Evaluating a decade of the African Union’s protection of human rights and democracy: A post-Tahrir assessment

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Summary

When the African Union was established, replacing the Organisation of African Unity, many were enthusiastic that it would champion the cause of human rights and democracy, one of the areas in which its predecessor had failed. Among the reasons for optimism was the fact that the African Union’s Constitutive Act was a lot more empathetic for the cause of human rights and democratic ideals. This article contends that, while the Constitutive Act might be potentially important, it is but one among many conditioning factors for the Union’s actions. The article argues that the most important determining factor for the Union’s success or failure is the human rights track record of member states and the perceived or real dependence of elites within these states on human rights violations. Other conditioning factors, such as international legal obligations created by the Constitutive Act and other treaties, pressure from pan-African sentiment within the AU, and pressure from the AU’s human rights organs play only a secondary and a comparatively minor role in affecting the AU’s behaviour.

1 Introduction

In July 2002, the Organisation of African Unity (OAU) was terminated and replaced by the African Union (AU). One of the stated reasons for the establishment of the AU was to open a new chapter in the history of Africa; a chapter in which peace, security, stability, sustainable

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development, democracy and human rights would be ensured.\(^1\)

By ratifying the Constitutive Act of the AU, the Heads of State and Government made an undertaking to ensure respect for democracy and human rights.\(^2\) A decade has passed since these undertakings, and numerous opportunities have presented themselves for the AU to work towards realising this promise. During this period, armed conflicts and peace, election-related violence and democratic transitions, coups d'état and constitutional restoration, international crime and international justice, have all visited the continent. Most recently, it was in Africa and under the guard of the AU that the momentous events described as the ‘Arab Spring’ occurred.\(^3\)

The article takes stock of these events and whether and to what extent the AU has fulfilled its promise of a new Africa. In so doing, the article employs the policy-oriented or New Haven jurisprudential method initially developed by Yale Professors Harold D Lasswell and Myres S McDougal.\(^4\) Based on a broad conception of law as an ongoing social process of authoritative and controlling decision, the article attempts to map a developmental construct of the AU’s human rights practice. The practical output of such an approach is a capacity to

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\(^2\) See arts 3(f), (g), (h), (j), (k) & (n) of the AU Constitutive Act.

\(^3\) Ben Ali of Tunisia, Hosni Mubarak of Egypt and Gaddafi of Libya were in power for 23, 30 and 40 years respectively before they were removed from power. See M Eltahawy ‘Tunisia’s jasmine revolution’ Washington Post 15 January 2011; M Slackman ‘A brittle leader, appearing strong’ New York Times 11 February 2011; Y Saleh & B Rohan ‘Libya declares nation liberated after Gaddafi death’ Reuters 23 October 2011.

methodically distinguish the determining factors for present and future trends in the decisions of the AU. The ultimate end of the endeavour, however, is not a mere ability to accurately determine future outcomes of authoritative decision making. A grasp of determining factors and possible future outcomes should allow the researcher, policy maker or activist to be able to make sensible recommendations so as to pursue an international order of human dignity.

The article looks at the positive/written legal undertakings made by African states in the different treaties, and the actual decision-making history of the political and judicial organs of the organisation. Accordingly, the second part of the article briefly introduces the AU’s positive normative and institutional system in relation to human rights and democracy. The second part of the article analyses the continuum of past trends in decision making of the OAU and the AU. It then identifies the common and distinguishing conditioning factors for their successes and failures in protecting human rights and democracy. Analysing past trends and relevant conditioning factors, the third part of the article constructs possible future trends in the AU’s decisions. Finally, solutions are outlined which may help in ensuring the AU’s progress in the practice and promotion of human rights and democracy.

2 African Union’s positive human rights system

At the core of the AU’s human rights normative framework lies the African Charter on Human and Peoples’ Rights (African Charter), which is supplemented by the following: the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol); the AU Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention); and the African Charter on the Rights and Welfare of the Child (African Children’s Charter) and the Cultural Charter for Africa.5 At the time of writing, the African Charter on Democracy, Elections and Good Governance had been ratified by 12 states. This Charter became part of the normative framework on 15 February 2012.6

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The African Commission on Human and Peoples’ Rights (African Commission) and the African Court on Human and Peoples’ Rights (African Court) are the main human rights organs of the region. Additionally, the Assembly of Heads of State and Government of the African Union and the Pan-African Parliament are political organs of the institution with important powers that affect the human rights practice of the AU. The African Peace and Security Council generally functions as a decision-making organ of the AU with important powers that have a bearing on human rights and democracy.

The AU, which succeeded the OAU in 2002, is comparable to the Council of Europe and the European Union in that its main aim is to promote regional integration and the co-operation of member states in their international relations. One of the main objectives of the AU is the ‘promotion and protection of human rights’. The Constitutive

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8 The PSC was established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).


10 See generally art 1 of the Statute of the Council of Europe and art A of the Treaty on European Union (Maastricht Treaty), both of which emphasise European integration.

11 See the Preamble and art 2 of the Constitutive Act of the AU. The Organization of American States (OAS) is different from the other continental intergovernmental organisations in that it is concerned neither with human rights nor with regional economic integration. According to art 1 of the Charter of the Organization of American States, the organisation is established ‘to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence’.

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Act makes numerous explicit references to human rights, including its declaration that the AU has the right to interfere in the internal affairs of states where gross violations, such as war crimes, genocide and crimes against humanity, occur. Furthermore, among the novelties of the Constitutive Act (when compared to the OAU Charter) is that it creates the possibility whereby the AU’s Assembly could impose sanctions ‘such as the denial of transport and communications links with other member states, and other measures of a political and economic nature’ where a member state fails to comply with the decisions and policies of the AU on human rights.

As signs or symbols of authoritative communication, these statements of the AU’s Constitutive Act authoritatively indicate what the AU is going to strive for in the future. However, the fact that these statements are contained in the Constitutive Act is not a definitive guarantee that the AU is going to be a champion of human rights in the years and decades to come. The Constitutive Act also contains provisions that are the negation of these pro-human dignity aims. Article 4(g) of the Constitutive Act declares that one of the principles in accordance with which the AU is to function is ‘[n]on-interference by any member state in the internal affairs of another’. According to article 3(b), one of the objectives of the AU is the defence of the sovereignty of member states. From this, one can see that studying the ‘objective’ indices of the communication of the AU Constitutive Act will not yield an objective result of the interpretation of the Act. This underlines the importance of studying the ‘subjective’ indices of the AU Constitutive Act in order to be able to understand the genuine shared expectations of Africa’s political elites.

Merely studying the provisions of the AU’s Constitutive Act does not present a complete picture of what the prevailing authoritative decisions on the place of human rights are, and what impact the AU is going to have on the human rights conditions of everyday Africans. It is only when one has studied the whole process of authoritative and controlling decisions that one can begin to understand the impact of the AU on the practice of human rights. Therefore, it is imperative to study how Africa’s authoritative decision makers apply the Constitutive Act and how they reconcile the contradictions between

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12 Art 4(h) AU Constitutive Act. Art 4(j) also provides that member states may request the intervention of the African Union ‘in order to restore peace and security’. See the Preamble; arts 3(e), (h) & (g), arts 4(c), (h), (l), (m), (o) & (p), art 23(2) and art 30 of the Constitutive Act of the AU emphasise the importance of human rights which, when compared to the OAS Charter, is considerable.

13 Art 23(2) AU Constitutive Act.


15 However, see Magliveras & Naldi (n 9 above) 415 418, arguing that the reading of the Constitutive Act indicates that there is an obvious inclination towards limiting sovereignty.
the regional protection of human rights and the protection of their sovereignty.

Note that, although this article mostly uses ‘states’ and ‘political elites’ interchangeably, the latter word is purposefully used to connote a meaning beyond the legal/political fiction of statehood whereby the state is deemed a legitimate representative of a certain population. ‘Political elite’ is used in places where the use of the word ‘state’ would conceal the fact that a certain decision or move might not express the interest everyone implied by ‘state’, and represents the interest of the usually-undemocratic political elite.\(^\text{16}\)

3 Past trends in decision and controlling factors

If anything shows the potential of African states to act as a collective force in the defence of human dignity, it is their successful effort to end the apartheid regime of South Africa that stands out.\(^\text{17}\) The evidence suggests that if international action is effective at all, the international campaign of African states against apartheid was the most effective. The first ordinary session of the Assembly of Heads of State and Government outlines the strategy of the organisation that would see to it that apartheid was declared an international crime.\(^\text{18}\)

\(^{16}\) Such use was preferred especially because of the undemocratic nature of most African states as even in fully developed or mature democracies, the notion of representativeness (of the people versus the elite) is highly questionable. See S Chambers ‘Deliberative democratic theory’ (2003) 6 Annual Review of Political Science 307 308-309; C Pateman Participation and democratic theory (1979) 2-3; EL Rubin ‘Getting past democracy’ (2001) 149 University of Pennsylvania Law Review 711 733-744. The article, eg, would avoid the use of ‘state’ or ‘state interest’ when a ruler such as Gaddafi or Mugabe declares that something is in the interest of the state or the people to avoid the aura of legitimacy that is created by the statehood fiction.

\(^{17}\) Another achievement that would not have been realised without the constant efforts of African states is the ascendance of what have come to be known as ‘third generation of human rights’ to international recognition. See generally UO Umozurike The African Charter on Human and Peoples’ Rights (1997) 51-62. Although taking note of this fact is important, the interest of this part of the study is to show the potential of African states’ collective capacity to enforce already existing standards. Therefore, a detailed description of Africa’s role in the development of third generation rights jurisprudence is unnecessary.

\(^{18}\) Resolutions adopted by the 1st ordinary session of the Assembly of Heads of State and Government held in Cairo, UAR, from 17 to 21 July 1964, ‘Apartheid in South Africa’ AHG/Res 6 (I) http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm#19631969. (The Resolution outlines the intention of state parties to have apartheid outlawed and to make pressure to tighten the noose on South Africa politically and economically.) Apartheid is now accepted without much ado as an international crime by major international documents; see the Preamble and art 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by GA Res 3068 (XXVIII)), 28 UN GAOR Supp (No 30) 75, UN Doc A/9030 (1974); see also art 7 of the Rome Statute of the International Criminal Court (1998/2002).
Although the United Nations (UN) was initially indifferent to these gross violations, it was forced to reverse its policy following the filling of the Assembly’s seats with the newly-independent states of Africa.

The activism of the Africa Group has altered the perception of the place of human rights in the international community. This is especially true as this group has left a permanent mark on the human rights mechanisms and practices of the Economic and Social Council (ECOSOC). Although decision makers in the UN originally considered neither the General Assembly nor the Security Council to have the mandate to monitor human rights, both organs were forced by the African Group to pass an embargo against South Africa and Rhodesia. The actions of the General Assembly, in 1962, and the Security Council, in 1963, represented a major shift in patterns of decision making. What is worthy of note is that the Security

19 See JF Green The United Nations and human rights (1958) 779-793, reporting that India, followed by Pakistan, were the first states that protested the practices of the apartheid regimes in South Africa and Rhodesia, though their calls were for the better part ignored. The arguments of India and Pakistan would not have made sense if made in the name of human rights at that time, so they had to make their case by arguing that the apartheid regime was a threat to international peace and security.

20 What followed was the longest and most intensive human rights campaign ever by the General Assembly, which was not hampered even by the Cold War. The African Group was, through the General Assembly, successful in alienating South Africa from UNESCO, the ECA, the International Bank for Reconstruction and Development (IBRD), IMF, WHO and ILO; Carey UN protection of civil and political rights (1976) 27-33; see also Green (n 19 above) 779-783. Note that South Africa was either outright expelled or forced to resign from membership of these institutions. It also made numerous attempts to expel it from the UN Conference on Trade and Development (UNCTAD) and even from the membership of the General Assembly itself. The Assembly also established the Special Committee against Apartheid (1962), called for the boycott of South Africa from the Olympics; Jackson & Faupin ‘The long road to Durban: The United Nations role in fighting racism and racial discrimination’ UN Chronicle 2007; see also Rosner & Low ‘The efficacy of Olympic bans and boycotts on effectuating international political and economic change’ (2009) 11 Texas Review of Entertainment and Sports Law 27 60. The UN also adopted the Convention on the Suppression and Punishment of the Crime of Apartheid and labelled the constitutional order of South Africa a crime against humanity. See Apartheid Convention (n 18 above).


22 From the positivistic point of view, the former does not have formal power to pass embargos, while the latter does not have the power to do the same where there was no threat to international peace and security. A non-binding call for the cessation of trade with the Rhodesian de facto government (de facto because its declaration was void by virtue of SC Res 217 (1965)) was made in 1965; SC Res 217(1965). A similar resolution was made in the same year authorising the United Kingdom to search ships to ascertain if they were transporting oil to Rhodesia. See SC Res 221 (1966), also on (1966) 60 American Journal of International Law. The
Council imposed sanctions, not because South Africa caused a threat to international peace and security, but because of the threat coming from the anti-apartheid sentiment of member states of the OAU.\textsuperscript{23} The United Nations Commission on Human Rights was compelled to widen its mandate because of pressure from African states in alliance with other developing states. With the pressure of the African Group, the notorious ‘no power’\textsuperscript{24} doctrine was reversed to allow the establishment of what used to be known as the 1235 and 1503 human rights procedures of the UN.\textsuperscript{25}

3.1 Pre-Banjul trends in decision

In stark contrast to overwhelming activism mounted by OAU member states against institutionalised racism and apartheid, African elites stayed aloof from the idea of making similar decisions regarding the human rights of their own citizens. Their numerical strength in the General Assembly and the Human Rights Commission ensured that their domestic jurisdictions would not be disturbed by concerns for

Security Council did, however, impose its first binding decision in the form of a trade embargo under art 41 of the UN Charter against Rhodesia in 1966 (SC Res 232 (1966)); see FL Kirgis ‘The Security Council’s first fifty years, the United Nations at fifty’ (1995) 89 American Journal of International Law 506 512, reflecting on how the Security Council’s first decision was later taken as the norm in the interpretation of the Charter. The second-ever such binding decision was also taken after a decade, but under similar circumstances against South Africa (Security Council Resolution 418 (1977)).

\textsuperscript{23} Carey hypothesises that the threat to peace and security is from other African states that might militarily intervene in the apartheid regimes; Carey (n 20 above) 25; P Malanczuk (ed) Akehurst’s modern introduction to international law (1997) 394. (Since there was no apparent threat that the racist regimes did not pose a threat to the peace, he hypothesises that the threat might come from the nature of the regimes that invite sub-regional revolution.) Others have hypothesised that, since the apartheid system itself is described as a threat to the peace in the relevant resolutions, the Security Council’s actions should be seen as an attack on the regimes rather than a formalistic finding of a threat to the peace. See V Gowlland-Debbas ‘Security Council enforcement action and issues of state responsibility’ (1994) 43 International and Comparative Law Quarterly 64-65; CG Fenwick ‘When is there a threat to the peace? Rhodesia’ (1967) 61 American Journal of International Law 753.


\textsuperscript{25} The 1503 procedure was created as a result of objections by states who claimed that the non-confidential 1235 procedure could not use confidential communications to the UN as an input. The 1503 procedure was passed to allow confidential communications to pass to the 1235 procedure. See Tolley (n 24 above) 450. The accidental effect was the creation of a two-tiered process in which the 1503 superseded the 1235 process in its frequent use as it was preferred by states for its confidentiality. See HJ Steiner & P Alston International human rights in context: Law, politics and morals (2000) 612.
human rights, at least until the end of the Cold War changed the dynamics of international politics.26

Ever since its establishment, a distinct trait of the OAU has been to respect and defend the domain reserve of its member states and the autocratic elites that ruled them.27 For that reason, the ‘domestic affairs’ clause of the OAU Charter was followed to the letter.28 Not only did member states make sure that the African Commission would be under strict political scrutiny, but they also made sure that the OAU would tolerate and turn a blind eye to the human rights excesses of member states.29

How tolerant the OAU was towards domestic excesses can be glimpsed from reactions to consecutive coups d’état and the execution of its founding fathers. It was not odd for the OAU to acknowledge ‘the right of any member state to change its government in any way it sees fit’, when appealing to Sergeant Samuel Doe not to execute the cabinet members of the previous elected government.30 Dacko, Kasa-Vubu, Nkrumah, Haile Selassie, Olympio, Tolbert, Rawlings, Diallo Telli and Lumumba, some of the leaders who had confronted colonialism face to face, were being slowly killed off and replaced by

26 J Donnelly ‘Human rights at the United Nations 1955-85: The question of bias’ (1988) 32 International Studies Quarterly 297, describing how, except for South Africa, Chile and Israel, who obtained universal and protracted condemnation, no Third World or African country received any negative attention unless it was a Western state or an ally thereof; also W Weinstein ‘Africa’s approach to human rights at the United Nations’ (1976) 6 A Journal of Opinion 14 15-16. Immediately following the success of establishing the Human Rights Commission procedures, the procedure turned its attention to the violations of African states, thus leading them to rally to limit its ambit to the apartheid regime in South Africa.

27 CE Welch Jr ‘The African Commission on Human Rights and Peoples’ Rights: A five-year report and assessment’ (1992) 14 Human Rights Quarterly 43, explaining that this was caused by the fact that its newly-independent state parties had independence in their focus and not human rights protection; UO Umozurike ‘The domestic jurisdiction clause in the OAU Charter’ (1979) 78 African Affairs 197 202-203, explaining the importance of the domestic jurisdiction clause, but also noting that apartheid was agreed to be an exception to this rule; JD Boukongou ‘The appeal of the African system for protecting human rights’ (2006) 6 African Human Rights Law Journal 268 293, finding the evidence for this not only in the failure of African leaders to establish a regional court, but in their espousal of a notion of non-litigious African (ie culturally relative) system of human rights.

28 See arts 2(1)(c) & 3(2) & (3) of the OAU Charter.

29 See IG Shivji The concept of human rights in Africa (1989) 104, reporting that the original draft of the Banjul Charter had envisaged a restriction on the appointment of government employees or diplomats of states, though that proposal was dropped. He also reports the subsequent appointment of partisan politicians to the post.

30 NJ Udombana ‘Can the leopard change its spots? The African Union treaty and human rights’ (2002) 17 American University Law Review 1177, arguing that only ‘the presence of a threat of foreign intervention’ could prompt the OAU to act.
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Coup d'état while the OAU followed a hands-off policy. Following Idi Amin’s ascent to power, a Ugandan delegate aptly explained the lack of enthusiasm of Africa’s political elite to take up the cause of human rights and democracy when he argued:

The question of a change in government in one country is purely an internal matter which is not the concern of the OAU. Twenty member states of the OAU which are now taking their seats in the OAU conference have had changes of government through coups and counter-coups. We strongly feel that if the OAU tries to involve itself in the internal affairs of member states, it is going to destroy itself.

Gross violations and unusually repressive regimes that today fill the shameful history pages of Africa were neither prevented nor condemned by the OAU. Among the pre-Banjul cases in which the OAU remained mute include the repression of the Tutsi minority and the massacre of more than 10,000 Tutsi in Rwanda (1964); the massacre of more than 150,000 Hutu in Burundi (1973); Ghana’s mass expulsion of 100,000 aliens; Bokassa’s murderous regime; and Mobutu Sese Seko’s bloody military junta. The most notorious Chairpersons of the OAU included Mengistu Haile Mariam, who masterminded the ‘Red Terror’ campaign which saw the ‘liquidation’ of a generation of Ethiopian youth, and Idi Amin Dada; who was responsible for the perishing of 400,000 Ugandans and the robbery and exile of some 100,000 members of the Asian community.

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31 As above. See PC Aka ‘The military, globalisation, and human rights in Africa’ (2002) 18 New York Law School Journal of Human Rights 361 386-389, branding the political style prevalent on the continent as ‘politics by the gun’, describing the Nigerian civil war, which took three million lives (mostly Igbos) as one of ‘genocidal proportions’; T O’Toole & JE Baker *The historical dictionary of Guinea* (2005) ixiii, stating that Telli was executed by the orders of Amadou Sekou Toure.


33 Weinstein (n 26 above) 17-18, describing the Rwandan, Burundian and Ghanaian expulsions and violations of human rights.

34 Welch (n 27 above) also describes the lavish coronation party and Amnesty International’s report of how in one incident in which 500 students were killed in a crackdown against the students’ demonstration against a requirement that they wear uniforms that they could not afford – allegedly the uniforms were to be distributed and sold by a relative of Bokassa’s.

35 B Baker ‘Twilight of impunity for Africa’s presidential criminals’ (2004) 25 Third World Quarterly 1587 1496, describing the Mobutu regime as the longest surviving and most corrupt regime, reporting that Mobutu had collected for himself a fee of $5 billion for his disservices.


37 C Legum *Behind the clown’s mask* (1997) 250 252 253, stating that many states could have objected to his nomination (which is distributed on a rotation basis). African leaders were forced to accept Amin’s chairmanship and the holding of the 1975 ordinary session in Kampala because he had strong supporters and so as to keep cohesion within the organisation; Baker (n 35 above) 1493, describing the atrocities of Amin; Amnesty International estimates that the number of his killings...
3.2 Post-Banjul trends in decision

The entry into force of the African Charter and the consequent establishment of the African Commission do not seem to have had much of an impact on the practice of human rights on the continent. There is evidence that Africa’s political elites were, and still are, unwilling to establish an institution that would examine their human rights practices and effectively put their human rights practices on trial when necessary. Further, the reaction of these elites to the gross violations that have taken place since the establishment of the African Commission shows that the establishment of the African Charter by itself did not make much of a difference.

The lack of intent on the side of African political elites to be bound by a human rights treaty that significantly limits their domestic prerogative can be seen in how blunt the African Charter was originally designed to be. To begin with, the African Charter gives a blank check when it comes to the limitation of rights. The only limitation that it purports to impose on states is that they should provide the limitation by law.38 Additionally, the wording of the Charter indicates not only that the Commission was intended to be a predominantly promotional mechanism with little or no enforcement powers.39 Even when declaring the obligation to submit periodic reports, the African Charter is sensitive to state parties’ jurisdiction because it merely asks them to ‘undertake to submit’ periodic reports on ‘legislative or other

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38 Eg, art 6 of the African Charter states that ‘[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained’ (my emphasis). See R Gittleman ‘The Banjul Charter on Human and Peoples’ Rights: A legal analysis’ in CE Welch & RI Meltzer (eds) Human rights and development in Africa (1984) 286. For a detailed discussion of the issue of limitations and derogations at the international and European level, see R Pati ‘Rights and their limits: The constitution for Europe in international and comparative legal perspective’ (2005) 23 Berkeley Journal of International Law 223.

39 See art 45 of the African Charter. Rather than a duty to ‘respect and ensure’ and to provide an ‘effective remedy’, state parties are only required to ‘allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter’ (my emphasis). Compare art 2 of ICCPR to art 26 of the African Charter.
Furthermore, what has evolved to become the individual communications mechanism of the Commission was never actually intended or designed to be an individual mechanism. Originally, individual communications were intended only to be input for the Commission to determine whether there are serious and massive patterns of violations.41

Although the conclusion of the Cold War had raised expectations of a more peaceful continent, Africa did not take the road to lasting peace and prosperity. The OAU had the dishonour of not being able to prevent or put a stop to conditions such as those in Liberia, Sierra Leone, Rwanda, Democratic Republic of Congo, Northern Uganda, Somalia and Southern Sudan.42 The OAU was not able to offer more than a ‘handful of pious declarations’, partly because of the institution’s decision to respect domestic jurisdiction,43 and a dire lack of resources, including military means.44 In addition to acknowledging the role played by a lack of resources, the OAU’s International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events reproached the OAU and its heads of state whose silence and inaction before and during the Rwandan genocide it found a ‘shocking moral failure’.45

One very interesting post-Banjul trend in the decisions of the OAU that continues to date is that, while the political organs of the OAU have shown little willingness to establish a strong and professional human rights mechanism, the mechanisms that have been established

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40 Art 62 African Charter, compared with art 40 of ICCPR, which requires state parties to submit reports on a wider category of ‘measures’; see TS Bulto ‘Beyond the promises: Resuscitating the state reporting procedure under the African Charter on Human and Peoples’ Rights’ (2006) 12 Buffalo Human Rights Law Review 57 60-61, arguing that it was not logical to focus on legislative measures at a time when Africa was seeing its most serious violations, therefore suggesting that reporting should have focused on situations on the ground.

41 Arts 55-58 African Charter. Thus, the individual communication procedure was intended to be more like the UN Human Rights Commission 1503 procedure.


44 Udombana (n 30 above) 1224.

have proven to be more effective than originally intended. Primarily through its professionalism and the assertiveness of its members, the African Commission has been able to overcome many of its structural difficulties. For instance, while the ‘individual communications’ mechanism was designed only as an information-input system to show the existence of gross violations, the Commission has in practice turned it into an individual complaints mechanism.46 While the African Charter was phrased to give states a nearly unlimited right to decide what limitations can be imposed on human rights, the Commission has taken an assertive step of interpreting the Charter to require the standards of legitimate aim, proportionality, absolute necessity as essential conditions for the limitation of rights.47 Among other things, the Commission’s attempts to overcome its structural deficiencies include its publication of a strong condemnation of non-compliance with its decisions, making binding ‘decisions’ in place of ‘recommendations’, the appointment of Special Rapporteurs and the initiation of in loco visits, in addition to a plethora of jurisprudential innovations.48

Despite the assertiveness of the African Commission, and its jurisprudential and substantive achievements, the fact remains that

46 According to the Commission, this practice is justified as ‘a single violation still violates the dignity of the victim and is an affront to international human rights norms’. The African Commission Human and Peoples’ Rights, Information Sheet 2, Guidelines of the Submission of Communications, Organisation of African Unity 6; also see CA Odinkalu ‘The individual complaints procedures of the African Commission on Human and Peoples’ Rights: A preliminary assessment’ (1998) 8 Transnational Law and Contemporary Problems 359 369-378, discussing the legal basis of the individual communications procedure under the African Charter; R Murray ‘Decisions by the African Commission on individual communications under the African Charter on Human and Peoples’ Rights’ (1997) 46 International and Comparative Law Quarterly 412 413, arguing that the individual complaints mechanism of the Commission does not have positive legal support within the treaty system; CA Odinkalu & C Christensen ‘The African Commission on Human and Peoples’ Rights: The development of its non-state communication procedures (1998) 20 Human Rights Quarterly 235 240-244, arguing that individual communication has enough positive conventional basis.


these developments have not been encouraged by member states of the AU.\textsuperscript{49} A study conducted by Viljoen and Louw on the implementation of the decisions of the African Commission shows that full compliance with its individual complaints decisions stands at only 14 per cent.\textsuperscript{50} Since the formation of the Commission, states have been persistent in not co-operating with its decisions, have generally not provided it with sufficient financial support, and have nominated ineligible or barely eligible individuals to Commission membership.\textsuperscript{51} Additionally, despite the Commission’s efforts to establish sound reporting procedures and guidelines, the periodic mechanism has not been able to assert its significance as state parties have been reluctant to submit their


\textsuperscript{51} As above. See also F Viljoen ‘Recent developments in the African regional human rights system’ (2004) 4 African Human Rights Law Journal 344 345, explaining that the lack of adherence to the Commission’s decisions is due to the fact that the OAU annual session does not put to public discussion (shame) state parties that do not comply with Commission decisions and is therefore easy to get away with violations; also Bulto (n 40 above) 69, concluding that the failure and delay in submitting periodic reports has been the ‘chronic problem’ plaguing the Commission’s work; also see Odinkalu (n 46 above) 398-400, going through the reports of the Commission, pleading for resources, qualified staff, office equipment and money to at least pay for telephone bills and reports one ex-commissioner’s complaint regarding ‘a lack of money, lack of funds, lack of ability to act; see K Quashigah ‘The African Charter on Human and Peoples’ Rights: Towards a more effective reporting mechanism’ (2002) 2 African Human Rights Law Journal 261 277, arguing that the whole state reporting mechanism is not taken seriously by states and the Commission itself pointing, among other things, to the fact that state representatives simply do not show up for reports and when they do, they do not stay for more than an hour and a half; also see GM Wachira & A Ayinla ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’ (2006) 6 African Human Rights Law Journal 465 466-467, observing that ‘the attitude of state parties, since the Commission’s inception ... by and large has been generally to ignore [its] recommendations, with no attendant consequences’; C Beyani ‘Recent developments in the African human rights system 2004-2006’ (2007) 7 Human Rights Law Review 582 587-588, noting that the Commission has unofficially pointed out that member states are not always complying with the eligibility criteria and that there are serious issues with budgeting.
reports.\textsuperscript{52} Even where states have submitted reports, they have not included adequate and relevant information so as to preclude the Commission from making sense of their human rights situations.\textsuperscript{53} That states have not followed the Commission’s guidelines, have refrained from participating in the presentation of reports,\textsuperscript{54} and have not given publicity to the reporting process and its results, have also contributed to the ineffectiveness of the reporting mechanism.\textsuperscript{55}

3.4 Trends in decision since the formation of the African Union

3.4.1 Critical institutional analysis

A textual reading of its Constitutive Act suggests that the AU would be nothing like the sovereignty-centric OAU. Not only does the Constitutive Act place human rights and democracy on a pedestal among its priorities, but it makes them actionable.\textsuperscript{56} The latter point is unique to the AU in that, in addition to promising to impose economic sanctions on states that grossly violate the principles of human rights and democracy, and excluding them from participation in its activities, the AU is given the power to intervene in a way reminiscent of the powers of the UN’s Security Council.\textsuperscript{57} The shift in the rhetoric of the AU Constitutive Act is certainly indicative of the emergence of an international intergovernmental institution with a constitutive mandate to take steps for the greater protection of human rights.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{52} As at May 2010 (note that the African Charter came into force in 1986), 13 states had not yet submitted any report, while 16 had only made their initial reports. Rwanda stands out for submitting the most number of reports, totalling five reports, whereas, according to art 62 of the African Charter, it ought to have submitted 12 reports by 2010; African Commission on Human and Peoples’ Rights, Status on Submissions of State Initial/Periodic Reports to the African Commission (updated: March 2008) http://www.achpr.org/english/_info/statereport_considered_en.html (accessed 4 October 2008).
\item \textsuperscript{54} Although the African Commission was for a long time prevented from considering state reports because states did not appear before the Commission for a consideration of their own situation, it has since 2006 (at its 39th ordinary session) been considering state reports in the absence of the states concerned; L Stone ‘The 38th ordinary session of the African Commission on Human and Peoples’ Rights, November 2005, Banjul, The Gambia’ (2006) 6 African Human Rights Law Journal 225 227.
\item \textsuperscript{56} See generally the 7th paragraph of the Preamble and arts 3(g), 4(c), (h), (j) & (l) and 9(g) of the AU Constitutive Act.
\item \textsuperscript{57} See arts 4(h), 23(2) & 30 of the AU Constitutive Act.
\item \textsuperscript{58} See T Maluwa ‘From the Organisation of African Unity to the African Union: Rethinking the framework for inter-state co-operation in Africa in the era of globalisation’ (2007) 5 University of Botswana Law Journal 5 36-37.
\end{itemize}
Nevertheless, there are some glitches in this mechanism that lead to a great deal of scepticism.

The first source of scepticism is the identity of the AU Assembly: the fact that the identity of its members remains the same as that of the previous Union. This raises the question as to why the same states with pretty much the same domestic political composition would now want to impose on themselves greater intergovernmental supervision. One’s scepticism is not helped by the fact that one of the longest-standing despots of the continent, the self-styled ‘international leader, the dean of the Arab rulers, the king of kings of Africa and the imam of Muslims’, Muammar al-Gaddafi, was at the forefront of the initiative to establish the AU. One can speculate that Libya’s human rights record, or that of any other state with a comparably alarming human rights record, is not going to be a cause for concern for the AU Assembly. The Assembly has, in the process of thanking the Libyan leader’s sponsorship of the process of forming the AU, chosen to reiterate the Libyan regime’s international relations rhetoric stating that the persistent attempts to destabilise the Great Libyan Arab Jamahiriya and thereby divert the attention of its leader from reasserting the dignity and

59 CS Martorana ‘The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples’ Rights?’ (2008) 40 George Washington International Law Review 583 595-596, arguing that if member states of the African Union are to allow the Commission to do its job and co-operate with it in enforcing human rights on other states, other states would do the same, and this is exactly why they do not wish to be co-operative in condemning violations; AE Anthony ‘Beyond the paper tiger: The challenge of a human rights court in Africa’ (1997) 32 Texas International Law Journal 511 517, questioning whether the states who control who becomes a member of the Commission would have independent experts appointed.


freedom of his people as well as undermining the important role that our Brother and his people have been playing in our continent.

The mere fact that the Assembly would go as far as echoing the international relations ideology of one of the most repressive regimes in the world draws a picture of how unwilling the Assembly might be to interfere with the human rights and democracy affairs of member states.

There are two more details in the AU’s Constitution that underscore a call for caution. While the establishment of a regional court per se calls for optimism, there is evidence in the Court’s design of how African political elites are unwilling to allow the Court to probe into how they treat their citizens. The Court looks well designed on most counts, but for its exclusion of individuals and non-governmental organisations (NGOs) from the list of regular applicants. According to the treaties establishing both the African Court on Human and Peoples’ Rights and the African Court of Justice and Human Rights, individuals and NGOs are allowed to petition the Court only if the relevant state has made an explicit declaration to that effect.62 Without such a declaration, the only regular customers of the Court are envisaged to be state parties to the Protocol, the African Commission and other African intergovernmental organisations. Although this fact does not necessarily deal either court a fatal blow, it certainly indicates the unwillingness of state parties to allow the establishment of any court that has a real potential to hold them accountable.63

There has been doubt as to whether African states would make a declaration to allow a genuine individual complaints mechanism to flourish when the African Court on Human and Peoples’ Rights was being established.64 Even though the prohibition of direct access to individuals was one of the preconditions under which states


63 As the law currently stands, the chances that the Court will deal with enough cases to make itself relevant depend on whether the African Commission will refer cases to it.

64 D Juma ‘Access to the African Court on Human and Peoples’ Rights: A case of the poacher turned gamekeeper’ (2007) 4 Essex Human Rights Review 1 4, arguing that the assumption behind such a construction, that states and state institutions and inter-governmental organisations would submit cases, is a false one.
agreed to sign the Protocol, ratification remains very slow. Only five states had made a declaration accepting individual complaints. Interestingly enough, before a significant number of states could ratify the Protocol, the whole process was restarted, when the states decided to merge the African Court on Human and Peoples’ Rights with the African Court of Justice, to establish the African Court of Justice and Human Rights. As of January 2012, only three states (Libya, Mali and Burkina Faso) have ratified the Protocol on the Court of Justice and Human Rights.

At the core of the discussion about the lack of individual complaints in a judicial mechanism is the assumption that a judicial mechanism is primarily fit for individual complaints. Africa’s political leaders must have been aware of the fact that the Inter-American Court, apparently an institution which had a similar predicament, considered its first case seven years after its inauguration and its second case after ten years. Thomas Buergenthal, one of the first justices of the Court, reported the frustration with waiting in vain for the Commission to send it its first contentious case, which led the Court to express its frustration to the public. The Court noted that, since states were not going to submit cases to the Court, the Commission ‘alone is in a position, by referring a case to the Court, to ensure the effective functioning of the protective system established by the Convention’. One should expect that, since member states of the AU will not normally have any incentive to make a declaration allowing individual communications, the Court is going to be getting its cases from the African Commission.


66 As above.


69 As above.

The second matter that underscores a call for caution is the mushrooming of institutions under the AU, despite a known lack of resources.\(^7\) It is known that the African Commission did not have enough resources to pay even its telephone bills.\(^7\) Costs of an additional court have not been prepared for, and it is unlikely that the AU will be able to fulfill its financial obligations any time soon.\(^7\) In 2008, the AU Assembly authorized a sizable sum to the Commission based on the logic that the Commission might fall under the influence of external funding institutions.\(^7\) However, it did not follow through with the budgetary hike the following year and cut it in half, making it difficult, and the Commission is complaining not only that it is unable to pay the honorarium and allowances of commissioners, but decided to make up for the budgetary deficit by resorting back to external sources of funding.\(^7\) This trend is apparent in the fact that the AU Assembly recently started a push towards burdening the Commission and Court with criminal jurisdiction, matching that of the International Criminal Court (ICC), in an apparent attempt to foil the ICC’s conspiracy to ‘abuse of the principle of universal jurisdiction’ in Africa.\(^7\) Thus, a valid critique of the African political elite is that it is creating unnecessary confusion with multiple mechanisms that it

\(^7\) The institutions that deal with human rights have been discussed in sec 3.1.

\(^7\) See below n 139 and accompanying text.

\(^7\) F Viljoen ‘A Human Rights Court for Africa, and Africans’ (2004) 30 Brooklyn Journal of International Law 1 63, having reported in previous publications that the Commission is deficient in resources, staff, paper, printers, buildings and infrastructure, argues that ‘[i]nstitutional mechanisms and procedures are only words on paper’.


\(^7\) Although the budget was increased in 2008 to 6 million, it came down to 3,5 million in 2009, Executive Council 15th ordinary session 24-30 June 2009, Sirte, Libya, EX CL/529(XV) paras 125-130 (27 May 2009); 28th Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) EX CL/600(XVII) paras 57 (iv) & 192 (2010), reporting that the Commission ought to find alternative financial resources and that the staffing situation ‘has reached critical levels’.

cannot pay for and establishing new mechanisms without allowing previous mechanisms to take off. 77

3.4.2 African Union in action: Case studies

Despite the fact that the AU was conservative in establishing institutions that seriously challenge domestic practices, the AU’s activities do show some positive transformation in the areas of dealing with conflicts and coups d’état. The AU cannot be credited for preventing conflicts on the continent. Nevertheless, it is increasing its unilateral involvement in peace brokering and peacekeeping activities. For instance, the AU is credited for acting in a timely manner in sending its first peacekeeping force to Burundi, which was able to stabilise the country. 78 The African Mission in Somalia is also playing an important role in stabilising Somalia and preventing a rebel takeover. 79

Even more impressive was the AU Peace and Security Council’s ability to impose sanctions and suspend from AU activities states whose regimes were replaced by unconstitutional means (coups d’état). The AU’s framework for responding to coups was established by the OAU’s Lomé Declaration of July 2000, and was put to practice after the AU was established. 80 Following the unconstitutional transfer of power in

77 S Gutto ‘The reform and renewal of the African regional human and peoples’ rights system’ (2001) 1 African Human Rights Law Journal 178-179, describing the duplication of mechanisms as ‘unfortunate and disturbing’, explicating how the mechanisms related to the African children’s and refugee conventions do not add any value to the whole African system other than its running cost; Heyns (n 53 above) 679 702, critiquing how the NEPAD African Peer Review Mechanism was launched before the courts had been firmly established). A good picture of the situation in which the Commission is striving can be seen in its 2007/2008 report. In this report, the Commission disclosed that it did not have the resources to lease an office while it was being forced to relocate its offices. Though it has been able to have an office at all, mainly due to the generosity of the Gambian government, its financial constrains prevented it from conducting in loco visits and from conducting seminars, and it was not able to hire the necessary staff and had to rely on non-budgetary resources that covered 43% of its expenditure. See paras 45–48, 65 & 112 and annex II of Executive Council 13th ordinary session 24–28 June 2008 Activity Report of the African Commission on Human and Peoples’ Rights, Submitted in Conformity with Article 54 of the African Charter on Human and Peoples’ Rights, http://www.achpr.org/english/_info/index_activity_en.html (accessed 31 January 2012).


80 See Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl 5 (XXXVI)).
Togo, Mauritania, Guinea, Madagascar, Niger and Mali, the AU Peace and Security Council imposed economic, military and travel sanctions on these states, and suspended their participation in the AU’s activities.81 In the case of the Union of the Comoros, the African Union went even further than imposing sanctions on Mohamed Bacar and his associates who took over the Comoros island of Anjouan.82 Between November 2007 and March 2008, the AU troops established a naval blockade and finally seized the island in a raid that was named Operation Democracy in the Comoros.83

The AU also continuously monitored the progress that was being made by these states towards the re-establishment of a constitutional government.84 It is clear that the AU’s actions have succeeded in depriving coup d’état regimes of international legitimacy. The AU removed its sanctions from the Comoros, Togo, Guinea, Mauritania and Côte d’Ivoire only after it was satisfied that elected governments had replaced the juntas.85 Here, however, lies one problem: a lack of concern for the quality and accuracy of elections.

After reacting to coups d’état and pressuring the re-establishment of constitutional order, the AU has failed to ensure that democratic elections, through which constitutional governments are installed, are free and fair. For example, in the case of Togo, the AU had no complaints when the leader of the same coup won highly-controversial elections

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which were held in an atmosphere of intimidation and disregard for freedom of expression, press, assembly and association.\(^\text{86}\) The embargo was lifted against the background of post-election violence in which hundreds died and 56,000 individuals were displaced from their homes.\(^\text{87}\) Similarly, the coup leader of Mauritania had no problems coming back as an elected civilian president with the blessing of the AU.\(^\text{88}\) In Guinea, Madagascar and Niger, however, negotiations succeeded in excluding coup leaders from running for power.\(^\text{89}\)

While the AU’s firm stance on coups d’état as a means of change in government is not perfect, it is highly praiseworthy, especially when compared with the practice of the OAU. However, outside of its reaction to coups d’état, its practice with regard to human rights and democracy is wanting. As will be shown in the cases of Darfur and the Arab Spring, the AU’s political establishment is unwilling to challenge regimes that commit unspeakable human rights violations. Relevant examples are the AU’s practice with regard to the Darfur situation, the worst crisis that the organisation has dealt with to date, and the most recent revolutions in Tunisia, Egypt and Libya.

The AU’s lack of will to probe into or challenge its member states’ undemocratic elections or the violation of rights is not limited to states that have undergone a coup d’état. For instance, the AU’s tolerance, if not outright support, of Robert Mugabe’s election and election-related suppression in Zimbabwe\(^\text{90}\) could be partly explained by


\(^{88}\) Omorogbe (n 87 above) 145; also see ‘Mauritania and the African Union: All is rather easily forgiven’ The Economist 23 July 2009; ‘Opposition claims “massive fraud” in Mauritania poll’ AFP 20 July 2009.

\(^{89}\) Omorogbe (n 87 above) 149 151 153.

the fact that more than a few African heads of government might have used electoral-rigging magic tricks and some hand twisting to stay in power.91 The tolerance and moral support for Mugabe’s regime by Africa’s political elite is of course against the backdrop of the powerless and voiceless African Commission’s conclusion that the Zimbabwean regime is committing serious violations of human rights.92 In the elections that took place in the last two years, the AU has consistently given its seal of approval despite the controversy surrounding these elections. For instance, although the elections in Chad, Cameroon, Uganda, Djibouti, Equatorial Guinea, Gambia, Ethiopia and Rwanda were highly controversial, if not outright fraudulent, the AU observer missions found all of them to meet international standards and appealed to the populations to accept the official results.93 Quite recently, amid reports and allegations of fraud in the presidential elections in Democratic Republic of Congo, the AU found that, except for ‘logistical difficulties’, the election was successful and ought to be accepted by Congolese voters.94

91 R Bush & M Szefel ‘Sovereignty, democracy and Zimbabwe’s tragedy’ (2002) 29 Review of African Political Economy 5 11, arguing that self-interest must have been the interest that the African leaders were defending the Mugabe regime and supporting the argument with pertinent examples; PD Williams ‘From non-intervention to non-indifference: The origins and development of the African Union’s security culture’ (2007) 106 African Affairs 423 274-275.


Trends in decision of the AU’s political organs concerning the Darfur situation suggest the development of a dual approach. This approach includes a willingness to treat internal conflicts as legitimate concerns of the organisation, while pushing the human rights aspect of the same conflict to the side line. Notwithstanding its failure to prevent the hell that broke loose on Darfur, the AU played a good fire brigade role as it was at the forefront of the effort to mitigate the horrific effects of the conflict. Beginning from successfully mediating the N’Djamena Humanitarian Cease-Fire Agreement, the AU has been active in mediating peace talks and supporting the implementation of agreements by providing peacekeeping troops. Additionally, the AU has not shied away from pointing fingers or even directing condemnations when any of the parties breached a ceasefire agreement. Despite great financial constraints, the AU’s provision of troops has increasingly contributed to the safety of internally-

95 In the past, the OAU had ignored violations of human rights and humanitarian law in the Sudan in keeping with its ‘domestic affairs’ doctrine. This is reflected in how the OAU sincerely dealt with the deteriorating relations of the Sudanese government with its neighbours (Ethiopia, Eritrea and Uganda) while ignoring the unfolding gross violations resulting from the war in the south; D Boubean ‘A case study of Sudan and the Organisation of African Unity’ (1998) 41 Howard Law Journal 413-436.


displaced persons and it has won the confidence of both the rebels and the government as a neutral intermediary.\textsuperscript{99}

Even though the AU has been actively engaged with the situation in Darfur, the actions of the AU Assembly suggest that they have a different attitude towards the issue of human rights. This attitude was, for example, reflected when the AU responded to the United States’ allegation that genocide was taking place in Darfur. Without launching any investigation of its own,\textsuperscript{100} the AU Assembly countered the allegations of the US and concluded that the situation did not constitute genocide and that it was only a ‘humanitarian situation’.\textsuperscript{101}

The AU’s indifference to the human rights aspect of the Darfur conflict is also reflected by the fact that the Sudanese government’s implication in atrocities in Darfur has not affected Sudan’s chairpersonship in the Peace and Security Council.\textsuperscript{102} A similar interpretation can be given to the fact that the AU did not mind conducting its Assembly’s annual ordinary session (2006) in Khartoum, despite the fact that their host stood accused of committing the most serious international crimes a few kilometres away from their meeting hall. The Executive Council has also conducted both its ordinary and extraordinary sessions of 2006 in Sudan and has decided to hold an AU conference of ministers in charge of social development in 2010 in Sudan.\textsuperscript{103}

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\textsuperscript{99} Rechner (n 78 above) 572-73, arguing that the OAU would not have been involved had the Darfur conflict taken place a decade earlier under the OAU’s guard; ‘The African Union in Darfur NewsHour 5 October 2005 (interview with employees of Refugees International describing the situation of internally-displaced persons) http://www.pbs.org/newshour/bb/africa/july-dec05/darfur_10-5.html# (accessed 31 January 2012).

\textsuperscript{100} NJ Udombana ‘An escape from reason: Genocide and the International Commission of Inquiry on Darfur’ (2006) 40 International Lawyer 41 64.

\textsuperscript{101} Para 2 of African Union, Assembly of the African Union 3rd ordinary session 6-8 July 2004, Addis Ababa, Ethiopia (Assembly/AU/Dec 54 (III)) http://www.africa-union.org/AU%20summit%202004/ Assm/Assembly%20Decisions%20-Final.pdf (accessed 31 January 2012); see also Udombana (n 100 above) 64, arguing that this shows that the member states of the AU chose to stand on Al Bashir’s side on his confrontation with the US.

\textsuperscript{102} Udombana (n 100 above) 65; see also JE Wokoro ‘Towards a model for African humanitarian intervention’ (2008) 6 Regent Journal of International Law 1 21, arguing that the chances that the Peace and Security Council of the AU or the AU in general will be a champion of human rights are slim.

The AU is also one of the institutions that rallied behind the government’s argument that the issuance of an arrest warrant against Hassan Al-Bashir would hurt the peace process in Darfur. Later, in July 2009, the AU issued a declaration in which the Heads of State and Government, including those that are party to the Rome Statute, agreed not to co-operate with the ICC prosecutor’s arrest warrant for Al-Bashir. This position was reaffirmed at every AU summit, including at its 17th Summit held in July 2011.

The possibility (and allegation) that the Mbeki report, which suggests the establishment of a UN-Sudan hybrid court to provide justice, aims at removing the ICC’s arrest warrant from Al-Bashir’s list of nuisances, is also one of the doings of the AU that has raised controversy. What is interesting, though, is that behind all this political support for Al-Bashir’s regime, the almost invisible human rights organs of the AU have been making findings that are opposite

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104 Reporting that Jean Ping, Chairperson of the AU Commission, told a journalist: ‘We say that peace and justice should not collide, that the need for justice should not override the need for peace.’ ‘Arrest warrant draws Sudan scorn’ BBC News http://news.bbc.co.uk/2/hi/africa/7924982.stm (accessed 31 January 2012); also see M Simons ‘Court issues arrest warrant for Sudan’s leader’ New York Times http://www.nytimes.com/2009/03/05/world/africa/05court.html (accessed 31 January 2012).


of the actions of the political organs. The political elite filling the AU have not faltered in rescuing Al-Bashir even from the censure of the harmless Commission on Human and Peoples’ Rights by preventing the publication of the Commission’s report on the situation in Darfur. The political organs’ activities are in negation of the Commission’s finding that the government of Sudan is responsible for ‘war crimes and crimes against humanity’.

An indifference of the AU’s political organs to the human rights practices of member states has also been reflected in the organisation’s reaction to the Arab Spring revolutions. The AU’s reaction to the revolutions in Tunisia and Egypt was very similar. During the critical days of the revolution where security forces were coming down hard on protesters, the AU kept completely silent. In the days following the success of both revolutions, the Peace and Security Council of the AU quickly met to make a declaration to condemn the violence that had already stopped, and expressed its solidarity with revolutionaries who would have benefited from that solidarity a day or so ago. In the two situations, therefore, the AU’s efforts were no more than a placebo, possibly also a face-saving move to smoothen diplomatic relations with future post-revolution governments.

In the Libyan situation, the AU initially took a different course by moving quickly to condemn the attacks on civilians. Within a week of the Libyan uprising, the AU Peace and Security Council condemned


112 While the President of Tunisia stepped down on 14 January and the AUPSC made the declaration the following day, the President of Egypt stepped down on 11 February and the AUPSC made the statement on 16 February; Peace and Security Council 257th Meeting, Addis Ababa, Ethiopia, 15 January 2011 PSC/PR/COMM.2 (CCLVII); Peace and Security Council 260th Meeting, PSC/PR/COMM.(CCLX) 16 February 2011. It was reported in the media that one of the commissioners of the AU Peace and Security Council was quoted to have stated in a summit: ‘We believe that there are changes that are necessary in order to respond to the wishes of the people, economic reforms, social measures, and probably also issues related to the government that need to be addressed.’ Technically, however, this cannot be considered as an action of any AU organ.’
‘the indiscriminate and excessive use of force and lethal weapons against peaceful protestors’ which it characterised as a ‘violation of human rights and international humanitarian law’.113 The Peace and Security Council also recognised the democratic right of the protesters and called on the government to show restraint in its actions and in its inflammatory statements.114 The African Court passed provisional measures ordering Libya to ‘immediately refrain from any action that would result in the loss of life or the violation of physical integrity’.115 Thus, in the short time between the Tunisian and Egyptian revolutions, the AU’s learning curve seems to have improved. However, the AU’s actions could be criticised for not going as far as suspending Libya from the organisation or imposing sanctions on it.116

In the later stages of the conflict, however, the AU became protective of Gaddafi, especially when it was becoming clear that the intervention of the North Atlantic Treaty Organization (NATO) was becoming inevitable and would later determine the outcome of the conflict. Despite the fact that three AU member states voted in the UN Security Council for the authorisation of chapter VII measures, the AU was the only organisation to oppose the authorisation of the use of force in order to protect the civilian population.117 All other relevant organisations, including the Arab League and the Gulf Co-operation Council, supported the resolution.118 Until the last moment, the AU supported Gaddafi by pushing for its peace plan, shifting part of the blame for the crisis on NATO, and trying to salvage Gaddafi until the takeover of Tripoli.119 Furthermore, the AU also called on its member states not to co-operate with the ICC arrest warrants against Gaddafi,

113 Peace and Security Council 261st Meeting, PSC/PR/COMM (CCLXI) 23 February 2011; see para 2.
114 Peace and Security Council 261st Meeting (n 113 above) para 5.
115 In the matter of African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya, Application 004/2011.
118 As above.
Although it is understandable that the AU should be unhappy with Western hypocrisy with regard to Gaddafi and the encroachment of NATO on its turf, it is unfortunate that the AU was willing to trade grave violations of human rights and humanitarian law for this interest.

Although the main impetus of this study is on the AU and its direct participants, it is important to point out that there are other actors that play a significant role in influencing its actions or the actions of its member states. Behind every major situation with which the AU and its members are faced, there are at least a number of hegemonic powers pulling one way or another. For example, the US war on terrorism and China’s trade policy have been a common theme in the assessment of most of these situations. The trade and foreign policy of the European Union is another factor that has great influence. Another example of the role of hegemonic power can be seen in the NATO involvement in Libya or the French involvement in the situations in Chad and Côte d’Ivoire. However, because of the article’s focus on the AU and actors within it, the article does not delve into the issue of hegemony in any depth.


121 Generally see JE Wokoro ‘Towards a model for African humanitarian intervention’ (2008) 6 Regent Journal of International Law 1 15-18, arguing that the West’s interests in Africa have been need based provides the scramble for Africa and the Cold War as examples of how only the need of the West can make Africa the centre of interest; JE Frazer ‘Reflections on US policy in Africa, 2001-2009’ (2010) 34 Fletcher Forum of World Affairs 95 105-107, briefly describing the US’s counterterrorism initiatives and other interests in Africa; RP McAleavey ‘Pressuring Sudan: The prospect of an oil-for-food programme for Darfur’ (2008) 31 Fordham International Law Journal 1058 1066-1067, stating that the inability of the Security Council to impose sanctions against Sudan has been primarily due to Chinese veto power and the expression of their willingness to use this power if such a binding resolution was voted on; D Haroz ‘China in Africa: Symbiosis or exploitation?’ (2011) 35 Fletcher Forum of World Affairs 65 77, stating that China’s investment policy does not take human rights practices into consideration.


4 Projection of future trends

4.1 Involvement in conflict situations

A look at the past trends in decisions indicates that the AU will be more actively engaged in mediating and keeping peace. The AU is unlikely to be able to prevent armed conflicts that are responsible for the suffering of millions on the continent. The controlling factors for conflicts have always been domestic factors and there has been no significant change in this respect that shows that the AU will be able to prevent conflicts. Where the belligerents are willing to stop fighting, the AU will play a role in mediating negotiations and in providing peacekeeping troops. The AU’s involvement in Burundi, Somalia, Comoros and Darfur is indicative of the fact that the AU is willing to go to places in Africa that the rest of the international community is either unwilling or unable to march into.

This positive projection does not, however, imply that the AU will tackle the determining factors behind these conflicts. For instance, in situations such as the one in Darfur, where inter-tribal conflicts, mainly between agrarian and sedentary communities, have spiralled out of control and turned into one of the worst catastrophes, the determining factor for the conflict is the combination of a lack of resources exasperated by desertification and global warming, proliferation of small arms, lack of democratisation and political stability in the state. It is unlikely that the AU will be able to deal with these determining factors. However, the determining factor for the AU’s willingness to mediate or to be involved in peacekeeping operations seems to be the growing convergence of national policy that has come to be described by the expression ‘African solutions to African problems’.125 This idea has been promoted since the mid-1990s by Africa, motivated by the prevention of another Rwanda, and by the West, motivated by a willingness to help from a distance.126

4.2 Prosecution of international crimes/Co-operation with the International Criminal Court

Despite increasing involvement in internal conflicts, the AU is likely to go through a long term phase of non-co-operation with the ICC. The AU has, regarding the situations in Sudan, Kenya and Libya,

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decided to publicly condemn and protest the ICC’s involvement and it is unlikely that they will reverse their position any time soon.\textsuperscript{127} However, despite their consensus for non-co-operation within the AU, individual African states have shown some difference as to the application of the AU’s decision. For instance, some African states that are members to the Rome Statute have declared that they would not abide by the AU Assembly’s decision,\textsuperscript{128} while others declared that they would not comply with the arrest warrants of the ICC.\textsuperscript{129} Since the number of states that have taken exception to the AU’s decision are small in number, this only indicates the proverbial light at the end of the tunnel.

The dominant determining factor for the AU’s resistance is African political elites fearing that the ICC might at some point investigate their own practices. Such a fear is not merely a subjective perception, as all of the cases that the ICC is currently prosecuting are African cases. An additional determining factor for non-compliance is the view


\textsuperscript{129} Djibouti, Chad, Uganda, Malawi and Kenya have invited Al-Bashir and pledged not to arrest him despite the fact that all three are members of the Rome Statute; see ‘Sudan’s President Bashir defies arrest warrant in Chad’ BBC News Africa http://www.bbc.co.uk/news/world-africa-10718399 (accessed 31 January 2012); ‘Court worry at Omar al-Bashir’s Kenya trip’ BBC News Africa http://www.bbc.co.uk/news/world-africa-1117662 (accessed 31 January 2012); ‘Djibouti has specifically declared that Al-Bashir would not be arrested if in its territory though Al-Bashir would not travel to Djibouti because of the French and US military presence in the country’ Sudan Tribune; ‘Djibouti will not honour its Rome Statute obligations, invites Sudan’s Bashir’ 6 April 2009, http://www.sudantribune.com/spip.php?article30777 (accessed 31 January 2012); ‘Uganda pledged to arrest Al-Bashir until the July 2010 AU Summit when it invited him to attend’; Aljezeera ‘Uganda invites al-Bashir to summit: Kampala reverses decision to bar Sudan’s President, wanted by ICC, from AU gathering’ http://english.aljazeera.net/news/africa/2010/06/201068123447183209.html (accessed 31 January 2012). In addition to these member states to the Rome Statute, Al-Bashir has visited Ethiopia, Eritrea, Zimbabwe and Egypt; although Kenya is one of the states that are opposed to the arrest of Al-Bashir, a Kenyan High Court issued an arrest warrant against him causing great concern on the side of the foreign ministry; D Miriri & A Dziadosz ‘Kenya, Sudan move to fix fallout from Bashir ruling’ Reuters Africa 30 November 2011; ‘Sudan’s Omar al-Bashir in Malawi: ICC wants answers’ BBC News 20 October 2011, http://www.bbc.co.uk/news/world-africa-15384163 (accessed 31 January 2012).
that the ICC is somehow enforcing the neo-colonial agenda of the West.\textsuperscript{130} Although this perspective is not clearly articulated in official AU declarations and documents, it is a powerful perspective that gives a rallying point and ideological support to political elites who wish to challenge the moral authority of the ICC.\textsuperscript{131}

A third determining factor is the role of the Rome Statute as a positive obligation upon states and as an authoritative symbol of state intent. Out of the 53 AU members, 41 states have signed the Rome Statute (not counting Sudan which withdrew its signature),\textsuperscript{132} while 33 of the signatories have ratified the statute.\textsuperscript{133} This means that the majority of the members of the AU are members of the Rome Statute and have a legal obligation to comply with ICC arrest warrants. Herein lays one determining factor for future compliance with ICC decisions. As the substantive and procedural rules emanating from the Rome Statute permeate into domestic legislation and practice, the likelihood of compliance might also increase. Ratification of the Rome Statute as a determining factor of AU compliance will be strengthened if more African states ratify the Rome Statute.

4.3 Support for democracy and human rights

There is a strong indication that the AU might have shifted its practice of burying its proverbial head in the domestic affairs doctrine when it comes to dealing with coups d’état. By reacting swiftly to the coups of Togo, Mauritania, Guinea, Madagascar and Niger, it deprived the takeover regimes of diplomatic and ideological support. That the AU had low standards for some of the gaps in the subsequent election processes and that it was neglectful of the human rights conditions indicate that democratisation may not be a major priority. The focus


\textsuperscript{131} Generally see AM Ibrahim ‘The International Criminal Court in light of controlling factors of the effectiveness of international human rights mechanisms’ (2010-2011) \textit{7 Eyes on the ICC} 157 177-186, discussing how the ICC and specifically the Office of the Prosecutor can minimise the perception of bias on the side of the ICC.


\textsuperscript{133} A list of signatories and members of the Rome Statute can be found on the website of the Coalition for the International Criminal Court, http://www.icc-cpi.int/Menus/ASP/States+Parties/ African%20States (accessed 1 December 2011).
rather is specifically on ensuring that the continent is cleared of coups d’état that have marred African history. As a sign of authoritative communication, the AU Constitutive Act confirms the view that there is an intent to focus exclusively on coups d’état rather than a real consolidation of democracy on the continent. A cumulative reading of articles 4(p) and 30 of the AU Constitutive Act gives the impression that the AU is more interested in preventing the overthrow of existing governments through unconstitutional means rather than in prohibiting the retention of power by the ruling elites through unconstitutional means.134

A construct of future trends in which the AU would react harshly against coups d’état that disturb the status quo, but would tolerate status quos that are maintained through unconstitutional means, is confirmed by a look at the conditioning factors of the AU’s decisions in this regard. Since the most important policy decisions that shape the direction in which the AU is moving are taken by the Assembly, it is important to look at what motivates the members of the Assembly. Economist Intelligence Unit’s ‘Democracy Index for 2011’ categorises one AU member state as a ‘full democracy’, nine as ‘flawed democracies’, 13 as ‘hybrid regimes’ and 27 (50 per cent) as outright ‘authoritarian regimes’.135 The Polity IV Dataset and the Polyarchy Dataset (Vanhanen Index) also support analogous conclusions about member states of the AU.136 Hence, it is only natural that the political elites of member states, three quarters of which are either authoritarian or hybrid regimes, do not want the AU to conduct critical inquiries into the election, re-election and re-re-election of their rulers.

Past trends in the decisions of the AU also indicate that the human rights mechanisms of the AU are not going to make any noticeable difference in the human rights condition of Africans. Again, these conditioning factors point to the interests of member states and those of their political elites. According to Freedom House’s ‘Map of Freedom’, out of the 53 member states of the AU, nine (17 per cent) can be characterised as ‘free’, 23 (43 per cent) as ‘partly free’ and 21 (40

134 Art 4(g) states: ‘The Union shall function in accordance with the following principles: ... (g) condemnation and rejection of unconstitutional changes of governments’ (my emphasis); and art 30 states: ‘Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.’

135 Economist Intelligence Unit, Democracy Index 2011: Democracy Under Stress 4 (2011); also see Economist Intelligence Unit, Democracy Index 2010: Democracy Under Stress 3 (2010) (giving South Africa the same score for 2010) that translates roughly as 2% full democracies, 16.6% flawed democracies, 24% hybrid regimes and 50% authoritarian regimes.

per cent) as ‘not free’. The same study conducted in previous years shows that there is no improvement in human rights conditions in Africa. Such statistics warrant the conclusion that the states covered in this report are more likely to want to avoid criticism from the AU and shield each other from such criticism. Even the minority that has a better human rights record is unlikely to actively champion the cause of human rights because it would be diplomatically imprudent to criticise and shame the majority of fellow member states.

Since the state parties and the Assembly are not going to easily erode their own domestic jurisdiction, whatever modest improvements in the system that could be achieved will depend on the activism of the African Commission. The Commission is deprived of resources to the extent that it does not have the financial capacity to hire or pay its professional and non-professional staff. The Commission has, however, managed with remittent incomes from governmental (primarily European) and non-governmental sources and has been successful in recording the bare facts of violations on the continent. Therefore, whether the Commission will make modest contributions will largely depend on whether the Commission will be able to direct


139 Viljoen (n 73 above) 63; also see Odinkalu (n 51 above) 398-400; Beyani (n 51 above) 587-588; D Olowu ‘Regional integration, development and the African Union agenda: Challenges, gaps, and opportunities’ (2003) 13 Transnational Law and Contemporary Problems 211 243-245, outlining the dire financial situation of the AU; also see n 74 and accompanying text above.
public shame on states that it finds to have violated human rights.\footnote{The probability of the African Commission becoming successful in this respect is small. First, the Commission's proceedings are not open to the public. Second, publication of the Commission’s reports is an annual affair and is contingent upon the Assembly’s authorisation (the Assembly has not always been co-operative in this regard). Third, the Commission has always had problems with financial resources that are necessary for any public relations activity. See generally Heyns (n 77 above) 700-702; Welch (n 49 above) 555.}{140} Part of the Commission’s contribution will depend on whether it allows the African Court to be relevant by referring cases to it. However, even in the best case scenario the contributions of the Commission and the Court are going to be gradual and indirect.

Behind the functioning of the African Commission, some credit should be attributed to the role of NGOs in the African human rights system. For instance, NGOs contribute financial support to the African human rights system, are the primary applicants to the African Commission, and have lobbied for the improvement of different aspects of the AU human rights system.\footnote{See generally F Viljoen International human rights law in Africa (2007) 324-325; also Viljoen (n 73 above) 1 8-9, stating that NGOs have been lobbying for the formation of the African human rights court since the formation of the African Commission.}{141} The role of human rights NGOs, such as Amnesty International and Human Rights Watch, can be felt in their human rights advocacy and their fact-finding endeavours.\footnote{Nyanduga (n 42 above) 261, concluding that the role of NGOs is crucial in the African Commission’s conclusions and decisions, especially on the finding of facts.}{142} In addition, one of the direct effects of international NGO activism has seen to the human rights violations of Western multinationals\footnote{Eg note the withdrawal of Western multi-nationals from Darfur for fear that their public image may be tarnished by NGO human rights activism. See RO Matthews ‘Sudan’s humanitarian disaster: Will Canada live up to its responsibility to protect?’ (2005) 60 International Journal 1049 1050-1053 1055, describing how Canadian civil society institutions were instrumental in influencing the withdrawal of Talisman from Sudan.}{143} and takes a lead role in human rights education.\footnote{Generally see JP Martin et al ‘Promoting human rights education in a marginalised Africa’ in CJ Andreopoulos & RP Claude (eds) Human rights education for the twenty-first century (1997); also RP Claude ‘The right to education and human rights education’ (2005) 2 SUR International Journal on Human Rights, describing the activities of NGOs in human rights education, including in Africa and elsewhere; Andreopoulos & Claude (above) 436, describing in detail the activities of NGOs independent of the African regional political system.}{144}

5 Conclusions and recommendations

The AU’s first decade of work on human rights and democracy has shown significant improvement compared to the OAU. There seems to be a good amount of rhetorical impetus and positive legal
development on the protection of human rights and democracy. Significant steps have also been taken to protect constitutionalism. However, the improvements are modest and for the main part lacking in consistency. As much as the AU has had achievements, it has either failed to act in certain situations and adversely contributed in others. A number of recurring conditioning factors of the AU’s actions pertaining to human rights and democracy are identified, each having different levels of influence in different situations. While the domestic political arrangements of member states have proven to be a primary conditioning factor for the effectiveness of the AU in promoting the cause of human rights and democracy, the pressure created by the international community, based on the member states’ legal obligations, pressure from pan-African sentiment within the AU and pressure from the AU’s human rights organs, have played a secondary role.

A lack of willingness and incentive of Africa’s political elite to protect human rights and democracy in their own territory, not least in other states, is the strongest conditioning factor. With some generalisation, it can be concluded that African domestic elites have an incentive and certainly a willingness to violate human rights. This has led to a tendency of African states to ignore or tolerate the violation of rights and the abrogation of democracy by other African states and to expect reciprocal treatment. It is, therefore, unreasonable to expect much change in the AU’s practice unless there is a change in the members of the organisation.

A long-term solution to the problem of the domestic unwillingness to uphold human rights can only be achieved through the liberalisation and democratisation of members of the AU. Democratic transition and subsequent consolidation of democracy may significantly change the collective behaviour in the AU. In the meantime, however, political elites are unlikely to allow the AU to stand behind the pro-democracy movements that have sprung up throughout the continent. If anything, Tahrir-like movements are a threat to the current domestic political structures in most African countries. In the short run, it is unlikely that the Arab Spring states (assuming they will consolidate democracy) will back democratisation or human rights on the rest

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145 Not counting states in which the level of repression precluded demonstrations. Arab Spring-inspired demonstrations have taken place in Uganda, Zimbabwe, Angola, Malawi, Burkina Faso, Sudan, Djibouti, Mauritania and South Africa. See C Ero ‘The political changes in North Africa and the Middle East and the implications for sub-Saharan Africa’ Open Society Institute – Africa Governance Monitoring and Advocacy Project, August 2011.
of the continent.\textsuperscript{146} Considering the fact that the interests of the domestic undemocratic elites are the strongest and most consistent conditioning factor for the AU’s human rights and democracy failures, the AU’s record will remain unimpressive. It will, however, be dotted by an inconsistent patchwork of success brought about by intervening but generally weaker conditioning factors.

Closely related to AU member states’ political motivations is the resurgence of a pan-Africanist sentiment that has created a common ideological platform. This has energised the push for the formation of the AU and has influenced its subsequent actions. Particularly, the African peace and security architecture and its activities in keeping the peace, including its opposition to \textit{coup d’état}, can be explained partly as an expression of this pan-Africanist sentiment. In some situations, however, this sentiment has been used to support the disregard of a public order of human dignity. Examples of the latter are the Zimbabwean, Libyan and Darfur situations where this notion was a rallying point to support dictators who were committing grave violations of human rights. In sum, it can be concluded that pan-Africanist resurgence has generally been the conditioning factor for movements in support of human rights and democracy. However, in specific situations where there is a perception of Western interference, this sentiment may be summoned even at the expense of human rights and democracy.

The rise of African and international legislation supportive of human rights and democracy, including a wider acceptance of the Rome Statute, can be seen as a positive conditioning factor. Positive legislation will create a potential for future action by the political and (quasi-)judicial organs of the AU. However, considering the lack of enthusiasm of AU member states to fully enforce these laws gives one reason to be highly sceptical of their motivation. Additionally, the fact that leaders like Gaddafi were the patrons of some of these laws suggests that there is a lack of genuineness in making these human rights and democratic commitments.

About five centuries ago Machiavelli wrote that ‘it is unnecessary for a prince to have all the good [ethical] qualities … but it is very necessary to appear to have them’\textsuperscript{147} It looks as if the political elites in the majority of these states may be agreeing to an expanding

\textsuperscript{146} Young democracies have been shown to be reluctant regarding the promotion of democracy in their foreign policy. See PB Mehta ‘Do new democracies support democracy?’ (2011) 22 \textit{Journal of Democracy} 101; T Carothers & R Youngs ‘Looking for help: Will rising democracies become international democracy supporters?’ (2011) \textit{The Carnegie Papers}; T Piccone ‘Do new democracies support democracy? The multilateral dimension’ (2011) 22 \textit{Journal of Democracy} 139.

\textsuperscript{147} N Machiavelli (trans WK Marriott) \textit{The prince} (2005) 92.
number of regional human rights standards for sanctimoniousness. Nevertheless, because these ethical standards are being legislated into positive law and morality, it will increasingly be possible to pressure current and future leaders to live up to these undertakings. Once the ink with which these commitments were signed has dried, it is up to Africa’s citizenry and supporters of human rights and democracy to call upon Africa’s elites to respect their promises by demanding and pleading pacta sunt servanda.

A final set of conditioning factors relate to the effectiveness of judicial organs of the AU. The professionalism and assertiveness of the members of the African Commission and the activism of NGOs working with the Commission have been noted for the development of the AU’s human rights mechanisms. While the African Commission is commended for making the best of the limited legal framework in which it is born, at present it is presented with a novel opportunity to make its assertive input. As it is the gatekeeper of the African Court, the Commission should begin referring cases that have jurisprudential significance. If the Commission fails to refer cases to the Court, then both bodies’ potential contributions to human rights will be foiled. Another point that underscores the importance of referring cases to the Court is that the Court’s proceedings are open to the public, whereas the Commission’s proceedings are confidential until their publication in the annual report is authorised by the Assembly. Both the Commission and the Court need to direct more funds to public relations endeavours, as their main, if not only, real power lies in their capacity to shame states that transgress against positive standards of the regional treaty system.

An analysis of the conditioning factors portrays a clear picture of where energies should be placed so as to get the most out of the AU system with regard to promoting human rights and democracy. Exertions on the secondary conditioning factors will have a limited impact and ought to be perused with the full knowledge that they wield only minor results over long periods of time. The fact remains that the most potent conditioning factor for the AU’s success or failure

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148 See M Killander ‘The African Peer Review Mechanism and human rights: The first reviews and the way forward’ (2008) 30 Human Rights Quarterly 41 54, concluding that, while most African states have not made any effort to live up to their human rights promises and norms, they show overwhelming acceptance of the rights in their rhetoric.

149 Full membership of AU states to the Rome Statute would certainly be helpful in this respect.

150 The lack of funding has been the most persistent problem facing the African Commission. However, this is primarily a failure of the political organs rather than the Commission itself.

151 While the African Commission’s referral of the Libyan situation is interesting, there was no point in referring this case to the Court since the Commission could itself had issued an interim measure according to Rule 111 of its Rules of Procedure. The Commission should refer cases that have a jurisprudential significance.
to support or protect human rights and democracy is and will remain to be the domestic political situation of member states. This suggests that the AU’s prospects of becoming a principal and constructive participant are contingent upon a dramatic change in the domestic political arrangements of member states. Unfortunately, the impetus for this change will not come from the AU itself. The thrust of human rights and democratisation movements should, therefore, be placed towards bringing about transformation within member states with or without the active involvement of the AU.