

Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa

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Summary

There is increasing recognition of the role of local government in the protection and realisation of human rights obligations. Recent studies on links between local government, decentralisation and human rights are evidence of this growing recognition. In Africa, there are newly-formed pan-African institutions on local government. Local authorities and national local government associations have also formed a regional association. National ministries in charge of local government have formed a regional inter-ministerial forum on local government and decentralisation. This trend is replicated at sub-regional levels in Africa. While the place and role of local government in international human rights law are not yet fully understood, the formation of these institutions provides an appropriate avenue for the same. The article makes a case for institutional collaboration between these regional institutions, sub-regional institutions and the African Commission on Human and Peoples' Rights in order to achieve more effective rights protection. While this article presumes that such institutional collaboration will lead to better protection of human rights, it makes a further argument that this will only happen where the specific gaps identified are addressed to strengthen the role of local government in human rights.

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1 Introduction

The end of the Cold War announced the 'third wave' of democracy in the 1990s in Africa which was characterised by the replacement of single-party autocracies with multi-party politics and democratically-elected governments.¹ Democratisation was accompanied by decentralisation, taking the form of a transfer of powers and functions to newly-created or existing sub-national units.² Western countries began paying increased attention to a respect for human rights as evidenced by measures such as making donor aid conditional upon human rights enforcement, democracy and the rule of law.³ The process of decentralisation was motivated by, among other factors, the failure of centralised forms of government, adopted in most African states after independence, to achieve the desired national unity and development.⁴ Thus, decentralisation and human rights gained prominence at the same time and have been linked to concepts such as democracy, development and conflict resolution.⁵ Noting this development, a report on the link between local government and human rights states:⁶

Underway since the 1970s, local government reforms have accelerated in the last decade and decentralisation has occurred in numerous countries and in very different regional and political contexts. It is a key plank in the good governance agenda that has been promoted by United Nations and International financial institutions, and because it focuses development priorities and aid at the local level, it is widely seen to be an effective approach for reducing poverty. Also where minorities exist, decentralisation and local authority offer alternatives to political secession and are believed to reduce conflict.

While decentralisation and human rights developed at about the same time in Africa, it is generally acknowledged that the two areas have developed almost in isolation despite having many common features. There is a fairly recent trend to establish conceptual and practical links between the two areas, in this regard, a report by the International Council on Human Rights and Policy (ICHRP) notes that decentralisation and local government are both 'associated with the

¹ Y Fessha & C Kirkby 'A critical survey of subnational autonomy in African states' (2008) 38 *Publius: The Journal of Federalism* 248 249.

² As above.

³ ICHRIP *Local rule: Decentralisation and human rights* (2002) 4.

⁴ See generally B Neuberger 'Federalism in Africa: Experience and prospects' in DJ Elazar (ed) *Federalism and political integration* (1979) 183.

⁵ WS Ayres 'Supporting decentralisation: The role and experience of the World Bank' in Swiss Agency for Development and Co-operation *Decentralisation and development* (1999) 70-85.

⁶ ICHRIP (n 3 above) 1; JW Nibbering & R Swart 'Giving local government a more central place in development: An examination of donor support for decentralisation' <http://www.lux-development.lu/workshop/segou2010/docs/NL%20Donor%20support%20for%20decentralisation.pdf> (accessed 20 October 2010).

ideas of democratic reform and with theories of good government that emerged at the end of the cold war'.⁷ However, in practice, they are separate and independent institutional and legal regimes on human rights and decentralisation.⁸

The African Charter on Human and Peoples' Rights (African Charter) is the primary human rights instrument in the region.⁹ The African Commission on Human and Peoples' Rights (African Commission) is the body that is mandated to monitor the implementation of human rights by state parties to the African Charter.¹⁰ While there is no such primary legal instrument or institution to guide decentralisation and local government in Africa, there are emerging efforts to establish institutional co-operation in local government at the regional and sub-regional levels in Africa.¹¹ These include a pan-African ministerial body on local government and decentralisation, the All-African Ministerial Conference on Local Government and Decentralisation (AMCOD)¹² and a regional local government association, the United Cities on Local Government Association (UCLGA).¹³ While institutional arrangements on human rights in Africa are fairly advanced as compared to institutional arrangements on local government, the latter institutions are gaining ground at the regional and even international level.¹⁴

As will be argued later in this article, local government functions are at the core of the realisation of certain basic and fundamental human rights obligations. Thus, there is a growing realisation of the importance of local government in the implementation of human rights obligations. A step towards institutional links between institutions of local government and human rights may lead to the better protection of human rights in the region. This article discusses the rationale, avenues and possibilities of institutional links between institutions of local government and human rights at the regional level in Africa. While this article presumes that such institutional collaboration will lead to better protection of human rights, it further argues that this can only

⁷ ICHRP (n 3 above) 2.

⁸ J Ahikire *Decentralisation in Uganda today: Institutions and possible outcomes in the context of human rights* (ICHRP working paper) (2002) 8.

⁹ Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29, entered into force 21 October 1981.

¹⁰ Art 30 African Charter.

¹¹ H Hoffschulte 'The UN Guidelines on Decentralisation and the Strengthening in Local Authorities' in B de Villiers (ed) *Review of provinces and local governments in South Africa: Constitutional foundations and practice* (2008) 107-127.

¹² The All-African Ministerial Conference on Decentralisation and Africa: Decentralisation and local democracy (AMCOD) 'African Ministers choose Yaounde their headquarters' <http://allafrica.com/stories/201010040896.html> (accessed 7 October 2010).

¹³ The United Cities and Local Government in Africa (UCLGA); see their website <http://www.uclgafrica.org> (accessed 8 October 2010).

¹⁴ Hoffschulte (n 11 above) 108-116.

happen where such collaboration finally leads to the identification of specific gaps and niche areas for co-operation and collaboration for better rights protection.

This article does not, even for a moment, propose a change to the legal status of local government under international law. Specifically, it does not call for equal rights and treatment for local governments and national governments at the international level. Rather, it argues for the recognition of the growing role of local government at the international level and calls for collaboration between supranational institutions of local government and human rights as a first step towards defining and protecting the role of local government in international human rights. The term 'local government', as used in this article, refers to all sub-national governments, including provinces, unless the specific context specifies otherwise.

The article consists of six sections. The first section introduces the topic and outlines the scope of the article; the second section discusses the basis and rationale for calling for institutional links; the third gives an overview of the current activities of the African Commission that touch on local government and the gaps that can be filled through institutional collaboration; the fifth focuses on pan-African and sub-regional institutions of local government and describes their nature, status, activities in relation to the topic of the article. The last section, by way of conclusion, gives a way forward and suggests specific steps to be taken in order to have appropriate institutional links in local government and human rights for a more effective realisation and protection of human rights.

2 Local government and human rights in Africa: The basis and rationale for institutional collaboration and co-operation

There is a growing realisation of the importance of local government in the implementation of international human rights law.¹⁵ Some fundamental human rights obligations fall within the functional competence of sub-national governments as opposed to national government. For instance, typical local government services and functions, such as water and sanitation services, housing, solid waste management, education and other typical local government functions, fall within the realm of economic, social and cultural rights.¹⁶ Key human rights instruments, such as the African Charter and the International Covenant on

¹⁵ ICHRP (n 3 above) 19-31.

¹⁶ ICHRP *Local government and human rights: Doing good service* (2005) 81-86.

Economic, Social and Cultural Rights (ICESCR),¹⁷ among other instruments, contain provisions the realisation whereof depends on effective local government service delivery. Thus, while national governments sign and ratify international human rights instruments, the primary obligation to implement specific fundamental rights rests with local government or sub-national governments generally.

Further, it has also been recognised that by their very nature and typical functions, local governments are the most appropriate level where the enjoyment and exercise of certain fundamental rights may be enjoyed. For instance, the Preamble to the European Charter of Local Self-Government¹⁸ recognises that the right of citizens to participate in the conduct of public affairs can be exercised most directly at the local level.¹⁹ Public or community participation, a core principle of local government,²⁰ linked to the right to participation in political processes, is also protected under the International Covenant on Civil and Political Rights (ICCPR)²¹ and the African Charter.²²

The increased recognition of the role of local government has perhaps led to yet another emerging trend of constitutional entrenchment and the protection of local government as a distinct sphere or level of government in national constitutions.²³ States previously never entrenched local government in their constitutions and even federal governments that operate on the principle of shared and self rule were no exception.²⁴ The constitutional entrenchment of local government is usually accompanied by a constitutional separation of powers and functions between the national government and local government.²⁵ In some instances, local governments have constitutional mandates, the performance of which leads to the actual fulfilment of international

¹⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27.

¹⁸ Council of Europe 'European Charter of Self-Local government' European Treaty Series 122.

¹⁹ Paras 4 & 5 of the Preamble to the Charter.

²⁰ Eg, sec 154 of the Constitution of the Republic of South Africa provides for 'involvement of communities and community organisations in matters of local government' as one of the objects of local government.

²¹ Arts 1(1) & 25 of the Convention protect the right to participation in government through elections and also freedom to freely determine and pursue their political development.

²² Art 13 African Charter.

²³ An appropriate example is South Africa; sec 40(1) of the Constitution provides that '[i]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and related'.

²⁴ Forum of Federations 'Background paper on the place and role of local government in federations' Cities and Federalism Conference, Rio de Janeiro, Brazil, 6 and 7 May 2002 (prepared by Prof Nico Steytler, Community Law Centre, University of the Western Cape).

²⁵ Steytler (n 24 above) 1-2.

human rights obligations.²⁶ For instance, provincial cultural matters are an exclusive function of provinces in South Africa,²⁷ and such a provision actually implements the right to culture that is provided for under article 17(2) of the African Charter.²⁸ States are therefore beginning to recognise and respect the distinct role of local governments, even in the context of international obligations.

Further, recent years have witnessed the increased participation of local government and other sub-national units in international and cross-border activities.²⁹ This trend may be seen especially in areas such as trade³⁰ and cross-border co-operation between local governments commonly referred to as 'twinning agreements',³¹ covering issues that range from technical co-operation, capacity building, to economic and development assistance.³² This trend calls for an evaluation of the broad principles which govern the involvement of local governments generally in international law matters.

2.1 Rationale for institutional co-operation and links

There are a number of factors, norms and principles that lay a basis for institutional co-operation between pan-African institutions consisting of local government and supra-national human rights institutions. These include the principle of subsidiarity, the need to protect local autonomy as a means of standard setting in regard to local government and human rights, and as a response to the emerging role of local government at the supranational level. Each of these grounds is discussed in more detail in the section below.

2.1.1 Principle of subsidiarity

The *New Oxford dictionary* defines subsidiarity as 'the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level'.³³ There are different modes of the principle of subsidiarity. These include

²⁶ C Bosire 'Local government and human rights in Africa: Forging the necessary institutional links' (2010) 12 *Local Government Bulletin* 23-24.

²⁷ Sch 5 of the Constitution of South Africa on 'Functional areas of exclusive legislative competence' (Part A).

²⁸ Art 17(2) states that '[e]very individual may freely take part in the cultural life of his community'.

²⁹ See generally C Murray & SA Nakhjavani 'South Africa' in H Michelmann (ed) *A global dialogue on federalism: Foreign relations in federal countries* (2009) 212-239.

³⁰ N Steytler 'Cross-border relations of South African provinces' in Nomos Verlagsgesellschaft *External relations of regions in Europe and the world* (2003) 247.

³¹ As above.

³² Steytler (n 30 above) 249.

³³ J Pearsall (ed) *The new Oxford dictionary in English* (1998) 1851, quoted in L du Plessis "'Subsidiarity": What's in the name for constitutional interpretation and adjudication?' (2006) 2 *Stellenbosch Law Review* 207 208.

institutional subsidiarity, jurisdictional subsidiarity and adjudicative subsidiarity.³⁴ However, institutional subsidiarity is the most relevant to this article. Du Plessis defines institutional subsidiarity as ‘the identification and empowerment of an appropriate institutional actor to perform a certain function’.³⁵ He notes further that³⁶

[i]nstitutional subsidiarity as a force in societal life constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society.

The principle of institutional subsidiarity thus calls on national governments to refrain from taking over functions that are best or most appropriately performed by local government. As explained above, there are local government service delivery functions that are linked to the fulfilment of fundamental human rights, such as economic, social and cultural rights. This is an example of local government functions that the principle of institutional subsidiarity seeks to protect. Basic services, such as water and sanitation and solid waste management, require decentralised and efficient services that respond to the particular needs of a community. Decentralised and effective services to a community can be achieved in a more effective manner through local government as opposed to central government.

Further, and as alluded to earlier, local government is best suited to fulfil fundamental human rights such as participation and involvement.³⁷ Indeed, the principle of institutional subsidiarity has been recognised widely by local government instruments such as the UCLGA,³⁸ the Commonwealth Aberdeen Agenda³⁹ and the European Charter on Local Self-Government. The European Charter is considered to have the clearest articulation of the principle.⁴⁰ Article 4(3) of the European Charter reads:

Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirement of efficiency and economy.

Applying the principle of institutional subsidiarity to the context of this article, human rights obligations may be performed more effectively where responsibility for their performance is given to the most

³⁴ For a discussion on the meaning and distinction of the different modes of the subsidiarity, see Du Plessis (n 33 above) 209; J de Visser ‘Institutional subsidiarity in the South African Constitution’ (2010) 21 *Stellenbosch Law Review* 90-115.

³⁵ De Visser (n 34 above) 91.

³⁶ Du Plessis (n 33 above) 209-210.

³⁷ See Preamble to the European Charter on Self-Local Government (n 18 above).

³⁸ De Visser (n 34 above) 98.

³⁹ As above.

⁴⁰ De Visser (n 34 above) 99.

appropriate tier or sphere of government. Institutional collaboration and application of this principle will lead to the identification of areas of human rights that should be left to local government. Such collaboration and co-operation may lead to the development of principles that will guide the application of the principle of institutional subsidiarity in the performance of human rights obligations in Africa. Consequently, regional bodies, such as the African Commission, the UCLGA and the AMCOD, may enforce this principle and ensure that the institutional integrity of local government is protected and respected to achieve a more effective realisation and protection of human rights.

The African Commission may use the principle of institutional subsidiarity in guiding state parties to the African Charter on how to implement the African Charter. For instance, the African Commission may list rights provided for under the African Charter that can best be performed by sub-national governments and encourage states to put in place mechanisms to ensure that sub-national governments are given such opportunities. As a result, the different rights provided for under the African Charter can be performed by different spheres or levels of government based on their respective strengths for the more effective protection and realisation of rights. Using this approach, application of the principle will ensure that the rights contained in the African Charter are realised and protected in a more effective and efficient manner.

However, the application of the principle of subsidiarity for the more effective protection of human rights in Africa can only happen where it is preceded by appropriate and effective institutional links between regional institutions of human rights and local government. Such links entails the sharing of positive experiences on which areas of human rights are best performed by local government and measures that can be taken to strengthen and make them more effective. The UCLGA is, for instance, the most appropriate forum where experiences and perspectives on local government and human rights in Africa can be shared and discussed. Such a discussion may focus on which rights in the African Charter are best left to local government and the role that the African Commission can play to facilitate them. Thus, institutional collaboration and co-operation will be the first step towards such developments.

2.1.2 Protecting local government and local autonomy

Local autonomy ensures that local institutions are able to exercise their powers and functions independently and effectively. Local autonomy entails adequate resources in the hands of local government and adequate control over such resources, utilising them for local development, with accountability lying with the local community as opposed

to the central government.⁴¹ Local governments draw a large part of their funds from transfers from central governments, thus there is a need for proper relations with the national government. The efficiency of local governments therefore depends on the quality and nature of the relationship between the central government and local government, which relationship should enhance autonomy. The ICHR report on Decentralisation and Human Rights notes:⁴²

Local governments remain elements in a larger polity: they are not independent politically and usually economically dependent and they enjoy limited, not sovereign powers. The quality of the relationship between central and local government is crucial to local government's performance; just as a local government's relationship with its electorate is crucial to its sovereignty.

Thus, there is a pressing need to protect local autonomy in order to guarantee the effectiveness of local government. Where the local autonomy has been secured, local governments are in a better position to effectively fulfil fundamental rights that fall within the functional areas of such provinces.

There are cases where local autonomy is threatened by national governments. This impedes the effectiveness of local governments. Some central governments or political leaders pursue centralisation policies that go against the principle of local autonomy.⁴³ Political dominance and interference in local government affairs impede the effectiveness of local government. In Kenya,⁴⁴ Uganda⁴⁵ and Ethiopia,⁴⁶ for instance, the political leadership used different avenues to regain political control of the respective capitals (Nairobi, Addis Ababa and Kampala) in instances where they fell into the hands of the opposition.

Political interference and unwarranted take-overs and control of local government by national governments not only violate core civil and political rights, but may also lead to the disruption of local government services, thus affecting the enjoyment of a range of economic, social and cultural rights. Institutional collaboration will lead to a common understanding and development of strategies on how local autonomy can be protected and promoted. Regional bodies may play a crucial role in protecting local governments from unwarranted political

⁴¹ See generally WO Oyugi 'Decentralisation for good governance and development: The unending debate' (2000) 21 *Regional Development Dialogue* 3.

⁴² ICHR (n 3 above) 39.

⁴³ See eg N Steytler 'One-party dominance and the functioning of South Africa's decentralised system of government' in R Hrbek (ed) *Political parties and federalism: An international comparison* (2004) 159.

⁴⁴ R Southall & G Wood 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 504.

⁴⁵ J Namutebi & C Bekunda 'House passes Kampala takeover Bill' *The New Vision* 4 November 2010 <http://www.newvision.co.ug/D/8/13/736999> (accessed 4 November 2010).

⁴⁶ *Ethiopian Review* 'Ethiopia: Addis Ababa city administration to regain control of police commission' <http://www.ethiopianreview.com/articles/2165> (accessed 27 April 2009).

interference and use the effective realisation of human rights obligations as the basis for their interventions.

2.1.3 Standard setting for local government and human rights in Africa

Local government and human rights practice vary from one African country to another as a result of different factors. Factors such as the political culture, legal system, the level of economic development influence the practice of local government in the area of human rights. While there are varied standards and practices, there is a need for a common approach to local government based on a common agreement. A report on the institutional framework on decentralisation and human rights in Uganda notes that:⁴⁷

A rights-based approach to local government would allow for critical interrogation of people's relationship to local government institutions and the relations that emanate from them. Decentralisation in the context of rights raises issues of people as subjects in the whole question of citizenship and how they are located within the political economic and social processes of local government and relation between them.

Thus, there is a need to have a rights-based approach to local government and decentralisation in Africa. Such an approach will lead to the development of institutional principles upon which the commitment of states to genuine decentralisation can be judged. The link between human rights and local government, even at the national level, remains unclear and, as the report on Uganda notes:⁴⁸

Decentralisation in Uganda has the potential for [the] generation of spaces for citizens demands for services and accountability. However, such concerns have not been framed within the context of human rights which in turn would give it more significance in as far as people's relationship to local government is concerned.

Uganda is one of the few African countries that embarked on an ambitious process of decentralisation under a new constitutional order in the early 1990s.⁴⁹ However, as shown above, the process is beset with challenges. The ICHRP report notes a general weak link between local government and human rights generally.⁵⁰ Thus, there is a need for measures to strengthen the link between local government and human rights. Institutional co-operation between the two areas becomes a significant step in this regard.

While institutional links may lead to the adoption of common regional standards on local government and human rights in Africa, the varying

⁴⁷ Ahikire (n 8 above) 2.

⁴⁸ Ahikire (n 8 above) 8.

⁴⁹ S Makara 'Decentralisation and urban governance in Uganda' unpublished PhD thesis, University of the Witwatersrand, 2009.

⁵⁰ ICHRP (n 3 above) 19-31.

standards of local government and human rights practice from one country to another are a challenge. This is further complicated by the fact that countries in Africa have different legal systems inherited from different colonial regimes.⁵¹ However, there is a basis upon which common standards in local government and human rights can be adopted. The presence of an African human rights instrument and a Commission to monitor its implementation and the emergence of pan-African institutions on local government are critical steps towards discussions on common regional standards on local government and human rights. There are specific opportunities and avenues for cooperation that are actually emerging, for instance, the UCGLA has written to the African Union (AU) leadership, calling for a regional charter on decentralisation and local government.⁵² AMCOD, on the other hand, is recognised as the technical advisory committee to the AU on decentralisation.⁵³ These two regional institutions on local government can thus get together and discuss with the African Commission on how to push the agenda of effective local governments in Africa forward. These developments, discussed in greater detail in the next section of this article, are vital steps towards a discussion of common regional approaches to decentralisation and local government in Africa.

The Council of Europe has a successful history of experience with the European Charter of Local Self-Government.⁵⁴ The Charter entered into force on 1 September 1988 after it had been ratified by the required minimum number of only four nations.⁵⁵ The Charter has since been an important instrument in entrenching democracy in the region. Hoffschulte notes that the Charter has become⁵⁶

... the basic text underlying the democratic reforms and new constitutions of all nations intending to join the Council of Europe. Those states wanting to join the European Union (EU) used the Charter and their transposition into national law to overcome the centralism of old inherited power structures and to build their democracies 'bottom up' by decentralisation and the strengthening of regional and local levels.

The experience of the European Charter was instrumental in the drafting of a World Charter on Local Self-Government that was prepared

⁵¹ These include anglophone Africa (former British colonies); francophone Africa (former French colonies); lusophone Africa (former Portuguese colonies); and the Arab countries in the North.

⁵² UCGLA Memorandum of the United Cities and Local Governments of Africa (UCLGA) to the African Union (AU) presented by the presidency of the UCLGA to His Excellency the Honourable President Olusegun Obasanjo, GCFR, President of the Federal Republic of Nigeria and Chairperson of the African Union in Abuja, Nigeria, 1 November 2005.

⁵³ AU '12th ordinary summit of the AU Heads of State and Government ends today in Addis Ababa' (press release 43/2009).

⁵⁴ Hoffschulte (n 11 above) 113-118.

⁵⁵ Hoffschulte 113.

⁵⁶ Hoffschulte 114.

in 1998.⁵⁷ Based on the experience of the European Charter, the same process can start in Africa and this can lead to the development of common regional standards for local government and decentralisation in Africa. There is a communication already before the AU on the need for a similar instrument in Africa which calls for institutional co-operation between local government and human rights in Africa. Such co-operation and collaboration will set the ground for discussions on a regional charter in Africa.

2.1.4 Emerging 'international role' of local government ('glocalisation')

De Visser explains that '[g]lobalisation has heralded in a shift in political power from the nation state to the supra-national and international levels'.⁵⁸ The resulting factor in this trend is that the factors at play at the international scene are increasingly having an impact on people at the local level. This trend, where international and regional activities impact on the local more than the national level, has come to be referred to as 'glocalisation'.⁵⁹ De Visser further notes:⁶⁰

National boundaries are rapidly losing their importance as criteria on the basis of which investment decisions are made and these decisions are more and more influenced by the standard of services provided by local governments. Hence, municipalities become contenders in global investment competition for investment.

The end result of the trend described above is that local communities and local governments are being connected with the international system and this has a direct impact on local government. There is a need to evaluate the process of glocalisation and its impact on the enjoyment of human rights at the local level. Does glocalisation offer opportunities or challenges to local governments in terms of the realisation of fundamental rights? What is the niche role for local governments in human rights protection in view of the current trend? Appropriate institutional linkages and discussions between the pan-African local government and human rights institutions can start answering some of the questions. Local governments are no longer the institutions that were conceived in the classical sense of local government and there is a need to develop principles to guide this.

⁵⁷ Hoffschulte 113.

⁵⁸ J de Visser *Developmental local government: A case study of South Africa* (2005) 26.

⁵⁹ De Visser (n 58 above) 27 notes that it not clear who coined the term and when. However, he further notes that '[a]t the opening of the Africities Conference 2000, the following remark was made by the Secretary-General of the Union of African Towns, Mr Badreddine Senoussi: "Globalisation should allow local authorities to be the speakers of the people in addressing irregularities."'

⁶⁰ De Visser (n 58 above) 27.

3 Local government and human rights institutions in Africa: Silent co-operation

The African Commission rarely, if ever, engages local governments directly in its work. The African Commission focuses its work on national governments only.⁶¹ Similarly, non-governmental organisations (NGOs) dealing with human rights issues direct most or all of their advocacy efforts at national governments.⁶² The ICHRP report notes that, while some attention may at times be directed to other spheres of government, this happens rarely and is almost exclusively directed at states/regional governments in federal states.⁶³ However, the report further notes that even in such cases, regions/states in a federation are treated as having secondary responsibility in the realisation of human rights.⁶⁴

The deliberate avoidance of lower spheres of government is, however, not unique to the African Commission. The ICHRP report notes the same trend even by UN human rights treaty bodies and experts appointed under special mechanisms. The report notes that 'when UN experts visit countries to investigate human rights, they usually raise complaints with central governments, even if the abuses are being carried out by lower levels of authority'.⁶⁵ States are the primary actors in international law (which international human rights law is part of). National spheres of governments are the primary subjects of international law as they are the ones which negotiate and conclude treaties, thus taking responsibility to implement the obligations at the international level.⁶⁶ Consequently, states are the primary actors and duty-bearers at the international level and supranational human rights bodies such as the African Commission are wont to focus on national governments. This trend is not misplaced as any direct approach to sub-national bodies will go against fundamental tenets of international law such as state sovereignty and non-interference.

Indeed, until the UN Habitat II Conference of 1996 in Istanbul, the UN was reluctant to engage local governments directly in its decentralisation and local government programmes and chose instead to deal with national governments.⁶⁷ There was also initial resistance by national governments⁶⁸ at attempts to have local government representatives participate directly in the conference sessions at UN Habitat

⁶¹ Ahikire (n 8 above) 2.

⁶² As above.

⁶³ ICHRP (n 3 above) 37-39.

⁶⁴ ICHRP (n 3 above) 37.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ Hoffschulte (n 11 above) 110-111.

⁶⁸ As above.

II.⁶⁹ National governments advanced the same argument of non-interference in internal affairs. Hoffschulte notes that the same resistance persisted in later conferences and still continues to be a major challenge, including during the adoption of a World Charter on Local Government.⁷⁰ Even the European Charter on local self-government, whose successful experience inspired the drafting of a World Charter on Local Government, faced initial resistance by member states based on the same argument of 'non-interference in their internal affairs'.⁷¹

However, the UN Habitat II Conference has also been hailed as a 'breakthrough' as local governments were directly engaged during the congress. Hoffschulte notes that 'local authorities were not only recognised as the "strongest partner close to the citizens", but they were also treated as levels of government'.⁷² The European Charter on local self-government continues to provide a useful example of member states. It uses its success as a basis for winning states opposed to a world charter on local government.⁷³

While the African Commission has as yet not directly or substantially engaged local governments, a review of the work of the African Commission shows that the Commission has in the past dealt with substantial issues of human rights that touch on local government. This can be seen when the African Commission considered communications under section 62 of the African Charter, in its examination of state reports and during promotional visits and fact-finding missions by commissioners. There are NGOs whose human rights work and activities touch on local government and decentralisation issues. Participation of NGOs in sessions of the African Commission and other activities of the Commission bring the African Commission into indirect touch with local government.

In *Katangese Peoples' Congress v Zaire*,⁷⁴ the African Commission observed that self-determination, as provided for under the African Charter, can be fully exercised through local government.⁷⁵ In arriving in its decision, the African Commission noted that there were no human rights violations that warranted the exercise of the right to self-determination in a manner that affects the sovereignty and territorial integrity of Zaire, as it was then referred to.⁷⁶ The African Commission proceeded to hold that, in the absence of any violations which justify external secession and fragmentation of the state of Zaire, the region of Katanga had an option of using local government and other

⁶⁹ Hoffschulte 110-111.

⁷⁰ Hoffschulte 110.

⁷¹ Hoffschulte 114.

⁷² Hoffschulte 109.

⁷³ Hoffschulte 113.

⁷⁴ (2000) AHRLR 72 (ACHPR 1995).

⁷⁵ n 74 above, para 4.

⁷⁶ As above.

arrangements, such as federalism, to exercise the right to self-determination as provided for under article 20(1) of the African Charter.

However, while the African Commission noted that the Katanga region could use local government to achieve self-determination, it did not go as far as describing, even at a general level, how same could be achieved. The African Commission never used the opportunity to engage with the place of local government in the realisation of the right to self-determination. A similar trend by the African Commission can be seen even in later communications, such as *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya (Endorois case)*.⁷⁷ While the Commission noted in its decision that the concerned local government authorities⁷⁸ had failed to protect some rights of the Endorois people,⁷⁹ the Commission did not proceed to make any substantive findings and recommendations against the local government institutions concerned.⁸⁰ Instead, the Commission focused its recommendations and follow up on the national government. Thus, the African Commission makes general recommendations which directly impact on local governments of state parties without recognising such recommendations expressly as duties of local governments.

There are also several activity reports which report of meetings between commissioners and officials of ministries in charge of local government officials during promotional visits and fact-finding missions.⁸¹ However, in most of these cases, there is no substantial engagement with local government or sub-national units of government. Thus, it is evident from the instances discussed above that the African Commission has never engaged with or focused on the distinct role that local government can play to ensure more effective protection and realisation of human rights.

Direct and substantial engagement with local governments around the continent presents pervasive consequences as this may be challenged on the basis of traditional norms, such as sovereignty and non-interference in internal affairs. The sheer number of local authorities across the continent can also overwhelm the African Commission if it decides to directly engage with each local government authority on the entire continent. Thus, a proposal for direct and substantial engagement of local authorities with the African Commission presents both legal and practical challenges. However, these legal and practical difficulties do not prevent the need to interrogate the distinct role that

⁷⁷ Communication 276/2003.

⁷⁸ Baringo and Koibatek County Councils.

⁷⁹ *Endorois case* (n 77 above) 159.

⁸⁰ *Endorois case* (n 77 above) 178.

⁸¹ African Commission Report Promotional Mission to the Republic of Mali 9-18 April 2004 9-10.

local governments play in the realisation of human rights and what role the African Commission can play to strengthen this role.

The formation of Pan-African Local Government bodies, such as the AMCOD and the UCLGA, presents an opportunity to better understand and refine the role of local governments. The fact that the two bodies are not local authorities *per se* makes it easier for the two bodies to work with the African Commission without meeting any of the main challenges identified above in order to develop means of strengthening human rights protection at the local level. Institutions similar to the AMCOD and the UCLGA have been formed at sub-regional levels in Africa and can still directly engage with the African Commission with little or no legal and practical difficulties. Ultimately, the African Commission and the pan-African institutions on local government should identify opportunities that can lead to more effective human rights protection at the local level. These institutions can then discuss the broad principles that can guide the African Commission with respect to local government, including if and how the Commission can get into direct contact with local authorities. The next section of the article briefly discusses the initiatives and process that led to formation of these regional and sub-regional bodies on local government.

4 Local government at regional and sub-regional levels in Africa

Pan-African institutions on local government can be classified into two broad categories: local government associations and inter-governmental institutions on local government. While the former draw their membership mainly from individual local authorities and national local government associations (organised local government), the latter are composed of national ministries that are in charge of local governance in their respective countries. An example of an inter-governmental institution of local government is the AMCOD which is composed of Ministers of local government in charge of local government across the continent. The UCLGA is an example of a regional local government association. A similar pattern of institutions is replicated at the sub-regional level in Africa and the next section discusses the main institutions at the regional and sub-regional levels under the two broad categories identified above.

4.1 Regional local government associations

The UCLGA is the continental body that represents local government in Africa at the regional level.⁸² The UCLGA was formed on 18 May 2005 in Pretoria, South Africa, after a merger of the three umbrella

⁸² UCGLA (n 52 above).

regional associations on local government.⁸³ It has established formal institutional links with the AU and has submitted a memorandum of its proposals to the Assembly of Heads of State and Government of the AU, including the adoption of a regional charter that commits member states to devolve their powers to sub-national units.⁸⁴ The UCLGA has a membership of over 40 national local government associations from all regions of Africa and consisting of 2 000 cities on the continent.⁸⁵ The UCLGA has since changed its headquarters to Rabat, Morocco, and enjoys the diplomatic status of a pan-African international organisation.⁸⁶ The AU has expressed its willingness to work with the UCLGA in order to enhance local democracy and other objectives of its formation.⁸⁷

UCLGA is also a founding member of the United Cities and Local Government (UCLG), the global body that represents local governments, and which operates as its regional section in Africa.⁸⁸ The UCLG was formed after calls for a unified local government during the UN Habitat II Congress in 1996.⁸⁹ The UCLG replaced a loose organisational structure that was formed after the UN Habitat II Congress, named the World Association of Cities and Local Authorities Coordination (WACLAC).⁹⁰ The UCLG was also formed after a merger of the major international local government associations into one body under the UCLG.⁹¹

UCLGA's Constitution lists one of its objectives to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁹² The mission statement of UCLGA is, among other things, to 'ensure democracy, equality and respect for human rights at the local level'. UCLGA has organised forums where the human rights situation at the local level has been discussed and has identified the role that

⁸³ The three institutions that were merged were the African Union of Local Authorities (AULA), Union de Villes Africaines (UVA) and the African Chapter of the Unao dos Cidades Lusofono Africana.

⁸⁴ UCGLA (n 52 above).

⁸⁵ See <http://www.uclga.org/pages/content/?&language=EN&id=19> (accessed 2 November 2010).

⁸⁶ As above.

⁸⁷ Assembly of the AU Opening Speech by His Excellency President Olusegun Obasanjo, President of the Federal Republic of Nigeria, Chairperson of the AU at the 5th ordinary session of the AU Assembly, Sirte, Libya, 4 July 2005.

⁸⁸ As above.

⁸⁹ Hoffschulte (n 11 above) 113.

⁹⁰ As above.

⁹¹ UCLG has its headquarters in Barcelona and commands presence in 136 of the 191 member states of the UN. Over 1 000 cities in over 95 countries across the world are direct members and also boast 115 national local government associations representing virtually all the existing local government associations.

⁹² Art 4, para 4.10 of the Constitution of the United Cities and Local Government Association (as amended by the UCLGA Extraordinary General Assembly Kopanong Resort and Conference Centre, Johannesburg, South Africa, 18 September 2008).

UCLGA can play.⁹³ This is the clearest indication that UCLGA is ready for dialogue and institutional collaboration for better and more effective realisation of human rights at the local level in Africa.

There are also significant developments at the sub-regional level. The East Africa Local Government Association (EALGA), based in Arusha, Tanzania,⁹⁴ represents local government in the East African Community. However, unlike UCLGA, EALGA draws its direct membership from the national local government associations of member states of the East African Community (EAC); there are no individual member local government authorities in EALGA.⁹⁵ Apart from EALGA, there are no other sub-regional local government associations. However, sub-regional communities are also coming up with ministerial forums of local government and it remains to be seen whether these will inspire the formation of sub-regional local government associations. However, sub-regional associations are not recognised within the structure of UCLGA and thus do not feature much in this discussion.⁹⁶

4.2 Regional inter-governmental institutions in local government

AMCOD is a regional forum of ministers in charge of local government and decentralisation.⁹⁷ AMCOD was formed after a series of meetings and activities on strengthening local governance.⁹⁸ In its last Special General Meeting on 30 September 2010 in Yaounde, AMCOD agreed on establishing a secretariat in Yaounde, on member states' contribution, an institutional logo and other important institutional arrangements.⁹⁹ AMCOD operates as a technical committee to the AU on matters of decentralisation,¹⁰⁰ thus making AMCOD an expression of the willingness of the AU to engage with local government as a level of government. At the Yaounde meeting, the president of UCLGA

⁹³ During the conference, papers were presented on women's rights in local government in Uganda and Zimbabwe.

⁹⁴ See the website <http://www.ealga.org> for more information (accessed 9 October 2010).

⁹⁵ As above.

⁹⁶ See UCLGA website <http://www.uclga.org/pages/content/?language=EN&Id=26> (accessed 3 November 2010).

⁹⁷ AMCOD (n 12 above).

⁹⁸ See report by the United Nations Public Administration and Development Programme Ministerial Conference on Leadership Capacity Development for Decentralised Governance and Poverty Reduction in Africa and 'All-Africa Ministerial Conference on Decentralisation and Local Government (AMCOD), held at Palais des Congres, Yaounde, Cameroon, 3-4, for detailed information on the forums and activities that led to formation of the AMCOD.

⁹⁹ P Bidjocka 'Decentralisation: Experts deliberate on working document' *CRTV* 30 September 2010 http://www.crtv.cm/cont/nouvelles/nouvelles_sola_fr.php?idFiel d=8002&table=nouvelles&sub=national (accessed 3 October 2010).

¹⁰⁰ AU '12th ordinary summit of the AU Heads of State and Government ends today in Addis Ababa', press release 43/2009.

noted that ‘with the establishment of both AMCOD and UCLGA, the decentralisation policy can now walk on both legs: the central government leg through AMCOD and the local government leg through UCLGA’.¹⁰¹

Similarly, there are efforts to have local government associations and ministerial initiatives on local government at the sub-regional level. In the East Africa region, ministers of local government met on 5 to 6 March 2010 in Uganda and adopted the Munyonyo Declaration on Leadership Capacity Building for Local Governance and Service Delivery in the East African Community.¹⁰² The Declaration recognises the special role of local government in the fulfilment of Millennium Development Goals (MDGs) which mainly hinge on economic, social and cultural rights.¹⁰³ The Declaration committed the participating governments to past initiatives on local government, such as the Aberdeen Agenda and the Kampala Agenda adopted under the Commonwealth Local Government Forum (CLGF).¹⁰⁴ In Southern Africa, the Department of Co-operative Governance and Traditional Affairs (CoGTA) hosted local government ministers from the Southern Africa Development Community (SADC) on 29 April 2009 to discuss a common regional agenda for local government in the sub-region.¹⁰⁵ The SADC Forum has also managed to establish a desk on local government matters at the SADC headquarters in Namibia.¹⁰⁶

5 Opportunities for forging institutional links in local government and human rights

The institutions and activities described above form a basis upon which institutional links and co-operation can be built. Activities through

¹⁰¹ President of the UCLGA, Tarayia Ole Kores, speaking during the extraordinary session of AMCOD on 30 September 2010; see E Kendemeh ‘Africa: Decentralisation – African Ministers choose Yaounde their headquarters’ <http://allafrica.com/stories/201010040896.html> (accessed 5 October 2010).

¹⁰² Adopted during the ‘Leadership Capacity-Building Workshop for Local Governance and Service Delivery in East African Community’ facilitated by UNDP held at the Commonwealth Resort Munyonyo Hotel, Kampala, Uganda, 5-6 March 2009.

¹⁰³ Preamble and main text of the Declaration focused on achievement of MDGs.

¹⁰⁴ CLGF ‘Time for local democracy, the Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance’, adopted during the general meeting of the CLGF, convened in Aberdeen, Scotland on 18 March 2005, following the Third Commonwealth Local Government Conference Deepening Local Democracy, 15-17 March 2005, attended by over 46 countries, including over 20 ministers with responsibility for local government.

¹⁰⁵ See Declaration of SADC Local Government Ministers Meeting, held at Sheraton Hotel, Pretoria, South Africa on 29 April 2010.

¹⁰⁶ IMC Chombo ‘Speech by the Honourable Minister of Local Government, Rural and Urban Development’ in J de Visser *et al* (eds) *Local government reform in Zimbabwe* (2010) xi.

which institutional links can be started include sessions of the African Commission,¹⁰⁷ and AMCOD and UCLGA meetings and forums, such as Africities Conferences.¹⁰⁸ These institutions need to start engaging with the idea of institutional linkages aimed at ensuring better protection and promotion of fundamental human rights. The African Commission has many avenues through which it can engage with pan-African local government institutions. The means available to the African Commission include avenues such as communications, state reporting, promotional visits and fact-finding. Each of these is discussed briefly below.

5.1 State reporting

State parties to the African Charter are required every two years to submit reports to the African Commission on the status of implementation of the African Charter.¹⁰⁹ The African Commission examines the reports submitted and engages state parties in constructive dialogue followed by general recommendations which note positive aspects of the report as well as areas where a state needs to improve in order to comply with the African Charter. This avenue offers the African Commission and state parties an opportunity to involve local government in the process. Firstly, the African Commission may call on state parties to substantially engage local government authorities and their associations to participate in the preparation of state reports under the African Charter. This should especially be encouraged in regard to Charter provisions that are relevant to local government functional areas. Generally, there has been very little or no involvement of sub-national units of government in the preparation of state reports to the African Commission and other treaty monitoring bodies.¹¹⁰

Secondly, the African Commission may recommend that state parties include representatives of local government in state delegations in sessions for constructive dialogue. The participation of local government representatives in constructive dialogue with the African Commission can be extremely useful where the core human rights concerns in a particular state are directly relevant to local government. In such a case, the relevant local government authorities may engage in a productive engagement with the African Commission on how to fulfil Charter

¹⁰⁷ African Commission 47th ordinary session 12-26 May 2010, Banjul, The Gambia http://www.achpr.org/english/_info/47th%20Ordinary%20Session.html (accessed 10 October 2010).

¹⁰⁸ A periodic event organised by UCLGA that brings together the UCLGA membership and other stakeholders on local government in the region. The last Africities Conference was held in Marrakech, Morocco, from 16-20 December 2009.

¹⁰⁹ Art 62 African Charter.

¹¹⁰ Community Law Centre 'South Africa: State of State reporting under international human rights law' reader prepared for the seminar on Promoting constitutional rights through international human rights law: The state of South Africa's state reporting held in Cape Town, South Africa, 22 September 2010.

obligations. The African Commission has, on many occasions, called for as wide participation as possible in the preparation of state reports and direct participation of local government in the process will go a long way to ensuring such participation.¹¹¹

5.2 Communications

The African Commission receives communications from individuals on violations of Charter obligations and also inter-state complaints on violations of the African Charter.¹¹² There are cases where the African Commission has received complaints on issues which relate to local government, for instance, the *Endorois* case, where local government authorities in Kenya had failed to honour constitutional and Charter obligations in respect to the land rights of the Endorois people.¹¹³ County Councils, created under the Local Government Act of Kenya,¹¹⁴ held the Endorois lands in trust for the community and were supposed to utilise the land according to the interests of the Endorois people.¹¹⁵ However, the Endorois people alleged a violation of their rights over their traditional lands.¹¹⁶ However, nowhere in the case and submissions were the relevant local government authorities involved. Submissions of the Kenyan government in the communication were brief, general and devoid of practical and detailed information on which steps, if any, the concerned local authorities took to safeguard the rights of the Endorois.¹¹⁷ The African Commission should use opportunities such as the *Endorois* case to clarify the place, role and extent of the accountability of local government to Charter obligations.

5.3 Promotional visits and fact finding

Commissioners from the African Commission carry out occasional visits to member states. In most cases, such visits are meant to promote the objectives and purpose of the Charter. During such visits, commissioners meet with various government officials of state parties. In some cases, commissioners meet with ministers and ministry officials

¹¹¹ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Journal* 280-283.

¹¹² Arts 47-59 African Charter.

¹¹³ *Endorois* case (n 77 above) 159.

¹¹⁴ Cap 265 Laws of Kenya.

¹¹⁵ Sec 115(1) of the immediate former Constitution of Kenya states that '[a]ll trust land shall vest in the county council within whose area of jurisdiction it is situated'. Subsec (2) further provides that '[e]ach county council shall hold the trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force, and applicable thereto, be vested in any tribe, group, family or individual'.

¹¹⁶ n 80 above.

¹¹⁷ *Endorois* case (n 77 above) 31-32.

in charge of local government.¹¹⁸ Promotional visits and fact-finding missions bring commissioners in close contact with local government and they should use such opportunities to highlight the synergies and need for more institutional collaboration between the African Commission and local government or representatives of local government at the national level.

Fact-finding missions and promotional visits by the African Commission provide an opportunity for the Commission to clarify practical links between local governments, national governments and the Commission for better protection of human rights. For instance, the African Commission may decide to carry out a fact-finding mission to assess human rights situations and the manner and extent to which local governments can be engaged by the African Commission for effective human rights protection. Reports from fact-finding missions which concern local government authorities will go a long way to understanding how the role of local governments can be strengthened.

5.4 Non-governmental organisations, local government and the African Commission

NGOs play an important role in terms of influencing the agenda of the African Commission and have been noted to have a robust relationship with the African Commission.¹¹⁹ NGOs participate in the work of the African Commission through the submission of communications, participating in sessions of the African Commission, the submission of shadow reports and other activities of the African Commission. This is an avenue that can be explored in order to influence the agenda of local government and human rights in the workings of the African Commission. NGOs that have a working relationship with the African Commission can submit communications related to local governments to the African Commission. This will in turn create an opportunity to discuss the nature of responsibility of local governments in the African Commission or at least to clarify the role of the African Commission to ensure that local governments are strengthened to perform their role.

A more desirable step is to grant institutions such as the UCLGA, sub-regional local government associations and even national local government associations, observer status at African Commission sessions. National local government associations and their regional and sub-regional counterparts are not local government authorities *per se* and can thus participate in African Commission activities, in the same way as NGOs and national human rights institutions. These institutions can in turn influence the agenda of the African Commission and

¹¹⁸ African Commission (n 81 above) 9-10.

¹¹⁹ BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 27.

continue the discussion on local government and human rights. Local government associations can also submit shadow reports, communications and participate in civil society forums of the African Commission. Local government associations may, for instance, approach the African Commission where political interference by national governments in local government matters impedes the latter from performing duties that lead to the fulfilment of fundamental human rights. This will in turn lead to a clarification of the role and extent to which the African Commission can go to protect the institutional integrity of local governments in order to promote rights protection.

6 Towards regional institutional collaboration for the effective realisation and protection of human rights at the local level

This article has attempted to make a case for institutional links between pan-African institutions for local government and the African Commission. In so doing, the article discussed the rationale and justification for such institutional collaboration and links. The motivation behind building such institutional links is to develop strategies for more effective protection of human rights at the local level. However, there is a need for more reflection on how institutional collaboration can be achieved and how this can lead to better protection of human rights. The ICHRP report notes that 'human rights provide a helpful and practical approach for solving some of the difficulties and disputes regarding social and economic development that local and central authority confront'.¹²⁰ Institutional collaboration at the regional level will lead to a better understanding of the complimentary role that local authorities may play in the protection and promotion of human rights in the region.

As discussed above, the African Commission has avenues through which institutional links can be built. Apart from the traditional avenues available for engaging issues of local government and human rights, such as communications and state reports, the African Commission may decide to employ special mechanisms. A special mechanism, such as the appointment of a Special Rapporteur on Local Government, Decentralisation and Human Rights, can be a significant step towards addressing this. From the cases and experiences discussed above, it is clear that even the African Commission needs to improve its approach to issues of local government and human rights. The appointment of a Special Rapporteur can lead to the clarification of possible areas of convergence and co-operation. The Special Rapporteur can also give broad

¹²⁰ ICHRP (n 3 above) 41.

guidance on how such collaboration can lead to better protection of human rights.

The establishment of a permanent Secretariat for the AMCOD is another important development in institutional collaboration on local government and human rights in Africa. This is because the AMCOD has the status of a technical committee on decentralisation matters to the AU. Given its close link to UCLGA and its commitment to local democracy and governance, the AMCOD is definitely an important lobbying point in AU structures. The AMCOD can easily lead the process of a regional instrument on decentralisation and local government, given its status in the AU and its proximity to the AHSG. However, there is a need for institutional collaboration between the AMCOD, UCLGA and the African Commission for further strategies. Human rights and democracy are core concerns for all these institutions and institutional collaboration will definitely lead to further strategies on how to strengthen and achieve local democracy and the effective realisation of human rights in the region.