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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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1 The Durban Declaration in Tribute to the Organisation of African Unity and on the Launching of the African Union ASS/AU/Decl 2 (I), Durban, South Africa, 10 July 2002; see paras 8 & 16, http://www.africa-union.org/Official_documents/Decisions_Declarations/durban%202002/Durban-Ass-AU-decl2.pdf (accessed 31 January 2012). However, scepticism has been expressed about whether a change in the institution's constitutive document and name (dropping the 'O' from the OAU they teased) would guarantee that the AU would clean up the former's untidy practice in the protection and promotion of human rights. See eg the reaction of African press outlets, who are rather unconvinced, that the new AU is any different from its predecessor; 'Africa's press sceptical about Union' *BBC* 9 July 2002, http://news.bbc.co.uk/2/hi/africa/2117997.stm (accessed 14 December 2009); E Harsch 'African Union: A dream under construction. Planners of new continental organisation ponder design, encounter skepticism' (2002) 16 *Africa Recovery* 1 http://www.un.org/ecosocdev/geninfo/afrec/ vol16no1/161afrun.htm (accessed 12 January 2010).

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.

4 Since this article is not a jurisprudential piece, it does not attempt to defend or explain the policy-oriented method. For a comprehensive statement of the policy-oriented method, see HD Lasswell & MS McDougal *Jurisprudence for a free society: Studies in law, science and policy* (1992); also generally see WM Reisman *et al* 'The New Haven school: A brief introduction' (2007) 32 *Yale Journal of International Law* 575; S Wiessner & AR Willard 'Policy-oriented jurisprudence and human rights abuses in internal conflict: Toward a world public order of human dignity' (1999) 93 *American Journal of International Law* 316. In this author's opinion, a very brief but one of the best expositions of the policy-oriented approach is contained in JN Moore 'Prolegomenon to the jurisprudence of Myres McDougal and Harold Lasswell' (1968) 54 *Virginia Law Review* 662.

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]

5 These documents are available at http://www.africa-union.org/root/AU/Documents/Treaties/ treaties.htm; see R Murray 'International human rights: Neglect of perspectives from African institutions' (2006) 55 *International and Comparative Law Quarterly* 193 197-203 (describing the potential for these instruments and the jurisprudence under them for mainstream international human rights law).

6 List of Countries that have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance 21 May 2012, http://www.au.int/en/treaties/status.

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.[7] 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.[8]

The AU, which succeeded the OAU in 2002,[9] is comparable to the Council of Europe and the European Union[10] in that its main aim is to promote regional integration and the co-operation of member states in their international relations.[11] One of the main objectives of the AU is the 'promotion and protection of human rights'. The Constitutive

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7 VO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 170-183; also U Essien 'The African Commission on Human and Peoples' Rights: Eleven years after' (2000) 6 *Buffalo Human Rights Law Review* 93; see also A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165; also generally see GJ Naldi 'The role of the human and peoples' rights section of the African Court of Justice and Human Rights' in A Abass (ed) *Protecting human security in Africa* (2010) 286.

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).

9 The overarching aim of the OAU Charter was the liberation and continued protection of African states from colonialism and neo-colonialism in addition to regional integration, while only one reference is made to human rights, where it is declared that one of the purposes of the OAU is to 'promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. The Charter's concern with self-determination and apartheid stems from political concerns of the time rather than from a concern for human rights. Compare the Preamble and the second and third articles of the constituting documents of the OAU and the AU. For a discussion of the pan-African context of the OAU Charter and the reasons for the unwillingness to emphasise human rights, see AM Adejo 'From OAU to AU: New wine in old bottle?' paper prepared for CODESRIA's 10th General Assembly on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002, http://www.codesria.org/Archives/ga10/Abstracts%20Ga%206-11/Regionalism_ Adejo.htm; see also E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299; for more information on the drafting process, see KD Magliveras & GJ Naldi 'The African Union – A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 424.

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'.

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.[12] 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.[13]

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[14] of the communication of the AU Constitutive Act will not yield an objective result of the interpretation of the Act.[15] 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

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.

14 MS McDougal *et al The interpretation of international agreements and world public order: Principles of content and procedure* (1994) 38-39.

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.[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.[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.[18]

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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,[19] it was forced to reverse its policy following the filling of the Assembly's seats with the newly-independent states of Africa.[20]

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.[21] The actions of the General Assembly, in 1962, and the Security Council, in 1963, represented a major shift in patterns of decision making.[22] What is worthy of note is that the Security

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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; J Carey *UN protection of civil and political rights* (970) 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; P Jackson & M Faupin 'The long road to Durban: The United Nations role in fighting racism and racial discrimination' *UN Chronicle* 2007; see also S Rosner & D 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).

21 GA Res 1761 (XVII); Security Council Decision 181 (1963) Resolution of 7 August 1963 and 182 (1963) Resolution of 4 December 1963. The activities of the African Group were not limited to fighting apartheid, of course; the OAU's efforts also encompassed the ending of colonialism on the continent. See MA El-Khawas 'Southern Africa: A challenge to the OAU' (1977) 24 *Africa Today* 25.

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.[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'[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.[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

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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)).

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.

24 See H Tolley Jr 'The concealed crack in the citadel: The United Nations Commission on Human Rights' response to confidential communications' (1984) 6 *Human Rights Quarterly* 426-429, explaining how this 'procedural breakthrough' was a result of the Third World's independence and describes the evolution of the 1503 and 1235 procedures.

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

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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.

coups d'état while the OAU followed a hands-off policy.[31] 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:[32]

> 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;[33] Bokassa's murderous regime;[34] and Mobutu Sese Seko's bloody military junta.[35] 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,[36] 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.[37]

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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.

32 Quoted by CE Welch Jr 'The OAU and human rights: Towards a new definition' (1981) 19 *Modern African Studies* 401 404.

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.

36 GA Aneme 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) 6 *African Human Rights Law Journal* 66-67.

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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might reach 500 000; Human Rights Watch 'Uganda: Idi Amin dies without facing justice' (2003) http://www.hrw.org/en/news/2003/08/18/uganda-idi-amin-dies-without-facing-justice (accessed 31 January 2012); also see NJ Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 106, criticising among other things the inability of the OAU to prevent Amin from ascending the chairmanship of the OAU.

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.

measures'.[40] 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 is 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.

42 BT Nyanduga 'Conference paper: Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 255 257-258, reasoning that the failure of the Commission to probe into the human rights abuses in these circumstances is mainly due to its financial disability. For a detailed look at the OAU's role in Rwanda, see A Tekle 'The OAU: Conflict prevention, management and resolution' in H Adelman & A Suhrke (eds) *The path of a genocide: The Rwanda crisis from Uganda to Zaire* (2000) 118-124.

43 PM Munya 'The Organisation of African Unity and its role in regional conflict resolution and dispute settlement: A critical evaluation' (1999) 19 *Boston College Third World Law Journal* 537 578, criticising the OAU's distinction between internal and international conflicts in Africa.

44 Udombana (n 30 above) 1224.

45 R Murray 'The Report of the OAU's International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' (2001) 45 *Journal of African Law* 123 130.

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

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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.

47 VO Nmehielle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 6 7; JH Knox 'Horizontal human rights law' (2008) 102 *American Journal of International Law* 1 17; GJ Naldi 'The African Union and the regional human rights system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 27-28.

48 J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 247 248-249; also see F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy* (2003) 626-627, discussing its jurisprudence of presuming that the evidence provided by an applicant will be presumed true if the state does not respond to an application; R Murray, 'Evidence and fact-finding by the African Commission' in Evans & Murray (n 47 above) 112-115; Odinkalu (n 46 above) 377; R Murray 'Recent developments in the African human rights system 2007' (2008) 8 *Human Rights Law Review* 356 366-370, discussing the most recent jurisprudential contribution of the Commission on the exhaustion of local remedies.

these developments have not been encouraged by member states of the AU.[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.[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.[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

49 See CE Welch 'The Organisation of African Unity and the promotion of human rights' (1991) 29 *Journal of Modern African Studies* 535 543-45; also see N Loum 'The African system of human rights: Institutional mechanisms and their interconnections' and SS Thompson 'The African human rights system: Comparison, context, and opportunities for future' in M Wodzicki (ed) *The fight for human rights in Africa: Perspectives on the African Commission on Human and Peoples' Rights* (2008) 24-26 38-39.

50 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1 5.

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.[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.[53] That states have not followed the Commission's guidelines, have refrained from participating in the presentation of reports,[54] and have not given publicity to the reporting process and its results, have also contributed to the ineffectiveness of the reporting mechanism.[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.[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. [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.[58]

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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).

53 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 696; Welch (n 49 above) 555.

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.

55 F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 111.

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.

57 See arts 4(h), 23(2) & 30 of the AU Constitutive Act.

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.

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.[59] 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',[60] 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[61]

> 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.

60 'I'm the king of kings: Gaddafi storms out of Arab summit and labels Saudi king "a British product"' *Mail on Line News* 31 March 2009, http://www.dailymail.co.uk/news/worldnews/article-1165858/Im-king-kings-Gaddafi-storms-Arab-summit-labels-Saudi-king-British-product.html#ixzz0c2Y4tBK2 (accessed 31 January 2012); 'Gaddafi: Africa's "king of kings"' *BBC News* http://news.bbc.co.uk/2/hi/africa/7588033.stm (accessed 31 January 2012), reporting that his ultimate intention in gathering African traditional leaders and conferring this title to himself is to push African political leaders by creating a grass-roots movements for African unification.

61 'Special Motion of Thanks to the Leader of the Great Socialist Libyan Jamahiriya Brother Muammar Al Ghaddafi' adopted by the 5th extraordinary session of the Assembly of Heads of State and Government, Decisions adopted by the 5th extraordinary session of the Assembly of Heads of State and Government of the OAU/AEC, 1-2 March 2001, Sirte http://www.au2002.gov.za/ docs/key_oau/sirterep.htm (accessed 31 January 2012); see H Richardson 'The danger of oligarchy within the pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 266-269, speculating that Ghaddafi's Libya, alongside South Africa and Nigeria, may be emerging as a regional hegemon due to its capacity to finance an under-funded AU; a similar view is expressed by B Müller 'The African Union as security actor: African solutions to African problems?' Crisis States Working Papers Series 2 (Working Paper 57 August 2009).

> 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

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62 See arts 5, 6(2) & 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III); and also read cumulatively art 30 of the Statute of the African Court of Justice and Human Rights and art 8 of the Protocol on the Statute on the African Court of Justice and Human Rights.

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.[65] Only five states had made a declaration accepting individual complaints.[66] 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.[67]

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.[68] 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.[69] 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'.[70] 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.

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65 Only 26 states had ratified it by the end of March 2011, List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (11/03/2011) http://www.au.int/en/sites/default/files/992achpr.pdf (accessed 31 January 2012).

66 As above.

67 List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (08/11/2011) http://www.au.int/en/treaties (accessed 31 January 2012).

68 T Buergenthal 'Remembering the early years of the Inter-American Court of Human Rights' Center for Human Rights and Global Justice Working Paper, NYU School of Law, New York (1, 2005) 10 http://www.chrgj.org/publications/docs/wp/s05buergenthal.pdf (accessed 31 January 2012), explaining that the Court opened its doors in 1979, received its first case in 1986 and its second in 1989.

69 As above.

70 Para 10 of Declaration of Judge Maximo Cisneros, Compulsory Membership in an Association Prescribed by Law, IACHR Ser A, OC-5/85 (13 November 1985).

The second matter that underscores a call for caution is the mushrooming of institutions under the AU, despite a known lack of resources.[71] It is known that the African Commission did not have enough resources to pay even its telephone bills.[72] Costs of an additional court have not been prepared for, and it is unlikely that the AU will be able to fulfil its financial obligations any time soon.[73] In 2008, the AU Assembly authorised a sizable sum to the Commission based on the logic that the Commission might fall under the influence of external funding institutions.[74] 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.[75] 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.[76] Thus, a valid critique of the African political elite is that it is creating unnecessary confusion with multiple mechanisms that it

71 The institutions that deal with human rights have been discussed in sec 3.1.

72 See below n 139 and accompanying text.

73 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'.

74 From $1,2 million in 2007, it raised the budget to $6 million in 2008; see J Biegon & M Killander 'Human rights developments in the African Union during 2008' (2009) 9 *African Human Rights Law Journal* 295 297; also see J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212 214, concluding that the African Commission was able to hold two extraordinary sessions because of the increased budget.

75 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'.

76 Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/13(XIII) (July 2010); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3 (XII) Assembly/AU/Dec.213 (XII) adopted by the 14th ordinary session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010; also see Coalition for an Effective African Court on Human and Peoples' Rights (CEAC) *et al*, Implications of the African Court on Human and Peoples' Rights Being Empowered to Try International Crimes such as Genocide, Crimes Against Humanity, and War Crimes: An Opinion 6-8, http://www.soros.org/initiatives/justice/news/africa_20091217/africa_20091217.pdf (accessed 31 January 2012).

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

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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, critiqueing 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).

78 See E Svensson 'The African mission in Burundi: Lessons learned from the African Union's first peace operations' (2008) http://www.foi.se/upload/projects/Africa/FOI2561_AMIB.pdf (accessed 31 January 2012); JD Rechner 'From the OAU to the AU: A normative shift with implications for peacekeeping and conflict management, or just a name change?' (2006) 39 Vanderbilt Journal of Transnational Law 568.

79 See 'Somalia Islamists al-Shabab "driven out of Mogadishu"' *BBC News Africa* http://www.bbc.co.uk/news/world-africa-15246093 (accessed 31 January 2012); also generally see T Murithi 'The African Union's evolving role in peace operations: The African Union mission in Burundi, the African Union mission in Sudan and the African Union mission in Somalia' (2008) 17 *African Security Review* 70 81.

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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81 JI Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Wisconsin International Law Journal* 785 813; 'Sanctions put on Mauritania junta' *BBC News* 6 February 2009, http://news.bbc.co.uk/2/hi/7874066.stm (accesse3d 31 January 2012); also AA Qadar 'The OAU's role in the consolidation of democracy in Africa' (2000) 4 *DePaul International Law Journal* 37 63-65; Peace and Security Council 181st Meeting, 20 March 2009 PSC/PR/COMM.(CLXXXI); Peace and Security Council 216th Meeting, 19 February 2010 PSC/PR/COMM.2(CCXVI); see also 'African Union bars Guinea on *coup*' *BBC News* http://news.bbc.co.uk/2/hi/7802803.stm (accessed 31 January 2012). The AU might have found a precedent for this sort of action in the interventions and involvements of sub-regional organisations such as ECOWAS (in Liberia, Sierra Leone, Guinea-Bissau, and Côte d'Ivoire) and SADC (Lesotho). Peace and Security Council 315th Meeting, 23 March 2012 PSC/PR/COMM (CCCXV).

82 *BBC News Africa*, Comoros profile, http://www.bbc.co.uk/news/world-africa-13231758; *AFP*, 'African Union slaps sanctions on rebel Comoran Isle leaders', afp.google.com/article/ALeqM5guu-gW6VQp2KyXIZSyPJC5ibuUFg (accessed 31 January 2012).

83 As above; E Svensson 'The African Union's operations in the Comoros: MAES and Operation Democracy, FOI Swedish Defence Research Agency' http://www.foi.se/upload/projects/ Africa/foir2659.pdf (accessed 31 January 2012).

84 See, eg, Peace and Security Council 221st Meeting, 17 March 2010 PSC/PR/COMM.(CCXXI); Peace and Security Council 220th Meeting, 11 March 2010 PSC/PR/BR.1(CCXX); Peace and Security Council 216th Meeting, 19 February 2010 PSC/PR/COMM.2(CCXVI); P Heinlein 'African Union suspends Ivory Coast, reinstates Guinea' *Voice of America* 9 December 2010.

85 Heinlein (n 84 above); 'African Union reinstates Ivory Coast' *CNN World* 22 April 2011 articles.cnn.com/2011-04-22/world/ivory.coast.african.union_1_peace-and-security-council-african-union-president-laurent-gbagbo?_s=PM:WORLD; AU Peace and Security Council, 30th Meeting, 27 May 2005, Addis Ababa, PSC/PR/Comm. (XXX),

which were held in an atmosphere of intimidation and disregard for freedom of expression, press, assembly and association.[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.[87] Similarly, the *coup* leader of Mauritania had no problems coming back as an elected civilian president with the blessing of the AU.[88] In Guinea, Madagascar and Niger, however, negotiations succeeded in excluding *coup* leaders from running for power.[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[90] could be partly explained by

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86 A Banjo 'Constitutional and succession crisis in West Africa: The case of Togo' (2008) 2 *African Journal of Legal Studies* 147 153-156, describing post-election crackdown on media and civil society and other related human rights abuses that were a backdrop to Faure Gnassingbe's victory; E Blunt 'African Union lifts Togo embargo' *BBC News* 27 May 2005, stating that African leaders accepted Mr Gnassingbe (the son of the former dictator) into their club despite the fact that the elections were controversial and the European Union did not lift its embargos for the same reason, http://news.bbc.co.uk/2/hi/7874066.stm (accessed 31 January 2012); PS Handy 'The dynastic succession in Togo: Continental and regional implications' (2005) 14 *African Security Review* 47 51.

87 EY Omorogbe 'A club of incumbents? The African Union and *coups d'état*' (2011) 44 *Vanderbilt Journal of Transnational Law* 123 141.

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.

90 Most independent observers are in agreement that the elections were won by Mugabe by the use of systematic violence against opposition supporters. Although the opposition leader, Morgan Tsvangirai, won a majority of votes, he withdrew from the second round citing violence against his electorate. See Amnesty International 'Zimbabwe: Amnesty International Report 2009', http://thereport.amnesty.org/en/regions/africa/zimbabwe (accessed 31 January 2012); Human Rights Watch 'Zimbabwe events of 2008', http://www.hrw.org/en/node/79221 (accessed 31 January 2012).

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]

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91 R Bush & M Szeftel '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.

92 Stone (n 54 above) 225 235, describing the African Commission's findings of violations in Zimbabwe, Eritrea, Sudan, DRC and Uganda; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); Final Communiqué of the 41st session of the African Commission on Human and Peoples' Rights, 30 May 2007; also Resolution on freedom of expression and the upcoming elections in Zimbabwe, ACHPR/Res 128 (XXXXII) 07 (28 November 2007); 'Kenya urges AU to suspend Mugabe' *BBC* 30 June 2008, http://news.bbc.co.uk/2/hi/africa/7481857.stm (accessed 31 January 2012).

93 Generally, see Preliminary Statement of the African Union Observer Mission to the Sudan Elections 11-15 April 2010, issued at the AU Observer Mission Office Grand Holiday Villa Hotel, Khartoum, Sudan, 18 April 2010; Preliminary Statement of the African Union Observer Mission to the Presidential Elections in The Republic of The Gambia, 24 November, 2011, issued at the AU Observer Mission Office Senegambia Beach Hotel, Banjul, The Gambia, 25 November 2011; Joint Statement of International observer Mission of the Djibouti Presidential Elections held on 8 April 2011, Djibouti, 9 April 2011; Preliminary Statement of The African Union Observer Mission to the Presidential and Parliamentary Elections in Uganda, 18 February 2011, COP17/CMP7, 23 February 2011; 'Chad vote conformed to international standards: AU observers' *Radio Netherlands Worldwide* 27 April 2011; Declaration of the Election Observation Mission of the African Union, Republic of Cameroon, 9 October 2011; Preliminary Statement of the African Union Observer Mission on the Ethiopia Legislative Elections of 23 May 2010, issued at the AU Observer Mission Secretariat, Hilton Hotel, Addis Ababa, Ethiopia, 26 May 2010; Beyani (n 51 above) 591-592.

94 See 'DRC election hailed a success by African observers' *BBC News* 30 November 2011; A Nossiter 'Congo President Kabila denies reports of election fraud' *New York Times* 12 December 2011.

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.[95] 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.[96] Additionally, the AU has not shied away from pointing fingers or even directing condemnations when any of the parties breached a ceasefire agreement.[97] Despite great financial constraints,[98] 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* 413 436-37.

96 African Union Peace and Security Council Communiqué of the 17th Meeting of the Peace and Security Council, PSC/AHG/Comm (X) 25 May 2004, Addis Ababa, Ethiopia, authorising the first observer mission (which eventually became the African Union Mission in Sudan) to observe the implementation of the ceasefire, http://www.africa-union.org/News_Events/Communiqu%C3%A9s/ 25%20mayCommuniqu%C3%A9%20_10th_.pdf (accessed 31 January 2012); also see JE Tangho & J Hermina 'The international community responds to Darfur: ICC prosecution renews hope for international justice' (2008-2009) 6 *Loyola University Chicago Law Review* 367 381-382, describing the role of the AU in negotiations and peace keeping; also see WWG O'Neill & V Cassis 'Protecting two million internally displaced: The successes and shortcomings of the African Union in Darfur' The Brookings Institution – University of Bern Project on Internal Displacement 5-8 (November 2005) (for a general description of the AU's role in the Darfur situation). A detailed description of the AU's mission in Darfur can also be found in Human Rights Watch 'Imperatives for immediate change: The African Union Mission in Sudan' (Human Rights Watch 18 1 (A)); also see SM Makinda & FW Okumu *The African Union: Challenges of globalisation, security, and governance* (2008) 84-87.

97 African Union, Press Release 112/2004, the Chairperson of the Assembly expressing serious concern over parties breaking the N'Djamena ceasefire, laying blame on both parties by describing specifically when and at what time each party was responsible for such, http://www.africa-union.org/News_Events/Press_Releases/112%2004%20Darfur%20Ceasefire%20Agreement%20violation.pdf (accessed 31 January 2012); African Union, Press Release 116/2004, the Chairperson of the Assembly condemning specifically the government of Sudan, http://www.africa-union.org/News_Events/Press_Releases/116%2004%20Darfur%2018%20dec%202004.pdf (accessed 31 January 2012).

98 The AU has been emphasising this point. See Assembly of the African Union – Declaration on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa (Assembly/AU/Decl 3 (VI)) http://www.africa-union.org/root/au/Documents/Decisions/ decisions.htm (accessed 31 January 2012).

displaced persons and it has won the confidence of both the rebels and the government as a neutral intermediary.[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,[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'.[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.[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.[103]

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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).

100 NJ Udombana 'An escape from reason: Genocide and the International Commission of Inquiry on Darfur' (2006) 40 *International Lawyer* 41 64.

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.

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.

103 African Union, Decisions and Declarations: Assembly 1963-2008, http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm (accessed 31 January 2012); African Union, Decisions and Declarations: Executive Council 1963-2006, http://www.africa-union.org/root/au/ Documents/Decisions/decisions.htm (accessed 31 January 2012); Executive Council, 14th ordinary session 26-30 January 2009, Addis Ababa, Ethiopia, Decision on the 1st session of the African Union Conference of Ministers in Charge of Social Development, Doc EX.CL/477(XIV) para 7, http://www.africa-union.org/root/au/Documents/Decisions/ExeCoundecisions.htm (accessed 31 January 2012).

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.[104] 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.[105] This position was reaffirmed at every AU summit, including at its 17th Summit held in July 2011.[106]

The possibility (and allegation) that the Mbeki report, which suggests the establishment of a UN-Sudan hybrid court to provide justice,[107] 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.[108] 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

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).

105 'African Union in rift with court' *BBC News* http://news.bbc.co.uk/2/hi/8133925.stm (accessed 31 January 2012); also see Human Rights Watch 'African civil society urges African states parties to the Rome Stature to reaffirm their commitment to the ICC' 30 July 2009, presenting the views and statements of 164 non-governmental organisations.

106 Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc EX.CL/670(XIX); also see Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court Doc Assembly/Au/10(XV).

107 Report of the African Union High Level Panel on Darfur (AUPD), Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government 29 October 2009 Abuja, Nigeria, PSC/AHG/2(CCVII) 64-67, http://www.africa-union.org/root/ar/index/AUPD%20Report%20on% 20Darfur%20%20_Eng%20_%20Final.pdf (accessed 31 January 2012); also see 'Mbeki to brief the UNSC on the AU roadmap for Darfur' *Sudan Tribune* 21 December 2009, http://www.sudantribune.com/spip.php?article33535 (accessed 31 January 2012).

108 '"Our goal was to find a way out for Sudan president" says Mbeki panel member' *Sudan Tribune* 2 November 2009, http://www.sudantribune.com/spip.php?article32981 (accessed 31 January 2012); Human Rights Watch 'UN: back AU call for Darfur prosecutions' 18 December 2009, arguing that the hybrid tribunal should be pursued but without affecting the ICC's arrest warrants on Al-Bashir and his co-accused collogues, http://www.hrw.org/en/news/2009/12/18/un-back-au-call-darfur-prosecutions (accessed 31 January 2012).

of the actions of the political organs.[109] 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.[110] 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'.[111]

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.[112] 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

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109 Press Release on the decision to suspend 13 international humanitarian organisations and the closure of three non-governmental organisations in Sudan (Commissioner, Special Rapporteur on the Rights of Human Rights Defenders in Africa) http://www.achpr.org/english/Press%20Release/ press%20release_HRD_ Sudan.htm (accessed 31 January 2012); Press Release of the Special Rapporteur on Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants in Africa, http://www.achpr.org/english/_info/news_en.html (accessed 31 January 2012).

110 Executive Council 8th ordinary session 16-21 January 2006, Khartoum, Sudan; Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Doc EX.CL/236 (VIII) (authorising the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe) http://www.africa-union.org/root/au/Documents/ Decisions/ExeCoundecisions.htm (accessed 31 January 2012).

111 22nd Activity Report of the African Commission on Human and Peoples' Rights EX.CL/364(XI) (2007); see paras 108-109, 123 & 137.

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,

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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.

116 O Tungwarara 'The Arab Spring and the AU Response, Open Society Institute – Africa Governance Monitoring and Advocacy Project' 19 September 2011.

117 See 'AU's opposition to military intervention in Libya ignored by UNSC' *Sudan Tribune* 18 March 2011; 'Africa: The African Union and Libya – On the horns of a dilemma' 2 November 2011, allafrica.com/stories/201111030819.html (accessed 31 January 2010); Department of Public Information 'Security Council approves "no-fly zone" over Libya, authorising "all necessary measures" to protect civilians, by vote of 10 in favour with 5 abstentions' Security Council 6498th Meeting (Night) (SC/10200).

118 As above.

119 Peace and Security Council 265th Meeting, PSC/PR/COMM (CCLXI) 23 February 2011; Decision on the Report of the Peace And Security Council on its Activities and the State of Peace and Security in Africa Doc.Assembly/AU/4(XVII); Assembly of the Union 17th ordinary session, Decision on the Situation in Libya Assembly/AU/Dec.385(XVII); W Davison 'African Union withholds support from Libyan rebels, calls for peace talks' *Bloomberg* 26 August 2011; 'Libya: Benghazi rebels reject African Union truce plan' *BBC News Africa* 11 April 2011.

Saif Al-Islam and Al-Sanusi.[120] 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.[121] The trade and foreign policy of the European Union is another factor that has great influence.[122] Another example of the role of hegemonic power can be seen in the NATO involvement in Libya[123] or the French involvement in the situations in Chad and Côte d'Ivoire.[124] 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.

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120 Assembly of the African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc.EX.CL/670(XIX); also AU Peace and Security Council, Decision on the Peaceful Resolution of the Libyan Crisis, Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, EXT/ASSEMBLY/AU/DEC/(01.2011) 25 May 2011.

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.

122 See generally NJ Udombana 'Back to basics: The ACP-EU Cotonou trade agreement and challenges for the African Union' (2004) 40 *Texas International Law Journal* 59.

123 'NATO and the African Union pursue dialogue on Libya, North Atlantic Treaty Organisation' 31 May 2011 http://www.nato.int/cps/en/natolive/news_74968.htm (accessed 31 January 2012).

124 A Hansen 'The French military in Africa, Council on Foreign Relations' 8 February 2008, http://www.cfr.org/france/french-military-africa/p12578#p2; S Stearns 'UN and French forces attack Gbagbo's heavy weapons in Abidjan' 10 April 2011.

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,

125 Generally see TM Mays 'African solutions for African problems: The changing face of African-mandated peace operations' (2003) 23 *Journal of Conflict Studies*; D Peterson 'Finding African solutions to African problems' (1998) 21 *Washington Quarterly*; Müller (n 61 above).

126 M Goldmann 'Sierra Leone: African solutions to African problems?' (2005) 9 *Max Planck Yearbook of United Nations Law* 457, especially 459 fn 5; L Lawson 'US Africa policy since the Cold War' (2007) 5-1 *Strategic Insights*; A Purvis 'The Somalia syndrome' *Time* 22 May 2000.

decided to publicly condemn and protest the ICC's involvement and it is unlikely that they will reverse their position any time soon.[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,[128] while others declared that they would not comply with the arrest warrants of the ICC.[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

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127 See Human Rights Watch 'Observations and Recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit' 26 June 2011.

128 'South Africa legally rebuts AU resolution on arresting Bashir' 3 August 2009, http://www.sudantribune.com/spip.php?article31996 (accessed 31 January 2012); 'Botswana says Sudan's Bashir will be arrested if he visits' *Sudan Tribune* 10 June 2009, http://www.sudantribune.com/spip.php?article31449 (accessed 31 January 2012); 'Botswana says Bashir still vulnerable for arrest on its territory despite AU resolution' *Sudan Tribune* 16 August 2010, http://www.sudantribune.com/spip.php?article35980 (accessed 31 January 2012); also see 'Botswana stands by International Criminal Court, Ministry of Foreign Affairs and international co-operation' 28 July 2010, http://www.iccnow.org/documents/BotswanaStandsByICC_28Jul2010_en.pdf (accessed 31 January 2012).

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-11117662 (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.[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.[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),[132] while 33 of the signatories have ratified the statute.[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

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130 See eg M du Plessis *The International Criminal Court that Africa wants* (2010) 20-21; K Ainley 'The International Criminal Court on trial' BISA Annual Conference 18, 15 December 2009; 'The International Criminal Court: Why Africa still needs it' *The Economist* 3 June 2010; 'Gadhaffi indictment hinders peace: African Union' *CBS News 2* July 2011, http://www.cbc.ca/m/touch/news/story/2011/07/02/world-african-union-gadhafi.htm (accessed 31 January 2012); A Arieff *et al* 'International Criminal Court cases in Africa: Status and policy issues' *Congressional Research Service* .15 2 April 2010, http://fpc.state.gov/documents/ organization/141591.pdf (accessed 31 January 2012); S Akaki 'Zimbabwe coalition: African solutions to African problems?' *The African Executive* 1 October 2008, http://www.africanexecutive.com/modules/magazine/articles.php?article=3575 (accessed 31 January 2012).

131 Generally see AM Ibrahim 'The International Criminal Court in light of controlling factors of the effectiveness of international human rights mechanisms' (2010-2011) 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.

132 See 'Sudan may lose access to EU funds under Cotonou agreement' *Sudan Tribune* 25 April 2009, http://www.sudantribune.com/spip.php?article30980 (accessed 31 January 2012).

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

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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.

136 Generally see MG Marshall & K Jaggers (Principal Investigators), Polity IV Country Reports 2010, Authority Trends, 1946-2010: South Africa, http://www.systemicpeace.org/polity/polity06.htm; Polyarchy dataset, Measures of democratisation 1999-2000 (April 2002) http://www.prio.no/sptrans/1141086495/file42500_democracy_1999-2000.pdf (accessed 31 January 2012).

per cent) as 'not free'.[137] The same study conducted in previous years shows that there is no improvement in human rights conditions in Africa.[138] 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.[139] 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

137 Freedom House 'Freedom in the world 2011: Subscores (2011)' http://www.freedomhouse.org/template.cfm?page=635; Freedom House 'Map of freedom: Sub-Saharan Africa' (2010) http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Map_Africa.pdf; Freedom House, Map of Freedom: Middle East and North Africa (2010) http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Map_MENA.pdf. Freedom House produced its index based on a seven-point scale (with 1 representing the most free and 7 the least free) in which questions relating to the electoral process (three questions), political pluralism and participation (4), and functioning of government (3), freedom of expression and belief (4), associational and organisational rights (3), rule of law (4), and personal autonomy and individual rights (4) are used to scale states as 'free' (1.0 to 2.5), 'partly free' (3.0 to 5.0) and 'not free' (5.5 to 7.0). See Freedom House *Methodology* (2008) http://www.freedomhouse.org/template.cfm?page=351&ana_page=341&year=2008; see also J Sarkin 'Dealing with Africa's human rights problems: The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: Connecting humanitarian intervention and the responsibility to protect' Hofstra University Legal Studies Research Paper 09-01, (2009) *Journal of African Law* 1-2, describing the findings of numerous other statistics sowing to a similar conclusion.

138 Freedom House *Map of freedom: Sub-Saharan Africa* (2009) http://www.freedomhouse.org/ uploads/fiw09/MOF09_SSAfrica_FINAL.pdf (accessed 31 January 2012).

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.[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.[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.[142] In addition, one of the direct effects of international NGO activism has seen to the human rights violations of Western multinationals[143] and takes a lead role in human rights education.[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

140 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.

141 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.

142 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.

143 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.

144 Generally see JP Martin *et al* 'Promoting human rights education in a marginalised Africa' in GJ 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.

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.[145] 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

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.[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 *coups 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'.[147] It looks as if the political elites in the majority of these states may be agreeing to an expanding

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 *Journal of Democracy* 101; T Carothers & R Youngs 'Looking for help: Will rising democracies become international democracy supporters?' (2011) *The Carnegie Papers*; T Piccone 'Do new democracies support democracy? The multilateral dimension' (2011) 22 *Journal of Democracy* 139.

147 N Machiavelli (trans WK Marriott) *The prince* (2005) 92.

number of regional human rights standards for sanctimoniousness.[148] 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.[149] 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.[150] 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.[151] 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

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.