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. Nevertheless, this is not to say that human rights were wholly neglected by the OAU Charters since it makes references, albeit slight, to human rights. 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. However, almost twenty years were to elapse before the OAU felt able to adopt a human rights document proper.

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1 Pliny the Elder.
4 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.
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.6 Conceived and born during the Cold War and the liberation struggle, the OAU remained in that mindset for a generation.7 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.8 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.9 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.10 It is now generally accepted that human rights assume priority over national sovereignty.11 Thus African States have been compelled to accept international scrutiny of their human rights credentials.12

7 Amate, Inside the OAU, pp. 60–1.
8 Article 3(2) of the OAU Charter.
9 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 Mihutu 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 communications 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.
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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. There has certainly been a reluctance to criticise leaders who fail to protect human rights. 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. Not only was the OAU designed to act only when assured of overwhelming support but a fear of divisiveness led to craveness. 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, 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. UN Secretary-General Kofi Annan has expressed the view that such efforts still have a valuable role to play. 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

14 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.
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. Accordingly, the Mechanism was approved by the OAU Assembly in 1993.

The Mechanism’s primary objective is the anticipation and prevention of conflicts, including internal ones, with emphasis on anticipatory and deterrent measures. Prompt and decisive action should prevent the emergence of conflicts, prevent conflicts from worsening, and preclude the need for complex and demanding peacekeeping operations. 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 of 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.


21 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.

22 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.

23 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. It is encouraging to note that the Mechanism has mediated in a number of internal conflicts.

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. 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. 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’) has largely proved to date to be a false dawn for the promotion and protection of human rights in Africa. Obinna Okere

describes the African Charter as ‘modest in its objectives and flexible in its means’.29 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.30 Moreover, extensive use is made of ‘clawback’ clauses31 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.32 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.33 However, it is interesting to observe that in a recent


32 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.

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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. 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.

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


35 Ibid.
The State and the community. As Ankumah points out, the duty provisions are generally ‘problematic and could adversely affect enjoyment of the rights set forth in the Charter’. 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’. Umozurike’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. 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. 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. Furthermore, second and third generation rights are listed as legally enforceable rights. This step, 


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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.43 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.44

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,45

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 Interafrique des Droits
(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 Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon, Eighth Activity Report
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
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
p. 388).

43 See, e.g., R. Higgins, Problems and Process: International Law and How We Use it (Oxford:
44 Vienna Declaration and Programme of Action, Part I, para. 5; UN Commission on Human
Principles also describe economic, social and cultural rights as an integral part of inter-
national 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 Cul-
tural 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.
45 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. Lack of an effective remedy has been identified as a particular deficiency. 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. However, an expectation of compliance does appear to have been engendered. It is also important to note that the Commission

46 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 Interafrique des Droits de l'Homme, Les Témoins de Jehovah v. Zaire, 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.

47 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 Interafrique des Droits de l'Homme, Les Témoins de Jehovah v. Zaire, 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'.


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