

The African Regional Architecture and Human Rights

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A Pan-Africanism, Colonial Borders, and the Contested Form of African Unity

Africa's continental architecture of the independence period and of the new millennium did not come about in an ideological vacuum, but was forged from the tension between different understandings of pan-Africanism, which are linked to contending visions of state sovereignty. The evolution of pan-African institutions reflects changing notions of what African unity and solidarity entail, and may be charted on the intergovernmental–supranational continuum. While the OAU Charter of 1963 does not identify its pan-Africanist roots by name, it locates itself in the 'aspirations of peoples for brotherhood and solidarity'.¹ The legal framework of two of the present institutions with African-wide ambitions, the AU and the APRM of NEPAD, make explicit reference to this ancestry.²

Pan-Africanism is not a one-dimensional concept that allows for an easy and finite definition. The term may be understood from a 'cultural' (people-centred) or from a 'political' (state-centred) perspective.³ Culturally, it is the affirmation of a

¹ OAU Charter, Preamble.

² AU Constitutive Act, Preamble: 'Inspired by...generations of Pan-Africanists'; see also the African Peer Review Mechanism Base Document (2003) (<<http://www.nepad.org/2005/files/documents/49.pdf>>) (para 6 requires the members of the Panel of Eminent Persons to be committed to the ideals of pan-Africanism). On the pan-African background to the AU, see T Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Aldershot: Ashgate, 2005) 7–38.

³ See I Geiss, *The Pan-African Movement* (London: Methuen, 1974) 7.

common ancestry of members of 'the black race' with their real or perceived 'origin' in Africa,⁴ wherever they find themselves. Politically, it is a movement aimed at closer unity between African states. As the movement towards African independence unfolded in the last century, the contested nature of the term's political implications was starkly revealed.

The origins of pan-Africanism as an intellectual movement may be traced to early advocates in Africa and in the African Diaspora. One of its earliest exponents, Edward Wilmot Blyden, who first settled in Liberia, the haven in Africa for freed slaves that became independent in 1847, and later in Sierra Leone, initiated campaigns for West African unity. Under the inspirational guidance of leaders in the Diaspora, such as Marcus Garvey (from Jamaica), WEB Du Bois (an African-American living in the USA), George Padmore (from Trinidad), and Sylvester Williams (a London barrister born in Trinidad), a tentative movement started in the nineteenth century, loosely aimed at giving a common voice to Africans and people of African descent.⁵ There is some irony in the fact that the descendants of African slaves, gained from and made use of educational opportunities provided in the 'new world' to verbalize their experience and to advocate solidarity between Africans.⁶

Africans' suffering, oppression, and exploitation can be traced back to a shared history of slavery, followed by colonialism and institutionalized discrimination.⁷ This initial focus on membership of the 'black race' caused the term 'pan-Negroism' to be used to describe the form of solidarity among Africans in the Diaspora and those living in Africa.⁸ In its most radical form, pan-Africanism may thus be defined as unity based on affiliation with the 'black race', based on the ideal of a common patria or motherland.

As support and interest grew, the movement became institutionalized. A first pan-African conference was organized when a small group met in 1900, at the start of the new century, in London.⁹ At this meeting and the subsequent five 'Pan-African Congresses', starting in 1919 with the 'First Pan-African Congress' of Paris, people from Africa were not well represented. The situation changed at the 'Fifth Pan-African Congress', held in Manchester in 1945, soon after the end of World War II. After their participation in the two world wars, Africans and people of African descent experienced their social and legal exclusion and the colonial domination as more hurtful and oppressive than ever before. Allowing Africans to take control and leading to the Africanization of pan-Africanism, Manchester was a turning point as the torch was handed to a new generation of Africans, such as Kwame Nkrumah and Jomo Kenyatta. The momentum of the movement strengthened the

⁴ A Ajala, *Pan-Africanism: Evolution, Progress and Prospects* (London: André Deutsch, 1974) 93.

⁵ See KA Appiah, 'Pan-Africanism' in KA Appiah and HL Gates (eds), *Africana: The Encyclopedia of the African and African American Experience* (New York: Basic Civitas Books, 1999) 1484.

⁶ Geiss (n 3 above) 5.

⁷ Geiss (n 3 above) 8 n 14 (pan-Africanism described as 'a delayed boomerang from the time of slavery').

⁸ B Davidson, *Modern Africa* (New York: Longman, 1987) 28.

⁹ Ajala (n 4 above) 4.

hands of African politicians and liberation leaders in their struggle against colonial rule and in favour of attaining independence.

Although inspired by a common ideology, in each colonial entity the struggle for independence relied heavily on a particularized discourse of nationalism. Pragmatism—and the target of the anti-colonial struggle—dictated that colonially imposed demarcations should define the various ‘nationalisms’. As independence was gained, it became almost inevitable that this image of the nationhood would be invoked to legitimate the new state. The problem is that this conception of ‘nation’ was an artificial and temporary construct that relied on the border lines invented by European powers and formalized at the Berlin Conference.¹⁰ Serving colonial interests rather than those of the people defined ‘in’ or ‘out’, these boundaries were mostly arbitrary and did not take into account the composition of the resulting population.¹¹ The colonial period and concomitant anti-colonial struggles were too brief to ensure the emergence of a centripetal and unifying concept of community within the new territories. ‘Nation-building’ campaigns to contain competing identities of entities constituting the ‘state’, which often followed independence, could not ensure ‘enduring stability, cultural identity and national development’.¹²

In 1957, Ghana became the first state with a majority black (‘African’) population to gain its independence from its colonial master.¹³ Nkrumah, who became the first independence President, campaigned under the slogan ‘Seek ye first the political kingdom’, and explained that it requires ‘resolute leadership’ ‘to subordinate the understandable desire of the people for better living conditions’ to the ‘achievement of the primary aim of the abolition of colonial rule’.¹⁴ Unfortunately, this sentiment was carried over into the independence era, where it manifested itself in a preoccupation with political power at the expense of the sustainable development of the people.

Soon after independence, Nkrumah brought together the eight states that had at that stage achieved independence together for the first Conference of Independent African states of 1958, which ‘marked the formal launching of the pan-African movement on African soil’.¹⁵ Pan-Africanism itself became the filter through which newly independent states would organize their relationships and co-existence. At the end of the same year, Nkrumah hosted another conference, the All African

¹⁰ T Pakenham, *Scramble for Africa: 1876–1912* (New York: Random House, 1991) part III.

¹¹ Forty-four per cent of modern African boundaries follow meridian parallels; 30% follow mathematical lines such as arcs and curves and 26% follow geographical features (J Castellino and S Allen, *Title to Territoriality in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003) sources cited at 113; see also C Clapham, ‘Boundaries and States in the New African Order’ in DC Bach (ed), *Regionalism in Africa: Integration and Disintegration* (Oxford: James Currey, 1999) 53, 55–6).

¹² Castellino and Allen (n 11 above) 118.

¹³ States in northern Africa attained their independence earlier (Libya, in 1951; and Sudan, Morocco, and Tunisia in 1956). Strictly speaking, Sudan is the first ‘sub-Saharan state’ to obtain independence, and Ghana the first ‘black’ African state. However, in the literature, Ghana is often identified as the first ‘sub-Saharan’ state to gain its independence, indicating that the term ‘sub-Sahara’ may sometimes be given more than merely a geographic content.

¹⁴ K Nkrumah, *Africa Must Unite* (New York: Praeger, 1963) 51, which appeared just in time for the Addis Ababa Conference in 1963.

¹⁵ Ajala (n 4 above) 14.

Peoples' Organization, a meeting of African political parties. During these events, Nkrumah propagated his vision that 'Africa must unite' to form a supranational 'United States of Africa'.¹⁶ In his view, the gains of freedom could only be secured if Africa formed a bulwark against the pressures of 'neo-colonialism'.¹⁷ The form of this 'Union' cannot clearly be discerned from his writings: on the one hand he models his thinking on states where smaller units have ceded their sovereignty to a central political entity;¹⁸ on the other hand he refers to separate states with common policies within an elaborate political framework.

At two further conferences of independent states and political parties, as well as at other conferences (held at Brazzaville, Casablanca, and Monrovia), the idea of continental unity grew, but three conflicts accentuated the fault lines among participants in the debate about the form that unity should take. The first was the armed struggle of the Algerian National Liberation Front (FNL) in pursuit of independence from France;¹⁹ the second was the situation in Congo, including the Katangese attempt at secession, the overthrow of Lumumba's government, and the UN's reaction to these events;²⁰ and the third was Morocco's challenge to Mauritania's claim to UN membership. The last two situations were especially intimately linked to the issue of territory and existing borders. Fearing the fragmentation of the territorial borders of their states, most leaders found recourse in the notion of *uti possidetis* (the principle of intangible borders).²¹

These and other complex and overlapping factors saw the emergence of perceived 'groupings': the 'Brazzaville' group (associated with former French colonies—except Guinea—that had a sustained reliance on the French economic, military, and administrative presence, and did not want to be part of a radical unitary Africa loose from France); the 'Casablanca' group (associated with a radical transformative and integrationist agenda driven by Ghana and Guinea); and the 'Monrovia' group (associated with attempts by more 'moderate' states such as Ethiopia, Nigeria, and Liberia to find a compromise position).

The hand of the 'Casablanca' group was strengthened by developments in West Africa, where attempts were made to forge a political union, first between Ghana and Guinea, which later extended to Mali.²² Threatened by these attempts, other states in the region disapproved, notably the leaders of Liberia and Nigeria. Benjamin Nnamdi Azikiwe, the first Nigerian President, stated that 'if for many years certain parties have fought for their sovereignty, it is unlikely that they will surrender that sovereignty to a nebulous organisation simply because we feel it necessary to work together'.²³

¹⁶ Nkrumah (n 14 above) 142.

¹⁷ B Davidson, *Africa in History: Themes and Outlines* (London: Paladin, 1974) 317.

¹⁸ Under the Ghanaian Constitution, the independence of Ghana may be diminished only on grounds of the 'furtherance of African Unity' (Nkrumah, n 14 above, 85).

¹⁹ Ajala (n 4 above) 16. ²⁰ *ibid* 28–30.

²¹ OAU Doc AHG/Res.16(I), July 1964, 'Border Disputes among African States', declaring the commitment of all member states 'to respect the borders existing on their achievement of national independence' (para 2).

²² Ajala (n 4 above) 32–3.

²³ Quoted in *ibid* 23.

As the movement became firmly rooted in African soil, two further major challenges to 'true' pan-Africanism emerged: ensuring the inclusion of Arabs and French-speaking Africans.

The initial 'cultural' focus on the 'black race' of Africa had to be adapted if the 'political' dimension of pan-Africanism were to include Arab-North Africa. After establishing himself as the Egyptian leader through the 1952 Revolution, Nasser supported nationalist movements in sub-Saharan Africa.²⁴ Nasser saw Egypt as the centre of three overlapping worlds: the Arab, Muslim, and African. To some extent, though, Nasser's aspirations in the Arab and African worlds were conflicting. In 1945, the Arab League had been established, with its headquarters in Cairo, suggesting primary concern with the Arab world. Only when Nasser's radical pan-Arabism failed in the early 1960s, with the dissolution of the political union between Egypt and Syria (the 'United Arab Republic'), was he able more fully to embrace political pan-Africanism.

Pan-Africanism was predominantly a movement of English-speakers. Its parallel, Léopold Senghor's *Négritude* movement, was concerned much more with the cultural implications of being African. Subsequent developments also saw the recently independent French states clinging on to colonial skirts. Based at least in principle on a policy of assimilation, the relationship between France and its subjects was different from that of the ex-British colonies. In the 1920s, Blaise Diagne, a Senegalese Member of the French Parliament, for example opposed Garvey's pan-African campaign in Africa by stating that 'we French natives wish to remain French, since France has given us every liberty and since she has unreservedly accepted us'.²⁵ With the exception of Guinea, where Sékou Touré opted for an early independence, close ties persisted between the French-speaking states and France.²⁶ As a result of their eventual independence, states previously under French rule also came around to accepting the importance of some form of unity of newly independent states.

Discussions among newly independent African states about the possibilities of regional cooperation and unity thus brought together sub-Saharan states, including the 'French states', and Arab-North African states. In this context, pan-Africanism changed its hue, and achieved an inclusive yet mythical trans-Saharan character.

As more states, including Mauritania, gained independence and membership of the UN, the question turned to the practical manifestation of unity of the newly independent states. Two major models served as points of reference: the USA inspired the notion of a closely knit 'United States of Africa'; and the UN, providing the model for a loose association in the form of a 'United Africa of (independent) states'. Moderate leaders such as President Senghor and Emperor Haile Selassie supported the second option. On behalf of the French-speaking

²⁴ On Nasser, see AA Mazrui and M Tidy, *Nationalism and New States in Africa from about 1935 to the Present* (Nairobi: Heinemann, 1984) 51–5.

²⁵ Quoted in Ajala (n 4 above) 99.

²⁶ Davidson (n 17 above) 317.

states, Senghor articulated a gradualist view: 'If we wish to succeed we must put the stress on cultural, technical and economic co-operation, rather than on the co-operation of political parties. We must progress step by step, keeping our feet firmly on the ground.'²⁷ Selassie questioned the existence of 'hard-and-fast groupings', mentioned above, and pointed out that 'we Africans have been misled into pigeonholing one another', and proclaimed that Ethiopia considered itself member of only one group—the African group'.²⁸ Another factor working against the acceptance of Nkrumah's vision was the suspicion by some fellow leaders that he was bidding for the 'leadership of Africa'.²⁹ Bridging all previous divides, Selassie succeeded in securing the presence of all 32 African independent states at the Addis Ababa conference, held in May 1963. The Organization of African Unity (OAU) came about on 25 May 1963 as the first pan-African intergovernmental organization taking the form of a loose association (a 'United Africa of independent states').

Having largely defined both the anti-colonial struggle and post-colonial statehood resulting from the struggle's eventual success, it seemed inevitable that colonial borders would also determine the form of a pan-African institution. At the time the OAU came into being, no dispute brought the contested nature of existing borders more clearly into relief than the Somali attempts to re-open discussions about its colonially determined borders in order to unite Somalis who were artificially separated from each other. Supporting these sentiments, Nkrumah contended that 'only African Unity can heal this festering sore of boundary disputes'.³⁰ However, the majority argued in favour of maintaining the borders drawn by 'the former colonizers', 'in the interest of Africa',³¹ or out of 'respect for the legacy that we have received from the colonial system'.³²

Despite its prominence, *uti possidetis*³³ did not feature explicitly in the OAU Charter. By demanding respect for 'sovereignty' and 'territorial integrity', the Charter lends support to this general trend of thinking, though. If there was any room for ambiguity, it was removed when the first Assembly of Heads of State and Government, in July 1964, 'solemnly declared' that 'all Member States pledge themselves to respect the borders existing on their achievement of national independence'.³⁴ Border disputes and simmering conflicts did not provoke discussions about the artificial nature of many of these borders, which came about through colonial fiat and not, as in the colonial states themselves, through protracted processes of

²⁷ Quoted in Ajala (n 4 above) 35. ²⁸ Quoted in *ibid* 48.

²⁹ C Chime, *Integration and Politics among African States* (Uppsala: Scandinavian Institute for African Studies, 1977) 178.

³⁰ S Touval, *The Boundary Politics of Independent Africa* (Cambridge, Mass: Harvard University Press, 1972) 85. ³¹ View of the Ethiopian Prime Minister, cited in *ibid* 84.

³² View of the President of Mali, cited in *ibid* 85.

³³ Defined as 'a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers' (T Maluwa, 'International Law-Making in the Organisation of African Unity: An Overview' (2000) 12 *RADIC* 201, 215).

³⁴ OAU Doc AHG/Res.16(I). The OAU affirmed 'a pre-existing principle of international law', which first emerged among newly independent Latin American states in the early 19th century.

consolidating 'nations' and territories. Obsessions with enlarging and supporting a continental 'political kingdom' of independent leaders and consolidating domestic political power blindfolded the OAU to the importance of economic development and human rights violations in the newly independent states.³⁵ In the years that followed, the geographical dimension of intangible frontiers colluded with the ideology of national sovereignty to insulate national interest, as defined by a narrow elite. The two main role players in the Cold War, the USA and the Soviet Union, also supported the territorial basis of the post-1945 world order as stable means to 'seek clients through the recruitment of state administrations rather than by challenging principles of state sovereignty'.³⁶

B From OAU to African Union (AU)

The subsequent evolution of the OAU may be charted through four phases, along the two axes of political and economic integration. The engagement with human rights forms the central prism through which these periods are briefly viewed.

1 Foundation and Stagnation (1963–1978)

In many respects the 1963 OAU Charter was the antithesis of Nkrumah's ideal of sovereignty ceded to a form of overarching African governance. By prioritizing the 'sovereign equality' and 'respect for the sovereignty and territorial integrity' of the new member states,³⁷ the OAU Charter provided a very heavy anchor to stabilize and solidify the position of fledgling African states in the sea of international relations. To this should be added the principle of 'non-interference in the internal affairs of states'.³⁸

It should come as no surprise that the Charter did not explicitly include human rights as part of the OAU's mandate.³⁹ The OAU member states were only required to have 'due regard' for the human rights set out in the Universal Declaration.⁴⁰ Bolstered by the principle of 'non-interference', the OAU in subsequent years turned a blind eye to allegations of human rights violations in member states. In one

³⁵ The lack of attention to economic development may in part be explained by the fact that much of Africa enjoyed relatively favourable economic growth rates at the time of independence. A period of drastic decline started in the early 1970s. The average per capita gross national product (GNP) for Africa declined from \$546 to \$525 (excluding South Africa, the decline is from \$525 to \$336) (see World Bank, *Can Africa Claim the 21st Century?* (Washington, DC: World Bank, 2000) table 1.1). The average African gross national income (GNI) declined by a further almost 10% from 1980 to 2004 (African Development Bank, 'Gender, Poverty, and Environmental Indicators on African Countries', 2006, <<http://www.afdb.org>>).

³⁷ OAU Charter, arts 3(1) and 3(3).

³⁸ OAU Charter, art 3(2).

³⁹ The OAU Charter was adopted by a Conference of Heads of States and Governments in Addis Ababa on 25 May 1963. The Charter was signed by 23 states. It is reprinted in (1964) 3 ILM 1116.

⁴⁰ OAU Charter, art 2(1)(e); the Preamble of the OAU Charter also recognizes the Universal Declaration and the UN Charter as the foundation of peaceful and positive cooperation between states.

commentator's view, the OAU could be regarded as functioning 'as a club of presidents, engaged in a tacit policy of not inquiring into each other's practices'.⁴¹ The lacuna was not only substantive, but also institutional. None of the specialist commissions provided for under article 20 of the OAU Charter, or established later, was devoted to human rights.⁴²

Despite the lack of a clear human rights mandate, the OAU in the period between 1963 and 1978 addressed two major issues of human rights concern. Predominantly concerned with issues external to the state, these developments did not provide for rights of nationals that could be enforced against their own states, and did not allow the domestic human rights record of post-colonial states to be scrutinized.

First, the OAU campaigned strongly for the self-determination of 'peoples' still under colonial domination. Decolonization implied the recognition of a whole range of basic rights that had been denied during colonialism. It also aimed at the removal of repressive regimes, most blatantly illustrated in the last days of Portuguese rule in Angola and Mozambique. Self-determination of African peoples enjoyed a high priority, but again within the context of decolonization.⁴³ In conformity with the 1964 resolution on respect for existing borders,⁴⁴ the OAU rejected post-independence claims to self-determination in Biafra, Katanga, southern Sudan, Shaba, and Eritrea.⁴⁵ Regarding the Western Sahara, the OAU admitted the Saharawi Arab Democratic Republic (Western Sahara) as a member, resulting in Morocco's withdrawal from the organization in 1984. However, the OAU did not recognize the Sahrawi people's right to self-determination.⁴⁶ A related area on which the OAU focused was the collective effort to rid Africa of apartheid in South Africa and white minority rule in Rhodesia (now Zimbabwe). The OAU dedicated itself to the full liberation of southern Africa, through its endorsement of the 'Lusaka Manifesto' in

⁴¹ CE Welch, *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organizations* (Philadelphia: University of Pennsylvania, 1995) 151; see also 288, where the OAU's policy of non-interference is criticized.

⁴² The Charter established five 'Specialized Commissions': (i) Economic and Social; (ii) Educational and Cultural; (iii) Health, Sanitation, and Nutrition; (iv) Defence; (v) Scientific, Technical and Research Commission. At the first ordinary session of the OAU in 1964, a Commission on Transport and Communications, and one on Jurists, were added. The last was designed as an instrument for legal research (KB M'Baye and B Ndiaye, 'The Organization of African Unity' in K Vasak and P Alston (eds), *The International Dimension of Human Rights* (Westport, Conn: Greenwood Press, 1982) 583, but was disbanded after only one year (AE El-Obaid and A Appiagyei-Atua, 'Human Rights in Africa—A New Perspective on Linking the Past to the Present' (1996) 41 *McGill LJ* 819–27)).

⁴³ Denoted 'pigmentational self-determination' by Mazrui, quoted by SKN Blay, 'Changing African Perspectives on the Right to Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29 *JAL* 143, 157.

⁴⁴ OAU Doc AHG/Res.16(1). Also see A Chanda, 'The Organization of African Unity: An Appraisal' (1989–92) 21–4 *Zambian LJ* 1, 13.

⁴⁵ Eritrea won its independence in 1991, despite the OAU's lack of support for the application of the principle of self-determination in its case (Blay, n 43 above, 152–3).

⁴⁶ G Naldi, 'The Organization of African Unity and the Sahara Arab Democratic Republic' (1982) 26 *JAL* 152–7.

1969. It also played an influential role in the UN to ensure an arms embargo, economic sanctions, condemnation of South Africa's main trade partners, and the non-recognition of the 'homelands'.⁴⁷ The OAU Liberation Committee, established to ensure the elimination of colonialism from Africa, in particular assisted in forging an international consensus against apartheid.⁴⁸

Secondly, the OAU had to deal with the problem of refugees, arising from the numerous conflicts in Africa. In 1964, the OAU set up the Commission on Refugees to work with the UN High Commission for Refugees.⁴⁹ In response to an increasing awareness of the vulnerability of a growing number of refugees in Africa, the OAU Assembly in 1969 adopted the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁵⁰ Although this development had positive implications for human rights, it was principally aimed at addressing friction between states arising from 'subversive activities' of refugees.⁵¹ The absence of a monitoring body also detracted from the potential of this Convention as an agent of changing domestic laws and practices.

As was to be expected, border disputes were often on the OAU's agenda. Some superficial success in this area over these years include involvement in the settlement of border disputes between Algeria and Morocco, between Somalia and Ethiopia, Somalia and Kenya and between Niger and Dahomey (now Benin), as well as the improvement of inter-state relations.⁵² However, none of these conflicts led to a reintroduction of a debate about the *uti possidetis* principle.

With the dissolution of the Ghana–Guinea–Mali Union soon after the formation of the OAU,⁵³ and after Nkrumah and Azikiwe had been overthrown in 1966, pan-Africanism as a political movement fell into abeyance.⁵⁴ In so far as it continued, it was in a much more pragmatic form, exemplified by ideologies such as Nyerere's 'African socialism'.

On the economic front, the OAU presided over a continent of unrelentingly declining growth rates and seemingly unstoppable increases in levels of poverty.⁵⁵ Instead of adopting inclusive people-oriented policies, most leaders tried to consolidate power by imposing state-driven developmentalist drives. One of the few early moves of significance was the establishment in 1964 of the African Development Bank, which is aimed at 'channelling investment of African capital into a wide variety of enterprises'.⁵⁶

⁴⁷ See eg B Andemicael, *The OAU and the UN: Relations between the Organization of African Unity and the United Nations* (New York: Africana Publishing, 1976) 133–7 and WJ Foltz and J Widner, 'The OAU and Southern African Liberation' in Y El-Ayouty and IW Zartman (eds), *The OAU after Twenty Years* (New York: Praeger, 1984) 249, 263–9.

⁴⁸ See eg Z Cervenka, *The Unfinished Quest for Unity: Africa and the OAU* (New York: Africana, 1977) 45.

⁴⁹ Davidson (n 8 above) 217.

⁵⁰ OAU Doc CAB/LEG/24.3.

⁵¹ Ajala (n 4 above) 174–5.

⁵² *ibid* 148–76.

⁵³ KC Kotecha and RW Adams, *African Politics: The Corruption of Power* (Washington, DC: University Press of America, 1981) 341.

⁵⁴ Geiss (n 3 above) 422.

⁵⁵ On the decline in food production in independent Africa, see A Adedeji, 'Comparative Strategies of Economic Decolonization in Africa' in AA Mazrui (ed), *General History of Africa VIII: Africa since 1935* (Glosderry: New Africa Books, 2003) 401.

⁵⁶ Davidson (n 8 above) 216.

2 Shaking the Baobab (1979–1989)

By the 1970s, the principle of non-interference in the domestic affairs of OAU members had become as firmly rooted in African soil as an unwavering baobab. The adoption in 1981 of the first set of continental human rights standards, in the form of the African Charter on Human and Peoples' Rights (African Charter), presents a drastic curtailment of the non-interference principle. Numerous writers have described and discussed political and other factors that created an enabling environment for the Charter's adoption.⁵⁷

Most commentators regard the drafting and adoption of the African Charter as Africa's response to the human rights abuses of the 1970s in Amin's Uganda,⁵⁸ Nguema's Equatorial Guinea, and Bokassa's Central African Empire. All three dictators were overthrown in 1979, bringing some pressure to bear on the baobab. The 'back-lash to these atrocities', Umozurike wrote, 'had their impact on Africa and the OAU'.⁵⁹ The need to review the principle of non-interference was enforced by the fact that the OAU raised no criticism against these dictators, while at the same time condemning South Africa's internal policies, giving rise to the criticism that African states had been applying 'double standards'.⁶⁰ The invasion by Tanzania of Uganda in 1978–9 also served as a precedent for the *de facto* erosion of the doctrine of non-interference in the domestic affairs of other OAU member states.⁶¹ As for the rest of the leaders, there was no changing of the guard, as in the three countries mentioned above, raising question marks about the sincerity of their involvement in the subsequent process of elaborating the Charter, to which the discussion now turns.

During the 1970s, human rights also became of more prominent concern in international politics, especially as an ideological tool in the West's Cold War armoury.⁶² Other regional human rights regimes, which only started flexing their muscles in the

⁵⁷ E Kannyo, 'The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background' in CE Welch and RI Meltzer (eds), *Human Rights and Development in Africa* (Albany, NY: State University of New York, 1984) 128.

⁵⁸ For an account of Tanzanian opposition against the regime, see United Republic of Tanzania, *Tanzania and the War against Amin's Uganda* (Dar es Salaam: Government Printer, 1979). This 'war' led to an important debate at the 16th summit of the OAU Assembly of Heads of State and Government in Liberia, touching on the question about the extent to which human rights violations may be regarded as matters of domestic concern only; see eg G Naldi, *The Organization of African Unity: An Analysis of its Role* (London: Mansell, 1989) 108–9.

⁵⁹ U Umozurike, *Five Years of the African Commission on Human and Peoples' Rights* (Ile-Ife: Obafemi Awolowo University, 1992) 3.

⁶⁰ RF Weisfelder, 'Human Rights and Majority Rule in Southern Africa: The Mote in Thy Brother's Eye' in Welch and Meltzer (eds), n 57 above, 90.

⁶¹ The Constitutive Act of the African Union reflects this shift, as it provides for 'the right of the Union to intervene in a Member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' (art 4(h)).

⁶² On President Carter's foreign policy, see H Hartmann, 'US Human Rights Policy under Carter and Reagan, 1977–1981' (2001) 23 *HRQ* 402.

1970s, provided a clear benchmark. The greater involvement of the UN in human rights questions also played its part. Throughout the 1970s, the UN promoted the idea of a regional human rights mechanism in Africa.⁶³ Although the two International Covenants were adopted in 1966, they only entered into force in 1976 and the Human Rights Committee only really started functioning in 1977.⁶⁴ Other developments on the international scene further favoured the adoption of the Charter. These include the emphasis placed on human rights by the then USA President, Jimmy Carter, the adoption of the Helsinki Final Act in 1975, and the media exposure of the suffering of the Vietnamese refugees ('boat people') in Southeast Asia. While critical of human rights abuses in some parts of Africa, the West (and particularly the USA) found it convenient to support dictators such as Mobutu in Zaire.

Democratization in some African states also facilitated discussion on a regional human rights instrument. Young identifies three 'waves of democratization' in Africa.⁶⁵ The first was embodied in the constitutional changes dictated by departing colonial powers. This 'wave' had little momentum. Soon after independence, democratic governance largely ceased to exist, being replaced by the doctrines of one-party rule, military dictatorship, and Afro-Marxism. Botswana, Mauritius, and Senegal were notable exceptions.⁶⁶ The 'second wave' came in the period just prior to the adoption of the African Charter. The defining cases of this wave were Ghana and Nigeria. In 1979 the military in Ghana agreed to 'full democratization'.⁶⁷ Sometimes the gains were short-lived. In Nigeria, Obasanjo in 1979 handed power to a democratically elected government. Broad public participation in establishing the Second Nigerian Republic, which culminated in the adoption of the 1979 Constitution,⁶⁸ soon had to make room for a return to military rule, first under Buhari, and then under Babangida.

The role of individuals should not go unnoticed. The OAU Secretary-General at the time, Edem Kodjo, used his influence to promote human rights. Other influential voices inside the OAU were those of the Senegalese President, Léopold Senghor, and the Gambian President, Jawara, as appears from a brief detour to the *travaux préparatoires* of the African Charter.

Senghor started the process within the OAU officially, at the OAU Assembly of Heads of State and Government in 1979,⁶⁹ when he, on behalf of Senegal, and the

⁶³ Some of these conferences and seminars are listed in Kannyo (n 57 above) 338.

⁶⁴ W Vandenhoele, *The Procedure before the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2004) 19.

⁶⁵ C Young, 'Africa: An Interim Balance Sheet' (1996) 7 *J of Democracy* 53, 54, following SP Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

⁶⁶ By and large, multi-party elections took place uninterrupted in these countries since independence (see the country discussions in C Heyns (ed), *Human Rights Law in Africa* (vol 2) (Leiden: Martinus Nijhoff, 2004) 904; 1311–13; 1444–6.

⁶⁷ Young (n 65 above) 56.

⁶⁸ Akende described it as Nigeria's first 'autochthonous Constitution' (JO Akende, *Introduction to the Nigerian Constitution* (London: Sweet and Maxwell, 1982) at intro).

⁶⁹ Meeting in Monrovia, Liberia; according to Welch (n 41 above) 165, Senghor's involvement was secured through the persuasion of Kéba M'Baye, the principal drafter of the African Charter.

representative of Mauritius, supported by Nigeria and Uganda, proposed that the OAU Assembly adopt a resolution to set in motion the process towards adopting an African human rights instrument. The resolution that was adopted called on the Secretary-General to 'organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights'.⁷⁰

Despite the presence of these favourable winds, progress on the journey towards a final draft was not always swift. The back-peddling oarsmen of the old guard delayed the process at every turn. After an initial draft was prepared in Dakar, it was to be submitted to a group of governmental experts, which never took place for want of a quorum.⁷¹ According to some, this was due to deliberate attempts by states that were not prepared to openly oppose the creation of a Charter to silently derail the process.⁷² After this failure, the Secretary-General changed tactics. Rather than referring the issue to an ad hoc meeting of governmental experts, he initiated a ministerial conference.⁷³ At his initiative, the president of one of the very few consistently democratic African countries at the time, President Jawara of The Gambia, invited the ministers to meet in Banjul.

This meeting of ministers of justice of OAU member states took place from 9 to 16 June 1980 in Banjul. Still, the baobab held firm. The meeting was also only partially successful, as the participants managed to finalize deliberations on the Preamble and only 11 of the more than 60 articles. Never opposing the process, but delaying it at every turn, delegations made 'general statements' about the realization of human rights in their countries,⁷⁴ and asked questions about the size of the 'small Committee of Experts requested to prepare the Preliminary Draft Charter on Human and Peoples' Rights' instead of getting on with the drafting.⁷⁵

After some prodding by the OAU Council of Ministers and Assembly, the ministerial group managed to finalize a draft at a further meeting, also held in Banjul, early in 1981. Two factors caused the ministerial meeting to accelerate into action when it met for the second time. The first was the fact that some members of the delegation of Upper Volta (now Burkina Faso) were politically victimized after the Banjul meeting of June 1980, putting in a new light 'the necessity not only to insist on human rights but also the importance of their effectiveness'.⁷⁶ The second factor was the result of political pressure of a different nature: At the 17th Ordinary Session of the Assembly of Heads of State and Government, the ministerial

⁷⁰ OAU DOC AHG/Dec.115(XVI) Rev.1.

⁷¹ K M'Baye, *Les Droits de l'Homme en Afrique* (Paris: Pedone, 1992) 153. ⁷² *ibid.*

⁷³ Almost without exception, African states regularly attend OAU meetings (see M'Baye (n 71 above) 153.

⁷⁴ Rapporteur's Report OAU Doc CAB/LEG/67/3/Draft Rapt.Rpt (11) Rev.4, para 9.

⁷⁵ Rapporteur's Report, para 32.

⁷⁶ ML Balanda, 'African Charter on Human and Peoples' Rights' in K Ginther and W Benedek (eds), *New Perspectives and Conceptions of International Law: An Afro-European Dialogue* (Vienna: Springer-Verlag, 1983) 134, 136.

meeting was urged to ‘exert efforts to complete its work’.⁷⁷ Instrumental in this resolution was the initiative of the OAU Secretary-General Kodjo, who persuaded President Jawara to table the resolution at the Assembly session following the first meeting in Banjul.⁷⁸

When the African Charter was eventually adopted in 1981, it happened with little fanfare, close to midnight on the last day of the Assembly’s session, with no debate or even a formal vote.⁷⁹ With the adoption event carrying clear insignia of a *rightorical* commitment—a formal resignation to the inevitable—it should come as no surprise that enthusiasm once again made room for stagnation. It took more than five years for a simple majority of states to ratify the Charter, allowing it to enter into force on 21 October 1986. The implementing arm of the Charter, the African Commission on Human and Peoples’ Rights (African Commission) was established in 1987, but did not have a permanent Secretariat after its inauguration and only became fully functional in June 1989. Very little was known of the Commission’s work in its early years. Only in 1994 did it start to make public its decisions on communications brought before it.⁸⁰

3 The Winds of Change (1990–2000)

In the 1990s, the effects of the end of the Cold War also reverberated through Africa. Multi-party democratic elections took place all over the continent, starting with Benin, Zambia,⁸¹ and South Africa. Constitutions were redrafted, and civil and political rights were mostly restored. In some instances the progress to democracy was incomplete, as in Nigeria, where Abacha forcibly took over power and presided over a regime of terror and human rights abuses. In other countries, such as Côte d’Ivoire, Uganda, and Zambia, election disputes marred the consolidation of democracy.

Showing keen awareness of the changed political landscape, the OAU in 1990 adopted the Declaration on Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (the Algiers Declaration).⁸² This Declaration notes that the era of focusing mainly on ‘political liberation and nation building’ should make way for a new era of greater emphasis on economic

⁷⁷ OAU Doc CH/1148(XXXVII). ⁷⁸ M’Baye (n 71 above) 158.

⁷⁹ AM Akiwumi, ‘The United Nations International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights’, unpublished paper, cited in F Ouguergouz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (The Hague: Kluwer Law International, 2003) 47–8.

⁸⁰ See Ch 8 on this and other aspects of the African Commission’s work.

⁸¹ M Bratton, ‘Zambia Starts Over’ (1992) 3 *J of Democracy* 81 (noting that Zambia was the first country in Anglophone Africa to hold multi-party elections, which resulted in the ousting of the ruling party).

⁸² OAU Doc AHG/Decl.1(XXVI). The Declaration is firmly rooted in Africa’s economic malaise, as appears from the acknowledgement that between 1980 and 1989 Africa’s external debt rose from US\$60 billion to 275 billion, and that the number of Least Developed Countries in Africa rose from 21 to 28 (para 6).

development and integration.⁸³ The heads of state also committed themselves to stronger unity and solidarity as part of reviving the ideals of pan-Africanism.⁸⁴ Two key preconditions for economic growth are identified: a political environment in which popular participation, human rights, and the rule of law are observed; and effective resolution of disputes to ensure lasting peace and stability.⁸⁵ Displaying an acknowledgement of the importance of the role of ordinary citizens in the processes of democratization and development, the OAU in 1999 adopted the 'Decision on the Right of Political Participation', as well as the 'Decision on Unconstitutional Changes of Government'.⁸⁶

In this era of possibilities, the OAU adopted two of its most progressive human rights instruments. The first of these, the African Charter on the Rights and Welfare of the Child (African Children's Charter), was adopted in 1990. Disappointingly, the spirit of the times did not change the *rightorical* stance of most OAU leaders, who did not come forward to accept as binding the new OAU instrument. The small target of 15 ratifying states was only reached at the close of the decade of promise, in 1999.

The process towards the second of these, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, began in 1994. Pioneered by NGOs, supported by the Commission, and benefiting from some high-level political support,⁸⁷ the movement for the creation of an African Court received the cautious support of the OAU Assembly in 1994. At its meeting in Tunis, the Assembly requested 'the OAU Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission...over the means to enhance the efficiency of the Commission in considering in particular the establishment of an African Court'.⁸⁸ Driven initially by NGOs and the African Commission, the OAU took ownership by adopting the Protocol on the Establishment of an African Court on Human and Peoples' Rights in 1998.

The establishment of an increasing number of regional economic communities (RECs) reflected growing concern that the OAU had failed to provide a framework for economic integration and development in Africa. Although the idea for the establishment of an African Economic Community was raised as early as 1977, it came to fruition only in 1991, with the adoption of the Treaty establishing the African Economic Community (AEC) in Abuja, Nigeria.⁸⁹ Its primary objective is to 'promote economic, social and cultural development and the integration of

⁸³ *ibid.*, para 12. ⁸⁴ *ibid.* ⁸⁵ *ibid.*, paras 10 and 11.

⁸⁶ OAU Doc AHG/Dec.141(XXXV); OAU Doc AHG/Dec.142(XXXV).

⁸⁷ The then Secretary-General of the OAU, Salim Ahmed Salim, stated at the Commission's 14th session, in 1993, that the time had come for an African Human Rights Court: see E Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague: Martinus Nijhoff, 1996) 70.

⁸⁸ OAU Doc AHG/Res.230(XXX).

⁸⁹ For a comprehensive discussion see B Thompson, 'Economic Integration Efforts in Africa: A Milestone—The Abuja Treaty' (1993) 5 *RADIC* 743.

African economies' in order to 'raise the standard of living in African peoples'.⁹⁰ One of its guiding principles is the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter'.⁹¹ The link to human rights is thus both implicit and explicit. The envisaged process of integration is a gradual one, comprising six stages over 34 years. Subregional economic communities are to form the building blocks of the larger integrated union. The AEC Treaty entered into force on 12 May 1994 as an integral part of the OAU Charter for those states that had become party to both the AEC and the OAU. However, little progress has subsequently been made towards its implementation.⁹²

The OAU took other steps relevant to human rights in this period. Departing from the realization that the aims of the AEC Treaty would not be fulfilled as long as war, civil strife, and insecurity beset the continent, the OAU finally, in 1993, created a mechanism to address conflicts in and between states, by adopting the Cairo Declaration establishing the OAU Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration), eroding somewhat the principle of non-interference.⁹³ Inspired by the accomplishments of the Conference on Security and Cooperation in Europe (CSCE),⁹⁴ and premised on the link between human rights and security, the Mechanism was set up to anticipate and prevent conflict in Africa. Suggesting an inroad into state sovereignty by allowing the Mechanism's involvement in intra-state conflicts, the Cairo Declaration acknowledges that no single factor 'has contributed more to the present socio-economic problems on the continent than the scourge of conflicts *within* and between our countries'.⁹⁵ Although the stipulation that it should be 'guided' by the principles of non-interference and state sovereignty introduced some ambiguity,⁹⁶ the Mechanism's Central Organ decided to be seized with situations of internal conflict, such as those in Angola, Burundi, Rwanda, and Somalia.⁹⁷ The Mechanism served as progenitor to the AU Peace and Security Council, by which it was replaced, and its fledgling efforts culminated in an explicit AU mandate with respect to humanitarian intervention.⁹⁸

⁹⁰ AEC Treaty, art 4(1)(a) and (c).

⁹¹ *ibid*, art 3(g).

⁹² See Ch 7 below.

⁹³ G Naldi *The Organisation of African Unity: An Analysis of its Role* (London: Mansell, 2nd edn, 1999) 32–3.

⁹⁴ In 1994 redefined and renamed as the Organization for Security and Cooperation in Europe (OSCE) (see M Nowak, *Introduction to the International Human Rights Regime* (Leiden: Martinus Nijhoff, 2003) 223).

⁹⁵ Cairo Declaration, para 9 (emphasis added).

⁹⁶ *ibid*, para 14.

⁹⁷ SBO Gutto, 'The New Mechanism of the Organisation of African Unity for Conflict Prevention, Management and Resolution, and the Controversial Concept of Humanitarian Intervention in International Law' (1996) 113 *South African LJ* 314, 321.

⁹⁸ AU Constitutive Act, art 4(h); see MD Wembou, 'A Propos du Nouveau Mécanisme de l'OUA sur les Conflits' (1993) 5 *RADIC* 725, 729, indicating that with the exception of Sudan, states agreed that the OAU may intervene in extraordinary circumstances (of extreme suffering, total disregard for human rights indicating the disintegration of the state) without first appealing to the international community.

The OAU Assembly also lent its institutional support to the drafting of a protocol to the African Charter on the rights of women,⁹⁹ setting in motion a process that culminated in the adoption of a final text in 2003. For the first time, in 1999, an OAU Ministerial Conference on Human Rights was held in Grand Baie, Mauritius, culminating in the adoption of the Grand Baie Declaration and Plan of Action. Another milestone was also reached in the same year, when Eritrea became a state party to the Charter, marking universal regional acceptance of the Charter by all 53 AU members. At its summit in 2000, the OAU took a clear stand in favour of democratic pluralism when it adopted the 'Declaration on the Framework for an OAU Response to Unconstitutional Government'.¹⁰⁰ Under this Declaration, the 'perpetrators' of an 'unconstitutional change' are given six months to 'restore constitutional order'.¹⁰¹ Should the new regime 'stubbornly' refuse to 'restore constitutional order', 'limited and targeted sanctions' may be imposed, in addition to suspension from participation in OAU policy organs.

Not all African leaders favoured the gradualist approach adopted in the Abuja Treaty. The first steps towards a radical acceleration of African unification in the new millennium were taken on the initiative of the Libyan President, Moummar al-Qadhafi. Meeting at his birthplace, Sirte, the OAU held the third extraordinary summit in its existence, to discuss the lack of progress in the process of African integration. In the Sirte Declaration, adopted on 9 September 1999, the OAU leaders committed themselves to form an African Union on the basis of accelerated implementation of the AEC timetable and the speedy establishment of the institutions envisaged in the AEC Treaty.¹⁰² The persistence of ambivalence about the meaning of pan-Africanism appears from the Declaration, which proclaims to be 'inspired by the ideals which guided the Founding Fathers of our organisation and Generations of Pan-Africanists' to forge on the one hand 'unity, solidarity and cohesion' and 'co-operation between African peoples', and among 'African States' on the other.

4 A New Institution for a New Millennium (2001–2006)

Ushering in the new millennium, the OAU leaders adopted the AU Constitutive Act on 11 July 2000 as a culmination of the Sirte Declaration. The Constitutive Act entered into force on 26 May 2001, replacing the OAU Charter, and incorporating within the AU the AEC Treaty in so far as there are no inconsistencies between the two treaties.¹⁰³ The AU, which was eventually inaugurated in 2002, is thus essentially a merger of the largely political ambitions of the OAU and the mainly economically minded AEC,¹⁰⁴ with the addition of some organs and with an acceleration of pace towards economic integration.

⁹⁹ OAU Doc AHG/Res.240(XXXI).

¹⁰⁰ OAU Doc AHG/Decl.5(XXXVI).

¹⁰¹ *ibid.*

¹⁰² OAU Doc EAHG/Draft/Decl.(IV)Rev.1.

¹⁰³ AU Constitutive Act, art 33(2).

¹⁰⁴ See CAA Packer and D Rukare, 'The New African Union and its Constitutive Act' (2002) 96 *AJIL* 365, 372 (although the AEC and its functions are 'subsumed' by the AU, its Treaty remains

The AU Constitutive Act presents its reader with the paradox between a quest for greater unity,¹⁰⁵ inspired by generations of pan-Africanists who promoted solidarity and cohesion, and unwavering reverence for the borders imposed in colonial times and sanctified by post-colonial governments.¹⁰⁶ Reiterating the 1964 OAU declaration referred to above, which was absent from the OAU Charter, the AU places 'respect for borders existing on achievement of independence' very high on its list of founding principles.¹⁰⁷

Reflecting major shifts in the intervening period of almost 20 years, the AU Constitutive Act contrasts sharply with the 1963 OAU Charter. It provides extensively for human rights in its Preamble, objectives, and founding principles.¹⁰⁸ 'Human rights', 'good governance', and 'the rule of law' are some of the most important recurring concepts in the Constitutive Act. Explicit reference is made to the African Charter: one of the objectives of the AU is the promotion and protection of human and peoples' rights in accordance with the Charter and other relevant human rights instruments.¹⁰⁹ Six of the 16 guiding principles of the AU make reference to human rights either implicitly or explicitly. The most far-reaching is the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity.¹¹⁰ Collective AU action, which is dependent on an Assembly decision, should be distinguished from the right of individual members 'to request intervention from the Union in order to restore peace and security'.¹¹¹

Other references to human rights-related issues include the promotion of gender equality;¹¹² respect for democratic principles, human rights, the rule of law, and good governance;¹¹³ the promotion of social justice to ensure balanced economic development;¹¹⁴ respect for the sanctity of human life, the condemnation and rejection of impunity and political assassination, acts of terrorism, and subversive activities;¹¹⁵ as well as the condemnation and rejection of unconstitutional changes of government.¹¹⁶ The possibility of suspending a member state if its seat

legally binding). The 1999 Sirte Declaration (OAU Doc EAHG/Draft/Decl.(IV) Rev.1, 8–9 September 1999, para 8) proposes the establishment of the AU 'in conformity with' the ultimate objectives of the OAU Charter and AEC Treaty by 'accelerating' the process of implementing the AEC Treaty and by shortening the 'implementation periods of the Abuja Treaty'. On the achievement of this objective, see Ch 7 below.

¹⁰⁵ One of its stated objectives is to 'accelerate the political and socio-economic integration of the continent' (AU Constitutive Act, art 3(c)).

¹⁰⁶ See NJ Udombana, 'A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development' (2002) 13 *Indiana International and Comparative LR* 185, 228 ('The paradox is that while the OAU is striving at regional co-operation and integration, it is simultaneously rigidly adhering to the colonial borders drawn in imperial European capitals').

¹⁰⁷ AU Constitutive Act, art 4(b).
¹⁰⁸ See in general E Baimu, 'The African Union: Hope for Better Protection of Human Rights in Africa?' (2001) 1 *AHRLJ* 299, 311–12.

¹⁰⁹ AU Constitutive Act, art 3(h).

¹¹⁰ *ibid.*, art (h).

¹¹¹ *ibid.*, art 4(j).

¹¹² *ibid.*, art 4(l).

¹¹³ *ibid.*, art 4(m).

¹¹⁴ *ibid.*, art 4(n).

¹¹⁵ *ibid.*, art 4(o).

¹¹⁶ *ibid.*, art 4(p).

of power has been usurped unconstitutionally presents a further significant inroad into the paramount importance of state sovereignty. The fact that the AU not only sets out to attain human rights *objectives* but also intends to use human rights-based means (or *principles*) to achieve those objectives evidences its resolve to make a clean break from the OAU's *modus operandi*.

However, from a human rights perspective the AU Constitutive Act falters in three respects. First, the principle of non-interference by any member state in the internal affairs of another has been retained.¹¹⁷ Secondly, the Constitutive Act does not require observance of human rights as a prerequisite for admission to the AU.¹¹⁸ It should be conceded, though, that this approach allowed states into the fold of an organization that should—in principle—have steered them towards ever-increasing observance of human rights. Thirdly, the Constitutive Act is vague on enforcement and the imposition of sanctions in cases where states do not conform to AU norms.¹¹⁹ For example, unlike the UN Charter, the Act does not explicitly provide for expulsion of a member state that persistently violates the principles, including those relating to human rights, set out in the Act.¹²⁰ However, the Constitutive Act does provide for sanctions against states that fail to comply with the principles and policies of the AU.¹²¹ Although the only specific instances mentioned are the denial of 'transport' and 'communication' links with other members, the Assembly may decide on potentially far-reaching 'other measures of a political and economic nature'.

Compared with the OAU Charter, the socio-economic well-being of Africa's people is accorded much more prominence in the AU Constitutive Act. Among other things, the AU aims at promoting 'co-operation in all fields of human activity to raise the living standards of African peoples',¹²² and hopes to 'work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent'.¹²³ In their formulation, however, these aspects are portrayed as being part of international cooperation efforts rather than as obligations of AU member states.

The post-2000 phase also saw the adoption of important new normative standards relevant to human rights, such as the Protocol to the African Charter on the

¹¹⁷ AU Constitutive Act, art 4(g). The principle has, however, been diluted by another principle which gives the Union the right to intervene in a member state pursuant to a decision of the Assembly in respect of war crimes, genocide, and crimes against humanity (Constitutive Act, art 4(h)).

¹¹⁸ In other regional and subregional bodies membership is conditional on demonstration of commitment to, among other things, respect of human rights, see for example arts 3 and 4 of the Statute of the Council of Europe which state that the membership of the Council of Europe is open only to those states that are deemed able and willing *inter alia* to accept the principles of the rule of law and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms. See also art 3(b) of the Treaty for the Establishment of the East African Community, reprinted in (1999) 7 *AYBIL* 421.

¹¹⁹ One should note though that, unlike the OAU Charter, the Act has put in place a mechanism to ensure that states pay their financial contribution, see the AU Constitutive Act, art 23(1).

¹²⁰ UN Charter, art 6.

¹²¹ AU Constitutive Act, art 23(2).

¹²² UN Charter, art 3(k).

¹²³ *ibid*, art 3(n).

Rights of Women in Africa (Women's Protocol), the AU Convention on Prevention and Combating Corruption and related offences,¹²⁴ and the African Charter on Democracy, Elections and Governance.¹²⁵ In this period, also, a sufficient number of states ratified the African Human Rights Court Protocol to ensure its entry into force.¹²⁶

Greater integration of the economic and political agendas, which was the order of the day in the period around the millennium, further gave rise to the New Partnership for Africa's Development (NEPAD). The omission from the AU Constitutive Act of an economic blueprint left an opening, and perhaps a need, for a continental economic and development framework. NEPAD, which resulted from two independent plans for Africa's economic development, the Millennium Africa Recovery Plan and the OMEGA Plan,¹²⁷ provides this framework. Tabled together at the Sirte Summit in March 2001, the obvious synergy between the two projects prompted a decision for their integration. The result, NEPAD, is a 'pledge by African leaders' to 'eradicate poverty' and to pursue 'sustainable growth'.¹²⁸

In the NEPAD 'Programme of Action', the conditions for sustainable development are identified as peace and security, economic and political governance, and subregional and regional approaches to development. Sectoral priorities for their achievement include bridging the gaps in infrastructure, investing in people, the development of agriculture, and the protection of the environment. One of its components, 'democracy and political governance', is most relevant to human rights, and reinforces the premise that democracy, respect for human rights, peace, and good governance are prerequisites for economic development.¹²⁹ A number of implementation plans aimed at social and economic development have been launched, including strategic plans on health and agriculture.¹³⁰

NEPAD differs from the AEC Treaty and its predecessors in important respects. NEPAD departs from a bleak reality of socio-economic deprivation, and targets specifically the eradication of poverty.¹³¹ The goal of the AEC was economic coordination and development, but its founding Treaty did not articulate the crux of its existence from a people-centred perspective and it was largely silent on human rights issues. While the AEC Treaty was premised on collective self-reliance,¹³² NEPAD embraces neo-liberal capitalist models of development,

¹²⁴ Adopted in Maputo, Mozambique, July 2003.

¹²⁵ Adopted at the Assembly's eighth session, January 2007 (AU Doc Assembly/AU/Dec.147(VIII)).

¹²⁶ See Ch 11 below.

¹²⁷ See eg E Baimu, 'Human Rights in NEPAD and its Implications for the African Human Rights System' (2002) 2 *AHRLJ* 301, 302.

¹²⁸ The New Partnership for Africa's Development (NEPAD Declaration) (2001), <<http://www.issafrica.org/AF/RegOrg/nepad/nepaddoc.pdf>>, para 1.

¹²⁹ Baimu (n 127 above) 301.

¹³⁰ See eg NEPAD, Main Report (Draft) Short-Term Action Plan Infrastructure (<<http://www.nepad.org>>), highlighting proposed projects for regional integration and infrastructure development in the areas of energy, transport, water, information and communications technology, and public-private partnerships.

¹³¹ See eg NEPAD Declaration (2001) para 4.

¹³² AEC Treaty, arts 3(b) and 4(1)(a).

where an emphasis on 'self-reliance' makes place for 'partnerships' with global, especially Western, economic powers.¹³³

Scepticism has been expressed that the NEPAD agenda is 'more tailored to commit African leaders to undertake the twin projects of political and economic liberalization in the anticipation that the flood-gates of developed country assistance and credit would suddenly open'.¹³⁴ This view may be overstated, but the NEPAD Declaration does not hide the nature of African leaders' commitment: It is as much a pledge to hold 'each other accountable' as it is to forge partnerships with 'the world to work together in rebuilding the continent'.¹³⁵ Despite the references to 'human rights' in the NEPAD Declaration, concerns have also been aired about the lack of a rights-based approach to development,¹³⁶ and the limited extent to which NEPAD is integrated into and coordinated with pre-existing human rights procedures and mechanisms.¹³⁷ For those states that accept NEPAD's African Peer Review Mechanism (APRM), voluntary peer review adds to the erosion of the doctrine of non-interference in internal affairs already brought about by acceptance of the African human rights regime. The APRM framework also represents a significant expansion on NEPAD's provisions related to human rights.

The Sirte Declaration also called for a conference on security, stability, development, and cooperation in Africa. Reviving an initiative dating back to the early 1990s, prodded by Nigerian President Obasanjo, the OAU in 2000 adopted the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Solemn Declaration.¹³⁸ As its name indicates, the CSSDCA encompassed four major areas, called 'calabashes': security, stability, development, and cooperation. The Solemn Declaration departs from the view that both security and stability are intimately entangled with and dependent on human rights. Security 'should be seen in its wholesomeness and totality', which includes socio-economic rights ('access to the basic necessities of life'), enjoyment of the rights in the African Charter, and unfettered participation in all societal affairs.¹³⁹ 'Strict adherence to the rule of law', 'good governance', public participation in politics, and 'respect for human rights and fundamental freedoms' are all prerequisites for stability.¹⁴⁰ Providing for a 'Standing Conference' to meet every two years and for review meetings, and geared towards the elusive ideal of an integrated response, the CSSDCA held much initial promise. A CSSDCA Unit was established and made part of the AU Commission. Overtaken by other institutional developments,

¹³³ NEPAD Declaration (2001) paras 183 and 184.

¹³⁴ J Gathii, 'A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centred Development' (2003) 13 *Transnational L and Contemporary Problems* 179, 183; S Gumedze, 'The NEPAD and Human Rights' (2006) 22 *South African J on Human Rights* 144, 151.

¹³⁵ NEPAD Declaration (2001) para 202.

¹³⁶ B Manby, 'The African Union, NEPAD and Human Rights: The Missing Agenda' (2004) 26 *HRQ* 983, 1002.

¹³⁷ Gumedze (n 134 above) 158–64.

¹³⁸ OAU Doc CM/Dec.520(LXXII) Rev1.

¹³⁹ CSSDCA Solemn Declaration, para 10.

¹⁴⁰ *ibid*, para 11.

most importantly the Peace and Security Council (PSC), the CSSDCA was soon consigned to the rubbish heap of lofty declarations without implementation. Only its initiative of country reviews was taken up by the APRM.

Debates about the extent and form of African unification, integration, and harmonization did not come to an end with the adoption of the AU Constitutive Act. To the contrary, soon after the AU was formed, for example, Qadhafi introduced a proposal for a common defence policy and an 'African army', effectively reviving Nkrumah's call for an 'African High Command'.¹⁴¹ The outcome was the adoption of the AU Non-aggression and Common Defence Pact,¹⁴² while the idea of a single pan-African military force was shelved. Even if, as a matter of principle, African states agree to the pan-African vision that the 'ultimate objective of the African Union is the political and economic integration of the continent leading to the creation of the United States of Africa',¹⁴³ the form of 'Union government' and the powers of a supranational 'United States of Africa' remain matters of continuous debate within the AU.¹⁴⁴

¹⁴¹ Chime (n 29 above) 186.

¹⁴² AU Doc Assembly/AU/Dec.71(IV), adopted by the Assembly at its fourth ordinary session, 31 January 2005.

¹⁴³ AU Doc Assembly/AU/Dec.156(VIII), adopted by the Assembly at its eighth session, January 2007, para 2.

¹⁴⁴ AU Doc Assembly/AU/Dec.123(VII), Decision on the Union Government, reporting on the progress of the 'Committee of Seven' on an 'African Union Government towards the United States of Africa'. See generally E Maloka (ed), *A United States of Africa?* (Pretoria: Africa Institute of South Africa, 2001), and also AU Doc Assembly/AU/Dec.99(VI), Decision on the Report of the Committee of Seven Heads of State and Government Chaired by the President of the Federal Republic of Nigeria, reaffirming that 'the ultimate goal of the African Union is the full political and economic integration of the continent leading to the United States of Africa' (para 3).