REJUVENATING THE COMMONWEALTH—THE HUMAN RIGHTS REMEDY

ALISON DUXBURY*

I. INTRODUCTION

> Anyone who tries, as I have tried for a number of years, to have constructive discussion on the Commonwealth in London will realize that interest in the subject is very small. Except in a few professionally interested quarters there is something close to a complete lack of interest in the subject, which is reflected in the glazed eye of boredom if one pursues it.[1]

LORD Casey's sad testament to an organisation which was perceived as "on the way to becoming not much more than a paper connection"[2] is hardly encouraging to someone intent on studying the institution. It would appear that the Commonwealth of Nations as a contemporary discussion point is even less fashionable today than it was 30 years ago. It has recently been written that in our generation those few individuals with an opinion about the Commonwealth view it as an "anachronistic organization whose retirement to the pages of history is long overdue".[3] The situation of an Australian attempting to write about the Commonwealth is confused by the need to distinguish it from the "Commonwealth of Australia" by such adjectives as the "British" Commonwealth or the "Commonwealth of Nations".[4]

While these comments do not augur well for a study of the organisation, it is widely acknowledged that the Commonwealth underwent a transformation in the years following 1965.[5] The establishment of a Secretariat, the articulation of an official definition of the Commonwealth as "a voluntary association of independent sovereign states ... consulting and co-operating in the common interests of their peoples"[6] and the growth in

* Assistant Lecturer, Faculty of Law, Monash University. The author wishes to thank Rebecca La Forgia for her helpful comments on an earlier draft of this article.

1. R. G. Casey, *The Future of the Commonwealth* (1963), p.27.
2. *Idem*, p.10.
3. N. Saravanamutto, "Are We Building a Commonwealth for Tomorrow?" (1995) The Round Table 433.
4. The "British" Commonwealth was considered too Anglo-centric, and the "of Nations" was dropped as redundant; W. Dale, "Is the Commonwealth an International Organisation?" (1982) 31 I.C.L.Q. 451.
5. This view is espoused by D. Ingram, *The Imperfect Commonwealth* (1977), p.ii, A. J. Groom and P. Taylor (Eds), *The Commonwealth in the 1980s: Challenges and Opportunities* (1984), pp.3–4 and D. Judd and P. Slinn, *The Evolution of the Modern Commonwealth* (1982), Part 7, pp.118–143.
6. The Commonwealth Declaration of Principles (1971), para.1, in *Background Documents—Commonwealth Heads of Government Meeting* (1981).

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

membership have contributed to the organisation's international validity. More recently, the unanimous decision of the South African Cabinet to seek readmission[7] demonstrates that it is premature to dismiss the Commonwealth as a historical organisation. The Commonwealth's continuing preoccupation with the issue of human rights has grown from its apparent need for a mission to promote a consensus among its members. In the past that mission has been the abolition of apartheid in South Africa (despite Britain's persistent refusal to approve trade sanctions during the apartheid regime). At the 1991 Heads of Government Meeting the topic of human rights, with its relevance to all members and citizens, arose as a natural extension to the problem of racial prejudice. In the 1990s Commonwealth officials have described human rights as a "tidal wave"[8] which must be ridden, a clock which will not be "lightly reversed".[9] However, the Commonwealth's style of operation, which promotes friendly discussion and precludes the dissection of individual members' affairs, appears to have prevented any real enquiry into the problem. Yet, recently the Commonwealth has taken a more pro-active role by suspending Nigeria for serious violations of the Harare Commonwealth Declaration,[10] perhaps heralding a new approach to the "awkward members of the family".[11]

The purpose of this article is to analyse the way in which the Commonwealth as an association of over 1.5 billion people,[12] with disparate cultural and ethnic backgrounds, has used the human rights debate to reaffirm and reform its role as an international organisation. The following section outlines the defining features of international organisations generally; their membership, constituent instruments and the role of their independent organs. While the precise status of the Commonwealth has been debated by a number of writers, this analysis will not centre on the question whether the Commonwealth is an international organisation. Rather, the effect human rights concerns have had on Commonwealth membership criteria and the development of its constitution will be discussed. Second, the entities of the Commonwealth, in particular the Secretariat and the Heads of Government Meetings, will be examined to determine the extent to which the association has used the functions traditionally performed by international organisations to implement a human rights programme. In the light of this discussion of the processes which have already

7. *The Report of the Commonwealth Secretary-General* (1995), p.30.

8. Address by Prime Minister Major at the Opening Ceremony of the Commonwealth Heads of Government Meeting in Harare, 16 Oct. 1991.

9. R. Chongwe, "The Commonwealth and the New World Order—Safeguarding Civil Society" (1992) African J.Int. and Comp.L. 962, 971.

10. The Auckland Communiqué (1995), para.10.

11. L. Chalker, "Development and Democracy: What Should the Commonwealth be Doing?" (1994) The Round Table 23, 24.

12. This figure is quoted in the *Report of the Commonwealth Secretary-General* (1995), p.108.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

been instituted, attention is focused on the future direction of the Commonwealth and the problems which may arise with the course it has adopted.

II. THE CONCEPT OF COMMONWEALTH

A. The Commonwealth as an International Organisation

For many Commonwealth citizens knowledge of the association is confined to vague notions of the British Empire, Heads of Government Meetings and the Commonwealth Games. Yet the Commonwealth certainly represents more than the annual Queen's Christmas message, a biennial meeting of leaders and a sports competition. In their study, *International Institutional Law*, Schermers and Blokker define international organisations as "forms of cooperation founded on an international agreement, creating at least one organ with a will of its own, established under international law".[13] Muller does not regard the Commonwealth as an international organisation, as it was not established by an international agreement.[14] Dale, while admitting that the Commonwealth is of an "exceptional nature", believes that it fulfils the attributes necessary to command the status of an international organisation.[15] Chan supports this contention, noting that the Commonwealth has both an international personality and an ability to undertake initiatives on behalf of its members and in its own name.[16]

One element which public international organisations have in common is member States.[17] A distinction can be drawn between universal organisations (aiming to have all States as members) and closed organisations (seeking membership only from a specified group).[18] The consequences of this distinction are many. Universal organisations must determine whether conditions will be imposed on membership and how strictly they will be enforced. Second, universal organisations will necessarily have a heterogeneous membership with large socio-economic, political and cultural differences between members.[19] The membership of closed organisations may be more homogeneous with closer economic and cultural ties.[20]

13. H. Schermers and N. Blokker, *International Institutional Law* (1990), p.23. These three requirements were adopted by A. Muller, *International Organizations and Their Host States* (1995), p.4.
14. Muller, *idem*, p.106.
15. Dale, *op. cit. supra* n.4, at p.473.
16. S. Chan, "The Commonwealth as an International Organization", in J. Alner (Ed.), *Twelve Years of Commonwealth Diplomatic History, Commonwealth Summit Meetings 1979–1991* (1992), p.3. See also W. D. McIntyre, *The Significance of the Commonwealth, 1965–90* (1991), p.4.
17. Schermers and Blokker, *op. cit. supra* n.13, at p.45.
18. *Idem*, pp.36–37.
19. *Idem*, p.36.
20. *Idem*, p.38.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

Additionally, participation by States in international organisations "should be designed to further the aims and purposes of the organization and the effectiveness of its work".[21] Membership criteria not only inform us about the extent of membership, but also the aspirations of the organisation.[22] Thus, in the next section the Commonwealth's membership criteria (to the extent they are articulated) will be examined to determine whether human rights concerns are taken into consideration.

Most organisations are established to perform a specific function.[23] This purpose may be gleaned from the international agreement which creates the organisation. While there is no definitive treaty which establishes the Commonwealth, there are a number of documents which clarify its status. These "constitutional instruments" have established the monarch as the head of the association, defined the relationship between the members and their organisation, set out certain principles to be adhered to and the objectives to be pursued. As the Commonwealth's aims have expanded to take into account broader issues, including human rights, the consequent developments in its constitution will be examined.

The third defining characteristic of an international organisation is the presence of an independent organ. The principal organs of the Commonwealth have been identified as the Heads of Government Meeting and the Secretariat.[24] It is through its organs that an organisation's functions are articulated and carried out. Groom considers that the essential functions which determine the survival of an international organisation are a capacity to adapt to society as a unit, the ability to integrate sub-units, a sense of identity and sufficient self-knowledge to enable the setting of goals.[25] If these are the touchstones for a properly functioning international organisation the Commonwealth fulfils the role ably. Its flexibility has enabled it to grow in size and adapt to a changing structure which now comprises over 200 formal and informal institutions incorporating the title of "Commonwealth". The loyalty that members exhibit towards the organisation demonstrates a sense of (perhaps somewhat hazy) identity, and numerous communiqués and declarations have proved the ability to set an agenda. To complete this picture the Commonwealth has observer status before the United Nations.

More specifically, in defining the functions of an international organisation, standard-setting, supervision and the enforcement of values are all important elements in fulfilling its purpose. The source of proposals for standards may be either the organisation's secretariat or individual or

21. F. Morgenstern, *Legal Problems of International Organizations* (1986), p.46.
22. C. Archer, *International Organizations* (2nd edn, 1992), p.45.
23. Schermers and Blokker, *op. cit. supra* n.13, at p.43.
24. Dale, *op. cit. supra* n.4, at p.465.
25. A. J. Groom, "The Commonwealth as an International Organization", in Groom and Taylor, *op. cit. supra* n.5, at p.294.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

groups of members.[26] For instance, in the Commonwealth, policy goals and objectives are established at the Heads of Government Meeting, while the Secretariat prepares strategic and operational plans and undertakes programme delivery.[27] In addition, non-governmental organisations have a very important role to play in identifying topics of concern—a role highlighted by the number of such organisations which attended the Second Commonwealth NGO Forum held in New Zealand.[28] One of the problems which arises in standard-setting is the nature of standards on which it is possible to obtain a sufficient measure of agreement among the membership.[29] This is particularly relevant in the Commonwealth, where consensus decision-making is the norm and human rights standards must accommodate many divergent beliefs and interests. The organisation must also determine whether the standards it drafts purport to represent binding rules of conduct or non-binding recommendations.

The purpose of standard-setting is to provide rules which further the aims and objectives of the organisation and which will be applied by member States. Thus, "It is generally recognized that one of the main tasks of international organizations is to supervise compliance with their rules."[30] Supervision may be based on reports by members on particular obligations, information collected by the organisation itself or by an inspection conducted of a member State.[31] Landy, in the context of the International Labour Organisation, has discerned two objectives in the process of supervision. First, full information must be obtained on the degree of application, then governments must be persuaded to adopt the measures required to achieve compliance.[32] In relation to Landy's first objective, the Commonwealth Secretariat has consistently denied that it has any role to play in investigating an individual member's conduct in the field of human rights.[33] This lack of supervisory or investigative role ensures that it is difficult to assess compliance and punish non-compliance with the standards expressed. Enforcement techniques in international

26. Morgenstern, *op. cit. supra* n.21, at p.93.

27. See "Governance Matrix" in *Report of the Commonwealth Secretary-General* (1995), p.135.

28. See Commonwealth Foundation, "Second Commonwealth NGO Forum—Paths out of Poverty: The Role of NGOs" (1995) where it was reported that 150 people representing NGOs participated in the Forum.

29. Morgenstern, *op. cit. supra* n.21, at p.96.

30. Schermers and Blokker, *op. cit. supra* n.13, at p.863.

31. See "B. Supervision by or on Behalf of the Organization", *idem*, pp.870–889.

32. E. Landy, *The Effectiveness of International Supervision—Thirty Years of I.L.O. Experience* (1966), p.151.

33. See Commonwealth Secretariat, *Rights—The Commonwealth Approach to Human Dignity* (1995), p.1. The mandate of the Human Rights Unit is to "(a) promote human rights within the Commonwealth; it being understood that the functions of the Unit will not involve any investigative or enforcement role".

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

organisations range from non-coercive compliance mechanisms such as informal persuasion and the "mobilisation of shame" involving international exposure,[34] to formal sanctions, the most drastic being expulsion from the organisation.[35] The extent to which the Commonwealth has engaged in supervision and applied sanctions will be examined in the context of the responses of its official and unofficial bodies to human rights problems in member States.

B. Membership

When Bull stated in the 1950s that "the history of the Commonwealth is one of continuous disintegration",[36] no doubt he did not envisage that in the 1990s the organisation would include "peoples from virtually all the main races of the world and countries from all continents, some very rich and some very poor, some very large and some very small".[37] This diversity indicates that there are no definitive criteria for membership of the Commonwealth; however, a number of principles have been established. Previously, membership was open only to former British dependants or dependants of other Commonwealth members.[38] Until 1995 no former British dependency had ever been refused entry and no country that had not been a Commonwealth dependency had asked formally to join.[39] The successful application of Mozambique is an unusual case as it is the first country with no historical links to Britain that has been granted membership.[40] In support of Mozambique's application were its geographical position (all its mainland neighbours are Commonwealth countries), the fact that it received bilateral assistance from other members, and the role it played in the struggle for majority rule in Rhodesia (now Zimbabwe).[41] Following this addition, the Heads of Government requested that the Secretary-General establish an intergovernmental group to examine and advise on the criteria for membership.[42] In its preliminary report the group has recommended that eligibility for membership be based on direct or indirect British rule or administrative links with another Commonwealth

34. F. Kirgis, *International Organizations in Their Legal Setting* (2nd edn, 1993), p.524.
35. Schermers and Blokker, *op. cit. supra* n.13, at p.921.
36. H. Bull, "What is the Commonwealth?" (1959) 11 World Politics 577, 579.
37. A. N. Papadopoulos, *Multi-Lateral Diplomacy Within the Commonwealth—A Decade of Expansion* (1982), p.10.
38. Not all members of the British Empire joined. E.g. when Burma became a republic in Jan. 1948 it left the Commonwealth: see Papadopoulos, *idem*, p.36.
39. Apparently the Prime Minister of Japan told the Queen in 1954 that Japan wished to join the Commonwealth, but this was not pursued. See J. D. Miller, *Survey of Commonwealth Affairs—Problems of Expansion and Attrition 1953–1969* (1974), pp.392–393, cited in Papadopoulos, *idem*, p.7.
40. "Welcome to Mozambique" (1996) Commonwealth Currents 4.
41. *Ibid.*
42. The Auckland Communiqué (1995), para.47.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

country, recognising Mozambique as an exceptional case.[43] The decision on Rwanda's current application for membership[44] will give some indication of the extent to which the Commonwealth will adhere to previous criteria or admit other nations, thereby suggesting a universal rather than closed organisation.

The second notable feature about membership is that on admittance a country does not have to sign any constituent instruments, the major requirement being that the Secretary-General must advise all existing members of the new member in advance.[45] Yet, following the drafting of the Harare Declaration, this position is changing dramatically. Prime Minister Hawke commented at Harare that "no one's talking about throwing anyone out if they don't currently meet [the Harare Declaration's] standards",[46] dismissing any possibility that members would be compelled to implement particular principles. However, he did suggest that the Declaration may be relevant for nations applying to join in the future. This idea was pursued at the Limassol Commonwealth Heads of Government Meeting when the Heads of Government stated that the Cameroon would become a member in 1995 "provided that the current efforts to establish a democratic system, consistent with the Harare Commonwealth Declaration, would by then have been completed".[47] More recently, the suspension of Nigeria pending its "return to compliance with the principles of the Harare Commonwealth Declaration"[48] demonstrates that Hawke's comments may no longer be appropriate when considering ongoing membership. Although the Inter-Governmental Group on the Criteria for Commonwealth Membership did not consider continuing membership standards, it did recommend that the Harare principles of "democracy, good government and human rights" should be adhered to prior to applying for admission.[49] While it may be enticing to link membership to certain fundamental principles, it is ironic "that existing members probably would fail to pass onerous tests".[50] If the Commonwealth closes

43. J. Collinge, "Criteria for Commonwealth Membership" (1996) The Round Table 279, 284. The present draft of the report has been sent to member governments for their comments.

44. Letter dated 2 Feb. 1996 to the Commonwealth Secretary-General from Gidean Kajinamura, Ambassador of Rwanda to the UK, referred to in R. Sanders, "The Commonwealth Must Not Wake Up Feeling Terrible" (1996) The Round Table 287, 292.

45. This is evident from Secretary-General Anyaoku's comment in the *Report of the Commonwealth Secretary-General* (1991), p.15, that all existing members were consulted in advance when Namibia requested to join the Commonwealth on gaining independence in 1990.

46. Transcript of News Conference with Prime Minister Hawke at Harare, 15 Oct. 1991, p.5.

47. The Limassol Communiqué (1993), para.43. The Cameroon was admitted to the Commonwealth on 1 Nov. 1995.

48. The Auckland Communiqué (1995), para.10.

49. J. Collinge, *op. cit. supra* n.43, at p.285.

50. "Britain and the Future Roles of the Commonwealth" (editorial) (1995) The Round

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

its membership to countries with "unacceptable" human rights records, there may have to be a more systematic examination of all members' records. If the Commonwealth pursues this type of strategy, it must ensure that such a fundamental alteration in its method of operation does not reduce its membership or fragment the present consensual nature of proceedings—results which would be detrimental to the organisation's underlying rationale.

Finally, despite Ramphal's recognition that the Commonwealth would have to "cease to be British"[51] to maintain relevance, all members do accept the Queen as head of the organisation. There is no barrier to secession from the Commonwealth but only four members have withdrawn—Ireland, South Africa, Pakistan and Fiji (Pakistan was readmitted in 1989 and South Africa in 1994). In 1993 the Heads of Government "looked forward to welcoming a non-racial and democratic South Africa back into the Commonwealth at the earliest opportunity".[52] Once these non-racial and democratic elections had been held, the Secretary-General confirmed South Africa's readmission.

Given the fact that there are no powerful forces actively seeking new members and the freedom to leave the association is unquestioned, why does the Commonwealth not only endure but continue to grow? In answering that question Ball paraphrases *The Wizard of Oz*—"because of the wonderful things it does"—an evaluation that she admits is somewhat extravagant.[53] A more realistic assessment might be that "it exists because its members have felt that the benefits of membership outweigh the costs".[54] Apart from contributions to the Secretariat, the duties imposed on governments are not onerous—members are not coerced into taking a particular position nor are their internal affairs discussed publicly to their detriment—a feature which is very relevant when dealing with the often controversial issue of human rights. But the major factor behind the Commonwealth's survival is not what the organisation provides its membership but what these members bring to the Commonwealth—an "intangible quality of a sense of togetherness"[55] promoted by the common legal, administrative and political traditions and the use of English as a working language. The Commonwealth nations have all inherited, with

Table iii, v. This point was also made by Nigeria's Foreign Minister, Chief Tomi Ikimi, in his press conference at Auckland where he stated with reference to the Harare Declaration that "we were sure that few Commonwealth countries would get a clean bill". The text of the speech is reproduced in (1996) The Round Table 131, 132.

51. S. S. Ramphal, "Shadows and Realities—The Imperatives of Independence", The Sir Robert Menzies Lecture (1983).

52. The Limassol Communiqué (1993), para.26.

53. M. M. Ball, *The "Open" Commonwealth* (1971), p.32.

54. M. P. Doxey, *The Commonwealth Secretariat and the Contemporary Commonwealth* (1989), p.10.

55. R. Maltby and P. Quartermaine (Eds), *The Commonwealth—A Common Culture?* (1989), p.14.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

variations, the Westminster system of government from Britain, many with a constitution and a Bill of Rights, an elected Parliament and an independent judiciary. Despite the considerable diversity within the membership, these components augur well for a human rights programme that seeks to be representative of the Commonwealth.

C. *Constitutional Instruments*

It is the considerable commonality within the Commonwealth that has enabled the members to compose a number of instruments constitutive of the association. In the past the most frequently cited documents have been the Agreed Memorandum on the Commonwealth Secretariat and the Declaration of Commonwealth Principles (the Singapore Declaration). Dale also mentions the London Declaration, which established the monarch as the head of the Commonwealth.[56] To this list must be added the relatively recent Harare Commonwealth Declaration. It is important to remember that, as these instruments were entered into after the formation of the Commonwealth, unlike the Charter of the United Nations they do not amount to a formal constitution and were never conceived of as such by the members.

1. *The Agreed Memorandum on the Commonwealth Secretariat, 1965*

Since "the Commonwealth as a genuine international organization really dates from the inception of the Secretariat",[57] the Agreed Memorandum which establishes that organ has particular significance. The importance of the document in a discussion of human rights, as indeed for any enquiry relating to the Commonwealth, is that it sets the limits within which the Commonwealth's main organ must act. The way in which the Secretariat has in fact developed will be discussed later. First, the Memorandum defines and highlights the advantages of informality in the Commonwealth association: "the Commonwealth is not a formal organization. It does not encroach on the sovereignty of the individual members. Nor does it require its members to seek to reach collective decisions or to take united action."[58] Thus the Memorandum proclaims the Commonwealth's adherence to two fundamental principles—State sovereignty and non-collective decision-making. The principle of non-interference in matters of domestic jurisdiction reflects the precept found in Article 2(7) of the UN Charter. The principle of sovereignty has often been relied upon to deny the international community's ability to interfere in human rights

56. W. Dale, *The Modern Commonwealth* (1983), p.54.
57. Papadopoulos, *op. cit. supra* n.37, at p.18.
58. The Agreed Memorandum on the Commonwealth Secretariat (1965), para.4. The full text of the Memorandum is reproduced in Papadopoulos, *idem*, pp.141–149 (App.A).

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

violations, which traditionally are considered to fall within a State's jurisdiction. While this contradiction between State sovereignty and international concern has gradually been eroded in the face of massive human rights abuses, paragraph 4 of the Memorandum does enunciate an important qualification within which the Commonwealth must operate. Second, the Memorandum provides that collective decision-making, or unanimity, is not a necessary precursor to Commonwealth action. Secretary-General Arnold Smith stated in his first report that where common decisions are required to be taken the Commonwealth operates not by voting but by consensus,[59] underlining that the Commonwealth will strive to reach maximum if not total agreement. When linked with the Commonwealth convention prohibiting discussion of members' internal affairs without their consent,[60] this method of decision-making is an important limitation on the extent to which Commonwealth bodies can pinpoint human rights problems and make determinations on appropriate action.

The main body of the Memorandum outlines the international, economic, general and administrative functions of the Secretariat. Premised with the warning that it "should not abrogate to itself executive functions",[61] the Secretariat's role is to promote consultation on matters of common concern, arrange meetings, disseminate factual information, assist in development and technical projects and where possible to absorb existing Commonwealth organisations into its structure.[62] The final section of the document creates the position of the Secretary-General as the Secretariat's Chief Officer.[63] Like the Secretariat generally, the Commonwealth Secretary-General is precluded from interfering in the internal affairs of member States or disputes between countries.[64] The Memorandum also prevents the Chief Officer from propagating partisan points of view or making policy judgments,[65] suggesting that sensitive issues (such as human rights violations) must be approached cautiously, if at all. Despite these limitations it will be seen that the Secretariat, and the Secretary-General, have articulated and promoted a Commonwealth human rights policy.

2. *The Declaration of Commonwealth Principles, 1971*

Dale states that the purposes of the Singapore Declaration are to describe the quality of the membership of the Commonwealth, state the principles which animate it, *the objectives to be pursued* and *outline certain*

59. *Annual Report of the Commonwealth Secretary-General* (1966), p.4.
60. The Agreed Memorandum on the Commonwealth Secretariat (1965), para.12.
61. *Idem*, para.6.
62. *Idem*, paras.9–30.
63. *Idem*, para.32.
64. *Idem*, paras.12–13.
65. *Idem*, para.12.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

lines of action.[66] This statement, when combined with Groom and Taylor's identification of equal rights *for the people of member States* as an essential point of the Declaration,[67] makes the document very appealing from a human rights perspective. Paragraph 5 declares:[68]

> We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live.

Although the most prominent right featured is the elimination of racial discrimination, the Declaration is not limited to traditional civil and political rights. It recognises the principle of self-determination[69] and pledges that the Commonwealth will "endeavour to overcome poverty, ignorance and disease, in raising standards of life and achieving a more equitable international society".[70] Papadopoulos believes that the pledges made "imply the conscientious effort to implement them",[71] although this is not stated as the intention of the drafters of the Declaration. However, this does not remove the fundamental importance of the principles espoused. Whether or not these rights are implemented, the mere fact that the Singapore Declaration with its emphasis on rights is viewed as a constitutional instrument illustrates the significance of human rights to the Commonwealth's agenda.

3. *The Harare Commonwealth Declaration, 1991*

There are a number of other documents important to the Commonwealth association which refer to human rights, such as the Commonwealth Statement on Apartheid in Sport, 1977, the Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice, 1979 and the Nassau Declaration on World Order, 1985.[72] With the possible exception of the Lusaka Declaration these documents do not amount to constitutional instruments as they do not add any further principles, but instead elaborate on particular objectives.[73] The most recent addition to the consti-

66. Dale, *op. cit. supra* n.56, at p.55 (emph. added).
67. Groom and Taylor, *op. cit. supra* n.5, at p.5.
68. Gender was not included in the 1971 Declaration. Cf. the Harare Commonwealth Declaration (1991), para.4.
69. The Declaration of Commonwealth Principles (1971), para.7.
70. *Idem*, para.8.
71. Papadopoulos, *op. cit. supra* n.37, at p.15.
72. The Commonwealth Statement on Apartheid in Sport—The Gleneagles Agreement (1977) and The Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice (1979), in *Background Documents*, *supra* n.6. The Nassau Declaration on World Order (1985), in *The Commonwealth at the Summit—Communiqués of the Commonwealth Heads of Government Meetings 1944–1980* (1987).
73. Dale, *op. cit. supra* n.56, at p.55, includes the Lusaka Declaration as one of the three main instruments of the association. However, his reason for its inclusion lies in its recog-

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

tutional scheme of the Commonwealth is the Harare Commonwealth Declaration, drafted at the 1991 Commonwealth Heads of Government Meeting. The fundamental importance of this document was highlighted when Secretary-General Anyaoku declared it the organisation's "Mission Statement"[74] for the 1990s and beyond. The Declaration begins with a restatement of the voluntary nature of the association, the diversity of its membership and the Commonwealth's emphasis on co-operation and international understanding.[75] Paragraph 4 reaffirms the organisation's commitment to "equal rights for all citizens regardless of gender, race, colour, creed or political belief". While the Singapore Declaration affirmed the right to participate in free and democratic political processes the Harare Declaration further defines "the fundamental political values of the Commonwealth"[76] as democratic processes which reflect national circumstances, the rule of law, the independence of the judiciary and just and honest government.[77] The standards articulated in the 1991 Declaration are not limited to traditional civil and political rights. Instead, the Heads of Government recognised the need for an integrated approach to rights by pledging their support for equality for women, universal access to education, programmes for strengthening family and community support, and extending the benefits of development within a framework of rights.[78] The members gave weight to their commitment by undertaking "to focus and improve Commonwealth co-operation in these areas".[79]

In 1991 it is doubtful that there was a clear intention to be formally bound by the Declaration's language. However, subsequent developments have indicated that the Declaration may not only set the standards to be attained in the organisation but could also determine future membership criteria. This is radically different from the previous position by which members were not bound to adhere to the principles contained in particular documents. In 1995 the Heads of Government adopted the Millbrook Commonwealth Action Programme, which outlines a tripartite plan to fulfil more effectively the commitments in the Harare Commonwealth Declaration.[80] Significantly, in the event of a member violating the Harare principles, the organisation's responses may include a public

nition of the Commonwealth as an international organisation rather than the specific principles it espouses.

74. Chief Anyaoku, "Human Rights and the Commonwealth". Address at the Launch of the Graduate School of International Relations, University of Kent, at the London School of Economics and Political Science, 9 May 1996.

75. Harare Commonwealth Declaration (1991), annexed to the Harare Communiqué (1991), para.1.

76. *Idem*, para.9.

77. *Ibid.*

78. *Ibid.*

79. *Idem*, para.10.

80. The Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration (1995).

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

expression of disapproval from the Secretary-General, the appointment of a Commonwealth envoy and the suspension of participation in all Commonwealth meetings.[81] In the light of this Action Programme it is clear that the Harare Declaration is one of the Commonwealth's most significant constitutional instruments and one which defines the future direction of the organisation.

Considering the problems posed by the limitations in the Agreed Memorandum, the question arises as to what advantages the organisation can offer when dealing with members' human rights records. As the Commonwealth is really a smaller representation of the United Nations, the question must be asked, why not leave human rights matters to the consideration of the larger organisation? When answering this question, attention must be directed first to Chapter VIII of the UN Charter, which specifically recognises the importance of regional agencies in maintaining international peace and security. Second, while the Commonwealth's diverse membership, its informal constitutional structure and flexibility as an international organisation may appear disadvantageous, the organisation's more friendly approach may be a significant asset when compared with the United Nations' power politics and formalised institutions. The documents outlined above demonstrate that the Commonwealth not only has a cohesive, if informal, constitutional structure but that it also has the ability to raise a consensus, even on the potentially divisive topic of human rights. They also indicate that the organisation views human rights as a fundamental part of its work. The way in which the Commonwealth projects itself and these values internationally through its various bodies will be the subject of the next section.

III. IMPLEMENTING THE COMMONWEALTH CONSENSUS

THE Commonwealth's attempts to formulate a human rights policy within its various organs and conferences highlight the fundamental distinction between the twin responsibilities entrusted to human rights institutions—promotion and protection. The promotion of rights implies action directed towards preventing abuses in the future, such as information campaigns, whereas protection is intended to ensure the observance of human rights as established under existing law, including the use of sanctions.[82] Although the goal of promotion is to reduce the need for protection in the long term and is thus an attractive aim, without protection mechanisms there is perhaps no compelling reason for governments to pursue that future agenda. As Vasak observes, "if an international body for the promotion of human rights is successful, it cannot help but assume

81. *Idem*, s.1(B).

82. K. Vasak, "The Distinguishing Criteria of Institutions", in K. Vasak (Ed.), *The International Dimensions of Human Rights* (1982), Vol.I, p.216.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

the task of protection".[83] Vasak lists the five components of a complete system for the control of the observance of human rights at the international level as information, investigation, conciliation, decision and sanction.[84] These factors elaborate on the three general functions of international organisations already identified, that is, standard-setting, supervision and enforcement.[85] The "rights record" of particular Commonwealth bodies will be examined to determine the extent to which past efforts have been directed towards the setting of standards, supervision with compliance and enforcement, thus indicating whether the goal has been the protection of Commonwealth citizens or the promotion of a human rights culture.

A. The Actions of the Official Commonwealth

The twin pillars of the Commonwealth's external face are the Secretariat and the Commonwealth Heads of Government Meeting. The role of these two organs is crucial in determining the association's role in the human rights debate. There are also a number of other meetings and conferences of Commonwealth bodies which have discussed the Commonwealth's human rights agenda, including the Commonwealth Parliamentary Association and the meetings of various ministers. Finally, the role of the Commonwealth Human Rights Initiative, a non-governmental effort supported by five Commonwealth associations,[86] will be examined to suggest the emphasis which the Commonwealth could pursue.

1. The Secretariat

The Secretariat, as the major independent organ of the official Commonwealth organisation, is perceived by members to be the main agency for joint endeavours. Following a structural reorganisation to enable the priorities in the Harare Commonwealth Declaration to be better met,[87] it now has three Deputy Secretaries-General, responsible for political, economic and social affairs, and development co-operation.[88] One of the Secretariat's 15 programmes concentrates on the "Promotion of the Fundamental Political Values of the Commonwealth—Democracy, Human Rights, Rule of Law and Just and Honest Government".[89] The reports of

83. *Idem*, p.217.
84. *Idem*, p.218.
85. See *supra* nn.26–35 and accompanying discussion.
86. The five supporting organisations of the Commonwealth Human Rights Initiative are the Commonwealth Journalists Association, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, the Commonwealth Medical Association and the Commonwealth Trade Union Council.
87. See *Report of the Commonwealth Secretary-General* (1995), p.96.
88. See *idem*, p.134 for a diagram of the Secretariat's structure.
89. *Yearbook of International Organizations* (1995/1996), Vol.1, p.288.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

the Commonwealth Secretary-General illustrate the range of activities in which the Secretariat is involved. Anyaoku's 1991 report, with chapters on South Africa, Namibia, democracy and human rights, the environment, development, education, gender and technical assistance,[90] demonstrates that the Secretariat does not deal exclusively in purely Commonwealth problems and is willing to formulate a collective Commonwealth stance on these issues. However, the limits prescribed in the Agreed Memorandum were to have confined the Secretariat to clarifying issues without becoming innovative.[91] Despite this constraint, a 1977 editorial of the *Round Table* considered that the Secretariat has been able to defuse confrontations that might otherwise have proved destructive.[92]

In relation to the Commonwealth's human rights agenda, the Secretariat plays an administrative role rather than specifically setting standards or protecting individuals. Consequently, in 1985 the Human Rights Unit was set up to "promote human rights within the Commonwealth"[93] and has no investigative or enforcement role. Three different initiatives within the Secretariat focusing on human rights have included the administration of certain promotional activities, the organisation of workshops on human rights and the supervision of elections. These programmes demonstrate different features of the Secretariat's work. The emphasis in the Report of the Commonwealth Governmental Working Group of Experts on Human Rights, administered by the Secretariat, is on providing information programmes, studies and training for government officials in human rights,[94] rather than assessing members' records. The Secretariat's role in promoting human rights, democracy and development is reinforced in its recent publication *Rights—The Commonwealth Approach to Human Dignity*.[95] As part of this function the Human Rights Unit has created two "accession kits", relating to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Human Rights Covenants, to aid governments in their ratification of these instruments.[96] These initiatives are illustrative of the traditional promotional approach to rights, an approach advocated in

90. See the relevant chapters in the *Report of the Commonwealth Secretary-General* (1991).

91. S. Chan, "Three Birds of Different Feathers: The Commonwealth, The Commonwealth Secretary-General and the Commonwealth Secretariat" (1984) The Round Table 299, 301.

92. "Commonwealth Quest—From a Faith in Symbols to a Commitment to Practical Action" (editorial) (1977) 67 The Round Table 111, 114.

93. See Human Rights Unit, "The Work of the Commonwealth Secretariat's Human Rights Unit" (1989), para.4.

94. *Report of the Commonwealth Governmental Working Group of Experts on Human Rights* (1990), pp.4–7.

95. Commonwealth Secretariat, *Rights—The Commonwealth Approach to Human Dignity* (1995), p.3.

96. *Idem*, p.12.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

the sections on human rights which have appeared in successive Secretary-General's reports.[97]

A more pro-active role has been undertaken by the Secretariat in organising workshops in Zimbabwe, Trinidad, the Cook Islands and Uganda on human rights training for public officials.[98] These training workshops now extend to sectors such as prison officials, law enforcement officers and foreign ministry staff.[99] In the area of women's rights, the Secretariat, together with the UN Division for the Advancement of Women, has arranged Caribbean and African workshops on CEDAW.[100] In 1995 the Human Rights Unit organised the Commonwealth Oxford Conference on Human Rights Education and Training, at which the participants drafted a framework for developing a comprehensive human rights programme at national and regional levels. Within this framework the Secretariat's tasks include assisting with the preparation of national conferences, the production of training manuals, the development of an information database for the Commonwealth and the provision of training and advisory services.[101] While these activities suggest the Secretariat is supervising the promotion of human rights, this does not extend to the supervision of the protection of rights within member countries.

The process of election monitoring in countries such as Namibia, South Africa, the Seychelles and Kenya[102] has involved the Secretariat in both standard-setting and the supervision of political rights. Election observation involves two stages—initially there is a period of assistance and advice; whether or not this advice is accepted is a matter for the individual country.[103] The second phase involves observation proper, Commonwealth observer groups being sent at the request of the host State to assess the election according to the standards of "free and fair"—a tag given to the whole process rather than to individual steps in isolation.[104] As yet, the Commonwealth has never declared an election unfree or unfair, the clos-

97. There are paragraphs in all reports of the Commonwealth Secretary-General during the 1980s on the Secretariat's role in human rights. In the reports of the 1990s this has been expanded to a separate section on rights. See "Democracy, Human Rights and Sovereignty", *Report of the Commonwealth Secretary-General* (1991), pp.41–44; "Promotion of Fundamental Political Values", *Report* (1993), pp.21–40; and "Promoting Good Governance", *Report* (1995), pp.15–40.

98. *Report* (1991), *idem*, p.42. The Commonwealth Secretariat has also produced a manual by M. Seydegart *et al.*, *Human Rights Training for Public Officials* (1990), as a practical guide for officials thinking of running human rights programmes.

99. Commonwealth Secretariat, *op. cit. supra* n.95, at p.15.

100. *Report of the Commonwealth Secretary-General* (1993), p.73.

101. See Framework for Developing a Comprehensive Programme for Human Rights Education and Training, Commonwealth Conference on Human Rights Education and Training, Christ Church, Oxford, 11–14 Sept. 1995.

102. See *Report of the Commonwealth Secretary-General* (1995), p.20.

103. B. Otlhogile, "Observing for Democracy: A Note on the Practices of Commonwealth Observer Groups" (1994) African J.Int. and Comp.L. 293, 296.

104. *Idem*, p.298.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

est it has come being the Kenyan elections. Despite the fact that there were a large number of irregularities in the process resulting in criticism of the Commonwealth's ambiguous assessment,[105] the Kenyan election was declared valid according to the Commonwealth's criteria. In this role of servicing Commonwealth observer groups, the Secretariat has not only been involved in setting the standards by which to judge elections, it has also supervised the actual process. The difficulty the Commonwealth observer group had in criticising the Kenyan election process demonstrates that, when the organisation has become involved in supervising the exercise of rights, the traditional limitations found in the Agreed Memorandum are still an abiding influence.

2. *The Commonwealth Heads of Government Meetings*

The biennial meeting of the Heads of Government is the principal decision-making body of the Commonwealth. As the emphasis in these meetings is on governing through consensus, set speeches and final voting are avoided, removing the parliamentary diplomacy and manipulation of procedures which characterise other international organisations.[106] With a media ban on the actual meetings, the final communiqués remain the only record of discussions. Since the first meeting of Commonwealth prime ministers in 1944 these communiqués have grown in both size and detail.[107] For instance, the 1993 communiqué evidences a discussion of democracy and human rights, Southern Africa, the Mediterranean, world economic issues, Bosnia-Herzegovina, the environment and food security.[108] Although this appears to demonstrate a Commonwealth commitment to important matters, the communiqués have been criticised as being "uncontroversial" and "bland".[109] Their generally sanitised style illustrates that, because governments dictate the agenda, in the past the meetings have generally not discussed members' internal affairs without their consent.

(a) Heads of Government Meetings pre-Harare and Harare. As the most widely recognised face of the Commonwealth, the Heads of Government Meetings have exhibited what can only be described as a consistently haphazard approach to human rights. Prime Minister Mulroney highlighted at Harare that the question of human rights has been ever present on the agenda of the Heads of Government Meetings through the issue of apart-

105. N. Saravanamutto, "What Role Can the Commonwealth Play in Conflict Resolution?" (1995) The Round Table 145, 154–155.

106. Groom, *op. cit. supra* n.25, at p.297.

107. For a record of CHOGM communiqués and their development see *The Commonwealth at the Summit*, *supra* n.72.

108. The Limassol Communiqué (1993). Human rights are discussed specifically in paras.7–11.

109. Chan, *op. cit. supra* n.91, at p.300.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

heid in South Africa.[110] But the communiqués and declarations show a lack of consistency and cohesion. Thus the meetings have vacillated between a broad commitment "to advancing respect ... for economic, social and cultural rights, no less than for civil and political rights",[111] and an exclusive focus on the issue of racial discrimination in Southern Africa.[112] As early as 1979 the Heads of Government recognised the problems of specific groups including indigenous minorities, immigrants and refugees.[113] Comments at the 1989 meeting as to the interrelationship of all rights[114] demonstrate, at least in theory, that priority is not to be given to any particular generation of human rights. The most appropriate way to characterise these statements would appear to be terms such as "support", "discussion" and the "declaration" of human rights, rather than any phrase which connotes a more active supervisory role for the Commonwealth. However, meetings have condemned the actions of member nations in certain circumstances—usually where their behaviour is so abhorrent it cannot legitimately be ignored. Such was the situation when the 1977 meeting condemned "the massive violation of human rights in Uganda";[115] however, Uganda was not present at that meeting.

Since the Singapore Declaration, the Harare Declaration, adopted at the 1991 meeting, represents the most conscientious effort in the official Commonwealth to set the standards by which members should abide. At Harare the Heads of Government also endorsed the Report of the Commonwealth Governmental Working Group on Human Rights and requested that the Secretariat give greater impetus to rights.[116] But the communiqué does not explicitly refer to the first report of the Human Rights Initiative and the recommendations it contained[117] nor did the meeting commit itself to any concrete steps or increases in funding for human rights projects.[118] Statements made at press conferences during the 1991 meeting are perhaps more revealing of the leaders' attitudes at that

110. Transcript of Joint News Conference with Prime Ministers Hawke and Mulroney, Harare, 14 Oct. 1991.

111. The Nassau Communiqué (1985), para.34; *The Commonwealth at the Summit*, *supra* n.72.

112. See the Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice (1979), the Commonwealth Accord on Southern Africa (1985) and the Commonwealth Statement on Apartheid in Sport (1977), in *Background Documents*, *supra* n.6.

113. The Lusaka Declaration (1979) and the Lusaka Communiqué, para.10, in *The Commonwealth at the Summit*, *supra* n.72.

114. The Kuala Lumpur Communiqué (1989), para.51.

115. The London Communiqué (1977), para.35, *The Commonwealth at the Summit*, *supra* n.72.

116. The Harare Communiqué (1991), para.16.

117. Prime Minister Hawke indicated that the report "did come into general discussion" in Harare, although he avoided a journalist's question whether most of its recommendations were ignored: Transcript of News Conference with Prime Minister Hawke, 20 Oct. 1991.

118. Amnesty International, *Commonwealth Heads of Government Meeting Strengthens Commitment to Human Rights* (1991), p.2.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

time than are the formal documents. Prime Minister Major indicated that "peer pressure"[119] would be used to promote compliance with human rights, but Prime Minister Hawke later denied that there was any particular dissection of the affairs of individual countries.[120] Major's modest suggestion of monitoring human rights abuses was also met with sound rejections from leaders choosing to perceive it as an example of colonial domination.[121] Similarly, the possibility of tying foreign aid to human rights was rejected by Mugabe and Mahathir,[122] although Mulroney stated that it was a policy that Canada already followed.[123] Therefore, the 1991 meeting rejected any possibility of gathering information on the affairs of particular member countries. Without accurate information on the extent of compliance it is difficult to envisage the extent to which the Heads of Government can instigate any of the formal or informal compliance techniques used by other international organisations. At the time there were fears that the Harare Declaration may be "little more than an indulgent exercise in consensus politics".[124]

(b) Heads of Government Meetings post-Harare. The Limassol Heads of Government Meeting has been described as a "somewhat muted summit",[125] neither the best nor worst of all meetings but perhaps "much nearer to being the worst than the best".[126] Prior to the meeting the 1993 Human Rights Initiative report stated: "We believe that the success of the Cyprus CHOGM will be widely judged by the progress it achieves in strengthening the machinery (and allocating additional resources) for the protection of human rights."[127] The 1993 communiqué placed human rights at the centre of the agenda, with paragraphs entitled "The Emergence of a Global Humanitarian Order" and "Democracy and Human Rights", and a section devoted to South Africa.[128] The meeting demonstrated the importance of human rights by linking the Cameroon's membership to the fulfilment of Harare criteria, and by urging member governments to ratify CEDAW and the two International Covenants and to protect the human rights and fundamental freedoms of indigenous

119. Transcript of Joint News Conference with Prime Ministers Hawke and Major, Harare, 15 Oct. 1991, p.3.
120. Transcript of News Conference with Prime Minister Hawke, Harare, 20 Oct. 1991, p.3.
121. "From Apartheid to African Democracy", *The Australian*, 17 Oct. 1991.
122. See "CHOGM Bid to Tie Human Rights to Aid Stalls", *The Australian*, 16 Oct. 1991, and Transcript of the Joint News Conference with Prime Ministers Hawke and Mulroney, Harare, 14 Oct. 1991.
123. See B. Mulroney, "Global Report: World Political Overview", speech delivered at the Harare CHOGM on 16 Oct. 1991, p.2.
124. "Cleaning Up the Commonwealth", *The Australian*, 22 Oct. 1991.
125. D. Ingram, "Limassol Notebook" (1994) The Round Table 13.
126. "The Commonwealth After the CHOGM in Cyprus" (editorial) (1994) The Round Table 3.
127. CHRI, *Act Right Now* (1993), p.17.
128. The Limassol Communiqué (1993), paras.6, 7–11 and 16–27.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

people.[129] However, words used such as "reiterate", "reaffirm" and "recall" in the communiqué suggest that in 1993 the Heads of Government merely rephrased and restated conclusions reached at Harare without necessarily articulating further standards or demonstrating any greater commitment to implementation.

Media interest in the most recent Heads of Government Meeting in Auckland was dominated by "nukes and Nigeria".[130] And indeed, with the renewed French programme of nuclear testing in the South Pacific and the imminent death sentence on Ken Saro-Wiwa, this was a natural focus. Yet the Global Overview in the meeting's communiqué refers to these two matters only briefly, and not only Nigeria but also Sierra Leone and The Gambia received attention for their lack of democratic institutions.[131] From the 1995 communiqué and the Secretary-General's report it is clear that "democracy, development and respect for human rights and fundamental freedoms"[132] have become the pillars of the Commonwealth's human rights programme. However, it is not clear to what extent the Heads of Government will monitor compliance with all three standards, nor what methods of persuasion or enforcement will be adopted.

What is clear from the Auckland summit is that fundamental political values have become the focus of the Commonwealth's enforcement strategy. Nigeria was suspended as a consequence of the "serious violation of the principles set out in the Harare Commonwealth Declaration",[133] although the precise infringements were not specified in the communiqué. At the opening ceremony Prime Minister Chretien stated that "the death sentence of Ken Saro-Wiwa is an example of the type of behaviour we all want to see abolished",[134] indicating that this was a motivating factor behind the leaders' actions. But it can be inferred from statements made at the meeting and further reference to The Gambia and Sierra Leone in the communiqué that it was the violation of political rights which engaged the wrath of other members. This conclusion is strengthened by the fact that these three States are not the only members which have engaged in the infringement of human rights, although they are the only three which (at that time) were governed by military regimes. The most recent Amnesty International report lists torture, extra-judicial killings, inhuman and degrading prison conditions, arbitrary restrictions on freedom of expression and the harassment of journalists as practices prevalent in

129. *Idem*, paras.8–9.
130. D. McIntyre, "Dramatic, Tragic, Business-like and Progressive: The Auckland CHOGM Sets New Standards" (1996) 21 N.Z.Int.Rev. 2, 3.
131. The Auckland Communiqué (1995), paras.11–12.
132. *Idem*, para.5.
133. *Idem*, para.10.
134. "Nigeria Accuses Us of Rights Abuse", *The Weekend Australian*, 11–12 Nov. 1995.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

some Commonwealth countries.[135] Despite this list of abuses, the Heads of Government singled out Nigeria for suspension and possible expulsion. The Millbrook Action Programme reinforces that enforcement action may be limited to political rights by specifically citing the unconstitutional overthrow of a democratically elected government[136] as an event which could incur one of a number of sanctions.

The use of suspension and expulsion at the meeting, two of the most drastic enforcement techniques employed by international organisations,[137] "marked a major transition from the former, rather easy-going, permissive, fudging Commonwealth towards a more rules- or norms-based Commonwealth".[138] It demonstrates that the Heads of Government regard at least some of the values articulated at Harare as binding rules rather than merely recommendations as to conduct. Thus the Commonwealth finds itself in a paradox—while it continually asserts that it will not scrutinise members' human rights records, in the case of Nigeria it was willing to go one step further and instigate enforcement action. The Nigerian Foreign Minister's warning that "the flexible and pragmatic character of the Commonwealth relationship has been gravely and ominously altered"[139] highlights that the Commonwealth may need to revise its convention which inhibits the supervision of members' records if it is to avoid future criticism. In this context it is noteworthy that, as The Gambia did not participate in the decision to suspend Nigeria,[140] the Heads of Government dispensed with another convention, that of consensus decision-making. This convention has been abandoned in the past, most prominently in the emergence of a majority Commonwealth view and an isolated British position over sanctions for South Africa.[141] Thus, consensus decision-making does not appear appropriate in a Commonwealth which seeks to enforce certain human rights through methods such as those espoused in the Millbrook Action Programme.

135. For further information about Commonwealth countries see the relevant sections of the *Amnesty International Report* (1996).

136. See Section B, "Measures in Response to Violations of Harare Principles" in The Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration (1995).

137. See Schermers and Blokker, *op. cit. supra* n.13, at p.921 and text accompanying *supra* n.35.

138. "Auckland, November 1995: The Kia Kaha CHOGM" (editorial) (1996) The Round Table iii, vi.

139. Speech by the Nigerian Foreign Minister, Chief Tomi Ikimi, *op. cit. supra* n.50 at p.132.

140. See the Auckland Communiqué (1995), para.10: "Commonwealth Heads of Government, with the exception of The Gambia, agreed to suspend Nigeria from membership." The Solomon Islands initially refused to support the suspension of Nigeria, but later withdrew its opposition; see McIntyre, *op. cit. supra* n.130, at p.7.

141. Chan, *op. cit. supra* n.16, at p.24.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

3. *Other Commonwealth bodies*

The views displayed at a number of other official and unofficial Commonwealth bodies indicate that these forums have focused on articulating human rights rather than strategies for protection. The Judicial Colloquia (organised by the Secretariat and Interrights) have enunciated a set of standards highlighting the importance of international instruments, the common law and the contribution of judges in promoting respect for human rights.[142] At certain Commonwealth meetings specific attention has been given to particular rights. For example, the Bloemfontein Judicial Colloquium focused on the rights of freedom of expression and the effective protection through the law of rights to equal treatment without discrimination.[143] The Third Meeting of the Ministers Responsible for Women's Affairs drafted the Ottawa Declaration, which commits governments to the reform of social, administrative and legal structures to enable women to enjoy effective rights to land, finance and other resources.[144] A broader range of issues is discussed at the conferences of the Commonwealth Parliamentary Association. In 1995 discussions ranged from the ratification of conventions, the position of parliamentarians as legislators, the importance of human rights education and the role of the judiciary.[145] Yet it was also asserted that qualifications as to abuse and observation of human rights should be assessed in terms of the level of socio-economic development of a particular society,[146] raising a familiar argument of cultural relativity.

The meetings of the Commonwealth Law Ministers have discussed a range of issues which impact on human rights. The final communiqués of both the 1990 and 1993 meetings include specific paragraphs dealing with human rights, although these sections do not contain recommendations for specific action.[147] In the 1996 communiqué emphasis is given to the role

142. Judicial Colloquium in Bangalore, *Developing Human Rights Jurisprudence—The Domestic Application of International Human Rights Norms* (1988). For a statement of the Bangalore Principles see *idem*, pp.ix–x. The Harare Declaration on Human Rights espoused at the Second Judicial Colloquium on the Domestic Application of International Human Rights Norms is extracted in M. D. Kirby, "Harare Declaration on Human Rights" (1989) 15 Commonwealth Law Bull. 999, 1002–1005. The meetings in Banjul and Abuja confirmed the Bangalore Principles. See "Abuja Confirmation of the Domestic Application of International Human Rights Norms" (1992) 18 Commonwealth Law Bull. 298–303.

143. See "1993 High Level Judicial Colloquium, Bloemfontein, South Africa" (1993) 19 Commonwealth Law Bull. 1644.

144. Ottawa Declaration on Women and Structural Adjustment (1990), annexed to the Harare Communiqué (1991), para.7.

145. "How Can Parliamentarians Improve Standards of Human Rights?" (1996) 77 The Parliamentarian 23–26.

146. *Idem*, p.23.

147. In para.40 of the communiqué of the 1990 Meeting of Commonwealth Law Ministers the "Ministers reaffirmed their commitment to human rights, which is a constant theme running through all Commonwealth legal issues", reproduced in (1990) 16 Commonwealth Law Bull. 1030. See also Commonwealth Law Ministers Meeting, Mauritius, 1993 Communiqué,

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

of ombudsmen and human rights and equal opportunity commissions, violence against women as a human rights issue and the independence of the judiciary.[148] A more significant achievement in relation to the implementation of rights has been the inclusion of rights safeguards in the formulation of schemes for legal co-operation—most notably extradition and assistance in criminal matters. Given that an objective of extradition treaty negotiations is to set out explicitly the human rights protections involved,[149] it is important that these safeguards appear in a Commonwealth agreement on the topic. Paragraph 10 of the Commonwealth Scheme for the Rendition of Fugitive Offenders[150] precludes the return of an offender where the offence is of a political character[151] if the request for surrender is motivated by the desire to prosecute on account of race, religion, nationality or political opinion, or if the offender may be prejudiced at trial for these reasons. For similar reasons a country may refuse to comply with a request for assistance under the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth.[152] Furthermore, Annex 2 of the extradition scheme provides that there is a discretion to return where it is likely that the offender would suffer the death penalty. The inclusion of the double criminality requirement in paragraph 12 can also be seen as an example of a rights protection as it prevents return where the conduct would not attract criminal sanction in the requested country. In this respect Singh refers to offences such as blasphemy and those relating to sexual orientation.[153] Recognising the importance of human rights principles, the Law Ministers have explicitly referred to the application of the norms of international law as part of the rule of law in extradition matters and the need to avoid State-sponsored abduction.[154] The provision of rights standards in these agreements is a more concrete demonstration of Commonwealth activity in the implementation of rights through adherence to internationally recognised norms.

para.5, in (1993) 19 Commonwealth Law Bull. 2006: "For their own part, Ministers dedicated themselves to work in all practical ways, both collectively and at the national level to realize the aspirations expressed at Harare and Limassol."

148. Communiqué of the Commonwealth Law Ministers Meeting, Kuala Lumpur, Malaysia, 15–19 Apr. 1996.

149. See S. Singh, "Extradition and Human Rights: An Australian Approach", *Proceedings of the Fourth Annual Meeting of ANZIL and the ILA*, 17, 19 May 1996, pp.115, 118.

150. For the full text of the Commonwealth Scheme for the Rendition of Fugitive Offenders, as amended in 1990, see (1990) 16 Commonwealth Law Bull. 1036.

151. Annex 1 of the Scheme, "Discretion as to Definition of Political Offences", outlines the circumstances where the law may provide that certain acts are not offences of a political character.

152. Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, para.7 (1996) 16 Commonwealth Law Bull. 1043, 1044.

153. Singh, *op. cit. supra* n.149, at p.117.

154. Commonwealth Law Ministers Meeting, 1993, Communiqué *supra* n.147, at para.16.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

B. The Commonwealth Human Rights Initiative

The presence of 150 people representing non-governmental organisations (NGOs) at the 1995 Commonwealth NGO Forum demonstrates the importance of NGOs within the organisation. The significance of NGOs is recognised by the official Commonwealth; the Secretariat has established an NGO desk, and the Auckland Heads of Government Meeting was the second at which they were granted observer status. The most prominent NGO dealing specifically with Commonwealth human rights is the Commonwealth Human Rights Initiative. The Initiative advocates the formulation of a Commonwealth human rights policy as a method of reaffirming "the moral basis of this community of nations".[155] *Act Right Now*, the Initiative's 1993 report, is one of the few documents which openly acknowledge that the gap between the rhetoric and reality of Harare remains "embarrassing and alarming".[156] Unlike other Commonwealth forums, the Initiative addresses itself to "the hard realities",[157] providing details of the most significant violations of human rights in its reports. The second report refers to the gross abuse of rights of children, refugees, women and indigenous peoples, as well as to reliance on administrative detentions and the continued practice of extra-judicial killings and torture.[158] The 1995 report focuses attention on two aspects—the abuse of freedom of expression and reform in prison conditions and the police force.[159]

The Initiative's first and most extensive report recommended that the association draft a Commonwealth Declaration on Human Rights to draw together accepted human rights principles and relate them to specific problems within the Commonwealth.[160] Second, the Initiative proposed the creation of a Standing Commission on Human Rights empowered to receive representations from governments, NGOs and Commonwealth citizens and having advisory, consultative and monitoring functions.[161] Through this Commission the Initiative envisaged an enhanced role for the Commonwealth in both promotional activities such as research and education and the protection of human rights by the investigation of current abuses. Indeed, the Initiative has already engaged in such supervisory techniques by sending a three-member fact-finding mission to Nigeria to

155. CHRI, *Put Our World to Rights—Towards a Commonwealth Human Rights Policy* (1991), p.16.
156. CHRI, *op. cit. supra* n.127, at p.6.
157. *Idem*, p.iii.
158. See *idem*, chap.II: "The Record of Human Rights in the Commonwealth", pp.20–33.
159. See CHRI, *Rights DO Matter* (1995), chaps.2 and 3. In 1995 CHRI also held a workshop on the topic of prisons, resulting in its report *Behind Prison Walls—Police, Prisons and Human Rights* (1995).
160. CHRI, *op. cit. supra* n.155, at p.19.
161. *Idem*, p.183.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

review conditions in the light of Nigeria's membership of the Commonwealth and make recommendations to Commonwealth governments.[162]

Despite the fact that the first major report of the Human Rights Initiative fell short of advocating enforcement procedures within the Commonwealth (although it did not rule them out), the 1991 Heads of Government Meeting ignored most of its substantive recommendations. In relation to the Expert Group's Report which was prompted by CHRI Bourne states it was a deliberately low-profile effort and was not publicised by the Secretariat.[163] Given the reaction to this report by the senior officials in Port Moresby, where Bourne reports that a third of the delegates were indifferent to the Expert's plan of action,[164] the depth of the Commonwealth commitment to protecting all aspects of the welfare of its citizens is doubtful. Yet the Initiative's recommendations demonstrate that the Commonwealth can pursue an investigative role and indeed such a position may be crucial in preventing violations in the future. In 1993 the Initiative recommended the establishment of a Commonwealth Human Rights Commissioner, increased ratification of human rights conventions, more significant financial contributions to human rights activities and the formation of a Commonwealth Action Plan for Human Rights.[165] Whereas in the past the Commonwealth at its most active has confined itself to promotional efforts, these reports emphasise the feasibility of the organisation implementing measures to stand "more clearly in the eyes of the international community generally as a champion of human rights".[166]

IV. THE COMMONWEALTH'S COURSE?

WHILE the Commonwealth has used rights to reaffirm its role as an international organisation, further reform is needed if it is to fulfil all the functions traditionally performed by such institutions. An examination of the Commonwealth's present actions discloses that its organs have been engaged for the most part in promoting certain rights through education, training, information and the articulation of *ad hoc* principles. But as this long-term promotional goal has led to few concrete or practical differences in the lives of Commonwealth people it would appear that the organisation needs to focus on immediate protection. The following sections raise some questions associated with the articulation of standards, the monitoring of members' records and the use of enforcement techniques which need to be addressed by the Commonwealth. Two issues

162. CHRI, *Nigeria Stolen by Generals—Abuja After the Harare Commonwealth Declaration* (1995), p.iii.
163. R. Bourne, "The Commonwealth and Human Rights" (1991) The Round Table 411, 412.
164. *Idem*, p.413.
165. CHRI, *op. cit. supra* n.127, at pp.36–40.
166. CHRI, *op. cit. supra* n.155, at p.5.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

which must be considered when assessing the availability of any suggested solutions are, first, whether all the rights articulated by the Commonwealth are amenable to implementation methods and, second, whether the Commonwealth's style of operation *prima facie* does not preclude the viability of these procedures.

A. Articulating Standards

There appears to be remarkably little conflict within the Commonwealth organisation as to the values which have attained the status of human rights. The Commonwealth Secretary-General has asserted an integrated approach to the traditional debate between civil and political rights and socio-economic rights, refining the Commonwealth's focus in terms of "development, democracy and human rights".[167] In the Secretariat the mandate of the Human Rights Unit defines human rights from the Commonwealth perspective to include "the right of all men and women to live in ways which sustain and nourish human dignity"[168] (encompassing socio-economic standards of living). The constitutional instruments of the organisation include reference to civil and political, socio-economic and people's rights. In this latter category, the importance of the right to self-determination,[169] sustainable development and the protection of the environment[170] are confirmed Commonwealth standards. This open-textured approach to rights creates two problems. The first is whether the Commonwealth is attempting to define binding standards by which its members should assess their conduct. The second is whether all rights specified in the Harare Declaration, and other instruments, are susceptible to enforcement techniques similar to those adopted against Nigeria.

Part of the task of adequately defining rights is to decide whether it is necessary to articulate precise standards or general principles. The main advantage of an enumerative approach is that it entails only the proclamation of principles on which agreement may easily be reached. However, States may subject these broad principles to abusive interpretation. The definitional approach sets forth in detail the nature of the obligations assumed, thereby making possible more effective implementation.[171] The definitional approach is preferred in the European and American Human Rights Conventions, both of which provide for judicial enforcement, while the enumerative approach is utilised in the Universal Declaration of

167. See Anyaoku, *op. cit. supra* n.74, at p.2.

168. Commonwealth Secretariat, *Human Rights Unit*, p.2. This statement was first articulated in the Melbourne Declaration (1981), annexed to the Melbourne Communiqué (1981).

169. The Commonwealth Declaration of Principles (1971), para.9 and the Nassau Declaration on World Order (1985), *supra* n.72.

170. Harare Commonwealth Declaration (1991), para.9.

171. L. J. Le Blanc, *The OAS and the Promotion and Protection of Human Rights* (1977), pp.28–29.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

Human Rights.[172] At present the Commonwealth has chosen an enumerative approach in relation to most of the rights it has espoused. In adopting this course the Commonwealth has indicated that the rights included in its documents are not legally binding obligations which will be evaluated with respect to effective application. This adheres to the Commonwealth's traditional flexible and informal character.

While the organisation has followed this course in relation to most of its proclaimed values, political rights are to be treated somewhat more rigorously. Commonwealth instruments provide detailed provisions on these rights, perhaps because member countries have all inherited, with a number of modifications, a common Westminster parliamentary system. The importance of fair elections and democracy is emphasised in Anyaoku's 1991 report, where he cites the use of election observer groups as evidence of efforts to strengthen the democratic process.[173] The concept of democracy is not limited to holding elections but includes strengthening institutions which sustain democracy and civil society.[174] An earlier example of Commonwealth attitudes towards the violation of these principles is evident in the Vancouver statement in relation to the coup in Fiji. In 1987 the Commonwealth leaders "hoped for a resolution of the problem by the people of Fiji on a basis consistent with the principles that have guided the Commonwealth".[175] In a later public address the Secretary-General specifically referred to the Singapore Declaration and the Lusaka Declaration against Racism and Racial Prejudice as the precepts which should guide the resolution of the matter.[176] The suspension of Nigeria with the suggestion of sanctions highlights that coercive compliance procedures will be used to enforce some political values. While the Commonwealth may be commended for its committed stance towards Nigeria, questions arise as to which other rights will be subject to such penalties. From attitudes displayed towards South Africa and Fiji it can be concluded that constitutionally entrenched racial discrimination will be liable to similar measures. However, more difficult questions arise in relation to violations of gender equality, the right to freedom of expression or even the right to self-determination. It is doubtful that all rights articulated in Commonwealth instruments are capable of being enforced by similar methods. How will members know which standards are mandatory and which are merely recommendatory? Will informal persuasion be used, with an emphasis on the "mobilisation of shame", or will sanctions be pursued?

172. *Idem*, p.29.
173. *Report of the Commonwealth Secretary-General* (1991), p.41.
174. *Report of the Commonwealth Secretary-General* (1995), p.17.
175. The Vancouver Statement is quoted in "Fiji no longer C'wealth member" (1987) Commonwealth Currents 5.
176. *Ibid*. For further information about Fiji and the Commonwealth see R. Barltrop, "Fiji, Crown and Commonwealth" (1996) The Round Table 83–89.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

Chief Tomi Ikimi's comment that worse "offences" than have been alleged against Nigeria have not resulted in such penalties[177] should be heeded if only to ensure that uncertainty and confusion are not created in the organisation's human rights programme.

B. Investigative Procedures

The Commonwealth Human Rights Initiative and the 1990 report of the Commonwealth Governmental Experts[178] both emphasised the necessity of promoting human rights through programmes of education and information—methods which are already being pursued within the Human Rights Unit. But at present this process appears to be taking place in a vacuum—it is difficult to provide information, conduct studies and instigate enforcement action without concrete facts on which to base conclusions. Supervision, based on reports by members or information collected by the organisation, is a central task of international organisations.[179] In the context of human rights it also fulfils Vasak's requirement of the need to investigate violations in order to maintain a complete system for the control and observance of human rights. If the Commonwealth is to implement such procedures, the question arises whether they are compatible with the organisation's current purpose and where they will fit into its structure. In particular, the adoption of investigative procedures is outside the present role of the Secretariat, and thus a number of other proposals have been made. It has been suggested that the Commonwealth Co-ordination Department and the Human Rights Divisions of the Foreign and Commonwealth Office undertake a review of the human rights records of all Commonwealth countries, with a view to keeping an up-to-date database.[180] Such a proposal may provide a means of both monitoring human rights infringements and supervising the ratification of standards articulated by other international organisations, notably the United Nations. Twenty-seven Commonwealth members are also parties to one of the three major regional human rights conventions in Europe, America and Africa,[181] raising the issue whether a Commonwealth supervisory role would duplicate existing efforts. Commonwealth meetings have on a number of occasions encouraged members to ratify certain international treaties[182] and the Secretariat has already produced two

177. Chief Tomi Ikimi, *op. cit. supra* n.50, at p.132.

178. *Report of the Commonwealth Governmental Working Group of Experts on Human Rights* (1990), pp.4–8.

179. See Schermers and Blokker, *op. cit. supra* n.13, at p.863 and text accompanying *supra* n.30.

180. "Britain and the Future Roles of the Commonwealth" *supra* n.50, at p.ix.

181. See "Selected Regional Human Rights Treaties", in the *Amnesty International Report* (1996), pp.357–359.

182. See the Limassol Communiqué (1993), paras.8–9, and the Auckland Communiqué (1995) paras.6–7. In 1993 the Law Ministers urged members to give priority to becoming

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

"accession kits" in relation to international instruments. Despite these encouragements, the Initiative points to the disappointing record of members in the ratification of human rights conventions and their non-fulfilment of certain reporting requirements—a situation which has not substantially altered between its 1991 and 1995 reports.[183] While it may be appropriate for the Commonwealth to develop a strategy of monitoring the ratification of existing conventions, it should not be limited to this role. First, by articulating standards which the Commonwealth regards as paramount, the organisation is representing that it will encourage compliance with them. Second, the Commonwealth may develop different, and perhaps more effective and flexible, strategies for investigating compliance with the rights it views as important, outside the frameworks offered by the regional conventions. Furthermore, only the Commonwealth can deny the benefits offered by membership through the withdrawal of technical assistance and suspension from membership.

One step more advanced in the supervisory process is the Initiative's recommendation that the Heads of Government establish an independent commission with wide-ranging powers to address human rights issues across the Commonwealth.[184] Whether these procedures would ever be acceptable to members would depend on the extent to which governments are willing to have their human rights records subjected to investigation by the organisation. At present the Commonwealth's inability to identify individual problems weighs heavily against the possibility of undertaking an investigative or monitoring role. Despite this traditional limitation, the use of the Eminent Persons Group as a fact-finding and evaluative mission to South Africa demonstrates that the Commonwealth has intervened in a State's affairs[185] (albeit not a member at that time). More recently the creation of the Commonwealth Ministerial Action Group with the task of assessing infringements and recommending measures for collective action[186] in the case of a country under non-constitutional rule demonstrates the Commonwealth's adaptable procedures. After receiving a request from the Armed Forces Provisional Ruling Council in The Gam-

parties to the Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and to adopt the draft UN Declaration on the Elimination of Violence Against Women: Commonwealth Law Ministers Meeting, Communiqué, *supra* n.147, at para.24.

183. See "Ratifications or Signatures of International Instruments", in CHRI, *op. cit. supra* n.155, at pp.228–229; and CHRI, *Rights . . ., op. cit. supra* n.159, at pp.76–77. The two conventions recording the greatest increase in ratifications are the Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination Against Women (1979).

184. See *supra* nn.161 and 165.

185. Saravanamutto, *op. cit. supra* n.105, at p.145.

186. Millbrook, *supra* n.80, at Section C, "Mechanism for Implementation of Measures".

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

bia, the Action Group requested the Secretary-General to constitute a mission to visit Banjul to make an evaluation of the situation and report on its return.[187] This suggests that if a member engages in violations of the Harare Declaration retrospective supervisory procedures may be instituted. The Group has continued to monitor The Gambia's compliance with the Harare principles, and has noted its doubts on the credibility of the presidential election poll held on 26 September 1996. In the light of present and future developments, the Group has decided to make "appropriate recommendations to Commonwealth Heads of Government".[188]

C. Enforcement Techniques

Although nations normally comply with the norms of the organisations which they join,[189] effective human rights programmes need the buttress of either coercive or non-coercive enforcement strategies to deal with violations. Kirgis has commented that international organisations have devised a variety of ways of settling disputes, some of which are contained in the constituent instruments and some of which have been developed in response to needs that may not have been perceived at the outset.[190] At the first level, the Commonwealth's constituent instruments do not contain any hint of coercive strategies; instead they emphasise consensus and consultation. Thus informal persuasion from within would appear to be the most appropriate enforcement technique for the Commonwealth. International exposure or the mobilisation of shame is not a strategy which accords with the organisation's objectives of friendship and co-operation, and thus in the past the Commonwealth has not generally highlighted members' human rights abuses. In the case of South Africa, however, international pressure was a key part of its strategy. Nigeria is also proving to be an exception to this rule, although the Commonwealth has concentrated on its strategy to encourage compliance rather than repeatedly publicising Nigeria's abuses.[191]

Beyond the spectrum of non-coercive processes implemented by international organisations lies a number of more exacting procedures which address particular infringements, provide binding solutions and expose States to international sanctions. When examining the purpose of such enforcement methods the limitations of the Commonwealth organisation

187. "Commonwealth Ministerial Action Group" (1996) 40 J. African L. 124, 125–126.

188. Fifth Meeting of the Commonwealth Ministerial Action Group on the Harare Declaration, New York, 28–29 Sept. 1996 in (1996) The Round Table 510, 511.

189. Kirgis, *op. cit. supra* n.34, at p.523.

190. *Idem*, pp.388–389.

191. Note also that the Millbrook Commonwealth Action Programme, *supra* n.80, includes "immediate public expression by the Secretary-General of the Commonwealth's collective disapproval" as one possible response to an unconstitutional overthrow of government; see Section B: "Measures in Response to Violation of Harare Principles", para.3(i).

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

become directly relevant. Robertson has argued that the only way the Commonwealth can be taken seriously on human rights matters is for the members to establish a Court of Human Rights with binding rulings.[192] The most important aspect of a judicial system is that it provides remedies for those subject to human rights abuses and ensures that the violations are recognised. Writers have emphasised the higher effectiveness of systems which bind States to redress injuries caused by a failure to fulfil obligations, thus ensuring a final solution to disputes.[193] The Human Rights Initiative also proposed the creation of Commonwealth adjudicatory machinery and urged the Harare Heads of Government Meeting to set up a committee to recommend its establishment,[194] indicating its view that judicial mechanisms are appropriate within the association. Yet this suggestion has not been pursued in the official Commonwealth and it is doubtful whether it will be seriously considered. Whether or not all the rights espoused in Commonwealth instruments are capable of judicial solution, the presence of a compulsory jurisdiction and the use of individual petitions are all matters which may fall foul of the informal and non-confrontational nature of the Commonwealth.

Notwithstanding these impediments to formal demonstrations of disapproval, the Commonwealth has not rejected the use of coercive methods. It has instigated sanctions against South Africa and used the power of suspension (with possible expulsion) against Nigeria. The imposition of sanctions has already been identified as one of the functions of international organisations. Sanctions are also the last criterion of Vasak's programme for the complete protection of human rights. Three possible purposes of such sanctions as international punishment are compulsion, deterrence and retribution.[195] Retribution would certainly be outside the scope of Commonwealth objectives, unless the harm caused to the member was merely a product of other aims. It appears that the purpose of the sanctions against South Africa, and proposed for Nigeria, was to compel changes in the members' behaviour and deter them (and possibly other States) from similar offences. Following the use of suspension for the first time, questions arise as to which rights must be infringed for a State to risk being suspended, the extent to which supervision of a State's behaviour

192. "CHOGMs Chamber of Horrors ... and How to Fix it", *The Weekend Australian*, 12–13 Oct. 1991.

193. See e.g. F. Capotorti, "The International Measures of Implementation included in the Covenants on Human Rights" and S. MacBride, "The Strengthening of International Machinery for the Protection of Human Rights", in A. Eide and A. Schou (Eds), *International Protection of Human Rights* (1968), pp.142, 158 respectively.

194. CHRI, *op. cit. supra* n.155, at p.183.

195. K. Nossal, "International Sanctions as International Punishment" (1989) 43 International Organization 302, 303.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

and perhaps international exposure will be necessary precursors to formal action, and whether it is the most effective weapon against members such as Nigeria.

The success of the Commonwealth's strategy towards Nigeria has yet to be proved. The Ministerial Action Group met in December 1995 and issued a statement expressing "the hope that the dialogue would achieve the desired results".[196] Since then Nigeria has lifted a ban on political parties (at the same time imposing rigid rules of registration)[197] and has sent a delegation to London to meet the Group (after first refusing the Group entry into Nigeria).[198] A number of sanctions were proposed in April by the Group, including visa restrictions, the withdrawal of military attachés, a possible ban on airlinks and a freeze on the foreign financial assets and bank accounts of members of the regime.[199] These sanctions were temporarily set aside at the June meeting[200] (at which Nigeria was present) where the Commonwealth ministers raised issues relating to human rights and the rule of law.[201] Subsequently there have been meetings of the Group in London and New York and two visits to Nigeria have been conducted by Commonwealth representatives, the first by a team of senior Secretariat officials[202] and the second by the Group itself. The statement by the Group's chairman following its two-day visit points positively to the fact that the Group obtained information about the human rights situation and the evolution of democracy in Nigeria. Dr Mudenge welcomed the release of three persons detained without trial, but regretted that the Group was unable itself to visit any detainees. Finally, he stated that the continuation of the dialogue would be useful to both the Commonwealth and Nigeria.[203] While it is clear from these statements that the Group is now in a dialogue with the Nigerian regime, perhaps this is the most it can claim.[204]

196. Concluding Statement from the First Meeting of the Commonwealth Ministerial Action Group on the Harare Declaration, reproduced in (1996) The Round Table 253, 254.
197. C. Ogunrinde, "Democracy Quest Branded as Mission Impossible" Gemini News Service, 19 July 1996.
198. D. Ingram, "Abacha Keeps Commonwealth Outside the Door" Gemini News Service, 11 Mar. 1996.
199. "Commonwealth Proposes Further Measures Against Military Regime in Nigeria" (1996) 2 Commonwealth Currents 3.
200. However, Canada decided to impose certain sanctions immediately. See "Dialogue with Military Regimes" (1996) 3 Commonwealth Currents 7.
201. Joint Statement by the Commonwealth Ministerial Action Group on the Harare Declaration and the Government of Nigeria, in (1996) The Round Table 510.
202. Fifth Meeting, *supra* n.188.
203. Statement by the Chairman of the Commonwealth Ministerial Action Group on the Harare Declaration at the Conclusion of the Group's Mission to Nigeria, 22 Nov. 1996.
204. D. Ingram, "Nigeria Outwits Eight Foreign Ministers" Gemini News Service, 28 June 1996.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

In an organisation where there are few concrete examples of enforcement measures it is difficult to conclude that enforcement techniques have either succeeded or failed. In the past, the imposition of sanctions against South Africa led to a "binary Commonwealth",[205] with Britain on the one hand and the remaining Commonwealth members on the other. If sanctions or other techniques are to be employed against members, further clarification is needed of both the objectives of Commonwealth action and the procedures it will adopt, to enable the organisation to respond effectively and consistently to human rights abuses in its member States.

V. CONCLUSION

> For those that argue that the Commonwealth is powerless, I have a simple answer as a South African. Look what the Commonwealth did to us in the bad old days. The Commonwealth spawned the Frontline States, they invoked sanctions and helped sanctions spread like measles against us. They mobilized the UN and other organizations against the South African government. They lobbied the Congress in America. They were anything but powerless.[206]

DURR's comments highlight that the Commonwealth is participating in the human rights debate and indeed has a powerful role to play. Throughout the statements and speeches of the Secretary-General and in the documentation issuing from Commonwealth meetings, the language of human rights has been employed to reaffirm its role as an international organisation. Declarations containing a broad and holistic approach to human rights, development and democracy and defining particular standards of conduct are considered to be part of an informal constitution, enunciating the organisation's purpose and goals. Current and future membership criteria have been judged according to these articulated standards, and the organs of the association have used the traditional functions associated with international organisations to implement a human rights strategy.

Yet a number of problems are associated with the Commonwealth's present direction. The major difficulty which arises when proposing a human rights strategy is that members do not join the organisation in order to be subjected to investigation and scrutiny by its organs. The Commonwealth's "family"[207] atmosphere would be severely challenged if the Commonwealth did pursue a programme which caused a decrease in membership. The human rights standards enunciated in the association's constituent instruments sit uncomfortably with notions of State sovereignty, non-interference in domestic affairs and consensus decision-making, all principles which may conflict with a comprehensive rights strategy.

205. Chan, *op. cit. supra* n.16, at p.19.
206. K. Durr, "South Africa and the Commonwealth" (1994) The Round Table 169, 172.
207. Commonwealth Secretariat, *op. cit. supra* n.95, at p.5.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press

The Secretariat, the Commonwealth's principal organ, asserts its role in education and training programmes but denies it has the ability to monitor compliance with particular rights. The same approach is evidenced in other Commonwealth bodies which prefer to proclaim human rights and suggest non-investigative procedures rather than highlight individual problems. While the Commonwealth convention prohibiting discussion of the internal affairs of its members may be considered "anachronistic",[208] it is still adhered to in many quarters and is in direct opposition to the initiation of enforcement mechanisms. Despite this, the Heads of Government have been willing to commence action against member States based on arguably non-binding standards.

Despite these contradictions, when examining the Commonwealth's functions in implementing rights Doxey's warning for the need to avoid a widening gap between pronouncements and outcomes in order to retain the confidence of all members should be heeded.[209] "If there are dangers in the Commonwealth attempting too much, there are also dangers in attempting too little."[210] In adopting the Millbrook Commonwealth Action Programme four years after the Harare Declaration, the Commonwealth has recognised that it must close this gap between rhetoric and reality in promoting and protecting human rights. In 1963 Lord Casey pleaded for the revitalisation of the Commonwealth: "Do not let us continue to speak of the Commonwealth in soothing tones. It is not tranquilizers that are wanted but stimulants. Either we stop talking about the Commonwealth or do our utmost to make it worth talking about."[211] While the Commonwealth has recognised the challenge it has yet to determine the extent to which it can, and should, adapt its processes and adopt new procedures to find the solution.

208. "The Commonwealth and Human Rights" (editorial) (1995) The Round Table iii, iv.
209. M. Doxey, "Continuity and Change in the Commonwealth" (1989) Yearbook of World Affairs 76, 98.
210. *Ibid.*
211. Casey, *op. cit. supra* n.1, at p.165.

https://doi.org/10.1017/S0020589300060462 Published online by Cambridge University Press