Scrutinising regional standards of democracy in Africa

NADJITA NGARHODJIM
Legal Officer, African Commission on Human and Peoples' Rights

1 INTRODUCTION

It has long been admitted that the right to determine its own political regime, vests in a State. The right falls within the realm of State sovereignty and excludes, *a priori*, any idea of external influence or interference. The principle of non-interference in domestic affairs is one of the sacrosanct values underlying inter-state relations. The principle was reaffirmed by UN General Assembly Resolution 1514 of 1960, regarding the granting of independence to colonised peoples and countries, whereby the General Assembly recalled the right of peoples to self-determination, which includes the right to be free from any form of colonialism, and also the right to independently choose their political status or regime.[1] Traditionally, therefore, international law purports to be politically and ideologically neutral, even though, during the so-called Cold War period, Washington and Moscow tried to impose their respective ideologies upon small states.[2] In Africa, the 1963 Charter of the Organisation of African Unity (OAU) installed non-interference in the internal affairs of Member States as one of the pillars of the Organisation.[3]

The gradual weakening of the Soviet bloc during the 1980s, leading to its disintegration following the collapse of the Berlin Wall, changed the global order. International organisations now adopt policies and undertake actions that are clearly at variance with the secular political and ideological neutrality of international law: the United Nations no longer hides its preference for democratic type regimes,[4] and the European Union (EU) considers democracy the only acceptable form of government in Europe, and, by extension, in any country expecting support from the EU. These factors led to a wave

1 These rights were invoked by African leaders in order to demand the independence of their countries from European colonial masters. Many of the same leaders, for decades, denied their people the right to freely choose their government.

2 Leonid Brezhnev, the former Soviet Union President, in a speech at the 5th Polish United Workers.

3 One of the purposes of the OAU was the defence of the sovereignty, the territorial integrity and the independence of African countries (article 2 of the OAU Charter). Furthermore, sovereign equality and non-interference in domestic affairs were among the Organisation's founding principles (article 3 of the OAU Charter).

4 Since 1988, the UN General Assembly annually adopts a declaration or a resolution supporting the establishment, promotion and consolidation of democracy in Member States. The first one was the resolution on "Enhancing the effectiveness of the principle of periodic and genuine elections" which called for the creation of a Commission on Human Rights.

2009-1-text.indd 76 10/8/09 11:08:19 AM

of democratisation in Eastern Europe (formerly communist countries)[5] and in Africa.[6]

Aside from international standards developed by the UN, regional organisations – including the Organisation of American States (in the Americas), the European Union (in Europe), and the former Organisation of African Unity (OAU), now known as the African Union (AU) (in Africa) – have developed regional standards to govern relations between States in various spheres. These organisations are increasingly going beyond the realm of international relations to address issues which were traditionally considered the *domaine reservé* of sovereign states, including human rights and democracy.

After a few words on democratisation in Africa, this paper will focus the debate on the relevance of regional standards, and examine regional standards of democracy in Africa, and critique these standards, leading to the main findings, which are an acknowledgment of the existence of African regional standards of democracy, on the one hand, and, the weakness of the mechanism for the implementation and monitoring of these standards, on the other.

2 DEMOCRATISATION IN AFRICA

Democratisation in Africa is part of what Samuel Huntington termed the "third wave" of democratisation, which started in the 1970s with political liberalisation in Southern Europe, Latin American and some South-West Asian nations.[7] A peculiarity of the "third wave" of democratisation is the influence of external factors,[8] the international organisations and other countries, which were instrumental in pushing authoritarian regimes to start liberalising.

The collapse of the Berlin Wall had a significant influence on democratisation in Africa. It brought about a complete change in political governance in Africa as a result of a shift in Western countries' policies towards African regimes. During the Cold War period, support was granted along ideological lines, even to regimes well-known for their poor human rights records. A typical example was Mobutu's regime in the former Zaire, which received unconditional support from many Western countries. With the collapse of the Berlin Wall, the ideological war between the West and the Socialist Bloc ended, and the EU started tying its assistance to progress in human rights and democratisation. It no longer sufficed to adopt a liberal economic and political system in order to receive unconditional support. Countries expecting assistance from the EU were required to respect human rights, and adopt democracy as their form of government.

---

5 These countries wanted to be integrated into the European Community but, pursuant to the Paris Pact, they could do so only if they fulfilled certain conditions, including democratisation.

6 Democratisation in Africa in the early 1990's was also due to huge pressure from the West and international financial partners, such as the World Bank.

7 Huntington *The third wave. Democratisation in the Late Twentieth Century* (1991).

8 Diamond "Introduction: In search of consolidation" in Diamond, Plattner, Chu, and Tien (eds) *Consolidating the third wave of democracies. Themes and perspectives* (1997) xiii-xlvii.

2009-1-text.indd 77 10/8/09 11:08:19 AM

In June 1990, in La Baule, France, where African heads of state and government came together with the French president for the traditional *France-Africa* Summit, President Francois Mitterrand clearly advised his African peers that from then on, only those African regimes that democratised would receive financial aid from France.[9] Just over a year later, on 20 October 1991, in Harare, Zimbabwe, the Commonwealth, decided to revive the 1971 Singapore Principles, and to adapt them to the contemporary situation through a declaration setting out the political principles of the Commonwealth. The principles adopted in the Harare Declaration, include, among others, democratic institutions and processes, the rule of law, the independence of the judiciary, and a just and honest government.[10] It was also decided that sanctions would be imposed upon member states which did not abide by these principles. In 1995, for instance, Nigeria, under General Sani Abacha's military regime, was ousted from the Commonwealth for not respecting the Harare principles. In 2002, a decade after the adoption of the Harare Declaration, Zimbabwe was also excluded from the Organisation for failing to comply with the same principles. In 1994, after a contested presidential election, won by the incumbent President, Gnassigbe Eyadema, in Togo, the EU suspended its financial aid to Togo for "democratic deficit". Some African leaders, traditionally supported by the West during the Cold War, who did not understand that the geopolitical situation had changed, were overthrown, with the West doing nothing to maintain them in power.

The move for the international recognition of democracy as the preferred system of government, and its direct implications for the relationship between African countries and their major political and economic partners, have justified the adoption of African regional standards of democracy.

3 THE RELEVANCE OF REGIONAL STANDARDS

The relevance of regional standards has been appropriately summarized by the Office of the UN High Commissioner for Human Rights in its Fact Sheet number 19:

> "Regional human rights systems have reinforced international standards and machinery by providing the means by which human rights concerns can be addressed within the particular social, historical and political context of the region concerned."[11]

The standards in the Office of the High Commissioner's fact sheet pertain to human rights. However, they can be extended to democratic principles,

---

9 See F Mitterrand, "Le discours de la Baule (1990)", available at <http://www.afrimap.org/english/images/paper/Manby_APRM-Kenya.pdf> (accessed on 15 March 2007). During the press conference held at the close of the Summit, President Mitterrand said that the "traditional and longstanding aid" of France would be "tepid *vis-à-vis* regimes that would behave in an authoritarian manner" and enthusiastic towards those that would courageously take the steps towards democratisation. See the telegram of Agence France presse, "Quinze ans après la Baule, le bilan démocratique africain reste mitigé" published in *Le potentiel* no 3456 of 21 June 2005, available at <http:www.lepotentiel.com/afficher_article.php?id_article=8858> (accessed on 18 April 2007).

10 Para 9 of the Harare Declaration.

11 Office of the High Commissioner for Human Rights, Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights.

2009-1-text.indd 78 10/8/09 11:08:20 AM

because the lines between the two are blurry[12] and, like human rights, democracy is largely influenced by the social, historical and political context of the countries concerned. Therefore, regional standards are more likely to take into account the specific context of each country than universal standards do.

The mere transplantation of European standards in "third wave" democracies was a failure, which led scholars to insist more on historical, cultural, and social factors when studying democratisation in Latin America, South West Asia, or Africa. One of the pioneers of this school of thought was Dankwart Rustow. In his attempt to come up with a model of democratic transition, after analysing the different schools of thought and reviewing the experiences of various countries, Rustow concluded that there "may be many roads to democracy".[13]

In the OAU Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World, adopted in July 1990, in Addis Ababa, Ethiopia, the Heads of State and Government clearly emphasised that although African countries have to move towards a more liberal political system, they have to choose, themselves, the type of democracy that best corresponds with the special nature and the aspiration of their peoples.[14]

The relevance of regional standards is further enhanced by their accessibility, as evidenced by the ever-growing number of African (and non-African) NGOs attending meetings of regional treaty monitoring bodies, and making use of the remedies offered by such bodies, such as the Communication (or complaint) procedure of the African Commission on Human and Peoples' Rights (the "African Commission"). The mechanisms created to monitor the implementation of regional standards are close to the people on the ground and, therefore, more accessible to them, than those put in place at the international level by bodies such as the UN in Geneva and New York.

4 LEGAL STANDARDS OF DEMOCRACY IN AFRICA

4.1 The constitutive act of the AU

Compared to the OAU, which was built on a strict respect for the principles of sovereignty and non-interference in internal affairs, the AU is a much more progressive organisation. Its Constitutive Act provides for the intervention of

12 Some aspects of democracy were recognised as human rights by various instruments, to quote but a few: the right to political participation (enshrined, *inter alia*, in the International Covenant on Civil and Political Rights (article 25), and the African Charter on Human and Peoples' Rights (article 13), the American Convention on Human Rights (article 23)); the right to freedom of opinion and expression (article 9 of the African Charter, articles 9 and 10 of the European Convention on Human Rights, article 13 of the American Convention on Human Rights). The African Charter on Democracy, Elections and Governance also clearly establishes the link between democracy and human rights, especially under its Chapter 4 titled "Democracy, Rule of Law and Human Rights".

13 Rustow "Transitions to democracy: toward a dynamic model" in Anderson (ed) *Transition to democracy* (1999) 20.

14 See para 10 of the Declaration on the Political and Socioeconomic Situation in Africa and the Fundamental Changes Taking Place in the World (*AHG/Decl.1 (XXVI)* 1990).

2009-1-text.indd 79 10/8/09 11:08:20 AM

the AU in Member States "in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".[15] Respect for democratic principles, human rights, the rule of law and good governance are included in article 4(m) as principles of the AU. Article 4(p) goes further and provides for "condemnation and rejection of unconstitutional changes of governments". By virtue of these provisions, and in accordance with declarations and resolutions of organs of the AU,[16] governments that would come to power by unconstitutional means, would not be allowed to participate in the activities of the Union. These provisions were referred to in order to terminate the participation of Madagascar in the organs of the AU, after President Marc Ravalomanana led a popular uprising that forced Didier Ratsiraka into exile, and he proclaimed himself the winner of the contested 2001 presidential election.[17] In his opening speech at the 76th Ordinary Session of the OAU Council of Ministers on 4th July 2002, South Africa's deputy President, Jacob Zuma, presented the banning of Madagascar from the Durban Summit as a "clear indication of a new way of doing things, and Africa's commitment to good governance."[18] The same provisions were invoked against General Francois Bozizé, in the Central African Republic, following his instigation of a *coup* against the democratically elected president, Ange-Felix Patassé, on 15 March 2003. More recently, the overthrow of President Ould Taya of Mauritania, on 3 August 2005, led to the suspension of Mauritania from the AU until constitutional order was re-established in that country.[19] In August 2008, still in Mauritania, the democratically elected President, Sidi Ould Cheikh Abdallahi, was overthrown by Army officers, which caused Mauritania to be suspended once more from AU Organs.[20]

4.2 The African charter on democracy, elections and governance

The Assembly of Heads of State and Government of the AU recently adopted the African Charter on Democracy, Elections and Governance (hereinafter the African Democratic Charter).[21] The document takes into account the

15 Article 4(h).
16 See section 5.1 below.
17 In early 2009, Andry Rajoelina, the Mayor of Antananarivo (who was eventually dismissed by Ravalomanana's government), led a protest that forced elected President Marc Ravalomanana to relinquish power to the Army, which, in turn, transmitted it to Mr. Rajoelina. Although the transmission of power to Mr. Rajoelina was validated by the Constitutional Court, the AU Peace and Security Council (PSC) condemned what it considered an unconstitutional change of government and suspended Madagascar from the AU on 20 March 2009 (see the Communiqué of the 181st Meeting of the PSC held in Addis Ababa, Ethiopia, on 20 March 2009 (PSC/PR/COMM.(CLXXXI)).
18 Jacob Zuma's speech is available at < http://www.anc.org.za/show.php?doc=ancdocs/history/zuma/2002/jz0704.htm > (consulted on 24 March 2009)).
19 Mauritania was readmitted to the AU after a new constitution was adopted and free and fair elections successfully organised. See communiqué PSC/PR/Comm(LXXVI) on the Situation in the Islamic Republic of Mauritania, adopted at the 76th meeting of the Peace and Security Council held in Addis Ababa, Ethiopia, on 10 April 2007.
20 See the Communiqué of the 163rd meeting of the Peace and Security Council, adopted on 22 December 2008 in Addis Ababa, Ethiopia (PSC/MIN/Comm.3 (CLXIII)).
21 Assembly/AU/Dec.147 (VIII), adopted at the 8th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, from 30 to 31st January 2007.

2009-1-text.indd 80 10/8/09 11:08:20 AM

main governance challenges in Africa, including, *inter alia*, issues around unconstitutional changes in government, gender inequality, corruption, civilian control of the military, and minority rights.

Essentially, the African Democratic Charter advocates political liberalisation – recognizing the role of non-state actors (including NGOs) and an independent press; the holding of regular free and fair elections as the sole avenue to access to or keeping power, the promotion of women and minority political participation – and condemns unconstitutional changes of governments.

The African Democratic Charter relies on the State at the national level, regional economic communities at the sub-continental level, and the AU Commission at the continental level for its implementation and monitoring. The AU Commission is the cornerstone of the system. It puts in place measurable benchmarks for implementing the commitments and principles of the Charter, and provides independent monitoring of compliance by State Parties.[22] The AU Commission has the task of receiving reports that State Parties are required to submit every two years on the legislative and other relevant measures taken with a view to giving effect to the principles and commitments enshrined in the African Democratic Charter.[23]

4.3 The African charter on human and people's rights

The African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter) is a major human rights instrument in Africa. It was adopted in Nairobi, Kenya, in 1981 and entered into force on 21st October 1986. All the 53 Member States of the AU are at present State Parties to the African Charter.

Following the example of many other international human rights instruments, the African Charter does not make any direct reference to democracy. However, some of its provisions recognise the right to political participation and peoples' right to self-determination. In terms of article 13(1):

> "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the law."

An analysis of the jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission) shows that the banning of a certain category of citizens from contesting certain political positions, based on their origin or their former political activities, is a violation of the right to political participation.[24] The African Commission also ruled that the right to political participation is the individual equivalent of the collective right to self-determination.[25] The African Charter goes further and extends the scope

22 Article 44(2)(A)(a) of the African Democratic Charter.

23 Article 49 of the African Democratic Charter.

24 See communications 44/90 *People's Democratique Organisation for Independence and Socialism v The Gambia* 10th Annual Activity Report par 67, and 97/93 *John K Modise v Botswana* 7th Annual Activity Report par 38.

25 See communication 129/94 *Civil Liberties Organisation v Nigeria*, par 52, 9th Annual Activity Report: 1995-1996. It should also be noted that one of the original features of the African Charter is that, unlike other international human rights instruments, it gives an important consideration to group rights known as "peoples' rights". See Hansungule "The African Charter on Human and Peoples' Rights: A critical review" (2000) 8 *African Yearbook of International Law* 288-292.

2009-1-text.indd 81 10/8/09 11:08:20 AM

of the right to political participation to cover the right to equal access to public service and to public property.[26]

Article 20 recognises peoples' right to self-determination, including the right to "freely determine their political status". Following the jurisprudence of the African Commission, an unconstitutional change of government is a gross breach of article 20. In *Media Rights Agenda v Nigeria*[27] and *Constitutional Rights Project and Another v Nigeria,*[28] communications were filed by Nigerian NGOs after the military regime decide to annul the results of the presidential election of 12 June 1993, which was presumably won by Chief Moshood Abiola, the opposition candidate. The authors of the communications denounced the suspension of the electoral process by the military regime, and the related human rights violations. The Commission ruled that a government by force is not compatible with the right of peoples to freely determine their political future. Furthermore, in *Jawara v The Gambia,*[29] a communication was brought before the Commission by the former Gambian president, Sir Dawda Jawara, who was removed from power by a military *coup d'état* in July 1994; the Commission held that military *coups* constitute grave violations of the right to freely choose government.

The African Charter also guarantees the right to freedom of expression, the right to freedom of association, and the right to freedom of peaceful assembly, all paramount in an open and democratic society.[30] The right to freedom of association, in the view of the African Commission, includes the right to form or join a political party,[31] and the right not to be persecuted on the basis of political affiliation. The African Commission also ruled, in *Malawi African Association and Others v Mauritania*, that the prohibition of an unauthorised meeting that does not constitute a threat to "national security, the safety, health, ethics, and rights and freedoms of others", is a violation of the right to peaceful assembly as guaranteed under article 11 of the African Charter.[32]

The right to freedom of expression protects the expression of opinions which criticise the government, as well as the freedom of the press. This was illustrated by a series of Communications filled by Nigerian NGOs, under the military regimes of Generals Babangida and Abacha. The military regimes had declared war on freedoms of opinion, expression and association through the seizure and banning of newspapers, persecution of NGO leaders, imposition of restrictive conditions and procedures for the registration of newspapers.[33]

---

26 Articles 13(2) and 13 (3) of the Charter, respectively.
27 (2000) HRLR 262 (ACHPR 2000) par 80.
28 (2000) AHRLR 248 (ACHPR 1999) paras 51-53.
29 (2000) AHRLR 107 (ACHPR 2000) paras 72-73
30 Articles 9(2), 10 and 11, respectively.
31 See for instance *Jawara v The Gambia* pars 66 and 68.
32 *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) pars 108-111. This point of view was already held by the African Commission in *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), pars 81-82.
33 See, for example, *Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (1998); Constitutional Rights Project and Others v Nigeria (2000) AHRLR 227(ACHPR 1999); International Pen and Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998); Media Rights Agenda v Nigeria (2000) AHRLR 262 (ACHPR 2000)*.

2009-1-text.indd 82 10/8/09 11:08:20 AM

It is also worth noting that the "doctrine of implicitly guaranteed rights"[34] developed by the African Court on Human and Peoples Rights (ACHPR) in *SERAC and Others v Nigeria*[35] provides a very dynamic interpretation of the African Charter and can be used to protect democratic principles which are not explicitly provided for under the Charter but could be deduced from the combined effect of various provisions of the Charter. In the *SERAC* case, the exploitation of oil reserves in Ogoniland, Nigeria, by the Nigerian Government, in a consortium with Shell, was done without any regard to the environment and the local population (the Ogonis). This resulted in the contamination of water, soil and air, causing "serious and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems".[36] In order to secure the oil installations, the Nigerian Army attacked, burned and destroyed villages and houses in an attempt to dislodge supporters of the Movement of the Survival of Ogoni People (MOSOP). In applying the doctrine of implicitly guaranteed rights, the ACHPR found Nigeria in violation of the right of members of the Ogoni community to adequate housing, implicitly protected under Articles 14 (right to property), 16 (right to health) and 18(1) (right to a family),[37] and their right to food, implicitly guaranteed under Articles 4 (right to life), 16 (right to health) and 22 (right to economic, social and cultural development).[38]

5 POLITICAL STANDARDS OF DEMOCRACY IN AFRICA

5.1 Declarations and resolutions of political organs

Before inserting democratic standards in binding instruments, such as the AU Constitutive Act, the major political organs of the OAU/AU, by means of declarations and resolutions, set minimum standards of democracy to be respected by Member States.

The landmark of this profusion of declarations and resolutions was the Declaration of the Assembly of Heads of State and Government of the OAU on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World, adopted in Addis Ababa, Ethiopia, in July 1990.[39] The Heads of State and Government, in this Declaration, took note of the principal changes within the international sphere,[40] and came to the conclusion that political systems in Africa were no longer adapted to the new situation. They also expressed the view that there was a need to move towards more liberal regimes in Africa, provided that Africans freely devise their own democratic systems, taking into account their political, historical,

34 Heyns (ed) *Human Rights Law in Africa vol 1*(2004) 410.
35 Communication 155/96 (2001).
36 *SERAC* case, par 2.
37 *SERAC* case, pars 59 -63.
38 *SERAC* case, pars 64 -66.
39 Document *AHG/Decl.1 (XXVI)* 1990.
40 The end of the Cold War, the situation in South Africa, the persistence of poverty in Africa, among others.

2009-1-text.indd 83 10/8/09 11:08:20 AM

social and cultural realities. The declaration firmly stated that the development of Africa is primarily the responsibility of African leaders and that the political system any country decides to adopt, must be in conformity with its circumstances.

The Grand Bay Declaration and Plan of Action on Human Rights in Africa, issued by the First OAU Ministerial Conference on Human Rights, held on 12-16 April 1999, in Grand Bay, Mauritius, is another important document. The Declaration addressed a range of issues, including the development of civil society, the independence, impartiality, accessibility and efficiency of the judiciary, and established a link between good governance, the rule of law, democracy and development.

The principles proclaimed in Grand Bay were later upheld and reinforced by the first AU Ministerial Conference on Human Rights, held from 5 to 9 May 2003 in Kigali, Rwanda.[41]

The Harare Declaration of 1997, Algiers Declaration of 1999, and Lomé Declaration of 2000 condemn unconstitutional changes in democratically elected governments. The Heads of State and Government of the OAU, through this series of declarations, resolved to discontinue the membership of any government that would take power by unconstitutional means. The exclusion would last until such a government restored constitutional order. This position was reinforced through the coming into force of the Constitutive Act of the AU, which includes the "condemnation and rejection of unconstitutional changes of governments" as one of its principles.[42]

The OAU/AU has also developed, through the same political organs, standards with regard to free and fair elections. In 2002, a Declaration on the Principles Governing Democratic Elections was adopted, followed by Election Observation and Monitoring Guidelines. These guidelines provide for AU monitoring groups, composed of members of the AU Commission and representatives of Member States, to be sent to Member States holding elections, at the request of the latter. The AU Commission defines the terms of reference of each election observer mission. The findings of these observer missions inform the AU decision as to whether elections held in Member States meet the standards of democratic election.

5.2 The NEPAD-APRM standards

The New Partnership for Africa's Development (NEPAD) is an initiative voluntarily agreed upon by African leaders in Abuja, Nigeria, on 23 October 2001. The overall objective of NEPAD is economic, that is, to improve the living conditions of historically impoverished African populations. However, the ambit of the initiative goes beyond economic problems to embrace issues such as peace, security, democracy, political governance, the environment,

41 See the Kigali Declaration (MIN/CONF/HRA/Decl.1 (I)).
42 See section 4.1 above on the Constitutive Act of the AU.

2009-1-text.indd 84 10/8/09 11:08:20 AM

among others, which are identified as *sine qua non* conditions for sustainable development in Africa.

The purpose of NEPAD is to create the appropriate political and economic environment for attracting foreign investors to the Continent. In other words, NEPAD purports to achieve Africa's development through African ideas and the creation, by African leaders, of conducive political and macroeconomic conditions, with assistance from foreign donors.

The African Peer Review Mechanism (APRM) was established in order to assess the compliance of participating states with NEPAD principles. It is a voluntary instrument which helps African governments to evaluate their peers. The APRM also assesses the conformity of policies and practices to the agreed political, economic and corporate governance values, codes and standards. These values, codes and standards are enshrined in the Declaration on Democracy, Political, Economic and Corporate Governance signed at the 38th Ordinary Session of the Assembly of Heads of State and Government held on 8 July 2002 in Durban, South Africa.[43]

The APRM is implemented by a Panel of Eminent African Personalities appointed by the Assembly of Participating States. There are four sorts of reviews: a first review carried out within 18 months of a country becoming a member of the APRM process; periodic reports every two years; additional reviews requested by a country for its own reasons; "emergency" reviews, initiated by the Participating Heads of State and Government in case of political or economic crisis in a participating state.

Each review consists of five main stages: the first stage involves the preparation by the APRM Secretariat of briefing material on the country; the second stage is the preparation of the Team's draft report; the third stage involves the discussion of the Team's draft report with the government concerned; the submission of the Team's report to the participating Heads of State and Government constitutes the fourth stage; the fifth, and final, stage is the public tabling of the report in key regional and sub-regional organisations six months after it has been considered by the Participating Heads of State and Government.

At a meeting of African Heads of State in Kigali, Rwanda, it was decided that four countries, namely, Ghana, Rwanda, Mauritius, and Kenya would be the first participating countries to be reviewed. A second group of six States, namely, South Africa, Senegal, Nigeria, Mozambique, Algeria and Mali, would follow.[44] Twenty-five AU Member States have so far signed the Memorandum of Understanding and are participating in the APRM.[45] Five countries have so far been reviewed, namely, Ghana, Rwanda, Kenya, South Africa and Algeria,

43 AHG/235 (XXXVIII), Annex I.

44 Kajee "NEPAD's APRM: A progress report" Seminar Manager & Researcher: Nepad and Governance Project, South African Institute of International Affairs, October 2004. Available at <www.isupportafrica.com>.

45 See list of participating countries available at <http://www.nepad.org/aprm/> (accessed on 25th April 2008).

2009-1-text.indd 85 10/8/09 11:08:20 AM

while three others, namely Benin, Nigeria and Uganda, are currently under review.

6 CRITIQUE OF THE STANDARDS

Two main criticisms can be addressed to the African standards of democracy presented, particularly in terms of their implementation: firstly, the lack of or the inefficacy of enforcement mechanisms, and secondly, the precedence given to procedures to the detriment of the substantive elements of democracy.[46]

To begin with, some of the standards do not have any monitoring devices. This is true of resolutions and declarations of political organs of the OAU/AU.[47] Others, such as the standards set by the African Charter, the Constitutive Act of the AU, the African Democratic Charter, and the NEPAD-APRM, have monitoring mechanisms. However, these mechanisms are not very effective.

The African Commission was established as the watchdog of the African Charter. It has the two-fold mission of promoting and protecting the rights enshrined in the African Charter.[48] However, the African Commission does not have the power to make binding decisions. It is only empowered to receive complaints (cautiously termed "communications" by the African Charter) from Member States, individuals or NGOs, regarding alleged violations of the rights protected under the African Charter by a Member State.[49] The decisions of the African Commission are mere "recommendations" to the Assembly of Heads of State and Government. It is up to this political organ to enforce these recommendations. The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Court), and the swearing in of the Judges of the African Court at the 7th AU Summit held in Banjul, The Gambia, on 01-02 July 2006, will definitely strengthen the enforcement device of the African Charter.[50]

The Assembly of Heads of State and Government, as the supreme organ of the AU, is also the guarantor of the standards of democracy existing under the Constitutive Act. So far, the Assembly has not yet imposed sanctions on any sitting head of State, albeit that some of them were engaged in gross and continuous violations of the standards concerned, mainly through elections

46 There is special emphasis on the way in which a government comes to power.
47 See section 5.1 above.
48 Articles 30 and 45 of the African Charter.
49 Articles 47-54 (Communications from States), and 55-59 (Other communications).
50 In contrast with the Commission, which makes mere recommendations, the decisions of the African Court of Justice and Human Rights are legally binding (see article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights). It is worth noting that the AU merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, into a single Court, the African Court of Justice and Human Rights. The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008 by the Assembly of Heads of State and Government at the 11th Ordinary Summit held in June/July 2008 in Sharm El Sheikh, Egypt. The Protocol is not yet in force.

2009-1-text.indd 86 10/8/09 11:08:20 AM

which were not free and fair. This was recently illustrated by the situation in Kenya following the December 2007 elections, and in Zimbabwe after the March 2008 elections. In both countries, the incumbent president (president Mwai Kibaki of Kenya and president Robert Mugabe of Zimbabwe) remained in power after flawed electoral processes, the outcome of which was contested by the opposition candidates (Raila Odinga in Kenya, and Morgan Tsvangirai in Zimbabwe). Instead of imposing sanctions, the AU, and the international community, urged protagonists to negotiate a power-sharing agreement, whereby the incumbent president remained in office and the leader of the opposition became his Prime Minister with extended powers.[51]

Sanctions were, however, imposed upon new heads of State that came to power through unconstitutional means.[52] Such sanctions were temporary, lasting only until fresh elections were organised, irrespective of how free and fair they were.

The standards set in the African Democratic Charter are to be monitored by the AU Commission. The latter is a political and executive organ, whose task is essentially to implement decisions taken by AU policy organs such as the Assembly and the Executive Council. The Commission has no power to make legally binding decisions.

No legal sanction is attached to the monitoring of the NEPAD-APRM standards of democracy. The monitoring takes the form of an assessment, by the country concerned, by a team of independent experts and by the Participating Heads of State and Government. A country that successfully undergoes the review undoubtedly acquires some democratic credit, will be quoted as an example of democracy and good governance, and would attract donors and foreign investors. The sanction, in my opinion, is therefore diplomatic and economic.

The AU gives greater consideration to procedures to the detriment of substantive democracy. It appears from the practices of the Assembly of Heads of State and Government of the AU, especially in the dispensation of sanctions, that, of all the standards, there is one that is more important than others, that is, accession to power through constitutional means. Other standards (eg, free and fair elections, fundamental civil and political rights) can be violated and the AU would ignore them or do very little to get those standards observed, but the unconstitutional change of an incumbent government almost automatically triggers the imposition of sanctions. This was aptly summarised by Christof Hartmann:

> "African states are clearly not monitoring democratic practice in the sense of a set of indicators. They have instead implicitly agreed that there is a single basic criterion that

51 For a discussion of the situation in Kenya, see Odinkalu, "Concerning Kenya: The current AU position on unconstitutional changes in government" *Afrimap* January 2008 available at <http://www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt_Odinkalu_Jan08.pdf> (accessed on 20 March 2009) and Manby, "Was the APRM process in Kenya a waste of time? Lessons for the future" *Afrimap* April 2008, available at <http://www.afrimap.org/english/images/paper/Manby_APRM-Kenya.pdf> (accessed on 20 March 2009).

52 See section 4.1 above.

2009-1-text.indd 87 10/8/09 11:08:20 AM

ex negativo excludes a country from the family of democracies: the access to power via unconstitutional means".[53]

7 CONCLUSION

Slowly but surely, uniform standards of democracy are taking shape in Africa. At present they are still weak and not well-entrenched, probably because African States are emerging from three decades of authoritarian rule, and democratic culture is still embryonic. However, more and more African countries are embracing democratic values, including the holding of free and fair elections. Their growing number, adding to the pressures from various donors, will certainly help to strengthen African regional standards of democracy as well as their monitoring mechanisms. At present these standards are not well-entrenched due to the weaknesses of the mechanisms for their implementation and monitoring.

BIBLIOGRAPHY

Legislation

OHCHR Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights.

BOOKS / JOURNAL ARTICLES

Diamond L "Introduction: In search of consolidation" in Larry Diamond, Marc F. Plattner, Yuan-Han Chu, and Hung-Mao Tien (eds), *Consolidating the third wave of democracies. Themes and perspectives* John Hopkins University Press, Baltimore and London (1997) xiii-xlvii.

Hansungule M "The African Charter on Human and Peoples' Rights: A critical review" (2000) 8 *African Yearbook of International Law* 288-292.

Hartmann C "Towards Internalisation of Democracy? Regional Organisations and the Survival of Democracy" Paper for ECPR Conference 18-22/09/2003 in Marburg (Section No.26) (2003)

Heyns C (ed) *Human Rights Law in Africa vol 1* Martinus Nijhoff Publishers Leiden (2004).

Huntington SP *The third wave. Democratisation in the Late Twentieth Century*: University of Oklahoma Press Norman (1991).

Rustow DA "Transitions to democracy: toward a dynamic model" in L Anderson (ed) *Transition to democracy* Columbia University Press New York (1999).

INTERNET

Agence France presse "Quinze ans après la Baule, le bilan démocratique africain reste mitigé" published in *Le potentiel* no 3456 of 21 June 2005, available at

53 Hartmann "Towards Internalisation of Democracy? Regional Organisations and the Survival of Democracy". Paper for ECPR Conference 18-22/09/2003 in Marburg (Section No.26) 9.

2009-1-text.indd 88 10/8/09 11:08:21 AM

<http://www.lepotentiel.com/afficher_article.php?id_article=8858> (accessed on 18 April 2007).

Kajee A "NEPAD's APRM: A progress report" Seminar Manager & Researcher: Nepad and Governance Project, South African Institute of International Affairs, October 2004. Available at <www.isupportafrica.com> (accessed on 25 November 2005).

Manby B "Was the APRM process in Kenya a waste of time? Lessons for the future" *Afrimap* April 2008 available at <http://www.afrimap.org/english/images/paper/Manby_APRM-Kenya.pdf> (accessed on 20 March 2009).

Mitterand F Le discours de la Baule (1990) available at <http://www.rfi.fr/actufr/articles/037/article_20103.asp> (accessed on 15 March 2007).

Odinkalu CA "Concerning Kenya: The current AU position on unconstitutional changes in government", *Afrimap*, January 2008 available at <http://www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt_Odinkalu_Jan08.pdf> (accessed on 20 March 2009).

2009-1-text.indd 89 10/8/09 11:08:21 AM