

THE AFRICAN CHARTER  
ON HUMAN AND  
PEOPLES' RIGHTS

The System in Practice, 1986–2000

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FUTURE TRENDS IN HUMAN RIGHTS  
IN AFRICA: THE INCREASED ROLE  
OF THE OAU?

GINO J. NALDI\*

Ex Africa semper aliquid novi.<sup>1</sup>

When the Organization of African Unity (OAU) was founded in 1963 the question of human rights did not feature prominently on its agenda. Unlike the Council of Europe the protection of human rights was not one of the OAU's principal aspirations.<sup>2</sup> Nevertheless, this is not to say that human rights were wholly neglected by the OAU Charter since it makes references, albeit slight, to human rights.<sup>3</sup> Accordingly, one of the purposes of the OAU is to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>4</sup> However, almost twenty years were to elapse before the OAU felt able to adopt a human rights document proper.<sup>5</sup>

\* The author dedicates this chapter to the memory of his father, Ferruccio Naldi.

<sup>1</sup> Pliny the Elder.

<sup>2</sup> On the objectives of the OAU, see G. J. Naldi, *The Organization of African Unity* (2nd edn, London: Mansell, 1999), pp. 2–18.

<sup>3</sup> ILM 2 (1963) 766; G. J. Naldi (ed.), *Documents of the Organization of African Unity* (London: Mansell, 1992), p. 3.

<sup>4</sup> Article 2(1)(e) of the OAU Charter. Furthermore, the Member States reaffirm their adherence to, *inter alia*, the Universal Declaration of Human Rights in the preamble to the OAU Charter.

<sup>5</sup> For the background leading to the adoption of the African Charter, see Naldi, *The Organization of African Unity*, pp. 109–13; E. A. Ankumah, *The African Commission on Human and Peoples' Rights* (The Hague: Kluwer, 1996), pp. 4–8; R. M. D'Sa, 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action', *Australian Year Book of International Law* 10 (1981–3) 101 at 103–6; K. O. Kufuor, 'Safeguarding Human Rights: A Critique of the African Commission on Human and Peoples' Rights', *Africa Development* 18 (1993) 65 at 66–9.

### The role of the OAU

The initial question that must be considered is why the OAU failed for many years to address adequately the issue of human rights. It must be clearly understood that the principal objectives of the OAU have been to defend the sovereignty and territorial integrity of its Member States and to rid Africa of colonialism and racialism.<sup>6</sup> Conceived and born during the Cold War and the liberation struggle, the OAU remained in that mindset for a generation.<sup>7</sup> Account must also be taken of the fact that the States of Africa, most newly independent, jealously guarded their freedom and deeply resented any measures which hinted at external interference with their internal affairs. Indeed, one of the basic principles of the OAU is that of non-interference in the internal affairs of States.<sup>8</sup> African States have traditionally insisted on rigorous compliance with this principle and have tended to regard international concern for human rights as a pretext for undermining their sovereignty.<sup>9</sup> However, the principle of domestic jurisdiction is a relative one, and as international law has evolved, particularly in the field of human rights, its scope and extent has been restricted accordingly.<sup>10</sup> It is now generally accepted that human rights assume priority over national sovereignty.<sup>11</sup> Thus African States have been compelled to accept international scrutiny of their human rights credentials.<sup>12</sup>

<sup>6</sup> Articles 2–3 of the OAU Charter. See further Naldi, *The Organization of African Unity*, pp. 2–18; C. O. C. Amate, *Inside the OAU: Pan-Africanism in Practice* (London: Macmillan, 1986), pp. 61–3; T. O. Elias, *Africa and the Development of International Law* (2nd edn by R. Akinjide, Dordrecht, Boston, London: Martinus Nijhoff, 1988), pp. 124–9.

<sup>7</sup> Amate, *Inside the OAU*, pp. 60–1. <sup>8</sup> Article 3(2) of the OAU Charter.

<sup>9</sup> See, for example, the statement made by Swaziland to the UN Human Rights Commission in 1997, UN Doc. E/CN.4/1997/SR.4, paras. 46–7; and *Mika Miha v. Equatorial Guinea*, Communication 414/1990 (UN Human Rights Committee), UN Doc. CCPR/C/51/D/414/1990, where Equatorial Guinea argued, unsuccessfully, that the communication submitted to the UN Human Rights Committee constituted interference in its internal affairs even though Equatorial Guinea had recognised the jurisdiction of the UN Human Rights Committee.

<sup>10</sup> *Tunis–Morocco Nationality Decrees Case*, PCIJ, Series B, No. 4 (1923), p. 24; M. N. Shaw, *International Law* (4th edn, Cambridge University Press, 1997), p. 24. UN Secretary-General Boutros Boutros-Ghali has therefore remarked that ‘the time of absolute and exclusive sovereignty’ has passed, *An Agenda for Peace*, ILM 31 (1992) 953, para. 17.

<sup>11</sup> Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights 1993, ILM 32 (1993) 1661, Part I, paras. 1, 4 and 5; Shaw, *International Law*, p. 202.

<sup>12</sup> C. Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge University Press, 1996), pp. 190–1. For examples of measures undertaken by the UN, see Naldi, *The Organization of African Unity*, p. 40 at note 22.

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However, it must be conceded that the OAU institutionally has not generally conducted itself in a manner to suggest that the protection of human rights has been regarded as an overriding consideration. Rather, rightly or wrongly, the perception given to the wider world is one of slavish adherence to the principle of domestic jurisdiction regardless of the human rights abuses that may exist within Member States.<sup>13</sup> There has certainly been a reluctance to criticise leaders who fail to protect human rights.<sup>14</sup> The institutional defects of the OAU may be responsible for this pusillanimity. It should be observed that the OAU Assembly operates by consensus; its resolutions have no binding force.<sup>15</sup> Not only was the OAU designed to act only when assured of overwhelming support but a fear of divisiveness led to cravenness. Nonetheless, a question that must be addressed is whether the OAU is endowed, institutionally or otherwise, to investigate human rights problems.

Eschewing official and institutional modes of dispute settlement,<sup>16</sup> resort to informal procedures has been the preferred method of the OAU. International mediation, conciliation or recourse to the good offices of African statesmen have been regular features.<sup>17</sup> UN Secretary-General Kofi Annan has expressed the view that such efforts still have a valuable role to play.<sup>18</sup> They have the convenience of pragmatism, flexibility, persuasion and compromise. In the context of human rights it seems undeniable that such processes can have a useful role, particularly where the problem at issue is one on a large scale or where there are systematic violations of human

<sup>13</sup> Clapham, *Africa and the International System*, pp. 110–17; G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 1999), p. 57.

<sup>14</sup> According to Amate, concern at human rights abuses was only expressed at the Assembly for the first time in 1979: Amate, *Inside the OAU*, p. 472.

<sup>15</sup> Naldi, *The Organization of African Unity*, p. 19.

<sup>16</sup> It is interesting to note that the Commission of Mediation, Conciliation and Arbitration, provided for by Article 19 of the Charter and the Protocol on the Commission of Mediation, Conciliation and Arbitration (see Naldi (ed.), *Documents of the Organization of African Unity*, p. 32) has never become operational. See Naldi, *The Organization of African Unity*, pp. 14 and 24–9.

<sup>17</sup> Amate, *Inside the OAU*, pp. 162–8; T. Maluwa, 'The Peaceful Settlement of Disputes Among African States, 1963–1983: Some Conceptual Issues and Practical Trends', *ICLQ* 38 (1989) 299 at 301; M. Shaw, 'Dispute Settlement in Africa', *Yearbook of World Affairs* 37 (1983) 149.

<sup>18</sup> 'United Nations, Report of the Secretary-General on: Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa', *RADIC*, 10 (1998) 549, para. 21.

rights. These methods remain underused, however, insofar as human rights are concerned.<sup>19</sup>

An important development at the institutional level has been the establishment of the Mechanism for Conflict Prevention, Management and Resolution. As has been observed, the OAU has usually relied on *ad hoc* arrangements of dispute settlement. However, among their drawbacks is that they are reactive and remedial rather than proactive and preventive. Considerable loss of life and property may have occurred before the OAU offered its services. It was therefore proposed that the OAU should commit itself towards the peaceful and speedy resolution of all conflicts in Africa.<sup>20</sup> Accordingly, the Mechanism was approved by the OAU Assembly in 1993.<sup>21</sup>

The Mechanism's primary objective is the anticipation and prevention of conflicts, including internal ones, with emphasis on anticipatory and deterrent measures.<sup>22</sup> Prompt and decisive action should prevent the emergence of conflicts, prevent conflicts from worsening, and preclude the need for complex and demanding peacekeeping operations.<sup>23</sup> However, the Mechanism operates subject to the fundamental principles of the OAU, especially respect for the sovereignty and territorial integrity of Member States and non-interference in the internal affairs of States. The consent and co-operation

<sup>19</sup> The OAU was involved in attempts at solutions to the ethnic conflicts in the Great Lakes region of Central Africa, P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts and the UN Criminal Tribunal* (Aldershot: Ashgate, 2000), pp. 30–1; A. Parsons, *From Cold War to Hot Peace: UN Interventions 1947–1995* (London: Penguin, 1995), p. 213. Most recently, Nelson Mandela has presided over efforts to moderate a peace agreement in Burundi.

<sup>20</sup> See 'Proposals for an OAU Mechanism for Conflict Prevention and Resolution', RADIC 4 (1992) 1072.

<sup>21</sup> Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, AHG/Dec. 3 (XXIX) (the 'Cairo Declaration'), RADIC 6 (1994) 158.

<sup>22</sup> Para. 15 of the Cairo Declaration. The Mechanism seems to mirror in part UN Secretary-General Boutros Boutros-Ghali's vision for more effective preventive action in *An Agenda for Peace*, ILM 31 (1992) 953.

<sup>23</sup> Adequate funding and the political support of Member States will ultimately determine the success of the Mechanism, M. A. Hefny, 'Enhancing the Capabilities of the OAU Mechanism for Conflict Prevention, Management and Resolution: An Immediate Agenda for Action', *Proceedings of the African Society of International and Comparative Law* 7 (1995) 176 at 181–3. The OAU must co-ordinate its activities with other African organisations, co-operate, where appropriate, with neighbouring countries, and liaise with the UN with regard to peacekeeping and peace-making activities, and, when necessary, call upon the UN to provide financial, logistic and military support for the OAU's efforts, paras. 24–5 of the Cairo Declaration.

of the parties to a dispute is a prerequisite for OAU involvement.<sup>24</sup> It is encouraging to note that the Mechanism has mediated in a number of internal conflicts.<sup>25</sup>

The Mechanism appears to herald a more resolute approach to dispute settlement by the OAU. At a conceptual level, the Mechanism may be regarded as revolutionary in the sense that it demands a rethink of the rigid adherence of African States to the principles of sovereignty and non-interference.<sup>26</sup> However, care should be taken not to overstate this assessment for, unlike the UN, there does not appear to be any imminent prospects for peace-enforcement which, as events in the Balkans and elsewhere suggest, can only be effective where the warring parties genuinely seek peace and/or the UN forces have the military resources and the political support necessary to act as a forceful deterrent.<sup>27</sup> At a practical level, the Mechanism enhances the OAU's capacity to solve disputes. Endowing it with a preventive role is especially welcome. The Mechanism seems eminently capable of assuming an appropriate role, more political than legal perhaps, over large-scale human rights concerns.

Notwithstanding these accomplishments, it does not seem that the OAU is in a very strong position, as a political organisation, to protect the human rights of the individual. Nevertheless, the fact should not be overlooked that the OAU has taken concrete measures to improve the protection of human rights through the adoption of various treaties and at the same time has made a distinctive contribution to international human rights law.

### **The African Charter on Human and Peoples' Rights: fatally flawed?**

The adoption of the African Charter on Human and Peoples' Rights (hereinafter the 'African Charter')<sup>28</sup> has largely proved to date to be a false dawn for the promotion and protection of human rights in Africa. Obinna Okere

<sup>24</sup> Para. 14 of the Cairo Declaration.      <sup>25</sup> Naldi, *The Organization of African Unity*, p. 33.

<sup>26</sup> Hefny, 'Enhancing the Capabilities of the OAU Mechanism', p. 180.

<sup>27</sup> Parsons, *From Cold War to Hot Peace*, pp. 256–7.

<sup>28</sup> Adopted by the Eighteenth Assembly of Heads of State and Government of the Organization of African Unity (OAU) at Nairobi in July 1981, entered into force on 21 October 1986, ILM 21 (1982) 58; Naldi (ed.), *Documents of the Organization of African Unity*, p. 109. All of the OAU's fifty-three Member States have now ratified the African Charter: see R. Murray, 'Africa', NQHR 17 (1999) 350. For an analysis of the African Charter, see Naldi, *The Organization of African Unity*, pp. 109–212; U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Kluwer, 1997).

describes the African Charter as ‘modest in its objectives and flexible in its means’.<sup>29</sup> Certainly, there are a number of features about the African Charter which have given cause for concern. More so than other comparable instruments, the substantive provisions of the African Charter are equivocally phrased.<sup>30</sup> Moreover, extensive use is made of ‘clawback’ clauses<sup>31</sup> that seem to make the enforcement of a right dependent on municipal law or at the discretion of the national authorities. Article 10(1) is one such example.<sup>32</sup> It states that: ‘Every individual shall have the right to free association *provided that* he abides by the law’ (emphasis added). The attainment of this right therefore appears to be undermined because it is subject to the dictates of municipal law.<sup>33</sup> However, it is interesting to observe that in a recent

<sup>29</sup> B. Obinna Okere, ‘The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems’, HRQ 6 (1984) 141 at 158. For other sceptical assessments, see R. Gittleman, ‘The African Charter on Human and Peoples’ Rights: A Legal Analysis’, *Virginia Journal of International Law* 22 (1982) 667; P. Amoah, ‘The African Charter on Human and Peoples’ Rights – An Effective Weapon for Human Rights?’, RADIC 4 (1992) 226; Robertson, *Crimes Against Humanity*, pp. 57–8.

<sup>30</sup> D’Sa, ‘The African Charter’, pp. 107–8; Gittleman, ‘The African Charter’, p. 685; C. A. Odinkalu, ‘The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment’, *Transnational Law and Contemporary Problems* 8 (1998) 359 at 398, who expresses little pessimism with this problem as he believes that the African Commission on Human and Peoples’ Rights has been addressing this concern through its procedures and jurisprudence.

<sup>31</sup> See R. Higgins, ‘Derogations Under Human Rights Treaties’, BYIL 48 (1976–7) 281.

<sup>32</sup> See also Articles 8, 9(2), 12(1) and 13(1) of the African Charter. It does not seem appropriate to draw an analogy with the limitations contained in Articles 10 and 11 of the European Convention on Human Rights, for example, since these are strictly defined and are only permitted subject to stringent criteria: see D. J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), pp. 285–301.

<sup>33</sup> Robertson, *Crimes Against Humanity*, pp. 57–8; Ankumah, *The African Commission*, pp. 176–7; D’Sa, ‘The African Charter’, pp. 109–11. Umzurike, who is less critical, divides the African Charter’s civil and political rights into unrestricted and restricted rights: see Umzurike, *The African Charter*, Chapter 3. See also U. O. Umzurike, ‘The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples’ Rights’, *African Journal of International Law* 1 (1988) 65 at 68. However, it is encouraging to note that the African Commission on Human and Peoples’ Rights has interpreted this provision creatively, stating that there is a duty on the State to abstain from interfering with the free formation of associations, and that there must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends: Communication 101/93, *Civil Liberties Organisation in respect of Nigerian Bar Association v. Nigeria*, Eighth Activity Report 1994–1995, Annex VI (see R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples’ Rights* (Oxford: Hart Publishing, 2001), p. 394 (hereinafter *Documents of the African Commission*)).

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opinion the African Commission on Human and Peoples' Rights (hereinafter the 'Commission') has rejected this interpretation and has asserted the supremacy of international human rights law.<sup>34</sup> The Commission's important views on this issue, which although dealing with the specific question of freedom of expression state a principle of general application, deserve to be quoted at length.

Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive . . .

According to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter . . .

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances . . .

The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest' . . .

The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained . . .

Even more important, a limitation may never have as a consequence that the right itself becomes illusory.<sup>35</sup>

It needs to be recalled that a distinguishing characteristic of the African Charter is the fact that it imposes obligations upon the individual towards

<sup>34</sup> Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, *Media Rights Agenda and Constitutional Rights Project*, Twelfth Activity Report 1998–1999, Annex V (*Documents of the African Commission*, p. 718).

<sup>35</sup> *Ibid.*

the State and the community.<sup>36</sup> As Ankumah points out, the duty provisions are generally ‘problematic and could adversely affect enjoyment of the rights set forth in the Charter’.<sup>37</sup> Gittleman hence writes that the African Charter is ‘incapable of supplying even a scintilla of external restraint upon a government’s power to create laws contrary to the spirit of the rights granted’.<sup>38</sup> Umzurike’s early assessment was that the African Charter may well be a paper tiger except for effective public opinion that may be whipped up against the offender.<sup>39</sup> The African Charter could aptly be described as a statist document. The suggestion has therefore been made that the African Charter be revised to make it more anthropocentric.<sup>40</sup>

However, lest it be thought that it is all doom and gloom with the African Charter its positive attributes should be acclaimed. A particularly constructive feature is the fact that the *locus standi* requirements before the Commission are relatively broad since individuals and organisations (such as NGOs) other than the victim can submit complaints.<sup>41</sup> Furthermore, second and third generation rights are listed as legally enforceable rights.<sup>42</sup> This step,

<sup>36</sup> Articles 27–29. See further Ankumah, *The African Commission*, pp. 170–2; Naldi, *The Organization of African Unity*, pp. 114 and 138–9; Umzurike, *The African Charter*, pp. 64–5; D’Sa, ‘The African Charter’, pp. 115–16; Makau wa Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’, *Virginia Journal of International Law* 35 (1995) 339.

<sup>37</sup> Ankumah, *The African Commission*, p. 171; Amoah, ‘The African Charter’, pp. 227–8.

<sup>38</sup> Gittleman, ‘The African Charter’, p. 159.

<sup>39</sup> Umzurike, ‘The Protection of Human Rights’, pp. 82–3.

<sup>40</sup> W. Benedek, ‘The African Charter and Commission on Human and Peoples’ Rights: How to Make it More Effective’, NQHR 11 (1993) 25 at 31. Odinkalu, ‘The Individual Complaints Procedures’, p. 398, is sceptical whether such a development would necessarily result in greater protection of human rights.

<sup>41</sup> The Commission’s Rule of Procedure 114(2), since deleted, made this clear, stating that: ‘The Commission may accept such communications from any individual or organisation irrespective of where they shall be.’ See Naldi (ed.), *Documents of the Organization of African Unity*, p. 151. See Umzurike, ‘The Protection of Human Rights’, p. 78; Benedek, ‘The African Charter’, pp. 27–8. In any event, this procedure is now clearly established in the Commission’s practice.

<sup>42</sup> Naldi, *The Organization of African Unity*, pp. 127–38; Umzurike, *The African Charter*, pp. 45–9 and 51–61; D’Sa, ‘The African Charter’, pp. 113–15 and 116–22. Umzurike has expressed doubts as to the wisdom of this approach which he believes confuses legally enforceable rights with desirable political rights. Since the integrity of the former could therefore be undermined, he would have preferred that the second and third generation rights have been declared merely hortatory. See Umzurike, ‘The Protection of Human Rights’, p. 81; and Umzurike, ‘The African Charter on Human and Peoples’ Rights’, in M. Theodoropoulos (ed.), *Human Rights in Europe and Africa* (Athens: Hellenic University Press, 1992), pp. 114–15. Nevertheless, the Commission has had occasion to pronounce

radical for its time, attracted considerable criticism, fuelling the debate about the nature of human rights, which traditionally has focused exclusively on an individualistic approach.<sup>43</sup> However, the ideological distinction between the different categories of rights now seems less important in light of the Vienna Declaration on Human Rights which stresses that all human rights are universal, indivisible and interdependent.<sup>44</sup>

It is common knowledge that the African Charter has created a safeguard mechanism. The Commission, mandated under the African Charter with promoting and ensuring the protection of human and peoples' rights,<sup>45</sup>

on these rights. Thus in Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaïre*, Ninth Activity Report 1995–1996, Annex VIII (*Documents of the African Commission*, p. 444), a violation of the right to health enshrined in Article 16 of the African Charter was established when the State failed to provide safe drinking water, electricity and medicines. The Commission additionally found that the closure of universities and secondary schools for a number of years constituted a violation of the right to education in Article 17 of the African Charter. In Communication 39/90, *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, Eighth Activity Report 1994–1995, Annex VI; Tenth Activity Report 1996–1997, Annex X (*Documents of the African Commission*, pp. 384 and 555), the Commission held that the right to work guaranteed by Article 15 of the African Charter had been violated when the applicant, a magistrate, who had been imprisoned without trial, failed to be reinstated when others who had been condemned in similar conditions had been reinstated. In Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Activity Report 1998–1999, Annex V (*Documents of the African Commission*, p. 718), the Commission found a violation of Article 16 when a detainee in deteriorating health was denied medical assistance. The Commission had to consider the nature and scope of the right to self-determination under Article 20(1) of the African Charter in Communication 75/92, *Katangese Peoples' Congress v. Zaïre*, Eighth Activity Report 1994–1995, Annex VI (*Documents of the African Commission*, p. 389).

<sup>43</sup> See, e.g., R. Higgins, *Problems and Process: International Law and How We Use it* (Oxford: Clarendon Press, 1994), pp. 99–103; P. Sieghart, *The Lawful Rights of Mankind* (Oxford: Oxford University Press, 1986), p. 161.

<sup>44</sup> Vienna Declaration and Programme of Action, Part I, para. 5; UN Commission on Human Rights, Resolution 1999/25, para. 3(d), UN Doc. E/CN.4/1999/167, p. 105. The Limburg Principles also describe economic, social and cultural rights as an integral part of international human rights law. See *The Review* (International Commission of Jurists), No. 37 (1986) 43–55. Significantly, the UN Committee on Economic, Social and Cultural Rights has stated that States Parties to the International Covenant on Economic, Social and Cultural Rights 1966 have assumed clear obligations in respect of the full realisation of the rights in question which require them to move expeditiously and effectively towards that goal. See General Comment 3, UN Doc. HRI/GEN/1/Rev.2, pp. 55–9.

<sup>45</sup> Articles 30 and 45 of the African Charter. Ankumah, *The African Commission*, p. 8, prefers to describe the Commission as a 'supervisory institution'.

has relatively weak powers of investigation and enforcement.<sup>46</sup> Lack of an effective remedy has been identified as a particular deficiency.<sup>47</sup> Its decisions do not formally have the binding force of a ruling of a court of law but have a persuasive authority akin to the Opinions of the UN Human Rights Committee.<sup>48</sup> However, an expectation of compliance does appear to have been engendered.<sup>49</sup> It is also important to note that the Commission

<sup>46</sup> Kufuor, 'Safeguarding Human Rights', p. 74; Z. Motala, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination', *Hastings International and Comparative Law Review* 12 (1989) 373 at 405. Articles 47–54 of the African Charter make provision for inter-State communications; one has been submitted to date. 'Other' communications, i.e. from individuals and NGOs, are governed by Articles 55–59 of the African Charter, although, as Odinkalu, 'The Individual Complaints Procedures', p. 371, has observed, the infelicitous wording of Article 55 of the African Charter has led some to question whether the Commission has the capacity to receive individual communications. However, this procedure is now well established in the Commission's practice. According to the Commission, the main aim of this procedure is 'to initiate a positive dialogue, resulting in an amicable resolution, which remedies the prejudice complained of. A prerequisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.' See Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaïre*, Ninth Activity Report 1995–1996, Annex VIII (*Documents of the African Commission*, p. 444). See further Odinkalu, 'The Individual Complaints Procedures', pp. 374–8. A State reporting procedure is also required under Article 62. See further Naldi, *The Organization of African Unity*, pp. 139–47; and Ankumah, *The African Commission*, pp. 20–8, 51–77 and 79–110.

<sup>47</sup> Benedek, 'The African Charter', pp. 31–2; and Kufuor, 'Safeguarding Human Rights', pp. 71–4. However, as has been noted, the Commission has stated that one of its principal objectives is to remedy the prejudice complained of: Communications 25/89, 47/90, 56/91 and 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaïre*, Ninth Activity Report 1995–1996, Annex VIII (*Documents of the African Commission*, p. 444). Hence Odinkalu, 'The Individual Complaints Procedures', p. 374, comments that the Commission 'thus recognises that the bottom line of the communications procedure is the redress of the violations complained of'.

<sup>48</sup> See Article 59 of the African Charter and Rule 120 of the Commission's Rules of Procedure, as amended, HRLJ 18 (1997) 154; Ankumah, *The African Commission*, pp. 24 and 74–5; D'Sa, 'The African Charter', p. 126. Murray writes that the Commission has relied on these provisions enabling it to declare that there have been violations of the African Charter: R. Murray, 'Decisions by the African Commission on Individual Communications Under the African Charter on Human and Peoples' Rights', *ICLQ* 46 (1997) 412 at 428.

<sup>49</sup> This approach would appear to be required under Article 1 of the African Charter: see Communications 129/94, *Civil Liberties Organisation v. Nigeria*, Ninth Activity Report 1995–1996, Annex VIII (*Documents of the African Commission*, p. 452). See further C. Anyangwe, 'Obligations of States Parties to the African Charter on Human and Peoples'

is effectively subordinate to the OAU and concerns were raised that its supervisory mandate could thereby be neutered. Although the Commission's independence does not appear to have been compromised,<sup>50</sup> it has nevertheless been criticised as being generally unable to act as a forceful guardian of rights.<sup>51</sup> However, an analysis of the Commission's decisions in recent times does suggest that the Commission is generally becoming more robust in performing its mandate.<sup>52</sup> Thus Odinkalu expresses the view that on

Rights', RADIC 10 (1998) 625. It may be that the Commission has come to regard its decisions on communications as binding: see Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*, Twelfth Activity Report 1998–1999, Annex V (*Documents of the African Commission*, p. 729); Murray, 'Decisions by the African Commission', p. 431; and further Murray, 'Africa', p. 93 at p. 94, and p. 516 at p. 519.

<sup>50</sup> Kufuor, 'Safeguarding Human Rights', p. 70; I. Badawi El-Sheikh, 'The African Commission on Human and Peoples' Rights: Prospects and Problems', NQHR 7 (1989) 272 at 274–5.

<sup>51</sup> The failings appear to be both institutional and personal: Ankumah, *The African Commission*, pp. 179–98; Robertson, *Crimes Against Humanity*, pp. 58–9. Makau wa Mutua, 'The Banjul Charter', p. 11, thus describes the Commission as 'a facade, a yoke that African leaders have put around our necks'. Oloka-Onyango, although not as critical, is also unimpressed: J. Oloka-Onyango, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa', *California Western International Law Journal* 26 (1995) 1 at 52–6. See also Amoah, 'The African Charter', pp. 232–7; C. E. Welch, Jr, 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment', HRQ 14 (1992) 43. For a more favourable assessment, see Umozurike, *The African Charter*, pp. 67–85; R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford: Hart Publishing, 2000). Ankumah, while acknowledging its failings, is nevertheless of the view that the Commission has the potential to become an effective body: see Ankumah, *The African Commission*, p. 9. More recently, Odinkalu writes that 'any conclusions . . . about the work of the Commission . . . must remain tentative and probably lie somewhere between the extremes of opinion', but that 'any temptation to dismiss it as a worthless institution today must be regarded as premature, ill-informed, or both': see Odinkalu, 'The Individual Complaints Procedures', pp. 401 and 402.

<sup>52</sup> See, for example, Communications 27/89, 46/91, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and the Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Inter africaine des Droits de l'Homme v. Rwanda*, Tenth Activity Report 1996–1997, Annex X (*Documents of the African Commission*, p. 551); Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Twelfth Activity Report 1998–1999, Annex V (*Documents of the African Commission*); Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria* Twelfth Activity Report 1998–1999, Annex V (*Documents of the African Commission*, p. 718). See further Murray, 'Decisions by the African Commission', pp. 428–32.

‘its interpretation of the Charter, the Commission has been mostly positive and sometimes even innovative.’<sup>53</sup> He adds that the Commission has been successfully addressing the deficiencies in the African Charter through its practice, evolving procedures and jurisprudence.<sup>54</sup>

An important practical consideration that is universally believed to be hampering the Commission’s ability to perform its role is the lack of financial resources.<sup>55</sup> The Commission must be adequately resourced to enable it to fulfil its mandate.

Whatever its failings, the Commission was assigned the role of safeguarding human rights under the African Charter. The suggestion of strengthening the protection of human rights by establishing a court like other regional human rights regimes was initially rejected.<sup>56</sup> This decision was justified on the ground that the African conception of dispute settlement is based on negotiation and conciliation rather than an adversarial or confrontational system.<sup>57</sup> However, the real reason may have been less prosaic. It appears there was widespread reluctance among OAU Member States to subordinate themselves to a supranational judicial organ.<sup>58</sup>

<sup>53</sup> Odinkalu, ‘The Individual Complaints Procedures’, p. 402.

<sup>54</sup> *Ibid.*, p. 398.

<sup>55</sup> The Office of the UN High Commissioner for Human Rights has identified the limited resources allocated by the OAU to the Commission as one of the major obstacles to its effective functioning: UN Doc. E/CN.4/1999/93, para. 6. See also Ankumah, *The African Commission*, pp. 32–3; Murray, ‘Decisions by the African Commission’, p. 414; Odinkalu, ‘The Individual Complaints Procedures’, pp. 398–400; C. M. Peter, ‘The Proposed African Court of Justice – Jurisprudential, Procedural, Enforcement Problems and Beyond’, *East African Journal of Peace and Human Rights* 1 (1993) 117 at 132–3; Robertson, *Crimes Against Humanity*, p. 58; and Shaw, *International Law*, p. 294.

<sup>56</sup> Amoah, ‘The African Charter’, p. 237.

<sup>57</sup> *Ibid.*, pp. 237–8. On the African philosophy of rights which emphasises the nexus between individual and community, see A. A. Naim and F. M. Deng (eds.), *Human Rights in Africa* (Washington DC: Brookings Institution, 1990); T. Maluwa, *International Law in Post-Colonial Africa* (The Hague: Kluwer, 1999), pp. 130–7; Umzurike, *The African Charter*, pp. 12–19; J. A. M. Cobbah, ‘African Values and the Human Rights Debate: An African Perspective’, HRQ 9 (1987) 309. It should be observed that the preamble to the African Charter stresses that the concept of human and peoples’ rights should be inspired by African values and historical tradition.

<sup>58</sup> Ankumah, *The African Commission*, p. 9. Umzurike, ‘The Protection of Human Rights’, p. 78, has also been critical of this omission, writing that it ‘was an attempt to avoid exposing a government or the head of State closely identified with the government for its wrong doings’.

### **The African Court on Human and Peoples' Rights**

The creation of an African Court on Human and Peoples' Rights<sup>59</sup> (hereinafter the 'Court') with the specific task of reinforcing the role of the Commission<sup>60</sup> enhances in theory the prospects of promoting the protection of human rights in Africa. The possibility of jurisdictional disputes between the two organs does exist, and will be discussed in Chapter 10.

In addition, it must be pointed out that the Court will not be the only judicial organ with sole responsibility for the protection of human rights in Africa. Thus the Court of Justice set up by the OAU's Treaty Establishing the African Economic Community (AEC Treaty)<sup>61</sup> is directed to protect human rights.<sup>62</sup> Similarly, a Court of Justice has been established under the Revised Treaty of the Economic Community of West African States (ECOWAS),<sup>63</sup> as has a Court of Justice of the Common Market for Eastern and Southern Africa.<sup>64</sup> Although the subject-matter of these treaties is economic affairs, the experience of the European Community proves that economic law has a justiciable human rights dimension<sup>65</sup> and it therefore seems only a matter

<sup>59</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the OAU Assembly of Heads of State and Government at its 34th Ordinary Session in Ouagadougou in 1998, RADIC 9 (1997) 953. The Protocol requires fifteen ratifications to enter into force: see Article 34(3). At the time of writing, five States have ratified. For an analysis of the Protocol, see G. J. Naldi and K. D. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', NQHR 16 (1998) 431. For further discussion of the Court, see Chapter 10 below.

<sup>60</sup> Article 2 of the Protocol.

<sup>61</sup> Naldi (ed.), *Documents of the Organization of African Unity*, p. 203; ILM 30 (1991) 1241. On the AEC, see Naldi, *The Organization of African Unity*, pp. 240–58; G. J. Naldi and K. D. Magliveras, 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?', *North Carolina Journal of International Law and Commercial Regulation* 24 (1999) 601.

<sup>62</sup> According to Article 3(g) of the AEC Treaty, one of the principles of the AEC is the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. The Court of Justice has jurisdiction to adjudicate upon this provision under Article 18 of the AEC Treaty.

<sup>63</sup> Article 4(g) of the Revised ECOWAS Treaty, RADIC 8 (1996) 187.

<sup>64</sup> Article 6(e) of the COMESA Treaty, ILM 33 (1994) 1111. On the jurisdiction of the Court of Justice, see in particular Articles 19, 23–26 and 32.

<sup>65</sup> *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle fur Getreide und Futtermittel* [1970] ECR 1125. In *Opinion 2/94 on Accession by the Community to the European Convention on Human Rights* [1996] ECR I-1759, paras. 33–4, the European Court of Justice

of time before these courts pronounce on human rights issues. This raises the issue of conflicting interpretations and conclusions arising concerning the application and definition of Charter rights.

### **The African Charter on the Rights and Welfare of the Child**

The African Charter only makes the briefest of express references to the rights of children.<sup>66</sup> In the years following the adoption of the African Charter, however, the question of children's rights came to the fore in the international arena leading to the adoption of the UN Convention on the Rights of the Child in 1989.<sup>67</sup> Although the UN Convention attracted the support of many African States,<sup>68</sup> it was felt that the African child was exposed to a particular set of dangerous circumstances<sup>69</sup> which called for additional measures of protection but in an African perspective.<sup>70</sup> The result was the 1990 African Charter on the Rights and Welfare of the Child.<sup>71</sup>

The Charter may be said to complement the UN Convention on the Rights of the Child. It seeks to guarantee a number of civil, political, economic, social and cultural rights comparable to those protected by the UN Convention, although it would seem that such protection is not generally as effective as under the UN Convention.<sup>72</sup> However, the Charter yields in those situations where it may be considered not to equal national or international standards.<sup>73</sup> Furthermore, in keeping with the African concept

stated that 'it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. Respect for human rights is therefore a condition for the lawfulness of Community acts.'

<sup>66</sup> Article 18(3) of the African Charter. <sup>67</sup> ILM 28 (1989) 1448.

<sup>68</sup> Somalia is one of only two States not to have ratified the UN Convention.

<sup>69</sup> K. C. J. M. Arts, 'The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child', RADIC 5 (1993) 139 at 141-3.

<sup>70</sup> B. Thompson, 'Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism', ICLQ 41 (1992) 434.

<sup>71</sup> Naldi (ed.), *Documents of the Organization of African Unity*, p. 183. The Charter requires fifteen ratifications to enter into force (Article 47(3)); it became operational on 29 October 1999.

<sup>72</sup> Arts, 'The International Protection of Children's Rights in Africa', pp. 147-9, identifies the freedom of expression, the freedom of thought, conscience and religion, the right to privacy, the right of access to information, the right to benefit from social security, and explicit rights for minorities as especially problematic since they are subordinate to the rights of parents, legal guardians or the State.

<sup>73</sup> Article 1(2); Arts, 'The International Protection of Children's Rights in Africa', pp. 154-5.

of rights, the Charter imposes responsibilities on the child towards his or her family, the community and the State.<sup>74</sup> Yet there are progressive features in the Charter. It should be observed initially that a child is defined as a person below the age of eighteen years.<sup>75</sup> The best interests of the child is *the* primary consideration.<sup>76</sup> The participation and recruitment of children in armed conflicts is prohibited.<sup>77</sup> Harmful social and cultural practices are to be eliminated.<sup>78</sup> It seems that female genital mutilation is included in this proscription.<sup>79</sup> Child marriages are expressly prohibited<sup>80</sup> but curiously the age bar is set somewhat high at eighteen years.<sup>81</sup> In relation to refugee children Article 23(4) of the Charter adheres to the broad definition of refugee status in the OAU Convention on Refugees 1969.<sup>82</sup> The prohibition on child labour is somewhat equivocal, however.<sup>83</sup> Requiring States Parties only to take legislative and administrative measures to combat this problem has been criticised as inadequate.<sup>84</sup> On the other hand, the

<sup>74</sup> Article 31. See Arts, 'The International Protection of Children's Rights in Africa', pp. 153–4.

<sup>75</sup> Article 2. Cf. Article 1 of the UN Convention on the Rights of the Child, which is less conclusive. See Arts, 'The International Protection of Children's Rights in Africa', p. 145.

<sup>76</sup> Article 4. By way of contrast, the best interests of the child is simply *a* primary consideration according to Article 3(1) of the UN Convention on the Rights of the Child.

<sup>77</sup> Article 22. The UN Convention on the Rights of the Child has come in for particular criticism because Article 38 permits recruitment as from age fifteen years. See now the Optional Protocol (2000) and notes 135, 138 and 139 below.

<sup>78</sup> Article 21(1). See further the UN Fourth World Conference on Women (Beijing Platform for Action), ILM 35 (1996) 401, paras. 113, 115, 118, 124, 224, 276 and 277; the Vienna Declaration and Plan of Action, Part I, para. 18(2), Part II, paras. 38 and 4. See also Article 1(3) of the Charter, which states that any custom, tradition, cultural or religious practice inconsistent with the Charter shall to the extent of the inconsistency be discouraged. In *Dow v. Attorney-General* [1992] 2 LRC (Const) 623, the Botswana Court of Appeal, addressing the issue of sex discrimination, held that custom and tradition must always yield to the Constitution and express legislation.

<sup>79</sup> Arts, 'The International Protection of Children's Rights in Africa', p. 151. This practice has been condemned by the Beijing Platform for Action, para. 283(d). It has been reported that female circumcision exists in at least twenty-five countries in Africa: UN Doc. E/CN.4/Sub.2/1991/6, p. 3. A WHO Regional Plan of Action to Accelerate the Elimination of Female Genital Mutilation was launched in many African countries in March 1997: UN Doc. E/CN.4/Sub.2/1997/SR.14, para. 15. See further below.

<sup>80</sup> Article 21(2); Beijing Platform for Action, paras. 93 and 274(e).

<sup>81</sup> Arts, 'The International Protection of Children's Rights in Africa', p. 149. See further below.

<sup>82</sup> Article 1(2), in Naldi (ed.), *Documents of the Organization of African Unity*, p. 101. For discussion, see Naldi, *The Organization of African Unity*, pp. 79–80.

<sup>83</sup> Article 15. Cf. Article 32 of the UN Convention.

<sup>84</sup> Arts, 'The International Protection of Children's Rights in Africa', pp. 149–50. By comparison, Article 32(2) of the UN Convention additionally requires social and educational measures.

measures required of States Parties is more extensive than those of the UN Convention.<sup>85</sup>

The Charter makes provision for an implementation mechanism, the African Committee of Experts on the Rights and Welfare of the Child,<sup>86</sup> which, while it must meet at least once a year, can be convened whenever necessary.<sup>87</sup> The mandate of the Committee, which has been praised as ‘positive’, broader and better defined than that of the UN Committee on the Rights of the Child,<sup>88</sup> is to promote and protect the rights and welfare of the child, especially to collect and document information, to assess problems relating to children, to organise meetings, to encourage national and local institutions concerned with child welfare, to advise governments, to formulate and draft rules aimed at protecting children, to co-operate with African, regional and international institutions and organisations concerned with the rights and welfare of children, to monitor the implementation and ensure protection of the rights enshrined in the Charter, and to perform any other tasks entrusted to it by the OAU.<sup>89</sup> As part of the monitoring activities, there is a reporting procedure that requires States to submit a report to the Committee every three years.<sup>90</sup>

A potentially significant achievement, which is not mirrored in the UN Convention, confers upon the Committee jurisdiction to entertain communications from persons, groups or NGOs relating to the Charter.<sup>91</sup> This provision would seem to allow the Committee to consider complaints in the manner of the African Commission or the UN Human Rights Committee. In addition, the Committee has been granted broad powers of investigation.<sup>92</sup> It may therefore resort to any appropriate method of investigating any matter falling within the ambit of the Charter, including measures a State Party has taken to implement the Charter, and request from the States Parties any information relevant to the implementation of the Charter. However, in formal terms of enforcement the Committee’s principal weapon under the Charter is publicity, the OAU having ultimate responsibility.<sup>93</sup> Nevertheless, the Committee thus has at its disposal considerable powers to hold States to

<sup>85</sup> Arts, ‘The International Protection of Children’s Rights in Africa’, p. 150.

<sup>86</sup> Article 32. <sup>87</sup> Article 37(3).

<sup>88</sup> Arts, ‘The International Protection of Children’s Rights in Africa’, pp. 155–7, who considers the African Commission to be a better comparison.

<sup>89</sup> Article 42.

<sup>90</sup> Article 43(1)(b). Under the UN Convention, the time period is five years: Article 44(1)(b).

<sup>91</sup> Article 44(1). <sup>92</sup> Article 45(1). <sup>93</sup> Article 45(2)–(4).

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account for their failings in relation to the rights and welfare of children. If exercised properly, the Committee could become a formidable guardian of children's rights.

The Charter must be viewed as a positive development on the whole. It does not detract from the UN Convention; rather it complements it. The mandate of the Committee compares favourably with that of the UN Committee. Since the Charter has just entered into force, it is still too early to say what its impact will be. It may be that the Charter is simply too radical and progressive for many African States to attract widespread support since it challenges established traditions and customary and religious laws.<sup>94</sup>

### **The Grand Bay Declaration**

In addition to the failings of the African institutional mechanisms for the protection of human rights, much of Africa has been racked in recent years by a series of events, civil wars, international conflicts, dictatorial rule, the collapse of civil society, economic crises and natural disasters,<sup>95</sup> which have contributed to the deterioration of the human rights situation. The OAU therefore decided that the root causes of human rights violations had to be reappraised with a view to improving strategies for the promotion and protection of human rights. The result was the OAU's First Ministerial Conference on Human and Peoples' Rights, held in Mauritius on 12–16 April 1999, which adopted the Grand Bay (Mauritius) Declaration and Plan of Action.<sup>96</sup>

The Declaration is significant in a number of ways. It seeks to integrate human rights policies throughout the activities of the OAU. It calls for the

<sup>94</sup> In particular, family law: Arts, 'The International Protection of Children's Rights in Africa', p. 158; Thompson, 'Africa's Charter on Children's Rights', pp. 438–42.

<sup>95</sup> United Nations, Report of the Secretary-General on Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, Part II. See also Resolution on the Human Rights Situation in Africa, Eighth Annual Activity Report (*Documents of the African Commission*, p. 402).

<sup>96</sup> CONF/HRA/DECL (I), reprinted in RADIC 11 (1999) 352. The Office of the UN High Commissioner for Human Rights was instrumental in providing assistance to the Commission in the preparation of the Conference: UN Doc. E/CN.4/1999/93, pp. 2–4. It should be observed that, although the Declaration is not a legally binding document, it could be viewed, *inter alia*, as an authoritative interpretation and elaboration of the meaning of human rights in the OAU Charter, the African Charter and the African Charter on the Rights and Welfare of the Child.

strengthening of the Commission. It encourages OAU Member States to ratify and implement all major OAU and UN human rights conventions. It reaffirms the evolution of our contemporary understanding of human rights as expressed in documents such as the Vienna Declaration and Programme of Action, although it cannot be said that the Declaration is revolutionary in expanding the frontiers of human rights. Therefore only those provisions that emphasise this assessment will be discussed.

The Declaration must be viewed in the wider context of the legitimate aspirations of the peoples of Africa to secure full enjoyment of human rights.<sup>97</sup> Hence the Declaration rightly considers the promotion and protection of human rights a priority for Africa,<sup>98</sup> acknowledging that observance of human rights is indispensable for maintaining national and international peace and security and encouraging sustainable development.<sup>99</sup> It therefore seeks to consolidate and build upon the gains already made in Africa in the field of human rights.<sup>100</sup>

The Conference 'affirms the principle that human rights are universal, indivisible, interdependent and inter-related' and calls for parity to be given to economic, social and cultural rights as well as civil and political rights.<sup>101</sup> In addition, the right to development, the right to a generally satisfactory, healthy environment and the 'right to national and international peace and security' are held to be 'universal and inalienable rights which form an integral part of fundamental human rights.'<sup>102</sup> It will be recalled that one of the distinctive features of the African Charter has been its inclusive nature, guaranteeing, *inter alia*, economic, social and cultural rights, or second generation rights, and peoples' rights, or third generation or group rights.

<sup>97</sup> Preambular para. 8. See also para. 5(c). <sup>98</sup> *Ibid.*, para. 1.

<sup>99</sup> *Ibid.*, paras. 3, 7, 9 and 10. Preambular para. 4 recognises that violations of human rights constitute a burden for the international community. See also the Vienna Declaration and Programme of Action, Part I, para. 6.

<sup>100</sup> Preambular paras. 12 and 15. The Declaration accepts that a multi-faceted approach is needed to tackle the causes of human rights violations in Africa: para. 8.

<sup>101</sup> Para. 1; preambular para. 12; and further African Charter, preambular para. 8. See also the Vienna Declaration and Programme of Action, Part I, paras. 5 and 8.

<sup>102</sup> Para. 2; see also preambular para. 9. See further Vienna Declaration and Programme of Action, Part I, paras. 10(1) and 11(1) and Part II, para. 74. With specific reference to the right to development, the Declaration on the Right to Development 1986, UN General Assembly Resolution 41/128, which describes this right as 'inalienable', reiterates the interdependence and indivisibility of all human rights.

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Taking the opportunity to reinforce its support for second and third generation rights, the Conference condemns poverty,<sup>103</sup> disease,<sup>104</sup> ignorance and illiteracy,<sup>105</sup> certain structural adjustment programmes giving rise to social dislocation and the debt problem<sup>106</sup> as inimical to the enjoyment of human rights.<sup>107</sup> It calls upon the international community to alleviate the debt burden in order to allow the maximisation of human rights.<sup>108</sup> It reaffirms its concern for the environment by identifying environmental degradation as a violation of human rights.<sup>109</sup>

<sup>103</sup> It is estimated that 40 per cent of the population of sub-Saharan Africa lives in poverty: UN Doc. E/C.12/1997/SR.27, para. 27. The Vienna Declaration and Programme of Action establishes a link between poverty and the inhibition of human rights: Part I, para. 14. See also para. 25 thereof. The rights especially affected include the right to food, the right to health and the right to education.

<sup>104</sup> See Article 16 of the African Charter. According to the Economic Commission for Africa (ECA), access to healthcare is generally poor in Africa: *African Economic Report – 1998*, paras. 78 and 80.

<sup>105</sup> According to the ECA, the literacy rate in Africa seems to be 61 per cent: *African Economic Report – 1998*, para. 75. Article 17 of the African Charter guarantees the right to education.

<sup>106</sup> UN Commission on Human Rights, Resolution 1999/22, UN Doc. E/CN.4/1999/167, p. 96.

<sup>107</sup> Para. 8(c), (e) and (f).

<sup>108</sup> Para. 26. A concerted, albeit limited, response by the international community has been the Heavily Indebted Poor Countries Initiative developed jointly in 1996 by the IMF and the World Bank: *African Economic Report – 1998*, Part I. A.6.

<sup>109</sup> Para. 8(n). The link between the two is well established in international law: *Lopez Ostra v. Spain* EHRR 20 (1995) 277; *Gabcikovo-Nagymaros Project Case*, ILM 37 (1998) 162 at 206 *per* Judge Weeramantry; Vienna Declaration and Programme of Action, Part I, para. 11(1); Stockholm Declaration on the Human Environment 1972, ILM 11 (1972) 1416; UN Commission on Human Rights, Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Progress Report of the Special Rapporteur, UN Docs E/CN.4/Sub.2/1991/8, E/CN.4/Sub.2/1992/7, pp. 22–31, E/CN.4/Sub.2/1993/7, E/CN.4/Sub.2/1994/9 and E/CN.4/Sub.2/1996/17, pp. 33–5. See further J. Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right', *Duke Journal of Comparative and International Law* 3 (1993) 351; W. P. Gormley, 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms', *Georgetown International Environmental Law Review* 3 (1990) 85; D. Shelton, 'Human Rights, Environmental Rights, and the Right to the Environment', *Stanford Journal of International Law* 28 (1991) 103. It must be recalled that the OAU paved the way in international law by establishing a satisfactory environment as a human right in Article 24 of the African Charter. This provision of the African Charter has been criticised for its vagueness: see R. R. Churchill, 'Environmental Rights in Existing Human Rights Treaties', in A. E. Boyle and M. R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996), p. 89 at pp. 104–7. Africa suffers from a number of environmental problems: see UN General Assembly Resolution A/RES/S-19/2.

The Conference ‘affirms the interdependence of the principles of good governance, the rule of law, democracy and development.’<sup>110</sup> Despite recent advances in constitutionalism across parts of Africa, liberal democratic values have not set deep roots.<sup>111</sup> Many ruling regimes lack popular support or democratic mandate.<sup>112</sup> Rather, bad governance and abuses of human

<sup>110</sup> Para. 3; preambular para. 8. The OAU had paved the way by endorsing these principles in two resolutions adopted at its 35th Ordinary Summit in Algiers in July 1999: see Murray, ‘Africa’, p. 518. Cf. Articles 13(1) and 20(1) of the African Charter, and see Umozurike, *The African Charter*, pp. 36–8. See also Vienna Declaration and Programme of Action, Part I, para. 9. The Vienna Declaration and Programme of Action establishes a link between democracy, respect for human rights and development: Part I, paras. 8 and 10(3). In its Resolution 1999/57, entitled ‘Promotion of the Right to Democracy’, UN Doc. E/CN.4/1999/167, p. 194, the UN Commission on Human Rights declared that democracy fosters the full realisation of human rights. See further Communication 129/94, *Civil Liberties Organisation v. Nigeria*, Ninth Activity Report 1995–1996, Annex VIII (*Documents of the African Commission*, p. 452), where the Commission sought to uphold the rule of law.

<sup>111</sup> M. Sinjela, ‘Constitutionalism in Africa: Emerging Trends’, *The Review* (International Commission of Jurists) No. 60 (1998) 23. The Commonwealth has been instrumental in setting an agenda of democracy and human rights: see the Harare Commonwealth Declaration 1991, *Commonwealth Law Bulletin* 18 (1992) 347–9; A. Duxbury, ‘Rejuvenating the Commonwealth: The Human Rights Remedy’, *ICLQ* 46 (1997) 344. Thus Nigeria’s membership of the Commonwealth was suspended in 1995 as a result of human rights abuses: see K. D. Magliveras, *Exclusion from Participation in International Organisations* (The Hague: Kluwer, 1999), pp. 188–92. The Commission also condemned the abuse of human rights in Nigeria, Resolution on Nigeria, Eighth Annual Activity Report (*Documents of the African Commission*, p. 400). The case of Sierra Leone is also instructive. The international community imposed sanctions on Sierra Leone following the *coup d’état* in 1997 which overthrew the democratically elected government. Under Resolution 1132 (1997) the UN Security Council imposed sanctions on Sierra Leone and authorised ECOWAS to enforce them. Moreover, the OAU authorised ECOMOG to remove the military junta by force: see *Keesing’s* 43 (1997) 41674. In addition, Sierra Leone was suspended from the Commonwealth: Magliveras, *Exclusion from Participation*, pp. 192–4.

<sup>112</sup> It is interesting to observe that the Commission has opined that the forcible assumption of power is in breach of Articles 13(1) and 20(1) of the African Charter and that the best form of government is one elected by and accountable to the people and has thus called upon military governments to hand over power to democratically elected representatives. Resolution on the Military, Eighth Annual Activity Report (*Documents of the African Commission*, p. 399). Moreover, it has condemned the planning or execution of *coups d’état* and any attempt to seize power by undemocratic means and has called upon African Governments to ensure that elections are transparent and fair. Eighth Annual Activity Report, Resolution on the Human Rights Situation in Africa (*Documents of the African Commission*, p. 559). See also Communication 44/90, *Peoples’ Democratic Organisation for Independence and Socialism v. The Gambia*, Tenth Activity Report 1996–1997, Annex X (*Documents of the African Commission*, p. 402); Communication 102/93, *Constitutional*