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THE AFRICAN CHARTER AND FREEDOM OF EXPRESSION IN AFRICA

*Claude E. Welch, Jr.**

One of the most disputed areas in contemporary human rights law is that of freedom of expression. How far does this right extend, particularly when threats to national security (real or presumed) exist? The International Covenant on Civil and Political Rights expresses this tension in Article 19 through the following words:¹

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [sic] choice.

3. The exercise of the[se] rights. . . carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of *national security* or of public order (*ordre public*), or of public health and morals.

These words of the ICCPR are regularly tested in courts around the world. Cases such as the Pentagon Papers provide encouraging evidence of judicial skepticism about wide-ranging claims of national security overriding

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¹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR] (emphasis added).

freedom of expression and information.² This is an exceptional case, however. Taking the world as a whole, claims of freedom of expression and information that collide with national security are more often denied than upheld, even with the wave of post-Cold War democratization.

Major non-governmental organizations (NGOs), such as Article 19,³ seek to clarify the respective limits of and restrictions upon freedom of expression. One of the most significant recent attempts at clarification came in October 1995 when a group of distinguished specialists met in South Africa to draft the "Johannesburg Principles on National Security, Freedom of Expression and Access to Information." This succinct statement includes twenty-five principles, subdivided among general principles, restrictions on freedom of expression, restrictions on freedom of information, and rule of law and other matters. I shall summarize those principles⁴ concerned with freedom of expression, examine the significance of international pressure from NGOs on governments, and then turn specifically to Africa and the role of the African Commission on Human and Peoples' Rights (African Commission or Commission) as a case study in application of evolving human rights standards.

What types of expression could threaten national security? In the words of Principle 6, only an expression "intended" and "likely" to incite imminent violence.⁵ By contrast, *not* included among threats are: advocacy of non-violent change of government policy; criticism of or insult to the nation, the state or its symbols, the government, or a foreign nation; objection to military conscription or service, a particular conflict, or threat of use of force; on the basis of religion, conscience, or belief; or communication of information about alleged violations of international human rights standards or international humanitarian law.

² *New York Times Co. v. U.S.*, 403 U.S. 713 (1971). It must be immediately noted, however, that no reference was made to Article 19 of the ICCPR in this litigation, the Supreme Court making its decision in accordance with American constitutional practice.

³ Article 19 draws its title from the section of the ICCPR quoted above, *see supra* note 1, and from Article 19 of the Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N. Doc A/810, at 71 (1948). *See, e.g.*, Richard Carver, ARTICLE 19, TRUTH FROM BELOW: THE EMERGENT PRESS IN AFRICA 86-7 (1991) [hereinafter TRUTH FROM BELOW]; *see also* ARTICLE 19, INFORMATION, FREEDOM AND CENSORSHIP WORLD REPORT 1988, at viii (1988).

⁴ *See* Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. 20 HUM. RTS. Q. 1, 4-6 (1998) (Principles 5 to 11).

⁵ *See id.* at 5, Principle 6(a) & (b).

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Further, expression "can never be prohibited on the ground that it is in a particular language, especially the language of a national minority."⁶ Governments must take "reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression. . . ."⁷ An equally impressive set of statements on freedom of information is also included in the Johannesburg Principles.⁸ Clearly, the drafters wanted to carve out a wide arena within which freedom of expression and freedom of information would flourish. How closely do these ideas track with existing practice?

Although articulated in Africa, the Johannesburg Principles bear little resemblance to current reality north or south of the Sahara. The fifty-plus states of the continent have long been characterized by governments intolerant of criticism, by restrictions on media coverage said to be justified by situations of national emergency, and by severe limitations on freedom of expression. Historically set patterns have continued into the present.

A cynic might argue, "What's new?" Widespread flouting of constitutional guarantees and unwillingness to honor commitments to international human rights treaties have characterized the majority of African states in their thirty-five plus years of independence. The continuities rather than contrasts are striking. Freedom of expression was subjected to significant restraints when Africa was divided among various colonial powers. The limits imposed in the colonial period were in many respects enhanced following independence, rather than relaxed or abolished. The veneer of democratization that accompanied the achievement of self-government was rapidly stripped away by leaders anxious to preserve their version of national unity, and/or by military elites who shot their way into power. Multi-party systems were consolidated into single-party systems, then into one-man systems. With the "second independence" of the 1990s, in which open political competition returned to many countries, freedom of expression seemed to obtain a new lease on life. In my judgment, however, the overall climate remains inhospitable.

The question that arises here is whether international pressures and NGO activity (both domestic and international) can help overcome obstacles to freedom of expression erected in the name of national security. Although

⁶ *Id.* at 6, Principle 9.

⁷ *Id.* at 6, Principle 10.

⁸ *See id.* at 5-8, Principles 11-19.

conventions such as the African Charter on Human and Peoples' Rights⁹ or the ICCPR have been widely ratified,¹⁰ their impact appears to have been limited. Governmental willingness to employ a variety of pressures against the media and individuals on grounds of "national security" has been a long-term feature of the African scene.

This article adopts a continent-wide approach, rather than concentrating on a single country. Because Africa was subjected to a particularly strong, intense form of colonial rule, individual governments were endowed with powerful means of restraining the media and restricting freedom of expression. This article also provides more of a political perspective on freedom of expression throughout Africa than a legal one. Where the rule of law is not firmly established, considerations of power dominate. The rights which Article 19, Human Rights Watch, International PEN and other major NGOs concerned with freedom of expression seek to globally enhance require political as well as legal strategies.

The reasons for the parlous state of affairs in many African countries, it seems, are twofold. They involve, paradoxically, both the strength and the weakness of African governments and the societies over which they attempt to rule. The state is in crisis; civil society is weak. The "patrimonial administrative state" of tropical Africa created under colonial rule and continued after independence became what Callaghy aptly deemed a "lame leviathan."¹¹ In theory, the administrative state disposed of vast powers; in reality, it existed as a means of transferring resources to small groups of politically privileged. Government activities south of the Sahara became, in the telling words of Bayart, the "politics of the belly."¹²

⁹ African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5 (1981), 21 I.L.M. 58 (*entered into force* Oct. 21, 1986) [hereinafter African Charter].

¹⁰ According to HUMAN RIGHTS L.J., fifty-one African countries had ratified the African Charter as of January 1, 1997 (the exceptions being Ethiopia and Morocco which withdrew from the Organization of African Unity following its recognition of the Saharawi Arab Democratic Republic). The ICCPR has been ratified by 136 countries (the African exceptions being Botswana, Burkina Faso, Comoros, Djibouti, Ghana, Guinea-Bissau, Liberia, the Saharawi Arab Democratic Republic, not considered a state by the United Nations, South Africa and Swaziland). Jean-Marie Bernard, *International Instruments Relating to Human Rights*, 18 HUMAN RIGHTS L.J. 79, 84, 86 (1997).

¹¹ Thomas M. Callaghy, *The State as Lame Leviathan: The Patrimonial Administrative State in Africa*, in *THE AFRICAN STATE IN TRANSITION* 87, 87, 111 (Zaki Ergas ed., 1987)

¹² JEAN-FRANÇOIS BAYART, *THE STATE IN AFRICA: THE POLITICS OF THE BELLY* (1993).

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But not merely interest in self and group enrichment drove national leaders. They responded to growing disjunctures between state and society. Concern about secession or ethnically-inspired unrest marked many countries. Civil society has cohered more around ethnic group or region than around putative nation -- a development, Ekeh reminds us, with deep historic roots.¹³ As a result the specter of "tribalism" haunts Africa.¹⁴ Major building blocks of civil society as conceived of largely by Western scholars remain weak, and hence the protection of freedom of expression remains limited. Human rights NGOs and privately-owned media in Africa confront enormous obstacles to their functioning. Political leaders remain intent on maintaining their control, despite (and because of) their weaknesses. Governments possess multiple means of restraint on freedom of expression. Poor, and in many respects worsening, economic conditions constrain the development of the press; radio, which serves as the most important means of communication, has almost without exception remained under direct government control. Political dissidents have found their liberties circumscribed -- and have sometimes been killed for their beliefs. Irrespective of liberal constitutional guarantees, the domestic reality has been severe restrictions on freedom of expression. Accordingly, domestically civil society is fragmented, while governments are narrowly based and fearful. There should be little wonder that major limits on freedom of expression exist, and that these limits have yet to be effectively challenged from within most African countries.

This phenomenon within individual African states has been paralleled in important respects by modest international initiatives. Neither international treaties, entreaties from important NGOs, nor even pressure from major aid-givers, have cracked the panoply of national security legislation that restricts freedom of expression through much of the continent. The African Charter on Human and Peoples' Rights contains very limited protection for freedom of expression. The African Commission, established by the African Charter,¹⁵ has given little serious attention to freedom of expression, for a variety of reasons subsequently explored. Article 19, PEN and other global NGOs have focused attention on problems, but can claim only limited successes to date. Despite rhetoric about linking foreign assistance with greater governmental openness,

¹³ See generally Peter P. Ekeh, *Colonialism and the Two Publics in Africa: A Theoretical Statement*, 17 COMP. STUD. IN SOC'Y & HIST. 91 (1975).

¹⁴ See *id.* at 108-9.

¹⁵ African Charter, *supra* note 9, arts. 30-64.

such conditionalities have been irregularly applied. On the other hand, pressures for democratization (internal and external) have started to expand attention and protection given to freedom of expression. NGOs should and will play an increasing role in this effort. It will be a lengthy struggle, requiring profound changes in attitudes about national security and significant alterations in the functioning of human rights treaty bodies. Strengthening of civil society, of constitutional and legal protections, and of freedom of expression should go hand-in-hand in this process.

In this article, I shall examine the following:

1. the armature of the "colonial state," which laid the basis historically for restrictions on freedom of expression throughout the African continent;
2. the unusual combination of optimism about the ease of change, characteristic of the early stage of self-government in Africa, with growing awareness of the inability of political institutions to resolve conflict effectively;
3. increased use of emergency powers to bolster post-independence governments, a process that proved unsuccessful as military coups d'état and domestic conflicts roiled the political cauldron;
4. problems both in the wording of the African Charter, and in the limited powers of, and support for, the African Commission on Human and Peoples' Rights; these exacerbate the weakness of political institutions and the tendency to resort to claims of national security to restrict freedom of expression; and
5. limited efforts by domestic and international human rights groups, and by external governments, to pressure newly-emergent African governments for effective guarantees for freedom of expression.

I. COLONIAL ROOTS OF LIMITATIONS

The roots of national security legislation lie in colonial history. The precedent for extensive governmental involvement in media regulation was set prior to 1960. In Howard's words, "[t]he idea that the African press should not be critical of the established government is thus a direct legacy of the colonial

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period."¹⁶ Whether by *arrêt*, ordinance, decree, or act of a national assembly, the various administrations were endowed with sweeping regulatory powers.

The colonial state in Africa, as Young has convincingly demonstrated, differed in some fundamental respects from earlier historical examples of colonial government.¹⁷ The implantation of European rule occurred with extraordinary rapidity; it coincided with the height of racist beliefs; and it sought dramatic transformation of societies to overcome chronic economic underdevelopment.¹⁸ Administrators imposed their versions of pax Britannica and did not welcome dissent. From early in the colonial period, security legislation quelled criticism. These powers were used frequently against "nationalists" who sought self-government and against the small, late-developing press linked to post-World War II nationalist parties.¹⁹

When independence came, many foreign-owned media were taken over by the state.²⁰ As a result, the press came to reflect the interests of the political elite.²¹ Few African states could boast a vigorous fourth estate -- vigorous in the sense of watching closely over government actions -- within a few years of independence. Why? The reasons can be found not only in colonial history, but also in the perceptions of African leaders. Freedom of expression was a casualty of their emphasis on the central importance of national unity.

¹⁶ RHODA E. HOWARD, *HUMAN RIGHTS IN COMMONWEALTH AFRICA* 121 (1986).

¹⁷ See CRAWFORD YOUNG, *THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE* (1994).

¹⁸ The Belgian, British, French and other colonial overlords believed firmly that the new possessions should finance their own development, by blood as well as by taxes.

¹⁹ Note should be taken, however, of Ghana (Gold Coast), Nigeria and Sierra Leone. In Hachten's words, "[a]n exception [to the journalist traditions of European influence or African nationalist influence], and a bright exception at that, was British West Africa where a firm tradition of African-run, owned and read newspapers preceded similar developments elsewhere on the continent by half a century or more." WILLIAM A. HACHTEN, *MUFFLED DRUMS: THE NEWS MEDIA IN AFRICA* 5 (1971). See also GUNILLA L. FARINGER, *PRESS FREEDOM IN AFRICA* 2-9 (1991).

²⁰ For example, the government acquired a majority share in the *Daily Times* of Nigeria by 1975, when the indigenization decree mandated national ownership; in other countries, such steps came earlier.

²¹ See HACHTEN, *supra* note 19, at 38-47; see generally FARINGER, *supra* note 19.

II. NATIONAL "EMERGENCY" AND LIMITATIONS

Kwame Nkrumah, the first African Prime Minister and President of Ghana -- itself the first tropical African colony to gain independence -- wrote a striking comment in his autobiography:

What other countries have taken three hundred years or more to achieve, a once dependent territory must try to accomplish in a generation if it is to survive. Unless it is, as it were, "jet-propelled," it will lag behind and thus risk everything for which it has fought. But even a system based on social justice and a democratic constitution may need backing up, during the period following independence, by emergency measures of a totalitarian kind. Without discipline, true freedom can not survive.²²

The sentiments expressed by Nkrumah became commonplace. A contradictory sense of optimism and crisis permeated African presidential palaces. On the one hand, euphoria generated by the unexpected ease with which independence had been gained in most states by the mid-1960s (with the obvious exceptions of Portuguese colonies and the white minority redoubts of Namibia, South Africa, and Zimbabwe) gave African leaders a sense they could, and must, compress stages of "nation-building."²³ Progress toward unity, they felt, was absolutely essential. The advent of home rule raised the complex question, "who shall rule at home?" Ethnic sentiments became more acute. In a process recognized by all students of African politics, force rather than consent became the currency of change. Government weakness rather than strength led to increased authoritarianism. Central institutions declined in their effectiveness. Using strikingly similar words, leading scholars opined that presidents such as Nkrumah worked within "an almost complete institutional vacuum at the central, national level;"²⁴ "the most salient characteristic of political life in Africa is that it constitutes an almost institution-less arena with conflict and disorder as its most

²² KWAME NKRUMAH, *GHANA: THE AUTOBIOGRAPHY OF KWAME NKRUMAH*, at xvi (1957).

²³ See generally William Foltz, *Building the Newest Nations: Short-Run Strategies and Long-Run Problems*, in *NATION BUILDING* 117 (Karl W. Deutsch & William J. Foltz, eds. 1963).

²⁴ *POLITICAL PARTIES AND NATIONAL INTEGRATION IN TROPICAL AFRICA* 2 (James S. Coleman & Carl G. Rosberg, Jr., eds. 1964).

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prominent features.²⁵

There is not space in this article to examine the twists and turns of post-independence politics. Major post-independence events include the following:

1. rosy visions of rapid economic development were replaced, especially from the mid-1970s, with the reality of agricultural stagnation, declining per capita GNP, and a growing gap between African states and other "developing" countries;²⁶
2. authoritarianism and personalized rule increased, with peaceful changes of government practically unknown;²⁷
3. limitations on freedom of expression, and in particular of the press, came largely from government actions, such as censorship, harassment of editors and reporters, and state takeovers;²⁸
4. one of the basic principles of the Organization of African Unity (OAU), non-interference in the internal affairs of states, has been used to justify a *noli me tangere* attitude among African leaders, for whom protection of domestic sovereignty and retention of position have been paramount values.

National leaders, whether elected, self-proclaimed, or beneficiaries of military seizures of power, used national security legislation to restrict freedom

²⁵ Aristide R. Zolberg, *The Structure of Political Conflict in the New States of Tropical Africa*, 62 AM. POL. SCI. REV. 70, 70 (1968).

²⁶ For example, in 1960 Ghana and South Korea were characterized by roughly similar gross national products per capita. By the early nineties, an extraordinary gap had opened: South Korea, ranked 31 of 174 countries by the U.N. Development Programme, had a per capita GNP of \$7,220 in 1992; Ghana, mired at 129 in the same ranking, had a per capita GNP of \$460! However, the U.N. Development Programme also calculated "real" GDP per capita, making the gap much smaller: South Korea, \$9,250; Ghana, \$2,110. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 158-59 (1995).

²⁷ Between 1965 and 1990, more than seventy-five successful coups d'état were staged in Africa, most notably in West Africa (Benin, Burkina Faso, Ghana, Mauritania and Nigeria each experienced at least four); peaceful change of government and dominant party through elections occurred only in the unusual island state of Mauritius (1982). I am not including transitions within the same party following resignation or death of a president, such as the changes in Somalia (1967), Kenya (1978) or Cameroon (1982).

²⁸ HOWARD, *supra* note 16, at 120.

of expression. The results were bleak. Although there have been exceptions, the decades following were heydays of authoritarianism. Some noteworthy changes came in the early 1990s when a "second independence" swept through parts of the continent. Democratization and concomitant emphasis on media openness have, in the view of several observers, opened new opportunities for freedom of expression. As Carver noted, "[t]hus the independent press which has emerged in recent years is, for most African countries, the *first* independent press that has been there."²⁹

How has this state of affairs been affected by human rights institutions, including inter-governmental groups such as the African Commission, or NGOs such as Article 19?

III. INTERNATIONAL PRESSURE AND MONITORING

We must recognize that, with the "second independence" and with ratification of human rights conventions, governments in Africa have started to confront a new situation. The long-standing assumptions of untrammelled domestic sovereignty and limited criticism of government activities have now been challenged.

As we have seen, the African political elite utilized -- and continue to draw upon -- restrictive national security legislation to limit freedom of expression. They drew lessons from their colonial predecessors, and added new twists. Domestic voices of dissent have been and continue to be stilled -- although the conditions they documented cannot be fully concealed. The majority of African governments have ratified international treaties in which they pledged to uphold freedom of expression. They thereby became potentially open to external pressure and monitoring. How effective have these avenues proven to be? In particular, what impact can be attributed to the African Charter on Human and Peoples' Rights?

The African Commission has, since its creation in 1987, played a marginal role in protecting freedom of expression. In both legal and political terms it appears to be a weak, but not an irrelevant player in efforts to achieve accountability of African leaders.

The African Charter gives the weakest formulation of freedom of expression of any major international human rights document. According to

²⁹ TRUTH FROM BELOW, *supra* note 3, at 12 (*italics original*).

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Article 9, "[e]very individual shall have the right to receive information[, and] [e]very individual shall have the right to express and disseminate his opinion within the law."³⁰ The last three words exemplify the cautious, state-centered approach found within the Charter, further reflected in many ways by the actions -- and inactions -- of the African Commission. "[W]ithin the law"³¹ as a phrase opens the door, at least theoretically, to any sort of *raison d'état*. It is a clawback clause, restricting rights from the start.³² Other major human rights treaties give considerably less scope to such restrictions. The ICCPR speaks of "certain restrictions," adding "but these shall only be such as are provided by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or public health or morals."³³ The ICCPR, the European Convention on Human Rights, and the American Convention on Human Rights are all treaties more rigorous,³⁴ and systems more vigorous, in protecting freedom of expression. Limitations are clear rather than vague; bodies of precedent and experience have developed; communications are numerous and carefully vetted; well-qualified (albeit overworked) professionals provide staff support; governments criticized by the treaty bodies usually modify the offending laws or practices. I regret to say that, as of the time of writing, these points did not apply to the African Charter or the Commission. A vague or weakly-worded treaty can be developed or interpreted over time, if the political will is present. The limitations of the African Charter are striking; even more, in the case of freedom of expression, the political will to interpret the wording of the African Charter broadly has not been present.

³⁰ African Charter, *supra* note 9, art. 9.

³¹ *Id.*

³² Richard Gittleman, *The Banjul Charter on Human and People's Rights: A Legal Analysis*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 152, 158-62 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984).

³³ ICCPR, *supra* note 1, art. 19(3).

³⁴ *Id.*; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953), *amended by* Protocol Nos. 3 (*entered into force* Sept. 21, 1970), 5 (*entered into force* Dec. 20, 1971), 8 (*entered into force* Jan. 1, 1990) [hereinafter European Convention]; *See also* American Convention on Human Rights, art. 13, O.A.S.T.S. No. 36, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1969), 1144 U.N.T.S. 123 (*entered into force* July, 18, 1978) [hereinafter American Convention].

In the decade since the African Charter entered into force, a wave of democratization has swept over much of the continent. Far greater attention has been generally given to human rights. However, conclusions that freedom of expression has drawn significant attention from the African Commission, or that restrictive national security legislation has been rescinded, would be unwarranted. The undoubted progress in South Africa since the freeing of Nelson Mandela, and the more restricted changes in the Southern African Development Community (SADC) countries, are encouraging, but far from continent-wide in their scope. The "second independence" promised far more than thus far delivered. The record of the African Commission to date has been spotty, as it has been hampered by the wording of the Charter, by Commissioners' reluctance, and by the inadequacies of government actions.

Clawback clauses constitute a particularly insidious way of weakening international human rights obligations. Gittleman quotes from the Constitution of the Republic of Zaire (now renamed Congo), exemplifying the ease with which national security can be invoked in proclaiming a state of emergency:

If serious circumstances imminently threaten the Nation's independence or integrity or cause an interruption in the regular functioning of the organs of the Popular Movement of the Revolution or jeopardize vital State interests . . . the President of the Republic may proclaim a state of emergency, with the consent of the Political Bureau.³⁵

Why is the wording of the African Charter so cautious? In brief, because of the timing and circumstances of its preparation. As I have written elsewhere,

[t]he Charter was drafted on behalf of the Organization of African Unity [OAU] by persons sympathetic to governments' desires (perhaps interpreted as necessities and preconditions), and desirous of including African values. The OAU itself was far more concerned early in its history with ensuring stability for newly independent countries and self-determination for remaining colonial areas, than with protection of human rights

³⁵ Gittleman, *supra* note 32, at 160 (quoting the Constitution of the Republic of Zaire) (emphasis added).

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within its member states.³⁶

In order to ensure adoption by African heads of state gathered at the 1981 OAU summit, and ratification by governments subsequently, the language chosen gave states wide discretion. The brief, government-centered wording of Article 9 of the African Charter should be contrasted with the comparable, lengthier sections of the European Convention and the American Convention.³⁷ Amending the Charter to strengthen its provisions is, in my judgment, quite unlikely.

Does the African Commission have the power, resources and willingness to enhance protection of freedom of expression within the narrow confines of Article 9 and other parts of the African Charter? I believe not under current conditions. Several commentators on the African Commission have urged it to become more active in interpreting the Charter. Slowly and hesitantly, a few steps have been taken.³⁸ For example, Commissioners have taken it upon themselves to examine reports from States Party in public session, although the Charter is by no means clear that this is what the framers intended. Non-governmental human rights organizations have attended Commission sessions in greater numbers, and started to generate additional documents for its members' consideration. In my view, the most important changes in the activity level of the African Commission will come when 1) States Party report seriously on freedom of expression and 2) NGOs concerned with this topic press both the African Commission and individual governments more vigorously for action.

The major responsibility of the African Commission lies in its examination of reports from the States Party to the African Charter. Reporting serves at least seven functions, aptly delineated by Alston:

1. initial review, through which the supervisory committee becomes aware of the relevant domestic law and practice;
2. monitoring, based on detailed review of current developments, as a step toward identifying and remedying

³⁶ CLAUDE E. WELCH, JR., PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS 149 (1995).

³⁷ See European Convention, *supra* note 34, art. 13; American Convention, *supra* note 33, art. 10.

³⁸ See commentaries on sessions of the African Commission, published periodically in NETH. HUM. RTS. Q.

human rights problems;

3. policy formulation, in which governments take steps (hopefully!) to respond to the problems identified;
4. public scrutiny, in which governmental accountability is enhanced both internationally and domestically;
5. evaluation, in which both states and supervisory bodies assess changes made over time;
6. acknowledgment of problems, in which governments become more candid in their discussion of human rights issues; and
7. information exchange, perhaps most notably through general comments by supervisory committees.³⁹

In almost all these respects, the African Commission has been hampered or deficient to date. Initial reviews of reports have been brief; more important, States Party have submitted patently inadequate documentation.⁴⁰ It has thus proven difficult to establish a baseline of information. Monitoring has been impeded by sketchy reports — or utterly precluded by failure to submit any reports whatsoever. The physical isolation of the African Commission in The Gambia has limited the extent to which Commissioners or governments can learn from each other; chronic staff shortages and problems have affected the Commission's efficiency; and general comments remain at a rudimentary stage.

³⁹ Philip Alston, *The Purposes of Reporting*, in *MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, at 13-16, U.N. Doc. HR/PUB/91/1 (1991).

⁴⁰ The case of Nigeria, which I treat in greater detail in a recent book, WELCH, *supra* note 36, at 154-55, is instructive. What can be kindly viewed as bureaucratic confusion meant that Nigeria's first attempt at a report consisted of nothing more than the table of contents of its suspended constitution! By the nineteenth session of the Commission, held in March 1996, the Commission had examined reports from barely a dozen states; the great majority of States Party had yet to furnish their initial reports, which provide the baseline information on which subsequent discussion would be based. On the other hand, lateness in submitting reports is hardly confined to Africa!

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There is little evidence that comments from the African Commission have been seriously heeded by governments in reformulating policies, although the U.N. Human Rights Committee, established as a result of the ICCPR, has scored some successes.⁴¹ Public scrutiny has been practically non-existent: reports by States Party have been drafted by bureaucrats who rarely communicate with human rights activists; comments made by members of the African Commission disappear into filing cabinets. On the brighter side, some states (notably Senegal) have reported more than once, and their second reports have been more open in acknowledging issues.

As of the middle of 1996, the Commission had not devoted any lengthy attention to Article 9 of the Charter in analyzing reports from States Party. Quite naturally, chief attention has been focused on these reports. More pressing issues, such as extra-judicial executions or creation of an African Court of Human Rights, have come to the fore when the Commission examines lacunae in the Charter. In part, the Commission's limited attention to freedom of expression has also been due to the lack of information in the initial reports. Details have been limited. Governments have often reported in formats other than an article-by-article march through the Charter. A few examples from the reports will suffice.⁴² Though fifty pages in length, the initial report from Egypt merely mentioned that the constitution contains the "freedom and the right of . . . journalism." Libya asserted, "[e]very one enjoys freedom of opinion, research and creativity," then added, "these rights are exercised without disturbing public order or morality." Neither Cape Verde, Rwanda nor Tanzania made any explicit mention of freedom of expression in their initial reports. Togo confidently proclaimed, without any detail, that "fundamental human rights and freedoms" are spelled out in its constitution. The Gambia quoted the relevant section of the country's constitution, whose wording was clearly inspired by Article 19 of the ICCPR; Senegal also made specific reference to its constitution and laws in discussing freedom of expression. I need not go further. With such sketchy information coming from official sources, members of the African

⁴¹ See Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUM. RTS. Q. 295, 298-300, 321 (1991); See also Ineke Boerefijn, *Toward a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights*, 17 HUM. RTS. Q. 766 (1995).

⁴² All quotations are from reports submitted under the African Charter by the governments cited, in the possession of the author.

Commission (assuming they are interested) must seek details about freedom of expression from other sources. Reports from ratifying countries are necessary, but they are not sufficient to examine the freedom of expression in individual African states.

The African Commission has the power to receive and make recommendations on communications. Communications, which have usually been generated by NGOs, call to the Commission's attention alleged violations of the Charter not resolved through domestic courts or by other means. These must, as is common for international human rights treaty bodies, go through a lengthy, complex and often unsatisfactory process of consideration.⁴³ Up to mid-1996, only one communication had been filed -- by International PEN --alleging specific violation of freedom of expression, in this case by the Government of Ghana; the communication itself was withdrawn before the Commission could take any action. Five others, all also filed by International PEN, dealt with alleged false imprisonment of writers or editors; PEN argued, implicitly, that freedom of expression had been denied. The fate of these communications may be instructive: one directed against Malawi, Ethiopia, Cameroon and Kenya, and another directed solely against Malawi, were both declared inadmissible since the four states had not ratified the African Charter;⁴⁴ a third, arising in Burkina Faso, was dismissed since the applicant had been released before the Commission could consider the communication;⁴⁵ the fourth, coming from Sudan, was not considered due to "non-exhaustion of local remedies;"⁴⁶ and in the last, arising in Côte d'Ivoire, an amnesty had "extirpated the legal effects of detention" which two journalists critical of the President had suffered!⁴⁷ A languorous pace has

⁴³ See WELCH, *supra* note 36, at 157-61.

⁴⁴ See *International PEN v. Malawi, Ethiopia, Cameroon, Kenya*, Communication 19/88, SEVENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 1993-1994 (June 13-15, 1994), 30th Ordinary session, <<http://www.umn.edu/humanrts/africa/ACHPR2.htm>>; *International PEN v. Malawi*, Communication 42/90, *id.*

⁴⁵ See *International PEN v. Burkina Faso*, Communication 22/88, *id.*

⁴⁶ *International PEN v. Sudan (in respect of Kemal al-Jazouli)*, Communication 92/93, EIGHTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 1994-1995 (June 26-28, 1995), 31st Ordinary Session <<http://www.umn.edu/humanrts/africa/ACHPRI.htm>>.

⁴⁷ See *International PEN on behalf of Senn & Sangaré v. Côte d'Ivoire*, Communication 138/94, *id.*; I wish to thank Dr. Gerd Oberleitner of the Institute of International Law and International Relations, University of Graz, for this information.

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been typical of the African Commission, hampered through most of its history by a poorly-staffed secretariat and by a high degree of caution of many members.

I do not wish to conclude this article on a pessimistic note. It is my contention that, despite the inherent limitations of the African Charter and the African Commission, pressure from below can help effect a change in the Commission's seemingly limited interest in freedom of expression. NGOs must play an important role in this effort.

IV. A NEW ELEMENT: NON-GOVERNMENTAL ORGANIZATIONS

Up through the fourteenth session of the African Commission,⁴⁸ there was little active NGO involvement focused specifically on freedom of expression;⁴⁹ the situation has not changed significantly since that date. Where NGOs have discussed media in the setting of the African Commission, it usually has been in terms of enhancing coverage of human rights issues. Communications on freedom of expression, as already noted, have been limited in number. But this record should not blind us to the possibilities for change that exist.

What I have referred to elsewhere as the "NGO revolution"⁵⁰ has the potential to affect freedom of expression in Africa, as in other parts of the world. Significant international publicity has occurred through Article 19⁵¹ and

⁴⁸ Held December 1-10, 1993 Addis Ababa, Ethiopia.

⁴⁹ Christopher Hall, legal officer for Africa at Amnesty International, compiled a 5-page table of recommendations to the African Commission from major NGOs from late 1987 through 1993; none in his compilation involved freedom of expression, although there were several suggestions for the Commission's interpreting the African Charter and improving the examination of States' reports. See Christopher Hall, *NGO's Recommendations to the African Commission* (submitted to the African Commission 1994) (on file with the author).

⁵⁰ WELCH, *supra* note 36, at 45, 284-317.

⁵¹ Article 19 has published reports or addressed specific comments to the Geneva-based Human Rights Committee, among others, on Cameroon, Central African Republic, Congo, Egypt, Guinea, Mauritius, Morocco, Rwanda, Togo, Tunisia, Zaire (now Congo) and Zambia. However, to my knowledge, Article 19 has not submitted comments directly to the African Commission on countries submitting reports to it. Reports from Human Rights Watch/Africa occasionally give attention to freedom of expression; a noteworthy recent example is its recent study of Sudan. See JEMERA RONE, *HUMAN RIGHTS WATCH/AFRICA, BEHIND THE RED LINE*, 142-63 (1996).

International Freedom of Expression Exchange (IFEX) a watchdog group, whose electronic clearing house, based in Toronto, carries reports and action alerts from groups such as the Committee to Protect Journalists (New York) or Reporters sans frontières (Paris). Most active among Africa-based groups has been MISA, the Media Institute of Southern Africa, based in Windhoek, Namibia. Founded by Namibia-based editor Gwen Lister,⁵² David Lush, and others, MISA concentrates its attention on the largely English-speaking countries from Malawi and Kenya to Lesotho and South Africa. MISA prepared and published the "Declaration of Windhoek on Promoting an Independent and Pluralistic African Press"⁵³ in May 1991. This proclaims, inter alia,

1. Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment and maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.

...

4. The welcome changes that an increasing number of African States are now undergoing towards multi-party democracies provide the climate in which an independent and pluralistic press can emerge.

...

9. African States should be encouraged to provide constitutional guarantees of the freedom of the press and freedom of association.⁵⁴

MISA has kept a watchful eye over the hesitant democratization steps taken south of the Equator. It has circulated vigorous challenges to abridgments of freedom of expression. Among the issues MISA publicized in the first half of 1996 were the dismissal of the editor of the *Times of Zambia* for "political'

⁵² For brief biographical details of Lister see WELCH, *supra* note 36, at 189-90.

⁵³ See ARTICLE 19 (1991), *supra* note 3, at 80-4.

⁵⁴ *Id.*, at 81-2.

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reasons,⁵⁵ the indefinite imprisonment in Zambia of two newspaper editors,⁵⁶ a proposed bill in Namibia to outlaw deliberate or unintentional publication of "false information" on Parliament and its proceedings,⁵⁷ and an attempt by the President of Malawi to use sedition laws against politicians who insulted him.⁵⁸ The Committee to Protect Journalists and Reporters sans frontières reported during the same period, among others, on arrests and imprisonment of Gambian, Ghanaian, Guinean and Ivoirien editors and reporters.⁵⁹ Thus, although the African Commission was not included "in the loop" for these communications, other human rights groups and agencies received information, and could potentially apply pressure on the relevant governments.

There is, I believe, a major lesson here. A new pattern is emerging in international human rights. A trilateral rather than bilateral relationship can be discerned. While the first decades of reporting on the application of human rights involved States Party to particular conventions and the relevant examining committee in a bilateral relationship, NGOs have now entered the scene. The struggle has become three-cornered. This change can be observed, for

⁵⁵ IFEX Action Alert Service, *"Times of Zambia" acting managing editor dismissed for "political" reasons* (Mar. 25, 1996) <<http://www.ifex.org/archive>>.

⁵⁶ See IFEX Action Alert Service, *United Nations Human Rights Committee Members criticize indefinite imprisonment of editors* (April 1, 1996) <<http://www.ifex.org/archive>>; IFEX Action Alert Service, *United Nations Human Rights Committee (UNHCR) concludes that contempt charges against "The Post" editors violate International Covenant on Civil and Political Rights (ICCPR)* (Apr. 12, 1996) <<http://www.ifex.org/archive>> (stating that the U.N. Human Rights Committee in Geneva criticized the action).

⁵⁷ See IFEX Action Alert Service, *Draft legislation could punish reporting of "false information"; call for power to ban reporters who report on classified information* (Apr. 23, 1996) <<http://www.ifex.org/archive>>.

⁵⁸ See IFEX Action Alert Service, *President Bakili Muluzi threatens to use sedition laws against opposition politicians who insult him* (June 26, 1996) <<http://www.ifex.org/archive>>.

⁵⁹ See IFEX Action Alert Service, *"The Free Press" published and editor arrested* (Apr. 23, 1996) <<http://www.ifex.org/archive>>; IFEX Action Alert Service, *Reporters Alieu Badara Sower and Bruce Asemota arrested and held incommunicado; police order them to reveal sources* (May 8, 1996) <<http://www.ifex.org/archive>>; IFEX Action Alert Service, *Journalist Thierno Sadou Diallo detained* (June 5, 1996) <<http://www.ifex.org/archive>>; IFEX Action Alert Service, *Appeal Court Confirms jail sentences of three journalists from "La Voie" newspaper* (June 14, 1996) <<http://www.ifex.org/archive>>.

example, in the extensive involvement of human rights groups in the Geneva-based Subcommission on Prevention of Discrimination and Protection of Minorities,⁶⁰ in the presence of non-governmental organizations in the Council for Sustainable Development created by the Rio summit, or in the regular workshops for African human rights NGOs organized by the International Commission of Jurists, in conjunction with the African Commission on Human and Peoples' Rights. NGOs play critical roles -- critical to the success of consultation, and critical of governments that abuse human rights or submit incomplete or misleading reports. MISA has the potential to influence the African Commission, albeit within severe limits.

Non-governmental organizations cannot, of and by themselves, make up for serious deficiencies in international human rights documents. The weakly-worded Article 9 of the African Charter will not be strengthened because NGOs complain. On the other hand, NGOs can, by their documentation,⁶¹ their presence at meetings, and their pressure for change, influence how treaty bodies operate. NGOs have the potential to press the protection of human rights generally to higher levels. Although freedom of expression remains weakly protected in most African states, and although the African Commission has thus far given it limited attention, increased attention can and should be expected as a result of NGO efforts. Article 19, the Committee to Protect Journalists, Reporters sans frontières, Human Rights Watch/Africa, MISA and similar groups will help create the future. What has emerged largely since 1991 should be seen as the first major international steps for freedom of expression to become a feature of African societies.

⁶⁰ See generally Karen Reiersen & David Weissbrodt, *The forty-third session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: the Subcommission Under Scrutiny*, 14 HUMAN RIGHTS QUARTERLY 232 (1992).

⁶¹ See WELCH, *supra* note 36, at 211-37.