.

create a human rights mechanism, just as the Nazi atrocities had served as a catalyst for the European Convention.<sup>154</sup>

The OAU, at its sixteenth session, in July 1979, resolved to "organize as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an 'African Charter of Human and Peoples' Rights' providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights."<sup>155</sup> During the following November, the first of several working sessions on the draft was held in Dakar, Senegal.<sup>156</sup>

In July 1981, a draft Charter on Human and Peoples' Rights was presented to the summit meeting of the OAU, held in Nairobi, Kenya.<sup>157</sup> After only minor revisions, the draft was approved.<sup>158</sup> The African Charter on Human and Peoples' Rights will come into force three months after the reception, by the OAU Secretary-General, of the instruments of ratification from a simple majority of the OAU member states.<sup>159</sup>

## B. THE AFRICAN CHARTER

The Preamble of the African Charter both recognizes a need for international protection of human rights,<sup>160</sup> and declares that the enjoyment of rights and freedoms implies the performance of duties.<sup>161</sup> The Preamble adds a new dimension to regional human rights agreements by declaring that it is essential to pay attention to the *right to development*.<sup>162</sup> Although the African Charter is very much like the European Convention in the way it seeks to

154. See *supra* notes 5, 6 & 27 and accompanying text.

155. Decision 115 (XVI) of the Assembly of Heads of State and Government, Sixteenth Ordinary Session of the OAU, Monrovia, Liberia, July 17-20, 1979.

156. KANNYO, PROBLEMS AND PROSPECTS, *supra* note 118, at 33.

157. Kannyo, *Human Rights in Africa*, *supra* note 142, at 18.

158. The African Charter on Human and Peoples' Rights has not yet gone into effect or been published in any official source. It can be obtained from Mulualem Teferi, Document Officer, OAU, 211 East 43rd Street, N.Y., N.Y. 10017 [hereinafter cited as African Charter].

159. *Id.* art. 63, § 1.

160. "Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection . . ." *Id.* preamble, para. 6.

161. "Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone . . ." *Id.* preamble, para. 7.

162. "Convinced that it 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

protect civil and political rights,<sup>163</sup> it moves beyond the traditional Western concept of individual rights by its equal emphasis on economic, social, and cultural rights.<sup>164</sup>

Many of the individual rights set out by the African Charter parallel those recognized by the European Convention: that individuals, without discrimination,<sup>165</sup> shall be equal before the law,<sup>166</sup> shall have the right to life and integrity of their person,<sup>167</sup> shall not be kept in slavery or punished in an inhumane or degrading way,<sup>168</sup> shall not be deprived of freedom except for reasons previously delineated,<sup>169</sup> shall be presumed innocent until proven guilty, and shall have the right to counsel and trial before a competent tribunal.<sup>170</sup> The Charter also recognizes the freedoms of conscience and religion;<sup>171</sup> the right to receive and disseminate information;<sup>172</sup> and the right to freedom of association,<sup>173</sup> subject only to necessary restrictions enacted in the interest of national security or the social welfare.<sup>174</sup> The African Charter protects the freedom of movement and the right to asylum, and prohibits the

---

of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights . . ." *Id.* preamble, para. 8.

163. Compare *supra* text accompanying notes 81-106, with *infra* text accompanying notes 165-81.

164. European concern about economic and social development expressed itself in the creation of the European Communities (European Coal and Steel Community in 1951, European Atomic Energy Community in 1957, and the European Economic Community in 1957), rather than in a concept of economic rights as human rights to be secured under the European Convention. See P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (1980).

165. "Every individual shall be entitled to the enjoyment of the rights and freedoms . . . without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." African Charter, *supra* note 158, art. 2.

166. *Id.* art. 3.

167. *Id.* art. 4.

168. "All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." *Id.* art. 5.

169. *Id.* art. 6.

170. "Every individual shall have the right to have his cause heard . . . No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. . . . Punishment is personal and can be imposed only on the offender." *Id.* art. 7.

171. *Id.* art. 8.

172. *Id.* art. 9.

173. *Id.* art. 10.

174. "The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics, and rights and freedoms of others." *Id.* art. 11.

mass expulsion of nonnationals.<sup>175</sup> It also guarantees the right to participate in one's government and to have equal access to public services;<sup>176</sup> the right to property,<sup>177</sup> to work,<sup>178</sup> to protection of one's health,<sup>179</sup> and to an education and cultural life;<sup>180</sup> and the right to protection for families, the aged, and the disabled.<sup>181</sup>

Just as the European Convention sets up a European Commission of Human Rights,<sup>182</sup> the African Charter sets up an African Commission on Human and Peoples' Rights.<sup>183</sup> The Commission consists of eleven African members,<sup>184</sup> with no more than one national from any single state,<sup>185</sup> who serve for six-year terms and are eligible for re-election.<sup>186</sup> The Secretary-General of the OAU appoints the Secretary of the Commission, and the OAU bears the cost of the Commission's staff and services.<sup>187</sup>

The functions of the Commission include collecting documents, undertaking studies, disseminating information, formulating principles and rules for solving legal problems relating to human rights, and interpreting provisions of the Charter.<sup>188</sup> The Commission can receive a communication or complaint from any state which is a party to the Charter,<sup>189</sup> and it must resort to any appropriate method of investigation.<sup>190</sup> It may seek an amicable

---

175. *Id.* art. 12.

176. *Id.* art. 13.

177. *Id.* art. 14.

178. "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." *Id.* art. 15.

179. "States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." *Id.* art. 16, § 2.

180. *Id.* art. 17.

181. *Id.* art. 18.

182. See *supra* text accompanying note 54.

183. "An African Commission on Human Rights and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa." African Charter, *supra* note 158, art. 30.

184. "The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience." *Id.* art. 31, § 1.

185. *Id.* art. 32.

186. *Id.* art. 36.

187. *Id.* art. 41.

188. *Id.* art. 45.

189. *Id.* art. 49.

190. *Id.* art. 46.



resolution to all problems, but if none can be achieved, the Commission reports the facts and its findings to the state concerned and to the Assembly of Heads of States and Government.<sup>191</sup> When transmitting its report, the Commission may make such recommendations as it deems useful.<sup>192</sup>

Communications from other than member states can be considered by the Commission, subject to approval by a simple majority of its members.<sup>193</sup> Such communications must indicate their authors, be compatible with the Charter, be written without insulting language directed against the state concerned, and be based on more than mere news disseminated through mass media.<sup>194</sup> Applicants for relief under the African Charter must also have exhausted local remedies, if any exist, unless that procedure is unduly prolonged.<sup>195</sup> These restrictions on admissibility are similar to the ones imposed by the European Convention.<sup>196</sup> Where communications make it appear that serious or massive violations of human rights exist, the Commission must bring the situation to the attention of the appropriate government officials.<sup>197</sup>

In contrast to the European Convention, the African Charter expands upon the traditional concept of individual human rights<sup>198</sup> and emphasizes collective, or peoples', rights<sup>199</sup> and individual duties to the state. The African Charter declares that individuals have the duty to: promote, safeguard and reinforce mutual respect and tolerance,<sup>200</sup> preserve the harmonious development of the

191. *Id.* art. 52.

192. *Id.* art. 53. The functions of the African Commission are almost identical to the function of the European Commission. See *supra* text accompanying notes 69-77.

193. African Charter, *supra* note 158, art. 55, § 2.

194. *Id.* art. 56, §§ 1-4.

195. *Id.* art. 56, § 5.

196. See *supra* note 108.

197. African Charter, *supra* note 158, art. 58.

198. See *supra* text accompanying notes 111-12.

199. Collective human rights have been characterized as third generation human rights. First generation rights, such as freedom of thought, expression, and association, are those which require that the government abstain from interfering with the individual. Second generation rights, such as decent working conditions, social security, and education, are those which make a claim upon the government for intervention in the economic or social sphere. Third generation rights, such as the right to development, to an adequate environment, and peace, are those which make a collective claim upon the government and can be realized only through the concerted efforts of governments at an international level. Collective rights are concerns of a planetary nature. See Marko, *Emerging Human Rights: A New Generation for the 1980's?* 33 RUTGERS L. REV. 435 (1980-81).

200. African Charter, *supra* note 158, art. 28.

family,<sup>201</sup> serve the national community with their physical and intellectual abilities,<sup>202</sup> refrain from compromising national security,<sup>203</sup> preserve and strengthen social and national solidarity,<sup>204</sup> as well as strengthen national independence and territorial integrity,<sup>205</sup> work and pay taxes,<sup>206</sup> preserve and strengthen positive African cultural values,<sup>207</sup> and contribute at all times and at all levels to the promotion and achievement of African unity.<sup>208</sup>

The African Charter reflects the historical and cultural differences between Europeans and Africans.<sup>209</sup> It holds that nothing shall justify the domination of one people by another,<sup>210</sup> and declares that all peoples have the inalienable right to self-determination.<sup>211</sup> The Charter proclaims the right of colonized or oppressed peoples to free themselves by any means recognized by the international community,<sup>212</sup> and asserts that all peoples who are struggling to liberate themselves from foreign domination have the right to assistance from states party to the African Charter.<sup>213</sup> These concerns for self-determination emerged from the African experiences of colonial domination and struggles for independence.<sup>214</sup>

The collective rights recognized in the African Charter include the peoples' right to dispose freely of their wealth and natural resources.<sup>215</sup> The Charter recognizes an obligation to promote inter-

---

201. *Id.* art. 29, § 1.

202. *Id.* art. 29, § 2.

203. *Id.* art. 29, § 3.

204. *Id.* art. 29, § 4.

205. *Id.* art. 29, § 5.

206. *Id.* art. 29, § 6.

207. *Id.* art. 29, § 7.

208. *Id.* art. 29, § 8.

209. *See supra* text accompanying notes 110-15.

210. African Charter, *supra* note 158, art. 19.

211. "All peoples shall have right [sic] to existence. They shall have the unquestionable 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." *Id.* art. 20, § 1.

212. *Id.* art. 20, § 2.

213. *Id.* art. 20, § 3.

214. Under colonial rule, foreigners who constituted a small minority of the population claimed the right to rule the majority. Many of the twenty million people in southern Africa struggled against this harsh reality. *See* COLONIAL RULE IN AFRICA, *supra* note 12.

215. "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it." African Charter, *supra* note 158, art. 21, § 1.

national economic cooperation,<sup>216</sup> and requires its members to undertake to eliminate all forms of foreign economic exploitation, particularly that exercised by international monopolies.<sup>217</sup> Rights to economic, social and cultural development,<sup>218</sup> and to a satisfactory environment favorable to development,<sup>219</sup> are similarly recognized.<sup>220</sup> The Charter also affirms a right to national and international peace and security, including a prohibition against allowing territories to be used as bases for subversive or terrorist activities against the people of any state party to the Charter.<sup>221</sup>

The African Charter's emphasis on collective and economic rights is not surprising, given the grave economic problems facing Africa.<sup>222</sup> In recent years, many African leaders have advocated a new concept of economic development; a concept which emphasizes minimum poverty, expanding employment, and greater socio-economic equality.<sup>223</sup> African countries are particularly apt to

216. "The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law." *Id.* art. 21, § 3.

217. *Id.* art. 21, § 5.

218. *Id.* art. 22.

219. *Id.* art. 24.

220. The concept of development as a human right emerged about the same time that African peoples, formerly subjugated to foreign and colonial domination, were achieving independence in the early 1960's. The concept of development as a right is relative and dynamic. It encompasses economic, social, cultural, and political content. Any particular model of development will be shaped by the history, culture, and religious traditions of the people who seek to exercise that right. The recognition of development as a right implies not only that a state may not forestall the normal process of development, but also that it has a positive duty to protect and promote its citizens' development. See Espiell, *The Right of Development As a Human Right*, 16 TEX. INT'L L.J. 189 (1981).

221. "All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states. . . . 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." African Charter, *supra* note 158, art. 23, §§ 1-2.

222. The dominant economic policy under colonialism was the extraction of African agricultural commodities and mineral resources, and the creation of monopolistic industrial production. There was no substantial accumulation of capital among Africans. Though political independence is now a fact, most African states continue to have staggering income inequalities, with much of their population in absolute poverty. See Langdon & Mytelka, *Africa in the Changing World Economy*, in *AFRICA IN THE 1980'S: A CONTINENT IN CRISIS* 123 (C. Legum, I.W. Zartman, S. Langdon & L. Mytelka eds. 1979).

223. Since the early 1960's, developing countries have pressed for an international

link economic rights with human rights because human survival needs are frequently not met in Africa.<sup>224</sup> Under such conditions, the protection of human rights may require more than just restraining governments from abusing their citizens; it may require preventing governments from neglecting their citizens.<sup>225</sup>

Difficult problems arise when economic rights are incorporated into law, however. Governments seeking to secure economic rights for their citizens must set economic standards, allocate resources to implement those standards, and develop mechanisms to monitor and enforce compliance with the standards. Advantaged classes will be threatened by a human needs approach which transfers income to benefit the poor.<sup>226</sup> It may also appear necessary for governments to curtail some civil and political rights in order to meet the chosen economic standards.<sup>227</sup> Even if the state's obligation to its citizens' economic well-being is accepted, and a political arrangement for achieving that level of subsistence is in place, there remains uncertainty concerning the appropriate economic strategies for achieving the desired standard.<sup>228</sup>

---

system more conducive to their needs. Many African leaders advocate a New International Economic Order (NIEO), a full-scale program for restructuring the international economic order which is based on the proposition that a system that allows or strengthens the inequalities rampant in the world economy cannot be considered just. For a discussion of the NIEO and its legal dimensions, see Fatouros, *The International Law of the New International Economic Order: Problems and Challenges for the United States*, 17 WILLIAMETTE L.J. 93 (1980-81).

224. Famine confronts more than 150 million Africans today. N.Y. Times, Apr. 7, 1981, at A2, col. 3.

225. Professor Lowell Schechter discusses the future of human rights in light of basic human needs. He notes that for every person shot to death in Uganda, one hundred may have starved to death in other African states. See Schechter, *The Views of "Charterists" and "Skeptics" on Human Rights in the World Legal Order: Two Wrongs Don't Make a Right*, 9 HOFSTRA L. REV. 357, 370-83 (1981).

226. There is a belief among some that it is not scarcity which is the first problem, but maldistribution. Governing classes have broad control over communications, land, tools, technology, education, and health services. A shift from subsistence crops to cash crops benefited those in power, and the basic human needs approach would undermine that gain. See Paul, *supra* note 114, at 29-30.

227. For example, to eradicate hunger and ill health, developing states with limited educational facilities can allocate careers to those they educate, and require a reciprocal period of service to the state. Under such circumstances, it is difficult to determine how to balance political and economic rights: decisions must be made as to which rights should be curtailed, under what conditions, and to what degree. See remarks by Neville Linton, senior lecturer at the Institute of International Relations, in Schechter, *supra* note 225, at 375-76.

228. For example, the state's goal of feeding all its people might be met by importing food, by importing agricultural technology, or by some other means.

African states, unlike European nations, do not share a cultural identity. They do, however, share a history of colonial exploitation, hard-won independence, and grave economic problems. The scramble for independence in Africa coincided with agitation for African unity, as though suffering together in the past paved the way for working together for the future.<sup>229</sup> Regional integration strategies are important in Africa, and the OAU and its new African Charter of Human and Peoples' Rights make a positive contribution to the process of regional cooperation. It is too early to tell how effectively the African Charter can influence human rights problems,<sup>230</sup> but there is reason to believe that it can help bring respect for human rights in Africa a step closer to realization.

#### IV. THE EUROPEAN CONVENTION TODAY

During the past decade, the Council of Europe has explored a number of ways for improving the European Convention. The idea of empowering the Court of Justice to give preliminary rulings at the request of either a national court or the Commission was seriously considered. In 1977, however, this idea was deemed inadvisable by the Steering Committee for Human Rights.<sup>231</sup> In 1978,

---

229. Pan-Africanism, a belief in the cooperation and unity of all Africans, was particularly widespread in the early 1960's, when various African states gained their independence. This mutuality of interest in freedom among African peoples and countries is discussed in Emerson, *Pan-Africanism*, XVI INTERNATIONAL ORGANIZATION (Spring 1962), reprinted in INTERNATIONAL POLITICAL COMMUNITIES 437 (1966).

230. There are severe obstacles to the realization of the right to development which is embodied in the African Charter. Making that right a reality would require that developed countries accept a share of the responsibility for the well-being of millions who live in absolute poverty, which would involve a drastic change in world economic and legal order. There is a persuasive moral argument that developed countries have been at least partially responsible for creating that impoverishment through their political and economic activities, and that they should therefore accept some responsibility for the well-being of those in poverty. Quite apart from the moral obligation, it may be in the best interest of the developed countries to ward off major political and social upheavals by attempting to eliminate the problem of absolute poverty. But, neither the political will nor the economic infrastructure necessary to carry out such a program currently exists. See Schechter, *supra* note 225, at 278-80.

231. In 1974 the Committee of Ministers asked the Committee of Experts on Human Rights to consider the idea of empowering the Court to give preliminary rulings requested by national courts. The Committee of Experts was replaced in 1977 by the Steering Committee on Human Rights. This Committee noted that the direct applicability of the European Convention varied in the legal systems of the contracting states, and that it would therefore be difficult to achieve a uniform interpretation of the Convention by the national courts in the various states. It was also feared that such preliminary rulings would require the Court to assume some of the investigatory functions currently bestowed upon the Com-

perhaps influenced by Third World concerns, the Committee of Ministers decided to explore the possibility of extending the list of protected rights to include social, economic, and cultural rights.<sup>232</sup>

The Parliamentary Assembly of the Council of Europe has recently recommended the addition of the following rights to the Convention: the right to freely choose or accept a paid activity; the right of access to free employment services, vocational guidance and vocational training; the right to an adequate standard of living in the event of involuntary unemployment; and the right to be affiliated with a social security scheme.<sup>233</sup> These rights, although economic in nature, would be conferred directly upon the individual. Thus, although European states are beginning to think about economic rights as human rights, their considerations continue to be grounded in the concept of an individualistic social order, in contrast to the African concept of collectivist rights.<sup>234</sup> It is difficult to see how even individualistic economic rights can be promoted and protected by the adjudicatory provisions of the European Convention, just as it is difficult to see how economic rights can be incorporated into African law.<sup>235</sup> Perhaps one must regard such rights as goals, rather than mandates, and hold the state responsible merely for moving in their direction.<sup>236</sup>

The European Convention has served to expand both the credibility and visibility of human rights issues. In fact, the Court of Justice of the European Communities<sup>237</sup> has already declared that the European Convention is an international treaty to be used to supply legal guidelines which should be incorporated into the

---

mission. The idea of empowering the Court to give preliminary rulings at the request of the Commission was likewise deemed unwise, both because of its potential to confuse the functions of the two bodies and because of its likelihood of prolonging the proceedings by introducing an additional stage. R. BEDDARD, *supra* note 34, at 178.

232. Any additional rights would be included in a further protocol. Since many states consider the Fourth Protocol to be poorly drafted, see *supra* note 106, it is important that any new protocol give full consideration to the jurisprudence of the Commission and the Court. R. BEDDARD, *supra* note 34, at 178.

233. *Id.* at 181.

234. See *supra* text accompanying notes 198-206.

235. See *supra* discussion accompanying notes 224-26.

236. Even states which regard these economic rights as fundamental human rights disagree over whether they should be included in the European Convention. Because economic rights are not easily justiciable, some argue that to include them would limit the scope of all of the substantive rights found in the Convention. See R. BEDDARD, *supra* note 34, at 179-81.

237. See *supra* note 61.

general framework of Community law.<sup>238</sup> The Court of Justice's integration of fundamental rights into Community law has been praised by the Commission of the European Communities.<sup>239</sup> In April 1979, the Commission recommended European Communities' accession to the European Convention.<sup>240</sup>

### V. CONCLUSION

The status of human rights in the world has been difficult to assess. There is little consensus on the definition, scope, and content of human rights,<sup>241</sup> and ethnocentric perspectives cause researchers to assess human rights problems differently.<sup>242</sup> Even in instances which evidence agreement that certain abuses constitute human rights violations, it is difficult to assess the efficacy of international human rights organizations in dealing with them. No one can say whether the abuses would have taken a harsher form, or whether additional abuses would have occurred, had there been no human rights machinery or climate of concern.<sup>243</sup>

The efficacy of international human rights organizations,

238. *Nold v. Comm'n* [1974] E.C.R. 491.

239. The Commission of the European Communities was created by the Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), Apr. 8, 1965, O.J. EUR. COMM. (No. 152) 2 (July 13, 1967) (effective July 1, 1967), art. 9. This Treaty was signed in Brussels by Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. The Commission acts as the executive branch of the Community and negotiates its international agreements.

240. *Accession of the Communities to the European Convention on Human Rights—Comm'n Memorandum*, 12 BULL. EUR. COMM. (No. 4 Supp. Feb. 1979). The Commission has stated the need for a written catalogue of fundamental rights, particularly with respect to certain economic and social rights, which are specifically designed for and binding on the Community. The process of drawing up such a catalogue will be lengthy, however, and formal accession to the Convention represents a desirable interim step. See Ruddick, *Fundamental Rights: The Protection of the European Citizen*, 129 NEW L.J. 1099 (Nov. 8, 1979).

241. See *supra* text accompanying notes 1-4.

242. Comparative research on international human rights is exceedingly complex. See Scarritt, *Definitions, Dimensions, Data, and Designs*, McCamant, *A Critique of Present Measures of "Human Rights Development" and an Alternative*, and Scoble & Wiseberg, *Problems of Comparative Research on Human Rights* in GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES 115-71 (V. Nanda., J. Scarritt, and G. Shepherd Jr. eds. 1981).

243. Direct evidence that abuses have abated is difficult to produce, and the effectiveness of measures taken against wrongdoers may never be known. Yet there is some testimony from those whose rights have been violated that economic or diplomatic sanctions have had a positive effect on government recognition of their rights. For example, some Soviet dissidents believe that Western pressure on the Soviet Union led to amelioration of their plight. See N.Y. Times, Nov. 16, 1976, at A17, col. 1.

because of the peculiar behavior of sovereign states, has similarly been difficult to assess. Some governments, out of a perceived self-interest, will subscribe to human rights regulations when they actually have no intention of complying with them.<sup>244</sup> Other governments, in contrast, will formally avoid subscribing to human rights norms although their intention to comply is evident.<sup>245</sup> In addition, because government officials are unlikely to acknowledge the reforming influence of outside criticism on their patterns of government,<sup>246</sup> measurement of international human rights organizations' effectiveness is imprecise at best.

The frequency of human rights violations in the modern world, as compared with past periods, is also difficult to measure,<sup>247</sup> particularly in light of the probability that contemporary human rights violations received greater publicity than in the past.<sup>248</sup> Critics of international human rights efforts<sup>249</sup> often

---

244. For reasons associated with public opinion and pride, as well as pragmatic calculations to avoid censure, governments may be ready to publicly endorse human rights standards in spite of their unwillingness to uphold such standards in practice. In the absence of any real prospect that the human rights will be enforced, it is feasible for such governments to pay lip service to the established norms. See R. FALK, *supra* note 7, at 33.

245. Governments which desire to protect their sovereign status may be unwilling to ratify international agreements even if they support their content. The United States' ratification record for human rights is very poor: the U.S. has failed to ratify the Genocide Convention, the Racial Discrimination Convention, and the American Convention on Human Rights. This result stems from federalism concerns and from an unwillingness to surrender domestic sovereignty. M. Sklar & J. Zorn, Report on the Proceedings of the First International Human Rights Teaching Institute at 11, *reprinted in* 3 HUM. RTS. Q. 104 (Summer 1981).

246. Where regimes are unstable and lack secure control of their population, the impact of external pressure to curb human rights abuses can be significant. Such pressure was mounted against the regimes of Amin in Uganda, Nguema in Equatorial Guinea, and Bokassa in the Central African Empire. These regimes all toppled in 1979, and it is impossible to know how significant a role external pressure played in undermining them. Also, in the past three years military regimes in Ghana, Nigeria, and Upper Volta have yielded to a multi-party civilian political system, apparently in response to pressure and criticism levied against the military governments. See Weinstein, *supra* note 139, at 100-01, 130-31.

247. Any assessment as to possible increased violations is influenced by the definitional parameters of the rights in question and by the subjective bias of the investigators. For a discussion of the methodological problems of research on human rights, see Scarritt, McCamant, Scoble, and Wiseberg, *supra* note 242.

248. It can be argued that what has increased is not the violations themselves, but the attention paid to them. An analogous situation is the tremendous increase in the number of child abuse cases reported in the United States in the past decade. Few believe that there has been a correspondingly massive increase in the incidence of child abuse. Instead, it is generally thought that new reporting laws, new definitions of what constitutes abuse, greater publicity, and increased public sensitivity account for much of the increase in reported cases. Similar factors may be at work in the reporting of international human rights violations. See Schechter, *supra* note 225, at 364-65.

249. One such critic is J.S. Watson. He blames the jurisdictional problems of interna-



point to the wide discrepancies between human rights law and political reality.<sup>250</sup> But, extensive media coverage of states that violate the rights of their citizens is not a viable justification for abandoning international efforts to safeguard human rights just as the fact that newspapers are full of stories about murders is not a reason for abandoning domestic efforts to create lawful order.<sup>251</sup> No matter how ineffective the mechanisms for protecting human rights appear to be, it is important that human rights violations not be accepted passively.

Science and technology have brought about a compression of time and space, an increase in the frequency of interaction between people of different nations, and a change in people's expectations. At the same time that aspirations are increasing, the world is experiencing population growth, dwindling resources, environmental degradation, and political instability.<sup>252</sup> Whatever uncertainty there may be about the efficacy of international human rights protections, it is important that human rights not be relegated solely to state sovereigns, where political pressures tend to produce leaders whose credibility is based upon their capacity to achieve short term goals.<sup>253</sup> Local passions and prejudices can lead to human rights violations, even in liberal democratic states.<sup>254</sup>

---

tional law, and the discrepancy between the fact of human rights violations and the existence of international law which supposedly prohibits such violations. He believes that proponents of an international regime of human rights ignore political reality. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609.

250. Freedom House, created in 1941 as a private defender of U.S. interests in a world at war, has since 1973 published an annual "Comparative Study of Freedom" for each nation. Developed by Dr. Raymond Gastil, this survey focuses on political rights and civil liberties. According to its latest report, 1.5 billion people in seventeen countries lost some political rights and freedoms in 1980. N.Y. Times, Jan. 4, 1981, at A14, col. 3.

251. Some believe that the incidence of violations of international rules is not any greater than the incidence of violations of domestic laws in major American cities. See Sohn, *supra* note 26, at 350.

252. Schechter discusses the potential impact of population growth, international migration, declining rates of economic growth, and environmental decay, on political stability and human rights in the 1980's. Schechter, *supra* note 225, at 383-96.

253. The problems created by population growth, environmental decay, and economic decline give rise to discontent and political instability. Under such conditions, maintaining control of the people becomes a paramount concern, and political leaders are tempted to substitute coercive rules for consensual decision-making in an effort to alleviate their most urgent problems. Falk maintains that sovereign power is increasing and frequently becoming more militarized, augmenting the state's capacity for the repression of human rights. The realization of human rights on a global scale thus requires some modification of the state system. R. FALK, *supra* note 7, at 6 & 395.

254. For example, the British Government's ostensible mistreatment of East African

Global organizations for protecting human rights are troubled by a lack of consensus regarding the content and scope of the ostensibly protected rights, and by the difficulty of creating mechanisms to ensure compliance.<sup>255</sup> These limitations can be partially overcome by regional human rights organizations which actually promote the perceived interdependence and self-interest of their member states.<sup>256</sup> Regional organizations can also employ diplomatic and economic sanctions more effectively than either global organizations or private human rights groups.<sup>257</sup> Thoughtful assignments of power to regional organizations, such as the European Convention and the African Charter, can help both to maintain world political focus on human rights, and to nudge states in the direction of respect for the human worth and dignity of their people.

Carol M. Tucker

---

Asian immigrants was brought before the European Court of Human Rights. *East African Asians v. United Kingdom*, [1970] Y.B. EURO. CONV. ON HUM. RTS. 928 (Eur. Ct. of Human Rights). Additionally, American Constitutional guarantees have not always protected American blacks from systematic human rights violations.

255. See *supra* text accompanying notes 14-15.

256. Friedman finds the universal sphere of human rights to be primarily a Western philosophical construct which saddles human rights with dilemmas and impracticalities, and provides no actual relief, remedy, or reparation to the victims of violations. Domestic jurisdiction for human rights, he contends, primarily protects the state, sealing it off from external machinations. The increasing internationalization of human rights, through regional treaty obligations and conventions, provides a promise for the future. Friedman, *Human Rights Internationalism: A Tentative Critique* in INTERNATIONAL HUMAN RIGHTS, *supra* note 2, at 29.

257. See *supra* note 25.