

Historical overview of human rights in the OAU/AU

Introduction

Human rights instruments and the organs that they created were for many years on the periphery of the political institutions under which they fell. This is despite the fact that the manner in which they are formulated and structured requires them to rely on these political institutions for their funding, nominations and appointments to their own organs and in some cases enforcement of their decisions.

Further, human rights as a discipline has evolved somewhat separately from international law, and international politics has been separated from international law. Thus, human rights have tended to have been dealt with by separate bodies created under the distinct human rights instruments and it is only recently that there has been an increased convergence of human rights into the mainstream of international organisations' thinking. Just as there has been a closer relationship between the European Convention on Human Rights (ECHR) and the European Union (EU),¹ so the African political organisation, the Organization of African Unity (OAU), which is now being transformed into the African Union (AU), illustrates this closer attention to human rights as falling within its remit. Whilst a separate instrument was adopted under the auspices of the OAU in 1981 specifically to deal with human rights (the African Charter on Human and Peoples' Rights (ACHPR)), it remained largely on the periphery of the OAU's attention until recently. Yet in later years the OAU organs developed an approach to human rights. This chapter will seek to chart the development of human rights within the OAU/AU from its inception in 1963 to the present day. It will examine the influences on the OAU/AU to deal with human rights and the trends which it has evidenced in selecting on what to focus.

¹ See, for example, P. Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999).

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The creation of the OAU and its structure

Whilst it is not the intention of this book to provide a detailed description of what led to the adoption of the OAU Charter in 1963,² a sketch of its development is useful. The background to the creation of the OAU can be traced back to a series of developments in various regions across the continent, with the various groupings among French-speaking countries,³ East and Central Africa⁴ and others pulling in slightly different directions.⁵ A number of All-African Peoples' Conferences were held in the late 1950s and early 1960s with the aim of encouraging those who were not yet liberated to liberate themselves and to organise non-violent revolution in Africa. Even at this stage the seeds of some human rights issues that would find their way into the OAU can be discerned with condemnation of racism in South Africa, the call for the need for universal vote and concerns about religious separatism, among others.⁶ States did not, however, agree on the nature of the regional organisation, with some falling into

² OAU Charter, adopted 25 May 1963, 3 ILM (1964) 1116. For this history to the background of the OAU see T. O. Elias, 'The Charter of the Organization of African Unity', *AJIL* 59 (1965) 243–67. For discussion of the OAU more generally see A. Chanda, 'The Organization of African Unity: An Appraisal', *Zambia Law Journal* 21–4 (1989–92) 1–29; H. Ait-Ahmed, *L'Afro-fascisme: les droits de l'homme dans la Charte et la pratique de l'OUA* (Paris: Harmattan, 1980); Boutros Boutros-Ghali, *L'Organisation de l'Unité Africaine* (Paris: A. Colin Collection U, Series Institutions Internationales, 1969); C. O. C. Amate, *Inside the OAU: Pan-Africanism in Practice* (New York: St Martin's Press, 1986); Z. Cervenka, *The Organization of African Unity and its Charter* (New York: Praeger, 1968); M. A. Abdul-Razag, 'The OAU and the Protection of Human Rights in Africa' (Ph.D. thesis, University of Hull, 1988); D. Mazzeo (ed.), *African Regional Organizations* (Cambridge: Cambridge University Press, 1984); C. Nwankwo, 'The OAU and Human Rights', *Journal of Democracy* 4 (1993) 50–4.

³ Groupings included the Brazzaville powers of the twelve French-speaking African states (Cameroon, Central African Republic (CAR), Chad, Congo, Dahomey, Gabon, Ivory Coast, Malagasy, Mauritania, Niger, Senegal, Upper Volta) meeting first in 1960.

⁴ The Pan-African Movement of East and Central Africa (PAFMECA).

⁵ In July 1959 the Sanniquellie Conference was held bringing together the governments of Liberia, Guinea and Ghana who pledged to work to set up a Community of Independent African States and decided to hold a conference in 1960. In August 1959 a conference was held in Monrovia of nine independent states (Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Tunisia and United Arab Republic) to look specifically at the Algerian question – to stop the war there and assist the nationalists, many of these states having recognised the Algerian provisional government. The first Conference of Independent African States took place in Accra, Ghana, in April 1958 (Ethiopia, Ghana, Liberia, Libya, Morocco, Sudan, Tunisia and United Arab Republic). See *International Organization* 16(2) (1962).

⁶ Resolutions of the first All African Peoples' Conference held in Accra, 8–13 December 1958, see *International Organization* 16(2) (1962) 429–34, at 430.

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the 'Monrovia' bloc,⁷ favouring a 'more classical, "confederal" approach where, far from aiming at the integration of African states, sovereignty would be preserved in the framework of a much looser arrangement'.⁸ In contrast, other states under the leadership of Ghana's President Nkrumah, in what became known as the 'Casablanca' bloc (United Arab Republic, Ghana, Guinea, Mali and Morocco), had signed the more federalist Casablanca Charter for economic cooperation, stressing elements of self-defence and the need to eliminate colonialism.⁹ In Monrovia in May 1961 a pan-African conference was held in which twenty-two of the twenty-seven states in Africa that were independent at that time participated, although none from the Casablanca bloc. Some liberation movements were also admitted as observers. These states decided what sort of organisation they wanted, as Elias noted:

The view was unanimous that a loose form of association of independent African states, based upon the principles of economic, cultural, scientific and technical cooperation among its members, was the ideal at which to aim. They one and all disavowed any intention to join any organisation of independent African states that would place the premium on political union supported by a military junta. It was generally felt that economic and technical development . . . should take precedence over political union, at least at this stage of the evolution of the newly independent states.¹⁰

One of the recommendations of the conference was that a Charter should be drawn up for an Organisation of African and Malagasy States.¹¹ Therefore, in January 1962 a second conference of the newly formed Assembly of Heads of States and Government was held in Lagos, Nigeria to look at drafting a Charter. Among other things it proposed the establishment of a Council of Ministers,¹² and this organ was mandated to meet in June in Lagos in 1962 to develop the Charter. The text of the Charter was

⁷ Cameroon, CAR, Chad, Congo, Dahomey, Ethiopia, Gabon, Ivory Coast, Liberia, Libya, Malagasy, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Togo, Tunisia and Upper Volta.

⁸ P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th edn. (London: Sweet & Maxwell, 2001), chapter 10, at 244.

⁹ Ibid. See also *International Organization* 16(2) (1962) 437–9.

¹⁰ Elias, 'The Charter', at 243–4. ¹¹ *International Organization* 16(2) (1962) 439–43.

¹² It approved in principle a detailed Charter for an Organisation of Inter-African and Malagasy States with three organs, an assembly of heads of state, a council of ministers and a secretariat, with a Secretary General. It proposed setting up committees on certain issues, see *International Organization* 16(2) (1962) 439–43.

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adopted at that meeting and at a further meeting in December of that year seventeen of the twenty-two states signed the Charter of the Organisation of African and Malagasy States, or Lagos Charter.¹³ A third conference was held in Addis Ababa in Ethiopia. The Council of Ministers prior to that meeting had the task of joining the Casablanca Charter, the Lagos Charter and an Ethiopian draft (similar to the Lagos Charter) together in one document. The result was the Charter of the Organization of African Unity.¹⁴ Elias notes that ‘the plea of Ghana and of one or two other members for the establishment of a political union of Africa was firmly rejected by the conference’.¹⁵ It would thus appear that although the wishes of the Monrovia group dominated, the OAU Charter was ‘a product of compromise’.¹⁶

The OAU Charter provided for four principal institutions:¹⁷ the Assembly of Heads of State and Government (AHSG), the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration. The AHSG was the primary organ with final decision-making powers and the power to review the structure and functioning of the other organs.¹⁸ It was composed of heads of state, or their representatives,¹⁹ and required to meet at least once a year.²⁰

The Council of Ministers was composed of the foreign ministers or their representatives and met at least twice a year,²¹ usually in February and just prior to the Summit of the AHSG in June/July. It was responsible to the AHSG and its task was to prepare these Summits, implement the decisions of the AHSG and coordinate with it.²² Again, as with the AHSG, there was one vote per state, but unlike the AHSG, voting on resolutions only required a simple majority.²³ In contrast to the AHSG, despite being

¹³ The Casablanca bloc were still not present at any of these meetings.

¹⁴ A Defence Commission was included among the specialised commissions to deal with the desire by the Casablanca bloc to have an African High Command.

¹⁵ T. O. Elias, *Africa and the Development of International Law*, 2nd edn., ed. R. Akinjide (The Hague: Martinus Nijhoff, 1988), at 124. Elias notes that nowhere in the purposes of the OAU Charter ‘is any reference made to political union of any kind; nor is the reference to co-operation “for defence and security” intended as relating to any idea of establishing an African High Command’, Elias, ‘The Charter’, 243–67, at 251.

¹⁶ G. Naldi, *The Organization of African Unity. An Analysis of its Role*, 2nd edn. (London: Mansell, 1999), at 2.

¹⁷ Article 7. ¹⁸ Article 8. ¹⁹ Article 9.

²⁰ Article 9. It in fact rarely met more than this, although there was a provision in Article 9 for extraordinary sessions to be held. See Sands and Klein, *Bowett’s Law*, at 246.

²¹ Article 12. Again, it can hold extraordinary sessions.

²² Article 13. ²³ Article 14. This also gives detail on quorum.

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‘the most dynamic organ of the OAU’, it had limited powers,²⁴ although its role in economic and social matters was often seen as important.²⁵

The Committee of Ambassadors offered advice to the Council of Ministers and AHSG and decided on issues to go on the agenda of the former. Given that ambassadors were in regular contact with the OAU Secretariat their role in placing human rights on the agenda of the Council of Ministers was crucial. This was particularly the case in respect of the work of the Central Organ on conflict, as Amnesty noted:

The Ambassadors who are part of the Central Organ form an integral part of the early warning system. During the monthly meetings of the Central Organ of the Conflict Resolution Mechanism, their role should be to assess information on specific human rights situations indicating a possible conflict developing and they should be able to make recommendations to the appropriate organs of the OAU . . . As they are central to the work of the Council, they can influence it to include a consideration of the human rights situation in Africa on the agenda of its meetings. They should include on the agenda of the Council situations where systematic human rights violations provides early warning of a possible conflict.²⁶

The fourth organ mentioned expressly by the OAU Charter was the Commission of Mediation, Conciliation and Arbitration. The Charter did not define its composition or terms of reference, leaving this to a separate Protocol to be adopted by the AHSG. Although a Protocol was adopted,²⁷ this Commission was never actually established.

Also provided by the OAU Charter were a number of specialised commissions:²⁸ the Economic and Social Commission;²⁹ the Educational, Scientific, Cultural and Health Commission; and the Defence

²⁴ Sands and Klein, *Bowett's Law*, at 246; Elias, *Africa and the Development*, at 141–2.

²⁵ Amate, *Inside the OAU*, at 550–1.

²⁶ Amnesty International, *Organization of African Unity: Making Human Rights a Reality for Africans* (London: Amnesty International, August 1998) AI Index IOR 63/01/98, at 31.

²⁷ The Protocol stated that it would be composed of twenty-one members nominated by states and elected by the AHSG for five years and who have ‘recognised professional qualifications’, and that jurisdiction of the Commission was limited to only inter-state disputes. The Protocol set out the procedure for referring a dispute to the Commission. The President and Vice Presidents would be full time and other members are part time. It would consult with parties as to the best method of settling the dispute.

²⁸ Article 20.

²⁹ The Economic and Social Commission held its first meeting in Niamey in December 1963 and set out activities with the aim of setting up an African common market and free trade area. It also called for an all-African trade union organisation to be set up, and for a pan-African youth organisation, Amate, *Inside the OAU*, at 477.

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Commission,³⁰ all of which were composed of the relevant ministers from each state.³¹ In July 1964 the AHSG also set up a Transport and Communications Commission³² and a Commission of African Jurists.³³

The General Secretariat of the OAU was based in Addis Ababa and was the administrative headquarters of the OAU. It operated under the authority of the Secretary General of the OAU, who was appointed by the AHSG.³⁴ He was supported by Assistant Secretaries.³⁵ The Secretary General and his staff were supposed to be independent of states³⁶ and states themselves were under a duty not to interfere with their mandates.³⁷ The role of the Secretary General in developing a human rights policy of the OAU has gained increasing importance. One of the former Secretary Generals, Dr Salim Ahmed Salim, took a particular interest in human rights concerns.³⁸ His powers have been 'dependent on the Organization's "sovereign" political organs. This limited political role has been partly compensated by a factual development which, over the years, has seen the OAU's Acting President ("Président en exercice") increasingly representing the Organization in relations with third parties.'³⁹

The General Secretariat was divided into various departments: political; administration and conferences; finance; economic development and co-operation; and education, scientific, cultural and social affairs.⁴⁰ The Legal Division of the Secretariat provided an overall role and in this respect was crucial in an examination of the approach of the OAU to human rights.

³⁰ The Defence Commission in the OAU Charter was not quite the African High Command envisaged by some African states at the time. Umozurike notes that it 'started off with no clear mandate and no direction' and only when Guinea was invaded by Portugal in 1970 did it have to respond. 'The Commission has not been directly connected with the liberation of colonial territories, a task assigned to the Liberation Committee', U. O. Umozurike, *International Law and Colonialism in Africa* (Enugu, Nigeria: Nwamife Publishers, 1979), at 99.

³¹ Article 21. ³² Resolution AHG/Res.20(I). ³³ Elias, 'The Charter', at 264–5.

³⁴ Article 16. ³⁵ Again appointed by the AHSG, OAU Charter, Article 17.

³⁶ 'In the performance of their duties the Secretary General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization', Article 18(1).

³⁷ Article 18(2). See Functions and Regulations of the General Secretariat, on file with author.

³⁸ See, for example, Message by Dr Salim Ahmed Salim, OAU Secretary General on the Occasion of the 36th Anniversary of the Organization of African Unity, Addis Ababa, May 1999, p. 5; Address by HE Dr Salim Ahmed Salim, Secretary General of the Organization of African Unity to the International Conference on Africa, Africa at 40, London, 29 October 1997, at 2–3.

³⁹ Sands and Klein, *Bowett's Law*, at 247.

⁴⁰ *Functions and Regulations of the General Secretariat*, Article 15.

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However, it is clear that its potential was not fully realised. As Amnesty indicates:

The role of the Legal Division in regard to human rights issues beyond monitoring of ratifications and drafting of treaties is not very clear but it is understood that it also provides advice to the Secretariat on a range of issues pertaining to human rights including the rights of children and women and contributes to reports of the Secretary General on these issues.⁴¹

With the transformation of the OAU into the AU many of these organs and structures have been replaced or renamed. These will be described further below.

Human rights within the OAU

The provisions of the OAU Charter make little express mention of human rights. Instead they reflect the dominating concerns of Africa at that time, namely to ensure the independence of those African peoples who were still colonised, condemnation of apartheid regimes in southern Africa, and protecting the newly acquired statehood.⁴² Thus, its provisions centre on issues such as the non-interference in internal affairs,⁴³ sovereign equality of states,⁴⁴ the fight against neo-colonialism,⁴⁵ self-determination in the state context,⁴⁶ and peaceful settlement of disputes.⁴⁷ Thus, at this stage, the OAU's focus was on protection of the state, not the individual,⁴⁸ and any concept of human rights within the OAU went little beyond the notion

⁴¹ Amnesty International, *Organization of African Unity*, at 28.

⁴² Furthermore, it has been suggested that the OAU was not initially willing to consider human rights, labelling them 'one of the main elements in the ideological armoury of imperialism', I. G. Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA Book Series, 1989).

⁴³ Articles 3(1) and (2). Elias, as one of the drafters of the Charter, notes that 'the desire to be left alone, to be allowed to choose its particular political, economic and social systems and to order the life of its community in its own way, is a legitimate one for large and small states alike', Elias, 'The Charter', at 248. See also A. B. Akinyemi, 'The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member States', *BYIL* 46 (1972–3) 393–400, at 393–5.

⁴⁴ Article 3(1). ⁴⁵ Preamble, Article 2(1)(d), Article 3(6).

⁴⁶ Preamble, Article 3(3). ⁴⁷ Article 3(4).

⁴⁸ For example, assassination is condemned in respect of subverting the state, 'unreserved condemnation . . . of political assassination as well as of subversive activities', Article 3(5). See also M.-C. D. Wembou, 'The OAU and International Law', in Y. El-Ayouty (ed.), *The Organization of African Unity after Thirty Years* (Westport, CT: Praeger, 1994) 15–26, at 17; K. Mathews, 'The Organization of African Unity', in Mazzeo (ed.), *African Regional Organizations*, 49–84, at 80.

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of self-determination in the context of decolonisation and apartheid in South Africa. As Mathews notes,

the OAU Charter, for instance, does not contain any provision for the protection of the rights of the African masses . . . evidently the emphasis in 1963 was on the state rather than the people. As President Nyerere of Tanzania, one of the founding fathers of the OAU, has pointed out, the OAU Charter spoke for the African peoples still under colonialism or racial domination, but once the countries emerged to nationhood, the Charter stood for the protection of their heads of state and served as a trade union which protected them. In other words, the OAU appears to be an institution of the African heads of state, by the heads of state and for the heads of state.⁴⁹

Thus, where other aspects of human rights are mentioned in the Charter they are broad and general and related to the relationship among states.⁵⁰ Although there is some note of ethnic divides: 'inspired by a common determination to promote understanding among our peoples . . . in a larger unity transcending ethnic and national differences', this is stressed in respect of African unity as a whole, rather than from the perspective of the impact upon the individual. Further, any threats to human rights appeared to be reflected in the OAU Charter as coming from outside the continent, something which African unity may help to prevent.⁵¹ It was clear, therefore, that state sovereignty was sacrosanct.⁵²

These influences during the 1960s were to define the OAU's approach to human rights issues for many years. Thus, from the point of view of human rights, it was the two issues of self-determination and apartheid/racial discrimination in southern Africa that were central to the OAU at its

⁴⁹ Mathews, 'The Organization of African Unity', at 79.

⁵⁰ For example, in the preamble it notes that states are 'conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. Also, 'persuaded that the Charter of the UN and the UDHR, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive co-operation among states'; 'to promote international co-operation, having due regard to the Charter of the UN and the UDHR', Article 2(1)(e).

⁵¹ 'Desirous that all African states should henceforth unite so that the welfare and well-being of their peoples can be assured . . . [and] to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa', Article 2(1)(b). With this in mind states should thus coordinate their efforts, according to Article 2(2), specifically in the political, diplomatic, economic, educational and cultural, health, scientific and defence and security fields.

⁵² C. Clapham, *Africa and the International System. The Politics of State Survival* (Cambridge: Cambridge University Press, 1996), at 115.

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formation and which appear to have guided its approach to human rights throughout its later years. It is worth paying some attention to them in this respect.

The concept of self-determination

The history of colonisation to which nearly all of Africa had been subject, the resulting groupings among newly independent African states and the idea of a sense of African unity⁵³ were behind the creation of the OAU.⁵⁴ Indeed, it has been said that ‘the Charter of the OAU is more than the constitution of an African regional organisation: it is a charter of liberation’.⁵⁵ This was reflected in the preamble of the OAU Charter which sought, as Naldi notes,

to preclude external intervention in African affairs. This aim is linked to the goal of eradicating all forms of colonialism and neo-colonialism from Africa . . . This was a reference not only to the racist regimes of Southern Africa . . . but also to the policies by which external powers indirectly maintained or extended their influence over African countries. The eradication of colonialism in all its forms was therefore regarded as a necessary prerequisite to the attainment of the OAU’s goals.⁵⁶

The OAU spent many of its early years assisting in the liberation of colonised entities and giving assistance to liberation movements,⁵⁷ including funding their arms purchases and providing them with training.⁵⁸

⁵³ Emerson attributes reasons for African unity to ‘all Africans [having] a spiritual affinity with each other’, but questions whether there is a presumption that Africans are all part of the same race, R. Emerson, ‘Pan-Africanism’, *International Organization* 16(2) (1962) 275–90, at 282.

⁵⁴ Naldi, *An Analysis*, at 1.

⁵⁵ J. Dugard, ‘The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism’, *ICLQ* 16 (1967) 157–90, at 158–9; G. L. Wilkins, *African Influence in the United Nations 1967–1975. The Politics and Techniques of Gaining Compliance to UN Principles and Resolutions* (Washington, DC: University Press of America, 1981), at 78–9.

⁵⁶ Naldi, *An Analysis*, at 3–4.

⁵⁷ For example, see Resolution on South Africa, CM/Res.1427(LVII).

⁵⁸ Z. Cervenka, ‘Major Policy Shifts in the Organization of African Unity 1963–1973’, in K. Ingham (ed.), *Foreign Relations of African States* (London: Butterworths, 1974) 323–44, at 330. I. Sagay, *International Law and the Struggle for the Freedom of Man in Africa* (Ife: Ife University Press, 1983). See GA Resolution 2625(XXV), 24 October 1970. Use of force to liberate is permitted in international law, and this has been confirmed for example in Conakry at the Conference of Afro-Asian Jurists, October 1964, Cairo Conference of Non-Aligned Movement, 1964 and in 1969 in the Lusaka Manifesto of OAU.

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Thus, the OAU would appear to have supported the notion that there was a legal duty on states to end colonialism⁵⁹ and 'armed struggle has proven to be . . . a legitimate method of asserting the right of self-determination of a colonial or oppressed people'.⁶⁰ This anti-colonialism stance is reflected in the main human rights treaty for Africa, Article 20(2) ACHPR, which suggests that those under foreign domination can use any means to be free from it. This was supporting the notion that 'once people are recognised as having a right of self-determination, it follows logically and inevitably that they must also be legally entitled to resist any action aimed at denying them that right'.⁶¹

Resolutions were adopted on decolonisation⁶² and the OAU created a Liberation Committee.⁶³ Despite some difficulties,⁶⁴ 'the OAU as a whole remained loyal to its self-assigned task of helping the people of the colonised territories of Africa to fight for their independence',⁶⁵ the Liberation Committee meeting regularly and ensuring that the issue was maintained on the agenda of the UN and OAU organs. Its recognition of liberation movements assisted in their obtaining assistance from other countries and access to the OAU and UN meetings and contributed

⁵⁹ Legal Consequences Case, ICJ Rep (1971), p. 14 through military or other means.

⁶⁰ I Enemo, 'Self-Determination as the Fundamental Basis of the Concept of Legitimate Governance under the African Charter on Human and Peoples' Rights', in E. K. Quashigah and O. C. Okafor (eds.), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) 403–18, at 417.

⁶¹ Ibid.

⁶² For example, Resolution CIAS/Plen.2/Rev.2, adopted by the Founding Fathers of the OAU and thus the first resolution of the OAU. This 'reaffirmed that is the duty of all independent African states to support dependant peoples in Africa in their struggle for freedom and independence' and agreed unanimously to 'concert and coordinate their efforts' for independence; condemned 'flagrant violation of the inalienable rights of the legitimate inhabitants of the territories concerned' and called for colonial powers to 'take immediate measures' to end colonial domination.

⁶³ For information on its work see Amate, *Inside the OAU*, at chapter 8.

⁶⁴ The persistent refusal by several member states to give the Liberation Committee the funds it needed to carry out the onerous task that had been entrusted to it coupled with the harsh criticisms by these very states of the performance of the Liberation Committee, would have killed the Committee within the first two or three years of its birth if it had not been sustained by the unquenchable desire and determination of the OAU as a whole to remove the stain of colonialism and white minority rule from the face of Africa,

Ibid., at 240

⁶⁵ Ibid., at 282–3.