

# BERICHTE UND URKUNDEN

## The OAU's Grand Bay Declaration on Human Rights in Africa in Light of the Practice of the African Commission on Human and Peoples' Rights

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The adoption of the African Charter on Human and Peoples' Rights (hereafter the Banjul Charter)<sup>1</sup> has largely proved to be a false dawn for the promotion and protection of human rights in Africa.<sup>2</sup> The African Commission on Human and Peoples' Rights (hereafter AfCHPR), mandated under the Banjul Charter with promoting and ensuring protection of human and peoples' rights, has relatively weak powers of investigation and enforcement.<sup>3</sup> Its decisions do not have the binding force of a ruling of a court of law but have a persuasive authority akin to the Opinions of the UN Human Rights Committee.<sup>4</sup> The AfCHPR has been criticised as being generally unable to act as a forceful guardian of rights.<sup>5</sup> The

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<sup>1</sup> Adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at Nairobi in July 1981, entered into force on 21 October 1986, (1982) 21 ILM 58; G.J. Naldi (ed.), Documents of the Organization of African Unity, London, 1992, 109. All of the OAU's fifty-three Member States have now ratified the Banjul Charter, see R. Murray, Africa, (1999) 17 NQHR 350. For an analysis of the Banjul Charter, see G.J. Naldi, The Organization of African Unity, 2<sup>nd</sup> ed., London, 1999, 109–212; U.O. Umozurike, The African Charter on Human and Peoples' Rights, The Hague, 1997.

<sup>2</sup> B. Obinna Okere describes the Banjul Charter as “modest in its objectives and flexible in its means”, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, (1984) 6 Human Rights Quarterly 141 at 158. For another skeptical assessment, see R. Gittleman, The African Charter on Human and Peoples' Rights: A Legal Analysis, (1982) 22 Virginia Journal of International Law 667.

<sup>3</sup> Articles 30 and 45 of the Banjul Charter. See further, Naldi, Organization (note 1) 139–147; E.A. Ankumah, The African Commission on Human and Peoples' Rights, The Hague, 1996, 20–28.

<sup>4</sup> See Article 59 of the Banjul Charter and Rule 120 of the AfCHPR's Rules of Procedure, as amended, (1997) 18 HRLJ 154; Ankumah (note 3) 24, 74–75. However, it may be that the Commission has come to regard its decisions on communications as binding, see Murray (note 1) 93 at 94, and 516 at 519, citing International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria, Communication Nos. 137/94, 139/94, 154/96 and 161/97, (2000) 7 IHRR 274, finding it to be, *inter alia*, in violation of Article 1 of the Banjul Charter for failing to abide by a previous decision.

<sup>5</sup> The failings appear to be both institutional and personal, Ankumah (note 3) 179–198; G. Robertson, Crimes Against Humanity: The Struggle for Global Justice, London, 1999, 58–59.

creation of an African Court on Human and Peoples' Rights<sup>6</sup> with the specific task of reinforcing the role of the AfCHPR<sup>7</sup> enhances in theory the prospects of protecting human rights although this remains a matter for speculation until such time as the Court starts delivering its judgements.

In addition to the failings of the African institutional mechanisms for the protection of human rights, much of Africa has been racked in recent years by a series of events, civil wars, international conflicts, dictatorial rule, the collapse of civil society, economic crises, natural disasters,<sup>8</sup> which have contributed to the deterioration of the human rights situation. The Organisation of African Unity (hereafter OAU) therefore decided that the root causes of human rights violations had to be reappraised with a view to improving strategies for the promotion and protection of human rights. The result was the OAU's First Ministerial Conference on Human and Peoples' Rights, held in Mauritius from 12–16 April 1999, which adopted the Grand Bay (Mauritius) Declaration and Plan of Action.<sup>9</sup>

### *The Grand Bay Declaration*

The significant elements of the Declaration may be summarised as follows. It seeks to integrate human rights policies throughout the activities of the OAU. It calls for the strengthening of the AfCHPR. It encourages OAU Member States to ratify and implement all major OAU and UN human rights conventions. It reaffirms the evolution of our contemporary understanding of human rights as expressed in documents such as the Vienna Declaration and Programme of Action,<sup>10</sup> although, as will become apparent, it cannot be said that the Declaration expands the frontiers of human rights.

Although the Declaration is not legally binding *qua* treaty its importance should not be underestimated since it can be viewed, *inter alia*, as an authoritative

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For a more favorable assessment, see Umozurike (note 1) 67–85; R. Murray, Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights, (1997) 46 ICLQ 412. An analysis of the AfCHPR's decisions in recent times does suggest that the AfCHPR is generally becoming more robust in performing its mandate.

<sup>6</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, adopted by the OAU Assembly of Heads of State and Government at its thirty-fourth ordinary session in Ouagadougou in 1998, (1997) 9 RADIC 953. The Protocol requires fifteen ratifications to enter into force, see Article 34(3); at the time of writing, three States have ratified, Burkina Faso, the Gambia and Senegal. For an analysis of the Protocol, see G. J. Naldi/K. Magliveras, Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights, (1998) 16 NQHR 431.

<sup>7</sup> Article 2 of the Protocol.

<sup>8</sup> United Nations, Report of the Secretary-General on: Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, (1998) 10 RADIC 549, Part II. See also, the AJCHPR's Eighth Annual Activity Report, Resolution on the Human Rights Situation in Africa, (1996) 3 IHRR 245–246.

<sup>9</sup> CONF/HRA/DECL (I), reprinted in (1999) 11 RADIC 352. The Office of the UN High Commissioner for Human Rights was instrumental in providing assistance to the AfCHPR in the preparation of the Conference, UN Doc. E/CN.4/1999/93, 2–4.

<sup>10</sup> Adopted by the UN World Conference on Human Rights 1993, (1993) 32 ILM 1661.

interpretation and elaboration of the meaning of human rights in the OAU Charter, the Banjul Charter and the African Charter on the Rights and Welfare of the Child.<sup>11</sup> It could additionally be classified as an example of "soft law" which may reflect or contribute to the generation of rules of customary international law,<sup>12</sup> particularly if based on an expression of consensus.<sup>13</sup>

The Declaration must be viewed in the wider context of the legitimate aspirations of the peoples of Africa to secure full enjoyment of human rights.<sup>14</sup> The Declaration hence rightly considers the promotion and protection of human rights a priority for Africa,<sup>15</sup> acknowledging that observance of human rights is indispensable for maintaining national and international peace and security and encouraging sustainable development.<sup>16</sup> It therefore seeks to consolidate and build upon the gains already made in Africa in the field of human rights.<sup>17</sup>

### *Substantive Principles*

The Conference "affirms the principle that human rights are universal, indivisible, interdependent and inter-related" and calls for parity to be given to economic, social and cultural rights as well as civil and political rights.<sup>18</sup> In addition, the "right to development, the right to a generally satisfactory healthy environment and the right to national and international peace and security" are held to be "universal and inalienable rights which form an integral part of fundamental human rights".<sup>19</sup> It will be recalled that one of the distinctive features of the Banjul Charter, reflecting in part the African philosophy of rights which emphasises

<sup>11</sup> *Western Sahara Case*, ICJ Reports 1975, 12, paras. 52–57; *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14, paras. 191–194; *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, (1990) 29 ILM 379, paras. 42–45; *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980); I. Brownlie, *Principles of Public International Law*, Oxford, 4th ed., 1990, 15; B. Sloan, *General Assembly Resolutions Revisited*, (1987) 58 BYIL 39 at 57–61. The authoritative nature of such a document would be reinforced through its adoption in the form of a "Declaration", *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

<sup>12</sup> *Texaco v. Libya*, (1978) 17 ILM 1, para. 87; *Kuwait v. American Independent Oil Co.*, (1982) 21 ILM 976, para. 143; Sloan (note 11) 67–70, 106–108.

<sup>13</sup> *Texaco v. Libya*, (1978) 17 ILM 1, para. 87; Sloan (note 11) 91–92.

<sup>14</sup> Preambular para. 8. See also, para. 5(c).

<sup>15</sup> Preambular para. 1.

<sup>16</sup> Preambular paras. 3, 7, 9 and 10. Preambular para. 4 recognises that violations of human rights constitute a burden for the international community. See also, the Vienna Declaration and Programme of Action, Part I, para. 6.

<sup>17</sup> Preambular paras. 12 and 15. The Declaration accepts that a multi-faceted approach is needed to tackle the causes of human rights violations in Africa, para. 8.

<sup>18</sup> Para. 1; preambular para. 12; and further, Banjul Charter, preambular para. 8. See also, the Vienna Declaration and Programme of Action, Part I, paras. 5, 8.

<sup>19</sup> Para. 2; see also, preambular para. 9. See further, Vienna Declaration and Programme of Action, Part I, paras. 10(1), 11(1), Part II, para. 74. With specific reference to the right to development, the Declaration on the Right to Development 1986, UN General Assembly resolution 41/128, which describes this right as "inalienable", reiterates the interdependence and indivisibility of all human rights.

the nexus between individual and community,<sup>20</sup> has been its inclusive nature, guaranteeing, *inter alia*, economic, social and cultural rights, or second generation rights,<sup>21</sup> and peoples' rights, or third generation or group rights.<sup>22</sup> This step, 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. However, the ideological distinction between the different categories of rights now seems less important in light of the Vienna Declaration on Human Rights which stresses that all human rights are universal, indivisible and interdependent.<sup>23</sup>

The right to development is guaranteed by Article 22 of the Banjul Charter which appears to be narrower than that under general international law, highlighting economic, social and cultural development.<sup>24</sup> It therefore seeks to promote opportunities for the advancement of the individual and the raising of the standard of living. The Conference therefore takes the opportunity to condemn poverty,<sup>25</sup> disease,<sup>26</sup> ignorance and illiteracy,<sup>27</sup> certain structural adjustment programmes

<sup>20</sup> See A.A. An-Naim/F.M. Deng (eds.), *Human Rights in Africa*, The Brookings Institution, Washington D.C., 1990; T. Maluwa, *International Law in Post-Colonial Africa*, The Hague, 1999, 130–137; Umozurike (note 1) 12–19.

<sup>21</sup> Naldi, *Organization* (note 1) 127–130; Umozurike (note 1) 45–49.

<sup>22</sup> Naldi, *Organization* (note 1) 131–138; Umozurike (note 1) 51–61.

<sup>23</sup> Vienna Declaration and Programme of Action, Part I, para. 5; UN Commission on Human Rights, resolution 1999/25, para. 3(d), UN Doc. E/CN.4/1999/167, 105. The Limburg Principles also describe economic, social and cultural rights as an integral part of international human rights law, *The Review* (International Commission of Jurists), (1986) No. 37, 43–55. Significantly, the UN Committee on Economic, Social and Cultural Rights has stated that State parties to the International Covenant on Economic, Social and Cultural Rights 1966 have assumed clear obligations in respect of the full realisation of the rights in question which require them to move expeditiously and effectively towards that goal, General comment 3, HRI/GEN/1/Rev.2, 55–59.

<sup>24</sup> Cf. Stockholm Declaration on the Human Environment 1972, (1972) 11 ILM 1416, Principle 8. The right to development can now be said to extend to the concepts of democracy, sustainability and good governance, UN Commission on Human Rights, resolution 1999/79, UN Doc. E/CN.4/1999/167, 253. See also, Agenda for Development, UN General Assembly resolution 51/240, para. 27; *Gabcikovo-Nagymaros Project Case*, (1998) 37 ILM 162 at 206, per Judge Weeramantry, Separate Opinion. The Declaration seems to acknowledge some of these links, see para. 3.

<sup>25</sup> It is estimated that 40% of the population of sub-Saharan Africa lives in poverty, UN Doc. E/C.12/1997/SR.27, para. 27. Unemployment is high, African Economic Report – 1998, para. 81. In Zambia, for example, the poverty level is currently 72.9%, UN Doc. E/CN.4/2000/SR.8, para. 81. The Vienna Declaration and Programme of Action establishes a link between poverty and the inhibition of human rights, Part I, para. 14. See also para. 25 thereof. The rights especially affected include the right to food, the right to health and the right to education. See further, Special Rapporteur Despouy's Final Report on human rights and extreme poverty, UN Doc. E/CN.4/Sub. 2/1996/13, and the report submitted by independent expert A.-M. Lizin on human rights and extreme poverty, UN Doc. E/CN.4/2000/52. It should be observed that in UN General Assembly resolution 50/107 a UN Decade for the Eradication of Poverty (1997–2006) was proclaimed. See also the Copenhagen Declaration on Social Development and Programme of Action and the World Summit on Social Development which provide a framework for eradicating poverty.

<sup>26</sup> See Article 16 of the Banjul Charter. According to the ECA, access to health care is generally poor in Africa, African Economic Report – 1998, paras. 78, 80.

<sup>27</sup> According to the ECA, the literacy rate in Africa seems to be 61%, African Economic Report – 1998, para. 75. Article 17 of the Banjul Charter guarantees the right to education.

giving rise to social dislocation and the debt problem<sup>28</sup> as inimical with the enjoyment of human rights.<sup>29</sup> It calls upon the international community to alleviate the debt burden in order to allow the maximisation of human rights.<sup>30</sup>

The Conference reaffirms its concern for the environment by identifying environmental degradation as a violation of human rights.<sup>31</sup> The link between the two is well-established in international law.<sup>32</sup> It must be recalled that the OAU paved the way in international law by establishing a satisfactory environment as a human right in Article 24 of the Banjul Charter.<sup>33</sup>

The reference to the right to peace and security reaffirms the commitment undertaken in Article 23 of the Banjul Charter.<sup>34</sup> It may be a trite observation that human rights abuses pose a threat to international peace and security and vice versa.<sup>35</sup>

<sup>28</sup> UN Commission on Human Rights, resolution 1999/22, UN Doc. E/CN.4/1999/167, 96.

<sup>29</sup> Para. 8(c), (e), (f).

<sup>30</sup> Para. 26. Zambia, for example, acknowledges that its efforts at development are seriously undermined by its external debt, UN Doc. E/CN.4/2000/SR.8, paras. 80–82. A concerted, albeit limited, response by the international community has been the HIPC Initiative developed in 1996 by the IMF and the World Bank, African Economic Report – 1998, Part I.A.6.

<sup>31</sup> Para. 8(n). Africa suffers from a number of environmental problems, see UN General Assembly resolution A/RES/S-19/2. In response thereto the UN Convention to Combat Desertification was adopted in 1994, (1994) 33 ILM 1328, which establishes, *inter alia*, a regional programme for Africa to fight the degradation of land and calls for the transfer of anti-desertification technologies to developing States. It should be observed that the OAU has sought to deal with the specific problem of toxic waste through the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa 1991, in: Naldi, Documents ... (note 1), 78. See further, Naldi, Organization (note 1) 217–220.

<sup>32</sup> *Lopez Ostra v. Spain*, (1994) Series A, Vol. 303-C; *Gabcikovo-Nagymaros Project Case*, (1998) 37 ILM 162 at 206, per Judge Weeramantry; Vienna Declaration and Programme of Action, Part I, para. 11(1); Stockholm Declaration on the Human Environment 1972, (1972) 11 ILM 1416; UN Commission on Human Rights, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Progress Report of the Special Rapporteur, UN Docs. E/CN.4/Sub.2/1991/8, E/CN.4/Sub.2/1992/7, 22–31, E/CN.4/Sub.2/1993/7, E/CN.4/Sub.2/1994/9, E/CN.4/Sub.2/1996/17, 33–35. See further, Naldi, Organization (note 1) 222; J. Downs, A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right, (1993) 3 Duke Journal of Comparative and International Law 351; W.P. Gormley, The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms, (1990) 3 Georgetown International Environmental Law Review 85; D. Shelton, Human Rights, Environmental Rights, and the Right to the Environment, (1991) 28 Stanford Journal of International Law 103.

<sup>33</sup> Cf. Article 11 of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights 1988 (Protocol of San Salvador), (1989) 28 ILM 156; Article 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, (1999) 38 ILM 517. This provision of the Banjul Charter has been criticised for its vagueness, R.R. Churchill, Environmental Rights in Existing Human Rights Treaties, in: A.E. Boyle/M.R. Anderson (eds.), Human Rights Approaches to Environmental Protection, Oxford, 1996, 89 at 104–107.

<sup>34</sup> Note UN General Assembly resolutions 50/173, 51/101 and 52/13 on a culture of peace.

<sup>35</sup> See, for example, UN Security Council resolution 788 (1992) on Liberia, resolution 794 (1992) on Somalia, resolution 955 (1994) on Rwanda and resolution 1304 (2000) on the Democratic Republic of the Congo. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Provisional Measures of Protection) (2000, unreported) the ICJ observed that

The AfCHPR has had occasion to pronounce on some of these second generation rights. Thus in *Union Interafricaine des Droits de l'Homme v. Zaïre* a violation of the right to health enshrined in Article 16 of the Banjul Charter was established when the State failed to provide safe drinking water, electricity and medicines.<sup>36</sup> The AfCHPR additionally found a violation of the right to education in Article 17 of the Banjul Charter when universities and secondary schools had been closed for a number of years.

In *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon* the AfCHPR held that the right to work guaranteed by Article 15 of the Banjul 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.<sup>37</sup>

Reflecting recent advances in constitutionalism across parts of Africa<sup>38</sup> the Conference "affirms the interdependence of the principles of good governance, the rule of law, democracy and development".<sup>39</sup> Sadly Africa has not generally had a history of constitutionalism and, barring a few exceptions, liberal democratic values have not taken deep roots. Most are partial democracies. Many ruling regimes have lacked popular support or democratic mandate. Elections have often been neither free nor fair. Regrettably, kleptocracies, bad governance, maladministration, mismanagement, malpractice, endemic corruption, coup d'états, human rights abuses, and breakdowns in civil society, leading even to collapsed states,

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grave and repeated violations of human rights had been committed on the territory of the Democratic Republic of the Congo and it therefore ordered the parties to ensure respect for fundamental human rights within the zone of conflict.

<sup>36</sup> Communication No. 100/93, (1997) 18 HRLJ 32. See also, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265; International Pen (note 4), where the AfCHPR held that the denial of medical treatment to detainees breached article 16.

<sup>37</sup> Communication No. 39/90, (1999) 6 IHRR 819. It has been suggested that the AfCHPR's interpretation of this right is a negative one, in the sense that a violation is likely to be established if the individual's capacity to work is obstructed, R. Murray, *Digest of Foreign Cases: African Commission on Human and Peoples' Rights*, (1999) 15 SAJHR 105 at 110.

<sup>38</sup> M. Sinjela, *Constitutionalism in Africa: Emerging Trends*, (1998) 60 *The Review (International Commission of Jurists)* 23.

<sup>39</sup> Para. 3; preambular para. 8. The OAU had paved the way by endorsing these principles in a couple of resolutions adopted at its Thirty-fifth Ordinary Summit in Algiers in July 1999, see Murray (note 1) 516 at 518. Cf. Articles 13(1) and 20(1) of the Banjul Charter, and see Umozurike (note 1) 36–38. See also, Vienna Declaration and Programme of Action, Part I, para. 9. The Vienna Declaration and Programme of Action establishes a link between democracy, respect for human rights and development, Part I, paras. 8, 10(3). In its resolution 1999/57 entitled "Promotion of the right to democracy", UN Doc. E/CN.4/1999/167, 194, the UN Commission on Human Rights declared that democracy fosters the full realisation of human rights. The resolution affirmed that the right of democratic governance includes the rights of freedom of expression and opinion, the right to freedom of information, the rule of law, the right to universal suffrage, the right to political participation, the right of citizens to equal access to public service, the right of citizens to choose their governmental system, and transparent and accountable governmental institutions. See further, *Civil Liberties Organization v. Nigeria* Communication No. 129/94, (1997) 18 HRLJ 35, where the AfCHPR sought to uphold the rule of law.

have tended to be the order of the day. Indeed, the Conference acknowledges the link between these situations and violations of human rights.<sup>40</sup> This state of affairs, however, has given rise in recent years to pressure for reform and democratisation. The Commonwealth has been instrumental in setting the lead, committing itself to an agenda of democracy and human rights.<sup>41</sup> Thus Nigeria's membership of the Commonwealth was suspended in 1995 as a result of human rights abuses.<sup>42</sup> The international community imposed sanctions on Sierra Leone following the coup d'état in 1997 which overthrew the democratically elected government.<sup>43</sup> The military coups in Lesotho that deposed King Moshoeshoe II led to the involvement of neighbouring States which mediated a compromise agreement initiating constitutional change leading to the restoration of the King in 1995 as a constitutional monarch.<sup>44</sup> Burundi's neighbours imposed sanctions against the regime of Major Buyoya following his takeover of power in July 1996. These sanctions were endorsed by the OAU in an effort to encourage negotiations between the warring ethnic groups in Burundi leading to a peaceful solution of the crisis.<sup>45</sup> While progress has certainly been made over the last decade Zimbabwe's slide into state-sponsored thuggery at the prospect of electoral gains by the opposition in 2000 demonstrates that the democratic values of pluralism, tolerance and the rule of law are under constant threat.

It is interesting to observe that the AfCHPR has opined that the forcible assumption of power is in breach of Articles 13(1) and 20(1) of the Banjul Charter and that the best form of government is one elected by and accountable to the people and has thus called upon military governments to hand over power to democratically elected representatives.<sup>46</sup> Moreover, it has condemned the planning or execution of coups d'état and any attempt to seize power by undemocratic means and has called upon African Governments to ensure that elections are transparent and fair.<sup>47</sup> In addition, it has condemned the military takeover in The Gambia in 1994 as a clear violation of the fundamental principle of democracy that governments should be based on the consent of the people and a "flagrant viola-

<sup>40</sup> Para. 8(g)-(i), (p)(r).

<sup>41</sup> See the Harare Commonwealth Declaration 1991, (1992) 18 CLB 347-349; A. Duxbury, *Rejuvenating the Commonwealth: The Human Rights Remedy*, (1997) 46 ICLQ 344.

<sup>42</sup> K. Magliveras, *Exclusion from Participation in International Organisations*, The Hague, 1999, 188-192. The AfCHPR also condemned the abuse of human rights in Nigeria, Eighth Annual Activity Report, Resolutions on Nigeria, (1996) 3 IHRR 242-243, 247-248.

<sup>43</sup> Under resolution 1132 (1997) the UN Security Council imposed sanctions on Sierra Leone and authorised ECOWAS to enforce them. Moreover, the OAU authorised ECOMOG to remove the military junta by force, Keesing's, (1997) 4341674. In addition, Sierra Leone was suspended from the Commonwealth, Magliveras, *ibid.*, 192-194.

<sup>44</sup> UN Doc. CERD/C/SR.1166, 3-4.

<sup>45</sup> UN Doc. CERD/C/SR.1175, 5-9; UN Doc. E/CN.4/1997/12, paras. 18, 22. UN Security Council resolution 1072 A (1996) expressed "strong support for the efforts of the regional leaders". The sanctions were lifted in early 1999. See also, UN Doc. HRI/CORE/1/Add.16/Rev.1.

<sup>46</sup> Eighth Annual Activity Report, Resolution on the Military, (1996) 3 IHRR 242.

<sup>47</sup> Eighth Annual Activity Report, Resolution on the Human Rights Situation in Africa, (1996) 3 IHRR 245-246.

tion of the right of the Gambian people to freely choose their government",<sup>48</sup> and further, it called upon the Nigerian military government to respect the right of free participation in government and the rule of law.<sup>49</sup>

The Conference acknowledges that the objectives of good governance cannot be easily achieved without an independent and impartial judiciary.<sup>50</sup> The role of the judiciary in Africa has not been easy, particularly as its independence has often been under threat from the executive or military.<sup>51</sup> The AfCHPR has therefore called for the independence of the judiciary to be respected.<sup>52</sup> Thus in *Civil Liberties Organization v. Nigeria* the AfCHPR found that the ousting of the jurisdiction of the courts to adjudicate the legality of decrees issued by the military regime violated, *inter alia*, Article 26 of the Banjul Charter.<sup>53</sup> The AfCHPR stated that Article 26 "clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power".<sup>54</sup> But courts of law exercising a judicial function must also be

<sup>48</sup> Eighth Annual Activity Report, Resolutions on The Gambia, (1996) 3 IHRR 244–245, 248. In *Peoples' Democratic Organisation for Independence and Socialism v. The Gambia*, Communication No. 44/90, (1999) 6 IHRR 823 at 825, a friendly settlement was reached when the respondent government accepted that its electoral laws were defective and declared its intention to review them in order to ensure regular, free and fair elections.

<sup>49</sup> Eighth Annual Activity Report, Resolutions on Nigeria, (1996) 3 IHRR 242–243, 247–248. See further, *Civil Liberties Organization v. Nigeria*, Communication No. 129/94, (1997) 18 HRLJ 35; and *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, (2000) 7 IHRR 259, where the AfCHPR held that the annulment of a free and fair election constituted violations of articles 13(1) and 20(1).

<sup>50</sup> Para. 4. The lack of an independent judiciary is considered as contributing to the violation of human rights in Africa, para. 8(k). See further, Vienna Declaration and Programme of Action, Part I, para. 27; UN Basic Principles on the Independence of the Judiciary, The United Nations and Human Rights 1945–1995, United Nations Publication, New York, 1995, 313.

<sup>51</sup> Pressure on the judiciary from the executive is common in much of Africa, notwithstanding Article 26 of the Banjul Charter, Ankuamah (note 3) 125–126. See further, the opinion of the UN Human Rights Committee in *Olo Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, UN Doc. A/49/40, Annex IX, BB; and the report of Special Rapporteur Mr Param Cumaraswamy on the independence of judges and lawyers, UN Doc. E/CN.4/2000/61. In *S. v. Heita and Another*, 1992 (3) SA 785 (Nm) at 789, 791, the significance of judicial independence for the effective functioning of the judiciary "without which the Constitution itself cannot survive" was emphasised. O'Linn J. stated that the courts in Namibia are subject only to the Constitution and the law, which "simply means that it is also not subject to the dictates of political parties, even if that party is the majority party. Similarly it is not subject to any other pressure group". For further discussion, see B. Ajibola/D. van Zyl (eds.), *The Judiciary in Africa*, Cape Town, 1998, 105–181.

<sup>52</sup> Eighth Annual Activity Report, Resolution on The Gambia, (1996) 3 IHRR 244–245; *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105 (etc.)/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265.

<sup>53</sup> Communication No. 129/94, (1997) 18 HRLJ 35; *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105 (etc.)/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265.

<sup>54</sup> Communication No. 129/94, (1997) 18 HRLJ 35, para. 14. The AfCHPR has stated further that "the courts are a critical monitor of the legality of government action, which no lawful government acting in good faith should seek to evade. The courts' ability to examine government actions and, if necessary, halt those violate human rights or constitutional provisions, is an essential protection for all citizens", *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265, para. 79.



properly constituted. Hence the AfCHPR has held that a tribunal composed of members of the armed forces, the police and the judiciary lacks independence.<sup>55</sup>

A plea is also made for the prompt and affordable delivery of justice. The former seems to reaffirm the right to liberty and security of the person as guaranteed by Article 6 of the Banjul Charter and the right to a hearing within a reasonable time guaranteed by Article 7(1)(d) of the Banjul Charter. Whereas resource constraints in many African countries often make compliance with these requirements difficult, the administration of justice should not be subject to undue delays.<sup>56</sup> Thus in *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon* the AfCHPR held that arbitrary detention violated Article 6 of the Banjul Charter and that two years without a hearing or projected trial date violated Article 7(1)(d) of the Banjul Charter.<sup>57</sup> Even worse, in *Alhassan Abubakar v. Ghana* the complainant endured detention without trial for seven years.<sup>58</sup> Furthermore, the AfCHPR has found that the indefinite detention of individuals constitutes a violation of Articles 6 and 7 of the Banjul Charter.<sup>59</sup>

The latter plea raises practical questions concerning the availability of legal costs and legal aid, issues that are not specifically addressed by the Banjul Charter.<sup>60</sup>

The Conference identifies the shared core values on which human rights are based and calls for account to be taken of positive traditional and cultural values.<sup>61</sup> Clearly, the basic aspirations of the human condition are thereby articulated and it must be observed that the instability that prevails in much of Africa cannot create the conditions necessary to satisfy these basic desires. These include, first, respect for the sanctity of life. This is a sweeping statement that requires clarification. It is unlikely that this phrase is to be read literally since the Banjul Charter itself does not provide an absolute guarantee.<sup>62</sup> The issue of capital punishment,

<sup>55</sup> *Constitutional Rights Project (in respect of Wahab Akamu, G. Adeg and others) v. Nigeria*, Communication No. 60/91, (1996) 3 IHRR 132; *Constitutional Rights Project (in respect of Zamani Lakwot and others) v. Nigeria*, Communication No. 87/93, (1996) 3 IHRR 137; Eighth Annual Activity Report, Resolution on Nigeria, (1996) 3 IHRR 247–248. See further, International Pen (note 4). See also, *De Lange v. Smuts NO and Others*, 1998 (3) SA 785 (CC) at 813–815.

<sup>56</sup> In *Lubutu v. Zambia*, Communication No. 390/90, the UN Human Rights Committee found that a delay of eight years between arrest and final judgement was attributable to the lack of administrative support for the judiciary.

<sup>57</sup> Communication No. 39/90, (1999) 6 IHRR 819. See also, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, (2000) 7 IHRR 259 where the AfCHPR found that detention without charge and without possibility of bail for a period of three years violated Article 6. In *Kone v. Senegal*, Communication No. 386/1989, the applicant was subjected to a delay of four years and four months, during which time he was kept in custody, and no special circumstances were present justifying such delay.

<sup>58</sup> Communication No. 103/93, (1999) 6 IHRR 832.

<sup>59</sup> *Krischana Achutan (on behalf of Aleke Banda) v. Malawi*, Communication No. 64/92, (1996) 3 IHRR 134; *Free Legal Assistance Group and Others v. Zaire*, Communication No. 25/89, (1997) 18 HRLJ 32.

<sup>60</sup> Cf. *Airey v. Ireland*, Series A, Vol. 32 (1979) where the European Court of Human Rights found that the right of access to the courts was effectively foreclosed due to prohibitive legal costs and that the availability of legal aid was one of the means of securing such access.

<sup>61</sup> Para. 5. Cf. Article 17(3) of the Banjul Charter.

<sup>62</sup> Article 4 of the Banjul Charter, and see, Naldi, Organization (note 1) 117–118.

for instance, immediately arises. The majority of African States retain the death penalty.<sup>63</sup> Rather it is the prohibition on the arbitrary deprivation of life that is reinforced. Thus the AfCHPR has condemned arbitrary<sup>64</sup> and extrajudicial killings.<sup>65</sup>

Naturally, as the Declaration itself recognises, respect for life has inextricable links with other human rights, the most obvious being second and third generation rights such as health, food, development and a healthy environment. These all have resource implications which African countries have difficulty meeting for a variety of reasons.

Respect for human dignity is also emphasised.<sup>66</sup> This augments Article 5 of the Banjul Charter which prohibits all forms of exploitation and degradation, particularly torture and inhuman and degrading treatment and punishment. The AfCHPR has found violations of this provision to have been established on a number of occasions.<sup>67</sup>

<sup>63</sup> Angola, Cape Verde, Guinea-Bissau, Mauritius, Mozambique, Namibia, Sao Tome e Principe, Seychelles and South Africa have abolished the death penalty. Mozambique, Namibia and Seychelles have ratified the Second Optional Protocol to the ICCPR. A number of other States are abolitionists *de facto*, see further, R. Hood, *The Death Penalty*, 2<sup>nd</sup> ed., Oxford, 1996, 241–246; UN Doc. E/CN.4/1999/52. It should also be observed that Article 5(3) of the African Charter on the Rights and Welfare of the Child prohibits the sentence of death being pronounced on a child.

<sup>64</sup> *Krischna Achutan (on behalf of Aleke Banda) v. Malawi; Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Communication Nos. 64/92, 68/92, 78/92, (1996) 3 IHRR 134. In *International Pen* (note 4), para. 103, the AfCHPR held that since the trials which ordered the executions were fundamentally flawed and in violation of article 7, “any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4.” See also, *Miango v. Zaire*, Communication No. 194/1985, UN Doc. A/43/40, 218.

<sup>65</sup> *Free Legal Assistance Group and Others v. Zaire*, Communication No. 47/90, (1997) 18 HRLJ 32; *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Démocrates and Others v. Rwanda*, Communication Nos. 27/89, 46/91, 49/91, 99/93, (1999) 6 IHRR 816. See also, *Tshishimbi v. Zaire*, Communication No. 542/1993.

<sup>66</sup> In *S. v. Makwanyane and Another*, 1995 (6) BCLR 665 (CC) at para. 391, O’Regan J. stated, “Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern”. See also, *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC) at 1570–1574 per Sachs J.

<sup>67</sup> *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Communication Nos. 68/92, 78/92, (1996) 3 IHRR 134; *Free Legal Assistance Group and Others v. Zaire*, Communication No. 25/89, (1997) 18 HRLJ 32; *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, (1997) 18 HRLJ 34; *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Démocrates and Others v. Rwanda*, Communication Nos. 27/89, 46/91, 49/91, 99/93, (1999) 6 IHRR 816; *Modise v. Botswana*, Communication No. 97/93, (1999) 6 IHRR 828; *Amnesty International v. Zambia*, Communication No. 212/98, (2000) 7 IHRR 286. See also, *Birhashwirwa and Mulumba v. Zaire*, Communication Nos. 241 and 242/1987, UN Doc. A/45/40, Annex IX, I; *Bozize v. Central African Republic*, Communication No. 428/1990, UN Doc. HR/94/24; *El-Megreisi v. Libya*, Communication No. 440/1990, UN Doc. HR/94/24; *Kalenga v. Zambia*, Communication No. 326/1988; *Kanana v. Zaire*, Communication No. 366/1989, UN Doc. A/49/40, Annex IX, J; *Marais v. Madagascar*, Communication No. 49/1979; *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, UN Doc. CCPR/C/51/D/414/1990; *Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991. Ankumah (note 3) is therefore moved to write that torture is practiced with “impunity” in Africa, 116.

Secondly, seeking to promote the values associated with cultural and other diversity, tolerance of differences, a distinguishing feature of liberal, pluralist democracies.<sup>68</sup> In this context, the Conference accepts that exploitation of ethnicity, racism and religious intolerance all contribute to the violation of human rights.<sup>69</sup> The genocidal massacres in Rwanda and Burundi and the ongoing conflict in the Democratic Republic of the Congo (former Zaire) are testimony to the evil of ethnic hatred. Thus in *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Democrates and Others v. Rwanda* the AfCHPR held that the denial of rights to individuals on account of their nationality or membership of a certain ethnic group violated Article 2 of the Banjul Charter.<sup>70</sup> President Mugabe's cynical ploy to exploit race issues for electoral gain in Zimbabwe during 2000 must therefore be deplored. The introduction of shariah law in 2000 in some of Nigeria's northern states has led to outbreaks of communal violence. Restrictions on rights and liberties to combat racism and related hatred are therefore considered legitimate.<sup>71</sup>

The freedom of conscience and religion is guaranteed by Article 8 of the Banjul Charter. In *Les Temoins de Jehovah v. Zaire* the AfCHPR held that the harassment of Jehovah's Witnesses, absent a threat to law and order, violated this provision.<sup>72</sup>

<sup>68</sup> In *South African National Defence Union v. Minister of Defence and Another*, 1999 (6) BCLR 615 (CC) at 623, O'Regan J. emphasised the importance of tolerance of different views by society, saying that, "Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views." See also, *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC) at 1574–1577 per Sachs J.; *Handyside v. United Kingdom*, (1976) Series A, Vol. 24, para. 49; *Olo Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, UN Doc. A/49/40, Annex IX, BB. See also, the Vienna Declaration and Programme of Action, Part II, B.1. In its resolution 1998/21 entitled "Tolerance and pluralism as indivisible elements in the promotion and protection of human rights", UN Doc. E/CN.4/1998/177, 84, the UN Commission on Human Rights recognised that tolerance and pluralism strengthen democracy, facilitate the full enjoyment of all human rights and thereby constitute a sound foundation for civil society, social harmony and peace.

It should be observed that in much of Africa little tolerance of homosexuality is shown, e.g., Zimbabwe, where President Mugabe has made homophobic statements on a number of occasions, see *Courson v. Zimbabwe*, Communication No. 136/94, (1996) 3 IHRR 129, and Ankuamah (note 3) 174. Cf. section 9(3) of the Constitution of South Africa and *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC).

<sup>69</sup> Para. 8(b), (s). See also, Article 28 of the Banjul Charter. According to Umozurike (note 1), Article 19 of the Banjul Charter protects minorities, 53–54. In its resolution 1999/78 on "Racism, racial discrimination, xenophobia and related intolerance", UN Doc. E/CN.4/1999/167, 242, para. 2, the UN Commission on Human Rights declares that "racism and racial discrimination are among the most serious violations of human rights in the contemporary world".

<sup>70</sup> Communication Nos. 27/89, 46/91, 49/91, 99/93, (1999) 6 IHRR 816. See also, *Prosecutor v. Akayesu*, (1998) 37 ILM 1399.

<sup>71</sup> See Articles 5(1) and 20 ICCPR, Article 17 ECHR, and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination 1966. Note *Kauesa v. Minister of Home Affairs*, 1994 (3) BCLR 1 (NmH) where the High Court of Namibia held that "hate speech" was not protected under the Namibian Constitution.

<sup>72</sup> Communication No. 56/91, (1997) 18 HRLJ 32. Cf. *Kokkinakis v. Greece*, (1993) Series A, Vol. 260-A, paras. 45–50.

Recognising that the family unit as the basis of society needs to be strengthened,<sup>73</sup> better protection of women and children's rights is also sought,<sup>74</sup> and the abolition of discrimination against women<sup>75</sup> and children<sup>76</sup> and cultural practices which dehumanise or demean women and children is called for.<sup>77</sup> Women in many African countries, often described as "junior males", routinely suffer discrimination in areas such as succession, marriage and divorce.<sup>78</sup>

With regard to harmful cultural or traditional practices<sup>79</sup> the issues of, *inter alia*, female genital mutilation<sup>80</sup> and child marriages<sup>81</sup> must be addressed. Furthermore, the Conference calls upon States to adopt measures to eradicate violence against women<sup>82</sup> and children.<sup>83</sup> In particular, the Conference wants to see

<sup>73</sup> Para. 10. Cf. Article 18(1) of the Banjul Charter. See further, *Amnesty International v. Zambia*, Communication No. 212/98, (2000) 7 IHRR 286.

<sup>74</sup> Cf. Article 18(3) of the Banjul Charter. According to the Vienna Declaration and Programme of Action, Part I, para. 18, and the UN Fourth World Conference on Women (Beijing Platform for Action), (1996) 35 ILM 401, para. 213, the human rights of women and of the girl-child are an inalienable, integral and indivisible part of human rights. It is interesting to note that in 1999 the AfCHPR adopted a draft Protocol to the Banjul Charter on Women's Rights, 26<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, 1–15 November 1999, Kigali, Rwanda, Final Communiqué, para. 16.

<sup>75</sup> Cf. Article 18(3) of the Banjul Charter; UN Convention on the Elimination of All Forms of Discrimination Against Women 1979; Vienna Declaration and Programme of Action, Part I, para. 18; Beijing Platform for Action, para. 214.

<sup>76</sup> See Articles 3, 21(1)(b) and 26 of the African Charter on the Rights and Welfare of the Child, in: Naldi, Documents ... (note 1) 183; Article 2(1) of the UN Convention on the Rights of the Child; Beijing Platform for Action, para. 93.

<sup>77</sup> Para. 6.

<sup>78</sup> As Ankumah (note 3) points out, in many African countries the husband is considered the custodian of the wife's person and property, 153–154. See the controversial recent judgement of the Supreme Court of Zimbabwe in *Magaya v. Magaya*, (unreported), noted in (1999) 43 JAL 248. But cf., *Dow v. Attorney-General*, (1992) LRC (Const) 623; *Ephraim v. Pastory*, (1990) LRC (Const) 757. See also, *Aumeeruddy-Cziffra v. Mauritius*, (1983) 4 HRLJ 139. And further, the Vienna Declaration and Plan of Action, Part II, para. 39; and the report of Special Rapporteur Ms. Radhika Coomaraswamy on violence against women, UN Doc. E/CN.4/2000/68/Add.5, 4–6.

<sup>79</sup> Para. 8(j) accepts that harmful traditional practices violate human rights, whereas para. 10 sees their removal as contributing to the promotion of human rights. See further, Beijing Plan of Action, paras. 113, 115, 118, 124, 224, 276, 277; Vienna Declaration and Plan of Action, Part I, para. 18(2), Part II, paras. 38, 49; Article 21 of the African Charter on the Rights and Welfare of the Child. In *Dow v. Attorney-General*, (1992) 2 LRC 623, the Botswana Court of Appeal held that custom and tradition must always yield to the Constitution and express legislation.

<sup>80</sup> Beijing Platform for Action, para. 283(d). It has been reported that female circumcision exists in at least twenty-five countries in Africa, UN Doc. E/CN.4/Sub.2/1991/6, 3. A WHO Regional Plan of Action to Accelerate the Elimination of Female Genital Mutilation was launched in many African Countries in March 1997, UN Doc. E/CN.4/Sub.2/1997/SR.14, para. 15.

<sup>81</sup> See Article 21(2) of the African Charter on the Rights and Welfare of the Child; Beijing Platform for Action, paras. 93, 274(e).

<sup>82</sup> See the Vienna Declaration and Programme of Action, Part II, para. 38; Beijing Platform for Action, paras. 99, 113.

<sup>83</sup> See Article 16 of the African Charter on the Rights and Welfare of the Child; Articles 19 and 37(a) of the UN Convention on the Rights of the Child; Beijing Platform for Action, paras. 99, 283(b), (d).

It should be observed that many African States retain judicial corporal punishment for juveniles although it has been declared unconstitutional by the Constitutional Court of South Africa, *S. v. Williams and Others*, 1995 (7) BCLR 861 (CC), the Supreme Court of Namibia, *Ex Parte Attorney*

an end to the use of child soldiers and urges better protection of peoples in conflict situations.<sup>84</sup>

In addition, the Conference, recognising that contemporary forms of slavery contribute to the violation of human rights in Africa,<sup>85</sup> recommends that steps be taken to eradicate child labour,<sup>86</sup> sexual exploitation of children,<sup>87</sup> trafficking in children,<sup>88</sup> and to protect children in conflict with the law<sup>89</sup> and refugee children.<sup>90</sup> The Vienna Declaration and Programme of Action has condemned these examples of contemporary forms of slavery.<sup>91</sup>

The Conference further urges full respect for the rights of people with disability<sup>92</sup> and people living with HIV-AIDS.<sup>93</sup> The impact of this disease on the fabric of

*General, Namibia: In re Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NmS), and the Supreme Court of Zimbabwe, *S. v. Juvenile*, 1990 (4) SA 151 (ZS) (although reversed by the Constitution of Zimbabwe Amendment (No. 11) Act 1990). It appears that Kenya is seeking to abolish such punishment which is presently provided for under Article 74(2) of the Constitution, UN Doc., E/CN.4/2000/9/Add.4, para. 52.

<sup>84</sup> See Article 22 of the African Charter on the Rights and Welfare of the Child; Article 38 of the UN Convention on the Rights of the Child; and note the draft optional protocol to the UN Convention on the Rights of the Child on involvement of children in armed conflict, UN Doc. E/CN.4/2000/74. See further, UN Security Council resolution 1261 (1999). It is estimated that there are some 120,000 child soldiers in Africa, UN Doc. E/CN.4/2000/3, para. 38. See also, Vienna Declaration and Plan of Action, Part I, para. 29, Part II, para. 50; Beijing Platform for Action, paras. 131–140.

<sup>85</sup> Para. 8(a).

<sup>86</sup> See Article 15 of the African Charter on the Rights and Welfare of the Child; Article 32 of the UN Convention on the Rights of the Child; Beijing Platform for Action, para. 282; ILO Convention No. 182 Concerning the Prohibition and Elimination of the Worst Forms of Child Labour, (1999) 38 ILM 1207. There appears to have been a sharp increase in the exploitation of child labour across Africa in recent years as a result of unfavourable economic conditions, including the use of children in crime and drugs-related activities, UN Docs. E/CN.4/Sub.2/1993/30, para. 39; E/CN.4/Sub.2/1993/30, paras. 97–98.

<sup>87</sup> See Article 27 of the African Charter on the Rights and Welfare of the Child; Article 34 of the UN Convention on the Rights of the Child; Vienna Declaration and Plan of Action, Part II, para. 48; Beijing Platform for Action, para. 283(d); and note the draft optional protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. E/CN.4/1998/103.

<sup>88</sup> See Article 29 of the African Charter on the Rights and Welfare of the Child; Beijing Platform for Action, para. 99; and note the draft optional protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. E/CN.4/1998/103. The abduction, sale and trafficking in children seems widespread in Sudan, UN Doc. E/CN.4/1997/95, para. 47.

<sup>89</sup> See Article 17 of the African Charter on the Rights and Welfare of the Child; Articles 37 and 40 of the UN Convention on the Rights of the Child. It appears that many African countries lack special jurisdictions for juveniles, UN Doc. E/CN.4/Sub.2/1991/50, para. 32. See further, Naldi, *Organization* (note 1) 183, at note 134.

<sup>90</sup> See Article 23 of the African Charter on the Rights and Welfare of the Child; Article 22 of the UN Convention on the Rights of the Child. See further, Naldi, *ibid.*, 90.

<sup>91</sup> Vienna Declaration and Programme of Action, Part I, para. 21.

<sup>92</sup> See Article 18(4) of the Banjul Charter; Article 13 of the African Charter on the Rights and Welfare of the Child; Article 23 of the UN Convention on the Rights of the Child. See also the Vienna Declaration and Plan of Action, Part II, paras. 63–65. The UN Committee on Economic, Social and Cultural Rights has stated that it must now be widely accepted that the rights of people with disabilities must be protected and promoted through legislation and policies, General comment 5, UN Doc. HRI/GEN/1/Rev.2, 66–70. Note Zimbabwe's Disabled Persons Act, UN Doc. CCPR/C/74/Add.3, para. 6(c).

<sup>93</sup> See also the Vienna Declaration and Plan of Action, Part I, para. 21; Beijing Platform for Action, paras. 98, 281(d)–(e).

African society must not be underestimated,<sup>94</sup> straining already limited resources.<sup>95</sup>

The Conference, acknowledging the link between human rights violations and population displacement,<sup>96</sup> calls for the problem of refugees and displaced persons to be addressed.<sup>97</sup> A combination of circumstances have caused human dislocation on a massive scale in Africa.<sup>98</sup> Notwithstanding the progressive nature of the OAU Convention on Refugees,<sup>99</sup> many African States have found that such population movements have stretched their ability to cope. Most recently, the conflict in the Great Lakes region of Central Africa gave rise to an exodus of some two million refugees and displaced persons, creating serious logistical, environmental and security problems for neighbouring countries. Indeed, on many occasions these States were unable to meet their legal obligations.<sup>100</sup> In *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Démocrates v. Rwanda* the AfCHPR had to consider the alleged expulsion from Rwanda of Burundian refugees on the grounds that they constituted a security risk.<sup>101</sup> The AfCHPR stated that Article 12 of the Banjul Charter included "a general protection of all those who are subject to persecution, that they may seek refuge in another state".<sup>102</sup> It found that the applicants had been subjected to arbitrary expulsion in violation of Articles 2 and 12 of the Banjul Charter, that they had been expelled *en masse* on the basis of their nationality in violation of Article 12(5) of the Banjul Charter, and that denying them the opportunity of putting their case before the national courts violated Article 7(1) of the Banjul Charter.

<sup>94</sup> African Economic Report – 1998, Economic Commission for Africa, para. 79, which states that 14 million people are affected by HIV/AIDS in sub-Saharan Africa. According to the World Bank, there are 23 million people with HIV/AIDS in Africa, *The Guardian* (London), April 14 2000, 27. See also, UN Doc. E/CN.4/2000/51, 12. As Zambia has acknowledged, social and economic development is threatened as HIV/AIDS hits the productive age group, UN Doc. E/CN.4/2000/SR.8, para. 87; UN Doc. E/CN.4/2000/51. James Wolfensohn, president of the World Bank, is quoted as stating that checking the spread of AIDS has probably become the "most important development challenge facing us in Africa today", *ibid.* UN Secretary-General Kofi Annan has sought to draw attention to the adverse impact of HIV/AIDS in Africa, UN Doc. E/CN.4/1999/76.

<sup>95</sup> United Nations, Report of the Secretary-General on: Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, (1998) 10 RADIC 549, para. 87. According to the ECA, access to health care in Africa is generally poor, African Economic Report – 1998, paras. 78, 80. The right to health is protected by Article 18 of the Banjul Charter and Article 14 of the African Charter of the Rights and Welfare of the Child. In *Union Interafricaine des Droits de l'Homme v. Zaire*, Communication No. 100/93, (1997) 18 HRLJ 32, the AfCHPR found that a shortage of medicine constituted a violation of Article 16.

<sup>96</sup> See preambular para. 8(d); Vienna Declaration and Plan of Action, Part I, para. 23(2). See further, Naldi, *Organization* (note 1) 99, at note 1.

<sup>97</sup> Para. 9. It should be observed that the UN Commission on Human Rights has adopted the Guiding Principles on Internal Displacement setting out the rights and guarantees under international law relevant to the protection of internally displaced persons, UN Doc. E/CN.4/1998/53/Add.2.

<sup>98</sup> Most recently in Burundi in September 1999, UN Doc. E/CN.4/2000/NGO/22, 4.

<sup>99</sup> See Naldi, *Organization* (note 1) 79–88.

<sup>100</sup> *Ibid.*, 84, 85–86.

<sup>101</sup> Communication No. 27/89, (1999) 6 IHRR 816.

<sup>102</sup> Communication No. 27/89, (1999) 6 IHRR 816, para. 30.

The Conference expresses deep concern about acts of genocide, crimes against humanity and war crimes that have been perpetrated in parts of Africa and calls both for their elimination and adequate treatment.<sup>103</sup> The Banjul Charter does not expressly address such massive violations of human rights which, in the light of the recent history of communal violence and "ethnic cleansing" in parts of Africa exemplified by the genocidal atrocities in the Great Lakes region, seems regrettable.<sup>104</sup> However, under Article 58(1) of the Banjul Charter the AfCHPR is allowed to draw to the OAU's attention cases revealing "the existence of a series of serious or massive violations of human and peoples' rights".<sup>105</sup> Thus the AfCHPR has been able to rely on this provision to find that events in Rwanda amounted to, *inter alia*, gross violations of human rights.<sup>106</sup>

In addition, the Conference condemns terrorism as a violation of human rights, in particular the right to life.<sup>107</sup> It also urges African States to adopt an African convention to combat this problem.<sup>108</sup>

<sup>103</sup> Para 11. See also, preambular paras. 6, 8(s). And see, Vienna Declaration and Programme of Action, Part I, para. 28. See further, the Statement on Africa adopted by the UN Committee on the Elimination of Racial Discrimination, UN Doc. A/54/18, 11–12. It is interesting to note that Hissene Habre, former president of Chad, has been indicted in Senegal under the UN Convention Against Torture 1984 for human rights abuses, (2000) 16 International Enforcement Law Reporter 634.

<sup>104</sup> It should be observed that the International Criminal Tribunal for Rwanda has found as proven accusations of genocide and crimes against humanity, *The Prosecutor v. Akayesu*, (1998) 37 ILM 1399; *The Prosecutor v. Kambanda*, (1998) 37 ILM 1411; and most recently, *The Prosecutor v. Musema*, (2000) 16 International Enforcement Law Reporter 652. Rwanda itself is trying suspects before a special genocide court but in an effort to expedite justice the introduction of a traditional form of trials known as "gacaca" is contemplated, Report on the situation of human rights in Rwanda submitted by the Special Representative, Michel Moussalli, UN Doc. E/CN.4/2000/41, 27–32. According to the UN Commission on Human Rights, violations of human rights and international humanitarian law continue in the Democratic Republic of the Congo, resolution 1999/56, UN Doc. E/CN.4/1999/167, 189.

<sup>105</sup> *Free Legal Assistance Group and Others v. Zaïre*, Communication No. 25/89, (1997) 18 HRLJ 32; *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, (1997) 18 HRLJ 34. On this question, see R. Murray, *Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms*, (1999) 17 NQHR 109.

<sup>106</sup> *Organisation Mondiale Contre La Torture and the Association Internationale des Juristes Démocrates and Others v. Rwanda*, Communication Nos. 27/89, 46/91, 49/91, 99/93, (1999) 6 IHRR 816. See also, *Armed Activities on the Territory of the Congo*, where the ICJ noted that it was not disputed that grave violations of human rights, including massacres, had occurred on the territory of the Democratic Republic of the Congo.

<sup>107</sup> Para. 12; see also, para. 8(q). It should be observed that Article 3(5) of the OAU Charter condemns political assassinations and subversive activities. This proscription was reinforced by the adoption in 1965 of the Declaration on the Problem of Subversion, text in: Naldi, Documents ... (note 1) 57, according to which Member States undertake not to tolerate any acts of subversion against the OAU or its Member States. See also, Article 23(2)(b) of the Banjul Charter. See further, Naldi, *Organization* (note 1) 11.

<sup>108</sup> The OAU adopted the Convention against Terrorism at its Thirty-fifth Ordinary Session held in Algiers in July 1999, see Murray (note 1) 516 at 517. Cf. the International Convention for the Suppression of Terrorist Bombings 1997, and the International Convention for the Suppression of the Financing of Terrorism 1999. For analysis of these conventions, see K.D. Magliveras, *A Critical Examination of the UN International Convention on the Suppression of Terrorist Bombings*, (1998)

The Conference seeks to safeguard the values that promote civil society. Recognising the role of the media as a public watchdog, the Conference urges States to guarantee a free and independent press.<sup>109</sup> It is a trite observation that the freedom of political expression and the freedom of the press in society is fundamental.<sup>110</sup> The press has a pre-eminent role because it provides the general public with information and with a means of forming opinions on political leaders; it must therefore be allowed to pass legitimate comment.<sup>111</sup>

Lack of freedom of association is also identified as a source of violations of human rights.<sup>112</sup> Article 10 of the Banjul Charter, which guarantees this freedom, is part of the problem because its wording is such that it is capable of negating the very essence of the right.<sup>113</sup> Nevertheless, the AfCHPR has interpreted this provision creatively, stating that there is a duty on the State "to abstain from interfering with the free formation of associations", and that "there must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends".<sup>114</sup>

The Conference recognises that non-compliance with the provisions of the OAU Charter on territorial integrity, the inviolability of colonial borders and the right to self-determination has contributed to the problems facing Africa.<sup>115</sup> These

14 International Enforcement Law Reporter 298; K.D. Magliveras, *Tightening the Grip on Terrorism: The International Convention on the Suppression of Terrorist Financing*, (2000) 16 International Enforcement Law Reporter 637.

<sup>109</sup> Para. 21; Preamble para. 8(m).

<sup>110</sup> *Lingens v. Austria*, Series A, Vol. 103 (1986); *Aduayom et al. v. Togo*, Communication Nos. 422-424/1990. It is interesting to note that the Banjul Charter does not expressly guarantee the freedom of the press, Article 9 thereof simply enshrines the freedom to receive information and to express and disseminate opinion. However, the practice of the AfCHPR establishes that the freedom of the press must be upheld, Eighth Annual Activity Report, (1996) 3 IHRR 242-243, 245-246, 247-248. See also, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, (2000) 7 IHRR 259, and *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265; International Pen (note 4).

<sup>111</sup> *Lingens v. Austria*, Series A, Vol. 103 (1986); *Aduayom et al. v. Togo*, Communication Nos. 422-424/1990; *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265, paras. 72-75.

<sup>112</sup> Para. 8(m).

<sup>113</sup> See Naldi, Organization (note 1) 115. However, it is encouraging to observe that the AfCHPR has recently opined that limitation must never render rights illusory and that limitations must be based on a legitimate state interest, must be strictly proportionate and absolutely necessary for the advantages to be obtained, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, (2000) 7 IHRR 265, 271.

<sup>114</sup> *Civil Liberties Organization in respect of Nigerian Bar Association v. Nigeria*, Communication No. 101/93, quoted in R. Murray (note 37), (1997) 13 SAJHR 666 at 677-678. See further, International Pen (note 4).

<sup>115</sup> Para. 8(o); United Nations, Report of the Secretary-General on: Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, (1998) 10 RADIC 550-551, para. 8. See also, Articles 2(1)(c) and 3(3) of the Banjul Charter, and the Resolution on the Intangibility of Frontiers, in: Naldi, Documents ... (note 1) 49. This commitment has been reinforced by the Cairo Declaration on the OAU Mechanism for Conflict Prevention, Management and Resolution, (1994) 6 RADIC 158, para. 14, which lists the "inviolability of borders inherited from colonialism" as one of the "objectives and principles of the OAU Charter". See further, Naldi, Organization (note 1) 11-14.



tensions can be attributed in part to the legacy of the colonial division of Africa. The principle of *uti possidetis* has therefore been invoked to bring stability to the continent, not always successfully.<sup>116</sup> However, the relationship between the principle of *uti possidetis* and the right to self-determination is an uneasy one and it appears that, in order to avoid "balkanisation", the latter is qualified by the former.<sup>117</sup> The OAU has always opposed the view that the right of self-determination encompasses a right to secession.<sup>118</sup> However, in 1993 it was forced to accept the independence of Eritrea from Ethiopia.<sup>119</sup>

The AfCHPR was confronted in *Katangese Peoples' Congress v. Zaire* with the difficult question of assessing the nature and scope of the right to self-determination under Article 20(1) of the Banjul Charter in a claim requesting, *inter alia*, recognition of the independence of Katanga.<sup>120</sup> The AfCHPR, endorsing that all peoples have a right to self-determination,<sup>121</sup> nevertheless acknowledged that the definition of "peoples" and the content of the right were surrounded by controversy.<sup>122</sup> At issue was "not self-determination for all Zairians as a people" but for the Katangese and it was "immaterial" if they consisted of one or more ethnic groups. Self-determination could be exercised in a number of ways, including independence, self-government, and federalism, "or any other form of relations

<sup>116</sup> *Frontier Dispute Case*, ICJ Reports 1986, 554 at 565–566, 568. See generally, M.N Shaw, *The Heritage of States: The Principle of Uti Possidetis Iuris Today*, (1996) 67 BYIL 75.

<sup>117</sup> *Frontier Dispute Case*, ICJ Reports 1986, 565, 567. The EC Arbitration Commission on Yugoslavia has stated that, "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis iuris*)", Opinion No. 2, 92 ILR 167 at 168. See further, G.J. Naldi, *The Case Concerning the Frontier Dispute (Burkina Faso/Mali): Uti Possidetis in an African Perspective*, (1987) 36 ICLQ 893 at 899–902; J. Klabbbers/R. Lefebvre, *Africa: Lost Between Self-Determination and Uti Possidetis*, in: C. Brolmann [*et al.*] (eds.), *Peoples and Minorities in International Law* (1993) 37 at 59–65.

<sup>118</sup> Most recently, with regard to the secession of the "Republic of Somaliland" from Somalia in 1991, and the "Republic of Anjouan" from the Comoros in 1997, see Naldi, *Organization* (note 1) 13–14. For criticism of the OAU's rigid approach to this question, see C. Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples' Rights*, (1998) 10 RADIC 625 at 655–656.

<sup>119</sup> See Naldi, *Organization* (note 1) 14. In an attempt to bring about a peaceful settlement to the enduring civil war in Sudan, in 1997 the Sudanese Islamic Government concluded peace agreements with the belligerents which, *inter alia*, granted self-determination to the people of the black and Christian south of the country, UN Doc. E/CN.4/1998/SR.48, paras. 21, 64.

<sup>120</sup> Communication No. 75/92, (1996) 3 IHRR 136.

<sup>121</sup> Cf. common Article 1 of the International Covenants on Human Rights 1966; Vienna Declaration and Programme of Action, Part I, para. 2. According to the UN Human Rights Committee the realisation of the right of self-determination "is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights", General comment 12, UN Doc. HRI/GEN/1/Rev.2, para. 1. It should be noted that in the *East Timor Case*, ICJ Reports 1995, 90 at para. 29, the ICJ expressed the view that self-determination is an obligation *erga omnes*; see further, G.J. Naldi, *The East Timor Case and the Role of the International Court of Justice in the Evolution of the Right of Peoples to Self-Determination*, (1999) 5 Australian Journal of Human Rights 106.

<sup>122</sup> Thus the EC Arbitration Commission on the former Yugoslavia has observed that it "considers that international law as it currently stands does not spell out all the implications of the right to self-determination", Opinion No. 2, 92 ILR 167, para. 1.

that accords with the wishes of the people",<sup>123</sup> but in conformity with the principles of sovereignty and territorial integrity. Indeed, the AfCHPR was "obliged to uphold the sovereignty and territorial integrity of Zaire".<sup>124</sup> However, the AfCHPR also acknowledged the internal dimension of self-determination, finding that in the absence of violations of human rights and the right to participate in government Katanga had to exercise self-determination in conformity with Zaire's sovereignty and territorial integrity.<sup>125</sup>

### *Promotion and Protection*

The Conference reaffirms the promotion, protection and observance of human rights obligations.<sup>126</sup> The Conference proposes a multi-faceted approach in order to fulfil this commitment. It reiterates the fact that primary responsibility for the promotion and protection of human rights lies with the State.<sup>127</sup> It thus urges all OAU Member States to ratify the principal OAU and UN human rights conventions. Particularly worthy of mention are the OAU Convention on Refugees,<sup>128</sup> the African Charter on the Rights and Welfare of the Child,<sup>129</sup> the Protocol to the Banjul Charter on an African Court on Human and Peoples' Rights,<sup>130</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>131</sup> the International

<sup>123</sup> In the *Western Sahara* Case, ICJ Reports 1975 12 at 32–33, the ICJ, relying on UN General Assembly Resolutions 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, 1541 (XV) and 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations Among States, stressed the basic need to take account of the wishes of the people concerned through informed and democratic processes. In his Separate Opinion Judge Nagendra Singh described ascertaining the freely expressed will of the people as "the very *sine qua non* of all decolonisation", *ibid.*, 81; see further, Naldi (note 121) 130–134.

<sup>124</sup> See, for example, UN General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 6; Vienna Declaration and Programme of Action, Part I, para. 2(3). See also, Umozurike (note 1) 53–54. It is interesting to note that in *Reference re Secession of Quebec*, (1998) 37 ILM 1340, the Supreme Court of Canada expressed the view that no right of unilateral secession existed in international law.

<sup>125</sup> The AfCHPR drew a connection with Article 13(1) of the Banjul Charter. See also, *William A. Courson (on behalf of Severo Moto) v. Equatorial Guinea*, Communication No. 144/95, (1999) 6 IHRR 1137 at 1138–1139.

Considerable support exists for the view that internal self-determination requires good and democratic governance and respect of minority rights, thus the Vienna Declaration and Programme of Action requires that States conduct themselves "in compliance with the principle of equal rights and self-determination of peoples" and possess a government "representing the whole people ... without distinction of any kind", Part I, para. 2(3). See also, A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge 1995, 108–125.

<sup>126</sup> Para. 13. Cf. Article 25 of the Banjul Charter.

<sup>127</sup> Para. 15.

<sup>128</sup> Ratified by forty-three States, (1998) 10 RADIC 526–527.

<sup>129</sup> Not yet in force, ratified by twelve States, Murray (note 1) 517, n. 4.

<sup>130</sup> Not yet in force, ratified by Burkina Faso, Gambia and Senegal, 26th Ordinary Session of the African Commission on Human and Peoples' Rights, 1–15 November 1999, Kigali, Rwanda, Final Communiqué, para. 15.

<sup>131</sup> Ratified by forty-two OAU States as at 1 January 2000, UN Doc. E/CN.4/2000/89.

Covenant on Civil and Political Rights,<sup>132</sup> the UN Convention on the Elimination of All Forms of Racial Discrimination,<sup>133</sup> the UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>134</sup> the UN Convention on the Rights of the Child,<sup>135</sup> the UN Convention Against Torture,<sup>136</sup> and the Statute of the International Criminal Court.<sup>137</sup>

However, the Conference accepts that what is important is that these instruments be implemented in domestic law.<sup>138</sup> Thus Article 1 of the Banjul Charter imposes a binding legal obligation on the States Parties to recognise the rights, duties and freedoms set out therein which must be given effect to through the adoption of legislative or other measures.<sup>139</sup> Furthermore, the Conference recommends that States formulate and adopt national action plans for the promotion and protection of human rights.<sup>140</sup>

In addition, the Conference calls on all States Parties to meet their reporting obligations under the Banjul Charter.<sup>141</sup>

The Conference seeks to promote civil society.<sup>142</sup> The lack of independent human rights institutions is considered as contributing to the violation of human rights.<sup>143</sup> The Conference therefore urges the establishment of adequately financed national independent human rights institutions.<sup>144</sup> However, many Afri-

<sup>132</sup> Ratified by forty-two OAU States as at 1 January 2000, UN Doc. E/CN.4/2000/89.

<sup>133</sup> Ratified by forty-three OAU States as at 27 August 1999, UN Doc. A/54/18.

<sup>134</sup> Ratified by forty-six OAU Member States.

<sup>135</sup> Only Somalia has failed to ratify.

<sup>136</sup> Ratified by thirty-two OAU States as at 1 November 1999, UN Doc. E/CN.4/2000/59.

<sup>137</sup> Ratified by Ghana and Senegal.

<sup>138</sup> Para. 14.

<sup>139</sup> Thus in *Nemi and Others v. The State*, [1994] 1 LRC 376, the Supreme Court of Nigeria found that the Banjul Charter had been made part of domestic law by the legislation ratifying it. And see, Anyangwe (note 118) 625 at 627–635. See also, General comment 3 adopted by the Human Rights Committee, UN Doc. HRI/GEN/1/Rev.2, 4, 55–59; *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, UN Doc. CCPR/C/51/D/414/1990. In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Communication No. 74/92, (1997) 18 HRLJ 34 at para. 20, the AfCHPR stated that “if a state neglects to ensure the rights in the African Charter, this can constitute a violation”. It is interesting to note that attempts by the Nigerian military regime to limit or revoke the domestic effect of the Banjul Charter were condemned by the AfCHPR, *Civil Liberties Organization v. Nigeria*, Communication No. 129/94, (1997) 18 HRLJ 35. See further, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, (2000) 7 IHRR 259, and International Pen (note 4).

<sup>140</sup> Para. 28.

<sup>141</sup> Para. 16. On the State reporting system, see Article 62 of the Banjul Charter. Ankumah (note 3) 25 writes that most States have not taken this obligation seriously, but it may be that the AfCHPR is finally losing patience with defaulters, Murray (note 1) 94.

<sup>142</sup> Para. 17. See also, para. 10 where the Conference recognises that “the development and energisation” of civil society contributes to the creation of an environment conducive to human rights.

<sup>143</sup> Para. 8(l).

<sup>144</sup> Para. 15. See further, Vienna Declaration and Programme of Action, Part I, para. 36; Principles Relating to the Status of National Institutions, UN General Assembly resolution 48/134 (Paris Principles); Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), adopted by the UN General Assembly in resolution 53/144

can States have already set up statutory commissions with jurisdiction over human rights issues.<sup>145</sup> It therefore calls for cooperation between such bodies and the AfCHPR so as to enhance respect for human rights in Africa.<sup>146</sup> In this context the Conference stresses the importance of promoting an African civil society, particularly NGOs, a prerequisite for the healthy development of a State governed by the rule of law.<sup>147</sup> It therefore calls upon all international organisations to cooperate with the OAU in order to maximise the coordinated approach to the implementation of human rights in Africa.<sup>148</sup> Furthermore, the Conference appeals to the AfCHPR, the OAU Secretary-General and the media to raise awareness of human rights among the people of Africa.<sup>149</sup>

With regard to the OAU, the Conference stresses the need for human rights to be at the forefront of all OAU activities.<sup>150</sup> Noting the crucial role played by the AfCHPR in the observance of human rights the Conference feels that the structure and functioning of the AfCHPR must be re-evaluated with a view to removing all obstacles to the effective discharge of its mandate.<sup>151</sup> How this is to be achieved is not specified but it might be addressed at some future stage, although the Conference makes an urgent plea for increased resources for the AfCHPR.<sup>152</sup> Furthermore, in seeming recognition of the pusillanimous approach of the OAU Assembly to the AfCHPR's activity reports, the Conference hopes that the Assembly considers delegating this task to the Council of Ministers.<sup>153</sup>

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of 9 December 1998; the Durban Declaration, adopted by the Second Conference of African National Institutions, UN Doc. E/CN.4/1999/95, 4–5. And see, Article 26 of the Banjul Charter.

<sup>145</sup> For example, Lesotho, UN Doc. HRI/CORE/1/Add.98, para. 77; Mauritius, UN Doc. CERD/C/362/Add.2, paras. 4–7; Rwanda, UN Doc. CERD/C/SR.1386, paras. 55–56; Senegal, UN Doc. CCPR/C/102/Add.2, paras. 28–31; South Africa, UN Doc. HRI/CORE/1/Add.92, para. 16; Uganda, UN Doc. HRI/CORE/1/Add.69, paras. 29, 30; Zambia, UN Doc. E/CN.4/2000/SR.8, para. 79.

<sup>146</sup> Para. 25.

<sup>147</sup> Paras. 17–19; preambular para. 13. See also, the Johannesburg Declaration, a declaration of principles adopted by NGOs in 1998 which recognises the role, rights and protection due to human rights defenders, Amnesty International index: AFR 01/10/98; and further, the Declaration on Human Rights Defenders. In May 1999, however, Egypt adopted a restrictive law on NGOs, Law No. 153 of 1999, titled the Law on Civil Association and Institutions, UN Doc. E/CN.4/2000/NGO/132, para. 7.

<sup>148</sup> Para. 18. The Office of the UN High Commissioner for Human Rights, for instance, has provided technical, financial and other assistance to the AfCHPR and the OAU, UN Doc. E/CN.4/1999/93, 2–4.

<sup>149</sup> Paras. 20–21.

<sup>150</sup> Para. 22.

<sup>151</sup> See note 5 *supra*.

<sup>152</sup> Para. 23. The Office of the UN High Commissioner for Human Rights has identified the limited resources allocated by the OAU to the AfCHPR as one of the major obstacles to its effective functioning, UN Doc. E/CN.4/1999/93, para. 6.

<sup>153</sup> Para. 24.

### *Conclusion*

The Declaration is not an ambitious document and perhaps is something of a mixed bag. It may be considered disappointing in that it does not expand our understanding of human rights. The Declaration does not propose any new or revolutionary principles or category of rights. But such an expectation would be to imbue the Declaration with a purpose and objective it had not set itself. The Declaration is important because it constitutes a reaffirmation to the commitment to promote and protect human rights by the OAU and its Member States. It also updates the OAU's exposition of human rights as set out in the Banjul Charter, bringing it more into line with the current thinking and interpretation of human rights. The references to contemporary forms of slavery, women and children's rights, poverty, HIV-AIDS, democracy and the rule of law, for example, are all to be welcomed. In this respect the Declaration seems to have been inspired by, and to reflect, such soft law international documents as the Vienna Declaration and Programme of Action. However, it is true that the content of the Declaration is not as extensive as these international documents and some issues, such as the sanctity of life, no doubt reflecting a lack of consensus, are conspicuous by their cursory mention. The Declaration, whilst accepting the universality of human rights, is also notable in seeking to give human rights an African dimension so as to make the issue more relevant to the peoples of Africa. However, lest the Conference be accused of grandstanding, some modest practical proposals are made to secure more effective protection of fundamental rights and freedoms. Proper resourcing of the AfCHPR is crucial but there is still scope for improving its mandate, particularly with regard to enforcement, although such a step may be less urgent once the African Court on Human and Peoples' Rights comes into being. Ultimately the best guarantor of fundamental rights is the development of a culture that respects the rule of law and human rights norms.

Regrettably, much still remains to be done. Domestic realisation of international human rights standards are inhibited by a variety of factors, including lack of political will and resource constraints. There are still too many inter- and intra-State conflicts in Africa, the root causes of which must be decisively addressed if fundamental rights and freedoms are to be seriously advanced rather than undermined further.

External intervention is still required both to ensure there is no regression and to encourage better observance of basic rights. However, if the Declaration can have a civilising effect and consolidates and bolsters, however modestly, progress towards regard for basic human values it should be viewed in a positive light.

