

From mandates to economic partnerships: The return to proper statehood in Africa

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Summary

The concern over state strength has since the end of the Cold War under the intellectual dominance of economists identified political institutional capacity as the most critical variable in development. This concern, also known under a variety of other names, such as 'governance' or 'state and institutional capacity', has in the meantime become the subject matter of a number of international and regional efforts. These efforts are aimed at promoting the idea of the primacy of the state in sustaining peace and security, the flourishing of civil society and the private sector, and at creating an enabling environment for sustainable growth and development, thereby ensuring a more equitable society. This article examines the potential role of regional mechanisms, such as the African Peer Review Mechanism and the mechanisms created by the Cotonou Agreement, in the return to good governance and proper statehood in Africa.

1 Introduction

The concern over state strength, writes Fukuyama in 2004, has since the end of the Cold War under the intellectual dominance of economists identified political institutional capacity, and not economics, as the most critical variable in development.¹ This concern, also known under a variety of other names, such as 'governance' or 'state and institutional capacity', has in the meantime become the subject matter of a number of international and regional efforts²

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¹ F Fukuyama *State-building, governance and world order in the 21st century* (2004) 21-22.

² Economic Commission for Africa *African Governance Report* (2005) <http://www.uneca.org> (accessed 18 October 2006).

to advance the emerging consensus on the primacy of the capable state to sustain peace and security, promote the flourishing of civil society and the private sector, create an enabling environment for sustainable growth and development, and ensure a more just and equitable society.

Most notable amongst these efforts are the World Bank's reports on the building of effective states (2005),³ on governance indicators (2006)⁴ and on policy discussions in respect of fragile states (2006),⁵ the Economic Commission for Africa's African Governance Report (2005),⁶ Tony Blair's Commission for Africa Report (2005),⁷ the European Union's (EU) Strategy for Africa (2005)⁸ and the joint statement by the European Parliament, Council and Commission on Development (2006),⁹ also known as the European Consensus on Development, which will find application in terms of the new economic partnership agreements of the post-Lomé economic development arrangements between the EU and the African, Caribbean and Pacific (ACP) states. In these documents and in commentaries on the subject matter, Africa draws much of the interest because it is the only region that lags behind in reaching the millennium development goals and it has the largest concentration of states considered weak or dysfunctional.

The new framework for and ensuing debate on development aid and state capacity encapsulated in the above documents are largely shaped by historical events associated with a specific phase in the formation of statehood, the subsequent discontent with inferior accomplishments in many fields and the post-Cold War unease about the growth in multi-faceted threats to international peace and security. In dealing with these matters in the pages that follow, it must also be taken into account that there is a body of opinion that divides itself on the way in which dysfunctional states should be saved by either rejecting most rescue attempts by the West as forms of colonialism in disguise, resting, as in the case with the mandate and trusteeship systems, on notions of paternalism and cultural superiority, or by unequivocally arguing for rehabilitated forms of trusteeship over African states that face increasing difficulties in performing basic governmental functions and in delivering

³ World Bank Task Force on Capacity Development in Africa Building Effective States, Forging Engaged Societies (2005) <http://www.worldbank.org> (accessed 15 October 2006).

⁴ D Kaufmann *et al* 'Governance matters v aggregate and individual governance indicators for 1996 — 2005' <http://www.worldbank.org> (accessed 15 October 2006).

⁵ In World Bank parlance, these states are referred to as Low-income Countries under Stress (LICUS). See <http://www.worldbank.org/eig/licus/findings.html> (accessed 20 October 2006).

⁶ n 2 above.

⁷ 'Our common interest' Report of the Commission for Africa (2005) <http://www.commissionforafrica.org> (accessed 10 October 2006). See especially ch 4 and 5 of the report.

⁸ European Commission Document COM (2005) 489 of 12 October 2005.

⁹ OJ 2006/C 46/01 of 24 February 2006.

essential services to their citizens.¹⁰ In this latter category, it is sometimes bluntly stated that what much of Africa needs is a form of 'disinterested neo-colonialism', which, although it does not stand much chance of acceptance, must 'in the absence of an alternative ... be considered'.¹¹ Grand theories in the former category are often far removed from the needs of those who die at the hands of their own governments and the time has perhaps come to face things as they are.

What should also be understood from the start is that the prospects of the newly envisaged economic partnership agreements between the ACP countries and the EU could lose ground and legitimacy against other forms of regime change if accomplishments keep on being spiced up by diplomatic language and placating phrases, while in reality the millennium goals, or any other goals for that matter, keep on drifting further away. The Dayton Peace Agreements, bringing the bloody Yugoslav conflict to an end, should also serve as a further reminder that obstinate parties to an agreement can be made to accept the terms and conditions thereof and that the implementation of such agreements can be very weak.¹² For things to be put into historical perspective and to have some grasp of the nature and scope of the issues involved in this new phase in development aid relationships, it is perhaps useful to first have a glimpse of some past events and of the resulting consequences and challenges.

2 Historical precursors

There is a general tendency, not wholly incorrect, to explain the international supervision arrangements under the mandate system of the League of Nations¹³ and the trusteeship version thereof under the United Nations (UN) Charter¹⁴ with reference to moral convictions infused with humanitarianism or natural law ideals of justice, coupled with the force of the political self-determination dogma of the twentieth century.¹⁵ After all, both article 22 of the League Covenant and article 73 of the UN Charter applied the principle of the well-being and development of peoples not yet being able to govern themselves properly as an

¹⁰ See, eg, R Gordon 'Saving failed states: Sometimes a neocolonialist notion' (1977) 12 *American University Journal of International Law and Policy* 903.

¹¹ W Pfaff 'A new colonialism? Europe must go back to Africa' (1995) 1 *Foreign Affairs* 2 3.

¹² PC Szasz 'The Dayton accord: The Balkan peace agreement' (1997) 30 *Cornell International Law Journal* 760.

¹³ See art 22 of the Covenant of the League of Nations (1919). See also D Rauschnig 'Mandates' in R Bernhardt (ed) *Encyclopedia of public international law* (1997) 280.

¹⁴ See arts 73-91 of the UN Charter (1945). See also D Rauschnig 'United Nations trusteeship system' in R Bernhardt (ed) *Encyclopedia of public international law* (1983) 369.

¹⁵ See also N Tsagourias 'Humanism and the mandates system: Its modern revival' in A-Ch Kiss & JG Lammers (eds) *Hague Yearbook of International Law 2000* (2001) 97.

orientation for what both arrangements were designed to achieve. In the *International Status of South West Africa* case, the International Court of Justice ruled that the 'mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilisation'.¹⁶

However, from the vantage point of the transformation of international affairs in the twentieth century, the supervision arrangements in both instances were an integral part of the new ideas on collective security and the institutionalisation of mechanisms for international co-operation in every aspect of life — political, economic, social, technical and cultural — which might otherwise be a cause for conflict and strife.¹⁷ It is therefore no coincidence that article 76 of the UN Charter, in particular, lists the furtherance of international peace and security as the first basic objective of the trusteeship system,¹⁸ followed by the promotion of the political, economic, social and educational advancement of the inhabitants of the trust territories, respect for human rights and fundamental freedoms, and equal treatment in economic and commercial matters for all members of the UN.

Whether we talk about mandates or trust territories, or, in more contemporary terminology, bring up the security and development risks associated with weak, failing, failed, fragile or dysfunctional states as a security and development problem,¹⁹ the golden thread that runs through all these cases is the issue of good governance, or rather the lack thereof. Weak governance, Fukuyama points out,²⁰

undermines the principle of sovereignty on which the post-Westphalian international order has been built. It does so because the problems that weak states generate for themselves and for others vastly increase the likelihood that someone else in the international system will seek to intervene in their affairs against their wishes to forcibly fix the problem. Weak here refers to state strength and not scope . . . meaning a lack of institutional capacity to implement and enforce policies, often driven by an underlying lack of legitimacy of the political system as a whole.

Through time this issue has found expression in different terms, despite the fact that, during the different historical periods, layers of considerations could have served as inter-relating factors for the forces that eventually gave shape to the mandate, trusteeship and self-determination ideas.²¹ Some examples may suffice.

¹⁶ *International Status of South West Africa* 17 ILR (1950) 47 49 50.

¹⁷ See *inter alia* A Fleury 'The League of Nations: Toward a new appreciation of its history' in MF Boemeke et al (eds) *The Treaty of Versailles: A reassessment after 75 years* (1998) 507 508.

¹⁸ See also CE Toussaint *The trusteeship system of the United Nations* (1956) 54.

¹⁹ See also A von Bogdandy et al 'State-building, nation-building and constitutional politics in post-conflict situations: Conceptual clarifications and an appraisal of different approaches' (2005) *Max Planck Yearbook of United Nations Law* 579.

²⁰ Fukuyama (n 1 above) 96.

Shortly after the outbreak of World War I, a rather prophetic article on armaments, nationalist wars, hegemonial powers and a commonwealth of states appeared in *Round Table*, one of the oldest international affairs journals, in which the following observation was made:²²

If we look at it from the point of view of the whole world, the government of dependencies is obviously necessary in the present stage of human development. . . . In all these cases the only course consistent with human progress is for a civilised government, strong enough to control the foreigner, to step in, restore law and order and justice, and set to work to lay the material and moral foundations on which the structure of civilised self-government may eventually be built.

In 1931, the Permanent Mandates Commission took the bold step to spell out that independent statehood can only be claimed if a political entity is equipped with a properly constituted government and administration capable to ensure the functioning of regular public services, is in a position to maintain its own territorial integrity and political independence, can enforce public peace and security throughout its territory, can secure the financial resources needed for the regular functioning of the state, and possesses a legislative and judicial organisation that could mete out justice to all on a continuous basis.²³ No less is this the concept that also underlies article 4(2) of the UN Charter, which requires for UN membership the capacity and willingness of states to carry out the obligations they have assumed in terms of the UN Charter.

It is now a historical fact that these considerations were largely ignored during the decolonisation frenzy. The classical example remains General Assembly Resolution 1514(XV), which stated categorically that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.²⁴ By stigmatising the range of considerations that could co-determine the quality and sustainability of political governance as something more apparent than real (pretext), the resolution conveniently foreclosed the question on the content and substance of political rule that was taking shape under the self-determination campaign. Ironically, this was also the script for the coming into being of states whose sovereignty and political independence were more apparent than real, and eventually they became the prime violators of the very codes of conduct on

²¹ See also N Matz 'Civilisation and the mandate system under the League of Nations as origin of trusteeship' (2005) *Max Planck Yearbook of United Nations Law* 47 67.

²² *The Round Table* (1915/16) vol VI 'Harvest of the war' 1 12 13.

²³ *Commission Permanente des Mandates Procès-Verbale de la Vingtième Session*, 10 December 1931, No C 422 M 176 229.

²⁴ GA Resolution 1514 (XV) of 14 December 1960 para 3. See also D Rauschnig 'Das Ende des Treuhandsystems der Vereinten Nationen durch die Staatwerdung der ihm unterstellten Gebiete' (1965) *12 Jahrbuch für internationales Recht* 158 176.

non-intervention and human rights protection the General Assembly so energetically developed for the old colonial powers.²⁵

Clapham's striking assessment of these developments warrants emphasis:²⁶

The pretence that formally independent states should be treated 'as if' they possessed the full attributes of sovereignty, even if they evidently did not in fact do so, was used to cover the cracks in the façade, under the assumption that these cracks would eventually be sealed, and that artificial states would solidify into the real thing. Both superpowers and former colonial powers helped to maintain the states for whose protection they assumed responsibility, by means of diplomatic support, economic aid and, if need be, direct military intervention. These state-supporting activities were condoned and indeed encouraged by Third World international organisations, despite their general condemnation of 'imperialism', through the adoption of a doctrine of sovereignty that upheld the power of the government of any particular state, and recognised the right of that government to call on external assistance for its own protection. In the process little attention was given to the domestic structures of the state itself or, in the grossest cases, to the levels of repression and corruption that it embodied.

A familiar weakness in the African state-formation process, it is said, was the misfit between the indigenous foundations for statehood and the colonial-imposed government structures, coupled with historically too brief a period of engagement for external forces to build and develop institutional structures.²⁷ However, whatever the social, political and cultural circumstances, one of the decisive causes of the post-colonial failures in African statehood was the politically and internationally forced abandonment of developing the erstwhile colonies 'to the point of satisfying classical positive criteria of sovereign self-government', with the result that, to become a state, former colonial status and the 'evident desire of the population to be independent' at the expense of 'all other considerations' sufficed.²⁸ The irony that ensued from this was that decolonisation, instead of becoming the apotheosis of universal statehood in the post-war years, introduced its decline with the result that:²⁹

²⁵ See *inter alia* GA Resolution 2131 (XX) Rev 1 of 14 January 1966 and GA Resolution 2144 (XXI) of 26 October 1966.

²⁶ C Clapham 'The challenge of the state in a globalised world' (2002) 5 *Development and Change* 775 782.

²⁷ C Clapham 'The global-local politics of state decay' in RI Rotberg (ed) *When states fail: Causes and consequences* (2004) 77 85. See also A Mazrui 'Africa entrapped: Between the protestant ethic and the legacy of Westphalia' in H Bull & A Watson (eds) *The expansion of international society* (1984) 589; H Bull 'European states and African political communities' in Bull & Watson (above) 99.

²⁸ R H Jackson *Quasi-states: Sovereignty, international relations and the Third World* (1993) 17 18.

²⁹ Clapham (n 27 above) 82.

There are now significant areas of the world in which the existence of a state is little more than a pretence, maintained by the international system because it lacks any intellectual or legal framework other than statehood through which to understand and cope with developments on the ground. Legal fictions are of course a common place, in both domestic and international law, but they need to be recognised for what they are.

Two further examples illustrate the point made above. The first relates to Afghanistan, in which case the UN also had to uphold the illusion of statehood in order to make it possible to deal with a situation in terms of the Charter and to hold the incumbent 'government' responsible for enforcing UN resolutions. The case in point is Security Council Resolution 1267 of 15 October 1999, which, in the Preamble, reaffirmed the Council's 'strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan. . .'.³⁰ The purpose of this and other resolutions was to force the Taliban to discontinue giving sanctuary and assistance to a network of terrorists, including Al Qaida.³¹ At the time of these efforts, one part (approximately 90%) of Afghanistan was controlled by the Taliban, a dictatorial, fundamentalist, and drug-dealing religious clan, the other by tribal warlords caught in a mediaeval time-warp. The view, mainly held by non-governmental organisations (NGOs) that the Afghan 'state', 'formal justice system' and 'society' were destroyed by two decades of war before the United States removed the Taliban by military force after September 11, is wrong. The more accurate view is that³²

even before the war the Afghan state (*sic*) was exceedingly weak and not properly equipped for the administration of the country and the delivery of services to its citizens. . . . International assistance to the Afghan transitional process must therefore not 'merely' aim at restructuring governmental structures, but must start from the assumption that effective governance in the modern sense has never existed, even before the war. . . . It is thus not the reconstruction of formerly existing state structures that we are faced with, but in some sense the initial act of creation of the *political* community that transcends pre-modern ethnic, linguistic, religious and geographic loyalties.

The second example is Security Council Resolution 1725 of 6 December 2006 which deals with the escalating violence in Somalia even after the establishment of an internationally recognised but powerless transitional government, which included former warlords who, through their reign of terror, made ordinary government impossible since the

³⁰ See also SC Resolution 1333 of 19 December 2000, Preamble para 2.

³¹ On international law issues, see R Wolfrum & CE Philipp 'The status of the Taliban: Their obligations and rights under international law' in (2002) *Max Planck Yearbook of United Nations Law* 559.

³² E Afsah & AH Guhr 'Afghanistan: Building a state to keep the peace' in (2005) *Max Planck Yearbook of United Nations Law* 373 376. The conditions that existed before the US military offensive against the Taliban in 2002 are very much still in place. See FP Kühn 'Afghanistans schwieriger Weg zur Stabilisierung' in (2005) *Friedensgutachten* 60 62-64. See also SC Resolution 1662 of 23 March 2006 para 18.

early nineties. By all standards Somalia is a failed state, yet in the Preamble of the resolution, the Security Council *reaffirmed* its 'respect for the sovereignty, territorial integrity, political independence and unity of Somalia'. What the Security Council affirms here is far removed from the real state of affairs showing an embattled 'government' militarily, too weak to sustain an armed resistance against the militant Union of Islamic Courts without the large-scale military assistance of neighbouring Ethiopia.³³ But some entity must be the addressee of even the weakest international response to a crisis and a fake sovereign state will do just fine in the circumstances.

3 The return to first principles

The great irony of all this is that, while questions of effective governance and institutional capacity were blown away by the winds of change Harold MacMillan³⁴ warned about in the sixties, the international and regional communities of states were forced by subsequent events to return to this fundamental question and to confront it head-on. Even in the 2001 base document of the New Partnership for Africa's Development (NEPAD), it was acknowledged that post-colonial Africa inherited — by African leaders' own demands — 'weak states and dysfunctional economies that were further aggravated by poor leadership, corruption and bad governance', with the result that today 'the weak state remains a major constraint to sustainable development' and one of 'Africa's major challenges is to strengthen the capacity to govern and to develop long-term policies'.³⁵ This return to first principles was brought about mainly by two events: the unhappy experiment with economic reforms in developing countries since the seventies and, more recently, the concern with the interconnectedness between fragile or dysfunctional states and questions of international peace and security. The interesting aspect is that the pre-conditions for statehood and the question of state capacity, forgotten in the text of article 4 of

³³ See report of the Special Representative on Somalia in UN Doc SC 8930 of 26 December 2006; *Frankfurter Allgemeine Zeitung* 27 December 2006 1 3; *Neue Zürcher Zeitung* 27 December 2006 1 2.

³⁴ In 1960, the British Prime Minister, Harold MacMillan, gave his famous 'winds of change' speech in the South African Parliament in which he made the following pertinent observation: 'It is a basic principle of our modern Commonwealth that we respect each other's sovereignty in matters of internal policy. At the same time we must recognise that in this shrinking world in which we live today the internal policies of one nation may have effect outside it. We may sometimes be tempted to say to each other, "Mind your own business", but in these days I would myself expand the old saying so that it runs: "Mind your own business, but mind how it affects my business too".' See H MacMillan *Pointing the way* (1972) 473.

³⁵ New Partnership for Africa's Development (NEPAD) paras 2 & 4, adopted on 23 October 2001 in Abuja, Nigeria and accessible at <http://www.nepad.org> (accessed 31 March 2007).

the UN Charter under the domineering influence of post-colonial sentiments, were forced onto the world scene towards the beginning of the nineties, not so much through the efforts of the main political organs of the UN, but through the policy and research papers of international and regional donor institutions.

Already towards the end of the eighties a World Bank Report, co-produced by a large number of African researchers, acknowledged that the successful transformation of African economies is not only dependent on sound macro-economic policies and an efficient infrastructure. The root cause of weak economic performance, the report finds, has been the failure of public institutions. Thus, it was concluded that:³⁶

Underlying the litany of Africa's development problems is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. In self-defence individuals have built up personal networks of influence rather than hold the all-powerful state accountable for its systemic failures. In this way politics becomes personalised, and patronage becomes essential to maintain power.

In the wake of new economic and security challenges after the end of the Cold War, the UN's Committee for Development Planning came to a similar conclusion as is clear from the following excerpt:³⁷

In many developing countries, economic reforms and economic development are made impracticable by an unfavourable political process and mode of governance. There are countries where there is a lack of transparency in government decision-making, a lack of government accountability to the populace, and the denial of fundamental human rights to large segments of the population. Such situations are attributable to vested interest groups wielding economic and political power, averse to social change and broad-based economic progress for fear that their own particular interests would be undermined.

In both instances, what seems to have been identified as a core concern is the *behaviour* and *conduct* of politicians and bureaucrats, which explains the observation that '[p]ublic officials in many African countries have too often behaved in unpredictable and corrupt ways, injecting a measure of uncertainty into economic incentives, property rights and governmental laws and regulations so as to discourage potential investors from being willing to put their capital at risk'.³⁸ This realisation also

³⁶ World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1989) 60 61.

³⁷ UN Committee for Development Planning *Poverty alleviation and sustainable development: Goals in conflict* (1992) 5 6. See also K Ginther & PJJM de Waart 'Sustainable development as a matter of good governance: An introductory view' in K Ginther *et al* (eds) *Sustainable development and good governance* (1995) 1.

³⁸ Committee for Development Planning Report (n 37 above) 45.

led to the abandonment of the idea that the need for a steady and consistent economic policy sometimes justifies the acceptance of authoritarian regimes which could provide the institutional stability for economic policy adjustments to be kept on a consistent course.³⁹ With the focus more on actual decision-making relationships than on formal institutional structures and roles as a function of good governance, certain attributes and capacities of government authorities in such states have turned out to be highly problematic. Not only were the post-colonial state systems artificial and highly elite-centred constructs and weak in relation to their external environments, but also too heavy with oversized and inefficient executive, bureaucratic, military and security establishments. In addition, legal and public institutions were subordinated to the interests of ruling elites that could not bridge the gap between the lack of skills, resources and knowledge on the one hand and the demands of modern government and the exigencies of the international environment on the other.⁴⁰

In a more recent report, the Committee, renamed in 1998 as the Committee for Development Policy, affirmed the emergence of good governance as a condition for development assistance, but also brought up the lack of consensus on the concept's core meaning and how it could be applied in practice.⁴¹ Perhaps what should be stated at the outset is that one should avoid equating effective governance with good governance — dictatorships can also be effective — or democratic governance, especially of the kind we find on the African continent, with effective governance. South Africa is a case in point in the latter category. Although the government might qualify as democratically composed, it is ineffective in several core respects, most notably with regard to law enforcement, a core function of any state which wants to be called by that name.⁴²

In any event, a helpful starting point on the different meanings of the concept of governance is to be found in the distinction drawn by the Committee between the academic and donor-driven discourses on the matter. Under the former, the concept of governance relates to the way in which power and authority relations can be explained by understanding institutional links between state, civil society and the private sector. The donor-driven discourse, on the other hand, focuses on

³⁹ n 38 above, 58.

⁴⁰ n 38 above, 63.

⁴¹ Committee for Development Policy *Poverty reduction and good governance* (2005) 9.

⁴² Other African 'democracies' find themselves in a similar position. In a recent study it was concluded that there is a 'lack of capacity by governments to develop and implement effective counter measures to stem the growth in organised criminal activity. This inability to act against criminal networks is exacerbated by the overall weakness of state institutions, civil society and the media.' See G Wannenburg *Africa's Pablos and political entrepreneurs: War, the state and criminal networks in West and Southern Africa* (2006). See also W Reno *Warlord politics and African states* (1998).

questions relating to the accountability of state structures, due process of law and policy effectiveness.⁴³ The Committee itself seems to be comfortable with both,⁴⁴ but adds two further perspectives. The first is that the question about what constitutes *good* governance is embedded in the values and standards of conduct that are postulated by the defining institutions or actors. The second is that, since government is also instrumental, the question about it being good or bad must be linked to what is achieved or not achieved in terms of national and international policy goals.⁴⁵

The issue about the cultural embeddedness of what constitutes good governance raises the question about universally applicable norms versus situation-specific and, often, relativistic assessment of good governance practices. Under the democratic and political governance initiative, the NEPAD document has opted for what is called the 'global standards of democracy' as guideline for the commitment to establish proper conditions for sustainable development. The introductory part reads as follows:⁴⁶

It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the New Partnership for Africa's Development, Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, fair, open, free and democratic elections periodically organised to enable the populace to choose their leaders freely. The purpose of the Democracy and Governance Initiative is to contribute to strengthening 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.

In the case of human rights guarantees, the sentiments about global standards were recently also exhibited in the General Assembly's Third Committee in a draft resolution sponsored by Belarus and Uzbekistan, countries known for their human rights abuses, and adopted by a recorded vote of 77 states in favour and 63 against, with 26 abstaining.⁴⁷ In the Preamble it was affirmed that 'all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. . .'⁴⁸ However, it was added that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.⁴⁹

⁴³ n 41 above, 9 10.

⁴⁴ n 41 above, 10 11.

⁴⁵ n 41 above, 11.

⁴⁶ n 35 above, paras 79 & 80.

⁴⁷ GA/SHC/3873 of 16 November 2006, annex VIII.

⁴⁸ UN Doc A/C 3/61/L.31/Rev 1 Preamble para 2.

⁴⁹ As above. See also operative paras 3 & 5.

The elements or components of good governance and democracy mentioned in the NEPAD commitment above have become fashionable phrases in regional⁵⁰ and international documents dealing with the subject matter of good governance. However, the question remains about their meaning and realisation at the national level, especially in political, historical and cultural contexts where the understanding of governmental authority is undiluted by politically and culturally internalised constraints on the accumulation of power. The call for a more effective state machinery can be understood to mean more power to achieve narrow elite-centred objectives; majority rule without a concept of the republican idea of the state (formal democracy) could lead to absolute majority sovereignty; the rule of law may become the rule of the strongest group in the absence of effective checks and balances; a multi-party system with weak political opposition formations and the lack of differentiated civil institutions throughout the different strata of societal relationships could facilitate the bypassing of internal controls and coalition building behind a façade of political pluralism and competitiveness; etc.⁵¹ Commenting on the rise of illiberal democracies under the spectacle of formal, internationally monitored elections, Zakaria⁵² has made the following compelling conclusion:

There are no longer respectable alternatives to democracy; it is part of the fashionable attire of modernity. Thus the problem of governance in the 21st century will likely be problems *within* democracy. This makes them more difficult to handle, wrapped as they are in the mantle of legitimacy.

Against this background, certain main areas can be singled out where reform efforts in terms of the new initiatives on establishing good governance practices will be most critical, and most challenging at the same time.

⁵⁰ See eg the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I and the ECOWAS Protocol on Democracy and Good Governance, Protocol A/SP1/12/01 adopted in Dakar on 21 December 2001, especially arts 1 & 33.

⁵¹ See also African Governance Report (n 2 above) 203: 'Opposition parties in many African parliaments are very weak and could hardly engage the government in serious debates on major governance issues and policy options. Opposition party members in parliament are usually co-opted in legislative debates by the dominant or ruling party, weakening legislative deliberations and the capacity of members of parliament to effectively articulate the diverse interests of the people they serve.' For more analyses on these phenomena, see Freedom House *Freedom in the world country ratings 1972—2006* (2006) <http://www.freedomhouse.org> (accessed 27 November 2006); L Kekic *The world in 2007: The Economist Intelligence Unit's Index of Democracy* (2006).

⁵² F Zakaria 'The rise of illiberal democracy' (1997) 6 *Foreign Affairs* 22 42.

4 Main areas of concern and the challenges reform efforts could face

4.1 The executive and the public service

The recognition by the World Bank in 1989 that the economic crisis in Africa has deepened despite the efforts of the development community in the past, has led to the introduction of capacity building programmes with a view to address the failures caused by weak public institutions in Africa.⁵³ Amongst the range of governance aspects identified as in need of reform was, quite correctly, the civil service, a matter in respect of which the Bank's past reform efforts were equally disappointing. In putting the finger on this sore, the Bank has also struck at one of the fundamental problems with statehood in Africa. Subsequently, in 1994 the Africa Technical Department of the World Bank issued a report on the issue of civil service reform in which some key characteristics of the state-administrative environment in Africa were analysed by introducing the concept of the patrimonial state which emerged out of the superimposition of modern state and governance systems on traditional institutions based on kinship, ethnic and village linkages.⁵⁴ This opened the way for routes of entry into the public service and a whole range of official and unofficial fringe benefits based on dependency and reciprocity associations which could not but end in a coincidence of private and state interests. The report's findings on this phenomenon are important enough to quote extensively:⁵⁵

Generally the first order of business for any high-level official when taking office is to surround himself or herself with loyal friends, family members and supporters. The goal is to create personal and extra-legal bonds . . . Those who co-operate become bound by collusion to their superiors who may, at any time, denounce and demote them should they show signs of 'undue' independence or non-compliance. Each office/department becomes, therefore, dominated by the all-powerful group loyal to the 'boss' who are all linked by an all-embracing informal network of reciprocal claims and clandestine understandings and personal interests. Formal obligations of administrative duties are therefore almost irrelevant and effectively undermined. This is the reign of the 'in' crowd. Although appointments, promotions and transfers may nominally follow the formal administrative rules and needs, their latent but real purpose is to change the balance of power and financial position of incumbents and their allies. . . . Recruitment among the political elite and the bureaucracy constitute, therefore, the most privileged and secure way of building power, wealth and access to social services.

⁵³ n 36 above, xi.

⁵⁴ M Dia *A governance approach to civil service reform in sub-Saharan Africa* (June 1994), World Bank Technical Paper No 225 12.

⁵⁵ n 54 above, 18 19.

Elsewhere this phenomenon has been described as 'captured autonomy' in the sense that, in the absence of constraining forces outside the state apparatus, a ruling elite exercises control over the instruments of state power, that is, captures the state, and exploits it for the benefit of the elite's own narrow private interests. This is the rule of the 'strongman',⁵⁶ which means that:⁵⁷

The most important positions in the state apparatus, whether it be in the bureaucracy, military, police or in the polity, are filled with loyal supporters of the strongman. Loyalty is strengthened through the (unequal) sharing of the spoils of office. The strongman thus controls a complex network of patron-client relationships. The functions of the state only in a very limited sense has to do with producing public or collective goods. The state apparatus is a source of income for those fortunate or clever enough to control it. Such a state is by no means a basis for security, order and justice for its citizens; it is more of a threat, an apparatus against which the population must seek protection.

Such a state of affairs has ramifications for the efforts currently undertaken to address the situation through various reform packages in respect to constitutionalism, political and economic accountability, the rule of law, participatory government, the effective delivery of public services and control of corruption, all common elements of good governance one finds in the many reports on the subject-matter mentioned earlier on. A first concern is the effect of the economic and other awards of the patrimonial state on the incumbents of power and their willingness to abandon past practices in favour of governmental and management systems that will function without the social and political underpinnings for self-enrichment and the accumulation of power. Put differently: Why would the beneficiaries of the current system voluntarily give up their privileges in settings marked by largely apathetic and poorly-educated citizens and weak extra-governmental systems of control? Secondly, is there a social and political reality in place that could sustain the growth of forms of government the reform efforts wish for? And, if not, what will it take to create such a reality? Thirdly, can newly-designed government institutions and forms of constitutional governance really prevent the wholesale re-integration of existing patrimonial networks and mindsets into the new system?

⁵⁶ G Sorensen *Changes in statehood: The transformation of international relations* (2001) 84. See also M van Creveld *The rise and decline of the state* (1999) 329; M Bratton & N van de Walle *Democratic experiments in Africa* (1997) 61.

⁵⁷ n 2 above, 42: 'A common practice is for the ruling party to take undue advantage of state resources and deploy them for its private political ends during political campaigns and elections. Using government vehicles, diverting public funds to the political party and awarding contracts to party members are unhealthy political practices that do not encourage a level playing field among political parties and undermine the fair competition among political actors and organisations in a democracy.'

In the latter instance, one should consider the observation that⁵⁸

in new democracies corruption is a more pervasive threat to the rule of law than is political repression. Corrupt practices are carried over from the old regime and there are new opportunities for corruption as new governors gain the power to re-allocate the assets of the old regime.

This phenomenon, it has been argued, is associated with countries in the third wave of democratisation, that is, countries that have introduced competitive elections before the basic institutions of the modern state such as the rule of law, institutions of civil society and the accountability of governors were in place. Because they have democratised backwards, such countries can develop in three different ways: complete the process of democratisation, repudiate free elections and return to the undemocratic past, or fall into 'a low-level equilibrium trap in which the inadequacies of elites are matched by low popular demands and expectations'.⁵⁹

That the current nascent progress in good governance remains precarious and in danger of reversal also becomes clear once one looks behind the smoked glass version of reality fashioned by introductory words of praise in international institutional publications on governance in Africa. In its 2005 African Governance Report, the UN Economic Commission for Africa has pointed out that, although merit and performance are legally stipulated as criteria for appointments to the civil service in many countries, there is a 'wide gap between precepts and practice' and that meritocracy in appointment and promotion is largely compromised because '[p]olitical considerations and social links of ethnic, religious and kinship ties often influence recruitment to the public service'.⁶⁰ On capacity building in the public policy area, the report has noted that⁶¹

⁵⁸ R Rose & DC Shin 'Democratising backwards: The problem of third wave democracies' (2001) 31 *British Journal of Political Science* 331-341. See also M Szeftel 'Misunderstanding African politics: Corruption and the governance agenda' (1998) 25 *Review of African Political Economy* 221-235; 238: '[T]he governance agenda tackles corruption as if it were the cause of democratic and development problems rather than a symptom or consequence of them. Thus it fails to address the deeper political and class forces which drive the politics of clientelism and corruption.' See also M Szeftel 'Between governance and underdevelopment: accumulation and Africa's catastrophic corruption' (2000) 27 *Review of African Political Economy* 287; C Allen 'Understanding African politics' (1995) 22 *Review of African Political Economy* 301; I Taylor 'Advice is judged by results, not by intentions: Why Gordon Brown is wrong about Africa' (2005) 81 *International Affairs* 299.

⁵⁹ Rose & Shin (n 59 above) 331.

⁶⁰ n 2 above, 138.

⁶¹ n 2 above, 201. See also Report of the World Bank Task Force on Capacity Development in Africa *Building effective states, forging engaged societies* (2005) 42-43: 'Restoring ethics and professionalism in African public services will be an uphill journey without wider political support for bold efforts to transform the public service. The scope and speed of public service reform depend on the political capital and fiscal space of national leaders and on the commitment and strength of the public service leaders. . . . Do major business interests collude with political and bureaucratic elites and engage in procurement fraud, or organise to lobby for efficient government, a good investment climate, and lower tax burdens? Do citizens rely on government as the biggest employer and the source of patronage, or organise to pressure for efficient government and better services?'

the public policy community is very weak or virtually non-existent in many African countries, especially those that have only recently emerged from one-party or military rule. Policy formulation continues to be the domain of the leaders of the governing political parties and their chosen confidants, supported by favoured and trusted bureaucrats. And even within these narrow decision-making circles, policies are formulated without much regard to the relevant information or data and without consulting those who are likely to be affected by the policies.

Just as mass attitudes to democracy determine the prospects for the consolidation and legitimisation of a democratic form of government, the sustainability of and support for democratic rule by the ruling elite hinges on the question of intrinsic versus instrumental commitment to democracy. In the case of intrinsic support, a fragile political regime has the potential of being sustained through troubled times, because the democratic form of government is itself the motivation for the commitment. On the other hand, if the support is instrumental, that is, based on government's capacity to comply with popular needs according to the mood of the times, the support is conditional and can easily be withdrawn.⁶² If the latter view is also pervasive in government circles, then the question from the ruling elite's point of view is likewise whether there remains an alternative form of rule with a 'greater subjective validity or stronger objective claim to their allegiance'.⁶³

4.2 Parliament's role

A functioning parliament is constitutive for good governance. In addition to exercising an oversight function with respect to the executive and other public institutions, it provides the legislative framework for all government powers and functions, including those of the judiciary, and is therefore indispensable for setting the boundaries in terms of which determinations of legality and illegality can be made. In addition, it plays a key role in the allocation of the state's financial resources. Furthermore, it is also the forum where the government's accountability to its citizens can be determined.

Since independence, the balance between the executive, the legislature and judiciary in African states has shifted to the executive, and in Tony Blair's Commission for Africa Report it has been noted that fewer than half of the respondents in 15 out of 28 countries considered the legislative branch to be free from executive control and only about a quarter of respondents rated parliamentary performance in their respective countries as good.⁶⁴ The Economic Commission for Africa, while noting some improvements in the overall picture, has also concluded that 'more than half of the legislatures in Africa are under various

⁶² M Bratton & R Mattes 'Support for democracy in Africa: Intrinsic or instrumental?' (2001) 31 *British Journal of Political Science* 448.

⁶³ As above.

⁶⁴ n 7 above, 142.

degrees of subordination to external agencies in all major areas of legislation' and that 'very few legislatures were perceived by the experts as being largely or above corruption'.⁶⁵

Although some progress has been made in improving parliamentary control mechanisms, African parliaments in general are faced with formidable obstacles. Furthermore, a distinction must be made between constitutional regulation of oversight and separation of powers where it has been introduced or improved, and what is actually happening or is realisable in practice. Since opposition parties in many African parliaments are weak, engaging government in serious debates on government issues and policies is more ostensible than real. Furthermore, it has been noted that opposition party members are 'usually co-opted in legislative debates by the dominant or ruling party, weakening legislative deliberations and the capacity of members of parliament to effectively articulate the diverse interests of the people they serve'.⁶⁶ The capacity to perform in real terms is further debilitated by African legislators' lack of education, knowledge, information and research facilities, majority party control of the parliamentary machinery, lack of professional or trained support staff, and a low comprehension of the actual functions legislators must perform.⁶⁷

4.3 Rule of law, law enforcement and security

The rule of law is usually associated with legally circumscribed government conduct, independent judicial control over laws and the exercise of government powers and functions and the protection of human rights guarantees. Even if this very limited understanding of the rule of law is relied on, the gap between formal acceptance and substantive enforcement of the principle is notoriously wide on the African continent. In contrast to the abundance of rhetorical confessions to abide by the rule of law, wide-spread ratifications of the major international and regional human rights instruments and ceremonial references to the globally accepted codes of conduct in this regard in national constitutions, the mechanisms for enforcing the principles in question remain weak and precarious. The picture darkens if one considers some other elements of the rule of law which are often conveniently left out of the equation, such as the accessibility of the judicial system, effective reme-

⁶⁵ n 2 above, 126.

⁶⁶ n 2 above, 201. See also C Clapham *Africa and the international system: The politics of state survival* (1996) 56: 'Within an often astonishing short period after independence, the nationalist parties formed to mobilise popular support against the colonial regime, and at the same time to launch their leaders into positions of state power, declined from their previous position of apparently unchallengeable strength. . . . In the initial phase, opposition parties were permitted to remain in being only where the government lacked the resources to crush them, or where they were in any event so feeble that they presented no challenge to its tenure of power.'

⁶⁷ n 2 above, 201-202.

dies, effective law enforcement and prosecutions and the willingness and ability of the state to comply with court judgments.

On the issue of policing in general, one of the surprisingly few studies on the role of the police in post-colonial Africa concludes that, despite the political changes of the nineties, most aspects of post-colonial policing in African states have remained unchanged. Consequently, the protection of regimes from internal threats, accommodating new rulers and adapting to new political environments and their peculiar economic awards still overshadow the catching of criminals and the protection of life and property.⁶⁸ Commenting on the steep decline in state capacity in post-apartheid South Africa's Safety and Security and Home Affairs Departments, a country where crime and corruption have reached critical levels, Good has wisely noted that it is important to consider in such circumstances who might gain and who might lose from institutional erosion and resource dissipation.⁶⁹ If the gains are on the side of an elite of politicians, bureaucrats and their business associates, the profiting leadership will be unconcerned with corruption and would prefer to keep performance and standards low in the police services. This might also support the conclusion that⁷⁰

the many anticorruption and good-governance campaigns of recent years are in practice of little relevance to the reality of crime in the region and elsewhere, since the trade in drugs, gems, weapons and so on is either tremendously profitable for many politicians or is quite outside state and police control anyway.

The obstacles in making the rule of law real in citizens' lives are a well-known: lack of resources, capacity and training, lack of independence and security of tenure amongst the judiciary, unreliable, ineffective and corrupt law enforcement agencies, and so on.⁷¹ However, of even greater concern for the future establishment of real constitutional democracies with well-functioning judicial and law enforcement systems and in overcoming these deficiencies, is how to disentangle the state and its institutional apparatus from the warlord politics⁷² of the incumbents of power. To sustain some semblance of state sovereignty, and of an internal functioning state, the rulers of bureaucratically weak and internally insecure states in Africa must cultivate systems of patronage that are based on control over state resources and, in conflict zones, on the commercialisation of conflict goods. Such a network of rulers and clients, bound together through an exchange of largesse, removes the need for building strong, neutral and law-bound bureau-

⁶⁸ A Hill *Policing Africa: Internal security and the limits of liberalisation* (2000) 15 59 187.

⁶⁹ K Good 'Accountable to themselves: Predominance in Southern Africa' (1997) 4 *Journal of Modern African Studies* 554.

⁷⁰ Hill (n 68 above) 61.

⁷¹ See *inter alia* African Governance Report (n 2 above) 171.

⁷² See Reno (n 42 above).

cracies, since the patronage network itself is relied on as a (shadow) state bureaucracy that upholds the semblance of a functioning state. Thus, the 'term *weak* state signifies a spectrum of conventional bureaucratic state capabilities that exists alongside (generally very strong) informal political networks'.⁷³ The difference between this style of organisation and a conventional state⁷⁴

lies in the fact that the inhabitants do not enjoy security by right of membership in a state. Security is coincidental; it is reliant on the venture's profitability and the degree to which it satisfies the shared interests of the members of the organisation.

In such circumstances, there exists no institutionalised or widespread personal acculturation of the rule of law as *constitutive* of the state and of the powers and functions of state organs. Instead the (rule of) law is seen as part of the state *apparatus*, that is, a complex of *instruments* the incumbents of power (or their opponents) can appropriate to achieve objectives that are intimately tied up with their personal aspirations, fears and positions and the need to wield influence over followers and competitors. Thus, as has been noted elsewhere, the establishment of the rule of law can⁷⁵

imply either a strengthening of state capacities or a weakening of state power. It can represent the imposition of a set of state-determined rules governing private behaviour or the imposition of constraints on the personalised nature of government.

Regional and international reforms in this area face the further obstacle of changing the underlying pervasive influence of the instrumentalisation of the state since decolonisation to undertake rescue operations in almost every area of human endeavour. Even in the case of regime transition or reform, the contents of the constitution or the need to design new legal rules become points of contestation, often not for reasons of remedying the mischief in the old system, but to gain access to resources monopolised by the previous regime or to ensure benefits from state patronage or business opportunities that come in the wake of state capture under the pretext of reform or transformation.⁷⁶

In as much as the current concern with good governance and effective state institutions has forced the international community to revisit the constitutive elements of statehood, a debate on the distinction between the state and the aims pursued in its name, and between the constitutive and regulatory elements of the rule of law is long overdue. Under the instrumentalist conception of the state and of the law, these distinctions have become blurred or obscured and have

⁷³ n 42 above, 2.

⁷⁴ n 42 above, 3. See also N Cooper 'State collapse as business: The role of conflict trade and the emerging control agenda' (2002) 33 *Development and Change* 935.

⁷⁵ S Rose-Ackerman 'Establishing the rule of law' in Rotberg (n 27 above) 182-183.

⁷⁶ See also Bratton & Van de Walle (n 56 above) 88.

smoothed the way for some dangerous experiments with state power since decolonisation. What needs to take root is the insight that as long as an instrumentalist view of law and state prevails, the idea of legally circumscribed and limited state power remains an oxymoron. Under an instrumentalist paradigm, state power simply follows and coincides with state aims and objectives and whatever qualifies as a state aim or objective from time to time is at the same instant the subject matter of legal regulation and legitimisation.

4.4 Regional economic integration

In 1994 it was observed that⁷⁷

the track-record of regional co-operation in Africa has been a major cause of concern. Three decades of continued efforts have ended in near bankruptcy, which has given rise to a growing worry about the direction in which the co-operation drive is heading.

The 'three decades of continued efforts' is also littered with a multitude of sub-regional organisations⁷⁸ which have emerged in an unco-ordinated fashion all over Africa, only to produce a myriad of problems and disappointing outcomes. The genesis, growth, decline and stagnation of the regional institution-building efforts on economic integration are well captured in the following assessment by Gruhn:⁷⁹

The usual life-cycle of an inter-African organisation started with a series of inter-state conferences, which culminated in a charter-signing ceremony attended by heads of states, and the selection of a headquarters site. This was followed by the creation of an organisational bureaucracy, which then generally encountered financial difficulties, bureaucratic disarray, loss of interest by the organisation's members, and decline (and sometimes demise) of the organisation. It has become a common observation that many inter-African organisations are merely paper organisations.

In 2006, the Economic Commission for Africa still recorded a lack of substantial progress and mentioned rationalisation of regional economic communities as one of the main challenges confronting Africa in its quest for full economic integration. Although progress has been

⁷⁷ A Aly (ed) *Economic co-operation in Africa: In search of direction* (1994) 1.

⁷⁸ The following sub-regional organisations exist with the common purpose to achieve economic integration in the areas under their jurisdiction: Central Africa: Economic Community of Central African States (ECCAS); Central African Economic and Monetary Community (CEMAC); Economic Community of Great Lakes Countries (CEPGL); East and Southern Africa: Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Inter-Government Authority on Development (IGAD); Indian Ocean Commission (IOC); Southern African Development Community (SADC); Southern African Customs Union (SACU); West Africa: West African Economic and Monetary Union; Manu River Union; ECOWAS; North Africa: Arab Maghreb Union (UMA), Community of Sahel-Saharan States.

⁷⁹ IV Gruhn *Regionalism reconsidered: The Economic Commission for Africa* (1979) 5. See also S Asante *The political economy of regionalism in Africa* (1985) 28.

made in the areas of trade, infrastructure, regional public goods and peace and security, the Commission pointed out that⁸⁰

only a fifth of the regional economic communities have achieved their targets for trade among members. Common labour laws, free movement of labour, and rights of residence and establishment have still not been undertaken by most regional economic communities, and most are also lagging on almost all critical elements necessary for the success of an economic union. Progress in harmonising tax policies, deregulating, financial sectors, liberalising the capital account, and other areas has been insufficient. Even with sectoral programmes needed to deepen African integration, a third to a half of the regional economic communities acknowledge shortcomings in the effectiveness of their initiatives towards the integration goals.

Underlying causes for this malaise, according to the Commission, are, *inter alia*, overlapping membership in the different organisations, duplication of programmes, institutional inefficiency and ineffectiveness and poor co-ordination at the continental level.⁸¹

However, despite many set-backs and uninspiring progress, the ideal of regional economic integration is still high on the agenda and for obvious reasons: Without regional economic integration, inter-state trade in Africa will remain at its current low levels and the enlargement of internal African markets for sustainable economic growth, especially in countries with small economies, will remain nothing but an aspiration. Hence, a renewed effort was made in the Lagos Plan of Action, which recognised that rapid self-reliance, sustainable development and economic growth are linked, *inter alia*, to the economic integration of the African region. Hence, the proposal for an African Economic Community to be set up by 2000 by means of which the economic, social and cultural integration of the African continent must be effected.⁸² Although this process was set in motion by the adoption in 1991 of the Treaty Establishing the African Economic Community (AEC), outlining a staged process of economic integration over a 34-year period, which included the strengthening of the existing regional communities,⁸³ the Community's future existence as an autonomous entity for facilitating economic integration on the continent is uncertain. Since its objectives are now fully integrated within the African Union and NEPAD objectives, the AEC might become subsumed under the former.⁸⁴ In any event, most regional economic communities are

⁸⁰ United Nations Economic Commission for Africa *Assessing regional integration in Africa II* (2006) xvi <http://www.uneca.org> (accessed 10 November 2006).

⁸¹ n 80 above, ch 3-5.

⁸² Lagos Plan of Action for the Economic Development of Africa, Preamble and Annex I, adopted by the Assembly of Heads of State and Government of the OAU in Lagos, Nigeria, 28-29 April 1980.

⁸³ Treaty Establishing the African Economic Community paras 1, 2 & 6, adopted by the Heads of State and Government of the OAU in Abuja, Nigeria on 3 June 1991.

⁸⁴ See also E Baimu 'The African Union, African Economic Community and NEPAD' in C Heyns (ed) *Human rights law in Africa* (2004) 103.

behind on the stages set by the Treaty Establishing the AEC and it is difficult to see how the process will unfold if the whole project for regional economic integration is going to be taken over by the African Union (AU) under the NEPAD initiatives.

Whatever vehicle is chosen for economic integration, the process itself as well as its sustainability and successful implementation cannot be separated from finding a solution to the lack of institutional capacity and good governance at the national level. Strong and effective regional institutions are unthinkable without national states that have the capacity and will to work towards the common good at the regional level. This pre-condition is implicit in the Economic Commission for Africa's assessment of the poor national underpinnings for regional efforts towards economic integration. According to the Commission, progress is hampered by weak institutions lacking co-ordinating capacity within national governments, little translation of economic community goals into national plans, poor implementation of agreed programmes due to a lack of effective integration mechanisms at the national level, weak legislative processes for integration, poor fulfillment of financial obligations to regional organisations, and a poor understanding of economic integration issues amongst the general population.⁸⁵

5 The case for economic partnership agreements

According to the EU's 2005 Strategy for Africa,⁸⁶ the period between 2005 and 2015 will be a watershed period in relations between Europe and Africa. The Strategy, whose main objective is the achievement of the UN Millennium Development Goals in Africa, is based on extensive consultations with the AU and the African regional economic communities. In assisting African countries in making better progress towards achieving the Millennium Goals, the Strategy aims at (1) strengthening EU support in priority areas; (2) increasing EU financing for Africa, and (3) developing and implementing a more effective EU approach to development.⁸⁷ Of importance, though, is the Strategy's unambiguous declaration that peace and security for citizens and good and effective governance are central prerequisites for sustainable development for which government reforms will have to be undertaken in a number of areas.⁸⁸ Support for African initiatives, such as the African Peer Review Mechanism, forms part of the Strategy's approach. For the purpose of establishing a more comprehensive, integrated and long-term framework for future development arrangements with ACP coun-

⁸⁵ n 80 above, 69.

⁸⁶ EU Strategy for Africa (n 8 above).

⁸⁷ n 8 above, 9.

⁸⁸ n 8 above, 4 21.

tries, economic partnership agreements (EPAs) will be the instruments of sustainable development and of the ACP countries' integration into the global economy. The fundamental principles and objectives of the EPAs are defined by the 2002 Cotonou Agreement which is the new legal framework covering development assistance, trade and political relations between the EU and the ACP countries. Since this agreement is a sequel to the Lomé Agreements (1975-2000), some relevant historical elements must first be underlined.

5.1 The Lomé background

When the Treaty of Rome establishing the European Economic Community (EEC) was signed in 1957, some Community members still had overseas colonies and other dependencies. Since the state of political and economic development of the overseas dependencies at the time made it impossible for them to be treated on the footing of equality with the members of the Community, the relationship between Community members and their overseas dependencies came to be based on the principle of association. According to the original article 131 of the Rome Treaty, the purpose of association was to promote the economic and social development of the territories concerned and to establish close economic relations between them and the Community. In terms of the original article 132 of the Rome Treaty, association also meant that Community members were obliged to treat associated countries and territories as if they were participants in the evolving customs union of the EEC itself.⁸⁹ On the basis of this, the trade relationships that were to be established had to protect the Community members' reliance on raw material supply from the overseas territories while financial and technical assistance by the Community members were to bolster development efforts in these territories, some of which were in the process of becoming independent. The focus on economic and social development and on the improvement of economic relations as opposed to political governance issues is also clear from the series of implementing conventions that were adopted during the sixties to give effect to the articles of association in the Treaty of Rome. For instance, the Second Yaoundé Convention (Yaoundé II), adopted in 1969, states clearly in article 1 that the provisions of the Convention have as their object⁹⁰

the promotion of co-operation between the Contracting Parties with a view to furthering the economic and social development of the Associated States by increasing their trade and putting into effect measures of financial inter-

⁸⁹ For a more comprehensive account of these and subsequent developments, see *inter alia* EC Djamson *The dynamic of Euro-African co-operation* (1976) 1; CC Twitchett *Europe and Africa: From association to partnership* (1978) 17; M Lister *The European Community and the developing world* (1988) 13.

⁹⁰ Quoted in Djamson (n 89 above) 10.

vention and technical co-operation. . . . By these provisions, the Contracting Parties intend to develop their economic relations, to strengthen the economic structure and economic independence of the Associated States and promote their industrialisation, to encourage African regional co-operation towards the advancement of international trade.

Commenting on the objectives of association, one commentator has observed that the 'most crucial type of development which the Associates were likely to have expected in 1957, that is, the political development of independence, was not mentioned'.⁹¹ However, this, as well as the colonial overtones of the association-based relationships between the former colonies and EEC members, were about to change with the advent of the new development policies that evolved since 1975 under the Lomé Conventions, in response to the first enlargement of the EEC through the accession of Great Britain, Ireland and Denmark in 1973. Great Britain's accession, in particular, confronted the commonwealth ACP countries with an unfavourable competitive position *vis-à-vis* associated countries.⁹² Originally signed in 1975 between nine EEC members and 46 ACP countries, the Lomé Convention was subsequently renegotiated and signed to produce Lomé II (1980), Lomé III (1985) and Lomé IV (1990), each time introducing new issues that resulted from the gradual and incremental evolvement that characterised ACP-EU relations.⁹³ Because of its unrivaled extensive concessions and privileges granted to the ACP group of countries, this arrangement, that remained in force until 2000, is considered the most far-reaching and complex North-South contractual development initiative of the post-World War II period.⁹⁴

Of particular importance for current purposes is the role played by the Lomé process in placing governance issues in the ACP countries, initially by means of the issue of human rights protection, on the table. The opportunity for considering the inclusion of human rights considerations in the text of the Lomé Convention surfaced during the negotiations for Lomé II. Flagrant human rights violations in the seventies by the Amin regime in Uganda and the suspension in 1977, without the necessary legal basis, of Community development to that country, provided the prelude to this development. When these and other examples of misrule in Zaire, the Central African Republic, Liberia and Equatorial Guinea were introduced during an ACP-EEC Council of Ministers meeting in 1977, it soon became clear that the ACP countries were against

⁹¹ Lister (n 89 above) 18.

⁹² Djamson (n 89 above) 23; Lister (n 89 above) 61.

⁹³ S Marsh & H Mackenstein *The international relations of the European Union* (2005) 227; O Babarinde & G Faber 'From Lomé to Cotonou: ACP-EU partnership in transition' in O Babarinde & G Faber (eds) *The European Union and the developing countries: The Cotonou Agreement* (2005) 3.

⁹⁴ Babarinde & Faber (n 93 above) 4. See also H Noor-Abdi *The Lomé IV Convention* (1997) 29 30.

the introduction of human rights themes in the relationship with the EEC. In the ACP view, such a development would undermine their sovereignty, open the door to the EEC for unilateral intervention in internal affairs and lead to discriminatory and selective measures against ACP states. Also strongly defended was the view that human rights themes had no place in an agreement that deals with trade and economic co-operation and should be dealt with by the UN organs with legal competence in the field.⁹⁵ This strong opposition, maintained till the end, resulted in the adoption of Lomé II without a textual reference to human rights issues.

The negative attitude of the ACP countries changed in the run-up to Lomé III. In part this was the result of a trade-off based on *realpolitik*: The ACP countries wanted stronger Community action against apartheid South Africa as well as the recognition in Lomé of the human right to development.⁹⁶ Under the first claim, they could hardly shield their own human rights situation from outside scrutiny and, under the second, since they affirmed the indivisibility of human rights themselves, they could not prevent civil and political rights to also become an issue over time once the right to development was recognised. The outcome of this was the inclusion in Lomé III of some human rights references, albeit very tentative and innocuous. In the Preamble and a Joint Declaration annexed to the Final Act, the parties agreed to adhere to the UN Charter principles and reaffirmed their faith in fundamental human rights on the basis of which they condemned discrimination on the ground of race, sex and religion and deemed apartheid to be an affront to human dignity, which should be eradicated.⁹⁷

The positions of the parties on human rights issues were consolidated during the negotiations for Lomé IV. This was mainly the result of the European Commission's stance on strengthening the human rights provisions in Lomé and of the new contours drawn for the European Community's foreign relations on development aid that were starting to take shape in the eighties. The latter became particularly clear in a statement issued in 1986 by the EC Foreign Ministers to the following effect:⁹⁸

The Twelve seek universal observance of human rights. The protection of human rights is the legitimate and continuous duty of the world community and of nations individually. . . . Respect for human rights is an important element in relations between third countries and the Europe of the Twelve The Foreign Ministers affirm that in the development of their relations with non-member states as well as in the administration of aid the European Community and its member states will continue to promote fundamental

⁹⁵ K Arts *Integrating human rights into development co-operation: The case of the Lomé Convention* (2000) 167.

⁹⁶ n 95 above, 176.

⁹⁷ n 95 above 179-181; Noor-Abdi (n 94 above) 241 242.

⁹⁸ Bulletin of the European Communities 19 (1986) 7/8 item 2.4.4. 100 101.

rights so that individuals and peoples will actually enjoy to the full their economic, social and cultural rights and their civil and political rights.

In a 1991 resolution on human rights, democracy and development, the European Council made it clear that priority would be given to developing countries that have demonstrated a commitment to the implementation of democratic rule, human rights protection and the strengthening of the rule of law. In the same resolution, the notion of good governance was formally introduced, the adherence to which was seen as a precondition for achieving equitable development and therefore central to future development co-operation relationships between the European Community and developing countries. The principles espoused under the notion of good governance included democratic decision making, adequate governmental transparency and financial accountability, the creation of a market-friendly environment for development, measures to combat corruption, respect for the rule of law, human rights, and freedom of the press and expression.⁹⁹

The tentative results of Lomé III opened the door for a new drive on linking human rights considerations with development aid in the main text of Lomé IV. Apart from the Preamble, which reaffirmed the parties' commitment to all the major international and regional human rights instruments, article 5 of Lomé IV unequivocally linked co-operative operations between the negotiating parties with respect for human rights 'as a basic factor of real development and where co-operation is conceived as a contribution to the promotion of these rights'.¹⁰⁰ This undertaking must also be read in conjunction with article 10, in which the parties committed themselves to take all measures necessary for fulfilling their obligations under the Convention.

In essence, the position of the negotiating parties with regard to these commitments remained unchanged when the agreed upon mid-term review of the Lomé IV process took off in November 1994. The great irony of the time was that the situation in South Africa, for long a bone of contention between the negotiating parties, had changed for the better, which could not be said of the situation in many of the ACP countries. The European Commission's mid-term proposals centred around the establishment of closer links between development co-operation and democracy, good governance and the rule of law, including the strengthening of the human rights provisions of the text; the introduction of suspension mechanisms in the case of violations, and greater EU control over performance-related tranching of development finance disbursements. The ACP countries, on the other hand, while agreeing to the strengthening of the human rights provisions and the introduction of a democracy clause, emphasised the need for mutually accepted concepts of democracy, human rights, good gov-

⁹⁹ Bulletin of the European Communities No 24 (1991) II No 11 item 2.3.1 para 5 122.

¹⁰⁰ See also Arts (n 95 above) 183 184.

ernance and the rule of law, and raised concern over the procedures for suspension and EU control over the implementation process, which was considered to be a violation of the basic Lomé principles of equitable partnership and respect for ACP sovereignty.¹⁰¹

Apart from the many reproaches and demarches to governments in the nineties on human rights and democratic process issues, the more crucial question from an effective enforcement point of view was whether the human rights references and commitments in Lomé IV were strong enough to raise the suspension of the treaty arrangement in the case of non-compliance. Of relevance for this question are the grounds for the suspension of a treaty under articles 60(3)(b) and 62 of the Vienna Convention on the Law of Treaties (1969). In terms of the former article, a party to a treaty may terminate the treaty in the case of a violation of a treaty provision that is essential to the accomplishment of the object or purpose of the treaty. In terms of the latter, a change in circumstances since the conclusion of the treaty and which was not foreseen by the parties may be invoked as a ground for terminating the treaty if (a) the circumstances in question constituted an essential basis of the parties' consent to be bound by the treaty, and (b) the effect of the change is to radically transform the extent of obligations still to be performed by the parties.

That article 5 of Lomé IV did not create a watertight juridical basis for suspension in the above instances should be clear. In fact, the European Commission itself was of the unequivocal opinion that the human rights provisions in Lomé IV and the other conventions did not establish an essential element of the treaty arrangement between the parties and their breach not material in terms of the Vienna Convention on the Law of Treaties.¹⁰² This only changed with the adoption of Lomé IV-bis after the mid-term review when respect for human rights, democratic principles and the rule of law became essential elements of the Convention and linked to a suspension clause in the case of non-fulfilment.¹⁰³ This settled the legal basis for suspension, leaving another obstacle, that of consistent and non-discriminatory enforcement, still in need of a solution.

5.2 The Cotonou agreement

The above changes came during the last phase of the Lomé development arrangement between the ACP countries and the members of the European Community. In 2000, this arrangement had run its full course and a number of factors necessitated its replacement with a new North-South agreement covering development assistance, trade and political

¹⁰¹ K Arts & J Byron 'The mid-term review of the Lomé IV Convention: Heralding the future?' (1997) 18 *Third World Quarterly* 73 77.

¹⁰² See COM (95) 216 (1995) 7-8. See also Arts (n 95 above) 194.

¹⁰³ Arts (n 95 above) 198.

relations between the enlarged European Union and the 79 ACP countries. Firstly, 25 years of privileged concessions under the Lomé arrangements was unable to bring the majority of ACP countries into the fold of middle-income countries, and economic and social progress in many of these countries were 'uneven, dramatically slow or even in reverse'.¹⁰⁴ Secondly, after the end of the Cold War, the European Union had to rethink its external relations with the erstwhile eastern neighbours who were prepared to join under conditions set by the Union on internal governance matters and which in turn could not leave the EU-ACP relations on these issues intact. Thirdly, with the advent of the WTO in 1995, the privileges of Lomé became vulnerable under the equal treatment and non-discrimination WTO rules and had to be revisited. Fourthly, the forces of globalisation necessitated the integration of the ACP economies into the global economy to prevent their further marginalisation. Fifthly, the growing visibility of the EU in the international arena and the role it could play in the effective application of development aid and in matters of international peace and security necessitated a new orientation. Sixthly, the internal reforms that were taking place — sometimes begrudgingly and under external pressure — within some ACP countries created opportunities for dealing more effectively with the deteriorating conditions and growing public discontent in many of them.¹⁰⁵

This is the new environment in which the Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (Cotonou Agreement), signed in Cotonou, Benin on 23 June 2000, has to give substance to the future ACP-EU relationships. Intended to remain in force for a period of 20 years, starting from 1 March 2000, the agreement was revised in 2005 with a view to enhance the effectiveness and quality of the partnership, a process that will be repeated with five year intervals. Here, only the most relevant aspects of the agreement will be highlighted.

In the Preamble, the parties acknowledged the fact that a specific kind of political environment, namely one that guarantees peace, security and stability, respect for human rights, democratic principles and the rule of law and good governance, is part and parcel of long-term development and that the responsibility for establishing such an environment primarily rests with the countries concerned.¹⁰⁶ A further preambular provision, recognising the contribution of regional

¹⁰⁴ Babarinde & Faber (n 93 above) 5.

¹⁰⁵ See O Babarinde 'The changing environment of ACP — EU relations' in Babarinde & Faber (n 93 above) 18.

¹⁰⁶ Cotonou Agreement, Preamble para 5. The Agreement and its 2005 amendments are accessible at http://ec.europa.eu/development/body/cotonou/index_en.htm (accessed 19 November 2006).

human rights instruments¹⁰⁷ was amended in 2005 by inclusion of a paragraph reaffirming that the most serious international crimes must not go unpunished and that effective measures must be taken at the national level to ensure their effective prosecution. This must be read in conjunction with the amended article 11 which, in paragraph 11(6), places an obligation on the parties to take steps towards ratifying and implementing the Rome Statute of the International Criminal Court in pursuance of their article 11 determination to bring about legal adjustments for this purpose in their national legal orders.

Of special significance for the legal enforcement of the Agreement are the fundamental principles of ACP-EU co-operation enumerated in article 2. The first principle, namely equality of the partners and ACP ownership of the implementation of the objectives of the agreement in accordance with their own development strategies, are not, as in the past, self-standing, but linked to the *essential elements* in article 9 regarding human rights, democratic rule, the rule of law, and the *fundamental element* regarding good governance.¹⁰⁸ In addition, article 9 determines that: co-operation between the parties must be directed towards sustainable development that shows respect for all human rights, democracy based on the rule of law and transparent and accountable government;¹⁰⁹ the parties accept their international obligations in this regard and the indivisibility and inter-relatedness of all human rights; democratic principles are linked to the organisation of the state to ensure the 'legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system and the existence of participatory mechanisms';¹¹⁰ respect for human rights, democratic principles and the rule of law 'shall underpin the domestic and international policies of the parties and constitute the essential elements of [the] Agreement',¹¹¹ and, lastly, good governance is considered to be the 'transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development'. This includes 'clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption'.

With this elaboration, the Cotonou Agreement has established a much firmer legal basis for terminating the treaty arrangement between the parties in the case of non-fulfilment of the treaty obligations. This

¹⁰⁷ n 106 above, para 8.

¹⁰⁸ See the 2005 title amendment of art 9 of the Cotonou Agreement.

¹⁰⁹ Art 9(1).

¹¹⁰ Art 9(2).

¹¹¹ As above.

must also be read in conjunction with the article 2 principle that the 'fulfillment of mutual obligations . . . assumed by the parties in the framework of their dialogue shall be central to their partnership and co-operation relations'. The dialogue framework mentioned here apparently refers to the political dialogue mechanism created in article 8 of the Agreement, according to which the parties assume the obligation to regularly engage in a 'comprehensive, balanced and deep political dialogue leading to commitments on both sides'. The objective of the dialogue is, *inter alia*, to establish agreed priorities, to address matters of significance for the attainment of the objectives of the agreement, such as the arms trade, excessive military spending, drugs and organised crime and discrimination, and to assess developments concerning human rights protection, democratic principles, the rule of law and good governance.¹¹²

The *essential elements* mentioned in articles 2 and 9 are directly linked to the dispute resolution and enforcement measures provided for in articles 96 and 97 of the Agreement.¹¹³ Article 96 provides for political consultations between the parties in the case of non-fulfilment of an obligation stemming from respect for human rights, democratic principles and the rule of law with a view to seeking a solution acceptable to all the parties. If the consultations do not lead to an acceptable solution, or if consultations are refused, other 'appropriate measures' may be taken. This procedure does not apply in 'cases of special urgency', a term which refers to 'exceptional cases of particular serious and flagrant violation' of one of the essential elements referred to in article 9 and which requires immediate reaction.¹¹⁴ Measures taken in terms of article 96 must comply with the general principles of international law and must be proportional to the violation. Suspension of the treaty obligations is now specifically mentioned as an 'appropriate measure', but only as a measure of last resort.¹¹⁵

The political dialogue provided for in article 8 of the Cotonou Agreement must be distinguished from the political consultations in article 96. The primary function of the article 8 political dialogue is to build up trust between the parties with a view to establishing long-term, sustainable and deeper relations between all participants. The regular dialogues envisaged here are therefore not a prelude to the political consultations of article 96, but are intended as a preventive measure

¹¹² Arts 8(2) & (4). See also K Arts 'Political dialogue in a "new" framework' in Babarinde & Faber (n 93 above) 155 159; See also Annex VII, arts 1 & 2 of the revised Cotonou Agreement, Official Journal of the European Union L 385, 29 December 2004 88 and the Guidelines for ACP-EU Political Dialogue adopted by the ACP-EU Joint Parliamentary Assembly in Official Journal of the European Union C80/17, 25 November 2004.

¹¹³ The title of art 96 reads as follows: 'Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law'.

¹¹⁴ Cotonou Agreement art 96(2)(a).

¹¹⁵ n 114 above, art 96(2)(c).

for the elimination of issues that could create the kind of crises that must be settled in terms of article 96.¹¹⁶

Article 97 of the Cotonou Agreement applies the political consultation procedure as a measure in combating corruption. This measure stems from the acknowledgment that the 'impact of corruption and illegal financial practices on the economies and societies of developing countries is enormous and constitutes an insurmountable obstacle to development and to breaking the poverty gap'.¹¹⁷ To put this into context, it was pointed out that while \$50 billion in aid flows to developing and transitional economies each year, an estimated \$500 billion is illegally transferred from developing and emerging countries to other countries as 'dirty money'.¹¹⁸ Given the seriousness of the situation, it is rather strange that the parties are under no obligation to enter into consultations in the case of 'serious cases of corruption'. Article 97 merely states that such instances 'should' give rise to consultations, and either party 'may' invite the other to enter into consultations. As in the case of article 96, the normal international law restrictions apply with regard to measures taken and suspension of the treaty arrangement is again a measure of last resort.

The above sets out in part the legal and institutional framework within which economic partnership agreements¹¹⁹ are supposed to give effect to the objectives of the Cotonou agreement, which cover all the institutional, governance and regional economic integration challenges highlighted earlier on. These agreements, for which negotiations must end on 31 December 2007 to allow them to enter into force on 1 January 2008,¹²⁰ must be WTO-compatible trading arrangements¹²¹ that take account of the different needs and levels of development of the ACP countries and regions.¹²² Although they carry the name of *economic* partnership agreements, they will have a clear disposition towards state-institutional capacity building in general with a view not only to help developing countries, especially in Africa, to meet the Millennium Development Goals, but to remove threats to human existence and to international peace and security broadly understood. This is clear, *inter alia*, from the EU Strategy for Africa which lists as priority areas the ensuring of security for citizens and the rule of law

¹¹⁶ See Guidelines for Political Dialogue (n 112 above) paras 5 & 8.

¹¹⁷ n 116 above, para AB.

¹¹⁸ n 116 above, paras AB & AC.

¹¹⁹ Cotonou Agreement art 37. See also S Wright 'Negotiating economic partnership agreements: Contexts and strategies' in Babarinde & Faber (n 93 above) 65; G Faber 'Economic partnership agreements and regional integration among ACP countries' in Babarinde & Faber (n 93 above) 85.

¹²⁰ Cotonou Agreement art 37(1).

¹²¹ Art 36. See also B Onguglu & T Ito 'How to make EPA's WTO compatible?' European Centre for Development Policy Management, Discussion Paper No 40 (2003).

¹²² Cotonou Agreement arts 35(3), 37(5) & (7).

and of good and effective governance as central prerequisites for sustainable development.¹²³

In a second, almost parallel development, the leaders of the European Union also approved the European Security Strategy (ESS) on 12 December 2003 which includes in its list of new threats facing the world, state failure (bad governance, corruption, abuse of power, weak institutions and lack of accountability) and state collapse often associated with organised crime or terrorism. Under the heading 'An international order based on effective multilateralism', the Strategy stated that:¹²⁴

The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.

Considering itself, on good facts, to be a global player in today's world,¹²⁵ the EU Security Strategy's aim is to bring about an improvement in global governance also in areas that are beyond the borders of the immediate neighbourhood. The role of other regional organisations in this regard is therefore clearly acknowledged, including that of the AU,¹²⁶ in which respect the efforts undertaken under the newly-established African institutions are claimed to have changed the relationship between Africa and Europe.¹²⁷ In terms of the Security Strategy's objectives, the aim is therefore to contribute to 'better governance through assistance programmes, conditionality and targeted trade measures' to which is attached the clear warning that those states that place themselves outside the bounds of international society or persistently violate international norms should understand that there will be a price to be paid, including 'in their relationship with the European Union'.¹²⁸

6 Conclusion

Post-colonial states in Africa have had three things in common: a shared understanding of the need to maintain existing borders in the interest

¹²³ EU Strategy (n 8 above) at 4.

¹²⁴ EU Doc 15895/03 PESC 787 10. For general comments on the strategy, see A Toje 'The 2003 European Union security strategy: A critical appraisal' (2005) 10 *European Foreign Affairs Review* 117; AJK Bailes 'The European security strategy: An evolutionary history' Stockholm International Peace Research Institute (SIPRI) Policy Paper No 10 (2005).

¹²⁵ See *inter alia* C Bretherton & J Vogler *The European Union as a global actor* (2006), in particular ch 5 & 7.

¹²⁶ EU Doc 15895/03 PESC 787 9.

¹²⁷ EU Strategy (n 8 above) 2.

¹²⁸ EU Doc 15895/03 PESC 787 10.

of self-preservation,¹²⁹ regional inter-state relations based on the rhetoric of political self-determination and independence, state sovereignty, solidarity and unity, which also shaped their opposition to external domination, especially if it could be designated as some or other form of colonialism, and formal statehood marginally kept in place by a network of patrimonial internal and donor-dependent external power relations.

How long the *uti possidetis* claim will remain intact is a debatable point. After all, the nature of the numerous threats, both external and internal, to the future existence of the post-colonial state, as well as the countermeasures states must consider in response thereto, have little in common with the maintenance of arbitrarily drawn colonial borders. The two other common features of post-colonial statehood in Africa now also face a crucial moment with the unprecedented degree to which the international community and recently created regional institutions are becoming involved in almost every aspect of political and economic governance at the domestic level, as well as the strengthening of civil society, all aspects that were for long insulated against outside scrutiny under a political rhetoric designed to conceal unpalatable truths. Ironically, this is the result of post-colonial states' own double strategy pursued in international fora. In embracing the dominant values of the Westphalian state system to compensate for substantial inequality, weak post-colonial states demanded recognition as *equal* sovereigns through equal membership in the UN while, at the same time, sought economic assistance and other forms of special (*unequal*) treatment for the purpose of which the rules on equal rights and obligations had to be revisited to accommodate a wholly new legal regime on economic rights and duties and development assistance.¹³⁰ It is this latter strategy that has over time paved the way for domestic governance issues to become exposed to external inquiry, a process that has assumed a greater urgency in the context of the twenty-first century's peculiar security dilemmas. Moreover, the fact that the new demands for substantial reforms in political and economic governance were given form and substance by and through donor institutions and programmes is not a coincidence, but the result of a deliberate decision by donor countries to move the decision-making process away from the 'one country one vote' UN system to the Bretton Woods institutions where power is distributed according to economic resources.¹³¹

¹²⁹ Sorensen (n 56 above) 104: '[T]he OAU's commitment to colonial precincts . . . probably had to do with the general weakness of those states, large and small. The lack of an economic resource base, of any developed sense of community binding state and nation together, and of a capable apparatus of government, created a profound scarcity of mechanisms that could create coherence in the new states. In that situation it was not difficult for the elites to agree on the persistence of borders, the one remaining tangible element of cohesion'; Clapham (n 66 above) 45 46.

¹³⁰ See also Sorensen (n 56 above) 105.

¹³¹ n 56 above, 112.

Under current conditions, the combined results of the African Peer Review Mechanism and the mechanisms created by the Cotonou Agreement could hold the following prospects for the future: Firstly, it could upset the entrenched patron-client relations and patrimonial power structures that rendered the post-colonial state incapable of responding to the political, security, economic and social needs of its citizens. Secondly, the changes foreseen at the governance and economic integration levels have the potential, for the first time, in creating what is referred to as multilevel governance associated with regional arrangements that have developed into a well-integrated political, legal and economic union of member states where regulatory powers, exercised and overseen by institutions at different levels, including below and above the nation-state, are rule-bound and incapable of being over-accumulated in one area at the expense of another. In the European Union, this process has been largely facilitated by a fairly homogenous political and legal culture with roots deep in a common enlightenment experience.

For African states, both prospects raise interesting questions. Firstly, since the replacement of political rule that is not commensurate with good governance could pose a threat to the economic and other interests of a ruling elite and its clientele, both the resistance to or exploitation of change and what it will take to overcome the resistance may impair or even lead to a reconsideration of outcomes. It will be short-sighted to ignore the realistic assessment that in many African countries¹³²

neopatrimonialism will live on, albeit within the context of nominally democratic politics. In Africa's big man democracies, public life will continue to be dominated by executive presidents and their networks of personal loyalty. The prospects for the deepening of democracy will hinge on the strength of the permanent state apparatus relative to the ability of non-governmental actors to exert countervailing powers. At the same time, the survival of these new regimes is by no means assured; their fates are likely to be just as divergent as prior regime forms and transition trajectories. Despite the striking changes of the early 1990s, new democracies are likely to coexist alongside familiar and reinvented forms of governance.

¹³² Bratton & Van de Walle (n 56 above) 260. See also the following at 259: 'The high degree of continuity between the political personnel of the old and new regime and their reliance on private patronage during the transition have implications for the consolidation of democracy in Africa. First, neopatrimonial politics will persist after the transition; both by habit and by necessity, the victorious politicians will resort to clientelism to consolidate their own power. Over time, these tendencies may well intensify. Because security of office is more tenuous in regimes where leaders are chosen in elections, incumbents will quicken the quest for personal gain while they still have the opportunity to do so. Against this tendency, the human rights and good government activists in the prodemocracy coalition can initially temper the corruption and clientelism of the new government. But over time, these activists are eclipsed when they come into conflict with the leadership over issues of political expediency and are purged by old-style politicians.'

As for the regional integration prospect, there is the underlying force of homogenisation in terms of which countries, once integrated into the global economy, should converge on a similar model of economic development, namely the 'modern, industrialised, open, capitalist market economy'.¹³³ However, in a regional setting marked by diversity in state strength, the economic development trajectory could be quite different for the individual member states, more so since some may simply lack the institutional sophistication to cope with the demands of regional integration and co-operation. For such members, it will also become apparent that the concept of the national state economy based on an undiversified industrial sector is no longer appropriate. Moreover, to the extent that regional integration goes hand in hand with multi-level governance, marked by a diffusion and decentralisation of power, both upwards and downwards, the process also involves both a weakening and strengthening of states. States are 'strengthened to the extent that they acquire fresh regulative powers over a vast range of issues that would otherwise been outside the scope of their influence' and they are weakened 'to the extent that the regulation of the domestic affairs is now heavily dependent on bargaining with a host of other actors, especially the other member states'.¹³⁴ However, the acquisition of more regulatory powers will mean nothing if the capacity for exercising such powers is lacking from the start.

If the current circumstances are taken into consideration, making the development consensus behind the economic partnership agreements an effective instrument in the interest of good governance, will require, once again, difficult judgments, which will have to take into account the specific problems of often very different African states. Moreover, the practical challenges still remain, namely how to secure government effectiveness while changing the political culture of dysfunctional states, and how to arbitrate between the demands of greater participation, on the one hand, and the maintenance of authority on the other, if democracy appeared to be leading to greater inter-rival conflict and further state collapse.¹³⁵

¹³³ Sorensen (n 56 above) 63.

¹³⁴ n 56 above, 88.

¹³⁵ See also Clapham (n 66 above) 199. See also the following comment at <http://www.rationalreview.co/.content/31034> (accessed 18 June 2007): 'Sudan and seven other sub-Saharan African countries are among the 10 nations in the world most vulnerable to violent internal conflict and deteriorating conditions, according to a private survey. In the third-annual "failed state" index, analysts for *Foreign Policy* magazine and the Fund for Peace, a not-for-profit organisation dedicated to conflict resolution, Sudan was judged most at risk of failure. Violence in the Darfur region was the main contributing cause. As evidence that troubles in failing states often cross borders, the report cited violence spilling from Darfur into the Central African Republic and Chad. The five other African nations found most vulnerable were Somalia, Zimbabwe, Ivory Coast, Democratic Republic of Congo and Guinea. The ratings are based on 12 social, economic, political and military indicators.'