

# Assessing the African Union’s 2016–19 Human Rights Action Planning Process: Embracing, and De-Coupling from, the Conventional “Ideal”

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## Abstract

This article assesses the African Union’s planning process regarding the development of the African Human Rights Action Plan (AHRAP) against the dominant or conventional “ideal” or model of human rights action planning. It examines the extent to which the AU’s process followed or departed from the conventional model, the strengths and weaknesses of the AU human rights action planning

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process, and the lessons scholars and policymakers have learned about more effective and more locally responsive human rights action planning. In doing so, the article sequentially addresses the following specific themes: human rights action planning as a concept and its essential elements; the key characteristics and features of the conventional “ideal” human rights action planning process; and the extent to which the AU plan conformed to or departed from this conventional process, and its import. It also teases out some key insights and lessons learnt (in terms of strengths and weaknesses) in respect of the AHRAP planning process.

### Keywords

Human rights action planning, conventionally ideal action planning processes, African Union, African Union Human Rights Action Plan

## INTRODUCTION

On 18 July 2016, the Assembly of the African Union (AU) meeting in Kigali, Rwanda declared the start of the Human and Peoples’ Rights Decade in Africa 2017–26 (Human Rights Decade).<sup>1</sup> On this occasion, the Assembly instructed the relevant AU organs and institutions to spearhead the development of an action plan that would enhance “efforts aimed at entrenching and reinforcing deeper understanding of the culture of human and peoples’ rights ... and their promotion and popularization amongst the African peoples”.<sup>2</sup> Responding to this call, the Human Rights and Transitional Justice Cluster of the African Governance Architecture (AGA) appointed the Pan African Lawyers Union (PALU) as the lead consultant to assist in the preparation of the mandated African Human Rights Action Plan (AHRAP). PALU then initiated and led a planning process aimed at crafting a robust ten-year AHRAP to replace the Human Rights Strategy for Africa 2012–2016.<sup>3</sup> For the most part, this planning process proceeded over the 2016–19 period. It was anticipated that the AHRAP would: respond better to the challenges and obstacles militating against the protection and promotion of human and peoples’ rights; spur even more ratification, domestication and implementation of the relevant African human rights instruments; accord keen attention to priority areas; and realize the human rights aspects of the AU’s Agenda 2063 on development and other goals.<sup>4</sup>

1 Declaration of the Assembly on the theme of the year, Assembly/AU/Decl.1(XXVII) rev 1, 17–18 July 2016 (Human Rights Decade Declaration).

2 Id, para 2.

3 Department of Political Affairs, AU Commission “Human rights strategy for Africa” (action plan 2012–16), available at: <[https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table\\_en3.pdf](https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf)> (last accessed 20 May 2020).

4 Agenda 2063 (popular version, May 2016, AU Commission), available at: <[https://au.int/sites/default/files/documents/33126-doc-03\\_popular\\_version.pdf](https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf)> (last accessed 30 April 2020).

## OBJECTIVES AND METHOD

This article systematically assesses the AU's planning process for the development of the AHRAP against what is widely regarded as the conventional "ideal" or model (referred to in this article as the conventional ideal or conventional model) of human rights action planning. It examines the extent to which the AU process embraced, but also decoupled from the approach to human rights action planning that is considered "ideal" by almost all of those who think about and practise the conventional model, and reflects on the possible contributions (if any) of the AU process to improving the conventional approach. While keeping sight of the primary goal of human rights action plans as instruments of socialization, the article discusses the key characteristics of the approach to the human rights action planning process that has become conventional mainly by being featured in the work of the United Nations (UN), other bodies and key scholars, and that has therefore been presented in these works as the preferred model, or the ideal type. This article acknowledges that the conventional model of human rights action planning is animated by an explicitly and implicitly articulated "ideal type". However, this acknowledgment does not represent an endorsement of this conventional "ideal" as some sort of universally held or desirable ideal, especially given that most of the body of practice from which this conventional approach has been formed occurred outside Africa. The goal of this article is therefore to assess the extent to which the AHRAP simultaneously embraces and departs from the main characteristics of the type of human rights action planning that is considered ideal among those who adopt the conventional approach to that endeavour. In so doing, it is hoped that some general lessons can be drawn for future human rights action planning on the African continent and in similarly situated jurisdictions elsewhere.

Accordingly, the article investigates the following questions. To what extent did the AU's process follow or depart from the conventional human rights action planning model? Viewed from that perspective, what were the strengths and weaknesses of the AU human rights action planning process being studied? And what lessons might be learned from this analysis by scholars and policy-makers / practitioners alike about more effective and more locally responsive human rights action planning? The investigation of these questions is grounded in a focused study carried out by the authors that consisted of: an extensive review of the literature; field interviews with the main stakeholders in the process (including policymakers and practitioners who participated closely in the process); and a systematic review of relevant documents. The article interrogates what is already known from the limited literature on this important, but less understood, aspect of human rights praxis (ie the concept, theory and practices of "human rights action planning" or of "human rights strategy and tactics development"), and examines this body of knowledge alongside, and in the context of, the primary and other data and evidence gathered from the field.

Within this framework, the article sequentially addresses the following specific themes: the human rights action plan as a concept and its essential

elements; the key characteristics and features of the conventional ideal human rights action planning processes (as rooted in the determinants of the failure and / or success of such processes); and the extent to which the AU plan conformed to or departed from this conventional ideal process. It also teases out, by way of concluding remarks, some key insights and lessons learnt, in terms of strengths and weaknesses of the AHRAP planning process. It is hoped that the conceptual and practical lessons drawn from this in-depth and interdisciplinary study of this, admittedly specific, pan-continental human rights action planning process will be useful as a broad guide to stakeholders, scholars, policy-makers and practitioners, not just on the African continent in which it is intended to be implemented, but also in similarly situated regions of the world.

However, before undertaking this critical assessment of the AHRAP planning process, it is important to consider whether the AHRAP itself fits the generally accepted (albeit still contingent) understanding of what a human rights action plan should or should not look like. This exercise is, of course, merely preliminary and is intended to provide a background for the substantive discussions later in the article.

## THE CONCEPT AND KEY ELEMENTS OF A HUMAN RIGHTS ACTION PLAN

Both by its meaning and purpose, a human rights action plan “articulates a comprehensive and pragmatic programme of activities aimed at progressively bringing about improvements” in the human rights situation of a given continent, country, or other defined area.<sup>5</sup> Thus, the main objective of a human rights action plan has often reflected a vision of outlining “achievable [human

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5 UN Office of the High Commissioner for Human Rights (OHCHR) *Handbook on National Human Rights Plans of Action* (2002, UN) at 9 lists the following as the goals of an ideal human rights action plan: improving the promotion, protection and observance of human rights in a particular country or region; assessing a country / region’s human rights situation; formulating programmes and ideas aimed at strengthening human rights institutions and other organs and agencies charged with the protection and promotion of human rights; sensitizing, deepening awareness and promoting the penetration of human rights ethos and values in day-to day work and among government officers and institutions, regional institutions, civil society and the general public; forging alliances and linkages with other agencies on human rights objectives; suggesting commitments and targets to be achieved; catalysing governments and duty bearers to ratify instruments and commit faithfully to human rights cultures; providing guidance to governments, human rights agencies and civil society on the specific actions and programmes that need to be accomplished to ensure that human rights are effectively observed; coordinating and enhancing cooperation and synergized action between all groups involved in the perpetuation of a human rights agenda, such as the strong relationship between governments and civil society; promoting, maintaining and monitoring a high level of awareness of the state of human rights observance in the region or country concerned; fashioning and implementing programmes specifically targeting the situation of vulnerable groups in society and other priority areas of concern; and

rights] goals through practical measures, based on each country's [or continent's] historical, social, political, cultural, economic, and legal circumstances".<sup>6</sup> Typically, the practical measures by which an actual action plan can do these things include: assessing the human rights situation of a country or continent; sensitizing and deepening the human rights ethos among the relevant institutions and actors (including governments, regional institutions, civil society and the general public); forging alliances and linkages on human rights objectives with other agencies; suggesting commitments and targets to be achieved; and catalysing governments to commit faithfully to developing a culture of human rights.<sup>7</sup>

On this last point, the mismatch between states' commitments and their compliance with them has been widely articulated in human rights scholarship, and various preferred methods for overcoming the problems associated with the behaviours that lead to such implementation gaps have been suggested.<sup>8</sup> The logic of taking this mismatch into account in even the very conception and definition of a human rights action plan stems from widespread experience that acceding to or ratifying human rights instruments "is often not the end, but the beginning of a prolonged struggle about their implementation".<sup>9</sup>

Human rights action plans are, in effect, mechanisms for human rights socialization and their planning process must reflect this goal. Socialization involves internalizing "norms, so that external pressure is no longer needed to ensure compliance".<sup>10</sup> The objectives of improving human rights conditions and programming in a given geography that are articulated in human

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facilitating the mobilization of international resources through international institutions and other agencies.

- 6 A Chalabi "National human rights action plans: A roadmap to development" (2014) 24/8 *Development in Practice* 989 at 995. OHCHR *Handbook*, above at note 5 at 8 notes that "the fundamental purpose of a national human rights action plan is to improve the promotion and protection of human rights in a particular country".
- 7 *National Action Plans on Business and Human Rights Frameworks: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (June 2014, Danish Institute for Human Rights (DIHR) and The International Corporate Accountability Roundtable (ICAR)).
- 8 OA Hathaway "Do human rights treaties make a difference?" (2002) 111 *Yale Law Journal* 1935 at 1938; EM Hafner-Burton and K Tsutsui "Human rights in a globalizing world: The paradox of empty promises" (2005) 110/5 *American Journal of Sociology* 1373; EM Hafner-Burton and J Ron "Seeing double: Human rights impact through qualitative and quantitative eyes" (2009) 61/2 *World Politics* 360; E Neumayer "Do international human rights treaties improve respect for human rights?" (2005) 49/6 *Journal of Conflict Resolution* 925.
- 9 H Schmitz and K Sikkink "International human rights" in W Carlsnaes, T Risse and BA Simmons (eds) *Handbook of International Relations* (2002, Thousand Oaks) 517 at 529.
- 10 T Risse and K Sikkink "The socialization of international human rights norms into domestic practices: Introduction" in T Risse, SC Ropp and K Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999, Cambridge University

rights action plans are embodied in, and conceptualized through, the broader vision of human rights socialization. To borrow language from scholars of international relations, human rights action plans help move human rights norms towards internalization.<sup>11</sup> The signing and ratification of human rights treaties are not, on their own, sufficient to ensure the internalization of human rights norms.<sup>12</sup> Rather, the legal norms contained in treaties and customary international law undergo stages of development (the “norm life cycle”) before being internalized.<sup>13</sup> Differing accounts of the process of norm development exist.<sup>14</sup> In Finnemore and Sikkink’s intervention, the norm life cycle proceeds in three stages: the first stage of “norm emergence”; a second stage featuring “norm cascades”; and a third stage, which culminates in “norm internalization” where “norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.”<sup>15</sup> The socialization process is located in the second stage of the norm life cycle. During this phase, “norm leaders attempt to socialize” others “to become norm followers”.<sup>16</sup> Pan-continental human rights action plans such as the AHRAP are particularly interesting mechanisms for norm diffusion, as the norm leaders (ie African states) are also the main targets or subjects of the intended socialization.<sup>17</sup> However, objects of human rights socialization, either through human rights action plans or other mechanisms, extend beyond states. The entire society must simultaneously form part of the socialization efforts while also being socialized. This objective is crucial for the human rights action planning process, given that actors who are engaged in formulating a plan have more impetus to execute the plan. Features of human rights action planning processes, such as multi-stakeholder participation and human rights education and awareness (which are discussed below), as well as engagement in the planning process, are particularly apposite in meeting this objective.

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Press) 1 at 11. See also T Risse, SC Ropp and K Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (2013, Cambridge University Press).

- 11 M Finnemore and K Sikkink “International norm dynamics and political change” (1998) 52 *International Organization* 887.
- 12 E Cox “State interests and the creation and functioning of the United Nations Human Rights Council (2010) 6 *Journal of International Law and International Relations* 87 at 92.
- 13 Finnemore and Sikkink “International norm dynamics”, above at note 11.
- 14 See J Gest et al “A comparative analysis of six agendas and emerging migrants’ rights” (2013) 19 *Global Governance* 1; C Bob “Introduction: Fighting for new rights” in C Bob (ed) *The International Struggle for New Human Rights* (2009, University of Pennsylvania Press) 1.
- 15 Finnemore and Sikkink “International norm dynamics”, above at note 11 at 895.
- 16 *Ibid.*
- 17 Scholars have theorized the relationship between international organizations and norm diffusion. See generally, B Greenhill *Transmitting Rights: International Organizations and the Diffusion of Human Rights Practices* (2015, Oxford University Press); B Greenhill “The company you keep: International socialization and the diffusion of human rights norms” (2010) 54 *International Studies Quarterly* 127.

The AHRAP appears to adopt this view of an action plan as a mechanism of socialization. Its purpose is “the development of a comprehensive programme of action aimed at reinvigorating and better organizing the urgent work of implanting already agreed upon African human and peoples’ rights standards”.<sup>18</sup> Pillar one of the AHRAP is particularly instructive as it focuses on “inculcating a culture of human and peoples’ rights in Africa”.<sup>19</sup> While directing attention to different stakeholders, the three key result areas of pillar one all seek to facilitate human rights socialization in Africa: entrenching and reinforcing “deeper understanding of and commitment to the culture of human and peoples’ rights”; “ratification, domestication, harmonisation and implementation of shared values instruments”; and “knowledge generation, management and dissemination on human and peoples’ rights in Africa”.<sup>20</sup>

In summary therefore, a human rights action plan is, essentially, a policy document that highlights a comprehensive programme and timeline of activities and goals to be achieved, with the aim of effecting incremental (or even at times semi-revolutionary) changes and improvements in human rights. It should also be regarded as a form of evidence-based accountability in the fulfilment of international standards and commitments (be they regional or global in provenance) through targets, indicators and the continuous measuring of progress. A human rights action plan does this by identifying action-oriented steps that human rights duty bearers must take to improve the promotion and protection of human rights within their various jurisdictions. Furthermore, as we are about to see in more detail, such action plans also tend to disclose gaps in state and inter-state human rights practices, and highlight priority areas that need attention.

## DOES THE AHRAP FIT THE CONVENTIONAL NOTION OF A HUMAN RIGHTS ACTION PLAN?

The main question focused upon in this article is the extent to which the AU human rights planning *process* conforms to the conventionally “ideal”, though still challengeable, process of human rights action planning. However, it is first important to understand whether the AHRAP even fits the definition of a human rights action plan?

This article has already noted that the AHRAP seeks to achieve the overarching goal of human rights socialization. To begin with, therefore, the two imperatives of programming and improvement that tend to feature as the chief objectives of a human rights action plan were, rather unsurprisingly, present in the AU Assembly’s statement of its broad vision for the ten-year AHRAP

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18 “African human rights goals (African HRGs): 10 goals in 10 years for human and peoples’ rights in Africa – Action plan of the Human and Peoples’ Rights Decade in Africa, 2017–2026 as at June 2018” at 14 (forthcoming, on file with the authors).

19 Id at 25.

20 Id at 25–26.

that it commissioned at its 2016 summit in Kigali. The mandate of prioritizing a commitment to the deepening of human rights culture(s) on the African continent that the AU Assembly gave to those who would produce the AHRAP clearly embraces the intention of bringing about improvements and changes in the human rights situation on the continent through conscious planning, followed by concerted action.<sup>21</sup> The AU summit's mandate on the development of the AHRAP commits to "enhancing efforts" and the "promotion and popularization" of human and peoples' rights.<sup>22</sup> It also encompasses all existing human rights standards and obligations that bind AU member states (though to varying extents).<sup>23</sup>

The five pillars of the AHRAP address most of the thematic human rights issues that would be expected of such a plan. The content of the plan states the concrete and specific measures to be taken by African states as human rights duty bearers and proposes how to address the identified existing gaps in the implementation of the international human rights agenda in Africa. This is in line with one of the widely accepted key principles on the content of human rights action plans: that, among other things, the implementation of international human rights obligations must enjoy pride of place in any plan, and that the plan must, therefore, be based on the development and indication of the steps that the relevant states must take to give effect to their international commitments in the area, either through the enactment of legislation or other measures.<sup>24</sup>

Also, as enumerated in the 2016 declaration mandating the AHRAP's development, the AU's policy commitments are in sync with the major principles agreed at the 1993 World Conference on Human Rights in Vienna.<sup>25</sup> This is not at all surprising because, since the Vienna conference, Africa has led the way as the first continent to enact a regional action plan.<sup>26</sup> The Vienna Declaration's<sup>27</sup> emphatic language of improvement in the protection and promotion of human rights through planning has, indeed, underpinned the AU planning process since the 1999 Grand Bay (Mauritius) Declaration and Plan of

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21 Human Rights Decade Declaration, above at note 1, para 2.

22 Ibid.

23 Id, para 4.

24 OHCHR *Handbook*, above at note 5 at 13–21 enumerates a number of principles, including the principle that an action plan is a commitment to universal human rights standards.

25 Vienna Declaration and Programme of Action, UN doc A/CONF.157/23, 12 July 1993, part II, para 71.

26 See African Commission on Human and Peoples' Rights: The Grand Bay (Mauritius) Declaration and Plan of Action of 1999, and Human Rights Strategy for Africa (2012–16); Council of the European Union: European Union Action Plan on Human Rights and Democracy (2012) and Action Plan on Human Rights and Democracy (2015–19); Organization of American States: Inter-American Commission on Human Rights Strategic Plan (2017–21).

27 See generally, Vienna Declaration, above at note 25.



Action.<sup>28</sup> However, much of this commitment to the principles in the Vienna Declaration remains rather rhetorical, and has not been matched as much as it should or could be by improvements in the real situation on the continent.

Furthermore, while the AHRAP has set out its own version of intended outcomes, these stated objectives also correspond to at least two major international models of what these outcomes should look like. For one, they tend to mimic the stated objectives in the UN Office of the High Commissioner for Human Rights (OHCHR) *Handbook*.<sup>29</sup> The only slight deviation is that the AHRAP is designed not only to target bland outcomes, but envisions them as corresponding to key “result areas” that are based on five major pillars drawn directly from the AU Assembly directive and the human rights aspects of both Agenda 2063 and its first ten-year implementation plan.<sup>30</sup> Secondly, the AHRAP’s goals also reflect and draw upon the Commonwealth Secretariat’s recommendations on the nature of national action plans.<sup>31</sup>

In the African human rights system, non-compliance with and non-implementation of human rights commitments have been identified as areas that need attention in the human rights action plans of African states and the AU alike. Quashigah and Welch had, for example, long noted that states often regard their reporting mandate as an upsetting nuisance.<sup>32</sup> Mutua has noted the, at most, lukewarm embrace by too many states (including on the African continent) of invasive international human rights instruments.<sup>33</sup> Mutua explains that the overly intrusive nature of these instruments on state sovereignty is one reason for the ineffective enforcement of human rights standards by those states, and their tendency to select “normatively weak” options.<sup>34</sup> He therefore cautions that standard-setting, in

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28 Available at: <[https://archives.au.int/bitstream/handle/123456789/2058/Grand%20Bay%20Declaration\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2058/Grand%20Bay%20Declaration_E.pdf?sequence=1&isAllowed=y)> (last accessed 30 April 2020).

29 OHCHR *Handbook*, above at note 5 at 9.

30 For example, pillar one of inculcating a culture of human and peoples’ rights in Africa has three key result areas: entrenching and reinforcing “deeper understanding of and commitment to the culture of human and peoples’ rights; ratification”, “domestication, harmonization and implementation of shared values instruments”; and “knowledge generation, management and dissemination on human and peoples’ rights in Africa, including the use of African languages”: “African HRGs”, above at note 18 at 25.

31 Commonwealth Model National Plan of Actions on Human Rights (2007, Commonwealth Secretariat) at 19–20. These recommendations include: stronger administration of justice and the rule of law; strengthened independence of the judiciary; better relationships between governments and intergovernmental agencies and civil society; and the facilitation of the mobilization of international resources through international institutions and other agencies.

32 K Quashigah “The African Charter on Human and People’s Rights: Towards a more effective reporting mechanism” (2002) 2 *African Human Rights Law Journal* 261 at 261; C Welch *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental Organizations* (1995, University of Pennsylvania Press) at 58.

33 M Mutua *Human Rights Standards: Hegemony, Law and Politics* (2016, State University of New York Press).

34 Id at 76.

terms of the generation of norms, must be followed by “structures” of realization or “pathways of enforcement”.<sup>35</sup> This insight raises the question of how the mismatch can be overcome in human rights action plans, and what form human rights action plans such as the the AHRAP should take if they are to become as effective as they could.

The AHRAP’s dominant feature is its validation of the traditional conception of human rights action plans as documents that are designed to drive a form of “evidence-based” accountability in the fulfilment of international standards and commitments by states.<sup>36</sup> Traditional human rights action plans emerged as state policy action strategies, but are increasingly being replicated by pan-continental and sub-continental institutions to set clear implementation targets as their modality of executing human rights mandates. Most human rights plans resonate with Chalabi’s proposition that an action plan should be “based on clear and explicit objectives, agreed upon at the international level” and derived from universal human rights standards to which states have ascribed.<sup>37</sup> The AHRAP’s development over time clearly reflects this thinking. Accordingly, the AHRAP’s shining feature is its avoidance of the pitfalls that bedevilled its counterpart in the European Union (EU), one of the few jurisdictions to have formulated a continental action plan. During the formative stages of the European model of human rights action plans, one of the criticisms was that it didn’t specify outcomes to be achieved or take as seriously as it ought the measurability of progress.<sup>38</sup> By contrast, the AHRAP sets specific goals, objectives and tasks / activities, and steps to be undertaken as well as timelines. On this issue of target setting, the AHRAP compares well, for instance, with the Irish national human rights action plan on the specific human rights of women in the peace and security context, which followed on work related to UN Security Council resolution 1325 (2000). A point of clarification is that the AHRAP is a pan-continental policy plan, which ordinarily precludes comparison with national action plans; however, because it is largely shaped by the concept of national action planning, it may be permissible that it draws from relevant experiences and best practices of other regional or national contexts. It is notable that the Irish plan was for instance acclaimed for “setting out specific and measurable indicators in both quantitative (numerical) and qualitative (categorical) formats that allow progress to be measured

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35 Id at 10.

36 A Swaine “Globalising women, peace and security: Trends in national action plans” in S Aroussi (ed) *Rethinking National Action Plans on Women, Peace and Security* (2017, IOS Press) 7 at 9.

37 A Chalabi “The nature and scope of states’ obligation to adopt a national human rights action plan” (2014) 18/4–5 *The International Journal of Human Rights* 391 at 404.

38 “Plan International’s recommendations on the draft EU action plan on human rights and democracy 2015–19”, available at: <<https://plan-international.org/publications/eu-action-plan-human-rights-and-democracy-2015-2019-recommendations>> (last accessed 30 April 2020). The current Council of Europe 2015–19 action plan was faulted for failing to provide targets or results to be achieved or providing indicators for their achievement.

against both outputs (activities) and outcomes (the impact of those activities)".<sup>39</sup> So, borrowing from the Irish and EU cases leads to the clear insight that the AHRAP's outstanding feature is its endorsement of the traditional conception of human rights action plans, often a national one, as policy documents that are designed to drive a form of "evidence-based" accountability.

## KEY CHARACTERISTICS AND FEATURES OF CONVENTIONALLY IDEAL PAN-CONTINENTAL HUMAN RIGHTS ACTION PLANNING PROCESSES

The following core elements have conventionally been thought to be necessary for an effective human rights action planning process (and are therefore key to the successful implementation of any resulting human rights action plan):<sup>40</sup> a preceding baseline study/gap analysis; the prioritization of both "critical areas of concern"<sup>41</sup> and flagship areas; a commitment to the inclusion of targets, timelines and indicators, and to the adoption of "measurable" goals;<sup>42</sup> the mainstreaming of the planning process into both the work of an inter-governmental organization's and domestic public policy; multi-stakeholder participation and civil society involvement in the process; the anchorage of the planning process in a suitable theoretical framework; and attention to the key role of human rights education and training.

These elements are discussed below, but it should be noted at the outset that, while most of the available scholarly and policy work on human rights action planning relates to the domestic context, there are certain points made in such works that can, and have been, adapted and adopted in pan-continental human rights action planning processes.<sup>43</sup>

### The necessity for a preceding baseline study

According to conventional wisdom, the first (indispensable) element necessary for the success of a pan-continental human rights action planning process is a preceding baseline study (ie a gap analysis) diagnosing the areas of concern that will inform the substance of the plan itself, and identifying both the new initiatives that will have to be undertaken to implement the plan and the ways and means of monitoring and evaluating the success of those implementation activities.<sup>44</sup> A baseline study analyses the human rights situation in

39 Aroussi (ed) *Rethinking National Action Plans*, above at note 36 at ix.

40 For example, see OHCHR *Handbook*, above at note 5 at 60–77.

41 A Chalabi "Australia's national human rights action plans: Traditional or modern model of planning?" (2016) 20/7 *The International Journal of Human Rights* 993 at 1000.

42 For a critique of measurement in the field of development, see R Buchanan, K Byers and K Mansveld "What gets measured gets done: Exploring the social construction of globalized knowledge for development" in M Hirsch and A Lang (eds) *Research Handbook on the Sociology of International Law* (2018, Edward Elgar Publishing) 101.

43 Swaine "Globalising women, peace and security", above at note 36 at 24.

44 Chalabi "Australia's national human rights", above at note 41 at 1004.

a given space (including a country or continent) in respect of the complete range of human rights.<sup>45</sup> As has been argued, the “baseline assessment can then be used to compare future conditions with the initial status after a particular intervention or program has taken place, with the aim to help understand its effects and results; in other words, to assess impact”.<sup>46</sup> According to the OHCHR, while there is no universally accepted format, substance or vision of a baseline study, it should “examine the legal framework, institutions for the protection of human rights and the state of human rights education and awareness [and] identify the main areas in which problems have been encountered in meeting the country’s human rights obligations”.<sup>47</sup> This analysis then forms the basis upon which the targets and goals to be accomplished in the future are set.

In the conventional way of doing things, once a draft baseline study has been prepared, it is made available for public access through various channels. This enhances the legitimacy and credibility of the documents.<sup>48</sup> Given that such studies do not tend to involve original research, the reasonable time-period for the preparation of the study should be roughly two months.<sup>49</sup>

Equally important, baseline studies regarding the preparation of human rights actions plans will involve consultation with local communities, government agencies with human rights mandates, non-governmental organizations and relevant donors.<sup>50</sup> In this connection, although we are concerned here with a pan-continental action plan, certain (though not all) lessons can still be drawn from individual countries with histories of human rights action planning. The reason is that, since the emergence of the concept of human rights action planning in 1993, it is mostly states that have embarked seriously on these exercises and some have since effected them in practice. Even though Africa was the first to adopt a pan-continental plan, the practice has been marginal across regions, with the EU and Organization of American States following in 2012 and 2017 respectively. Hence a richer tapestry of experiences can be hewn out of those individual countries that have put the concept into practice. In Australia, for instance, Chalabi is of the opinion that its former national human rights action plans failed largely because they were hastily prepared, without an informed prior study or assessment of existing human rights needs in the country at the time, and because they were beset by a top-

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45 European Group of National Human Rights Institutions “Implementing the UN Guiding Principles on Business and Human Rights: Discussion paper on national implementation plans for EU member states” at 4, available at: <<https://www.business-humanrights.org/sites/default/files/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf>> (last accessed 30 April 2020).

46 *National Action Plans on Business and Human Rights*, above at note 7 at 31.

47 OHCHR *Handbook*, above at note 5 at 62.

48 *Id* at 67.

49 *Id* at 64.

50 Commonwealth Model National Plan, above at note 31 at 28.

down approach that did not engage civil society, the general public and sub-state institutions.<sup>51</sup>

### Prioritization of areas of concern

According to the conventional ideal, the prioritization of areas of concern is another crucial pillar for the success of any human rights action planning process, be it national or pan-continental. This prioritization will lead to an emphasis in both the planning process and the envisioned plan on areas where human rights threats are ongoing or most imminent (as informed by the baseline study), areas where there has been little or no remediation of violations, or areas where human rights action is most urgent. Priority should also be given to the protection of the rights of those considered most vulnerable in the given society.<sup>52</sup> The scalable experience of some national action plans reveals that a country's national planning process may fare better if it selects issues to be prioritized so as to "make actions more impactful" over time.<sup>53</sup> Limited resources, the vast fields of activities to be engaged, and the massive amount of work often involved, make it impractical to deal with all human rights issues at once. It is for this reason that context-dependent prioritization of critical areas, or areas where immediate action is necessary, must be emphasized. In practice, the recommended criteria for identifying high-priority areas include: the severity of the problems; the cost implications; the timeframe for implementation; and the extent of public sensitivity to the issue.<sup>54</sup>

A note of caution is, however, appropriate here, given that the effort at prioritization as between varying human rights problems should not negate the fundamental obligation assumed by the relevant entities to implement and realize all rights in an interconnected, interdependent and indivisible way. Some countries, which opted to set as their priority areas of concern, visions and agenda that do not tend to correspond to international human rights standards, have experienced non-conformity to universal values or what has been termed the "non-correspondence" problem.<sup>55</sup> In other instances, governments have sometimes enacted plans that support the anti-human rights

51 Chalabi "Australia's national human rights", above at note 41 at 997.

52 OHCHR *Handbook*, above at note 5 at 66: "Some vulnerable groups are apparent to those working regularly in the human rights field. Indigenous peoples, ethnic, linguistic or religious minorities, persons with disabilities and refugees are examples that appear in most of the plans that have been prepared to date. Women and children are also always mentioned as groups requiring specific attention, though whether they should be classed as 'vulnerable' groups is a matter for debate. Other groups that may not always spring to mind also demand serious attention. They include people living with HIV/AIDS, the mentally ill, the elderly and sexual-orientation minorities".

53 Swaine "Globalising women, peace and security", above at note 36 at 17.

54 OHCHR *Handbook*, above at note 5 at 65.

55 A Chalabi "The problem-oriented approach to improving national human rights action plans" (2015) 7/2 *Journal of Human Rights Practice* 272 at 276.

status quo or have developed non-comprehensive human rights action plans that ignore critical facets of concern.<sup>56</sup> For instance, Australia's first two action plans of 1994 and 2004 suffered this weakness because they tended to ignore certain urgent and desperate human rights problems in the country at the time, such as the plight of refugees and asylum seekers, and concerns over the mandatory detention of children seeking asylum.<sup>57</sup>

### Target setting, timelines, indicators and “measurability”

The established understanding is that the effectiveness of a human rights action planning process (and therefore of the resulting plan) depends, in part, on the adequacy of the timespan during which the achievement of the envisaged plan's objectives and targets can be measured: “a lag time that is long enough to ensure that the actual impact can be measured”.<sup>58</sup> This is the period during which strategic targets are to be realized, evaluated and monitored. For instance, one important feature of the EU's human rights planning process is its “mid-term review” conducted to assess progress and “if required, adjustments in the light of experience and of the emergence of new challenges”.<sup>59</sup> This is one reason why, by 2015, the EU's 2012 Human Rights Strategy was transformed into a new action plan to run from 2015 to 2019. In the mid-term assessment that led to this transformation, the EU's high representative for foreign affairs and security policy was able to report to both the European Parliament and the European Council some achievements attained during that period, as well as the need for some improvements to be made.<sup>60</sup>

Measurement is a process that “converts well-defined and well-specified concepts into meaningful quantitative measures or qualitative categories”.<sup>61</sup> Indicators may entail quantitative and qualitative assessment of compliance by duty bearers and the extent of enjoyment of rights by individuals. Qualitative indicators may include general descriptions and narratives about human rights situations and the measures may be structural (policy, rules and an institution's compatibility), process or outcome based.<sup>62</sup> For example, qualitative indicators may be expressed as “elimination of systemic obstacles to citizen access to national, regional and continental institutions with a

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56 Id at 280.

57 Chalabi “Australia's national human rights”, above at note 41 at 998.

58 Ibid.

59 “Keeping human rights at the heart of the EU agenda” (joint communication to the European Parliament and Council: Action plan on human rights and democracy, 2015–19) at 4, available at: <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52015JC0016>> (last accessed 20 May 2020).

60 Id at 4.

61 See for example T Landman and E Carvalho *Measuring Human Rights* (2010, Routledge) at 31.

62 *National Action Plans on Business and Human Rights*, above at note 7 at 29.

mandate for protection of human and peoples' rights".<sup>63</sup> These qualitative measures can be quantified by, for example, counting the number of laws that protect a vulnerable group, the number of shelters that give them succour from abusers, and so on, to produce a number for each relevant indicator.<sup>64</sup> One last point in this respect is that the "indicators must be clear and measurable".<sup>65</sup>

It is, however, increasingly being recognized that, as important as they are, measurements are not neutral nor do they really serve the neutral purposes that they purport to serve. Based on an in-depth appreciation of what the literature says about the role of measurement in the discipline of development, some scepticism about measurability may thus be warranted. This scepticism is due to reasons other than the inaccuracies of indicators or quantification methods that may imperil the evaluation of achieving progress in planning. As Buchanan et al note, it has to do with the functionality of measurements as a "technology" of knowing that may deliberately be deployed to achieve certain desired ends, to the effect that the outcomes "can never be neutral representations of external objects" given this constructed tendency to bias.<sup>66</sup>

### **Mainstreaming into the work of inter-governmental organizations and domestic public policy**

Another orthodox understanding about successful continental human rights action planning processes is that they must be mainstreamed into both the operations of inter-governmental organizations and domestic public policy. The latter requires the location of the planning process and of the plan itself within the "context of public policy, so that governments and communities can endorse envisaged human rights improvements as practical goals, devise programmes to ensure the achievement of these goals, engage all relevant sectors of government and society, and allocate sufficient resources".<sup>67</sup> In a study documenting the trends in national action plans giving effect to the UN Security Council's women, peace and security resolution 1325 (2000),<sup>68</sup> Swaine illustrates that national human rights action plans may have significant prospects of success if led by well-resourced and politically powerful ministries or public agencies.<sup>69</sup> Thus, the effectiveness of this kind of planning

63 AHRAP, pillar 2, key result area 2.2 and outcome 2.2.1: see "African HRGs", above at note 18 at 27.

64 S Engel-Merry "Measuring the world indicators: Human rights and global governance" (April 2011) 52/S3 *Current Anthropology* 83 at 86.

65 See Aroussi (ed) *Rethinking National Action Plans*, above at note 36.

66 Buchanan, Byers and Mansveld "What gets measured", above at note 42 at 101, and generally for a discussion of the biases inherent in the use of measures in development.

67 OHCHR *Handbook*, above at note 5 at 9.

68 This resolution sought to "address women's exclusion from mainstream decision-making, policy and programming in international peace and security". See Swaine "Globalising women, peace and security", above at note 36 at 7.

69 Id at 16.

manoeuvre is determined by the “qualities” of the “lead government entity” charged with the initiation and implementation of an action plan.

Thus, in the case of pan-continental human rights action planning processes, leadership by a well-resourced and / or influential (and therefore powerful) department within the relevant inter-governmental organization can also be said to be an important factor that shapes the relative success or failure of such processes.<sup>70</sup> Similarly, therefore, the qualities of the lead department within the relevant inter-governmental body that has primary carriage of the human rights action planning process at issue is an important factor in the effectiveness of the process and plan alike.<sup>71</sup>

Nevertheless, the idea of interdepartmental coordination (synergy between other organs and the lead department) has been proposed elsewhere in the case of national action plans in the business and human rights area.<sup>72</sup> It is not hard to imagine why it would also be relevant to the inter-governmental human rights action planning process. The main contribution of such coordinated action, it is said, is that it can have an impact on the political weight, resources and goodwill that the planning process and the plan itself may garner. Crucially, the integration of the action planning process and the plan itself into the policy deliberations of a range of domestic ministries or inter-governmental organizations’ departments is key for the success of both the planning process and the envisaged plan. This is because such mainstreaming generates inclusivity and acceptability from those that are necessary for its implementation.<sup>73</sup> However, such inclusivity should also include other stakeholders. Swaine conducted a comprehensive review of action plans on women, peace and security adopted between the year 2000 and 2016 and noted the various institutions, agencies and groups that were given attention in the consultation processes. She notes that Liberia and Sierra Leone, for instance, opted to conduct wider consultation with women and girls in the development of their national plans, while Finland, Ireland and the Netherlands consulted civil society and other public bodies.<sup>74</sup> The practice, as she observes, always involves selecting a lead governmental agency, such as the Ministry of Foreign Affairs or the Ministry of the Interior and National Security, to have primary responsibility for developing and implementing the plan. Similarly,

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70 Ibid.

71 Ibid.

72 ICAR and DIHR “European civil society dialogue on the national action plans (NAPs) project” (18 October 2013) at 41, available at: <<https://www.business-humanrights.org/en/european-civil-society-dialogue-on-the-national-action-plans-naps-project>> (last accessed 30 April 2020); European Group of National Human Rights Institutions “Implementing the UN Guiding Principles”, above at note 45; UN Human Rights Council *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises A/HRC/23/32* (14 March 2013) at 20.

73 Swaine “Globalising women, peace and security”, above at note 36 at 16.

74 Ibid.



she advises that consultation must involve different government agencies and those stakeholders with the expertise and ability to influence outcomes.<sup>75</sup>

### Multi-stakeholder participation and leadership

The conventional approach also tells us that a planning process that will lead to an effective human rights action plan must be conceived of, and executed as, a participant-led and multi-stakeholder-owned process founded on the twin ethos of consultation and legitimacy, as the instrumental pillars for both its formulation and actualization. Almost needless to say, the process of developing a plan is as important as the outcome (the plan itself). Thus, like the plan itself, the process must incorporate the voice of citizens and stakeholders. It is no wonder then that many policy practitioners in this area have reiterated that emphasis should be on the involvement of stakeholders in the planning process.<sup>76</sup> A key insight that has been offered in this regard is that, to be successful, a human rights action planning process and the plan itself must mobilize a broad range of constituencies in support of the human rights agenda at issue.<sup>77</sup>

In the past, traditional conceptions of planning were “top-down”, “technocratic”, “state-centric”, bereft of any theoretical foundation and focused solely on the “process” of reaching a predetermined outcome set by state elites.<sup>78</sup> In some countries, state-led planning often came with the baggage of the parochial political ideology of functionaries in power and a lack of theoretical anchorage.<sup>79</sup> A modern notion of human rights action planning is that it must be grounded in broad-based consultation that “allows discourse, and socialization, to take place” between governmental and non-governmental stakeholders and affords these diverse groups “various access points to pressure their government [or pan-continental inter-governmental organization] into better respect for human rights”.<sup>80</sup> As Chalabi notes:

“[A]ll the stakeholders, from the local to the global, should get involved in the identification of problems in the preparatory phase, the development of the plan, implementation, monitoring and the evaluation of the plan. Modern planning is based on a top-down bottom-up strategy which includes the advantages of both the superior vast knowledge and expertise of experts who have

75 Ibid.

76 OHCHR *Handbook*, above at note 5 at 10.

77 Swaine “Globalising women, peace and security”, above at note 36 at 16.

78 Chalabi “Australia’s national human rights”, above at note 41 at 994.

79 Id at 1002–04.

80 D de Felice and A Graf “The potential of national action plans to implement human rights norms: An early assessment with respect to UN Guiding Principles on Business and Human Rights” (2015) 7/1 *Journal of Human Rights* 40 at 46–47; T Risse “Let’s argue! Communicative action in world politics” (2000) 54/1 *International Organization* 1. On human rights socialization, see the discussion above under “Objectives and method”.

clear ideas about different phases of planning and human rights from the top down and the detailed wisdom located in the community itself from the bottom up so that the direction of planning and development can be directed by both experts and those most affected.”<sup>81</sup>

Consultation and participation of stakeholders is often done “through stakeholder mapping, capacity building, and engagement of the disempowered or at-risk stakeholders”.<sup>82</sup> For example, Australia’s more recent progress in human rights action planning has been cited as having been brought about by a new era of cooperation between government and civil society.<sup>83</sup> One of the pillars of success of the new plans was the “social coalitions approach”, which brought on board government agencies, non-governmental groups, the media, academia and other social movements.<sup>84</sup> The process of developing the plan was also evidence-based and emphasized the knowledge of both experts and local communities.<sup>85</sup>

### **The need to anchor the action plan’s objectives in some relevant foundational theory**

Another critical element is the need to anchor a human rights action planning process and the resulting plan’s objectives on some relevant foundational theory “to guide both the content and the process of planning”.<sup>86</sup> Theory provides “a frame of reference” for studies, content development, evaluation and monitoring.<sup>87</sup> By enlisting a theory in an action plan, the gap between knowledge and action is more likely to be bridged than not. For instance, with regard to Australia’s experience, Chalabi indicates that one of the weaknesses of the initial relatively unsuccessful action plans was the failure to anchor them in any theoretical framework, let alone a relevant one. This allowed the Australian government in office at the time to centre its own partisan political ideology while marginalizing international human rights standards and some urgent areas of concern, such as the rights of refugees and asylum seekers in general, and the specific issue of the mandatory detention of child asylum seekers.<sup>88</sup>

81 Chalabi “Australia’s national human rights”, above at note 41 at 995.

82 S Blackwell and K Shay “The role of national action plans on business and human rights in protecting human rights defenders” (November 2014), available at: <<http://www.ishr.ch/news/role-national-action-plans-business-and-human-rights-protecting-human-rights-defenders>> (last accessed 30 April 2020).

83 Chalabi “Australia’s national human rights”, above at note 41 at 1001.

84 Ibid.

85 Id at 1012–13.

86 Id at 996. On this point, Chalabi relies on the work of J Friedmann *Insurgencies: Essays in Planning Theory* (2011, Routledge) and S Campbell and SS Fainstein (eds) *Readings in Planning Theory* (2012, Wiley Blackwell Publishing) at 1–15.

87 Chalabi, *ibid.*

88 Id at 998 and 1003.

## Greater mass human rights education and awareness

One final conventionally-accepted requirement for successful human rights action planning processes is the need to create mass human rights education and awareness regarding both the process and plan. The UN human rights guidelines on human rights action plans are instructive in this regard. It is recognized that a human rights education sub-plan is essential in promoting the agenda of the national (and other) plans that are intended to result from the human rights action planning process, which is the “building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes” in the relevant location(s).<sup>89</sup> Thus, the planning process should aim to include a human rights education sub-plan. Such an education sub-plan may involve incorporating: “human rights education into all levels of formal education [to augment the capacity of citizens to participate more fully in the process]; the training of professionals or other groups (in particular vulnerable groups); public awareness campaigns; the translation, production and revision of materials; research and legislative reform”.<sup>90</sup> Substantively, this aids human rights socialization and the eventual internalization of human rights norms. Pan-continental human rights action plans such as the AHRAP aim to socialize actors at both intergovernmental and domestic levels. They aim to ensure that human rights “acquire a taken-for-granted quality”<sup>91</sup> and are “vernacularized” at the domestic level.<sup>92</sup>

## Concluding point

It is generally accepted that the conventional features of successful human rights action planning processes discussed above ought not, in general, be deviated from, whether at the pan-continental or domestic level. Of course, this point is made without disregarding or losing sight of the historical and contextual peculiarities of every given country and region. It goes as far as to emphasize that no single template can fit all, given the range in complexities and dynamisms from one region of the world to another. That is to say, human rights action planning must still be context-relevant and context-specific.<sup>93</sup> In relation to context-specificity, let us take as an example Germany's 2017–20 national human rights action plan, which deviated from

89 OHCHR “Guidelines for national plans of action for human rights education (1997)”, doc A/52/469/Add.1 and A/52/469/Add.1/Corr.1 (20 October 1997 and 27 March 1998), para 11, available at: <[http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/GuidelinesforNationalPlansofActionforHumanRightsEducation\(1997\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/GuidelinesforNationalPlansofActionforHumanRightsEducation(1997).aspx)> (last accessed 30 April 2020).

90 OHCHR *Handbook*, above at note 5 at 12.

91 Finnemore and Sikkink “International norm dynamics”, above at note 11 at 895.

92 See generally, SE Merry and P Levitt “The vernacularization of women’s human rights” in S Hopgood, J Snyder and L Vinjamuri (eds) *Human Rights Futures* (2017, Cambridge University Press) 213; SE Merry *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006, University of Chicago Press, 2006).

93 OHCHR *Handbook*, above at note 5 at 12.

previous models that tended to focus on issues external to the country and has moved to a new framework confronting some of the more contemporary human rights issues facing the country, such as the rights of refugees and asylum seekers. The incorporation of the plan into Germany's current national action plan, which now "pays specific attention to work that will improve the protection of refugees, especially refugee girls, within Germany", is one of the few actual examples, although from a different context, that shows the necessity to modify an action plan to be context specific and context relevant.<sup>94</sup> This note of caution (that such plans be cognizant of changing dynamics) is especially relevant to the African context, which is very different from that of any European country. Indeed, this all-important point on context specificity should be regarded as an agreed principle applicable to any human rights planning process, whether pan-continental, regional or national.

## **EMBRACE AND DE-COUPLE: THE AFRICAN UNION'S HUMAN RIGHTS ACTION PLANNING PROCESS AND THE CONVENTIONAL "IDEAL"**

This section analyses available evidence of the process adopted by the AU in developing the AHRAP, to determine its conformity or otherwise with the conventional "ideal": to what extent did the AU process embrace the conventional model, and to what degree did it de-couple itself from it? The key features of effective human rights action planning processes discussed in the previous section are deployed as a "standard" for assessing the AU planning process, while keeping a critical eye on what, if anything, the AU planning process's departure from this conventional human rights action planning model can teach us about the latter's appropriateness or otherwise as a standard of assessment.

### **Did the AU process incorporate and rely on a preceding baseline study?**

As noted above, the formulation of a human rights action plan typically begins with drafting a baseline study. In the AU's planning process, consultants (led by PALU) were engaged by the relevant sub-unit within the AGA unit to conduct a study of the existing policy and legal infrastructure on human rights that would inform the formulation of the plan.<sup>95</sup> Their desk research provided "disaggregated data"<sup>96</sup> on a range of phenomena that were seen as needing special attention and reflection in the envisaged

94 Aroussi (ed) *Rethinking National Action Plans*, above at note 36 at viii.

95 AU Commission "Updates on AU development of the African Ten-Year Action Plan on Human and Peoples' Rights" (21 October 2017), available at: <[https://au.int/sites/default/files/newsevents/workingdocuments/33231-wd-updates\\_on\\_au\\_development\\_of\\_the\\_african\\_ten\\_year\\_action\\_plan\\_on\\_human\\_and\\_peoples\\_rights-english.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/33231-wd-updates_on_au_development_of_the_african_ten_year_action_plan_on_human_and_peoples_rights-english.pdf)> (last accessed 30 April 2020).

96 OHCHR *Handbook*, above at note 5 at 62.

AHRAP; for instance, the four flagship areas on which the AHRAP focuses, were crafted through the consultative and participatory processes of developing the plan.<sup>97</sup> Thus, in the authors' view, the AU planning process had to place emphasis on these flagship areas because past studies had identified them either as the critical areas to which the AU must pay attention, or the main areas where the visibility of the relevant normative instruments remains lower than should be the case, such as the right to development, socio-economic rights, statelessness and migrants' rights.<sup>98</sup> The sources that informed the initial desk research conducted as part of the AU planning process included data held by AU institutions (such as state reports that had been filed with the African Commission on Human and Peoples' Rights, data held by national human rights institutions, information that had been documented by civil society, reports issued by other human rights monitoring bodies and credible information published in the media).<sup>99</sup> Stakeholders, particularly civil society, were consulted widely before finalization of the PALU-led initial baseline study.<sup>100</sup>

### The prioritization of areas of concern

The AU planning process did identify a number of flagship areas and particularly stressed pillar five of the AHRAP.<sup>101</sup> Nevertheless, the AU grasped the significant danger of "alienation by prioritization" that was discussed in the previous section of this article, and as such made a great effort to avoid inconsistency between its planning process and international human rights standards and values. It did so by setting its goals and objectives in a way that strove to be in consonance with the operative African human rights instruments.<sup>102</sup>

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97 "African HRGs", above at note 18 at 25.

98 *Ibid.*

99 *Id* at 24.

100 *Ibid.*

101 *Id* at 31. The fifth pillar provides: "Entrench as an African value and establish the continental architecture for ensuring free movement of persons in Africa, and to ensure enjoyment of the rights of residence and establishment; Manifest the right to nationality and the eradication of statelessness in Africa as rights promoted and protected within the African human rights system; Entrench deep understanding and implementation of the right to development and subsidiary rights contained therein; Develop transformative leadership on governance and human and peoples' rights on the continent through capable, accountable national, regional and continental institutions; Ensure and sustain adequate institutional financial and human resourcing for AU, RECs and National organs and institutions with a human and peoples' rights mandate."

102 The Human Rights Decade Declaration, above at note 1, sets as its sole agenda the realization and promotion of the values and ethos of the shared instruments. It mandates that the AHRAP develops "efforts aimed at entrenching and reinforcing deeper understanding of the culture of human and peoples' rights ... and their promotion and popularization amongst the African peoples".

However, in the view of most of the respondents interviewed as part of the study that grounds this article, an issue that needs urgent attention as a critical area of focus in the AU planning process is that of the relationships between the businesses that operate on the continent and their commission of international crimes and violation of human rights. This is a matter to which the AHRAP has not paid as much attention as it should, in line with the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (2014).<sup>103</sup> One respondent was categorical that this issue must be treated as a matter of utmost priority on account of the international political economy of development that has unleashed fierce competition among African and international businesses for Africa's rich mineral and other resources, leading to increased exposure of its people to human rights abuses and ecological harms.<sup>104</sup> Another respondent favoured giving this issue special attention "because of the alliance that forms between foreign investors and local actors".<sup>105</sup>

Although in no way a recent development, the intense competition for Africa's valuable resources continues to pose a serious practical challenge to the autonomy of the African state to regulate the operations of multinational corporations within their territories.<sup>106</sup> The dwindled power of the state, especially African and most Global South states, to regulate and constrain (harmful) multinational corporate behaviour can be explained by Baxi's hypothesis or claims regarding the production of a "soft" and "hard" state by the various networks, rationalities and strategies deployed by "global capital". These corporate forces tend (on the one hand) to aim to fetter the regulatory power of the state, while, on the other, tending to rely on the very capacity of the state to further their interests.<sup>107</sup> The essential logic intricately woven into this rather complicated strategy is to create a "soft state" that is generally accommodative to multinationals, protective against disruptions to the market and accountable, if at all, only to certain supranational financial institutions.<sup>108</sup> Baxi argues that the resulting erosion of, or derogation from, human rights commitments is grounded in the creation or augmentation of "a hard state and regime, which must be market-efficient in suppressing and de-legitimizing human rights-based practices of resistance or the pursuit of alternative politics".<sup>109</sup>

103 See arts 14, 28A, 28L and 28LB. The Malabo Protocol is available at: <[https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)> (last accessed 30 April 2020).

104 Respondent Q.

105 Respondent R.

106 See, for example, OC Okafor "Assessing Baxi's thesis on an emergent trade-related market-friendly human rights paradigm: Recent evidence from Nigerian labour-led struggles" (2007) *Law, Social Justice & Global Development* 1.

107 U Baxi *The Future of Human Rights* (2006, Oxford University Press) at 289.

108 *Id* at 290–91.

109 *Id* at 294.

Significantly, scholars have also discussed the issue of the contents and orientation of national action plans in the business and human rights context. De Felice and Graf<sup>110</sup> outline criteria for developing these national action plans, including criteria indicating state commitment to the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>111</sup> While the serious limitations of the UNGPs as an instrument that responds to the human rights responsibilities of business actors are beyond the scope of this article,<sup>112</sup> there is overwhelming evidence to bolster the view that “business and human rights” is a subject that requires urgent attention in African countries, especially in the area of extractive industries.<sup>113</sup> What is more, even the AHRAP recognizes this dire situation, although it does not appear to prioritize the issue as much as it could when it states that the state of “Africa’s material social and intellectual development in the context of the global political economy has made our continent very valuable to exploitative practices by global business interests. This exploitation is often supported by gross violations of human and peoples’ rights”.<sup>114</sup> Instead of fully engaging businesses as core actors in the socialization process, the AHRAP tends to over-emphasize their role as stakeholders that may, inter alia, build “their own understandings of the nexus between business and human and peoples’ rights”.<sup>115</sup>

Given that, for historical reasons, African states tend to be even more vulnerable to global corporate power matrices and the regimes they have helped create, it is disappointing, though not un-surprising, that the AU planning process did not focus on this matter even more than it has. This situation is not surprising given that this non-prioritization of the gross violations of human rights committed by global / local capital and businesses in Africa is one, unfortunate, way in which the AU planning process embraces the conventional model of human rights action planning.

### Target setting, timelines, indicators and measurability?

The AU planning process (and plan) establishes a timeline of between three to five years for the mid-term assessment of the extent to which its targets and

110 de Felice and Graf “The potential of national action plans”, above at note 80.

111 OHCHR *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011, UN).

112 For critique of the UNGPs, see generally S Deva and D Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2015, Cambridge University Press).

113 U Idemudia and UE Ite “Corporate-community relations in Nigeria’s oil industry: Challenges and imperatives”(2006)13/4 *Corporate Social Responsibility and Environmental Management* 194; M Power and M Gwanyanya “The massacre at Marikana” (2017) 14/25 *SUR-International Journal of Human Rights* 61; CE Welch Jr “Human rights, environment and the Ogoni: Strategies for non-governmental organizations” (1999) 7 *Buffalo Environmental Law Journal* 251.

114 “African HRGs”, above at note 18 at 36.

115 Id at 37.

goals have been realized. This approach tightly embraces, for good reason, the conventional model of human rights action planning.

Similarly, the overall timeframe of ten years that the AU planning process has specified as the period within which the AHRAP's targets are to be realized is consistent with the overall timespan recommended by the conventional model of human rights action planning, which adheres to the principle that such planning processes should not set too short or too long a timeframe for the realization of envisaged human rights action plans, lest "a sense of continuity or overall perspective is difficult to maintain".<sup>116</sup> This time-span is adequate and would allow enough time for the necessary administrative, resource, educational and infrastructure measures to be mobilized and availed for some of the objectives to be achieved.

By setting specific targets, the AU planning process and AHRAP embrace the conventional, yet sensible, notion that, as roadmaps for the practical implementation of the human rights obligations assumed by the relevant state(s), human rights action plans are auxiliary measures to be deployed in service of the task of bridging state compliance, and thus the accountability gaps in the arena of human rights protection.<sup>117</sup> One way through which most human rights action planning processes and plans have attempted to do this "work" is to focus on setting "measurable" goals or targets and developing compliance indicators.<sup>118</sup> In practice, measurability relies on markers such as percentages, indices or numerical representations (in the case of quantitative indicators). The AU planning process and plan embrace the utilization of indicators as "statistical measures" or representations of complex phenomena into simplified and allegedly more meaningful forms.<sup>119</sup> For example, some outcomes are framed in terms of percentages, signalling the measurability of the AHRAP's relevant strategic objectives.

However, given what scholars such as Buchanan et al have taught us about the non-neutrality of measurement, it is appropriate to sound an important note of caution here. Measurements are often not what they seem to be. They are what they are made to be and to represent: a feature that can at times negate their credibility as meaningful indicators of trends, as reliable quantification of phenomena or as credible evidence for tracking accountability.<sup>120</sup> In their use as "a technology of governance, including their key role in shaping what can be known at any given time, as well as how that knowledge can be used", measurements are made to serve roles that transcend the empirical representations that they purport to be.<sup>121</sup> In the African context, where

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116 OHCHR *Handbook*, above at note 5 at 69.

117 See Swaine "Globalising women, peace and security", above at note 36 at 9.

118 Respondent Q asserted that the goal of the plan should be to measure or to design the plan technically so that it can measure.

119 Engle-Merry "Measuring the world indicators", above at note 64.

120 Buchanan, Byers and Mansveld "What gets measured", above at note 42 at 103.

121 *Id* at 102.



compliance with human rights instruments is still a very significant problem for all too many states, it is at least doubtful (although certainly not definite) whether, whatever indicators or markers of progress are adopted by a group that includes these states, they will be neutral enough to portray the true human rights situation.

### **Mainstreaming into inter-governmental operations and domestic public policy?**

In the AU, the human rights action planning process was led by the AGA unit within the AU's Political Affairs Division. This aspect of the planning process clearly conforms with the conventional model of human rights action planning discussed earlier in this article. Some of the interviewees emphasized the institutional capacity of a coordinating organ such as the AGA unit to lead the process.<sup>122</sup> Asked about the likelihood that, as a result of this feature of the planning process, the proposed plan will be effectively implemented by African states, civil society, multinational corporations and other actors, these highly experienced and knowledgeable interview subjects responded that the institutional capacity of the AU and of the regional economic communities (which also come within the AGA framework) will still be instrumental, even at that stage, because AGA unites the political structures of these continental and sub-continental organizations. This buttresses the point about the need for such planning processes to be mainstreamed into the operations of intergovernmental organizations, if the effectiveness of the resulting plans is to increase in the long term.

On the actual mainstreaming of the AHRAP itself into the domestic public policy of African states, we have little choice at this point but to wait to see whether the domestic institutions of the various AU member states will endorse the emergent AHRAP's stated agenda and objectives, devise concrete programmes (in addition to the existing ones) to ensure their attainment, and allocate sufficient resources to ensure this positive result. Informing this perspective is the fact that states are the duty bearers and, given that human rights are implemented or realized at the domestic level, it is states that have the onus to implement the AHRAP's key goals and targets. Accordingly, one key to the AHRAP's success will lie in the full commitment and leadership of the governments of member states, the AU and all its relevant organs, in the processes of its domestic implementation. It is for this reason that PALU adopted a broad-based, participatory and consultative process to bring on board and sensitize as many stakeholders as possible. The need for even wider consultation with civil society, citizens and governments was a view shared by most of the respondents. By its very nature, participatory deliberation on public policy is built on a social coalitions approach, which serves to create legitimacy in the process and outcome by securing the

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<sup>122</sup> Respondents M and Q.

endorsement of states and governments, who in any case are the duty bearers tasked with implementing the AHRAP's targets and goals. This crucial insight was not missed in the planning process.

### **Multi-stakeholder participation and leadership?**

The AU planning process was conceived as a participant-led process and a multi-stakeholder owned plan, founded on the ethos of legitimacy and consultation which, as we have seen, is an instrumental pillar that was intended to ground both the plan's formulation and actualization. The AHRAP's development process emphasized participation and consulted many citizens of African states (including academics and members of local communities), the governments of member states, the regional economic communities, other regional mechanisms, various AU organs and institutions and civil society.<sup>123</sup> The AU planning process leaned on the pivotal insight that, to be successful, a human rights action plan must mobilize a broad range of constituencies in support of the human rights agenda. One interview subject emphasized the need for harmony and cooperation between states and civil society as co-participants and joint stakeholders in the planning and implementation process.<sup>124</sup> The media through which contact was established and participation ensured were varied, including social media (such as Twitter and Facebook), face to face communication with stakeholders, and conferment at inter-governmental and other AU fora.<sup>125</sup>

The AU planning process seems to have, at least to an extent, evaded the missteps of past human rights action planning ventures both on and off the African continent. Traditional praxis of planning (including in the human rights field) tended to be rather "top-down", "technocratic" or "state-centric", had theoretical foundation, and also tended to focus solely on the "process" of reaching a predetermined outcome set by state elites.<sup>126</sup> The AU planning process under study adopted a process that was largely "participatory, multi-level, top-down-bottom-up and theory-laden".<sup>127</sup> From the time of the AU Assembly's issuance of the mandate to develop the AHRAP, the AU planning process involved both expert engagement and wider consultation alike (all with a significant degree of citizen-centredness). The AU planning process adopted a broad-based consultation model that, as shown in this article, affords these diverse groups "various access points to pressure their government into better respect for human rights".<sup>128</sup> Thus, the AU human rights

123 AU Commission "Updates on AU development", above at note 95.

124 Respondent M.

125 "African HRGs", above at note 18 at 24.

126 Chalabi "Australia's national human rights action plans", above at note 41 at 994.

127 Id at 995.

128 On this point, see de Felice and Graf "The potential of national action plans", above at note 80 at 46.

action planning process exemplified the prerequisites of stakeholder participation and socialization at the formulation stages of the plan.

### **Anchoring the planning process on some foundational theory?**

As discussed in the previous section of this article, theory provides an important frame of reference for the baseline studies, content development, evaluation and monitoring associated with both the process and output in the human rights action planning context. It is therefore essential that any such planning process be coherently and deeply grounded in foundational theory or theories. Yet, although the AU planning process relied on and drew upon a number of existing studies that, *inter alia*, documented the origins, philosophy, practices, institutional strengths and fundamental failings of the African human rights system, and research on the African human rights system is now as vast as it is richly varied, there is little evidence that the AU planning process was as deeply framed by a coherent theoretical framework(s) as it should have been.

It may, however, be said in their defence that those involved in the process were certainly theoretically well informed. They also drew upon a wide range of academic writing and this, perhaps, explains the lack of explicit reference in the planning process and its outputs to a unifying theoretical framework upon which to ground the process and the plan. It is only reasonable to suppose therefore that, to them, the complexity and diversity of the problems that afflict the African human rights system seemed to require different conceptual approaches. Indeed, the AHRAP appears to recognize that its objectives can only be achieved through deploying different methods and strategies, without all of them being tethered to one theoretical underpinning.

### **Greater mass human rights education and awareness?**

While the plan that resulted from the AU planning process pays significant attention to the need to enhance mass human rights education and awareness on the continent as a pre-condition for greater success even in its implementation, the process through which the AHRAP itself was developed was, perhaps due to resource constraints, not guided as much as it could have been by the recognition of this imperative.<sup>129</sup> The AU planning process should have thus taken more of a cue than it did from the UN Guidelines for National Plans of Action for Human Rights Education. These guidelines recognize that bringing about real human rights change depends on training and

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129 To deal with the problem of non-visibility of the AU human rights systems, the first and foremost results indicator of pillar one of the AHRAP was prioritizing and emphasizing the entrenchment and reinforcement of “deeper understanding of and commitment to the culture of human and peoples’ rights”. It envisions that this would be achieved through “continental adoption of a sustained multi-stakeholder public education campaign on the central role of human and peoples’ rights in governance, human security and sustainable development in Africa”.

human rights education, quite apart from the political will of governments or member states.<sup>130</sup>

## KEY INSIGHTS AND LESSONS FROM THE AU'S HUMAN RIGHTS ACTION PLANNING PROCESS

### Exemplification of the conventional understanding of an “ideal” planning process

The discussion in the previous section of this article suggests that the AU planning process under study generally embraced the conventional model of human rights action planning. For example, it (for good or for ill) incorporated a preceding baseline study, prioritized certain areas of concern, set “measurable” targets and timelines, developed and / or adopted indicators, was mainstreamed into the work of the relevant intergovernmental body (the AU) and was (at least in aspiration) participant-led and multi-stakeholder owned. It is not necessary to repeat the discussion, already offered in that section, of the details of the ways in which the AU process appears to have tightly embraced the key pillars of the conventional model.

### Departures from the conventional “ideal”

Perhaps of greater interest to the reader is the one main way in which the AU planning process de-coupled from the (rather idealized, if not stylized) conventional model, in that not enough time was devoted to broad-based consultation with stakeholders, victims and vulnerable groups, and public agencies across the African continent to which the plan applies. PALU wished to consult a wide range of groups and reach them in every part of the continent and collect as many and as diverse views as possible, but, as constraints of time and resources always plague this kind of exercise, it did not appear that it could do so.<sup>131</sup> Accordingly, therefore, one major weakness of the AU planning process is that there was not enough participation of disempowered groups, the would-be beneficiaries of the process. The limited reach and awareness of the planning process are factors that negatively impact the transparency and legitimacy of the drafting process. Secondly, there is little, if any, evidence that the planning process was well mainstreamed into domestic public policy debates and action on the African continent. Thirdly, although grounded in a number of conceptual frameworks, the AU planning process was, for good or for ill, not anchored in one coherent foundational framework. The point here is not so much that it had to be so anchored, but that this represents a departure from the requirements of the “conventional ideal” of human rights action planning. More positively, the AU planning process departed slightly from the

130 OHCHR “Guidelines for national plans of action”, above at note 89.

131 See “African HRGs”, above at note 18 at 23.

conventional model in that it also sought to pay some attention (however slight) to the “business and human rights” question.<sup>132</sup>

### Key lessons learnt

The first lesson is that the leading role taken by AGA in the planning process<sup>133</sup> did, to a significant extent, allow the mainstreaming of the planning process into the workings of the AU (of which it is a part), although the same cannot be said of the process's in-depth percolation into domestic public policy on the African continent. Because of the representative nature and diversity of AGA as an arrangement within the AU, it is expected that this reality will allow the governments of the various states that constitute the AU to endorse and own its stated agenda and objectives, devise programmes to ensure their achievement, and improve the allocation of resources to the implementation effort. This aspect of the process conforms with the dictates of the conventional model of human rights action planning.

Secondly, even more time and resources need to be devoted to the grassroots consultation aspect of the planning process. Although the reach and grasp of the interviewing conducted as part of the planning process was quite broad-based (and included elements from civil society, local communities, academia, governments and governmental institutions), those who drove the process did not have as much time as they should have had to reach out to as many stakeholders as possible.<sup>134</sup> An associated lesson here is that, despite the best intentions, it is usually very difficult to consult adequately when undertaking pan-continental human rights action planning processes. The terrain and population to be covered is usually extensive, and this was certainly so in the case of a continent as large and populous as Africa. Furthermore, the resources that would be needed to consult as fully as should be the case are usually not easily mobilized, especially in the poorer regions of the world, such as the African continent. Nevertheless, it should be stated that the consultations that were undertaken as part of the AU planning process provided knowledge that was crucial, including for the identification of priority areas and the gaps on which the resultant plan should focus.

Thirdly, because of limited resources, the vast fields of activities to be engaged and the amount of work that would be involved in implementing the output of the planning process (ie the plan), it was realized that the AHRAP cannot deal with all the many human rights issues that trouble the African continent all at once, and with the same priority. It is for this reason that the approach was taken of prioritizing flagship areas, or areas where immediate action was considered most necessary. The AU planning process fares well as one of the pan-continental human rights action planning processes to have adopted this highly favoured approach. It is because of this

132 Id at 35.

133 This was clearly stated by respondent Q in their interview.

134 Respondents V, U, Q and M emphasized the need for a participatory process.

approach that there was an emphasis in both the AU planning process and the AHRAP on the right to development, socio-economic rights, statelessness and the rights of migrants. These flagship areas seek to address some of the African people's most urgent and desperate current needs.

Lastly, the experience of the AU human rights action planning process also shows that, despite a strong conceptual understanding of the necessity for doing so, and sufficient political backing for it at the level of the AU's highest policy-making organ, it was quite a tall order to mainstream the planning process into the domestic public policy activities of the same states that mandated the development of the plan and in whose territories it would have to be primarily implemented. Even with the best intentions, the resources with which this would be done are rather scarce and the attention of the domestic agencies of most of these states is usually heavily divided by a myriad of needs that are at least as pressing.

## CONCLUSION

In conclusion, this article has highlighted the extent to which the AU human rights action planning process conformed to, or departed from, the conventional ideal. This involved explicit and implicit comparison, first with various human rights planning processes that have been generated historically across countries and the EU and their outputs and, secondly, with the standards that have been developed and propagated by the UN human rights systems and other agencies. As has been noted, the AU planning process and AHRAP largely embrace the conventional model of human rights action planning processes. Perhaps of more interest is the fact that they also depart from that model to an extent, even breaking new ground in at least a couple of respects: a development that may even help improve the conventional approach to human rights action planning. In the end, the hope here is that the analytical exercise undertaken in this article will be of some assistance to those involved in human rights action planning, both on the African continent and in similarly situated regions of the world.

## CONFLICTS OF INTEREST

None