

**THE CONTRIBUTION OF THE AFRICAN CHARTER ON HUMAN AND
PEOPLE'S RIGHTS TO THE REALISATION OF DEMOCRATIC
GOVERNANCE IN AFRICA**

By

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DECLARATION

I Mpumelelo Thamsanqa Ngwenya hereby declare that this dissertation is my original work, and where I have used other people's ideas, such have to the best of my knowledge been accordingly and appropriately acknowledged. I have not submitted this work to any other institution for other academic purposes.

Signature

Mpumelelo Thamsanqa Ngwenya

DEDICATION

In memory of my late grandmother Kellina (uMaDlamini), who believed that knowledge is both a liberation tool and power. She was illiterate and never aware of her rights that are enshrined in the International Bill of Rights and the African Charter on Human and Peoples' Rights. Like many others among the indigenous people of this country, she lived under a tyrannical apartheid system that never recognized her as a human being. However, she did everything possible to ensure that her children and grandchildren could stand in dignity and honor among other peoples' of the world. She understood her duties to humanity.

And to all my fellow human rights activists who brave all forms of brutality to raise issues of human rights, sometimes against very brutal regimes some whom they had fought against colonialism and neo-colonialism to bring into power. And to those who struggled and sometimes paid the ultimate price for our Africa to have such a groundbreaking regional human rights instrument.

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ABBREVIATIONS

APRM	African Peer Review Mechanism
AU	African Union
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
COMESA	Common Market for East and Southern Africa
ECOWAS	Economic Community of West African States
IGAD	Inter-Governmental Authority on Development
PAP	Pan African Parliament
PSC	Peace and Security Council
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-Operation and Development
NEPAD	New Partnership for Africa's Development
NGOs	Non Governmental Organisations
SADC	Southern African Development Community
UN	United Nations
UNDHR	United Nations Declaration for Human Rights
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
PHSG	Participating Heads of State and Government
ICCPR	International Covenant for Civil and Political Rights
ICESR	International Covenant for Economic, Social and Cultural Rights
ECOSOCC	Economic, Social and Cultural Council
REC	Regional Economic Community

SUMMARY

The African Charter on Human and Peoples Rights (hereinafter the African Charter) was adopted by the OAU Heads of State and Government on 27 June 1981, and entered into force on the 21st October 1986. The African Charter moves from a premise that fundamental human rights enjoyment is based on collective responsibility in terms of performance of duties. The African Charter operates within the framework of the African Union, which is a premier institution for Africa. The African Union has a Constitutive Act is hailed as for its articulated principles of democracy, good governance, human rights, peace and security.

This dissertation attempts to engage these principles and how the African Charter itself advances the establishment of democratic governance in Africa. The dissertation attempts to engage this question over five chapters. The dissertation begins by unpacking the contents, debates and criticisms of the Charter by exploring its distinctive features when compared to other regional human rights instruments. In chapter two the imprints of the African Charter on the continental governance architecture is explored. This chapter examines the differences between the AU and its predecessor the Organization of African Unity (OAU). These differences are mainly centred on the earlier position of the OAU that placed emphasis on sovereignty of states and non-interference in domestic affairs. The AU departs on this by making provisions for intervening in cases of gross violation of human rights and genocide. The chapter ends by reflecting on the AU's development plan known as the New Partnership for Africa's Development (NEPAD). This plan is itself centred on principles of democratic governance. This chapter is followed by a examination of the innovative concept of peer review under the African Peer Review Mechanism (APRM). This is a process that countries accede to voluntarily as a self-monitoring mechanism.

The two last chapters focus on elections as one of the fundamental principles in promotion of democratic governance, and why the African Charter should be seen as a progressive approach towards establishment of democratic governance. The dissertation attempts to engage the topic on democratic governance, human rights and the rule of law in the context of Africa's poor record in the promotion and protection of human rights and good governance as articulated in the African Charter. Despite a number of international human rights instruments, Africa has experienced 186 unconstitutional seizures of power between 1956 and 2001. To date, the cases of human rights abuses are reported in some countries in Africa. The regional system has however, changed

dramatically with the coming into being of the AU and the recent coming into force of the African Court on Human and Peoples Rights. The Court is seen as a beacon of hope in the protection of human rights after long absence of an enforcement mechanism in the Africa. However, it should be noted that despite the positive developments that the AU has come to introduce, Africa is still faced with numerous challenges as seen in Sudan, Somalia, Swaziland, Zimbabwe and others. This dissertation engages a topic that has been researched in other areas. It however, dissects the African Charter from a point of view of its contribution to the establishment of democratic governance in the continent. It does contribute to the development of body of knowledge in this regard.

CHAPTER ONE

THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: UNPACKING THE CONTENTS, DEBATES AND CRITICISMS

1.1. Introduction

The issue of human and peoples' rights is one of the most contentious but fundamental subjects on political, social and economic governance in Africa today. Dictatorships, authoritarianism, gross violation of human rights, and mismanagement of state resources predominantly characterized post-independence Africa. This phenomenon of authoritarianism and gross violation of fundamental freedoms is not peculiar to Africa but is also found in both the European Human Rights Protection System¹ and the Inter-American System.² The Inter-American System was at one time affected by widespread overthrow of governments that became a regular phenomenon, with military and civilian dictatorships, wreaking havoc in most Latin American countries.³ Among the countries that experienced dictatorships that were characterized by gross violations of human rights and collapse of democratic practice are Uruguay, Dominican Republic, Haiti, Bolivia, and Colombia. As the Cold War came to an end, towards the end of the eighties, with the collapse of the Soviet Union and the historic fall of the Berlin Wall in 1989, the demise of the bi-polar world gave rise to the global dominance of the United States of America, that represented a western liberal form of democracy.⁴ An accelerated programme of democratisation was put into action mainly in one party states in southern Africa.

The program of democratisation has highlighted if not brought to the fore the issue of the human rights-centred state. Though the Cold War ended with the collapse of Soviet Union only as recently as 1989, the process of adopting human rights

¹ The European Human Rights Protection System is based on the European Convention for the Protection of Rights and Fundamental Freedoms, which entered into force in September 1953.

² The Inter-American System is mainly based on the American Convention on Human Rights which was adopted on 22 November 1969 and entered into force on 18 July 1978

³ M. Hansungule, 'Protection of Human Rights under the Inter-American System: An Outsider's Reflection' in Alfredsson, Grimheden, Ramcharan and de Zayas (Eds) *International Human Rights Monitoring Mechanisms – Essays in honour of Jakob Th. Moller*, (2001) 679-729.

⁴ *Ibid* 681.

instruments by African states had started long before that by the ratification of most international treaties. Despite such ratifications, meaningful programmes of mainstreaming human rights principles into domestic laws remained a far-fetched dream. Most African states particularly those in the Anglophone region have a dual system of law, where ratification of an international instrument must be passed through a domestic system before it comes into law. The focus of this dissertation is on the African Charter on Human and Peoples Rights⁵ (hereinafter the African Charter) otherwise known as the Banjul Charter and how it contributes to the establishment of democratic governance in Africa. The preliminary draft of the African Charter among other things provided for the State Parties to promote and protect human and peoples' rights. Though the initial process was not a smooth one, as the first Ministerial Conference in Banjul from 9 to 15 June 1980 managed to agree only on the Preamble and the first eleven Articles⁶, this was the beginning of a commitment by African Heads of State and Government to the establishment of human rights centred governance.

The enthusiasm by African leaders to ratify the African Charter with speed as compared for example with the ratification of the Protocol on the Establishment of the African Court on Human and Peoples Rights, needs some reflection. The position of the Organisation of African Unity (hereinafter the OAU) at the time was to 'adopt an open door policy' towards states with no due consideration of 'state of democracy or human rights'.⁷ In Europe for example, it is a requirement that any state wanting to join the Council of Europe, must be democratic and respect the rule of law.⁸ In Africa this has not been the case, as demonstrated by the formation of the African Union (AU) where the membership was wide open to all states, irrespective of the track record as far as democratic governance and human rights were concerned.

⁵ The African Charter came about following Decision 115 (XVI) of the Assembly of Heads of State and Government at the Sixteenth Ordinary Session that was held in Monrovia, Liberia from 17 to 20 July 1979.

⁶ Report of the Secretary General on the Draft African Charter on Human and Peoples' Rights, Council of Ministers, Thirty-Seventh Ordinary Session, 15-21 June 1981.

⁷ M. Hansungule, 'African Charter on Human and Peoples Rights: A critical Review'; *African Yearbook of International Law*, 8, pp. 265-331, (2000)

⁸ Article 3 of the Statute of the Council of Europe (1949) which stipulates that 'every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment of all persons within the its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the of the Council as specified in Chapter one.' Available on <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm>

Human rights experts, like Hansungule, see this omission, as having a negative impact in advancing democratic governance and human rights in Africa and even suggested that African leaders worked hard to ensure that ‘it becomes a toothless body that will not come back to haunt them’ thus weakening its enforcement mechanisms.⁹ There are interesting issues to note in this regard. Firstly, African states have made other undertakings under international law, which they have not completely adhered to, like the UNDHR and the ICCPR. This has happened without any severe punishment¹⁰ by the international community for breaching the provisions of these legal instruments, as is the case with Gambia, Mauritania, Sudan, and Zimbabwe in their many recorded human rights abuses. Secondly, African leaders have realized the shift in the international community to link development aid to human rights. So human rights language and the adoption of the Charter to that end was an inevitable consequence.

1.2 Background to the African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights was adopted by the OAU Heads of State and Government on 27 June 1981, and entered into force on the 21st October 1986. However, scholars like Hansungule¹¹ and Ouguergouz¹² argue that in actual fact its origins are beyond this period. They agree that the first seeds of the African Charter were planted at the African jurists’ conference held in Lagos, Nigeria in 1961. The jurists attending the conference had made a call to African leaders to look into the introduction of a regional human rights instrument that will provide for the promotion and protection of human rights; hence the theme chosen for this meeting was ‘rule of law’. Ouguergouz asserts that the outcome of this meeting, which is widely known, as the ‘Law of Lagos’ was an equal appeal to the colonial powers themselves.¹³ This was captured under paragraph 2 of this Law, which drew clear parallels on the successful maintenance of the rule of law to fully representative legislatures.

⁹ M. Hansungule (note 7 above)

¹⁰ *Ibid*

¹¹ *Ibid*

¹² See F. Ouguergouz ‘*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*’ (2003). In his book he states that the Congress was attended by 194 lawyers from 23 African States and 9 States from other regions under the theme – *African Conference on the Rule of Law, Lagos (Nigeria), 3 -7 January 1961*.

¹³ *Ibid*. 20

Ouguergouz maintains that paragraph 4 of the 'Law of Lagos' was a yardstick for the birth of the African Charter. It reads:

...That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.¹⁴

This call was prematurely made, as most of Africa at the time was under colonial rule. The continent had not even come up with a regional body to look after matters between and among states. It should be remembered that the Organization of African Unity (OAU)¹⁵ only came into being in 1963, and was to drive the programme of an integrated approach towards decolonisation. It was the OAU that was to later drive and introduce the African Charter. Most countries in southern Africa were in the middle of their struggles to end colonialism.¹⁶ Countries like Angola, Mozambique, Namibia and Zimbabwe were under colonial rule, with South Africa under an apartheid regime that was bent on entrenching separate race development. The call for a regional human rights instrument was ignored. The reign of terror that saw human rights falling into the margins of African polity was rampant in a number of countries under dictatorship and repressive governments.

An interesting development to the whole debate or struggle for an enactment of a regional human rights instrument, is found in the later submission of the 'Dakar Declaration'¹⁷ of 1967, by the Franco-phone jurists which resolved that:

¹⁴ *Ibid.*

¹⁵ The African Union (AU) replaced the OAU on July 10, 2002. Its objective is the achievement of unity between African countries and its people. It is also geared towards the defense of African sovereignty, territorial integrity, independence and the political and socio-economic integration of the African continent. It also seeks to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights.

¹⁶ See M. Hansungule (note 7 above).

¹⁷ Adopted by the African jurists of French speaking countries who had convened for another conference in Dakar, Senegal from 5 to 9 January 1967. F. Ouguergouz (note 11 above) says 80 lawyers attended this conference from 15 French-speaking countries of Black Africa and Madagascar.

Political, economic and cultural construction of emerging nations, and especially the systematic planning of programmes for development, are (sic) liable to lead to encroachments on certain individual rights. Jurists must therefore maintain constant vigilance to ensure an equitable balance between the requirements of the public well being and the rights of the individual, and must ensure that measures adopted to deal with pressing problems of a temporary nature are not allowed to be used as permanent solutions.¹⁸

Ouguergoz notes that the process of drafting the African Charter got under way after a meeting requested by the African Heads of State and Government that was held in Dakar from 28 November to 8 December 1979. The opening address by Senegal's President Leopold Senghor laid the philosophical grounds for the African Charter, where he urged the African experts invited to the conference to 'use their imagination and draw inspiration from African traditions, keeping in mind the values of civilization and real needs of Africa'.¹⁹ This call inspired the incorporation into the text of the African Charter, the language of duties of the individual to family and society, and that the right to development needed to be incorporated as well as embracing both first and second-generation rights.

The African Charter moves from a premise that the fundamental human rights stem from the attitudes of human beings and that the enjoyment of human rights is therefore based on collective responsibility in terms of performance of duties. The African Charter operates within the framework of the AU,²⁰ which replaced the OAU under which it was drafted and ratified. Among the organs of the AU are the Economic, Social and Cultural Council (ECOSOCC), whose focus is on the promotion of democratic principles and institutions, popular participation, good governance, human rights and freedoms, and social justice. Democratic governance focuses on participation

¹⁸ *Ibid.* 21

¹⁹ See 'Address delivered by HE Mr. Leopold Sedar Senghor, President of the Republic of Senegal', OAU DOC CAB/LEG/67/5 as quoted by Ouguergouz (note 11 above) 41.

²⁰ The Constitutive Act establishing the African Union, OAU Doc. CAB/LEG/23.15 was adopted on 11 July 2000 at Lome, Togo by 53 member states of the Organisation of African Unity (OAU) to replace the OAU Charter and *entered into force* May 26, 2001. Available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

and accountability,²¹ and is more than just having the right to vote, but extends to include the strengthening of the voice and power of the electorate through democratic cultures and practices, thus creating inclusive and fair rules, institutions and practices that govern social interactions.

The Constitutive Act of the African Union marks a complete departure from previous OAU practice, which had stressed the principle of non-interference in the internal affairs of member states enshrined in Article 3 of the OAU Charter. In the past, that principle had been used to prevent the OAU from dealing with gross abuses of human rights by African States, for example Uganda under Idi Amin and Milton Obote; Equatorial Guinea under Macias Nguema; Central African Republic under Emperor Bokassa; Ethiopia under Colonel Mengistu; Malawi under Hastings Banda; Zaire under Mobutu Sese Seko; and South Africa under the Nationalist Party regime. All these abuses happened within the context of dictatorship and the systematic suppression of fundamental freedoms.²²

In this dissertation the intention is to focus more specifically on civil and political rights as the cornerstone of democratic governance. The reason being mainly that such rights can become a rallying point for mobilization against despotic rule in the continent.²³ Despite all the provisions of the African Charter on democratic governance, human rights, and the rule of law, and its ratification by almost all African states, the enjoyment of these noble values and principles remain under serious threat from the very same governments that are supposed to promote and protect them. Despite a number of international human rights instruments, Africa has experienced 186 unconstitutional seizures of power through coups d'état between 1956 and 2001.²⁴ Fundamental freedoms, as provided for under the African Charter, like freedom of expression, association, assembly and the right to receive information, respect for human dignity and freedom from exploitation, torture, cruel, inhuman or degrading punishment, and slavery, freedom of the press and a number of others are violated on

²¹ See for example B. Mkapa in 'Priorities for Democratic Governance in Tanzania and Africa' Keynote speech at the official launch of the Africa Regional Symposium on the Human Development Report 2002.

²² See M. Hansungule (note 7 above).

²³ See M. Mutua in 'African Human Rights System: A critical Review' available at http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF

²⁴ See 'Strategic Plan of the African Union Commission' Vol.1 (2004), available at <http://www.africa-union.org/root/au/AboutAu/Vision/Volume1.pdf>

an unprecedented scale. Pluralist democracies that African states have embraced have not made a significant change to this. Cases of human rights abuses are still widely reported in countries like Zimbabwe, Swaziland, Sudan, Kenya, Uganda, Sierra Leone, and Congo.

1.3 Objectives

This dissertation seeks to make some reflections on the principles of the African Charter and interrogate their meaningfulness and applicability in establishing and deepening democratic governance in Africa. Secondly, it seeks to analyse the distinctive features of the African Charter, from other regional human rights instruments, in terms of African traditions and the influence of United Nations (UN) human rights instruments. Thirdly, it explores the implications of the clawback clauses in terms of restrictions and limitations on the exercise of the rights it provides. Finally, it seeks to make a reflective analysis of how the African Charter in principle and spirit, impacts on the governance architecture, as manifested through various related documents for the renewal of Africa, like the Constitutive Act of the AU, the New Partnership for Africa's Development (NEPAD) and its African Peer Review Mechanism (APRM), which are centred on principles of democracy and good governance. In this regard, it looks in particular at the practice of periodic elections, as a basis for democratic governance provided for under the International Bill of Rights.²⁵ This is done because periodic elections are important criteria in ascertaining the level of democracy, even though their regular occurrence is no guarantee that there are people-centred democratic practices.

For the purposes of this dissertation, the African Charter is itself examined with a focus on Articles 2-13,²⁶ which specifically cover civil and political rights. This dissertation though grounded on the works done by others before, it contributes to the body of knowledge with its incorporation of the dimension of governance as envisioned under the architecture of the African Union (AU) and the Regional Economic

²⁵ The International Bill of Rights comprises the Universal Declaration on Human Rights of 1948; the International Covenant on Civil and Political Rights of 1966; and the International Covenant on Economic, Social and Cultural Rights of 1966.

²⁶ Non-discrimination (Art 2); equality before the law (Art 3); the right to life (Art 4); and inherent right to dignity (Art 5); Articles 6 to 13 specify rights similar to those provided for under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Community (REC) of the Southern African Development Community (SADC). This process contributes to the evolving inquiry and body of knowledge on Africa's attempt to relocate and reposition herself within the nations of the world. Therefore, this dissertation attempts in a challenging way to engage the African Charter from the basis of democratic governance as an enabling environment for the realization and enjoyment of rights enshrined in this instrument.

1.4 Research problem

The African Charter has distinctive features that distinguish it from other regional human rights instruments.²⁷ It is the only regional instrument to encompass all three generations of rights, which are civil and political rights; economic, social and cultural rights; and peoples or group rights, in one legal instrument.²⁸ Its further distinction lies in its introduction of perhaps a controversial yet innovative concept of peoples' rights; and the imposition of duties on individuals and the state, thus boldly suggesting that the enjoyment of human rights does not happen in a vacuum.²⁹ It is also distinctive in that it does not only encapsulate the three generations of rights into one instrument, but its expression of the economic, social and cultural rights goes a step further, to include the right to development.

This position by the African Charter thus brings all these rights together and builds a comprehensive understanding of an African worldview of what are the requirements of human rights and dignity. The African Charter makes this important link in its preamble, saying:

It is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights, *which are a* (my addition) guarantee for the enjoyment of civil and political rights.

²⁷ See M. Mutua in 'The Banjul Charter: The Case for an African Cultural Fingerprint' in *Abdullahi A. An-Na'im, ed. Cultural Transformation and Human Rights in Africa. London: Zed Books, 2002.* The other regional human rights instruments are (i) the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, (ii) European Social Charter, 18 October 1961 which forms the basis European Human Rights System, (iii) the American Convention on Human Rights, 22 November 1969 which 'anchors' the Inter-American Human Rights System. See also M. Hansungule (note 7 above).

²⁸ See F. Ouguergouz 57 (note 11 above). Also see the Preamble of the African Charter, Para. 7.

²⁹ See M. Mutua (note 23 above). On duties on the individual, see Arts. 27-29

Interestingly, this line of thought seems to have been adopted by the United Nations in the wording of the Declaration on the Right to Development.³⁰ Article 1(1) of the Declaration defines this right as an:

Inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.³¹

The African Charter presents positive principles for the human rights centred world, which has respect for fundamental principles of democratic governance. Since its adoption, subsequent documents in the African governance architecture have drawn extensively from this instrument. Key among these is the AU Constitutive Act, the New Partnership for Africa's Development's (NEPAD) Declaration on Democracy and Governance, and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), the Grand Bay (Mauritius) Declaration and Plan of Action, and the Kigali Declaration.

It must be noted however, that the African Charter has visible clawback clauses found within its principles and articles, which permit the states to restrict certain rights within the law.³² The African political landscape is currently informed or dominated by concepts of democracy and central to this, are terms such as good governance, respect for the rule of law, and participatory democracy through an entrenched concept of popular participation.³³ Despite these documents and commitments to them by African leaders, the continent still witnesses gross violation of human rights through the suppression of fundamental freedoms. There is widespread suppression of press freedom in countries like Gambia, displacement of people as a result of ethnic

³⁰ The Declaration on the Right to Development was adopted by the General Assembly resolution 41/128 of 4 December 1986

³¹ See Declaration on the Right to Development, available at <http://www.unhchr.ch/html/menu3/b/74.htm> - 17k

³² See M. Mutua (note 23 above). See also J. Oloka-Onyago 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizon.' *HDR 2000 Background Paper* at <http://www.yorku.ca/hdrnet/library.asp?id=7&subid=68>

³³ See the Constitutive Act of the African Union Art. 3; the NEPAD Base Document, and the Grand Bay Declaration and Plan of Action

cleansing in areas like Darfur in Sudan, and banning of free political activity in countries like Zimbabwe.

These are fundamental issues that call for deeper reflection. Are these developments positive for the democratization project and its consolidation in Africa? Or does the African Charter serves no just cause but only that of mere fences or obstacles to true democratic governance? Furthermore, to what extent has the architecture of the African Charter advanced the agenda of democratic governance in Africa? The focus on civil and political rights is assumed to be a pillar of human development and peace on the international scene, which in recent African programmes has become a central point, for example in NEPAD. This increasing focus on good governance does not seem to be primarily located within the bounds of the Charter as much as it is with the Constitutive Act of the AU and its programme NEPAD. Though references are made in numerous AU official documents, the nature of the AU architecture needs further analysis, and this is what this dissertation attempts to do.

Previous studies on the question of democratic governance and human rights with reference to the African system have highlighted some constituent elements necessary to ensure the entrenchment and effectiveness of a regional enforcement mechanism in achieving the anticipated and desired outcomes. This dissertation takes a look at the continental governance architecture in its holistic nature from the African Charter as its base to the AU's architecture with its combined set of objectives of development and continental integration.

1.5 Methodology

This dissertation has adopted a qualitative method of inquiry in interrogating and analysing other works around this issue, which focus on principles of democratic governance, as a basis for theoretical inquiry and understanding, to assist in the formulation of finer arguments.

The main source of study is the international and regional human rights instruments and their treaty bodies, particularly the African Commission on Human and Peoples' Rights and the protocols and declarations that supplement them. The author's focus was on books, journal articles, written on human rights generally, and governance

and democracy in particular. To examine the applicability of the principles of the African Charter, an extensive use of journals and papers presented in various forums of governance and human rights has been made. This has been in form of library search and Internet sources. The author has also relied on papers presented at various human rights meetings and colloquiums organized and held internationally.

1.6 Literature review

There is an abundance of existing literature on democracy in Africa, which unfortunately has not mainly been informed or linked to the African Charter as the regional corpus of human rights. Whilst a great deal has been written on the African Charter from the legal angle in terms of enforcement of the principles articulated in the Charter, there is limited work on issues of democratic governance, in the context of the African Union architecture. The focus in this dissertation therefore falls on the area of how the African Charter promotes or hinders democratic cultures and practices on the continent. It is without doubt that democratic governance and its twin, the rule of law, are fundamental to national strategies for development, which confirms the indivisibility of civil, political, economic, social and cultural rights as well as the interdependence of development and human rights.

One of the interesting inputs on the subject is the address by President Benjamin Mkapa of Tanzania on priorities for democratic governance in his country and Africa.³⁴ He argues in his speech for the centrality of human development with democracy as one of the means to achieve this. He makes an interesting point on why the focus should be more on democratic governance, than just on democracy. He views democracy as a process about acquiring power whilst democratic governance is more about how such power is exercised. He places much emphasis on responsiveness of government, transparency, and participation of the public. He argues that such democratic governance is 'necessary not only nationally, but also in inter-state relations, and in relations between African countries and multilateral institutions for global governance'.³⁵ Such analysis is clearly in line with the African Charter as a

³⁴ See B. Mkapa (note 21 above)

³⁵ *Ibid*

governing regime for human rights on the continent as it deals with relations among State Parties to the Charter, and relations between the individual and the state.

Paul Nchoji Nkwi engages with the issue of democratic governance by critically examining some thorny issues around liberal democracy in the continent.³⁶ He argues that ‘African democracies must possess certain universals, dealing mostly with finer aspirations of the people, for example, the guarantee of human rights, freedom of speech and due process before the law.’³⁷ He places emphasis on the need for political accountability of the state, and the empowerment of the citizens by giving them their rights, as proscribed in the Universal Declaration of Human Rights and the African Charter. His main point is that in as much as the African Charter and any other instrument might be in place, there is a need for empirical evidence of democratic mode of governance to be embraced. He views corruption, vote rigging, religious fundamentalism that conflicts with the right to religion and conscience, failure to consult the public on an ongoing basis, as fundamental obstacles to the realization of the rights enshrined in the African Charter.

Makau Wa Mutua in the ‘Banjul Charter: The Case for an African Cultural Fingerprint’³⁸ revisits the conception of human rights as a western concept. He disputes this outright and traces the origins and development of human rights in Africa. He makes an interesting observation that whilst a number of scholars place emphasis on the tensions between human and people’s rights; little attention is paid to the issue of individual duties. Mutua argues elsewhere that the African Charter did not come about as an ‘accident of history’ but an outcome of the very struggles for liberation in the continent that had been shaped along the lines of deploring human rights record of the colonial state.³⁹ Linked to this analysis are the views by Ouguergouz, asserting that human rights protection in Africa particularly under the OAU Charter, with regard to fundamental freedoms have for years been ‘considered a taboo’ or not an ‘issue of

³⁶ See P. Nkwi in ‘Democratic governance in Africa: A decade of misconceptions’ *Presented at a UNESCO Seminar on Democracy and World Governance in the 21st Century, Porto Alegre (Brazil), 29-30 January 2001*, available at <http://www.unesco.org/most/wsfnkwi.doc>

³⁷ *Ibid*

³⁸ See M. Mutua (note 27 above)

³⁹ See M. Mutua (note 23 above)

priority'.⁴⁰ As a result, African leaders have tended to invoke the principle of non-interference and national sovereignty, when challenged on their human rights record.

The OAU Charter had in itself placed emphasis on the sovereignty and territorial integrity of states rather than on individual rights. The reference it made to human rights was essentially not at the core of the Charter. It only makes a clear reference to human rights in the ninth paragraph of the preamble, and under Article II (1) (e) with regards to the promotion of international cooperation; a point Oloka-Onyango characterizes as a 'scant reference' to human rights.⁴¹ Interestingly, the OAU Charter stops short of referring outright to human rights by merely referring to 'international cooperation...having due regard of Universal Declaration of Human Rights'.

This is further articulated under Articles 13(1), 55, 62(2) and 68. Clearly, although the OAU Charter makes reference to the UN Charter, it was state centric and focused solely on state sovereignty and its principle of non-interference. Meanwhile, the UN Charter places equal emphasis on human rights as it did by member states' international cooperation. The Constitutive Act of the African Union that came into force on 26 May 2001 replacing the OAU Charter makes a complete departure from the principle of the state as central point. It builds on the principles and spirit of the African Charter in its emphasis on the respect for human rights, good governance and the rule of law.

1.7 Distinctive features of the African Charter

The African Charter reflects African traditions and the influence of UN human rights instruments. It guarantees both civil and political rights on one hand, and economic, social and cultural rights on the other. Paragraph seven of the preamble the African Charter boldly proclaims mutual relationships or dependent variables between civil and political rights on one hand, and economic, social and cultural rights on the other. Mutua posits that the African Charter is an 'innovative human rights document' that if compared to other regional instruments 'departs from narrow formulations'.⁴² It makes a striking link between the right to development, and civil and political rights.

⁴⁰ See F. Ouguerouz (note 11 above)

⁴¹ See J. Oloka-Onyango (note 32 above), See also F. Ouguerouz (note 11 above)

⁴² See M. Mutua (note 23 above)

According to Ouguergouz, these ‘cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’.⁴³ Inherent in this relationship is the emphasis on the right to development as an important link between the two ‘generations’ of rights. The African Charter brings to the fore the debate whether civil and political rights should be placed above the economic, social and cultural rights. The African Charter outlines individual rights and the corresponding duties of an individual to enjoy protection of such rights, which Mutua argues is its ‘most controversial provisions’.⁴⁴ This the African Charter recognizes clearly in its preamble that:

... On the one hand ... fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand ... the reality and respect of peoples’ rights should necessarily guarantee human rights...considering that the enjoyment of rights and freedom also implies the performance of duties on the part of everyone.

This introduction of the language of duties along rights is what many scholars and critics of the African Charter characterize as clawback clauses,⁴⁵ which again distinguishes it from other regional instruments. These clauses seem to make the enforcement of rights to be dependent on national laws or at the discretion of the States. It incorporates third generation rights with their emphasis on peoples’ rights and has four extensive articles in this regard, namely, Articles 21 to 24.⁴⁶ The African Charter also draws criticism for its lack of qualification or non-derogation of the restriction on rights. In a number of Articles it provides for rights whilst limiting them through the ‘within the law’ provisions. This is particularly in relation to fundamental rights, as provided under Article 9, the right of expression and dissemination of opinions ‘within the law’; Article 10, the right to free association ‘provided he abides by the law’;

⁴³ See F. Ouguergouz (note 11 above) 57

⁴⁴ *Ibid*

⁴⁵ See M. Mutua (note 23 above). See also J. Oloka-Onyago (note 32 above), and F. Ouguergouz (note 11 above). Clawback clauses found in the Charter are restrictive language like ‘except for reasons and conditions previously laid down by law,’ ‘subject to law and order,’ ‘within the law,’ ‘abides by the law,’ ‘in accordance with the provisions of the law,’ and other restrictions justified for the ‘protection of national security’

⁴⁶ The right to dispose of wealth and natural resources (Article 21); right to economic, social and cultural rights (Article 22); right to peace (Article 23); satisfactory environment for development (Article 24)

Article 12 (1) on the right to freedom of movement and residence ‘provided he abides by the law’; and Article 13 about the right to participate in governance processes ‘in accordance with the provisions of the law’. There is a lack of a derogation clause that provides for suspension in exceptional circumstance of the rights recognized.⁴⁷ Naldi argues that the adoption of the African Charter has ‘proved to be a false dawn for the promotion and protection of human rights in Africa’.⁴⁸ This seems to be a very harsh and a somewhat unbalanced criticism against the African Charter.

1.8 Human rights and democratic governance

Any attempt to address the issues of human rights devoid of democracy, as a system of governance, is limited in scope as rights like freedom of speech, association and assembly, ensure transparency and accountability of the state.⁴⁹ Democracy is said to belong in the sphere of collective decision-making, which is an embodiment of equality in the decision-making process by all members of a given society. Human rights as a concept and principle have occupied centre stage of international law, which has been guided by United Nations treaties⁵⁰ from which the African Charter draws its basic principles.

Human rights are those rights that belong to every individual - man or woman, girl or boy, infant or elder - simply because she or he is a human being. They embody the basic standards without which people cannot realize their inherent human dignity. It is noted that human rights are about the relations between the state and individual freedoms, hence the attempt to examine the extent to which the African Charter seeks to address principles of democratic governance. This is closely linked to the role that people’s representatives play as part of the promotion and protection of human rights, in a context of the consolidation of democratic governance. Article 1 of the African Charter provides and binds state parties to recognize the rights and duties in the Charter and to incorporate them into domestic laws. It provides:

⁴⁷ See F. Ouguergouz (note 11 above)

⁴⁸ See G. Naldi ‘Future Trends in Human Rights in Africa: The Increased Role of OAU?’ Pp 1-35 in *The African Charter on Human and Peoples’ Rights – The System in Practice 1986-2000* (eds) Malcolm Evans & Rachel Murray, (Cambridge UP), 2002, available on, <http://assets.cambridge.org/052180/2075/sample/0521802075ws.pdf>

⁴⁹ See B. Mkapa (note 21 above)

⁵⁰ This is reflected in the Universal Declaration of Human Rights and the ICCPR and ICESCR

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

The assumption is that parliamentarians are conventionally elected representatives of the people to serve their interest through an institution of parliament, and have a specific responsibility of creating legislation that respects, promotes and protects human rights of their constituents. The bottom line is that human rights are universal, and are the birthright of every member of the human family. No one has to earn or deserve human rights.⁵¹

1.9 Assumptions on human rights and the African Charter

Human rights are both abstract and practical. They uphold the inspiring vision of a free, just, and peaceful world and set minimum standards for how both individuals and institutions should treat people. They also empower people to take action to demand and defend their rights and the rights of others.

Different governments in democratic states provide themselves the context, shape and quality of governance.⁵² Civil and political rights relate to the right to governance and in principle should be expressed through democratic values and processes. Democratic governance calls for strengthened institutions of states. Fukuda-Parr argues that democracy is an important system that addresses peoples' interests and 'avoids catastrophe and tyranny'. It is however, not a 'panacea for all society's economic and social ills'. In other words, democracy does not equal prosperity but allows the will of the people to thrive. It is thus an important element in the promotion and protection of civil and political rights, which must have an institutional dimension that creates space for civil society participation in their development. Popular participation is an important element in democratic governance because in a certain

⁵¹ See the Universal Declaration on Human Rights, Art 1

⁵² See H. Spiro, 'Responsibility in Government: Theory and Practice' *New Encyclopedia Britannica*, Vol. 5 (1969) 1978

way, it is about access to power and decision-makers.⁵³ Its effectiveness and realisation depends on the protection of certain fundamental civil and political rights such as freedom of speech, freedom of expression, the right to vote and be elected, and freedom of assembly. The International Covenant on Civil and Political Rights (ICCPR), which had a strong influence on the African Charter, presents an interesting dimension in the promotion of civil and political rights. It recognizes that the ideal of free human beings that enjoy civil and political freedom and is dependant or can only be achieved if conditions are created for everyone to enjoy these rights.⁵⁴

1.10 Constitutional government and human rights

The principle of constitutional government is in fact comprised of certain distinct elements, which are deemed important pillars for consolidated democracy and thus human rights protection. These are procedural stability, accountability, representation, division of power and transparency.

Procedural stability of a constitutional government ensures that certain fundamental processes and procedures are not subject to arbitrary change. Stable and clear government processes in legislative processes provide the citizens with adequate knowledge of possible outcomes of their actions in so far as their participation or lack thereof is concerned.⁵⁵ In states under dictatorship or authoritarian regimes, rules of the game are frequently changed according to the political will of the parliamentarians in government. This undermines predictability of the state and government processes. Some countries have over the years been ruled through decree, as has been the case in Mobutu Sese Seko's Zaire and King Sobhuza's Swaziland despite these countries having ratified the African Charter.

Accountability of those in government is one important element in the promotion and protection of human rights. The process of accountability is enforced through regular free and fair elections, public financial management legislation, and referendums, among other things. Accountability is a two directional process where the

⁵³ See S. Fukuda-Parr in 'Deepening Democracy in a Fragmented World', *A Speech at the Africa Regional Symposium on the occasion of the launch of the Human Development Report 2002*, on 11 October 2002, Dar es Salaam, Tanzania

⁵⁴ See ICCPR, Para. 3 of the Preamble and Articles 19, 21, and 22 of the same

⁵⁵ See H. Spiro (note 52 above) 1978

elected representatives promise the citizenry to deliver certain programmes, and the citizens have the responsibility for the acts of government.⁵⁶ A member of the legislature is elected and vested with the authority and power to deliver on the promised programmes, including upholding the country's constitution. At the end of the term of the elected representative, the citizenry has the opportunity to re-elect or dismiss the member from office.

The other important element is the clear division of power, which is crucial in sustaining democratic rule and facilitating a human rights culture. This separation of powers ensures the presence of checks and balances in a given political system. The independence of the judiciary guarantees the principle of rule of law.⁵⁷ The African Charter places some emphasis on the principle of rule of law.

1.11 Conclusion

A close look at the broad principles outlined in the African Charter suggests that it provides pathways to democratic governance in spite of the clawback clauses that seek to restrict such rights. This will be interrogated at length in the closing chapter of this dissertation. In this introduction, an attempt has been made to examine a range of issues regarding the African Charter in relation to other human rights instruments.

The analysis of these issues has demonstrated that the preliminary draft of the African Charter among other things provided for the State Parties to promote and protect human and peoples rights. The issue of promotion and protection of human rights was thus catered for or formed part and parcel of the whole human rights corpus in the Charter and preceding deliberations in its drafting process. Though the process of coming up with a regional human rights instrument was not a smooth one, it needs to be noted that this was nonetheless a beginning of a commitment by African Heads of State and Government to the establishment of human rights centred governance whether in practice or in mere rhetoric. An equal appreciation has to be made that this call was made at a time when most countries particularly those in Southern Africa, were in the middle of their struggles to end colonialism.

⁵⁶ *Ibid*

⁵⁷ *Ibid*

The role of non-state actors in the form of human rights advocates and non-governmental organizations (NGOs) should be acknowledged in bringing to the fore the issue of establishing a regional human rights instrument for Africa. The conference by African jurists and other practitioners held in Lagos, Nigeria in 1961 proved to be an important catalyst in a struggle for a human rights regime of the continent. As Ouguergouz correctly noted, the outcome of this meeting, which is widely known as the 'Law of Lagos' was an equal appeal to the colonial powers themselves.⁵⁸ This highlights an important angle to this dissertation that suggests that colonial powers did not have in themselves any moral authority to challenge African newly independent states, to observe the rule of law in the absence of truly representative legislatures thus bringing into focus the right to self determination as provided for under the International Covenant on Civil and Political Rights.⁵⁹

This chapter has attempted to outline some of the interesting points covered by the African Charter with a specific focus on areas that guarantee full enjoyment of rights, in particular a reference to freedom, equality, justice and dignity as 'essential objectives for the achievement of the legitimate aspirations of the African peoples.' These terms are further found in the subsequent documents that govern Africa at a continental level which are focused on the promotion of democratic principles and institutions, popular participation, good governance, human rights and freedoms, and social justice. This provides a solid ground for the establishment of democratic governance in Africa. This is mainly in the African Charter's guarantees of both civil and political rights on one hand, and economic, social and cultural rights on the other. An interesting yet very controversial issue that the African Charter outlines is that of individual rights and the corresponding duties of an individual to enjoy protection of such rights. It is also important to note that the African Charter provides for and outlines some of the fundamental pillars of democratic governance, which are procedural stability, accountability, representation, division of power and transparency. The following chapter will interrogate some of the crucial aspects in democratic governance, as reflected in the continental architecture.

⁵⁸ See F. Ouguergouz (note 11 above)

⁵⁹ Article 1 of the ICCPR

CHAPTER TWO

THE AFRICAN CHARTER AND ITS IMPRINTS ON THE CONTINENTAL GOVERNANCE ARCHITECTURE

‘For many years, we have adopted at the national, regional and continental levels many plans, strategies and programmes for the development of our countries, individually and collectively. Unfortunately, these plans and programmes were not adequately implemented by the majority of our countries and in some cases were completely paralysed and jeopardised by incessant civil strife and natural calamities.’⁶⁰

2.1 Introduction

The foregoing chapter focused on the design of the African Charter and its contending issues. These issues have in the main been concerned with the fundamental freedoms covered under Articles 3 – 13, which range from the right to equality, non-discrimination, freedom of assembly, expression and association, equality before the law and popular participation. They have also outlined principle issues in assessing the extent to which the African Charter provides for pathways to the establishment of democratic governance of the continent. This chapter seeks to examine the imprints of the African Charter on the governance architecture of Africa. This is done by particular focus on the African Union (hereinafter AU), the New Partnership for Africa’s Development’s (hereinafter NEPAD) Declaration on Democracy and Good Governance, the Grand Bay Declaration, and the African Charter on Popular Participation. This is done to demonstrate that any credible inquiry into the subject matter discussed here, should interrogate and analyse the impact of the African Charter on the entire governance architecture of the continent and its entire human rights corpus.

⁶⁰ See Declarations and Resolutions of the AU Heads of State and Government during the 31st Ordinary Session of the Assembly of Heads of State and Government, Addis Ababa, June 1995; AHG/Decl. 1-2 (XXXI) and AHG/Res.234-246 (XXXI) available at www.africa-union.org/root/au/Documents/Decisions/hog/5HoGAssembly1995.pdf

Notwithstanding the continental developments in governance architecture under both the OAU and its successor the AU, which are manifested in a range of policy documents, decisions, treaties and protocols, Africa's human rights situation remains bleak. This is a major disappointment in light of the promises and commitments by African leaders to peace, democracy, human rights and the rule of law. Without doubt, the imprints of the African Charter are visible throughout Africa's continental architecture, as has been the case over the years since independence, with clear failures when it comes to implementation and enforcement of these commitments. The formation of the AU as constituted under the Constitutive Act of the African Union, its programme of NEPAD and its peer review mechanism, undoubtedly is a representation of renewed commitment by African leaders to democratic governance and human rights, and perhaps a beacon of hope to the peoples of Africa of a better-governed continent. As the continent was experiencing a democratisation wave in the late 1980's to mid 1990's, equally it had to contend with conflicts and gross human rights violations in countries like Sierra Leone, Liberia, Angola, Congo, Rwanda and Burundi, Nigeria, Guinea Bissau, Ethiopia and Eritrea, and recently in Cote D'Ivoire, Darfur in Sudan and the fallen beacon of hope in southern Africa – Zimbabwe. In its 1999 report, Amnesty International indicated that in 1998 alone, twenty-four African countries had experienced widespread human rights violations with 'social and political unrest having continued unabated'.⁶¹

These unfortunate and highly embarrassing developments against a background of ground-breaking commitments made under instruments like the African Charter, the African Charter for Popular Participation in Development (1990), the Kampala Document Towards a Conference on Security, Stability, Development and Cooperation in Africa (1991), the Cairo Declaration Establishing the Mechanism for Conflict Prevention, Management and Resolution (1993), the Grand Bay Declaration and Plan of Action for Human Rights (1999), and the Abuja Treaty (1991), undermined progress towards attainment of democratic governance on the continent. It comes as no surprise that the Human Rights Watch in its 2000 report concluded that, 'much of Africa made

⁶¹ 'Amnesty International 1999 Regional Highlights, Africa', available at www.AI.org

little headway in adjusting to the imperatives of democratic rule and respect for human rights *as a respect of commitments made* (emphasis mine).⁶²

2.2 Key commitments to democracy

The opening quote of this chapter highlights a disappointing trend in African regional governance architecture that is characterised by popular language of commitment to democracy and human rights, but is lacking in implementation. This is a statement that not only highlights Africa's acknowledged failures in these commitments made in the documents mentioned in this introduction, but the blurring fault lines in the system as well.

It is important to note the recognition the African leaders make of democracy, peace and development.⁶³ This recognition is what has informed the shape, form and content of the Constitutive Act of the AU and NEPAD in linking democracy, good governance, respect for human rights and rule of law as prerequisites for peace and stability on the continent. The African Charter as the foremost regional instrument provided pathways in terms of the positive language of democracy and human rights, which had not been explicitly expressed in the OAU Charter. It thus influenced the subsequent documents mentioned earlier, by emphasising democracy, human rights and good governance as imperative prerequisites to stability and development in Africa.⁶⁴ The earlier failures by African leaders to observe commitments made under these legal instruments to promote and protect democratic governance, human rights and the rule of law, led to a new wave of struggle by African peoples. Mutua attributes this to the dawn of the 'African Renaissance' in the late 1980's and early 1990's, and the determination by African peoples to end all forms of 'despotic, unaccountable, single party or military governance.'⁶⁵

⁶² See 'Africa Overview', Human Rights Watch 2000 Report, available at www.hrw.org

⁶³ Par 10 in Relaunching Africa's Economic and Social Development: the Cairo Agenda for Action, 31st Ordinary Session of the Assembly of Heads of State and Government, Addis Ababa, Ethiopia, 26 to 28 June, 1995. Also NEPAD Base Document A1, 71 on peace, security, democracy and political governance initiatives.

⁶⁴ Par 9(h), 11 and 14 (i) under sub-title Stability, CSSDCA Declaration, 2000 available on http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg5.doc

⁶⁵ See M. Mutua p.35 (note 23 above)

This was an era characterised as the ‘second wave of independence’- an era of African peoples’ demand of ‘a government sanctioned by the free will of the governed’, and most interestingly human rights and the rule of law was a rallying point for reforms.⁶⁶ This ‘renaissance’ concept other than its pursuit of democratic governance at a political and social level, is equally about locating Africa’s development challenges in their proper context, which can be traced back to slave trade, colonialism and later the introduction of the World Bank’s Structural Adjustment Programmes of the 1980’s. As Mbeki emphasised in his address to the first sitting of the Pan African Parliament, this is a necessary process for Africa. He observed:

There is a continuing and urgent need for Africa's historians, sociologists and others to assess and write about the long-term impact of these three historical phenomena on Africa - slavery, colonialism and racism. There are some in our country and the rest of the world who demand that we should view and treat these phenomena merely as a matter of historical record, with no relevance to our contemporary struggles for Africa's rebirth.⁶⁷

2.3 Introduction of the African Union (AU): Is it a mere OAU without an O?

The adoption of the Sirte Declaration on 9 September 1999, which called for the establishment of the African Union (AU) replaced the Organisation of African Unity (OAU) as a premier continental body. The OAU had been in existence since 1963 to rid the continent of colonisation and to promote the affirmation of a common African identity. The official launch of the AU in 2000 at the Durban Summit could be characterised as a major milestone towards the realisation of Africa’s integration agenda. The birth of the AU offered an opportunity for accelerated integration in the continent. The Maputo Summit of July 2003 was crucial as it took key decisions with respect to the establishment of key organs of the AU.

The AU has important strengths and it is an important break with the past. Landsberg observes that if we are to compare the AU to its predecessor, the strengths

⁶⁶ *Ibid*

⁶⁷ See T. Mbeki in ‘African Parliament of Liberators’, Vol. 4, No.27. 9-15 July 2004, available on <http://www.anc.org.za/ancdocs/anctoday/2004/text/at27.txt>

become clear.⁶⁸ While the OAU had a single source of authority, namely the all-powerful Assembly of Heads of State and Government, in which there was a tendency to close ranks⁶⁹, the AU possesses multiple sources of authority, namely the Assembly of Heads of State and Government, the Peace and Security Council, the Pan-African-Parliament, and most importantly the Economic, Social and Cultural Council (ECOSOCC) which is an advisory body of civil society. Oloka-Onyango notes that whilst the OAU's power was purely in the executive, the AU envisages a democratic decision-making tapestry.⁷⁰ The OAU was an institution based purely on the collaboration of governments of sovereign states where respect for sovereignty was paramount, and interference in internal affairs of member states was treated with disdain. There was almost no pooling of sovereignty, and the prime objective of the OAU was the collective struggle for national liberation from colonialism and white minority domination.⁷¹ For the AU it is different. While the AU also stresses respect for national sovereignty and non interference by Member States in the internal affairs of other states, it crucially articulates a right of the Union to intervene in grave circumstances like war crimes, genocide, gross violations of human rights, and crimes against humanity, and to date the most advanced doctrine of them all, unconstitutional changes of government.

The AU, unlike the OAU, adopts policies of respect for democratic principles, human rights, the rule of law and good governance, together with the promotion of social justice. The Constitutive Act of the AU adopted in Lome in July 2000 states in its preamble that States Parties are:

Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.⁷²

This is the language highly influenced by the African Charter as manifested under Article 3 for example, which takes a complete departure from the OAU by

⁶⁸ See C. Landsberg, in 'The African Peer Review Mechanism and Democratic Consolidation', paper presented at the Electoral Institute of Southern Africa Conference on *'Strengthening Democracy through NEPAD: The Role of African Civil Society, 26-27 May 2003, Johannesburg.*

⁶⁹ *Ibid*

⁷⁰ See J. Oloka-Onyango (note 32 above)

⁷¹ *Ibid.* 4

⁷² Constitutive Act of the AU (note 20 above)

making a direct reference to the African Charter. It places emphasis on human rights as the objective of the Union in Article 3(g), which emphasises the ‘promotion of democratic principles and institutions, popular participation and good governance’. Article 3(h) makes it clear that the objective is to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’. There are some AU principles, which are in line with the African Charter that are notably absent in the OAU language. These include the ‘promotion of gender equality’, ‘respect for democratic principles, human rights, the rule of law and good governance’. The AU makes provision for a Peer Review Mechanism. Through its purported development plan, the NEPAD as has been highlighted above, makes provision for public monitoring of delivery and commitments through its Conference for Stability, Security, Development and Co-operation in Africa (hereinafter the CSSDCA). The prime objective of the AU is to help Africa meet the challenges of the 21st Century by creating a link between peace, security, governance, democracy and development.

The AU makes provision for the establishment of some ten new organs, nine of which are already in place with the exception of the African Court of Justice. Two of these organs are important for the purposes of this dissertation. These are the Pan-African Parliament (hereinafter the PAP) and the Economic, Social and Cultural Council (hereinafter the ECOSOCC) as representative bodies that promote democratic governance and respect of human rights. The PAP is a unicameral body with representatives from all parliaments of African countries, with an initial role of an advisory nature for the first five years of its existence. In its Rule 4(b), the PAP undertakes to ‘promote human and peoples’ rights, consolidate democratic institutions and the democratic culture, good governance, transparency and the rule of law by all organs of the Union, Regional Economic Communities and Member States’.⁷³ The ECOSOCC was launched in March 2004 in Addis Ababa, and is an advisory organ composed of different social and professional civil society groups from member states, particularly youth and women’s organizations. It is an instrument to give civil society a

⁷³ See the ‘Rules of Procedure’ a Pan African Parliament document adopted at the Second Ordinary Session, 16 September – 1st October 2004, Midrand, South Africa.

voice. Some of the important objectives of ECOSOCC in so far as democracy and good governance are concerned as articulated in Article 2 are:

- The promotion of a permanent dialogue between the African people and its (sic) leadership on vital issues concerning Africa and its future;
- The promotion of strong partnerships between governments and all segments of civil society, in particular women, youth, children, the Diaspora, and the private sector; and
- Promoting and defending a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms, and social justice.⁷⁴

The ECOSOCC has to ensure that the AU's activities effectively meet the aspirations of the African peoples, thus contributing towards building and sustaining the institutional, human and operational capacity of the African civil society. This body is very important for civil society participation, which rarely engages Africa's inter-state bodies and when it has, it has in the main, been weak in its capacity and strategies for engaging such inter-state entities.

2.4 NEPAD: Human Rights centred development plan?

The AU at its Durban Summit adopted a development plan known as New Partnership for Africa's Development (NEPAD) that had in the main been pioneered by a handful of countries in the form of South Africa, Nigeria, Senegal, Algeria, and Egypt. NEPAD is a plan premised on the attainment of peace and stability through governance based on democratic values and principles.⁷⁵ The overall purpose of NEPAD is to give practical effect to the African Renaissance vision. This is the vision by Africa's leaders to reclaim and place the destiny of the continent in the hands of its people; a recognition that the a new vision and hope for the future must be crafted as

⁷⁴ See the Statues of the Economic, Social and Cultural Council of the African Union, available at <http://www.africa-union.org/organs/ecosocc/STATUTES-En.pdf>

⁷⁵ See NEPAD Base Document available at www.un.org/africa/osaa/reports/nepadEngversion.pdf

reflected in the AU Commission's Strategic Plan Document. Mbeki who has been one of the pioneers of such 'rebirth' characterised it in the following terms:

The call to achieve Africa's renaissance is therefore necessarily a call to the African masses to rise up in struggle to defeat poverty and underdevelopment, to end Africa's marginalisation and to restore the dignity of Africans everywhere. The genuine democratisation of African politics and systems of governance, and the empowerment of the African masses to be their own liberators, as visualised both in the Constitutive Act of the AU and NEPAD, is critical to the achievement of this objective. Failure to realise these goals would nullify the historic possibility we have to make decisive advances towards Africa's renaissance. This would condemn all Africans to the perpetuation of their status as the "wretched of the earth".⁷⁶

In the wisdom of the NEPAD Base Document drafters, this is to be reinforced by new commitments by Northern powers in the form of financial assistance and the enhancement of the continent's capacity to consolidate peace and democracy. Yet, in proposing the new partnership, NEPAD recognises that Africa holds the key to its own development. The logic of NEPAD is thus to make a clear link between development and stability. It singles out three prerequisites for social and economic regeneration, poverty alleviation and empowerment. These are:

- Peace and security;
- Democracy and political governance; and
- Economic and corporate governance.⁷⁷

NEPAD goes further and asserts that, of crucial importance to Africa and the rest of the world is the establishment and consolidation of a political order and system of governance that is (i) 'legitimate and enjoys the support and loyalty of the African people; (ii) strong enough to advance the interests of African people; (iii) able to

⁷⁶ See T. Mbeki, in 'Defeating African underdevelopment' addressing the Third African Renaissance festival in Durban, South Africa, taken from *Africa Define Yourself*, Tafelberg Publishers (2001)

⁷⁷ See NEPAD Base Document (note 75 above)

address the fundamental development interests of African people; and (iv) able to engage effectively with various global processes that characterise the world economy.⁷⁸

NEPAD acknowledges that in those regions and countries marred by armed conflict, the overwhelming priorities are (i) to achieve peace; (ii) to disarm and demobilise combatants; and (iii) to resettle refugees. Africa's capacity to prevent, mediate and resolve conflicts on the continent must strengthen, including, the capacity to deploy African peacekeeping forces when necessary.⁷⁹

NEPAD recognises that if peace and security are to lead to sustained growth and development, it is of the utmost urgency that the capacity of the state in Africa to fulfil its responsibilities be strengthened. These responsibilities include:

- Poverty eradication and development;
- Entrenching democracy;
- Human rights and respect for the rule of law;
- Creating a conducive environment for private sector mobilisation; and
- Responding appropriately to the process of globalisation.⁸⁰

States that have signed on to be part of NEPAD have committed themselves to these key issues

- Strengthening parliamentary oversight;
- Promoting participatory decision-making;
- Adopting effective measures to combat corruption and embezzlement; and
- Undertaking judicial reforms.⁸¹

These issues are fundamental as far as the principles of democratic governance are concerned. For example, the initial drafts of the Political and Good Governance Peer Review Mechanism stress the importance of 'political will' to keep to core values,

⁷⁸ *Ibid*

⁷⁹ See C. Landsberg (note 68 above)

⁸⁰ See NEPAD Base Document (note 75 above)

⁸¹ *Ibid* par 83

commitments and obligations on democracy, human rights and good governance. It stresses the need to ‘adhere to principles of a constitutional democracy, the rule of law and the strict separation of powers, including the protection of the independence of the judiciary.’⁸²

The NEPAD Declaration on Governance makes a link between development and democracy, concluding that:

Development is impossible in the absence of true democracy, respect for human rights, peace and good governance...And Africa undertakes to respect the global standards of democracy, the core component of which include political pluralism, allowing for existence of several political parties and workers’ unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.⁸³

It hopes to ensure ‘the periodic democratic renewal of leadership, in line with the principle that leaders should be subjected to fixed terms in office’.⁸⁴ It is committed to the ‘freedom of expression, inclusive of a guaranteed free media’.⁸⁵ These provisions are contained in the African Charter irrespective of the restrictions it imposes on their full enjoyment.

2.5 The African Charter and its influence on the continental architecture

Despite the criticism levelled against the African Charter, it has very important and clearly visible imprints almost across all official documents of the OAU/AU that were drafted after its adoption. All these documents carry a language of democracy, the rule of law, human rights, peace, good governance, and greater freedom.⁸⁶ Take the Grand Bay Declaration for example. It opens by full acknowledgement that the promotion and protection of human rights is a ‘matter of priority for Africa’. Such language would not be thought of in the pre-Charter deliberations. The Ministerial

⁸² See APRM Base Document, NEPAD/HGSIC-3-2003/APRM/Guideline/O&P, 9 March 2003, Para.18, Available at <http://www.nepad.org/2005/files/documents/48.pdf>

⁸³ NEPAD Base Document (note 75 above), Para 17

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See the Grand Bay (Mauritius) Declaration and Plan of Action OAU DOC CONF/HRA/DECL (I). Available at <http://www.africanreview.org/docs/rights/grandbBay.pdf>

Conference held in Mauritius in April 1999,⁸⁷ though using throughout the text of the declaration a language of request to the Assembly of Heads of State and Government, marked an improvement in the manner in which human rights language and that of democratic governance is embraced in the African governance corpus.

At that conference, the Ministers ‘acknowledged that observance of human rights is a key tool for promoting collective security, durable peace and sustainable development’,⁸⁸ and thus they reaffirmed their ‘commitment to the purposes and principles contained in the OAU Charter, the UN Charter, the Universal Declaration of Human Rights, as well as the African Charter on Human and People’s Rights’.⁸⁹ The Declaration further outlines in a kind of direct embracing way the language of the African Charter on issues like anti-discrimination. For example, Article 2 of the African Charter, provides that ‘Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.’⁹⁰ The Grand Bay Declaration affirms this by acknowledging ‘the democratisation processes taking place on the continent and the expressed desires of African people to live in a state of law which secures the full enjoyment of human rights and fundamental freedoms for all peoples, regardless of their gender, race, place of origin, religion, social status, ethnic background, political opinion and language’.⁹¹ Most importantly, the Declaration embraces a language key to the realisation of democratic governance by affirming the ‘interdependence of the principles of good governance, the rule of law, democracy and development’.⁹² Where the Declaration marks a clear importance of the African Charter, is in its ‘recognition of the necessity for States to give effect to the African Charter on Human and Peoples’ Rights, international humanitarian law and other major international human rights instruments which they have ratified and incorporated in their legislations for wider effect throughout Africa’.⁹³

⁸⁷ *Ibid*

⁸⁸ *Ibid* Para 3

⁸⁹ *Ibid*

⁹⁰ See African Charter, Article 2.

⁹¹ See Grand Bay Declaration (note 86 above)

⁹² *Ibid.* Art 3

⁹³ *Ibid.* Art 14

2.6 Conclusion

This chapter has sought to focus more on the evolving governance architecture of Africa and how it has sought to place issues of democratisation, human rights, the rule of law, and popular participation on the mainstream agenda of all AU structures, mechanisms and programmes. This has been done as part of examining the extent to which the African Charter has influenced the processes of shaping a continental architecture that is premised on the importance of democratic governance and respect for human rights.

In this chapter, Article 3 of the Constitutive Act of the AU whose language is about democratic governance and human rights in line with the African Charter has been highlighted. There are two most important sub-clauses here that should be emphasised namely, Article 3(g) that outlines one of the objectives of the Union as the ‘promotion of democratic principles and institutions, popular participation and good governance’ and Article 3(h) which identifies another objective as to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’. There has been a further emphasis on the principles of the African Charter in the Constitutive Act of the AU on the ‘promotion of gender equality’ and the ‘respect for democratic principles, human rights, the rule of law and good governance’.⁹⁴

The next chapter examines in detail the design and implementation of the African Peer Review Mechanism (APRM) and its effect on the quality of democratic governance within the context of the African Union. This is hailed as an innovative concept by African leaders to review one another’s performance on broad areas like political governance, economic governance, human rights and the rule of law. Though it is an instrument that AU member States accede to voluntarily, its conceptualisation and introduction nonetheless presents a complete departure from the practice of the Organisation of African Unity.

⁹⁴ See Art.4 (l) and (m) of the Constitutive Act of AU (note 20 above)

CHAPTER THREE

THE AFRICAN PEER REVIEW MECHANISM AND DEMOCRATIC GOVERNANCE

‘SADC and its external partners do agree that the political values of good governance, democracy, rule of law, and respect for human rights are a necessity... In SADC, we are deeply committed to the new values that should guide the relationships between our states and our peoples. But we believe that it is not wise to push us to implement such values using undemocratic means, with constant interference.’⁹⁵

3.1 Introduction

As mentioned earlier, at the Durban Summit of the African Union (AU) in 2002, a plan that had been largely driven by a select group of African leaders in the form of South Africa’s Thabo Mbeki, Nigeria’s Olusegun Obasanjo, Algeria’s Abdelaziz Bouteflika, and Senegal’s Abdoulaye Wade, was adopted as an official development programme for Africa. This was the beginning of incorporating the NEPAD into the mainstream activities of the AU and its organs.

It was adopted as an African programme tailored by Africans and driven by Africans for the development of the African continent. Criticism of NEPAD as being presented or portrayed as an independent organization from the AU was beginning to gain ground even at international level. This necessitated Mbeki to clarify the matter in his letter to the Canadian Prime Minister Jean Chrétien by saying in part, that:

The AU is the primary organization that unites the people of Africa. NEPAD is its socio-economic development programme. Accordingly, NEPAD is not an organization separate from and independent of the AU. It has been authorized by the AU in all its elements, including the peer-review mechanism. Indeed, there is no way in which there can be no socio-economic development programme covering the member states of the AU independent of and outside the AU.⁹⁶

⁹⁵ Address to the SADC Summit by Dr Leonardo Santos Simao, Minister of Foreign Affairs, Mozambique, (March 2002)

⁹⁶ K. Hope, in ‘Toward Good Governance and Sustainable Development: The African Peer Review Mechanism’ (2005) 18(2) *Practitioner Perspective: An International Journal of Policy, Administration and Institutions* 285

NEPAD makes a direct link between development, peace and security, democracy and governance, and economic growth. To ensure that these objectives and values underpinning NEPAD are seen as central to the whole evolving continental governance architecture, African leaders adopted another innovative initiative to be driven by Africans themselves, which Mbeki alluded to in his letter to the Canadian Prime Minister, regarding the African Peer Review Mechanism (APRM). This is the process designed to deal with monitoring and assessment of the nature and extent to which African countries have complied with the dictates of human rights and good governance. It seeks to foster democratic cultures and practices for the realization of good governance advocated for in the NEPAD framework.⁹⁷

The AU provides the framework under its Constitutive Act to pursue unity and the establishment of democratic cultures and practices through its institutionalised organs like the PSC, the PAP and the ECOSOCC. In its vision,⁹⁸ the AU Commission articulates a quest for the promotion of peace, security and stability as the prerequisites for the implementation of the development and integration agenda of the Union. The launch of the AU and its adoption of NEPAD are according to the African Commission, under the leadership of President Alpha Omar Konare, a 'reflection of the determination of African leaders to take the continent on another path'.⁹⁹ This is clearly captured in Mission Five of the Strategic Plan of the African Union Commission, which commits the Union to 'play a leadership role for promotion of peace, human security and good governance in the continent'.¹⁰⁰ To realise these objectives of the Union and its programme NEPAD, a peer review has been put in place. It is on this basis that the focus of this chapter is on assessing the extent to which the design and implementation of the APRM could affect the quality of democratic governance in Southern Africa and trace the imprints of the African Charter on this process.

In this chapter a brief outline is made of key democracy and good governance principles as envisioned under the continental governance architecture, and how initiatives like NEPAD seek to realise such ideals. The chapter looks into political contexts and dynamics that inform the AU and NEPAD. The opening quote is

⁹⁷ *Ibid.*

⁹⁸ See Vision of the AU Commission Vision (note 24 above)

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

interesting to note for analysis on how African leaders interpret issues of human rights, good governance, and democracy. It offers an interesting basis for reflection on the question being addressed here. The author thus concludes by arguing that the emerging African governance architecture sets Africa on the right path to meeting the standards of democratic governance and accountability. It is further argued that while the APRM is another 'innovative initiative' (to use Hope's words), to have been adopted by the African leaders, it would be meaningless in deepening democratic cultures and practices, if civil society does not get involved in shaping this agenda.

3.2 Emphasising good governance

Hope contends that the introduction of APRM within the framework of NEPAD is a unique and innovative initiative. In fact he refers to the latest continental developments as a result of innovative leadership by what he interestingly terms 'enlightened leaders'.¹⁰¹ The APRM itself he contends, serves as a 'sea of change in the thinking of African leaders as they seek to reverse the trend of lack of accountability, political authoritarianism, state failure, and corruption to embrace and consolidate democracy as well as effect sound and transparent economic management'.¹⁰² In other words, the whole idea of NEPAD for its drivers is to move the continent to good political, economic and corporate governance.

NEPAD's philosophy is interestingly premised on an emphasis on good governance as a driving force for development. Inherent in this is an emphasis on democracy as an important element that informs the character of such development. This view by African leaders has heavily borrowed from the thesis advocated by Zack-Williams that development in Africa in the 21st century should be driven by a philosophy of '*no democracy - no development*'.¹⁰³ Amoako, Mbeki, and Annan all emphasise good governance as a critical measure in eradicating poverty.¹⁰⁴ This governance deals with matters of how the affairs of the state are handled, which is

¹⁰¹ See K. Hope (note 96 above)

¹⁰² *Ibid*

¹⁰³ See A. Zack-Williams 'No Democracy, No Development: Reflections on Democracy in Africa' (2001) 28(88) *Review of African Political Economy* 285

¹⁰⁴ See K. Hope (note 96 above), and see also K. Amoaka in 'Perspectives on Africa's development', United Nations, New York (2000)

mean discharging one's responsibility in 'an effective, transparent and accountable manner'. Hope thus concludes:

Good governance entails the existence of efficient and accountable institutions – political, judicial, administrative, economic, corporate – and entrenched rules that promote development, promote human rights, respect the rule of law, and ensure that people are free to participate in, and be heard on, decisions that affect their lives.¹⁰⁵

The 2002 UN Human Development Report reminds us that good governance should essentially serve human development, and in that way it becomes democratic governance. Such governance means that 'people's human rights and fundamental freedoms are respected, allowing them to live with dignity.'¹⁰⁶ NEPAD is itself premised on these principles of good governance and stresses the fundamental principles of democracy and human rights. It regards good political and corporate governance, peace and security as inherent requirements if Africans are to succeed in placing the continent on a path of lasting growth and development. It is also a way of impressing upon the world that Africans have taken ownership of their own development as architects of the NEPAD renewal plan.¹⁰⁷ In its attempt to link development to democracy, it concludes as follows:

Development is impossible in the absence of true democracy, respect for human rights, peace and good governance...And Africa undertakes to respect the global standards of democracy, the core component of which include political pluralism, allowing for existence of several political parties and workers' unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.¹⁰⁸

NEPAD arguably makes an interesting departure from other preceding development plans for Africa's recovery like the Lagos Plan of Action with emphasis

¹⁰⁵ *Ibid*

¹⁰⁶ See paragraph 51 of APRM Base Document (note 82 above)

¹⁰⁷ For the debate on good governance within the context of NEPAD and the AU, see C. Moore in 'Democratic peace and governance: Two sides of the same coin?' *Centre for Policy Studies Policy Brief 27, Johannesburg, April 2003*. See also C. Landsberg, 'Building sustainable peace requires democratic governance', *Synopsis, vol. 7, no. 1, Centre for Policy Studies, April 2003*

¹⁰⁸ See NEPAD Base Document, Para. 17 (note 75 above)

on these democratic principles and institutional reforms based on international partnership.¹⁰⁹ Critical in this, is the focus on building capacity of Africa's institutions to focus on: a) strengthening parliamentary oversight, b) promoting participatory decision making, and c) undertaking judicial reforms.¹¹⁰

The UNDP therefore concludes that good governance advances sustainable development. It points to two critical areas relevant to the subject of this chapter. The first is that enjoying political freedoms as enshrined in all human rights instruments, and citizen participation in decision making are fundamental human rights; and secondly that it promotes sustainable development by empowering citizens to influence policies that promote growth and prosperity, and reflect their priorities. The UNDP further stresses that democracy requires effective and functioning institutions.¹¹¹ The building of capacity that NEPAD identifies is in line with the universal position held by the international community. Landsberg and Moore for example see the central point of NEPAD as being to create conducive conditions for meaningful and sustainable development in Africa.¹¹² African leaders make commitments to democracy as well as 'good' political and economic governance, while they continue to work towards the prevention and resolution of situations of conflict and instability on the continent.¹¹³

Speaking on defeating African underdevelopment,¹¹⁴ Mbeki argued that Africa and the rest of the world must act collectively towards building an 'evolutionary movement from neo-colonial dependence to genuine independence and democracy.' He sees such a movement as an important and crucial aspect in addressing Africa's quest to defeat underdevelopment; however it is 'dependent' on certain conditions that should be addressed. These conditions deal with issues of governance and he argues that it is in the interests of Africa to address them. He concludes that Africa must organise itself such that:

¹⁰⁹ See W. Gumede in 'Thabo Mbeki and the Battle for the Soul of the ANC', *Zebra Press, Cape Town* (2005) 208

¹¹⁰ See NEPAD Base Document (note 75 above), 18

¹¹¹ See UN Human Development Report 2002: 'Deepening Democracy in a fragmented World', p.1 available at <http://hdr.undp.org/reports/global/2002/en/pdf/overview.pdf>

¹¹² See Landsberg and Moore (note 107 above)

¹¹³ *Ibid.*

¹¹⁴ See T. Mbeki (note 76 above)

- Democracy and respect for human rights prevail underwritten by the necessary constitutional, legislative and institutional arrangements; and
- There exists a system of governance, with the necessary capacity, to ensure that the state is able to discharge its responsibilities with regard to such matters as development, democracy and popular participation, human rights and respect for the rule of law, and appropriate responses to the process of globalisation.¹¹⁵

A year later, Mbeki argued that Africa was content in her resolve to realise good governance in its entirety confidently saying, this will happen 'not because we seek to improve our relations with the rest of the world as a first objective, critically important as this is, but to end political and economic mismanagement on our continent, and the consequential violent conflicts, instability, denial of democracy and human rights, deepening poverty and global marginalisation.'¹¹⁶

3.3 The APRM: Its context and outline

In attempting to critically assess the extent to which the design and implementation of the APRM could affect the quality of democratic governance and respect for human rights in Africa, the mechanism needs to be understood from the point of view of its design and the context in which it is built. In the APRM base document, the mechanism is defined as 'an instrument voluntarily acceded to by Member states of the African Union as an African self-monitoring mechanism'.¹¹⁷

The APRM focuses on four areas for review, which are democracy and good political governance, economic governance and management, corporate governance and socio-economic governance. The whole process of a country's review should be completed within six months, where after the report is made public and is tabled in the AU and its key organs like the PSC, the PAP, the African Commission on Human and Peoples Rights, and other agencies like the United Nations Economic Commission for

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ See APRM Base Document (note 82 above)

Africa (UNECA). In terms of organisation and process of the peer review, the overall responsibility of supervision falls under the APR Forum, which is made up of Participating Heads of State and Government (PHSG), a forum composed of leaders of those states, which have acceded to the peer review process. This body appoints a team that will direct and manage the process assisted by technical experts, which is known as the Panel of Eminent Persons drawn from all regions of the AU. Currently, members of the Panel are the Chairperson Ms Marie-Angelique Savane (Senegal), Prof Adebayo Adedeji (Nigeria), Ambassador Bethuel Abdu Kiplagat (Kenya), Dr Graca Machel (Mozambique), Mr Mourad Medelci (Algeria), Dr Dorothy Njeuma (Cameroon), and Dr Chris Stals (South Africa).¹¹⁸ Among the areas of responsibility of the Panel, as per the given mandate by the PHSG, is to 'exercise oversight of the African Peer Review process with a view to ensuring the independence, professionalism, and credibility of the process'.¹¹⁹ These members are not representing their countries.

Whilst the process of the APRM is an initiative by African leaders and is African led, designed to deal with issues of monitoring and assessing the nature and extent to which African countries have complied with dictates of good governance, its operationalisation clearly would happen if countries are voluntarily acceding to it.¹²⁰ It is not about retribution¹²¹ but about sharing experiences, offering a platform to foster democratic cultures and practices, for the realisation of good governance advocated for under the NEPAD framework. Accession by a country means 'undertaking to submit to periodic peer reviews, as well as to facilitate such reviews, and be guided by agreed parameters for good political governance and good economic and corporate governance'.¹²² These areas of review and the general direction taken under the APRM are based on the Declaration on Democracy, Political, Economic and Corporate Governance.¹²³ It is important to note that APRM is intended to frankly assess all

¹¹⁸ See K. Hope (note 96 above)

¹¹⁹ See the African Peer Review Mechanism Organisation and Process: NEPAD Heads of State and Government Implementation Committee Sixth Summit, NEPAD/HSGIC/03-2003/APRM/Guideline/O&P, 9 March 2003, Abuja, Nigeria.

¹²⁰ See paragraph 7 of the Memorandum of Understanding on the African Peer Review mechanism, which states that countries enter this process as a mutually agreed instrument voluntarily acceded to by member states of the African Union as an African self-monitoring mechanism, available at www.nepad.org/2005/files/documents/111.pdf.

¹²¹ See K. Hope (note 96 above).

¹²² See APRM Base Document (note 82 above)

¹²³ *Ibid.*

critical challenges in the above-mentioned focus areas so that needed action could be identified, and also secure commitments from the country being reviewed in order for it to fix those areas it has committed itself to.

According to the APRM Base Document, the countries that have voluntarily acceded as members of the APRM have committed themselves to:

- Ensuring impartial, transparent and credible electoral administration and oversight systems;
- Promoting a dedicated, honest and efficient civil service, and establishing oversight institutions providing necessary surveillance;
- Ensuring transparency and accountability by all layers of government; and
- Favouring the creation and strengthening of institutional capacity to ensure the proper functioning of democratic institutions and instruments.¹²⁴

The APRM country self-assessment includes nine major objectives to be met under the Democracy and Good Political Governance section. For the purposes of this chapter, seven of these objectives that have a direct impact on democratic governance are highlighted.

These are:

- Prevention and reduction of intra-and inter-country conflicts;
- Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, a Bill of Rights and supremacy of the Constitution;
- Promotion and protection of economic, social and cultural rights, civil and political rights as enshrined in African and international human rights instruments;
- Upholding the separation of powers, including the protection of the independence of the judiciary and of an effective parliament;
- Ensuring accountable, efficient and effective public office holders and civil servants;
- Fighting corruption in the political sphere; and

¹²⁴ APRM Base Document (note 82 above)

- Promotion and protection of the rights of women.¹²⁵

The overall objective of the APRM as outlined in the base document in as far as democratic governance is concerned, is 'fostering the adoption of policies, standards and practices that lead to political stability... Through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs of capacity building.'¹²⁶ Furthermore, this process will lead to 'sharing of information that will focus on mutual learning in areas of high priority in NEPAD such as strengthening institutions of democracy and human rights.'¹²⁷

There is no intention in this dissertation to go into details in terms of all the steps to be followed in the review process, suffice to highlight the first three and detail the last two as they are critical in the entire analysis of the subject at hand. The first stage is twofold in that the country under review 'takes necessary steps' in preparing a national Programme of Action, and the preparation of background information about the country. The second stage involves country visits by the APR Team, and the role of the country is to assist in enabling this team to have access to all areas of its source of information. The third stage is about the preparation of the report in a draft form and discussing it with government, and government responses are attached to the final report. The fourth stage is about sending the report to the APR Forum, which meets to consider it and decide on the course of action to be taken, which is then communicated to the Head of State or Government of the reviewed country. In that regard, Article 24 of the base document reads:

If the government of the country in question shows a demonstrable will to rectify the identified shortcomings, then it will be incumbent upon participating Governments to provide what assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed. However, if the necessary political will is not forthcoming from the Government, the participating states should first do everything practicable to engage it in constructive dialogue, offering in the process technical and other appropriate assistance. If dialogue proves unavailing, the participating Heads of State and Government may wish to put the Government on

¹²⁵ *Ibid*

¹²⁶ *Ibid.* 40

¹²⁷ *Ibid.* 41

notice of their collective intention to proceed with appropriate measures by a given date. The interval should concentrate the mind of the Government and provide a further opportunity for addressing the identified shortcomings under a process of constructive dialogue. All considered, such measures should always be considered as a last resort.¹²⁸

It is interesting to note the use of three important and loaded concepts in this Article 24, which shall be visited later on. Firstly, the position by the AU here in seeking to achieve its objective of promotion of good political governance and good economic and corporate governance as part of the promotion of democracy and human rights, is dependent on a 'demonstrable will' of a reviewed country. Secondly, another important concept is the use of 'constructive dialogue' as means of persuasion of the reviewed country to address certain issues highlighted by the APR Team. The last concept is the requirement that notice be given to a country if dialogue fails, of the other members' 'collective intention to proceed with appropriate measures' that are not spelt out, basically stopping short of providing for particular sanctions.

The last step that follows this 'constructive dialogue' is to make the document public six months after it has been considered by the APR Forum, by tabling it at key regional structures like the PAP, the African Commission on Human and People's Rights, the PSC, and the ECOSOCC. This becomes the final step in the process.

3.4 Diagnosis of APRM in the context of AU, SADC and NEPAD

The African governance, security and human rights architecture is intertwined with and interlinked to various protocols at continental and international levels. The APRM that is being discussed here seeks to enhance the implementation of NEPAD, which is a programme of the AU. The tendency is to discuss NEPAD and all its processes outside the broader governance and African human rights regime.¹²⁹

There are three fundamental instruments in this regard, which require interrogation to inform the discussion at hand. These instruments are the Constitutive Act of the AU, the African Charter, and the SADC Treaty. The African Charter

¹²⁸ *Ibid.* 21

¹²⁹ See G. Masterson 'An Analysis of the Implementation of the African Peer Review Mechanism in Ghana, Kenya and Mauritius', *EISA*, Johannesburg (2005)

arguably represents a comprehensive instrument to assess relative matters of democracy, human rights and all other positive principles that should govern and inform the African continent as one which respects fundamental principles of democratic governance. Since its adoption in 1981, the African Charter offered a basis for the Constitutive Act of the AU and NEPAD's Declaration on Democracy and Governance in formulating principles for solid and sustainable democracy. Today, the African political landscape is dominated by concepts of democracy that are based on good political and economic governance, respect for the rule of law, and participatory democracy through an entrenched concept of public participation.

The AU Commission in its Strategic Plan¹³⁰ tabled at the Addis Ababa Summit in 2004, argued that the Regional Economic Communities as envisioned by the AU, should drive the integration of the African continent. This makes SADC a regional body that falls under scrutiny on how it plays its role in the promotion and protection of democracy and human rights. The key organ in SADC for interrogation is the Protocol on Politics, Defence and Security Co-operation, which came into effect in 2002. The objective of the protocol on promoting democracy is covered under Article 2 (g), in the following terms:

To promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the African Union and United Nations respectively.¹³¹

During the sixth Summit of the Heads of State and Government Implementation Committee of NEPAD, African leaders agreed on a framework for a peer-review mechanism designed to tackle obstacles to growth and development on the continent.¹³² The framework is aimed at encouraging and building responsible leadership within the continent, and will involve voluntary self-assessment, constructive peer dialogue and the sharing of common experiences. The idea is to expose under-achievers and identify problems, as well as provide corrective measures and support.

¹³⁰ Note 24 above

¹³¹ See Art. 2 (g), SADC Protocol on Politics, Defence and Security Co-operation, available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/1Protocol_on_Defence_Organ.pdf

¹³² See C. Landsberg, (note 68 above)

3.5 Governance, democratisation and the rule of law

The AU's objectives on issues of governance, democratisation and the rule of law include:

- Greater political participation, pluralism, transparency, accountability and freedoms for the citizenry to participate and entrench democratic governance processes;
- Establishing and strengthening organs and mechanisms of good and democratic governance such as the Pan-African Parliament (PAP), the African Court of Justice, ECOSOCC, and the Regional Economic Communities;
- The involvement and participation of civil society in governance;
- Promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments;
- Strengthening efforts such as the Peer Review Mechanism;
- Effective promotion and protection of human rights; and
- Addressing issues of humanitarian and refugee crises.¹³³

The above objectives clearly reflect the AU's overwhelming continental integration programme that places the issue of democratic governance on what is obviously a complex and ambitious agenda. It is premised on the attainment of peace and stability through sound governance based on democratic values and principles. A critical analysis of the situation however, suggests that the commitment of some of the AU's member states to the values of democratic governance as outlined in its Constitutive Act, the African Charter on Popular Participation, and most importantly the African Charter including NEPAD, remains weak. This is further complicated by the fact that the AU has inherited a very weak, chronically debt-burdened organizational apparatus from the OAU, and runs the risk of becoming a litany of constitutional and legal provisions, declarations and protocols that lack a tangible implementation capacity.

The logic of NEPAD is thus to create a clear link between development and stability. It singles out three prerequisites for social and economic regeneration, poverty

¹³³ See Article 3 of the Constitutive Act of the AU, (note 20 above)

alleviation and empowerment. These are: (a) peace and security; (b) democracy and political governance; and (c) economic and corporate governance. This is clearly illustrated by the dictum: ‘no peace without development; no development without peace’.¹³⁴ NEPAD goes further and asserts that, of crucial importance to Africa and the rest of the world, is the establishment and consolidation of a political order and system of governance that is:

- Legitimate and enjoys the support and loyalty of the African people;
- Strong enough to advance the interests of African people; and
- Able to address the fundamental development interests of African people.¹³⁵

NEPAD acknowledges that in those regions and countries marred by armed conflict, the overwhelming priorities are: to achieve peace, disarm and demobilise combatants; and to resettle refugees. Africa’s capacity to prevent, mediate and resolve conflicts on the continent must strengthen, including, the capacity to deploy African peacekeeping forces when necessary.¹³⁶ NEPAD recognises that if peace and security are to lead to sustained growth and development, it is of the utmost urgency that the capacity of the state in Africa to fulfil its responsibilities should be strengthened. These responsibilities most importantly include:

- Entrenching democracy;
- Protecting and promoting human rights; and
- Respect for the rule of law.¹³⁷

As far as the issues of governance, democratisation and the rule of law are concerned, African states need to entrench democratic governance processes by ensuring greater political participation, pluralism, transparency, accountability, human rights and fundamental freedoms for all, as these factors will enable the citizenry to participate fully in the decision-making processes.

Landsberg notes that African leaders adopted the Constitutive Act of the African Union, which was to become the article of faith and constitutional legal

¹³⁴ Par 79 NEPAD Base Document (note 75 above)

¹³⁵ *Ibid*

¹³⁶ *Ibid*, Par. 16

¹³⁷ *Ibid*

framework of the African Union, the member states of the Organisation of African Unity (OAU) and African Economic Community (EAC) articulating the vision of a people-centred African Union.¹³⁸ The preamble to the Constitutive Act states that the AU would be ‘guided by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our people’.¹³⁹ Article 3 of the Act, makes a commitment to ‘promote democratic principles and institutions, popular participation and good governance’.¹⁴⁰ Thus, the AU recognises that the full realisation of its common vision of a united and strong Africa requires the building of partnerships between governments and all segments of civil society - in particular women, youth and the private sector.

3.6 From institutional matters to substantive issues

The organisation and design of the APRM emphasises the principle of constructive engagement where the reviewed country will be persuaded to act on the issues highlighted in the review process. Masterson argues that NEPAD seeks ‘to promote African development on African terms, through governance reforms and increased transparency and accountability’.¹⁴¹ He correctly observes that APRM is central to this process, as ‘part and parcel’ of it.¹⁴² This process is in terms of a concept based on the model of the Organisation for Economic Co-operation and Development (OECD), whose intention is to ‘bring together like minded states committed to principles of good political, economic and corporate governance.’¹⁴³ He takes a swipe at those critics of the APRM that suggest that it is a ‘toothless’ instrument because it is not punitive to those countries who are non-compliant to the standards, criteria and indicators of the mechanism, by comparatively analysing the OECD model that

¹³⁸ See Landsberg (note 68 above)

¹³⁹ Constitutive Act of the AU, Preamble, Para 7 (note 20 above)

¹⁴⁰ *Ibid.* 4

¹⁴¹ See G. Masterson (note 129 above)

¹⁴² *Ibid.*

¹⁴³ See F. Pagani ‘Peer Review as a Tool for Co-operation and Change. An analysis of the OECD working method’, SG/LEG (2002) 1, available at <http://www.oecd.org/dataoecd/33/16/1955285.pdf>

suggests that such criticism is out of order.¹⁴⁴ Pagani had concluded in his definition of the term peer review that:

Over the years, the expression in the practice of international organisations had come to mean a systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the states involved in the review, as well as on their shared confidence in the process.¹⁴⁵

The APRM also adopts this soft approach of persuasion to achieve ‘mutual accountability’ that Pagani contends is important in stimulating the state to change, attain goals of the review and meet outlined standards. He further makes an interesting and important case for peer review in other areas like human rights and democratic governance, which is central to Africa’s whole development agenda. These involve transparency, which he sees as very important towards public opinion as it contributes to the effectiveness of the process; and compliance with internationally agreed standards.¹⁴⁶ He thus concludes that, ‘In many contexts, the soft law nature of peer review can prove better suited in encouraging and enhancing compliance than a traditional enforcement mechanism.’¹⁴⁷

Africa has not been left out of the global trend of democratisation and promotion and protection of human rights. According to Mutua, this new acknowledgement of democratic principles that relate to demands for more open political processes may auger well for protection of civil and political rights particularly, in these emergent democracies, as they are more ‘inclined than their predecessors to respect human rights at home and to agree to a more viable regional system.’¹⁴⁸

¹⁴⁴ *Ibid*

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid.*

¹⁴⁸ See M. Mutua (note 23 above)

3.7 Conclusion

The emerging African governance architecture, as advanced through the continental body - the AU and its organs like the Pan African Parliament, ECOSOCC, and NEPAD and its APRM, offers an opportunity for developing the region of Africa as one that is democratic and respects human rights. As mentioned earlier on, the SADC Protocol on Politics, Defence and Security Co-operation further entrenches these principles at a regional level.

All these principles are inherent in the APRM as a conscious approach to enhancing the AU and NEPAD in the promotion of democratic governance, which places the importance of human rights at the centre of the democratisation discourse in line with the overall principles contained in the African Charter. The UNDP thus concludes that, ‘democracy is inseparable from human rights and is founded on the primacy of the law, for which judicial institutions and independent, impartial, effective oversight mechanisms are the guarantors’.¹⁴⁹ The Constitutive Act recognizes this principle and is a legally binding instrument as is the African Charter, which the Act refers to as its body representing African leadership’s commitment to human rights centred governance. However, we cannot afford to miss the point made by Mutua that its irony is that it was adopted by people who themselves did not practice the same democratic principles it provides. He highlights the claw back clauses saying that, ‘the post colonial state, like its predecessor, impermissibly restricts most civil and political rights, particularly those pertaining to political participation, free expression, association and assembly, movement, and conscience.’¹⁵⁰

Hope summarizes this point well in his assessment of the benefits the APRM brings to member states and the region as well, saying:

Peer reviews have been demonstrated to have a number of beneficial effects as applied across the world. As African countries seek to improve their governance and march towards sustainable development, peer reviews can provide the basis for policy changes to meet commitments and to observe the agreed standards and codes.¹⁵¹

¹⁴⁹ See UN Human Development Report 2002 (note 111 above)

¹⁵⁰ See M. Mutua (note 23 above) p. 6

¹⁵¹ See K. Hope (note 96 above) p. 295

Africa has long suffered under dictatorships and bad governance. The accession to APRM means that countries open themselves to scrutiny through monitoring their compliance to standards and would therefore move to comply, because they know that they are being monitored. Those who lack institutional capacity, open themselves to intervention from their peers to build such institutions that are relevant for instilling good governance. Acceding to APRM indeed implies a 'sea change' in leadership. The success of this project in advancing democratic governance is dependent on a vigilant civil society as well. Civil society should effectively develop engagement strategies for influencing Africa's inter-state institutions and programmes, ranging from the African Union, to NEPAD, to SADC, to COMESA, to ECOWAS, to IGAD, and to MAGREB. For civil society not to be engaged would be to leave integration programmes and structures to elitist and state-driven agendas. Engagement should seek to make these initiatives people-centred.

The cost of non-engagement is to leave Africa's inter-state bodies as mere extensions of governmental interest. For civil society not to engage the leaders would be to leave these institutions untransformed and undemocratised. This engagement should happen right from the first stage to the last when the report is made public. Where civil society participation is not provided for, allowance should be made for alternative or shadow reports, as provided for under the United Nations system.

CHAPTER FOUR

TOWARDS DEMOCRATIC CONSOLIDATION THROUGH REGULAR ELECTIONS AND PEACE INITIATIVES

4.1 Introduction

Democratic stabilization, strengthening, consolidation, and deepening as concepts and principles have in the latter part of the 20th century, occupied the centre stage in debates on democracy and governance. Closely linked to these, is the concept of human rights under international law, which has been guided by the United Nations under its various legal instruments, like the Universal Declaration on Human Rights (UNDHR) and the International Covenant on Civil and Political Rights (ICCPR). With the birth of the UN Millennium Declaration, a new terrain has been introduced that moves away from the traditional context of governance to include “democratic” aspects of governance. This is governance that is participatory, responsive, and accountable, which seeks to promote human development.¹⁵² Generally, discussions on human rights in the context of governance are centred on civil and political rights as embodied in the 1966 International Covenant on Civil and Political Rights (ICCPR).¹⁵³ Among the key aspects of the Convention are political liberties like freedom of expression, freedom of the press, and freedom of association and assembly, and the right to vote and stand for elections.

Under international human rights law, these rights are classified as first generation rights. They are immediate in application because a human being acquires them at birth. The focus of this chapter is on how the African Charter has opened pathways for democratic consolidation in Africa, and the practice of regular elections, as a way through which we can ascertain the level of such consolidation as an expression of the will of the people. Elections, or the practice of elections, strongly involves the political freedoms alluded to earlier. It is through these freedoms that the electorate can exercise their right to vote in a free and fair manner. Here, we examine the historical nature of governance in the continent with a primary focus on southern

¹⁵² See the UN Development Report 2002, (note 111 above)

¹⁵³ The International Covenant on Civil and Political Rights entered into force on 23 March 1976

Africa with particular reference to the democratisation processes of the early 1990s and how these have impacted on democracy and peace building. The chapter touches on the emerging governance and peace architecture on the continent as informed by the developments of regional initiatives like the AU and the NEPAD.

It concludes by examining the notion of democracy consolidation in the region. This is done with a view to examine whether Africa's democracy consolidation is judged on the basis of procedural or substantive democracy. The chapter is non-linear and cyclical as an attempt to build a holistic picture rather than being a mere insular presentation. It presents a global picture of what is involved in the discourse on democratic consolidation, by arguing that protocols are in place, but are not effected or adhered to as required for the consolidation of democracy.

4.2 Historical Background

Since the 1990s with the collapse of the Soviet Union and the subsequent end of the bipolar world of the Cold War era, there has generally been a massive move to democratisation in a number of countries in the South and in Eastern Europe.¹⁵⁴ This global trend has not left Africa unaffected, particularly the southern region that witnessed the collapse of the last pariah state of apartheid, when a new democratic state of South Africa emerged in 1994 after the historic April 27 elections of the same year.

The collapse of apartheid in South Africa was preceded by other success stories of democratisation projects in neighbouring countries like Namibia (1989), Zambia (1991), Malawi (1994), and Mozambique (1994).¹⁵⁵ The collapse of the Soviet Union and the end of the bipolar world coupled with the democratic transition in South Africa had an impact in Mozambique and Angola, which had been involved in long civil wars. Both countries had been colonies of Portugal and had attained independence in 1975 after the 1974 left-wing military coup in Portugal.¹⁵⁶ The new Portuguese government had a policy of supporting self-determination for Portugal's colonies. These two

¹⁵⁴ See R. Southall in 'Democracy in Africa: Moving Beyond a Difficult Legacy', *HSRC Press*, Cape Town (2003)

¹⁵⁵ See K. Matlosa 'Review of Electoral Systems and Democratisation in Southern Africa', *paper presented at the International Roundtable on the South African Electoral System*, Cape Town, 9-10 September 2002, available on <http://www.eisa.org.za/EISA/conferences/Matlosa.htm>

¹⁵⁶ See Wikipaedia (The free Encyclopaedia), The History of Mozambique, available on http://en.wikipedia.org/wiki/History_of_Mozambique

countries were engulfed in civil war since independence with many external forces involved, including apartheid South Africa. Matlosa observes that whilst Mozambique made a peaceful transition to democracy and has held three elections since 1994, Angola's peace process was dealt a blow after the aborted 1992 elections. It is yet to have elections under a new environment of peace after UNITA leader Jonas Savimbi was murdered in early 2002.¹⁵⁷ In the larger African continent, we have witnessed successful elections in countries like Kenya (2002), Nigeria (2003) with her first civilian-administered elections in two decades, and Rwanda (2003) since the 1994 genocide.

The democratisation process in Africa was an agenda aimed at replacing one-party and military regimes with multiparty states. Southall argues that the call for democratisation was an internal process with explicit linkages to external forces, which were predominantly economic. He refers to views by Woodward on what is seen as the 'second wave of freedom' (the first being decolonisation),¹⁵⁸ for Africa in asserting that elections are the ultimate form of accountability in the democratic process. Whilst this 'second wave of independence' has ushered in a new multiparty democratic process that has led to almost all of the SADC member states holding regular elections, Matlosa is of the view that it is however characterized by interesting contradictions, which require interrogation. Zimbabwe which has held regular elections since independence from Britain in 1980 in what became an almost one-way election process for the ruling Zanu-PF, which entrenched it as a dominant party state, for the first time in 2000 parliamentary elections witnessed a possibility of fierce competitive democracy with the emergence of the Movement for Democratic Change (MDC) thus creating a two party state.¹⁵⁹ In Zambia and Malawi for example, popular pressure had to be applied to Presidents Chiluba and Muluzi to stick to two-terms, as provided for by the constitutions of their countries, whilst Nujoma in Namibia stepped down after an extended three terms and transferred the reigns of power officially on 21 March 2005 to Hifikipunye Pohamba, his handpicked presidential candidate for the elections held late in 2004.

¹⁵⁷ See K. Matlosa (note 155 above) p. 4

¹⁵⁸ See R. Southall (note 154 above). The use of the term 'second wave of independence' refers to the democratization process that was aimed at doing away with one party state that dominated African politics after independence

¹⁵⁹ See K. Matlosa (note 155 above)

The 'second wave of independence' Southall concludes, was characterised by new constitutions that sought to entrench a democratic ethos in countries like Namibia and South Africa. The collapse of the apartheid state, and the end of one-party regimes in other parts of the region like Zambia and Malawi brought about new commitments to democracy and human rights as provided for under the international conventions these countries are state party to. Further, it was a new acknowledgement and embracing of liberal democracy and its values of individual rights, responsiveness and accountability to the electorate.¹⁶⁰

4.3 Theories and concepts of elections in Africa

Makoa contends that the democratisation process ('second wave of independence') in southern Africa occurred within and as part of the global political process. The 2002 UNDP report states that 140 of the world's nearly 200 countries hold multiparty elections and 34 countries with multiparty electoral systems in 1999 were in Africa.¹⁶¹

According to Booysen, quoting Pridman and Lewis, at the core of elections and democratisation theories and concepts, the complete process is characterised by three inherently linked processes, which are democratisation, democratic transition, and democratic consolidation. Democratisation denotes 'the overall process of regime change from start to completion, meaning from end of the previous authoritarian regime to the stabilisation and rooting of new democracies'.¹⁶² It is therefore informed by a transition from authoritarian or a one party system to a constitutional type of democracy, and the consolidation thereof of that newly established system. Democratic transition¹⁶³ refers to the two periods, which start at the disintegration of the authoritarian rule to a democratic one that is liberal or constitutional with all the systems put in place for democratic processes. Consolidation is a lengthier process that

¹⁶⁰ See R. Southall (note 154 above) p. 49

¹⁶¹ See P. Makoa, 'Electoral systems and procedures in southern Africa: electoral debates, the free and fair principle and non-acceptance of electoral outcomes', *paper at the conference on Southern Africa Ten years after Apartheid, Misty Hills, Gauteng, South Africa*.

¹⁶² See S. Booysen 'Elections in Southern Africa: Comparative Studies of Elections, Governance and Opposition' (2005)

¹⁶³ Ibid

is based on the deeper institutionalisation of democratic structures and processes, and the internalisation of the rules of engagement by all sectors of society.

a) Belief in the value of democracy

Though the Cold War ended with the collapse of the Soviet Union only as recently as 1989, the process of moving towards liberal democracy and of adopting human rights instruments by African states had happened long before that. Hansungule argues that despite such ratifications, meaningful programmes of mainstreaming human rights principles into domestic laws remained a far-fetched dream.¹⁶⁴ As suggested elsewhere, the belief by certain African leaders and intellectuals on the value of democracy could be drawn from the provisions of the African Charter on Human and Peoples Rights. The preliminary draft on the African Charter among other things, provided for the State Bodies to promote and protect human and peoples rights.¹⁶⁵ This was the beginning of a commitment by African Heads of States to the establishment of human rights centred governance that is based on the will of the people.

b) Elections as means of democracy consolidation

Elections are widely accepted as a crucial element of the democratisation process in terms of affording the electorate an opportunity to choose leaders. Giddens for example, sees elections as fulfilling another basic requirement of democracy, which he defines as a 'system involving effective competition between political parties for positions of power'.¹⁶⁶ Though this definition locates the process within the bounds of multi-partyism, it does not critically look at no party election processes like Uganda that have interestingly been largely approved by the international community.¹⁶⁷

¹⁶⁴ See M. Hansungule (note 7 above)

¹⁶⁵ See F. Ouguergouz (note 11 above)

¹⁶⁶ See A. Giddens, 'The Runaway World: Reith Lectures Revisited' at <http://www.polity.co.uk/giddens/pdfs/Democracy.pdf>

¹⁶⁷ Yoweri Museveni's National Resistance Movement, which led the country out of a rebel war into government in 1986, has for long been the official political party of the country, until recently when multiparty elections were held. In theory every Ugandan was a member of the Movement and could stand for any public office, from the village to the cabinet, but could not do so under the banner of the three political parties that existed. Museveni argued that multi-party politics bred ethnicity in underdeveloped countries. Available at <http://news.bbc.co.uk/1/hi/world/africa/816192.stm>

The Declaration on Criteria for Free and Fair Elections was unanimously adopted by the Inter-Parliamentary Council (IPU) at its 154th session in Paris, France on 26 March 1994, wherein the Council reaffirmed the importance of elections under political rights as enshrined in a number of UN instruments, as an expression of the people's will on how they should be governed through periodic elections. In the preamble of the same document, the signatories express the wish to promote the 'establishment of democratic, pluralist systems of representative democracy throughout the world' *including Africa (emphasis mine)*. Article 1 of the Declaration focuses on free and fair elections as a system of establishing democratic states. The article reads as follows:

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.¹⁶⁸

Clause 4, which is titled 'The Rights and Responsibilities of States' which calls on states to ensure that legislative measures are taken to guarantee the rights and institutional frameworks for genuine periodic elections that are free and fair. This must be done in line with constitutional processes and obligations of member states under international law. Goodwin-Gill referring to the Special Report on election in the Dominican Republic reminds us that:

The consolidation of democracy requires that the institution that manages the electoral process be independent, competent, and perceived as completely fair by all the candidates and parties participating in the process¹⁶⁹

Reports issued by the Electoral Institute of Southern Africa (EISA) in 2004, cast some doubts on the independence of the electoral bodies in many parts of the region with the exclusion of South Africa and Botswana. At regional level, SADC adopted the Protocol on Politics, Defence and Security Co-operation, which came into effect in

¹⁶⁸ See the Inter Parliamentary Union Declaration on Criteria for Free and Fair Elections of 1994, particularly Section 4, The Rights and Responsibilities of States.

¹⁶⁹ See Council of Freely Elected Heads of Government, *National Democratic Institute for International Affairs*. The 1990 Elections in the Dominican Republic: Report of an Observer Delegation, Special Report (1990) 20.

2002. The objective of the protocol on democratic consolidation is stated under Article 2 (g), as:

To promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the African Union and United Nations respectively.

The 1948 Universal Declaration of Human Rights, which is the basis on which the 1966 ICCPR was founded, sets out basic premises for elections and the rights of citizens thereof. The Covenant states that every citizen has the right to vote and be elected at genuine periodic elections held by universal suffrage through a secret ballot, thus guaranteeing the expression of the will of the people.¹⁷⁰ According to Hansungule the impact of these rights go hand in hand with political rights to effect them,¹⁷¹ which could be drawn in depth from the entire election processes, like holding of rallies, freedom of expression and of the press.

4.4 From governance to democratic governance

It has been stated in the foregoing discussion that elections are widely accepted as a crucial element of the democratisation process in terms of affording the electorate an opportunity to choose leaders. Fukuda-Parr and Ponzio make a case for elections as an instrument for participation in governance. They argue that democracy includes participation and accountability and this should be more than just having the right to vote, but should extend to include the strengthening of the voice and power of the electorate through 'democratic politics that make participation and public accountability' to be people centred rather than elite driven and centred. This agenda is a pro-poor agenda of democratic governance that extends to include civil society and the private sector. It is centred on a policy agenda that fulfils three essential components. The first component revolves around structures and processes that focus on good political governance, which in the main is about responsiveness and accountability of government to the electorate and is centred on participatory model. The second and third focus on good economic and civic governance; where civil

¹⁷⁰ Article 25 (b) on the right and opportunity of every citizen to vote

¹⁷¹ See M. Hansungule (Note 7 above)

society is given space to play its critical role of engaging with governance processes to shape government policy. NEPAD places some emphasis on these areas to entice the developed world to play an active role in reversing the fortunes of the continent.

As noted earlier, Mkapa's argument is worth noting here that democracy is central to human development because it is about how power is exercised, thus emphasizing responsiveness of government, transparency, and popular participation.¹⁷² Nkwi tries to contrast thorny issues around liberal democracy in the continent. He advocates for a particular consensus saying:

African democracies must possess certain universals, dealing mostly with finer aspirations of the people, for example, the guarantee of human rights, freedom of speech and due process before the law.¹⁷³

This is an emphasis on the need for political accountability of the state, and the empowerment of the citizens by giving them their rights as proscribed in the African Charter and the Universal Declaration of Human Rights.

4.5 Elections as a critical factor of governance

There is no doubt that elections are a major determinant of a mode of governance that any democracy chooses to adopt. In other words, elections provide the electorate with the right to decide on the kind of governance they want, and acceptance of the outcome as genuine in terms of their freeness and fairness is linked to the quality of governance in a state. Democratisation is generally defined as a system which should minimally meet 'certain procedural requirements',¹⁷⁴ such as a commitment to regular elections, institutional structures and processes that provide checks on the executive power, the guarantee of human rights and the emergence of a political culture that clearly is supportive of democratic political life. According to Fukuda-Parr and Ponzio, the emphasis has mainly been on elections and not on 'participation of people and

¹⁷² See B. Mkapa (note 21 above)

¹⁷³ See P. Nkwi (note 36 above)

¹⁷⁴ See G. Goodwin-Gill, in 'Free and Fair Elections: International Law and Practice', *The Conferences of the Inter-Parliamentary Union on European* (1994)

accountability of decision makers, which should also be emphasised'.¹⁷⁵ They see governance as generally about processes and not the ends. Such processes are about the way that power and the government of any given society exercises authority, and how civil society articulates and lobbies for their interests, and exercise their rights as provided for under international law and presumably under their country's constitution in advancing these.

Some of the definitions by leading multilateral institutions seem to focus on the process through which this power is exercised. The UNDP in its 1997 development report defines governance as the exercise of economic, political and administrative authority to manage a particular country's affairs at all levels of the state. It focuses on structures and processes of governance where civil society engages with the state. The OECD refers to governance as a concept that denotes the use of political authority and management of the country's resources for its development. They both refer to good governance as a concept that is about efficient institutions of governance, which emphasises the principles of the rule of law, transparency in public institutions and elimination of corruption.

Democratic governance, which has been a strong focus of the 2002 Human Development Report, is different from the 'good governance' concept in that it is centred on the principles of civil and political rights that are about political freedoms, human rights and elimination of all forms of discrimination. It does however, share with 'good governance' the quest or search for efficient institutions in a stable and predictable political and economic environment. According to this report, democratic governance at its core means:

- People's human rights and fundamental freedoms are respected, allowing them to live with dignity;
- People have a say in decisions that affect their lives;
- People can hold decision-makers accountable;
- Inclusive and fair rules, institutions and practices that govern social interactions;

¹⁷⁵ See S. Fukuda-Parr and R. Ponzio in 'Governance: Past, Present, Future Setting the Governance agenda for the Millennium Declaration' *UNDP (2002)*

- Women are equal partners with men in private and public spheres of life and decision-making; and
- Economic needs and social policies are responsive to people's needs and aspirations.¹⁷⁶

The concept of democratic governance is built on the political rights and freedoms that the ICCPR enshrines. These basic tenets of democratic governance are important for us to assess the relevance of any view on the nature and extent of democracy consolidation within the context of the African Charter, to ascertain whether it is a pathway or an obstacle to the establishment of democratic governance in Africa.

It is worth noting Southall's view on the way forward for democracy in Africa in seeking to address the question whether regular elections that have been held on the Continent are a sufficient test for us to proclaim some form of democratic stabilisation or consolidation. He concludes that:

Obstacles to democracy in Africa remain legion, and democratic progress is highly uneven, yet the continent's political systems are, overall, more pluralistic and more open than they were before 1990. And democracy remains on the agenda because there is no plausible alternative.¹⁷⁷

The region of Southern Africa, as a typical example, has arguably since the 1990s, been characterised by two distinct political developments, namely, democratisation and peace building. Respect for human rights is essential to the development of stable, democratic and prosperous societies at peace with one another. Fukuda-Parr and Ponzio further make an interesting point on the centrality of human rights and public participation in governance. They argue that a type of political regime that guarantees civil and political liberties as human rights and that ensures participation of people and accountability of decision-makers must underpin democratic consolidation.¹⁷⁸ The emphasis these authors make on public participation is important in that at the core of any legitimacy of a political system, is the popular participation by the people.

¹⁷⁶ See UN Human Development Report 2002 (note 111 above)

¹⁷⁷ See R. Southall (note 154 above)

¹⁷⁸ See S. Fukuda-Parr and R. Ponzio (note 175 above)

Democracy thus empowers people to take action to demand and defend their rights and the rights of others. The right to governance in principle should be expressed through democratic values and processes.¹⁷⁹ In a certain way, it is about access to power and decision-makers that give a sense of ownership of the decision-making process to the public, and thus facilitating people's power. Its effectiveness and realisation depends on the protection of certain fundamental civil and political rights like freedom of speech, freedom of expression, the right to vote and be elected, and freedom of assembly. Democracy that is devoid of civil and political rights is limited in scope as freedom of speech, freedom of association and assembly, ensure transparency and accountability of the state. Democracy is about collective decision-making, which is an embodiment of equality in the decision-making process by all members of a given society. Popular participation is crucial because it consolidates and entrenches support for democracy, whilst legitimising and strengthening the institutions that maintain and give expression to it.¹⁸⁰

4.6 Regional governance architecture – The case of SADC

The issue of whether the SADC region has deepened or consolidated democracy with the holding of regular elections is a more complex one. The holding of periodic elections as provided for in a number of international human rights instruments and governance protocols, is an important component of ascertaining the level to which as a region we have made advances in democratic consolidation. The basic tenets of democratic governance as outlined in the UNDP Human Development Report, 2002, suggest that as a region southern Africa has made great strides towards democracy consolidation.¹⁸¹ The adoption of the SADC Principles and Guidelines governing democratic elections in 2004 at the Mauritius Summit is a major achievement by the regional body and an indication of its seriousness in advancing the governance and security architecture that is based on respect for human rights. The regional body has with this adoption opened some space for the popular participation in decision-making processes, which in the process will consolidate democratic cultures and practices.

¹⁷⁹ See S. Fukuda-Parr (note 53 above)

¹⁸⁰ *Ibid*

¹⁸¹ See UN Human Development Report 2002 (note 111 above)

The SADC regional governments have, through the existence of the SADC Treaty that came into effect in 1992, committed themselves to democratic governance. Article 4 (c) of the treaty binds members to act in accordance with 'human rights, democracy, and the rule of law' principles. Article 5 focuses on measures to achieve the objectives of the organisation. The treaty commits member states 'to promote common political values, systems and other shared values, which are transmitted through institutions that are democratic, legitimate and effective', and this would be done in promotion and pursuit of peace and security. The Protocol on Politics, Defence and Security Cooperation further provides for consolidation of democratic practices. Under Article 2 (g) of the objectives of the Protocol, it provides that it shall 'promote the development of democratic institutions and practices within territories of State Parties and encourage the observance of universal human rights' (emphasis mine).

At the continental level, the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, makes reference to a number of protocols which emphasise democratic principles such as the Cairo Agenda for Action adopted in 1995 that stresses the good governance 'through popular participation based on the respect for human rights and dignity, free and fair elections, as well as respect of the principles of freedom of the press, speech, association and conscience'. The Declaration sees democratic elections as the basis of authority of any government that claims to be representative of its people. It commits State Parties to hold regular democratic elections that are 'free and fair', which is essential for 'maintenance of peace', 'rule of law' and 'democratic governance'.

4.7 Conclusion

Whilst these protocols are in place, the challenge of incorporating them into domestic law and policy seems to be ever present. Protocols are under international law, binding on states that are party to them. Judging by the provisions of these protocols, African countries should be governed along genuine democratic lines. The reality on the ground is that freedom of opinions and expression are summarily abused. Those in power often very severely, sanction any form of objection or criticism to their rule by characterising the expressed divergent opinions by civil society as acts of undermining national sovereignty. This was the case recently in Zimbabwe with the

passing of the NGO Bill, 2004.¹⁸² Reported acts of criminalisation of political dissent in the region, must not be permitted because freedom of expression and freedom of association are important civil and political rights protected at the national and international levels. As correctly noted by Almeida and Lipsett, ‘freedom of expression is the basis of debate and that freedom of association is the basis of pluralism. Without debate and pluralism, democracy withers and society stagnates. When governments suppress the human rights of their citizens and restrict participation and debate, they close off avenues of peaceful dissent and stifle democracy.’¹⁸³ The adoption of the SADC Principles and Guidelines Governing Democratic Elections is a major step in putting into operation, the overall plan of the African Union as outlined in the Constitutive Act and other protocols and policy documents. The way ahead is still long but achievable.

The region of Southern Africa has come a long way from authoritarianism, one-partyism and apartheid rule to the kind of democracy that is based on the will of the people, determined through competitive electoral processes.¹⁸⁴ The agenda in democracy consolidation means that civil society must have belief in its right to participate meaningfully in public policy issues that shape and give content to democratic governance discourse. The more the public is institutionally and informationally empowered to form views and opinions on public policy issues that address development in a free and open manner in full compliance with human rights provisions, the more democratic governance and consolidation can be realised.

¹⁸² This Bill was introduced by government as a measure to provide an enabling environment for the operations, monitoring and regulation of all non-governmental organisations. It was passed by Parliament before the March 2005 parliamentary elections, but has not been enacted into an Act of Parliament because President Robert Mugabe did not sign it. It is still hanging without clarity on its final status.

¹⁸³ See I. Almeida and L. Lipsett, ‘Promoting Human Rights and Democracy in the Context of Terrorism and the Security State’, *Prepared for Rights & Democracy's Think Tank*, (2002), available at <http://www.ichrdd.ca/english/commdoc/publications/intHRadvocacy/thinkTank2002Eng.html>

¹⁸⁴ See K. Matlosa in ‘Caught between Transition and Democratic Consolidation: Dilemmas of Political Change in Southern Africa since the last Decade’ (2004).

CHAPTER FIVE

THE AFRICAN CHARTER: A PROGRESSIVE APPROACH TOWARDS THE ESTABLISHMENT OF DEMOCRATIC GOVERNANCE IN AFRICA

‘Our dream of Africa’s rebirth as we enter the new millennium depends as much as anything on each country and each regional grouping on the continent committing itself to the principles of democracy, respect for human rights and the basic tenets of good governance. Among SADC’s basic principles are respect for the sovereignty of member states and non-interference in one another’s internal affairs. This is the basis of good governance on the inter-state level. But these considerations cannot blunt or totally override our common concern for democracy, human rights and good governance in all our constituent states. Can we continue to give comfort to member states whose actions go so diametrically against the values and principles we hold so dear and for which we struggled so long and so hard?’¹⁸⁵

5.1 Introduction

Whereas the earlier struggle in Africa was about decolonization, post-colonial Africa was beset by massive underdevelopment, military coups, dictatorships, authoritarianism and corruption as demonstrated elsewhere in this dissertation. The political situation of the post-colonial Africa is characterised by a long list of negatives, some which are a result of failures by African leaders to live up to commitments they made as articulated in Chapter 2 of this dissertation. By its own admission, the AU self-reflects on this sad development under its AU Commission’s Strategic Plan presented at the 2004 Addis Ababa Summit, characterising this sad reality as ‘distrust for constituted authority, corruption and impunity that is coupled by human rights abuses’.¹⁸⁶ This it concluded was a character of Africa’s conflict, which tended to undermine sustainable development. The Commission identified three key areas of negative character to the political situation, which are:

- The recourse to force and coup de’tat as a means of gaining power or undermining democratically elected governments.

¹⁸⁵ Nelson Mandela addressing the SADC Summit, Malawi, (September 1997), available at <http://www.anc.org.za/ancdocs/history/mandela/1997/sp0908a.html>

¹⁸⁶ See AU Commission Strategic Plan Vol. 1 (note 24 above)

- The difficult progress of the continent towards democracy as evidenced by the reluctant recognition of the rights of opposition forces, press freedom as well as the right of civil society to participate in decision-making and to express its opinion. Disputes over election results, especially presidential elections, with the attendant allegations of fraud sometimes degenerating into show of force and culminating in outright nullification of election results;
- Africa currently portrays the image of a continent synonymous with violence, a continent structurally characterised by long standing conflicts that have claimed lots of human lives and occasioned untold destabilisation of states and societies.

The Commission thus concluded that these factors stand in the way of development. This acknowledgement accepts the critical role of transparent, free and fair elections. It emphasises the interdependence of peace, security, stability, political and economic good governance and respect for human rights.

5.2 African renaissance: Calling for an African century!

The renewed vigour in Africa that has seen almost every document coming out of the African Union heavily loaded with the language of human rights, the rule of law, democratic and good governance should not be seen as a mere coincidence. Africa is having a new breed of leaders amidst some life presidents, who embrace the thinking that it is Africa's time, which has been conveniently coined - the African Renaissance. This concept flows from a belief that the reconstruction of the continent's destiny lies in the hands of African people themselves. It symbolises a better future for Africa based on the restoration of African principles of human dignity, shared humanity, expression of values and symbols talking to African issues and perceived solutions. This expression of African values and thinking is reflected in the tapestry of the AU architecture clearly outlined in its Constitutive Act.¹⁸⁷ The Constitutive Act places at its centre a renewed commitment to human rights, rule of law, peace and security, good governance, transparency and accountability. This thinking brings to the fore the thinking that influenced Afrocentricity,¹⁸⁸ which seeks to re-locate Africa and the

¹⁸⁷ See J. Oloka-Onyango (note 32 above)

¹⁸⁸ A term popularly coined by Molefi Kete Asante which seeks to re-locate the African person as an agent in human history in an effort to eliminate the illusion of the fringes. It argues that the past five

African person as ‘an agent in human history’ rather than footnotes of history. In attempting to highlight this process, the AU Commission asserted that Africa can no longer ‘trail behind’ or be ‘relegated to the sidelines by anyone’ but rather it is an attempt to place the African continent firmly in the centre of development processes.

It is probably this thinking that influenced Nelson Mandela in the opening quote of this chapter that this ‘dream of Africa’s rebirth’ is dependent on ‘each country and each regional grouping on the continent committing itself to the principles of democracy, respect for human rights and the basic tenets of good governance’. The adoption of principles like democracy, intervention in state affairs in case there is an unconstitutional change of government, human rights and the rule of law in the Constitutive Act, marks a renewed commitment by African leaders that is different from the OAU architecture.

For the realisation of these new ideals by African leaders, there has to be a change in the mindset. Already, the African leaders have put into effect the African Court on Human and People’s Rights with the swearing in of judges in the Banjul Summit of the AU Heads of State and Government. The Treaty creating the Court entered into force on 25 January 2004. The lack of enforcement mechanisms in the past had been a sore point in the whole architecture of the African human rights system. The coming into force of the Court will undoubtedly provide important foundations for democratic governance, human rights and the rule of law. It is also hoped that it will form a basis for the creation of ‘a strong jurisprudence of African human rights’.¹⁸⁹ Mbeki makes an interesting point in defining what should be understood as genuine liberation in the context of the African renaissance, which builds on the analytical observation on Africa’s challenges made by the AU Commission. He points out that:

The first of these (elements) is that we must bring to an end the practices as a result of which many throughout the world have the view that as Africans, we are incapable of establishing and maintaining systems of good governance. Our own practical

hundred years (a period of slavery and colonialism), Africans have been taken off of cultural, economic, religious, political, and social terms and have existed primarily on the periphery of Europe. This has made Africans to kind of worship this anti-African racism born of Western triumphalism and undermined African classical heritage and contributions to world civilization and knowledge.

¹⁸⁹ See W. Nagan in ‘Implementing the African Renaissance: Making African Human Rights Comprehensive for the New Millenium’, February 9, 2004.

experiences tell us that military governments do not represent the system of good governance, which we seek.¹⁹⁰

This reflects an emergence of a new thinking in the continent and a demonstration that Africa now has leaders who are consistently pushing for social and political reforms that are centred on democracy and sound governance, and who have committed their countries to democratic governance by subjecting themselves to a process of peer review under the voluntarily acceded to APRM. The intended outcome of the APRM is to provide a mechanism for peer review and appraisal to effect common values of governance. This is further captured in the NEPAD Base Document to demonstrate Africa's commitment to the promotion and protection of human rights as enshrined in the African Charter. It says:

Across the continent, Africans declare that we will no longer allow ourselves to be conditioned by circumstance. We will determine our own destiny and call on the rest of the world to complement our efforts. There are already signs of progress and hope. Democratic regimes that are committed to the protection of human rights, people-centred development and market-oriented economies are on the increase. African peoples have begun to demonstrate their refusal to accept poor economic and political leadership. These developments are, however, uneven and inadequate and need to be further expedited.¹⁹¹

Interestingly, NEPAD in its content and framework asserts an emphasized recognition of the interdependence of peace, human rights and development, which is an important development as it affirms the contention of interrelatedness of rights to development outlined in the African Charter. This linkage of development to human rights and sound political and economic governance, suggest that the evolving African governance and security architecture incorporates democracy, peace and development as fundamental pillars of a new Africa seeking to reclaim its place in history necessary for development. We see these positive elements in instruments like the SADC Treaty particularly its objectives, which are to (a) evolve common political values and, systems and institutions; and (b) promote and defend peace and security. Herein lies the

¹⁹⁰ See T. Mbeki (note 76 above).

¹⁹¹ See NEPAD Base Document, Para 7 (note 75 above)

vision of an African renaissance, which recognizes the importance of democratic governance and human rights as enshrined in a number of clauses in the African Charter. These in a way suggest that in order for Africa to realize the objectives of development within their set timeframes, a change in thinking must be realized. Perhaps President Mandela's address to the SADC Summit in Malawi in September 1997, quoted above captures the spirit of such new thinking.

At a political level, SADC member states have to commit themselves 'to promote common political values, systems and other shared values, which are transmitted through institutions that are democratic, legitimate and effective',¹⁹² and this would be done in promotion and pursuit of peace and security.

5.3 Increased emphasis on principles of democratic governance

The most important development in the African governance architecture is arguably the emphasis on democracy, peace, respect for human rights and rule of law and the commitment to good governance adopted under the AU/OAU. Whilst a tendency to demonize the OAU as a failed institution is always possible, particularly in reference to human rights protection, its achievements in fighting against colonialism and apartheid despite all its organizational challenges, need not be forgotten. These challenges are acknowledged by the AU Commission in its Strategic Plan¹⁹³ document when reflecting on the extent to which 'distrust of authority, corruption and impunity coupled with human rights abuses' has undermined any meaningful progress for the continent towards attainment of sustainable development. This emphasis on democratic governance is absent in the OAU architecture. The AU Commission in its Strategic Plan of Action for 2004-2007 outlined the following objectives in its Flagship Priority Programme 7 titled Democracy on the Move:

- Promote common principles for the democratisation process;
- Ensure effective election observation;

¹⁹² See The Declaration and Treaty establishing the Southern African Development Community, signed on August 17, 1992 in Windhoek, Namibia.

¹⁹³ See Strategic Plan of the AU Commission Vol. 1 (note 24 above) p.14

- Build capacities, sensitise and ensure systematic advocacy for respect for human and peoples' rights;
- Promote and respect for the rights of women;
- Ensure the establishment/operation of continental institutions working for democracy and the respect for human rights;
- Ensure monitoring and evaluation of implementation by Member States of conventions, protocols and declarations on democratisation and human rights; and
- Facilitate participation of the civil society and the Diaspora.¹⁹⁴

This plan by the AU Commission suggests an increased emphasis and commitment by this new breed of leaders to democracy, respect for human rights and the rule of law. It suggests that certain standards have to be established to build a 'well governed Africa'. Interestingly it brings into the process the participation of civil society. The new continental architecture under the AU epitomizes a renewed willingness to promote democracy, peace, human rights and development. The AU and its development plan – NEPAD places the responsibility for undoing the negatives of the past, firmly in the hands of the African peoples. The AU recognizes that any meaningful project of political integration that will ensure that sustainable development is achieved in Africa must depart from the earlier OAU position of non-interference with national sovereignty. Such belief is again captured by NEPAD in its Declaration on Governance. In its link of development to democracy, it concludes that:

Development is impossible in the absence of true democracy, respect for human rights, peace and good governance...And Africa undertakes to respect the global standards of democracy, the core component of which include political pluralism, allowing for existence of several political parties and workers' unions, and fair,

¹⁹⁴ See Strategic Plan of the Commission of the African Union Volume 3, 2004-2007 Plan of Action, Programmes to Speed Up Integration of the Continent, May 2004

open and democratic elections periodically organised to enable people to choose their leaders freely¹⁹⁵

This commitment to pluralism and popular participation that moves away from the OAU state of dominance by leaders at the expense of other non-state actors is reflected under the AU by an increased emphasis on collective responsibility in the process of integration. The realisation of this key ideal is meant to be facilitated through the PAP and ECOSOCC both of which provide for civil society participation, transparency, human rights and the rule of law. This commitment to democracy and good governance is monitored through the CSSDCA in its key areas known as ‘the Four Calabashes’.¹⁹⁶ Mbeki argued that in order to defeat African underdevelopment, Africa and the rest of the world must act collectively towards building an ‘evolutionary movement from neo-colonial dependence to genuine independence and democracy’.¹⁹⁷ He sees such an initiative as an important and crucial aspect in addressing Africa’s quest to defeat underdevelopment; however it is ‘dependant’ on certain conditions that should be addressed. These conditions deal with issues of governance, and he argues that it is in the interests of Africa to address them. He concludes that Africa must organise itself such that:

- Democracy and respect for human rights prevail underwritten by the necessary constitutional, legislative and institutional arrangements; and
- There exists a system of governance, with the necessary capacity, to ensure that the state is able to discharge its responsibilities with regard to such matters as development, democracy and popular participation, human rights and respect for the rule of law, and appropriate responses to the process of globalisation.¹⁹⁸

The above is clearly a reflection of the AU’s concerted continental integration programme that places the issue of democratic governance on its complex and

¹⁹⁵ *Ibid.* Para 17

¹⁹⁶ The ‘Four Calabashes’ are captured under the CSSDCA Solemn Declaration that was approved in Lome in 2000. The Calabashes cover collective security, stability, development, and cooperation.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* 96

ambitious agenda. It is premised on the attainment of peace and stability through sound governance based on democratic values and principles.

5.4 Conclusion

The first chapter of this dissertation explored the criticism the African Charter draws for its lack of qualification on its restriction of certain rights. This is drawn from the fact that in a number of Articles it provides for rights whilst restricting them through the ‘within the law’ provisions. This is mainly under the fundamental rights as provided for under Article 9. The criticism against the African Charter on the lack of derogation seems to be disproved in one very bold opinion made by the African Commission on Human and Peoples’ Rights in an example of the interpretation by States of the African Charter. It rejected the interpretation by States of the clawback clauses on the enjoyment of freedom of expression by asserting the supremacy of international human rights law.¹⁹⁹ In this regard the Commission stated the principle of general application and concluded as follows:

Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter productive... International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter...

In contrast to other international human rights instruments, the Charter does not contain a derogation clause... limitations to the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances...The only legitimate reasons for limitations to the rights and freedoms of the Charter are found in Article 27 (2)... and shall be exercised with due regard to the rights of others, collective security, ... The reasons for possible limitations must be founded in a legitimate State interest ... even more important, a limitation may never have as a consequence that the right itself becomes illusory.²⁰⁰

¹⁹⁹ See Communication 105/93, 128/94, 130/94 and 152/96. *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Media Rights Agenda and Constitutional Rights Project, Twelfth Activity Report 1995-1999 (Annex V) of the African Commission 178.

²⁰⁰ *Ibid*

This is a manifestation of the breakthrough that the African Charter offers towards the realisation of democratic governance in the continent through concerted promotion and protection of human rights. The African Charter should be read, analysed and understood as a product of negotiations and consensus. Like other international instruments and documents, resolutions and decisions at a multilateral level, it cannot be absolutely perfect. Member States negotiate based on their self-interest and there are no perfect human rights standards except the universal values that are commonly agreed upon. The AU Commission was very bold in its Strategic Plan to acknowledge that part of Africa's problems lay in the lack of political will in addressing bad governance and human rights violations.²⁰¹ The challenges of governance facing Africa in this age cannot be eradicated overnight but will require leadership that recognises that Africa's time to reclaim its place in history has arrived, and it can only be successfully done with the participation of Africa's people as provided for under the CSSDCA Solemn Declaration, the Constitutive Act of the AU, PAP and ECOSOCC. This would be a realisation of the vision of the AU, which seeks to build a continent that is 'prosperous and peaceful and driven by its citizens'.

The AU Commission interestingly set the promotion of peace, human security and good governance as a critical area of its leadership intervention that it should spearhead. This development is manifested with coming into being of the Peace and Security Council, which has actively engaged the process of promotion of stability in the Continent albeit all its challenges of resources for an effective intervention in conflicts like Darfur in Sudan and the Democratic Republic of Congo. The coming into being of the African Court of Human and Peoples Rights further marks a level of seriousness of the AU as compared to its predecessor on the promotion and protection of human rights. The Court is a measure to strengthen the African human rights protection system more especially the enforcement of decisions of protection mechanism. The Court is meant as a mechanism to enhance the effectiveness of the African Commission. It is encouraging that the AU Commission set as its action area the promotion of peace, governance and human security for the period 2004-2007. Among the objectives it had set itself in this action area, it has successfully implemented the development of the African Charter on Elections, Democracy and

²⁰¹ See note 24 above p.21

Good Governance, the implementation of the PAP and ECOSOCC, and the establishment of the African Court of Human and People's Rights. The road to the establishment of an Africa that truly upholds democratic governance, human rights and the rule of law is long and not easy, hence the need for a vigilant civil society that will constantly monitor the protection of human rights and realisation of sustainable development. Perhaps the resolution taken by African leaders in the NEPAD Base Document is a necessity for reflection, where Member States committed themselves to the 'promotion and protection of democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels'.²⁰² This commitment should thus be used to hold the African governments to account to their citizenry over standards of democratic governance.

²⁰² *Ibid.* 49

APPENDICES

APPENDIX I

African [Banjul] Charter on Human and Peoples' Rights

Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations, and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties

Chapter I - Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and

degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. the right to defence, including the right to be defended by counsel of his choice;
 - d. the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
 - a. any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
 - b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in

the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II - Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is;
3. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
4. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
5. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
6. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
7. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Part II: Measures of Safeguard

Chapter I - Establishment and Organization of the African Commission on Human and Peoples' Rights

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity. . . .

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services. . . .

Chapter II - Mandate of the Commission

Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
 - a. to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
 - b. to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
 - c. co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III - Procedure of the Commission

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication From States

Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other Communications

Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to human and peoples' rights referred to in 55 received by the Commission shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,

3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. . . .
2. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV - Applicable Principles

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and

peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Article 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

Part III: General Provisions

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocol or agreements may, if necessary, supplément the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

APPENDIX II

Constitutive Act of the African Union

We, Heads of State and Government of the Member States of the Organization of African Unity (OAU):

1. The President of the People's Democratic Republic of Algeria
2. The President of the Republic of Angola

3. The President of the Republic of Benin
4. The President of the Republic of Botswana
5. The President of Burkina Faso
6. The President of the Republic of Burundi
7. The President of the Republic of Cameroon
8. The President of the Republic of Cape Verde
9. The President of the Central African Republic
10. The President of the Republic of Chad
11. The President of the Islamic Federal Republic of the Comoros
12. The President of the Republic of the Congo
13. The President of the Republic of Cote d'Ivoire
14. The President of the Democratic Republic of Congo
15. The President of the Republic of Djibouti
16. The President of the Arab Republic of Egypt
17. The President of the State of Eritrea
18. The Prime Minister of the Federal Democratic Republic of Ethiopia
19. The President of the Republic of Equatorial Guinea
20. The President of the Gabonese Republic
21. The President of the Republic of The Gambia
22. The President of the Republic of Ghana
23. The President of the Republic of Guinea
24. The President of the Republic of Guinea Bissau
25. The President of the Republic of Kenya
26. The Prime Minister of Lesotho
27. The President of the Republic of Liberia
28. The Leader of the 1st of September Revolution of the Great Socialist People's
Libyan Arab Jamahiriya
29. The President of the Republic of Madagascar
30. The President of the Republic of Malawi
31. The President of the Republic of Mali
32. The President of the Islamic Republic of Mauritania
33. The Prime Minister of the Republic of Mauritius
34. The President of the Republic of Mozambique
35. The President of the Republic of Namibia
36. The President of the Republic of Niger
37. The President of the Federal Republic of Nigeria
38. The President of the Republic of Rwanda
39. The President of the Sahrawi Arab Democratic Republic
40. The President of the Republic of Sao Tome and Principe
41. The President of the Republic of Senegal
42. The President of the Republic of Seychelles
43. The President of the Republic of Sierra Leone
44. The President of the Republic of Somalia
45. The President of the Republic of South Africa
46. The President of the Republic of Sudan
47. The King of Swaziland
48. The President of the United Republic of Tanzania
49. The President of the Togolese Republic

50. The President of the Republic of Tunisia
51. The President of the Republic of Uganda
52. The President of the Republic of Zambia
53. The President of the Republic of Zimbabwe

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our Continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world;

DETERMINED to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively;

RECALLING the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist People's Libyan Arab Jamahiriya, on 9.9. 99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community;

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

In this Constitutive Act:

"Act" means the present Constitutive Act;

"AEC" means the African Economic Community;

"Assembly" means the Assembly of Heads of State and Government of the Union;

"Charter" means the Charter of the OAU;

"Committee" means a Specialized Technical Committee of the Union;

"Council" means the Economic, Social and Cultural Council of the Union;

"Court" means the Court of Justice of the Union;

"Executive Council" means the Executive Council of Ministers of the Union;

"Member State" means a Member State of the Union;

"OAU" means the Organization of African Unity;

"Parliament" means the Pan-African Parliament of the Union;

"Union" means the African Union established by the present Constitutive Act.

Article 2

Establishment

The African Union is hereby established in accordance with the provisions of this Act.

Article 3

Objectives

The objectives of the Union shall be to:

- a. Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- b. Defend the sovereignty, territorial integrity and independence of its Member States;
- c. Accelerate the political and socio-economic integration of the continent;
- d. Promote and defend African common positions on issues of interest to the continent and its peoples;
- e. Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- f. Promote peace, security, and stability on the continent;
- g. Promote democratic principles and institutions, popular participation and good governance;
- h. Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- i. Establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
- j. Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- k. Promote cooperation in all fields of human activity to raise the living standards of African peoples;
- l. Coordinate and harmonize policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- m. Advance the development of the continent by promoting research in all fields, in particular in science and technology;
- n. Work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Article 4 **Principles**

The Union shall function in accordance with the following principles:

- a. Sovereign equality and interdependence among Member States of the Union;

- b. Respect of borders existing on achievement of independence;
- c. Participation of the African peoples in the activities of the Union;
- d. Establishment of a common defence policy for the African Continent;
- e. Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;
- f. Prohibition of the use of force or threat to use force among Member States of the Union;
- g. Non-interference by any Member State in the internal affairs of another;
- h. The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;
- i. Peaceful co-existence of Member States and their right to live in peace and security;
- j. The right of Member States to request intervention from the Union in order to restore peace and security;
- k. Promotion of self-reliance within the framework of the Union;
- l. Promotion of gender equality;
- m. Respect for democratic principles, human rights, the rule of law and good governance;
- n. Promotion of social justice to ensure balanced economic development;
- o. Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- p. Condemnation and rejection of unconstitutional changes of governments.

Article 5

Organs of the Union

- 1. The organs of the Union shall be:
 - a. The Assembly of the Union;
 - b. The Executive Council;
 - c. The Pan-African Parliament;
 - d. The Court of Justice;
 - e. The Commission;
 - f. The Permanent Representatives Committee;

- g. The Specialized Technical Committees;
- h. The Economic, Social and Cultural Council;
- i. The Financial Institutions;

2. Other organs that the Assembly may decide to establish.

Article

6

The Assembly

1. The Assembly shall be composed of Heads of States and Government or their duly accredited representatives.
2. The Assembly shall be the supreme organ of the Union.
3. The Assembly shall meet at least once a year in ordinary session. At the request of any Member State and on approval by a two-thirds majority of the Member States, the Assembly shall meet in extraordinary session.
4. The Office of the Chairman of the Assembly shall be held for a period of one year by a Head of State or Government elected after consultations among the Member States.

Article 7

Decisions of the Assembly

1. The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.
2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.

Article 8

Rules of Procedure of the Assembly

The Assembly shall adopt its own Rules of Procedure.

Article 9

Powers and Functions of the Assembly

1. The functions of the Assembly shall be to:
 - a. Determine the common policies of the Union;

- b. Receive, consider and take decisions on reports and recommendations from the other organs of the Union;
- c. Consider requests for Membership of the Union;
- d. Establish any organ of the Union;
- e. Monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States;
- f. Adopt the budget of the Union;
- g. Give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
- h. Appoint and terminate the appointment of the judges of the Court of Justice;
- i. Appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.

2. The Assembly may delegate any of its powers and functions to any organ of the Union.

Article 10

The Executive Council

1. The Executive Council shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.

2. Council shall meet at least twice a year in ordinary session. It shall also meet in an extra-ordinary session at the request of any Member State and upon approval by two-thirds of all Member States.

Article 11

Decisions of the Executive Council

1. The Executive Council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.

2. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive Council.

Article 12

Rules of Procedure of the Executive Council

The Executive Council shall adopt its own Rules of Procedure.

Article 13

Functions of the Executive Council

1. The Executive Council shall co-ordinate and take decisions on policies in areas of common interest to the Member States, including the following:

- a. Foreign trade;
- b. Energy, industry and mineral resources;
- c. Food, agricultural and animal resources, livestock production and forestry;
- d. Water resources and irrigation;
- e.
- f. Environmental protection, humanitarian action and disaster response and relief;
- g. Transport and communications;
- h. Insurance;
- i. Education, culture, health and human resources development;
- j. Science and technology;
- k. Nationality, residency and immigration matters;
- l. Social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
- m. Establishment of a system of African awards, medals and prizes.

2. The Executive Council shall be responsible to the Assembly. It shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly.

3. The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical Committees established under Article 14 of this Act.

Article 14

The Specialized Technical Committees Establishment and Composition

1. There is hereby established the following Specialized Technical Committees, which shall be responsible to the Executive Council:
 - a. The Committee on Rural Economy and Agricultural Matters;
 - b. The Committee on Monetary and Financial Affairs;
 - c. The Committee on Trade, Customs and Immigration Matters;
 - d. The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
 - e. The Committee on Transport, Communications and Tourism;
 - f. The Committee on Health, Labour and Social Affairs; and
 - g. The Committee on Education, Culture and Human Resources.
2. The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees.
3. The Specialized Technical Committees shall be composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence.

Article 15 Functions of the Specialized Technical Committees

Each Committee shall within its field of competence:

- a. Prepare projects and programmes of the Union and submit in to the Executive Council;
- b. Ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;
- c. Ensure the coordination and harmonization of projects and programmes of the Union;
- d. Submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provision of this Act; and
- e. Carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.

Article 16
Meetings

1. Subject to any directives given by the Executive Council, each Committee shall meet as often as necessary and shall prepare its rules of procedure and submit them to the Executive Council for approval.

Article 17
The Pan-African Parliament

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

Article 18
The Court of Justice

1. A Court of Justice of the Union shall be established;
2. The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.

Article 19
The Financial Institutions

The Union shall have the following financial institutions, whose rules and regulations shall be defined in protocols relating thereto:

- a. The African Central Bank;
- b. The African Monetary Fund;
- c. The African Investment Bank.

Article 20
The Commission

1. There shall be established a Commission of the Union, which shall be the Secretariat of the Union.
2. The Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.

3. The structure, functions and regulations of the Commission shall be determined by the Assembly.

Article 21

The Permanent Representatives Committee

1. There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.

2. The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.

Article 22

The Economic, Social and Cultural Council

1. The Economic, Social and Cultural Council shall be an advisory organ composed of different social and professional groups of the Member States of the Union.

2. The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly.

Article 23

Imposition of Sanctions

1. The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments therefrom.

2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Article 24

The Headquarters of the Union

1. The Headquarters of the Union shall be in Addis Ababa in the Federal Democratic Republic of Ethiopia.

2. There may be established such other offices of the Union as the Assembly may, on the recommendation of the Executive Council, determine.

Article 25

Working Languages

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

Article 26

Interpretation

The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority.

Article 27

Signature, Ratification and Accession

1. This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.
2. The instruments of ratification shall be deposited with the Secretary-General of the OAU.
3. Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.

Article 28

Entry into Force

This Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU.

Article 29

Admission to Membership

1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
2. The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

Article 30
Suspension

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

Article 31
Cessation of Membership

1. Any State which desires to renounce its membership shall forward a written notification to the Chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, if not withdrawn, the Act shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Union.

2. During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this Act up to the date of its withdrawal.

Article 32
Amendment and Revision

1. Any Member State may submit proposals for the amendment or revision of this Act.
2. Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.
3. The Assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member States, in accordance with the provisions of paragraph 2 of this Article.
4. Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States in accordance with their respective constitutional procedures. They shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States.

Article 33
Transitional Arrangements and Final Provisions

1. This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.

2. The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.

3. Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.

4. Pending the establishment of the Commission, the OAU General Secretariat shall be the interim Secretariat of the Union.

5. This Act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Secretary-General of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the Act to the Government of each signatory State. The Secretary-General of the OAU and the Chairman of the Commission shall notify all signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act.

Done at Lomé, Togo, this 11th day of July, 2000.

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