

**A CRITICAL APPRAISAL OF THE MUTUAL ENGAGEMENT OF AFRICAN STATES IN THE AFRICAN  
PEER REVIEW AND UNIVERSAL PERIODIC REVIEW MECHANISMS: A HUMAN RIGHTS  
PERSPECTIVE**

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE MASTER  
OF LAWS DEGREE (LL.M) HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA**

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**30 OCTOBER 2010**

**DECLARATIONS**

I, **OBONYE JONAS**, do hereby declare, certify and affirm that this research is my own original work and that to the best of knowledge, it has not been submitted nor is it currently being considered either in whole or in part, to be submitted to any other institution in fulfillment of any degree requirement or any qualification for that matter. Some of the ideas presented herein have been taken from other scholars. I however take full responsibility for all shortfalls, shortcomings and inaccuracies in this work, if any.

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**DEDICATION**

*To Thelma*

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**LIST OF ABBREVIATIONS**

<b>African Charter</b>	<b>African Charter on Human and Peoples Rights</b>
<b>African Commission</b>	<b>African Commission on Human and Peoples' Rights</b>
<b>APR Forum</b>	<b>African Peer Review Forum</b>
<b>APRM</b>	<b>African Peer Review Mechanism</b>
<b>AU</b>	<b>African Union</b>
<b>CSAR</b>	<b>Country Self Assessment Report</b>
<b>CSO Law</b>	<b>Charities and Societies Organisation Law</b>
<b>DRC</b>	<b>Democratic Republic of Congo</b>
<b>ECOSOC</b>	<b>United Nations Economic and Social Council</b>
<b>HRC</b>	<b>Human Rights Council</b>
<b>ICC</b>	<b>International Criminal Court</b>
<b>ICJ</b>	<b>International Court of Justice</b>
<b>ICTY</b>	<b>International Criminal Tribunal for former Yugoslavia</b>
<b>ILO</b>	<b>International Labour Organisation</b>
<b>IMF</b>	<b>International Monetary Fund</b>
<b>MOU</b>	<b>Memorandum of Understanding</b>
<b>NEPAD</b>	<b>New Partnership for Africa's Development</b>
<b>NGOs</b>	<b>Non Governmental Organisations</b>
<b>OAU</b>	<b>Organisation of African Unity</b>
<b>OECD</b>	<b>Organisation for Economic Cooperation and</b>

**Development**

<b>OHCHR</b>	<b>Office of the High Commissioner for Human Rights</b>
<b>PAP</b>	<b>Pan African Parliament</b>
<b>PSC</b>	<b>Peace and Security Council</b>
<b>SADC</b>	<b>Southern African Development Community</b>
<b>SAIIA</b>	<b>South African Institute for International Affairs</b>
<b>UK</b>	<b>United Kingdom</b>
<b>UN</b>	<b>United Nations Organisation</b>
<b>UN Charter</b>	<b>Charter of the United Nations</b>
<b>UNCTAD</b>	<b>United Nations Conference on Trade and Development</b>
<b>UPR</b>	<b>Universal Periodic Review</b>
<b>US</b>	<b>United States of America</b>
<b>WTO</b>	<b>World Trade Organisation</b>
<b>WTO-TPRM</b>	<b>World Trade Organisation Trade Policy Review Mechanism</b>

## TABLE OF CONTENTS

<i>Item</i>	<i>Page no.</i>
Declarations.....	i
Dedication.....	ii
Acknowledgements .....	iii
List of abbreviations .....	iv
<b>CHAPTER I.....</b>	<b>1</b>
<b>1 Introduction.....</b>	<b>1</b>
1.1 Background of the study.....	1
1.2 Statement of research problem.....	5
1.3 Research questions.....	6
1.4 Focus and Objectives of the study.....	6
1.5 Significance of the study.....	7
1.6 Research methodology and limitations.....	7
1.7 Literature review.....	8
1.8 Outline of chapters.....	10
<b>CHAPER II: The concept of ‘peer review’ .....</b>	<b>11</b>
<b>2.1 Introduction.....</b>	<b>11</b>
<b>2.2 The APR Mechanism.....</b>	<b>14</b>
2.2.1 Introduction.....	14
2.2.2 Structure of APRM.....	16
2.2.3 Types of reviews under the APRM.....	17
2.2.4 Stages of reviews under the APRM.....	18
<b>2.3 The UPR Mechanism.....</b>	<b>20</b>
2.3.1 Introduction.....	20
2.3.2 Language shift from ‘peer review’ to ‘periodic review’ .....	20

2.3.3 Basis for the UPR review.....	21
2.3.4 Review procedures of the UPR.....	23
2.3.5 Interactive dialogue.....	23
2.3.6 The Outcome Report.....	24
2.3.7 Concluding remarks.....	24
CHAPTER III: Nature of political engagement among African states in the UPR and APRM frameworks.....	25
3.1 Introduction.....	25
3.2 Politics of bargaining among African states in the UPR.....	25
3.3 Approaches of Western and African countries contrasted.....	32
3.4 Politics of flattery in the APRM.....	32
3.5 Enhancing creative dialogue: UPR versus APRM.....	36
3.6 Of African states and criticism.....	38
3.7 Concluding remarks.....	40
CHAPTER IV: Rationalizing misplaced solidarity among Africans states.....	41
4.1 Introduction.....	41
4.2 Sovereignty as a bar to intervention.....	41
4.3 Anti-colonial struggle comradeship.....	45
4.2 Concluding remarks.....	45
CHAPTER V: Conclusion and recommendations.....	47
5.1 Conclusion.....	47
5.2 Recommendations.....	48
Bibliography.....	50



## Chapter I

### 1. Introduction

#### 1.1 Background of the study

We must face the matter squarely that where there is something wrong in how we govern ourselves, it must be said that the fault is not in our stars but in ourselves. We know that we have it in ourselves, as Africans, to change all this. We must assert our will to do so – we must say that there is no obstacle big enough to stop us from bringing about an African renaissance – Nelson Mandela.<sup>1</sup>

Africa's woes - social disequilibrium, civil wars, ethnic unrest, poverty, corruption, disease, bad governance, violations of human rights, decrepit institutions, are all public knowledge and are hardly new to academic discourse. They have been the subject of several studies and analyses by scholars, politicians and policy makers.<sup>2</sup>

Kofi Annan, former United Nations Secretary General, highlighted the gloomy picture of the African continent by remarking that for many people in other parts of the world, the mention of Africa evokes images of mounting political and socio-economic problems.<sup>3</sup> Wole Soyinka, the Nigerian Nobel Prize Laureate, starkly quipped, 'we can no longer speak of wars [in Africa] but only of arenas of competitive atrocities'. He continued, 'I do not hear the annunciation of a renaissance, nor read the flickers of its regenerating fires on our ever-receding horizons'.<sup>4</sup> He concluded that it is time Africa begins 'to stare into the cold eyes of statistics'.<sup>5</sup>

The *raison d'être* of a state is to provide good governance. Good governance is described by Rotberg as 'the delivery of high quality political goods to citizens'.<sup>6</sup> Political goods, he explained, include but are

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<sup>1</sup> N Mandela, Statement by former President of the Republic of South Africa, at the Organisation of African Unity (OAU) Meeting of Heads of State and Government, Tunis, Tunisia on 13 June 1994.

<sup>2</sup> O Oko 'Leaders behaving badly: The perils of bad governance by Africa's tyrants masquerading as democrats' (2009) <[www.works.bepress.com/okechukwu\\_oko](http://www.works.bepress.com/okechukwu_oko)> (accessed 13 July 2010).

<sup>3</sup> Foreword to UNCTAD Foreign Direct Investment in Africa, New York, 1999<[www.unctad.org/en/doc /poiteiitem1501.pdf](http://www.unctad.org/en/doc /poiteiitem1501.pdf)> (accessed 13 July 2010).

<sup>4</sup> W Soyinka in 'A continent's unequal dialogue' (2009) T Davie Memorial lecture.

<sup>5</sup> As above.

<sup>6</sup> R Rotberg 'Governance and leadership in Africa: Measures, methods and results' (2009) 62 *Journal of International Affairs* 113.

not limited to 'security and safety, rule of law, participation and human rights, sustainable economic opportunity and human development'.<sup>7</sup> Africa is experiencing an acute 'democracy deficit.' Rotberg, a prominent expert on governance, provides a disappointing yet accurate account of leadership in Africa. He observes that:

Leadership in Africa is typified more by disfiguring examples — Idi Amins and Robert Mugabes — than by positive role models such as Nelson Mandela and Seretse Khama. Other clusters of developing nations, such as South East Asia or Latin America, exhibit wide variations in leadership quality, but none is so extreme in its range. During the past three decades, roughly 90 percent of Sub-Saharan Africa's leaders have behaved despotically, governed poorly, eliminated their people's human and civil rights, initiated or exacerbated existing civil conflicts, decelerated per capita economic growth and proved corrupt.<sup>8</sup>

The 1960s and 1970s may be said to represent the darkest age in the evolution of human rights in Africa. It was during this era that Africa experienced unprecedented human rights violations of damaging proportions. These included plunder of property, extra-judicial killings, massacres, forced disappearances, torture, official persecutions, arbitrary detentions and political repression.<sup>9</sup> Ugandan dictator, Field Marshall El-Haji Dr Idi Amin (who was toppled from power in a *coup d'état* in 1979) perpetrated human rights violations which are arguably unequalled in the Continent's history.<sup>10</sup> After seizing power in 1971, this 'certified psychopath',<sup>11</sup> oversaw the extermination of over ten thousand Ugandans during the first year of his nine-year tenure of office.<sup>12</sup> Today human rights violations still subsist unabated in Africa, albeit on lesser intensity and scale.

African problems have been associated mainly with institutional inadequacy or failure.<sup>13</sup> For instance when monstrosities of power trampled rights of citizens underfoot as in Uganda, the then Organisation of African Unity (OAU) now African Union (AU), stood by and did nothing. Former President Julius

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<sup>7</sup> As above. See also Oko (n 2 above) 9.

<sup>8</sup> R Rotberg 'The roots of Africa's leadership deficit' (2003), [www.worldpeacefoundation.org](http://www.worldpeacefoundation.org) (accessed 13 July 2010).

<sup>9</sup> N Udombana 'Between promise and performance: revisiting states obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 106.

<sup>10</sup> As above.

<sup>11</sup> W Soyinka, as quoted by Udombana (n 9 above) 106.

<sup>12</sup> Udombana (n 9 above) 107.

<sup>13</sup> Oko (n 2 above) 72.

Nyerere of Tanzania, one of the founding fathers of the OAU has derided it as ‘a trade union of [African leaders] with solidarity reflected in silence, if not open support for each other.’<sup>14</sup> The OAU stance was informed by its inflexible adherence to the doctrine of *reserved domain*<sup>15</sup> which allowed African leaders to violate rights of their people with impunity.<sup>16</sup> It was with a view to addressing this institutional inadequacy that in 2002 African Heads of State through the Durban Declaration on Democracy, Political, Economic and Corporate Governance<sup>17</sup> established the African Peer Review Mechanism (APRM). Countries that have signed the APRM Memorandum of Understanding subject themselves to peer review periodically so that, *inter alia*, their human rights situations are exposed to peer scrutiny. In addition, as members of the United Nations (UN), African countries are reviewed under the Universal Periodic Review (UPR) after every four years. One of the common objectives of these mechanisms is to review human rights situations in member states and make recommendations for improvement where necessary.

African states are notorious for not voicing their concerns about unimpressive human rights situations in other African states. This attitude dates back to the OAU days where member states never engaged one another, or did it in a carefully measured manner, ensuring that their solidarity was not harmed.<sup>18</sup> This situation was exacerbated by the fact that the OAU Charter made little explicit mention of human rights.<sup>19</sup> Instead the Charter reflected profound concerns of Africa at the time, namely to ensure the independence of those African people who were still under colonial subjugation, condemnation of apartheid regimes in Southern Africa and protecting the newly acquired statehood.<sup>20</sup> African statesmen were loath to discuss human rights, describing them as ‘one of the main elements in the ideological armoury of imperialism’.<sup>21</sup> Thus, central to the OAU Charter, were provisions on issues

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<sup>14</sup> J Nyerere quoted by E Abdulai ‘The standoff between ICC and African leaders debate revisited’ (2009), <[www.africanarguments.org/2010/03/the-standoff-between-icc-and-african-leaders-debate-revisited](http://www.africanarguments.org/2010/03/the-standoff-between-icc-and-african-leaders-debate-revisited)> (accessed 17 July 2010).

<sup>15</sup> The doctrine of reserved domain (or domestic jurisdiction) is to the effect that a state is not bound by international law for activities that are essentially within its domain or jurisdiction. See further article III(2) of the OAU charter which proclaims ‘non-interference in the internal affairs of states’ as one of the cardinal guiding principles of the OAU.

<sup>16</sup> Udombana (n 9 above) 106.

<sup>17</sup> AHG/235/XXXV 111, Annex 1.

<sup>18</sup> K Matthews ‘The Organisation of African Unity’ in D Mazzeo (ed.) *African regional organisations* (1984) 79.

<sup>19</sup> R Murray *Human Rights in Africa: from OAU to African Union* (2004) 7.

<sup>20</sup> As above.

<sup>21</sup> I G Shivji *The concept of human rights in Africa* (1989) 137.

such as the non-interference in internal affairs,<sup>22</sup> sovereign equality of states, eradication of neo-colonialism,<sup>23</sup> and self-determination (in the context of states),<sup>24</sup> among other things. Thus, in early Africa, the OAU's focus was the protection of a state not the individual, and any concept of human rights was merely notional.<sup>25</sup> There can hardly be any divergence of views that this has had a negative impact on democracy, human rights and governance in Africa. However, through its article 4(h), the AU Constitutive Act<sup>26</sup> attempts to secure a radical break-away for African states from their past of indifference to each others' human rights situations by conferring upon the AU a right to intervene in a member state in respect of grave human rights breaches. Despite the existence of grave human rights breaches in several parts of Africa, article 4(h) has only been invoked once in relation to the Comorian crisis in 2008.<sup>27</sup> Further, article 47 of the African Charter provides for an inter-state complaint mechanism where a State Party to the Charter can, *inter alia*, launch a communication to the African Commission on Human and Peoples' Rights (African Commission) or bring such communication to the attention of the State Party concerned if in its view that other State Party 'has violated provisions of the Charter'. However, the inter-state mechanism has been of less practical significance. The African Commission has so far entertained only one inter-state claim.<sup>28</sup> The failure of African states to avail themselves of opportunities presented under articles 4(h) and 37 above shows that they are still firmly holding onto their old tradition of 'mutual avoidance' insofar the discourse of human rights is concerned.

By signing on to the APRM and UPR, African states were conceding that more needs to be done about Africa's human rights situation. An assumption is made here that an open and frank political engagement among African states within the frameworks of these two mechanisms will go a long way in enhancing the human rights situation in Africa. This study therefore analyses the nature of political engagement amongst African states within the UPRM and APRM and gives reflections on its impact on human rights, democracy and governance.

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<sup>22</sup> Arts 3(1) and (2) of the OAU Charter.

<sup>23</sup> As above, preamble, arts 2(1)(d) & (6).

<sup>24</sup> As above, preamble, art 3(3).

<sup>25</sup> Murray (n 19 above) 7.

<sup>26</sup> Entered into force on 26 May 2001.

<sup>27</sup> <[www.asil.org/rio/africanunion.html](http://www.asil.org/rio/africanunion.html)> (accessed 20 October 2010).

<sup>28</sup> Communication 227/99, *DRC v Burundi & others*.

## 1.2 Statement of research problem

This study focuses on the nature of political engagements among African states within the APRM and the UPR. It looks particularly at matters that African countries raise among one another under peer review within the discourse of human rights, democracy and governance and whether such engagements are worthwhile. It is clear from the foregoing that African states have never used opportunities availed by the OAU to critically and frankly engage one another on their human rights situations. The OAU did not only avoid condemning and ostracising governments that violated human rights, but on occasion, it permitted the leaders of such regimes to host OAU meetings and assume the rotating annual chairmanship of the Organisation.<sup>29</sup> The practice, even in post the OAU era, has been that mutual engagement among African states is epitomised by pre-arranged and self-serving compliments on each others' human rights record.<sup>30</sup> This undermines commitments incurred by African states under international law to respect, promote and fulfill human rights. In addition, this practice of mutual praise may undermine the force of recommendations of the African Commission which are usually critical of human rights situations in African states. This is because states may easily be trapped in complacency based on flattery they reserve for each other.

The gains to be secured by Africa from incisive, critical and extensive political engagements on matters of governance, human rights and democracy are not difficult to imagine. As indicated above, Africa is deeply immersed in a political quagmire. It is only through honest yet robust, critical and open political dialogue among African states that solutions can be found to some of the deep-seated and age old problems that keep Africa entangled in a labyrinth of political problems. This manner of engagement will enable Africa to emerge from the doldrums and assume her rightful place in the international arena not as a 'basket case' but as an important partner and contributor in global affairs.

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<sup>29</sup> The oft-cited example in this regard was when the OAU allowed Idi Amin, a notorious human rights violator to host the 1975 OAU Summit in Kampala thereby assuming the Chairmanship of the Organisation.

<sup>30</sup> I Taylor 'Obstacles to Change in Africa: NEPAD, Zimbabwe and Elites' (2002) *Foreign Policy in Focus* <[www.fpif.org/articles/obstacles\\_to\\_change\\_in\\_afriac\\_nepad\\_zimbabwe](http://www.fpif.org/articles/obstacles_to_change_in_afriac_nepad_zimbabwe)> (accessed 11 August 2010).

### **1.3 Research questions**

Against the foregoing background, the following questions arise:

- a. How relevant are the objectives of the UPR and the APRM to governance in Africa?
- b. What is the nature of political engagement by African states at the APRM and UPR on matters of human rights, democracy and governance?
- c. What factors undermine or enhance critical, open and meaningful political dialogue on the issues of human rights, democracy and governance?

### **1.4 Focus and objectives of the study**

As shall be shown below, several African countries have undergone APRM and UPR review processes. The purpose of these reviews is to induce compliance with ideals of these mechanisms by participating states through peer pressure. In addition such reviews are based on the assumption that no one knows it all and therefore that states will need to learn from one another through peer review, and that in so doing, they should critically engage one another on matters of concern. This study therefore focuses on the nature of political engagement at play among African countries within the APRM and UPR frameworks and how these engagements could be improved for the benefit of human rights, governance and democracy in Africa. The author appreciates that the scope of the UPR review process is limited to human rights whilst that of the APRM is broader and includes issues of governance, sustainable development, socio-economic development and cooperate governance, among others. The scope of these two processes is however not of concern to this work, as the focus of this work is only limited to the nature of political engagements amongst African states within these two peer review mechanisms. The study will also critically examine the designs of the two mechanisms, proffering suggestions for reform, where necessary. In addition, this study mainly focuses on the practice of African states that have undergone APRM and UPR review processes, particularly those states with unimpressive human right records who need these institutions the most. However, reference will from time to time be made to countries which have not been reviewed for purposes of elucidating points.

### **1.5 Significance of the study**

This area of study is still fallow. There is paucity of scholarly work done on the subject matter of study. This study therefore aims at providing in-depth analysis intended to fill this lacunae by giving some insights and reflections on the nature of debates that African states engage in vis-à-vis one another in the APRM and UPR. In addition, it is hoped that this work will provide a stimulant to prospective researchers who have an interest in doing subsequent detailed research in this area.

### **1.6 Research methodology and limitations**

This study will adopt both the descriptive and analytic approaches. The former approach will be adopted to inform the latter for comprehensiveness. In addition, the study mainly but not exclusively, adopts a comparative approach in relation to the two mechanisms under study. Further, processes like the state reporting before the African Commission and other reviews might also be referred to on a comparative note to enrich the analysis.

The study will examine Outcome Reports of African countries that have emerged from UPR processes and APR Forum communiqués for those countries already reviewed under the APRM. Since the APRM review is semi-open, the study will also extract information through interviews from people with knowledge of the APRM closed door processes. The study will also draw from other experiences of African solidarity which are not directly related to the UPR or the APRM to enrich the analysis.

The research will rely on both primary and secondary materials. These will include APRM and UPR official documents. Particularly, the research will analyse APRM Country Review Reports, APR Forum communiqués, UPR National Reports and Outcome Reports of select states. It must be conceded that the communiqués may not exhaustively reflect the nature of political engagement as had taken place but at least one hopes to find how some of the core human rights issues therein have been approached. The inadequacy of communiqués will be complemented by the use of semi-structured interviews of APRM personnel who have had occasion to sit at APRM sessions at APR Forum level. In addition, the study will rely on UPR and APRM websites for information. The APRM website is [www.aprm.org](http://www.aprm.org) and that of the UPR is [www.upr-info.org](http://www.upr-info.org).

This study does not purport to be exhaustive. It is only limited to interrogating a rather narrow issue, namely the nature of political engagements within the framework of APRM and UPR. Further the study

does not seek to deal with all review mechanisms that there are, save on a comparative note to add depth to the analysis that is being undertaken. In addition, another limitation will be that, as opposed to UPR proceedings which are open to the public and are being telecast, APRM reviews are relatively shrouded in secrecy. As such sources of information on activities conducted behind closed doors will be limited. It must also be conceded as a limitation of this study that an improvement in the nature of political engagement at both UPR and APRM cannot lead to Africa's instant recovery. Africa's problems are too diverse and complicated to be resolved through enhanced political engagement alone. However, this does not in any way attenuate the importance of a more critical and robust political engagement for the benefit of human rights, democracy and governance.

### 1.7 Literature review

As Killander points out, the APRM has generated profound interest among commentators.<sup>31</sup> Numerous journal articles, chapters in books and dissertations have been written on the framework and norms of the APRM. However as Killander further argues, the majority of writings on the APRM, particularly early the ones, focus more on its procedures and processes, and thus merely reflect what is contained in the APRM founding documents. Some articles which were written at the initial stages of the APRM were critical of its justifiability, in view of the fact that African countries are already subject to other review processes such as International Monetary Fund Article IV Consultations, the World Trade Organisation Trade Policy Review Mechanism (WTO-TPRM), the International Labour Organisation Enforcement Mechanism, state reporting before the African Commission and other reviews.<sup>32</sup> Some commentators have also expressed misgivings about the absence of sanctions in the APRM system<sup>33</sup> while others argue that the absence of sanctions is best suited for a mechanism where members voluntarily choose to be peer reviewed.<sup>34</sup> There are also some relatively shorter articles which deal with factual updates of the

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<sup>31</sup> M Killander 'The role of the African Peer Review Mechanism in inducing compliance with human rights' Unpublished LLD thesis, University of Pretoria, (2009) 7.

<sup>32</sup> Z Kebonang 'NEPAD: Making the APRM work, critique' (2005) *A Worldwide Journal of Politics* 46.

<sup>33</sup> J Akokpari 'Policing and preventing human rights abuses in Africa: the OAU, the AU, the NEPAD Peer Review' (2004) 32 *International Journal of Legal Information* 468.

<sup>34</sup> M Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: Opportunities and constraints in implementation' (undated), <[www.sarpn.org.za/documents/d0003007/APRM\\_review\\_Hansungule.pdf](http://www.sarpn.org.za/documents/d0003007/APRM_review_Hansungule.pdf)> (accessed 12 July 2010) 6.



APRM and are relatively less critical of the structural outlook of the mechanism.<sup>35</sup> Some academic contributions attempt to compare the APRM with other review mechanisms.<sup>36</sup>

Herbert and Gruzd have produced the first monograph on the APRM, *The African Peer Review Mechanism – Lessons from the pioneers* under the auspices of South African Institute of International Affairs (SAIIA) which converges the insights and experiences that have been gleaned through active engagement with the APRM process since its inception.<sup>37</sup> The focus of the monograph is on the APRM's design and its procedural aspects. SAIIA has also published a number of other working papers focusing on particular procedural aspects and best practices in organising the reviews, drawing from experiences of countries that have undergone the review process.<sup>38</sup> Some contributions in this area are on the centrality of civil society participation in the APRM process.<sup>39</sup> Some scholarly work also exists on country specific appraisals. Since the UPR is relatively new, there is relatively limited scholarly work done on it. Some of the existing work on the UPR is limited its procedures and processes and the assessment of its sessions.<sup>40</sup> Questions are also being raised by scholars on whether the UPR would be successful in the protection of human rights.<sup>41</sup> Some commentators have addressed the issue as to whether the UPR duplicates the work and recommendations of the seven functioning UN human rights treaty bodies.<sup>42</sup> Lawrence examines the opportunities for the involvement of NGOs on the work of the UPR.<sup>43</sup> A more useful contribution is by Abebe, who examines the issue of 'regional alliance' within the UPR where countries from the same region take turns to praise the human rights situation of their fellow country under review.<sup>44</sup> Unlike the present work, which is comparative in approach, Abebe's article focuses

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<sup>35</sup> An example of this is A Kajee 'NEPAD's APRM: A progress report – practical limitations and challenges' in *SA Yearbook of International Affairs* (2004).

<sup>36</sup> R Kanbur 'The APRM: An assessment of concept and design' (2004), [www.arts.cornell.edu/poverty/kanbur/APRM.pdf](http://www.arts.cornell.edu/poverty/kanbur/APRM.pdf) (accessed 13 July 2010); Z Kebonang 'African Peer Review Mechanism: An assessment' (2005) 61(2) *India Quarterly* 138.

<sup>37</sup> R Herbert & S Gruzd *The African Peer Review Mechanism – Lessons from the pioneers* (2008).

<sup>38</sup> Killander (n 31 above) 7.

<sup>39</sup> For instance, see L Verwey 'NEPAD and civil society participation in the APRM' IDASA Occasional paper (2004).

<sup>40</sup> E Redondo 'The UPR Mechanism: An assessment of the first session' (2008) 7 *Chinese Journal of International Law* 721-734.

<sup>41</sup> As above.

<sup>42</sup> F Gaer 'A voice not an echo: UPR and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109-139.

<sup>43</sup> L Moss 'Opportunities for Non-Governmental Organisations advocacy in the UPR 2010' 2 *Journal of Human Rights Practice* 122-150.

<sup>44</sup> A Abebe 'Of shaming and bargaining of African States: African states and the UPR of the UN Human Rights Council' (2009) 9 *Human Rights Law Review* 1-35.

exclusively on the UPR processes. No work was found that touches on the nature of political engagements within these mechanisms at a comparative level and its implications on human rights, democracy and governance in a more comprehensive sense. It is this lacunae that this work attempts to fill.

### **1.8 Outline of chapters**

This study is in five chapters. Chapter one gives a background of the study. It also gives the basis and the entire structure of this work. Chapter two deals with the background to the concept of peer review, both in its general sense and how it was originally understood in Africa and further discusses this concept within UPR and APRM. Chapter three analyses the specific mechanisms under study, namely the APRM and UPR, giving a brief conceptual analysis of mechanisms, their structural outlook and some reflections on their review procedures. Chapter four undergirds the entire study. It focuses on the nature of political engagement in the APRM and UPR - looking into factors that undermine or enhance critical political engagement in the UPR and APRM. This chapter concludes by highlighting some possible rationalisation for the solidarity of African states. Finally Chapter five concludes the study and proffers some recommendations on how political engagements at APRM and UPR can be managed or handled to ensure that they are done in a frank and yet critical manner to produce the intended results – the betterment of governance, protection of human rights and consolidation of democracy in Africa.

## CHAPTER II

### 2. The concept of 'Peer Review'

#### 2.1 Introduction

The term 'peer' has its origins from the Latin word 'par' which means equal.<sup>45</sup> Ojienda explains that the term 'peers' refers to persons of equal rank or merit.<sup>46</sup> Under international law, states are equal. It is therefore argued that it is on this basis that African states (or states generally) can be viewed to be peers. The APRM Base Document or UPR founding documents do not define 'peer review' - understandably so because the concept is notoriously elusive to be captured in precise terms. In this thesis, we venture only to canvass the concept of peer review in broad strokes without annexing any specific or definitive definition to it.

Kebonang opines that there is a 'literature famine' on the concept of peer review.<sup>47</sup> His claim notwithstanding, he made a valiant attempt at giving insight into this concept using the scant materials he could lay his hands on. Relying on Ngamau,<sup>48</sup> Kebonang argues that peer review is an amorphous concept that generally involves two areas.<sup>49</sup> He states that the first category involves the evaluation of proposals, programs and projects by experts.<sup>50</sup> Second, he states that it is used to monitor compliance with treaty commitments. He makes reference to the Organisation for Economic Cooperation and Development (OECD), an organisation whose experience in this field is unrivalled, and explains that 'peer review involves a systematic examination and assessment of either the performance or practices of a state by other states (peers) or designated institutions'.<sup>51</sup>

Kebonang likens the process of 'peer review' to the review process by which articles submitted to academic journals are reviewed by experts in the field under study before being approved for

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<sup>45</sup> Killander (n 31 above) 47.

<sup>46</sup> T Ojienda 'Implementing NEPAD: Wither the APRM?' (undated) [www.saiia.org.za](http://www.saiia.org.za) (accessed 9 August 2010).

<sup>47</sup> Kebonang (n 32 above) 2.

<sup>48</sup> R Ngamau 'The role of NEPAD in African economic regulation and integration' (2004) 10 *Law and Business Review America* 515-44.

<sup>49</sup> Kebonang (n 32 above) 2.

<sup>50</sup> As above.

<sup>51</sup> As above.

publication.<sup>52</sup> However, this analogy has been discredited by Hansungule who argues that, while this may be correct, the idea that based on the negative comments of the reviewer, the publication may be rejected by the editorial board and therefore not appear in the journal contradicts the philosophical construct underpinning the APRM in that this mechanism does not reject any country no matter how notorious its human rights situation is. In fact, one could argue that it is partly on account of such human rights notoriety in Africa that the APRM was established. Rather than rejecting non-performers, they must be shown the right path through the pointing out of gaps in their governance by their peers. This argument becomes more potent when viewed within the context that peer review in its broader context speaks to ‘learning as you go’. This learning can only be effective if mistakes are pointed out to the ‘learners’ or reviewees – the so called learning from your own mistakes. Hansungule’s argument holds true for the UPR in that both the APRM and UPR do not seek to exclude from review those states whose human rights record is found to be unimpressive. Mathoho describes peer review as systematic examinations done to a state by another state(s), or done by specifically designated institutions or a combination of the two.<sup>53</sup> The OECD, define ‘peer review’ as:

a method by which countries can assess the quality and effectiveness of their policies, legislation, policy environments and key institutions. It provides a forum where policies can be explained and discussed, where information can be sought and concerns expressed, on a non-confrontational and non-adversarial basis. The feedback provides the reviewee with a yardstick for measuring its system against those of other peers while also informing the reviewing countries.<sup>54</sup>

Hansungule suggests that the concept of peer review has African origins.<sup>55</sup> He argues that although most of the writers on this concept have tended to view it as a European construct that is alien to Africa, literature on early African Society demonstrates that the concept of peer review is not foreign to classical African civilization. Significantly, he makes reference to Jomo Kenyatta<sup>56</sup> and Nelson Mandela,<sup>57</sup>

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<sup>52</sup> As above.

<sup>53</sup> M Mathoho ‘An African Peer Review Mechanism: A panacea for Africa’s government challenges?’ (2003), [www.saiia.org.za](http://www.saiia.org.za) (accessed 11 August 2010).

<sup>54</sup> OECD ‘Peer pressure as part of surveillance by international institutions’ (2002) Discussion led by Mr Niels Thygesen, chairman, Economic Development Review Committee, para 2, 4 June 2002.

<sup>55</sup> Hansungule (n 34 above) 4.

<sup>56</sup> J Kenyatta *facing mount kenya* (1938) 130-185.

<sup>57</sup> N Mandela *long walk to freedom* (1994) 17-29.

whom, he states, have demonstrated through their writings that peer review has a traditional African conception.<sup>58</sup> Hansungule argues further that in their respective works on traditional African society, the two African leaders easily found practices of peer review in African age-groups or peers as a common phenomena. He reasons that an African faced with a situation would turn to their peers organised according to age-groups for counsel, advice or direction, and then to their parents as an option of last resort.<sup>59</sup> Therefore, peer review in its pristine nature is an African social construct or invention that was critical towards ensuring a stable governance system in traditional African society before the advent of colonialism.<sup>60</sup> As a social value, peer review ensured individual and community peace and security thereby maintaining social cohesion and equilibrium which are the underlying guiding principles of APRM and UPR.<sup>61</sup>

As indicated above, the term 'peer' refers to those who are equal in status or stature. This therefore implies some form of equality between the parties that are participating in the process.<sup>62</sup> Flowing from this, peer reviews are thus conducted on non-adversarial basis and are predicated on the mutual trust and good faith of those involved in the process as well as common abiding commitment to the outcome of the process.<sup>63</sup> It has been recorded that review procedures are most successful when they are based on a high degree of trust between the reviewers and those being scrutinised.<sup>64</sup> Such a process addresses a number of measurable norms, laws, policies or quantitative benchmarks, and are conducted by peers, or experts appointed by peers, who are both competent and skilled.<sup>65</sup> Peer reviews are typically characterized by constructive mutual dialogue and interactive investigation. However it can also make use of questionnaires designed to make an assessment of the reviewed state.<sup>66</sup> The APRM employs all

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<sup>58</sup> Hansungule (n 34 above) 4.

<sup>59</sup> As above.

<sup>60</sup> As above.

<sup>61</sup> As above.

<sup>62</sup> Y Turianskyi 'A critical analysis of the APRM as a standard for good governance' Unpublished MA thesis, University of Pretoria, 1998 57.

<sup>63</sup> As above.

<sup>64</sup> Gaer (n 42 above) 112.

<sup>65</sup> Kanbur 'The African Peer Review Mechanism (APRM): An assessment of the concept and design' (2004) 31 *South African Journal of Political Studies* 157.

<sup>66</sup> F Pagani 'Peer Review: A tool for cooperation and change. Analysis of the OECD working method' (2002), [www.iss.org.za/Pubs/ASR/11No/Feature2.pdf](http://www.iss.org.za/Pubs/ASR/11No/Feature2.pdf) (accessed 11 August 2010).

the three approaches, with particular emphasis on mutual dialogue and questionnaires.<sup>67</sup> The UPR procedures are undertaken on the basis of reliable information relating to the fulfilment by each state of its human rights commitments and pledges based on interactive dialogue.<sup>68</sup> Several African states have undergone voluntary sectoral peer reviews before the advent the APRM.<sup>69</sup> For instance, South Africa belongs to the ‘enhanced engagement country’ category of the OECD and has undergone peer reviews with regard to competition law and policy and education policy.<sup>70</sup> Some other review procedures that African countries undergo include the World Trade Organisation-Trade Policy Review Mechanism (WTO-TPRM), the International Labour Organisation’s Enforcement System, the International Monetary Fund (IMF) Article IV consultations, the United Nations Conference on Trade and Development (UNCTAD).<sup>71</sup> As at the time of writing, the UNCTAD had conducted Investment Policy Reviews on 20 African countries.<sup>72</sup> The IMF reviews approximately 130 countries annually under Article IV consultations.<sup>73</sup> Desiring to enhance their performance on the fulfilment of human rights, African states have submitted themselves to be peer reviewed in APRM and UPR. The following discussion provides insights into these mechanisms.

## 2.2 The APR Mechanism

### 2.2.1 Introduction

In 2002, the African Heads of State through the Durban Declaration on Democracy, Political, Economic and Corporate Governance established a regional institution called the APRM. The APRM is an instrument voluntarily acceded to by the general membership of the AU as an African self-monitoring mechanism.<sup>74</sup> However countries wishing to accede to the APRM must first notify the Chairperson of

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<sup>67</sup> Turianskyi (n 62 above) 57.

<sup>68</sup> Redondo (n 40 above) 724

<sup>69</sup> Killander (n 31 above) 48.

<sup>70</sup> see Remarks by Angel Gurría, OECD Secretary-General at the launch of the first OECD Economic Assessment of South Africa, Pretoria, 15 July 2008 <[www.oecd.org](http://www.oecd.org)> (accessed 8 August 2010).

<sup>71</sup> For an excellent discussion on the nature of these reviews see Z Kebonang and C Fombad ‘The African Peer Review Mechanism: Challenges and prospects’ (2006) 32 *Current African Issues* 40.

<sup>72</sup> <[www.unctad.org/Templates/Page.asp?intItemID=3534&lang=1](http://www.unctad.org/Templates/Page.asp?intItemID=3534&lang=1)> (accessed 9 August 2008).

<sup>73</sup> Killander (n 31 above) 49. See further Kebonang & Fombad (n 71 above) 40.

<sup>74</sup> APRM Organisation and Processes, 2001 para 1.

New Partnership for Africa's Development (NEPAD), heads of state and government implementation committee and deposit a signed memorandum of agreement at the NEPAD secretariat in South Africa.<sup>75</sup>

Herbert and Gruzd<sup>76</sup> state that the start date of APRM is open to debate in that the Protocol establishing the APRM was agreed at the OAU Summit on July 2002 but other elements of the system took additional time to develop. For instance, the APRM Country Guidelines were put to finality in November 2003 and the first meeting of the APR Forum occurred on 13 February 2004, at which time the Panel of Eminent Persons was announced. They argue that this could be considered the effective date of commencement of APRM. According to Kebonang, the origins of APRM can be traced to the inaugural Summit of the African Union held in July 2002, Durban, South Africa.<sup>77</sup> He points out that it is at this Summit that African Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance, whose primary role is to foster Africa's socio-economic development through the adoption of better democratic, political and corporate government practices and also committed themselves to the implementation of the APRM.<sup>78</sup> Wherever accuracy of the start date of the APRM lies, it is inconsequential to the outcome of the work under study.

The APRM is a framework for monitoring policies and practices of participating states to ensure their conformity to agreed political, economic and corporate values, codes and standards which are enshrined in the Declaration on Democracy.<sup>79</sup> The APRM is an Africa's attempt to answer a question posed by German philosopher, Georg Simmel (1858-1918) several decades ago to the effect that; how is a good society possible? In answering this transcendental question, the APRM insists that an ideal society is anchored, *inter alia*, on good political governance and sound economic policies. Founders of the APRM believe that these concepts should guide Africa, if it is to turn a corner.

This mechanism is an initiative by African leaders which is supposed to be 'people centered, people owned, people managed, and people driven.'<sup>80</sup> Elsewhere, the APRM has been laudatorily described as 'Africa's premier home-grown governance and accountability tool,'<sup>81</sup> while others view it as the 'jewel in

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<sup>75</sup> See para 30 of the Memorandum of Understanding on the APRM (NEPAD/HSGIC/03-2003/APRM/MOU).

<sup>76</sup> Herbert & Gruzd (n 37 above) 4.

<sup>77</sup> Z Kebonang, (n 32 above) 40.

<sup>78</sup> As above.

<sup>79</sup> Para 2 of the APRM Base Document AHG/235(XXXV111), Annex 11, 16 September 2003.

<sup>80</sup> <[www.ghana.diplo.de/Vertretung/ghana/en/01/Appiah](http://www.ghana.diplo.de/Vertretung/ghana/en/01/Appiah)> (accessed 9 August 2010).

<sup>81</sup> <[www.europafrica.net/2010/08/04](http://www.europafrica.net/2010/08/04)> (accessed 10 August 2010).

NEPAD's crown'.<sup>82</sup> As shall be shown below, these claims are misplaced. The APRM was born out of the need to give impetus to African renaissance or re-birth. Out of a possible 53 African states, as at August 2010, the number of APRM members is standing at thirty following the accession of Cape Verde on 30 March 2009.<sup>83</sup> This figure accounts for 76% of Africa's total population.<sup>84</sup> So far, 14 states have been peer reviewed, with Mauritius being the last country scheduled for review in late 2010.<sup>85</sup>

It is submitted that only norms, standards, practices, values, and aspirations that are consistent with modernity, progress, and development can turn around the fortunes of the African continent. However, any approach to Africa's redemption must be informed and guided by a historicism and experience that contextualises the continent and is derived from her own tradition-bound trajectory.<sup>86</sup> It is important to dissect the anatomy of APRM and establish how one part relates with the rest within the APRM system. It is to this that we now turn.

### **2.2.2 Structure of APRM**

The APRM has four distinct yet related organisational components. The following is a list of and provides brief descriptions of these components:

- a. The Committee of Participating Heads of State and Government (APR Forum). This is the highest level structure at the continental level, which is where the actual 'peer pressure' will ultimately occur. This is the pulse point of the process.<sup>87</sup>

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<sup>82</sup> APRM, Country Review Report of the Republic of Kenya (2006), quoted by M Killander 'The African Peer Review Mechanism and human rights' (2008) 30 *Human Rights Quarterly* 42.

<sup>83</sup> See APRM website: <[www.upr-info.org](http://www.upr-info.org)> (accessed 10 August 2010).

<sup>84</sup> Adopted from the speech of Professor Adebayo Adedeji, former Chairperson of the APR Panel of Eminent Persons, at the 12th Summit of the Committee of APR Forum held at the African Union Commission Headquarters in Addis Ababa, Ethiopia, 30 January 2010.

<sup>85</sup> These are Ghana (January 2006), Rwanda & Kenya (June 2006), Mali, Mozambique & Lesotho (June 2009), Uganda (June 2008), Nigeria, & Burkina Faso (October 2008), Algeria & South Africa (June 2007), Senegal, Benin (January 2008) and Mauritius (July 2010).

<sup>86</sup> F Appiah 'The APRM – An analysis through the German intellectual traditions' (2007) <[www.ghana.diplo.de/Vertrutung/ghana/en/01](http://www.ghana.diplo.de/Vertrutung/ghana/en/01)> (accessed 12 August 2010).

<sup>87</sup> The APR Forum is presently under the Chairpersonship of Ethiopian Prime Minister Meles Zenawi.



- b. The Panel of Eminent Persons (APR Panel), which oversees the review process to ensure that it is within bounds of integrity and considers reports and make recommendations to the APR Forum. The APR Forum has appointed a panel of seven eminent persons - Africans of high stature, integrity and moral probity from the various regions of the continent.<sup>88</sup>
- c. The APRM Secretariat (Secretariat) which provides the technical, secretarial, coordination and administrative support services for the APRM. The continental APRM Secretariat is based in Durban in South Africa and is responsible for the coordination and implementation of the review process and;
- d. The Country Review Team (APR Team), appointed only for the duration that a country's review visit lasts. It carries out the review process and examines progress made by the reviewed country on its program of action.

### **2.2.3 Types of reviews under the APRM**

There are basically four types of reviews envisaged under the APRM system, namely:

- a. The base review - this is the first country review, initiated within eighteen months of a country having subjected itself to the APRM process;
- b. The periodic review - this takes place every two to four years after the first review;
- c. A member country can on its own accord, ask for a review that is not part of the periodically mandated review and;
- d. Early ominous signs of impending political and/ or economic crisis in a member country would also be sufficient trigger institution of review proceedings. Participating Heads of State and Government can call for such a review on humanitarian grounds in a spirit of 'helpfulness' to the country concerned.<sup>89</sup>

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<sup>88</sup> The APR Panel is presently chaired by Professor Mohamed Senghor Babes of Algeria who was appointed by Prime Minister Zenawi on 26 July 2010, succeeding Professor Adebayo Adedeji of Nigeria, who retired the same year.

<sup>89</sup> APRM Base Document 2001, para 14.

#### 2.2.4 Stages of reviews under the APRM

It is apposite to give some insight, albeit briefly into how APRM processes operate. The APRM Base Document identifies five stages in the APR process:<sup>90</sup>

- a) The first stage takes place after a country has acceded to the APRM and has signed a Memorandum of Understanding (MOU) on technical Assessment and Country Review Visit.<sup>91</sup> This process entails, among other things, the presentation of all available information pertinent to the review process. The first stage will involve a study of the political, economic and corporate governance and development environment in the prospective reviewee, based principally on up-to-date background documentation prepared by the APRM Secretariat and material provided by national, sub-regional, regional and international institutions.<sup>92</sup>
- b) In the second stage, the Review Team will visit the country concerned where its priority order of business will be to carry out the widest possible range of consultations with the Government, officials, political parties, parliamentarians and representatives of civil society organizations (including the media, academia, trade unions, business, professional bodies).<sup>93</sup>
- c) The third stage is the preparation of the Team's report. The report is prepared on the basis of the dossier prepared by the APRM Secretariat and the information provided "in-country" by official and unofficial sources during the wide-ranging consultations and interactions with all stakeholders. The report must be measured against the agreed political, economic and corporate governance commitments made under the Programme of Action. The Team's draft report is first discussed with the concerned government. Those discussions are conducted to ensure accuracy of the information and to provide the Government with an opportunity both to react to the Team's findings and to put forward its own views on how the identified shortcomings may be best addressed. These responses of the Government will be annexed to

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<sup>90</sup> See Herbert & S Grudz (n 37 above) 63.

<sup>91</sup> See paras 7(1) and 7(2) of the APRM Organisation and Processes, 2001.

<sup>92</sup> See para 17 of Protocol Establishing the APRM 8 July, 2002 AHG/235 (XXXV III) Annex II.

<sup>93</sup> As above, para 18.

the Team's report. It is a requirement that the Team's report be clear in instances where problems are identified.<sup>94</sup>

- d) At the fourth Stage, the Team's report is submitted to the participating Heads of State and Government through the APRM Secretariat. The consideration and adoption of the final report by the participating Heads of State and Government, including their decision in this regard, marks the end of this stage. 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 such a recalcitrant state on notice of their collective intention to subject it to 'collective adverse action.'<sup>95</sup> Whatever this 'collective adverse action' means, it is a measure of last resort to be considered only after all attempts at constructive engagement have proved unavailing.
- e) The fifth stage is the last stage that completes the first 'cycle' of the APRM for the country under assessment. It is at this stage that the report is tabled before the APR Forum for actual peer review to take place. At the Forum, a presentation is made by the Eminent Person responsible for the review of that country and by the President of the state under review and it is upon these presentations that the review will be based. Six months after the report has been considered by the APR Forum, it should be formally and publicly tabled in key regional and sub-

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<sup>94</sup> As above, paras 19-21.

<sup>95</sup> APRM Base Document 2001, para 24.

regional structures such as the Pan-African Parliament (PAP), the African Commission, the Peace and Security Council (PPC) and the Economic, Social and Cultural Council (ECOSOCC) of the AU.<sup>96</sup>

## **2.3 The UPR Mechanism**

### **2.3.1 Introduction**

According to the UN description, ‘the [UPR] is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.’<sup>97</sup>

The UPR was established on 15 March 2006 through UN General Assembly Resolution 60/251,<sup>98</sup> which created the Human Rights Council itself. It is a cooperative process which, by the close of 2011, will have completed the review of human rights records of every country in the world.<sup>99</sup>

### **2.3.2 Language shift from ‘peer review’ to ‘periodic review’**

During the negotiations leading to the structuring of the UPR, the term ‘peer review’ was commonly used, however the outcome of the New York negotiation process in GA Resolution 60/251 adopted the term ‘periodic’ instead of ‘peer’ review. The preference of one term over the other is not a mere issue of linguistic concern. The term periodic review underscores that the UPR is not exclusively an intergovernmental process but one involving various stakeholders and based on information from various sources.<sup>100</sup> The interactive dialogue and the initial stage of the review process are conducted by the Working Group, but all states with Observer States can participate in the review. Other stakeholders like NGOs and National Human Rights Institutions can attend but do not have right of audience. However, they are allowed to submit written submissions which will be used in the review process and

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<sup>96</sup> As above.

<sup>97</sup> <[www.upr-info.org](http://www.upr-info.org)> (accessed 14 July 2010).

<sup>98</sup> A/RES/60/251; 13 IHRR 1195, 15 March 2006.

<sup>99</sup> See n 97 above.

<sup>100</sup> Redondo (n 40 above) 225.

can take the floor before the adoption of the of the UPR Working Group report at the HRC plenary session. The change of language from 'peer' to 'periodic' review does not suggest that UPR is any less of a 'peer review' mechanism. In fact this is largely what it is. The language of 'periodic review' is convenient in that it takes cognisance of the fact that non-state actors, who are not 'peers' in our context, are also involved in UPR review procedures. The situation is different in the APRM where the peer review process involves Heads of States and Government reviewing one another.

### **2.3.3 Basis for the UPR review**

The UPR review processes are conducted under the auspices of the UN Human Rights Council in accordance with human rights obligations and commitments expressed, *inter alia*, in the UN Charter, the Universal Declaration of Human Rights and other human rights instruments.<sup>101</sup> Like the APRM, The UPR is not a creature of a treaty. This therefore means that it has an expansive focus that reaches beyond those human rights and norms contained in treaties. According to Resolution 5/1, the normative framework of the review is not restricted to human rights treaties to which a state under review is a party but has a wider coverage that includes voluntary pledges and commitments made by the reviewee. These include national human rights policies and/or programs.<sup>102</sup> Given the complementary and mutually interrelated nature of international human rights law and humanitarian law, the review shall further take into account humanitarian law where circumstances so demand.<sup>103</sup>

Within the given parameters, three documents are presented before the Working Group sessions forming the basis for interactive dialogue according to the guidelines approved by the Council. These are: (I) a report/presentation submitted by the state under review, (II) a report compiled by the Office of the UN High Commissioner for Human Rights (OHCHR) of information contained in the reports of treaty bodies and special procedures concerning the country, including its observations and comments, and other relevant official UN documents and (III) an OHCHR compilation of 'additional credible and reliable information provided by other relevant stakeholders',<sup>104</sup> including NGOs, national human rights

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<sup>101</sup> Para 1(a) to (c) of HRC Res. 5/1, adopted 18 June 2007.

<sup>102</sup> As above, para 1 (d).

<sup>103</sup> As above, para 2(2).

<sup>104</sup> HRC Res. 5/1 paras 15-17.

institutions and regional inter-governmental organisations. Select members of the HRC called the 'troika' facilitate the interactive dialogue and the preparation of the outcome report.<sup>105</sup>

The UPR provides an opportunity for all States to declare what actions they have taken to improve the human rights situations within their territories and to overcome challenges that impede the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe.<sup>106</sup>

The protracted negotiation on Resolution 60/251 of the General Assembly (GA Resolution 60/251), which establishes the Council reveals the different views and aspirations that different stakeholders had in relation to the new institution and its mechanisms including the UPR.<sup>107</sup> This host of issues is not germane to this study and as such to avoid prolixity, will not be recounted here, suffice to say that states and other stakeholders across the spectrum generally embraced the idea of a peer review mechanism where states' human rights situations or performance will be assessed by the Council in an 'objective, universal, genuine and non-selective manner'.<sup>108</sup>

African states were active participants in the negotiations that led to the final adoption of Resolution 60/251 in New York and later played a vital role in Geneva on working towards the adoption of what is colloquially referred to as 'institution building text' of the Council, Resoution 5/1 (endorsed by the General Assembly Resolution 62/434 of 3 December 2007).<sup>109</sup> Annexed to this resolution is the institution building text. This text covers, *inter alia*, procedures or modalities of the UPR, the basis of the review, UPR principles and objectives, the periodicity and the order of countries to undergo the review and the outcome and follow-up of the review mechanism.<sup>110</sup>

Former High Commissioner for Human Rights, Ms Louise Arbour has hailed the UPR as a robust response to most of the criticisms leveled against the former Commission and that it would 'provide a vehicle for scrutiny of the implementation of rights and norms beyond anything ever attempted by the

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<sup>105</sup> For UPR procedures, see: <[www.ishr.ch/upr](http://www.ishr.ch/upr)> (accessed 13 August 2010).

<sup>106</sup> <[www.state.gov/g/drl/upr/132216.htm](http://www.state.gov/g/drl/upr/132216.htm)> (accessed 10 August 2010).

<sup>107</sup> Abebe (n 40 above) 2.

<sup>108</sup> As above.

<sup>109</sup> A/HRC/RES/5/1, 2007.

<sup>110</sup> See n 105 above.

Commission on Human Rights'.<sup>111</sup> Mr Ban Ki-moon, current UN Secretary General has also meticulously observed that UPR 'has great potential to promote and protect human rights in the darkest corners of the world.' He continued to advise that, '[a]ll victims of human rights abuses should be able to look to the Human Rights Council as a forum and a springboard for action.'<sup>112</sup>

#### **2.3.4 Review procedures of the UPR**

General Assembly resolution 60/251 sets out the mandate of the Council as being to:

Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.<sup>113</sup>

The following paragraphs speak to the review processes and stations where such processes are undertaken, including the modalities and practices that are employed in this mechanism.

#### **2.3.5 Interactive dialogue**

The maximum allowable time for the review of a state is three hours. The reviewed state is entitled to use an hour of that time to present its report, react to any written questions it may have received prior to the day of the review, respond to oral questions, comments and recommendations from the floor and present its conclusions. The reviewed state enjoys discretion on the use of the time as well as issues they wish to address. During the course of the interactive dialogue members states of the HRC are entitled to three minutes and observers two minutes to put raise their questions, comments and recommendations.<sup>114</sup>

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<sup>111</sup> UN Press Release, address by Ms Louise Arbour, Former UN High Commissioner for Human Rights on the Occasion of the eighth session of the Human Rights Council, Geneva, 2 June 2008.

<sup>112</sup> Speech by UN Secretary General, Ban Ki-moon at the opening of the 4<sup>th</sup> session of the Human Rights Council, Geneva 12 March 2007.

<sup>113</sup> Resolution 60/251, para 5(e).

<sup>114</sup> See n 105 above.

As pointed above, after the interactive session, a group of three HRC members, known as the ‘troika or rapporteurs,’ and a member of the Secretariat (OHCHR) work together to produce the report of the review. The report must be factual and an accurate reflection of the debate that took place during the review and must contain the recommendations and/ or conclusions proffered to the state during the process by delegations during interactive dialogue. The state can accept or decline to accept or implement any of the recommendations resulting from the review, and must inform the troika of its decisions. The report is presented to the Working Group, two days after the review has taken place, for adoption. Factual errors in the report can be corrected for a two week period following adoption, through the request of delegations.<sup>115</sup>

### **2.3.6 The Outcome Report**

The final Outcome Report of the UPR of a state is debated and adopted in the following plenary session of the HRC by resolution or decision. One hour of the plenary session (also webcast) is allocated to the adoption of the report, with the state under review being allowed twenty minutes to address issues raised at the Working Group session. Other member states are also allowed an opportunity to express their views during the review.<sup>116</sup> Members and observers of the HRC (open to all 192 members of the UN) are allowed twenty minutes to make comments on the UPR Outcome Report. Lastly, 20 minutes is dedicated for civil society organisations and National Human Rights Institutions with ECOSOC status, which can make short two-minute interventions to express their views on the UPR Outcome Report for a given country. The final outcome Report of the UPR is adopted at the plenary session.<sup>117</sup>

### **2.3.7 Concluding remarks**

There can be no gainsaying that if properly implemented, with African states engaging in an open and frank talk with one another, these two mechanisms have the potential to stem the tide of decades of bad governance and human rights violations in Africa. This will require collective political will among African states which is regrettably still absent.

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<sup>115</sup> As above.

<sup>116</sup> As above.

<sup>117</sup> As above.



## CHAPTER III

### 3. Nature of political engagement among African states in the UPR and APRM frameworks

#### 3.1 Introduction

For long, the defining hallmark of the interaction of African states has been the absence of mutual criticism even in the face of massive human rights violations. This habit is amply exemplified by their deafening silence, yet on-looking while President Robert Mugabe of Zimbabwe decimates his people, and tears apart a country which was once touted as the bread basket of Africa. At the Commonwealth Meeting in 2002, the Commonwealth decided to suspend Zimbabwe after its 2002 elections which were marred with large-scale violence and other severe irregularities. Although the suspension of Zimbabwe's membership was finally effected, it left the Commonwealth divided into two factions; one camp led by Britain and Australia, which supported the suspension and the other led by Nigeria and South Africa which was bitterly opposed to the suspension. Ironically both Nigeria and South Africa are the chief architects of NEPAD of which the APRM is an integral aspect.<sup>118</sup>

It is against this background that this chapter looks into the nature of mutual political engagement between African states in the UPR and APRM. Is it critical enough to be worthwhile? Under this chapter, the thesis analyses UPR reports for some African states that have undergone the UPR review procedures and APR Forum communiqués for some of those countries that have been peer-reviewed under the APRM. The study mainly focuses on some of the African countries with notorious human rights record, and how other African states have reacted to this situation in the UPR and APRM. This thesis will use several human rights indicators, such as the Mo Ibrahim Index, UN reports, reports of internationally reputed NGOs like Human Rights Watch, among others, to determine the notoriety of human rights in a country. We begin with the examination of the nature of engagement within the UPR and turn to the APRM, provide commentary and make concluding observations.

#### 3.2 Politics of bargaining among African states in the UPR

Abebe writes that although a number of radical and progressive procedural reforms have been introduced to make the Human Rights Council more responsive to its mandate, it remains an inter-governmental organ.<sup>119</sup> Therefore this means that much as states politicised the Human Rights

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<sup>118</sup> Kebonang (n 32 above) 46.

<sup>119</sup> Abebe (n 44 above) 19.

Commission, states in the Council often organise themselves and undertake their activities in regional groupings and networks.<sup>120</sup> As such, regional alliances play a decisive role influencing the conduct and outcome of review processes.<sup>121</sup>

As indicated above, so far around 30 African countries have undergone the UPR review process. Among the countries that have been peer-reviewed whose human rights situations are notorious include, among others, Ethiopia, Equatorial Guinea and Eritrea.<sup>122</sup> This thesis will endeavour to analyse the reports of some of these countries, in relation to the reaction of African states thereto.

On 19 March 2010, the Human Rights Council considered the outcome of the Universal Periodic Review on Ethiopia.<sup>123</sup> The Ethiopian national report<sup>124</sup> was introduced by Fisseha Yimer, Special Advisor to the Minister of Foreign Affairs and leader of the delegation. Almost predictably, in his address, Mr Yimer spoke about his country's 'demonstrable commitment', to democracy and the fulfilment of all human rights obligations.<sup>125</sup> Mr Yimer's sentiments notwithstanding, Ethiopia's commitment to democracy is questionable. However, as Hansungule notes, given a chance, all regimes around the world, will proclaim themselves to be democratic.<sup>126</sup> In the lapidary words of Gitonga:

the term [democracy] has become more and more honorific with an unequivocal 'laudatory' meaning attached to it. Supporters and apologists of all kinds of regimes and systems are therefore quick to attach the tag 'democratic' unto them. It is not even uncommon to find the term used to signify and thereby sanctify perfectly antithetical realities and practices.<sup>127</sup>

As Mr Yimer concluded his speech, Mr Boualem Chebihi of Algeria took the floor to react to Ethiopia's report. He opened his address by indicating that 'Ethiopia [is] a *brotherly* [emphasis supplied] country

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<sup>120</sup> As above.

<sup>121</sup> As above.

<sup>122</sup> All of these countries occupy the bottom half in the Moo Ibrahim Index rankings.

<sup>123</sup> See Ethiopian Outcome Report: <[www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A\\_HRC\\_13\\_17\\_ETH\\_E.pdf](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A_HRC_13_17_ETH_E.pdf)> (accessed 18 August 2010).

<sup>124</sup> Available at: <[www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A\\_HRC\\_WG6\\_6\\_ETH\\_1\\_E.pdf](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A_HRC_WG6_6_ETH_1_E.pdf)> (accessed 18 August 2010).

<sup>125</sup> See Ethiopian Outcome Report (n 123 above) para 2.

<sup>126</sup> M Hansungule 'Malawi and the African Peer Review Mechanism: A bold step towards good governance?' (2008) 2 *Malawi Law Journal* 21.

<sup>127</sup> A Gitonga 'Meaning and foundations of democracy' (1988) as quoted by Hansungule, above.

which is host to the headquarters of the African Union.<sup>128</sup> The leader of the Algerian delegation noted further that his Government appreciates Ethiopia's unwavering determination towards the promotion and protection of human rights. Several other African countries like Djibouti, Congo and Morocco, among others also joined to praise Ethiopia's human rights situation.

What beats the writer's mind is how African countries in the UPR managed to overlook factors that undermine governance and effective fulfilment of human rights obligations in Ethiopia. According to the 2009 Human Rights Watch Report, 'Ethiopia is on a deteriorating human rights trajectory.'<sup>129</sup> The report notes that in 2009 Ethiopia promulgated two draconian pieces of legislation 'that codify some of the worst aspects of the slide towards deeper repression and political intolerance.'<sup>130</sup> In January 2009, Ethiopia passed the Civil Society Organisations (CSO) Law,<sup>131</sup> which is one of the 'most restrictive of its kind, and its provisions will make most independent human rights work impossible'.<sup>132</sup> This law makes any work within the domain of human rights or governance illegal if carried out by foreign non-governmental organizations, and labels any Ethiopian organisation that receives more than 10 percent of its funding from sources outside of Ethiopia as 'foreign.'<sup>133</sup> In essence, the law makes most independent human rights work in Ethiopia virtually impossible to undertake.<sup>134</sup>

In July 2009, Ethiopia passed the Proclamation on Antiterrorism.<sup>135</sup> This law permits the Ethiopian government to prosecute political protesters and non-violent expressions of dissent as acts of terrorism.<sup>136</sup> It appears that some provisions of this law appear to be tailored less towards addressing terrorism but more towards allowing for a callous and heavy-handed response to mere public unrest.<sup>137</sup>

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<sup>128</sup> As above, para 26.

<sup>129</sup> Available at: <[www.advocacyforethiopia.org/up-content/uploads/2010/01/humanrightswatch2009](http://www.advocacyforethiopia.org/up-content/uploads/2010/01/humanrightswatch2009)> (accessed 14 August 2010).

<sup>130</sup> As above.

<sup>131</sup> Proclamation No. 621 of 2009.

<sup>132</sup> For a comprehensive discussion of this law, see Y B Mulat, e tal 'Sounding the horn: Ethiopia's Civil Society Law Threatens Human Rights Defenders' (2009) 1-19. Available at: [www.law.northwestern.edu/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf](http://www.law.northwestern.edu/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf) (accessed 15 February 2010).

<sup>133</sup> n 131 above, see art 2 thereof.

<sup>134</sup> As above, art 8 thereof.

<sup>135</sup> Proclamation 652/ 2009.

<sup>136</sup> As above, art 3 thereof.

<sup>137</sup> See Human Watch Report executive summary at: <[www.abbaymedia.com/news/?p](http://www.abbaymedia.com/news/?p)> (accessed 30 August 2010).

These laws make Ethiopia a virtual pariah state. As the country was heading towards elections in the winter of 2010, the Ethiopian government clamped down on the already limited space for dissent and general political activity.<sup>138</sup> It has been observed that ordinary citizens who criticize government policies or officials are gagged through trumped-up and spurious charges such as belonging to illegal 'anti-peace' groups, including armed opposition movements and banned political formations.<sup>139</sup>

According to the 2009 US Department of State Human Rights Report for Ethiopia,<sup>140</sup> human rights abuses reported during that year included, *inter alia*, torture, unlawful killings, ill-treatment of detainees and opposition supporters by state security forces, often acting with evident impunity.<sup>141</sup>

During Ethiopia's UPR review, none of the African countries forthrightly engaged the Ethiopian delegation on the massive human rights violations catalogued above. All African countries that had occasion to speak took turns, without even an iota of compunction, to heap flattery on the Ethiopian government on its imagined commitment in fulfilling its human rights obligations. Where some germane issues were raised, they were perfunctorily discussed and they paled into insignificance by comparison to praises from the African bloc which dominated the review process. Whereas African states commended the situation of human rights in Ethiopia, the Human Rights Watch report states that '[Ethiopia] is slid[ing] deeper into repression.'<sup>142</sup> Ethiopia's unimpressive human rights record demonstrates the clear lack of political will on the part of the Ethiopian government in advancing the human rights agenda in Ethiopia. The startling part of it is that the Ethiopian Prime Minister Zenawi is the Chairperson for the APR Forum, the very nucleus of the APRM.

The uncritical nature of engagement among African states as reflected by the Ethiopian review above seems to be part of the larger pattern of how African states engage one another in the UPR. During Eritrea's review, Algeria which was the first of African states to take the floor, reminded the reviewers that 'the universal periodic review was not a place for confrontations but rather a way to assess progress and challenges.'<sup>143</sup> This statement reminds one of Abebe's words that African states are easily

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<sup>138</sup> As above.

<sup>139</sup> As above.

<sup>140</sup> <[www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm](http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm)> (accessed 19 August 2010).

<sup>141</sup> As above.

<sup>142</sup> See n 137 above.

<sup>143</sup> See n 125, para 26.

tempted to equate the cooperative nature of the UPR with the absence of any genuine criticisms.<sup>144</sup> On a positive note however, Algeria encouraged Eritrea to establish a national human rights institution in line with the Paris Principles.<sup>145</sup> DRC congratulated Eritrea for having ratified several international human rights instruments and having adopted a Constitution that guarantees fundamental freedoms of citizens.<sup>146</sup> Whereas the adoption of a 'good' Constitution is a proper starting point towards the creation of comprehensive legal framework for the protection of human rights, it cannot be viewed as an end in itself. It must be appreciated as a vehicle to deliver the goodies of human rights and good governance and as Ebrahim, aptly observes:

... no matter how wonderful the Constitution may be, unless it is respected by all – government and citizens alike – it will not be of much value. Laws do not make a better society, people do. Law can only be of assistance in empowering people to achieve their aspirations.<sup>147</sup>

For its part, South Africa welcomed the ongoing efforts of the Government of Eritrea to reform its national laws, bringing them in conformity with the Constitution as well as international obligations that Eritrea has incurred under international law. However, the South African delegation was brave to enquire from Eritrea about allegations of enforced disappearances and torture by the police and the army.<sup>148</sup> The South African manner of questioning touching on the so called sensitive issues must be commended.

Despite South Africa's valiant attempt to get Eritrea to account for its massive human rights violations, generally the nature of engagement among African states has been noted to be less than critical, with a host of critical issues in Eritrea's human rights domain remaining untouched. For instance, prison conditions are said to be harsh and life-threatening; arbitrary arrests and detentions are

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<sup>144</sup> Abebe (n 44 above) 20.

<sup>145</sup> See Eritrean Outcome Report: <[www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_WG.6\\_6\\_L1\\_Eritrea](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_WG.6_6_L1_Eritrea)> (accessed 15 August 2010), para 26. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights.

<sup>146</sup> As above, para 58.

<sup>147</sup> H Ebrahim *The soul of a nation* (1998) 259.

<sup>148</sup> See n 145 above, para 67.

widespread, causing Georgette Gagnon, Human Rights Watch director for Africa to remark that 'Eritrea's government is turning the country into a giant prison'.<sup>149</sup>

African states continued heaping praises on each of their own fellow African states including pariah states like Equatorial Guinea. According to the 2009 Human Rights Watch Report for that country,<sup>150</sup> despite the fact that she earns tens of billions of dollars as the fourth largest Sub-Saharan African oil producer, the vast majority of her people remain impoverished due to corruption and economic mismanagement, with more 77% of its population living below the poverty datum line (less than \$ 1 dollar per person per day). The Report states further that free and fair elections are denied to the citizens of Equatorial Guinea, and arbitrary detentions subsist unabated. In addition, it noted that the government severely restricts the right to expression and that almost no independent news information exists within the country. *Reporters Without Borders* ranked Equatorial Guinea the 158th worst out of 175 countries for press freedom in 2009.<sup>151</sup>

During the review for the Gambia, African states praised that country for being a good guardian for human rights as exemplified by its hosting of the African Commission. Despite these misplaced praises, in *Purohit v The Gambia*, the Commission itself lambasted the Gambia for its unwillingness to protect human rights and lack of cooperation with it, a conduct that the Commission decried could adversely impede its work.<sup>152</sup>

Further, out of 65 statements during the review of Tunisia, 50 'favourable' statements were made, mainly by African and Muslim countries.<sup>153</sup> More than half of the 50 'favourable' statements that were recorded during the review of that country came from African states in complicity with developing world states.<sup>154</sup>

Ironically, African states joined by other developing countries turned the UK review into a bashing session, severely criticizing its human rights situation. However, a similar reaction towards reports by

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<sup>149</sup> <[www.hrw.org/en/news/2009/04/16/eritrea-repression-creating-human-rights-crisis](http://www.hrw.org/en/news/2009/04/16/eritrea-repression-creating-human-rights-crisis)> (accessed 10 August 2010).

<sup>150</sup> Available at: <[www.hrw.org/en/node/87456](http://www.hrw.org/en/node/87456)> (accessed 21 August 2010).

<sup>151</sup> See Press Freedom Index at: [www.en.rsf.org/press-freedom-index-2009,1001.html](http://www.en.rsf.org/press-freedom-index-2009,1001.html) (accessed 21 August 2010).

<sup>152</sup> (2003) AHRLR 96 (ACHPR 2003) para 41.

<sup>153</sup> Abebe (n 44 above) 20.

<sup>154</sup> As above.

African and other developing countries was absent, given that such countries have worse human rights records than the UK. This attitude of African states which is fraught with vices of double standards and hypocrisy and smacking of misplaced solidarity attracted scathing criticism from a group of NGOs. They discredited this approach thus:

On the UPR Working Group, we note the value of a cooperative approach but express serious concern at the practice of some States which have been lining up only to praise their allies. This approach runs contrary to the agreed principle that the UPR should be conducted in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner'. In this sense, the UPR has not lived up to the expectations of a move away from the 'politicisation' of the past. Indeed, in many cases, this 'politicisation' has seemed more pronounced than ever. In several instances information provided by states under review, or by those praising them, has been misleading at best.<sup>155</sup>

This, however, does not mean that there were no serious and meaningful questions put by African states to other African countries under review. Some African countries broke ranks with 'tradition' and posed difficult and yet substantively significant questions to their own fellow African states. For example, South Africa inquired from the Eritrean delegation on the rampant incidence of torture and arbitrary detentions in that country.<sup>156</sup> Angola and Zambia raised questions about the restrictions on freedom of expression and persecution of journalists in Tunisia.<sup>157</sup> The Democratic Republic of Congo criticized the report of Gabon for lack of information on people living with HIV/AIDS.<sup>158</sup> Regrettably, this nature of engagement is sporadic.

On the basis of the foregoing analysis, the author asserts that in the absence of Western countries, not much meaningful mutual peer review can be done by African states on their own. They would reduce the process to a shameful charade of mere exchange of flattery. The very essence of the UPR is to address human rights concerns and if the UPR is to succeed in its mandate, such issues must be laid bare before it for appraisals to take course in all candidness.

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<sup>155</sup> Joint NGO Statement on 8<sup>th</sup> session, Human Rights Council, <<http://www.ishr.ch>> (accessed 16 August 2010).

<sup>156</sup> Eritrean Outcome Report, n 148 above, para 67.

<sup>157</sup> Abebe (n 44 above) 20.

<sup>158</sup> See Report of the Working Group on the Universal Periodic Review, A/HRC/8/35 para 15.

### 3.3 Approaches of Western and African countries contrasted

The lack of critical engagement among African states in the UPR is mitigated to some extent by the presence of western states in the UPR. These states never shy away from criticising Africa's gloomy human rights situation. For instance the Eritrean human rights situation was sharply commented on by the American delegation which 'note[d] with concern' the systematic and massive human rights violations obtaining the Eritrean soil.<sup>159</sup> The views of the US were concurred in by the UK,<sup>160</sup> Austria,<sup>161</sup> and Australia.<sup>162</sup> During the review for Equatorial Guinea, Germany noted reports about a pervasive culture of impunity of perpetrators of human rights violations and the contributing factors to this situation, such as lack of an independent judicial system, corruption and ineffectiveness of habeas corpus guarantees.<sup>163</sup> The Netherlands encouraged Ethiopia to amend its CSO Law so as to bring it into conformity with international human rights standards.<sup>164</sup>

### 3.4 Politics of flattery in the APRM

As already indicated, in the APRM, peer review obtains at the APR Forum level. This is the highest level structure at the continental level, which is where actual 'peer pressure' is applied on errant states. The review is exclusive to Heads of State of participating states only. NGOs are not permitted to enter the meeting room where a peer review exercise or activity is being conducted, let alone take the floor to contribute in interactive dialogues. Part of the proceedings is held in camera – the so called Closed Session of the Summit. All persons who are not representatives of the Heads of state and Government or heads of partner institutions of the APRM or APRM team are excluded from attending the session. However, at the end of each summit of the committee of Heads of State and Government participating in the African Peer Review Mechanism, a communiqué is issued. This communiqué indicates names of Heads of State and Government who attended the Summit, date and venue of such summit and review outcomes of a state(s). It is these APR Forum communiqués which form the basis of our analysis, examining the nature of engagement that obtains among participating states. As indicated above, about

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<sup>159</sup> See Eritrean Outcome report (n 148 above) para 66.

<sup>160</sup> As above, para 33.

<sup>161</sup> As above, para 37.

<sup>162</sup> As above, para 40.

<sup>163</sup> As above, para 19.

<sup>164</sup> See Ethiopian Outcome Report (n 123 above) para 26.



fourteen states have undergone the APRM review process. For purposes of this study, communiqués resulting from reviews of such countries as Kenya and Rwanda will be used. This is on account of the fact that of the countries peer reviewed, there is evidence (as shall be shown below) that their human right records are not positive. This by no means suggests that they have the worst human rights situations in Africa. African countries with the most notorious human rights situations like Zimbabwe, Somalia, Chad, among others are conspicuously absent from the APRM. As a process voluntarily acceded to, the APRM has no authority over these regimes with the worst human rights records. Evidently, these are also the regimes least likely to subject themselves to external review.

It is worth noting that compared to the UPR outcome reports which cover some 21 pages on average, the APR Forum communiqués are typically very short, only covering some 6 pages, with some huge space accorded to the long list of heads of states in attendance. From the outset, this creates a biased view that human rights will not receive the utmost attention they deserve in the review - more so that the APRM review process is not limited to human rights but covers a wide spectrum of cross-cutting issues that includes, *inter alia*, sustainable development and corporate governance. We now turn to analyse the APRM Forum communiqués insofar as they relate to human rights situations within peer reviewed states.

Lack of straight talk is also the hallmark of engagements in the APRM. The review of Kenya eloquently speaks to this fact. Kenya was peer reviewed at the fifth summit of the APR Forum held at the Gambia on 30 June 2006. This review followed the release of the African Peer Review Mechanism, Country Review Report (Kenya Report) for that country by APRM eminent persons. This Report, which one scholar described as ‘remarkably frank,’ identified critical and ‘overarching’ issues of human rights and governance that Kenya needed to address promptly. It observed that there is a need for a healing of the nation and that the process of national healing and reconciliation is unlikely to proceed as long as society is still polarised.<sup>165</sup>

In particular, the APRM eminent persons noted ‘the role of prominent members of the ruling party and high ranking government officials in fuelling the so-called ethnic clashes’. They lamented that many of the perpetrators ‘have neither been investigated nor prosecuted. Some have continued to serve as

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<sup>165</sup> APRM Country Review Report (Kenya) <<http://www.nepad.org/2005/files/aprm/APRMKenya-report.pdf>> (accessed 10 May 2010).

senior officers, ministers, or members of parliament. The inability to act [against them] tends to underline general public perception of impunity, while at the same time constricting the ability of people to come to terms with the past experiences of injustice and violence thus further aggravating and reinforcing polarities and suspicion. The Report recommended for 'transformational leadership' – a leadership that 'entails not simply directing change but managing it in a way that ensures broad ownership, legitimacy and self-directed sustenance and replication of change in all associated systems.'<sup>166</sup>

The APR Forum took the observations of the panel of eminent persons lightly at Kenya's review. Heads of State and Government of participating states did not put these issues to Kenyan President Mwai Kibaki with a view to averting the calamity which the eminent persons had warned about in their report. Hardly two years after its review, Kenya was plunged into massive post election tribal violence that left thousands of people dead and multitudes displaced. It is submitted that had Kibaki's peers engaged him frankly about the impending ethnic based violence, Kenya could have taken calculated measures to avert this unfortunate eventuality. The failure to critically engage President Kibaki prompted Manby to ask: '[are] ... African heads of state who had signed up for the APRM process ... ready to urge remedies for poor performance, or would their own glass houses discourage the throwing of stones?'<sup>167</sup> African leaders lack the moral authority to keep one another under check. To expect them to criticize one another, as one commentator scathingly remarked, 'is like seconding [a] mafia to raid dope smokers at a high school'.<sup>168</sup>

Manby writes that a journalist and member of Kenya's national NEPAD secretariat, Jerry Okungu was present at the APR Forum during Kenya's review. He records the following as what Okungu told him about how the review was conducted. Okungu recounts:

I counted the number of leaders who spoke after President Kibaki had responded to Dr Machel. They were from Ghana, Ethiopia, South Africa, Rwanda and Nigeria. Not one posed a question to Mr Kibaki. They all praised the report and commended Kenya for being candid, thorough and

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<sup>166</sup> As above 250.

<sup>167</sup> B Manby 'Was the APRM Process in Kenya a waste of time? (2008) <[www.afrimap.org/english/images/paper/Manby\\_APRM-Kenya.pdf](http://www.afrimap.org/english/images/paper/Manby_APRM-Kenya.pdf)> (accessed 17 August 2010).

<sup>168</sup> G Ayittey *Africa in chaos* (1999) 34.

open. They pledged to support Kenya in seeking solutions to its constitution review and diversity problems. When it was all over, presidents Obasanjo and Mbeki and Prime Minister Meles Zenawi ... expressed relief and promised to go on with the process, after realising that it was not a life-and-death situation.<sup>169</sup>

Prior to the 2008 post election violence, Kenya was being touted as a pearl of human rights and democracy in east Africa. Its accession to the APRM was seen as a stride towards the strengthening of its human rights protection system and the consolidation of its democracy through the adoption of agreed international best standards and practices. In this writer's view, these phenomenal gains have been reversed in a remarkable fashion. It could be profitably argued that had the APRM played its role in all earnestness and in a decisive manner, Kenya could have successfully steered away from this tragedy.

The Kenya Report also recommended 'mediatory and conciliatory intervention under the aegis of the African Union' for that country.<sup>170</sup> The AU could not act and neither did the APRM which was presented with an opportunity at Kenya's review make any attempts at mediatory or conciliatory intervention as recommended by the country report.

The Kenya situation replayed itself in the review of South Africa where the Country Review Report, cautioned of the impending slew of xenophobic attacks.<sup>171</sup> The Report noted that '[d]espite the solidarity and comradeship between black South Africans and the rest of the people of sub-Saharan Africa during the decades of struggle against apartheid, and for liberation, foreigners mostly of African descent, are being subjected to brutality .... [x]enophobia against other Africans is currently on the rise and should be nipped in the bud.'<sup>172</sup>

This issue was overlooked at the South African review in 2007. Hardly a year later, South Africa was bristling with xenophobic attacks that left various nationalities at best displaced and at worst dead. It

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<sup>169</sup> Manby (n 167 above) 2.

<sup>170</sup> Kenyan report (n 165 above) 286.

<sup>171</sup> See the South African Country Review Report: <[www.aprm.org.za/docs/SACountryReviewReport5.pdf](http://www.aprm.org.za/docs/SACountryReviewReport5.pdf)> (accessed 20 August 2010).

<sup>172</sup> As above, 286.

can be repeated here that had the APR Forum engaged South Africa on its intended measures to avert impending xenophobic attacks, perhaps these attacks would not have occurred.

The uncritical manner of mutual engagement is standard practice in the APRM. When Rwandan President Paul Kagame appeared before his peers for review in June 2006, they applauded Rwanda's promising efforts to secure a breakaway from its aghast past of genocide and lawlessness. They also engaged in trivial issues, like debating the length of that country's APRM Country Review Report, with Meles Zenawi of Ethiopia arguing that it was too long, and Thabo Mbeki defending its length, arguing that the Report must be all-encompassing and as comprehensive as possible.<sup>173</sup> In fact an insider says that this was one of the rare occasions where African leaders debated anything despite, its triviality notwithstanding.<sup>174</sup> Hansungule, one of APRM's consultants, remarks quite poignantly that the APR Forum has turned out to be a sham as leaders hardly comment on each others' records, let alone critically.<sup>175</sup> Without teeth to bite errant states, it would appear that the only means to enforce APRM recommendations is through moral approbation, particularly naming and shaming which is supposed to come from leaders of APRM participating states.<sup>176</sup> As pointed out above, mutual criticism or persuasion among leaders in the APR Forum, which is supposed to be the engine of the APRM where peer pressure occurs, is simply absent.

### **3.5 Enhancing creative dialogue: UPR versus APRM**

Both the UPR and the APRM mechanisms provide platforms in their different ways through which human rights situations of African countries could be improved through interactive dialogue. For the cause of APRM and APRM to be stayed, their processes must be conducted in a transparent and open manner. Hebert and Gruzd write that a government can earn substantial goodwill if it offers early signals that it is willing to listen and is determined to make the process as open and transparent as possible.<sup>177</sup>

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<sup>173</sup> Hansungule (n 126 above) 13.

<sup>174</sup> An anonymous interviewee, 12 July 2010.

<sup>175</sup> Hansungule (n 126 above) 21-22.

<sup>176</sup> As above.

<sup>177</sup> Herbert & Gruzd (n 37) 23.

Unlike the UPR whose proceedings are conducted in public, broadcasted live on webcasts, and NGOs given the opportunity to add their views during the Working Group plenary session, the APRM review is enshrouded in smog. As indicated above, the Closed Session of the APR Forum where peer pressure is supposed to be applied is conducted outside public view and NGOs are also not allowed in the meeting room. Only the Heads of State and Government of participating states, heads of the APRM partner institutions and the APRM team are allowed access. In the APRM, NGOs and the media are only involved in the process at its preliminary stages as the country undergoes self-assessment which results in a Country Self Assessment Report (CSAR) and the Program of Action to fix the identified gaps in governance.<sup>178</sup> Their involvement goes no further than this. Even then, complaints have arisen that governments tend to exclude those NGOs that they perceive as 'hostile' and stack the process with compliant ones.<sup>179</sup> It is argued that this secrecy contributes to the poor quality of political engagement in the APR Forum. It is during these closed door sessions that African leaders take turns to praise one another.

The controlling idea behind the formation of the APRM was that this mechanism should be people centered, people focused and people driven. Can it be validly claimed so when its business is conducted outside the eye of the people? The APRM mechanism can be summed up in the words of Kansteiner, US Department for Africa official who described it as being 'philosophically spot-on'.<sup>180</sup> Despite its lofty aspirations, like several African regional institutions and mechanisms before it, the APRM, has become a 'trade union' of African leaders. It has become more sovereign and sacrosanct than the people themselves who must confer legitimacy upon it, and for whom it was intended. It is centered around, focused on and driven by Heads of State and Government of participating countries and has nothing to do with the ordinary African people who have been despoiled of their humanity through hunger, disease and human rights deprivations occasioned by the same leaders. The APRM has become a platform for exchange of pre-agreed rhetoric for African leaders without meaningful political engagement among them.

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<sup>178</sup> As above, 5.

<sup>179</sup> N Nyembezi 'The place of NGOs in the APRM' (2006) 4 *Human Rights Quarterly* 17.

<sup>180</sup> W Kansteiner quoted by P Bond 'A critique of the APRM' <[www.africafiles.org/article.asp?ID=22541](http://www.africafiles.org/article.asp?ID=22541)> (19 August 2010).

The absence of NGO participation in the APRM reviews has not helped the situation. It cannot be gainsaid that NGOs have contributed in no small way in the workings of the UPR, raising critical, substantially fair and well researched questions and comments. For instance during the Working Group Preliminary Session for Ethiopia, Human Rights Watch, Amnesty International, Cairo Institute for human rights Studies and other NGOs criticised the Ethiopian delegation about the continued deterioration of human rights in that country.<sup>181</sup>

### 3.6 Of African states and criticism

African states hardly accept criticism no matter how genuine and constructive it could be. For instance, initially South Africa rejected the APRM assessment report which was quite damning yet accurate. There is no doubt that its process would have easily become the golden standard as South Africa already enjoys appreciable moral authority on the continent. In this, South Africa, as one of the leading voices for governance reform in Africa, has undermined that very effort by the manner in which it has conducted its review. This conduct has served to jeopardise the country's hard-earned moral high ground on the global stage and within the African continent.<sup>182</sup>

In its blistering response to the critical report of eminent persons, the government argued that South Africa's challenges are unique in the world and dismisses all but one of the APRM's 150 recommendations! It called the report 'contradictory and inconsistent' and says it does not take adequate account of the country's apartheid past.<sup>183</sup> In other comments, the government response said:

- a) On statistical information used by the APRM panel: 'the risk is that general perceptions, often essentially racist, about the hopelessness of the African situation are all too easily confirmed by statistical constructs that have a very tangential relationship to the actual universe.'
- b) On the controversial proposals for judicial reform to which many judges stand opposed: 'the report appears to have relied on its interaction with certain stakeholders who have interpreted the draft Bills incorrectly ... there is no threat to the independence of the judiciary.'

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<sup>181</sup> See Ethiopian Outcome Report (n 123 above) paras 60, 61 & 62.

<sup>182</sup> 'Act now or history will say South Africa ruined African Peer Review' *The Times* Newspaper 30 May 2007 7.

<sup>183</sup> As above.

- c) On the view that affirmative action has forced whites out of the public service: 'it is true in some instances that people have left the public service as they were at odds with the spirit of transformation in the country.'
- d) On the suggestion that Parliament should be endowed with more powers: 'what stops Parliament from exercising its current powers more vigorously?'
- e) On the underlying motive of the reviewers: 'embedded in [the] discourse; ideological and value-laden propositions.'<sup>184</sup>

Reacting to the government's rejection of APRM Report, opposition leader Hellen Zille correctly remarked that:

Unfortunately, this knee-jerk reaction ... has grave implications for our standing in Africa and the world, as well as the President's own vision of continental renewal. At stake is not merely government's reflexive inability to take criticism. Our reputation for probity, democratic practice and good governance is also under threat.<sup>185</sup>

Ross Herbert of the *South African Institute for International Affairs* described South Africa's conduct as 'churlish and quibbling'.<sup>186</sup> Worse still, South Africa's initial rejection of the APRM conclusions is part of a larger pattern of denial. For instance, in 2005, Mr Mbeki (then South African President) rejected the finding by the UNDP Global Human Development Index that South Africa had fallen from 105<sup>th</sup> to 120<sup>th</sup> position in the global rankings, saying it was 'patently wrong'.<sup>187</sup>

Indications of African states' resentment to criticism are also evident in UPR reviews. For instance, in reply, the Ethiopian delegation accused NGOs who commented on its report for having gone outside the rules of the UPR. The delegation noted though that it was not shocked by critical statements raised in particular by NGOs such Human Rights Watch and the Cairo Institute on Human Rights Studies, which it called 'well-known Ethiopia bashers.' The Ethiopian delegation expressed the view that they did not

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<sup>184</sup> Quoted by B Boyle 'South Africa rejects APRM report' (2007) <[www.africafiles.org/article.asp?ID=15042](http://www.africafiles.org/article.asp?ID=15042)> (accessed 22 August 2010).

<sup>185</sup> 'ANC government rejects the APRM Report' *The Sowetan Newspaper* 13 May 2007 10. ANC stands for African National Congress. It is the ruling party in South Africa.

<sup>186</sup> R Herbert, quoted by Boyle (n 184 above).

<sup>187</sup> *The Sowetan Newspaper*, n 185 above.

expect anything encouraging from them. In that regard, they teased NGOs that they are afflicted with insanity.<sup>188</sup>

In its attack on NGOs, Ethiopia was joined by the Beninese delegation, led by Naim Akibou. The delegation leader expressed his 'surprise and indignation' regarding the statements made by the representatives of NGOs during the adoption of Equatorial Guinea's report. According to that statement, the authorities of Equatorial Guinea had abducted opponents to its regime in Benin. Mr Akibou curtly remarked that the statement on abductions of opponents was the speaker's 'fantasy... and fruit of his very fertile imagination.'<sup>189</sup>

This defensive mode that characterises the attitude of African states to criticism undermines the basic tenets which ground the process of review itself. In reviews, mistakes and shortcomings must be bared no matter how embarrassing or sensitive they are. African countries are always keen to defend their human rights situations at all cost. This nullifies the idea behind peer review that criticisms must be acknowledged and received in good spirit. Rather than being defensive, African states must view these criticisms as advice, and accept them in sincerity and use them to formulate strategies to confront their failures in the interest of the citizenry and posterity.

### **3.7 Concluding remarks**

It has been demonstrated above that straight talk is woefully lacking among African states. In addition, they spurn constructive criticisms from independent entities like NGOs and ignore spot-on recommendations such as those suggested by western states. Perhaps African states still share Kwame Nkrumah's sentiments that it is far easier for the proverbial camel to pass through the needle's eye, hump and all, than for erstwhile colonialists to give sound and honest political counsel to their liberated territories.<sup>190</sup> Whichever way one looks at the situation, the reality is that this lack of mutual criticism among African states and their reflexive inability to accept constructive criticism has only helped to allow the tide of human violations to subsist unabated on the continent. It is time for African states to appreciate that romanticism is a fossil of a bygone dispensation when human rights mattered very little. This is a new era – an era of human rights.

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<sup>188</sup> See The Outcome Report for Ethiopia (n 123 above) para 83.

<sup>189</sup> As above, para 84.

<sup>190</sup> K Nkrumah quoted in M Asante & A Abarry (eds) *African intellectual heritage* (1996) 368.



## CHAPTER IV

### 4. Rationalising misplaced solidarity among African states

#### 4.1 Introduction

In the early years, lack of democracy in one state was hardly the concern of other states. Before the end of the Cold War at around 1990, human rights did not prominently feature in the scheme of international law because until that period the widely accepted view was that 'international law does not generally address domestic constitutional issues, such as how government is formed [or run]'.<sup>191</sup> Other scholars such as Ake talk of 'democratization of disempowerment' which is manifested through governments' protection of each other against criticism.<sup>192</sup> Writing about the Southern African Development Community (SADC), Maundeni observes that it is a truism that SADC states invariably defend one another and never criticize each other.<sup>193</sup> Though these observations were made within the context of SADC, they are as relevant to the UPR and APRM as they are to SADC. The discussion under Chapter III of this thesis eloquently speaks to this fact.

Other scholars argue that this silence is principally in line with 'respecting the sovereignty of member states'.<sup>194</sup> A single most important question that springs to mind is this: should states that violate human rights be allowed to hide behind the veil of sovereignty to avoid criticism? It is to this issue that we now turn to.

#### 4.2 Sovereignty as a bar to intervention

We need to make an understanding of the concept of state sovereignty from the outset. Discussions on this concept have generated a lot of heat, albeit less light. Students and scholars of International Law

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<sup>191</sup> G Fox & B Roth 'Introduction: The spread of democracy and its implications for international law' in G Fox & B Roth (eds) *Democratic Governance and International Law* 1.

<sup>192</sup> C Ake quoted by Z Maundeni 'Regional election bodies and Southern African integration' in J M Kaunda (ed) *Essays on regional integration and development* (2007) FOPRISA 44.

<sup>193</sup> As above.

<sup>194</sup> As above, 45.

or political relations will be aware of a legion of contentious literature on this subject. As one writer has aptly observed:

Few subjects in international law and international relations are as sensitive as the notion of sovereignty. Steinberger refers to it in the *Encyclopedia of Public International Law* as “the most glittering and controversial notion in the history, doctrine and practice of international law.” On the other hand, Henkin seeks to banish it from our vocabulary and Lauterpacht calls it a “word which has an emotive quality lacking meaningful specific content,” while Verzijl notes that any discussion on this subject risks degenerating into a Tower of Babel....<sup>195</sup>

Conceptually, ‘sovereignty’ has been described as the competence and the ‘primary power or independent right to act without accountability to any other.’<sup>196</sup> At an abstract level, ‘...it resides in the body of the nation and belongs to the people.’<sup>197</sup> It is widely believed that present conceptions of the doctrine of sovereignty were influenced by agreements concluded by European states as part of the Treaties of Westphalia.<sup>198</sup>

The importance of the sovereignty of states under international law cannot be over-emphasized. The sovereignty and equal legal status of states offers protection for weaker states in the face of intrusion and bully tactics from the more powerful ones. This sentiment was captured by one African leader<sup>199</sup> in his address to the UN in 1999 when he described sovereignty as ‘our final defense against the rules of an unjust world.’<sup>200</sup> In 1949, in the *Corfu Channel Case (United Kingdom v Albania)*, the ICJ observed that ‘between independent States, respect for territorial sovereignty is an essential foundation of international relations.’<sup>201</sup> Thirty years later in *Military and paramilitary Activities (Nicaragua v The US)*

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<sup>195</sup> *Report of the Panel on United Nations Peace Operations* (2000), para 33.

<sup>196</sup> <[www.iciss.ca/pdf/Supplementary-Volume-Section-A.pdf](http://www.iciss.ca/pdf/Supplementary-Volume-Section-A.pdf)> (accessed 24 August 2010).

<sup>197</sup> As above.

<sup>198</sup> F Hinsley *Sovereignty* (1966) 126. Treaties of Westphalia refer to a series of peace treaties signed in 1648 in Osnabrück and Münster. These treaties ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Dutch Republic.

<sup>199</sup> President Abdelaziz Boueteflika of Algeria, who was also OAU Chairman at the time.

<sup>200</sup> S Thadood & S Daws ‘Humanitarian intervention: Getting past the reefs’ (2001) 28 *World Policy Journal* 25.

<sup>201</sup> [1949] ICJ Reports 4.

the ICJ observed that the whole corpus of international law rests upon the fundamental principle of state sovereignty.<sup>202</sup>

The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations which governs a community composed primarily of states having a uniform legal personality.<sup>203</sup> The principal corollaries of state sovereignty are *inter alia* jurisdiction (*prima facie* exclusive) over a territory and the duty of non-intervention in the area of exclusive jurisdiction of other states.<sup>204</sup>

Recalling our question posed above, it is argued that the concept of state sovereignty has undergone radical evolution over time and space such that it can no longer be defined in such chinkless, non-relative and absolutist terms. As the world strives to democratise, the need for accountability becomes the more necessary. Accountability is desirable not only because it limits official abuse of power but also because it entails visibility of state's action.

In the case of *Prosecutor v Dusko Tadic*,<sup>205</sup> the question as to whether sovereignty can be successfully pleaded as a bar to foreclose external intervention in the face of massive human rights within the territory of a concerned state arose. In answering it, the International Criminal Tribunal for the former Yugoslavia (ICTY), which tried the case, observed quite correctly that, 'it would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights'.<sup>206</sup> In Kofi Annan's words, '[t]he sovereignty of states must no longer be used as a shield for gross violations of human rights'.<sup>207</sup> Another UN former Secretary General Boutros Boutros-Ghali has argued in his Treatise, that, 'the time of absolute sovereignty ... has passed; its theory was never matched by reality'.<sup>208</sup> Thakur is more emphatic in his rejection of the unqualified doctrine of state sovereignty. He argues that '[t]he doctrine of national sovereignty in its absolute and unqualified form, which gave rulers protection against attack from

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<sup>202</sup> [1986] ICJ Reports 133.

<sup>203</sup> I Brownlie *Principles of public international law* (1998) 229.

<sup>204</sup> As above.

<sup>205</sup> Case No. IT-94-1-AR72; decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995).

<sup>206</sup> As above,32.

<sup>207</sup> K Annan <[www.nobelprize.org/nobel\\_prizes/peace/laureates/2001/annan-lecture.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html)> (accessed 27 September 2010).

<sup>208</sup> B Boutros-Ghali *Agenda for peace* (1992) 17.

without while engaged within in the most brutal assault on their own citizens has gone with the wind.<sup>209</sup> Former US President Bill Clinton has also trenchantly remarked that ‘there will never be a time in human affairs when we will ever be able to say we cannot criticise an action simply because it happened within the territorial borders of a single nation.’<sup>210</sup> Under international law, the duty to protect human rights has an *erga omnes* character.<sup>211</sup> This is to say each state can be said to have a legal interest in their protection. This point was underscored by the ICJ in *Barcelona Traction Case (Belgium v Spain)*.<sup>212</sup>

Clearly these claims make a direct appeal to the traditional notion of sovereignty on the one hand and the duty to intervene on the other. On the question as to whether sovereignty must give way to human rights or *vice-versa*, the preponderant and transcendental view is that sovereignty cannot be used as a bar by a state to exclude external criticism of its human rights violations. This is not to say the regime of human rights has replaced sovereignty. The author holds the view that two are mutually reinforcing, albeit in constant tension.<sup>213</sup> They must therefore be weighed ‘in golden scales’ of a jeweller and be balanced with great nicety for the establishment of an optimal constitutional order.

The twentieth century witnessed profound developments in international law. The Cold War, just like World War II forty years before it, awakened the international community to the reality that international law has to extend beyond protecting the sovereignty of States over their territories and extend to domestic matters like governance.<sup>214</sup> The fostering of democracy in states has come to the fore of world agenda because of the fact that democracies are more likely to work in concert in the promotion of globally agreed and shared goals and aspirations.<sup>215</sup>

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<sup>209</sup> R Thakur ‘Global norms and international humanitarian law: An Asian perspective’ (2001) 83 *International Review of the Red Cross* 35.

<sup>210</sup> ‘Sovereignty and the duty to protect human rights’ *The New York Times* November 19 1999 A13.

<sup>211</sup> J Dugard *International Law: A South African perspective* (2006) 44.

<sup>212</sup> [1970] ICJ Reports 3. See further, J Dugard ‘1966 and all that: the South West African judgment revisited in the East Timor case’ (1966) 8 *African Journal of International and Comparative Law* 549.

<sup>213</sup> M Smith ‘sovereignty, human rights and legitimacy’ <[www.faculty.virginia.edu/irandhumanrights/mjsonsovtv](http://www.faculty.virginia.edu/irandhumanrights/mjsonsovtv)> (accessed 17 August 2010).

<sup>214</sup> E Gross ‘Fighting terrorism: Bringing democratic regime to non-democratic countries’ (2007/2009) 16 *Tulane Journal of International and Comparative Law* 17-47.

<sup>215</sup> Fox & Roth ‘Introduction: The spread of liberal democracy and its implications for international law’ in Fox & Roth (n 171 above) 1-8.

Related to the argument of sovereignty, is the argument that instead of openly engaging one another African states prefer to engage each other through quiet diplomacy.<sup>216</sup> It is submitted that African states have misapplied the idea of quiet diplomacy. Quiet diplomacy means that states must publicly defend one another against negative publicity to protect each others' image. However, they are still required to intensely engage one another on issues of concern outside public eye.<sup>217</sup> Gauging by results, one can conclude that quiet diplomacy has been an abysmal failure in Africa. For instance, Mr Mbeki's application of quiet diplomacy in Zimbabwe is totally unavailing.<sup>218</sup>

### 4.3 Anti-colonial struggle comradeship

It could also be argued that the attitude of African states not to criticize one another is embedded in their solidarity during their struggle for independence. Leaders of liberation movements in Africa viewed colonisers as a common enemy against whom they had to concert their efforts to defeat. This comradeship has lived up to the present day. Thus, some commentators have argued that it is well-nigh impossible for the South African former President, Thabo Mbeki to criticize Zimbabwe's leader, Robert Mugabe on account of the fact that during South Africa's struggle against apartheid, Zimbabwe supported and even hosted South African nationalists. It has been argued that Mr Mbeki feels very much indebted to President Mugabe to the extent of failing to advise him.<sup>219</sup> Closely related to this supposition, is the argument that regional alliance also plays a decisive role in influencing attitudes of African states *vis-à-vis* one another. It therefore stands to reason that owing to regional alliances, African states operate on the basis of an unwritten rule of avoidance of mutual criticism.

### 4.4 Concluding remarks

*Ex facie*, the APRM and UPR are exceptional undertakings. For a continent that has jealously protected its sovereignty, it is diplomatically exceptional for its nations to throw themselves open to external scrutiny. However it appears that the notion of sovereignty has been attenuated only in theory and

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<sup>216</sup> Maundeni (n 192 above) 44.

<sup>217</sup> As above.

<sup>218</sup> <[www.guardian.co.uk/world/2008/jul/07/zimbabwe.southafrica1](http://www.guardian.co.uk/world/2008/jul/07/zimbabwe.southafrica1)> (accessed 24 August 2010).

<sup>219</sup> 'Thabo Mbeki's attitude: Quiet Diplomacy or Negligence of Duty?' Zimbabwe Daily News 21 April 2008 34. [www.zimdaily.com/news/mbeki22.4893.html](http://www.zimdaily.com/news/mbeki22.4893.html) (accessed 2 September 2010).

remains absolute in practice. African states must move away from the dogma of absolute sovereignty to match theory with practice as Botrous-Ghali suggests. Let mutual criticism penetrate walls of tyranny which still stand strong in many parts of Africa. Further, African leaders cannot afford to watch in idleness while their counterparts tear their countries asunder, choosing to protect their colonial comradeship through silence. The placing of personal relations over fundamental norms of human rights defies logic. This collegiality will render both the UPR and APRM other 'cosmetic exercises without effect in the real world of policy and decision making'.<sup>220</sup> Without hard talk, APRM and UPR are destined to early failure.

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<sup>220</sup> Kebonang (n 32) 46.

## CHAPTER V

### 5. Conclusion and recommendations

#### 5.1 Conclusion

This study has come to an unfortunate conclusion that mutual political engagement among African states in the UPR and the APRM is largely uncritical, less frank, and highly romanticised. African states hardly engage in any straight talk on their human rights situations and this has had dire consequences on human rights, democracy and governance. It is argued that this nature of engagement partly accounts for the loss of out-and-out enthusiasm that greeted the APRM at the time of its inception. Today, even its pioneers admit, albeit painfully, that it has not been a successful project. For instance, Senegalese President, Abdoulaye Wade, one of the ardent initial believers in the APRM is quoted as having said the following in relation to the APRM:

I am disappointed. I have great difficulties explaining what we have achieved when people at home and elsewhere ask me. We're spending a lot of money and, above all, losing time with repetition and conferences that end and you're not quite sure what they've achieved.<sup>221</sup>

In December 2008, Mr Mbeki, the chief architect of NEPAD and its APRM was quoted as saying:

I am afraid that we have not made the progress we had hoped for. Indeed, and regrettably, I believe that we have lost some of the momentum which attended the launch ... of the NEPAD programmes.<sup>222</sup>

It can be profitably argued that the presence of other nations in the UPR have helped stay its cause. It is very predictable that if it was a mechanism exclusively managed by African states, this far, it would have been heavily politicised, and caused to lose direction. All said, not all is lost for Africa. For it to turn a leaf, it needs, *inter alia*, to inculcate a culture of straight talk in its ranks. The following are recommendations on how to improve the level of political engagement in the APRM and UPR (from the African perspective).

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<sup>221</sup> Bond (n 180) above.

<sup>222</sup> As above.

## 5.2 Recommendations

It is argued that lack of frank talk in the UPR and APRM results partly from lack of skill in diplomatic debates. This requires that African leaders and representatives be trained on how to debate issues, asking serious and searching questions yet remaining within bounds of diplomacy.

As explained above, peer review in the APRM is shrouded in secrecy. To enhance accountability, all APRM processes should be held in public, where the people, who own the process, can attend, including the media which so far has played a very decisive watch role in Africa's democratisation process.

It is further recommended that the APRM must offer accreditation or affiliate status to NGOs to freely attend and fully participate during peer reviews at APR Forum in order to enhance the quality of the interactive dialogue during reviews. It is further argued that the inclusion of NGOs must not be limited to African NGOs alone, who are at best under resourced and at worst denied space to operate. International human rights NGOs like Human Rights Watch and Amnesty International must be granted affiliate status with the APRM with power to attend and fully participate during the review process. There is no rhyme or reason why a discussion in human rights or governance must be shrouded in secrecy. After all, African states participate in the UPR where proceedings are open to the public and NGOs. In the UPR, over and above supplying information that forms basis of a review, NGOs enjoying consultative status with the United Nations Economic and Social Council (ECOSOC) can be accredited to participate in the Human Rights Council's sessions as Observers.<sup>223</sup> As Observers, they are entitled to, *inter alia* (I) attend and observe all proceedings of the Council with the exception of the Council deliberations under the Complaints Procedure (II) submit written statements to the Human Rights Council (III) Participate in debates, interactive dialogues, panel discussions and informal meetings.<sup>224</sup>

The issue of governance is central to Africa's problems. It is recommended that APRM must give due prominence and attention to this issue. To do so, would require that the APRM founding documents be revised and its scope limited to focus on a narrow issue, albeit of great concern to Africa, namely governance. It is submitted that the mandate of APRM as spelt out in its founding documents is too broad. Since Africa's problems are quintessentially political in nature, the APRM should therefore focus

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<sup>223</sup> See The Practical Guide for NGO Participants <[www2.ohchr.org/english/bodies/hrcouncil/ngo.htm](http://www2.ohchr.org/english/bodies/hrcouncil/ngo.htm)> (accessed 20 August 2010).

<sup>224</sup> <[www.ohchr.org/english/bodies/hrcouncil/ngo.htm](http://www.ohchr.org/english/bodies/hrcouncil/ngo.htm)> (accessed 20 August 2010).



on political problems on the Continent. This would help the APRM to utilise its time and meager resources on a narrow yet vital and clearly identified objective. There can be no gainsaying that this will also assist debates to be focused.

It is usually said that if a country gets the political equation correct, it is hard for it to miss the economic equation. Put differently, there is a direct correlation between political stability and economic development. This therefore means that if the APRM seriously addresses the political situation, its other objectives like economic development and corporate governance will in all probability be easily met. According to Mbazira, human rights and good governance are integral to economic prosperity and social equity.<sup>225</sup>

Finally the relevance of UPR and APRM to Africa cannot be overemphasized. Africa needs these mechanisms to extricate itself from its political morass. Through these mechanisms, African states have an opportunity to speak among themselves on how to tackle their political issues. African states must critically engage one another on each others' governance and human rights situation without fear or favour, affection or ill-will for the good of the African people and posterity. As Kofi Annan once said, what stands between Africa and its future is Africa itself. As indicated above, not by any stretch of imagination can it be claimed that mutual straight talk alone is the 'silver bullet' for all problems that Africa faces. However, it is submitted that robust mutual criticism will appreciably set Africa on course to attain her destiny and assume her rightful place in world affairs.

**18 000 words (footnotes inclusive)**

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<sup>225</sup> C Mbazira 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's development' (2004) 4 (2) *African Human Rights Journal* 50.

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