



PART I

THE ROLE OF THE AFRICAN PEER REVIEW MECHANISM IN HUMAN RIGHT MONITORING

CHAPTER 2

THE QUEST FOR DEVELOPMENT

2.1 Introduction

This chapter sets out to answer the question why the African Peer Review Mechanism was established. The chapter first explores the origins of the APRM against the background of other attempts to improve the living conditions of Africans since independence. Development plans and their shortcomings are discussed. This is followed by a discussion of the latest continental development plan, the New Partnership for Africa's Development (NEPAD), considering the views of both its proponents and detractors.

2.2 The failure of development

2.2.1 Conceptualising development

Development has always been an elusive concept. In 1971 Lofchie noted that 'the notion of development has become so diffuse that it must be redefined afresh by each scholar who wishes to use it'.¹ Gross National Income (GNI) per capita remains a popular determinant of the development of a country. However, for a long time it has been recognised that this criterion is inadequate. Economic growth is necessary but not sufficient to achieve substantive poverty reduction. As noted in chapter 1, the UNDP Human Development Index (HDI) is also too narrow in its conception of development. Among its shortcomings is that it does not reflect that exclusion and lack of accountability are not included in national statistics.²

¹ MF Lofchie *State of the nations: Constraints on development in independent Africa* (1971) 3.

² P Uvin *Human rights and development* (2004) 169.

In his book *Development as freedom* Amartya Sen treats 'the freedom of individuals as the basic building blocks of development.'³ Achieving development

requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.⁴

Development as freedom, the concept of development I adopt in this study, requires respect for human rights. It further requires a just economic world order to allow for the economic opportunities that would decrease the incidence of poverty.⁵

Development no longer means economic growth from which all else will flow: it incorporates broad social objectives; notions of people's right to certain opportunities, services and levels of care; and issues of sustainability and security. Development has come to mean the creation of an entirely different society, where absolute poverty is eradicated, where all people have access to the same opportunities, where all live without fear.

This can be contrasted with economic freedom as defined by the so called Chicago school, with the IMF as one of its main proponents, which over the last decades, often successfully, has argued for wholesale economic liberalisation, with disastrous results.⁶

³ A Sen *Development as freedom* (1999) 18.

⁴ Sen (1999) 3.

⁵ M Jennings 'A century of development: Policy and process in Sub-Saharan Africa', in *Africa south of the Sahara* (2006) 32.

⁶ N Klein *The shock doctrine – the rise of disaster capitalism* (2007); J Stiglitz *Globalization and its discontents* (2002).

2.2.2 A historical overview of African development plans

The African state

The focus of most of Africa's post-independence leaders was on staying in power and divisions in society were fostered and exploited by the leaders.⁷ Calls for 'development', 'liberation' and 'unity' were made. However, with few exceptions such calls were only made as a rhetorical diversion from the real focus, regime survival.⁸ The statist economic structures with their dependence on the former colonial power were retained and used by rulers to increase their wealth.⁹ Available resources were used for elite consumption, not investment.¹⁰ Clientilism played an important role in this neo-patrimonial system, which is a defining feature of many African countries still today.¹¹

Not much attention was given to how 'the political structures and practices, the administrative system, or even the social institutions of a country might affect its possibility of development.'¹² If considered at all traditional culture was seen as hindering development rather than something that could be used positively.¹³

⁷ C Ake *Democracy and development in Africa* (1996) 5.

⁸ C Clapham *Africa and the international system – The politics of state survival* (1996) 5; I Taylor *Nepad - Toward Africa's development or another false start?* (2005) 4.

⁹ Ake (1996) 6.

¹⁰ P Chabal 'The quest for good government and development in Africa: is NEPAD the answer?' (2002) 78(3) *International Affairs* 447-62 451.

¹¹ Chabal (2002), Taylor (2005) 2-4. 'In a neo-patrimonial system, political accountability rests on the extent to which patrons are able both to influence and to meet the expectations of their followers (or 'constituents') according to well-established norms of reciprocity'. Chabal (2002) 451. However, compare E Kannyo ('Liberalization, democratization and political leadership in Africa' in Jeggan C Senghor and Nana K Poku *Towards Africa's renewal* (2007) 63-84) 78-79 who argues that patrimonial networks are slowly being replaced by class formation through societal changes brought about by urbanisation and capitalism. Kannyo argues that developed countries could contribute to the demise of neo-patrimonialism through the return of stolen assets and the opening of markets. An improvement in socio-economic conditions would mean less need to search for 'heroic leaders' which would 'eventually mean that institutions [would] matter more than men ...'. Kannyo (2007) 79.

¹² Ake (1996) 13.

¹³ Ake (1996) 15.

This neglect of local culture had, and continues to have, serious implications for the whole development enterprise.¹⁴

Because the development paradigm tends to have a negative view of the people and their culture, it cannot accept them on their own terms. Its point of departure is not what is but what ought to be. The paradigm focuses on the possibility of Africa's becoming what it is not and probably can never be.

Self-reliance v structural adjustment

In the wake of decolonisation, developing countries found themselves in the majority in global organisations such as the United Nations. This numerical advantage was used to promote the idea of the establishment of a new economic order that would result in more equal relations with the developed world. In 1974 the UN adopted the Declaration and Program of Action of the New International Order and the Charter of Economic Rights and Duties of States. However, the increased number of developing states did not correspond to a change in the international power balance and the international economic order did not change.

In the late 1970's the OAU and the UN Economic Commission for Africa (UNECA) set out to develop a continental development strategy. In 1980 the OAU Assembly adopted the resulting Lagos Plan of Action.¹⁵ The Plan only recognised external factors as an explanation for the lack of development.¹⁶ The proposed solution lay in self-reliance and regional cooperation. According to the Lagos Plan OAU member states should in their development plans give emphasis to 'the development of agriculture and agrobased industries, development of socio-economic infrastructure, co-operation, eradication of

¹⁴ Ake (1996) 15-16.

¹⁵ Lagos plan of action for the economic development of Africa 1980-2000, www.uneca.org/itca/ariportal/docs/lagos_plan.PDF (accessed 9 July 2009); Reprinted in Africa Institute of South Africa *Africa's development thinking since independence: A reader* (2002) 31.

¹⁶ Taylor (2005) 21.

mass poverty, unemployment, underemployment and the satisfaction of basic needs.¹⁷ In the Final Act of Lagos, an annex to the Lagos Plan of Action, the Assembly set out to establish by the year 2000 an African Economic Community with regional economic communities in the five sub-regions of Africa as building blocks.

The Lagos Plan of Action was never implemented. One of the reasons for this was that many African countries in the early 1980's became reliant on the international financial institutions (the IMF and the World Bank) to avoid economic collapse. The World Bank and the IMF introduced what has become known as Structural Adjustment Programmes (SAPs) which differed from the Lagos Plan of Action in their approach to how development should be achieved. The SAPs were

designed to address the four maladies assumed to underlie all economic ills: poor governance, excessive government intervention in the markets, excessive government spending, and too much state ownership. Belt tightening, privatization, liberalization, and good governance became the order of the day.¹⁸

In 1985 the OAU Assembly adopted Africa's Priority Position on Economic Recovery (APPER),¹⁹ which reaffirmed the principles of the Lagos Plan of Action but also constituted acceptance of many of the ideas underlying structural adjustment.²⁰ APPER got support from the UN which adopted it as 'United Nations Programme of Action for African Economic Recovery and Development, 1986-1990' (UN-PAAERD).

¹⁷ Lagos Plan of Action para 333.

¹⁸ J Sachs *The end of poverty – How we can make it happen in our lifetime* (2005) 81.

¹⁹ Declaration on the economic situation in Africa, adopted by the 21st ordinary session of the Assembly of Heads of State and Government of the Organization of African Unity, July 1985, reprinted in Africa Institute of South Africa (2002) 157. United Nations Programme of Action for African Economic Recovery and Development 1986-1990, GA Res S-13/2.

²⁰ Ake (1996) 27; P Mashela 'The New Partnership for Africa's Development – Four years of a promising attempt or hollow optimism?' ISS paper 125, March 2006; APPER section (e) 'policy reforms'. It should however be noted that African states often tried to avoid implementing the structural adjustment prescriptions, see Taylor (2005) 24.

It is against this background that in 1986, the main regional human rights instrument, the African Charter on Human and Peoples' Rights, adopted by the OAU Assembly in 1981, entered into force. The following year the African Commission on Human and Peoples' Rights started its work of monitoring compliance with the Charter.

Political conditionality: Good governance

It is now generally recognised that efforts to reduce poverty and improve socio-economic indicators should go hand in hand with improved political governance. More controversial is good governance conditionality which has been introduced by donor countries and international organisations as a requirement for further aid and other benefits such as market access.²¹ It is noteworthy how the renewed emphasis on good governance and human rights after the end of the cold war resembles the language of civilisation of the colonial era.²²

In 1989 UNECA published the African Alternative to SAP (AAF-SAP) which was adopted by the OAU and endorsed by the UN General Assembly. It sought to revive the Lagos Plan of Action but was in practice neglected as the World Bank came up with an alternative development framework, *Sub-Saharan Africa: From crisis to sustainable growth: a long-term perspective study*.²³ This report introduced the concept of good governance which since then has dominated the development debate.²⁴ The state which had previously been largely as a problem was now seen as part of the solution.²⁵

²¹ Conditionality is further discussed in chapter 5.

²² See eg DP Fidler 'International human rights law in practice: The return of the standard of civilization' (2001) 2 *Chicago Journal of International Law* 137.

²³ Taylor (2005) 24-26.

²⁴ M Kjaer & K Kinnerup 'Good governance: How does it relate to human rights? In HO Sano & G Alfredsson (eds) *Human rights and good governance* (2002) 1-18 4. The report defined governance as the 'exercise of political power to manage a nation's affairs', World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1989) 60.

²⁵ Taylor (2005) 26.

In February 1990 UNECA organised an International Conference on Popular Participation in the Recovery and Development Process in Africa with participants from African civil society organisations, governments and UN agencies. The conference adopted the African Charter for Popular Participation in Development and Transformation.²⁶ This was the first time that African leaders recognised the importance of participation of all parts of society in formulating and implementing development plans.

In July 1990 the OAU Assembly adopted the Declaration on the Political and Socio-Economic Situation in African and the Fundamental Changes Taking Place in the World.²⁷ In the Declaration African heads of state and government set out the external causes of the predicament facing their countries, in particular the 'heavy political and social costs of the structural adjustment programmes'. They also expressed concern about 'conditionalities of a political nature'.²⁸ However, for the first time African leaders recognised that the problems facing the continent were not only caused by an international economic order that was detrimental to Africa's development. Adapting to the agenda set by international donors and the African Charter for Popular Participation, the Declaration made concessions for popular participation in development and held that '[a] political environment which guarantees human rights and the observance of the rule of law, would assure high standards of probity and accountability particularly on the part of those who hold public office.'²⁹ The necessity of peace and stability for development was also recognised.³⁰

²⁶ Reprinted in C Heyns (ed) *Human rights law in Africa* (2004) 787.

²⁷ AHG/Decl 1 (XXVI) 1990 (Fundamental Change Declaration).

²⁸ Fundamental Change Declaration paras 6-7.

²⁹ Fundamental Change Declaration para 10.

³⁰ Fundamental Change Declaration para 11.

Democratisation, whether genuine or rhetorical, became a hallmark of the 1990's. Multiparty elections have in some cases resulted in 'greater openness and a greater diversity of political opinion', while in other states it has caused increased conflict through 'a more acute rivalry among the elites for control of the state'.³¹

The Fundamental Change Declaration also reaffirmed self-reliance and regional integration.³² This led to the adoption in 1991 of the Abuja Treaty on an African Economic Community.³³ The Treaty includes as one of its principles '[r]ecognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' and '[a]ccountability, economic justice and popular participation in development'.³⁴ The Treaty provides that sanctions could be imposed against any member state which 'persistently fails to honour [their] general undertakings' or fails to implement decisions of the Community.³⁵

The UN General Assembly adopted the United Nations New Agenda for Development in Africa (UN-NADAF) in December 1991 as a 'compact of mutual commitments by African countries and the international community'.³⁶ The commitment of African countries included structural reformation of their economies, regional integration, democratisation and implementation of the

³¹ Chabal (2002) 450. On how neo-patrimonialism is adjusted to suit the democratisation process see Chabal (2002) 457.

³² Fundamental Change Declaration para 8.

³³ The establishment of the African Economic Community (AEC) should be through a gradual process no longer than 34 years from the entry into force of the treaty in 1994. Eight regional economic communities have been recognised by the AU to form the building blocks of the AEC. Progress towards free trade within these blocks has been uneven and the realisation of the vision of a self-reliant Africa seems distant.

³⁴ Treaty establishing the African Economic Community, adopted 3 June 1991, 30 ILM 1241, art 3(g) & (h).

³⁵ Art 5(3). Since the establishment of the African Union the imposition of sanctions is regulated by art 23 of its Constitutive Act.

³⁶ United Nations New Agenda for the Development of Africa in the 1990's, annex II to GA res 46/151 (1991) (UN-NADAF).

African Charter on Human and Peoples' Rights.³⁷ The international community should *inter alia* address the debt issue and increase resource flows and market access.³⁸ The evaluation of UN-NADAF noted a number of lessons that should guide future initiatives. These included that attention should be given to conflict resolution and that commitments must be kept. In particular donors should deliver on promised financial support for countries with a good track record. The evaluation noted as a 'major lesson' that

reliance on liberalization, privatization and market-based reforms has distinct limits, and has in many cases proved counterproductive in accelerating development and alleviating poverty ... the wholesale and uncritical adoption of that philosophy, including the minimization of the role of the State and the withdrawal of all forms of State support to local industry and agriculture by African Governments and donors, while the developed countries continued such support by large transfers, currently averaging about 1 billion dollars a day, serve to undermine the region's development in several ways.³⁹

The 1993 Cairo Declaration on the Occasion of the Thirtieth Anniversary of the Organization of African Unity recognised the 'close link between development, democracy, security and stability ... as the most ideal formula for fulfilling the legitimate aspirations of the peoples of Africa to a decent life, progress and social justice.'⁴⁰ At the same summit the Assembly adopted a Mechanism for Conflict Prevention, Management and Resolution.⁴¹

³⁷ UN-NADAF paras 10-21.

³⁸ UN-NADAF paras 22-41.

³⁹ Ad Hoc Committee of the Whole of the General Assembly for the Final Review and Appraisal of the Implementation of the United Nations New Agenda for the Development of Africa in the 1990s 'Independent evaluation of the implementation of the United Nations new agenda for the development of Africa in the 1990's', 10 June 2002, UN Doc A/AC.251/8, para 22. (Hereafter Ad Hoc Committee (2002)).

⁴⁰ AHG/Decl 1 (XXIX) para 8.

⁴¹ Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, AHG/Decl 3 (XXIX). The Mechanism has been replaced by the AU Peace and Security Council.

In 1994 the OAU Assembly declared that ‘the time has come to take our destiny into our own hands and to seek African solutions to the problems besetting our continent’.⁴² Since then much rhetorical emphasis has been placed on finding ‘African solutions’ as opposed to solutions imposed by outsiders in particular the international financial institutions.

In 1995 the OAU Assembly adopted Relaunching Africa’s Economic and Social Development: The Cairo Agenda for Action.⁴³ The Cairo Agenda reaffirmed the principle of collective self-reliance for self-sustaining development.⁴⁴ The Cairo Agenda noted that ‘Africa must take new steps to ensure that it becomes an active partner in the world economic system. In this regard, Africa must adopt a new vision for its development and translate this vision into appropriate programmes.’⁴⁵

The Cairo Agenda offered more recognition than previously that African countries could do more to improve the situation for their people by improving their own governance. This was hardly an ‘African solution’ as international donors had tried to impress this view on African leaders for a long time. Following the approach of APPER and UN-NADAF, the Cairo Agenda was divided into two main sections: ‘What we can do for ourselves’⁴⁶ and ‘What we require from our development partners’.⁴⁷ The section on ‘What we can do for ourselves’ is divided into the following sub-sections:

- Democracy, governance, peace, security, stability and sustainable development
- Food security
- Capacity building and human resources development

⁴² Declaration on a Code of Conduct for Inter-African Relations, AHG/Decl 2 (XXX) preamble.

⁴³ AHG/Res 236 (XXXI) Annex (Cairo Agenda).

⁴⁴ Cairo Agenda para 5.

⁴⁵ Cairo Agenda para 2.

⁴⁶ Cairo Agenda paras 10-29.

⁴⁷ Cairo Agenda paras 30-38.

- Structural transformation of African economies

The Agenda provided that:⁴⁸

Member States should give priority in their development programmes to the basic needs of the people by developing appropriate infrastructure (such as rural roads, potable water supply ...), meeting basic food requirements, providing primary health services, education and skills and generating productive and remunerative employment opportunities as a means of eradicating poverty.

This paragraph of the Cairo Agenda illustrates what Sen calls the ‘crucial valuational difference’ between the human capital approach and the human capability approach to development. The human capital approach focuses on economic growth while the focus of the human capability approach is ‘the freedom to live the kind of lives that people have reason to value’, thus focusing on the ends rather than the means.⁴⁹ The human capability approach is clearly linked to human rights, though the section of the Cairo Agenda quoted above refers to ‘basic needs’ rather than human rights. At the same time other parts of the Cairo Agenda focus on ‘human resources’, corresponding to the human capital approach.

The section in the Cairo Agenda on ‘What we require from our development partners’ is divided into the following sub-sections:

- Understanding, appreciation and support of Africa’s development efforts
- Trade and development
- Africa’s external debt

In the view of African leaders there was ‘an urgent need for our development partners to significantly increase resource in-flows to African countries’.⁵⁰ Debt

⁴⁸ Cairo Agenda para 14.

⁴⁹ Sen (1999) 295.

⁵⁰ Cairo Agenda para 31. See also para 37.

relief was said to be necessary but should not be at the 'expense of official grant financing.'⁵¹

In its 1996 Yaoundé Declaration, the OAU Assembly recognised that the plight of Africa was due 'particularly to the failure of our countries to provide good governance'.⁵² Over the following decade debt relief conditional on improved governance and pro-poor policies became the main theme in development discourse.

In 1999 the IMF and the World Bank decided that poor countries that wanted debt relief should prepare Poverty Reduction Strategy Papers (PRSP) to ensure that the poor would benefit from debt relief.⁵³ 55 countries, 30 of which are from Africa, have participated in the PRSP process. When a final PRSP has been approved by the IMF and the World Bank, these countries can reach the so called 'completion point' after one year of implementing the PRSP and are then entitled to debt relief.⁵⁴

To summarise the situation at the end of the 1990's: African leaders had since the mid 1980's adjusted their rhetoric, and to a lesser degree practice, to what was popular among donors and lenders. Rhetoric on the promotion and protection of human rights entered development plans in the late 1980's as part of the focus on good governance and was included in all plans over the coming decade.

⁵¹ Cairo Agenda para 38.

⁵² Yaoundé Declaration (Africa: Preparing for the 21st century), AHG Decl 3(XXXII) para 7.

⁵³ J Klugman 'Overview' in World Bank *PRSP sourcebook 2004*
povlibrary.worldbank.org/files/5301_overview.pdf.

⁵⁴ F Stewart & M Wang 'Poverty reduction strategy papers within the human rights perspective' in Philip Alston & Mary Robinson (eds) *Human rights and development – Towards mutual reinforcement* (2005) 450.

National human rights institutions began to be established in the 1990's initially mostly with negligible impact.⁵⁵ The same can be said about the regional human rights initiative, the African Commission on Human and Peoples' Rights. By the end of the 1990's the mandate of the Commission was set to be complemented by a court, ostensibly to give more 'teeth' to the regional human rights system, but at the time few states showed any interest in ratifying the protocol establishing the court.⁵⁶

Development plans had succeeded each both at the national and the international level. Lack of implementation of commitments by both African countries and donor countries had been identified as the main reason for lack of progress. It was time for change.

2.3 The African renaissance and NEPAD

2.3.1 Building a new Africa

'African solutions' did not stop with the Cairo Agenda, which was soon forgotten. However, many of its themes emerged later in new packaging. At a conference in Johannesburg in September 1998, Thabo Mbeki set out his vision for an African renaissance⁵⁷ and what would be needed to achieve it:⁵⁸

⁵⁵ Human Rights Watch *Protectors or pretenders – government human rights commissions in Africa* (2001).

⁵⁶ The institutional framework for implementation of human rights in Africa will be discussed further in chapter 5.

⁵⁷ The word 'renaissance' is usually associated with Europe and as Magubane has noted 'the European renaissance was not simply the freedom of spirit and body for the European men, but a new freedom to destroy freedom for the rest of humanity.' BM Magubane 'The African renaissance in historical perspective' in MW Makgoba (ed) *The African renaissance – The new struggle* Magubane (1999) 21. It should also be noted that the European renaissance was an 'amorphous process' and not a 'willed project', Taylor (2005) 33.

⁵⁸ T Mbeki *Africa: The time has come – selected speeches* Mbeki (1998) xviii.

The new African world which the African renaissance seeks to build is one of democracy, peace and stability, sustainable development and a better life for the people, nonracism and nonsexism, equality among the nations, and a just and democratic system of international governance. None of this will come about of its own. Inasmuch as we liberated ourselves from colonialism through struggle, so will it be that the African renaissance will be victorious only as a result of a protracted struggle that we ourself must wage. ... It is not the repetition of these objectives that will bring about an African renaissance. It is what we do to bring about these objectives that will take us a step forward in our quest for a new and better African reality.

In July 2000 the OAU Assembly adopted a Declaration on Unconstitutional Changes of Government. A Sub-committee to the Central Organ was established to monitor compliance with the Declaration. At the same summit the OAU Assembly adopted the Solemn Declaration of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) which called for the implementation of the AEC Treaty and the Cairo Agenda.⁵⁹

The most important decision at the July 2000 summit was the adoption of the Constitutive Act of the African Union (AU) which built on many ideas first set out in the AEC Treaty. One of the objectives of the new continental organisation is the promotion 'of sustainable development at the economic, social and cultural levels as well as the integration of African economies.'⁶⁰ Another objective of the AU is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.

⁵⁹ Many of the deadlines set for complying with commitments concerning a wide area of issues including human rights and development have already been passed. The CSSDCA can trace its origin to an initiative by the African Leadership Forum which resulted in the adoption in May 1991 of the Kampala Document: Towards a Conference on Security, Stability, Development and Cooperation in Africa. www.africaaction.org/african-initiatives/kampall.htm (accessed 11 July 2007). On the CSSDCA process see further below.

⁶⁰ Constitutive Act of the African Union, adopted 11 July 2000, entered into force 26 May 2001, OAU Doc CAB/LEG/23.15. The Assembly of the AU held its first meeting in July 2002.

The establishment of the AU has resulted in a number of new institutions. A Pan-African Parliament has been established. Civil society has been given their own AU organ, the Economic, Social and Cultural Council (ECOSOCC). A Peace and Security Council has replaced the OAU Central Organ. These new institutions all have a mandate to promote human rights.⁶¹

The Abuja Treaty on the African Economic Community remains in force, but the provisions of the AU Constitutive Act take precedence. It is thus foreseen that the African continent, with the regional economic communities as building blocks, will eventually be transformed into a common market. It is assumed that this economic integration will lead to increased economic growth. Even if this scenario materialises more is needed to achieve sustainable human development and the realisation of human rights.

2.3.2 The New Partnership for Africa's Development

In an interview with *Time* magazine in September 2000, Thabo Mbeki set out the necessity of creating a new development programme developed by Africans themselves:⁶²

What we are saying to world leaders is that we have to respond to the challenge of African development. ... the bulk of the current [African] leadership will at least say, 'We have to abandon previous experiences of military governments, military coups, and we really have to work hard at this democratic system.' They are saying, 'We have to abandon the failed economic policies of the past.' And I've been saying to the leadership of the developed world that they need to respond positively, even if it is to challenge us, to say 'this is what you say but we want to see practical action from you consistent with what you are saying'. ...

⁶¹ The institutional framework for implementation of human rights in Africa will be discussed further in chapter 5.

⁶² 'The road ahead' interview with *Time* magazine, 4 September 2000, reprinted in T Mbeki *Africa define yourself* (2002) 203-204.

Mbeki noted that he had received positive response from donor countries and the international financial institutions to his idea to develop 'a realistic, practical programme to help Africa's underdeveloped countries'. Mbeki set out to develop the plan with the assistance of Nigerian President Obasanjo and Algerian President Bouteflika.⁶³ In October 2000 a team was established at the South Africa-based Development Bank of Southern Africa (DBSA) which prepared a first draft of the new development plan.⁶⁴ The draft was subjected to extensive negotiation over the coming months.⁶⁵ According to Stephen Gelb, leader of the DBSA team, the Nigerian agenda was to obtain debt relief while Algeria saw the process as a possibility of gaining legitimacy for the regime. South Africa's motive seemed to be Mbeki's ambition for African renaissance with South Africa as the leading light.⁶⁶ Egypt and Senegal later invited themselves to the drafting club.⁶⁷

Mbeki first publicly announced the plan, then known as the Millennium Africa Renaissance Programme (MAP), at the World Economic Forum in Davos in January 2001. He set out the following priority areas:⁶⁸

⁶³ The three presidents had been mandated by the OAU Assembly in September 1999 to 'engage African creditors on our behalf on the issue of Africa's external indebtedness'. See Sirte Declaration, EAHG/Decl (IV) Rev 1. For a historical overview of the initiatives leading up to the adoption of NEPAD see Department of Foreign Affairs, South Africa, 'NEPAD historical overview', www.dfa.gov.za/au.nepad/historical_overview.htm (accessed 15 December 2005). See also Taylor (2005) 34-42.

⁶⁴ Interview with Stephen Gelb, Pretoria, 4 June 2009. Mr Gelb, an economist, was research coordinator of the SA government team developing the plan from November 2000 to July 2001.

⁶⁵ Six negotiation meetings were held in South Africa, Algeria, Nigeria and Egypt. Interview with Stephen Gelb, 4 June 2009.

⁶⁶ As above.

⁶⁷ As above.

⁶⁸ Briefing at the World Economic Forum Meeting – Millennium Africa Renaissance Program – Implementation issues. www.thepresidency.gov.za/show.asp?type=sp&include=president/sp/2001/tm0128.html (accessed 12 July 2007) (Mbeki 2001a). See also Mbeki's address at the University of Havana, Cuba, 28 March 2001, www.thepresidency.gov.za/show.asp?type=sp&include=president/sp/2001/tm0328.html (accessed 12 July 2007).

- Creating peace, security and stability, and democratic governance without which it would be impossible to engage in meaningful economic activity;
- Investing in Africa's people through a comprehensive human resource strategy;
- Harnessing and developing Africa's strategic and comparative advantages in the resource based sectors to lead the development of an industrial strategy;
- Increasing investments in the Information and communication technology sector without which we would not be able to bridge the digital divide;
- Development of infrastructure including transport and energy; and
- Developing financing mechanism.

Mbeki presented MAP as being spearheaded by a 'coalition of the willing':⁶⁹

Participating African leaders would form a Compact committing them to the programme and a Forum of Leaders who would make decisions about sub-programmes and initiatives and review progress on its implementation. Every attempt will be made by the forum of leaders to be inclusive of all countries that agree to the elements of the Compact.

It is however noticeable that of the original five-member coalition Algeria, Egypt and Nigeria lacked strong democratic credentials.

The IMF and the World Bank were quick to welcome MAP, noting 'that the areas outlined in the MAP were convergent with the priority areas as seen by the Bank and the Fund.'⁷⁰ When Mbeki visited the UK in June 2001, British Prime Minister Tony Blair promised to assist Mbeki in his efforts to persuade other Western countries to join in 'a new partnership with Africa'.⁷¹ The broad

⁶⁹ Mbeki (2001a). The notion of a 'club' of reformers was not accepted by all AU members. DG Anglin 'The African peer review of political governance: Precedents, problematics & prospects' in Muna Ndulo (ed) *Democratic reform in Africa: Its impact on governance & poverty alleviation* (2006) 255-256.

⁷⁰ 'Mr Wolfensohn's trip to Africa with IMF Managing Director Horst Koehler, February 17-25, 2001', www.worldbank.org (accessed 15 December 2005).

⁷¹ W Dhlamini 'Africa's economic recovery plan yet to win financial backing' *IPS* 19 June 2001 www.twinside.org.sg/title/recovery.htm (accessed 20 December 2008).

support for the new plan outside Africa should come as no surprise as the G8 had participated in the development of MAP.⁷²

In a speech to African ministers of finance in November 2000, KY Amoako, the Executive Secretary of the UN Economic Commission for Africa (UNECA) suggested a 'New Global Compact with Africa' which would include 'mutual accountability towards defined outcomes in place of one-sided conditionality'.⁷³ A detailed 'Compact for African Recovery' was presented by UNECA to ministers of finance in May 2001 as a complement to MAP.⁷⁴

The draft MAP⁷⁵ was revised by a 'team of prominent African and international economists' ahead of the OAU summit in July 2001.⁷⁶ Aspects of the Omega plan, developed by President Wade of Senegal, and the UNECA Compact were incorporated into MAP.⁷⁷ The plan was adopted by the OAU Assembly in July 2001 as the New African Initiative (NAI).⁷⁸ NAI established a Heads of State Implementation Committee (Implementation Committee) with 15 members (later

⁷² Thabo Mbeki interviewed by Mathatha Tsedu, SABC3, 19 July 2001, printed in Mbeki (2002) 229. See also J Dlodlu 'Seeking G-8 backing for MAP' *Business Day* 20 July 2001, www.businessday.co.za/Articles/TarkArticle.aspx?ID=427777 (accessed 12 July 2007).

⁷³ KY Amoako 'A new global deal for LDC's - A new global compact with Africa', Eighth session of the ECA Conference of Ministers of Finance', Addis Ababa 21 November 2000.

⁷⁴ Compact for African Recovery, Operationalising the Millennium Partnership for the African Recovery Programme, Addis Ababa, 20 April 2001. De Waal calls the compact the 'most intellectually substantive contribution to NEPAD' A De Waal 'What's new in the "New Partnership for Africa's Development"?' 78(3) *International Affairs* 463-75 469.

⁷⁵ 'The Millennium Partnership for the African Recovery Programme (MAP), prepared by the presidents of South Africa, Nigeria and Algeria (as presented to a conference in Algiers during May 2001)', www.sarpn.org.za/NEPAD/MAP/index.php

⁷⁶ Dhalmini (2001). Much negotiation had also preceded the April draft. According to Stephen Gelb the text of what eventually became NEPAD was negotiated line by line by South Africa, Nigeria, Algeria, Senegal and Egypt. Interview with Stephen Gelb, 4 June 2009.

⁷⁷ South Africa and Senegal negotiated on what to incorporate from the Omega plan up until the eve of the adoption of NAI at the Lusaka summit. Interview with Stephen Gelb, 4 June 2009.

⁷⁸ Declaration on the New Common Initiative (MAP and Omega), AHG/Decl.1 (XXXVII), para 9.

expanded to 20).⁷⁹ At the first meeting of the Implementation Committee in October 2001 NAI was renamed the New Partnership for Africa's Development (NEPAD).

The NEPAD Declaration stated that the new plan 'differs in its approach and strategy from all previous plans and initiatives in support of Africa's development, although the problems to be addressed remain largely the same.'⁸⁰ As discussed below these differences in approach are difficult to discern. Increased political will to reform is often highlighted as a critical difference as compared to the past, an implicit recognition that earlier initiatives have been full of rhetoric.

2.3.3 The NEPAD Declaration and Programme of Action

The founding document of NEPAD (NEPAD Declaration⁸¹) is divided into eight parts: (I) Introduction, (II) Africa in today's world: Between poverty and prosperity, (III) The new political will of African leaders, (IV) Appeal to the peoples of Africa, (V) Programme of Action, (VI) A new global partnership, (VII) Implementation of the New Partnership for Africa's Development and (VIII) Conclusion. The Programme of Action is divided into conditions for sustainable development, sectoral priorities and mobilising resources.

The first paragraph of the Declaration sets out that NEPAD is

⁷⁹ As of July 2008 the members of the NEPAD Implementation Committee were Cameroon, Congo-Brazzaville, DRC, Gabon (Central Africa), Ethiopia, Madagascar, Rwanda, Sudan (East Africa), Egypt, Algeria, Libya, Tunisia (North Africa), South Africa, Namibia, Malawi, Lesotho (Southern Africa), Nigeria, Senegal, Mali, Benin (West Africa). See Decision on the report of the Heads of State and Government Implementation Committee on NEPAD, Doc Assembly/AU/11 (XI), para 11.

⁸⁰ New Partnership for Africa's Development (NEPAD) para 59. Available at www.nepad.org/2005/files/documents/inbrief.pdf (accessed 14 July 2009).

⁸¹ Encompassing the Strategic Policy Framework and the Programme of Action, see AHG/Decl 1 (XXXVII) para 9. Sometimes also referred to as the NEPAD Framework Document.

a pledge by African leaders, based on a common vision and a firm and shared conviction that [African leaders] have a pressing duty to eradicate poverty and to place their countries ... on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic.⁸²

The introduction ends with a call 'for a new relationship of partnership between Africa and the international community, especially the highly industrialised countries, to overcome the development chasm that has widened over centuries of unequal relations'.⁸³ The eight paragraph introduction to the NEPAD Declaration could be summarised as a call for donor support for ideas that the African leaders have come up with on behalf of their subjects.

Part II first deals with Africa's role as an 'indispensable resource base' for the world before turning to the historical reasons for the impoverishment of the continent, namely 'the legacy of colonialism, the Cold War, the workings of the international economic system, and the inadequacies of and shortcomings in the policies pursued by many countries in the post-independence era'.⁸⁴ Looking to the future, part II finally discusses Africa in the context of globalisation, concluding that '[w]hile globalisation has increased the cost of Africa's ability to compete, we hold that the advantages of an effectively managed integration present the best prospects for future economic prosperity and poverty reduction'.⁸⁵

In part III, development plans of the past are said to have failed because of 'a variety of reasons, both internal and external, including questionable leadership and ownership by Africans themselves'.⁸⁶ As has been noted above this recognition of both internal and external reasons for past failures has been recognised in African development plans since the early 1990's.

⁸² NEPAD para 1.

⁸³ NEPAD para 8.

⁸⁴ NEPAD para 18.

⁸⁵ NEPAD para 28.

⁸⁶ NEPAD para 42.

The leaders hold that 'there is today a new set of circumstances, which lend themselves to integrated practical implementation'.⁸⁷ These 'new circumstances' are said to include 'new concepts of security and self-interest' in the aftermath of the cold war, the increase of democratically elected leaders on the continent and the AU's 'resolve to deal with conflict and censure deviation from the norm', reinforced by the activities of civil society. African governments are also held to be more resolute about regional economic integration. The UN Millennium Declaration 'points to the global community's commitment to enhance resource flows to Africa, by improving aid, trade and debt relationships between Africa and the rest of the world, and by increased private capital flows to the continent'.⁸⁸

Paragraph 47 sets out the importance of national development plans 'developed through participatory processes'. It is not clear why this principle was not applied to the development of NEPAD itself.⁸⁹ In paragraph 49 African leaders 'take joint responsibility' to strengthen mechanisms for conflict prevention, promoting and protecting democracy and human rights, establish macroeconomic stability, provide frameworks for financial markets, 'revitalising and extending' education and health services, promoting the role of women, capacity building for the maintenance of law and order and developing infrastructure and agriculture.

Part V is the main part of the document, the Programme of Action covering paragraphs 59-170 of the 205 paragraphs long document. Para 67 sets out two long term objectives:⁹⁰

⁸⁷ NEPAD para 42.

⁸⁸ NEPAD para 46.

⁸⁹ Cf criticism of NEPAD discussed below.

⁹⁰ NEPAD para 67.

- To eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development and thus halt the marginalisation of Africa in the globalisation process.
- To promote the role of women in all activities.

Paragraph 68 sets out the goals to ‘achieve and sustain’ a growth rate of 7% per annum over the next 15 years and translate the UN Millennium Development Goals into reality.⁹¹ By using the MDGs as goals, ‘NEPAD is challenging aid donors ... to take their commitment to global poverty reduction seriously.’⁹²

To realise these goals would according to NEPAD require an additional US\$ 64 billion per year. ‘The bulk of the needed resources will have to be obtained from outside the continent,’ in the short and medium term in the form of debt reduction and aid and in the long term in the form of private capital flows.⁹³ Domestic resources are to be mobilised through increased savings and improved tax collection.⁹⁴

In paragraphs 71-95 the NEPAD Declaration sets out the conditions for sustainable development under three headings: the peace, security initiative, the democracy and political governance initiative, and the economic and corporate governance initiative. The Peace and Security Initiative set out in paragraphs 72-78 has led to the establishment by the AU of the Peace and Security Council.

Under ‘Democracy and Political Governance Initiative’, paragraphs 79-85, it is stated that it ‘is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good

⁹¹ See also para 46.

⁹² De Waal (2002) 465.

⁹³ NEPAD para 144.

⁹⁴ NEPAD para 145.

governance.⁹⁵ The objective of the initiative is to strengthen ‘the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and the promotion of the rule of law.’⁹⁶ Participation in the initiative is voluntary. The leadership of NEPAD is tasked with identifying ‘appropriate diagnostic and assessment tools, in support of compliance with the shared goals of good governance’.⁹⁷ This formed the basis for the establishment of the African Peer Review Mechanism.⁹⁸ Respect for human rights is seen as instrumental to achieving the goals of NEPAD but not as essential goals in their own right.⁹⁹

The ‘Economic and Corporate Governance Initiative’ in paragraphs 86-89 has as its objective to ‘promote throughout the participating countries a set of concrete and timebound programmes aimed at enhancing the quality of economic and public financial management, as well as corporate governance.’¹⁰⁰ Ministries of finance and central banks are asked to help in identifying appropriate standards and codes of good practice. The NEPAD Implementation Committee will then mobilise resources for capacity building. No mention is made of review of compliance with commitments as with the ‘Democracy and Political Governance Initiative’.

The Programme of Action includes priority areas that ‘may be revised from time to time by the Heads of State Implementation Committee’¹⁰¹ The sectors included in the Programme of Action are infrastructure (in particular information technology and energy), human resources (including education and reversing the brain drain), health, agriculture and market access in developed countries

⁹⁵ NEPAD para 79.

⁹⁶ NEPAD para 81.

⁹⁷ NEPAD para 82.

⁹⁸ The idea of the need for ‘peer review’ was recognised early on in the development of the NEPAD Declaration, Interview with Stephen Gelb, 4 June 2009.

⁹⁹ According to Stephen Gelb human rights did not feature prominently in the negotiations over the text of what became the NEPAD Declaration.

¹⁰⁰ NEPAD para 88.

¹⁰¹ NEPAD para 61.

for African exports.¹⁰² Detailed objectives and actions with regard to these priority areas are set out in paragraphs 96-170. Programmes dealing with communicable diseases, information and communication technology, debt reduction and market access are to be 'fast-tracked'.¹⁰³ The focus is on human capital not human capabilities.

Under the heading 'A new global partnership' part VI sets out what African leaders see as the 'responsibilities and obligations' of developed countries and multilateral institutions.¹⁰⁴

Part VII deals with the implementation of NEPAD. The role of the Implementation Committee includes:¹⁰⁵

- Identifying strategic issues that need to be researched, planned and managed at the continental level.
- Setting up mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed standards;
- Reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays.

A comparison with the earlier initiatives discussed above makes it clear that there is not much new to NEPAD.¹⁰⁶ The recognition that economic progress depends on good political governance is important,¹⁰⁷ but as noted above not new. Indeed, one of the main features of NEPAD is increased aid in response to

¹⁰² NEPAD para 94.

¹⁰³ NEPAD para 186.

¹⁰⁴ NEPAD para 185.

¹⁰⁵ NEPAD para 201.

¹⁰⁶ De Waal (2002) 465, Taylor (2005) 40.

¹⁰⁷ B Manby 'Application of the criteria for periodic evaluation of global development partnerships, as defined in Millennium Development goal 8, from the right to development perspective: Further analysis of the African Peer Review Mechanism and the ECA/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD', report to the Working Group on the Right to Development, UN Doc A/HRC/8/WG.2/TF/CRP.5, 28 December 2007, para 7.

improved governance, which, as noted above, was also a main feature of UN-NADAF. Another main feature, accountability, was a major theme of the 1990 African Charter for Popular Participation for Development and thereafter reaffirmed in numerous declarations by the OAU Assembly.¹⁰⁸

Thus, if there is something new it is not in the policy prescriptions but in the monitoring of implementation. NEPAD provides for establishing 'mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed standards'. By establishing the APRM (described below), the Implementation Committee ostensibly took a major step from rhetorical to practical accountability.¹⁰⁹

2.3.4 Response of the international community

The United Nations has adopted NEPAD as its framework for cooperation with Africa. The support of rich countries, and in particular the international financial institutions, apparently makes NEPAD different from earlier initiatives. However, there is a clear difference between pledging support and actually giving support through increased aid, debt relief and the removal of distorting trade barriers such as subventions. The discrepancy by the developed world in its pledges and its actions was cited as the main failure in the evaluation of UN-NADAF.¹¹⁰ So far the resource flows under NEPAD have been quite moderate and not at all what NEPADs main proponents had hoped.¹¹¹ African governments working

¹⁰⁸ See also Taylor (2005) 27.

¹⁰⁹ NEPAD para 201. The establishment of the Implementation Committee was endorsed by the OAU Assembly see Declaration on the New Common Initiative (MAP and OMEGA), AHG/Decl. 1 (XXXVII) para 12.

¹¹⁰ Ad Hoc Committee (2002).

¹¹¹ See eg Activity report by Ambassador S Olukorede Willoughby, Acting Chief Executive Officer, NEPAD Secretariat, to the 19th summit of the NEPAD Heads of State and Government Implementation Committee (HSGIC), 29 June 2008, Sharm El Sheikh, Egypt, HSGIC/19/REP-AG: CEO/4, 9.

together with the NEPAD Secretariat is trying to change this situation *inter alia* through the Africa Partnership Forum.¹¹²

2.3.5 Criticism of NEPAD

Much of the ample criticism against NEPAD has centred on the notion that it 'embraces the forces of neoliberal globalization, and promotes these forces as a cure for Africa's ills.'¹¹³ The initiative is seen as just another application of the 'Washington consensus' and a continuation of structural adjustment.¹¹⁴ The underlying assumption that 'integration into global markets solves poverty' has been much criticised as has other NEPAD prescriptions for achieving development, such as reliance on privatisation and information technology.¹¹⁵

¹¹² Manby (2007) para 26. The Africa Partnership Forum (APF) meets twice a year since its establishment in November 2003 to discuss 'policy issues, priorities and commitments in support of Africa's development.' The Forum brings together African government representatives and their development partners belonging to the OECD. At the fifth APF in London in October 2005, the African representatives presented an AU/NEPAD African Action Plan. The Forum agreed to develop a Joint Action Plan 'bringing together the commitments that Africa and its development partners have both made.' (Communiqué issued at the end of the 5th meeting of the Africa Partnership Forum, London 4-5 October 2005). However, such a plan has not yet materialised. A revised version of the AU/NEPAD African Action Plan was presented to the APF in Tokyo in April 2008. The plan sets out costed actions under the following priority areas: infrastructure, agriculture, health, education, science & technology, trade, industry & investment, environment, peace & security, governance, and gender development. (AU/NEPAD African Action Plan, updated final draft version, 28 March 2008). However, development partners noted that the plan needed additional revisions including to identify which projects were already underway, where bottlenecks existed and the exploration of 'alternative and innovative financing'. (Co-chairs summary of the 10th APF, June 2008). For more information see www.africapartnershipforum.org

¹¹³ Civil society Indaba, Johannesburg, Resolution on NEPAD, 4 May 2002, reprinted in P Bond *Fanon's warning: A civil society reader on the New Partnership for Africa's Development* (2005) 33. See also MJ Kankwenda 'Revisiting the African development trajectory: From LPA to NEPAD' in Jeggan C Senghor and Nana K Poku *Towards Africa's renewal* (2007); L Diamond 'Promoting real reform in Africa' in E Gyimah-Boadi (ed) *Democratic reform in Africa – The quality of progress* (2004) 277.

¹¹⁴ P Bond *Talk left, walk right – South Africa's frustrated global reforms* (2004) 103; Taylor (2005) 94. The 'Washington consensus' included fiscal discipline, market determined interest and exchange rates, trade liberalisation and privatisation. See Jennings (2006) 32. For a counter-argument see Mashele (2006) 3-4.

¹¹⁵ Bond (2005) 11.

NEPAD has also been criticised for ‘making aid a major factor’.¹¹⁶ Underlying this criticism is the view, expressed over seventy years ago, that ‘Africans must realize that he who pays the piper calls the tune ... only through African philanthropy can this continent be saved from its impending doom’.¹¹⁷ There is also the risk that aid is diverted for elite consumption and to reinforce a neo-patrimonial system rather than being used for investment.¹¹⁸ Some have contented that African states should not compete over conditional foreign direct investment.¹¹⁹ It has been argued that an Africa-owned programme should mainly be financed by the participants.¹²⁰

The main criticism of NEPAD has been that it is a top down initiative adopted without any consultation.¹²¹ NEPAD is ‘a pledge by African leaders’.¹²² No civil society organisations were consulted in developing the initiative, even though civil society participation in development is recognised as essential in the NEPAD Declaration. This lack of consultation in drafting the plan must be seen as one of its major weaknesses.¹²³

In an interview in July 2001, shortly after the adoption of NAI, Mbeki said that ‘these are not matters which can be confined to governments. The people have to be involved. What we will do here, is to ensure that there is that popular

¹¹⁶ A Adedeji ‘From the Lagos Plan of Action to the New Partnership for Africa’s Development and from the Final Act of Lagos to the Constitutive Act: Wither Africa?’, Keynote address prepared for presentation at the African Forum for Envisioning Africa to be held in Nairobi, Kenya, 26-29 April 2002, 11; Taylor (2005) 88. On the impact of aid on Africa see also G Hyden *African politics in comparative perspective* (2006) 256-260.

¹¹⁷ N Azikiwe *Renascent Africa* (1968) 260 (originally published in 1937).

¹¹⁸ Taylor (2005) 93.

¹¹⁹ V Mosoti ‘The New Partnership for Africa’s Development: Institutional and legal challenges of investment promotion’ 5 *San Diego International Law Journal* 145-178 160-162.

¹²⁰ De Waal (2002) 470.

¹²¹ De Waal (2002) 474, S Gumede ‘The NEPAD and human rights’ (2006) 22 *South African Journal on Human Rights* 144-171 147-149, Diamond (2004) 277.

¹²² NEPAD para 1.

¹²³ B Manby ‘The African Union, NEPAD, and human rights: The missing agenda’ (2004) 26 *Human Rights Quarterly* 983-1027 1004.

participation.¹²⁴ This is also reflected in the NEPAD Declaration that provides that the 'agenda is based on national and regional priorities and development plans that must be prepared through participatory processes involving the people.'¹²⁵ Nevertheless it has been argued that NEPAD does not provide for sufficient interaction with civil society.¹²⁶ It must also be kept in mind that the 205 paragraph NEPAD Declaration is not all there is to NEPAD. Strategies have been adopted in a number of fields, such as health, environment and agricultural policy. Unfortunately, lack of consultation continues to be a problem in developing these initiatives.¹²⁷

NEPAD has also been criticised for having achieved little since it was adopted and for claiming 'credit for virtually every development project on the continent', even projects that were conceived long before NEPAD.¹²⁸ The vagueness of NEPAD is a major weakness.¹²⁹

The Nepad text and even its sectoral documents fall far short of any common sense definition of a plan or a strategy. They organise the many African development problems into a structure, but offer no guide about which problems must be solved first. The Nepad text and subsequent documents say nothing about how, given the many priorities competing for scarce resources,

¹²⁴ Mbeki interviewed by Mathatha Tsedu, SABC3, 19 July 2001, reprinted in Mbeki (2002) 30.

¹²⁵ NEPAD para 47.

¹²⁶ Bond (2005) 3.

¹²⁷ R Herbert 'The survival of Nepad and the African Peer Review Mechanism: A critical analysis' (2004) 11(1) *South African Journal of International Affairs* 21-37 29.

¹²⁸ Herbert (2004) 27, Taylor (2005) 92. For a more positive overview of the impact of NEPAD see D Malcolmson 'Implementation of the Nepad initiative – Overview' (2004) 11(1) *South African Journal of International Affairs* 11-20. RK Edozie 'Promoting African "owned and operated" development: A reflection on the New Partnership for Africa's Development' (2004) 3(2) *African and Asian Studies* 145-173.

¹²⁹ Herbert (2004) 24. See also MO Chibundu 'NEPAD and the rebirth of development theory and praxis' in JI Levitt (ed) *Africa – Mapping new boundaries in international law* (2008) 260-262. Dr Hespina Rukato, Deputy CEO of NEPAD, noted in a presentation in Pretoria on 4 June 2009 that NEPAD concerned itself with processes rather than implementation: 'NEPAD brings together stakeholders that can build a road but does not build the road itself'.

governments should choose strategically from those competing priorities. They also offer wish lists but fail to note how funds will be raised or how the proffered solutions would do more than tinker expensively around the margins.

The public perception of NEPAD is also not helped by the fact that public relations and information do not seem to have been high on the agenda.¹³⁰

With regard to human rights the NEPAD Declaration has been criticised for the lack of a rights-based approach to development: 'NEPAD's endorsement of human rights ... is segregated from its discussion of objectives in relation to infrastructure, health, education, and other areas.'¹³¹ Issues of discrimination and systematic violations do not get sufficient attention in the NEPAD Declaration. For example no mention is made of ethnic discrimination despite the consequences such discrimination has had on the continent.¹³² Gender and HIV and AIDS are inadequately addressed in NEPAD.¹³³

¹³⁰ For example by the end of December 2008 the latest news item on the NEPAD web site, www.nepad.org, was from June 2007. However, in an interview in December 2008, Bankole Adeoye, coordinator: external relations & partnerships of NEPAD indicated that this issue was being attended to and a new web site would be launched in January. A revamped web page was finally launched in July 2009 with much relevant information still missing.

¹³¹ Manby (2004) 1003. See also CJ Doebbler 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law and Contemporary Problems* 7. Stephen Gelb one of the main drafters of NEPAD confirmed in an interview that human rights was not something that the drafters gave much thought in the drafting process. Interview with Stephen Gelb, Pretoria, 4 June 2009. It is noticeable that NEPAD was mainly developed by economists. Gumedze (2006) 153 is of the opinion that NEPAD 'is an initiative aimed at providing an environment that is conducive to the promotion and protection of human rights in Africa by fostering the right to development through a number of strategies.' Gumedze further notes that NEPAD should not be considered in isolation, 157. For an analysis of the human rights rhetoric in the NEPAD Declaration see Gumedze, 157-164.

¹³² Manby (2004) 1005.

¹³³ De Waal (2002) 473, 475, Taylor (2005) 127-151. On the impact of AIDS on African governance see A De Waal 'How will HIV/AIDS transform African governance?' (2003) 102 *African Affairs* 1-23.

2.4 Concluding remarks

This chapter has illustrated that NEPAD is one in a long line of African development plans with similar policy prescriptions. The focus is on economic growth. Human rights are seemingly included mostly for rhetorical effect as in earlier development plans. The references to democracy in the NEPAD Declaration are not reflected in African reality. While most African leaders today seek endorsement from elections the idea that democracy is more than regular elections with given outcomes is still to take hold among many African leaders. Perhaps even more importantly, as discussed above, NEPAD is premised on the existence of a type of state that is rare in Africa where most states still display clear neo-patrimonial tendencies.¹³⁴

The response of donors to NEPAD has been warm as far as statements go, but colder when it comes to actual assistance in the form of trade concessions and more development assistance. Similarly, African leaders have in general been slow to implement the admittedly vague commitments contained in the NEPAD framework document. Does this mean that NEPAD is just another development plan that will be forgotten in a decade when all the talk will be of a new acronym as yet unborn? Only time will tell.

Two factors have often been mentioned as contributing to the negative performance of development plans of the past. These are lack of popular participation in designing and implementing development plans and the lack of monitoring compliance with commitments. Before tackling how the APRM deals with these issues the next chapter will examine how the APRM came into being and its mandate.

¹³⁴ Taylor (2005) 153.

CHAPTER 3

THE APRM MANDATE AND HUMAN RIGHTS

3.1 Introduction

The main question this chapter seeks to answer is: What is the APRM meant to achieve? The formative stages of the APRM are considered and the mandate of the APRM is set out. The main focus of the chapter is on the role human rights plays in the APRM framework.

3.2 Developing the APRM

3.2.1 The need for monitoring

Inadequate monitoring was identified as one of the reasons for the failure of the various development initiatives discussed in the previous chapter. For the drafters of the various initiatives that were finally adopted as NEPAD it was thus clear that monitoring was necessary. The question was which form it should take.

3.2.2 The concept of peer review

The word peer derives from the Latin word *par*, meaning equal. Most people, at least in academia, associate 'peer review' with the review process by which articles submitted to academic journals are scrutinised by experts in the field before being accepted for publication.

Peer review as discussed in this study refers to a number of mechanisms for international monitoring of compliance with agreed norms. This form of peer review is relatively new and has been used mainly by international

organisations in the economic field.¹ In a paper by the Organization of Economic Cooperation and Development (OECD), the organisation that has been a pioneer in this field, peer review is defined 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.²

Most peer review systems share the following characteristics:³ A questionnaire is sent out to the national government which conduct a self-evaluation report. Some peer review systems use cycles of review where each cycle deals with a different aspect of the standard under review. Interviews are conducted with government representatives and in many instances with representatives of civil society and the private sector. The interviews are often conducted as part of a country visit. A country report is prepared by civil servants from other member states of the organisation conducting the review or by staff of the secretariat of the organisation. The country report is discussed in a meeting between government representatives and the monitoring body, composed of government representatives of the other countries of the organisation conducting the review. The report with its recommendations is thereafter published, though publication in some review systems requires the consent of the reviewed country.

¹ Peer review as a method of inducing compliance with agreed norms is further discussed in chapter 5.

² OECD (2002) 'Peer pressure as part of surveillance by international institutions' Discussion led by Mr Niels Thygesen, chairman, Economic Development Review Committee, Tuesday 4 June 2002, para 2.

³ See eg Transparency International 'How does the peer review system of monitoring work?' www.transparency.org (accessed 1 March 2007); F Pagani 'Peer review: A tool for co-operation and change - An analysis of an OECD working method', OECD SG/LEG(2002)1.

3.2.3 Peer review of African countries

Some African states have undergone voluntary sectoral peer reviews before the creation of the APRM. For example South Africa is an ‘enhanced engagement country’ of the OECD and has undergone peer reviews with regard to competition law and policy and education policy.⁴ The UN Conference on Trade and Development (UNCTAD) has conducted Investment Policy Reviews of 16 African countries.⁵

Some of the organisations that conduct peer reviews or similar reviews have a global membership. The IMF reviews around 130 countries in a year through Article IV consultations. Less than two hours is devoted to a report and representatives of the reviewed country are not present during the review meeting.⁶ The dominating role of the IMF in surveillance of macroeconomic policies has often been criticised,⁷ leading to calls for peer review at the regional level.⁸

⁴ OECD ‘Competition law and policy in South Africa, an OECD peer review’, May 2003, www.oecd.org/DAF/Competition. On the ‘enhanced engagement’ 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.

⁵ www.unctad.org/Templates/Page.asp?intItemID=3534&lang=1 (accessed 27 November 2008).

⁶ OECD (2002).

⁷ To the extent that the IMF can pressure countries to follow its advice through economic means the review cannot be considered a peer review. As stated by Kanbur: ‘[I]t is in rich countries, where IMF resources are not used, that the Article IV consultations tend to play the same role as OECD peer reviews. In these countries, the visit of an IMF mission, and the subsequent report, is one among a number of assessments of the economy, produced by domestic and international entities (including in the latter, OECD peer reviews). There is a vibrant and domestic dialogue which the IMF Article IV consultation feeds into and makes a contribution—the final policy decisions of the governments are influenced by, not determined by, the IMF review. This is a very different picture from poor countries where IMF resources are often in play. There are program missions, conditionalities of the program, and the IMF’s assessment is almost invariably the gateway to resource flow from private and public sources.’ R Kanbur ‘The African Peer Review Mechanism (APRM): An assessment of concept and design’ (2004).

⁸ United Nations ‘Role of the United Nations in promoting development in the context of globalization and interdependence, Report of the Secretary-General’, 5 October 2001, UN Doc A/56/445, para 32; J Stiglitz *Globalization and its discontents* (2002) 232-233.

Peer review that does not directly deal with African countries can have an indirect effect. The most prominent example of this is the peer review of donor countries in the OECD Development Assistance Committee.

Different systems of peer review are further discussed in chapter 5 focusing on impact and similarities and differences with the APRM.

3.2.4 Constructing the APRM

The idea

Parallel to the development of NEPAD as described in the previous chapter, two economists drafted a paper on an implementation framework where the idea of peer review was first mooted.⁹ However, no agreement could be reached on this proposal among the five initiating states of NEPAD.¹⁰

In the context of NEPAD, the term 'peer review' first appeared publicly in the Compact for African Recovery in April 2001.¹¹ The Compact sets out four principles that should guide the development framework: African ownership, stable long-term resource flows to Africa, transformed partnership based on mutual accountability and recognition of Africa's diversity.¹² Mutual accountability should be achieved through 'peer review and performance monitoring among both African countries and international partners'.¹³ The

⁹ Interview with Stephen Gelb, Pretoria, 4 June 2009. Mr Gelb was himself one of the drafters of this paper.

¹⁰ As above.

¹¹ Adopted by the UN Economic Commission for Africa (UNECA), see chapter 2.

¹² Compact for African Recovery paras 21-25.

¹³ The main donor countries, making up the OECD, have for long monitored the development assistance policies of each other through the Development Assistance Committee (DAC) peer review. Mutual monitoring would have addressed the fact that the solution to the African predicament lies both in the hands of the African people and its leaders and in the hands of the countries that dominate the world economy. Such an approach would recognise that: 'The structure of African statehood certainly contributed to the dismal record of African economies, just as the structure of African involvement in global production and trade helped to induce political alienation and institutional decay'.

Compact saw as one of the main functions of the MAP Forum (which became the NEPAD Implementation Committee) to ensure 'broad-based buy-in by African governments to peer review of performance on issues of governance and economic management.'¹⁴ The Compact noted that such 'monitoring has relevance not only for reporting purposes, but also for identifying constraints and taking corrective measures.'¹⁵ Some human rights indicators were included among the 'performance indices proposed in the Compact.'¹⁶

At their meeting in Algiers in May 2001 African ministers of finance and ministers of economic development and planning held that a 'dialogue on governance in Africa will allow us to share lessons and experiences, identifying capacity needs and best practices.' The ministers declared their willingness to participate in peer reviews.¹⁷

MAP was more vague than the Compact in its considerations of implementation measures providing that African leaders should take responsibility for monitoring implementation.¹⁸ As noted in the previous chapter, the NEPAD

(C Clapham Africa and the international system – The politics of state survival (1996) 163). For a suggestion to broaden the OECD DAC reviews to include 'all policies having an impact on Africa' see Ad Hoc Committee of the Whole of the General Assembly for the Final Review and Appraisal of the Implementation of the United Nations New Agenda for the Development of Africa in the 1990s 'Independent evaluation of the implementation of the United Nations new agenda for the development of Africa in the 1990's', 10 June 2002, UN Doc A/AC.251/8, para 39. On the suggested mutual accountability review see Report of the high-level working session of the African Peer Review Mechanism [APRM] Panel of Eminent Persons [APR Panel] Le Vendom Hotel, Cape Town, South Africa, 25-27 July 2003, paras 92-94. Cf B Manby 'Application of the criteria for periodic evaluation of global development partnerships, as defined in Millennium Development goal 8, from the right to development perspective: Further analysis of the African Peer Review Mechanism and the ECA/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD', report to the Working Group on the Right to Development, UN Doc A/HRC/8/WG.2/TF/CRP.5, 28 December 2007.

¹⁴ Compact for African Recovery para 31.

¹⁵ Compact for African Recovery para 167.

¹⁶ Compact for African Recovery para 186.

¹⁷ Ministerial Statement, annex to resolution 837 (XXXIV), Development of the African initiative, of the Economic Commission for Africa, paras 4 & 5. Reprinted in the addendum to Regional cooperation in the economic, social and related fields, Report of the Secretary-General, 30 May 2001, UN Doc E/2001/18/Add.3.

¹⁸ The Millennium Partnership for the African Recovery Programme (MAP), Prepared by the Presidents of South Africa, Nigeria and Algeria (as presented to a conference in Algiers

Declaration sets out as one of the functions of the Implementation Committee to set up 'mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed standards.'¹⁹ Despite peer review not being mentioned explicitly in the NEPAD Declaration it is clear that the principle of peer review as conceived in the Compact was implicitly recognised.²⁰

At the initiative of the UN Economic Commission for Africa (UNECA) a meeting between the ministers of finance and development planning of 13 African countries and the ministers of development cooperation of nine OECD countries was held in Amsterdam from 14 to 16 October 2001.²¹ The discussion focused on governance, aid effectiveness and 'the Africa [*sic*] Peer Review Process'. It was agreed that the 'intended objective' should be

to encourage mutual learning, monitor progress towards agreed goals, apply peer pressure on governments to adhere to agreed standards and benchmarks ... disseminate good practices, identify capacity gaps and recommend approaches for addressing these gaps.²²

The African participants at the meeting

felt that taking into account the various review processes underway such as the IMF's Article IV consultations, the World Bank's Country Policy and Institutional Assessment (CPIA), the niche for an African Peer Review Process might be for it to

during May 2001) para 99. This draft MAP was referred to as draft 3a. Draft 3b is MAP merged with the Omega Plan and the UNECA Compact, the document later referred to as NAI and NEPAD).

www.sarpn.org.za/NEPAD/MAP/index.php, para 99.

¹⁹ NEPAD para 201.

²⁰ See above and the discussion on the Democracy and Political Governance Initiative of NEPAD in the previous chapter. See also J Dlodlu 'Seeking G-8 backing for MAP' *Business Day* 20 July 2001.

²¹ UNECA 'Africa/OECD Ministerial Consultation Big Table II, Amsterdam, 14-16 October 2001', summary report, www.uneca.org/thebigtable/bigtable2.htm (accessed 12 December 2005).

²² As above.

focus on the key features of the capable state; namely the capacity of the state to safeguard peace and security for its citizens, secure an enabling environment for sustained growth and poverty reduction, and facilitate the role of the private sector in development.²³

Developing the mandate

At its first meeting on 23 October 2001 in Abuja, Nigeria, the NEPAD Implementation Committee decided that 'African leaders should set up parameters for Good Governance to guide their activities at both the political and economic levels' and that it would at its next meeting 'consider and adopt an appropriate peer review mechanism and a code of conduct'.²⁴ A Sub-Committee of Heads of State and Government led by President Mbeki was tasked with drafting a 'protocol ... defining what is acceptable and what is unacceptable behaviour on the part of all our governments.'²⁵ In an answer to a question in the South African Parliament, President Mbeki stated that the Implementation Committee 'emphasised the need for peer review of government activities on the continent, to ensure that we act collectively and successfully to address issues of democracy, of human rights, of peace and stability.'²⁶

A 'draft report on good governance and democracy as well as an African Peer Review Mechanism (APRM)' was presented to the Implementation Committee

²³ As above.

²⁴ Communiqué issued at the end of the meeting of the Implementation Committee of Heads of State and Government on the New Partnership for Africa's Development, Abuja, Nigeria, 23 October 2001, Para 6.

²⁵ Reply by President Mbeki to question by Dr PWA Mulder (FF), National Assembly, 24 October 2001, reprinted in T Mbeki *Africa define yourself* (2002) 261. The word 'protocol' seems to indicate that a binding instrument was foreseen.

²⁶ As above. See also T Mbeki 'Address to the joint sitting of the National Assembly and the National Council on the New Partnership for Africa's Development' 31 October 2001, www.anc.org.za/ancdocs/history/mbeki/2001/tm1031.html (accessed 12 July 2007).

at its meeting in March 2002. It was 'strongly supported' by the Committee which stressed that:²⁷

An effective African Peer Review Mechanism, designed, owned and managed by Africans, must be credible, transparent and all-encompassing, so as to demonstrate that African leaders are fully aware of their responsibilities and obligations to their peoples, and are genuinely prepared to engage and relate to the rest of the world on the basis of integrity and mutual respect. It, therefore, mandated the Steering Committee to finalise the Report for adoption at its next meeting.

At the same meeting the Committee approved 'draft codes and standards for economic and corporate governance for Africa'.²⁸ It was decided that a suggestion for an African Peer Review Mechanism with regard to these issues should be reviewed 'by an independent, credible African institution, separate from the political process and structures'.²⁹

In May 2002 ministers from the OECD countries met ministers from Algeria, Egypt, Nigeria, Senegal and South Africa to discuss NEPAD. It was decided to have further dialogue including 'exchanging views and experience on peer review mechanisms and the requirements necessary for African countries to effectively apply them'.³⁰

The NEPAD Implementation Committee meeting in Rome on 11 June 2002 adopted the Declaration on Democracy, Political, Economic and Corporate

²⁷ Communiqué issued at the end of the second meeting of the Heads of State and Government Implementation Committee of the New Partnership for Africa's Development (HSIC), Abuja, 26 March 2002, para 11. (Hereafter HSIC 2).

²⁸ See UNECA, 'Codes and standards for good economic and corporate governance in Africa: Summary of key issues and declaration of principles', final draft, May 2002, www.uneca.org (accessed 12 December 2005).

²⁹ HSIC 2 para 14.

³⁰ OECD DAC 'The OECD and the New Partnership for Africa's Development' www.oecd.org (accessed 27 May 2005).

Governance³¹ (Governance Declaration) and a document simply called the African Peer Review Mechanism (APRM), setting out the process in 28 short paragraphs (APRM Base Document).³² Two weeks later, on 27 June, the G8, meeting in Canada, adopted its Africa Action Plan in which it stated that '[t]he peer-review process will inform our considerations of eligibility for enhanced partnerships ... We will not work with governments which disregard the interests and dignity of their people.'³³

At the Summit in Durban in July 2002 the Assembly of the new African Union 'encouraged' AU members to 'adopt' the Governance Declaration and accede to the APRM.³⁴ It also 'mandated' the Implementation Committee to further elaborate the NEPAD framework and ensure implementation of the initial action plan.³⁵ A workshop convened by the UN Office of the High Commissioner for Human Rights on the fringes of the July 2002 Summit noted that '[h]uman rights indicators need to be developed and used strategically in the APRM's evaluation process.'³⁶

In October 2002 President Mbeki indicated that the APRM should be confined to economic and corporate governance as the AU had institutions in place to deal with political governance.³⁷ The debate was however short lived as on 3

³¹ AHG/235 (XXXVIII) Annex I.

³² The APRM framework documents are available at www.aprm-international.org (accessed 14 July 2009).

³³ G8 'Africa Action Plan', adopted at the G8 summit in Kananaskis, Canada, June 2002, para 7.

³⁴ Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD Assembly/AU/Decl 1(I) para 12.

³⁵ As above, para 13.

³⁶ Office of the High Commissioner for Human Rights 'NEPAD, human rights and OHCHR', a workshop convened by the Office of the High Commissioner for Human Rights during the inaugural summit of the African Union 8 July 2002, Holiday Inn, North Beach – Durban, South Africa 5.

³⁷ J Katzenellenbogen 'Nepad vision a victim of African realpolitik' Business Day 31 October 2002. See also President Mbeki's response to this debate in his letter to Canadian Prime Minister Jean Chretien, 6 November 2002.

www.sarpn.org.za/documents/d0000137/index.php (accessed 16 May 2006). That NEPAD should focus on economic issues and political issues be left to the AU seems to

November 2002 the NEPAD Implementation Committee ‘emphasised the comprehensiveness of the APRM, which covers both political, and economic and corporate governance ...’.³⁸

At the November NEPAD meeting a Declaration of Intent to accede to the APRM was signed by Algeria, Congo-Brazzaville, Egypt, Ethiopia, Gabon, Ghana, Mali, Mauritius, Mozambique, Nigeria, Rwanda and South Africa.³⁹ Of the countries represented at the meeting Angola, Botswana, Cameroon, Mauritius, Senegal, Tunisia and Uganda did not sign the Declaration of Intent.⁴⁰ The Implementation Committee decided that the accession process to the APRM and ‘detailed criteria and indicators for measuring performance on political and economic governance’ should be devised by the NEPAD Secretariat. At the time the APRM was seen as ‘a transitional arrangement’⁴¹ to be established ‘pending the setting up of relevant institutions within the African Union.’⁴²

A Memorandum of Understanding on the African Peer Review Mechanism (MOU) was adopted by the Implementation Committee in Abuja on 9 March 2003 ‘as a framework for a formal accession to the APRM’.⁴³ By July 2009, 29

have been Mbeki’s original conception see transcription of SABC 3 interview with President Mbeki, 19 July 2001,

www.info.gov.za/speeches/2001/010725410p1001.htm (accessed 12 July 2007). Cf the proposed CSSDCA process discussed below.

³⁸ Communiqué issued at the end of the fifth summit of the Heads of State and Government Implementation Committee (HSIC) of the New Partnership for Africa’s Development, Abuja, Sunday, 03 November, 2002, para 13.

³⁹ As above, para 20.

⁴⁰ As above, para 2. See also ‘Cabinet welcomes signing of Peer Review Mechanism’ *BuaNews* 7 November 2002, www.polity.org.za (accessed 20 April 2006).

⁴¹ Communiqué issued at the end of the fifth summit of the Heads of State and Government Implementation Committee (HSIC) of the New Partnership for Africa’s Development, Abuja, Sunday, 03 November, 2002, para 14.

⁴² State of the nation address of the President of South Africa, Thabo Mbeki, Houses of Parliament, Cape Town, 14 February 2003,

www.info.gov.za/speeches/2003/03021412521001.htm (accessed 20 April 2006).

⁴³ Memorandum of Understanding on the African Peer Review Mechanism (“the MOU”) NEPAD/HSGIC/032003/APRM/MOU, 9 March 2003.

of the 53 AU member states had signed the MOU.⁴⁴ The MOU, the Governance Declaration and the APRM Base Document are the basic instruments that guide the APRM process. As will be discussed below and in the following chapter a number of other documents have been adopted to guide the review process.

CSSDCA – a discarded alternative peer review process

At the same time as the NEPAD peer review process was being developed, work was underway on developing a Memorandum of Understanding (MOU) which would give effect to the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA) Solemn Declaration. The Solemn Declaration had been adopted by the OAU Assembly in July 2000 and provided for an implementation mechanism which would include regular review meetings.⁴⁵ Experts meeting in December 2001 and May 2002 adopted MOUs on the Development and Cooperation Calabashes and the Security and Stability Calabashes. The MOUs were merged into the Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa which was adopted by the OAU Assembly in July 2002.⁴⁶ The CSSDCA MOU provided for a peer review process separate from the APRM. The CSSDCA unit in the AU Commission was mandated to

elaborate a comprehensive work programme and time schedule for its activities including administrative arrangements for overseeing the monitoring process, with diagnostic tools and measurement criteria for assessing performance, as well as

⁴⁴ Cape Verde was to have signed the MOU at the APRM Forum on 30 June 2009, thereby making it the 30th state to have signed up for review. However, at the time of writing it was unclear whether the President of Cape Verde had actually signed the MOU. See S Gruzd 'APRM Forum in Libya: Few surprises, unanswered questions', 3 July 2009, www.saiia.org.za/diplomatic-pouch/aprm-forum-in-libya-few-surprises-unanswered-questions.html (accessed 14 July 2009).

⁴⁵ CSSDCA Solemn Declaration, AHG/Decl.4 (XXXVI) (2000) para 15.

⁴⁶ Decision on the Conference on Security, Stability, Development and Cooperation (CSSDCA), AHG.Dec 175 (XXXVIII); Report of the Secretary-General on the Implementation of the CSSDCA, Council of Ministers (Seventy-sixth Ordinary Session/Eleventh Ordinary Session of the AEC), 28 June – 6 July 2002, Durban, South Africa, www.africa-union.org/Special_Programs/CSSDCA/cssdca-implementation.pdf (accessed 14 July 2009).

deficiencies and capacity restraints that impede them. All stakeholders in providing inputs for the review process will use the diagnostic tools and measurement criteria and highlight capacity restraints or gaps that should be bridged to enable higher standards of performance along with resources that should be mobilised to support this process. This process of peer scrutiny will facilitate the development of best practices and suggest ways in which they can be effectively transferred to where they are not in operation.⁴⁷

The Solemn Declaration provided for a Standing Conference of Heads of State and Government to meet every second year. The MOU stated that the process should be ‘supported by visitation panels composed of eminent, reputable Africans to carry out professional, independent and objective spot assessments in two-year circles as part of the preparation for the bi-annual Standing Conference.’⁴⁸ As will be shown in the next chapter this process clearly resembled the APRM process as set out in the APRM Base Document. The main difference was the vaguer goals in the Governance Declaration as compared to the CSSDCA MOU with its time-bound goals and indicators, and that the APRM process would be voluntary⁴⁹ as opposed to the CSSDCA process which would apply to all AU members. Many criticised the overlapping processes and in the end the CSSDCA peer review system was never implemented.⁵⁰

⁴⁷ Draft Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa, V1.

⁴⁸ As above.

⁴⁹ Governance Declaration para 28.

⁵⁰ The CSSDA unit in the AU Commission has instead focused on one of its original mandates: civil society relations with the AU and was renamed the African Citizens’ Directorate in 2005. Afrimap *et al* ‘Towards a people-driven African Union – current obstacles and new opportunities’ (2007) 29.

3.3 Purpose and mandate

By signing the MOU participating states undertake to take ‘all necessary steps to facilitate the development and implementation of a national Programme of Action ... to improve our performance in the areas of governance and socio-economic development as stipulated in the *African Peer Review Mechanism Base Document*.’⁵¹

The primary purpose of the APRM as set out in the APRM Base Document is to

foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies, and assessing the needs for capacity building.⁵²

The underlying assumption is that one set of ‘policies, standards and practices’ is applicable to every country, non-regarding different experiences. This is in particular perilous with regard to economic policy.⁵³

It is noteworthy that democracy and respect for human rights are not seen as purposes of the APRM, but as tools to be used to achieve the purpose set out above. In this the basic framework documents of the APRM are similar to the NEPAD framework document as discussed in chapter 2.

The APRM Base Document sets out the following mandate of the APRM:

The mandate of the African Peer Review Mechanism is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration

⁵¹ MOU para 21.

⁵² APRM Base Document para 3; MOU para 8.

⁵³ Cf S Browne *Aid & influence – Do donors help or hinder?* (2006); Stiglitz (2002).

on Democracy, Political, Economic and Corporate Governance. The APRM is the mutually agreed instrument for self-monitoring by the participating member governments.⁵⁴

This can be compared to the mandate as set out in the MOU:

[T]o encourage participating States in ensuring that the policies and practices of participating States conform to the agreed political, economic and corporate governance values, codes and standards, and achieve mutually agreed objectives in socio-economic development contained in the Declaration on Democracy, Political, Economic and Corporate Governance.⁵⁵

The MOU as the document actually signed by participating states takes precedence over the Base Document. This is significant as the emphasis in the APRM Base Document is to 'ensure' conformity while the emphasis in the MOU is on 'encourage'. The weaker language of the MOU ostensibly represents a weakening of the APRM, in line with the move from what was proposed to be a legally binding treaty, the Accord on the African Peer Review Mechanism, to the 'softer' framework of the MOU.⁵⁶

The wording of the MOU seems to indicate that the 'agreed' values, codes and standards with regard to political, economic and corporate governance, and the objectives with regard to socio-economic development, are those contained in the Governance Declaration. Participating states may agree on additional values, codes, standards and objectives to be monitored by the APRM. The NEPAD Implementation Committee adopted a document entitled 'Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism' (OSCI) in March 2003. OSCI was expanded into a document entitled 'Country Self-Assessment for the African Peer Review Mechanism', popularly known as the Questionnaire. At its meeting in February 2004 the APRM Forum of Heads

⁵⁴ APRM Base Document para 2.

⁵⁵ MOU para 6.

⁵⁶ The possible impact of this change is further discussed in chapter 5.

of State and Government took note of the Questionnaire and requested that it be forwarded to all participating countries.⁵⁷ Participating countries are allowed to adapt the Questionnaire to local circumstances.

In preparing the Questionnaire a technical experts meeting was held, but according to one of the participants the 'draft that has been prepared bears only modest resemblance to the experts' recommendations.'⁵⁸ Some of the questions in the experts' recommendations that had been left out related to freedom of association, the right of the opposition to access state media and Parliament's role in ensuring an accountable executive. At the time of writing the Questionnaire is being reviewed as part of the revision of the APRM framework documents.

OSCI lists objectives, discussed further below, under each of the four governance areas: democracy and political governance,⁵⁹ economic governance and management, corporate governance and socio-economic development. Under each objective OSCI lists standards, indicative criteria and example of indicators. Indicative criteria are framed as questions as to 'whether the government has taken the necessary steps to achieve the objective and attain the standards'.⁶⁰ Indicators 'are used as the means by which it is determined whether the criteria have been met'.⁶¹ In the Questionnaire OSCI's 'indicative criteria' has been renamed 'questions', while the term 'indicator' remains. OSCI and the Questionnaire set out a number of additional international instruments that are not listed in the Governance Declaration.

⁵⁷ Communiqué issued at the end of the first summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism (APR Forum), Kigali, Rwanda, 13 February 2004, para 21.

⁵⁸ R Herbert 'The survival of Nepad and the African Peer Review Mechanism: A critical analysis' (2004) 11(1) *South African Journal of International Affairs* 21-37 36.

⁵⁹ The Questionnaire refers to 'good' political governance.

⁶⁰ OSCI para 1.10.

⁶¹ OSCI para 1.10.

OSCI and the Questionnaire can be seen to expand the issues covered and codes and standards monitored compared to the briefer Governance Declaration. However, as will be discussed below, the Governance Declaration itself includes many open-ended formulations which could be used by the APRM Panel to include many codes and standards that are not explicitly incorporated into the APRM framework, for example because they were adopted after the APRM framework documents were adopted.⁶²

3.4 Indicators and benchmarking

The UNDP Human Development Report 2000, with the theme human rights and human development, states that: 'Statistical indicators are a powerful tool in the struggle for human rights'.⁶³ In a background paper to the report, Green defines a human rights indicator as 'a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation'.⁶⁴

According to Tomaševski '[t]o measure the performance of governments one needs to define what governments are required to do, and then compare this against what they are willing and able to do, demonstrated by their efforts and accomplishments'.⁶⁵

⁶² The South African Institute of International Affairs has made an attempt to collect what it calls the APRM governance standards, see South African Institute of International Affairs *APRM governance standards – An indexed collection* (2007). The 600-page collection includes the instruments specifically mentioned in the Governance Declaration, OSCI and the Questionnaire with the exception of the Report on the World Summit for Social Development (too lengthy), International Accounting Standards and the King Report on Corporate Governance (copyright), ILO and WHO standards (APRM makes general reference without specifying which standards apply). The compilation includes the African Charter on Democracy, Elections and Governance which was adopted in 2007, but not for example the African Youth Charter which was adopted in 2006.

⁶³ UNDP *Human Development Report 2000* (2000) 89.

⁶⁴ M Green 'What we talk about when we talk about indicators: Current approaches to human rights measurement' (2001) 23 *Human Rights Quarterly* 1062-1097 1065.

⁶⁵ K Tomaševski 'Indicators' in A Eide et al (eds) *Economic, social and cultural rights* (2001) 534.

Indicators can be quantitative (statistical) or qualitative,⁶⁶ and relate to outcome or process.⁶⁷ Outcome indicators are generally quantitative. Process indicators are often qualitative but can also be quantitative (eg resource allocation). Both types of indicators are used by human rights monitoring bodies with regard to both socio-economic rights and civil and political rights.⁶⁸ It can also be useful to distinguish 'between indicators of the will by states to implement the rights and indicators of their degree of achievement in relation to capacity.'⁶⁹

Kirby is of the view that at the national level the prerequisite for protection of human rights is independent courts and 'an independent legal profession which has the courage to bring difficult and unpopular cases to the courts'.⁷⁰ Other institutional arrangements, such as national human rights institutions, if effective and approachable, also work as positive indicators.⁷¹ A free media is also an important human rights indicator.⁷² But as pointed out by Kirby: 'the intangible sense of freedom which derives from general respect for human rights is resistant to mathematical measurement'.⁷³ The exception may be economic and social outcome indicators which are mainly used in the development context, but also provide important human rights indicators.⁷⁴

Indicators can be used in different ways. Some studies have made ranking-lists of country compliance with various aspects of human rights and

⁶⁶ Green (2001) 1077-1080.

⁶⁷ Green (2001) 1075. To this can be added structural indicators, S Fredman *Human rights transformed – Positive rights and positive duties* (2008) 83. I include these under process indicators.

⁶⁸ Green (2001) 1091-1094.

⁶⁹ A Eide 'The use of indicators in the practice of the Committee on Economic, Social and Cultural Rights' in A Eide et al (eds) *Economic, social and cultural rights* (2001) 545. See also Tomaševski (2001) 532, 534.

⁷⁰ M Kirby 'Indicators for the implementation of human rights' in J Symonides *Human rights: International protection, monitoring, enforcement* (2003) 335.

⁷¹ Kirby (2003) 337.

⁷² Kirby (2003) 340.

⁷³ Kirby (2003).

⁷⁴ Kirby (2003) 339-340.

democratisation.⁷⁵ The UNDP created a Human Freedom Index (HFI) to complement its Human Development Index. It was discontinued because it was based on qualitative judgments rather than quantifiable data.⁷⁶ Kirby rightly notes that '[e]veryone has his or her own notions of what freedoms are important and how they should be weighted in the scale of things'.⁷⁷ Indicators are probably more useful in measuring changes over time in one country.⁷⁸

With regard to standards and codes the indicators in the APRM Questionnaire relate to ratification of treaties and legislative and policy measures adopted to comply with the listed instruments. Easily measurable indicators with regard to international human rights treaties such as reporting status and acceptance of individual complaint mechanisms are not included.⁷⁹ Challenges experienced in implementing standards and codes are also listed as indicators.

Process indicators under the objectives can be divided into those dealing with underlying causes to the problems facing a specific country (eg 'factors that cause or are potential sources of conflicts'⁸⁰), and legislative and policy measures to address the situation and resource allocation (budgeting).⁸¹

Outcome indicators for example call on participants to '[p]rovide evidence of improved broad participation'.⁸² Statistical outcome indicators (eg '[g]rowth in

⁷⁵ Freedom house, worldaudit.org etc, Kirby (2003) 327.

⁷⁶ UNDP (2000) 91.

⁷⁷ Kirby (2003) 327.

⁷⁸ Tomaševski (2001) 542.

⁷⁹ However, they are despite this discussed in the country review reports, see the case studies in chapters 6-8.

⁸⁰ APRM Questionnaire 27.

⁸¹ The initiatives do not necessarily have to be by the state of corporate social responsibility, APRM Questionnaire 69. On budgeting for human rights see Fundar, International Human Rights Internship Program and International Budget Project *Dignity counts – A guide to using budget analysis to advance human rights* (2004). The UN Committee on Economic, Social and Cultural Rights has in several general comments called on states to adopt framework laws dealing with specific rights, Eide (2001) 546-547.

⁸² APRM Questionnaire 31.

employment per sector for the past 5 years'),⁸³ which are absent from the section on Democracy and Political Governance, are included in the sections on Economic Governance, Corporate Governance, and Socio-economic Development.

In determining which indicators to use criteria such as collectability, accuracy and comparability must be considered.⁸⁴ It is not always clear whether the APRM indicators, in particular the outcome indicators live up to these criteria. From a human rights perspective it is important to have disaggregated statistical data so that discriminatory practices are not hidden away under the guise of a national average.⁸⁵ This is recognised in the APRM Questionnaire which calls for '[s]ocial indicators disaggregated by gender, rural and urban areas'.⁸⁶ The different methods to collect the data will be discussed in the next chapter.

After the data has been collected the result should be measured against benchmarks. An example of an international benchmark is the pledge by African leaders in the Abuja Declaration on HIV/AIDS, tuberculosis and other related infectious diseases adopted by the OAU in 2001 that governments should allocate 'at least 15% of our annual budget to the improvement of the health sector'.⁸⁷ There is no mention of this declaration in the APRM framework documents.

More important than internationally agreed benchmarks are national benchmarks. The APRM process should identify existing national benchmarks and identify new ones in the POA. Specific time-bound targets with actions aimed at realising human rights should be included in the POA. The measures taken should 'prioritize the needs of the most disadvantaged and

⁸³ APRM Questionnaire 48.

⁸⁴ Green (2001) 1084.

⁸⁵ Green (2001) 1085, Eide (2001) 548.

⁸⁶ APRM Questionnaire 82, 84.

⁸⁷ OAU/SPS/Abuja/3, 24-27 April 2001, para 26.

marginalized'.⁸⁸ Progressive realisation 'means that there should ... be continuing movement towards the next target on the road to ultimate fulfilment.'⁸⁹

The APRM has a focus on best practices. These should not only be used to congratulate a country under review on a work well done but also when appropriate be seriously considered by other countries being reviewed.

3.5 The human rights mandate of the APRM

3.5.1 The Governance Declaration

The Governance Declaration identifies the 'eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance' as the most urgent of the 'grave challenges' facing Africa.⁹⁰ The Declaration is divided into five parts: Preamble, Democracy and Good Political Governance, Economic and Corporate Governance, Socio-Economic Development and the African Peer Review Mechanism.

In the Preamble the 'participating Heads of State and Government' of the AU reaffirms their 'full and continuing commitment' to a number of listed treaties and declarations. The following treaties are explicitly mentioned in the Declaration:

- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child
- Abuja Treaty establishing the African Economic Community

⁸⁸ Fredman (2008) 83. See also Eide (2001) 549.

⁸⁹ Fredman (2008) 83.

⁹⁰ Para 5.

- Protocol on the Establishment of an African Court on Human and Peoples' Rights
- Constitutive Act of the African Union
- UN Charter
- Convention on the Elimination of All Forms of Discrimination against Women

The Declaration also makes reference to the Universal Declaration on Human Rights 'and all conventions relating thereto'. The Governance Declaration specifically mentions the following declarations adopted by the OAU:

- Lagos Plan of Action for the Economic Development of Africa (1980)
- Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (1990)
- Cairo Declaration Establishing the Mechanism for Conflict Prevention, Management and Resolution (1993)
- Grand Bay Declaration and Plan of Action for the Promotion and Protection of Human Rights (1999)
- Framework for an OAU Response to Unconstitutional Changes of Government (2000)
- Conference on Security, Stability, Development and Cooperation (CSSDCA) Solemn Declaration (2000)

The member states also reaffirm their 'full and continuing commitment' to the African Charter for Popular Participation in Development (1990) and the Beijing Declaration. The Governance Declaration makes no distinction between treaties and declarations, instead dividing the list between regional and UN instruments. Thus it refers to 'We, member states parties to the aforementioned instruments' also with regard to non-binding declarations. In particular the inclusion of the African Charter for Popular Participation in Development is interesting as it was

adopted at a conference that included representatives of governments, NGOs and UN agencies.⁹¹

The ‘full and continuing commitment’ is not limited to the listed instruments but includes ‘other decisions of our continental organization, as well as the other international obligations and undertakings into which we have entered in the context of the United Nations.’ The formulation ‘We, member states parties to the aforementioned instruments’ indicates that signing the MOU does not give rise to obligations under treaties listed to which the state is not a party.

The APRM differs from many other monitoring bodies in that it is given a mandate to monitor not only compliance with its founding instrument, but with a number of other instruments, including all OAU/AU ‘decisions’ and all UN ‘undertakings’.⁹² The inclusion of instruments for which monitoring mechanisms already exists, such as the African Charter on Human and Peoples’ Rights, raises particular problems with regard to how the APRM organs should interact with these other bodies, further discussed in chapter 5.

The Governance Declaration is divided into three main headings: political governance, economic and corporate governance, and socio-economic development. In the following the structure of the Questionnaire, with corporate governance as a separate category, will be followed to set out how human rights are treated in the document that forms the basis for self-assessments and country review reports.

⁹¹ KO Kufuor ‘The African Charter for Popular Participation in Development and Transformation: a critical review’ (2000) 18 *Netherlands Quarterly of Human Rights* 7.

⁹² However, note the reporting guidelines of the CEDAW Committee which provides for not only reporting on the implementation of CEDAW but also of the Beijing Platform of Action and gender dimensions of the outcome documents of other UN conferences.

3.5.2 Democracy and political governance

Under the heading ‘Democracy and Good Political Governance’ in the Governance Declaration the Heads of State and Government renew their

determination to enforce the rule of law, the equality of all citizens before the law and the liberty of the individual; individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the constitution; equality of opportunity for all; the inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.⁹³

Commitments are also undertaken to combat corruption,⁹⁴ build capacity for conflict prevention,⁹⁵ ‘to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situation in Africa’⁹⁶ and to ‘ensure that women have every opportunity to contribute on terms of full equality to political and socio-economic development in all our countries.’⁹⁷ Seemingly there is recognition of the intrinsic value of human rights, but there is no discussion of socio-economic rights.

Paragraphs 12 to 15 set out an action plan with regard to political governance which include ensuring democracy and accountable governance in national constitutions, promoting the free and fair participation of all citizens in the political process, strengthen electoral commissions and provide the necessary resources for free and fair elections, heighten public awareness of the African

⁹³ Governance Declaration para 7.

⁹⁴ Governance Declaration para 8.

⁹⁵ Governance Declaration para 9.

⁹⁶ Governance Declaration para 10.

⁹⁷ Governance Declaration para 11.

Charter on Human and Peoples' Rights, provide for an 'accountable, efficient and effective civil service', ensuring the effective functioning of 'parliaments and other accountability institutions', ensure judicial independence, facilitate development of a vibrant civil society and ensuring 'responsible freedom of expression.' The participating states should also 'adopt clear codes, standards and indicators of good governance at the national, sub-regional and continental levels', support the African Commission and Court on Human and Peoples' Rights and adhere to AU decisions aimed at promoting democracy, good governance and peace and security.

OSCI identified nine 'key objectives' under Democracy and Political Governance:

1. Prevent and reduce intra- and inter-country conflicts
2. Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, a Bill of Rights and the supremacy of the constitution are firmly established in the constitution.
3. Promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments
4. Uphold the separation of powers including the protection of the independence of the judiciary and of an effective Parliament
5. Ensure accountable, efficient and effective public office holders and civil servants
6. Fighting corruption in the political sphere
7. Promotion and protection of the rights of women
8. Promotion and protection of the rights of the child and young persons
9. Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees

Under each objective OSCI lists some relevant standards, indicative criteria (questions) and indicators. The Questionnaire calls the promotion of democracy

and good political governance ‘the main objective of the APRM’.⁹⁸ The introduction to this part of the Questionnaire sets out three broad categories:

- A guaranteed framework for equal citizen rights (objectives 1-4)
- Institutions of representative and accountable government (objectives 5-6)
- A vibrant civil society (objectives 7-9)

It is questionable whether such a division is justifiable considering that the issues are very much interlinked. For example, women’s rights in objective 7 are clearly relevant for ‘equal citizens rights’. However, at least there is indication that human rights discourse, including the interrelatedness of different rights, has had some influence over the development of the Questionnaire as exemplified by the fact that the first category is held to include ‘issues such as access to justice, respect for the rule of law, the freedoms of expression, association and assembly, as well as the basic economic and social rights to enable citizens to exercise these freedoms effectively.’⁹⁹

The Questionnaire follows the same structure as OSCI, though standards and codes are listed in the beginning of the section with the applicable objective in parenthesis after the name of the instrument.

The question on ‘standards and codes’ is: ‘To what extent has the country taken measures to sign, ratify, adopt and comply with these standards?’¹⁰⁰ It is clear from the indicators listed that ‘adopt’ means ‘legislative, policy or institutional’ measures to implement the international instrument. Participating state are also asked to outline ‘challenges experienced and the steps taken to address shortfalls and capacity constraints.’¹⁰¹ Participants are also asked to provide ‘any official evaluation and assessments’ undertaken by the country and ‘any

⁹⁸ Questionnaire 18.

⁹⁹ Questionnaire 18.

¹⁰⁰ Questionnaire 26.

¹⁰¹ Questionnaire 26.

other surveys or reviews' which 'may usefully contribute to the country's self-assessment.'¹⁰² Findings of human rights monitoring bodies, at the national and international level, clearly have a role to play here. However, as will be shown in the case studies in chapters 6-8, the focus with regard to standards in the reviews which have been undertaken has been on whether treaties have been ratified and procedural aspects, such as state reporting has been complied with. Substantive issues have been dealt with under the various objectives as set out in the Questionnaire.

Human rights are explicitly considered under objective 2 dealing with constitutional democracy ('outline the individual and collective political rights and mechanisms and institutions to protect them'), objective 4 dealing with separation of powers (independence of the judiciary), objective 7 on the promotion and protection of the rights of women, objective 8 on the promotion and protection of the rights of children and young persons and objective 9 dealing with the promotion and protection of the rights of vulnerable groups. However, the omnibus clause on human rights is objective 3 dealing with the 'promotion and protection of economic, social and cultural rights, civil and political rights as enshrined in African and international human rights instruments.'¹⁰³ There are two questions under this objective:

1. What measures have been put in place to promote and protect economic, social, cultural, civil and political rights?
2. What steps have been taken to facilitate equal access to justice for all?

The indicators under question 1 call on participants to identify relevant legal provisions and assess the effectiveness of the provisions and mechanisms put

¹⁰² Questionnaire 26.

¹⁰³ As Hofseth Hovland notes this objective covers 'more or less what African states are expected to report on to the African Commission on Human and Peoples' Rights, reporting duties which many states have severe delays in fulfilling'. (K Hovland (2006) 'Africanising accountability? The African Peer Review Mechanism in a human rights perspective', unpublished MPhil thesis, University of Oslo, 2006, 36.

in place to promote and protect human rights rights. Major court cases from the last five years dealing with citizens rights and liberties should be discussed.

The indicators on access to justice include legal provisions and institutions, fees, proximity of courts, legal education, legal aid, alternative dispute resolution mechanisms, training, monitoring and evaluation. Participants are asked to provide any official assessment of the justice system.

While the questions and indicators in the Questionnaire raise many important issues others are left out. For example under objective 1, prevention and reduction of conflicts it would have been beneficial to also consider issues of international humanitarian law and efforts against impunity.¹⁰⁴ Another issue which is left out of the Questionnaire is the obligation to 'foster a free and independent media'.¹⁰⁵

3.5.3 Economic governance

The role of the APRM in the realization of human rights is not limited to the explicit discussions of human rights under political governance. Economic governance is essentially about how to provide opportunities for people to provide for themselves and how to obtain the necessary resources to fulfil the responsibilities of the government.

Wenar has noted that 'responsibility for averting threats to basic well-being should be located in the agent who can most easily avert the threat.'¹⁰⁶ In the context of securing an adequate standard of living he states that '[w]hen resources and opportunities are generally available, each person has primary

¹⁰⁴ See also B Manby 'The African Union, NEPAD, and human rights: The missing agenda' (2004) 26 *Human Rights Quarterly* 983-1027; R Herbert & S Gruzd *The African Peer Review Mechanism – Lessons from the pioneers* (2008) 47-49.

¹⁰⁵ R Louw 'Media freedom, transparency and governance', SAIIA occasional paper, number 11, October 2008, 4.

¹⁰⁶ L Wenar 'Responsibility and severe poverty' in T Pogge (ed) *Freedom from poverty as a human right* (2007) 258.

responsibility for doing what he can to provide himself with adequate food, clothing, shelter, and so on.¹⁰⁷ If opportunities are not available one must "step back" to the next level' of responsibility. If the 'next level' is 'unwilling or unable to take responsibility' another level of responsibility is engaged. Wenar sets out the following levels of responsibility with regard to severe poverty: individual, family, local community, national government and the international community.¹⁰⁸ The duties of a government of course extend much further than this: creating and enforcing regulatory frameworks, providing infrastructure and service delivery etc. All of this requires resources which in line with NEPAD should preferably be generated from within the state.

The Governance Declaration sets out that good economic and corporate governance are prerequisites for promoting economic growth and reducing poverty.¹⁰⁹ Economic policies determine how much resources are available in a country and can help improve levels of employment, thus allowing people to provide for themselves. However, not all would agree with the policy prescription in the Governance Declaration that governments should 'concentrate on the development of infrastructure and the creation of a macro-economic environment' while leaving the private sector to 'be the veritable engine of economic growth.'¹¹⁰ Issues such as these should be open to democratic contestation. A human rights based approach would also require that in devising economic policies not only poverty reduction as a percentage of the population is considered but also the impact of such policies on specific groups.

Eleven codes adopted by various international organisations, which 'all African countries should strive to observe within their capacity capabilities', are endorsed in the Governance Declaration¹¹¹ These codes are:

¹⁰⁷ As above.

¹⁰⁸ Wenar (2007) 270-271.

¹⁰⁹ Governance Declaration para 16.

¹¹⁰ Governance Declaration para 23.

¹¹¹ Governance Declaration para 17.

- Code of Good Practices on Transparency in Monetary and Financial Policies¹¹²
- Code of Good Practices on Fiscal Transparency¹¹³
- Best Practices for Budget Transparency¹¹⁴
- Guidelines for Public Debt Management¹¹⁵
- Principles of Corporate Governance¹¹⁶
- International Accounting Standards¹¹⁷
- International Standards on Auditing¹¹⁸
- Core Principles for Effective Banking Supervision¹¹⁹
- Principles for Payment Systems¹²⁰
- Recommendations on Anti-money laundering¹²¹
- Core principles for securities and insurance supervision and regulation¹²²

The claim that these codes have been developed 'through consultative processes that involved the active participation of and endorsement by African countries' might be correct with regard to some of the instruments, but certainly not all of them. Some of these codes have been adopted by organisations in which there is no African representation, such as the OECD. It is notable that the list is almost identical to the 'Standards and Codes Relevant for Bank and

¹¹² IMF.

¹¹³ IMF.

¹¹⁴ OECD.

¹¹⁵ IMF/World Bank (2001).

¹¹⁶ OECD (1999, revised 2004).

¹¹⁷ International Accounting Standards Board.

¹¹⁸ International Federation of Accountants.

¹¹⁹ Basle Committee on Banking Supervision (1997).

¹²⁰ Core Principles for Systematically Important Payment Systems adopted by the Committee on Payment and Settlement Systems of the Bank for International Settlements (2001).

¹²¹ Financial Action Task Force on Money Laundering.

¹²² These presumably refers to the Objectives and Principles for Securities Regulation of the International Organization of Securities Commissions and the Insurance Supervisory Principles of the International Association of Insurance Supervisors.

Fund Work' which forms the basis of the Standards and Codes Initiative launched in 1999 by the IMF and the World Bank in which these institutions evaluate the implementation of these codes.¹²³

In line with the Governance Declaration, OSCI and the Questionnaire set out five objectives under economic governance and management:

1. Promote macroeconomic policies that support sustainable development
2. Implement transparent, predictable and credible government economic policies
3. Promote sound public finance management
4. Fight corruption and money laundering
5. Accelerate regional integration by participating in the harmonization of monetary, trade and investment policies amongst the participating states

As implementation of human rights demand resources question 4 under objective 1 is particularly important: 'What has your country done to increase domestic resource mobilisation including public and private savings and capital formation, and reduce capital flight?'¹²⁴

3.5.4 Corporate governance

OSCI and the Questionnaire treat corporate governance as a separate category from economic governance. The following objectives are set out:¹²⁵

1. Provide an enabling environment and effective regulatory framework for economic activities
2. Ensure that corporations act as good corporate citizens with regard to human rights, social responsibility and environmental sustainability

¹²³ International Monetary Fund & The World Bank The Standards and Codes Initiative – Is it effective? And how can it be improved? (2005).

¹²⁴ Questionnaire 49. Cf NEPAD paras 144-145.

¹²⁵ OSCI 60.

3. Promote the adoption of codes of good business ethics (eg Cadbury and King codes) in achieving the objectives of the organisation
4. Ensure that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner
5. Provide for accountability of corporations and directors

Human rights are explicitly discussed under objective 2. According to the introduction to the corporate governance section of the Questionnaire:¹²⁶

Some of the specific issues covered include employee rights, provision of safe working environment and fair wages; the degree of corporations' responsiveness to community needs including focus on issues such as health (HIV/AIDS, Malaria, Tuberculosis (TB), Yellow Fever), education and skills development; and responsible behaviour with regard to the environment including environmental rehabilitation projects, environmental impact assessments, recycling and use of clean technology.

Three questions are set out under this objective:

1. Are there measures in place to ensure that corporations recognise and observe human [sic] and labour laws?
2. To what extent are corporations responsive to the concerns of the communities in which they operate?
3. What measures have been put in place to ensure sustainable management on the part of corporations?

The indicators under question 1 are:

Describe your country's labour laws particularly with regard to:

- Employee's rights including the right to unionise
- The procedures for handling and settling labour disputes

¹²⁶ Questionnaire 61.

Assess the level of corporations' compliance with labour laws and human rights provisions with reference to:

- The provision of a safe working environment and fair wages to employees
- Corporations' handling of employee disputes, safety issues and matters relating to employee compensation for injury in the workplace
- Number of trade unions, the percentage share of the workforce belonging to a trade union, and the effectiveness of trade unions in resolving labour disputes
- Number and frequency of mass industrial and labour disputes and strikes
- Citation and prosecution of corporations for labour and human rights violations and details of sanctions imposed.

While these issues are important it must also be recognised that they tend to neglect the informal sector through which most Africans earn their living.

3.5.5 Socio-economic development

The Governance Declaration states under the heading 'Socio-economic development' that

poverty can only be effectively tackled through the promotion of democracy, good governance, peace and security; the development of human and physical resources; gender equality; openness to international trade and investment; allocation of appropriate funds to social sector and; new partnerships between governments and the private sector, and with civil society.¹²⁷

The Heads of State and Government undertake to provide 'more and better education and training, especially in Information and Communications Technology (ICT) and other skills central to a globalising world; and better health care, with priority attention to addressing HIV/AIDS and other pandemic diseases'¹²⁸ and to ensure gender equality.¹²⁹

¹²⁷ Governance Declaration para 20.

¹²⁸ Governance Declaration para 21.

OSCI and the Questionnaire sets out the following objectives:

1. Promote self-reliance in development and build capacity for self-sustaining development
2. Accelerate socio-economic development to achieve sustainable development and poverty eradication
3. Strengthen policies, delivery mechanisms and outcomes in key social areas including education and combating of HIV/AIDS and other communicable diseases
4. Ensuring affordable access to water, sanitation, energy, finance (including micro-finance), markets, ICT, shelter and land to all citizens, especially the rural poor
5. Progress towards gender equality in all critical areas of concern, including equal access to education for girls at all levels
6. Encourage broad-based participation in development by all stakeholders at all levels

The APRM framework documents do not include references to human rights in the governance area of socio-economic development, though some human rights standards are listed as relevant to socio-economic development. There is clearly much duplication in the reports due to the same issues being treated as human rights issues under political governance and as developmental issues under socio-economic development.

User charges for basic public services is very much an issue in many African countries in particular in the context of privatisation. Such charges can be seen as 'regressive taxation' disadvantaging the poor.¹³⁰ The Questionnaire highlights the issue under objective 4 in posing the question: 'What policies and strategies has the government put in place to ensure that all citizens, in

¹²⁹ Governance Declaration para 22.

¹³⁰ K Tomaševski 'Unasked questions about economic, social, and cultural rights from the experience of the Special Rapporteur on the Right to Education (1998-2004): A response to Kenneth Roth, Leonard S Rubenstein and Mary Robinson' (2005) 27 *Human Rights Quarterly* 709-720 718.

particular the rural and urban poor, have affordable access to basic needs?¹³¹
The indicators under this question illustrate a recognition of human rights principles such as accountability and non-discrimination:

- (i) Provide evidence of legal, policy, processes and institutional steps to ensure affordable access to basic needs;
- (ii) Provide evidence of the resources mobilised and allocated and criteria for such allocation;
- (iii) Describe the results achieved in terms of:
 - Percentage of population disaggregated by region, residence, gender, social category, etc. with affordable access to basic needs,
 - Availability and accessibility of basic services to rural and urban poor and other vulnerable groups,
 - Particular impact of the privatisation of public utilities where applicable;
- (iv) Outline the challenges faced and steps to address these constraints.

3.5.6 Overlap

There is much overlap within and between the four governance areas, for example with regard to corruption which is dealt with both under political governance and economic governance. The problem of overlapping is made worse by the fact that analysts, both at the national and international level, are assigned to one specific governance area and there is thus a risk of conflicting outcomes. That this risk is not only theoretical is clear from a perusal of the country review reports which have been published so far.

3.5.7 Standards not included in the APRM framework

Among UN treaties which have not been explicitly included in the APRM framework documents are the Convention on the Prevention and Punishment of the Crime of Genocide, the Optional Protocol to the Convention on the

¹³¹ Questionnaire 84.

Elimination of All Forms of Discrimination against Women,¹³² and the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. No mention is made of the UNESCO Convention against Discrimination in Education. With regard to instruments on international humanitarian law only Geneva Convention IV relating to protection of civilian persons in time of war is mentioned in any of the APRM documents. There is no mention of the Statute of the International Criminal Court. While many of the outcome documents of the UN World Conferences are referred to, there is no mention made of the Vienna Declaration and Programme of Action. Many of the major declarations dealing with administration of justice and protection of detained persons have also been left out.¹³³ In addition to the instruments which have been left out, recently adopted treaties such as the Convention on the Rights of Persons with Disabilities and the Convention for the Protection of All Persons from Enforced Disappearance should also be considered.

With regard to African Union instruments there is no reference to the Protocol to the African Charter on Human and Peoples' Rights on establishment of an African Court on Human and Peoples' Rights. There is also no reference to the Convention on the Prevention and Combating of Terrorism and the Protocol thereto. The Declaration and Plan of Action for the Promotion and Protection of Human Rights adopted by the first OAU ministerial conference on human rights in Mauritius in 1999 is referred to but not the Declaration of the first AU ministerial conference on human rights in Kigali, Rwanda, in 2003. There is no reference to the many resolutions of the African Commission which provides an authoritative view on the content of the brief and often vague provisions of the Charter.

¹³² This protocol sets out procedures for individual complaints and inquiries.

¹³³ These include the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles of Medical Ethics, Basic Principles on the Independence of the Judiciary, Basic Principles on the Role of Lawyers, Declaration on the Protection of All Persons from Enforced Disappearances, Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and the Basic Principles for the Treatment of Prisoners.

3.5.8 Conflicting standards and codes

It is not clear from the APRM framework how to deal with standards and codes set out in the Governance Declaration, OSCI and the Questionnaire which conflict with each other. As will be clear from the case studies in chapters 6 to 8 the situation may not arise as actual compliance monitoring with the specific standards and codes is often lacking in the country review reports. However, should the question arise the conflicting codes and standards would have to be examined in the light of the values set out in the Governance Declaration.

3.6 Concluding remarks

The genesis of the APRM can be traced to the lack of monitoring of agreed goals. In addition to lack of commitment and resources, a lack of monitoring has been identified as having contributed to the failure of the various development plans of the past. The APRM sets out to fill this gap. However, it must be noted that the APRM is not about measuring compliance with the NEPAD Declaration which only features as one of many international instruments underlying the process.

The APRM framework is far from straightforward with its myriad of standards and codes. The picture gets even more complicated when one considers the recommendations in the country review reports or the action points in the Programme of Action which are often not clearly based on any enumerated standard or codes or on popular views. However, the focus of this chapter has been on how human rights are dealt with in the APRM framework. Actual practice will be dealt with in the case studies in part II of this study. It is clear from the overview above that human rights have been considered quite extensively in designing the APRM but that there is a lack of coherence

between and within the framework documents in particularly the overly detailed Questionnaire.

To fulfil its potential it is imperative that the APRM should use a rights-based approach to development. Such an approach is goal orientated in that it seeks the realisation of everyone's human rights and also process orientated in that it requires a 'participatory, non-discriminatory, transparent, and accountable' development process.¹³⁴ Such an approach is evident to some extent in the APRM framework documents in particular in the Questionnaire. As has been noted in this chapter there is however much that can be improved in the current framework.¹³⁵ The impact of the current framework on the first country review reports will be evaluated in the case studies in part II of this study.

In order for the APRM to contribute to a rights-based development process it must itself be guided by these requirements. The extent to which this is the case will be examined in the next chapter.

¹³⁴ SP Marks & BA Andreassen (2006) 'Introduction' in BA Andreassen & SP Marks (eds) *Development as a human right – Legal, political and economic dimensions* (2006) vii.

¹³⁵ At the time of writing the outcome of the current review process of the APRM framework documents was not known.

CHAPTER 4

STRUCTURE AND PROCESS: PARTICIPATION, ACCOUNTABILITY AND TRANSPARENCY

4.1 Introduction

This chapter first gives a brief overview of how the APRM process works. It thereafter sets out the institutions which have been established at the international and national level to implement the APRM.

The former chairperson of the APRM Forum, Chief Olusegun Obasanjo has noted that ‘[i]f the APRM is to be credible and effective, it will need to be transparent and engage all the stakeholders in each country.’¹

Participation of all concerned in devising policies and responses to governance deficiencies is essential for a rights-based approach. In analysing the APRM process this chapter thus considers to what extent effective non-discriminatory participation of all stakeholders has been ensured.

To ensure accountability structures must be in place to make sure that identified governance deficiencies are addressed. The Programme of Action (POA) forms the basis for ensuring that rhetoric is replaced by action. However, the POA is not enough in itself. There is need for vigilance from all parts of society in ensuring that it is implemented.

Transparency is essential both for effective participation and accountability and the chapter discusses to what extent the APRM has been implemented in a transparent manner in the participating countries and the extent to which the international APRM structures have helped in ensuring transparency.

¹ African Peer Review Mechanism *Annual report 2006 (2007)* vii.

4.2 The review process

The APRM Base Document sets out a five stage process.² The first stage involves a background study by the APRM Secretariat, based in South Africa, which is conducted parallel to a self-assessment at the national level. The background study and self-assessment are based on the Questionnaire discussed in the previous chapter. A country support mission is fielded before the commencement of the self-assessment to ensure that the national structures needed to conduct the review in accordance with the guidelines are in place. The country under review prepares a preliminary Programme of Action to respond to the governance shortcomings identified in the self-assessment.

The first step for a country that will undergo a review is to establish the necessary national structures as described below. When a country considers that it has made sufficient progress in establishing these structures it requests a support mission. This mission is undertaken with the purpose to

ascertain the extent of preparedness and the capacity of the country to participate in the peer review process, and particularly to undertake its self-assessment and draft its National Programme of Action. The Support Mission is also intended to create common understanding of the overall APRM processes and instruments, and to ensure that the institutional and organisational arrangements provide for active involvement and participation of major stakeholders on an ongoing basis.³

The support missions usually last around three days. The support mission team consists of seven to nine members, including staff from the APRM Secretariat, the UN Economic Commission for Africa (UNECA), the African Development Bank (ADB) and the UN Development Programme (UNDP). The team is led by

² APRM Base Document paras 18-25.

³ APRM country support missions to Ghana, Rwanda and Mauritius, press release, 18 June 2004.

the member of the APRM Panel of Eminent Persons responsible for the review of that country. During the support mission an MOU on technical assessments and the country review visits is concluded between the APRM Panel and the country reviewed represented by the APRM National Focal Point.

The APRM Secretariat has indicated that it will send advance missions to certain countries that have signed up for the APRM but which have not reached a stage which would merit the sending of a support mission.⁴ With regard to participating states that have received a support mission, the Panel can decide to send a follow-up mission as it has done with regard to Algeria, Kenya, Nigeria, South Africa and Uganda. Such follow-up missions are necessary with regard to countries which have experienced a long delay in implementing the APRM process.⁵ At the time of writing a number of countries which have signed the MOU had still not taken any action to start the review process.⁶

Stage two consists of the visit by the country review team after the self-assessment and the preliminary Programme of Action has been submitted to the APRM Secretariat. The country review mission is undertaken by a team which is normally led by the same Panel member that undertook the support mission.⁷ Review missions had by July 2009 been sent to Ghana (April 2005), Rwanda (April 2005), Kenya (October 2005), South Africa (July 2006), Algeria (December 2006, March 2007) and Benin (July-August 2007), Uganda

⁴ African Peer Review Mechanism *Annual report 2006* 3. An advance mission consisting of Ambassador Kiplagat and an APRM Secretariat staff member was sent to Sudan in April 2007

⁵ Uganda launched the self-assessment process only in February 2007, two years after the country support mission which should have kick-started the process. Nigeria received a follow-up mission in July 2007, almost two and a half years after the country support mission. Burkina Faso which had received a country support mission in June 2006 launched its self-assessment in October 2007. Mozambique held its first stakeholder conference in August 2007, a year after the country support mission. Sierra Leone started the APRM process in September 2008, more than four years after signing the MOU.

⁶ For details on the status of implementation of the APRM in the countries which have signed the MOU see annex.

⁷ However, the country review mission to Rwanda was led by Dr Njeuma and not by Ms Savané who had conducted the support mission. J Wangui 'NEPAD team lauds Kagame' *The New Times* (Kigali), 1 May 2005, allafrica.com (accessed 24 May 2005).

(February 2008), Burkina Faso (February 2008), Nigeria (February-March 2008), Mali (December 2008), Lesotho (January-February 2009) and Mozambique (February 2009).

Stage three is the preparation of the country review report following the country review mission. At the fourth stage the report is submitted for discussion among the peers in the APRM Forum of Heads of State and Government. By July 2009 the reports of the 12 countries listed above had been considered by the Forum.

The fifth stage consists of the report being publicly tabled in the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the Peace and Security Council and ECOSOCC. This should take place six months after its consideration by the Forum.

The APRM Base Document sets out that the review process from the start of stage one until submission of the report to the Forum should not exceed six months.⁸ In February 2004 the Panel expressed the hope that the 16 countries that had signed up by then should be reviewed by March 2006.⁹ By that time only one country had completed the review process. It is thus clear that the time frames set out at the beginning of the process were overly optimistic.

4.3 Institutional structure at the international level

4.3.1 Forum of Heads of State and Government

The highest decision making body of the APRM is the Forum of Heads of State and Government of the participating states. Both the NEPAD Implementation Committee and the APRM Forum of Participating Heads of State and Government (APRM Forum) can be seen as sub-committees to the AU

⁸ APRM Base Document para 26.

⁹ D Mageria 'Africa to review 16 nations' governance by 2006' *Reuters* 14 February 2004, www.reuters.com

Assembly of Heads of State and Government. The NEPAD Implementation Committee took a number of decisions with regard to the APRM, especially during the early development of the process.¹⁰ As the Forum of Heads of State and Government now meets regularly on the fringes of the bi-annual AU Assembly meetings, there is no longer a need for the NEPAD Implementation Committee to deal with the APRM. Indeed, the APRM has been delinked from NEPAD.¹¹

The Forum meets at least twice a year.¹² President Obasanjo of Nigeria presided over the Forum from its inception until he stepped down as president of Nigeria in May 2007. He was replaced as chairperson of the NEPAD Implementation Committee and the Forum by Prime Minister Meles Zenawi of Ethiopia.¹³

¹⁰ Decisions concerning the APRM were taken by the NEPAD Implementation Committee at its summits in October 2001, March, June and November 2002, March and May 2003, May 2004 and April 2005.

¹¹ Presentation by Dr Hespina Rukato, Pretoria, 4 June 2009. See also B Manby 'Application of the criteria for periodic evaluation of global development partnerships, as defined in Millennium Development goal 8, from the right to development perspective: Further analysis of the African Peer Review Mechanism and the ECA/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD', report to the Working Group on the Right to Development, UN Doc A/HRC/8/WG.2/TF/CRP.5, 28 December 2007 para 20.

¹² The APRM Forum held its first meeting in Kigali, Rwanda on 13 February 2004, the day before the ninth Summit of the NEPAD Implementation Committee. The second Forum was held in connection with the 12th Summit of the NEPAD Implementation Committee in Algiers on 23 November 2004. The third Forum was held in Abuja, Nigeria on 19 June 2005, announcing that the fourth APRM Forum would be held in the middle of August 2005. However, the Forum was later postponed and held in conjunction with the AU Summit in Khartoum, Sudan, in January 2006. Since then the APRM Forum has met in connection with the AU Summits: fifth Forum, Banjul, July 2006, sixth Forum, Addis Ababa, January 2007, seventh Forum, Accra, 1 July 2007, eighth Forum, Addis Ababa, January 2008, ninth Forum, Sharm el Sheik, Egypt, July 2008. An 'extraordinary' Forum was held in October 2008 in Cotonou, Benin. On the extraordinary Forum see www.forumextra1maep.bj/actu.php and S Gruzd 'Peer review progress, but many miss the meeting', South African Institute of International Affairs, 29 October 2008, www.saiia.org, (accessed 7 July 2009).

¹³ T Mbeki 'Letter from the president', *ANC Today*, vol 7 no 4, 2-8 February 2007. N Fethi 'NEPAD at the crossroads', *Magharebia*, 23 March 2007, www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2007/03/23/feature-02 (accessed 7 July 2009).

The main function of the Forum is to exercise peer pressure to persuade the state under review to initiate changes suggested in the APRM country review report.¹⁴ In addition the Forum adopts the various documents that form the APRM framework and appoints the members of the Panel.¹⁵ The Forum also approves the list of partner institutions and consultants. The Forum has also started to have general discussions about common problems facing the continent.¹⁶

The peer review undertaken by the Forum will be discussed further below.

4.3.2 Panel of Eminent Persons

The APRM Base Document provides for the APRM to be ‘directed and managed by a Panel of between 5 and 7 Eminent Persons.’¹⁷ The Panel has an oversight function and should ensure the integrity of the process.¹⁸ The APRM Base Document makes provision for a ‘Charter’ that should set out its ‘mission and duties’ and ‘secure the independence, objectivity and integrity of the Panel’. Such a Charter has not been adopted, but in February 2004 the Forum approved Rules of Procedure of the Panel and the Secretariat.¹⁹ The mandate of the Panel is to ‘exercise oversight of the APR process with a view to ensuring the independence, professionalism and credibility of the process.’ In particular the Panel:

- Reviews and adopts the work plan and budget prepared by the Secretariat;
- Approve the terms of any agreements that may be necessary for the proper conduct of the APRM;

¹⁴ APRM Base Document para 24.

¹⁵ Many decisions with regard to the APRM process have however been taken by the NEPAD Implementation Committee.

¹⁶ African Peer Review Mechanism *Annual report 2008* (2009).

¹⁷ APRM Base Document para 6.

¹⁸ APRM Base Document para 10

¹⁹ The Rules and Procedures of the APR Panel and the APR Secretariat NEPAD/APR FORUM1/02-2004/Rules/Doc2a. (Hereafter Rules).

- Approve plans for missions and the composition of the review teams;
- Examine the country review reports and make recommendations to the APR Forum;
- Present an annual report to the APR Forum on the implementation of the APRM;
- Initiate seminars and consultations;
- Review the APRM ‘from time to time’ and make recommendations to the Forum.

The Panel should meet at least four times a year, normally at the Secretariat in South Africa.²⁰ The Panel has issued communiqués after some of its meetings, but not on a regular basis.²¹ Relevant material should be distributed to the members at least ten days prior to the meeting.²² Five members constitute quorum for a meeting of the Panel. Decisions are taken by a majority of the votes cast.²³ The Executive Director of the APRM Secretariat acts as Secretary of the Panel.²⁴

Candidates to the Panel should be nominated by participating countries. However, only two of the initial panel members came from countries that had signed up for the APRM at the time of their appointment. At the sixth summit of the NEPAD Implementation Committee in March 2003 the chairperson of the Committee, President Obasanjo, was mandated to discuss with each African

²⁰ Rules paras 16 & 18.

²¹ Communiqué issued at the end of the second meeting of the African Peer Review Mechanism (APRM) Panel of Eminent Persons (APR Panel) held at Hilton Hotel, Johannesburg, South Africa, 3-4 October 2003; Communiqué issued at the end of the second meeting of the African Peer Review Mechanism (APRM) Panel of Eminent Persons (APR Panel) held at Hilton Hotel, Abuja, Nigeria, 14-15 November 2003; The fifth meeting of the African Peer Review Mechanism (APRM) Panel of Eminent Persons (APR Panel) held at the Sun Intercontinental Hotel, Johannesburg, South Africa, 29th-30th April 2004, communiqué; Press release following the 13th meeting of the African Peer Review Mechanism Panel of Eminent Persons, 12-13 August 2005 (Johannesburg); Communiqué of the 15th meeting of the African Peer Review Mechanism Panel of Eminent Persons 19-20 January 2006, Khartoum, Sudan.

²² Rules para 19.

²³ Rules para 20.

²⁴ Rules para 21.

region who should be appointed to the Panel. At the following NEPAD summit in May 2003 six persons were appointed as members of the panel: Adebayo Adedeji (Nigeria) and Marie-Angelique Savané (Senegal) for west Africa, Bethuel Kiplagat (Kenya) for east Africa, Dorothy Njeuma (Cameroon) for central Africa and Graca Machel (Mozambique) and Chris Stals (South Africa) for southern Africa. At the third meeting of the Panel in November 2003, President Obasanjo noted the appointment of Mourad Medelci (Algeria) as the seventh member of the Panel. The APRM Forum, meeting in February 2004, confirmed the appointment effective from 27 July 2003. When Mr Medelci became a minister in May 2005, the Algerian president Bouteflika was given the choice of who to replace him with. Mr Medelci's compatriot Mohammed Seghir Babes became the new representative of the northern region.²⁵

The APRM Forum appoints the chairperson of the Panel. At the third meeting of the Panel in Abuja in November 2003, President Obasanjo appointed Ms Savané as chairperson. Mr Kiplagat became chairperson in June 2005, replaced by Dr Njeuma in 2006. Professor Adedeji was appointed chairperson by the Forum in July 2007.²⁶

The initial term of appointment for Panel members is four years.²⁷ As the terms thus expired in May 2007, the Forum extended the terms of all the Panel members for one year at the Forum in July 2007.²⁸ Panel members may offer themselves for reappointment. It was decided that three new members should be elected at the Forum in July 2008 and four new members at the Forum in

²⁵ Press release following the 13th meeting of the African Peer Review Mechanism Panel of Eminent Persons.

²⁶ Communiqué issued at the end of the 7th summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism [APR Forum] 01 July 2007, Accra, Ghana 4. (Hereafter 7th summit communiqué). His term was extended by a year at the Forum in January 2009. Communiqué issued at the end of the tenth summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism (APRM Forum), 31 January 2009, Addis Ababa, Ethiopia. (Hereafter 10th summit communiqué).

²⁷ Rules para 10.

²⁸ 7th summit communiqué 4.

January 2009.²⁹ However, by July 2009 only one new member had been elected to the Panel, Ms Domitille Mukantaganzwa from Rwanda.³⁰ Dr Stals and Ms Savané have retired from the Panel.³¹ There are plans to expand the number of Panel members.³²

In appointing the members of the Panel the Forum should ensure that the candidates are Africans 'of high moral stature and demonstrated commitment to the ideals of Pan Africanism.' They should 'have distinguished themselves in careers that are considered relevant to the work of the APRM'. The Panel should have 'expertise in the areas of political governance, macro-economic management, public financial management and corporate governance.' Regional balance, gender equity and cultural diversity should also be considered in appointing the members of the Panel.³³

Some of the members of the Panel have been criticised for being too close to government.³⁴ However, the first reviews indicate that they have undertaken their work in an independent and impartial manner without any political interference. A more fitting critique is with regard to the system of appointment of the members of the Panel. The APRM Forum in January 2009 'mandated the Panel to come up with transparent procedures for appointing members of the Panel as well as modalities of designating the Chairperson at the next meeting of the APR Forum.'³⁵ A welcome development would be if the Forum started to

²⁹ JP Tougouma 'Mécanisme africain d'évaluation par les pairs - Relever le défi de la gouvernance', *Sidwaya* (Ouagadougou), 15 February 2008, allafrica.com (accessed 26 February 2008).

³⁰ 'Gacaca boss elected among AU monitors', *New Times* 2 February 2009, www.rwandagateway.org/article.php3?id_article=10627 (accessed 15 July 2009). See also 10th summit communiqué para 22.

³¹ 10th summit communiqué para 22. Dr Stals noted in an interview that he asked to be replaced when his five-year mandate was up. Interview with Chris Stals, Pretoria, 16 July 2009.

³² Interview with Ambassador Bethuel Kiplagat, Pretoria, 15 December 2008.

³³ APRM Base Document paras 6-7. The extent to which the composition of the Panel fulfils these requirements will be discussed in chapter 5.

³⁴ I Taylor *Nepad - Toward Africa's development or another false start* (2005).

³⁵ 10th summit communiqué para 22.

appoint the members of the Panel in a transparent manner which would include civil society consultations.

4.3.3 Secretariat

To support the Panel the APRM Base Document provides for the establishment of a 'competent' Secretariat.

The functions of the Secretariat include

maintaining extensive database information on political and economic developments in all participating countries, preparation of background documents for the Peer Review Teams, proposing performance indicators and tracking performance of individual countries.³⁶

The mandate of the Secretariat is further elaborated in the 'Rules and Procedures of the APR Panel and the APR Secretariat' and include to:

- Organise the country review visits;
- Liaise with other international organisations;
- Liaise with interested external partners and supporting participating countries in raising money for the APRM process;
- Facilitate technical assistance;
- Organise workshops and regional networks.

The MOU provides that the NEPAD Secretariat shall act as APRM Secretariat until the latter has been established. The decision to place the APRM Secretariat under NEPAD reversed an earlier decision by the NEPAD Implementation Committee that the Secretariat should be located in UNECA.³⁷

³⁶ APRM Base Document para 12.

³⁷ Communiqué of the third meeting of the Heads of State and Government Implementation Committee of the New Partnership for Africa's Development (NEPAD), 11 June 2002, Rome, Italy, para 9.

A separate APRM Secretariat was later established but both the NEPAD Secretariat and the APRM Secretariat were housed in the headquarters of the Development Bank of Southern Africa (DBSA) in Midrand, South Africa.³⁸

The African Union concluded host agreements with the government of South Africa for the APRM and NEPAD Secretariats in October 2008.³⁹ Before this the DBSA contracted staff and consultants for the APRM and NEPAD and administered funds.⁴⁰ This is despite the fact that the Rules and Procedures of the APR Panel and the APR Secretariat provided that the Executive Director of the APRM Secretariat should be the legal representative of the APRM.⁴¹ Through the host agreement the South African government provides the APRM Secretariat with legal status as 'an AU office operating outside the headquarters of the AU'. The Chairperson of the Panel of Eminent Persons or his or her representative is given the power to conclude contracts, acquiring and disposing of property and receiving and instituting legal proceedings.⁴²

³⁸ The NEPAD Secretariat relocated at the end of 2008. The NEPAD and APRM Secretariats were housed in the DBSA at the request of South African President Mbeki. Development Bank of Southern Africa *Activities report 2005-2006* (2006)

www.dbsa.org/Research/Documents/DBSAActivitiesReport2005-2006.pdf (accessed 16 October 2007). DBSA has provided a variety of services for the APRM and NEPAD Secretariat including human resources management. This support was still in place as of July 2009. Interview with Chris Stals, Pretoria, 16 July 2009.

³⁹ Host agreement between the government of the Republic of South Africa and the African Union on an interim AU office for the APRM operating outside the African Union headquarters, 9 October 2008, *Government Gazette* no 31583, 14 November 2008, 21-34 (APRM host agreement). Host agreement between the government of the Republic of South Africa and the African Union on an interim AU office for the NEPAD operating outside the African Union headquarters, 9 October 2008, *Government Gazette* no 31583, 14 November 2008, 7-20. The APRM host agreement follows the decision of the the AU Assembly in July 2008 adopted that 'the APRM Forum, the APRM Panel and the APRM Secretariat shall be part of the processes and structures of the African Union' and its request for the AU Commission to negotiate and conclude a host agreement with South Africa. Decision on the African Peer Review Mechanism, Assembly/AU/Dec.198(XI) paras 6 & 7.

⁴⁰ DBSA was the 'legal face' of NEPAD which meant that South African rules and regulations had to be applied by the NEPAD and APRM Secretariat. Presentation by Dr Hespina Rukato, Pretoria, 4 June 2009.

⁴¹ Rules para 26.

⁴² APRM host agreement article 2.

The Executive Director is appointed by the Panel for a three-year term, renewable once.⁴³ In October 2003 Dr Kerfalla Yansane, a Guinean economist, was appointed by the Panel to lead the Secretariat for six months while an Executive Director was recruited.⁴⁴ In 2005 Dr Bernard Kouassi was appointed as Executive Director of the Secretariat.⁴⁵ In July 2008 the Forum decided not to renew the contract of Dr Kouassi.⁴⁶ Staff of the APRM Secretariat must be nationals of an African country, but not necessarily one that has acceded to the APRM. According to a former member of the Panel, the Secretariat suffers from lack of research capacity and much of the time of its staff is devoted to administrative tasks and the planning of review missions.⁴⁷

According to the Rules and Procedures, members of the Panel, the Executive Director and Secretariat staff shall 'be granted in the territory of Participating Countries such rights, immunities and privileges as may be necessary for the independent exercise of their functions, in accordance with the General Convention on the Privileges and Immunities of the Organization of African Unity and the Vienna Convention on Diplomatic Relations, 1961.'⁴⁸ Immunities are further provided for in the host agreement.

4.3.4 Partner institutions and consultants

The Panel presented a provisional list of partner institutions to the Forum in February 2004. The Forum took note of the list and 'further mandated the APR

⁴³ Rules para 24. It is noteworthy that it is the Panel and not the Forum or the AU that appoints the Executive Director.

⁴⁴ Communiqué issued at the end of the second meeting of the African Peer Review Mechanism (APRM) Panel of Eminent Persons (APR Panel) held at Hilton Hotel, Johannesburg, South Africa, 3-4 October 2003.

⁴⁵ Dr Kouassi is an Ivorian economist, who prior to his appointment was the Executive Secretary of *Sécurité Alimentaire Durable en Afrique de l'Ouest Centrale*, an organisation based in Burkina Faso dealing with food security in Burkina Faso, Côte d'Ivoire, Ghana, Mali and Togo.

⁴⁶ E-mail communication from Steven Gruzd, South African Institute of International Affairs, 11 September 2008.

⁴⁷ Interview with Chris Stals, 16 July 2009.

⁴⁸ Rules para 30.

Panel to work out modalities for establishing relations with other institutions on the continent that may be able to assist and facilitate its work.⁴⁹ The functions of the partner institutions include the following:⁵⁰

- Advice the Panel and Secretariat;
- Sharing information and experiences;
- Advising participating countries.

The list of partner institutions is divided between strategic partners and regional and international resource institutions. The strategic partners are the organs/units of the African Union. Specifically mentioned are the African Commission on Human and Peoples' Rights,⁵¹ the African Committee on the Rights and Welfare of the Child, the Peace and Security Council, the Pan-African Parliament and the CSSDCA unit of the AU Commission.⁵² It also makes provision for including '[a]ny other organ, committee or unit of the AU as they are established or operationalised such as the election monitoring committee and the Court of Justice.' ECOSOCC is not included on the list, but as the voice of civil society in the AU it could play a role in the process. The AU organs have not actively participated in the APRM process with the exception of the presentation of the country review reports to the Pan-African Parliament discussed further below.

⁴⁹ Para 23.

⁵⁰ Provisional list of partner institution for the APRM, NEPAD/APRM/FOURUM/02-2004/listPIs/Doc7.C.

⁵¹ The working group of the African Commission dealing with the review of its Rules of Procedure discussed including reference to cooperation with the APRM in the revised Rules of Procedure. BTM Nyanduga 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights – The system in practice 1986-2006* (2008) 403. However, in the interim Rules of Procedure circulated for comments in January 2009 there is no specific reference to the APRM. Rule 126(1) provides that: 'The Commission, in fulfilling its mandate, shall establish formal relations of cooperation, including meetings as necessary, with all African Union organs, institutions and programmes that have a human rights element in their mandate.'

⁵² The CSSDCA unit has been renamed the African Citizens' Directorate to better reflect its current mandate of facilitating civil society engagement with AU organs.

The strategic partners further include the African Development Bank (ADB), the United Nations Economic Commission for Africa (UNECA) and the Africa Bureau of the United Nations Development Programme (UNDP). These three institutions have actively participated in the process, at their own cost, for example through staff members participating in the country review visits.⁵³

Regional resource institutions include the regional economic communities (RECs), the Association of African Central Banks, the Centre for Corporate Governance and private sector associations linked to the RECs, the African Academy of Sciences and the African Capacity Building Foundation. International resource institutions include the UN and its agencies, the OECD, the EU Commission, the Commonwealth, the *Francophonie*, the Arab League, the South Centre, the IMF, the World Bank, the Bank for International Settlements and the International Institute for Democracy and Electoral Assistance (IDEA).

The APRM Secretariat has relied heavily on consultants for the country review teams. Some of these consultants have been associated with regional resource institutions. The process for selection of consultants is unclear apart from that they should be Africans, though they may live in other parts of the world. It is clear that the length of the country review missions (which can last up to a month as discussed further below) have an impact on the pool of available consultants.

⁵³ On the participation of UNECA see the reports written by participating staff members after each mission available at geoinfo.uneca.org:8777/cf/APRM/index.cfm (accessed 26 December 2008).

4.4 The national structures and process: Ensuring participation and credibility

4.4.1 The meaning of participation

The MOU provides that participation of ‘all stakeholders ... including trade unions, women, youth, civil society, private sector, rural communities and professional associations’ in the development of the Programme of Action should be ensured.⁵⁴

A stakeholder is someone who has ‘an interest or share in an undertaking or enterprise’.⁵⁵ Since the objective of the APRM is to improve the performance of the participating states in the four governance areas it follows that all residents of a state are stakeholders in this ‘undertaking’. This definition of stakeholder also corresponds to the examples given in the MOU as set out above. Participation of stakeholders should not be equated with civil society participation. For example parliaments can play an important role in the APRM process.⁵⁶

Participation must include collecting and seriously considering the views on the issues to be addressed and possible solutions of a cross section of society with a view of building a national consensus. As many of the issues are complex the process requires public education, but an education campaign should not be aimed at imposing certain views on the populace. The ‘core guiding principles’ of the review must be kept in mind, namely that the review must be ‘technically competent, credible and free of political manipulation’.⁵⁷

⁵⁴ MOU para 22.

⁵⁵ Merriam-Webster Online, www.m-w.com/dictionary/stake (accessed 8 October 2007).

⁵⁶ Cf I Sarakinsky ‘APRM and parliaments’, World Bank Institute and AWEPA Conference, Dar es Salaam and Cape Town, 6-7 May 2004.

⁵⁷ APRM Base Document para 4.

Democracy is clearly absent from a number of the states that have signed up for the APRM. It seems unlikely that these states would engage their citizens in a genuine consultative process when they are denied the right to participate in government through free and fair elections.⁵⁸ Representative democracy is about giving a limited number of citizens the mandate to decide which policy should be pursued by the state and regularly submit the performance of these representatives to be judged by the populace in elections. But democracy does not end with regular elections.

Democracy requires the protection of human rights which includes the 'right [of the citizen] to participate freely in the government of his country.'⁵⁹ This requires that the representatives of the people, whether part of the legislative or executive branch of government and whether at the national or local level, should conduct their business in a transparent manner and be open to suggestions from everyone. Participation also requires empowerment of the poor which in addition to education requires 'the realization of a minimum degree of economic security without which the poor are unlikely to be able to resist established structures that perpetuate their poverty.'⁶⁰ It is thus clear that effective participation require a minimum respect for both civil and political and socio-economic rights.

The APRM provides a framework for anyone interested in any of the issues covered to engage the representatives of the state on the policy adopted by the state. There are certain limitations to this engagement inherent in the APRM framework in addition to the limitations to effective participation set out above. Firstly, to obtain the views of everybody on all the issues raised by the APRM would be impossible. Secondly, there are many issues on which the ordinary

⁵⁸ However, it could also be argued that the APRM open up space for dialogue which will 'be difficult to reverse'. E Kannyo 'Liberalization, democratization and political leadership in Africa' in JC Senghor and NK Poku *Towards Africa's renewal* (2007) 78.

⁵⁹ African Charter on Human and Peoples' Rights art 13(1).

⁶⁰ Office of the High Commissioner for Human Rights 'Draft guidelines: A human rights approach to poverty reduction strategies' (2002) para 86.

citizen would not have an opinion, either because a lack of interest or because a lack of knowledge of the particular topic.

The easiest way to ensure participation is to engage civil society organisations. However, it has been argued that in most of Africa there is ‘no self-standing civil society because vertical ties remain more significant than horizontal (professional or functional) links.’⁶¹ Thus, it is essential to consider how representative civil society organisations are of those they claim to represent. Thirdly, the mandate of the APRM is to encourage compliance with ‘agreed political, economic and corporate governance values, codes and standards’.⁶² Ostensibly only views that agree with what is set out in these standards will be considered. This is despite that many of these standards were not adopted through participatory process. The APRM POA should be aligned to existing plans which often were adopted without any genuine participation.

The emphasis on participation is nothing new. For example participation is central to the process leading to the adoption of Poverty Reduction Strategy Papers (PRSPs).⁶³ PRSPs should be developed through consultations with a cross section of society. However, participation of local communities in the PRSP process has mostly been formal. Questions have been frowned upon and ‘[o]wnership’ is created through witnessing an inaudible rendition of problems, and an illegible rendering of solutions.⁶⁴ Some have argued that the participatory approach of the PRSPs have focused on getting support for neo-liberal economic policies, as pursued by the IMF and the World Bank.⁶⁵ Indeed ‘[a] closer examination of the macroeconomic and structural reform policy

⁶¹ Chabal ‘The quest for good government and development in Africa: is NEPAD the answer?’ (2002) 78(3) *International Affairs* 447-62 452. For a more positive view on the potential of African civil society see Kannyo (2007) 78-79.

⁶² MOU art 6.

⁶³ Cf chapter 2.

⁶⁴ A Cornwall & K Brock ‘What do buzzwords do for development policy? A critical look at “participation”, “empowerment” and “poverty reduction” (2005) 26(7) *Third World Quarterly* 1043-1060 1054.

⁶⁵ P Uvin *Human rights and development* (2004) 172.

contents of the 30 completed PRSPs reveals that there is no fundamental departure from the kind of policy advice provided under earlier structural adjustment programmes.⁶⁶ In practice 'participation' has seldom had any real influence.⁶⁷

In PRSP implementation the consultative processes designed to create social ownership have conceptualised participation narrowly, and often run on timetables that disregard the rhythm of the domestic policy process. They have usually offered limited spaces for engagement to invited CSOs, whose views beyond the consensus, if they are expressed at all, seldom find their way into final documents.

To what extent does the APRM process invite more genuine participation than has been the case with the development of PRSPs? Initiatives to ensure participation in the APRM have included inviting comments from individuals, civil society organisations, elite and household surveys and validation workshops. The use of these various methods will be discussed below. The country review missions potentially play an important role in monitoring that the views of stakeholders are reflected in the self-assessment.

4.4.2 Raising awareness

To receive useful input the APRM coordinating structures must embark on public education about the APRM. Knowledge about the purpose of the APRM is particularly needed when the review process takes place at the same time as political campaigning. This was for example the case with the self-assessment of South Africa which coincided with elections to local government. However, it might be advisable to avoid scheduling the APRM review at times of elections as a government might not want to open itself up to a process that is bound to

⁶⁶ F Stewart & M Wang 'Poverty reduction strategy papers within the human rights perspective' in P Alston & M Robinson (eds) *Human rights and development – Towards mutual reinforcement* (2005) 466.

⁶⁷ Cornwall & Brock (2005) 1052.

provide political opponents with ample arguments about the government's shortcomings.

Knowledge about the process is obviously important to ensure that everyone interested make their voices heard.⁶⁸ It is important to invite everyone interested to participate in meetings or make written submissions and ensure that the diversity of views is reflected in the final report. Advertisements can be placed in various media taking note of the wider use of broadcast than print media in Africa. Media should also be encouraged to discuss the APRM. However, cost and benefit of awareness raising initiatives must be evaluated. For example the creation of an APRM song in South Africa arguably did not contribute much to the process.

4.4.3 National focal points

At its first meeting in February 2004 the APRM Forum

endorsed the recommendation that a Focal Point be established in each participating country. The APRM National Focal Point should be at Ministerial level or a High-Level Official reporting directly to the Head of State or Government and with access to all national stakeholders. The contact details of all APRM National Focal Points should be forwarded to the NEPAD Secretariat/APR Secretariat as soon as identified.⁶⁹

Participating countries have taken different approaches as to who to appoint as national focal point. Some countries have appointed a person, while others an institution. In the latter case it seems clear that the head of the institution or government department is the person assigned as focal point.⁷⁰ The powers of

⁶⁸ On 'popular consultation methods' which can be used in the APRM process see Herbert & Gruzd *The African Peer Review Mechanism – Lessons from the pioneers* (2008) 57-63.

⁶⁹ Communiqué issued at the end of the first summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism (APR Forum), Kigali, Rwanda, 13 February 2004 para 24.

⁷⁰ For a list of the focal points see African Peer Review Mechanism (2007b) 5-11.

the national focal point stretches from South Africa where the national focal point was fully in control of the whole review process to Benin where the national focal point 'was directed not to intervene at all in the process itself so as not to influence or distort the results.'⁷¹

4.4.4 National coordinating structures

At its meeting in February 2004 the APRM Forum approved a recommendation by the Panel that 'participating countries immediately take steps to identify or establish broad-based and all-inclusive APRM National Coordinating Structures where they do not already exist.' The participating countries have given these structures different names: Governing Council (Ghana, Kenya, South Africa), National Commission (Algeria, Benin,⁷² Mali, Rwanda⁷³ and Uganda), National Council (Burkina Faso⁷⁴) and National Working Group and Steering Committee (Nigeria)⁷⁵. Their role is to ensure that the self-assessment and Programme of Action is developed according to the 'core guiding principles' of the APRM which means that the reviews must be 'technically competent, credible and free of political manipulation.'⁷⁶

To place the national coordinating structure outside the control of government is meant to ensure the credibility and independence of the process. However, not all countries agree and some such as Rwanda and South Africa have put the process firmly in the hands of government. The Panel has insisted that civil society organisations should be well represented and many of the participating

⁷¹ G Badet 'Benin and the African Peer Review Mechanism: Consolidating democratic achievements' (2008) 7.

⁷² Commission nationale indépendante de mise en oeuvre du Mécanisme africain d'évaluation par les pairs. See Conseil des ministres, 6 April 2006, www.sonangnon.net/actualites/2006/avril/intlematin0604_6.php (accessed 21 April 2006).

⁷³ APRM National Commission. See *Rwanda Nepad Magazine* Issue No 001, May-July 2004, 14.

⁷⁴ *Conseil National du MAEP*, established 23 June 2006, 'Le MAEP est en marche au Burkina Faso', www.mae.gov.bf/SiteMae/archive.jsp?num=30.

⁷⁵ LA Jinadu 'The African peer review process in Nigeria' (2008).

⁷⁶ APRM Base Document para 4.

states have also included representatives of the private sector, national monitoring institutions, parliaments etc. The post of chairperson is often given to someone representing civil society.⁷⁷ A lack of transparency in selecting the members of the national coordinating structure has been raised with regard to many of the participating countries.

The different approaches to the independence of the APRM coordinating structure for government was discussed at the Sixth Africa Governance Forum in May 2006.⁷⁸

On the one hand, there was a strong argument for internalising the APRM process within the government system as a way of securing its legitimacy and access to public resources. On the other hand, some countries argued for the exact opposite: the independence of the governing Councils so as to secure freedom to effectively undertake the APRM reviews. This issue provoked considerable level of debate/reflection during the plenary sessions as well as during the Heads of State segment. It was generally concluded that ‘absolute independence’ from the governments was neither feasible nor desirable while there is value in ensuring that APRM structures at the country level retain significant professional leverage and freedom of action to manage the process without undue state influence that could compromise professional judgment.

The size and composition of the coordinating structures vary from country to country. Membership of the national coordinating structures ranges from seven members in Ghana’s Governing Council to 250 members of Nigeria’s National Working Group as reconstituted by President Yar’Adua in November 2007.⁷⁹ The Panel has noted that if ‘the Commission is too small, it may bring

⁷⁷ According to the decree establishing the Benin Commission the chair and one of the vice-chairs must come from civil society while the other vice-chair should be held by a member of parliament, Badet (2008) 7.

⁷⁸ UNDP ‘Implementing the African Peer Review Mechanism – Challenges and opportunities’, Report of the Sixth Africa Governance Forum (AGF-VI), Kigali, Rwanda, 9-11 May 2006.

⁷⁹ The initial arrangement in Nigeria was a 49-member National Working Group with a 14-member National Steering Committee. The current National Steering Committee has 42 members, see Jinadu (2008).

perceptions of non-inclusivity; if too large, it may make decision-making cumbersome.⁸⁰

Some national coordinating structures, such as Ghana, have been given the task of producing the follow up reports on implementation of the POA. Others, such as Kenya, have been dissolved following the conclusion of the review.

The extent to which civil society has been able to participate effectively through the national coordinating structures varies. South African civil society representatives on the Governing Council have complained that they were not paid and therefore had limited time to devote to the process.⁸¹ On the other hand in Kenya where members of the Governing Council were given allowances to attend meetings, there were initially many meetings which generated meagre results.⁸²

4.4.5 Self-assessment and Programme of Action

Most countries have opted for letting different research institutes prepare draft reports on the four thematic areas which are then integrated into one report.⁸³ The selection of these institutions should be transparent and everyone interested should be invited to present written submissions. The process of producing the self-assessment usually starts with desk research. In conducting this research it can be useful to divide the four governance areas in smaller clusters.⁸⁴ Cooperation between those involved in preparing reports is essential.

⁸⁰ African Peer Review Mechanism *Annual report 2006* (2007) 2.

⁸¹ South African Institute of International Affairs (2006) 6. The same concern has been noted with regard to Benin, Badet (2008) 19.

⁸² South African Institute of International Affairs (2006) 6. African Peer Review Mechanism, *Country review report of the Republic of Kenya*, May 2006, (CRR Kenya) 34.

⁸³ Rwanda and Mauritius have not used the model with technical research institutions while other participating countries have not yet selected these institutions.

⁸⁴ Herbert & Gruzd (2008) 54.

Many institutions, both national and international, conduct governance research and it is important to ensure consistency with such initiatives.⁸⁵ Researchers involved in drafting the reports should therefore aim at extracting key issues and recommendations from the vast number of reports, reviews, surveys etc which exist with regard to most of the issues covered in the Questionnaire. This desk research can then be used to initiate public debate and for consultations with experts and government officials.⁸⁶ The research institutes finally must consolidate the input received from various stakeholders into a report. The four reports are then consolidated into the self-assessment.

The self-assessment should reflect the different views put forward during the review process, while the POA by necessity must be a consensus document. The need to align the POA with other already existing plans to some extent constrains the degree of innovation possible.

Many of the same problems which have been identified with regard to stakeholder participation in other development initiatives, such as lack of awareness, limited time frames and disregard of input given, applies equally in the APRM process. Herbert and Gruzd have noted that in developing the APRM self-assessment 'public meetings are usually inefficient means of gathering information or finding solutions to problems.'⁸⁷ Instead they find that surveys, and focus-group discussions and workshops focusing on specific issues have been more useful.⁸⁸ It is clear that adequate time must be given to make effective use of such forms of consultations, and perhaps even more importantly to come up with a synthesis of existing reports, surveys, reviews etc. There is no need to reinvent the wheel.

⁸⁵ Guidelines for countries to prepare for and participate in the African Peer Review Mechanism para 12.

⁸⁶ Herbert & Gruzd (2008) 54-57, 149.

⁸⁷ Herbert & Gruzd (2008) 143.

⁸⁸ Herbert & Gruzd (2008) 143.

Herbert and Gruzd argues that while there has been much focus on public consultation less attention has been given to the equally important task of securing buy-in from political leaders for suggested reforms.⁸⁹ More attention should also be given to the development of the POA as the most important implementation tool of the APRM.⁹⁰

4.5 Accountability

4.5.1 Monitoring by the Panel and the country review mission

Before the country review mission the APRM Secretariat together with consultants prepare issues papers on the four governance areas. These are used to inform the country review team in their interactions with the various national stakeholders and help ensure that important issues are not overlooked in the review process.

Apart from the Panel member responsible for the country review the country review mission consists of APRM staff members, partner institutions and consultants. It has been argued that the length of the country review missions are 'clearly not enough' and that consultations 'are restricted to the programme set by the host'.⁹¹ With regard to the first issue it is noticeable that the length of the missions has increased. The Ghana and Rwanda missions in 2004 only lasted 13 days. In contrast the missions to Uganda lasted 22 days and the mission to Burkina Faso 23 days. The Nigerian mission lasted 29 days and the mission was divided into two teams covering different parts of the country.

After the review mission the mission members have a short period of time to write the report on the issues they have covered. The report is edited by the

⁸⁹ Herbert & Gruzd (2008) 144.

⁹⁰ Herbert & Gruzd (2008) 148,

⁹¹ M Hansungule 'Malawi and the African Peer Review Mechanism' (2008) 2 *Malawi Law Journal* 3-28 12.

APRM Secretariat and presented to the APRM Panel. After it has been adopted by the Panel the report is sent to the government of the country under review for its comments. Lack of consultation by government at this stage of the process, which includes the submission of the final POA which should reflect the comments in the country review report, seems to be the norm rather than the exception in the reviews that have so far been conducted. Clear factual errors in the review report can be corrected by the Panel, but no other amendments can be made to the Panel's report. The report, with the comments from the government and the final Programme of Action as amended in light of the recommendations in the country review report attached, is then presented to the APRM Forum for its consideration.

4.5.2 The status of the country review report and the Programme of Action

Aggad has illustrated how the first states to undergo the review in their POAs fail to take on board many of the recommendation made by the Panel in the country review reports.⁹² However, a state is under no legal obligation to follow the recommendations of the Panel. A legal obligation could possibly arise through the sanctions procedure available to the Forum.⁹³ A best practice would be for the government to provide clear reasons as to why a certain recommendation is not transformed in to an action point in the POA.⁹⁴

Peer pressure and in particular public pressure are likely to be the most effective means of enforcement of both the recommendations in the country

⁹² F Aggad 'Addressing the African Peer Review Mechanism's Programmes of Action' SAIIA occasional paper number 5, June 2008.

⁹³ See chapter 5.

⁹⁴ The scope of the governments' comments varies significantly between the reports. The Ghana response from the Office of the President is four pages, Kenya submitted a 68-page response, and Rwanda submitted 39 pages of comments. The South African government submitted a 30-page response to the country review report on 18 January 2007. African Peer Review Mechanism, Comments from the Government of South Africa, 18 January 2007, www.thetimes.co.za/TheVault/Documents/APRM.pdf (accessed 1 October 2007).

review report and the POA. The implementation reports play an important role in this regard. Financial support from donors could also play a role. The effectiveness of the APRM process in bringing about change will be further explored in chapter 5.

4.5.3 The Forum discussion

The APRM Base Document provides that the fourth stage of the APRM process ends with the ‘consideration and adoption of the final report by the participating Heads of State and Government, including their decision in this regard ...’.⁹⁵ More details on the role of the Forum are provided in the Organisation and Processes document. The Forum has the ‘ultimate responsibility’ for ‘mutual learning and capacity building, and for exercising the constructive peer dialogue and persuasion required to make the APRM effective, credible and acceptable.’⁹⁶ The Forum should ‘[c]onsider, adopt and take ownership of the country review reports submitted by the APR Panel.’⁹⁷ It should ‘[e]xercise constructive peer dialogue and persuasion (through offering assistance or applying appropriate measures) to effect changes in country practice where recommended’.⁹⁸ The experience of the first reviews is that the Forum has engaged the reviewed country’s head of state in some dialogue but there has not been much persuasion.

There has been much doubt expressed as to whether African leaders will be prepared to criticise each other. The ‘politics of solidarity’ is still strong in Africa.⁹⁹ It is however not possible to judge the whole process on what takes place in a few hours after a process extending for several months, even years.

⁹⁵ APRM Base Document para 23.

⁹⁶ Organisation and processes, NEPAD/HGSIC-3-2003/APRM/Guideline/O&P, para 2.1.

⁹⁷ Organisation and processes para 2.2.

⁹⁸ As above.

⁹⁹ See eg C Clapham *Africa and the international system – The politics of state survival* (1996), 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* 461-473 469-470.

The reports on Ghana and Rwanda were presented to the third Forum in June 2005 by the respective team leaders, Dr Stals and Dr Njeuma. The participating leaders decided that they should have time to study the reports before the actual peer review took place. In January 2006 the country review report on Ghana and the accompanying Programme of Action were discussed by President Kufuor and the other heads of state at the Forum in Khartoum. The discussion lasted for four hours but according to one observer

there was little discussion of best practices in Ghana; some heads of state seemed not to grasp the ethos of the peer review and spent time castigating Ghana for following (and the APR panel for supposedly endorsing) Western-inspired neo-liberal policies; Ghana's report was so candid that there was little for the peers to add; and there was no press briefing arranged for Kufuor and little media interest generated.¹⁰⁰

Rwanda was also scheduled to be reviewed by the Forum in Khartoum in January 2006. However, only Ghana was reviewed as President Kagame of Rwanda had sent his Prime Minister to represent him at the meeting. The Forum held that the review could only take place in the presence of the President.¹⁰¹ Rwanda was finally reviewed in July 2006. After Dr Njeuma and President Kagame made their presentations with regard to the Rwanda review, President Obasanjo of Nigeria and chair of the Forum noted that 'the areas of divergence do not seem very serious.'¹⁰² This was despite the critical comments in the report on, for example, political diversity, discussed further below. Only one other member of the Forum commented: The President of Mozambique noted that he was impressed that corruption was not a big issue in Rwanda.

¹⁰⁰ S Gruzd 'Africa's trailblazer: Ghana and the APRM' (2006), www.saiia.org.

¹⁰¹ 'Rwanda: Top world leaders converge for governance summit' *New Times* 8 May 2006 www.andnetwork.com/index?service=direct/0/Home/top.titleStory&sp=133732

¹⁰² African Peer Review Mechanism, Country Review Report of the Republic of Rwanda (November 2005) 187, www.nepad.gov.rw/docs (accessed 18 October 2007).

After the country review report on Kenya was presented at the Forum in Banjul, The Gambia, in June 2006, the Prime Minister of Ethiopia, Meles Zenawi, urged that the presentations of the reports and the responses of the reviewed state should be brief 'to allow more time for discussions'. However President Mbeki of South Africa responded that a more thorough presentation gave those who had not read the report beforehand a chance to follow the discussions.¹⁰³ The Communiqué issued after the Forum in Accra in July 2007, at which the reports of Algeria and South Africa were discussed, shows that the discussion of the reports was not very substantial.¹⁰⁴ President Mbeki attacked what he saw as the unfair presentation of crime and xenophobia in the country.¹⁰⁵

On the one hand it is positive that heads of state are involved to a high degree in the process. On the other hand it creates problems such as slowing down the process. Expertise in the various sub-fields is also often greater among the ministers dealing with a specific issue than with the head of state.

Though the Forum is meant to consist of the heads of state or government, representation at the highest level has often been lacking. At the first Forum in February 2004, 14 of the 18 countries that had by then signed up for the APRM were represented.¹⁰⁶ Only nine of these were represented by their President or Prime Minister.¹⁰⁷ 15 states were represented at the third Forum in June 2005,

¹⁰³ Proceedings of the peer review of Kenya at the 5th summit of the Committee of Participating Heads of State and Government of the African Peer Review Mechanism (APR Forum) in Banjul, The Gambia on 30th June 2006, reprinted in CRR Kenya, 295-301, paras 21 & 22.

¹⁰⁴ 7th summit communiqué. The omission to include the final Programme of Action in the country review report on South Africa prepared by the APRM Secretariat for the Forum on 28 January 2007 led to the report only being presented and discussed at the Forum in Accra on 1 July 2007.

¹⁰⁵ Report on the peer review of South Africa by the Committee of Heads of State and Government participating in the African Peer Review Mechanism [APR Forum], 1 July 2007, paras 21 & 27, reprinted in African Peer Review Mechanism, country review report no 5, Republic of South Africa, September 2007, 376-377.

¹⁰⁶ Cameroon, Mali, Egypt and Benin did not send any representative.

¹⁰⁷ Congo, Ethiopia, Gabon, Ghana, Mozambique, Nigeria, Rwanda, Senegal, South Africa. Algeria was represented by the Minister of State in charge of Maghreb and African Affairs, Kenya by the Minister of Planning and NEPAD, Uganda by the Minister of

nine of which were represented by a head of state or government.¹⁰⁸ Even when the Forum was held on the fringes of the AU Summit in January 2006, only eight ordinary members of the Assembly of Heads of State and Government turned up. The Presidents of Algeria, Angola, Benin, Cameroon, Congo, Egypt, Gabon, Kenya, Mali, Mauritius, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania and Uganda sent representatives.¹⁰⁹ Participation had improved at the 7th Forum in July 2007 where 18 of 25 participants were Presidents or Prime Ministers who were ordinary members of the Assembly. Angola, Cameroon, Congo, Egypt, Mali, Mauritius and Sudan send representatives while Saõ Tomé and Príncipe and Sierra Leone were not represented at the Forum.¹¹⁰ At the 'extra-ordinary' Forum in October 2008 only Benin, Burkina Faso, Ethiopia, South Africa and Togo were represented at the highest level. Not even the president of Nigeria turned up even though the review of the report on his country was concluded at the meeting.¹¹¹

Hansungule has argued that '[i]n order for the peer review to be effective, the APR Forum should hold its meetings in the home country of the state under review.'¹¹² Leaving aside the issue whether such a practice would actually make the review more efficient, it is questionable whether a large number of heads of state and government would turn up to reviews in say five different countries each year. It would also not help transparency to have the Forum in the country under review if the current practice of private Forum meetings were retained.

Finance. Mauritius was represented by an ambassador and Burkina Faso by the NEPAD National Coordinator.

¹⁰⁸ Algeria, Nigeria, Ghana, Rwanda, Sierra Leone, South Africa, Mozambique and Benin.

¹⁰⁹ Communiqué issued at the end of the 4th summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism, 22 January 2006, Khartoum, Sudan.

¹¹⁰ 7th summit communiqué.

¹¹¹ Gruzd (2008).

¹¹² Hansungule (2008) 13.

4.5.4 Implementation

The Forum has a role to play also after its consideration of a country review report. The Organisation and Processes document provides that the Forum is responsible for the transmission of the reports to AU structures and, through the Secretariat, of the publication of the reports. The Forum also has the mandate to '[p]ersuade development partners to support the recommendations approved by the APR Forum by providing technical and financial assistance'.¹¹³ The 'recommendations approved' is presumably the POA. There is however no indication that the Forum has played this role.

According to the APRM Base Document periodic reviews should be held every two to four years.¹¹⁴ The slow pace of the reviews means that it is likely that periodic reviews including country review missions will be held more infrequently.

Participating countries are obliged to submit implementation reports to the Panel every six months and annually to the Forum.¹¹⁵ The Forum has noted that the progress reports are 'as important as the Country Review Reports'.¹¹⁶ However, lack of time at the Forum meetings has meant that consideration of implementation reports has been delayed. For example none of the progress reports submitted to the Forum in Egypt in July 2008 could be considered then and were again deferred at the extra-ordinary summit in Benin in October 2008.¹¹⁷ The progress reports of Ghana, Rwanda, Kenya, Algeria, South Africa and Benin were finally discussed at the summit in January 2009.¹¹⁸ This delay

¹¹³ Organisation and processes para 2.2.

¹¹⁴ APRM Base Document para 14.

¹¹⁵ 4th summit communiqué para 14. The Panel does not play an active role in the consideration of the implementation report, interview with Chris Stals, 16 July 2009.

¹¹⁶ 7th summit communiqué 4.

¹¹⁷ Gruzd (2008).

¹¹⁸ 10th summit communiqué.

of consideration of implementation reports further illustrates the problem of putting the process in the hands of the Forum.

In both Ghana and Rwanda the responsibility of monitoring remains with the national coordinating structure, while in Kenya the National Commission was abolished upon completion of the review. Kenyan reporting is coordinated by the NEPAD Kenya Secretariat.¹¹⁹ It is important to ensure participation in the monitoring of implementation and it would in general be preferable to retain the structures already put in place for ensuring such participation. Ghana has established APRM oversight committees at the district level to ensure the implementation of the POA.¹²⁰

Evaluations of the implementation of the POA should consider how it has been transferred into the budget and used. Non-utilisation of resources budgeted for the fulfilment of human rights could constitute a breach of the state's obligation.¹²¹

The Chairperson of the APRM National Governing Council of Ghana has noted that the recommendations emanating from the APRM process would be meaningless unless integrated into other development strategies.¹²² Thus, the Ghana country review report and POA influenced the development of the Growth and Poverty Reduction Strategy (GPRS II).¹²³ Similarly the Rwandan POA is being integrated into the Rwandan Economic Growth and Poverty

¹¹⁹ NEPAD Kenya Secretariat 'Kenya annual progress report on the implementation of the African Peer Review Mechanism (APRM) national Programme of Action, June 2006-June 2007' (2007).

¹²⁰ 'Prof. Greenstreet urges independence for oversight committees' *GNA* 17 October 2007 www.myjoyonline.com/politics/200710/9583.asp (accessed 18 October 2007).

¹²¹ S Fredman *Human rights transformed – Positive rights and positive duties* (2008) 82.

¹²² Isaac Essel 'Panel pleads with media to get the facts!', *Accra Mail*, 27 June 2005.

¹²³ Government of Ghana, National Development Planning Commission, 'The implementation of the Growth and Poverty Reduction Strategy (GPRS II) 2006-2009, 2006 Annual Progress Report', Accra, Ghana, March 31 2007, Appendix IV: Status report on the implementation of the POA of the African Peer Review Mechanism (APRM).

Reduction Strategy (EDPRS).¹²⁴ Uganda is in the process of integrating its POA with the National Development Plan and the Medium Term Expenditure Framework.¹²⁵ The precedence given to the PRSP is problematic considering the dominance of the international financial institutions over this process.

Specific issues with regard to implementation will be discussed in the case studies on Ghana, Rwanda and Kenya in chapters 6-8.

4.6 Transparency

The Panel members may not disclose 'confidential information related to their deliberations, the country reviews, or the Participating Countries in general.'¹²⁶ Seemingly there is a presumption of secrecy in the process which corresponds to the general preference for secrecy among international organisations.¹²⁷ It is unclear what the reason for this confidentiality is as the process also aims at being inclusive.

Stakeholders should be able to consider various drafts and also be privy to the self-assessment report and draft POA as submitted to the APRM Secretariat in South Africa. On the contrary the final self-assessment report has been kept secret in almost all countries which have so far undergone the review.¹²⁸ This situation obviously makes much more difficult the task of the country review

¹²⁴ APRM National Commission 'Rwanda's APR Programme of Action (PoA) implementation progress report (June-December 2006)', produced by the APRM National Commission, for submission to the 6th APR Forum, Addis Ababa, Ethiopia 28th January 2007.

¹²⁵ 'Integration of the National POA into the Uganda National Development Plan (NDP)' www.nepaduganda.or.ug/general/newsdetails.php?id=13 (accessed 26 December 2008).

¹²⁶ Rules para 12.

¹²⁷ Cf J Stiglitz *Globalization and its discontents* (2002) 33; M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 572.

¹²⁸ With the exception of Ghana and Uganda which have made the self-assessment available to the public. The Uganda self-assessment is available at www.nepaduganda.or.ug/general/downloads.php?cat=APRM (accessed 15 July 2009).

team to verify that the self-assessment report represents the different views expressed and that the POA is a genuine consensus document.

The country review report should be 'jointly published by the APRM Commission of the country concerned and the APR Panel in accordance with laid down procedures and regulations.'¹²⁹ The participants of the 6th African Governance Forum in May 2006 recommended that the 'Peer Review reports should be released simultaneously to the public and to the APRM Heads of State and Government so as to minimize negative speculations and to satisfy the ownership criteria'.¹³⁰ In practice the country review reports are published in English and French by the APRM Secretariat a few months after it has been presented to the Forum. Minutes from the Forum meeting are included as an annex to the printed reports. The reports are also made available on the APRM web site. The delay in publication of the reports makes monitoring of the implementation of the POA difficult as it is only published as part of the Country Review Report.

According to the APRM Base Document the country review report is to be publicly tabled in 'key regional and sub-regional structures' such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the Peace and Security Council and the Economic, Social and Cultural Council (ECOSOCC). This should take place '[s]ix months after the report has been considered' by the Forum.¹³¹ As noted above it is the Forum which is responsible to transmit the reports 'in a timely manner'. However, in praxis this is left to the Secretariat which had by July 2009 only tabled five reports in the Pan-African Parliament.¹³²

¹²⁹ Communiqué issued at the end of the third Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism (APR Forum) 19 June 2005, Abuja, Nigeria, para 17.

¹³⁰ UNDP (2006) 39.

¹³¹ APRM Base Document para 25.

¹³² The Ghana, Kenya and Rwanda reports were presented to PAP in November 2006 and the reports on Algeria and South Africa in October 2008. Discussion on the APRM was included on the agenda of the PAP for its 7th session in May 2007, but not on the agendas from the 8th session in October 2007 and the 9th session in May 2008. For the

A revision of the APRM framework documents, including the Questionnaire, was initiated by the Panel in September 2007.¹³³ The process has not been transparent and has generated little response from civil society.

4.7 Concluding remarks

This chapter has explored the extent to which the APRM process is itself participatory, non-discriminatory, transparent and accountable. This is required for the process to be seen as legitimate. Through its insistence on a participatory process the APRM has the potential of deepening democracy. The process becomes an opportunity to engage on policy and resource allocations in a situation where elections are often determined by other factors. As has been shown above many challenges remain before the APRM will fulfil this potential.

Many of the countries which have gone through the process so far have in various ways made genuine effective stakeholder participation difficult. In reviewing the APRM process it is important that the APRM Panel and Forum draws up clear guidelines for effective participation. The lack of participation in the process is an often heard criticism of the APRM. However, it is not only up

presentation of Dr Kouassi and the comments of MPs at the 7th session see the PAP hansard for 8 May 2007, available at www.pan-african-parliament.org. The reports on Algeria and South Africa were tabled in PAP on 31 October 2008, see Pan-African Parliament, Draft programme of the tenth ordinary session October 27 to November 07, 2008, www.pan-african-parliament.org (accessed 22 November 2008).

¹³³ G Oukazi 'Le MAEP revoit sa méthodologie' *Le Quotidien d'Oran* 2 October 2007 www.lequotidien-oran.com/index.php?news=506221&archive_date=2007-10-02 (accessed 18 October 2007). This follows from the APRM Base Document para 28 which provides that the APRM should be reviewed every five years '[t]o enhance its dynamism'. Dr Chris Stals, one of the Panel members, told the author in May 2008 that a meeting in Algiers on revision of the APRM framework documents had been disappointing and that he did not foresee any major revision in the near future. The process was at the time of writing still on-going. In July 2009 advertisements to recruit consultants for review of the APRM framework were published by DBSA and UNDP.

to government to ensure civil society participation. Indeed, 'civil society has not mobilised to exploit the opening that peer review offers'.¹³⁴

Participation, transparency and accountability are important as human rights in and of themselves. However, participation in the sense that a majority view would always prevail could come in conflict with other human rights. A human rights based approach requires the building of a consensus which would consider the human rights implications of all policy prescriptions.

The extent to which the APRM process is in a good position to influence states to improve their compliance with human rights will be explored from a theoretical perspective in the next chapter and further explored in the case studies in part II of this study.

¹³⁴ R Herbert 'Peer review: Who owns the process?' *e-Africa – The electronic journal of governance and innovation* volume 1, October 2003, 10. See also R Herbert 'Influencing APRM – A checklist for civil society' (2007).

CHAPTER 5

INDUCING COMPLIANCE WITH HUMAN RIGHTS

5.1 Introduction

Many different international institutions monitor compliance with standards included in the APRM documents.¹ Such monitoring of African countries exists among others with regard to peace and security,² elections,³ human rights,⁴ economic policy,⁵ anti-corruption measures,⁶ money laundering,⁷ labour rights,⁸ protection of the environment,⁹ trade policy¹⁰ and human development.¹¹ In addition to international institutions, the governance performance of a state is

¹ The institutions listed in the footnotes that follow are examples of some of the main international institutions involved in monitoring of compliance with international commitments, both soft law and hard law.

² Eg AU Peace and Security Council, UN Security Council (including sanction committees and the counter-terrorism committee).

³ The AU and sub-regional organisations often sends electoral observation missions to member countries. In addition overseas countries and organisations such as the EU often send missions to African elections.

⁴ Eg African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, Pan-African Parliament, courts of sub-regional organisations, UN Human Rights Council and treaty bodies, World Bank Inspection Panel.

⁵ Eg IMF article IV consultations, Poverty Reduction Strategy Papers (PRSPs).

⁶ The AU Convention on Preventing and Combating Corruption entered into force in August 2006. It provides for the establishment of an Advisory Board on Corruption. UN initiatives include the UN Convention against Corruption and the Global Programme against Corruption of the Centre for International Crime Prevention www.uncjin.org/CICP/Folder/corr.htm.

⁷ South Africa is the only African member of the Financial Action Task Force on Money-Laundering (FATF), but FATF-style sub-regional bodies have been established: the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and the Inter-Governmental Action Group Against Money-Laundering in Africa (GIABA).

⁸ International Labour Organisation (ILO).

⁹ World Bank Inspection Panel and various institutions established under international environmental law treaties.

¹⁰ WTO Trade Policy Review Mechanism.

¹¹ Reports on implementation of the Millennium Development Goals (MDGs), the annual UNDP *Human Development Report* and World Bank *World Development Report*.

monitored by its own institutions and civil society, by other states and by international NGOs.¹²

This chapter first describes how the APRM fits into the wider international human rights system as applicable to Africa. The chapter explores why states sign up to the APRM process. It further assesses the potential effectiveness of APRM reviews in promoting compliance with APRM standards and objectives in light of compliance theories and the experience of different methods of monitoring compliance with international norms.

5.2 The international human rights regime

5.2.1 Global institutions with a mandate to promote and protect human rights in Africa

The UN human rights system is composed of the treaty based and the charter based system.¹³ The treaty based system is made up of treaty bodies established under six of the seven 'core' human rights treaties: The Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). The Committee on Economic, Social and Cultural Rights was established by the UN Economic and Social Council

¹² On governance assessments by international organisations and individual donor countries see University of Essex & UNDP *Preliminary survey on donor use of governance assessments* (2007).

¹³ For an overview of the UN human rights system and its interaction with Africa see M Killander 'Introduction to the United Nations and human rights in Africa' in C Heyns (ed) *Human rights law in Africa* Killander (2004) and F Viljoen *International human rights law in Africa* (2007).

(ECOSOC) which is mandated by the International Covenant on Economic, Social and Cultural Rights (ICESCR) to monitor the implementation of the Covenant.

The Charter based system is made up of the principal organs of the UN: The General Assembly, the Security Council, the Economic and Social Council (ECOSOC), the International Court of Justice and the Secretariat. A number of functional commissions composed of government representatives have been established under ECOSOC. The most important from a human rights perspective are the Commission on Human Rights and the Commission on the Status of Women. In 2006 the Commission on Human Rights was abolished and replaced by the Human Rights Council which was made a subsidiary body to the General Assembly.

The Office of the High Commissioner for Human Rights (OHCHR) offers secretarial support to both the charter based and the treaty based system. A number of other UN bodies, such as the High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF) and the United Nations Development Programme (UNDP) play an important role with regard to human rights as do specialised agencies such as the International Labour Organisation (ILO). In establishing its Inspection Panel the World Bank took an important step to ensure the protection of human rights of those affected by projects funded by the Bank.

5.2.2 The African regional human rights system

The African Union (AU) replaced the Organisation of African Unity (OAU) in 2002.¹⁴ The main focus of the OAU had been on achieving decolonisation and the end of minority rule and racial segregation in Southern Africa. Human rights within the member states did not feature prominently, but despite this the OAU

¹⁴ C Heyns, E Baimu & M Killander 'The African Union' (2003) 46 *German Yearbook of International Law* 252.

adopted the African Charter on Human and Peoples' Rights (African Charter) in 1981.¹⁵

The main institution in the African human rights system is the African Commission on Human and Peoples' Rights established in 1987 after the entry into force of the African Charter. All African states except Morocco are parties to the African Charter.¹⁶ An African Court on Human and Peoples' Rights has been established in line with a Protocol to the African Charter adopted in 1998 which entered into force in 2004.¹⁷ The judges were elected in 2006, but the Court is yet to hear its first case.¹⁸ A Protocol to the African Charter on the Rights of Women was adopted in 2003 and entered into force in 2005.¹⁹ The African Commission and Court are responsible for monitoring implementation of this Protocol. The African Charter on the Rights and Welfare of the Child, which entered into force in 1999, provides for the establishment of a Committee on the Rights and Welfare of the Child to monitor its implementation.

The AU main organs also increasingly play a role in monitoring human rights. These include the Assembly of Heads of State and Government, the Executive Council, the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC), the Peace and Security Council (PSC) and the AU Commission. Of these there were no equivalent to PAP and ECOSOCC in the

¹⁵ On human rights initiatives of the OAU see R Murray *Human Rights in Africa: From the OAU to the African Union* (2004). For a general overview of the African regional human rights system see C Heyns & M Killander 'The African regional human rights system' in F Gómez Isa & K de Feyter (eds) *International human rights law in a global context* (2009).

¹⁶ There are 53 AU members. The withdrawal of Morocco was caused by the OAU admitting the Sahrawi Arab Republic (Western Sahara) as a member of the OAU. Since Western Sahara is not a member of the UN, there are thus also 53 members of the African Group at the UN (including Morocco).

¹⁷ Protocol on the establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1/rev.2/1997.

¹⁸ The Court adopted its 'interim Rules' in June 2008.

¹⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005. A Protocol creating an African Court of Justice and Human Rights was adopted in July 2008. This court will replace the African human rights court when the Protocol enters into force.

OAU. The proliferation of institutions has led one commentator to suggest that there might be 'a deliberative strategy to bring the notion of supra-national legality into disrepute through the creation of a multiplicity of under-resourced and deliberately ineffectual institutions.'²⁰ It is too early to assess whether recent increases in the budget allocated to the African Commission by the AU will make it more effective.²¹ However, it can no longer blame lack of resources. It is noticeable that African regional institutions such as the African Commission often do not publish the result of its work. With little in the way of visible results many observers tend to neglect their work.

In addition to the organs established under the AU there are a number of regional economic communities that could play an important role in the protection of human rights: the Arab Maghreb Union, the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).²² ECOWAS is the most developed with regard to human rights as the Protocol establishing the ECOWAS Community Court of Justice, as amended, gives the Court explicit jurisdiction to hear human rights cases brought by individuals.²³

²⁰ CA Odinkalu 'Back to the future: The imperative of prioritizing for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1. With regard to resources it should be noted that the budget of the AU has increased substantially over the last few years.

²¹ J Biegon & M Killander 'Human rights developments in the African Union in 2008' (2009) (9) *African Human Rights Law Journal* 295.

²² On these sub-regional organisations and their role in protecting human rights see C Heyns (ed) *Human rights law in Africa* (2004) 620-694; Viljoen (2007).

²³ The ECOWAS Court of Justice is directly accessible by ECOWAS citizens claiming human rights violations.

5.2.3 Interaction between the APRM and international human rights monitoring bodies

The APRM Panel got exposure to human rights issues at an early stage. At its first meeting, in Cape Town in July 2003 the members of the Panel were addressed by the acting UN High Commissioner for Human Rights.²⁴ However, since then there has been a lack of involvement of international human rights bodies with the APRM. No member of an international human rights monitoring body has participated in a country review mission. This is particularly noteworthy with regard to the African Commission on Human and Peoples' Rights, which is listed as one of the APRM partner institutions.²⁵

Co-operation between the APRM structures and the African Commission within the current framework is necessary, but not sufficient to make both institutions more efficient in the promotion and protection of human rights. African human rights instruments should form the basis of human rights related parts of the review and inform the development of the questions in a revised Questionnaire in a clearer way.²⁶ The African Commission, the African Committee on the Rights and Welfare of the Child and other relevant organs should be closely involved in the development of these questions.

²⁴ Address by Dr Bertrand Ramcharan acting High Commissioner for Human Rights to the high level working session of the African Peer Review Panel, Cape Town, South Africa, 25 July 2003. See also Report of the high-level working session of the African Peer Review Mechanism [APRM] Panel of Eminent Persons [APR Panel] Le Vendom Hotel, Cape Town, South Africa, 25-27 July 2003.

²⁵ In an interview with the author in April 2008, Dr Angela Melo, vice-chair of the African Commission noted that the Commission had made some efforts to establish contact with the APRM but that these efforts had not been successful.

²⁶ Cf M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41-75 73. The reason to focus on African instrument is to avoid the 'rule-taker' phenomenon as African states tend to have difficulty making their voice heard in the negotiation over global instruments, A Hurrell & N Woods (1999) 'Introduction' in A Hurrell & N Woods (eds) *Inequality, globalization, and world politics* Hurrell & Woods (1999) 1.

5.3 Commitment

5.3.1 Membership

The first ideas of the peer review system was based on the idea of a 'club' of willing states to which other African states could apply and which could reject a state if it did not fulfil certain governance criteria.²⁷ In the end a voluntary 'open' process to which any member of the AU could sign up was selected. Some have argued that the APRM should be compulsory,²⁸ as would have been the case with the discarded CSSDCA peer review process. However, there is much to be said for the position that the voluntariness of the process is 'key to its effectiveness' as co-operation would be more difficult to obtain in a compulsory process.²⁹ However, as noted below some countries have seemingly signed up to the process as a publicity stunt rather than from a genuine conviction that the APRM can assist the country in overcoming governance challenges.

The MOU was signed at the NEPAD Implementation Committee meeting on 9 March 2003 by Algeria, Congo-Brazzaville, Ethiopia, Ghana, Kenya, Mozambique, Nigeria, Rwanda, South Africa and Uganda.³⁰ As the MOU stipulated that the APRM would be operational on the day on which the fifth Member State of the African Union deposited the signed MOU, the process was in effect from this day.

By the end of May 2003 Burkina Faso, Cameroon, Gabon, Mali and Senegal had also signed the MOU. In 2004 another eight countries signed the MOU:

²⁷ Interview with Stephen Gelb, Pretoria, 4 June 2009.

²⁸ I Taylor *Nepad - Toward Africa's development or another false start?* (2005) 66-67; D Geldenhuys 'Brothers as keepers: Africa's new sovereignty regime' (2006) 28(1) *Strategic Review for Southern Africa* 1-29 21.

²⁹ House of Lords, European Union Committee *The EU and Africa: Towards a strategic partnership* volume 1: report, 34th report of session 2005-06 (2006) para 247.

³⁰ Communiqué issued at the end of the sixth summit of the heads of state and government implementation committee (HSGIC) of the New Partnership for Africa's Development, Abuja, 9 March 2003, para 24. (6th summit communiqué).

Angola, Benin, Egypt, Lesotho, Malawi, Mauritius, Sierra Leone and Tanzania. Sudan and Zambia signed the MOU in January 2006, Saõ Tomé and Príncipe in January 2007, Djibouti in July 2007 and Mauritania in January 2008. Togo became the 29th state to sign the MOU in July 2008. The participation of Mauritania has been suspended following a *coup d'état*.

A state that does no longer want to participate in the process can give notice to the Secretariat to this effect. Such a notice takes effect six months after it has been received, thus allowing an ongoing review to be concluded.³¹

5.3.2 Why states commit to the APRM

The AU Summit in July 2005 urged all member states to join the APRM ‘as a matter of priority’ and to ‘strengthen the APRM process for its efficient performance’.³² In May 2006 the sixth African Governance Forum was held, organised by the UNDP. The theme was ‘Implementing the African Peer Review Mechanism – Challenges and opportunities’. Seven countries that had not signed up for the APRM participated in the Forum.³³

The reasons for not participating obviously vary from country to country.³⁴ A country like Somalia that does not have a government controlling the territory of the state obviously would not sign up. Seemingly the same would apply to states with extremely serious human rights and governance problems.³⁵ Equatorial Guinea, Eritrea and Zimbabwe are some of the countries falling in

³¹ MOU para 32.

³² Declaration on the review of the Millennium Declaration and the Millennium Development Goals. Assembly/AU/Decl. 1 (V).

³³ Botswana, Burundi, Cape Verde, Djibouti, Liberia, Madagascar and Saõ Tomé and Príncipe. See ‘Top leaders converge for governance summit’ *New Times* 8 May 2006.

³⁴ G Masterson *Governance quality and government commitment to the NEPAD African peer review mechanism* (2004) explores why states commit to the APRM with case studies of Angola, DRC, Ghana and Botswana to the APRM. Masterson mistakenly refer to the DRC as having signed up for the APRM, Masterson (2004) 40.

³⁵ J Akokpari ‘Dilemmas of regional integration and development in Africa’ in J Akokpari *et al* (eds) *The African Union and its institutions* Akokpari (2008) 101.

this category. Surprisingly Sudan signed the MOU in January 2006. This could be seen as an example of a state under increasing international pressure coming to the conclusion that agreeing to be reviewed would at least not weaken its already tarnished international reputation. Sudan's attempts to secure the chairmanship of the AU when it hosted the Khartoum summit in January 2006 could also have played a role.³⁶

Other countries have totally opposite reasons to opt out from the process. Botswana decided not to join the APRM because 'the country feels it has already opened its economy to enough international scrutiny, while the political review process will be too difficult to implement because the issues are not quantitative.'³⁷ Botswana already has a reputation for good governance and therefore feels the process is unnecessary and that the review process might lead to changes to its already existing development plan, Vision 2016.³⁸

The frank criticism expressed in the reports which have been finalised so far has in some cases surprised the governments. After Rwanda was reviewed in 2005 its Minister of Foreign Affairs, Charles Murigande, stated:³⁹

Rwanda knows very well that it (Rwanda) is not a paradise, but we invited people and we put ourselves bare-necked to be assessed and to be told where our weaknesses lie ... But to have come up with such a criticism, it surprised us.

At the APRM Forum in July 2007 which discussed the country review report on South Africa, President Mbeki seemed shocked about some criticism against the state of his country. President Mbeki said that the finding that there was an

³⁶ However, the attempt to secure the chairmanship was unsuccessful mainly due to international outrage over the Darfur crisis. Instead the chair of the AU was given to Congo-Brazzaville.

³⁷ *Daily News* 5 November 2002 quoted in Ditshwanelo – The Botswana Centre for Human Rights 'Botswana does not join African Peer Review Mechanism' press statement on the New Partnership for African Development, 12 December 2002, www.ditshwanelo.org/bw (accessed 18 May 2005).

³⁸ Masterson (2004) 67.

³⁹ 'Rwanda to send 1,200 troops to Darfur in mid-July', *Reuters*, 4 July 2005.

'unacceptably high level of violent crime' was populist and that the finding of the report that 'xenophobic tendencies prevail' in South Africa was 'simply not true'.⁴⁰

These examples illustrate that some countries may believe they have a relatively good governance record and therefore sign up for the review, just to be disappointed with the outcome. This may lead other countries sensitive of criticism to not sign up to be reviewed or if they have already done so delay the process.

Arguably, the APRM would have its greatest potential in countries with governments which are open to suggestions on how to rectify shortcomings, whether from its own citizens or from outsiders. Democracy and an active civil society would make the dialogue easier, but would as the South African example illustrate not always be sufficient.

Among the states that have signed up for the APRM are some that would hardly have met any criteria with regards to respect for human rights and democracy. One way of measuring democracy is to see if a state is viewed as a democracy by its peers. 21 African countries were invited by the Convening Group to the Fourth Ministerial Meeting of the Community of Democracies in Bamako, Mali, in November 2007.⁴¹ Of the 29 states that have signed the APRM MOU only 13

⁴⁰ Report on the peer review of South Africa by the Committee of Heads of State and Government participating in the African Peer Review Mechanism [APR Forum], 1 July 2007, paras 21 & 27, reprinted in African Peer Review Mechanism, country review report no 5, Republic of South Africa, September 2007, 376-377.

⁴¹ They were: Benin, Botswana, Cape Verde, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Sao Tome and Principe, Senegal, Seychelles, South Africa, Tanzania and Zambia. Algeria, Burkina Faso, Burundi, Cameroon, DRC, Djibouti, Egypt, Guinea-Bissau, Mauritania, Nigeria, Rwanda, Sierra Leone and Uganda were invited as observers. Statement of the Convening Group of the Community of Democracies on the Invitation Process for the Fourth Ministerial Conference to be held in Bamako, Mali, November 14-17, 2007.

www.demcoalition.org/pdf/CG%20Statement%20of%20the%20Invitation%20Process%20to%20CD%20Bamako%20Ministerial%20Conference.pdf (accessed 13 December 2007). On the lack of 'democratic qualifications' of some member states see also Taylor (2005) 48-57.

were invited to the meeting, while another 10 were on the list of countries invited as observers.⁴² Ethiopia, whose Prime Minister, Meles Zenawi, is the current chairperson of the APRM Forum, is among the countries which were not even invited as an observer.

Considering the constraints and delays that have plagued the process, it might be good that the queue for assessment is not longer than it is.⁴³ It should however also be noted that many of the countries that have signed up have not yet started the national process.⁴⁴ This is in particular so with countries with none or limited democratic credentials.

5.3.3 Financing the APRM

The high cost involved might also discourage some states from signing up to the process. The APRM is not funded through the AU budget. In the MOU the participating states agree to 'contribute fully to the funding of the African Peer Review Mechanism in order to affirm the African ownership of the Mechanism. This includes sourcing funds from African people, businesses and institutions.'⁴⁵ The Forum has decided that a country that has signed the APRM MOU should contribute at least US\$ 100 000 annually to the APRM Secretariat.⁴⁶ Only a few countries have fulfilled this requirement. From 2004 to the end of October 2008 the APRM raised nearly US\$ 17.5 million from member states. South Africa was

⁴² The APRM countries which were not invited as participants or observers were Angola, Ethiopia, Gabon, Sudan and Togo.

⁴³ This problem was confirmed by the chairperson of the APRM Panel at a press briefing ahead of the 6th Africa Governance Forum organised by the UNDP in May 2006. See www.undp.org/agf/working/Press%20Briefing-AGF6.pdf (accessed 16 May 2006).

⁴⁴ See national AGF VI work shop reports available at www.undp.org/agf/papers.shtml (accessed 18 May 2006).

⁴⁵ MOU para 20.

⁴⁶ Communiqué issued at the end of the first summit of the committee of participating Heads of State and Government in the African Peer Review Mechanism (APR Forum), Kigali, Rwanda, 13 February 2004, para 26.

the single largest contributor to the APRM budget with a contribution of US\$ 6 million.⁴⁷

An APRM Trust Fund has been established and managed by the UNDP. Non-African contributions to the Trust Fund from 2004 to the end of October 2008 were more than US\$ 13 million.⁴⁸

Estimated expenditure for regional APRM activities in 2008 was US\$ 5.3 million. Of this a bit over US\$ 3 million was expenditure for the Secretariat. The cost of review visits and support missions was estimated at US\$ 1.4 million.⁴⁹ This does not include the participation of staff from the African Development Bank, UNECA and UNDP as these organisations fund their own participation in country review visits and support missions.⁵⁰ It should also be noted that the Development Bank of Southern Africa has provided 'treasury services, including a bridging facility of ZAR 10 million, along with financial and accounting, disbursement, procurement and contracting, legal, logistical, and human resource management services.'⁵¹ South Africa is to continue to bear some costs for the Secretariat under the host agreement concluded in October 2008.

The reliance on contributions from states that will undergo review could be criticised. A state that got a bad review could refuse to contribute financially. However, it is questionable whether a financing under the regular AU budget would be a feasible alternative considering the resource constraints facing various AU organs. Since the APRM process is voluntary, financing under the regular AU budget would also surely be controversial among states not

⁴⁷ African Peer Review Mechanism *Annual report 2008* 26-28.

⁴⁸ African Peer Review Mechanism *Annual report 2008* 29.

⁴⁹ African Peer Review Mechanism *Annual report 2008* 30.

⁵⁰ African Peer Review Mechanism (2007) 5.

⁵¹ Development Bank of Southern Africa *Activities report 2005-2006* (2006) 49.

participating in the process. Donor funding is also problematic.⁵² The establishment of the Trust Fund is a way to avoid conditionality. African ownership of the APRM is important to ensure credibility and the increased reliance on funding from the UNDP and other donors risks compromising the APRM.⁵³

In addition to financing the international secretariat and review process each participating state must also finance its own national review process. This includes the cost of the in-country part of the country review mission. The cost of the Ghana APRM process until the completion of the self-assessment was US\$ 1.5 million.⁵⁴ The budget for South Africa's national APRM process (2005-2006) was ZAR 20.5 million (US\$ 3 million).⁵⁵ The National Focal Point of Nigeria has indicated that the federal government had spent US\$ 14 million on the APRM process by March 2008.⁵⁶ In Kenya the APRM process was funded through a 'basket fund' administered by the UNDP. The UNDP contributed almost US\$ 1 million to the fund.⁵⁷ Slow disbursement of funds created problems in implementing the various activities within the timeframes set.⁵⁸ Similar problems have been noted with regard to the UNDP administered fund for the APRM process in Benin.⁵⁹ In March 2006 the Tanzanian Ministry of Planning, Economy and Empowerment estimated that the national review process would cost about US\$ 1 million. The UNDP had allocated US\$ 200,000 while the remaining funds would be requested from the government and

⁵² DA Bekoe 'Creating a reliable African Peer Review Mechanism' (2003) 1(4) *Chimera – The Creation of Imagination* 2-9 6.

⁵³ Lecture by Professor Wiseman Nkuhlu, former CEO of NEPAD, University of Pretoria, 8 November 2007.

⁵⁴ A Bing-Pappoe 'Ghana and the APRM: A critical assessment' (2007) 9.

⁵⁵ By January 2006, ZAR 9 million had been secured from the South African government and ZAR 1.2 million had been committed by the UNDP. African Peer Review Mechanism, South Africa 'Progress report 13 January 2006', 6.

⁵⁶ LA Jinadu 'The African peer review process in Nigeria' (2008) 22.

⁵⁷ O Oreyo 'Nepad to create media office' *The Standard* 19 May 2006.

⁵⁸ SO Akoth 'The APRM process in Kenya – A pathway to a new state?' (2007) 15, 17.

⁵⁹ G Badet 'Benin and the African Peer Review Mechanism: Consolidating democratic achievements' (2008) 19.

donors.⁶⁰ UNDP together with France, Norway, Germany and the UK provided US\$ 1.9 million for the review process in Mozambique.⁶¹

The lack of take-off of the APRM process in some countries can be explained by lack of genuine willingness (some seemingly signing up for the APRM because they were on the NEPAD Implementation Committee at the time), fear of critical reports and lack of finances. With regard to the last issue, donor countries may feel that countries that have not reached a certain governance level will not benefit from the process and they will therefore not provide money to assist with the implementation of the self-assessment process.

As has been noted above financing from donors is available to conduct the reviews. In addition donors have promised to provide financial assistance to assist in the implementation of the Programmes of Action. As the cost of the reviews are minor compared to the cost of implementing the POAs, it is difficult to neglect this as an incentive for participation in the APRM despite the assertion of President Kagame of Rwanda that

the APRM should not be perceived as an instrument to access foreign resources or to please donors, but rather as a process to improve the national policy making, sharing of experiences and creating a conducive environment for investments, all of which are in our best interests.⁶²

The G8 reiterated its support for the APRM in June 2007:⁶³

⁶⁰ Report for the Africa Government Forum VI (AGF VI) on preparations for the African Peer Review Mechanism (APRM) in Tanzania , 9th–11th May 2006, Kigali, Rwanda, 9.

⁶¹ undp.org.mz (accessed 8 October 2007).

⁶² 'Building business confidence through corporate governance and African Peer Review' remarks by HE Paul Kagame, President of the Republic of Rwanda at the ninth COMESA Summit, *Rwanda NEPAD magazine*, issue no 2, November 2004, 2.

⁶³ G8 Summit 2007, Heiligendamm, Growth and responsibility in Africa, Summit Declaration (8 June 2007), para 8,

www.g-8.de/Content/DE/Artikel/G8Gipfel/Anlage/Abschlusserkl_C3_A4rungen/WV-afrika-en,templateId=raw,property=publicationFile.pdf/WV-afrika-en (accessed 18 July 2007).

The G8 reaffirm their commitments to actively support countries that implement sound policies consistent with the recommendations of the APRM. We will support these countries in implementing their national Plans of Action to make progress in achieving the MDGs by 2015. Consequently, we commit ourselves and encourage others to give priority attention to the results of the reviews in their own strategies for bilateral and regional cooperation.

Despite this commitment a 2007 study showed that it is only Canada and the UK of major donors which explicitly rely on the APRM country review reports for governance assessment which in turn influence decisions on aid.⁶⁴ The House of Lords has called on the EU to support the APRM process and to use the outcome of the APRM process to determine where aid should go but to avoid 'specify the means by which countries implement any recommendations made.'⁶⁵

The funding of POA implementation will be discussed further below and in the case studies in part II of this study.

5.3.4 Commitment to human rights treaties

All AU members have acceded to the African Charter and all but Somalia to the CRC. CEDAW has been ratified by all African countries except Somalia and Sudan, the ICCPR by all except the Comoros, Guinea-Bissau and Saõ Tomé and Príncipe, CERD by all except Angola, Djibouti, Guinea-Bissau and Saõ Tomé and Príncipe and ICESCR by all except Botswana, the Comoros, Mozambique, Saõ Tomé and Príncipe and South Africa. As on the global level CAT is the least ratified of the six main human rights treaties, with ten African states not having ratified this treaty, including Angola, Saõ Tomé and Príncipe, Sudan and Tanzania of countries that have signed up for the APRM. Nineteen AU members have not ratified the first Optional Protocol to the Covenant on

⁶⁴ University of Essex & UNDP (2007). See also DFID *Country Governance Analysis – A DFID practice paper*, July 2008.

⁶⁵ House of Lords, European Union Committee (2006) para 490. See also paras 234-252.

Civil and Political Rights (ICCPR) allowing for individual complaints to the Human Rights Committee. These include nine states that have signed up for the APRM, including Kenya and Rwanda.⁶⁶ Seemingly there is no significant difference in the levels of commitment to international human rights law between the 29 states that have signed up for the APRM review process and the 24 AU members that have not.

The commitment to international human rights law through ratification of treaties is often only rhetorical. As with signing up to the APRM, there are many different factors that contribute to whether a state decides to become a state party to an international human rights treaty. International commitments entail costs to bring practices into conformity with the norms.⁶⁷ These costs are not always realised because of weaknesses in ensuring compliance that will be discussed further below. Thus a state can use the ratification of a treaty as ‘window-dressing’ if it considers it unlikely that the cost of commitment will actually be realised.⁶⁸ This could explain Hathaway’s finding that ‘ratification of the treaties by individual countries appears more likely to offset pressure for change in human rights practices than to augment it.’⁶⁹

5.4 Compliance theory

To comply is to ‘act according to accepted standards’. A step towards such substantive compliance is implementation of the standards, ‘the process of

⁶⁶ The others are Egypt, Ethiopia, Mozambique, Nigeria, Tanzania, Sudan and Saõ Tomé and Príncipe.

⁶⁷ OA Hathaway ‘The cost of commitment’ (2003) 55 *Stanford Law Review* 1821 1856. According to Goldsmith & Posner (2005) 127-132 both costs and benefits of treaty ratification are very small and there is therefore no systemic reason for treaty ratification which is dependent on the ‘vagaries of domestic politics and institutions, which are lost in noise.’ JL Goldsmith & EA Posner *The limits of international law* (2005) 132.

⁶⁸ Hathaway (2003) 1825.

⁶⁹ OA Hathaway ‘Do human rights treaties make a difference?’ (2002) 111 *Yale Law Journal* 1935.

putting international commitments into practice'.⁷⁰ This can be done for example through legislation and the creation of institutions. The fact that rules have been implemented does not necessarily mean that compliance in the sense of 'rule-consistent behaviour' has been achieved.

It should also be noted that even if norms have been complied with this does not necessarily mean that they are effective in achieving the objective sought.⁷¹ This difference between compliance and effectiveness is apparent in the APRM; not everyone agrees that the prescriptions of the APRM framework documents and the standards to which they refer will bring about the ultimate objective of development and poverty eradication. Indeed, popular will could often contradict agreed standards.

The clarity of the norms also affects the effectiveness of an agreement.⁷² Human rights are often vaguely defined in international treaties. Many agreements also include imprecise limitations of the rights. Fortunately international human rights law have developed a lot over the last decades through interpretation both by international and national bodies. In addition to judicial and quasi-judicial pronouncements on the contents of rights, general comments and resolutions have been adopted to give a more precise meaning to the content of human rights norms.

The aim of compliance with international human rights law is to achieve 'rule-consistent behaviour on the domestic level'.⁷³ The rest of this chapter will discuss what factors contribute to compliance with international law and in

⁷⁰ K Raustiala & A Slaughter 'International law, international relations and compliance' in W Carlsnaes *et al* (eds) *Handbook of international relations* (2002) 539.

⁷¹ R Higgins 'Compliance with United Nations decisions on peace and security and human rights questions' in SM Schwebel (ed) *The effectiveness of international decisions* (1971) 32.

⁷² However, Posner & Goldsmith (2005) 134 argue that 'clearer and more specific' human rights would lead to more violations.

⁷³ HP Schmitz & K Sikkink 'International human rights' in W Carlsnaes *et al* (eds) *Handbook of international relations* (2002) 529.

particular what role international monitoring can play in achieving compliance with human rights.

In *How nations behave* Henkin posited that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’⁷⁴ However, international law comprises many different fields and it is clear that compliance varies.⁷⁵ Compliance with ‘coordination agreements’ is very high.⁷⁶ Some regulatory agreements require little change in behaviour and therefore have high compliance rates.⁷⁷ The situation is different with regard to agreements that require major changes in policy and practice at the domestic level, such as human rights treaties. Human rights are often singled out as having the largest compliance gap.⁷⁸

Realists argue that compliance occur when state interest and rule-consistent behaviour converges as the ‘rational actor’ considers the cost and benefit of compliance.⁷⁹ The supporters of managerialism argue that states generally comply with international law if they can.⁸⁰ Compliance is achieved through dialogue. In their view capacity building is the major tool to address non-compliance.⁸¹ Another theory hypothesises that compliance follows if norms and the institutions set up to monitor compliance with them are perceived as

⁷⁴ L Henkin *How nations behave - Law and foreign policy* (1968).

⁷⁵ GW Downs & AW Trento ‘Conceptual issues surrounding the compliance gap’ in EC Luck & MW Doyle (eds) *International law and organization* (2004) 20.

⁷⁶ Downs & Trento (2004) 20; J Dugard *International law - A South African perspective* (2005) 9.

⁷⁷ This may also have to do with the required conduct is specific. Franck notes that ‘[r]ules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct.’ T Franck *Fairness in international law and institutions* (1995) 30-31, 99-100.

⁷⁸ Downs & Trento (2004) 37, L Henkin *International law: Politics and values* (1995) 203.

⁷⁹ See eg Goldsmith & Posner (2005) 3. As noted by A Chayes & A Chayes *The new sovereignty* (1995) 3 this notion goes back to Machiavelli. This does not necessarily mean that there is not a high degree of compliance with at least some aspects of international law. See HJ Morgenthau *Politics among nations – The struggle for power and peace* (1967) 265.

⁸⁰ Chayes & Chayes (1995) 3.

⁸¹ Chayes & Chayes (1995) 14-15.

legitimate and just.⁸² Many variations on these theories have been put forward.⁸³ The managerial school with its focus on dialogue is seemingly the closest to the philosophy underlying the APRM.

A number of statistical studies have found that ratification of international human rights treaties does not necessarily lead to improved respect for human rights.⁸⁴ It is clear that merely adopting a constitution with a comprehensive bill of rights or ratifying an international human rights treaty does not necessarily change the human rights situation in a country for the better.⁸⁵ As noted by Shue: 'A proclamation of a right is not the fulfilment of a right, anymore than an airplane schedule is a flight.'⁸⁶

Statistical analysis has been used to try to determine the factors that contribute to human rights violations. These studies have generally focused on repression, such as the incidence of torture, forced disappearances and extra-judicial executions. Statistical information for these studies has been obtained by coding for example the annual human rights reports of the US State Department and Amnesty International.⁸⁷ Factors that has been identified as contributing to repression include the type of regime (democratic regimes are less repressive), the level of economic development and the presence of armed conflict.⁸⁸ While

⁸² Franck (1995).

⁸³ For an overview of different theories of compliance with international law see W Bradford ('International legal compliance: Surveying the field' (2005) 36 *Georgetown Journal of International Law* 49. See also R Goodman & D Jinks 'How to influence states: Socialization and international human rights law' (2004) 54 *Duke Law Journal* 621 who distinguish between coercion, persuasion and acculturation.

⁸⁴ LC Keith 'The United Nations International Covenant on Civil and Political Rights: Does it make any difference in human rights behavior?' (1999) 36 *Journal of Peace Research* 95; Hathaway (2002); T Landman *Protecting human rights: a comparative study* (2005). In most of these studies respect for human rights is used as a synonym for the absence of repression.

⁸⁵ C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483.

⁸⁶ H Shue *Basic rights - subsistence, affluence and US foreign policy* (1996) 15.

⁸⁷ Schmitz & Sikkink (2002) 518.

⁸⁸ Schmitz & Sikkink (2002) 518-519. As noted by Downs & Trento any compliance strategy is sure to fail in a war situation, Downs & Trento (2004) 33.

there has been little focus on socio-economic rights,⁸⁹ there is a large body of literature on what factors inhibit development, in particular the relationship between democracy and development.⁹⁰

There is no agreement on the methodology to be used for statistical analysis. Some argue that it is not possible to construct a framework that takes into consideration all the complexities of compliance.⁹¹ It is noteworthy that the quantitative studies cited above only consider the direct impact of treaty ratification. They do not consider for example if states that have complied with formal requirements, such as state reporting, have a higher degree of compliance with the norms. The reality of compliance with human rights norms is seemingly more complex than can be articulated in a statistical theory:⁹²

International articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce, stimulate, and monitor these domestic dialogues. While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits for rights protection.

Detailed qualitative studies of the effectiveness of the international human rights system are few. The study by Heyns and Viljoen on the impact of six core UN

⁸⁹ An exception is Heinisch who argues that 'performance in securing basic economic and political rights ... can be adequately explained by two key regime type variables – political competitiveness and political openness.' R Heinisch 'Basic human rights – Does regime matter' (1997) 25 *Southeastern Political Review* 571.

⁹⁰ See eg A Przeworski *et al Democracy and development - Political institutions and well-being of the world, 1950-1990* (2000); R Alence 'Political institutions and developmental governance in sub-Saharan Africa' (2004) 42(2) *Journal of Modern African Studies* 163-187. See also chapter 2.

⁹¹ See the response of R Goodman & D Jinks 'Measuring the effects of human rights treaties' (2003) 14 *European Journal of International Law* 171-183 to Hathaway (2002) and the rebuttal of Hathaway 'Testing conventional wisdom' (2003) 14(1) *European Journal of International Law* 185-200. See also Landman (2005).

⁹² D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121 122.

human rights treaties in 20 countries is the most elaborate of these studies.⁹³ Other studies have focused on the impact of complaints procedures,⁹⁴ state reporting⁹⁵ and the monitoring methods of the UN special procedures.⁹⁶ As in the quantitative studies cited above, to establish causation is also a problem in qualitative studies. In addition it can be difficult to draw general conclusions from a small group of countries.⁹⁷

Heyns and Viljoen find several factors that limit the impact of treaty monitoring. The limiting factors include reluctance to implement recommendations, ignorance and lack of coordination, lack of 'domestic human rights culture', poverty and traditional practices.⁹⁸ Among factors that contribute to compliance they list media coverage, national action plans, NGO mobilisation facilitated by access to information such as concluding observations, international donor pressure and education.⁹⁹

The dearth of studies is indicative that the impact of international monitoring is difficult, if not impossible, to measure. Monitoring reinforces the domestic debate; it is seldom the only reason for change. An evaluation of international monitoring methods must thus focus on the extent to which a monitoring method has the potential of contributing to the ongoing debate at the domestic level. A consequence of this is that there is reason to be pessimistic about any impact of international monitoring in countries where there is little opportunity for domestic dialogue.

⁹³ Heyns & Viljoen (2001). See also C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002).

⁹⁴ F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004' (2007) 101 *The American Journal of International Law* 1..

⁹⁵ D Baro *A tool for change? Reporting to the UN Committee on the Rights of the Child* (2003).

⁹⁶ P Flood *The effectiveness of UN human rights institutions* (1998), I Nifosi *The UN special procedures in the field of human rights* (2005).

⁹⁷ Heyns & Viljoen (2001) 486-487.

⁹⁸ Heyns & Viljoen (2001) 517-522.

⁹⁹ Heyns & Viljoen (2001) 522-523.

5.5 International monitoring methods

In the following I will discuss the main methods of international monitoring in the field of human rights starting with other peer review mechanisms. Thereafter state reporting, independent fact-finding and complaints procedures are considered with a focus on how the APRM compares to these measures.¹⁰⁰ An attempt will be made to consider to which degree the various mechanisms play a role in inducing compliance in addition to their obvious role of assessing compliance.¹⁰¹ Thereafter specific factors which could affect the role of a monitoring mechanism in inducing compliance are considered such as the normative framework, the expertise and independence of monitoring bodies, peer and public pressure, assistance and sanctions.

5.5.1 Peer review

The OECD makes use of peer review in a number of policy areas: economic policy, environment, development cooperation, public management service, trade, financial, fiscal and enterprise affairs, science, technology and industry, education, labour and social affairs, agriculture/fisheries and energy.¹⁰² The European Union has developed a similar mechanism called the Open Method of Co-ordination (OMC).¹⁰³ Noteworthy in the context of human rights are the anti-

¹⁰⁰ Forms of compliance control which are not used in Africa, such as the 'screening' of potential members of the Council of Europe (CoE) and in particular the European Union is not discussed. For a discussion of the CoE system see A Zimmermann 'Dispute resolution, compliance control and enforcement in human rights law' in G Ulfstein (ed) *Making treaties work – Human rights, environment and arms control* (2007) 22-25.

¹⁰¹ Cf RA Falk *The status of law in international society* (1970) 332.

¹⁰² F Pagani 'Peer review: A tool for co-operation and change - An analysis of an OECD working method', OECD SG/LEG(2002)1 (2002) 15-21.

¹⁰³ A Schäfer 'A new form of governance? Comparing the open method of co-ordination to multilateral surveillance by the IMF and the OECD' (2006) 13(1) *Journal of European Public Policy* 70. See also O de Schutter & S Deakin (eds) *Social rights and market forces: Is the open method of coordination of employment and social policies the future of social Europe?* (2005).

corruption peer reviews conducted by the OECD, the Council of Europe¹⁰⁴ and under the Inter-American Convention against Corruption.¹⁰⁵

Schäfer sets out the following six elements of a peer review:¹⁰⁶

- Definition of legally non-binding common goals
- Exclusively national implementation
- Monitoring and reporting by the Secretariat including bilateral contacts
- Multilateral discussion (peer pressure)
- Country-specific recommendations (non-enforceable)
- Publication of the results (public pressure)

Schäfer's six elements illustrate the similarities and differences with the APRM process as set out in chapter 4.¹⁰⁷ One difference is that most peer reviews do not require the development of a Programme of Action, a central feature of the APRM process. This aspect is however not absent in all peer reviews. For example, under the EU OMC process some reviews demand that governments develop national action plans.¹⁰⁸ Another difference is that most peer reviews make use of civil servants of other member states to conduct the fact-finding part of the review. The APRM in contrast rely to a large degree on other international organisations in complementing its own staff. In his schematic

¹⁰⁴ Group of States against corruption (GRECO), www.greco.coe.int.

¹⁰⁵ N Boswell 'The impact of international law on domestic governance' (2003) 97 *American Society of International Law Proceedings* 133 135, Organization of American States 'Report on the activities to date by the Committee of Experts of the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption', fifth meeting of the Committee of Experts, 2-6 February 2004, Washington DC, SG/MESICIC/doc.95/04 rev 3.

¹⁰⁶ In Schäfer's terminology multilateral surveillance, Schäfer (2006) 82.

¹⁰⁷ For a comparison between the APRM and some of the peer reviews mentioned in this section see R Kanbur 'The African Peer Review Mechanism (APRM): An assessment of concept and design'(2004)

www.arts.cornell.edu/poverty/kanbur/APRM.pdf (accessed 2 April 2007); Z Kebonang 'African Peer Review Mechanism: An assessment' (2005) 61(2) *India quarterly* 138.

¹⁰⁸ Schäfer (2006) 79. On the OMC and human rights see S Fredman *Human rights transformed – Positive rights and positive duties* (2008) 159-165.

presentation Schäfer takes note of the importance of both peer pressure and public pressure. This is equally important for the APRM.

Peer review covering human rights was an APRM novelty,¹⁰⁹ but the UN has followed suit. When the UN Human Rights Commission was transformed into the Human Rights Council in 2006 it was decided that all countries should undergo regular periodic review by the Council of their compliance with human rights norms.¹¹⁰ The modalities of what came to be known as the Universal Periodic Review (UPR) were developed by the Council.¹¹¹ It was decided that the reviews should be undertaken in four-year cycles with three sessions per year. 48 states are reviewed each year. All UN member states are scheduled to have been reviewed by the end of 2011.¹¹² The first UPR session was held in Geneva from 7 to 18 April 2008.

The UPR review is based on a national report, a report summarising findings by UN human rights bodies and a report summarising submissions by other stakeholders, including NGOs and national human rights institutions.¹¹³ The national report should be maximum 20 pages and the other summary reports, prepared by the Office of the High Commissioner for Human Rights, maximum 10 pages each.¹¹⁴ The review is conducted through an 'interactive dialogue' before the UPR working group of the Council. The review of each country is allocated three hours. All states may participate in the dialogue. Other

¹⁰⁹ However, note monitoring of health, social and education policies by the OECD and the EU's OMC.

¹¹⁰ General Assembly resolution 60/251 of 15 March 2006.

¹¹¹ Human Rights Council resolution 5/1 of 18 June 2007. On the development of the UPR see FD Gaer 'A voice not an echo: Universal Periodic Review and the UN treaty body system' (2007) 7(1) *Human Rights Law Review* 109-139.

¹¹² Calendar for the full cycle, www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf (accessed 27 November 2008).

¹¹³ The African Commission could also submit information, cf comments by Ms Samia Slimane, representative of the United Nations High Commissioner for Human Rights, Final communiqué of the 44th ordinary session of the African Commission on Human and Peoples' Rights, held in Abuja, Federal Republic of Nigeria from 10 to 24 November 2008, para 27.

¹¹⁴ Resolution 5/1 para 15.

stakeholders may attend but not participate in the review. After the dialogue a report is prepared by the *troika*, a group of three rapporteurs representing members of the UPR working group, in addition to the country under review. The report includes the recommendations to the reviewed state put forward during the interactive dialogue and the state's response to these recommendations. The report of the *troika* is adopted by the working group. A few weeks later the report is presented to the plenary of the Human Rights Council which adopts the outcome report after inviting the state under review and other stakeholders, including states and NGOs, to make comments.¹¹⁵ All reports and other documents which form part of the UPR country review are published on the OHCHR web site.¹¹⁶

The UPR was originally perceived as 'a chamber of peer review'.¹¹⁷ Though peer review was not retained in the final name, the UPR share most of the characteristics of a peer review process as discussed above: reporting by the Secretariat, peer pressure through multilateral discussion, non-enforceable recommendations and public pressure through publication of the results. The country under review explicitly endorses the recommendations emanating from the process which it wants to take on board. These recommendations thus take on the form of a plan of action, progress with which can be measured in the next round of reviews. However, it must be noted that the recommendations are often vague and that there is no discussion on how to finance new interventions. The UPR also share some characteristics with state reporting, but it is noticeable that while in the state reporting process NGOs have the possibility to comment on the state report through submission of shadow reports, under the UPR stakeholders make their submissions prior to the submission by the state of its report.

¹¹⁵ Resolution 5/1 paras 18-32.

¹¹⁶ www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx

¹¹⁷ 'Secretary-General elaborates on reform of human rights structures in address to Commission on Human Rights', UN press release, 7 April 2005.

An evaluation of the first session of the UPR notes that it has 'shown the potential for providing a political forum for following up treaty bodies and charter bodies' activities and Recommendations' but that it is also used as a 'pat-on-the-back' exercise in particular by African states.¹¹⁸

5.5.2 State reporting

To have states report on regular intervals on their implementation of international agreements to an independent body set up under the agreement is one of the most common methods of trying to induce compliance with international norms. Because of the similarities with the APRM process, state reporting will here be treated in some detail.

Provisions on state reporting on human rights

State reporting to an international body was first provided for after World War I by the International Labour Organisation (ILO) to monitor compliance with international labour standards.¹¹⁹ This system is still in place.¹²⁰ The ILO reviews its 178 members annually. States are required to send reports on ratified conventions to the ILO with copies to workers' organisations and employers' organisations. The Committee of Experts on the Application of Conventions and Recommendations examines nearly 2000 reports at its annual meetings. The report of the Committee of Experts goes to the Committee on the Application of Standards of the International Labour Conference, composed of representatives of governments, employers and workers. A dialogue with the

¹¹⁸ E Domínguez Redondo 'The Universal Periodic Review of the UN Human Rights Council: An assessment of the first session' (2008) 7(3) *Chinese Journal of International Law* 721–734 731.

¹¹⁹ State reporting was also provided for in the Mandates system set up by the League of Nations to administer former colonies of Germany and Turkey.

¹²⁰ L Swepston 'The International Labour Organization's system of human rights protection' in J Symonides (ed) *Human rights: International protection, monitoring, enforcement* (2003). 95. See also C Tomuschat *Human rights - between idealism and realism* (2003) 136; EA Landy *The effectiveness of international supervision - Thirty years of ILO experience* (1966) 204-208.

government under review is held in the Committee, usually led by the employers' and workers' representatives of the reviewed country.¹²¹

The UN main human rights conventions, ICCPR, ICESCR, CERD, CEDAW, CAT, CRC and CMW, and other human rights conventions such as the UNESCO Convention against Discrimination in Education, all provide for state reporting. The human rights conventions provide that states shall report on implementation of the treaties at regular intervals ranging from two to five years. The reports are examined by a committee of independent experts set up under the treaty.

At the regional level article 62 of the African Charter provides for states to submit reports on the implementation of the Charter every two years.¹²² It is not clear from the Charter which organ should examine these reports. Shortly after its establishment the African Commission in 1988 requested the OAU Assembly to entrust it with this task. The request was granted and the same year the Commission adopted Guidelines for National Periodic Reports.¹²³ State reporting on human rights exists also in the other regional human rights systems.¹²⁴

¹²¹ Swebston (2003) 96.

¹²² On the state reporting system under the African Charter see M Evans *et al* 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in M Evans & R Murray *The African Charter on Human and Peoples' Rights - The system in practice* (2002).

¹²³ On these and further guidelines on state reporting by the Commission see Viljoen (2007) 371-373.

¹²⁴ In the European system state reporting is the main monitoring mechanism under the European Social Charter. Under the European Convention on Human Rights state reporting is only at request and not regular. The Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights includes a state reporting mechanism.

Objectives of state reporting

The Committee on Economic, Social and Cultural Rights has in a general comment set out the objectives of state reporting as follows:¹²⁵

- Comprehensive review of national legislation and administrative rules, procedures and practices
- Ensuring that the state monitors the actual situation with respect to each of the rights
- Establishment of principled policy-making by government
- Facilitate public scrutiny of government policies
- Basis for effective evaluation by government and Committee
- Provide better understanding by state party to problems and shortcomings
- Facilitate exchange of information among states

The focus is clearly on the state's self-assessment of the situation in the country.¹²⁶ If the state itself is the only one involved in this assessment the risk for an inadequate report increases. The reports risk becoming purely copies of constitutional provisions without any reference to actual practice. Civil society should be involved in the preparation of a state report, but this should never go as far as diminishing the role of the state as the author and the entity ultimately responsible for the report and the implementation of human rights. Zambia's 2003 report to the CESCR Committee indicates a balancing of state and civil society input in the process:

The preparation of Zambia's initial report for submission to the United Nations Committee on Economic, Social and Cultural Rights involved the participation of academia, civil society and all relevant line ministries. This exercise provided the Government with an opportunity to review relevant policies, legislation and administrative practices bringing to the fore the various challenges and difficulties

¹²⁵ Committee on Economic, Social & Cultural rights: General Comment 1 (Reporting by states parties), third session, 1989, E/1989/22. (CESCR General Comment 1).

¹²⁶ F Viljoen Realisation of human rights in Africa through inter-governmental institutions, unpublished LLD thesis, University of Pretoria (1997) 235-236.

that the Government faces in effecting the full realization of economic, social and cultural rights. The exercise further availed the Government of the opportunity of identifying new ways in which to overcome the various challenges that Zambia faces in the implementation of economic, social and cultural rights.¹²⁷

However, despite this effort, the CESCR Committee in its concluding observations stated that

the information provided was not sufficient for the Committee to be fully able to assess developments in the status of implementation of most of the Covenant's provisions ... [The Committee] regrets that there were not enough members in the delegation who were expert in all economic, social and cultural rights and could provide more information to the Committee ...¹²⁸

Civil society participation is more integral to the APRM process than what is the case in state reporting in most countries. In addition the country review visit gives opportunity to interaction with all stakeholders and should therefore improve the information flow.

Submission of reports

States are often tardy with their reports or do not submit them at all. Factors that have been raised by the states for non-reporting include: state of emergency,¹²⁹ deep social and economic crisis,¹³⁰ war and genocide¹³¹ and lack of personnel trained in drafting reports.¹³² To address the last of these issues donor funding specifically for a state to fulfil its reporting obligations is becoming

¹²⁷ Initial report: Zambia, E/1990/5/Add.60, 1 September 2003, 3.

¹²⁸ Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.106, 23 June 2005, paras 2-3.

¹²⁹ Eleventh periodic report: Burkina Faso, CERD/C/279/Add.2, 13 March 1997.

¹³⁰ Tenth periodic report: Burundi, CERD/C/295/Add.1, 4 April 1997.

¹³¹ Twelfth periodic report: Rwanda, CERD/C/335/Add.1, 28 June 1999.

¹³² Eleventh periodic report: Sudan, CERD/C/334/Add.2, 30 May 2000

increasingly common.¹³³ Support has for example been given by international organisations with field offices in the country reporting.¹³⁴

The slow take-off of the process in many countries that have signed up for the APRM reflects similar constraints as those that affect the late submission of state reports. Financing is an even more important factor with regard to the APRM as it is a more costly process than state reporting.

Other sources of information

One NGO observer has described the meetings of the UN human rights treaty bodies where they discuss state reports as ‘a strange diplomatic ritual’ where committee members ‘pose gently worded questions’ and the government representatives ‘are unable to respond to the questions but are particularly able at talking around the subject in a lengthy and uninformative response.’¹³⁵ For the examination to be meaningful the Committee members, who most of the time do not have expert knowledge on the country under examination, must be exposed to other sources on the situation in the country than the state report.¹³⁶ The chairperson of the Human Rights Committee has stated that NGOs serve as the ‘eyes, ears and hands’ of the treaty monitoring bodies.¹³⁷ NGOs play an important role both at the national level and by providing the monitoring body with information that could raise issues that have been omitted from the official state report.

¹³³ See eg initial report: Zambia, E/1990/5/Add.60, 1 September 2003; initial report: Uganda, CCPR/C/UGA/2003/1, 25 February 2003; eighteenth periodic report of Madagascar, CERD/C/476/Add.1, 1 April 2004, para 4.

¹³⁴ Eg UNICEF, see combined fourth and fifth periodic reports: Burkina Faso, CEDAW/C/BFA/4-5, 9 February 2004, 7.

¹³⁵ A Clapham ‘The UN human rights reporting procedures: An NGO perspective’ in J Crawford and P Alston (eds) *The future of UN human rights treaty monitoring* (2000) 176.

¹³⁶ Clapham (2000) 181.

¹³⁷ Justice PN Bhagwati ‘Foreword’ to M O’Flaherty *Human rights and the UN practice before the treaty bodies* (2002) vii

State reports to the UN committees are put on the web site of the OHCHR as soon as they have been received. The dates of consideration of the reports are also published well in advance. These measures have improved the access of NGOs to the process. Apart from national NGOs submitting shadow reports, some international NGOs, for example Amnesty International, publish reports linking their concerns with state reports that will come up for scrutiny.

In Africa the input by NGOs towards monitoring by the African Commission has been severely hampered by lack of access to state reports. Despite provisions in the activity reports that the reports and concluding observations should be published this have not been done. However, recently state reports have been published on the web site of the African Commission prior to the session at which the reports were to be considered. This is to be welcomed as many times governments are not keen to inform NGOs in advance.¹³⁸

Independent information can come from other sources than NGOs. For example, UNICEF provides the Committee on the Rights of the Child with information on states that are scheduled for review.¹³⁹

The flow of information obviously creates problems in that the volume of information that a monitoring body receives can become more than it can handle. To verify information is also often problematic.¹⁴⁰ In contrast, the APRM

¹³⁸ South Africa's first periodic report was considered at the 38th session of the Commission, starting 21 November 2005. A copy of the report that had been submitted to the Commission was given to an NGO only on 9 November by the Department of Foreign Affairs after a request from the NGO that had received information about the upcoming examination of the report. See Shadow report to South Africa's first periodic state report to the African Commission on Human and Peoples' Rights, to be presented at the 38th session of the African Commission on Human and Peoples' Rights, 21 November - 5 December 2005, Banjul, The Gambia, prepared by the Centre for Human Rights, University of Pretoria; Socio-economic rights project, Community Law Centre, University of the Western Cape, the Human Rights Institute of South Africa, Lawyers for Human Rights, Central and Gauteng Mental Health Society, Gauteng Children's Rights Committee, Community Law and Rural Development Centre, 18 November 2005, www.chr.up.ac.za/Shadow%20report.doc (accessed 22 December 2005).

¹³⁹ J Fitzpatrick 'Human rights fact-finding' in A Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 84.

¹⁴⁰ Fitzpatrick (2000) 93-94.

provides for much more active information gathering, both at the national and international level and means of on-site verification. However, the lack of transparency in various stages of the APRM process is a matter of concern.

Establishment of principled policy-making

According to the Committee on Economic, Social and Cultural Rights one of the outcomes of the state reporting process should be the ‘establishment of principled policy-making by government’.¹⁴¹ This important aspect has largely been lacking as states have focused their reporting on existing legislation and policy.¹⁴² State reporting provides for no equivalent to the APRM Programme of Action.

Dialogue between the state and the monitoring body

When a report is received by the Office of the High Commissioner for Human Rights in Geneva, which functions as the secretariat of the committees, it is first translated. In the past the Secretariat of the African Commission did not translate reports, which led to a situation where some of the Commissioners could not participate in the discussion.¹⁴³

For the first years of its existence the CERD Committee examined state reports without delegations from the country concerned participating in the examination process. From 1972 states were given the opportunity to participate in the process. As pointed out by Tomuschat examination ‘without a counterpart would have deprived the process of any effectiveness.’¹⁴⁴

¹⁴¹ CESCR General Comment 1.

¹⁴² Fredman (2008) 165.

¹⁴³ Evans *et al* (2002) 52

¹⁴⁴ Tomuschat (2003) 143

An indicator of whether a state takes the work of the committees seriously is the level and size of the delegation that presents the report.¹⁴⁵ However it should be noted that resources could be a limiting factor for poor countries in this regard. One advantage of the African Commission over the UN treaty bodies is that one of the two annual sessions of the Commission is often held outside its headquarters in Banjul. The fact that the UN treaty bodies only meet in Geneva or New York is a limitation on NGO engagement. The examination by the Human Rights Committee of the first report of the United States under the ICCPR took place in New York, thus allowing NGOs ‘a remarkable opportunity to work with the Committee members.’¹⁴⁶

The APRM country review mission can be seen as an external validation of the self-assessment. It is thus a much more elaborate and time consuming process than the more formal setting of discussing a state report in Geneva or other places far away from the country under review.

Concluding observations

In 1984 the Human Rights Committee started to publish concluding observations by individual Committee members. Since the early 1990’s all the treaty bodies adopt collective concluding observations setting out what the Committee considers to be positive and negative developments with regard to implementation of the treaty. When the state is reviewed the next time the concluding observations from the previous session forms one of the basis for the examination. The African Commission has started to adopt concluding observations, but since these are not published they are of limited effect.

The APRM country review report is the equivalent of the concluding observations of treaty monitoring bodies. While concluding observations are

¹⁴⁵ Connors (2000) 11

¹⁴⁶ Clapham (2000) 180. On the need to ‘bring the treaty system to the people’ see also Heyns & Viljoen (2002) 39.

quite brief,¹⁴⁷ the country review reports are long and it can therefore be harder to quickly get a clear overview of the main issues. However, the more lengthy APRM reports allow the Panel to substantiate their views more clearly, setting out the reasons for their position on a certain issue.

Follow-up

The Committee on the Rights of the Child was the first to adopt a follow-up procedure to its concluding observations, in 1999. Despite the limited follow-up activities an official of the High Commissioner, commenting in 2000, was of the view that

states are mindful of ... concluding observations and do take them into consideration when preparing their next periodic report; some have used them as a basis for amendments to domestic legislation.¹⁴⁸

A lack of compliance with a recommendation or decision is often not showing that the state is unwilling. Rather the state is unable to comply and therefore in need of assistance. Article 45(b) of the Convention on the Rights of the Child provides that the Committee shall contact other bodies if a need for technical assistance is indicated in a report. To send concluding observations to the UN resident coordinator in the country that has been reviewed as well as field offices where such exist could improve the possibilities for implementation.¹⁴⁹

¹⁴⁷ However, of the state reporting system under the European Social Charter where the report of the European Committee on Social Rights (the equivalent of concluding observations) can be over 100 pages. P Alston 'Assessing the strengths and weaknesses of the European Social Charter's supervisory system' in Grainne de Burca and Bruno de Witte (eds) *Social rights in Europe* (2005a) 52. Similarly to the ILO, these conclusions are first drafted by the Secretariat, a draft which forms the basis for the Committee's discussion. Alston (2005a) 59.

¹⁴⁸ MG Schmidt 'Follow-up mechanisms before UN human rights treaty bodies and the UN mechanisms beyond' in A Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 244.

¹⁴⁹ Schmidt (2000) 247-248.

Follow-up should not be left only to the expert bodies themselves. Political organs have an important role to play. Nowak talks of a 'missing link between independent expert bodies and political decision-making bodies'.¹⁵⁰ The Universal Periodic Review should ideally play the role of monitoring compliance both with recommendations from the state reporting process and decisions on individual complaints.¹⁵¹ Civil society also has an important role to play. A report on the impact of the UN treaty system in 20 countries concludes that the reporting process leads to negligible media coverage, though controversial issues raised in concluding observations sometimes gained media attention.¹⁵²

To summarise, a number of factors weaken the impact of state reporting.¹⁵³ Information is often lacking, and the process does not allow for easy verification of information at hand. The review meetings are short, take place far away from the country under review and does only allow for the active participation of the state party. Fitzpatrick paints a rather dark, but essentially correct, picture of the potential effectiveness of the reporting system when she states that the

report review system is posited on a utopian vision of constructive dialogue between knowledgeable and candid state representatives and treaty body members who can, through careful questioning informed only by a general expertise on human rights norms, assist the state to achieve compliance with the treaty.¹⁵⁴

¹⁵⁰ M Nowak 'The UN High Commissioner for Human Rights: A link between decisions of expert monitoring bodies and enforcement by political bodies' in A Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 253.

¹⁵¹ M Nowak 'The need for a world court of human rights' (2007) 7 *Human Rights Law Review* 251.

¹⁵² Heyns & Viljoen (2001) 513. See Clapham (2000) 182-183 on the role the media can play in the examination and follow up to state reports.

¹⁵³ Quashigah's assertion that the state reporting system under the European Social Charter is effective and could therefore serve as a model for the African Commission is not reflecting the reality of that process which display many of the weaknesses of a state reporting system, in particular low levels of NGO engagement. K Quashigah *The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism* (2002) 2 *African Human Rights Law Journal* 261; Alston (2005a).

¹⁵⁴ Fitzpatrick (2000) 88.

5.5.3 Independent fact-finding

Special rapporteurs and working groups

The UN Commission on Human Rights, now replaced by the Human Rights Council, developed a system of working groups and special rapporteurs, often referred to as special procedures.¹⁵⁵ These have thematic or country-specific mandates. Thematic mandates can examine the situation with respect of the right it is monitoring in any country in the world. Country mandates may investigate all types of human rights violations in the country, non-regarding which international instruments the country has ratified. The holder of the mandate and members of a working group are appointed by the chairperson of the Human Rights Council, previously the Commission on Human Rights. The African Commission has also established special rapporteurs, all of which are members of the Commission. Working groups of the African Commission include both members of the Commission and other independent experts.

The working methods of the special procedures include country visits, where the special rapporteur discusses the human rights issue within his or her mandate with government officials and civil society and thereafter produces a report. Special rapporteurs in the UN system also respond to individual complaints and can issue urgent actions. Through their role as the eyes and ears of the Human Rights Council they are also in a good position to act as an early warning system on deteriorating situations.¹⁵⁶

¹⁵⁵ The term special rapporteur is here used to also cover a number of other titles are used such as special representative or independent expert. There is no clear distinction between these titles. For an overview and assessment of effectiveness see Nifosi (2005).

¹⁵⁶ See Nifosi (2005) 134-135 for examples where special rapporteurs have fulfilled such a function. It should however be noted that this has not been followed up by any meaningful action from the Commission on Human Rights and other UN organs.

Inquiry procedures

Inquiry procedures are provided for under article 20 of CAT and article 8 of the CEDAW Optional Protocol. When the Committee receives reliable information of systematic violations it invites the state party to respond to the allegations. A member of the Committee can be assigned to conduct a confidential inquiry. On-site visits can be undertaken as part of the inquiry if the cooperation of the state concerned is obtained. The inquiry procedures are confidential, but the reports of finalised inquiries have been published.¹⁵⁷ ILO also has the possibility of instituting inquiry procedures.¹⁵⁸

The UN Security Council can use its chapter VII powers to establish inquiry procedures. A five-member Commission of Inquiry on Darfur was appointed by the UN Secretary-General in October 2004, following a Security Council Resolution. After on-site investigations the Commission presented its report to the Security Council in February 2005, leading the Council to submit the case for further investigation and possible prosecutions to the International Criminal Court. Another example is the international independent investigation Commission established in 2005 with a mandate to assist the Lebanese authorities to establish the truth behind the murder of former Prime Minister Hariri.¹⁵⁹

Reports by non-governmental organisations

Mention has already been made of the importance of civil society, national and international, to engage in the state reporting process. NGOs also have an important role to play in independent fact-finding. They form an important

¹⁵⁷ The CAT Committee has published the reports of five inquiries: Turkey (1993), Egypt (1996), Peru (2001), Sri Lanka (2002) and Mexico (2003).

¹⁵⁸ A Commission of Inquiry established by the ILO to investigate allegations of forced labour in Burma held hearings in Geneva and in neighbouring countries but was not allowed to visit Burma. Fitzpatrick (2000) 66.

¹⁵⁹ Security Council Resolution 1595 (2005).

source of information for special rapporteurs and working groups and their reporting on human rights violations play an important role on its own in exerting public pressure that will be discussed further below.

On-site visits

Most of the UN special procedures conduct a few country visits every year. A limitation is obviously that a visit requires an invitation from the state concerned. The UN has therefore encouraged states to submit standing invitations. However, few such invitations have been forthcoming, especially from Africa.¹⁶⁰ On-site visits by treaty bodies are rare. Preventative visits to places of detention are to be conducted under the Optional Protocol to the UN Convention against Torture, which recently entered into force.

The African Commission on Human and Peoples' Rights conducts promotional and fact-finding visits to member countries, though the distinction between these types of missions is not always clear. The impact of the missions is limited due to late publication or no publication at all of mission reports. The African Commission could learn from the Inter-American Commission which has for a long time made use of on-site visits to produce reports on the situation of human rights in member countries.¹⁶¹

One of the main problems with on-site visits is that they must take place within terms of the visit agreed on with the government. Since the authorities will know the whereabouts of the delegation it can prevent it from seeing persons it would

¹⁶⁰ As of July 2009 66 countries had extended standing invitations. The only African countries were Ghana, Sierra Leone, South Africa and Zambia. See www.ohchr.org/english/bodies/chr/special/invitations.htm (accessed 19 August 2009).

¹⁶¹ R Murray 'On-site visits by the African Commission on Human and Peoples' Rights: A case study and comparison with the Inter-American Commission on Human Rights' (1999) 11 *African Journal of International and Comparative Law* 460. See also T Mutangi 'Fact-finding missions or omissions? A critical analysis of the African Commission on Human and Peoples' Rights' (2006) 12(1) *East African Journal of Peace & Human Rights* 1-48.

like to see and prevent those wanting to give the delegation information from approaching it. Reprisals after a visit are also a possibility.¹⁶²

The objective of the APRM country review mission is to validate the self-assessment, not to conduct independent fact-finding. Background reports etc produced by the APRM Secretariat as part of the review process are produced to assist in this process and remain confidential. However, in the process of validating the self-assessment the country review mission meet a variety of stakeholders. When there are discrepancies between the self-assessment and the views of stakeholders this has often been reflected in the country review reports. It should however be noted that the constraints of a programme controlled by the inviting government is a reality also in the APRM process. Reports that have been produced as part of the independent fact-finding procedures set out above should clearly form part of the APRM evaluation. Such reports should be considered in both the self-assessment and the country review.

5.5.4 Field presence

The UN High Commissioner for Human Rights has held that 'an active presence in a country can often be considered to be the most effective way to engage.'¹⁶³ Field offices focus on technical cooperation and protection. In Africa the Office of the High Commissioner (OHCHR) has country offices in Angola, Togo and Uganda and regional field offices in Cameroon (for central Africa), Ethiopia (for eastern Africa) and South Africa (for southern Africa). In addition there are human rights components of peace missions in Burundi, Côte d'Ivoire, DRC,

¹⁶² Fitzpatrick (2000) 82.

¹⁶³ Report of the High Commissioner for Human Rights, A/60/36, para 22.

Eritrea/Ethiopia, Liberia, Sierra Leone and Sudan.¹⁶⁴ The tendency to restrict field presences to conflict-torn areas is problematic.¹⁶⁵

It is difficult to staff a mission quickly with substantial numbers of persons who possess the necessary background knowledge, language ability, objectivity and field operational skills to produce credible evidence of a human rights situation in crisis. The mission may be confused as to whether its focus is moderating ongoing human rights violations or investigating and documenting massive violations of the immediate past.

Most field offices have a mandate covering both monitoring and technical cooperation.¹⁶⁶ Sometimes a human rights field office serves as the main source of information to a country special rapporteur.¹⁶⁷ The increased field presence has also given the OHCHR the opportunity to publish follow-up reports on undertakings by governments.¹⁶⁸ Other UN agencies such as UNHCR and UNICEF are increasingly focusing on human rights in their fieldwork.¹⁶⁹

An APRM country review mission spends around three weeks in a country before it returns home to write up its report. There has been some criticism that there is a lack of knowledge of the country specific situation among the members that make up the review team.¹⁷⁰ Obviously people that stay longer in a country, such as staff of field offices, often have a more in-depth knowledge of local conditions.

¹⁶⁴ 'Making a difference where it matters most: OHCHR's support to implementation at country level', www.ohchr.org/EN/Countries/Pages/MapOfficesIndex.aspx (accessed 7 July 2009).

¹⁶⁵ Fitzpatrick (2000) 83.

¹⁶⁶ I Martin 'The role of a human rights field presence' in A Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000) 102.

¹⁶⁷ Martin (2000) 102.

¹⁶⁸ See eg on Sudan: Access to justice for victims of sexual violence, Report of the United Nations High Commissioner for Human Rights, 29 July 2005.

¹⁶⁹ Martin (2000) 100.

¹⁷⁰ See eg comments by President Kagame of Rwanda.

5.5.5 Complaints procedures

It is unlikely that one could talk of judicial human rights enforcement at the international level in Africa in the foreseeable future. The European Court of Human Rights has taken on a role much like a Constitutional Court of Europe, but as will be shown below there is little possibility of Africa emulating this system.¹⁷¹ This is not to say that the judiciary can not play a complementary role in the African human rights system.

All AU member states have ratified the African Charter on Human and Peoples' Rights.¹⁷² Despite this the African Commission has only considered around 300 individual complaints in the 18 years that the institution has existed. In contrast the European Court of Human Rights had by September 2008 handed down 10 000 judgment since its inception. The case load of the European Court has increased dramatically in recent years and in 2007 alone the court delivered over 1 500 judgments and 27 000 inadmissibility decisions.¹⁷³ This figure is hardly an indication that the situation for human rights is more problematic in Europe than in Africa. Most would argue that the opposite is true. In addition the African Charter covers more rights than the European Convention and the victim requirement that limits the access of NGOs to the European system does not exist in Africa.¹⁷⁴ However, standing requirements in national courts can

¹⁷¹ For a more positive view on the role of the African Court see CFJ Doebbler 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law and Contemporary Problems* 7 27.

¹⁷² Morocco is however not a state party. Morocco withdrew from the OAU in 1984 because of the regional organisations recognition of Western Sahara. The Constitutive Act of the AU

¹⁷³ 'European Court of Human Rights delivers its 10 000th judgment', press release issued by the Registrar, 638, 18 September 2008.

¹⁷⁴ See eg *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

have a limiting effect since the system requires exhaustion of local remedies through the domestic court system.¹⁷⁵

Very few people on the continent have the resources to exhaust local remedies in countries where legal aid is non-existent.¹⁷⁶ If the African Commission and Court for this reason interpreted the admissibility criteria in the Charter generously, the flood gate may open, but only if victims of human rights violations would see the regional system as an effective resort.

A study on compliance by African countries with decisions adopted by the African Commission and the UN Human Rights Committee shows that the compliance rate with decisions from both these bodies is very low.¹⁷⁷ In contrast, compliance with the judgments of the European Court of Human Rights is quite good.¹⁷⁸ A case remains on the agenda of the Committee of Ministers until the remedy ordered by the European Court has been complied with. To uphold compliance with the judgments of the European Court requires both peer and public pressure.¹⁷⁹ It must also be noted that the system is in need of constant revision to make it more efficient, as its success is the main reason for its heavy caseload.

¹⁷⁵ However, also the principle of exhaustion of local remedies has been interpreted generously for the complainant. See eg *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

¹⁷⁶ The Commission's view that domestic remedies do not have to be exhausted under these circumstances could have serious implications for the case load of the Commission. Cf *Purohit and Another v The Gambia*.

¹⁷⁷ Viljoen & Louw (2007). However, Doebbler (2003) 8-9, notes that African states have generally respected international law. As evidence he gives high rates of treaty ratification and compliance with international judgments. Whether high compliance with ICJ judgments, which is the example Doebbler gives, will mean high compliance with the judgments of the African human rights court remains to be seen.

¹⁷⁸ Council of Europe, Committee of Ministers, Supervision of judgments of the European Court of Human Rights, 1st annual report, 2007, annex 2: statistics, www.coe.int/t/e/human_rights/execution/CM_annreport2007_en.pdf

¹⁷⁹ A Moravcsik 'Explaining international human rights regimes: Liberal theory and western Europe' (1995) 1(2) *European Journal of International Relations* 157-189 158-159.

Getting the facts right is important to ensure credibility.¹⁸⁰ This together with the importance of well-reasoned judgments or decisions can in turn affect compliance. The remedies for a human rights violation set out by the monitoring body can also affect the likelihood of compliance. Shelton has held that '[n]on-monetary awards can be difficult to adjudicate, formulate, administer and enforce.'¹⁸¹ Compensation can never fully remedy a violation, but monitoring bodies that do not award compensation, such as the African Commission and the UN treaty bodies, risk being neglected.

The discussion above has dealt with the complaints system under the African Charter. Much the same is true for the UN treaty bodies which can receive complaints from African individuals. Kirby sees ratification of the Optional Protocol to the CCPR, allowing for individual complaints to the UN Human Rights Committee, as one of the most important indicators of implementation of human rights.¹⁸² Thirty African states have ratified this protocol. However, this system has not proved more effective than the African Commission. As Henry Steiner notes:

[The Human Rights Committee] is capable of issuing only about thirty views annually. On the other hand, well over a billion people inhabit the States that are parties to the Protocol, including many states with poor human rights protection. Although the Committee has produced a large and important body of decisions over the years that develop the Covenant's provisions, it seems evident that the complaints procedure cannot serve as an effective 'review' of human rights violations that would assure individual justice and the rule of law within the States parties to the Protocol.¹⁸³

¹⁸⁰ Fitzpatrick (2000) 65.

¹⁸¹ D Shelton *Remedies in international human rights law* (1999) 306.

¹⁸² M Kirby 'Indicators for the implementation of human rights' in J Symonides (ed) *Human rights: International protection, monitoring, enforcement* (2003) 331.

¹⁸³ H Steiner 'International protection of human rights' in M Evans (ed) *International law*. (2003) 768-769.

It is sometimes argued that a significant limitation in the individual complaints systems of the UN treaty system and the African Commission lies in the fact that their decisions are not legally binding.¹⁸⁴ On the other hand there is nothing stopping states from treating the decisions of these bodies as binding in their national legal system through enabling legislation, as a few states, mainly in Latin America, have done.¹⁸⁵

More importantly, to have any chance of success, follow-up to the decisions taken by the monitoring body is needed. Under the European Convention the Committee of Ministers keeps non-compliance with a judgment of the European Court on the agenda until the remedy ordered has been executed. This creates a 'psychological pressure' to comply.¹⁸⁶ In 1990 the UN Human Rights Committee created a Special Rapporteur for Follow-Up on Views.¹⁸⁷ Results of the follow-up activities are published in the Committee's annual report to the UN General Assembly. The Committee routinely requests states to submit information on measures taken to implement the views within three months. The African Commission adopted a resolution on follow-up in 2006.¹⁸⁸ However, as noted above efforts by decision making bodies to monitor the implementation of their own decisions have seemingly not led to increased compliance.

The reasons for the limited use of the complaints systems seem to lie in a combination of ignorance about their existence and the lack of effective

¹⁸⁴ Eg Schmidt (2000) 233. For an opposing view see Nowak (2000) 251. For an argument that the findings of the African Commission are binding see F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48(1) *Journal of African Law* 1; on the views of the UN treaty bodies, Zimmermann (2007) 45. See also the judgment of the Inter-American Court in *Loayza Tamayo* holding that states parties to the American Convention should 'carry out their best efforts to enforce the recommendations' of the Inter-American Commission. *Loayza Tamayo v Peru* (1997) 40 Inter-Am Ct HR (ser A), para 80, as cited by Shelton (2000) 451.

¹⁸⁵ Schmidt (2000) 241-242.

¹⁸⁶ Schmidt (2000) 233.

¹⁸⁷ Schmidt (2000) 235.

¹⁸⁸ Resolution on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights by States Parties, adopted at the 40th session of the African Commission on Human and Peoples' Rights, November 2006.

remedies provided. Currently there are very limited avenues of redress for an individual seeking redress for human rights violations at the international level in Africa. Complaints mechanisms will continue to play a role, but in the context of the current situation in Africa they cannot form the basis of the international system. As in the national systems access to justice must be seen in a wider light than access to courts.

5.6 Factors affecting compliance

5.6.1 The effect of the normative framework

When elaboration of the legal framework for accession to the APRM started in November 2002 the intention was to draft a legally binding instrument. In the drafting stages this instrument was known as the Accord.¹⁸⁹ It was to enter into force after having been ratified by one state from each of the five African regions. When the accession instrument was adopted by the Implementation Committee in March 2003 it had been renamed Memorandum of Understanding and provided that it should start to be operational on the day on which the fifth AU member state had deposited the signed document with the NEPAD Secretariat.¹⁹⁰

It is unclear what caused the changed terminology from what would have been a clearly legally binding treaty to what is seemingly a 'soft law' instrument that is not legally binding on the participants.¹⁹¹ One possible factor is that a ratification procedure as provided for in the draft Accord would have taken time. Since the NEPAD Implementation Committee was keen on getting the process going it would have chosen a legal framework that could enter into force immediately.

¹⁸⁹ Accord on the African Peer Review Mechanism, undated draft instrument (on file with author).

¹⁹⁰ MOU art 31.

¹⁹¹ On factors deciding whether states opt for soft law or hard law instruments see Goldsmith & Posner (2005) 91-100.

Though this factor might have played a role, the shift of terminology from Accord to MOU indicate that the Implementation Committee wanted a non-binding legal framework. This also explains the change of the word ‘ensure’ in the draft Accord and the APRM Base Document to the weaker ‘encourage’ in the MOU.

Memorandum of Understanding is a term normally used for bilateral agreements, with multilateral non-binding instruments often referred to as declarations.¹⁹² What makes the APRM MOU different from other multilateral declarations is that it includes certain provisions more often found in treaties. The reasons for this can probably be found in the drafting history of the MOU and the fact that it is a voluntary procedure and that participating countries must therefore sign up for the process.

As set out in the Vienna Convention the name of the agreement does not determine whether it is to be seen as a treaty or not.¹⁹³ The text of the agreement must be studied to determine whether it is to be seen as a treaty, and therefore legally binding. A careful reading of the MOU and its annexures seems to suggest that the intention of the Implementation Committee in adopting the MOU has not been to create a legally binding instrument. This is also how it has been interpreted by states.¹⁹⁴ Though not legally binding, the MOU is politically binding on the participating states. A violation can therefore have political consequences for the state in question.¹⁹⁵

¹⁹² See on the differences between treaties and MOUs, A Aust *Modern treaty law and practice* (2000) 26-46.

¹⁹³ Art 2.

¹⁹⁴ For example most states provide that treaties must be ratified by parliament. It appears that only Tanzania has followed this route, and then only after the signed MOU had already been submitted to the AU. The President of Tanzania signed the MOU on 26 May 2004 and submitted it to the AU Assembly in July. The MOU was ratified by the Tanzanian Parliament in February 2005. Report for the Africa Government Forum VI (AGF VI) on preparations for the African Peer Review Mechanism (APRM) in Tanzania, 9th – 11th May 2006, Kigali, Rwanda, 1.

¹⁹⁵ On politically binding agreements in the context of the CSCE/OSCE, see EB Schlager ‘A hard look at compliance with “soft” law: The case of the OSCE’ in D Shelton (ed) *Commitment and compliance – The role of non-binding norms in the international legal system* (2000) 350.

If consensus would emerge among the participating governments that the APRM is not needed anymore, a decision by the APRM Forum could dissolve the APRM. Amendment of the MOU is by mutual consent. If states had acceded to the APRM by way of a treaty such as the draft Accord, the APRM would have had a more stable legal basis.

The MOU on the APRM is not the first 'soft law' agreement to establish international institutional structures, indeed the structures established under NEPAD is another example. Among other examples can be mentioned the institutions of the Organisation for Security and Cooperation in Europe (OSCE),¹⁹⁶ the Commonwealth Secretariat¹⁹⁷ and the Commission on Sustainable Development,¹⁹⁸ that monitors the implementation of Agenda 21, which all have been established through non legally binding international agreements. The same applies to the UN special procedures and the special rapporteurs of the African Commission. The lack of a treaty basis for these mechanisms has led them to monitor compliance not only with treaties but also with 'soft' law instruments such as declarations and resolutions.¹⁹⁹

It has been argued that moving away from 'hard' to 'soft' law, as exemplified by the ILO Declaration on Fundamental Principles and Rights at Work, can lead to a weakening of treaty norms.²⁰⁰ The APRM uses a 'soft' approach both in setting out objectives and in the implementation process. Treaty norms remain

¹⁹⁶ HJ Schermers & NM Blokker *International institutional law: unity with diversity* (2003) 23; Schlager (2000) 360-365.

¹⁹⁷ Aust (2000) 30.

¹⁹⁸ D Shelton *Commitment and compliance – The role of non-binding norms in the international legal system* (2000) 11.

See also www.un.org/esa/sustdev/csd/csd.htm.

¹⁹⁹ Nifosi (2005) 132-134, who argues that this monitoring has strengthened the monitored soft law instruments and 'established a sort of *mandatory significance* of such instruments which is in between the exhortative power of a UN Declaration and the legal force of a human rights Convention.' Nifosi (2005) 134, emphasis in original.

²⁰⁰ Doebbler (2003) 23; P Alston "Core labour standards" and the transformation of the international labour rights regime' (2004) 15(3) *European Journal of International Law* 457.

legally binding with the APRM acting in a subsidiary role with regard to these norms, thus the importance of referring to the findings of the primary monitoring body. It is important to see the role of the monitoring of the APRM as complementary to other mechanisms. Its role is to exert additional pressure.²⁰¹

Some have argued that whether a finding of non-compliance is binding or not does not really affect the effectiveness of the finding as 'the various compliance procedures appear to derive their force from the ongoing interactions in which they are anchored, not from legal status.'²⁰²

5.6.2 Expertise and independence

The use of experts in assessing compliance has the advantage of making the assessment as objective as possible. Factors that the state parties should take into consideration when electing members to treaty bodies include: high moral standing,²⁰³ acknowledged impartiality,²⁰⁴ equitable geographical distribution,²⁰⁵ representation of principal legal systems,²⁰⁶ competence in the field covered by the convention,²⁰⁷ recognised competence in the field of human rights,²⁰⁸ and legal experience.²⁰⁹ Other factors limiting the pool of potential experts include that the positions are time consuming and not paid.

²⁰¹ Cf EB Weiss 'Conclusions: Understanding compliance with soft law' in Dinah Shelton (ed) *Commitment and compliance - The role of non-binding norms in the international legal system* (2000) 536, who finds that 'soft law instruments linked to a binding obligation were more likely to be complied with than were those not so affiliated'.

²⁰² J Brunnée 'Compliance control' in G Ulfstein (ed) *Making treaties work – Human rights, environment and arms control* (2007) 389.

²⁰³ ACHPR art 31, CCPR art 28(2), CERD art 8(1), CEDAW art 17(1), CRC art 43(2), CAT art 17(1).

²⁰⁴ CERD art 8(1).

²⁰⁵ CERD art 8(1), CEDAW art 17(1), CRC art 43(2), CAT art 17(1).

²⁰⁶ CERD art 8(1), CEDAW art 17(1), CRC art 43(2).

²⁰⁷ CEDAW art 17(1), CRC 43(2).

²⁰⁸ ACHPR art 31, CCPR art 28(2), CAT art 17(1).

²⁰⁹ ACHPR art 31, CCPR art 28(2), CAT art 17(1).

There has in the past been a tendency of appointing civil servants to the African Commission. A *note verbale*²¹⁰ to all ministries of foreign affairs in AU member states in April 2005 seeking nominations to four seats on the Commission excluded senior civil servants and ambassadors. The result of the election of the new members at the AU Summit in July 2005 indicates that these guidelines were followed.²¹¹

The quality of special rapporteurs and members of monitoring bodies should also be considered in determining the potential effectiveness of a monitoring mechanism. If the arguments put forward by the expert body is persuasive enough or if they are taken up by domestic media and civil society organisations they might lead to policy change. However, many times there is a need for additional political pressure to persuade a country to adopt and implement necessary reforms.

The independence of the APRM Panel is guaranteed in its Rules:

The APR Panel is an autonomous body. Its members shall serve in their personal capacity and not as members of governments or organizations. The APR Panel shall neither seek nor receive instructions from any authority external to the APR Forum. The recommendations and decisions of the APR Panel shall be made independently, impartially, and in good faith. The APR Panel shall not be influenced by political preferences or any particular interest whatsoever.²¹²

A short background on the original members of the Panel will be given below to evaluate whether the Panel is competent in all governance areas.²¹³ Professor

²¹⁰ BC/OLC/66/Vol.XVIII. This followed a similar *note verbale* in April 2004 concerning nominations for judges of the African Court on Human and Peoples' Rights. BC/OLC/66.5/8/Vol.V.

²¹¹ F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 237.

²¹² Rules para 11.

²¹³ This overview includes Dr Stals and Ms Savané which at the time of writing had retired from the Panel, see chapter 4.

Adebayo Adedeji (born 1930) is a Nigerian economist that until 1991 was Executive Secretary of the UN Economic Commission for Africa. Marie-Angelique Savané from Senegal is former director of the Africa division of the UN Population Fund and was a member of the Commission on Global Governance. Ambassador Bethuel Kiplagat (born 1936) is former permanent secretary of the Kenyan ministry of foreign affairs and ambassador to France and the UK. Mr Kiplagat has been involved in peace making efforts on the horn of Africa and in early January 2006 was appointed to head a committee charged with reviewing the Kenyan constitution. Dr Dorothy Njeuma (born 1943) has a PhD in zoology. She is former vice-minister for national education and currently rector of Université de Yaoundé 1. Graca Machel (born 1946) is former minister of education of Mozambique and NGO activist. Dr Chris Stals (born 1935) is former reserve bank governor of South Africa. Mohammed Seghir Babes is chairperson of the Algerian Economic and Social Council and former minister of health in the Algerian government,

Regional balance has been assured, but it is unclear if all of the eight countries that had signed up for the APRM at the time of the election of the first Panel members were consulted. The fact that three out of the seven original members were women shows that the gender equity requirement has been taken seriously.

The composition of the panel is thus quite different from human rights monitoring bodies which to a large extent are made up of lawyers. However, it has been argued that a legal background is only really needed in the context of dispute settlement and that a diversity of expertise would benefit the UN human rights treaty bodies in their mandate of examining state reports.²¹⁴ The overview

²¹⁴ T Buergenthal 'A court and two consolidated treaty bodies' in A Bayefsky (ed) *The UN human rights treaty system in the 21st century* (2000). For a discussion on the lack of competence in economics within the UN Committee on Economic, Social and Cultural Rights and its consequences see M Dowell-Jones 'The Committee on Economic, Social and Cultural Rights: Assessing the economic deficit' (2001) 1 *Human Rights Law Review* 11-33.

above shows that a broad set of experiences of relevance to the APRM are represented on the Panel.²¹⁵

Some members of the Panel have strong links with their governments, raising questions with regard to their independence. This situation is however not surprising considering the lack of transparency in the selection process. The Panel includes three former ministers (Ms Machel, Dr Njeuma and Mr Seghir Babes). It is interesting to note that Dr Njeuma is a member of the central committee of the ruling party of Cameroon.²¹⁶ It is clear that she would not fulfil the criteria of independence established for election of members of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. It must however be noted that there is no indication in the first country review reports of any deference to governments on the side of the Panel.

5.6.3 Quality of the recommendations

The quality of the recommendations in the country review reports may influence whether they are implemented or not. Recommendations which are difficult to understand or not based on any analysis in the report are less likely to be included in the Programme of Action. Such recommendations may also be neglected in the implementation reports.

Jordaan has criticised the Rwanda country review report for including recommendations which are vapid, tautological, naïve, officious and obvious.²¹⁷ While this is true, the same criticism could to varying degrees be levied against the other country review reports and indeed against other monitoring

²¹⁵ In an interview with the author Dr Stals noted that there was need for expertise in finance on the Panel in particular after his retirement. Interview with Chris Stals, Pretoria, 16 July 2009.

²¹⁶ WW Nana *et al* 'Njeuma predicates Muyuka's development on Biya's election' www.postnewsline.com/2004/09/strongnjeuma_pr.html#more (accessed 24 April 2006).

²¹⁷ E Jordaan 'Grist for the sceptic's mill: Rwanda and the African Peer Review Mechanism' (2007) 25:3 *Journal of Contemporary African Studies* 331-353 341.

mechanisms, including state reporting. However, the APRM country review reports, as concluding observations of treaty monitoring bodies, also include many recommendations which are relevant, insightful and concrete.

5.6.4 Types of rights

Does the APRM have more potential in bringing about change with regard to some types of rights as opposed to others? Human rights can be divided into positive and negative rights. Civil rights are often seen as negative rights 'restraining the State from unjustified interference'.²¹⁸ In contrast socio-economic rights are seen as rights which impose a duty on the state to take action to ensure a level playing field.²¹⁹ However, it is clear that socio-economic rights have a 'negative' component restraining the state from taking action that would violate these rights. Similarly civil rights have resource implications and therefore have a 'positive' component in addition to the duty of restraint.

The distinction between negative and positive elements of rights is relevant in determining the potential contribution of the APRM to the realisation of human rights. The APRM is unlikely to play a major role in redressing violations of negative rights apart from the public pressure that can be exerted through discussion of such rights in the implementation reports. Instead the potential of the APRM lies in being used as a pro-active, preventative tool which programmatically addresses positive rights through a participative process with rights-based resource allocations in the POA. This approach would use the supervised participatory process of the APRM to make the necessary choices among demands on the public purse in a rights-based manner. These clear time-bound commitments would be followed up both nationally and internationally with consequences for government officials if it could be shown that they had neglected to implement the POA.

²¹⁸ S Fredman *Human rights transformed – Positive rights and positive duties* (2008) 9.

²¹⁹ See eg UN Declaration on the Right to Development art 8(1), 'States ... shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.'

5.6.5 Peer pressure and public pressure

Peer pressure between states is exercised bilaterally and in international organisations, both in formal and informal settings.²²⁰ As has been noted above the political organs of international organisations have an important role in the follow-up of decisions and recommendations of human rights monitoring bodies. The UN Commission on Human Rights was criticised for applying double standards. There is no indication that the situation has improved through its replacement by the Human Rights Council.

There is a strong movement within the UN, supported mainly by developing states, to move away from 'naming and shaming' of violating states. Social sanctions in the form of 'naming and shaming' have formed an important part of the international approach to human rights. The effectiveness of this approach is disputed by some.²²¹

The African Commission's public sessions are the regional equivalent of the Human Rights Council's public debates. However, political power lies not in these sessions but in the summits of the AU Assembly of Heads of State and Government to which the African Commission reports. Some commentators have been critical of the role political bodies can play in the process. Flinterman and Henderson make the following comment on the African regional human rights system:

Whatever power exists to implement the Commission's findings seems to be vested in the OAU's Assembly of Heads of State and Government, which as a political body, should not be trusted to put human rights above state interests.²²²

²²⁰ On the role of meetings of contracting parties see Zimmermann (2007) 40-41.

²²¹ E Hafner-Burton 'Sticks and stones: Can bad media publicity solve human rights enforcement problems?' (2007).
www.princeton.edu/~ehafner/pdfs/sticks_stones.pdf (accessed 2 April 2007).

²²² C Flinterman & C Henderson 'The African Charter on Human and Peoples' Rights' in Rajja Hanski and Markku Suksi (eds) *An introduction to the international protection of human rights* (1999) 395.

The role the AU Assembly has under the African Charter to approve the reports of the Commission should be criticised.²²³ However, it is also clear that the AU could benefit from a more thorough discussion of the human rights situation in its member states at the highest level.

Even more important than peer pressure is public pressure. To achieve such pressure requires firstly an active local civil society and thus respect of freedom of expression and association. Secondly it requires access to information. Without these two key components public pressure becomes virtually impossible to achieve. It must also be noted that people who live in poverty and thus are denied their right to an adequate standard of living, rarely have the opportunity to contribute to the public debate even if they enjoy freedom of expression and freedom of association. Respect for human rights, both socio-economic and civil and political, is thus necessary to achieve one of the main factors, public pressure, which induces compliance with human rights.

International NGOs play an important role in both developing international standards and monitoring of compliance.²²⁴ Transnational NGOs can play an important role in assisting nascent local civil society.²²⁵ The combined pressure from above and below can improve the situation for local organisations and thus improve the prospects for impact through public pressure in the country.²²⁶ However, the impact may be more limited if it is true, as is sometimes asserted,

²²³ M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' 6 *African Human Rights Law Journal* 572.

²²⁴ On the role of international environmental NGOs see P Sands 'The role of non-governmental organizations in enforcing international environmental law' in WE Butler (ed) *Control over compliance with international law* (1991).

²²⁵ BP Ambrose *Democratization and the protection of human rights in Africa - problems and prospects* (1995) 111.

²²⁶ Risse & Sikkink (1999) 5. Goldsmith & Posner (2005) 124-125 recognise that transnational NGOs can have a role to play but argue that international law does not play a role in their mobilisation.

that many local NGOs focusing on human rights in Africa are elite-driven 'mechanisms for obtaining foreign funds'.²²⁷

5.6.6 Sanctions

The different methods of monitoring that have been discussed above often result in the finding that a particular rule has not been complied with. When compliance with such a finding is not forthcoming sanctions can under certain circumstances help convince the non-compliant state to change its behaviour.

The most common form of sanctions in the African context is withdrawal of aid by donor countries often referred to as conditionality. More comprehensive economic sanctions have become increasingly controversial. It should be noted that '[t]he logic of sanctions – that diminishing ability to implement human rights guarantees will enhance the willingness of a government to do so – has thus far failed empirical verification.'²²⁸

After failures such as Iraq where economic sanctions had disastrous consequences for the general population, violating their socio-economic rights, the focus has shifted to 'smart' sanctions which 'have a high probability of directly hurting those responsible for the targeted policies while sparing the general population'.²²⁹ The UN Security Council adopted mandatory sanctions only twice before 1990: against Rhodesia and South Africa.²³⁰ In the 1990's the number of sanctions regimes increased dramatically and by 2003 another 13

²²⁷ IG Shivji *The concept of human rights in Africa* (1989). See also CA Odinkalu 'Why more Africans don't use human rights language'

www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/602 (accessed 1 March 2006).

²²⁸ K Tomaševski *Between sanctions and elections – Aid donors and their human rights performance* (1997) 216.

²²⁹ M Brzoska 'From dumb to smart? Recent reforms of UN sanctions' (2003) 9 *Global Governance* 519 522.

²³⁰ The economic blockade against Southern Rhodesia (1966-1979) and the arms embargo against South Africa (1977-1994). S Chesterman & B Pouligny (2003) 'Are sanctions meant to work? The politics of creating and implementing sanctions through the United Nations' (2003) 9 *Global Governance* 503.

countries had been subjected to mandatory sanctions regimes by the Security Council, most commonly an arms embargo. Of these countries, nine were in Africa.²³¹ As of July 2009 the UN Security Council had various sanctions in place against six African countries: Côte d'Ivoire, Democratic Republic of the Congo, Liberia, Sierra Leone, Somalia and Sudan.²³²

The APRM MOU does not include any equivalent to the last paragraph of the CSSDCA MOU which provides that 'We commit ourselves to respect and implement all the above undertakings in conformity with Articles 9(e) and 23(2) of the Constitutive Act of the African Union.' Article 23(2) of the Constitutive Act provides that the Assembly can decide on sanctions of a 'political and economic nature' against a state that fails to comply with decisions or policies of the AU. Suspension of participation in the work of the organisation as a sanction has been used quite extensively by the AU with regard to membership dues arrears and as a response to military coups.²³³

Article 23(2) is not directly applicable to the recommendations of the APRM Panel. However, the APRM Base Document provides that the APRM Forum 'may wish to put the Government on notice of their intention to proceed with appropriate measures by a given date' against a state which does not show the 'necessary political will' to 'rectify identified shortcomings'.²³⁴ It should be noticed that the Forum's power to take such action is discretionary. Any decision on sanctions by the Forum in terms of the APRM Base Document

²³¹ Chesterman & Pouligny (2003) 505.

²³² www.un.org/sc/committees/ (accessed 15 July 2009).

²³³ Decision on the contributions of member states, Doc EX.CL/Dec.379(XII) (2008). On the response to unconstitutional change of government see DG Anglin 'The African peer review of political governance: Precedents, problematics & prospects' in Muna Ndulo (ed) *Democratic reform in Africa: Its impact on governance & poverty alleviation* (2006) 239-242; PD Williams 'From non-intervention to non-indifference: the origins and development of the African Union's security culture' (2007) 106 *African Affairs* 253 271-275. See also with regard to the coup in Mauritania, communiqué of the 163rd meeting of the Peace and Security Council, 22 December 2008, PSC/MIN/Comm.3(CLXIII) and with regard to the coup in Guinea, communiqué of the 165th meeting of the Peace and Security Council, 29 December 2008, PSC/PR/Comm(CLXV).

²³⁴ APRM Base Document para 24.

would need the endorsement of the AU Assembly in terms of article 23(2) of the Constitutive Act.

It seems unlikely that the Forum would seek to impose sanctions against a country which does not implement the recommendations in the country review report or does not implement the POA. Firstly, international organisations are generally reluctant to impose sanctions.²³⁵ Secondly, as has been noted in chapter 4, the participating heads of state and government have not taken a critical approach in examining the reports presented to the Forum. Participating governments have emphasised that the process is an assisted self-assessment.

5.6.7 Aid and capacity building

When discussing the potential effectiveness of the APRM it is also necessary to examine the implication of 'positive sanctions'. Donor countries have repeatedly stated that the outcome of the reviews should be taken into consideration when deciding about aid allocations.²³⁶ The link to aid thus exists in relation to both 'negative' and 'positive' sanctions. Such links are nothing new; Shivji sees the need for African states to prove their 'aid-worthiness' as one of the contributing factors to the drafting of the African Charter on Human and Peoples' Rights.²³⁷

Aid conditional on adoption of specific economic policies was a mainstay of structural adjustment from the 1970's followed by good governance conditionality from the end of the cold war.²³⁸ Donor conditionality can take different forms: no or less aid to those who do not follow conditions decided by the donors or rewards to those the donors consider have good policies. Human rights conditionality can also be used to redistribute aid between sectors within

²³⁵ Schermers & Blokker (2003) 913.

²³⁶ To link aid to desirable behaviour is nothing new. Already in the early 19th century Britain provided financial incentives to other states to abolish the slave trade. Goldsmith & Posner (2005) 114-115.

²³⁷ Shivji (1989) 94.

²³⁸ Tomaševski (1997) 10.

the country to improve human rights.²³⁹ In the latter case it must be noted that sectoral reallocation can open up resources for the government which it would otherwise not have.²⁴⁰

With conditionality a government is no longer accountable to its citizens but to donors. According to Tomasevski ‘the use of “human rights” to legitimize external policing and sanctioning undermines the very basis for human rights protection, which ought to be domestic.’²⁴¹ Sanctions, for example in the form of withdrawal of aid, can have serious consequences for the population of a country. To again quote Tomasevski: ‘in trying to punish “a state” sanctions necessarily victimize its population and result in double victimization. The human rights rationale should accord priority to the victim.’²⁴²

To protect rights takes commitment but also requires resources. This applies to both civil and political rights and socio-economic rights.²⁴³ Many African states might use their available resources for the wrong things,²⁴⁴ but there is no denying that there is also a substantial resource gap. It is clear that this gap in the long term needs to be filled in other ways than aid. However, for the time being aid is still needed and may be effective if used in the right way. The APRM has the potential of providing a holistic framework for using aid as effectively as possible. However, there are still many problems as will be illustrated in the case studies on Ghana, Rwanda and Kenya in the following chapters.

²³⁹ Tomaševski (1997) 63.

²⁴⁰ In development literature this phenomenon is known as fungibility.

²⁴¹ Tomaševski (1997) 215.

²⁴² As above.

²⁴³ IE Koch ‘The justiciability of indivisible rights’ (2003) 72 *Nordic Journal of International Law* 3 8.

²⁴⁴ K Tomaševski *The state of the right to education worldwide – Free or fee: 2006 global report* (2006) 10.

A donor industry has developed around technical assistance aimed at filling existing or perceived gaps in the knowledge of the recipient country bureaucracy.²⁴⁵ However, it is generally recognised that ‘challenges of building state capacity are at least as political as they are technical’.²⁴⁶ There is therefore a need to build the capacity of accountability structures.²⁴⁷ According to Levy this requires ‘understanding country-specific constitutional structures and patterns of political, social, and economic interests and to aim for a good fit between efforts to strengthen administrative and accountability systems and these country-specific realities.’²⁴⁸ Arguably, the country itself through participatory processes such as the APRM is better positioned than donors to find this ‘good fit’. External expertise may be needed in some circumstances but this should be provided at the request of the developing country and not be imposed as part of an aid package.²⁴⁹

Assistance to improve public expenditure management is often seen as particularly important as it will lead to increased accountability on the use of public resource. A second reason for a focus on public expenditure management is that better capacity in this area would increase donors’ willingness to provide budget support rather than project financing which would increase ‘country ownership’.²⁵⁰

²⁴⁵ S Browne *Aid & influence – Do donors help or hinder?* (2006) 29-31.

²⁴⁶ B Levy ‘Governance and economic development in Africa: Meeting the challenge of capacity building’ in B Levy and S Kpundeh (eds) *Building state capacity in Africa – New approaches, emerging lessons* (2004) 18.

²⁴⁷ Levy (2004) 25, 26.

²⁴⁸ Levy (2004) 26.

²⁴⁹ Browne (2006) 144.

²⁵⁰ Levy (2004) 15.

5.7 Concluding remarks

Cassel states that international human rights law is ‘one strand in the rope that pulls rights forward’, with the central strand being global growth in human rights consciousness.²⁵¹

Martin Scheinin has noted that the state reporting system to the UN Human Rights Committee

functions well in respect of those States parties that wish to co-operate with the Committee in good faith. In general, they may not be the most problematic countries in respect of human rights violations. Nevertheless, in all countries, there is room for continuous improvement in the implementation of the Covenant, and the reporting procedure provides for an opportunity for regular review and feedback on the international level. This is highly conducive to a national discourse and the development of a culture of human rights in respective countries.²⁵²

Much the same can be said about the APRM. It is in countries that are committed to reform that the APRM can have its biggest impact. As with state reporting and individual complaints, the impact of the APRM in conflict-ridden countries with grave human rights violations is likely to be minor. In such cases direct action at the political level is necessary. In such scenarios special procedures and field presences are more likely to play a significant role in for example conducting independent fact-finding which can form the basis for action at the political level.

The various monitoring methods discussed above, good as they may be in obtaining reliable information, must also be linked to political leverage. Political involvement in human rights, such as through the now defunct UN Human

²⁵¹ Cassel (2001) 124

²⁵² M Scheinin ‘The International Covenant on Civil and Political Rights’ in G Ulfstein (ed) *Making treaties work – Human rights, environment and arms control* (2007) 60.

Rights Commission is often seen as selective in that powerful states avoid criticism. However, the fact that some countries avoid criticism should not be seen as an excuse to doing nothing. To what extent the new Universal Periodic Review of the UN Human Rights Council will address these concerns remain to be seen. History has shown that leverages such as sanctions and military intervention must be used with extreme caution.

Christian Tams has noted that ‘systemic enforcement’, the system for enforcement established under an international instrument, is particularly weak with regard to human rights treaties. He argues that this may explain the many efforts to ‘non-systemic’ enforcement in this field, for example UN resolutions, sanctions and the ‘humanization’ of cooperation agreements.²⁵³

The APRM is non-systemic in its application of standards and codes. The focus of the APRM is both on monitoring and enforcement. With regard to monitoring, the question is whether the APRM raises issues not already raised by a multitude of other mechanisms. The case studies in part II of this thesis will attempt a partial answer to that question.

Tams notes with regard to human rights that ‘the demand for non-systemic enforcement is considerable.’²⁵⁴ The APRM plays a role in enforcement through addressing the identified shortcomings. To what extent the enforcement aspect of the APRM, the development and monitoring of the Programme of Action, has been effective will be investigated in the case studies. This aspect is very important as the Programme of Action to a large extent is what sets the APRM apart from other monitoring.

One of the prominent attributes of the APRM is the manner in which it brings together international and domestic monitoring. International monitoring can

²⁵³ CJ Tams ‘Enforcement’ in G Ulfstein (ed) *Making treaties work – Human rights, environment and arms control* (2007) 395, 400-403.

²⁵⁴ Tams (2007) 403.

help strengthen domestic human rights institutions in a number of ways. International human rights law provides a common language, reinforces universality, legitimises claims, signal will of the international community; gives judicial precision and expectation of compliance, encourages enforcement and creates stigma for violators.²⁵⁵

Though this chapter has been focusing on the role of international institutions, it must be emphasised that national watch dog institutions, civil society organisations and the media play an even more important role in inducing compliance with human rights norms. The APRM Panel of Eminent Persons has noted: ‘Existing national oversight institutions should be an integral part of the national preparation for and participation in the APRM’.²⁵⁶ The same should apply to international monitoring. Greater reliance should be given to their findings both at the national and international level in the APRM process. At the same time international human rights monitoring bodies should where applicable take note of APRM findings. It is through the combined effect of different types of monitoring, at the domestic and international level, that an effective human rights system can be established.

²⁵⁵ Cassel (2001).

²⁵⁶ Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism (APRM) para 37.