An historical investigation of the origins of the African Charter on Human and Peoples’ Rights

Nathaniel Rubner

“A Thesis presented in fulfilment of the requirements of the degree of Master of Philosophy in Historical Studies at the University of Cambridge”.

Cambridge University
June 2008
Declarations

This dissertation is of 29,886 words including an appendix but excluding abbreviations, dramatis personae, timeline, footnotes, references and bibliography.

I hereby declare that my dissertation is not substantially the same as any that I have submitted for a degree or diploma or other qualification at any other University.

I further state that no part of my dissertation has already been or is being concurrently submitted for any such degree, diploma or other qualification.

Nathaniel Rubner
June 2008
Acknowledgements

My greatest debt of gratitude is owed to Dr Melissa Lane, my supervisor, who took a chance on me. I hope that I have justified her faith. I am also most grateful to the distinguished experts, listed in the bibliography, who gave their time freely and thereby added to the possibility of this dissertation. It has also been my good fortune to meet with Sika Frepeau and Stephen Mayega of the AU Archive Unit in Addis Ababa who welcomed me with their friendship on my research visit and helped with documents, contacts and advice. Thanks are also due to the ICJ in Geneva, the WCC Library in Geneva, the African Studies Library in Cambridge, UN library staff in Geneva and New York and the library staff at Cambridge, IALS, LSE, SOAS and UCL for all due assistance with my research.
Index

Declarations i
Acknowledgements ii
Index iii
Abbreviations iv
Dramatis Personae vi
Timeline vii
Introduction 1
Chapter One: The OAU System 9
Chapter Two: The Outsiders 31
Chapter Three: The Political Process 52
Chapter Four: The Content 80
Conclusion 103
Bibliography 111
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>AACC</td>
<td>All African Conference of Churches</td>
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<tr>
<td>ABA</td>
<td>African Bar Association</td>
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<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<tr>
<td>African Commission</td>
<td>African Commission on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>CHR</td>
<td>UN Commission of Human Rights</td>
</tr>
<tr>
<td>CIAS</td>
<td>Conference of Independent African States</td>
</tr>
<tr>
<td>Dakar Colloquium</td>
<td>Colloquium on ‘Development and Human Rights’, sponsored by the ICJ and the Senegalese Association of Legal Studies and Research, Dakar, Senegal 7-12 September 1978</td>
</tr>
<tr>
<td>Dakar Draft</td>
<td>Draft of ACHPR prepared by the Dakar Meeting</td>
</tr>
<tr>
<td>Dakar Meeting</td>
<td>Restricted meeting of highly qualified experts called for by Resolution 115 to prepare a preliminary draft of an ACHPR, Dakar, Senegal 28 November to 8 December 1979</td>
</tr>
<tr>
<td>ECA</td>
<td>Economic Commission for Africa</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>UN Economic and Social Council</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Commission of Jurists, Geneva</td>
</tr>
<tr>
<td>Lagos Conference</td>
<td>ICJ Conference on ‘The Rule of Law’, Lagos, Nigeria 3-7 January 1961</td>
</tr>
<tr>
<td>M’baye Draft</td>
<td>Draft of ACHPR prepared by M’baye as working paper for Dakar Meeting</td>
</tr>
<tr>
<td>Term</td>
<td>Definition/Description</td>
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<tr>
<td>Monrovia Proposal</td>
<td>Proposal for an African Commission on Human Rights by the Monrovia Seminar</td>
</tr>
<tr>
<td>Monrovia Seminar</td>
<td>UN Seminar ‘On the Establishment of Regional Commissions on Human Rights with Special Reference to Africa’, Monrovia, Liberia 10-21 September 1979</td>
</tr>
<tr>
<td>NGO</td>
<td>An ‘adversary’ non-governmental organisation</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
</tr>
<tr>
<td>OAU AHSG</td>
<td>Annual Assembly of the Heads of State and Government of the Organization of African Unity</td>
</tr>
<tr>
<td>OAU Charter</td>
<td>Foundational charter of the OAU 25 May 1963</td>
</tr>
<tr>
<td>OAU CoM</td>
<td>Meeting of the Council of Ministers of the Organization of African Unity held twice a year to discuss OAU budgetary and administrative matters and the OAU AHSG agenda, but also applied to any other OAU meeting of Ministers such as the Banjul Meetings.</td>
</tr>
<tr>
<td>Resolution 115</td>
<td>Decision by the 1979 OAU AHSG to ‘organise...a restricted meeting of highly qualified experts to prepare a preliminary draft of an “African Charter on Human and Peoples’ Rights”’.</td>
</tr>
<tr>
<td>UD</td>
<td>Universal Declaration of Human Rights of 1948</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNDHR</td>
<td>United Nations Division of Human Rights</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>WCC</td>
<td>World Council of Churches</td>
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**Dramatis Personae**

<table>
<thead>
<tr>
<th>Name</th>
<th>Role and Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>William Butler</td>
<td>Chairman, ICJ Executive Committee 1977-81 and 1985-89</td>
</tr>
<tr>
<td>Adama Dieng</td>
<td>Assistant to Keba M'baye; Legal officer for Africa, ICJ 1982-1990; and Secretary-General, ICJ 1990-2000</td>
</tr>
<tr>
<td>Ibrahima Fall</td>
<td>Dean, Cheikh Anta Diop University 1975-81; assisted in M'baye Draft; attended Dakar Meeting</td>
</tr>
<tr>
<td>Edem Kodjo</td>
<td>Secretary General, OAU AHSG 1978-83; Prime Minister, Togo 1994-96 and 2005-06</td>
</tr>
<tr>
<td>Neil MacDermot</td>
<td>Secretary-General, ICJ 1970-1990</td>
</tr>
<tr>
<td>Keba M'baye</td>
<td>First President of the Supreme Court of Senegal; adviser to President Senghor; ICJ Commissioner 1972-87; President, ICJ 1977-85</td>
</tr>
<tr>
<td>Bertrand Ramcharan</td>
<td>Special assistant to van Boven in 1979; Secretary to Monrovia Seminar working group; Acting High Commissioner for Human Rights 2003-04</td>
</tr>
<tr>
<td>President Senghor</td>
<td>President of Senegal 1960-80</td>
</tr>
<tr>
<td>President Tolbert</td>
<td>President of Liberia 1971-80; Chairman, OAU 1979-80</td>
</tr>
<tr>
<td>Theo van Boven</td>
<td>Director, UNDHR 1977-82</td>
</tr>
</tbody>
</table>
Timeline

1961
January   Lagos Conference

1963
May       Addis Ababa Summit Conference.

1977
December  UNGA authorises regional seminar on regional commissions

1978
September Dakar Colloquium
December  UNGA resolution regrets failure to hold regional seminars.

1979
March     Dakar Colloquium follow-up group meets
April     Liberia agrees to host UN Monrovia Seminar
          President Senghor agrees to sponsor Resolution 115
July      OAU CoM, Monrovia determines OAU AHSG agenda.
          OAU AHSG, Monrovia approves Resolution 115.
          M'baye asked to prepare working draft for Dakar Meeting
September Monrovia Seminar approves Monrovia Proposal.
          M'baye Draft presented to OAU Secretariat
November/December Dakar Meeting to draft ACHPR.

1980
March     OAU CoM, Addis Ababa to discuss Dakar Draft inquorate
June First Banjul Meeting to discuss Dakar Meeting draft of ACHPR.

OAU CoM, Freetown requires completed ACHPR draft to be presented to 1981 OAU AHSG.

OAU AHSG, Freetown confirms OAU CoM resolution.

1981

January Second Banjul Meeting completes discussion of Dakar Draft.

June OAU CoM, Nairobi puts ACHPR on OAU AHSG agenda.

OAU AHSG, Nairobi adopts ACHPR.

1985

December ICJ seminar, Nairobi to press African states to ratify ACHPR.

1986

October ACHPR ratified by simple majority of OAU member states.
An historical investigation of the origins of the African Charter on Human and Peoples' Rights

Introduction

The African Charter on Human and Peoples’ Rights was adopted by the 1981 OAU AHSG in Nairobi, Kenya and came into effect on 21 October 1986, three months after a majority of OAU member states had deposited their instruments of ratification with the Secretary-General of the OAU. It was the third regional human rights instrument to be adopted following the European Convention on Human Rights in 1950 and the American Convention on Human Rights in 1969.

The current state of knowledge of the origins of the ACHPR is informed largely through a lack of interest. It is a subject-matter that has been neglected by historians, and largely ignored by human rights specialists, who have always regarded the practice of human rights as their predominant area of interest. As a result, not one major work has emerged that can be said to have as its primary purpose an historical investigation of the origins of the ACHPR. Whilst there have been several book-length treatments of the ACHPR, for example, Bello, Jallow, Murray, Nmehielle, Ouguergouz and Umozurike, none of them

1 It originated in AHG/Dec.115 (XVI) Rev.1, otherwise Resolution 115, passed by the 1979 OAU AHSG. CM/1149 (XXXVII) is the Report of the Secretary-General on the Draft ACHPR to the OAU CoM, which includes CAB/LEG/67/3/Rev.5, the final draft of the ACHPR. CM/Plen/Rapt.Rpt (XXXVII), 55-60 reports the OAU CoM decision to pass that draft to the 1981 OAU AHSG for consideration. The ACHPR was adopted under Item 8 of the 1981 OAU AHSG agenda. 'Adoption of the Recommendations ... of the Council of Ministers' (see AHG/101 (XVIII) Rev.1, the OAU AHSG agenda).


have chosen to devote much more than the few pages of an opening chapter to a
consideration of the origins of the ACHPR. Their prime emphasis, as some of the titles
suggest, has been on a legal analysis of the ACHPR and an assessment of the system in
practice; the implication being that such accounts do not require more than a passing
acquaintance with an understanding of the origins of the ACHPR.

Within those few pages devoted to the origins of the ACHPR, Bello and Ouguergouz
offer the most interesting and extensive detail on the process; Jallow, although otherwise
limited in the scope of his account, participated in the Dakar and Banjul Meetings, and
attended the 1981 OAU AHSG, and, therefore, provides an indispensable account of
those meetings; and Murray is strongest in her explanation of the OAU system as a
factor in the process, but otherwise weak on the detail of the political phase. By
comparison, Umozurike is rather more concerned to place the ACHPR in an historical
context going back to Magna Carta, as is Nmehielle, who sees the UD and the European
and American Conventions on Human Rights as providing the essential background.
Moreover, with the exception of Ouguergouz, none of these accounts are concerned to
provide much more than passing explanations as to why the ACHPR came to be
adopted; it is largely to be inferred from a sequence of events and human rights
conferences.

More focused information on the origins of the ACHPR is to be found in articles on
specific aspects of the process. These include personal recollections by Kodjo (of the

6 Murray, Human Rights in Africa, pp.2-17, 21-22.
Human Rights System, pp.32-67 (only seven of these pages are devoted to the 'OAU and human rights' as
background).
Rights System, pp.67-70; Umozurike, The African Charter on Human and Peoples' Rights, pp.24-26; and
Ouguergouz, The African Charter on Human and Peoples' Rights, pp.20-35. It is a pattern that is repeated
by most articles on the ACHPR, to the extent they touch on the origins.
OAU AHSG), M’baye and others (of the political lobbying process and relationship with the UN) and Ramcharan (of the Monrovia Seminar); and commentaries by Kannyo (on the genesis and political background), Tolley (on ICJ history) and Weinstein, Welch and Welch/Meltzer (on OAU policy and approaches to human rights in Africa and the UN).

By comparison with the limited direct historiography on the origins of the ACHPR, the indirect historiography is fairly extensive. The Addis Ababa Summit Conference and the early history of the OAU are well served by contemporary accounts from Amate, Boutros-Ghali, Cervenka, Elias, Legum, Padelford, and Wallerstein; and, thereafter, by commentators such as van Walraven and Wolfrers. Clapham, Davidson, Ferguson and Thomas provide necessary reminders of the realities of Africa politics. Similarly, African intellectual thought is well covered by, for example, Gyekye, Hountondji, Mudimbe, Neale Vaillant and Wiredu. Specific works of international human rights


15 K. Gyekye, An essay on African philosophical thought: the Akan conceptual scheme (Cambridge, 1987);
history which touch on the ACHPR include Korey (Human rights NGOs and the UN), Young-Anawaty (ACP-EEC Lome II Convention), Andrews and ICJ (Uganda) and Carter/Brogan, Hartmann, Jinadu, Weissbrodt and Wiseberg/Scoble (US human rights policy). 16

The existing accounts, such as they are, are, inevitably, unsatisfactory. Firstly, in the historiography as a whole, there has been insufficient research on the detail of the essential elements of the political process in the period 1978-81; and such details as have been identified, or disclosed in personal accounts of events, are widely dispersed in the historiography in no discernable pattern. Secondly, in the absence of hard facts, explanations or analyses, to the extent that they are proffered, are reduced to a simple narrative that focuses on the major set-piece events without any understanding of the underlying nuances or of the part played by individuals in the overall process. The consensus narrative, in broad terms, argues that, from its inception in 1963, the OAU did not accord human rights any meaningful importance beyond an understandable preoccupation with colonialism and apartheid. 17 However, by the late 1970s, African


political excesses, in particular, the widely publicised activities of President Amin (Uganda), Emperor Bokassa (Central African Empire) and President Nguema (Equatorial Guinea), human rights promotion by the UN and an international climate increasingly driven by human rights considerations moved or compelled African heads of state to accept an inevitable international scrutiny of their human rights credentials. Historical significance is usually ascribed to the ICJ Lagos Conference and to a series of UN human rights conferences, in particular the Monrovia Seminar, but not, to the proper extent, to the Dakar Colloquium. It is also suggested by some accounts that the ACHPR was, in some way, a significant first step of acceptance by African heads of state of the principle of universal human rights.

The aim of this dissertation, therefore, is to provide a more substantial understanding of why and how the ACHPR came into being, and of the political and intellectual forces that shaped its content. Firstly, by adding to the level of detail that is known about the process by which the ACHPR came into being through private interviews/correspondence (with participants in the political and drafting process) and archival research; secondly, by consolidating that enhanced body of knowledge in a single work for the first time; and, thirdly, by proposing a more layered explanation of the process and content of the ACHPR.

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20 There is no excuse for this omission as an indication of its importance is suggested in Human and Peoples' Rights in Africa and THE AFRICAN CHARTER, pp.21-22 and in OAU and ICJ documents, all as more fully described in Chapter Three.


22 See Bibliography. Several other parties were approached but were either unavailable for interview or,
In particular, the explanations advanced by this dissertation will challenge several aspects of the consensus narrative (as described above). Specifically, the dissertation will propose that: i) Throughout the period covered by this dissertation, broadly 1963-85, the OAU consistently asserted a definition of human rights exclusively in terms of the immediate needs and aspirations of Africans, specifically, an ending of colonialism and apartheid and economic development; ii) The UN and Monrovia Seminar had little influence on the process of the ACHPR or on its essential content; iii) The ACHPR was not brought about as a result of a confrontation with Western public opinion; iv) The ACHPR responded to a growing desire among all parties to the process to advance an African conception of human rights based on African needs and aspirations; an idea that was located within the wider debate of post-colonial African (Negro) identity; and v) The ACHPR was not an acceptance by most African heads of state of universal human rights, merely a tacit accommodation to temporary political necessity that could be frustrated by other means.

The dissertation divides naturally into three parts. The first part outlines the political context and framework in which human rights in Africa were viewed. Chapter One looks at the extent to which the political concerns and framework embodied in the OAU system in 1963 remained at the forefront of the OAU's political outlook and, together with the Cold War, served as the prism through which all questions of human rights were viewed. Chapter Two looks at the view from the outside. That is, the efforts of Western public opinion to persuade African heads of state to accept the idea of regional regulation of human rights; specifically, the efforts of the USA, UN and the ICJ. The second part, Chapter Three, describes the emergence and path of the political and drafting process of the ACHPR and suggests why African heads of state were minded, first, to consider, and, then, to accept adoption of the ACHPR. The third part, Chapter Four, looks at the political and intellectual influences on the content of the ACHPR. In particular, the wider debate about African (Negro) identity and interests, from which, it is argued, the idea and need for an African conception of human rights emerged; and the intentions of the heads disappointingly, did not respond to a request for a meeting.
of state with respect to the protection of human rights in Africa.

Primary source material accessed for research in this dissertation falls into four main categories. Firstly, documents from the official archives of the OAU in Addis Ababa, the ICJ in Geneva, the UN in Geneva, London and New York and the WCC in Geneva. With respect to the OAU, only limited access was possible to the separate, possibly more politically-sensitive and, therefore, more interesting, private archives of the Secretariat and Legal Departments, which are not formally open to outside researchers. As regards the ICJ and UN, it was not possible to access either the private papers of MacDermot and M'baye, if, in fact, they exist at all, 24 or van Boven and Ramcharan's internal memos or external correspondence. Secondly, it was possible to interview or correspond with several of the participants in the political and drafting process, and, thereby, to compensate for some of the silences or gaps in the archives. This resulted in a number of original details and insights into the process that are mainly to be described in Chapter Three. 25 Thirdly, a number of the participants recorded personal accounts of various stages of the process. 26 Finally, contemporary press reports. They are not always reliable; however, because OAU AHSG rapporteur reports carry only limited commentary on the debates, the details of positions taken by African heads of state in the OAU AHSG may only be made known through these press reports. In the available time it has not proved possible to access local, daily African newspaper reports. Further research would also look to: i) Expand on the interviews and documents accessed; ii) To the extent possible, identify sources within the archives of individual African states; 27 and, iii) Access US

23 (At least) as defined by the African political and intellectual elites.
24 MacDermot died in 1996; M'baye died in 2007. It has not proved possible to identify even the existence of any collections of personal material.
25 The interviews were not recorded as they might have suffered in frankness, but contemporaneous notes were taken.
27 A US based project to 'rescue' Liberian government files produced nothing of value; and, rather late in the day, an introduction was proposed to Senegalese Foreign Office circles that might have opened up some access to government records. F.E.Denton's work also suggests possible access to The Gambian government records. See 'Foreign policy formulation in The Gambia, 1965-1994; small weak developing states and their foreign policy choices and decisions' (unpublished PhD thesis, Birmingham University,
State Department and UK Foreign Office assessments of the foreign policy policies of individual African heads of state.
Chapter One: The OAU System

The creation of the OAU in 1963 at the Addis Ababa Summit Conference was an important landmark in the possibility of an African regional human rights charter. As van Walraven pointed out: 'Africa had now moved from a mere geographical entity to a political community with its own consciousness.'28 The process of bringing about that political consciousness had been difficult and protracted; the OAU Charter was described by the US State Department as a 'remarkable achievement'.29 It was, however, a necessary step if the most pressing regional questions with which African heads of state were faced were to be confronted, and African aspirations for the future realised. Consequently, Legum was to suggest that: 'The OAU was born...out of historic necessity and a welter of conflicting political ideas and interests.'30

The necessity and aspirations were described by Emperor Haile Selassie (Ethiopia) in his opening address to the Addis Ababa Summit Conference:

What we still lack...is the mechanism which will enable us to speak with one voice when we wish to do so and take and implement decisions on African problems when we are so minded...What we require is a single African organisation through which Africa's single voice may be heard, within which Africa's problems may be studied and resolved. We need an organisation which will facilitate acceptable solutions to disputes among Africans...Let us not put off...the one decision, which must emerge from this gathering if it is to have real meaning...We cannot leave here without having created a single African organisation...31

It moved President Ahidjo (Cameroun) to reflect that: '...sentiment, reason, self-interest

30 C. Legum, 'The Organization of African Unity - Success or Failure?', 51 International Affairs 2 (1975), 208.
and in the final analysis, survival, all of these impel Africa to unite...”

As this chapter will describe, those pressing political questions and aspirations remained at the forefront of the OAU’s political perspective throughout the period under review, leading Wolfers to observe that: ‘The OAU after nearly twenty years is still recognizably the institution that was shaped in the imagination of its founding fathers.’ They would confront any proposal for an African human rights charter; confront it in terms of its possibility and in the shaping of its content. For that reason, the starting-point of the dissertation is an understanding of those political questions and aspirations, and an appreciation of their enduring importance to the OAU member states and the eventual process of the ACHPR.

The political questions of greatest importance to member states are clearly identifiable in the Preamble and Articles II and III of the OAU Charter, and in the working procedures of the OAU system; indeed there was a conscious desire to give them due prominence. More than half the discussion of the drafting sessions was taken up with the Preamble alone, and ‘new items were added to the Preamble, more amply reflecting the motives...The paragraphs were also reshuffled to indicate the relative order of priority.’ That priority is also apparent in the first five resolutions adopted by the Summit Conference.

These political questions divide into two categories: Relations between OAU member states; and OAU relations with the outside world. In the first category are: Non-

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31 SUMMIT CIAS/GEN/INF/3, 5-6.
32 SUMMIT CIAS/GEN/INF/10, 2.
36 These were: Decolonisation, Apartheid and Racial Discrimination, Africa and the United Nations,
intervention by the OAU in the internal affairs of member states; sovereign equality and respect as between member states, that is non-interference; and matters of regional cooperation in finance and infrastructure. In the second category are: Self-determination for Africans remaining under apartheid or colonial rule; and the right to development, seen in economic, cultural and ideological terms. Underlying all these concerns is the post-colonial desire to assert newly-acquired sovereignty against all potential rival political authorities.

Non-intervention

The majority of 'independent sovereign African states' had refused to contemplate a ceding of sovereignty which could subsequently be employed to justify intervention in their internal affairs. That refusal was deeply-embedded in the structure of the OAU. Thus, Article VIII provided that the supreme, essentially the only, decision-making authority was vested in the annual OAU AHSG. Already in 1964, Boutros-Ghali observed that: '...the Assembly is the only real organ of the OAU.' With regard to voting, a resolution required a two-thirds majority, but, in practice, the OAU AHSG operated largely through a process of consensus: ‘Consensus politics is... a crucial aspect of the “African way of doing things”, and finds its highest expression in the way the OAU conducts its business.’ However, as Amate reports, the often chaotic, time-constrained OAU AHSG also offered scope for resolutions to be rushed through at the last moment.

General Disarmament and Areas of Cooperation in Economic Problems. (See OAU Resolutions)

37 This is largely peripheral to the ACHPR and is passed over in the remainder of the dissertation.
38 The term employed in Article IV to describe the qualification for OAU membership.
39 Cervenka, The Organisation of African Unity, pp.49-51 explains that 'as a rule' and 'in practice' the decisions of the OAU CoM, the second institution of the OAU, are submitted for approval to the OAU AHSG, to which it is answerable.
41 See Article X. Cervenka, The Organisation of African Unity, pp.44-45 points out that 'Resolution' is not defined in the OAU Charter, particularly in contra-distinction to 'Decision'.
42 C. Legum, 'The Organization of African Unity - Success or Failure?', 51 International Affairs 2 (1975), 214. At the Addis Ababa Preparatory Conference, the Ethiopian Foreign Minister as Chairman noted: 'In past practices we have used the method of consensus. Don't ask me what that means, but we have used it effectively in other conferences...Is that agreed? Good!' (See Proceedings of the Summit Conference of Independent African States Preparatory Conference of Foreign Ministers Verbatim Record I-7 Item 5: The
with minimal scrutiny. This was the strategy adopted by the sponsors of the ACHPR at the 1979 and 1981 OAU AHSG.

Operational matters were handled by a (permanently under-funded) Secretariat in Addis Ababa reporting to the OAU Chairman; by custom, the head of the member state in which the OAU AHSG had last been held. Kodjo (OAU Secretary-General) described the position of OAU Secretary-General as both powerful and empty. For all intents and purposes, therefore, the OAU was born, and remained, a creature of the OAU AHSG.

Furthermore, although member states were bound to ‘coordinate and harmonize their general policies’ to meet the purposes of the OAU, and to ‘solemnly affirm and declare their adherence’ to the principles of the OAU, it was recognised that these commitments and decisions of the OAU were, effectively, only morally binding recommendations. There were no enforcement provisions in the OAU Charter; the structure was designed ‘to promote cooperation, not to exact it; to urge collaboration’. The OAU was little more than a ‘club of statesmen who are obliged to subscribe to a small number of rules and practices of regional conduct’, but with a wide degree of latitude and minimal risk of enforcement.

The history of the OAU has provided ample evidence of the enduring attachment of the OAU AHSG to non-intervention as an immovable object which any initiative has to confront or circumvent. The most compelling occasions have been those in which the OAU AHSG has been prompted to take sides in a dispute between member states or between competing factions within a member state. The OAU AHSG came under greatest

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44 Kodjo Interview 2007.
45 Article VI specifically reinforces these obligations in Article III.
46 N.J. Padelford, ‘The Organization of African Unity’, 18 International Organization 3 (1964), 535. See also Cervenka, The Organisation of African Unity, pp.45-46 and Clapham, Africa and the International System, p.111. The sponsors of the ACHPR were aware of the possibility of a veto by neglect and sought, successfully, for ratification to be obtained on the basis of a simple majority.
pressure during the 1967-70 Biafran war, when it was argued that the countervailing principle of self-determination should be applied. Nonetheless, the Nigerian position, that this was simply an internal matter, prevailed and was not seriously challenged thereafter by the OAU AHSG. A similar dilemma arose following General Amin's coup in Uganda. On finally taking his seat at the 1971 OAU AHSG, President Amin pointedly remarked: "... the question of a change in government in one country is purely an internal matter which is not the concern of the OAU... Twenty member states of the OAU... now taking their seats... have had changes in government through coups and counter-coups."

Exceptions have been made, for example in the Congo (1964-65) and the Comoros (1978), but these were held to be exceptional because of the involvement of foreign mercenaries. As Legum wisely remarks: "... the reality is that no organisation like the OAU can hope to survive once it attempts to intervene - however good the reasons - in the internal conflicts of one of its members."

Non-intervention also took centre stage at the 1979 OAU AHSG. An unsuccessful effort was made by Libya to exclude President Sadat (Egypt) following Egypt's peace treaty with Israel; the Western Sahara dispute was discussed; and the Tanzanian invasion of Uganda provoked such acrimonious recriminations that OAU Chairman President Tolbert (Liberia) 'ruled that... all remarks made by President Binaisa (Uganda) (be) deleted from OAU records'. In closing the Uganda debate, President Toure (Guinea) is alleged to have remarked that: 'The OAU was not a tribunal which could sit in judgement on any member state's internal affairs.' Of course, Resolution 115, which proposed an African charter, sought to do just that.

Statehood', 35 World Politics 1 (1982), 19.
48 See Amate, Inside the OAU, pp.440-45.
52 Reported by Africa Diary September 17-23 1979, 9686.
53 On the grounds that the OAU AHSG was not a forum for criticism of African heads of state. Reported by Africa Research Bulletin July 1-31 1979, 5329.
Non-interference

The 1958 All-African Peoples’ Conference in Accra, Ghana\(^55\) denounced the ‘artificial frontiers drawn by imperialist Powers to divide the peoples of Africa...of the same stock’ and called for ‘the abolition or adjustment of such frontiers at an early date’.\(^56\) However, as more African states became independent, the idea of boundary adjustments merely created a destabilising distraction and uncertainty. By 1963, the necessity of recognising fixed boundaries had become for many smaller African states the key issue of African regional politics. The importance of the issue was such that many contemporary commentators suggested that agreement at the Addis Ababa Summit Conference would not have been possible without the bigger states allaying the fears of the smaller states.\(^57\) Kodjo suggests that: ‘...the OAU was founded above all in order to freeze the crises and stabilize the political map of Africa fashioned by colonial partitioning...the Organization of African Unity was first and foremost a political body with a well-defined objective, ie maintaining the original geographic form for the new states.’\(^58\)

Speeches at the Addis Ababa Summit Conference anticipated the problems that would arise. For example, President Diori (Niger) pointed out that cooperation must be:

‘...based on reciprocal respect and esteem, brotherly trust, excluding all desire for ethnical, ideological, religious or economic pre-eminence, sincerely repudiating any attempt to settle possible differences by force, any interference in the domestic affairs of nations, any direct or indirect support of subversion.’\(^59\) Prime Minister Balewa (Nigeria), in a reference to Ghana, declared: ‘... if we want this unity in Africa we must first agree to certain essential things: the first is that African states must respect one another...we


\(^{56}\) See C. Legum, ‘The Organization of African Unity’, 231. The readjustment of boundaries was felt to be in Ghana’s ethnic and political interests at that time.


\(^{59}\) SUMMIT CIAS/GEN/INF/19, 3.
cannot achieve this African unity as long as some African countries continue to carry on
subversive activities in other African countries... '60 The one dissenting voice was that of
President Osman (Somalia): 'It has been suggested...that any attempt to adjust existing
boundary arrangements would aggravate rather than ease the situation and for that reason
matters should remain as they are. We do not subscribe to that view.' 61

This concern of the smaller states was reflected in the OAU Charter. The Preamble refers
to a 'determination to safeguard and consolidate the hard-won independence as well as
the sovereignty and territorial integrity of our states'; and the first five (of seven)
principles set out in Article III confirm the basis on which the relationship between
member states is to be conducted. 'Sovereign equality'; 'non-interference in...internal
affairs'; 'respect for... sovereignty and territorial integrity'; 'peaceful settlement of
disputes'; and 'unreserved condemnation of...political assassination as well as of
subversive activities'. 62 To support peaceful settlement of disputes, Articles VII and XIX
provided for a Commission of Mediation, Conciliation and Arbitration as one of the
OAU's principal institutions. However, as a later report regretted, the Commission 'has
been virtually dormant since its establishment' as 'not a single Member State had paid its
assessed contribution' and 'not even one dispute had been referred' to it. 63

The express obligations of the OAU Charter notwithstanding, border disputes between
member states were not easily contained. A few months after the Addis Ababa Summit

60 SUMMIT/CIAS/GEN/INF/35, 1-6 quoted by Padelford, 'The Organization of African Unity', 532,
version has a slightly different wording.
61 SUMMIT CIAS/GEN/INF/25, 5, quoted by Boutros-Ghali, 'The Addis Ababa Charter', 30. Amate,
Inside the OAU, p.405 points out that when Morocco joined the OAU a few months later, it added a
reservation that its membership did not imply acceptance of existing boundaries or that existing rights were
renounced.
62 Elias, 'The Charter of the Organization of African Unity', 249, Y. el-Ayouty, (Ed.), The Organisation of
African Unity after ten years: comparative perspectives (New York, 1976), pp.112-13 and Amate, Inside
the OAU, p.62 point to the influence of the assassination of President Olympio (Togo) on the drafting of
this Article.
63 CM/1767 (LVIII), 5-9. In 1970, it was downgraded from a permanent to an ad-hoc body of the OAU;
and in 1973 there were communications 'from a certain number of states requesting that the Commission be
purely and simply abolished' (see CM/1767 (LVIII), 26). See also M. Wolfers, Politics in the Organisation
Conference, disputes had broken out in most parts of Africa.\textsuperscript{64} In view of the importance of this issue to the integrity of the OAU, unlike other matters, it could not be passed over in silence, and it became essential to restate the principles of non-interference more forcefully. At the 1964 OAU AHSG, a resolution was therefore passed re-affirming respect for the principles of Article III, specifically ‘non-interference in the internal affairs of states’, and pledged ‘to respect the borders existing on their achievement of national independence’.\textsuperscript{65}

In the early years, non-interference was largely understood as upholding the integrity of OAU unity. However, by the mid-1970s, it became apparent that non-interference was no longer a question of legitimacy or sovereignty, but had been commandeered by both the old and new generations of African leaders as a shield against criticism of their domestic policies, even when the impact of those policies was felt in neighbouring states. It was, nevertheless, felt to be such an important principle that, at the 1979 OAU AHSG, even moderate Nigeria saw in the Tanzanian invasion of Uganda an interference that threatened the OAU, not a ‘trump’ card of human rights. As Thiam (Head of Delegation, Chad) explained to the UNGA: ‘We... deplore intervention by one African state in the affairs of another because of opposition to the policies of its government. Where the pre-eminent right to self-determination is not involved such intervention can only damage the structure of African peace and security built on the principles of the OAU.’\textsuperscript{66}

Surprisingly, therefore, the ACHPR felt it necessary to remind member states that ‘territories shall not be used as a base for terrorist or subversive activities against...any other state’.\textsuperscript{67}


\textsuperscript{65} AHSG /Res.16 (I) (see OAU Resolutions).

\textsuperscript{66} A/34/PV.1-32 3 October 1979, Para 164.

\textsuperscript{67} ACHPR Article 23 (2)b.
Self-determination

If non-interference was the political necessity, self-determination was the emotional necessity and aspiration at the heart of the OAU Charter. As Emperor Haile Selassie, in his opening address, declared: 'Our liberty is meaningless unless all Africans are free.' This was, probably, a deliberate echo of President Nkrumah's (Ghana) declaration that: 'Ghana's freedom would be meaningless if it was not linked with the total liberation of the entire continent of Africa.' There is in this, and many similar sentiments voiced by the other heads of state, a genuine sense of shared personal and political experiences arising out of the independence movement. As President Nyerere (Tanzania) noted: 'There now exists a strong feeling of unity on the continent. It is an emotion that has grown out of the struggle for freedom.' Similarly, President Ahidjo suggested that: '...this aspiration towards Unity has figured...in the programmes of all African nationalist parties who have fought...for the liberation of their territory.' It was an emotion and aspiration that possibly rescued the Addis Ababa Summit Conference from failure as, mired in personal differences and political conflicts, it needed President Ben Bella (Algeria), recalling the support he had received from other African countries in Algeria's struggle for liberation, to redirect the hearts and minds of the heads of state back towards the need for agreement if total liberation was to be achieved. He proposed that: 'We must all agree to die a little... Cervenka described this emotional unity as the 'Spirit of Addis Ababa.' It prompted Prime Minister Abboud's (Sudan) perception that: 'We are gathered today to strive for the liberation of... this dear Continent where

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70 SUMMIT CIAS/GEN/INF/10, 1.
colonialism (sic) wages its last desperate battle'\textsuperscript{73}; and President Tombalbaye's (Chad) explanation that: 'African unity means all the forces of the continent united for the total liberation of the continent.'\textsuperscript{74} Kodjo, reflecting on the enduring predominance of this emotion, concluded that: 'The last generation of Africans made political struggle for decolonization an ideal.'\textsuperscript{75}

The importance attached to the question of self-determination was reflected in its placement as the opening line of the OAU Charter: 'Convinced that it is the inalienable right of all people to control their own destiny.' In Article II one of the Purposes is 'to eradicate all forms of colonialism from Africa'; and Article III confirmed the: 'Absolute dedication to the total emancipation of the African territories which are still dependent.' The first resolution of the Addis Ababa Summit Conference also addressed the issue of decolonisation: 'Reaffirming that it is the duty of all African Independent States to support dependent peoples in Africa in their struggle for freedom and independence'; the second resolution addressed Apartheid and Racial Discrimination: 'Unanimously convinced of the...urgent necessity...to put an end to the South African Government's criminal policy of apartheid...'.\textsuperscript{76} The importance of self-determination was further recognised by the formation of a Liberation Committee that convened one month later, several months before even the OAU Secretariat was established.\textsuperscript{77} May 25, the closing day of the Addis Ababa Summit Conference, was designated as Liberation Day for the whole of Africa.\textsuperscript{78}

Self-determination naturally emerged as the primary foreign policy goal of the OAU; and the UN as the principal forum and fulcrum for pursuing that goal. In fact, the opportunity which the UN represented had been recognised a few years earlier. The 1958 CIAS in

\textsuperscript{73} SUMMIT CIAS/GEN/INF/5, 1.
\textsuperscript{74} SUMMIT CIAS/GEN/INF/24, 1.
\textsuperscript{75} Kodjo, \textit{Africa Today}, p.65.
\textsuperscript{76} See CIAS/Res.2 (See OAU Resolutions).
\textsuperscript{77} Amate, \textit{Inside the OAU}, p.214.
Accra, Ghana had established, on an informal basis, an African Group at the UN, a caucus aimed at coordinating African opinion for greater effectiveness. This arrangement was supplemented in 1960, following the Brazzaville Conference, by a parallel grouping of French-speaking African states. At the Addis Ababa Preparatory Conference, therefore, UN representation was discussed as a matter of essential importance, with confident predictions that African unity will raise the prestige of African states in the councils of the world. The political mathematics were compelling. African representation at the UN rose from eight in 1959 to approximately one-third in 1963, but the effectiveness of this voting block was considerably enhanced by political and tactical collaboration with other lesser developed countries and, in particular, the Soviet Bloc.

The African Group achieved an immediate success when the UN was persuaded, in late 1963, to increase the number of non-permanent representatives of the Security Council from six to ten; with African representation determined at three seats. ECOSOC was also increased in size to cater for the increased representation of the African and other emerging countries. However, representation was merely a means to an end. That end was an agenda and resolutions more suited to the interests and aspirations of the OAU. Akpan asserts that the three primary goals for the African Group in the period 1967-74 were: Political freedom for all of Africa; elimination of racial discrimination; and economic and technical assistance for economic progress. Cervenka also observed that: 'The African members have always regarded the United Nations first of all as an instrument for fighting colonialism and racial discrimination.'

The approach adopted by the OAU was to demand compliance with the UN Charter and the UD; a strategy that had been developed earlier at the 1955 Bandung Conference, which, in its final communiqué, had ‘...declared its full support of the fundamental

80 Discussed within Committee 1.
82 Cervenka, The Organisation of African Unity, p.103.
principles of Human Rights as set forth in the Charter of the United Nations and took note of the Universal Declaration of Human Rights... (and)... declared its full support for the principles of self-determination... as set forth in the Charter of the United Nations... (as) a prerequisite of the full enjoyment of all fundamental Human Rights'; 83 It was impossible to refute this textual logic, particularly when backed by a majority in the UNGA; and it was used to devastating effect to influence resolutions at the UNGA. As Rateb pointed out: 'A number of UN resolutions, declarations and conventions have defined and widened the sphere of its (the UD) application' in the direction of apartheid, racial discrimination and colonialism. 84 Similarly, van Boven reflected that: 'In no other area did the UN proclaim and defend human rights principles with so much vigour as in the fields of decolonization and racial discrimination' 85 Ferguson suggests that: 'From 1946 to 1978 in the General Assembly alone, there have been more than 400 resolutions concerning the racial policy of South Africa.' 86 So successful was this campaign that, already in 1966, ECOSOC 'contrasted the frequent publications by UN bodies of human rights complaints regarding dependent areas and South Africa with the private treatment of complaints regarding other areas'.

Murray argues that: '...the OAU used human rights standards in the context of what was seen as a liberation struggle. As a result, it looked at a variety of human rights-related issues and in its condemnation of apartheid drew upon these tools to support its position.' 88 This is a somewhat partial view and, perhaps, indicative of why Africans felt the need to assert an African conception of human rights. The African conception was that colonialism and apartheid were not merely a 'liberation struggle' or 'human rights-related issues', they were fundamental human rights that were endorsed by the UN

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84 See SO 216/3 (17) BP.A, prepared by Rateb, Professor of Law, Cairo University.
Charter and the UD. Moreover, for Africans, such human rights were, as M'baye argued: '...the first human rights in that all the others are dependent on it.'

This emerging African assertiveness that sought to define human rights exclusively with African interests in mind, and to deploy the UN Charter and the UD in its support, is apparent in the consistently-expressed world-view of the African states from 1963 onwards; it is expressed in the OAU Charter, in the African Group's lobbying at the UN and, finally, in the text of the ACHPR. It is particularly apparent in the consistent effort to deploy Articles 2.7 and 39 of the UN Charter against apartheid, which can be traced from the OAU Charter through to the ACHPR. Article 2.7 provides that 'nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'; it connects with Article 39 which authorises intervention in the event 'of any threat to the peace, breach of the peace, or act of aggression' and empowers the UN to 'make recommendations...to maintain or restore international peace and security'.

The OAU Charter makes reference to the UN Charter and the UD in its Preamble and Article II, but only on the basis that the OAU is persuaded that they 'provide a solid foundation for peaceful and positive cooperation among States' and in order 'to promote international cooperation'. This seems an unnecessarily clumsy formulation by which to make an outright commitment to the UN Charter and UD, if, indeed, that was the intention. A more likely intention is that the reference is to Articles 2.7 and 39 of the UN Charter, with apartheid in mind. This is suggested because there is a continuity from the first usage of 'world' or 'international' peace and 'cooperation' or 'security' for that purpose in the 1955 Bandung Conference, and, thereafter, in resolutions of the 1958 and 1960 CIAS; and in the resolutions of both the 1961 Monrovia and Casablanca.

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90 Final Communiqué Bandung Conference D. Problems of dependent peoples.
Conferences. The probability is further reinforced by its continuing usage by the OAU for the same purpose in UNGA resolutions and in the ACHPR.

For example, as described earlier, the principle of non-intervention has always been fundamental to the OAU’s integrity; however, at the same time, the OAU has always insisted it cannot be applied to South Africa. The OAU has, therefore, consistently argued that apartheid represents a threat to ‘international peace and security’. In 1965, following a series of aggressive security measures by South Africa in maintenance of its apartheid policy, the OAU secured a UNGA resolution which drew ‘the attention of the Security Council to...a threat to international peace and security, that action...is essential in order to solve the problem of apartheid and that universally applied economic sanctions are the only means of achieving a peaceful solution’. It was not an interpretation that the OAU would have welcomed in respect of conflicts in the Congo, Nigeria or Uganda, or indeed in any member state.

This continuity of intent is then reflected in the wording of the ACHPR (fifteen years after these two UNGA resolutions). In the Preamble, the OAU reaffirms: ‘...the pledge they solemnly made in Article 2 of the...(OAU) Charter to eradicate all forms of colonialism...and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration...’. This reaffirmation is further reinforced by: ‘...their duty to achieve the total liberation of Africa... and to eliminate colonialism, neo-colonialism, apartheid...’ The intention behind this drafting was clearly identified by Kodjo in his report to the OAU CoM: Emphasis was laid ‘on the Principles


92 UNGA 20/2054A. It was on this interpretation of the UN Charter that sanctions and the removal of South Africa from the UN were eventually effected.

93 Six days later, in response to South African economic sanctions against frontline states, the African Group sponsored UNGA 20/2131 21 December 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, which argued that non-interference, including any boycott or sanctions, by member states was absolutely inadmissible under
and objectives of the OAU as defined in Article 2 of the Charter... with particular reference to... absolute dedication to the total emancipation of African territories which are still dependent. 94

The predominant place of apartheid in the OAU’s definition of human rights was further reflected in Articles 19, ‘Nothing shall justify the domination of a people by another’, and Article 20, ‘All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination’, of the ACHPR. It is, no doubt, for this reason that M’baye, in his drafting of Resolution 115 and the 1985 Nairobi Declaration (aimed at prompting ratification), felt compelled to give prominence to apartheid as a justification for an African charter. 95

The OAU’s successful campaign against colonialism and apartheid can be compared with an equal and opposite indifference to the wider UN human rights agenda of promotion, standard-setting and implementation. It suffices to say that, until the Monrovia Seminar, there was no OAU representation at any UN human rights conference in Africa with the exception of the 1971 Addis Ababa conference. The OAU made no submission to the 1968 UN Tehran Conference 96 and was the only regional organisation not to present a report. 97 Significantly, the OAU was represented at Tehran by its Head of the Bureau of Sanctions and Decolonization, reflecting its priorities. It is also a matter of record, in almost every UN human rights conference in Africa, that member states have a poor record of ratifying UN human rights instruments.

94 CM/1148 (XXXVII), 1.
Development

In the first instance, self-determination was a demand for political independence, but, beyond that, it was a declaration and demand for an economic, cultural and ideological independence that was perceived to be threatened by neo-colonialism or neo-imperialism. President Nkrumah had defined neo-colonialism as a situation in which ‘the state which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality, its economic system and thus its political policy is directed from outside.’\(^\text{98}\) Moreover, employing Lenin’s analysis of imperialism as the highest stage of capitalism, Nkrumah was also to argue that: ‘...neo-colonialism...can be more dangerous to our legitimate aspirations of freedom and economic independence than outright political control’.\(^\text{99}\) The importance of the OAU as an offensive shield against neo-colonialism was proclaimed by several heads of state at the Addis Ababa Summit Conference. For, example, President Bouguiba (Tunisia) envisaged the OAU as intended to ‘complete the decolonization of the continent...to mobilize all material and moral resources...to combat underdevelopment ...to set the seal on the political and economic emancipation of Africa.’\(^\text{100}\); and Prime Minister Obote (Uganda) explained that: ‘We have gathered here to...advance...the revolt against foreign rule and economic and social domination.’\(^\text{101}\)

These sentiments were reflected in the OAU Charter. The Preamble referred to a ‘responsibility to harness the natural and human resources of our continent for the total advancement of our peoples’ and a determination ‘to fight against neo-colonialism in all its forms’; and Article II of the need ‘to eradicate all forms of colonialism from Africa’ and ‘to coordinate and intensify...cooperation and efforts to achieve a better life for the

\(^{98}\) G-C.M. Mutiso/S.W. Rohio (Eds.), Readings in African Political Thought (London, 1975), p.413, quoting K. Nkrumah ‘Neo-Colonialism: the last stages of imperialism’. Although published in 1965, it was a recapitulation of his many earlier speeches and writings on neo-colonialism.


\(^{100}\) SUMMIT CIAS/GEN/INF/8, 1.

\(^{101}\) SUMMIT CIAS/GEN/INF/15 and Transcript of tape of Heads of State Reel #6, Page 3.
peoples of Africa'.

Behind these sentiments, however, there was a far deeper grievance that gradually emerged into the international arena throughout the 1960s and into the 1970s as political independence translated into economic failure. This failure was attributed not to post-colonial domestic policies but to inequities, past and present, of colonialism and, what is often described as, the international economic order. As Welch observed, there was 'a sense of deep resentment against the economic backwardness of much of the continent, the consequence...of colonialism and the “development of underdevelopment”'.

This resentment is captured by Fanon, with whose writings most first generation African leaders were familiar: 'We are not blinded by the moral reparation of national independence, nor are we fed by it. The wealth of the imperial countries is our wealth too...Europe has stuffed herself...with the gold and raw materials of the colonial countries...help should be...the realization by the colonized peoples that it is their due, and the realization by the capitalist powers that in fact they must pay.'

This was a philosophy and assertiveness that was to assume a greater part in African approaches to international negotiations. For example, the US State Department noted that: ‘...there is a growing sense of economic and political grievance against the developed countries and a search for ways to organize economic pressure against the rich. The Africans want greater control over their own natural resources and foreign enterprises...’; and went on describe this grievance as having ‘an unmistakeable, emotional element...’

It is hardly a coincidence, therefore, that it is only since 1960, as African states emerged into independence, that: ‘...the United Nations began to give attention to the concept of development’; and that it was ‘originally conceived of as a right of political communities,

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states and people subjugated to foreign and colonial domination. In 1972 M’baye was to combine this sense of resentment with President Senghor’s philosophy of the ‘Development of Man’ into a formal theory of the right to development. M’baye proposed that ‘development is the right of all men. Each man has the right to live better’. He argued that this is a collective right owed by the international community. It arises from historic exploitation and continued inequities, which (again) threaten ‘international peace and security’, but also from the move towards a system of international relations based on solidarity, which demands greater equality. Moreover, this right is inherent in Articles 55-56 of the UN Charter and Articles 22-27 of the UD, and also the International Covenants; it has therefore descended from ‘the sphere of morals to that of law. As a result of lobbying by M’baye and others, in 1977, the CHR passed a resolution recommending that the UN Secretary-General investigate ‘the international dimensions of the right to development as a human right, in relation with other human rights based on international cooperation including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental of human needs’. The resulting report of the Secretary-General found a ‘moral duty of reparation for the under development caused by colonial and neo-colonial exploitation’, thereby vindicating M’baye’s interpretation of the UN Charter and UD. In this way, Vice-President Alier (Sudan) could explain to the UNGA: ‘Human rights questions cannot be considered in isolation from their economic, social and political aspects...it would be illogical and

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unfair to demand human rights for individuals alone, while whole nations and communities are denied basic rights.'

These aspirations also found a place in the ACHPR. Although Article 17 allows that 'Every individual may freely, (sic) take part in the cultural life of his community', emphasis is increasingly placed on economic and not cultural or ideological independence. Thus, the Preamble stresses that 'it is henceforth essential to pay a particular attention to the right to development', but it is proposed in the context of the relative equality of economic rights with civil and political rights. Moreover, economic sentiments are particularly expressed by Article 21, in which reference is made to the right to 'freely dispose of their wealth and natural resources' and to the obligation 'to eliminate all forms of foreign exploitation, particularly that practiced by international monopolies'; and by Article 22, which places an obligation on States 'individually or collectively to ensure ... the right to development'.

However, in a parallel development, with obvious intellectual comparison to the ACHPR, in 1976, the OAU AHSG adopted the Cultural Charter for Africa. The Preamble states: 'that cultural domination led to the depersonalisation of part of the African peoples, falsified their history, systematically disparaged and combated African values...'

The aims of this charter were: 'to liberate the African peoples from socio-cultural conditions which impede their development'; and 'the combating and elimination of all forms of alienation and cultural suppression everywhere in Africa...'

The Cold War ideological overlay

For African heads of state, the Cold War was a two-edged sword; both an opportunity and a threat to personal political survival. For the OAU, it carried a major threat to African unity. It was particularly with the latter in mind that many African leaders looked to a

110 A/34/PV.1-32 Official Records of the General Assembly 34th Session Plenary Meetings, verbatim records of 1st to 32nd meetings 18th September - 12th October 1979, Para 64.
111 AHG/Res. 82 (XIII).
formal OAU policy of non-alignment as a means of limiting the scope for intra-African conflict. The OAU Charter included an ‘Affirmation of a policy of non-alignment with regard to all blocs’ as one of its foundational principles; and was supplemented by a resolution at the Addis Ababa Summit Conference on General Disarmament (repeated at the 1964 OAU AHSG), in which both the Soviet Union and the USA were asked ‘to use their best endeavours to secure the objective(s)...’  At the 1964 OAU AHSG this policy was reinforced by a decision ‘that in the interest of African unity all of the OAU member-states were to join the non-aligned movement and adopt non-aligned policy in their relations with the East and the West.’ Non-alignment from this perspective was intended neither as neutrality nor even-handedness but as a further extension of African post-colonial political assertiveness. It was described by Nkrumah as a position in which: ‘We examine international problems in the light of our national interests and of the interests of Africa...’

As with so many of the OAU’s good intentions, this policy of non-alignment was much honoured in the breach as African heads of state naturally placed personal interests and political survival over ill-defined notions of African or national interests. The history and detail of this breach largely fall outside the scope of this dissertation. It is sufficient to note with Naldi: ‘Conceived and born during the Cold War and the liberation struggle, the OAU remained in that mindset for a generation.’ It is, however, primarily with the second phase of decolonisation in the mid-1970s and the Ethiopian revolution that the Cold War consequences for the process of the ACHPR become apparent and of essential relevance to this dissertation.

Independence for the former Portuguese colonies and the Ethiopian revolution of 1974, brought into power heads of state who owed much of their position and future prospects

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112 See Agenda Item 3 1963; and AHG/Res.11(I), 1964.
113 Amate, Inside the OAU, p.25.
to the support of the Soviet Union. Their allegiance can be best illustrated by Mozambique's application to join Comecon in 1980 and by President Mengistu's (Ethiopia) annual May Day parade of giant portraits of Lenin. More significantly, in terms of the prospects for an African charter, it produced a significant shift in the basis of OAU politics, in that it brought about a loose, but quite significant, ideological block of states aggressively opposed to the West and Western ideas. That block extended from the extreme 'radical' states of Angola, Dahomey/ Benin, Ethiopia, Guinea-Bissau and Mozambique to socialist fellow-travellers of varying degrees such as Guinea, Libya, Madagascar, the Seychelles, Somalia and Tanzania. That, in turn, forced the creation of a counter-bloc of so-called 'moderate' states, with only a few uncommitted states such as Nigeria, Kenya, Ghana and Botswana left to maintain a precarious and uneasy balance. It also led to a weakening of the, already, low level of cohesion of the OAU AHSG, as had been feared by the heads of state in 1963-64. As Amate records, by 1977, a position had been reached in which the two blocs of 'radical' and 'moderate' states would regularly meet prior to OAU CoM and OAU AHSG deliberations in order to coordinate policy. In 1978, Kodjo, on taking office, was to warn that: 'Our ancient continent is now on the brink of disaster, hurtling towards the abyss of confrontation, caught in the grip of violence, sinking into the dark night of bloodshed and death.' Finally, in 1982, it was to lead to a break-down of the OAU itself with the failure of the 1982 OAU AHSG in Tripoli, Libya to achieve a quorum as a result of a mass boycott by over twenty of the 'moderate' states.

In such circumstances of fracture within the OAU polity, any debate over an African charter could hardly remain immune from Cold War ideological politics; all the more so

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116 The most unfortunate loser was, of course, Somalia, which, in 1977, was abandoned by the Soviet Union in favour of much larger and more strategic Ethiopia. See Clapham, *Africa and the International System*, p.152 and Andrew/Mitrokhin, *The Mitrokhin Archive II*, p.458.


120 Ibid, p.23.


as a parallel ideological war was being fought over the course of human rights in the UN in which the Soviet bloc and the African Group were arrayed together on the same side. As will be more fully described in Chapter Three, the main vocal opposition to the ACHPR came from the core group of ‘radical states’ who saw in the proposal for an African charter the hand of the USA, and, in particular, of President Carter. That perception played into the hands of other heads of state who were either opposed out of personal antipathy towards interference and protective of sovereignty, or opposed what they saw as neo-colonialist ideology. It was, in this way, possible to wrap opposition to human rights within various shades of anti-Westernism. Even as late as 1998, UN Secretary-General Annan was to observe that: ‘...some Africans still view the concern for human rights...as a conspiracy imposed by the industrialised West.’ If an African charter proposal was to succeed, it had, therefore, to overcome several layers of ideological and self-interested opposition. The ideological struggle was stressed as an essential element of the process by Kodjo and Fall, and by Jallow, who noted that: ‘This ideological and political cleavage was to haunt and dog the drafting of the Charter and...to threaten the integrity and survival of the process.’ From the perspective, even, of the UNDHR, Ramcharan also emphasised the difficulties of negotiating an agreement in the face of such virulent disagreement over principles.

124 Kodjo Interview 2007 and Fall Interview 2008.
126 Ramcharan Correspondence 2008.
Chapter Two: The Outsiders

There is broad complicity within the historiography of the ACHPR that African political excesses throughout the 1970s, in particular President Amin, Emperor Bokassa and PresidentNguema, prompted a confrontation with Western public opinion that led directly to the decision of the OAU AHSG to adopt the ACHPR. That confrontation was supported by the promotional activities of the UN and an international climate of opinion that increasingly focused on human rights considerations. There is, however, much less complicity, or even explanation, as to the precise nature of that confrontation and the causal chain of events linking confrontation to adoption by the OAU AHSG of the ACHPR. Too often, it amounts to little more than a recital of the abhorrence felt by Western public opinion, European and US aid policies and a list of UN seminars promoting regional commissions of human rights. The aim of this chapter, therefore, is to look at human rights in Africa from the outside and consider the various means by which Western public opinion might be said to have sought to confront, or, at least, engage with, African heads of state; and to assess the extent to which such confrontation or engagement contributed to a political climate in which African heads of state, whether willingly or reluctantly, agreed to adopt, first, Resolution 115 and, thereafter, the ACHPR itself. The dissertation will focus on the specific actions of the US Congress (and Carter Administration), the UN and the ICJ standing as proxy for governments, multilateral agencies and NGOs more generally.

The US Congress (and Carter Administration)

The importance of US interest in human rights reflected the USA’s influential position in the UN and other multilateral agencies and the financial resources that it was able to deploy at its discretion from both the public and private purse. Publicly, the USA dispensed substantial aid and subsidies through a variety of Federal agencies. Privately,

127 'Western' rather than 'international' public opinion is preferred due to the leading role played by public opinion in the USA and Europe.
the USA supported the most numerous base of human rights NGOs with the deepest pockets of funding. However, US interest also emerged at a time when, as described in Chapter One, the UN human rights agenda was under the effective control of the OAU, and it therefore assumed an even greater importance as an alternative forum for human rights discourse. It was an importance that was promptly recognised by human rights NGOs. Amnesty opened an office in Washington in 1976, and, in the following year, a Human Rights Working Group of thirty NGOs was formed to coordinate the lobbying activities of international human rights groups.128

The first tentative steps towards a US human rights policy were taken in 1973 by Rep. Fraser in the House Foreign Affairs Subcommittee on International Organizations and Movements, which opened hearings on a range of human rights issues. The Subcommittee’s 1974 Report129 argued that ‘...consideration for human rights in foreign policy is both morally imperative and practically necessary’;130 and that: ‘the human rights factor is not accorded the high priority it deserves in our country’s foreign policy’.131 In the following year, the Subcommittee examined the human rights record of eighteen countries.132 This was the beginning of a more active involvement by the US Congress in matters of human rights and its relation to foreign policy. In particular, the US Congress began to insert a series of legislative amendments designed to circumscribe US support to countries violating human rights.

It was felt that military aid was the appropriate starting point as it was invariably through the use of military supplies that regimes were able to abuse due process and maintain

129 ‘Human Rights in the World Community: A call for US leadership’.
132 None of them African. Countries are listed in Weissbrodt, ‘Human Rights Legislation and U.S. Foreign
themselves in power.\textsuperscript{133} Thus, s32 of the 1973 Foreign Assistance Act noted that: ‘...it is the sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country’s citizens for political purposes.’\textsuperscript{134} Doubts about the State Department’s compliance with this amendment led to s502b of the 1974 Foreign Assistance Act requiring that the President reduce or terminate military assistance to: ‘Any country which engages in a consistent pattern of gross violations of internationally recognised human rights’. Further tightening was applied to the 1975 and 1976 Foreign Assistance Acts, and, in 1978, the US Congress further required the Administration to make a full human rights report on every country obtaining assistance. The US Congress also inserted an amendment asserting that: ‘A principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognised human rights by all countries.’\textsuperscript{135} In response to the Administration’s continued reluctant compliance, the Fraser Subcommittee held further hearings in 1976 on the human rights status of eighteen countries,\textsuperscript{136} and the Senate and House Foreign Policy Subcommittees required the State Department to provide assessments on the human rights record of nineteen countries.\textsuperscript{137} By 1977, the Administration was obliged to issue status reports on 82 countries.\textsuperscript{138}

Shortly thereafter, restrictions were also applied to economic and financial aid. In 1975, s116 of the International Development and Food Assistance Act required that: ‘No ...assistance may be provided to a government which engages in a consistent pattern of

\textsuperscript{138} R. Cohen, ‘Human Rights decision-making in the Executive Branch’, p.224.
gross violations of internationally recognized human rights. 139 S116 also required US representatives at international financial institutions to vote against all loans to ‘a government which engages in a consistent pattern of gross violations of internationally recognized human rights’. This was supplemented by s611 of the 1978 Foreign Assistance and Related Program Appropriations Act which sought a change in the charter of international financial institutions requiring human rights considerations to be applied automatically to loan applications; and also to disbursements under the IMF Supplementary Financing Facility. 140 As a result, starting in 1976 with opposition to an IADB loan to Chile: 141 ‘By the end of 1978, the U.S.A. had opposed 52 loans to 16 countries on human rights grounds...In several other instances countries were advised that the human rights concerns...would result in a negative vote.’ 142

The US Congress’ human rights policy stance was strengthened in 1977 by the election of President Carter. In the course of his election campaign, he had indicated that: ‘We should begin by having it understood that if any nation, whatever its political system, deprives its people of basic human rights, that fact will help shape our people’s attitude towards that nation’s government.’ 143 His inaugural address stressed that ‘commitment to human rights must be absolute’; and, in a major foreign policy address at Notre Dame University in May 1977, that ‘we have reaffirmed America’s commitment to human rights as a fundamental tenet of our foreign policy’. 144 These words were backed up by a commitment to the UN of US intent to ratify the two International Covenants of 1966 and an application to the US Congress for ratification of the American Convention on Human Rights.

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Human rights aids considerations were not directed specifically at African countries. US interests in sub-Saharan Africa were, after all, '...modest and will remain so when compared to our interests elsewhere in the world.' The USA, inevitably, placed a higher priority on its interests with Latin America and the Soviet Bloc. That, in part, explained why Africa was relatively under-represented in the list of countries whose human rights record was now under annual Congressional scrutiny. However, given the political complexion of many African regimes, it was inevitable that independent African states seeking aid would be caught up in the process. In due course, Mauritania, Zaire, Central African Empire, Malawai, Guinea and Ghana were all warned that they demonstrated a 'consistent pattern of gross violations of internationally recognized human rights'. Military assistance to Ethiopia was suspended in 1977, and, despite strong political support for Zaire, in 1978, President Mobuto (Zaire) was also warned about his human rights record. That same year, aid was suspended to the Central African Empire; Mozambique and Angola were excluded from the aid budget due to poor human rights records (although communist sympathies may have played some part) and also, together with Zambia and Tanzania, excluded in 1979, unless the President determined otherwise on foreign policy grounds. However, it was Uganda that became the most prominent test case for human rights action. By 1978, it was US policy 'consciously to distance the United States from human rights violations in Uganda... while actively encouraging...action by the international community as a whole'. The US Congress imposed specific restrictions on military supplies and a much wider trade embargo, and also requested President Carter to pursue an international embargo. The Carter

146 The military had overthrown democratically-elected civilian regimes in Chile (1973), Uruguay (1973) and Argentina (1976).
147 See Foreign Relations 1969-75 Volume E5 Documents on Africa 1969-72. Secretary of State Kissinger's briefing to Nixon 24-25 February 1970 on his recent visit to Africa noted that Kenya, Ethiopia, Ghana, Cameroun and Morocco had all requested either military supply or other economic aid.
Administration, too, banned all aid and instructions were given to representatives to veto all loan applications in international development banks.

The inability of the Soviet Union to fund its African patrons with hard cash as opposed to weaponry obliged many African countries to turn to the USA and Europe as primary providers of development aid.\(^{151}\) It was understood that that necessitated some adjustment in behaviour. For example, the 1973 US/UK Foreign Relations consultations noted the reliance of African leaders on military and financial aid and their recognition of the need to respect the wishes of donor countries.\(^{152}\) However, although the examples given above of aid suspensions indicate that Congressional human rights policy barked, it is less than clear that it had any bite. As Clapham points out: "...it may be assumed that African leaders sought to maximise their own security."\(^{153}\) Aid was only one small part of that calculation, and then only to the extent that it supported that primary aim. Moreover, there was also a suspicion, almost certainly justified, that there was a discretionary element in US aid decisions that had more to do with the Cold War and US trade interests than with human rights; President Mobuto was a particular case in point.\(^{154}\) This muddied the basis and reception of the human rights message that US aid restrictions were intended to send and suggested that a change in political rhetoric was more effective than a change in political method. As a result, therefore, there is little evidence that aid policy prompted any essential change in African attitudes or compelled African states to turn to an African charter.\(^{155}\) The evidence of the failure of aid policy to force change was further demonstrated by the rejection of even the modest demand of the EEC for a statement on human rights to be incorporated into the Lome II agreement to appease European public

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154 ibid, p.191.
155 Further research in US State Department archives and, where possible, African foreign ministry files would be most helpful here.
a direct linkage having been rejected outright from the outset. By 1980, too, President Reagan had replaced President Carter with a consequent down-grading of human rights as a US foreign policy concern; information that was available to African heads of state ahead of the second Banjul Meeting and well in advance of the 1981 OAU AHSG that adopted the ACHPR, further reducing any perceived threat or need to comply with Western calls for human rights compliance.

Ironically, the involvement of the USA in human rights agitation may have actually been counter-productive. As Fall, Kodjo and Ramcharan all stressed, negotiations over the ACHPR took place against the background of the Cold War. In that context, the identification of the USA and President Carter, personally, with an aggressive human rights policy in international relations immediately made the idea of an African charter suspect in the eyes of the ‘progressive’ African states. During the Lome II negotiations, the Ugandan representative was to argue that: ‘...human rights were viewed as a weapon in the Cold War which the United States was waging against the Soviet Union, and ACP countries did not want to be drawn into any similar circumstances of confrontation with Western Europe.’ Whilst this may have been a somewhat disingenuous argument in the Ugandan case, it certainly pandered, as was its intention, to the perceptions of many other African states towards human rights.

The UN

There has always been an ambivalence at the centre of the UN’s human rights mandate. The Preamble and Articles 1 (Purposes) of the UN Charter clearly indicate the importance to be attached to human rights in the post-war system of international relations, but are

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157 Fall Interview 2008, Kodjo Interview 2007 and Ramcharan Correspondence 2008.


159 The UD was only a Declaration, not a legally binding obligation. For an interesting explanation of the
directly opposed by Article 2.7, which equally clearly imposes a limit on the right to intervene in matters of domestic jurisdiction.\(^{160}\) The balance between these mutually exclusive principles has, therefore, largely been a matter of political interpretation in the UN and its agencies, notwithstanding the general inclination of most permanent staff at the UNDHR and CHR to support a more interventionist interpretation.

In 1947, recognising the political problems that would arise from intervention, the CHR issued what has been called its self-denying rule; that is 'a ruling denying that it has any authority whatsoever to deal with human rights complaints.'\(^{161}\) This rule was followed until the mid-1960s when, with the increase in UN membership of the newly-independent African states, the CHR was pushed to develop procedures for acting against human rights violations albeit with a strictly restricted mandate directed by the OAU.\(^{162}\) With the major exception of South Africa, (and Chile and Israel), therefore, the UN was, at best, reluctant to act against even well-publicised human rights violations. As Shestack observed: 'It is striking that all... examples... by... NGOs to restrain government abuses occurred outside of the UN structure. This is not an accidental trend.'\(^{163}\) The UN's limitations have nowhere been more apparent than in its approach to human rights violations in the newly-independent African states during the 1960s and 1970s, of which Uganda, following the military coup by General Amin in 1971, is the outstanding example.

The first approach to the CHR about Uganda was made in 1972 to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. It was dismissed over the Nigerian representative's objection that: '...he did not feel “the matter was related to


\(^{161}\) Korey, NGOs and the Universal Declaration of Human Rights, pp.5, 53.


\(^{163}\) Quoted in Korey, NGOs and the Universal Declaration of Human Rights, p.50.
human rights". Over the next few years, the ICJ submitted several reports and witness statements and published two major reports on Uganda. Further reports were also provided by other NGOs, such as Amnesty and the International League for the Rights of Man. In 1974, following further allegations, Uganda was reviewed under the Resolution 1503 procedure. At the insistence of CHR representatives, it was 'decided to postpone the matter for a year, apparently in order to give the Ugandan government further time to reply'. Two years later, in an unprecedented step, Uganda made a private submission to the CHR, which decided to take no action, allowing President Amin to claim that he had been 'cleared'. Shortly thereafter, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities recommended that an ad hoc committee undertake a 'thorough study of human rights violations in Uganda'. However, by 1977, Uganda had obtained membership of the CHR through President Amin's status as OAU Chairman for 1975/76, and the CHR, therefore, merely determined that the Uganda matter be kept 'under review'. Further information was presented in 1978, following the murder of Archbishop Luwum, but the CHR was denied permission by Uganda for an 'impartial' investigation' leaving the CHR to 'study' the situation without access to Uganda. In 1978, too, the CHR: '...took an undisclosed view on Uganda...after consultations...in confidential session.' Several other African countries were on the agenda for discussion but, as with Uganda, these were handled in private session. It

169 See Report on the Activities of the ICJ 1971-77, 12, 15 and Uganda and Human Rights, p.xiv
170 Archbishop Luwum was Primate of the Anglican Church in Uganda.
was only in 1979, after President Amin had been removed, that the CHR finally requested the appointment of a Special Representative to examine the situation.\textsuperscript{175}

The experience of Uganda at the CHR is not an argument that can be adduced to support the case for confrontation or engagement by the UN with African states in response to human rights violations; on the contrary, it supports the view that, before 1979, African countries were easily able to deflect criticism in the CHR against even the most serious of human rights violations and that the threat of UN sanctions was not taken seriously. Any impact was only marginal and indirect, in that it added further evidence of perceived African double-standards of human rights compromising the support the African Group could expect against apartheid in South Africa.

The other aspect of the UN's human rights mandate was promotion. In 1967, five African states\textsuperscript{176} sponsored a resolution at the CHR calling for an ad-hoc Study Group 'to study in all its aspects the proposal to establish regional commissions on human rights within the United Nations family.'\textsuperscript{177} Sponsorship of this resolution is adduced by most commentators\textsuperscript{178} as evidence, even at this early stage, of the desire of some African states to promote human rights in Africa. In fact, its background and history demonstrate quite conclusively the opposite; that the desire, such as it was, was strictly limited in application to apartheid and colonialism. For example, a closer consideration of the origin of the resolution,\textsuperscript{179} and a reading of its Preamble, indicate that it was rather more concerned to make a point about apartheid and colonialism than promoting a wider conception of human rights. Nor was the resolution carried through with any conviction.

\textsuperscript{175} Korey, NGOs and the Universal Declaration of Human Rights, p.261
\textsuperscript{176} The five states were Dahomey, Nigeria, Senegal, Tanzania and Zaire. (See Kannyo, 'The Banjul Charter on Human and Peoples' Rights', p.138).
\textsuperscript{177} CHR Resolution 6 (XXIII) Paragraph1 in HR/LIBERIA/1979/UNWP, 8-9. See also ST/HR/2,185 and HR/LIBERIA/1979/UNWP, 1.
\textsuperscript{179} Report of the ad-hoc Study Group Paragraph 1 in HR/LIBERIA/1979/UNWP,10. See also HR/LIBERIA/1979/UNWP, 56.
The resulting report of the ad-hoc Study Group was inconclusive as its members were sharply divided on a range of issues and, as it became clear, neither African nor Soviet Bloc states were prepared to contemplate the possibility of a regional commission.  

On one point, the ad-hoc Study Group was agreed; any regional approach ‘could only be established on the direct and exclusive initiative of the States comprising a given region’ and there was no question that such a body could be imposed by the UN. The report was distributed for comments, but, apart from the Maldivian Islands, no comment was received from either the OAU or a member state. Nor did the OAU attend the twenty-fourth session of the CHR at which some CHR representatives suggested that: ‘...the task of the ad-hoc Study Group had been fulfilled...There was no need for any substantive discussion of the report...nor was any further action thereon called for.’

Nonetheless, between 1966 and 1973 a series of UN human rights seminars were held in Africa. Only one of those seminars, 1969 Cairo, dealt directly with a regional commission of human rights, but almost all the seminars concluded that a regional commission was desirable. The ACHPR historiography is inclined to list these seminars and the conclusions they reached as if such a recital is pregnant with importance; in fact, the greater historical interest and importance lies in the reporting of the African voices in the debates. These voices, of the middling sort of state officialdom, indicate a consistent pattern of difference in perspective about the nature of human rights. A brief (selective) commentary suffices to illustrate this point:

i) Dakar, 1966

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184 See Appendix 1.
185 The 1971 Addis Ababa Conference was the exception.
186 B.G. Ramcharan, ‘The Travaux Preparatoires of the African Commission on Human Rights’, 13 Human Rights Law Journal 7/8 (1992) explains how the UNDHR was able to manage the proposals of the Monrovia Seminar and is a warning not to accept UN seminar conclusions at face value.
The seminar considered a roll-call of internationally recognised human rights in an African context. Whilst most participants were sympathetic, several objections were raised. For example, there was concern that individual rights of land ownership might conflict with the African concept of communal ownership and also allow foreign control of essential assets. Religious freedom was acceptable, provided that it did not interfere with politics or impede development; freedom of information was, similarly, acceptable but could not be absolute or allow the disintegration of the state; the right to participate in political activity was supported but depended on the needs of society at different stages of development and could not be allowed to sharpen dissent as the individual was inseparable from society. It was also observed that Africans had not been involved in the drafting of the UD. All participants were in favour of human rights but felt that different paths might be needed.

ii) Cairo, 1969

The opening speech endorsed the idea of a regional commission as all Africans were committed to the total unity and liberation of Africa. This was supported by the seminar as a commission could also enhance and reinforce the consciousness of those Africans still to be liberated and 'greatly enhance Africa's international and moral image in that it would be a practical demonstration...that they were concerned with the practice and protection of human rights in their own countries'. Six commission functions were proposed: Education and information; Research; Advisory; Seminars; Fact-finding and conciliation; and consideration of communications. The first four functions were considered acceptable, but the latter two functions, it was argued, would

187 ST/OHR/25, 20-25. This became an issue in the ACHPR drafting process and Article 14 was suitably drafted to cater for this potential problem.
188 ibid, 25-29
189 ibid, 29-34.
190 ibid, 34-41.
191 ibid, 45-57
192 ST/OHR/38, 4-5.
conflict with the OAU’s principle of non-interference and the sovereignty of states. In any event, the commission’s powers would have to depend on what Africans were prepared to accept; the OAU being the appropriate forum for that discussion.

iii) Lusaka, 1970

There was a discussion of the general conditions necessary for the progressive realisation of economic, social and cultural rights: ‘It was stated that representative ... governments did not necessarily ensure a just society... governments established by other means were endeavouring to respond to the needs of the majority’. It was also noted that: ‘Only when such malpractices as apartheid and racialism were totally eradicated could African countries devote their full energies and resources to the realization of economic, social and cultural rights’; although, generally, African governments, other than the racist regimes, did already give due recognition to these rights. Africa’s colonial past was responsible for most of Africa’s current economic problems.

iv) Addis Ababa, 1971

This was a largely technical discussion on the process of law. However, the OAU representative felt it necessary to explain that the OAU Secretariat had not taken up previous seminar recommendations calling for a regional commission as it was for the member states themselves to propose resolutions to the OAU AHSG. The view was also expressed that an inter-African judicial organ was a project ahead of its time as OAU

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193 ibid, 7-10.
194 ibid, 7-10. See also Robertson, ‘A Commission on Human Rights for Africa?’, 698-99: ‘While most of the participants favoured such procedures (fact-finding) in relation to South Africa, Rhodesia and Israel, few were prepared to accept them for their own countries...The idea of conferring on the African Commission competence to consider communications from States or individuals met with little favour...’.
195 ibid, 11-14.
196 ST/TAO/HR/40, 5-10.
197 ibid, 5-10.
198 E/CN.14/521, 14 Para. 63. This was a point that was only really grasped by M’baye and his ICJ colleagues (see Chapter Three).
member states remained too jealous of their sovereignty.\textsuperscript{199}

v) Dar es Salaam, 1973

The opening remarks suggested that the shortfall of human rights, due to capitalism and the legacy of colonialism and apartheid, would be relevant topics of discussion, and justified the one-party state system in terms of the needs of development.\textsuperscript{200} Some speakers felt 'that the discussion went beyond the scope of the seminar's agenda and might involve the seminar in embarrassing intrusions into the internal affairs of certain States'.\textsuperscript{201} It was noted that only four of forty-one African states had ratified the 1966 International Covenants and many had not ratified the conventions on refugees.\textsuperscript{202} Whereas the seminar conclusion indicated support for a binding African commission, determined by an OAU committee of experts, the debate did not seem wholly to support such a conclusion. Specifically, comments were made that an African commission should be flexible, reflecting Africa's peculiar problems, of which under-development was the most important; and, indeed, 'some participants... expressed reservations about the advisability of recommending the setting up of an African Commission...While not opposed to the idea in principle, they felt that the time was not ripe for such an initiative...'.\textsuperscript{203} Suggestions for topics for future UN human rights meetings included protection of the royalties of African musicians.\textsuperscript{204}

In 1977, a new Director of the UNDHR, van Boven, was appointed. A committed Christian,\textsuperscript{205} he announced at his first CHR meeting: 'It is impossible to remain indifferent when confronted with the many appeals which are directed to the United

\textsuperscript{199} ibid, 15 Para. 66.
\textsuperscript{200} ST/TAO/HR/48, 2-4.
\textsuperscript{201} ibid, 12.
\textsuperscript{202} ibid, 19.
\textsuperscript{203} ibid, 20 and 22.
\textsuperscript{204} ibid, 24.
No UN conference on regional commissions having been held for some time, Van Boven sought to revive that dormant project. His initiative resulted in the Monrovia Seminar. The background to this seminar, and its contribution to the process of the ACHPR, is assessed as part of the political process of the ACHPR in Chapter Three.

It is difficult to avoid the conclusion that these UN conferences were, at best, of limited significance, although Ramcharan's view is that they kept the subject of human rights at the forefront of the consideration of African leaders. This is a view that is supported by inference in much of the historiography, but not by the evidence of African contemporaries. For example, in his opening address to the Dakar Meeting, President Senghor noted that: 'Since 1961, some people have been conceiving an organ to protect human rights. Unfortunately, this idea never left the beautiful and many pages doctrine devoted to it...nor was it discussed beyond the narrow range of...symposia and seminars on the theme.' Kodjo was similarly certain that little attention was paid to the UN's contribution, but there are other arguments to support this conclusion. Firstly, the composition of African delegates was invariably of a low level in terms of political influence; to which can be added a large number of delegates from UN agencies and interest groups each competing to project their personal mandate. Typical of the part played by these UN agencies is that of UNESCO at the Monrovia Seminar. UNESCO promised that it 'plans to establish, in the near future, an African institute for teaching

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207 See UNGA Resolution 32/127 16 December 1977.


209 Ouguerghouz, *The African Charter on Human and Peoples' Rights*, p.19 argues that 'it is hard to assert that the efforts...were decisive...the favourable effects...cannot be underestimated.'

210 CAB/Leg/67/5, 2.

and research in the field of human rights', 212 a promise which featured prominently in the conclusions and recommendations of the Monrovia Seminar. No such institute seems to have been established. 213

Secondly, there is a sense of dialogue between the deaf. The seminar conclusions often seem stage managed, irrespective of the debate, with the UN committed to certain obligatory recommendations oblivious to the African contribution. Thirdly, although these seminars ‘called’ for a regional commission on human rights to be adopted, nothing followed beyond UNGA resolutions. The irrelevance of these UN activities was stated forcefully by M’baye who suggested that: ‘Unfortunately no attention was given in Africa to these proposals. Seminars followed upon conference with no positive outcome. Resolutions and recommendations swelled the dossier of the project for an African human rights commission.’ 214 It was an assessment that so apparent, it was explicitly confronted at the Monrovia Seminar. 215 For example, Wiredu noted: ‘The failure in the follow-up to the recommendations of previous seminars’ 216; and Harris-Eze suggested that ‘previous seminars had not led to concrete results’ and ‘urged the Seminar not to repeat the mistakes...but to try to ensure that its work would lead to concrete results’. 217 It was also a point to which Eze had sought to draw attention in his background paper to the conference. 218

NGOs

It is no disrespect to the contribution of Amnesty or the AAA/WCC and other church

212 A key theme of the seminar was ‘promotion’ of human rights.
214 Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER: report of a Conference held in Nairobi from 2 to 4 December 1985 convened by the ICJ (Geneva, 1986), p.21. See also SO 216/3 (17) BP.A, 35, prepared by Rateb, Professor of Law, Cairo University, who also argues that the UN was ineffective beyond the historical and moral sphere.
217 ST/HR/SER.A/4, 15.
groups that the focus on NGO activity in respect of the campaign to encourage the OAU to adopt an African charter should fall on the role played by the ICJ. The impact of Amnesty’s country reports and campaigns on the psychology of African leaders is well attested;\textsuperscript{219} and the ICJ itself has publicly acknowledged the place of the AAA/WCC as the most active human rights force in Africa.\textsuperscript{220} However, the claim for the ICJ’s pre-eminence in the history of the ACHPR rests largely on the remarkable political campaign that MacDermot,\textsuperscript{221} its Secretary-General, orchestrated in conjunction with a small group of lawyers, primarily from West Africa, under the informal leadership of M’baye, Chief Justice of the Senegal Supreme Court and a personal confidante of President Senghor.\textsuperscript{222}

Based in Geneva, the ICJ had, at that time, a limited membership of twenty-five commissioners\textsuperscript{223} but with autonomous national sections and affiliated legal organisations world-wide.\textsuperscript{224} Its foundational mandate was the promotion of the rule of law, but under MacBride (1963-70) and MacDermot (1970-90) it pursued a wider brief. For example, it intervened, successfully, with governments on behalf of individual cases of unlawful imprisonment,\textsuperscript{225} issued a stream of reports on human rights abuses in Africa, notably, on Burundi, Uganda and Equatorial Guinea, and testified before the UN, CHR and US Congress as to cases of ‘gross violations of human rights’. Nonetheless, its particular expertise within the human rights NGO constellation was its high-level political and legal contacts, and its pool of legal drafting expertise.

\textsuperscript{218} HR/LIBERIA/1979/BP.3, 15.
\textsuperscript{219} Kodjo Interview 2007. See also Kodjo’s address to the Dakar Meeting in which he refers to ‘the suppression of torture’ (see CAB/LEG/67/4, 4), a project particularly associated with Amnesty.
\textsuperscript{220} 57 ICJ The Review (1996), 99.
\textsuperscript{221} His determination was stressed by Butler Interview 2007 and his ‘tenacity’ was singled out by M’baye for ‘public homage’ at the 1985 ICJ Nairobi Conference (See Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.21).
\textsuperscript{222} Dieng (Dieng Interview 2007) suggested that M’baye and President Senghor met every month for a private discussion and advice. Both Dieng and Fall (Fall Interview 2008) also commented on M’baye’s refusal to participate directly in politics and on his strict political independence of thought combined with a sense of justice.
\textsuperscript{223} Subsequently increased to sixty commissioners.
\textsuperscript{224} Tolley, Jr., ‘Popular Sovereignty and International Law’, 563 estimated a mailing list of 40,000 jurists world-wide.
\textsuperscript{225} Notably in the case of one of its members, former President Binaisa (Uganda). (See ICJ Executive Committee Minutes 1 November 1980).
The first step into Africa for the ICJ was its 1961 African Conference on the Rule of Law, held in Lagos, Nigeria. The conference aimed at extending the ICJ’s message of the rule of law as a means to ‘protect the individual against arbitrary acts of government and to enable him to enjoy fundamental human dignity’226 to a wider international audience.227 It is most remembered for Declaration 4 of the Law of Lagos: ‘That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights’.228 This is probably the most famous statement in African human rights literature. Less frequently quoted is the corollary calling for such rights to be safeguarded ‘by the creation of a court of appropriate jurisdiction’, possibly out of embarrassment at its obvious political naivete.229 In fact, the ‘invitation’ was slightly at odds with the otherwise generally dry focus of the Lagos Conference on the prosaic minutiae of the relationship between the Legislature, the Executive and the Judiciary.

In his conference report, Lalive (ICJ Secretary-General) concluded that: ‘African lawyers emphatically rejected any notion of a purely African juridical system’; that: ‘Confronted with an order of priorities, African lawyers persist in the belief that the protection of human rights is the only solid basis for any new society’;230 and, finally, that ‘the first stage towards African unity might well be some form of uniform and coordinated safeguard of the basic rights’.231 This conclusion was reached notwithstanding the

226 African Conference on the Rule of Law, Lagos, Nigeria January 3-7, 1961: a report on the proceedings of the conference ICJ, (Geneva, 1961), p.5. The wording of the ICJ objectives was subsequently amended, the most important being the incorporation (in 1983) of economic, social and cultural rights as rights rather than conditions precedent. See ICJ Objectives 1975 and 1983.
227 It followed earlier conferences in Athens (1955) and New Delhi (1959), and was itself followed by conferences in Rio de Janeiro (1962) and Bangkok (1965).
228 See African Conference on the Rule of Law, p.11. In a further alliteration it was the Act of Athens and Declaration of Delhi, but, alas, only the Declaration of Bangkok.
229 The honour for proposing and drafting the ‘invitation’ lies with a Togolese barrister-at-law, Amorin (see African Conference on the Rule of Law, pp.110-13). As M’baye explained to the Dakar Meeting: ‘The establishment of a Human Rights Court...is not included...It is thought premature to do so at this stage. The idea is, no doubt, a good and useful one which could be introduced in future.’ (Cab/ Leg /67/1,1).
230 African Conference on the Rule of Law, pp.5-6.
231 African Conference on the Rule of Law, p.6. This ludicrously romantic conclusion was endorsed by
warning given by D’Arboussier (Minister of Justice, Senegal) that: ‘Together with the principles of universal legality there are also principles of legality specific to Africa and corresponding to the African requirements of independence, unity, democracy and economic development.’

It was a hopelessly romantic assessment that was already condemned by the time it came out in print. In fact, the Declaration of Lagos had virtually no political effect; it was largely show. In 1961, there was no OAU, and most African states had barely come into existence a few months earlier. For these newly-independent states, human rights was not the pressing issue that jurists might dream it to be. Over time and with the emergence of human rights as a political question for Africa, the Law of Lagos would become romanticised as the moment when the first call was made in Africa for a human rights charter. More to the point was the fall-out from the Conference. Casell, former Attorney-General of Liberia, was disbarred by Liberia because an outraged Chief Justice objected to his criticisms and ‘contemptuous paper’ being presented to an international conference in a sister state; Danquah, who was President of Freedom and Justice, was detained with other opposition leaders and refused an exit visa to attend the ICJ Rio de Janeiro Conference, and disallowed a visit from an ICJ observer. It was also noted that Boateng (Minister for Information, Ghana) was instructing Korsah (Chief Justice, Ghana) at the Conference, and trying to promote an alternative organisation of non-aligned jurists.

233 African Conference on the Rule of Law, p.5. M’baye also makes this point in HR/Liberia/1979/BP.2.6.
236 ICJ’s Ghanaian affiliate.
237 Tolley Jr., The International Commission of Jurists, p.64.
Lagos did, however, have an important, if unspectacular, long-term effect, rarely noted in the historiography, in that it encouraged the formation of local ICJ affiliates, such as the African Bar Association, as a forum and esprit de corps around which the African legal elite could congregate and exchange views. For example, the 1961 ICJ Lagos Conference was 'the first time in the history of the continent of Africa there were assembled jurists from both the English-speaking and French-speaking African territories.' Among the attendees were M'baye (and Diop and Wade two of his collaborators) and Elias who were subsequently appointed to the ICJ.

For internal reasons, largely relating to funding issues following disclosure that the ICJ had been funded by the CIA, the ICJ was subdued operationally until well into the early 1970s. However, it managed to hold a conference in Dakar in 1967. In what was to be a precedent for future seminars, the 1967 Dakar Declaration was circulated to all African lawyers and teachers of law. Thereafter, the greater availability of funding combined with the driving force of MacDermot changed the ability and willingness of the ICJ to pursue a more pro-active policy in Africa. Butler cannot recall that there was a formal African policy, a deliberate push, but there is no denying that African representation increased dramatically in the 1970s. Ten African members were appointed from 1970-1982. The most important appointment was that of M'baye in 1972. The combination of M'baye's political address book and MacDermot's 'tenacity' and access to funding were critical to the campaign for an African charter.

238 ibid, p.64.
239 'Liberty', the Nigerian section, was also set up following the conference. (See Tolley Jr., The International Commission of Jurists, p.64.)
241 African Conference on the Rule of Law, pp.23-31 List of participants.
244 M'baye suggests that for 'tactical reasons' the ICJ 'concentrated its efforts on Francophone Africa', but does not elaborate further on why this was (see Human and Peoples' Rights in Africa and THE AFRICAN CHARTER, p.21).
246 Butler Interview 2007.
It was unfortunate that the first ICJ conference to be held in Africa in the 1970s was the 1976 Dar es Salaam Conference ‘Human Rights in a One-Party State’. This was an attempt to engage with the existing political system in Africa, and to communicate to the outside world the African notion of communal society and the difficulties faced by emerging states. However, the message that the conference conveyed, of the theoretical merits of a one-party structure, did not seem to accord well with the actual merits observable in many African states. The conference was severely criticised by a number of ICJ commissioners.\(^\text{248}\) At the 1977 ICJ Twenty-Fifth Anniversary meeting in Vienna, several commissioners argued that a one-party state was incompatible with the rule of law and the right to criticise, oppose and force elections; that the conclusions of the conference which sought to emphasise the freedom of the press but denied it the right to challenge a government’s fundamental philosophy or policies was a contradiction; and that dialogue with one-party states could be taken as implied approval.\(^\text{249}\) MacDermot and other members argued that such systems of government ‘were here to stay for a substantial period of time’ and that, instead of condemning them, there should be an attempt to understand the circumstances that had given rise to them.\(^\text{250}\) The conference was also criticised by some African leaders from the opposite perspective; President Kaunda (Zambia) insisting on having his displeasure recorded formally at the end of the report.\(^\text{251}\) It was, nonetheless, the start of a series of smaller co-sponsored seminars that the ICJ assisted in over the next three years in M’baye’s backyard of Dakar, Senegal that were to have an important bearing on the possibility of an African charter; that process is more appropriately located in Chapter Three.

\(^{248}\) The individual ICJ commissioners enjoyed little influence over operational matters which were in the hands of the Secretary-General, and the Executive Committee to the extent that funding was invariably an issue.

\(^{249}\) It was described as ‘a lively discussion’ (see Human Rights in a One-Party State for the ICJ (London, 1978), pp.127.

\(^{250}\) Report of the Twenty-Fifth Anniversary Meeting of the ICJ held in Vienna, April 1977, Appendix A-B.

\(^{251}\) Human Rights in a One-Party State, pp.125-26. As did the unrepentant ICJ Commissioners, pp.127-19.
Chapter Three: The Political Process

The first, tentative, signs that the heads of some African states were prepared to extend their consideration of human rights beyond a limited remit of colonialism and apartheid began to become apparent in 1977. In that year, Nigeria, working together with a rejuvenated UNDHR under van Boven, helped draft and sponsor an UNGA resolution appealing to those regions in which regional commissions do not already exist: ‘...to consider agreements with a view to the establishment... of suitable regional machinery for the promotion and protection of human rights’ and requesting ‘the Secretary-General...to give priority to...seminars for the purpose of discussing...the establishment of regional commissions....’ Nigeria also sponsored a CHR resolution calling on the UN Secretary-General to: ‘...take appropriate steps to give the Organization of African Unity, if it so requests, such assistance as it may require in facilitating the establishment of a regional commission on human rights for Africa.'

The Gambia, too, had sought, as early as the 1975 Commonwealth Law Ministers Meeting to press for a Commonwealth human rights charter. That initiative had been easily dismissed, such that ‘if there had been any lack of determination on the part of The Gambia, it might have died a natural death’. However, by the time of the 1977 Commonwealth Heads of Government Meeting in London, England, the heads of government were prepared to denounce the ‘massive violation of basic human rights in Uganda...in strong and unequivocal terms’; moreover, at the 1979 Commonwealth

252 Ramcharan Correspondence 2008.
256 Commonwealth Secretariat Commonwealth Heads of Government The London Communique June 1977
Heads of Government Meeting in Lusaka, Zambia, they: 'Reaffirmed the importance attached...to the observance of human rights...and welcomed in principle the initiative by...The Gambia for the establishment of a Commonwealth Human Rights Commission.'\(^{257}\)

In July 1979, President Jawara also sponsored the New African Human Rights Award, the recipient to be determined by the votes of readers.\(^{258}\)

Nonetheless, it was significant that neither Nigeria nor The Gambia felt sufficiently confident to put a proposal before the OAU AHSG, preferring to float the idea outside of the OAU. However, for many other African states, outside involvement was an anathema; for example, an attempt in 1977, by the Nordic countries, to promote a UNGA draft resolution against human rights violations in Africa was killed by the African states on the principle that this was purely a matter for the OAU.\(^{259}\) It was clear, therefore, that no regional initiative for human rights could succeed without the consensus approval of, at that time, a deeply divided OAU AHSG; less clear, however, was how that process was to be attempted and who would be prepared to risk their political reputation in the attempt.

At about the same time, M'baye was also faced with the need for a reassessment of old certainties. The 1976 Dar es Salaam Conference had been his idea, which he had 'sold' to MacDermot as a necessary reconciliation with political reality.\(^{260}\) He had also recently committed himself in print to the idea that: '...African governments appear clearly to have sacrificed rights and freedoms for the sake of development and political stability. This situation can be explained and even justified.'\(^{261}\) However, by the late 1970s it had

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\(^{258}\) New African July 1979 143, 7. Later editions do not report if an award was actually made.

\(^{259}\) Ramcharan Correspondence 2008.

\(^{260}\) Dieng Interview 2007.

become abundantly apparent that the major human rights violations in Africa had little
direct connection with an unwieldy balance between priorities, and, at some point around
late 1977, M’baye must have begun to reconsider his position. At a UNESCO conference
on ‘The Right to Development’ in June 1978, he posed the question about the balance
between development and human rights:

Within the framework of development law, the traditional balance “freedom-social
order” is upset because the need for order overrides the need to grant liberties. This is
where…government...invoke...: “you can’t make an omelette without breaking a few
eggs”. Unfortunately, it often happens that eggs are broken without producing an
omelette at all....The idea would be to discover what is the required correlation
between development and respect for human rights...what would be the shape of the
graph representing respect for human rights in terms of level of development?262

A few months later, at the Dakar Colloquium, he was to go further:

Economic and social development provides a ready pretext for very serious
violations...of rights and freedoms...In the 1967 Dakar Declaration, the jurists
noted that there were violations of rights and freedoms...but that there were
justifications of varying degrees...for these violations...This “dynamic” view...
presented obvious dangers...As a result, at the Dakar Conference of September
1978...African jurists started out on a new tack. They no longer considered it
acceptable to justify systematic violations of human rights by the need for
economic and social development...263

It was fortunate that by 1977 the ICJ’s financial position had improved, enabling
MacDermot and M’baye to contemplate a more ambitious programme of action. There
seems to have been a conscious decision to target Africa.264 M’baye was elected ICJ
President in 1977. Although, primarily, titular, it provided M’baye with suitable
quite different conclusion.
262 UNESCO SS-78/CONF.630/8 K. M’baye Paper ‘Emergence of the “Right to Development” as a human
right in the context of a new international economic order’, UNESCO Paris Meeting of experts on human
rights, human needs and the establishment of a new international economic order, 19-23 June 1978, 3.
263 HR/LIBERIA/1979/BP.2, 6-7. Dieng said that M’baye had described the old argument as a ‘pretext, self-serving’ (see Dieng Interview 2007). In his address to the Dakar Meeting, Kodjo also proposed that:
...Africa wants to be of age, to break the monotheistic straightjacket that interned Human Rights and
Development, in conflictual and not complementary terms...' (See CAB/LEG/67/4, 2).
264 Dieng suggested that MacDermot was very attached to Africa (Dieng Interview 2007).
credentials when meeting with African leaders and, almost certainly, was intended with that purpose in mind. Funding enabled the ICJ to take two important steps. As a first step, the ICJ was able, belatedly, in April 1978, to arrange for Chomba (Supreme Court Justice, Zambia) and Thoolen (ICJ Executive-Secretary) to visit the Minister of Justice of all the participant states at the 1976 Dar es Salaam Conference in order to discuss implementation of its recommendations. This was the first time that the recommendations of an African human rights conference had been actively followed-up by a direct approach to the political kingdom. Secondly, MacDermot, at M’baye’s prompting, proposed a further conference in Africa on development and human rights to publicise the new balance of priorities. The ICJ Executive Committee queried whether the ICJ should be involved in such a discussion, but resolved that, to the extent that it posited a possible justification for restrictions on civil and political rights in the interests of development, it was a legitimate subject of ICJ debate.

The Dakar Colloquium met in September 1978 with representatives from twelve Francophone-Africa countries. As M’baye anticipated it would, the Dakar Colloquium: ‘...no longer considered it acceptable to justify systematic violations of human rights by the need for economic and social development...that the road to economic growth and progress should not bypass human rights’. How much of the debate and subsequent declarations were spontaneous, and to what extent the colloquium was intended as a calling card for the ICJ’s real objective - follow-up lobbying of OAU heads of state - is not clear. Following the pattern established by the 1976 Dar es Salaam Conference, in March 1979 a working party of four under M’baye met in Abidjan, Ivory Coast to discuss the manner and substance of the follow-up. It was agreed that all heads of state of the

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265 In June 1978 he was appointed Minister for Legal Affairs and Attorney-General.
267 Dieng Interview 2007.
268 ICJ Executive Committee Minutes 6 May 1978, 2.
269 HR/Liberia/1979/BP.2, 7.
270 Dieng suggested that for MacDermot the follow-up was the essential purpose (Dieng Interview 2007).
271 Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER: report of a Conference held in Nairobi from 2 to 4 December 1985 convened by the ICJ (Geneva, 1986), p.22. The other members included Mbouyon (Cameroun) and Amega (Togo) (Dieng Interview 2007).
Francophone countries south of the Sahara should be approached with a view to a meeting at which the Dakar Colloquium conclusions could be explained and their opinion and advice sought on the more difficult political question of implementation.\textsuperscript{272} The first mission was received by President Senghor in April 1979 who 'promised to give close personal attention to the recommendations...and to raise the international proposal with other African Heads of State'.\textsuperscript{273} Subsequent visits were made to a further nine countries.\textsuperscript{274}

The ICJ reported that: ‘The interest shown by Heads of State... has been encouraging and is very timely in view of the OAU Summit meeting in July’,\textsuperscript{275} and that: ‘As a direct consequence of the mission..., President Senghor decided to propose the Resolution to the Heads of State meeting which received encouragingly wide spread support and was eventually adopted unanimously.’ Moreover, unanimity was ‘in no small part due to the follow-up missions of the Dakar Seminar’.\textsuperscript{276} M’baye was also to claim personal credit for this achievement, and to add that he had also, as President of the Senegalese Presidential advisory committee, drafted Resolution 115 at President Senghor’s request.\textsuperscript{277} His role was further acknowledged by Nguema (First Chairman of the African Commission), who wrote that: ‘As a result of that symposium, a follow-up group was formed to “sell” the idea to African Heads of State. Following that consciousness-raising campaign, President Senghor... submitted a resolution... to the Summit of African Heads

\textsuperscript{272} ICJ Executive Committee Minutes 28 April 1979, 4. See also 4/5 Human Rights Internet Newsletter 9/1,16, Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.5, ICJ Report on Activities 1977-80, 4-5, ICJ Newsletter Quarterly Report 11 1 April-30\textsuperscript{th} June 1979, 3 and ICJ Executive Committee Minutes 19 April 1980.

\textsuperscript{273} ICJ Executive Committee Minutes 28 April 1979 and Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.5. President Senghor was briefed by M’baye in advance, by letter, that it was the intention that the ACHPR would be drafted by Africans to meet the needs of Africans (Dieng Interview 2007).

\textsuperscript{274} Cameroun, Ivory Coast, Mali, Senegal, Togo; subsequently, Rwanda, Burundi, Benin and Niger. Gabon meeting did not happen due to an organisational mix-up. ICJ Executive Committee Minutes 6 October 1979 and 19 April 1980.

\textsuperscript{275} ICJ Newsletter 1 1 April-30 June 1979, 3.

\textsuperscript{276} ICJ Newsletter 2 1 July-30 September 1978, 4. See also Kodjo’s address to Dakar Meeting which credits the Dakar Colloquium, and M’baye personally, for Resolution 115 (Cab/LEG/67/4, 1).

\textsuperscript{277} Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.22.
of State and Government'.

Quite independently, Kodjo, who was appointed OAU Secretary-General in July 1978, had written personally to President Senghor in the summer of 1978, after having read an interview with President Senghor in Jeune Afrique. He proposed to President Senghor that he should sponsor a human rights resolution, reasoning that it needed an African head of state of stature to promote the idea of an African charter as an African idea; that is, as an idea that was not imposed on Africa by Western leaders such as President Carter. President Senghor 'found that the idea was a good one' and it was then followed up with the Senegalese Ambassador in Addis Ababa and the elements of a resolution discussed.

Resolution 115 was introduced by President Senghor to the 1979 OAU AHSG at the last possible moment under 'Items proposed by Member States'. It called for:

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279 Kodjo Interview 2007. It has not proved possible to locate Kodjo's references, that is either the article or the letter, but this episode fits in with the political thinking and nature of the OAU AHSG and Kodjo's subsequent, strong personal, support for the ACHPR. Unfortunately, a possible introduction to the Senegal Embassy in Addis Ababa was effected too late to be able to follow up for purposes of this dissertation.
281 I have not identified an earlier tabling than AHG/91 (XVI) Rev.1. It is not reported in CM/Plen/Rapt. Rpt (XXXIII) which determined the draft agenda. Dieng explained that a conscious decision was taken not to table the resolution at the OAU CoM, as normal practice would dictate, and that delay was strategic ‘lest it be killed’. (Dieng Interview 2007). F. Ouuguerouz, The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa (The Hague, 2003), p.38 incorrectly suggests that human rights was ‘not included in the agenda of the meeting’ but ‘was broached in various ways'.
...the Secretary-General of the Organization of African Unity to:

a) draw the attention of Member States to certain international conventions whose ratification would help to strengthen Africa's struggle against...especially apartheid and racial discrimination...

b) organise as soon as possible...a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing inter alia for the establishment of bodies to promote and protect human and peoples' rights.\(^{282}\)

With this step, for the first time, a resolution on human rights had gone beyond the confines of a seminar and was placed before the OAU AHSG for consideration;\(^{283}\) a resolution to which African heads of state were bound to respond, one way or another, before their peers. Moreover, that resolution had been preceded by a sufficient degree of political lobbying among heads of state to ensure a critical body of support on the floor of the OAU AHSG.

There was little to suggest in either the preceding OAU CoM or in the opening speeches of the 1979 OAU AHSG that human rights was an issue of pressing concern. For example, in his opening address to the OAU CoM, President Tolbert, the OAU Chairman, outlined the problems facing Africa; at the top of his list were: Liberation; Peace in Africa; and Economic growth and development.\(^{284}\) However, in his opening address to the 1979 OAU AHSG, President Tolbert suggested that the principle of non-interference had become 'an excuse for our silence over inhuman actions committed by Africans against Africans...The provisions concerning human rights must be made explicit'.\(^{285}\)

There was also a, possibly coded, reference by Kodjo: 'At the time when certain people all over the world are in doubt about us, we must have the courage to remove the sources

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\(^{282}\) AHSG/Dec.115 (XVI) Rev.1.

\(^{283}\) Kodjo suggested that human rights had never before been discussed at the OAU AHSG (Kodjo Interview 2007).

\(^{284}\) See CM/Plen/Rapt.Rpt. (XXXIII), 1-3, Annexe I. Waiyaki's (Foreign Minister, Kenya) speech listed racism, apartheid and economic problems as the main issues facing Africa (see CM/Plen/Rapt.Rpt. (XXXIII), 3-4, Annexe II).

\(^{285}\) Keessing's Contemporary Archives 1979, p.29840. This implication was somewhat spoiled by his closing address which called for respect for human rights and aid to the liberation movements in order 'to liberate the continent from the whites' hegemony'. (Keessing's Contemporary Archives 1979, p.29841).
of distress through our conviction.\textsuperscript{286}

It was also evident from the tactical need for late disclosure of Resolution 115 that widespread opposition was expected. As Kodjo had suggested, many African heads of state saw human rights as an ideological form of neo-imperialism, more especially given President Carter's strong support for human rights.\textsuperscript{287} Typical of this view was the reservation made by Guinea to the Recommendations of the May 1979 Conference on Refugees in Arusha, Tanzania: "(Guinea) was of the opinion that the use of the concept of Human Rights on the international political scene is incompatible with the rights of peoples and furthermore, used as a weapon of perturbing the process of a harmonious historic evolution of independent African States".\textsuperscript{288} President Ahidjo was also to point out to "...the fallacious pretext of human rights" used by some to 'deceive the ill-informed', and to wonder whether concern for human rights should permit plotters to attack the state and the people.\textsuperscript{289} Furthermore, for many other heads of state an African charter on human rights would have been an uncomfortable distraction and regarded as interference in their internal affairs. Support for the resolution from the floor of the OAU AHSG from 'elder statesmen' such as President Senghor and President Jawara, and from senior states such as Nigeria, was, therefore, an essential element of the possibility for success.

A contemporary press report said that: 'Although the debate...was prolonged and at times excited, there were no voices raised against.'\textsuperscript{290} Welch suggests that the fact that it: '...passed unanimously and almost without debate, indicated the willingness of the O.A.U. to take its first major step, following several years of urging by other groups'; but added in conclusion that unanimity 'might be attributed to the relatively vague nature of

\textsuperscript{286} CM 967(XXXIII) Part1 Introduction to the Secretary-General's Report of the Activities of the OAU, 25.
\textsuperscript{287} Kodjo (Kodjo Interview 2007) and Fall (Fall Interview 2008) laid particular stress on this consideration.
\textsuperscript{289} Quoted by 17 Africa Research Bulletin 2 15 March 1980, 5575-76.
\textsuperscript{290} Africa Research Bulletin July 1-31 1979, 5330B.
the Senegal-Gambia proposals'. Kodjo remembered the occasion somewhat differently. Towards the end, President Senghor asked for the floor to make a proposal. The debate was 'long and daft'. Angola, Mozambique, Madagascar, Guinea and Ethiopia all opposed the idea. President Machel (Mozambique) was 'very tough' convinced that it was due to President Carter's pressure. President Toure was also vocal about the concept and concerned about the rights of the group not merely the rights of the individual. The moderate countries gave some support in the debate. Other reports suggest that Liberia, Mauritania, Nigeria, Tanzania and Uganda seemed to have given active support to Senegal and The Gambia. There is a noticeable absence of reference to North African involvement in the debate. In the end, however, 'the first step' was achieved rather more easily than might have been expected. What is remarkable from the above accounts is that the obstacles traditionally associated with opposition to a human rights regime in Africa, such as non-intervention, non-interference and sovereignty, are, at least for the moment, absent. Opposition is almost exclusively political and split along Cold War fault lines.

There were several reasons why a window of opportunity for such a proposal may have opened at this time. Firstly, many African leaders, felt an increasing sense of personal shame and embarrassment at the activities, in particular, of President Amin, Emperor Bokassa and President Nguema. In May 1979, the Sixth Franco-African Summit at Kigali, Rwanda had established a Commission of Enquiry, comprising of five African jurists, that by June 1979 had largely confirmed the publicly reported details of the murder of some hundreds of schoolchildren on the orders of Emperor Bokassa. A few months earlier, Amnesty had made a public appeal to the OAU to remove President

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292 Fall stressed the extent to which the OAU AHSG was a battleground of the Cold War in which there were deep suspicions of Western cultural colonialism and opposition from both sides to ideas 'almost without reason' (Fall Interview 2008).
293 Kodjo Interview 2007.
294 See Note X Page Y.
295 Dieng described M'baye's tactics as 'step-by-step' (Dieng Interview 2007).
Nguema whose brutality was equally compelling if slightly less conspicuous. In fact, both were removed shortly after the 1979 OAU AHSG with the secret assistance of, respectively, French and Spanish special forces. Clapham notes that: '...the sense of continental relief was such that external involvement was tacitly ignored.' President Amin had, of course, already been removed as a result of the Tanzanian invasion earlier in 1979. This sense of shame, that one could be against but could not be seen publicly to oppose the idea of the ACHPR, is a factor that was particularly stressed by Kodjo; shame because violence was being directed by African leaders against their own people and the heads of state had conspired in these acts by their silence, and embarrassment as Africans (Negroes) tainted by racial association. Kodjo was to conclude that the ACHPR 'came about as the result of the ordeals which certain African peoples had suffered at the hands of their governments' and that 'the Secretary-General...pressed by Statesmen like President Senghor...was worried by the authoritarian and totalitarian drift which was taking hold of power in Africa'.

It is an explanation that is reinforced by an anecdotal report of a moderate West African state that was asked to table a resolution at the 1979 OAU AHSG in respect of the Tanzanian/Uganda conflict. Tanzanian diplomacy 'showed the country concerned that there was more prestige to be gained from championing the human rights campaign unleashed by the fall of Amin than by pursuing a side show'. Nonetheless, it is balanced by the vehemence with which Nigeria, together with Liberia and other states otherwise supportive of Resolution 115, argued against Tanzania that non-interference in

299 See, for example, M.J.K. Nyerere, 'Pick up the Torch of Unity', Resolving Conflicts 4 OAU Conflict Management Bulletin Jan-May 2000, 6.
300 E. Kodjo, 'The African Charter on Human and Peoples' Rights', 11 Human Rights Law Journal 3/4 (1990), 273-74. He added: 'It was further justified by the desire of the African people to see the world governed by the principle of the right to self-determination.'
the internal affairs of Uganda was a more important principle than the defence of the human rights of the people of Uganda: '...our position was that it was primarily a matter for the Ugandans themselves to resolve. We never saw it as our duty...to forcefully effect a change in the government of another country.'

Secondly, there was a growing awareness among African heads of state of the increasing importance that human rights considerations were assuming within the ambit of international relations; and, therefore, of an increasing need to bend with that wind if foreign policy objectives were to be met at regional and individual state level. It was a message that was also filtering back from the African Group. The Lome II negotiations were an obvious example. Although any linkage to human rights was successfully resisted, the EEC sought to emphasise that human rights would have to find a place in any future agreement: 'The Community would...like to point out the importance it attaches to...statements regarding the respect of basic human rights.' These comments and a status report on the negotiations were submitted to African leaders at the two OAU CoM meetings in 1979 and at the 1979 OAU AHSG. Young-Anawayt, for example, suggests that the 1979 OAU AHSG decision was influenced, at least in respect of relations with the EEC, by the desire to pre-empt future negotiations having to go over similar ground; although it has to be said that the OAU were most adept at responding to such pressure.

In addition, the 1979 OAU AHSG papers refer to an impending OAU/UN international conference on apartheid, the continuing importance of which is underscored by a separate report to the OAU AHSG by the OAU Secretary-General on UN activities in

303 Speech by Commissioner Cheysson (see CM/960 (XXXII) Annex I, 2-3). The request for a mere statement was already a downgrading from a request for direct linkage.
304 See CM/960 (XXXII) in CM/PLEN/Rapt.Rpt (XXXII) and CM960 (XXXIII) ADD.7 Report on the Negotiations.
which apartheid remains at the centre of policy objectives.\textsuperscript{307} The beneficial impact of an African charter on the OAU's campaign against apartheid was also, subsequently, invoked by delegates at the Monrovia Seminar\textsuperscript{308} as justification for adoption; and in the few press reports on Resolution 115 similar justifications were mentioned. For example, it was reported that: 'A point made in the debate was that the OAU would strengthen its position over South Africa if it showed concern about abuses among its own member States.'\textsuperscript{309} At the Dakar Meeting, too, Kodjo suggested that: 'Africa will thus derive more strength for her dignity and her honour. She will better be able to command attention when she voices out her rejection of hatred and oppression in Namibia, Zimbabwe and South Africa'.\textsuperscript{310} It was a theme he reiterated in his report to the 1980 OAU CoM in Addis Ababa: We 'have thus shown to this world of criticism that we are concerned about the wholeness of our Continent.'\textsuperscript{311}

Thirdly, foreign lobbying of African states prompted the argument that it was better for Africa to take the initiative and employ its own vision of human rights than to permit a foreign concept to be imposed on Africa. This was an argument first formulated by M'baye, who pointed out that the UD had been a declaration by and for white people, and that what was needed was an African declaration that met the aspirations and needs of black people.\textsuperscript{312} This was an argument that all the heads of state could find attractive and it was increasingly taken up as a justification for the ACHPR around which all opinion could and would coalesce.

\textsuperscript{307} CM/928 (XXXII) Part III in CM/PLEN/Rapt.Rpt (XXXII). The OAU was, at that time, also seeking Senator Kennedy's support against the US Senate's efforts to reduce sanctions against South Africa.
\textsuperscript{308} ST/HR/SER.A/4, 10
\textsuperscript{310} CAB/LEG/67/4, 8.
\textsuperscript{311} CM/1002 (XXIV) Part 1,15.

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Finally, it was understood that silent acquiescence in respect of Resolution 115 did not presage final acceptance of a human rights regime, or indicate in any way a surrender to outside scrutiny or interference in internal affairs. It was easy to approve a vague motion and easier to kill it thereafter procedurally. Resolution 115 did no more than commit the OAU AHSG to examine the issue. That examination could be obstructed and, in any event, it would be subject to political review. Thereafter, it would still have to return to the OAU AHSG for approval; and then obtain a two-thirds majority for ratification. Finally, the system had to be made to work. As an Asian observer to the 1981 OAU AHSG presciently remarked: '...it would be a shame if African's (sic) effort to establish a Human Rights code of conduct for governments and opponents turned out to be nothing but window dressing'.

However, whilst such reasoning may have appealed to the 'traditional' opponents of human rights, the opposition of the 'radical' states was less easily bought off or mollified. It was eventually proposed, at the insistence of Guinea and Madagascar, that 'Peoples' Rights' should be added to the title of the proposed charter, a proposal that was accepted by the sponsors as a relatively easy concession to make in return for the final approval of the OAU AHSG. Much has been made of the significance of this amendment. In fact, it was less of a philosophical debate about the nature of human rights than a politically-inspired intervention within the context of the Cold War; and it was seen at the time as precisely that, a balance between two competing political systems. As to how peoples' rights were to be incorporated textually into the proposed African charter, little guidance was provided. Furthermore, no definition was provided, either in

314 Dieng Interview 2007.
315 Bello records that: '...it has been made clear on the different occasions that some African Heads of State and Government, particularly the President of Madagascar, favoured the inclusion of the phrase "Peoples Rights" in the title of the African charter.' (see Bello, 'The African Charter on Human and Peoples' Rights: a legal analysis', 32). A 'Malagasy' origin is also attributed by Cervenka/C. Legum 'The Organization of African Unity in 1979', A66. See also reference by Kodjo to President Toure in OAU AHSG debate in Note 293. Nonetheless, despite the originality of 'peoples' rights', the historic origin does not seem to be an issue of wide interest and is rarely mentioned.

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1979 or in the final draft ACHPR in 1981. M'baye explained that there was a: ‘... deliberate refusal to indulge in the definition of such notions as “Peoples”’ so as not to end up in difficult discussions.’\textsuperscript{316} Botswana, commenting on the draft ACHPR, noted that: ‘The reference to “Peoples” is not clear. The meaning of the word needs to be brought out clearly so that it leaves no room for misinterpretation.’\textsuperscript{317} Kiwanuka suggests that there are four different ‘definitions’ of peoples’ rights employed in the ACHPR.\textsuperscript{318} This obvious political need for obfuscation has not removed academic speculation about the underlying interpretation that was really intended. Typical of this speculation, which seems to ignore the evidence of the drafting process debates, is Kunig’s suggestion that: ‘A formal definition of what the term “peoples” means in the context of (sic) these norms is not given. It is most likely therefore that the African Charter refers to the notion of the term as used in international law generally.’\textsuperscript{319} In fact, what the debates show is a constant battle over words between the two sides leading to a less than coherent legal document and ‘a compromise between the ideological belief systems represented at its negotiation.’\textsuperscript{320}

As noted earlier, the UN’s promotion of regional commissions ‘which had been on the table in the 1960s but had lain dormant for a number of years’\textsuperscript{321} was resurrected by van Boven. The most important outcome of this resurrection was the Monrovia Seminar. The Monrovia Seminar is widely regarded as having been influential in the process of the ACHPR. Its influence is largely attributed to the Monrovia Proposal and to its timing, that is after Resolution 115 but before the Dakar Meeting. In fact, its timing was fortuitous and was largely determined by the UN’s budget circumstances and the timing of the

\textsuperscript{317} Note No:10, EA.10/1 III(9)D1 Letter from Botswana to OAU General Secretariat 17 April 1980.
\textsuperscript{321} Ramcharan Correspondence 2008.
Liberian government’s agreement to sponsor the seminar. Lack of funding deferred the seminar from 1978, as originally authorised, to 1979; and Liberian government agreement was only conveyed on 4 April 1979.\footnote{Communications from Dennis, Jr. (Liberia, Minister of Foreign Affairs) to UN Secretary-General and Sanon (Deputy Director, UNDHR) 4 April 1979 (see UNOG file G/416/3 (30) 781-82). They also indicate that discussions with Liberia had been on-going since at least December 1978.} Invitations to participants were therefore sent out throughout April and May. Requests to Elias, Eze and M’baye for working papers were sent out on 11 April 1979.\footnote{For all Monrovia Seminar preparatory material see UNOG file G/416/3 (30).} Although the UNDHR may have been aware of M’baye’s desire to promote a resolution for an African charter at the forthcoming 1979 OAU AHSG,\footnote{The ICJ met with the UNDHR in February 1979 in Geneva at the 35th CHR sessions to discuss the outcome of the Dakar Colloquium (see 4/5 Human Rights Internet Newsletter 9/1 1979, 16). Ramcharan also confirmed that there was regular contact between the UNDHR and the ICJ and suggested, that, without the van Boven initiative, ‘the process would not have restarted’ and that ‘the discussions preceding the Monrovia Seminar spurred the Senegalese and others into action’. The van Boven initiative also ‘prompted the Senegalese’. It is not clear whether he means to suggest by this that Resolution 115 can also be attributed to the initiatives of the UNDHR from 1977. (Ramcharan Correspondence 2008).} the commitment from President Senghor to sponsor such a resolution was only given in April 1979 and could not, therefore, have been taken into account by the UNDHR in respect of the Monrovia Seminar.

However, the UNDHR had been in discussions with various African parties about the terms of reference for a seminar throughout 1978 and into 1979, and discussions between with M’baye had apparently not gone well.\footnote{M’baye was highly critical, in a rather personal manner, of the UN’s performance (See Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.21-22.} M’baye refers to discussions that were conducted ‘in a courteous and discreet, but nevertheless unequivocal manner’.\footnote{Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.21.} Ramcharan refers to the fact that everyone was able to agree on suitable terms of reference except for the Senegalese.\footnote{B.G. Ramcharan, ‘The Travaux Preparatoires of the African Commission on Human Rights’, 13 Human Rights Law Journal 7/8 (1992), 307.} The UNDHR wanted to propose a regional human rights commission, whereas M’baye sought an African charter incorporating a commission.\footnote{Ibid, 307.} M’baye’s reasoning was set out in his background paper for the Monrovia Seminar, which he did not attend.\footnote{This was unlikely to have been a deliberate snub. His close colleagues, M’backe and Fall, attended and}
the possible, he believed that an effort should be made to achieve the maximum programme: ‘Neither politicians nor even jurists have a unanimous longing for an African commission....; the reasons of the politicians can easily be divined, while those of the jurists are based on realism. But is it not dangerous for specialists in law to give in to pessimism?’

Secondly, it made no sense to have an African commission without an agreed normative base and therefore the two would need to go hand in hand; Elias also made this point in his background paper. But, more importantly, what M'baye primarily had in mind was that any normative base should be African.

It is not clear why the UNDHR was so firmly opposed to M'baye in view of the 1967 ad-hoc Study Group findings that human rights regimes were not to be forced upon regions; a policy approach that had been restated in 1970: ‘Since the question of the establishment of such a commission by OAU was still in the early stages of consideration...the Commission on Human Rights should avoid the appearance of exerting any pressure in the matter.’ It seems highly likely that, on a personal level, van Boven and his staff were keen to progress human rights in Africa and inclined to push for a more pro-active role for the UNDHR. Aware of the desire of the African states to manage their own affairs, van Boven was able to utilise Nigerian sponsorship of UNGA and CHR resolutions as a protective shield against any accusation of outside interference. However, the suspicion is that the UNDHR’s intentions went far deeper. Suspicion is aroused because, although, in hindsight, Ramcharan reported that ‘a fundamental policy question had been settled’ by the adoption of Resolution 115, there is no sense that this was perceived in that way at that time by the UNDHR, who continued to behave as if the ‘policy question’ was still open and Resolution 115 had not been adopted. That is, there is nothing in the UNDHR’s behaviour to suggest acceptance of the proposed OAU approach.

he supplied a background paper. Most likely his obligation to provide a working paper draft for the Dakar Meeting kept him away. The M'baye Draft was delivered to the OAU by the end of September at the latest. (See Memo from Egbunike to Onu 4 October 1979).

330 HR/Liberia/1979/BP.2, 8.
331 HR/Liberia/1979/BP.1, 36.
332 See Note 181 above.
as set out in Resolution 115 and everything to suggest that it was a policy question that they still wished to dispute.\footnote{Ramcharan suggests that it was purely a tactical question; a commission established by the OAU AHSG under Article 20 could come into being immediately whereas a charter would take time to negotiate and ratify, and would then only apply to those OAU member states that ratified it.\footnote{However, the UNDHR’s actions are open to alternative interpretations of their intent. Firstly, Ramcharan clearly describes UNDHR aspirations at that time. These were that a commission should precede a Charter because it ‘was similar to the pattern which had been set for...the first inter-American Commission on Human Rights’,\footnote{and that it was desirable to create ‘universal standards for human rights machinery’.\footnote{Secondly, there is a clear sense in the UNDHR’s initial working group draft of the Monrovia Declaration that the UNDHR, naturally, wanted to promote UN normative standards and did not want a separatist African interpretation of human rights; which is what M’baye, above all, sought.\footnote{Thus, the UNDHR influenced drafts\footnote{of the Monrovia Seminar invariably place UN normative bases at the forefront, and it is only in the plenum discussion of the working group draft that, at African insistence, an African element is given prominence. Moreover, in a 1979 publication, Ramcharan also quoted}}}}}


\footnote{Ramcharan Correspondence 2008. This interpretation of Article 20 was challenged. It was subsequently argued at the OAU CoM preceding the 1981 OAU AHSG, which discussed the draft ACHPR, that, even if the ACHPR was adopted, Article 20 was insufficient to support it and that an African Commission would therefore be ultra vires. (See CM/Plen.Rapt.Rpt (XXXVII), 58.)}


\footnote{Ouguerouz, The African Charter on Human and Peoples’ Rights, pp.42-43 argues that the Monrovia Proposal ‘was wholly devoted to the attempt to find a structure for the protection of human rights. It neglected...the normative aspect of the African system envisaged.’ If so, the protection element is hardly evident. That the UN was, above all, concerned with the issue of ‘universality’ and was fearful of the idea of an ‘African’ conception, possibly followed by an ‘Asian’ conception, was confirmed to me in a private interview that I have agreed not to quote on an attributable basis.}

\footnote{There were three drafts of the Monrovia Proposal: The pre-prepared draft of the UNDHR; the working group draft; and the final plenum draft.}
approvingly the idea that regional organisations 'serve as adjuncts to the United Nations...subjecting them in considerable measure to the direction and control of the central organization. The Charter reflected the premise that the United Nations should be supreme and accepted regionalism conditionally.'

The UNDHR, therefore, went ahead with the terms and content of its seminar largely unchanged by the adoption of Resolution 115, although in the debates it was forced to confront the question of a charter with normative clauses. Moreover, the discussions were stage-managed in such a way as to be unhelpful to the process started by Resolution 115. The need for a charter was dismissed by a rather strange argument of the Tanzanian session chairman and other disagreements seemingly swept aside. Significantly, it was suggested that a commission could be set up by the OAU without a charter under Article 20 of the OAU Charter. The significance of this suggestion was picked up by the OAU and it featured in the official OAU report on the seminar: '...it is as good as saying that there will be no need for the African Charter...as proposed by the OAU AHSG'. As usual for a UN seminar, despite the concerns expressed earlier about meaningful follow-up, and a specific proposal that a working group 'should be entrusted with the task of making representations to African Heads of State', a UNGA resolution expressing satisfaction with the seminar, and a meeting with President Tolbert, OAU Chairman, was all that was deemed appropriate or possible. One promising aspect of the seminar was the attendance of Kodjo and Egbunike (OAU, Chief Legal Adviser); the

342 ST/HR/SER.A/4, 9. He argued that '...the OAU had a solid record of co-operation'. This is a particularly strange argument for a Tanzanian to deploy after the 1979 OAU AHSG.
344 ST/HR/SER.A/4, 9. See Note 336.
345 Memo from Egbunike to Onu 4 October 1979, 5.
346 ST/HR/SER.A/4, 15. (See note x).
347 UNGA 34/171 17 December 1979.
348 See 5 Human Rights Internet Newsletter 2/3 September/October 1979, 65. President Tolbert offered his personal assurances of support only to be assassinated seven months later.
first OAU presence at an UN seminar on human rights in Africa outside of Addis Ababa. Their attendance was given prominence in the Preamble of the Monrovia Proposal and in Ramcharan's subsequent personal memoir. In fact, it seems that the OAU representatives showed no interest and were 'downright obstructive'. Within the OAU, however, both delegates were strongly supportive of the ACHPR process; the question has, therefore, to be asked why it was they were only obstructive at the Monrovia Seminar. Subsequently, Kodjo could not recall his attendance at the seminar and dismissed any UN role in the ACHPR process whatsoever with considerable indignation; perhaps the UN gave a hand, but it was an African initiative.

With the adoption of Resolution 115, the ball now passed to Kodjo, whose responsibility it was to appoint the experts and arrange a suitable time and date for the meeting. The fact that this responsibility was executed on an expedited basis indicates a high degree of personal support for the project. It was natural that M'baye - 'a world respected expert' - should prepare the working paper draft for the forthcoming meeting. M'baye refers to the support of Professor Fall and Supreme Court Judge M'backe in preparing this draft. That draft was available, most likely, by the end of September.

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350 Ramcharan Correspondence 2008

351 Kodjo Interview 2007.


353 Jallow, The law of the African (Banjul) Charter on Human and Peoples' Rights, p.25 suggests Kodjo 'was quick to execute his mandate'.

354 Kodjo Interview 2007.

355 N.J. Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never', 3 Yale Human Rights and Development Law Journal (2000), 59 suggests that the OAU set up a working group under Justice Wiredu to prepare a proposal and that 'The Wiredu proposals formed the basis, in part, of the draft charter prepared by the M'baye Committee.' I have not come across this reference anywhere else, including the OAU files. Most likely he is referring to Wiredu as Chairman of the working group for the UN's Monrovia Proposal.

356 Human and Peoples' Rights in Africa and THE AFRICAN CHARTER, p.22. Dieng, who was M'baye's
The experts were chosen by Kodjo: 'I knew who was fighting for the rule of law and human rights.'\(^{358}\) The ICJ, and its affiliate the ABA, lobbied hard for representation, however, the core group came from the existing OAU Committee of Legal Experts.\(^{359}\) Of seven prominent legal experts proposed by the ABA, only one, Wako (Secretary-General, ABA), seems to have been appointed, but Seck may have attended anyway and two others seem to have sent deputies (as they appeared on the original list of proposed attendees).\(^{360}\) It was also considered important tactically for Guinea to be represented.\(^{361}\) Two ICJ members were appointed.\(^{362}\) Libya seemed to want its representative to attend but he was not apparently included on the list of attendees;\(^{363}\) indeed, there were no North African 'experts'. In view of Libya's subsequent (successful) attempt to disrupt the first Banjul Meeting, the exclusion of a Libyan delegate may be regarded as prescient.

The opportunity to host the meeting was presented to all nine member state on the OAU Legal Committee.\(^{364}\) Rather late in the day, Egypt offered to host this meeting,\(^{365}\) but in mid-November it was finally agreed that, probably the favoured choice all along, Dakar, Senegal, would host the meeting.\(^{366}\) In addition to the working draft prepared by M'baye and the OAU Charter, the 'working documents' included human rights papers from the

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\(^{359}\) Memo from Egbonike to Otu 4 October 1979.

\(^{360}\) See letter from ABA to Kodjo 31 August 1979 and List of participants for Dakar Meeting (undated) and two earlier versions (14 November and undated).

\(^{361}\) Dieng Interview 2007.

\(^{362}\) They were: Wako and M'baye. A third, Chomba, was on the original invitee list but was unable to attend. Four Senegalese representatives seem to have attended; two, M'backe and Seck apparently unofficially. The precise list is difficult to ascertain as several variants exist (see List of participants for Dakar Meeting (undated) and two earlier versions (14 November and undated)). List identified as, possibly, ref.267 tallies with the precise list provided by Jallow, The law of the African (Banjul) Charter on Human and Peoples' Rights, p.64 Note 6 except for the two 'unofficial' Senegalese representatives.

\(^{363}\) Note Verbale from Embassy of Libya to OAU General Secretariat 14 November 1979 Ref 2/97/397.


\(^{366}\) Memo from Egbonike to Head of Conference 14 November 1979.
UN, the Monrovia Seminar and the European and American systems of human rights.\textsuperscript{367}

The meeting of experts took place in Dakar, Senegal from 28 November to 8 December 1979 in a positive spirit amongst a group of like-minded professional jurists. M'baye, who was unanimously elected as Chairman,\textsuperscript{368} described the atmosphere as one of fraternity and understanding, and a desire on the part of all to play their part in this great project to bring human rights to Africa.\textsuperscript{369} However, there were already a few signs of tensions as some of the ‘radical’ states flexed their ideological muscles.\textsuperscript{370} Kodjo, however, recalled ‘a good meeting’ and a ‘moment of exultation’ at its end.\textsuperscript{371} The work was completed in only ten days, less time than had initially been considered and allowed.

The ball was then returned to Kodjo to make arrangements for the OAU CoM Ministers of Justice to discuss the draft. This was to be the political review. A meeting was scheduled for 24-31 March 1980 in Addis Ababa, Ethiopia\textsuperscript{372} although, in late February, Guinea offered to host the meeting.\textsuperscript{373} M'baye delicately notes that this meeting was inquorate and that: ‘A number of newspapers interpreted this set-back as a deliberate policy on the part of certain States to kill the Charter in its cradle’.\textsuperscript{374} In fact, too many OAU states declined to send a representative, and an unsympathetic government in Ethiopia, the Marxist Derg, refused visas to some delegations.\textsuperscript{375} Kodjo recalls that Ethiopia was ‘very much against human rights’ and happy at the outcome, and that an

\textsuperscript{367} Memo from Egbunike to Head of Conference 14 November 1979.
\textsuperscript{369} Letter from M'baye to Kodjo 12 December 1979.
\textsuperscript{370} Jallow, \textit{The law of the African (Banjul) Charter on Human and Peoples' Rights}, pp.31-32.
\textsuperscript{371} Kodjo Interview 2007.
\textsuperscript{372} See CAB/LEG//67 Invitation to OAU member states to OAU CoM in Addis Ababa, Ethiopia to review Dakar Draft 19 December 1979.
\textsuperscript{373} Letter from Embassy of Guinea to Kodjo Ref. 29/AG/AD/80 26 February 1980.
\textsuperscript{374} \textit{Human and Peoples' Rights in Africa and THE AFRICAN CHARTER}, p.23. Jallow, \textit{The law of the African (Banjul) Charter on Human and Peoples' Rights}, p.35 reports that twenty-two states appeared. Under Article XIV of the OAU Charter, two-thirds, thirty-three at this time, of the member states were required for a quorum.
\textsuperscript{375} Kodjo Interview 2007. Bello, 'The African Charter on Human and Peoples' Rights: a legal analysis', 28-29 reports that ‘the delegates who were present at that meeting found that the Government of Ethiopia was neither in the mood nor keen on the idea of hosting a human rights conference'.
Ethiopia Herald headline proclaimed 'OAU dispersed'.\textsuperscript{376} Contrary to M'baye's apologia, it is hard to interpret these facts in any other way than as an attempt to 'kill the charter'. Dieng expressed the view that there was 'bad will without expressing openly their opinion, fearing the start of liberalism', as it was still felt to be a matter of shame to oppose the ACHPR openly.\textsuperscript{377} Kodjo felt that the revolutionary states had sabotaged the meeting but that the fault also lay with the moderate states who were ill-prepared due to a lack of communication.\textsuperscript{378} It was now evident, though, that acquiescence in Resolution 115 had not dimmed the opposition of either the radical states or those states opposed on 'traditional' OAU grounds.

Kodjo responded to this failure by flying to The Gambia to meet with President Jawara to request him to host another OAU CoM meeting 'knowing he would accept the meeting'.\textsuperscript{379} President Jawara's enthusiastic response, in due course, resulted in the first Banjul Meeting, which met 9-15 June 1980 and was attended by 38 representatives.\textsuperscript{380} Once again, delaying tactics led to problems and slow progress,\textsuperscript{381} confirming the depth of opposition. On this occasion, Libya disrupted the meeting by demanding that Arabic be added as an official language of the OAU.\textsuperscript{382} As Jallow reports, the meeting was heavily-bogged down in the Preamble - 'there were not many significant changes of substance to the eleven articles' - which was seen as the battleground between radicals and moderates over the hierarchy of rights. For example, the radicals proposed to qualify the idea that human rights derived from the attribute of being human by the comment that

\textsuperscript{376} Kodjo Interview 2007.
\textsuperscript{377} Dieng Interview 2007.
\textsuperscript{378} Kodjo Interview 2007.
\textsuperscript{379} Kodjo Interview 2007. Dieng confirmed that Kodjo was pro-active after the failure of the Addis Ababa OAU CoM meeting and spoke with President Jawara about hosting a meeting (Dieng Interview 2007). The official record indicates that the meeting in Banjul was held 'at the request' of President Jawara, but this wording probably represents the procedural position of the OAU. (See Cab/Leg/67/Draft Rapt.Rpt (II) Rev.4, 1.)
\textsuperscript{380} CM/1149 (XXXVII), 2.
\textsuperscript{381} Bello, 'The African Charter on Human and Peoples' Rights: a legal analysis', 30 suggests that, in the absence of a clear political directive, delegates took a cautious approach in preferring to maintain the status quo.
‘it is above all the reality and respect of peoples’ rights which effectively guarantee human rights’.383

The meeting ended with only the Preamble and eleven clauses agreed but with little meeting of minds and hearts and with ‘a sense of frustration and defeat and an air of despondency’.384 Even M’baye was prepared to describe this outcome as a ‘semi-failure’.385 It had been hoped that a final draft could be presented to the 1980 OAU AHSG; in its place was a report detailing the meagre progress.386 At the conclusion of the first Banjul Meeting, The Gambia immediately offered to host a second meeting and put that offer to the OAU CoM. In the background, Kodjo and M’baye worked hard to manoeuvre a continuation of the process, which was by no means certain at that time;387 but, in due course, they were able to ensure that the 1980 OAU CoM in Freetown, Sierra Leone passed a resolution, under Egyptian sponsorship, requiring that a complete draft of the ACHPR should be presented to the 1981 OAU AHSG and approving Banjul as the place for the second review meeting.388 This resolution was itself subsequently approved by the 1980 OAU AHSG, at the instigation of Senegal and The Gambia.

To maintain political momentum, Kodjo moved quickly to make arrangements for this second Banjul meeting. By August 1980389 a 7 November date was proposed for the second meeting, but, eventually, it was only possible to agree a 7-27 January 1981 date, a delay that might have hinted at further troubles to come.390 However, this second Banjul

385 Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER , p.23. Bello suggests ‘the project fell into abeyance’; and that ‘a number of conflicting views were put forward but, in the final analysis, it simply boils down to a lack of will-power, coupled with the simmering distrust among member states.’ (See Bello, ‘Human Rights: The Rule of Law in Africa’, 632.)
387 Kodjo Interview 2007.
meeting ended successfully with an agreed draft several days earlier than the timetable had allowed. M’baye remembered that: ‘The draft Charter was adopted at the Second Session in an atmosphere of willingness to bring it to a conclusion.’ Kodjo noted that: ‘Despite some energetic discussions among government representatives concerning the nature and significance of the rights included in the draft, it was unanimously accepted by the delegations who were present.’ Gomez (OAU Secretariat) noted the ‘high degree of professionalism’ of the delegates. Jallow reports a ‘dramatic improvement’ in the atmosphere and an awareness of the failure of the previous meeting. The atmosphere was also improved by the absence of an Ethiopian delegation. Saho (Attorney-General, The Gambia) ‘thought the difference between this and the last conference was because people had time to reflect on the document and become more convinced of the need for such charter’. Balanda also noted that delegates were aware of the arrest of the delegates to the first Banjul meeting from Upper Volta on their return, as a result of a coup, and that this event helped focus minds on the necessity of a charter. President Jawara closed the second Banjul meeting with a reminder that: ‘It must not be left to gather dust in our respective archives and merely become material for succeeding generations to speculate as to what could have been’; and added that personal responsibilities should not end at Banjul but that all should be responsible for ensuring final adoption in the shortest time.

The final draft was now ready to be presented to the OAU AHSG. As was standard practice, a report was presented to the OAU CoM preceding the OAU AHSG. After some

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391 West Africa 2 February 1981, 205.
393 However, see Kodjo, ‘The African Charter on Human and Peoples’ Rights’, 275: ‘...some states like Angola, Ethiopia and Mozambique, who were in the grip of armed rebellions, found it necessary to make reservations’.
394 West Africa 2 February 1981, 205.
395 Jallow, The law of the African (Banjul) Charter on Human and Peoples’ Rights , p.44.
396 West Africa 2 February 1981, 205.
discussion of procedure, it was agreed that the draft ACHPR should be handed down in its entirety to the OAU AHSG without discussion, on the basis of the resolution at the 1980 OAU CoM Freetown, Sierra Leone; however, delegations ‘could express general views or make observations’. This was an important ruling that may have saved the draft ACHPR from further delays and emasculation, and was taken by the OAU Chairman ‘supported by some speakers’ from the floor. A number of states made observations. For example, it was suggested that Article 45, which set out the powers of the African Commission, would need to be amended ‘so as not to make the commission think it has the power to interfere in the internal affairs of OAU Member States’; and that, as the commission was not envisaged (as a specialised commission) under Article 20 of the OAU Charter, it was therefore ultra vires under the OAU Charter. Relevantly, particularly in hindsight, the financial implications of the new regime were also raised. It was also pointed out that, notwithstanding the requirement of the OAU Charter for ratification by a two-thirds majority, ‘the Ministerial Meeting...preferred an absolute majority’ in this case. Finally, however, as the ‘delegations were unanimous in underscoring the adherence of their state...to the principles of Human and Peoples’ Rights’, it was ‘decided to take note of the Draft Charter and submit it to the...Heads of State..., together with the observations made by the delegates, for consideration’.

The 1981 OAU AHSG realised fairly quickly that if the ACHPR was opened up for debate, it would never be passed but that momentum was now with acceptance. Many heads of state remained suspicious and saw the ACHPR as a ‘window open to foreign

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398 Closing Address by President Jawara to second Banjul Meeting 19 January 1981.
399 Resolution CM/Res.792 (XXXV). See CM/Plen.Rapt.Rpt. (XXXVII), 57. Jallow suggests that what was also critical was the endorsement of CM/Res.792 (XXXV) by the 1980 OAU AHSG (see Jallow, *The law of the African (Banjul) Charter on Human and Peoples’ Rights*, p.49), but this is not what is actually reported by CM/Plen.Rapt.Rpt. (XXXVII), 57.
401 CM/Plen.Rapt.Rpt. (XXXVII), 57. Jallow also reports that the Somali delegation asked the Chairman for a formal ruling on this point (see Jallow, *The law of the African (Banjul) Charter on Human and Peoples’ Rights*, p.49).
eyes', but the absence of provisions for an African court, and with President Reagan now in the White House, human rights were no longer the polemical issue they were in 1979. In the limited discussion, Kenya, The Gambia, Senegal, Nigeria and Mauritius were influential; Liberia and Sierra Leone were pushy, but the North African states were lukewarm. In fact, the only change was in the title. It was proposed that it should be the Banjul Charter, in honour of the place at which it was agreed, and to distinguish it from the OAU Charter. This was accepted. At 1.10am on 28 June, with delegates tired, it was put to the vote without debate. The ACHPR was adopted unanimously.

The sense that emerges from this meeting is that, to a great extent, the heads of state had accepted that the die had already been cast at the 1980 OAU AHSG, which had insisted that an agreed draft be presented to the 1981 OAU AHSG, and by the final agreement on the content at the second Banjul Meeting. Moreover, since adoption of Resolution 115, military coups in Ghana (1979) and Liberia (1980) had added to the outside world's negative perception of Africa; and, to that extent, the need, however that was to be understood, was even greater. However, there is also a sense that, for a number of states still opposed in principle, adoption and implementation were quite separate matters. Udombana suggests that ratification was, possibly, a 'smokescreen to hide the reality of repression', reflecting the increasing linkage between financial aid and human rights pieties.

More significantly, the provisions of the ACHPR had been considerably weakened from the draft prepared by the Dakar Meeting, and this added further to the comfort of those

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405 Kodjo Interview 2007.
407 This proposal was made by the OAU CoM meeting in Addis Ababa in February/March 1981 at the suggestion of the participants at the Banjul CoM meetings. See CM/1073 (XXXVI) Part I, 22 and the Introductory Note of the Secretary-General, AHG/102 (XVIII), 22. In fact, it is still commonly referred to as the ACHPR.
heads of state still opposed in principle. In May 1980, Scobie reported that: ‘...the majority interpretation was that the draft places far too much stress on promotion, and far too little on protection...this sorry situation existed because the Head of the Malagasy Republic and Colonel Menghistu of Socialist Ethiopia threatened to walk out unless the proposed draft was watered down to the least effectual level.’ There is also a news report, not reported elsewhere, that: ‘The final text of the Charter had, however, been opposed by a minority of “moderate” African governments, a Senegalese delegate having been quoted as saying that it was “a charter to licence and perpetuate oppression”.’

Two years later, with the ratification process moving slowly, MacDermot wrote to M'baye and Elias suggesting ‘a joint Letter of Appeal to a number of Heads of State and Governments ... urging ... ratification.’ In response, ‘some 15 African governments gave favourable reactions’. Nonetheless, by 1985, only fifteen member states had ratified the ACHPR; another eleven were needed for the ACHPR to come into effect. A further small number of member states had ratified the ACHPR but had not deposited that ratification with the OAU Secretary-General, and could not therefore be included in the count.

M'baye and MacDermot determined to give history a further shove. A conference was arranged in Nairobi, Kenya for December 1985 on the ACHPR and the provision of legal services in rural areas. Once again, this conference was really intended as a cover for the political follow-up aimed at prompting ratification. After a three day meeting, two conference declarations were agreed: The first called for an end to apartheid using the traditional formulation, that the UN should ‘declare the system of apartheid to be a threat to international peace and security’ and, therefore, impose sanctions. The second called for ratification of the ACHPR after having assessed the role the ACHPR ‘can play in the

411 Keesing’s Contemporary Archives 1981, 31055. Jallow, however, reports that at the OAU CoM preceding the 1981 OAU AHSG, The Gambia had intervened to express ‘satisfaction with the draft charter...’ (see Jallow, The law of the African (Banjul) Charter on Human and Peoples’ Rights, p.49).
412 Reported by Elias in Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.12.
struggle for the elimination of apartheid, racism and racial discrimination'. It was clearly felt that the vicarious involvement of apartheid was still necessary to justify adoption of the ACHPR; and, indeed, some of the concerns expressed during the debates - that the ACHPR should not be seen as a Western document lacking African credentials, or that it might unduly disadvantage African states - had also to be reflected in the wording of the Preamble of Declaration 2. Declaration 2 also referred to six regional follow-up groups. In due course, Dieng enclosed copies of the ACHPR and the Nairobi Declarations with the letter sent by President Diouf (Senegal), at that time OAU Chairman, to all African heads of state requesting that they ratify the ACHPR. Success was quickly noted with Gabon and Cape Verde, and that, as a result, Somalia finally conveyed its existing ratification to the Secretary-General. Within seven months of the ICJ initiative, ratification of the ACHPR had achieved its simple majority and came into effect on 21 October 1986.

Chapter Three having concluded the political process by which the ACHPR came into being, Chapter Four will now focus on some of the intellectual and political forces that gave it shape and content.

415 For example: ‘Having noted that the Charter is based on strict respect for African historical traditions, on the values of African civilisation, and on the conception of law and human rights in Africa.’ (See Human and Peoples’ Rights in Africa and THE AFRICAN CHARTER, p.74.
417 Abdul-Razaq also notes the role played by the OAU Secretariat in this process. He quotes reminders from the OAU Secretariat to OAU members states about ratification as early as 7 September 1981: ‘The OAU Secretary-General also issued similar appeals on each Human Rights Day (Dec.10) from 1981 to 1986’ (CAB/LEG/67/1/12). (See M.A. Abdul-Razaq, ‘The Organisation of African Unity and the Promotion and Protection of Human Rights in Africa’ (unpublished PhD. thesis, University of Hull, England, 1988), 121 Note 168). This would confirm once again the extent of Kodjo’s commitment to the ACHPR process.
Chapter Four: The Content

Resolution 115 having been adopted, attention shifted from consideration of the principle to consideration of its substance. As described in Chapter Three, that consideration rested, initially, with the Dakar Meeting, but, thereafter, it was subject to political review by the OAU CoM Ministers of Justice. This left only limited opportunity for Western public opinion to interpose itself in the drafting process. In the main, though, there was no deep desire on the part of Western public opinion for any direct involvement in the drafting process; except, perhaps, on the part of the UNDHR. Western public opinion wanted, above all, an end to the institutionalised violence and brutality that had become an increasingly common feature of African political life in the late 1970s. To that extent, therefore, an African human rights regime was merely a means to an end; an indication of a willingness on the part of African leaders to end that endemic violence, and an acceptance of the right of other African states to hold them to account. The detail, it was felt, could and should be left for Africans themselves to decide. As Cheysson, the EEC Commissioner responsible for the ACP/EEC Lome II negotiations, was to point out, Resolution 115’s statement of respect for the dignity of man and his person was ‘in our opinion exactly what we wanted to say and show to our peoples’.

An alternative, perhaps more politically sophisticated, opinion held that acceptance of the principle of human rights by the OAU was, initially, sufficient, irrespective of the form in which it would be expressed. The first step was the key, and essential elements, if, at first, absent, would inevitably follow. As M’baye had explained about his decision to exclude an African Court from his draft: ‘It is thought premature...The idea is...a good and useful one which could be introduced in future...’; and such a consideration probably explains, in part, the modesty of the Monrovia Proposal.

418 The UNDHR was staffed, at least at senior level, by officials such as van Boven and Ramcharan who saw human rights in 'Western' terms.
420 CAB/LEG/67/1, 2.
This is not to suggest that Western public opinion was indifferent to the outcome. As the debate in the 1979 OAU AHSG had recognised, Western history and culture had placed a premium on some human rights values over others. For example, quite independently of, and prior to, the debate that attended adoption of Resolution 115, President Carter's administration set out its priorities for human rights in a series of keynote speeches and a Presidential Directive. As Hartmann has identified, President Carter's 1977 speech at Notre Dame University was deliberately excised of the suggestion in an early draft that economic rights to food, shelter and health were human rights; they were merely human needs. Moreover, Secretary of State Vance's 1977 Law Day speech at the University of Georgia identified three categories of human rights: Integrity of the person; fulfilment of basic needs; and civil and political rights. However, special emphasis was to be placed on integrity of the person as the other categories represented 'a broader challenge, which might take longer to be accomplished'. By 1978, a Presidential Directive on human rights set out guidelines and priorities: '...first of all to reduce worldwide governmental violations of the integrity of the person...; and, secondly to enhance civil and political liberties...It will also be a continuing U.S. objective to promote basic economic and social rights.' President Carter also publicly announced that: 'There is one belief above all others that has made us what we are. This is the belief that the rights of the individual inherently stand higher than the claims or demands of the State.' On this view, the ACHPR would have been disappointing in several obvious respects, but there is no suggestion that the USA attempted to intervene in the drafting process in order to direct deliberations in a more sympathetic direction.

The UNDHR, however, had a greater interest in the drafting process, the more so as van Boven, as described earlier, was particularly keen to push the boundaries of UN leadership and standards in human rights. The timing of the Monrovia Seminar was,

422 Speech, Paris, France 4 January 1978, quoted by B.V. Bitker 'The United States and International Codification of Human Rights: A case of Split personality', in N.K. Hevener (Ed.), The dynamics of human...
therefore, particularly fortuitous in that it presented the UN with an ideal opportunity to put before the forthcoming Dakar Meeting its vision of an African human rights regime. For that reason, the modesty of the Monrovia Proposal is somewhat surprising. The Monrovia Proposal is a sparse document of fifteen articles, largely centred around what Ramcharan describes as ‘the institutional parts of the African Charter’. 423 For example, how many commissioners should be appointed, how they are to be elected, their qualifications and term of office; but not their pay. That last, it was determined, should be left to the discretion of the OAU. 424 It indicates that the purpose of the proposed African Commission is to ‘promote and protect human rights in Africa’, but the proposed functions seem to emphasise only promotion. The only function which seems to fall into the category of protection is that which enables the African Commission to: ‘...study situations involving alleged violations’ and ‘provide its good offices to any State member ... in relation to such situations...’ 425 Whilst a greater part of the institutional parts of the Monrovia Proposal was eventually incorporated into the ACHPR, in other more important respects, such as measures of protection and normative values, its approach was rejected. As Gittleman pointed out, the Dakar Meeting rejected ‘the substantive provisions of the United Nations-sponsored Monrovia Proposal’ and attempted ‘to create a uniquely African document more responsive to African needs’. 426 However, with the Monrovia Proposal, the UNDHR’s active involvement ended, and it, too, made no further

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424 ST/HR/SER.A/4, 12-14. Although intended to demonstrate the fatuity of the Monrovia Proposal, in an African context, the pay of international civil servants is a matter of considerable importance (Dieng Interview 2007).
425 See ST/HR/SER.A/4, 10 Article 1. It is ironic that in that same year van Boven contributed a chapter, ‘United Nations and Human Rights: a Critical Appraisal’, in A. Cassese (Ed.), UN Law/ Fundamental Rights: Two topics on international law (Alphen aan den Rijn, 1979) pp.119-35 in which (p.121) he proudly argues that since 1965 ‘the United Nations has entered into the stage of protection’; the stage of promotion having ended.
effort to interpose itself in the drafting process.\textsuperscript{427}

Finally, the ICJ, which had been most closely involved in the political process, was also, effectively, excluded from the drafting process. More precisely, there is no indication that MacDermot or any other non-African member participated, or even sought to participate, in the drafting process.\textsuperscript{428} It is as if it were understood that politesse demanded they stand aside. M'baye and the ICJ's African commissioners and associates were closely involved in the drafting process, but only in their capacity as African experts or jurists. It was the definitive expression of the ACHPR as an African affair. As M'baye had promised President Senghor in April 1978, the ACHPR was to be a process by Africans and designed to meet the needs of Africans.\textsuperscript{429}

\textit{The African conception of human rights}

The most striking feature of the ACHPR is not so much its difference from the other regional charters and the UD, as its evident desire and intention to be different; an intention that is far and away absent from the other regional charters. It dominates the Preamble and infuses the text. President Senghor's opening address to the Dakar Meeting set the tone: 'As Africans, we shall neither copy, nor strive for originality... We must show imagination... We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.'\textsuperscript{430} It was an approach that Kodjo highlighted in his official report on the Dakar Meeting: '... the preliminary draft was guided by the principle that the African Charter should reflect the African conception of human rights. It was not therefore necessary to copy simply and purely what was done in other regions or at world level. The African Charter should take as a pattern the African philosophy of law and meet the needs

\textsuperscript{427} Confirmed by Ramcharan (Ramcharan Correspondence 2008).
\textsuperscript{428} At least there is nothing in the ICJ Archives; it would be interesting to see what, if anything, might emerge from any private papers of M'baye or MacDermot.
\textsuperscript{429} See Note 273.
\textsuperscript{430} CAB/LEG/67/5, 2.
of Africa. This idea led to some originality in the contents and presentation of the Charter.\textsuperscript{431} It is also a philosophy that Kodjo himself sought to emphasise in his own opening address to the Dakar Meeting.\textsuperscript{432}

However, to a considerable extent, the instructions to the Dakar Meeting to deliver an African conception of human rights entered through an open door. The idea of difference, of an African conception to world affairs, was by now a familiar one to African intellectuals; and the idea of an African conception of human rights, merely one expression of that difference, had been for many years a staple of African human rights conferences. The experts also needed no reminder of 'the needs of Africa'; they were also familiar from the OAU Charter and long-standing political rhetoric. Nonetheless, what was being proposed, was no less than a radical reinterpretation of human rights principles. To grasp how the idea of an African conception of human rights emerged and came to overwhelm the idea of universality, the essential core of human rights, it is necessary to locate that idea in the more wider-ranging debate in African society from which it emerged; a debate in which all African elites, intellectual and political, participated.

It is not a debate that lends itself to an easy characterisation. For example, in a single (introductory) chapter, Hountondji describes it as a problem of African reflection, African self-reflection, African identity and African being;\textsuperscript{433} but, nevertheless, a debate with a common core, namely, a response to the effects of the colonial experience and a challenge to the presumption that: 'For too long, the Western conception of Africa has been that of a continent that has contributed little or nothing to human ideas and civilization.'\textsuperscript{434} By comparison, Wiredu seems to prefer a description of self-definition, self-identity, self-

\textsuperscript{431} CAB/LEG/67/3/Rev.1, 1. The precise origin of this narrative in the report is not identified and it may be, therefore, that it is a summary of President Senghor’s opening address as there are evident similarities. Kodjo was a great admirer of President Senghor and the editing may reflect that admiration.

\textsuperscript{432} CAB/LEG/67/4.


\textsuperscript{434} P. Bodunrin, quoted by Hountondji, \textit{African philosophy: myth and reality}, 11.
evaluation and self-identification: \textsuperscript{435} ‘...the question of identity was...posed as “Are we what we used to be?” The obvious fact was that we were not; and consequently...we should discover what we were previously and take steps to become such again’. This suggested the next question: ‘Why should we be other than we currently are?...Because we became what we are now not of our own free will but rather through a colonial imposition.’ \textsuperscript{436}

These, and other, commentaries identify two central themes to this debate. Firstly, that, although invariably expressed in terms of African identity, it is, more correctly, a debate about Negro identity. Africa was a necessary political construct brought about at a particular historical moment through common interests, but, for that reason, as a recent and artificial construct, it could not be expected to foster a debate of such intense existential proportions. To that extent, therefore, the term ‘African identity’ is merely an expedient political expression of that debate. It is a point that Mafeje presses: ‘At the centre of these theories (ie African personality and Negritude) was the question of the liberation of the Black man, his identity or the meaning of “being-Black-in-the-world”.’ \textsuperscript{437}

Secondly, that there is an uncomfortable dichotomy between a romantic desire to look back and a practical need to move forward. For Africa to prosper, African lives had to be ‘accommodated to the demands of modernity’, \textsuperscript{438} that was what ‘development’ meant in practice. However, those demands were confronted by the demands of cultural nationalism that called for a return to pre-colonial culture and institutions. This confrontation was most immediately evident in the political sphere: ‘The new centres of


\textsuperscript{436} Wiredu, ‘Problems in Africa’s Self-Identification in the Contemporary World’, p.213-14.


\textsuperscript{438} P.J. Hountondji, \textit{African philosophy: myth and reality}, p.9. See also Wiredu, ‘Problems in Africa’s Self-Identification in the Contemporary World’, p.214.
political authority have not evolved from the traditional cultures but have either been continued, with modifications, from colonial models which were earlier counterpoised to local institutions, or have been installed through coup d'états.\footnote{439} This led to a situation in which heads of state, for example, President Toure in Guinea, Prime Minister Obote in Uganda and President Nyerere in Tanzania, sought to romanticise the pre-colonial past in rhetoric but also moved quickly to abolish rival bases of traditional authority such as the tribal chiefs in practice.\footnote{440}

It was an issue that emerged, in a small way, at the Monrovia Seminar. The initial UNDHR draft called for ‘African practices evidencing customs generally accepted as law’ to be accepted within the African Commission’s normative purview. This was an accommodation too far. In an unusual reversal of roles, it was accepted by African delegates only with the qualification that such practices ‘were consistent with internationally recognized standards of human rights’.\footnote{441} In this way, traditional notions, such as bride-price, were to be excluded from a modern African conception of human rights. This limitation was, in due course, reflected in the wording of Article 61 of the ACHPR.

In its various manifestations, this debate was pervasive and influential in all areas of African culture and intellectual thought. Political independence had provided the conditions in which the debate could thrive by changing the context of the debate and broadening its sphere of application. It was now no longer a subject of personal metaphysical speculation; a cry of the diaspora; or a literary debate conducted in Parisian café society; it was a debate directly connected to living history and social existence.


Political and mental liberation were, for the moment, symbiotically joined in praxis: 'African political nationalism aimed at regaining national independence and building viable modern states...while cultural nationalism aimed to restore to Africans their confidence in their own culture.' What had been a pre-independence trickle, famously, President Senghor's philosophy of 'Negritude' and Diop's 'Nations Negres et culture' (1954), now became a debate taken at the flood. Summarising this debate, Balandier saw Africans trying 'to gain recognition as a subject of history' and this period as 'a moment of aggressive “self expression”.' Perhaps its most poignant expression was Du Bois' reflection on Ghanaian independence: 'Once I thought of you Africans as children who we educated Afro-Americans would lead to liberty. I was wrong. We could not even lead ourselves, much less you.' As a recognition of the change in status and circumstances, he wrote a public letter to President Nkrumah declaring: 'I hereby put into your hands...my empty but still significant title of President of the Pan-African Congress...'

Within the constraints imposed on this dissertation, it is not possible to provide more than the briefest outline of the range and depth of this debate. However, that outline can, nonetheless, convey a sufficient impression of the intimate connection between the idea of an African conception of human rights and similar ideas of 'aggressive self-expression' current in parallel areas of intellectual and political thought, and of a common origin for those ideas within the orbit of this debate over identity and modernity. Moreover, that it was an idea with which politicians and jurists were familiar and comfortable so that in due course it could emerge as a common ground around which otherwise conflicting philosophies could, nevertheless, come together in support of the idea of an ACHPR.

442 Wiredu, 'Problems in Africa's Self-Identification in the Contemporary World', p.213.
443 Quoted by V. Y. Mudimbe, Invention of Africa: gnosiss, philosophy and the order of knowledge (Bloomington, 1990), p.38.
Thus, for example, in religion, Africans began to question European cultural domination of basic church practices. Native dress now became acceptable; services that would have been in English or French turned increasingly to local languages to accommodate the congregation not the preacher; and Jesus began to be represented as a black man.\textsuperscript{446} Herskovits was to observe that: ‘Independence encouraged greater devolution and control of churches to Africans’.\textsuperscript{447} It is a point that also emerges strongly in the follow-up reports to the 1975 WCC meeting in Nairobi, as Africans took the opportunity to express dissatisfaction and resentment at their lowly status within the world-wide organisation.\textsuperscript{448} Africanisation of practice prompted Africanisation of theology. In a debate that questions essentially the identical premises which an African conception of human rights confronts, it was asked: ‘...can one reconcile a universal faith (Christianity) and a culture (African) within a discipline (theology) that is epistemologically and culturally marked?’\textsuperscript{449} The identical answer seems to have been reached, and increasingly applied: ‘Perhaps Africans can be Christians in good conscience only by Africanising Christianity.’\textsuperscript{450}

In philosophy, a debate emerges about the nature of African philosophy: ‘Philosophy in Africa has for more than a decade now been dominated by the discussion of one compound question, namely, is there an African philosophy?’\textsuperscript{451} Indeed, does the word philosophy exist in the African language?\textsuperscript{452} Towa proposes that Nkrumah’s Conscientism is the first work of African philosophy because it asks how African society can absorb foreign influences but ‘in such a way that they fit into the African personality’.\textsuperscript{453} African historians were similarly concerned that: ‘Political independence

\textsuperscript{446} Wiredu, ‘Problems in Africa’s Self-Identification in the Contemporary World’, p.217.
\textsuperscript{448} Post-event Follow-up report, WCC, Nairobi 1975. The WCC wanted to assess the success of its conference arrangements and sought feed-back from attendees.
\textsuperscript{449} V.Y. Mudimbe, Invention of Africa: gnosis, philosophy and the order of knowledge (Bloomington, 1990), p.164. The debate took place in 1960 between Tshibang and his teacher, Vanneste, Dean of the School of Theology, Lovanium University.
\textsuperscript{450} Wiredu, ‘Problems in Africa’s Self-Identification in the Contemporary World’, p.217.
\textsuperscript{451} Bodunrin ‘The Question of African Philosophy’, p.1
\textsuperscript{453} Quoted by C. Summer, ‘African Man and his values’, in Diemer (Ed.) in conjunction with J. P.
could only have meaning if it was accompanied by historical independence.'\(^{454}\) African history had, therefore, to be liberated: 'The first task that fell to the African historian...was that of “correcting” what had already been said and written by Africanist historians: to re-establish the truth, to defalsify what had already been done.'\(^{455}\) Moreover, as Neale points out, starting with Diop: ‘The creation of African self-respect was felt to rest upon repeated demonstrations that Africans had contributed to...achievements.'\(^{456}\) The validity of Western scholars’ work is also challenged ‘since most of them cannot understand African languages and conduct their studies ‘by proxy...or by library work’.’\(^{457}\) Within African literature, the ‘decolonisation’ debate’ argued that: ‘Our basic assumption...is that contemporary African culture is under foreign domination...our culture...has to map out new foundations for an African modernity ...one which, above all, will emphasizes valuable continuities with our pre-colonial culture.’\(^{458}\) Meanwhile, the same question was posed: ‘What is African literature?’\(^{459}\) At the same time, it was demanded that ‘the European critic of African literature must cultivate the habit of humility appropriate to his limited experience of the African world and purged of the superiority and arrogance which history so insidiously makes him heir to.’\(^{460}\)

In its political form, the debate looked outwards to Africa’s relations with the international community, and inwards to the society that would be created in the newly-independent states. With respect to Africa’s external relations, President Nkrumah argued for a new assertiveness: ‘For too long in our history, Africa has spoken through the voice of others. Now, what I have called the African Personality in international affairs will

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\(^{454}\) B. Ogot, quoted by C. Neale, *Writing “independent” history*, p.3.


\(^{456}\) Neale, *Writing “independent” history*, p.3.

\(^{457}\) Idowu, quoted by V.Y. Mudimbe, *Invention of Africa*, p.78.


\(^{459}\) See ibid, p.10

have a chance of making its proper impact. In asserting our African Personality, we shall be free to act in our individual and collective interests.\footnote{Recalling those words, Mboya identified that the 1958 CIAS meeting: ‘...marked the rediscovery of Africa by Africans... (and)... the birth of the African personality... all agreed on the need for Africa to rise and be heard at all the councils of world affairs.’ Herskovits described the African personality as ‘a symbol of the new and highly significant fact that the Africans have come into their own at home and have emerged as a factor to be reckoned with on the world stage’. Vaillant, President Senghor’s biographer, saw in Negritude an argument that: ‘Africans must be free to direct their own future’, and Wallerstein, that the idea of Pan-Africanism was ‘a taking in hand by black men of their own destiny’. Its inward form is most closely connected with the idea of African socialism. In a withering critique of the intellectual basis of a distinct form of ‘African’ socialism, Wiredu identified that ‘the question of African socialism’ is connected ‘to Africa’s quest for identity’. Thus, for example, Mboya was to argue that African socialism ‘has an entirely different history from European socialism’; and (not-yet) President Senghor, who, it is suggested, invented the term ‘African socialism’ in the 1940s that in Africa ‘we had already achieved socialism before the coming of the European’, and that

\begin{itemize}
\item Wiredu, \textit{‘Problems in Africa’s Self-Identification in the Contemporary World’}, pp.220-22. See also Mudimbe, \textit{Invention of Africa: gnosis, philosophy and the order of knowledge}, pp. 92-95.
\item Vaillant, \textit{Black, French and African: a life of Leopold Sedar Senghor}, p.270 It was also a point made by Blyden: ‘The communistic order of African life is not the result of accident. It is born of centuries of experience and is the outcome of philosophy and faultless logic.’ (E.W. Blyden, \textit{African Life and Customs}
African socialism is 'socialist in technique but...it is African in spirit.' At a 1964 conference on African socialism it was proposed that: '...democratic socialism as conceived by Africans in Africa, evolving from the African way of life and formulated in particular terms is the result of a continued examination of African society...'. At that same conference, the Kenyan government's paper proposed that: '“Africa” in “African socialism” has been offered as a way of expressing the African roots of a system that is itself African in its characteristics.' The Malagasy paper went further: 'Community life, this form of socialism, we knew it before Marx was born.' Perhaps the best known variant of African socialism is President Nyerere's Ujaama. Ujaama, President Nyerere explained 'is opposed to Capitalism...and it is equally opposed to doctrinaire socialism'.

Within his field of expertise, law and, increasingly, human rights, M'baye's sought to make his contribution to this debate in a manner that clearly indicated his sympathies with its underlying premises and objectives. It is also possible to trace the intellectual path that was to lead to the identification of the need for an African conception of human rights and its expression in the ACHPR.

In 1969, M'baye was to argue that, since 1948,

new communities of nations have emerged, bringing with them different views of the world, and correspondingly different notions of human relations. Among these are the states of black Africa...New black African states have...their special problems...The situation has seemed to call for a new interpretation of the Universal Declaration ... The states of black Africa cannot rely solely on occidental legal concepts. Their people have a different culture and different problems to be solved. Within this
context, a black African concept of human rights must grow.474

M'baye himself was instrumental in promoting the growth of that 'black African concept of human rights'. As described in Chapter One, in 1972, he had formulated the intellectual basis and essential content of the 'right to development' which was accepted by the UN Secretary-General in 1979 and adopted into the UN's canon by the UNGA in 1986.475 In 1975, he turned his attention to the African conception of law, as the foundation for an African conception of human rights. In an expression of difference typical of President Senghor's distinction between Arab and Negro, M'baye identifies black Africa with African law.476 He argues that African law did exist: 'African law, fragmentary in its inception was “Balkanised” by colonialism';477 and notes that: 'African law is group law...' that applies to 'families...tribes, ethnic groups'.478 This last point he was to repeat a few years later, this time more directly in the context of human rights: 'African law...is a law of the group...the role of the individual in it is insignificant. For that reason, human rights in traditional Africa have their own distinctive cause, aim and function.'479 That notion of traditional Africa had also been stressed a year earlier when he argued, in the spirit of those times, that: 'Pre-colonial Africa possessed a fitting system of rights and freedoms, although there was neither the recognition nor the clear formulation of such rights and freedoms as they are recognized, formulated and analysed today.'480 He also returned to his earlier theme of difference; he pointed out once again that the UD had been concerned only with the war against Nazism, which was of little interest to Africa, and that 'only two black African countries were members of the international community at that time.' Africans were more concerned about poverty,

475 Declaration on the Right to Development UNGA 41/128 4 December 1986.
477 ibid, 155.
478 ibid, 148.
479 HR/Liberia/1979/BP.2, 3.
economic backwardness, fragile independence and support for colonial people. 481

Against this background, the M'baye Draft that emerges in September 1979 is somewhat of a disappointment. It is dry and legalistic with little of the political sensitivity evident in M'baye's drafting of Resolution 115 or the 1985 ICJ Nairobi Declaration. For example, the Preamble is short to a fault. There is a mild political nod to the equivalence of economic, social and cultural rights with civil and political rights that underestimates the coming ferocity of disagreement; a Senghorian reference to human rights being derived from 'attributes of the human personality', as opposed to the mere fact of being human; and an almost personal reference to a sentimental Marxist idyll of 'the ideal of free men enjoying freedom from fear and want'; but none of the bold rhetoric of African values, self-determination or development that featured in his other political writings. Fall has suggested that, nevertheless, the African conception of human rights was reflected in the M'baye Draft in five respects: The mixture of individual and collective rights; the idea of duties as a counterpart to rights; the notion of the family as a the backbone of society; peoples' rights in various manifestations; and, finally, the equality of economic rights with civil and political rights. 482 That is to miss the point; the text reads rather more like a listing of rights drawn, as M'baye himself explained, 483 from the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights: 'These...papers have been found to contain provisions which could...be applied to the peoples of Africa.' 484 Thus, Self-determination (Article 2), Development (possibly Article 3), and the Family and Duties (Article 37) are given walk-on parts. Most interestingly, normative values are not explicitly stated, they are to be inferred from the text itself; and there is, again, in an African document, no direct mention of the UD. 485

Unfortunately, the reasoning behind this style and its content remains (for the time being)

482 Fall Interview 2008. Fall was a member of the Senegalese legal cooperative that put together this draft under Chairmanship of M'baye. See Note X. The Dakar Draft was to revert to a justification of human rights on the basis that 'Human beings are sacred' (see CAB/LEG/67/3/Rev.1, Article4).
483 CAB/LEG/67/1, Introduction.
484 CAB/LEG/67/1, 1.
485 As with the OAU Charter, the UD is mentioned indirectly.
elusive. Most likely, M'baye simply felt himself acting at this moment as a legal draughtsman not a politician; but it resulted in a significant rewriting of his draft by the Dakar Meeting.

As described above, the opening addresses of Kodjo and President Senghor to the Dakar Meeting expressed more boldly than the M'baye Draft the idea of an African conception of human rights. Jallow notes that the experts were particularly minded, and reminded, ‘by continuous advice of President Senghor’, that they should not merely reproduce a copy of other regional charters. It was advice that the Dakar Meeting took on board. In the summary provided to the OAU CoM, they sought to stress that essential difference in the list of principles that had directed their work: ‘Emphasis was laid on the great importance of African values and morals in our societies’, and ‘a place of choice was given to the principle of non-discrimination...the first principle stated in the draft.’ That principle was further reinforced in the Preamble: ‘...eradication all forms of colonialism...the total liberation of the African Territories’; moreover, Articles 19 and 20 now sanctioned the right of ‘colonial or oppressed people’ to resist and the right of assistance. It now also became ‘essential to pay a particular attention to ‘the right to development’, which was set out in Articles 21-22. Duties were more widely explained and defined in a separate section, Articles 23-29. Significantly, Article 58 now provided for specific normative values. These included the UD, which took lesser precedence than the UN Charter, on which the right to self-determination is more usually asserted, and the ACHPR and OAU Charter. Overall, the Dakar Draft is less of a legal work and rather more a political document.

Finally, as the opening remarks by the delegates to the first Banjul Meeting indicate, they, too, were keen to promote the African conception of human rights. Responding to M’baye’s opening explanations of the principles by which the Dakar Draft had been

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486 See CAB/LEG/67/4 (Kodjo) and CAB/LEG/67/5 (President Jawara).
determined, they ‘noted that, in Africa, Man is part and parcel of the group’ and ‘laid emphasis on the specificity of African problems with regard to Human Rights’ including the importance of economic, social and cultural rights to developing countries, the total liberation of Africa from foreign domination, the need to eradicate apartheid, the need for a new economic and legal order, the right to self-determination. The Banjul Meeting thereupon further reinforced the public assertion of the African conception by the addition of a further paragraph in the Preamble: ‘Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.’ It is at this point that the extent to which the rhetoric of an African conception has become influential in the politics of the drafting process becomes fully apparent. It was influential because it reflected many of the personal inclinations and aspirations of the African elite and because it was increasingly a discourse on which the diverging opinions of the African leaders could unite and justify, each in their different way, the argument for an ACHPR on its own merits and not as a sop to Western values or pressures.

The ACHPR and protection of human rights

The working paper draft that M’baye had been asked to prepare for the Dakar Meeting had to perform a delicate balance in two separate but connected respects. Firstly, as between two political systems deeply suspicious of each other’s intentions throughout the process. Therefore, economic, social, cultural and peoples’ rights, the latter deliberately left undefined ‘so as not to end up in difficult discussions,’ had to be balanced against civil and political rights. President Senghor also made it clear that: ‘We are certainly not drawing lines of demarcation between the different categories of rights.

489 See CAB/LEG/67/3Rev.1.
491 See Jallow, The law of the African (Banjul) Charter on Human and Peoples’ Rights, p.27.
492 See Note 317.
We are not grading these either.\textsuperscript{493} The sensitivity of this issue can be measured by the constant need for reassuring references in speeches, statements and the Preamble to their equivalence.\textsuperscript{494} Secondly, the provisions for the protection of human rights had to acknowledge the reluctance of many heads of state to cede sovereignty and accept interference in their internal affairs; a reluctance that might easily result in outright rejection on any pretext. As Takarimbudde observed with hindsight: ‘...the OAU leaders were unprepared to commit suicide.’\textsuperscript{495}

It seems most unlikely that, at that time, the vast body of Africans could understand the concept of human rights. There is considerable anecdotal evidence that few of the political concepts that emerged in the late 1950s were understood by any strata below the professional and political elites. For example, the 1979 Monrovia Symposium concluded that, almost thirty years after the creation of the OAU, the concept of African unity still needed to be explained to the African people.\textsuperscript{496} It was the same for the idea of independence. Davidson reports a peasant saying: ‘Independence it isn’t for us...it’s for the people in the town.’\textsuperscript{497} Oruka similarly suggests that: ‘As culture, Negritude has as yet no deep roots among the African masses. It is...an appeal to the alienated intelligentsia, it speaks to alienation and not to exploitation, to the individual not the to the masses.’\textsuperscript{498} Similarly, in the context of the debate on pre-colonial concepts of human rights, a number of studies suggested that the concept of human rights had no foundation in African languages and ‘the continued reliance on imperial languages may itself have become the primary cause in the failure of...human rights culture to take root in the continent’\textsuperscript{499}

\textsuperscript{493} CAB/LEG/67/5, 2.  
\textsuperscript{494} See CAB/LEG/67/4, 4-5, CAB/LEG/67/5, 2 and CAB/LEG/67/3/Rev.1, 2.  
\textsuperscript{499} A.M Mazrui ‘Globalization and some Linguistic Dimensions of Human Rights in Africa’, in P.T.
There was, therefore, it seems, a clear case for 'promotion' of human rights in Africa.

UN conferences on human rights invariably conjoined 'promotion and protection' of human rights as an aim and as the putative function of an African commission, but it is clear, from the debates, that what was really proposed was promotion alone. It was not, however, with education in mind that UN conferences opposed any further steps beyond promotion, it was, primarily, an issue of non-interference and sovereignty, as the reporting of the debates makes abundantly clear. There was, therefore, as the drafting process is approached, a history of advancing promotion at the expense of protection of human rights. It was into this mix that the Monrovia Proposal was put forward. As indicated earlier, the Monrovia Proposal put forward little in the way of protective measures. Aware of the political sensitivities, unlike M'baye and the Dakar Meeting, a telling comparison, the UN preferred to side-step the issue. If, therefore, as Ramcharan believes, the UNDHR was influential in the process, then the message that was sent to the heads of state, that protection did not matter, was an unfortunate one, and could only have undermined the efforts of M'baye and the Dakar Meeting to ensure the inclusion of a substantial measure of protection.

M'baye, as described in Chapter Three, had determined that human rights violations could no longer be tolerated or excused, and he was, therefore, resolved that some measure of protection should be attempted. As he pointed out in his background paper to the Monrovia Seminar: '...is it not dangerous for specialists in law to give in to pessimism?' Kodjo, too, in his opening address at the Dakar Meeting advised that: 'If rights are to be determined they must be protected lest we fall prey to theory, illusion and futile exercise.' Nonetheless, both were aware of the delicate political balancing act

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See Note 194.

See Note 324.

HR/Liberia/1979/BP.2, 8.

CAB/LEG/67/4, 7.
that had to be performed. That balancing act was laden in three ways. Firstly, it was unrealistic to expect acceptance of certain measures. For this reason, as we have seen, it was considered 'premature' to provide for an African court. Secondly, it was recognised that the system as a whole would have to be subjected to some measure of OAU political control; and, thirdly, protective measures would have to be limited in extent, lest they be rejected in their entirety. As a consequence, political opposition to the idea of an ACHPR was to cast its shadow over the drafting process from the first.\(^{504}\)

In practice, therefore, the M’baye Draft was forced to recognise the impossibility of the independence of the African Commission. Consequently, whilst an attempt was made to create an independent group of experts that might have the 'high moral character'\(^{505}\) to take an independent stand, and to enable communications to be received from any source, M’baye was forced to concede that any findings and reports prepared by the African Commission, in effect, could not be issued publicly without the approval of the OAU AHSG.\(^{506}\) An effort was also made to limit the scope of exceptions against the spirit of the prescribed rights arising out of the application of domestic law. Thus, Article 5 required that ‘the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. However, to some extent, the acceptance of the principle of exceptions arising out of domestic law opened Pandora’s box; its effect is to limit protection to no more than is permitted by domestic law. Thus, when the sense of Article 5 was taken out at the Dakar Draft stage, it prompted Gittleman to suggest the ACHPR: ‘…is incapable of supplying even a scintilla of external restraint upon a government’s power to create laws contrary to the spirit of the rights granted.’\(^{507}\) The implications of duties owed by an individual to the state represented another potential erosion of protection; M’baye wisely limited the obligation

\(^{504}\) It is not the intention of this dissertation to provide a detailed analysis of the protective element of the ACHPR, merely to indicate by reference to the various drafts the intentions behind the drafting process.
\(^{505}\) CAB/LEG/67/1, Article 38.
\(^{506}\) CAB/LEG/67/1, Article 56 (1).
to a general statement of moral obligation to the family, community and mankind. 508

The Dakar Meeting was faced with the identical problem of political balance, with the added burden of a larger, less cohesive, drafting group. As Jallow described, there was an initial discussion, prompted by a minority, as to whether their mandate was to provide for protection at all, 509 in itself a cautionary warning. They decided that it was, but were, nonetheless, obliged to be 'realistic about the extent to which...sovereignty could be curtailed despite the mandate granted by the AHG', 510 and, therefore, for example, did not press for an African court. It was also at this point that some delegates sought to reduce the content of civil and political rights 'by subjecting them to unnecessary limitations as well as by seeking to tilt the balance in favour of the collective rights and the duties of the individual'. 511 Although that attempt was largely defeated, drafting amendments began to change the robust tone of the M’baye Draft. For example, Article 9 limits freedom of expression ‘to the respect of others’ honour and reputation’; and Article 11 limits freedom of assembly ‘... in the interest of national security...ethics, people’s rights and freedoms’. Similarly, obligations arising out of duties begin to express the conflict between the rights of the individual and the rights of the community, eroding the scope of the protection afforded to the former. Thus, Article 29 provides for an individual: ‘The duty not to compromise the security of the state whose national or resident he is...The duty to preserve and strengthen social and national solidarity’; and Article 27 that: ‘The rights and freedoms of each person shall be exercised with due respect to the rights of others, by collective security and by morals and common interest. 512

In respect of the functions and powers of the African Commission, the fundamentals of the M’baye draft were retained. It was agreed that the African Commission could receive communications and submit reports on violations, but sensitivity suggested that

508 CAB/LEG/67/1, Article 37.
510 ibid, p. 32.
511 ibid, p. 32.
proceedings would be confidential and the OAU AHSG would have the final power of
decision as to publication and sanction: 'The AHG would provide the political decisions
which needed to be taken at the conclusion of an investigation.' However,
significantly, it was proposed that disclosure merely required a request from one-third of
the OAU AHSG. It was also at this point that the need to avoid 'insulting terms' in
any communication was inserted. There was also a debate on the qualifications of
membership of the commission. On this point there was considerable disagreement but it
was finally agreed, as a compromise, that whilst membership was 'incompatible with that
of a government member or a member of the diplomatic corps', no restriction would be
applied in respect of government officials. There was also a conscious effort made to
bring the ACHPR into force in advance of full ratification by providing for the African
Commission to be set up immediately after OAU AHSG approval.

The Banjul Meeting, the political review, then began the detailed review of the wording
of each article leading to a further erosion of protective capacity. For example, Article 10
provided that an individual may be compelled to join an association 'subject to the
obligation of solidarity provided for in Article 29' (see above); Articles 11 (Freedom of
association), Article 13 (political rights) and Article 14 (property rights) limited rights 'in
accordance with the provisions of the law' or 'as provided by law'; membership of the
African Commission was no longer restricted and, indeed, Mokama (Botswana) and
Gabou (Congo) served as members of the African Commission whilst also serving as
Attorney-General and Minister of the Interior in their own countries. The one-third
vote requirement for publication was also removed to be kept in line with existing OAU
AHSG practice, and it was also decided that no prior administrative arrangements should
be made for an African Commission in advance of final ratification.

514 See CAB/LEG/67/3/Rev.1 Article 57(2).
515 CAB/LEG/67/3/Rev.1 Article 55(3).
516 CAB/LEG/67/3/Rev.1 Article 32.
517 Jallow, The law of the African (Banjul) Charter on Human and Peoples' Rights, p.34.
518 N.J. Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never', 3
Postscript

The dissertation suggested in Chapter Three that, for a number of heads of state, adoption of the 1979 and 1981 resolutions proposing the ACHPR could be contemplated because opposition could be reflected by other means within the OAU system. It is, of course, a simple matter to point to the continuing disparity in Africa between the rhetoric and practice of human rights, largely unaffected by the existence of the ACHPR, in support of that contention. That would also amply demonstrate the point made in Chapter One that the OAU, at that time, was not a club with enforceable rules, merely an annual meeting of heads of state. However, the suggestion implied more subtle scope for silent opposition on the part of unrepentant heads of state; this was to be expressed in several ways.

Firstly, a large number of states simply declined to ratify the ACHPR. Some element of randomness or particularity would certainly explain a part of that failure. However, perhaps the best indication of opposition and differences unresolved is that, as of 1992, almost all of the most 'radical' states who had opposed the progression of the ACHPR had still not ratified the ACHPR. That list includes, Angola, Mozambique, Ethiopia, Djibouti, Seychelles, Mauritius and Madagascar.519

Secondly, at the OAU CoM preceding the 1981 OAU AHSG that adopted the ACHPR, one of the final points raised concerned the future funding of the African Commission.520 It was a point well made. Although formally the responsibility of the OAU Secretary-General to arrange, it is, of course, subject to the agreement of the OAU member states, who can express their opposition by the simple expedient of withholding funding. The funding experience of the African Commission has not been positive. It took eighteen or so months for a base to be established in Banjul, The Gambia, and '...fifteen years after its inauguration, the African Commission was still based in a rented flat in The

520 See CM/Plen.Rapt.Rpt (XXXVII), 58.
Gambia'; 521 Lack of funding has also obviously impacted on the quantity and quality of staff to the extent that staff have had to be funded from non-African NGO sources. 522 A former Chairman has reported publicly that limited financial resources has meant that the OAU Secretary-General 'has not been able to "provide the staff and services necessary for the effective discharge of the duties of the Commission"'. 523 This has meant that: '...there are no summaries or minutes of many of its sessions. The secretariat has not been able to have documents translated...neither has it been able to assist the Commission on the determination of admissibility of communications. Finally, the Commission has not been able to publish its annual reports and other documents... 524

Thirdly, African states have largely ignored their obligations under the ACHPR. Article 62 of the ACHPR requires states to submit periodic reports every two years as regards the measures they have taken to give effect to the ACHPR. As of September 2001, only fifteen states had submitted all their reports. Twenty-three states had not submitted any report since their ratification. 525 As regards the review of these reports, only three hours were permitted for discussion of reports and 'minimal efforts have been made to ensure meaningful implementation of...obligations'. 526

Finally, because of the nature of the requirements of the African Commission in respect of communications, such as the need for identification, exhaustion of local remedies and respectful language, more than half the communications the African Commission has

522 ibid, 1251.
524 ibid, 315.
received have been declared inadmissible,\textsuperscript{527} and 'the Commission has not been able to complete the examination of a single communication'.\textsuperscript{528}


\textsuperscript{528} Dankwa, 'Conference on regional systems of human rights protection in Africa', 315.
Conclusion

In 1986 Vincent wrote that: ‘...human rights arrangements at the regional level are made to carry global standards into all the provinces of international politics...and, for their part, the regions have seen themselves as the local carriers of a global message.' The conclusion of this dissertation is that, in the case of the ACHPR, this is not an explanation that can be supported; that, on the contrary, the ACHPR must be seen primarily in terms of an African assertion of an African conception of human rights driven by African political perspectives of African national and international interests. That is, that the ACHPR is an example of the operation of the particular not the universal in human affairs.

That particularity began to emerge from 1957 onwards with independence, but it was only with the creation of the OAU in 1963 that it was given form and only with UN membership that it gained a platform from which it could be projected with intent. It sought immediately to assert itself on the international stage in pursuit of African interests. President Nkrumah declared: ‘For too long in our history, Africa has spoken through the voice of others. Now, what I have called the African Personality in international affairs will have a chance of making its proper impact....In asserting our African Personality, we shall be free to act in our individual and collective interests...’ This assertiveness, of which the African conception of human rights was merely one expression, it has been argued, was more than the natural pursuit of self-interest in international affairs, it expressed a far-deeper existentialism about Negro identity in the world that was also reflected in all spheres of African cultural and intellectual thought at that time.

African political principles were expressed prominently in the OAU Charter. Regionally,

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in the principles of non-interference and non-intervention, and in the concentration of sole power in the OAU AHSG, they reflected a desire to assert national sovereignty. Internationally, in the demands for the liberation of the African continent, the ending of apartheid and a greater African share of world economic wealth, they reflected a desire to extinguish the remaining marks of an historic racial inferiority. These political principles were to be the prism through which human rights were consistently viewed throughout the period under review.

From an African perspective, self-determination and development, its international goals, were the human rights that mattered; other human rights were appropriate only to rich Western economies not poor African countries in the early-stages of state formation and economic development as a result of colonial distortions and depredations. This assertion of human rights was applied consistently by the OAU in the activities of the African Group at the UN and in the primary documents of the OAU. Notably, the OAU Charter declines to take the opportunity to accept the UD unreservedly; it chose to give its support only in the context of self-determination. A similar approach is evident in the ACHPR itself. It is also evident in the disinterest shown by the OAU to other aspects of human rights.

This African perspective on human rights was formalised and systematised by M'baye throughout the 1970s. Firstly, through his ‘discovery’ of the ‘right to development’, which was accepted into the canon of human rights by the UNGA in 1986, and, secondly, in his formulation of an African conception of human rights; a conception that was paralleled by similar Africanisation in other African academic and cultural spheres. M’baye argued that black Africa had not been able to participate in the negotiations in 1948 that had resulted in the UD and that, naturally, as a result, the outcome was a conception that reflected occidental interests and considerations, particularly a concern with Nazism. The emergence, since that time, of independent black states in Africa required that a new conception of human rights be formulated which more accurately reflected the aspirations and interests of black Africa. This idea formed the basis on
which the Dakar Meeting deliberated and, in due course, became the common ground around which all political opinions could coalesce and an important element driving the process. It found expression in the Preamble of the ACHPR which sought to reflect, in its concept of human rights, the ‘historical tradition and the values of African civilization’. In this desire to present an African conception lies the heart of the conflict between M’baye and the UNDHR, which sought to preserve the sanctity of the universality of human rights, and the reproach to Vincent.

The argument is frequently put that foreign pressure was a major factor in the decision of the OAU to adopt Resolution 115 and the ACHPR. This, as the dissertation has sought to demonstrate, is to overstate both the importance of foreign pressure on African leaders, whose prime concern was the maintenance of their domestic power, and the effectiveness of that pressure. The UN was ineffective, if not counter-productive, in its institutional failure to respond to human rights violations, bureaucratic in its promotional activities and craven in its Monrovia Proposal; the USA sent out mixed signals, and indeed, as Kodjo indicates, it may well have been, ironically, the election of President Reagan and not pressure from President Carter that limited African opposition to the ACHPR; and Europe, as the Lome II negotiations demonstrated, was largely powerless. Whilst NGOs and Church groups were effective on the ground, in terms of effecting change, it was only the ICJ, working through African jurists, that was able to exert any influence.

Change, when it came, emerged through an unexpected window of opportunity as a result of a well-organised political initiative by African jurists centred around the ICJ, sympathetic heads of state and a pro-active OAU Secretary-General. There was, perhaps, a common recognition and embarrassment that political excesses in Africa and a changing international climate, generally, towards human rights were reflecting badly on Africa’s image and ability to negotiate from strength in other areas to which African states attached importance; not least apartheid, where Africa’s double standards were becoming an increasing embarrassment. However, opposition was most vocal from the ‘radical states’ who saw the idea as a Western neo-imperialism, and from the significant
block of 'silent' states who were prepared for the moment to acquiesce but who were shortly to express their opposition in more subtle ways. The actions of these states in delaying the process, in limiting the scope of the content, delaying ratification and, finally, through operational attrition confirmed that adoption did not signify a change of heart or acceptance; it was merely a necessary accommodation with political reality.

The underlying aim of this enquiry into the origins of the African experience of human rights regime formation was to determine whether the particularism, if that indeed was what it was, of the African experience could enable any wider implications to be drawn about the conception of human rights itself. The intention is that this case study of the African experience should be extended to include the experience of the, so-called, two earlier generations of human rights in order to identify whether particularism is a natural feature of all human rights regimes and, if so, whether that casts doubt on the claim of human rights to universal political legitimacy.
## Appendix 1 Human Rights Conferences in Africa 1961-1980*

<table>
<thead>
<tr>
<th>Seminar</th>
<th>Location</th>
<th>Date</th>
<th>Sponsor</th>
<th>References (See Bibliography)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seminar on Human Rights in Developing Countries</td>
<td>Dakar, Senegal</td>
<td>8-22 February 1966</td>
<td>UN ECOSOC (followed similar event in Kabul, 1964 for Asia)</td>
<td>ST/TAO/HR/25 UN 1966 Background Papers a-d Working Papers 1-16 SO 216/3 (7) UN</td>
</tr>
<tr>
<td>Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa</td>
<td>Cairo, Egypt</td>
<td>2-15 September 1969</td>
<td>UN (CHR Resolution 7 (XXIV) requesting UN Secretary-General to arrange seminars on Regional Commission on Human Rights)</td>
<td>ST/TAO/HR/38 UN 1969 Background Papers a-b Working Papers 1-2 2 Regional IGO papers SO216/3 (17) UN A. Robertson, 'A Commission on Human Rights for Africa?*, 2 Revue des Droits de l’Homme (1969), 696-702</td>
</tr>
<tr>
<td>Seminar on the Realization of Economic and Social Rights with particular reference to Developing Countries</td>
<td>Lusaka, Zambia</td>
<td>23 June-6 July 1970</td>
<td>UN (UNGA Resolution 926 (X) authorising advisory services in the field of human rights)</td>
<td>ST/TAO/HR/40 UN 1970 Background Papers a-c SO 216/3 (19) UN</td>
</tr>
</tbody>
</table>
Sixth Annual Franco-African Summit of the Heads of State
Kigali, Rwanda 21-22 May 1979 France

Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa
Monrovia, Liberia 10-21 September 1979 UN (UNGA Resolution 33/167 1978)

Human Rights Conference
Kinshasa, Zaire 29-31 January 1980 Zaire Institute for Protection of Human Rights in Central Africa

Colloquium on Human Rights and African Political Systems
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Postscript

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Nairobi, Kenya 2-4 December 1985 ICJ

*List is, primarily, of those conferences dealing with human rights as a concept; however, some flexibility in criterion has been necessary so as to allow the inclusion of seminars particularly important to the history of the origins of the ACHPR. The list and details are an expanded version of similar listings in C.E. Welch, Jr./R.I. Meltzer, (Eds.), Human rights and development in Africa (Albany, 1984), 338-39 Appendix Three and M.A. Abdul-Razaq, 'The Organisation of African Unity and the Promotion and Protection of Human Rights in Africa' (unpublished PhD. thesis, University of Hull, England, 1988), 631-32 Appendix VII.

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112
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