

# Reflections on the practices and experiences of African states in the African Peer Review Mechanism (APRM) and the Universal Periodic Review Mechanism (UPR): a human rights perspective

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## *Abstract*

This article focuses on the nature of political engagements among African states within the APRM and the UPR. It focuses specifically on matters that African countries raise among each other under peer review within the discourse of human rights, democracy, and governance; and whether such engagements are worthwhile. The article asserts that African states have hardly used opportunities provided by the APRM and UPR to engage one another critically and frankly on their human rights situations.

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## **Introduction**

A key feature common to the APRM and the UPR is the process of peer review. The term ‘peer’ originates from the Latin word ‘par’ which means ‘equal’.<sup>1</sup> Ojienda explains that the term ‘peers’ refers to persons of equal rank or merit.<sup>2</sup> Under international law, states are equal. It is on this basis that African states (or states generally) can be perceived as peers. The APRM Base Document and the UPR founding documents, do not define the phrase ‘peer review’. This is understandable because the concept is notoriously

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<sup>1</sup> Killander ‘The role of the African Peer Review Mechanism in inducing compliance with human rights’ (Unpublished LLD thesis, University of Pretoria (2009)) 47.

<sup>2</sup> Ojienda ‘Implementing NEPAD: whether the APRM?’ (undated) available at: [www.saiia.org.za](http://www.saiia.org.za) (last accessed 9 August 2010).

elusive. In this article I venture only to canvass the concept of peer review in broad strokes, without attaching any specific definition to it.

Kebonang states that there is a ‘literature famine’ on the concept of peer review.<sup>3</sup> Notwithstanding his claim, he has made a valiant attempt to elucidate the concept using the scant material he could access. Relying on Ngamau,<sup>4</sup> Kebonang argues that peer review is an amorphous concept that generally involves two areas.<sup>5</sup> The first involves the evaluation of proposals, programmes, and projects by experts;<sup>6</sup> the second is used to monitor compliance with treaty commitments. He refers to the Organisation for Economic Cooperation and Development (OECD), an organisation whose experience in this field is unrivalled, and explains that ‘peer review involves a systematic examination and assessment of either the performance or practices of a state by other states (peers) or designated institutions’.<sup>7</sup>

Kebonang compares the process of ‘peer review’ to the review process by which articles submitted to academic journals are reviewed by authorities in the relevant field of expertise before being approved for publication.<sup>8</sup> However, this analogy has been discredited by Hansungule<sup>9</sup> who argues that, while it may be attractive initially, the idea that – based on the negative comments of the reviewer – the academic journal may reject the article which will then not appear in the journal, contradicts the philosophical construct underpinning the APRM, in terms of which no country – no matter how notorious its human rights situation – is rejected by the APRM. In fact, one could argue that it is partly on account of such human rights notoriety in Africa, that the APRM was established. Rather than rejecting non-performers, they must pointed in the right direction by their peers in the APRM who indicate the gaps in their governance. This argument becomes more persuasive when one remembers that in its broader context, ‘peer-review’ speaks to ‘learning as you go’. This ‘learning as you go’ can only be

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<sup>3</sup> Kebonang ‘NEPAD: making the APRM work, critique’ 2005 *A Worldwide Journal of Politics* 46, 48.

<sup>4</sup> Ngamau ‘The role of NEPAD in African economic regulation and integration’ (2004) 10 *Law and Business Review America* 515–44, 517.

<sup>5</sup> Kebonang n 3 above at 49.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Hansungule ‘Overview paper on the role of the APRM in strengthening governance in Africa: opportunities and constraints in implementation’ (undated) available at: [www.sarpn.org.za/documents/d0003007/APRM\\_review\\_Hansungule.pdf](http://www.sarpn.org.za/documents/d0003007/APRM_review_Hansungule.pdf) (undated) (last accessed 12 July 2010) 4.

effective if the mistakes of the ‘learners’ or reviewees are pointed out – the so-called learning from your own mistakes. Hansungule’s argument also holds true for the UPR in that both the APRM and UPR do not seek to exclude those states whose human rights record is found to be unsatisfactory by the review process. Mathoho describes peer review as systematic examinations of one state by another state or states, or by specifically designated institutions, or a combination of the two.<sup>10</sup> The OECD defines ‘peer review’ as:

a method by which countries can assess the quality and effectiveness of their policies, legislation, policy environments and key institutions. It provides a forum where policies can be explained and discussed, where information can be sought and concerns expressed, on a non-confrontational and non-adversarial basis. The feedback provides the reviewee with a yardstick for measuring its system against those of other peers while also informing the reviewing countries.<sup>11</sup>

Hansungule suggests that the concept of peer review has African origins.<sup>12</sup> He argues that although most of those writing on this concept have tended to view it as a European construct that is alien to Africa, literature on early African society reveals that the concept of peer review is not foreign to classical African civilisation. Significantly, he refers to Jomo Kenyatta<sup>13</sup> and Nelson Mandela,<sup>14</sup> who, he states, have demonstrated through their writings that peer review is a traditional African conception.<sup>15</sup> Hansungule argues further that in their respective works on traditional African society, these two African leaders easily found practices of peer review in African age-groups or peers as a common phenomenon. He reasons that an African faced with a situation would turn to his peers organised according to age, for counsel, advice, or direction, and then to his parents as an option of last resort.<sup>16</sup> Therefore, peer review in its pure form, is an African social construct or invention that was critical in ensuring a stable governance system in

<sup>10</sup> Mathoho ‘An African Peer Review Mechanism: a panacea for Africa’s government challenges?’ (2003) available at: [www.saiia.org.za](http://www.saiia.org.za) (last accessed 11 August 2010).

<sup>11</sup> OECD ‘Peer pressure as part of surveillance by international institutions’ (2002) Discussion led by Niels Thygesen, chairman, Economic Development Review Committee, par 2, 4 June 2002. Available at: [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/DAFFE/TD\(2002\)82/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/DAFFE/TD(2002)82/FINAL&docLanguage=En) (last accessed 29 May 2012).

<sup>12</sup> Hansungule n 9 above at 4.

<sup>13</sup> Kenyatta *Facing Mount Kenya* (1938) 130–185.

<sup>14</sup> Mandela *Long walk to freedom* (1994) 17–29.

<sup>15</sup> Hansungule n 9 above at 4.

<sup>16</sup> *Ibid.*

traditional African society before the advent of colonialism.<sup>17</sup> As a social value, peer review ensured individual and community peace and security thereby maintaining social cohesion and equilibrium which are the underlying guiding principles of APRM and UPR.<sup>18</sup>

As indicated above, the term ‘peer’ refers to those who are equal in status or stature. This implies some form of equality between the parties participating in the process.<sup>19</sup> Flowing from this, peer reviews are thus conducted on a non-adversarial basis and are predicated on the mutual trust and good faith of those involved in the process, as well as a common abiding commitment to the outcome of the process.<sup>20</sup> It has been recorded that review procedures are most successful when they are based on a high degree of trust between the reviewers and those being scrutinised.<sup>21</sup> Such a process addresses a number of measurable norms, laws, policies, or quantitative benchmarks, and are conducted by peers, or experts appointed by peers, who are both competent and skilled.<sup>22</sup> Peer reviews are typically characterised by constructive mutual dialogue and interactive investigation. However, they can also make use of questionnaires designed to assess the reviewed state.<sup>23</sup> The APRM employs all three approaches, with particular emphasis on mutual dialogue and questionnaires.<sup>24</sup> The UPR procedures are undertaken on the basis of reliable information relating to the fulfillment by each state of its human rights commitments and pledges, and are based on interactive dialogue.<sup>25</sup> Several African states had undergone voluntary sectoral peer reviews before the advent the APRM.<sup>26</sup> For instance, South Africa belongs to the ‘enhanced engagement country’ category of the OECD, and has undergone peer reviews with regard to competition law and policy, and

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Turianskyi *A critical analysis of the APRM as a standard for good governance* (unpublished MA thesis, (1998) University of Pretoria) 57.

<sup>20</sup> *Ibid.*

<sup>21</sup> Gaer ‘A voice not an echo: UPR and the UN Treaty Body System’ (2007) 7 *Human Rights Law Review* 109–139, 112.

<sup>22</sup> Kanbur ‘The African Peer Review Mechanism (APRM): an assessment of the concept and design’ (2004) 31 *South African Journal of Political Studies* 157.

<sup>23</sup> Pagani ‘Peer review: a tool for cooperation and change: Analysis of the OECD working method’ (2002) available at: [www.iss.org.za/Pubs/ASR/11No/Feature2.pdf](http://www.iss.org.za/Pubs/ASR/11No/Feature2.pdf) (last accessed 11 August 2010).

<sup>24</sup> Turianskyi n 19 above at 57.

<sup>25</sup> Redondo ‘The UPR Mechanism: an assessment of the first session’ (2008) 7 *Chinese Journal of International Law* 721–734, 724.

<sup>26</sup> Killander n 1 above at 48.

education policy.<sup>27</sup> Other review procedures that African countries undergo include the World Trade Organisation-Trade Policy Review Mechanism (WTO-TPRM), the International Labour Organisation's Enforcement System, the International Monetary Fund (IMF) Article IV consultations, and the United Nations Conference on Trade and Development (UNCTAD).<sup>28</sup> At the time of writing, the UNCTAD had conducted investment policy reviews of twenty African countries.<sup>29</sup> The IMF reviews approximately 130 countries annually under its Article IV consultations.<sup>30</sup> Desiring to enhance their performance on the fulfillment of human rights, African states have submitted themselves to the peer review mechanisms in the APRM and the UPR. The following discussion provides insights into these mechanisms.

### **Genesis of the APRM**

In 2002, the African Heads of State through the Durban Declaration on Democracy, Political, Economic and Corporate Governance, established a regional institution called the APRM. The APRM is an instrument voluntarily acceded to by the general membership of the AU as an African self-monitoring mechanism.<sup>31</sup> However, countries wishing to accede to the APRM must first notify the chairperson of the New Partnership for Africa's Development (NEPAD), heads of state and government implementation committee, and deposit a signed memorandum of agreement with the NEPAD Secretariat in South Africa.<sup>32</sup>

Herbert and Gruzd<sup>33</sup> state that the start date of APRM is open to debate in that the Protocol establishing the APRM was agreed upon at the OAU Summit on July 2002, but other elements of the system took additional time to develop. For example, the APRM Country Guidelines were only finalised in November 2003, and the first meeting of the APR Forum was held on 13 February 2004, at which time the Panel of Eminent Persons was

<sup>27</sup> See remarks by Angel Gurría OECD Secretary-General at the launch of the first OECD Economic Assessment of South Africa, Pretoria, 15 July 2008 available at: [www.oecd.org](http://www.oecd.org) (last accessed 8 August 2010).

<sup>28</sup> For an excellent discussion on the nature of these reviews see Kebonang & Fombad 'The African Peer Review Mechanism: challenges and prospects' (2006) 32 *Current African Issues* 40.

<sup>29</sup> See [www.unctad.org/Templates/Page.asp?intItemID=3534&lang=1](http://www.unctad.org/Templates/Page.asp?intItemID=3534&lang=1) (last accessed 3 February 2013)

<sup>30</sup> Killander n 1 above at 49. See further Kebonang & Fombad n 28 above at 40.

<sup>31</sup> APRM Organisation and Processes, 2001 par 1.

<sup>32</sup> See par 30 of the Memorandum of Understanding on the APRM (NEPAD/HSGIC/03-2003/APRM/MOU).

<sup>33</sup> Herbert & Gruzd *The African Peer Review Mechanism – lessons from the pioneers* (2008) 4.

announced.<sup>34</sup> They argue that this could be considered the effective date of commencement of the APRM. According to Kebonang, the origins of the APRM can be traced to the inaugural Summit of the African Union held in July 2002, in Durban, South Africa.<sup>35</sup> He points out that it was at this summit that African Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance,<sup>36</sup> the primary role of which is to foster Africa's socio-economic development through the adoption of better democratic, political and corporate government practices; and also committed themselves to the implementation of the APRM.<sup>37</sup> The precise date, however, is not important for the current discussion.

The APRM is a framework for monitoring the policies and practices of participating states to ensure their conformity to agreed political, economic and corporate values, codes and standards which are enshrined in the Declaration on Democracy.<sup>38</sup> The APRM is Africa's attempt to answer a question posed by the German philosopher, Georg Simmel (1858–1918) as to how to establish a good society.<sup>39</sup> In answering this question, the APRM posits that an ideal society is anchored, *inter alia*, in good political governance and sound economic policies.

This mechanism is an initiative by African leaders which is intended to be 'people centred, people owned, people managed, and people driven.'<sup>40</sup> The APRM has been hailed as 'Africa's premier home-grown governance and accountability tool'<sup>41</sup> or as the 'jewel in NEPAD's crown'.<sup>42</sup> As shall be shown below, these claims are misplaced. The APRM was born out of the need to give impetus to African renaissance or re-birth. Out of a possible fifty-three African states, as at March 2012, the number of APRM members is standing at thirty-one with the expected accession of Niger and Guinea raising the number to thirty-three.<sup>43</sup> This figure accounts for 76% of Africa's

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<sup>34</sup> *Ibid.*

<sup>35</sup> Kebonang n 3 above at 40.

<sup>36</sup> Available at: <http://www.uneca.org/aprm/documents/book2.pdf> (last accessed 11 April 2012).

<sup>37</sup> *Ibid.* See the preambular paragraphs.

<sup>38</sup> *Id* at par 2.

<sup>39</sup> Jarwoski 'Simmel in early American sociology' (1995) 3 *International Journal of Politics, Culture and Society* 389–417, 390.

<sup>40</sup> [www.ghana.diplo.de/Vertretung/ghana/en/01/Appiah](http://www.ghana.diplo.de/Vertretung/ghana/en/01/Appiah) (last accessed 9 August 2010).

<sup>41</sup> [www.europaafrica.net/2010/08/04](http://www.europaafrica.net/2010/08/04) (last accessed 10 August 2010).

<sup>42</sup> APRM, Country Review Report of the Republic of Kenya (2006), quoted by Killander 'The African Peer Review Mechanism and human rights' (2008) 30 *Human Rights Quarterly* 41–75, 42.

<sup>43</sup> See APRM website: [www.upr-info.org](http://www.upr-info.org) (last accessed 11 April 2012).

total population.<sup>44</sup> So far, fourteen states have been peer reviewed, with Mauritius being the most recent country to be reviewed towards the end of 2011.<sup>45</sup>

It is submitted that only norms, standards, practices, values, and aspirations that are consistent with modernity, progress, and development can turn around the fortunes of the African continent. However, any approach to Africa's redemption must be informed and guided by the continent's historical circumstances and experience that contextualise it, and are derived from its own tradition-bound trajectory.<sup>46</sup>

### **The UPR Mechanism**

According to the UN, 'the [UPR] is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a state-driven process, under the auspices of the Human Rights Council, which provides an opportunity for each state to declare what actions it has taken to improve the human rights situations in its country and to fulfil its human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.'<sup>47</sup>

The UPR was established on 15 March 2006 through UN GA res 60/251,<sup>48</sup> which created the Human Rights Council itself. It is a cooperative process which, by the close of 2011, had completed the review of human rights records of every country in the world.<sup>49</sup>

<sup>44</sup> Adopted from the speech of Professor Adebayo Adedeji, former Chairperson of the APR Panel of Eminent Persons, at the 12th Summit of the Committee of APR Forum held at the African Union Commission Headquarters in Addis Ababa, Ethiopia, 30 January 2010.

<sup>45</sup> These are Ghana (January 2006), Rwanda & Kenya (June 2006), Mali, Mozambique & Lesotho (June 2009), Uganda (June 2008), Nigeria, & Burkina Faso (October 2008), Algeria & South Africa (June 2007), Ethiopia, Benin (January 2008) and Mauritius (July 2011).

<sup>46</sup> Appiah 'The APRM – an analysis through the German intellectual traditions' (2007) available at: [://www.ghana.diplo.de/Vertretung/ghana/en/01/Kesse/Kesse.html](http://www.ghana.diplo.de/Vertretung/ghana/en/01/Kesse/Kesse.html)"The Ghana Embassy in Germany – 50 Years of Diplomatic Relations [www.ghana.diplo.de/Vertretung/ghana/en/01](http://www.ghana.diplo.de/Vertretung/ghana/en/01) (last accessed 12 August 2010).

<sup>47</sup> See: [www.upr-info.org](http://www.upr-info.org) (last accessed 14 July 2010).

<sup>48</sup> A/RES/60/251; 13 IHRR 1195, 15 March 2006.

<sup>49</sup> See n 47 above.

*Basis for the UPR review*

The UPR review processes are conducted under the auspices of the UN Human Rights Council (HRC) in accordance with human rights obligations and commitments expressed, *inter alia*, in the UN Charter, the Universal Declaration of Human Rights, and other human rights instruments.<sup>50</sup> Like the APRM, the UPR is not a creature of a treaty. This means that it has an expansive focus that reaches beyond those human rights and norms contained in treaties. According to Resolution 5/1, the normative framework of the review is not restricted to human rights treaties to which a state under review is a party. However, it has a wider coverage that includes voluntary pledges and commitments made by the state under review. These include national human rights policies and/or programmes.<sup>51</sup> Given the complementary and mutually interrelated nature of international human rights law and humanitarian law, the review process also considers humanitarian law where appropriate.<sup>52</sup>

Within the given parameters, three documents are presented to the Working Group sessions and form the basis for interactive dialogue in accordance with the guidelines approved by the Council. These are:

- a report/presentation submitted by the state under review;
- a report compiled by the Office of the UN High Commissioner for Human Rights (OHCHR) on information contained in the reports of treaty bodies and special procedures concerning the country, including its observations and comments, and other relevant official UN documents; and
- an OHCHR compilation of ‘additional credible and reliable information provided by other relevant stakeholders,’<sup>53</sup> including NGOs, national human rights institutions, and regional inter-governmental organisations.

Select members of the HRC termed the ‘troika’, facilitate the interactive dialogue and the preparation of an outcome report.<sup>54</sup>

The UPR provides an opportunity for all states to declare what actions they have taken to improve the human rights situations within their territories and to overcome challenges that impede the enjoyment of human rights. The

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<sup>50</sup> Par 1(a) to (c) of HRC Res. 5/1, adopted 18 June 2007.

<sup>51</sup> *Id* at par 1 (d).

<sup>52</sup> *Id* at par 2(2).

<sup>53</sup> HRC Res. 5/1 pars 15–17.

<sup>54</sup> For UPR procedures, see: [www.ishr.ch/upr](http://www.ishr.ch/upr) (last accessed 13 August 2010).

UPR further includes a sharing of best human rights practices around the globe.<sup>55</sup>

The protracted negotiation surrounding GA res 60/251, reveals the different views and aspirations that different stakeholders had in relation to the new institution and its mechanisms, including the UPR.<sup>56</sup> For present purposes, it is sufficient to point out that states and other stakeholders across the spectrum generally embraced the idea of a peer review mechanism where states' human rights situations or performance are assessed by the Council in an 'objective, universal, genuine and non-selective manner'.<sup>57</sup>

African states were active participants in the negotiations that led to the final adoption of GA res 60/251 in New York. Later, they also played a vital role in Geneva on working towards the adoption of what is colloquially referred to as the 'institution building text' of the Council, res 5/1 (endorsed by the GA res 62/434 of 3 December 2007).<sup>58</sup> Annexed to this resolution is the institution building text. This text covers, *inter alia*, the procedures or modalities of the UPR, the basis of the review, UPR principles and objectives, when and in what order countries would undergo the review, and the outcome and follow-up of the review mechanism.<sup>59</sup>

Former High Commissioner for Human Rights, Ms Louise Arbour, has hailed the UPR as a robust response to most of the criticisms levelled against the former Commission. She also indicated that it would 'provide a vehicle for scrutiny of the implementation of rights and norms beyond anything ever attempted by the Commission on Human Rights'.<sup>60</sup> Current UN Secretary-General, Ban Ki-moon, has also observed that the UPR 'has great potential to promote and protect human rights in the darkest corners of the world'. He continued to advise that '[a]ll victims of human rights abuses should be able to look to the HRC as a forum and a springboard for action'.<sup>61</sup>

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<sup>55</sup> See: [www.state.gov/g/drl/upr/132216.htm](http://www.state.gov/g/drl/upr/132216.htm) (last accessed 10 August 2010).

<sup>56</sup> Abebe 'Of shaming and bargaining of African States: African states and the UPR of the UN Human Rights Council' (2009) 9 *Human Rights Law Review*, 1–35, 2.

<sup>57</sup> *Ibid.*

<sup>58</sup> A/HRC/RES/5/1, 2007.

<sup>59</sup> See n 54 above.

<sup>60</sup> UN Press Release, address by Louise Arbour, former UN High Commissioner for Human Rights on the occasion of the eighth session of the Human Rights Council, Geneva, 2 June 2008.

<sup>61</sup> Speech by UN Secretary General, Ban Ki-moon at the opening of the 4<sup>th</sup> session of the Human Rights Council, Geneva 12 March 2007.

*Review procedures of the UPR*

GA res 60/251 sets out the mandate of the Council as follows:

To undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.<sup>62</sup>

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

*Interactive dialogue*

The maximum time allowed for a state review is three hours. The reviewed state is entitled to use an hour of that time to present its report, react to any written questions it may have received prior to the day of the review, respond to oral questions, comments and recommendations from the floor, and present its conclusions. The state under review has a discretion as to how it will use its allocated time and what issues it wishes to address. During the course of the interactive dialogue, HRC member states are allowed three minutes, and observers two minutes in which to raise their questions, comments, and recommendations.<sup>63</sup>

As pointed out above, after the interactive session a group of three HRC members, known as the ‘troika or rapporteurs,’ and a member of the Secretariat (OHCHR) work together to produce the report of the review. The report must be factual and an accurate reflection of the debate that took place during the review, and must contain the recommendations and/or conclusions proffered to the state during the process by delegations during interactive dialogue. The state under review can accept, decline to accept, or undertake to implement any of the recommendations resulting from the review, and must inform the troika of its decision. Two days after the review has taken place, the report is presented to the Working Group for adoption. Factual

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<sup>62</sup> Resolution 60/251, par 5(e).

<sup>63</sup> See n 54 above.

errors in the report may, at the request of delegations, be corrected for a two week period following adoption.<sup>64</sup>

#### *The Outcome Report*

The final Outcome Report of the UPR of a state is debated and adopted at the next plenary session of the HRC by resolution or decision. One hour of the plenary session (also webcast) is allocated to the adoption of the report, with the state under review being allowed twenty minutes to address issues raised at the Working Group session. Other member states are also allowed an opportunity to express their views during the review.<sup>65</sup> Members and observers of the HRC (open to all 193 members of the UN) are allowed twenty minutes to make comments on the UPR Outcome Report. Lastly, twenty minutes are set aside for civil society organisations and National Human Rights Institutions with ECOSOC status, to make short two minute interventions to express their views on the UPR Outcome Report for a given country. The final outcome Report of the UPR is adopted at the plenary session.<sup>66</sup>

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

The defining hallmark of the interaction between African states has long been the absence of mutual criticism, even in the face of massive human rights violations. This habit is amply exemplified by their deafening silence while President Robert Mugabe of Zimbabwe decimates his people, and tears apart a country which was once touted as the bread basket of Africa. At the Commonwealth Meeting in 2002, the Commonwealth decided to suspend Zimbabwe after its 2002 elections which were marred by large-scale violence and other serious irregularities. Although the suspension of Zimbabwe's membership finally came into effect, it left the Commonwealth divided into two factions: one camp, led by Britain and Australia, supported the suspension; while the other, led by Nigeria and South Africa, was bitterly opposed to the suspension. Ironically both Nigeria and South Africa are the chief architects of NEPAD of which the APRM is an integral aspect.<sup>67</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Kebonang n 3 above at 46.

*Politics of bargaining among African states in the UPR*

Abebe writes that although a number of radical and progressive procedural reforms have been introduced to make the HRC more responsive to its mandate, it remains an inter-governmental organ.<sup>68</sup> Therefore this means that much as states have politicised the HRC, states in the Council often organise themselves and undertake their activities in regional groupings and networks.<sup>69</sup> As such, regional alliances play a decisive role in influencing the conduct and outcome of review processes.<sup>70</sup>

As indicated above, so far some fourteen African countries have undergone the UPR review process. Among the countries that have been peer-reviewed, whose human rights situations are notorious are, among others, Ethiopia, Equatorial Guinea, and Eritrea.<sup>71</sup> This article will endeavour to analyse the reports of some of these countries, in relation to the reaction of African states thereto.

On 19 March 2010, the HRC considered the outcome of the Universal Periodic Review of Ethiopia.<sup>72</sup> The Ethiopian national report<sup>73</sup> was introduced by Fisseha Yimer, Special Advisor to the Minister of Foreign Affairs and leader of the delegation. Almost predictably, in his address, Yimer spoke of his country's 'demonstrable commitment', to democracy and the fulfillment of all human rights obligations.<sup>74</sup> Yimer's sentiments notwithstanding, Ethiopia's commitment to democracy is questionable. However, as Hansungule notes, given a chance, all regimes around the world will proclaim themselves to be democratic.<sup>75</sup> In the words of Gitonga:

the term [democracy] has become more and more honorific with an unequivocal 'laudatory' meaning attached to it. Supporters and apologists of all kinds of regimes and systems are therefore quick to attach the tag

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<sup>68</sup> Abebe n 56 above at 19.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> All of these countries occupy the bottom half in the Moo Ibrahim Index rankings.

<sup>72</sup> See Ethiopian Outcome Report available at: [www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A\\_HRC\\_13\\_17\\_ETH\\_E.pdf](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A_HRC_13_17_ETH_E.pdf) (last accessed 18 August 2010).

<sup>73</sup> Available at: [www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A\\_HRC\\_WG6\\_6\\_ETH\\_1\\_E.pdf](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ET/A_HRC_WG6_6_ETH_1_E.pdf) (last accessed 18 August 2010).

<sup>74</sup> Ethiopian Outcome Report n 72 above, par 2.

<sup>75</sup> Hansungule 'Malawi and the African Peer Review Mechanism: a bold step towards good governance?' (2008) 2 *Malawi Law Journal* 3–28 21.

‘democratic’ unto them. It is not even uncommon to find the term used to signify and thereby sanctify perfectly antithetical realities and practices.<sup>76</sup>

As Yimer concluded his speech, Boualem Chebihi of Algeria took to the floor to react to Ethiopia’s report. He opened his address by indicating that ‘Ethiopia [is] a *brotherly* [own emphasis] country which is host to the headquarters of the African Union.’<sup>77</sup> The leader of the Algerian delegation noted further that his government appreciated Ethiopia’s unwavering determination to promote and protect human rights. Several other African countries like Djibouti, Congo, and Morocco, also joined in the praise of Ethiopia’s human rights situation.

What surprises me is how African countries in the UPR managed to overlook factors that undermine governance and effective fulfillment of human rights obligations in Ethiopia. According to the 2009 Human Rights Watch Report, ‘Ethiopia is on a deteriorating human rights trajectory.’<sup>78</sup> The report notes that in 2009 Ethiopia promulgated two draconian pieces of legislation ‘that codify some of the worst aspects of the slide towards deeper repression and political intolerance’.<sup>79</sup> In January 2009, Ethiopia passed the Civil Society Organisations (CSO) Law,<sup>80</sup> which is one of the ‘most restrictive of its kind, and its provisions will make most independent human rights work impossible’.<sup>81</sup> This law makes any work within the domain of human rights or governance illegal if carried out by foreign non-governmental organisations, and labels any Ethiopian organisation that receives more than ten percent of its funding from sources outside of Ethiopia, ‘foreign’.<sup>82</sup> In essence, the law makes most independent human rights work in Ethiopia virtually impossible.<sup>83</sup>

<sup>76</sup> Gitonga ‘Meaning and foundations of democracy’ (1988) as quoted by Hansungule, *id* at 23.

<sup>77</sup> Ethiopian Outcome Report n 72 above at par 26.

<sup>78</sup> Available at: [www.advocacyforethiopia.org/up-content/uploads/2010/01/humanrightswatch2009](http://www.advocacyforethiopia.org/up-content/uploads/2010/01/humanrightswatch2009) (last accessed 14 August 2010).

<sup>79</sup> *Ibid.*

<sup>80</sup> Proclamation 621 of 2009.

<sup>81</sup> For a comprehensive discussion of this law, see Mulat *et al* ‘Sounding the horn: Ethiopia’s civil society law threatens human rights defenders’ (2009) 1–19. Available at: [www.law.northwestern.edu/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf](http://www.law.northwestern.edu/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf) (last accessed 15 February 2010).

<sup>82</sup> Proclamation 621 of 2009, see art 2 thereof.

<sup>83</sup> *Id* at art 8.

In July 2009, Ethiopia passed the Proclamation on Antiterrorism.<sup>84</sup> This law permits the Ethiopian government to prosecute political protesters and non-violent expressions of dissent as acts of terrorism.<sup>85</sup> Some provisions of this law appear to be tailored less towards addressing terrorism and more towards allowing a callous and heavy-handed response to public unrest.<sup>86</sup> These laws make Ethiopia a virtual pariah state. As the country was heading towards elections in the winter of 2010, the Ethiopian government clamped down on the already limited space for dissent and general political activity.<sup>87</sup> It has been observed that ordinary citizens who criticise government policies or officials are gagged through trumped-up and spurious charges such as belonging to illegal ‘anti-peace’ groups, including armed opposition movements and banned political formations.<sup>88</sup>

According to the 2009 US Department of State Human Rights Report on Ethiopia,<sup>89</sup> human rights abuses reported during that year included, *inter alia*, torture, unlawful killings, and ill-treatment of detainees and opposition supporters by state security forces, often acting with evident impunity.<sup>90</sup>

During Ethiopia’s UPR review, none of the African countries forthrightly engaged the Ethiopian delegation on the massive human rights violations highlighted above. All African countries which had an opportunity to speak, took turns, without an iota of compunction, to heap flattery on the Ethiopian government for its imagined commitment to fulfilling its human rights obligations. Where some germane issues were raised, they were perfunctorily discussed and paled into insignificance in comparison with praises from the African bloc which dominated the review process. Whereas African states commended the human rights situation in Ethiopia, the Human Rights Watch report states that ‘[Ethiopia] is slid[ing] deeper into repression’.<sup>91</sup> Ethiopia’s unimpressive human rights record demonstrates a clear lack of political will on the part of the Ethiopian government to advance the country’s human rights agenda. The startling part of it is that Ethiopian Prime Minister Zenawi is the chairperson of the APR Forum, the very nucleus of the APRM.

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<sup>84</sup> Proclamation 652/2009.

<sup>85</sup> *Id* at art 3 thereof.

<sup>86</sup> See Human Watch Report executive summary at: [www.abbaymedia.com/news/?p](http://www.abbaymedia.com/news/?p) (last accessed 30 August 2010).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> See: [www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm](http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm) (last accessed 19 August 2010).

<sup>90</sup> *Ibid.*

<sup>91</sup> See Human Watch Report executive summary at: [www.abbaymedia.com/news/?p](http://www.abbaymedia.com/news/?p) (last accessed 30 August 2010).

The uncritical nature of engagement among African states as reflected by the Ethiopian review above seems to be part of the larger pattern of how African states engage one another in the UPR. During Eritrea's review, Algeria, the first African state to take the floor, reminded the reviewers that 'the universal periodic review was not a place for confrontations but rather a way to assess progress and challenges'.<sup>92</sup> This statement reminds one of Abebe's words that African states are easily tempted to equate the cooperative nature of the UPR, with the absence of any genuine criticisms.<sup>93</sup> On a positive note, however, Algeria encouraged Eritrea to establish a national human rights institution in line with the Paris Principles.<sup>94</sup> The DRC congratulated Eritrea for having ratified several international human rights instruments and having adopted a constitution that guarantees the fundamental freedoms of citizens.<sup>95</sup> Whereas the adoption of a 'good' constitution is a proper starting point towards the creation of a comprehensive legal framework for the protection of human rights, it cannot be viewed as an end in itself. It must be appreciated as a vehicle to deliver human rights and good governance, and, as Ebrahim aptly observes:

...no matter how wonderful the Constitution may be, unless it is respected by all – government and citizens alike – it will not be of much value. Laws do not make a better society, people do. Law can only be of assistance in empowering people to achieve their aspirations.<sup>96</sup>

For its part, South Africa welcomed the ongoing efforts of the Government of Eritrea to reform its national laws, bringing them in conformity with the constitution as well as international obligations that Eritrea has incurred under international law. However, the South African delegation was brave to enquire from Eritrea about allegations of enforced disappearances and torture by the police and army.<sup>97</sup> The South African manner of questioning touching on the so called sensitive issues, must be commended.

<sup>92</sup> See n 81 above at par 26.

<sup>93</sup> Abebe n 56 above at 20.

<sup>94</sup> See Eritrean Outcome Report available at: [www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_WG.6\\_6\\_L1\\_Eritrea](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_WG.6_6_L1_Eritrea) (accessed 15 August 2010), par 26. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights.

<sup>95</sup> *Id* at par 58.

<sup>96</sup> Ebrahim *The soul of a nation* (1998) 259.

<sup>97</sup> See n 46 above. See Eritrean Outcome Report available at: [www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A\\_HRC\\_WG.6\\_6\\_L1\\_Eritrea](http://www.lib.ohchr.org/HRBodies/UPR/Documents/Session6/ER/A_HRC_WG.6_6_L1_Eritrea) (last accessed 15 August 2010), para 67. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights.

Despite South Africa's valiant attempt to get Eritrea to account for its massive human rights violations, generally the nature of engagement among African states has been less than critical, with a host of critical issues in Eritrea's human rights domain remaining untouched. For instance, prison conditions are said to be harsh and life-threatening; arbitrary arrests and detentions are widespread, causing Georgette Gagnon, Human Rights Watch director for Africa, to remark that 'Eritrea's government is turning the country into a giant prison'.<sup>98</sup>

During the review of the Gambia, African states praised that country for being a staunch guardian of human rights as exemplified by its hosting of the African Commission. Despite this misplaced praise extended to The Gambia by fellow African states, in *Purohit v The Gambia*, the Commission itself lambasted Gambia for its unwillingness to protect human rights and reluctance to cooperate with the Commission – conduct that the Commission indicated could adversely affect its work.<sup>99</sup>

Further, of sixty-five statements during the review of Tunisia, fifty were 'favourable' – mainly from African and Muslim countries.<sup>100</sup> More than half of the fifty 'favourable' statements recorded during the review of that country, emanated from African states with strong ties to developing world states.<sup>101</sup>

Ironically, African states, joined by other developing countries, turned the United Kingdom (UK) review into an opportunity for attack, severely criticizing its human rights situation. However, there was no corresponding attack on African and other developing countries, many of whom have worse human rights records than the UK. This attitude of African states, which is fraught with double standards and hypocrisy and smacks of misplaced solidarity, attracted scathing criticism from a group of NGOs. They discredited this approach as follows:

On the UPR Working Group, we note the value of a cooperative approach but express serious concern at the practice of some States which have been lining up only to praise their allies. This approach runs contrary to the agreed principle that the UPR should be conducted in an 'objective, transparent,

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<sup>98</sup> See: [www.hrw.org/en/news/2009/04/16/eritrea-repression-creating-human-rights-crisis](http://www.hrw.org/en/news/2009/04/16/eritrea-repression-creating-human-rights-crisis) (last accessed 10 August 2010).

<sup>99</sup> (2003) AHRLR 96 (ACHPR 2003) para 41.

<sup>100</sup> Abebe n 56 above at 20.

<sup>101</sup> *Ibid.*

non-selective, constructive, non-confrontational and non-politicized manner'. In this sense, the UPR has not lived up to the expectations of a move away from the 'politicisation' of the past. Indeed, in many cases, this 'politicisation' has seemed more pronounced than ever. In several instances information provided by states under review, or by those praising them, has been misleading at best.<sup>102</sup>

This, however, does not mean that there were no serious and meaningful questions put by African states to other African countries under review. Some African countries broke ranks with 'tradition' and posed difficult and yet substantively significant questions to their fellow Africans. For example, South Africa inquired from the Eritrean delegation on the rampant incidence of torture and arbitrary detentions in that country,<sup>103</sup> and Angola and Zambia raised questions about the restrictions on freedom of expression and persecution of journalists in Tunisia.<sup>104</sup> Regrettably, this form of engagement is sporadic.

On the basis of the foregoing analysis, I feel that in the absence of Western countries, not much meaningful mutual peer review can be done by African states on their own. There is a danger that the process would be reduced to a shameful charade of mutual congratulation. The very essence of the UPR is to address human rights concerns, and if the UPR is to succeed in its mandate, such issues must be laid bare before it for candid appraisal to run its course.

#### *Politics of flattery in the APRM*

As already indicated, in the APRM, peer review applies at the level of the APR Forum. This is the highest level structure at continental level, which is where actual 'peer pressure' is applied on errant states. The review is exclusive to participating Heads of State. NGOs are not permitted to enter the meeting room where a peer review exercise or activity is being conducted, let alone take the floor to contribute in interactive dialogue. Part of the proceedings is held in camera – the so-called Closed Session of the Summit. All persons who are not representatives of the Heads of State and Government, or heads of partner institutions of the APRM or APRM team, are excluded from attending these sessions. However, at the end of each summit of the Committee of Heads of State and Government participating in the APRM, a communiqué is issued. This communiqué indicates the names

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<sup>102</sup> Joint NGO Statement on 8<sup>th</sup> session, Human Rights Council available at: <http://www.ishr.ch> (last accessed 16 August 2010).

<sup>103</sup> Eritrean Outcome Report n 97 above at par 67.

<sup>104</sup> Abebe n 56 above at 20.

of Heads of State and Government who attended the summit, the date and venue of the summit, and the review outcomes for a state or states. It is these APR Forum communiqués which form the basis of our analysis, examining the nature of engagement that obtains among participating states. As indicated above, some fourteen states have undergone the APRM review process. For purposes of this study, communiqués resulting from the reviews of Kenya and Rwanda will be used. This is because, of the countries peer reviewed, there is evidence (as shall be shown below) that their human rights records are not positive. This by no means suggests that they have the worst human rights records in Africa. African countries with the most notorious human rights records – Zimbabwe, Somalia, and Chad, for example – are conspicuously absent from the APRM.<sup>105</sup> As a process voluntarily acceded to, the APRM has no authority over these regimes with the worst human rights records, as they have opted not to be party to APRM. At present, there are no indications that these countries are likely to subject themselves to peer review.

Lack of straight talk is also the hallmark of engagements in the APRM. The review of Kenya eloquently speaks to this fact. Kenya was peer reviewed at the fifth summit of the APR Forum held at the Gambia on 30 June 2006. This review followed the release of the APRM Country Review Report (Kenya Report) for that country by the APRM eminent persons. This report, which one scholar described as ‘remarkably frank,’ identified critical and ‘overarching’ issues of human rights and governance that Kenya needed to address promptly. It observed that there is a need for a healing of the nation, and that the process of national healing and reconciliation is unlikely to proceed so long as society remains polarised.<sup>106</sup>

In particular, the APRM eminent persons noted ‘the role of prominent members of the ruling party and high ranking government officials in fuelling the so-called ethnic clashes’. They lamented the lack of investigations and prosecutions of many perpetrators. It was noted that many of the perpetrators

have neither been investigated nor prosecuted. Some have continued to serve as senior officers, ministers, or members of parliament. The inability to act

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<sup>105</sup> For the performance of African countries in the area of human rights, see for example, the Mo Ibrahim index. Its latest edition (2011) is available at: [http://www.moibrahimfoundation.org/en/media/get/20111003\\_About-the-Ibrahim-Index.pdf](http://www.moibrahimfoundation.org/en/media/get/20111003_About-the-Ibrahim-Index.pdf) (last accessed 31 May 2012). In terms of this index, out of a total of fifty-three states, Zimbabwe ranks the 51<sup>st</sup>, followed by Chad on the 52<sup>nd</sup> spot and then Somalia which occupies the 53<sup>rd</sup> position.

<sup>106</sup> APRM Country Review Report (Kenya) <http://www.nepad.org/2005/files/aprm/APRMKenya-report.pdf> (last accessed 10 May 2010).

[against them] tends to underline general public perception of impunity, while at the same time constricting the ability of people to come to terms with the past experiences of injustice and violence thus further aggravating and reinforcing polarities and suspicion.

The Report recommended ‘transformational leadership’ – a leadership that ‘entails not simply directing change but managing it in a way that ensures broad ownership, legitimacy and self-directed sustenance, and replication of change in all associated systems.’<sup>107</sup>

At Kenya’s review, the APR Forum took the observations of the panel of eminent persons lightly. Heads of State and Government of participating states did not put these issues to the Kenyan President, Mwai Kibaki, in an attempt to avert the calamity of which the eminent persons had warned in their report. Barely two years after its review, Kenya was plunged into massive post-election tribal violence that left thousands of people dead and many more displaced. It is submitted that had Kibaki’s peers engaged him frankly about the impending ethnic-based violence, Kenya could have taken calculated measures to avert this unfortunate eventuality. The failure to engage President Kibaki critically, prompted Manby to ask whether ‘African heads of state who have signed up for the APRM process [are]... ready to urge remedies for poor performance, or [whether] ... their own glass houses [would] discourage them [from] throwing of stones?’<sup>108</sup> African leaders lack the moral authority to keep one another in check. To expect them to criticise one another, as one commentator scathingly remarked, ‘is like seconding [the] mafia to raid dope smokers at a high school’.<sup>109</sup>

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

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

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<sup>107</sup> *Id* at 250.

<sup>108</sup> Manby ‘Was the APRM Process in Kenya a waste of time? (2008) available at: [www.afrimap.org/english/images/paper/Manby\\_APRM-Kenya.pdf](http://www.afrimap.org/english/images/paper/Manby_APRM-Kenya.pdf) (last accessed 17 August 2010).

<sup>109</sup> Ayittey *Africa in chaos* (1999) 34.

pledged to support Kenya in seeking solutions to its constitution review and diversity problems. When it was all over, presidents Obasanjo and Mbeki and Prime Minister Meles Zenawi ... expressed relief and promised to go on with the process, after realising that it was not a life-and-death situation.<sup>110</sup>

Before the 2008 post-election violence, Kenya was touted as a bastion of human rights and democracy in east Africa. Its accession to the APRM was seen as a stride towards the strengthening of its human rights protection system and the consolidation of its democracy through the adoption of agreed international best standards and practices. In my view, these phenomenal gains have been reversed in a remarkable fashion. It could be argued that had the APRM played its role seriously and decisively, Kenya could have successfully steered away from this tragedy.

The Kenya Report also recommended 'mediatory and conciliatory intervention under the aegis of the African Union'.<sup>111</sup> The AU could not act, and when presented with the opportunity during Kenya's review, the APRM too, made no attempt at mediatory or conciliatory intervention as recommended by the country report.

The Kenyan situation replayed itself in the review of South Africa where the Country Review Report cautioned of the impending slew of xenophobic attacks.<sup>112</sup> The Report noted that

[d]espite the solidarity and comradeship between black South Africans and the rest of the people of sub-Saharan Africa during the decades of struggle against apartheid, and for liberation, foreigners mostly of African descent, are being subjected to brutality .... [x]enophobia against other Africans is currently on the rise and should be nipped in the bud.<sup>113</sup>

This issue was overlooked at the South African review in 2007. Hardly a year later, South Africa was reeling under xenophobic attacks that left various foreign nationals at best displaced, and at worst dead. It can be repeated here that had the APR Forum engaged South Africa on its intended measures to avert impending xenophobic attacks, these attacks might have been averted.

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<sup>110</sup> Manby n 108 above at 2.

<sup>111</sup> Kenyan report n 106 above at 286.

<sup>112</sup> See the South African Country Review Report available at: [www.aprm.org.za/docs/SACountryReviewReport5.pdf](http://www.aprm.org.za/docs/SACountryReviewReport5.pdf) (last accessed 20 August 2010).

<sup>113</sup> *Id* at 286.

This uncritical mutual engagement is standard practice in the APRM. When Rwandan President Paul Kagame appeared before his peers for review in June 2006, they applauded Rwanda's promising efforts to secure a breakaway from its ghastly past of genocide and lawlessness. They also engaged in trivial issues, like debating the length of that country's APRM Country Review Report, with Meles Zenawi of Ethiopia arguing that it was too long, and Thabo Mbeki defending its length, arguing that the report must be all-encompassing and as comprehensive as possible.<sup>114</sup> In fact, an insider reported that this was one of the rare occasions on which African leaders debated anything at all – its triviality notwithstanding.<sup>115</sup> Hansungule, one of APRM's consultants, remarks quite poignantly that the APR Forum has turned out to be a sham, as leaders hardly comment on each others' records, let alone assessing these critically.<sup>116</sup> Without teeth to bite errant states, it would appear that the only means of enforcing the APRM recommendations is through moral approbation – particularly naming and shaming which is supposed to come from leaders of the APRM participating states.<sup>117</sup> As pointed out above, mutual criticism or persuasion between leaders in the APR Forum, which is supposed to be the engine of the APRM where peer pressure occurs, simply does not happen.

*Enhancing creative dialogue: UPR versus APRM*

Both the UPR and the APRM mechanisms provide platforms in their different ways through which the human rights situations in African countries could be improved through interactive dialogue. For the cause of the APRM and the APRM to be stayed, their processes must be conducted in a transparent and open manner. Hebert and Gruzd write that a government can earn substantial goodwill if it offers early signals that it is willing to listen and is determined to make the process as open and transparent as possible.<sup>118</sup>

Unlike the UPR where the proceedings are conducted in public, are broadcasted live on webcasts, and where NGOs are given an opportunity to add their views during the Working Group plenary session, the APRM review is shrouded in secrecy. As indicated above, the Closed Session of the APR Forum, where peer pressure is supposed to be applied, is conducted behind closed doors, and NGOs are also not allowed into the meeting room. Only the

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<sup>114</sup> Hansungule n 9 above at 13.

<sup>115</sup> An interview with Professor Michelo Hansungule of the University of Pretoria, who is one of the APRM expert consultants, 12 July 2010.

<sup>116</sup> Hansungule n 9 above at 21–22.

<sup>117</sup> *Ibid.*

<sup>118</sup> Herbert & Gruzd n 33 above at 23.

Heads of State and Government of participating states, heads of the APRM partner institutions, and the APRM team are granted access. In the APRM, NGOs and the media are only involved in the process at its preliminary stages as the country undergoes self-assessment which results in a Country Self Assessment Report (CSAR), and during the Programme of Action to fix the identified gaps in governance.<sup>119</sup> Their involvement goes no further than this. Even then, complaints have arisen that governments tend to exclude those NGOs that they perceive as 'hostile', and stack the process with compliant ones.<sup>120</sup> It is submitted that this secrecy contributes to the poor quality of political engagement in the APR Forum. It is during these closed door sessions that African leaders take turns to praise one another.

The controlling idea behind the formation of the APRM was that this mechanism should be people centred, people focused, and people driven. Can this be validly claimed when its business is conducted outside of the eye of the people? The APRM mechanism can be summed up in the words of Kansteiner, a US Department for Africa official, who described it as being 'philosophically spot-on'.<sup>121</sup> Despite its lofty aspirations, as with several African regional institutions and mechanisms before it, the APRM, has become a 'trade union' of African leaders. It has become more sovereign and sacrosanct than the people on whom it relies for legitimacy, and for whom it was intended. It is centred around, focused on, and driven by Heads of State and Government of participating countries and has little to do with the ordinary African people who have been despoiled of their humanity through hunger, disease, and the denial of human rights by the same leaders. The APRM has become a platform for the exchange of pre-agreed rhetoric between African leaders without any meaningful political engagement.

The absence of NGO participation in the APRM reviews has not helped the situation. It cannot be gainsaid that NGOs have contributed in no small way in the workings of the UPR, raising critical, substantially fair, and well researched questions and comments. For instance, during the Working Group Preliminary Session for Ethiopia, the Human Rights Watch, Amnesty International, the Cairo Institute for Human Rights Studies, and other NGOs criticised the Ethiopian delegation for the continued deterioration of human rights in that country.<sup>122</sup>

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<sup>119</sup> *Ibid* at 5.

<sup>120</sup> Nyembezi 'The place of NGOs in the APRM' (2006) 4 *Human Rights Quarterly* 17.

<sup>121</sup> Kansteiner quoted by Bond 'A critique of the APRM' available at: [www.africafiles.org/article.asp?ID=22541](http://www.africafiles.org/article.asp?ID=22541) (last accessed 19 August 2010).

<sup>122</sup> See Ethiopian Outcome Report n 72 above at pars 60, 61 & 62.

It has been demonstrated above that straight talk is woefully lacking among African states. In addition, they spurn constructive criticism from independent entities like NGOs, and ignore spot-on recommendations such as those suggested by western states. Perhaps African states still share Kwame Nkrumah's sentiments that it is far easier for the proverbial camel to pass through the eye of a needle – hump and all – than for erstwhile colonialists to give sound and honest political counsel to their liberated territories.<sup>123</sup> Whichever way one looks at the situation, the reality is that this lack of mutual criticism among African states and their inability to accept constructive criticism has only helped to allow the tide of human violations to subsist unabated on the continent. It is time for African states to appreciate that romanticism is a fossil of a bygone dispensation when human rights mattered very little. This is a new era – an era of human rights.

#### **Rationalising misplaced solidarity among Africans states**

In the early years, lack of democracy in one state was hardly the concern of other states. Before the end of the Cold War in around 1990, human rights did not feature prominently in the scheme of international law, as until then the widely accepted view was that 'international law does not generally address domestic constitutional issues, such as how government is formed [or run]'.<sup>124</sup> Scholars such as Ake talk of 'democratization of disempowerment' which is manifested through governments' protection of each other against criticism.<sup>125</sup> Writing about the Southern African Development Community (SADC), Maundeni observes that it is a truism that SADC states invariably defend one another and never criticise each other.<sup>126</sup> Though these observations were made within the context of SADC, they are as relevant to the UPR and APRM as they are to SADC.

Other scholars argue that this silence is principally in line with 'respecting the sovereignty of member states'.<sup>127</sup> The single most important question that springs to mind is this: should states that violate human rights be allowed to hide behind the veil of sovereignty to avoid criticism? It is to this issue that I now turn.

<sup>123</sup> Nkrumah quoted in Asante & Abarry (eds) *African intellectual heritage* (1996) 368.

<sup>124</sup> Fox & Roth 'Introduction: The spread of democracy and its implications for international law' in Fox & Roth (eds) *Democratic governance and international law* (2000) 1.

<sup>125</sup> Ake quoted by Maundeni 'Regional election bodies and Southern African integration' in Kaunda (ed) *Essays on regional integration and development* (2007) *FOPRISA* 44.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Id* at 45.

*Anti-colonial struggle comradeship*

It could also be argued that the attitude of African states not to criticise one another is embedded in their solidarity during their struggle for independence. Leaders of liberation movements in Africa viewed colonisers as a common enemy against whom they had to unite their efforts to defeat. This comradeship has survived to the present day. Thus, some commentators have argued that it is well-nigh impossible for the South African former President, Thabo Mbeki, to criticise Zimbabwe's leader Robert Mugabe as during South Africa's struggle against apartheid, Zimbabwe supported and even hosted South African nationalists. It has been argued that Mbeki feels greatly indebted to Mugabe and so is hesitant to advise or oppose him.<sup>128</sup> Closely related to this supposition, is the argument that regional alliance also plays a decisive role in influencing the attitudes of African states *vis-à-vis* one another. It therefore stands to reason that owing to regional alliances, African states operate on the basis of an unwritten rule of avoidance of mutual criticism.

*Ex facie*, the APRM and the UPR are exceptional undertakings. For a continent that has jealously protected its sovereignty, it is diplomatically exceptional for its nations to throw themselves open to external scrutiny. However, it appears that the notion of sovereignty has been attenuated only in theory and remains absolute in practice. African states must move away from the dogma of absolute sovereignty to match theory with practice as Botrous-Ghali suggests. Let mutual criticism penetrate the walls of tyranny which still stand strong in many parts of Africa. Further, African leaders cannot afford to stand by idly while their counterparts tear their countries asunder, choosing to protect their colonial comradeship through silence. The placing of personal relations over fundamental norms of human rights defies logic. This collegiality will reduce both the UPR and APRM to yet further 'cosmetic exercises without effect in the real world of policy and decision making'.<sup>129</sup> Without hard talk, the APRM and UPR are destined to early failure.

**Conclusion and recommendations**

It is clear from the foregoing that mutual political engagement among African states in the UPR and the APRM is largely uncritical, less than frank, and highly romanticised. African states hardly engage in little straight talk on their

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<sup>128</sup> 'Thabo Mbeki's attitude: 'Quiet diplomacy or negligence of duty?' Zimbabwe Daily News 21 April 2008 34, available at: [www.zimdaily.com/news/mbeki22.4893.html](http://www.zimdaily.com/news/mbeki22.4893.html) (last accessed 2 September 2010).

<sup>129</sup> Kebonang n 3 above at 46.

human rights situations, and this has had dire consequences for human rights, democracy, and governance on the continent. It is argued that this nature of engagement partly accounts for the lack of out-and-out enthusiasm that greeted the APRM at the time of its inception. Today, even its pioneers admit, albeit painfully, that it has not been a successful project. For instance, Senegalese President Abdoulaye Wade, one of the ardent initial advocates for the APRM, is quoted as having said the following in relation to the APRM:

I am disappointed. I have great difficulties explaining what we have achieved when people at home and elsewhere ask me. We're spending a lot of money and, above all, losing time with repetition and conferences that end and you're not quite sure what they've achieved.<sup>130</sup>

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

I am afraid that we have not made the progress we had hoped for. Indeed, and regrettably, I believe that we have lost some of the momentum which attended the launch ... of the NEPAD programmes.<sup>131</sup>

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

In the first place, the APRM must offer accreditation or affiliate status to NGOs and allow them to attend and participate fully and freely during peer reviews in the APR Forum in order to enhance the quality of the interactive dialogue during reviews. It is further argued that the inclusion of NGOs must not be limited to African NGOs, who are at best under-resourced, and at worst denied space to operate. International human rights NGOs – like Human Rights Watch and Amnesty International – must also be granted affiliate status with the APRM with power to attend and fully participate during the review process. There is no reason why a discussion on human rights or governance should be shrouded in secrecy. After all, African states participate

<sup>130</sup> Bond 'Removing neocolonialism's APRM mask: a critique of the African Peer Review Mechanism' (2009) available at: <http://www.africafiles.org/article.asp?ID=22541> (last accessed 19 August 2010).

<sup>131</sup> *Ibid.*

in the UPR where proceedings are open to the public and NGOs. In the UPR, over and above supplying information that forms basis of a review, NGOs enjoying consultative status with the United Nations Economic and Social Council (ECOSOC) and can be accredited to participate in the HRC's sessions as observers.<sup>132</sup> As observers, they are entitled to, *inter alia*, attend and observe all proceedings of the Council with the exception of the Council deliberations under the Complaints Procedure; submit written statements to the HRC; and participate in debates, interactive dialogues, panel discussions and informal meetings.<sup>133</sup>

The issue of governance is central to Africa's problems. It is recommended that the APRM must give due prominence and attention to it. To do so, would require that the APRM founding documents be revised and its scope be limited to focus on a narrow issue, albeit of great concern to Africa, namely governance. It is submitted that the mandate of the APRM as spelt out in its founding documents, is too broad. Since Africa's problems are quintessentially political in nature, the APRM should focus on political problems on the continent. This would help the APRM to utilise its time and meagre resources on a narrow yet vital and clearly identified objective. There can be no gainsaying that this will also assist in focusing debate,

Finally, the relevance of the UPR and the APRM to Africa cannot be overemphasised. Africa needs these mechanisms to extricate itself from its political morass. Through these mechanisms, African states have an opportunity to speak among themselves on how to tackle their political issues. African states must critically engage one another on each others' governance and human rights issues without fear or favour, affection, or ill-will, for the good of the African people and posterity. As Kofi Annan<sup>134</sup> once said, what stands between Africa and its future is Africa itself. As indicated above, not by any stretch of imagination can it be claimed that mutual straight talk alone is the 'silver bullet' for all problems that Africa faces. However, it is submitted that robust mutual criticism will appreciably set Africa on course to attain her destiny and assume her rightful place in world affairs.

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<sup>132</sup> See The Practical Guide for NGO Participants available at: [www2.ohchr.org/english/bodies/hrcouncil/ngo.htm](http://www2.ohchr.org/english/bodies/hrcouncil/ngo.htm) (last accessed 20 August 2010).

<sup>133</sup> Available at: [www.ohchr.org/english/bodies/hrcouncil/ngo.htm](http://www.ohchr.org/english/bodies/hrcouncil/ngo.htm) (last accessed 20 August 2010).

<sup>134</sup> Foreword to UNCTAD Foreign Direct Investment in Africa, New York, 1999 [www.unctad.org/en/doc/poiteiitem1501.pdf](http://www.unctad.org/en/doc/poiteiitem1501.pdf) (last accessed 13 July 2012).