

STANDARDS OF PROCEDURAL DUE PROCESS UNDER INTERNATIONAL LAW VS. PREVENTIVE DETENTION IN SELECTED AFRICAN STATES

*James W. Skelton, Jr. **

I. INTRODUCTION

At the heart of the worldwide debate over human rights issues is this question: are there minimum standards of procedural due process which are applicable to all governments and all individuals through international law? The overwhelming weight of authority supports an affirmative answer to this question. The initial thrust of this article is to review the legal authorities which support the arguments in favor of the application of such standards of procedural due process through international law. Armed with such internationally-accepted standards, the status of the practice of preventive detention¹ in six countries in Africa will be discussed. Four of these nations, Tanzania, Kenya, Nigeria and Zambia, share a common historical position as developing countries. The two remaining countries surveyed, Ethiopia and South Africa, have very little in common with each other except for a geographical claim to portions of the African continent. Though a thorough inquiry into the state of human rights in Africa is neither feasible nor intended, this article acknowledges some trends and make some general observations regarding preventive detention as a violation of international human rights law.

II. STANDARDS OF PROCEDURAL DUE PROCESS UNDER INTERNATIONAL LAW

Prior to World War II, the individual person was hardly considered a subject of international law.² Despite this, "a whole series of

* Attorney, Houston, Texas. J.D., 1975, South Texas College of Law; LL.M., 1978 (International Legal Studies) New York University.

1. The most important rule of procedural due process is that a person shall not be imprisoned without a fair trial. The practice of preventive detention constitutes the exercise of power by a government to detain persons without trial in circumstances less dangerous than those which threaten the life of the nation. It is this infringement upon basic civil and political rights which is the topic of this article.

2. P. JESSUP, A MODERN LAW OF NATIONS 2 (1948).

rules and institutions . . . the effect of which was to protect the rights of individuals and groups³ have been recognized through such actions as the diplomatic protection of a State's own nationals, the prohibition of slavery and slave trade, and the like. Yet the individual was neither the subject of nor directly protected by international law.

"The Second World War was, as no other war has ever been, a war to vindicate human rights."⁴ Consequently, the Charter of the United Nations⁵ recognized the promotion of, and respect for, human rights as equal in importance to the maintenance of international peace and security. These purposes of the United Nations were set forth in the first article of the Charter, while Articles 55 and 56 committed the member states to "pledge themselves to take joint and separate action in cooperation with the Organization" in order to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."⁶ In this connection, an advisory opinion of the International Court of Justice concerning South Africa's continued presence in Namibia held that:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.⁷

Thus, the Charter took on a binding status as regards the observance and respect for human rights.

In order to add substance to these general aims, Lauterpacht proposed in 1945,⁸ and later through the United Nations Commission on Human Rights in 1947,⁹ that an International Bill of Human Rights be established. Late in 1947, the Commission decided that the Bill was to have three parts: a declaration, conventions, and measures for imple-

3. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 1, 4-5 (1979).

4. *Id.* at 5.

5. U.N. CHARTER art. 1, para. 3.

6. U.N. CHARTER art. 56; art. 55, para. c.

7. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 57. By "Mandatory," the opinion refers to South Africa in its capacity as a trustee in charge of a Mandate Territory. The concept of Mandate Territory was begun under the League of Nations and has been continued under the United Nations.

8. P. JESSUP, *supra* note 2, at 69.

9. Humphrey, *supra* note 3, at 6.

mentation.¹⁰ Coincidentally, Professor Jessup called for a revision of the traditional international legal order. He believed that the key to prospective revision was that international law, like national law, must be made directly applicable to the individual, and that the recognition of this interest which the whole international society has in the observance of its law is essential.¹¹ Jessup interpreted Articles 55 and 56 of the United Nations Charter to mean: "It is already the law, at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. This duty is imposed by the Charter, a treaty to which they are parties."¹² It was also about this time that the International Military Tribunal was equating crimes against humanity with universal crime.¹³

The Western democratic nations took the lead as originators of ideas and as ardent sponsors of the movement toward the adoption of an international standard of human rights. This effort came to fruition in the General Assembly in December 1948, when the Universal Declaration of Human Rights¹⁴ was passed without a dissenting vote.¹⁵ True, there were some notable abstentions—*e.g.*, the Soviet bloc and South Africa—but only South Africa has remained adamantly opposed to any type of human rights declaration or covenant.

From the outset, many of the draftsmen regarded the Universal Declaration as a non-binding instrument. For example, as a representative of the United States, Eleanor Roosevelt said: "It is not a treaty; it is not an international agreement. It does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms . . . to serve as a common standard of achievement for all peoples of all nations."¹⁶

Nevertheless, it is quite arguable that the Universal Declaration has, by general practice, become accepted as part of international law since custom is one of the three main sources of international law.¹⁷ This is an important point inasmuch as customary international law is binding upon *all* states, whereas treaties bind only the states which adhere to them.¹⁸ This is not, however, traditional international law—*jus*

10. *Id.*

11. P. JESSUP, *supra* note 2.

12. *Id.* at 91.

13. See N. LEECH, C. OLIVER AND I. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 694-96 (1972).

14. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948).

15. *Id.*

16. 19 DEP'T STATE BULL. 751 (1948).

17. M. MCDUGAL, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 275 (1980).

18. R. LILlich & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 55 (1979).

inter gentes—which is comprised only of the relations between states. On the contrary, the promulgation of the Universal Declaration of Human Rights constitutes a truly new international law which expresses its purpose in terms of the protection of the rights of individual men and women even against their own governments.¹⁹ The Universal Declaration has been referred to directly in the constitutions of the Federal Republic of Germany, France, Libya and other nations.²⁰ Perhaps Professor Humphrey best summarizes the evolving customary international status of the Universal Declaration:

The Declaration and the principles enunciated in it have been officially invoked on so many occasions both within and outside the United Nations that it can be said that it is the juridical conscience of the international community that the rules enunciated by it are normatively binding, and this whether they are in fact respected or not. It can be said that the Universal Declaration of Human Rights authentically defines those human rights and fundamental freedoms which the member states of the United Nations undertook to respect and observe by the Charter but which the Charter does not itself define. In retrospect . . . the adoption of the Declaration appears as a much greater achievement than anyone could have imagined in 1948.²¹

Further evidence of the growing consensus that the Universal Declaration must be accorded the status of customary international law came during the meeting of the Assembly for Human Rights in 1968. What became known as the "Montreal Statement" asserted that the "Universal Declaration of Human Rights . . . has over the years become a part of customary international law."²² In the same year, the Proclamation of Teheran stated: "The Universal Declaration of Human Rights constitutes an obligation for members of the international community."²³ In this connection, however, Professor Sohn has gone even further stating that, "[i]n a relatively short period, the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community; and, together with the Charter of the United Nations, it has achieved the character of a world law

19. Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUMAN RIGHTS J. 205, 208 (1975).

20. Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 AM. SOC'Y INT'L L. PROC. 217, 223-24.

21. Humphrey, *supra* note 19, at 207-08.

22. *Montreal Statement of the Assembly for Human Rights*, 9 J. INT'L COMM'N JURISTS 94, 95 (1968).

23. PROCLAMATION OF TEHERAN, International Conference on Human Rights, U.N. DOC. A/CONF. 32/41 (1968).

superior to all other international instruments and to domestic laws."²⁴

These pronouncements are "persuasive evidence" that the norms of the Universal Declaration have become so widely accepted as to constitute a rule of customary international law, and, at very least, these norms "constitute important indications that a lawmaking consensus on this subject is evolving."²⁵ The important point to be made is that by the actual practice of states and the recognition that the Universal Declaration's norms represent general principles of law, the Declaration has been transformed into customary international law and, thus, into a standard of international human rights law. Whether one utilizes the customary international law theory or the treaty obligation approach of Professor Sohn to transform the Declaration into a standard of international human rights law is not of great practical significance, since nearly "all states in the international community already are bound by the human rights provisions in the U. N. Charter."²⁶ In short, the Declaration is the standard by which human rights issues and violations may be judged throughout the world.

The provisions of the Universal Declaration which contain the basic standards of procedural due process are Articles 9 and 10, which state, respectively: "No one shall be subjected to arbitrary arrest, detention or exile;" and, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. . . ."²⁷ Of all the basic rules of procedural due process, "perhaps the most important . . . is the principle that a man shall not be imprisoned without a fair trial."²⁸ It is true that these may have been basic common law notions before World War II, but through the Universal Declaration they have taken on an international character. In this regard, it has been written that the Declaration, "has gained considerable authority as a general guide to the content of fundamental rights and freedoms as understood by members of the United Nations, and it is important as providing a *connecting link* between different concepts of human rights in different parts of the world."²⁹

The International Covenant on Civil and Political Rights³⁰ (Civil

24. Sohn, *The Universal Declaration of Human Rights, A Common Standard of Achievement? The Status of the Universal Declaration in International Law*, 2 J. INT'L COMM'N JURISTS 17, 26 (1968). See also Sohn, *Protection of Human Rights Through International Legislation*, in RENE CASSIN I AMICORUM DISCIPULCOROMQUE LIBER 325, 328 (1969).

25. R. LILICH & F. NEWMAN, *supra* note 18, at 66.

26. *Id.*

27. Universal Declaration of Human Rights, *supra* note 14, arts. 9, 10.

28. T. FRANCK, *COMPARATIVE CONSTITUTIONAL PROCESS* XXXIX (1968).

29. J. BRIERLY, *THE LAW OF NATIONS* 294 (6th ed. 1963) (emphasis added).

30. International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6546 (1966), *reprinted in* 56 DEP'T STATE BULL. 111 (1967) [hereinafter cited as Civil and Political Covenant].

and Political Covenant) and the International Covenant on Economic, Social and Cultural Rights³¹ codified nearly every provision of the Universal Declaration in considerably more detail and with greater precision. These covenants were designed to complete the second and third parts of the International Bill of Human Rights by providing multilateral treaties which would include mechanisms for implementation. The Civil and Political Covenant, however, allows for derogation from the prohibition against arbitrary arrest and detention and from the guarantee to a fair and public trial by an independent and impartial tribunal, "in time of public emergency which threatens the life of the nation. . . ."³² Nevertheless, for those states which have acceded to the Civil and Political Covenant³³ there exists an additional "connecting link" which permits close scrutiny of violations of the standards of procedural due process. It is this "connecting link," the minimum standard of procedural due process, that bridges widely divergent concepts of human rights, and, more particularly, the failure of selected African states to adhere to this standard, which is the subject of the following study.

III. PREVENTIVE DETENTION IN SELECTED AFRICAN STATES

Only a small minority of today's African states were free from colonial rule when the United Nations General Assembly resolution on the Universal Declaration occurred in 1948. Since then, however, the newly liberated nations, through the Organization of African Unity (O.A.U.), have recently declared their faith in, and adherence to, the principles of the Universal Declaration of Human Rights. This is significant since only twelve of the continent's nations have ratified the Civil and Political Covenant as of this writing.³⁴

This is not to say, however, that the national governments of Africa have overcome the fears and suspicions concerning international scrutiny of their internal affairs. On the contrary, the constitution of the O.A.U.³⁵ is replete with references to sovereignty—five of the seven

31. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), *reprinted in* 56 DEP'T STATE BULL. 107 (1967).

32. Civil and Political Covenant, *supra* note 30, art. 4, para. 1.

33. See *Multilateral Treaties in Respect of Which The Secretary General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc. as at December 31, 1978*, 106-07, U.N. Doc. ST/LEG/SER.D/12 (1979) for a list of those states which have acceded to the Civil and Political Covenant.

34. *Id.* The first ten nations were Guinea, Kenya, Libya, Madagascar, Mali, Rwanda, Senegal, Tanzania, Tunisia and Zaire. Morocco ratified the Civil and Political Covenant on May 3, 1979, 79 DEP'T STATE BULL. No. 2028, at 71 (1979), and Gambia became an adherent on Mar. 22, 1979, 79 DEP'T STATE BULL. No. 2026, at 67 (1979).

35. O.A.U. CHARTER, *reprinted in* 2 INT'L LEGAL MATERIALS 766 (1963).

principles of the O.A.U. Charter are in one way or another concerned with sovereignty.³⁶ Following the days of colonial repression, however, many of the new states reiterated their devotion to human rights and the dignity of man, especially as a means "to justify and strengthen their claim to independence and their attack upon white-dominated southern Africa."³⁷

The crucial question which must be asked is whether the new African States have "lived up to the brave hopes and expectations that marked their birth, and—perhaps the most searching query of all—have they been prepared to apply to themselves the admirable principles which they have insisted upon for others?"³⁸ This inquiry is also relevant for other countries not falling into the category of new states, but nonetheless having a considerable impact on the African approach to standards of procedural due process. Consequently, this examination will include a comparative discussion of the practice of preventive detention in Tanzania, Kenya, Nigeria and Zambia, all of which are included in the new states category, as well as in Ethiopia and South Africa, two of the oldest states in Africa.

A. *East African Traditions: Tanzania and Kenya*

General statements have been made concerning the status of procedural due process in some of the new states of Africa. For instance, one commentator asserts that, in terms of the Universal Declaration and the Civil and Political Covenant:

the intricate set of provisions outlawing arbitrary arrest or detention, asserting the right of anyone arrested or detained to take proceedings before a court, and seeking to guarantee humane treatment, presumption of innocence till proved guilty, and fair and speedy trial *are remote* from a world in which, leaving aside other abuses, preventive detention without right of access to any court is a *standard* part of the procedure.³⁹

Another author cautions that "it is not perhaps realized how closely interwoven into the public life and practices of government in East Africa are preventive detention and similar laws and practices."⁴⁰

This observation certainly reflects the legacy of colonialism, at least for the Commonwealth nations. In fact, preventive detention was

36. Okoth-Ogendo, *National Implementation of International Responsibility: Some Thoughts on Human Rights in Africa*, 10 E. AFR. L.J. 1 (1974).

37. Emerson, *The Fate of Human Rights in the Third World*, 27 WORLD POL. 201 (1975).

38. *Id.*

39. *Id.* at 208 (emphasis added).

40. R. MARTIN, *PERSONAL FREEDOM AND THE LAW IN TANZANIA* 8 (1974).

introduced into British East Africa in 1897 through section 77 of the Native Court Regulations.⁴¹ Under the Native Court Regulations, the Commissioner of the Protectorate could order the detention of anyone he thought displeased with the government, and there was no appeal from his decision.⁴² Accompanying this type of legalized repression was a distinct attitude toward both the Africans and the rule of law. "The whole tradition of colonial government was autocratic and carried with it a dislike of opposition of any sort and a willingness to override, disregard or amend the law, where necessary, to suit its own convenience."⁴³

Shortly after the British began to administer Tanzania (then called Tanganyika), this attitude manifested itself in the Deportation Ordinance of 1921.⁴⁴ This ordinance gave the Colonial Governor the power to order any person, whom he thought to be conducting himself in a dangerous manner, to be deported. This deportation from one part of the territory to another carried with it confinement without the right of appeal.⁴⁵

Many of the powers contained in the Deportation Ordinance were carried forward in the Preventive Detention Act of 1962⁴⁶ in Tanzania. Under this Act, the President may order the detention of any person who, he is convinced, is conducting himself so as to be dangerous to peace and good order or in a manner prejudicial to the defense or the security of the state or to prevent any person from doing so.⁴⁷ The President thus possesses very broad discretion indeed, and Section 3 precludes any court from reviewing any orders made pursuant to the Act. Obviously, this effectively emasculates an independent judiciary. Furthermore, Sections 5 and 6 do not provide a time limit within which to prove the validity of any detention order. Only the President is authorized to make regulations concerning persons detained, or to rescind or suspend such orders. Nor is there any requirement to publish the names of the detainees in the weekly government newspaper, as is required, for example, in Zambia and other countries. Although Tanzania has ratified the Civil and Political Covenant, the Preventive Detention Act does not require that its detention orders include the legal safeguards which are provided for in the Covenant.⁴⁸

41. *Id.*

42. *Id.*

43. McAuslan, *The Republican Constitution of Tanganyika*, 13 INT'L COMP. L.Q. 502, 565-66 (1964).

44. *Id.* at 561.

45. *Id.* at 565-66.

46. Preventive Detention Act of 1962, No. 60 of 1962, Cap. 490.

47. *Id.* at § 2(1)(a)-(b).

48. AMNESTY INTERNATIONAL REPORT 1978, at 88 (1979).

In a word, almost unrestricted power rests in the office of the President of Tanzania. This, in turn, reflects one of the basic principles followed by the drafters of the Interim Constitution of Tanzania:⁴⁹ to give the Executive the necessary powers to carry out the functions of a modern state⁵⁰—albeit a one-party state. The words “necessary powers” have been interpreted to mean that the problems implicit in Tanzania’s social and economic development require that the President be given whatever power is necessary to deal with them.⁵¹ The Interim Constitution does not contain a Bill of Rights, although the Preamble does refer to the more rudimentary elements of personal freedom in terms of moral aspirations.⁵²

Some commentators have argued that,

[t]he Tanzanian system recognizes the fact that there is a profound inter-relation between civil and political rights, and socio-economic and cultural rights; and proceeds on the basis that *human rights* as such cannot be enforced or safeguarded *except* by way of promoting and furthering the cultivation of certain minimum standards of political and executive conduct.⁵³

Still others believe that the liberated peoples of Africa, “defined racism, the remnants of colonialism, and what was seen as rising neocolonialism as being the major threats to rights and freedom.”⁵⁴ Therefore, the argument goes, the emphasis on fundamental rights and standards of procedural due process were relegated to second place. “The result of that situation has been the emergence of a double standard which has worked to debase the moral coinage of the Third World countries and to lessen the appeal of the causes they advocate. . . .”⁵⁵

At one time, Tanzania’s President Nyerere protested the existence of anything resembling a double standard. Indeed, speaking of the Biafran struggle in Nigeria, he declared during the African Summit Meeting in 1969:

If we do not learn to criticize injustice within our own continent, we will soon be tolerating fascism in Africa as long as it is practised by African governments against African peoples. Consider what our reaction would have been if the 30,000 Ibos had been massacred by whites in Rhodesia or

49. INTERIM CONSTITUTION OF TANZANIA, No. 43 of 1965.

50. *Id.* at Preamble.

51. McAuslan, *supra* note 43, at 504.

52. INTERIM CONSTITUTION OF TANZANIA, *supra* note 49, Preamble.

53. Okoth-Ogendo, *supra* note 36, at 14.

54. Emerson, *supra* note 37, at 222.

55. *Id.* at 223.

South Africa. One can imagine the outcry from Africa. Yet these people are still dead; the colour of those who killed them is irrelevant.⁵⁶

Perhaps President Nyerere would have been more precise had he said that the color of those who killed the Ibos *should be* irrelevant. For, clearly, color has become the ultimate yardstick by which human rights violations are being measured in Africa today. Though the history of colonialism renders this state of affairs understandable, it is nonetheless tragic and regrettable, and must be changed.

Tanzania's own position seemed even less virtuous following the United States State Department report on the condition of human rights in 105 nations. Of Tanzania, the report noted:

In contrast to its stance on violations of human rights in other countries, Tanzania tends to ignore or at best to justify in the interests of state security, most violations of human rights. Freedom of religion is observed, but other basic civil rights are subordinated to the achievement of Tanzanian Socialist objectives.⁵⁷

The history of colonialism has served, at least for Tanzania, to make preventive detention and similar deprivations of civil rights a part of its regular practice. Ironically, since 1969 when President Nyerere began giving more personal attention to the problem of preventive detention, there have been numerous examples of its abuse.⁵⁸ Although threats to the security of the state have, in many cases, been the explanation for the use of preventive detention, it would be fair to say that the Act is implemented not only to protect the Union, but to detain political opponents and to arrest ordinary criminals in order to avoid normal criminal procedure.⁵⁹ Although this abuse of the Act is not surprising, it does represent a flagrant violation of, and a studied indifference to, the international standards as recognized in the Universal Declaration of Human Rights.

As one of the nations which has ratified the Civil and Political Covenant, Kenya has opened itself to criticism from Western democracies which expect it to live up to the standards set forth in the Universal Declaration and the Covenant.⁶⁰ While Kenya's history is similar to Tanzania's in many respects, it was not until 1966, three years after Kenya became independent, that the Preservation of Public Security

56. *Id.* at 224.

57. N.Y. Times, Feb. 10, 1978, at 14, col. 1.

58. See R. MARTIN, *supra* note 40, at 92-93.

59. *Id.* See also 1975-76 AFRICA CONTEMPORARY RECORD B327 (C. Legum ed. 1976).

60. See generally Comment, *Detention Without Trial in Kenya*, 8 GA. J. INT'L & COMP. L. 441-61 (1978).

Act⁶¹ (Security Act) was passed. One writer noted that, "[t]he pattern in Kenya is now clear; the Security Act is used to imprison without trial those who go too far in criticizing the government."⁶²

This pattern of abuse under the guise of the Security Act was discernible during the years of Jomo Kenyatta's presidency.⁶³ Since the death of Kenyatta in August 1978, however, President Daniel Arap Moi has proven to be a moderating force against the use of the Security Act for political purposes. In fact, on December 12, 1978, the fifteenth anniversary of Kenyan independence, President Moi announced the release of all political prisoners in Kenya, thus making the nation one of the few black African countries without political prisoners.⁶⁴ Notwithstanding the release of all political prisoners, the Security Act remains in force, and President Moi has warned that "the Government will not hesitate in taking immediate and firm action against anyone whose activities threaten our peace, unity and stability."⁶⁵ It would appear, therefore, that the final chapter on Kenya's traditional use of preventive detention has yet to be written.

B. The Nigerian and Zambian Experiences

The creation of an African Commission on Human Rights was first proposed in Lagos, Nigeria, at the African Conference on the Rule of Law in 1961.⁶⁶ The question was subsequently discussed at the 1969 United Nations Human Rights Commission seminar and at the Addis Ababa Conference in 1971.⁶⁷ Although the functions of an African Commission were thought to be mainly promotional rather than judicial, the Organization of African Unity has yet to muster sufficient support for the establishment of an African regional human rights organization.⁶⁸

Among the participants at the 1971 Addis Ababa Conference were the Chief Justice of Nigeria and the Chairman of the Permanent Com-

61. Preservation of Public Security Act, No. 18 of 1966. For an excellent discussion of this Act see Comment, *supra* note 60, at 443-50.

62. Comment, *supra* note 60, at 449.

63. See generally AMNESTY INTERNATIONAL REPORT 1978, at 56 (1978).

64. N.Y. Times, Dec. 13, 1978, at A8, col. 3. See also AMNESTY INTERNATIONAL REPORT 1979, at 22-23 (1979).

65. N.Y. Times, Dec. 13, 1978, at A8, col. 3.

66. FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, 95TH CONG., 1ST SESS., HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY AND IN U.S. FOREIGN POLICY, 1945-1976, at 28-29 (Comm. Print 1977).

67. *Id.*

68. *Id.*

mission of Enquiry (Ombudsman) of Tanzania.⁶⁹ The group of jurists unanimously condemned any legislation which would permit detention without trial, and agreed that all places of detention should be subject to frequent and regular judicial inspection.⁷⁰ The participants revealed a willingness to criticize and call for improvements, but only in the context of domestic reform.⁷¹ The absence of any reference of international standards is evidence of the nationalistic approach taken by supporters of human rights, including the judiciary in Africa today.

According to a Nigerian commentator, in the mid-1960's it was virtually unthinkable that preventive detention could become a part of the written law in Nigeria.⁷² In fact, when an attempt was made to introduce such legislation, "[t]he entire country opposed the proposed legislation, and the government was forced to abandon it."⁷³ The Republican Constitution of 1963 included provisions regulating arbitrary arrest or detention and the guarantee of a fair hearing within a reasonable time.⁷⁴ All of those points were taken almost directly from the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁵ (European Convention). This provided Nigeria with a direct link to the Universal Declaration since the drafters of the European Convention selected provisions from the Universal Declaration which had been traditionally recognized by the contracting parties in Europe.⁷⁶

Not long after the government was forced to abandon the idea of legislation to implement the practice of preventive detention,⁷⁷ Nigeria entered a period of severe political crises. Military coups and civil wars put the nation in a genuine state of emergency. A combination of the Emergency Powers Act of 1961⁷⁸ and the Decrees of the Federal Military Government⁷⁹ were invoked to control the situation. The State Security (Detention of Persons) Decree of 1966⁸⁰ "suspended Chapter III of the Republican Constitution of Nigeria dealing with fundamental

69. Robertson, *African Legal Process and the Individual*, 5 HUMAN RIGHTS J. 465, 466 (1972).

70. *Id.* at 472.

71. *Id.*

72. Amachree, *Fundamental Rights in Nigeria*, 11 How. L.J. 463, 481 (1965).

73. *Id.*

74. *Id.* at 483-86 app.

75. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955) (entered into force Sept. 3, 1953).

76. Scheuner, *Comparison of the Jurisprudence of National Courts with that of the Organs of the Convention as Regards Other Rights*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 236 (A. Robertson ed. 1968).

77. Amachree, *supra* note 72.

78. Aihé, *Preventive Detention in Nigeria*, 9 REV. INT'L COMM'N JURISTS 68, 70 (1972).

79. *Id.* at 71.

80. *Id.* at 72.

human rights in respect of the individuals named in the Decree.”⁸¹ Predictably, the decrees deprived the judicial branch of jurisdiction to inquire whether the fundamental human rights standards of the Constitution had been violated. The only remedy under the Constitution had been an application for a writ of *habeas corpus*, but that, too, was suspended by the various decrees.⁸² In consequence, those affected by the decrees were not protected under the Constitution or the general laws. Any protection of the individual became meaningless, but such lack of protection was rationalized as being necessary during a national state of emergency.

With the assassination of Head of State General Murtala Muhammad, in February 1976, Lieutenant-General Obasanjo gave renewed pledges, and then delivered on his promise, to return the country to civilian rule by October 1979. The draft of the Constitution roughly followed the United States model, rejecting “the Westminster model inherited from the colonial period.”⁸³ The new Constitution devotes eight pages to “Fundamental Human Rights in legal and religious spheres,”⁸⁴ and marks the return to basic standards of procedural due process so jealously defended and lost fourteen years before.

Although the initial draft of the Constitution was prepared by a special civilian assembly, it was “subsequently amended by the ruling Supreme Military Council to include, among other things, the retention of the National Security Organization, Nigeria’s security police.”⁸⁵ With the announced termination of the state of emergency in October 1978, “the military government introduced new powers of detention without trial. This was interpreted as a precautionary measure to ensure that the removal of restrictions on political activity did not lead to ethnic hostility.”⁸⁶ There have been no reports of detention since then, and there are no known political prisoners in Nigeria as of this writing.⁸⁷

In 1972, Zambia followed Tanzania by proclaiming itself a one-party state—that of the United National Independence Party (UNIP). It has been suggested that “a one party democracy has been invited to

81. *Id.* This provision was extended to other cases of detention by various types of subsequent decrees. *Id.* But see AMNESTY INTERNATIONAL REPORT 1977, at 89 (1977) (wherein it is reported that, “The human rights situation in Nigeria has greatly improved since 1975-76. . . . There is a large measure of press freedom . . . and the judiciary retains a considerable degree of independence. . . .”).

82. *Id.* at 74.

83. 1976-77 AFRICA CONTEMPORARY RECORD B661-62 (C. Legum ed. 1977).

84. *Id.* at B662.

85. AMNESTY INTERNATIONAL REPORT 1979, at 29 (1979).

86. *Id.*

87. *Id.*

bring a halt to political rivalry and divisiveness often seeking roots in the various ethnic groups."⁸⁸ Yet the Constitution of Zambia, like that of Kenya, may be included among those in which there is a full entrenchment of fundamental rights,⁸⁹ the provisions of which have been derived essentially from the European Convention on Human Rights. This constitutes Zambia's direct link to the standards of procedural due process as set forth in the Universal Declaration.

The Preamble to the new Zambian Constitution—which became law in August 1973—articulates the kind of nationalism encountered in both Tanzania and Nigeria. It states:

We, the People of Zambia, by our representatives assembled in our Parliament, having established a One-Party Participatory Democracy under the Philosophy of Humanism; in pursuance of our determination to uphold our inherent and inviolable right to decide, appoint and proclaim the means and style whereby we shall govern ourselves as a united and indivisible Sovereign State under the banner of our motto "One Zambia, One Nation."⁹⁰

The Constitution's 138 articles provide extremely broad powers for the Executive, vesting in the President the right to declare a state of public emergency during which time the safeguards and limitations regarding preventive detention may be abrogated.⁹¹ In this, of course, Zambia is merely following the general mode of derogation provided for in times of crisis in the Universal Declaration and the treaties based on it.

Preventive detention has been an accepted part of Zambian society since its independence in 1964. Only four months prior to independence, Kenneth Kuanda, the then Prime Minister, requested the Colonial Governor to invoke his powers under the self-government Constitution and declare a "state of threatened emergency" in order to counteract the Lumpa uprising in the northern province.⁹² The requested declaration was made July 27, 1964, and since that date Zambia has been considered to be operating under a state of threatened emergency. Following the Lumpa affair came the military commitment to the liberation of southern Africa and its accompanying economic problems; both of these factors served to perpetuate the "emergency" atmosphere and thus contributed to the continuing prac-

88. 7 ANNUAL SURVEY OF AFRICAN LAW 185 (N. Rubin & E. Cotran eds. 1977).

89. Okoth-Ogendo, *supra* note 36, at 14.

90. 1973-74 AFRICA CONTEMPORARY RECORD C121 (C. Legum ed. 1974).

91. ZAMBIAN CONST. art. 30, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 225-26 (A. Blaustein and G. Flanz eds. Supp. 1980).

92. ZAMBIA, INDEPENDENCE AND BEYOND, SPEECHES OF K. KUANDA 104 (C. Legum ed. 1966).

tice of preventive detention without trial.⁹³

Safeguards against these emergency practices were provided for in the new Constitution which requires that any detainee be informed within fourteen days of the grounds for his detention.⁹⁴ Furthermore, notification of the person's detention must be published in the government newspaper within thirty days of its commencement.⁹⁵ The detention must be reviewed after one year, if requested by the detainee, by an independent and impartial tribunal.⁹⁶ Also, the detainee shall be afforded reasonable facilities to consult legal counsel.⁹⁷ These so-called safeguards are much broader than those contained in the Preventive Detention Act of 1962⁹⁸ in Tanzania, but what is most peculiar about them is the constitutional assumption and implicit recognition of preventive detention as a necessary and normal part of life and the law in Zambia. Surely this makes the Zambian approach unique.

The safeguards set forth in Article 27 of the Zambian Constitution do not limit the period of detention; consequently, this permits the President to continue the detention as long as he thinks it necessary. Furthermore, the independent and impartial tribunal which may review the necessity of the detention is accorded mere advisory powers, and may not override any executive detention order. In effect, therefore, the phrase "independent and impartial tribunal" becomes an empty, innocuous phrase.

Some Africans have argued that the preventive detention mechanism is a necessary one for the emerging nations.⁹⁹ The security of the state is given primary emphasis, and, in Zambia's case, with apparent good reason. The placing of unlimited powers in the hands of the President of a one-party state may, however, one day come to haunt the Zambians. President Kuanda has reportedly used his broad powers infrequently; indeed, he claims allegiance to "the philosophy of Humanism."¹⁰⁰ In any case, it is hardly wise to overlook the potential for gross abuses and violations of human rights standards, by this or future Presidents, which exists in the very heart of the Zambian Constitution.

The Zambian approach of constitutional recognition of preventive detention without trial by Presidential Decree indicates a slight divergence from the approaches previously discussed. "Slight" because the

93. J. PETTMAN, ZAMBIA, SECURITY AND CONFLICT 94-95 (1974).

94. ZAMBIAN CONST. art. 27(1), *supra* note 91, at 229-30.

95. *Id.*

96. *Id.*

97. *Id.*

98. Preventive Detention Act of 1962, *supra* note 46.

99. 1976-77 AFRICA CONTEMPORARY RECORD, *supra* note 83, at B403.

100. *Id.*

potential for abuse seems greater under the constitutional means of derogation from internationally recognized standards than it does under statutory methods. An additional problem is that any person may be detained whenever the President is satisfied that that person is a threat to the public security. "Public security" has been defined by the Preservation of Public Security Act to include:

the security of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance and administration of justice.¹⁰¹

Clearly, under this definition, practically any activity may be deemed a threat to public security, whether it be economic, criminal, or political in nature. Emerging nations do, of course, need some mechanism for the protection of the state, but it is evident that both the constitutional and legislative devices available in Zambia go far beyond the recognized limits of derogation from the standards of procedural due process.

One African commentator has concluded that "[t]he idea of a One-Party State has now become practical politics in Africa. The adoption of this system of government is clearly inconsistent with the enjoyment of the fundamental rights of the individual. . . ."¹⁰² Unlike Ghana, Tanzania and Malawi, Zambia has maintained a Bill of Rights within its One-Party State Constitution, subject, however, to wide-ranging exceptions and derogation escape clauses. The inclusion of the Bill is an indication that Zambia is not ready to join Tanzania in relegating civil rights to a secondary status beneath economic development and state goals. A continued devotion to a more nearly even-handed treatment of the individual's rights and the nation's economic and social objectives and problems will be required, however, if Zambia is to remain safe from the great dangers implicit in the unique system it has created.

Speaking from knowledge born of the raw experience of repression and incarceration in a totalitarian regime, the dissident Yugoslav writer, Mihajlo Mihajlov, articulates some of those "dangers" most eloquently:

101. Preservation of Public Security Act, 1964, sec. 2.

102. Aihé, *Neo-Nigerian Human Rights in Zambia: A Comparative Study With Some Countries in Africa and West Indies*, 3/4 ZAMBIA L.J. 43, 63 (1972). Note, a great deal of this article contains background material in regard to a Nigerian/Zambian approach to human rights which is now somewhat obsolete, or at least obscure, based on recent developments in both countries.

It is clear to everyone that discrimination and spiritual genocide against *the color of ideas*, which exists in all one-party systems, whether they are associated with an international one-party center or are independent, is as inexcusable as the discrimination against *the color of the skin*. It is also clear that those rights that allegedly exist in totalitarian societies—the right to work, apartment, medical and social care—mean nothing without other human rights because these same rights are granted in all the world's prisons.

. . . The destruction of elementary rights of the *individual* opens the door to amoral, monopolistic organizations (all monopolies are amoral), red, brown or black and to the possibility of struggle for power over people.

Can there be a question of freedom of exchange of ideas and information where every spoken word or thought not in line with resolutions of the latest plenum of the monopolistic and almighty party is declared an "*ideological diversion*," and is persecuted in the same manner as the act of planting dynamite?¹⁰³

A newly independent, vibrant nation like Zambia must realize that it is not immune to such dangers.

C. *The Ethiopian Wrinkle*

The Preamble to the Universal Declaration of Human Rights asserts that "disregard for human rights has resulted in barbarous acts which outraged the conscience of mankind." Concerning this, a commentator pointedly inquires, "[h]ave not some of the 'barbarous acts' which erupted in the Third World . . . also outraged that conscience?"¹⁰⁴ He was referring, of course, particularly to the Biafran debacle and the Ugandan massacres, but the point is equally telling when reference is made to Ethiopia. For Ethiopia presents the observer with what might be called a new twist: Ethiopia has had no history of colonial domination to speak of, and, consequently, lacks the status of a newly-independent or emerging nation.

Far from that, Ethiopia was one of the original members of the United Nations which voted in favor of the Universal Declaration of Human Rights,¹⁰⁵ and became a leader of the African independence movement in the 1950's and 1960's. Ethiopia's benevolent monarch, Haile Selassie, "gave" the people rights through the 1955 Constitu-

103. N.Y. Times, Apr. 8, 1978, at 23, col. 1 (editorial opinion).

104. Emerson, *supra* note 37, at 226.

105. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

tion¹⁰⁶ while, simultaneously, a quasi-feudal autocratic society continued to exist.

The 1955 Constitution contained a section entitled "Rights and Duties of the People," which enumerated twenty-nine rights and duties.¹⁰⁷ Most of these provisions reflected a certain tendency to incorporate the Universal Declaration and a Bill of Rights similar to that of the United States. For instance, Article 43 declared, "No one within the Empire may be deprived of life, liberty or property without due process of law;" while Articles 51 and 52 prohibited arrest without warrant except in cases of flagrant violations of law, and guaranteed the right to speedy trial and assistance of counsel. Article 53 contained a statement of presumption of innocence until proven guilty. Article 122, a general provision, declared the revised Constitution to be "the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void."¹⁰⁸ Presumably then, the document itself would have allowed for a system of judicial review, a functioning Bill of Rights, if the Emperor had not been accorded absolute power over the ministers, the parliament and the judiciary.¹⁰⁹ Imperial regimes like that of the "Conquering Lion of the Tribe of Judah Haile Selassie I Elect of God, Emperor of Ethiopia," are not given to disempowering themselves when granting faithful subjects a constitution.

Notwithstanding various constitutional provisions to the contrary, the Emperor promulgated detention orders for public safety and welfare, the last of which was entitled the "Detention Order of 1969."¹¹⁰ The order created "an unlimited number of penal offenses existing only in the mind of the Minister of Interior," so that the Minister's subjective belief that a person was a threat to public order, safety or welfare was sufficient to detain him without trial.¹¹¹ Such wide-ranging power was open to abuse and, indeed, was used to effect arbitrary and long-term detentions without trial during the reign of Emperor Haile Selassie.¹¹²

The severe drought and resulting famine in Wollo province from

106. ETHIOPIAN CONST. arts. 43 and 51-53, IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, 14-16 (A. Blaustein and G. Flanz eds. 1971).

107. J. PAUL & C. CLAPHAM, I ETHIOPIAN CONSTITUTIONAL DEVELOPMENT, A SOURCEBOOK 10-13 (1967).

108. *Id.* at 23.

109. *Id.* at 13-18.

110. Detention Order of 1969, No. 56 of 1969, Neg. Gaz. 28/13, *as amended by* Order No. 62 of 1970.

111. 7 ANNUAL SURVEY OF AFRICAN LAW, *supra* note 89, at 331-32.

112. Prepared Statement by Amnesty International Concerning Human Rights in Ethiopia, March 1977, at 1.

1972-74 marked a turning point in Selassie's reign that may be summarized as follows:

The Government's failure at first to admit publicly the extent of the famine and, when it was forced to do so, its failure to do anything effective about it, did more than anything else to arouse widespread public uneasiness about the state of the country. The Wollo drought came to symbolize the total failure of the Emperor's rule and was to become the centerpiece of the charges against him and his government after the army take-over.¹¹³

Estimates of the death toll resulting from the famine have been put at more than 200,000.¹¹⁴

Then with the overthrow of Haile Selassie in September 1974, what had been an intricate system of aristocrats, landlords and servants came crashing down. The military takeover which began as a "well-intentioned effort to galvanize a poverty-stricken but resourceful people into a hopeful campaign for national unity and economic salvation" soon became a deadly struggle among rival factions.¹¹⁵ "By 1976 the Ethiopian revolution had reached the classical stage of devouring its own children."¹¹⁶

One of the first actions taken by the Provisional Military Administrative Council (PMAC, but referred to as the *Dergue*, i.e., Committee) was to denounce the Constitution and ban all political parties. Rather than reducing the population by benign neglect, the military government chose to use a system of revolution by euphemism, a penal system whereby individuals died as the result of revolutionary measures and extra-judicial execution. The Penal Code Proclamation of 1974¹¹⁷ signaled the beginning of widespread repression. Under the proclamation, special military tribunals were created and empowered "to impose death penalties and long prison terms on civilians for treason, armed rebellion and a range of other offenses. The Code is retroactive and cases which might endanger public order or affect public morals may be heard *in camera*."¹¹⁸ The vagueness of the offenses and, especially, the retroactivity of the Code, violate the very principle of legality as developed under the Universal Declaration. Additional capital offenses were added to the Penal Code in July 1976, creating even more ambiguous offenses such as hoarding or sympathizing with "anti-

113. 1974-75 AFRICA CONTEMPORARY RECORD B162-63 (C. Legum ed. 1975).

114. Prepared Statement by Amnesty International, *supra* note 112, at 3.

115. 1976-77 AFRICA CONTEMPORARY RECORD, *supra* note 83, at B178.

116. *Id.*

117. Penal Code Proclamation of 1974, No. 2 of 1974.

118. Prepared Statement by Amnesty International, *supra* note 112, at 2.

revolution" or "anti-people" organizations.¹¹⁹ The newly-created urban dwellers' association (*kebelle*) tribunals and peasants' association tribunals were given jurisdiction over these offenses, and the *Dergue* continued the practice of indefinite detention without trial.¹²⁰ The stage was set for a brutal campaign against what the *Dergue* perceived to be its main opposition.

According to Amnesty International, a campaign of "Red Terror" was instituted by the *Dergue* in 1977 against "counter-revolutionaries," especially the Ethiopian People's Revolutionary Party (EPRP).¹²¹ "Killing took place arbitrarily when groups of young people were seen in the streets, during house searches for EPRP activists, and as a result of *kebelle* tribunal decisions following hearings unregulated by legal formalities. . . ." ¹²² Amnesty International has estimated that about 5,000 young people aged between 12 and 25 were summarily killed in Addis Ababa during the Red Terror, particularly between December 1977 and February 1978, when killings and imprisonment reached a peak and an average of about 100 people were killed each night.¹²³ Combining the use of summary execution and preventive detention in such a manner constitutes the most outrageous violation of the standards of procedural due process that a government may commit against its own people.

Predictably, the Penal Code Proclamation contains no legal safeguards for detainees. In addition, the *Dergue* created a "special category of persons arrested: women and girls. These comprise, first, the wives, daughters and mothers of former government ministers, relatives of the former Emperor and other prominent people. . . . It is often said that these women are 'hostages' against the behavior of their relatives."¹²⁴ In order to illustrate the ends to which the military government has sought to dominate the population, Amnesty International reports:

It is common knowledge that if a person wanted by the army is not found, a relative, even a child or a mother nursing a child, is often taken instead. Such detention is both arbitrary and contrary to any principle of legal liability as regards other persons' alleged offenses. In both cases women are arrested as if implicated in their menfolk's alleged political of-

119. Human Rights Violations in Ethiopia, Amnesty International, 5-6, November, 1978.

120. *Id.*

121. *Id.* at 14-15.

122. *Id.*

123. *Id.*

124. Prepared Statement by Amnesty International, *supra* note 112, at 5.

fenses, which is both arbitrary and extra-judicial.¹²⁵

There seemed to be, therefore, not even the facade of the rule of law in Ethiopia. With an estimated 30,000 men and women being held in all 291 of the *kebelle* detention centers at the height of the "Red Terror" campaign between December 1977 and February 1978, and numerous other thousands already executed,¹²⁶ it is obvious that not even the most fundamental human rights guaranteed by the Universal Declaration were being respected by the *Dergue*. There appeared to be but one right remaining in Ethiopia—the "right" to agree with the military government. Even though the "Red Terror" campaign officially ended by mid-1978, many of those detained during the campaign are still in detention and others have been detained since then.¹²⁷ In early 1979, the total number of political prisoners was believed to be about 8,000 although some sources put the number higher.¹²⁸

D. South Africa's Consistent Contempt

The South African abstention from the U.N. General Assembly vote on the Universal Declaration in 1948 was merely symptomatic of its devotion to what has been termed "pigmentocracy." Although it was only after World War II that the Afrikaner-dominated Nationalist Party obtained Parliamentary control and made apartheid the country's "official" policy,¹²⁹ the denial of human rights standards of procedural due process had long been part of the written law of South Africa.

As far back as 1927 in the Native Administration Act of that year it had been enacted that if an African, ordered to leave an area, refused to comply with the order, the Governor-General might in his unfettered discretion order that, without trial in a court of law or further investigation of any kind, the African can be summarily arrested, detained and removed from that area.¹³⁰

Significantly, the next action taken was the Native Laws Amendment Act¹³¹ in the early 1950's. This Act permitted entire African tribes to be moved from one province to another without recourse to the courts.¹³²

125. *Id.*

126. Human Rights Violations in Ethiopia, *supra* note 119, at 7.

127. *Id.* at 8.

128. AMNESTY INTERNATIONAL REPORT 1979, at 19 (1979).

129. RACE, PEACE, LAW AND SOUTHERN AFRICA 24 (J. Carey ed. 1968).

130. D. COWEN, THE FOUNDATIONS OF FREEDOM 52 (1961).

131. Native Laws Amendment Act, No. 54 of 1952.

132. D. COWEN, *supra* note 130.

The 1960's witnessed a series of preventive detention laws, the most draconian of which is the still effective Terrorism Act of 1967.¹³³ The relevant provision is Section 6, which appears to have borrowed some of its language from the now defunct fourteen-day detention clause¹³⁴ of the previous year. The major difference between the two is that the Terrorism Act contains no time limitation upon detention without trial, while the fourteen-day provision required application to the courts for an extension beyond the fourteen-day period.

The Terrorism Act itself created a new type of treasonous offense in South Africa, namely participation in terroristic activities. The concept of terrorism is "extremely widely framed and covers acts which would not normally be described as acts of terrorism."¹³⁵ A South African law professor sympathizes with both the ordinary citizens and courts in attempting to understand the definition of terrorism: "Well might one of their lordships declare, with suitable acknowledgement to Wellington: 'I don't know about the terrorists, but by God, this Act terrifies me.'"¹³⁶ Although this comment assumes that any judge would have occasion to review the legislation, Section 5 of the Act precludes courts of law from making pronouncements "upon the validity of any action taken," or "to order the release of any detainee."¹³⁷

Unlike the cases of black African laws or constitutions previously discussed, Section 6 authorizes any commissioned officer of, or above, the rank of Lieutenant-Colonel to arrest without warrant and detain persons "*if he has reason to believe* that any person is a terrorist or is withholding from the South African police any information relating to terrorists or offences under this Act."¹³⁸ A more subjective basis for detention, and a wider, more vague, category of persons to be detained without trial is difficult to imagine. In effect, Section 6 gives the security police "absolute powers above the courts, above the law and above the individual."¹³⁹ The power of the security police in dealing with detainees has been well summarized as follows:

If the security police will it, such a person is held in solitary confinement. If the security police require it, he is held incommunicado or allowed visitors only as the security police may admit. If the security police consider it necessary, a detainee may not be allowed to wash or shave or change his

133. Terrorism Act, No. 83 of 1967.

134. General Law Amendment Act, No. 62 of 1966, § 22.

135. 1967 ANNUAL SURVEY OF SOUTH AFRICAN LAW 327 (1968).

136. Matthews, *The Terrors of Terrorism*, 91 S. AFR. L.J. 381 (1974).

137. Terrorism Act, *supra* note 133, at 85.

138. *Id.* at § 6 (emphasis added).

139. J. CARLSON, NO NEUTRAL GROUND 155 (1973).

clothing or have eating utensils. If the security police believe it necessary, a detainee may be interrogated endlessly for months after his detention. No court may inquire into or pronounce upon the validity of any such action taken by the security police.¹⁴⁰

As proof of these assertions, during the inquest into Stephen Biko's death in 1977 (then the 48th known death during detention), South African security police officers admitted that "they had forced the black leader to spend 19 days naked in a cell before moving him to an office where they interrogated him around the clock and kept him shackled in handcuffs and leg-irons almost continuously for 50 hours."¹⁴¹ Not long thereafter, a commentator accurately pointed out what all this means: "In death, Stephen Biko tells us the fundamental truth about South Africa. A minority holds power there by violence. It has no consent and can only rule by force."¹⁴² Of the inquest which followed Biko's death, a South African journalist who observed the proceedings offered this observation: "It is a picture of unbridled political police power over life and death—a power which, condoned by the State, descended to a level of brutality and callousness unmatched in any society that still clings to at least some vestiges of legality."¹⁴³

Despite the protests from within and without South Africa following Steve Biko's death, waves of detentions continued in 1978 and 1979.¹⁴⁴ In fact, a new means of restricting freedom, by detention of state witnesses in political trials, began in 1978 when the Criminal Procedures Amendment Act¹⁴⁵ was passed by parliament in order "to increase security police powers to detain potential state witnesses in Terrorism Act Trials."¹⁴⁶ Under this new Act, there is no limit of time for which witnesses may be held incommunicado until the completion of trials in which they are scheduled to give evidence.¹⁴⁷ There appears to be no limit to the number of ways in which South Africa may attempt to preempt the rights of its citizens.

140. Carlson, *South Africa Today: The Security of the State vs. the Liberty of the Individual*, 2 HUMAN RIGHTS J. 125, 135-36 (1972). Mr. Carlson served as the defense attorney in the celebrated case of "the twenty-two" in South Africa in 1969-70, a case which involved the detention of twenty-two individuals under Section 6 of the Terrorism Act.

141. N.Y. Times, Oct. 11, 1977, at 1, col. 2. See also D. WOODS, BIKO 254-55 (1978), and AMNESTY INTERNATIONAL REPORT 1978, at 80 (1979) wherein it is stated: "In addition to Biko, at least 10 other political detainees died in detention in 1977 alone." No deaths of detainees have been reported during the past two years, however. N.Y. Times, June 29, 1980, at 10, col. 3.

142. N.Y. Times, Dec. 5, 1977, at 7, col. 1 (editorial opinion).

143. D. WOODS, BIKO 262 (1978).

144. AMNESTY INTERNATIONAL REPORT 1979, at 32 (1979).

145. Criminal Procedure Matters Amendment Act, No. 52 of 1978.

146. AMNESTY INTERNATIONAL REPORT 1979, at 33 (1979).

147. *Id.*

South Africa's unqualified racism, coupled with its state security mentality, has created a contemptuous attitude toward human dignity and the rule of law. Of course, the rule of law and standards of procedural due process are much more likely to be adhered to when the favored people of its One-Color State are involved. The continued existence of such an unashamedly discriminatory society may well be sufficient reason for the black African nations to apply, in turn, a double standard to their public condemnations of violations of international human rights standards.

IV. CONCLUSION

In this article, the writer has presented the arguments which support the claim to the establishment of minimum standards of procedural due process under international law. As a part of both positive international law and customary international law, the Universal Declaration has been incorporated, through treaties or constitutions, either directly or indirectly into almost all of the legal systems surveyed herein. Therefore, the Universal Declaration of Human Rights has been used by the United Nations and other international and regional organizations, as well as by national governments as a yardstick by which to measure compliance with basic standards of human rights.

Yet it is still true that, "[i]nternational experience suggests that while many governments are willing to support the principle of international concern respecting the problems of other states, each typically seems to consider that its own human rights problems are somehow different and remain solely its own business."¹⁴⁸ This phenomenon is most vividly illustrated by the militant attitude of some black African nations toward South Africa's unmitigated racism and the seeming lack of protest coming from those same nations regarding violations of human rights in Ethiopia and elsewhere. Yet, "[t]he untold story of the African controversy is that such violations of human rights and fundamental freedoms, in fact, do occur in startling proportions in independent African states ruled by native Africans themselves."¹⁴⁹

The most disturbing tendency observed, however, is that most of the developing African countries reviewed are turning to one-party systems of government with unbridled executive powers. Of the five black African nations discussed, only Nigeria currently employs a multi-party system of constitutional government, the Constitution of which guarantees civil rights. Kenya is stable under President Moi, but the

148. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 Wis. L. Rev. 171, 181 (1969).

149. Ebiasah, *Africa: New Masters, New Slaves*, 8 HUMAN RIGHTS 10 J. (1979).

old detention laws remain intact, ready to be used against political opponents. The Tanzanian system is geared to a legalized denial of procedural due process through orders of its one-party President. The military dictatorship of Ethiopia has violated even the most basic of all human rights, the right to life, in such a way as to scarcely allow time for the consideration of standards of due process. Ethiopia's gross violations of the standards of procedural due process pale in comparison to the denial of the right to life there; furthermore, those violations are surely irrelevant to those whose lives have been, or will be, summarily terminated through "revolutionary measures." Zambia is comparatively much more stable, although it is leaning towards the Tanzanian model. All of the African states surveyed rely on some method of preventive detention, but the South African method goes much further than the others, spawning a network of security police, free to roam about arresting and detaining persons, solely on the basis of their subjective opinions. South Africa has steadfastly ignored all human rights declarations and conventions, in effect virtually abandoning the rule of law and the international standards of due process.

Generally, it is fair to say that "[p]reventive detention is no longer used in these countries to protect state security but to suppress legitimate opposition to the existing political order."¹⁵⁰ If the Universal Declaration is used as a yardstick, it is indisputable that the practice of preventive detention constitutes a blatant violation of the international standards created by it. It is equally true, however, that no international standard of procedural due process can be expected to protect human rights unless and until the societies involved are prepared to adhere to those standards for the sake of the individual. "Thus, the success of international efforts will not be measured by the quantity or noise-level of international activities, but by what actually happens within the countries concerned."¹⁵¹ Fortunately, the international standard has survived violations by one state or another in the past, and lives on to provide a framework for comparison, criticism and continual improvement.

150. *Id.* at 13.

151. Bilder, *supra* note 148, at 217.

