

## Human rights in NEPAD and its implications for the African human rights system

*Evarist Baimu\**

LLD candidate and research associate, Centre for Human Rights, Faculty of Law, University of Pretoria

### 1 Introduction

This article examines the human rights component of Africa's contemporary development blueprint — the New Partnership for Africa's Development (NEPAD).<sup>1</sup> It focuses on the emerging structures and mechanisms under the NEPAD framework to address human rights challenges on the continent. The main aim is to highlight the dangers and opportunities that are presented by adoption of NEPAD, particularly by its human rights institutional framework. Some of the new institutions could add value to the African human rights system in terms of increased protection of human rights. However, NEPAD-driven proliferation of human rights institutions could lead to diversion of attention and resources allocated to the existing human rights institutions. In an effort to bring an orderly evolution of new human rights institutions, the article proposes the creation of a dual African human rights system, hinged on the political-orientated Constitutive Act-based human rights regime and the rule-orientated African Charter-based human rights regime.

---

\* LLB (Dar es Salaam), LLM (Pretoria); ebaimu@postino.up.ac.za. An earlier version of this article appeared as Occasional Paper No 15 of the Centre for Human Rights, University of Pretoria. I am grateful to Professors Christof Heyns and Frans Viljoen of the University of Pretoria for their useful comments on earlier versions of the article.

<sup>1</sup> The NEPAD document is available on the internet at <http://www.nepad.org/AA0010101.pdf> (accessed 1 July 2002). The NEPAD website <http://www.nepad.org> also contains other NEPAD texts such as the communiqués, legal instruments and reports.

The article is divided into five main parts. The first part gives a historical backdrop to NEPAD. An overview of the substance and institutional framework of NEPAD follows under part two. Next, the NEPAD provisions with human rights content are scrutinised and analysed. NEPAD and its evolving institutions are then placed within the African human rights system and the African Union (AU) framework. Proposals are then made with the view of consolidating, rationalising and harmonising the evolving and existing human rights mechanisms and structures under NEPAD and the AU.

## 2 Background of NEPAD

The NEPAD document started off as the Millennium Africa Recovery Plan (MAP) conceived by Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria in the year 2000.<sup>2</sup> MAP merged with the OMEGA plan developed by President Wade of Senegal to form the New African Initiative (NAI) in July 2001. The title NAI was later changed to NEPAD in October 2001.<sup>3</sup>

The MAP document had its immediate origins in the Organisation of African Unity (OAU) Summit held in Togo in July 2000. This summit mandated Presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria to engage the countries in the north with a view to developing a partnership for the renaissance of the continent.<sup>4</sup> Going in tandem with these promotional efforts was the development of a document named MAP, outlining the terms of the partnership.<sup>5</sup> Around the same time, the newly elected president of Senegal, Wade, conceived a plan titled OMEGA.<sup>6</sup>

The MAP and OMEGA plans were presented respectively by Presidents Obasanjo and Wade during the fifth Extraordinary Summit of the OAU

---

<sup>2</sup> Although for the purpose of this paper the historical background is chronologically set to 2000, its background could be traced further back at least to the 1970s with efforts within the Economic Commission for Africa to come up with programmes to address challenges of development in Africa. See J Ohiorhenuan 'NEPAD and dialectics of African underdevelopment' (2002) 7 *New Agenda* 9-10.

<sup>3</sup> Para 5(b) of the Communiqué issued at the end of the first meeting of the HSIC, Abuja, Nigeria, 23 October 2001.

<sup>4</sup> Para 321 of the OAU Secretary-General Report (2001). Pursuant to this mandate, the three leaders relentlessly engaged the industrialised countries in the north and multi-lateral organisations on the partnership at various fora. For example, the three leaders made a presentation on the MAP at the World Economic Forum in Davos in January 2001.

<sup>5</sup> The Economic Commission for Africa (ECA) was to be given a mandate to develop a document to operationalise MAP by the Conference of the African Ministers of Finance. The ECA document is known as New Global Compact with Africa. Para 325 of the OAU Secretary General Report (2001).

<sup>6</sup> Para 323 of the OAU Secretary-General Report (2001).

held in Sirte, Libya from 1 to 2 March 2001.<sup>7</sup> Recognising the synergies and complementarities between the two plans on continent-wide development, the Sirte Summit recommended the integration of the two initiatives. The decision to have a single, co-ordinated African plan was grounded on the need to avoid confusing Africa's partners, diffusing the focus, eroding capacity, splitting resources and undermining the credibility of the plans.<sup>8</sup> The result of this merger, which was finalised on 3 July 2001, was NAI. The NAI was approved by the 37th OAU Assembly of Heads of State and Government held in Lusaka in July 2001.<sup>9</sup> The NAI had to be reorganised and edited to clear repetition and inconsistencies emanating from the hasty merger of the MAP and OMEGA plans. The finalisation of the NAI document was achieved on 23 October 2001, when its name was also changed to NEPAD.<sup>10</sup>

### **3 Unzipping NEPAD: Content and institutional framework of NEPAD**

NEPAD constitutes a framework on the basis of which Africa as a continent intends to interact with the rest of the world, particularly the industrialised countries and the multi-lateral global institutions such as the World Bank, the International Monetary Fund and the United Nations (UN).<sup>11</sup> Its main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the escalating marginalisation of the continent.<sup>12</sup> Unlike prior analogous endeavours, NEPAD is an initiative conceived, owned and led by Africans themselves.<sup>13</sup> It is also an initiative that puts emphasis on a new partnership with the industrialised countries and with multilateral organisations based on mutual commitments and obligations.<sup>14</sup>

#### **3.1 Précis of the content of NEPAD document**

Apart from the introduction and conclusion, the NEPAD document is divided into six parts. Part one is the introduction. Part two places Africa

---

<sup>7</sup> Para 318 of the OAU Secretary-General Report (2001).

<sup>8</sup> As above.

<sup>9</sup> See OAU Declaration on the New African Initiative [MAP and OMEGA] 37th ordinary session of the Assembly of the Heads of State and Government of the OAU, July 2001 Lusaka, Zambia, OAU Doc AHG/Decl 1 (XXXVII) para 9.

<sup>10</sup> n 3 above, particularly paras 5(a) & b.

<sup>11</sup> Para 48 NEPAD document.

<sup>12</sup> Para 67 NEPAD document.

<sup>13</sup> Para 60 NEPAD document.

<sup>14</sup> Ohirohenuan (n 2 above) 10.

in its global context and provides a historical analysis of Africa's under-development. Part three attempts to make a case why NEPAD is poised to succeed while similar programmes undertaken in the past, failed. Part four is an appeal to the peoples of Africa to mobilise in support of the implementation of NEPAD.

Part five, containing the Programme of Action, is the core of NEPAD. This part is also the largest. It encompasses more than half of all the provisions of the NEPAD document (115 paragraphs of the total 207). Part five is divided into three main sub-parts. Sub-part A highlights the conditions for sustainable development in Africa. These are peace, security and political governance initiatives, economic and political governance initiatives and sub-regional and regional approaches to development. Sub-part B identifies the sectoral priorities for achieving sustainable development. These include bridging the infrastructure gap, investing in people, developing agriculture, protecting the environment and the role of culture as well as science and technology. Sub-part C outlines ways of mobilising resources for sustainable development.

Part six underlines the partnership nature of NEPAD. Part seven deals with the implementation of NEPAD. Part eight is the conclusion.

### 3.2 NEPAD's institutional framework

The institutional framework for the implementation of NEPAD is three-tiered, comprising the Heads of State and Government Implementation Committee (HSIC), the Steering Committee and the Secretariat.

The HSIC consists of Heads of State of the five states who have been the initiators of NEPAD, as well as 15 other states.<sup>15</sup> The AU Chairperson and the Head of the AU Commission are *ex officio* members of the HSIC. The HSIC has a Chairperson and two Vice-Chairpersons.<sup>16</sup> The HSIC meets every four months.<sup>17</sup> Its mandate is to set policies, priorities and the Programme of Action of NEPAD.<sup>18</sup> The HSIC has to report annually to the AU Assembly of Heads of State and Government.

<sup>15</sup> Para 202 NEPAD document. The five NEPAD initiators are Algeria, Egypt, Nigeria, Senegal and South Africa. Initially, 10 other states, namely Cameroon, Gabon, São Tomé and Príncipe, Ethiopia, Mauritius, Rwanda, Tunisia, Botswana, Mozambique and Mali were added to the five NEPAD promoters. During the Durban summit, the AU Assembly decided to add five more countries to the HSIC. See AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' first ordinary session of the Assembly of Heads of State and Government of the AU 9–10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 14.

<sup>16</sup> Currently President Obasanjo chairs the Implementation Committee with President Wade and Bouteflika serving as Vice-Chairpersons. Para 5(d) of the Communiqué issued at the end of the first meeting of the HSIC, Abuja, Nigeria, 23 October 2001.

<sup>17</sup> As above.

<sup>18</sup> Ohiorhenuan (n 2 above) 13.

The Steering Committee comprises two personal representatives of each of the Heads of States of the five NEPAD initiators and one personal representative of the 15 non-initiating NEPAD members. The AU Commission participates in the Steering Committee meetings. The functions of the Steering Committee include developing terms of reference of identified programmes and projects, developing a strategic plan for marketing NEPAD at national, sub-regional, regional and international levels as well as supervising the Secretariat.<sup>19</sup>

The Secretariat is located in Midrand, South Africa.<sup>20</sup> It handles the co-ordination and liaison responsibilities as well as administrative and logistical functions. As it is composed of a very small core staff, the Secretariat outsources work on technical details to the lead agencies and experts from the continent.

In addition to the above institutions, five task teams have been established. The task teams are responsible for identifying and preparing implementable projects and programmes under NEPAD.<sup>21</sup> Furthermore, there are five subcommittees, each of which is co-ordinated by one of the five NEPAD initiating states.<sup>22</sup>

## 4 Human rights in NEPAD: Content and institutional framework

### 4.1 Human rights provisions in NEPAD

Ensuring democracy, human rights and good governance is a central feature of NEPAD. NEPAD seeks to address Africa's underdevelopment and marginalisation through a number of ways, including promoting and protecting democracy and human rights in African countries and sub-regions, as well as developing clear standards of accountability, transparency and participatory governance at the national and sub-national level.<sup>23</sup> NEPAD acknowledges that African leaders have learnt from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for development.<sup>24</sup> In this regard, African leaders pledge to

<sup>19</sup> n 3 above, para 5(f).

<sup>20</sup> As above, para 5(e).

<sup>21</sup> The Task Teams and their lead agencies are as follows: Capacity-building on peace and security (AU); Economic and corporate governance (ECA); Infrastructure (Africa Development Bank); Central banks and financial standards (Africa Development Bank); Agriculture and market access (AU). See n 3 above, para 5(g) i–v.

<sup>22</sup> The subcommittees and their co-ordinators are as follows: Peace, Security, Democracy and Political Governance (South Africa); Economic and Corporate Governance/Banking and Financial Standards/Capital Flows (Nigeria); Market access and Agriculture (Egypt); Human Resource Development (Algeria); Infrastructure (Senegal).

<sup>23</sup> Para 49 NEPAD document.

<sup>24</sup> Para 71 NEPAD document.

work both individually and collectively to promote these principles, not only in their countries, but also in their sub-regions and the whole continent.<sup>25</sup>

This pledge is given concrete expression under the sub-heading entitled 'democracy and political governance initiative'. The purpose of this initiative is to contribute to the strengthening of the political and administrative framework of participating countries in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.<sup>26</sup> The NEPAD document reiterates that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. The focus on human rights and conflict prevention is one of the key features setting NEPAD apart from previous development programmes developed in the continent.

NEPAD states<sup>27</sup> will undertake a series of commitments towards meeting basic standards of good governance and democratic behaviour while giving support to one another.<sup>28</sup> The NEPAD states will also be expected to show leadership in supporting and building institutions and initiatives to safeguard these commitments.<sup>29</sup> In addition, to ensure that states adhere to their commitments, these commitments are to be institutionalised through the NEPAD leadership.<sup>30</sup> The NEPAD Heads of State Forum will monitor and assess the progress made by African countries in meeting their commitments towards achieving good governance and social reforms.<sup>31</sup> The Forum will also provide a platform for sharing experiences with a view to fostering good governance and democratic practices.<sup>32</sup>

#### 4.2 Evolving human rights structures under the NEPAD framework

NEPAD is working toward the setting up of structures and mechanisms to administer, among others, its human rights component (democracy and political governance initiative). Already, a subcommittee on peace

---

<sup>25</sup> As above.

<sup>26</sup> Para 80 NEPAD document.

<sup>27</sup> Although NEPAD is a project of the AU, participation in its mechanisms and projects such as the African Peer Review Mechanism is open to only those states that voluntarily accede to its instruments.

<sup>28</sup> Para 82 NEPAD document. To build capacity in meeting the commitments, the NEPAD leadership will undertake a process of capacity building initiatives. See para 83 of the NEPAD document.

<sup>29</sup> Para 84 NEPAD document. These institutions are to be created and strengthened at the national, sub-regional and continental levels.

<sup>30</sup> Para 81 NEPAD document.

<sup>31</sup> Para 84 NEPAD document.

<sup>32</sup> As above.

and security has been established.<sup>33</sup> In addition, there has been a proposal for the establishment of the post of a commissioner to be responsible for democracy, human rights and good governance.<sup>34</sup>

But perhaps the mechanism under the NEPAD process that is likely to have the most far-reaching implications is the independent mechanism of peer review, the African Peer Review Mechanism (APRM). The proposal for the establishment of the APRM was first made during the first HSIC meeting held in Abuja on 23 October 2001.<sup>35</sup> The APRM is an instrument voluntarily acceded to by African members of the African Union for the purpose of self-monitoring.<sup>36</sup> The mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration of Democracy, Political, Economic and Corporate Governance (Declaration on Governance).<sup>37</sup> The African leaders reaffirmed the commitment to the principles and core values contained in the Declaration on Governance during the first summit of the AU held in Durban in July 2002.<sup>38</sup>

The APRM is intended to 'foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration of the African continent'.<sup>39</sup> In the words of President Mbeki, one of the NEPAD architects, the provisions of the APRM are 'aimed at foreseeing problems and working to prevent their spread — rather than just censuring and punishing when things go wrong'.<sup>40</sup> The HSIC has approved the establishment of the APRM and has recommended that the proposed Secretariat of the APRM be located in the UN Economic Commission for Africa in Addis Ababa, Ethiopia.<sup>41</sup> The establishment of the APRM has received the AU's backing. The recently held first session of the Assembly

<sup>33</sup> n 3 above, para 7. The members of the subcommittee are Algeria, Gabon, Mali and Mauritius with South Africa as its Chairperson.

<sup>34</sup> See para 12 of the Communiqué issued at the end of the Second Meeting of the HSIC in Abuja, Nigeria, 26 March 2002.

<sup>35</sup> n 3 above, para 6.

<sup>36</sup> Para 9 of Communiqué issued at the end of the third meeting of the HSIC in Rome, Italy, 11 June 2002.

<sup>37</sup> See para 2 'The African Peer Review Mechanism' 10 June 2002. Available on the internet at <http://www.nepad.org/Doc006.pdf> (accessed 9 July 2002). The Declaration on Governance is available on the internet at <http://www.nepad.org/Doc004.pdf> (accessed 9 July 2002).

<sup>38</sup> See AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' 1st ordinary session of the Assembly of Heads of State and Government of the AU 9–10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 11.

<sup>39</sup> n 36 above, para 9.

<sup>40</sup> See T Mbeki 'Africa's new realism' *New York Times* (24 June 2002).

<sup>41</sup> n 36 above, para 9.

of the Heads of State and Government of the AU encouraged all AU members to adopt the Declaration on Governance and accede to the APRM.<sup>42</sup>

### 4.3 Critique of human rights in NEPAD

The virtues of NEPAD have been outlined in various fora. It is said to be an African document, authored by Africans on their own initiative. It attempts to link up with other efforts to achieve Africa's development. Thus, for example, the NEPAD document adopts the goals set in the UN Millennium Declaration, including cutting poverty by half and achieving universal primary education by the year 2015, both of which have implications for human rights, particularly socio-economic rights.<sup>43</sup>

On the other hand, criticism has been levelled against various aspects of NEPAD. In this article I will focus my critique on those aspects that relate to human rights. These could be divided into four: the process, the content, the strategy and the institutional framework.

First, the process leading towards the adoption of NEPAD has been criticised as being a top-down programme that was formulated with little consultation of civil society, the representative organs, such as parliaments, and the African peoples in general.<sup>44</sup> While the NEPAD document calls for the involvement of the people in development, the process on which the document itself was arrived at did not involve the people.<sup>45</sup> More pertinent from a human rights perspective, African human rights institutions such as the African Commission on Human and Peoples' Rights (African Commission) were not involved. This backtracks from the progressive stance of people-centred development which was initiated with the recognition of the right to development in the African Charter on Human and Peoples' Rights (African Charter) and further reinforced with the adoption of the African Charter for Popular Participation in Development and Transformation in 1990. The initial document should have served as the draft to be discussed in the cabinet meetings, parliaments, civil society workshops, academic discourses and among the general populace on the continent. The discussion would have embellished the document, assisted in spreading its message and

<sup>42</sup> n 38 above.

<sup>43</sup> Para 68 NEPAD document.

<sup>44</sup> S Matthews & H Solomon 'Prospects for African development in light of the New Partnership for Africa's Development (NEPAD)' *African Institute Briefing Paper* No 3/2002.

<sup>45</sup> Although the NEPAD document claims to be African-owned development programme, perhaps that assertion should have qualified as African leaders-owned development programme. This is reflected not just in the document itself (see for instance para 53), but also in the process towards its creation, which was essentially centred on leaders.

ensured ownership by the main stakeholders in its success, the African peoples themselves.

Second, while the initiative might be African, its human rights content is largely Eurocentric in perspective, especially in its overly strong focus on civil and political rights. The 'African human rights fingerprint' is conspicuously missing in its content. The Eurocentricity of NEPAD is evident in the placement of human rights issues under democracy and political governance initiative. This serves to reinforce the European conception by laying emphasis on civil and political rights, but failing to mention socio-economic rights. It would seem that the protection of human rights within the framework of NEPAD is not for the sake of African peoples, but in exchange for investments and aid from the West.<sup>46</sup> Therefore, if there are any benefits in human rights terms to the African peoples, this is just incidental to the main aim of protecting human rights in order to attract investments and aid.

The language of good governance could explain why Western governments seem to be quite enthusiastic about NEPAD. It serves their interests well without necessarily serving the interests of the vulnerable groups on the continent. In other words, the NEPAD human rights conception is in line with the quest by Western governments for an optimal political environment for multinational corporations. The benefits to the African people of such protection, if any, would be by 'trickle down effect'. The threat posed to human rights by such a conception is well captured by Upendra Baxi, who argues:<sup>47</sup>

I believe that the paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This new paradigm reverses the notion that universal human rights are designed for the dignity and well being of human beings and insists, instead, upon the promotion and protection of the collective rights of global capital in ways that 'justify' corporate well being and dignity over that of human persons.

There is a clear and present danger that NEPAD might provide a mechanism for the superimposition of such a paradigm in the human rights discourse in the continent to the detriment of vulnerable groups in Africa, unless concerted efforts are made to prevent it. This can only be done if the NEPAD document explicitly draws on the African regional human rights documents, such as the African Charter as well as the African Charter for Popular Participation in Development and Transformation. Furthermore, its implementation also ought to be informed by the standards with the African imprint found in these instruments.

<sup>46</sup> This view is implicit in the editorial by the *New York Times*: 'NEPAD resembles Mr Bush's plan for directing increased American foreign aid to countries following enlightened policies.' See 'African Opportunity' *New York Times* (6 June 2002).

<sup>47</sup> U Baxi 'Voices of suffering and the future of human rights' (1998) 8 (2) *Transnational Law and Contemporary Problems* 125.

Third, the NEPAD document makes use of human rights language in a very cosmetic fashion. There is nothing in the NEPAD document about integrating human rights in the development programme. Yet, the efforts to develop a human rights approach to development are so relevant now.<sup>48</sup> The formulation of a new continent-wide development programme such as NEPAD provides a good opportunity to adopt the human rights approach. This opportunity is being wasted.

The merits of a human rights approach to development are best summarised by the Committee on Economic, Social and Cultural Rights which has stated:<sup>49</sup>

[A]nti-poverty strategies are likely to be more effective, inclusive, equitable and meaningful to those living in poverty if they are based on international human rights.

The UN has been doing a lot of work in integrating human rights in development activities and could assist African countries in doing the same within the NEPAD framework. But without interest and push from African states themselves, which could strategically be expressed in the NEPAD document, this opportunity will be missed.<sup>50</sup>

Fourth, NEPAD identifies the need to strengthen the domestic political and administrative framework.<sup>51</sup> In my view, the NEPAD document ought to have also identified the need to strengthen collective, multi-lateral, regional African institutions of human rights, notably the African Commission. It is noted that proposals have been made for the creation of a new human rights structure under NEPAD to reinforce the human rights provisions in NEPAD. However, as will be demonstrated below, the founders of NEPAD do not appear to have put sufficient thought in to the functioning of the emerging human rights framework under NEPAD and how it will relate to the existing African human rights system, and more importantly how the new structures will be funded.

Ultimately, the relevance of NEPAD to the human rights discourse in Africa hinges mainly on the fact that it has human rights provisions in its

<sup>48</sup> For more information on the human rights approach to development, see M Nowak *et al* 'Human rights and poverty reduction strategies' (28 February 2002) available on the internet at [http://www.undg.org/documents/369-Human\\_Rights\\_and\\_Poverty\\_Reduction\\_Strategies\\_Discussion\\_paper\\_prepared\\_for\\_the\\_UN\\_Office\\_of\\_the\\_High\\_Commissioner\\_for\\_Human\\_Rights.doc](http://www.undg.org/documents/369-Human_Rights_and_Poverty_Reduction_Strategies_Discussion_paper_prepared_for_the_UN_Office_of_the_High_Commissioner_for_Human_Rights.doc) (accessed 23 March 2002).

<sup>49</sup> CESCR 'Statement on poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) UN Doc E/C 12/2001/10 para 13.

<sup>50</sup> It should be noted that NEPAD had generated a strong interest and support from the UN system. However, in their discussion on how to provide system wide support for Africa and NEPAD, the Heads of UN agencies agreed that 'the UN system, in following up on NEPAD and in relating to Africa's leadership, should be in "responsive" rather than "activist" mode'. See Summary of Conclusions of the Administrative Committee on Co-ordination at its Second Regular Session of 2001 UN Doc ACC/2001/5 (9 November 2001) para 9.

<sup>51</sup> Para 80 NEPAD document.

founding document. While an expression of commitment to human rights is indeed laudable, its utility can only be realised if such commitment is reinforced by proper strategies and concrete action. These would include, for example, adopting a human rights approach to development and creating effective institutions for giving effect to its vision of promoting and protecting human rights. The issue of institutional framework raises the point on how NEPAD fits into the larger institutional framework of the AU and the African human rights system. This is the subject of the next part of this paper.

## 5 NEPAD in the context of the AU and the African human rights system

The development of NEPAD should be seen in the light of another historic development in Africa's legal and political scene over recent years: the metamorphosis of the OAU into the AU.<sup>52</sup> NEPAD operates under the rubric of the OAU/AU. However, there is some ambiguity as to whether NEPAD is subsidiary to the AU or whether the two are in co-equal relationship. This ambiguity manifested itself best in the Declaration emanating from the second meeting of the HSIC held in March 2002 in Abuja.

In the meeting, HSIC declared that NEPAD is a mandated initiative of the AU.<sup>53</sup> At the same time, it called for greater co-operation and co-ordination between the AU and NEPAD Secretariats. Ohiorhenuan articulates the view that the statement that NEPAD is a mandated initiative suggests its subordinate relationship with the AU.<sup>54</sup> Conversely, the urge for co-ordination between the two suggests somewhat more egalitarian relations.<sup>55</sup> This writer holds the position that NEPAD is part and parcel of the AU structure and is subsidiary to the AU. The following arguments are advanced in support of this view:

First, the history of the NEPAD process reveals clear links with the AU predecessor, the OAU. The ideas behind NEPAD were conceived, developed and consolidated within the rubric of the OAU. NEPAD was approved at the highest level of the OAU, the predecessor of the AU, as the development blueprint for the AU.<sup>56</sup>

<sup>52</sup> For an examination of the transformation of the OAU into the AU, see S Gutto 'The reform and renewal of the African regional human rights and peoples' rights system' (2001) 2 *African Human Rights Law Journal* 175, 181–184; K Magliveras & G Naldi 'The African Union — A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 415; E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 2 *African Human Rights Law Journal* 299 305–310.

<sup>53</sup> n 34 above, para 20.

<sup>54</sup> Ohiorhenuan (n 2 above) 15.

<sup>55</sup> As above.

<sup>56</sup> n 9 above, para 10.

Second, NEPAD's institutional framework derives its legitimacy from the OAU/AU since the central institution in the NEPAD framework, the HSIC, was set up by the OAU Assembly.<sup>57</sup> The OAU Assembly decision setting up the HSIC confers on the HSIC the responsibility to 'ensure a continuous follow-up on the initiative, particularly the establishment of management institutions for the NAI (NEPAD)'.<sup>58</sup>

Third, in terms of lines of accountability, NEPAD's HSIC has to report to the OAU/AU Summit, which also provides guidance as to how the NEPAD process should progress.<sup>59</sup> There are also mechanisms in place for participation of the OAU/AU institutions in the NEPAD processes. The OAU/AU Chairperson and Secretary-General are *ex officio* members of the HSIC. Apart from that, the OAU/AU Secretariat participates in NEPAD's Steering Committee meetings.

The above analysis establishes the location of NEPAD within the AU, and the delegation of power to NEPAD's central institution, the HSIC, to set up institutions for managing NEPAD. This fuels the concern that if this power is not exercised judiciously, it might lead to proliferation and duplication of, among others, African structures and mechanisms for the promotion and protection of human rights.

Africa has a regional human rights system, operating under the auspices of the AU.<sup>60</sup> In addition, the Constitutive Act of the AU has human rights provisions, which could provide a basis for the creation of mechanisms and structures for the promotion and protection of human

<sup>57</sup> As above, para 12.

<sup>58</sup> n 9 above, para 12. This mandate was renewed for one year during the recent AU summit. The AU Assembly mandated NEPAD's HSIC and Steering Committee to continue the vital task of further elaborating the NEPAD framework and ensuring the implementation of NEPAD Initial Action Plan until reviewed at the 2nd Assembly of Heads of State and Government of the African Union in Maputo, Mozambique, in 2003; see AU 'Declaration on the implementation of the New Partnership for Africa's Development (NEPAD)' 1st ordinary session of the Assembly of Heads of State and Government of the AU 9-10 July 2002, Durban, South Africa, AU Doc ASS/AU/Decl 1 (I) para 13.

<sup>59</sup> Thus, the Chairperson of the HSIC submitted a report describing the developments in the NEPAD process since July 2001 during the recent OAU Assembly of the Heads of State and Government. The Assembly endorsed NEPAD's Progress Report as well as the Initial Action Plan; See n 38 above, paras 3 & 8.

<sup>60</sup> The AU Assembly of the Heads of State and Government decided, in their recent summit, that the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights and Welfare of the Child, the two institutions under the African human rights system, shall henceforth operate within the framework of the African Union; see AU 'Decision on the interim period' AU Doc ASS/AU/Dec1 (I). For more information on the African human rights system, see C Heyns & F Viljoen 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal on Human Rights* 425; see also R Murray *The African Commission on Human and Peoples' Rights and international law* (2000).

rights.<sup>61</sup> Since the HSIC has powers to create institutions for managing NEPAD, whose components include human rights aspects, it is conceivable that human rights mechanisms and institutions could be set up under the auspices of NEPAD. The above state of affairs poses a danger of proliferation and duplication of human rights mechanisms and structures in Africa. Indeed, there have been three types of developments towards proliferation and duplication of human rights structures and mechanisms.

In the first instance, structures have been developed under the auspices of NEPAD, which mirror existing structures within the AU. The Abuja meeting in October 2001 decided to set up a Subcommittee on Peace and Security to focus on conflict management, prevention and resolution in Africa.<sup>62</sup> Given that the AU already has the Central Organ for Conflict Prevention, Management and Resolution<sup>63</sup> as one of its organs, the probability of the mandates of the two organs overlapping is very high.<sup>64</sup>

In the second instance, some proposals have been made under the auspices of NEPAD for the establishment of the structures within the AU whose mandate could potentially rival that of the existing OAU/AU structures. For instance, a proposal has been made to establish, within

<sup>61</sup> Some of the human rights provisions in the Constitutive Act of the AU include arts 3(f), 3(g), 3(h), 4(h), 4(l), 4(m), 4(n), 4(o) & 4(p). The Constitutive Act is reproduced in (2001) 2 *African Human Rights Law Journal* 315 and (2000) 12 *African Journal of International and Comparative Law* 629.

<sup>62</sup> n 3 above, para 7. This is despite explicit recognition in the NEPAD document that at the Lusaka Summit the AU had started taking measures in reviving the organs responsible for conflict prevention and resolution. See para 78 of the NEPAD document.

<sup>63</sup> The Central Organ of the Mechanism for Conflict Prevention, Management and Resolution (CO) has been incorporated as one of the organs of the AU in accordance with art 5(2) of the Constitutive Act of the AU; see paras 8(a) & (b) of 'Decision on the implementation of Sirte Summit Decision on the African Union' OAU Doc AHG/Dec 1 (XXXVII). The recently held Assembly of Heads of State and Government of the AU adopted a Protocol on the Establishment of the Peace and Security Council of the AU. When the Protocol enters into force, after the requisite number of ratifications has been attained, the Peace and Security Council shall replace the CO. However, pending the entry into force of the Protocol, the CO and its founding document, the Cairo Declaration, shall remain valid. See AU 'Decision on the establishment of the Peace and Security Council of the African Union' AU Doc Ass/AU/Dec 3 (I), para 4.

<sup>64</sup> An example of the overlapping of the mandate is seen in the mandate given to the subcommittee to 'enhance capacity to conduct thorough, inclusive, strategic assessments of situations in the regions affected by conflicts'; n 34 above, para 7(a). This mandate is bound to overlap with that of the Mechanism for Conflict Prevention, Management and Resolution whose primary objective is to anticipate and prevent conflicts and, in instances where conflicts have occurred, to understand peace-making and peace-building functions in order to facilitate the resolution of these conflicts; see para 15 of the Declaration of the Assembly of the Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 28–30 June 1993, Cairo, Egypt (AHG/Decl.3 (XXIX)).

the AU, the portfolio of a commissioner to be responsible for democracy, human rights and good governance.<sup>65</sup> It is likely that the mandate of such an office will overlap with that of the African Commission, unless conscious efforts are made to prevent this.

Thirdly, some mechanisms have been created within the AU without sufficient thought as to how these new mechanisms could interface with the existing institutions and mechanisms under the African human rights system. Thus, while the APRM has no equivalent in the AU framework, its development in isolation from human rights mechanisms developed under the OAU/AU should be a source of concern.<sup>66</sup> Sufficient care ought to be taken, when fleshing out the mandate and functions of this mechanism, to avoid overlaps with the mandate and functions of the African Commission. In the same vein, attempts should be made to create linkages and synergies between the APRM and the African Commission.<sup>67</sup>

The three examples given above indicate at worst a trend towards duplication and at best a trend towards unnecessary and wasteful proliferation of human rights institutions on the continent. There is at least one example within the African system of human rights of duplica-

<sup>65</sup> n 34 above, para 12. A similar proposal for the establishment of the post of the Office of the High Commissioner for Human Rights has been made by two African scholars; see A Abbas & M Baderin 'Towards effective collective security and human rights protection in Africa: An assessment of the Constitutive Act of the new African Union' (2002) *Netherlands International Law Review* 1 36.

<sup>66</sup> The development of the APRM, and indeed of both the Constitutive Act of the AU and the NEPAD document, has been done without the participation of the African Commission. See para 20 of the adopted full report on the proceedings of a conference on 'Human rights, the African Union and the New Partnership for Africa's Development' *African Regional Dialogue* 1. Available on the internet at <http://www.unhchr.ch/html/menu6/Africadialog1.htm> (accessed 3 May 2002). As an afterthought, during their recent summit in Durban, South Africa, the OAU Assembly of Heads of State and Government called upon the African Commission to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the African Union and submit it at next year's AU session. See OAU 'Decision on the Fifteenth Annual Activity Report of the African Commission on Human and People's Rights' 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa, AHG/Dec 171 (XXXVIII) para 2.

<sup>67</sup> The trends so far do not offer much hope of this linkage happening. For example, the only linkage between APRM and the African Commission is the formal and public tabling of the report of the review team to key regional structures including the African Commission. This is to be done at the final stage of the reviewing process, six months after the consideration of the report by the Heads of State and Government of the NEPAD participating states. See para 25 'The African Peer Review Mechanism' 10 June 2002. Available on the internet at <http://www.nepad.org/Doc006.pdf> (accessed 9 July 2002). In my view, this is a cosmetic linkage, since the Commission could in any case access it easily on its own, as the report would then be in public domain. A truly effective linkage would have been achieved by creating an environment that would enable the African Commission to feed in the initial stages of the review process, particularly in relation to the component of political governance.

tion and proliferation of human rights bodies. The African Charter on the Rights and Welfare of the Child (African Children's Charter), which was adopted nine years after the adoption of the African Charter, provided for the establishment of a supervisory body, the African Committee of Experts on the Rights of Welfare of the Child (African Children's Committee).<sup>68</sup> As the mandate and functions of this new body bear a striking resemblance to that of the African Commission, there was an articulated view against its establishment and instead a proposal was made to amend the African Children's Charter to allow the African Commission to fulfil the functions designated to the African Children's Committee.<sup>69</sup> This proposal has not been heeded, and the African Children's Committee has already been established, adding yet another body whose functions could as well be handled effectively by existing institutions.<sup>70</sup>

It is also crucially important not to forget that the AU envisages the establishment of more institutions than those that operated under the OAU.<sup>71</sup> Thus, even without the addition of new institutions under the auspices of NEPAD, there will be more African institutions scrambling for the AU's meagre resources in the near future than those operational at present.<sup>72</sup> Magliveras and Naldi put their finger on the issue when they warn that '[t]he number of organs in the Union appear to be very large and in the long run it could not only result in the cumbersome operation

<sup>68</sup> OAU Doc CAB/LEG/24 9/49 adopted on 11 July 1990 and entered into force on 29 November 1999.

<sup>69</sup> One of the proponents of this view is Viljoen, whose arguments against the establishment of the African Children's Committee are the similarity of functions and mandate between the African Commission and the Committee, the need to avoid the diversion of resources from existing regional human rights institutions, the fact that the African Commission has been functioning reasonably well after initial inertia, and the need to avoid proliferation of state reporting. See F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C J Davel (ed) *Introduction to child law in South Africa* (2000) 214-227.

<sup>70</sup> See generally 'Decision on the report of the African Committee on the Rights and Welfare of the Child' 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa, OAU Doc AHG/Dec 172 (XXXVIII).

<sup>71</sup> The novel institutions in this regard include the Pan-African Parliament, the Court of Justice, the Economic, Social and Cultural Council, Permanent Representative Committee and Financial Institutions. However, one should note that the first three institutions in the list above were to be established under the African Economic Community, a regional body that was operating side by side with the OAU. To these institutions one could add the proposed one African army that will secure peace and stability in the AU. See generally AU 'Resolutions on the establishment of the African Army' 1st ordinary session of the Assembly of Heads of State and Government of the AU, 8 July 2002, Durban, South Africa, AU Doc. ASS/AU/Dec 4 (I)

<sup>72</sup> According to Solomon, the operational costs for the OAU were US \$9 million per annum, while the operational costs for the AU are conservatively estimated at US \$30 million per annum. See H Solomon 'Beyond the pageantry: A critical commentary of the African Union' *Africa Institute Briefing Paper* No 12 (2002).

of the Union but also present a financial burden'.<sup>73</sup> There is clearly a need to consider the financial implications of establishing new institutions. This is made all the more necessary by unbecoming behaviour of many states in Africa not to pay their dues to the African regional body on time.<sup>74</sup>

The creation of more institutions and mechanisms at the regional level is also likely to present problems to African states regarding how to allocate resources and personnel to deal with obligations arising from their involvement in these institutions and mechanisms. For example, the APRM is to develop a review procedure, which is similar to the state reporting under the African Charter, thus adding yet another reporting burden on the bureaucracies in the African states.

The problem of proliferation of international institutions is by no means unique to Africa. The international community is currently grappling with the phenomenal proliferation of international tribunals in recent years.<sup>75</sup> However, in under-resourced Africa it should be a source of major concern, since underfunding and understaffing plague the existing human rights institution on the continent. Both the African Commission and its parent institution, the OAU/AU, are currently under a severe shortage of human and financial resources, which restricts their effective functioning. Indeed, Africa has failed miserably to provide adequate resources and to focus its attention on one human rights institution currently in operation, the Africa Commission. How it will cope with several others that will be established in the future is beyond comprehension.

## **6 Rationalising human rights institutions under the AU: Proposal for the creation of a dual African human rights system**

Human rights structures and mechanisms established under NEPAD and the AU will have a similar regional focus and will operate under the auspices of a common international organisation, the AU. They are also likely to operate on the basis of the treaties, standards and regulations that are at least compatible with, if not similar to, one another. This

---

<sup>73</sup> Magliveras & Naldi (n 52 above) 419.

<sup>74</sup> The failure of member states to pay their dues explains lack of financial resources in the OAU. For example, as of June 2002, the OAU owed US \$54.53 million by 45 of its 54 members. See B Ankomah 'African Union in danger of being stillborn' *New African* issue 408 (June 2002) 18.

<sup>75</sup> The issue of proliferation of international tribunals was exhaustively addressed in a symposium with the title 'The proliferation of international tribunals: Piecing together the puzzle'. Some of the papers and reports of the symposium are found in (1999) 31 *New York University Journal of International Law and Politics* 679 *et seq.*

presents ample opportunities for synergies between these two sets of structures and mechanisms.<sup>76</sup> However, this potential will remain untapped unless there is a determined drive to develop strategies for co-operation and co-ordination among these structures and mechanisms.

One strategy that could facilitate the tapping of this synergy potential is the creation of a dual process within the AU: a legal process and a political process akin to the treaty-based and charter-based human rights procedures in the UN system. The UN treaty-based procedures refer to the specific committees of independent experts formally established through the principal UN human rights treaties.<sup>77</sup> These 'treaty bodies' monitor the implementation of the individual conventions by the state parties. The UN charter-based procedures, on the other hand, are independent and *ad hoc* systems of fact-finding outside the treaty framework, which derive their legitimacy from the UN Charter. In other words, these are procedures established by mandates emanating not from treaties but from resolutions of relevant UN legislative organs, such as the Commission for Human Rights or the General Assembly.

It is proposed that the structure of the UN system of human rights could be replicated in an African regional setting. The current African human rights system, which is founded on the African Charter and other African human rights instruments, should be the African Charter-based procedures, the equivalent of the UN treaty-based procedures. The proposed new mechanisms under NEPAD, particularly the APRM, should be part of the Constitutive Act-based mechanism (the equivalent of the UN charter-based mechanism), since it will be founded on the provisions of the Constitutive Act of the AU. The two procedures should complement one another rather than compete with one another. Duplicity will be avoided on account of the complementary nature of the two procedures. The African Charter-based mechanism will be primarily a legal procedure, while the Constitutive Act-based mechanism will be primarily a political process.

There should be a close co-operation and co-ordination between the two proposed procedures. There are legal and pragmatic grounds for

---

<sup>76</sup> Some of the ideas presented in this part, especially those related to synergy, are borrowed from Rosendal's excellent work on overlapping international regimes. In her work, Rosendal relies on the theories from the fields of institutionalism and international relations to develop an analytical framework for overlapping international institutions and applies this framework in relation to the two conventions dealing with the issue of biodiversity. The analytical framework she develops is clearly relevant to the subject matter of this article. See GK Rosendal 'Impacts of overlapping international regimes: The case of biodiversity' (2001) 7 *Global Governance* 95, especially 96–102.

<sup>77</sup> For more information on the UN treaty-based and charter-based procedures, see generally A Pennegard 'Overview over human rights — the regime of the UN' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms: Essays in honour of Jakob Th Moller* (2001) 19.

such co-operation. First, as stated above, both sets of procedures will operate under the auspices of one institution, the AU. Second, the Constitutive Act and the NEPAD provisions, which will constitute the Constitutive Act-based procedures, underpin the socio-economic rights, right to peace and right to development provisions of the African Charter, an instrument on which the African Charter-based procedure is founded.<sup>78</sup> Finally, on a pragmatic level, the alternative to co-ordination in co-operation is not that appealing: considerable double work, splitting of resources, diffusion of focus and erosion of capacity.

Under the proposed arrangement, it is to be expected that there will be a clear demarcation between the two procedures. However, it should also be recognised that there will be instances when boundaries between the two procedures will be blurred. Furthermore, in most cases, seeking synergies and symbiotic linkages between them will enhance the effectiveness of the two procedures. In this regard, ways and means will have to be explored as to how the two processes jointly pursue the common goal of a peaceful, stable and developed Africa. This is particularly the case in relation to issues such as conflict prevention efforts, which will invariably call for both political and legal approaches if optimum results are to be attained.

Ultimately, proper and sufficient thought prior to the creation of new institutions would contribute immensely to avoiding the problem of proliferation and duplication of human rights institutions. I propose the following criteria that ought to be considered before setting up a new human rights structure or mechanism under either NEPAD or the AU: First, what is the added value of the new structure? Second, what kind of legal, financial and administrative implications will the new structure have on states? Third, should the new structure be placed under the African Charter-based procedure or the Constitutive Act-based procedure? Finally, how will the new structure interface with the existing structures and mechanisms?

## 7 Conclusion

There is no denying that NEPAD holds a promise of unravelling the complex web of conflicts, diseases and poverty entangling the African continent at the moment. Besides espousing a philosophy of African ownership in the conception, management and implementation of development plans, NEPAD looks set to avoid pitfalls that doomed

---

<sup>78</sup> See para 11 of the Executive summary of the General Report of a conference on 'Human rights, the African Union and the New Partnership for Africa's Development' African Regional Dialogue 1. Available on the internet at <http://www.unhchr.ch/html/menu6/Africadialog1.htm> (accessed 3 May 2002).

previous regional development plans by synchronising itself with contemporaneous development endeavours on the continent, such as the UN Millennium Declaration.<sup>79</sup> A coherent strategy emanating from this wholesome and integrated approach offers some hope of progress.

However, in addition to this approach, there should be concerted efforts to link up NEPAD with African regional institutions of human rights. The AU is set to establish more institutions than those functioning at present in a period when international organisations all over the world, particularly in Africa, are struggling to meet their financial needs. This paper has highlighted the growing trends towards duplication and proliferation of human rights mechanisms under NEPAD and the AU, and has proposed a cautious approach towards creating new human rights institutions. The creation of a dual complementary set of mechanisms similar to the charter-based and treaty-based mechanisms under the UN system of human rights has been proposed as a way of curtailing the duplication and proliferation of human rights institutions in Africa. There should be a shift of focus from the creation of new institutions to a consideration of ways in which the existing institutions, better funded and resourced, can be made to work towards contributing to overall AU and NEPAD objectives. New institutions should only be created in instances where they will have clear added value.

During their annual meeting held from 8 to 10 July 2002, the OAU/AU Heads of State and Government called upon the African Commission to prepare a report proposing ways and means of strengthening the African system for the promotion and protection of human and peoples' rights within the AU and to submit it in next year's AU session.<sup>80</sup> In preparing its report, the African Commission might wish to reflect on how the new and old structures and mechanisms of the African regional human rights *system* could be *systematised* within the AU in a more consolidated, rational and harmonised manner. Hopefully, ideas expressed in this paper might assist in this vital reflection.

---

<sup>79</sup> For example, NEPAD adopts, in paragraph 68, the International Development Goals agreed under the UN Millennium Declaration. The lists of Millennium Development Goals are available on the internet at <http://www.developmentgoals.org> (accessed 1 July 2002).

<sup>80</sup> Para 2 Decision on the Fifth Annual Activity Report of the African Commission on Human and People's Rights — AHG/Dec 171 (XXXVIII) 38th ordinary session of the Assembly of Heads of State and Government of the OAU, 8 July 2002, Durban, South Africa.