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BEYOND THE PROMISES: RESUSCITATING THE STATE REPORTING PROCEDURE UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

*Takele Soboka Bulto**

I. INTRODUCTION

It is said that greater than a mighty army is an idea whose time has come. In Africa, as elsewhere, the principle of domestic jurisdiction over human rights has given way to international monitoring of domestic implementation of human rights. Infractions of basic human rights are no longer matters of exclusive internal concern, just as sovereignty is no longer an acceptable defense to deprivation of fundamental rights of nationals and other residents of a country.

However, the recognition of these rights in an international instrument like the African Charter on Human and Peoples' Rights¹ (the Charter) without an adequate monitoring and enforcement mechanism, does not augur well for effective protection of human rights in Africa. The two main mechanisms provided for under the Charter are the complaints system and the reporting procedure. The former deals with interstate complaints and individual complaints procedures. The aim of the complaints system is confined to addressing the violation(s) complained of in a case, and, as such, the system cannot ensure full overview and control of the implementation of the Charter's provisions. It cannot give a true picture of the human rights record of a given state. Additionally, it has been of minimal use as there has been only one interstate complaint so far.

The state reporting procedure, however, can be used to gauge general compliance with the whole gamut of rights, freedoms and duties guaranteed under the Charter. The main objective underlying the reporting mechanism is to produce state compliance with their obligations under the

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¹ African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58 (June 27, 1981), *entered into force* Oct. 21, 1986 [hereinafter the Charter].

instrument in question. It also aims at cultivating a domestic human rights culture. Ideally, reporting is considered an “integral part of a continuing process designed to promote and enhance respect for human rights rather than as an isolated event absorbing precious bureaucratic resources solely to satisfy the requirements of an international treaty.”²

Non-adversarial as it is, reporting aims at establishing a constructive dialogue between the states and the treaty monitoring body concerned with persuading states to implement their human rights obligations. It “is a means of ensuring the observance of human rights at the international level as well as ensuring government’s accountability to its own people and the international community.”³ Reporting offers an opportunity for domestic assessment and for the adoption of measures to remedy any shortcomings which have been identified. It is also a chance to proclaim to the international community that the government concerned is serious about its international commitments. In this context, state reporting aims at inward-looking as well as outward-looking objectives, termed *introspection* and *inspection*, respectively.⁴

The process of introspection and inspection will lead, in the end, to an increased awareness of human rights issues among government departments, the public and other state and non-state actors. The preparation of reports involves wide-ranging consultation among government departments and civil society in a dialogue on the status of domestic human rights. The effect of this dialogue will ultimately be reflected in legislation, policies and actions. As a result, reporting can be a means to develop human rights language in the implementation discourse, and to promote a basic understanding of the content and meaning of the commitments undertaken by states.

Moreover, state reports are examined by domestic and international non-governmental organizations (NGOs), the monitoring body, and perhaps even media coverage. The consequent praise and criticism associated with public exposure may make it easier for the state to internalize the instrument. Constructive dialogue between the state’s delegation and the monitoring body will promote respect and understanding of human rights within

² Philip Alston, *The Purposes of Reporting*, in *MANUAL ON HUMAN RIGHTS REPORTING*, 19, 20 (1997).

³ Kofi Quashigah, *The African Charter on Human and Peoples’ Rights: Towards a More Effective Reporting Mechanism*, 2 *AFRICAN HUM. RTS. L.J.* 261 (2002).

⁴ Frans Viljoen, *The Realisation of Human Rights in Africa through Inter-Governmental Institutions* 235 (1998) (unpublished L.L.D. thesis, University of Pretoria) (on file with the University of Pretoria).

the reporting state. This process of examination, along with concluding observations that may follow, will further the human rights objectives mentioned above.

Thus, reporting may prove to be an invaluable catalyst for creating a universally recognized human rights language and way of thinking. Because state parties to the Charter are equally subjected to examination, there will be less resistance to supervision. Because of its cyclical nature, it creates an avenue for continuous supervision and dialogue. In effect, reporting “may prove to be an effective means to develop a universal culture of rights, one in which the actual meaning of rights and their implementations for specific individuals and groups are commonly understood and internalized by governments and civil society alike.”⁵

In this respect, the success of the reporting procedure can be determined by the “extent to which treaty norms have been made part of the general culture of individual countries, for example through coverage in the media or educational programmes.”⁶ Thus, an effective reporting system contributes to the general culture of respect for human rights.

However, the efficacy of this procedure under the Charter has long been questioned, and it is generally agreed that the system has not been effective. Scholars are currently engaged in identifying both the reasons why the state reporting mechanism has failed and the possible solutions to this problem. It is the purpose of this work to contribute to that inquiry.

Having introduced the subject and the problems pertaining thereto in Part I above, Part II of this work analyzes the legal framework of the reporting procedure and problems pertaining thereto under the Charter. In Part III, the law and the practice of reporting in Africa will be contrasted and critically analyzed. Finally, Part IV will complete the study by presenting conclusions on this topic.

II. THE LEGAL FRAMEWORK

The Charter has been ratified by all member states of the Organization of African Unity (OAU) and the African Union (AU). The rights and duties enshrined in the Charter are applicable to each and every member state.⁷ The Charter derives its binding force, *inter alia*, from Article 1 in

⁵ Judith Karp, *Reporting and the Committee on the Rights of the Child*, in *THE HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY* 37 (Anne F. Bayefsky ed., 2000).

⁶ Christoph H. Heyns & Frans J. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 *HUM. RTS. Q.* 483, 485 (2001).

⁷ Mali and Eritrea were the first and the last states to ratify the Charter on Dec. 21, 1981 and Jan. 14, 1999 respectively. Niger’s ratification of the Charter on July 15, 1986 enabled the attainment of the simple majority required under Art. 63(3) of

which member states “recognize the rights, duties and freedoms enshrined in this Charter and . . . adopt legislative or other measures to give effect to them.”⁸ The state reporting procedure under Article 62 of the Charter is a mechanism for monitoring state compliance with their Article 1 obligation.⁹

II.A Scope of the Obligation Under the Charter

Article 62 of the Charter mandates states to submit biennial reports “on legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.”¹⁰ But the wording of the provision in Article 62 imposes a limitation on the scope of the reporting obligation – it is clearly silent on duties. While state parties have undertaken under Article 1 to recognize and to adopt legislative and other measures to give effect to “rights, duties and freedoms” enshrined in the Charter, Article 62 omits “duties” from the scope of the reporting obligation. This exclusion, however, has not absolved, in practice, the states from reporting on “duties” as the African Commission on Human and Peoples’ Rights (Commission) has required states to report on “individuals’ duties.”¹¹

While the United Nations (UN) instruments require states simply to report on “measures”¹² in general, Article 62 of the Charter requires states to “submit a report . . . on the legislative and other measures.”¹³ The wording of this provision seems to over-emphasize the legislative measures taken by a state as opposed to other practical measures that need to be taken to implement the Charter’s rights and freedoms. Some argue that the lack, in most African states at the time of the adoption of the Charter, of the

the Charter to bring it into force. The Charter came into force on Oct. 21, 1986 and the day is now commemorated as Africa’s Human Rights Day.

⁸ The Charter, *supra* note 1, at art. 1.

⁹ The Charter, *supra* note 1, at art. 62.

¹⁰ *Id.*

¹¹ See Guidelines for National Periodic Reports under the African Charter, at I(b), IV(4)-(6), reproduced in Second Annual Activity Report 45-70 (1988-89), available at http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr4.doc [hereinafter Guidelines for National Periodic Reports].

¹² See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at art. 40, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at art. 16, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

¹³ The Charter, *supra* note 1, at art. 62.

necessary legislation to ensure the recognized rights and freedoms justifies the approach.¹⁴ But the wisdom of this practice should be questioned.

Undeniably, the incidence of human rights violations has been so rampant in almost all states in Africa, both today and certainly at the time of the adoption of the Charter,¹⁵ that it casts doubt on the validity of the conclusion that the urgency of reporting on legislative measures deservedly took precedence over the practice on the ground. Even when this conclusion is conceded, it faces serious criticism.

The requirement of submission of state reports on “legislative and other measures . . . gives one the impression that a greater emphasis is being placed in the African system on legislative measures adopted than anything else.”¹⁶ Thus, “Article 62 of the African Charter must have accounted partly for the unsatisfactory nature of the early reports submitted to the African Commission.”¹⁷ In the UN system the word “measures” has been preferred to the more specific formulation of “legislative measures” due to the former’s ability to “afford State parties greater freedom to report on the entire range of laws and practices ensuring compliance [with the treaty concerned].”¹⁸ Alternatively, Article 62 should have simultaneously provided for reporting on legislative measures and practical implementation of the rights and freedoms contained in the Charter.

Notably, as stated in the Guidelines for National Periodic Reports under the African Charter¹⁹ (Guidelines), the Commission is of the conviction that “implementation of [the Charter] by word and deed, is of parallel significance and is equally needed.”²⁰ Accordingly, the Guidelines seem to be in variance, if not in disagreement, with the more restrictive manner in which Article 62 is formulated. In the Guidelines, state reports “should show not only the achievements made on the statute book but should also lucidly reveal the extent of implementation in terms of how far the rights and fundamental freedoms of the Charter are being fulfilled and how far the duties are being successfully carried out.”²¹

Furthermore, Article 62 only contains the obligation of a state party to submit a report, but it neither stipulates to which authority or body those

¹⁴ Michelo K. Hansungule, *State Reporting in Africa: An Overview 4* (2003) (unpublished) (on file with author).

¹⁵ Mention can be made of the Mengistu, Barre, Doe, Mobutu and Moi regimes.

¹⁶ Quashigah, *supra* note 3, at 274.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Guidelines for National Periodic Reports, *supra* note 11.

²⁰ *Id.* ¶ 1.

²¹ *Id.*

reports should be sent, nor specifically authorizes the Commission to examine the reports. Thus one might ask: Must the reports be examined? And if so, by whom? Once examined, what action should be taken, if any? In sharp contrast to the Charter, Article 40(4) of the International Covenant on Civil and Political Rights²² (ICCPR) explicitly entrusts the Human Rights Committee (HRC) with the authority of receiving and examining state reports and issuing general comments, otherwise known as concluding observations.²³

It has been argued that the omission in the Charter was deliberate “so as not to jeopardise ratification.”²⁴ However, it

created the possibility that a body composed of either independent experts, such as the African Commission, or government representatives, such as the Organisation of African Unity Assembly of Heads of State and Government [Assembly]. . . or the Council of Ministers . . . could be mandated to receive and examine state reports. Allowing a “political” body lacking independence, impartiality and human rights virtuosity to review reports would have undermined the benefits of state reporting.²⁵

Prompted by this conviction, the Commission at its third session adopted a resolution requesting the Assembly to entrust it with the task of reviewing state reports.²⁶ The Commission found it “difficult to see which other organ of the OAU could accomplish this work,”²⁷ and concluded that it was “the only appropriate organ of the OAU”²⁸ capable of both receiving and examining the reports.

²² ICCPR, *supra* note 12.

²³ *Id.* at art. 40(4).

²⁴ Frans Viljoen, *Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997*, in HUMAN RIGHTS LAW IN AFRICA 1997 47, 56 (C. Heyns ed. 1999).

²⁵ George William Mugwanya, *Examinations of State Reports by the African Commission: A Critical Appraisal*, 1 AFR. HUM. RTS. L.J. 268, 271-72 (2001).

²⁶ KOFI QUASHIGAH, CENTRE FOR HUMAN RIGHTS, AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: TOWARDS A MORE EFFECTIVE REPORTING MECHANISM ¶ 18 (April 2002), available at http://www.chr.up.ac.za/centre_publications/occ_papers/occ13.html.

²⁷ African Commission on Human and Peoples' Rights, Recommendation on Periodic Reports, ¶ 1, ACHPR/Recom.3(III)88 (1988), available at http://www.chr.up.ac.za/hr_docs/african/docs/achpr/achpr10.doc.

²⁸ *Id.*

Following the Commission's request, the Assembly authorized the Commission to examine state reports and to give the state parties general guidelines on the form and the content of the periodic reports. But the Assembly gave the Commission as much power as the Commission requested – nothing more, and nothing less. Unfortunately, the Commission did not request the Assembly to give it the authority to issue concluding observations and, as such, the Assembly did not give it the power to do so.

The Commission has therefore been without explicit power to issue concluding observations and it cannot issue any comments in relation to a reporting state's progress in the domestic implementation of the Charter's provisions. In effect, in terms of OAU authorization and Article 62, the Commission lacks the necessary capacity to appreciate the progress and advise the reporting states on how to improve any weaknesses revealed in the course of the examination process. However, the Commission rightfully provided for the procedure by which it would be able to make "general comments"²⁹ and "transmit[them] to the reporting state."³⁰

Nevertheless, the Commission's request for authorization to examine state reports and issue guidelines on the form and contents of the reports is legally justifiable and functionally appropriate. Legally, examination of state reports falls within the Commission's promotional and protective mandate.³¹ More specifically, Article 45(4) of the Charter empowers the Assembly to entrust to the Commission "any other tasks" not specifically mentioned within the Commission's explicit powers.³² Functionally, the prevailing experience from the time of the drafting of the Charter to date shows that reports are considered either by a body of independent experts or by government representatives. The propriety of the Assembly's decision to authorize the Commission with the task of examining state reports cannot be questioned due to the latter's legal independence.³³

The Charter's failure to require states to report on their progress made since the ratification of the Charter or after the submission of the preceding report, is another striking feature and weakness of the Charter. Although states are not prevented from stating the progress achieved in their reports, they are not required to do so. This was so "perhaps because it was realized that it would take long before witnessing progress in the

²⁹ Guidelines for National Periodic Reports, *supra* note 11, at I(8)(b).

³⁰ *Id.*

³¹ The Charter, *supra* note 1, at arts. 30, 45.

³² *Id.* at art. 45(4).

³³ *See id.* at art. 31(2).

enjoyment of fundamental human rights as a result of the intervention of the African Charter.”³⁴

Furthermore, the provisions of Article 62 oblige states to report on the implementation of all the rights and freedoms recognized in the Charter.³⁵ Reporting under the Charter therefore entails providing information on a very wide range of rights and freedoms and is bound to be an arduous task. In fact, a good report under the Charter is as time and resource consuming as the preparation of all six reports to the UN treaty bodies put together. This, arguably, could create the perception that reporting is too heavy an obligation and may discourage African states from reporting to the Commission in the face of their meager resources.

Thus, a mechanism must be found to lighten the burden of reporting in Africa. Advisedly, one may suggest that the Charter draw on the experience of the HRC, where the latter requests states to submit subsequent reports on issues of concern on a thematic basis. If, for instance, the right to equality of peoples is an area of concern for the Commission, the Commission may call upon the state concerned to report on the implementation of Article 19 of the Charter.³⁶ The Commission may also limit a state’s reporting requirements to a specific problem area faced by that party. The advantage of this approach is that, apart from substantially reducing the reporting burden, it enables the Commission to specifically scrutinize the level of implementation and difficulties encountered in the particular area selected for examination. Focused as it is, a thematic approach also helps avoid evasive reporting and enables the Commission to deeply appraise the state’s performance in a shorter period of time.

II.B Periodicity of Reporting

The reporting period stipulated under the Charter is one of the most important distinctions between the Charter and the UN instruments. The drafters of the Charter set the reporting period at once every two years. In contrast, the UN instruments provide for longer periods. Under the ICCPR, a state party is required to submit its first report “[w]ithin one year of the entry into force of the . . . Covenant for the States parties concerned”³⁷ and

³⁴ Hansungule, *supra* note 14, at 5.

³⁵ The Charter, *supra* note 1, at art. 62.

³⁶ *Id.* at art. 19 (“All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”).

³⁷ ICCPR, *supra* note 12, at art. 40.

“[t]hereafter whenever the Committee so requests.”³⁸ The phrase “whenever the Committee so requests” was translated into the duty to submit periodic reports every five years. In comparison, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁹ (CAT) sets a reporting period at four years and the Convention on the Rights of the Child⁴⁰ (CRC) provides for a reporting period of five years. The fact that each contracting party has to appear before the treaty body at regular intervals has the advantage of impartiality as no government will be summoned before the supervisory body as a suspect.⁴¹

Given the economic capacity of African states and the shortage of trained personnel, the two year period is too ambitious and too idealistic for states to comply with. It is interesting to note that under the International Covenant on Economic, Social and Cultural Rights⁴² (ICESCR), the examining Committee found that the submission of reports every two years was unduly burdensome.⁴³ In the context of the European Social Charter, however, a contrary argument has been advanced:

A conscience that speaks every two years is less easily ignored than one that will not come again for another six. Although there would have been some reduction in the work load of the contracting parties, it would have been sufficient to have outweighed the harmful effect of an essentially six-year cycle.⁴⁴

This may be sufficient for European countries that have better economic capacities and long-standing experience with reporting and monitoring. However, in the African context “the two years reporting obligation is problematic to most State parties.”⁴⁵ Considered in the light of African states’

³⁸ *Id.*

³⁹ G.A. Res. 36/46, at art. 19(1), U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

⁴⁰ G.A. RES. 44/25, AT ART. 44(1)(B), U.N. DOC. A/44/49 (Nov. 20, 1989).

⁴¹ V. Dimitrijevic, *State Reports*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MOLLER 193 (Gudmundur Alfredsson et al. eds., 2001).

⁴² ICESCR, *supra* note 12.

⁴³ See ASTRID DANIELSEN, THE STATE REPORTING PROCEDURE UNDER THE AFRICAN CHARTER 9 (1994).

⁴⁴ David Harris, *Lessons From the Reporting System of the European Social Charter*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 348 (Philip Alston & James Crawford eds., 2000).

⁴⁵ Hansungule, *supra* note 14, at 5.

reporting burden to various UN bodies, and taking into account the wide range of efforts a state has to make in the drafting of a report on all the rights and freedoms enshrined in the Charter, the two year period is so short as to hinder compliance with the reporting obligation under the Charter.⁴⁶ A more realistic periodicity is necessary and an amendment of the Charter's periodicity to that effect is, therefore, imperative.

II.C The Need for Urgent Inter-sessional Reports: A Proposal

Although, arguably, "the reporting system . . . [is] the best available means of overseeing the implementation of human rights obligations,"⁴⁷ this system may also be described as "unduly passive."⁴⁸ The traditional pattern of the reporting system is a cyclical mechanism in which states report at fixed intervals depending upon the periodicity of the treaty concerned. It has not been able to address emergency situations involving gross and systematic human rights violations that may occur within the states, and leaves much to be desired in this respect. The system "has compelled treaty bodies to behave, in situations where allegations of massive human rights violations were made, as if nothing has happened and wait for years until the time for the submission of the report was due."⁴⁹

Embarrassed by their inability to play any role in the emergency situations that threatened the populations of many countries of the world,⁵⁰ the UN treaty bodies have developed innovative approaches. In this regard, "[t]he 1990s have been years of innovation,"⁵¹ as the decade witnessed a new activism of the treaty bodies towards greater effectiveness of the reporting procedure. It was realized that the system of state reporting could play an active role outside the bounds of its cyclical period, hence the introduction of urgent inter-sessional state reports.

⁴⁶ The three years' periodicity provided for under the African Charter on the Rights and Welfare of the Child, at art. 43(1)(a)-(b), OAU Doc. CAB/LEG/24.9/49 (1990) is indicative of the recent realization on the part of African states that a longer and more realistic periodicity is necessary.

⁴⁷ Jane Connors, *An Analysis and Evaluation of the System of State Reporting, in THE U.N. HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* (Anne F. Bayefsky ed., 2000).

⁴⁸ Dimitrijevic, *supra* note 41, at 193.

⁴⁹ *Id.*

⁵⁰ The crises of the former Yugoslavia, Bosnia and Herzegovina, Rwanda and Burundi are but a few examples.

⁵¹ Michael O' Flaherty, *Treaty Bodies Responding to States of Emergency: The Case of Bosnia and Herzegovina, in THE FUTURE OF UN TREATY MONITORING* 439 (Philip Alston & James Crawford eds., 2000).

This urgent inter-sessional mechanism applies on an *ad hoc* basis to examine reports on human rights situations in particular countries or thematically on human rights violations committed in a specific country.⁵² It is a means of early warning and prevention of irreparable harm in the state concerned, thereby playing the preventive role of reporting. Thus, it has been described as “a pioneering intrusion”⁵³ by treaty bodies into the realm of state sovereignty. Accordingly, the UN treaty bodies have resorted to calling upon states to report on human rights situations which require immediate attention.

In April 1992, the HRC addressed to the governments of Bosnia and Herzegovina, Croatia and Yugoslavia an urgent request to submit specific thematic reports on the implementation of Articles 6, 7, 9, 10, 12 and 20 of the ICCPR that appeared to have been massively violated in the territories concerned.⁵⁴ These requests came before the deadline for initial reports of Bosnia and Herzegovina and Croatia, and only seven months after the third periodic report of Yugoslavia had been considered.⁵⁵ The HRC has amended its Rules of Procedure⁵⁶ to empower its Chairperson, acting in consultation with other members, to request a report in the case of an exceptional situation that occurs when the Committee is not in session.⁵⁷

By the end of 1999, the Committee on the Elimination of All Forms of Racial Discrimination had invoked the procedure with regard to 17 state parties and had considered the reports. Similarly, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) and Committee on Economic, Social and Cultural Rights (CESCR) have introduced the procedure for urgent reports and the CRC Committee has decided to follow suit.⁵⁸

⁵² Lyal S. Sunga, *The Special Procedures of the UN Commission on Human Rights: Should They Be Scrapped?*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MÖLLER 233 (Gudmundur Alfredsson et al. eds., 2001).

⁵³ Nigel S. Rodley, *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity or Competition?*, 25 HUM. RTS. Q. 882 (2003).

⁵⁴ Dimitrijevic, *supra* note 41, at 194.

⁵⁵ *Id.*

⁵⁶ ICCPR, Human Rights Committee, Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.6 (Apr. 24, 2001), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.3.Rev.6.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.3.Rev.6.En?Opendocument).

⁵⁷ *Id.* at Rule 3.

⁵⁸ Dimitrijevic, *supra* note 41, at 194.

The consideration of these reports led, *inter alia*, to the issuing of concluding observations, bringing the situation to the attention of the Office of the High Commissioner for Human Rights, the Secretary-General, the General Assembly or the Security Council, and undertakings by the relevant Good Offices Mission or Technical Cooperation Committee.⁵⁹

Despite the recurrence of gross and systematic human rights violations in Africa,⁶⁰ the Charter neither explicitly nor implicitly provided for urgent inter-sessional state reports. This should not come as a surprise in the circumstances where provisions dealing with the cyclical reporting procedure itself are so terse as to omit important aspects requisite for an effective reporting mechanism. Additionally, there has been no attempt on the part of the Commission to creatively enable itself to introduce the urgent reporting system. As was the case with the mandate to examine reports under Article 62, the Commission could call for the Assembly to mandate it as per Article 45(4) of the Charter to request, receive and examine urgent reports and to issue concluding observations. The Commission should follow the example of the CEDAW Committee which requested, received and examined urgent reports from Rwanda at the beginning of its genocide in 1994.

The utility of the system of urgent reports as a means of early warning and prevention cannot be called into question. Undoubtedly, prevention is better than cure in terms of the material and human cost engendered.⁶¹ It is important that the Commission work with and report to the Assembly, which has the right to intervene in instances of apparent human rights violations.⁶² Given the recurrence of a series of serious and massive human rights violations in Africa, and the possibility of the AU's intervention in member states, it is highly possible that the urgent reports mechanism could play a crucial role in reinvigorating the benefits that may be achieved through the reporting procedure. It is, therefore, a mechanism worthy of adoption by the Commission.

⁵⁹ *Id.*

⁶⁰ Rwanda, Algeria, Sierra Leone and Liberia are examples.

⁶¹ Hans Thoolen, *Early Warning*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MÖLLER 31 (Gudmundur Alfredsson et al. eds., 2001).

⁶² Constitutive Act of the African Union, at art. 4(h), OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001, available at http://www.au2002.gov.za/docs/key_oau/au_act.htm [hereinafter the Act] (reserving “[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”).

III. THE STATE REPORTING MECHANISM UNDER THE CHARTER: THE PRACTICE OF THE ACTORS

The responsibility for making the reporting procedure effective lies with a multiplicity of parties or actors. An appraisal of the effectiveness of the procedure must thus address the question of whether all the actors involved in the process have sufficiently played their parts. The level of introspection and inspection achieved, the contribution of the procedure towards cultivating the human rights culture, and the preventive role played by the procedure are among the indispensable considerations needed to evaluate reporting mechanisms.

III.A Submission and Presentation of Reports: Towards Introspection

The compliance of a state with its reporting obligations has various dimensions. The most fundamental of these is its willingness to draft and submit reports as required by the various treaties in accordance with the periodicity they establish. And “[t]he obvious case of non-compliance exists when the State party *fails to submit the report*.”⁶³ Without submission of reports, the procedure “cannot even get off the ground if the State does not meet its basic obligations under the Charter.”⁶⁴ Obviously, “[t]he eleven Commissioners cannot do much without states carrying out their obligations under the Charter, [and] facilitating the work of the Commission.”⁶⁵ Evaluation of a state’s compliance with the reporting obligation also involves the submission of adequately self-reflective reports and the presentation of the same by a qualified delegation.

III.A.1 Back to Basics

III.A.1.a Failure to Submit or Late Submission of Reports

The failure to submit and the late submission of reports have been chronic problems plaguing the reporting procedure of the Charter and the ultimate work of the Commission. As the Charter entered into force on October 21, 1986, the month of October 1988 marked the first deadline for reporting. However, none of the 26 initial members had submitted their

⁶³ Dimitrijevic, *supra* note 41, at 192.

⁶⁴ Malcom Evans, Tokunbo Ige & Rachel Murray, *The Reporting Mechanism of the African Charter on Human and Peoples’ Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000* 36, 37 (Malcom Evans & Rachel Murray eds. 2002).

⁶⁵ OJI U. UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS* 127 (1997).

reports by this date.⁶⁶ A decade later, i.e., by the 20th Session of the Commission, only the first reports of 16 of the then 51 state parties⁶⁷ had been examined, and 45 second reports were outstanding.⁶⁸ At that stage, no state had submitted a third, fourth or fifth report, which were already due.⁶⁹

The situation continued to deteriorate, and “[b]y the 25th Session there were over 200 state reports due.”⁷⁰ By the 26th Session, only 24 of the 53 state parties had reported at all and there were more than 225 reports overdue.⁷¹ By April 2001, 23 states had not submitted any reports at all, 18 states had submitted only an initial report, and 11 states had submitted a subsequent report.⁷² As a result:

[by] April 2001 the fifty-three State parties to the Charter should have submitted a total of 301 reports between them but only forty-one had actually been submitted. Three states were at least four years behind in the submission of reports, nine were at least six years behind, one was at least eight years behind and sixteen were at least ten years behind.⁷³

By May 2003, there were 20 states that had never submitted any reports.⁷⁴ Consequently, Hansungule has sarcastically divided African states into different categories based on their reporting records.⁷⁵ “Epileptic reporters” are those states that reported once and then bolted for the rest of the ensuing period, to reappear unexpectedly at another time, just like the disease epilepsy.⁷⁶ “Permanent defaulters” are those states that never both-

⁶⁶ See AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, STATUS ON SUBMISSION OF STATE PERIODIC REPORTS TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, at http://www.achpr.org/english/_info/status_submission_en.html [hereinafter STATUS ON SUBMISSION].

⁶⁷ The reports of South Africa and Swaziland were not yet due at that stage, as these states had acceded to the Charter for a period less than two years.

⁶⁸ See STATUS ON SUBMISSION, *supra* note 66.

⁶⁹ *Id.*

⁷⁰ Mugwanya, *supra* note 25, at 277.

⁷¹ Frans Viljoen, *State Reporting Under the African Charter on Human and Peoples’ Rights: A Boost from the South*, 44 J. OF AFRICAN L. 110, 111 (2000).

⁷² See STATUS ON SUBMISSION, *supra* note 66.

⁷³ Evans, Ige & Murray, *supra* note 64, at 41.

⁷⁴ See STATUS ON SUBMISSION, *supra* note 66.

⁷⁵ Hansungule, *supra* note 14, at 13-14.

⁷⁶ *Id.*

ered to comply with treaty obligations.⁷⁷ Between these extremes one can find many states whose reports trickle in at irregular intervals.

The problem associated with the reporting record is not only the failure to submit, but also the late or irregular submission of reports. To date, only one state has submitted a timely report.⁷⁸ Thus, the non-compliance of African states with their reporting obligation is most unsatisfactory and the reporting system is facing an "implementation crisis . . . of dangerous proportions."⁷⁹

The Charter's two year reporting period is too short and idealistic, and it is therefore an obstacle to compliance. States are increasingly becoming parties to multiple regional and universal treaties. States claim to be overexerted and overwhelmed from the reporting obligations under the treaties.⁸⁰ To make things worse, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁸¹ and the African Charter on the Rights and Welfare of the Child⁸² have come into effect with their respective reporting obligations and monitoring bodies.⁸³

Clearly, states do not take their reporting obligations seriously. There is a lack of political will to report⁸⁴ and it is therefore not a government priority.⁸⁵ Lack of expertise and other resources is another obstacle. A lack of appreciation of the benefits of reporting contributes to the problem.

Some states, especially the so-called epileptic reporters, argue that the Commission's public examination process is unfriendly and gives NGOs the opportunity to attack states, making states feel targeted.⁸⁶ But

⁷⁷ *Id.*

⁷⁸ See STATUS ON SUBMISSION, *supra* note 66. South Africa's first report was due on Sept. 7, 1998 and it submitted the report by Oct. 14 of that same year. However, subsequent reports from the country are overdue.

⁷⁹ Connors, *supra* note 47, at 21.

⁸⁰ Hansungule, *supra* note 14, at 14.

⁸¹ G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter Migrant Convention].

⁸² African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 [hereinafter African Charter on the Rights and Welfare of the Child].

⁸³ Migrant Convention, *supra* note 81, at art. 73(1); African Charter on the Rights and Welfare of the Child, *supra* note 82, at art. 43(1)(b).

⁸⁴ See Mugwanya *supra* note 25, at 278; Quashigah *supra* note 3, at 274.

⁸⁵ Heyns and Viljoen, *supra* note 6, at 23.

⁸⁶ Hansungule, *supra* note 14, at 14.

this argument's validity is debatable as the reporting records of African states to UN treaty-bodies, where NGOs could not take the floor and directly react to states' reports, are equally poor. Statistically, African states account for the largest percentage of overdue reports to UN treaty-bodies in relation to every treaty, accounting for an average of 38% of all overdue reports.⁸⁷ By any standard, African states are failing the minimal reporting obligations expected of them under Article 62 of the Charter. The trend does not show any signs of improvement.

III.A.1.b The Quality of Reports

Minimal information may be sufficient to determine that the report is present, but not that it is satisfactory. The completeness of the information contained in each report is as important as the submission of the report itself. This, in turn, depends on the specific nature of the report prescribed by the relevant human rights treaty.

Under the Charter, a complete report must incorporate information on legislative and other measures taken by a reporting state to implement the whole range of rights and freedoms enshrined in the Charter.⁸⁸ Besides, the reports should be substantive, containing sufficiently accurate information for the Commission to conduct an examination. However, to date, the reports submitted to the Commission have been brief and "were not the product of serious introspection, but rather the formalistic fulfillment of what was regarded as a bureaucratic obligation."⁸⁹

The initial Libyan report, for instance, admitted no difficulties in its human rights record. "Going by its human rights report," writes Hansungule, "Libya has the best record of human rights in the world."⁹⁰ The much-delayed initial report of Nigeria contained six pages, of which three pages were a photocopy of the table of contents of the partially suspended Constitution. "[T]he report sounded like Nigeria was a heaven;"⁹¹ the presenter parried all the allegations of human rights abuses, and pointed out that Nigeria had the best record on press freedom on the African continent as well as unequalled judicial independence.⁹² It is interesting to note that

⁸⁷ Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* 4 Kluwer L. Int'l (2001), available at <http://www.bayefsky.com/report/finalreport.php>.

⁸⁸ The Charter, *supra* note 1, at art. 62.

⁸⁹ Viljoen, *supra* note 4, at 242.

⁹⁰ Hansungule, *supra* note 14, at 16.

⁹¹ *Id.* at 17; Viljoen, *supra* note 24 at 95.

⁹² See The African Commission on Human and Peoples' Rights, Examination of State Reports, Summary of the Examination of the State Report of Nigeria (Apr.

this report was presented at a time when numerous allegations had been leveled against Nigeria for the ouster of the jurisdiction of the regular courts, thereby interfering with the independence of the judiciary.⁹³

The same was true of the initial report of Sudan, which admitted no atrocities.⁹⁴ The problems of freedom of religion, other human rights abuses and war in the country were presented in the report in such a way that made the perpetrators appear to be victims.⁹⁵ As regards Chad, the report contained one and a half pages, which prompted the ever-diplomatic Commission to decline to examine the report until additional information was provided. Similarly, Ghana's five and a half page initial report failed to provide information on specific rights and the difficulties encountered in giving effect to the rights provided for in the Charter and was silent on practical steps taken to give effect to the Charter. The 1991 report of Tanzania was confined to an explanation of legislative measures and failed to address the practical effects of the measures and the difficulties encountered in giving effect to the Charter. It did not refer whatsoever to economic, social and cultural rights. According to Viljoen, such reports indicate a lack of commitment on the part of the states and constitute "an insult to the Commission."⁹⁶

One may surmise that various factors contribute to the submission of poor quality reports. The Guidelines are too complex and detailed for states to follow and the Commission itself is lenient as to the necessity of adhering to the Guidelines. Dissatisfied with similar reporting problems,

1993), available at <http://www.law.wits.ac.za/humanrts/achpr/sess13-complete.htm> #Nigeria [hereinafter Examination of State Reports].

⁹³ To mention a few: *Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995); *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 87/93 (1995); *Civil Liberties Organization v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 101/93 (1995).

⁹⁴ The report was submitted at the time when concerns of gross human rights violations prompted the Commission in 1996 to send a mission to Sudan. Later, the Commission found that Sudan had been in violation of the Charter's rights, particularly the right to life (art. 4), the right to dignity (art. 5), the right to liberty and security of a person (art. 6), the right to a fair trial and to appeal (art. 7), independence of the judiciary (art. 26), freedom of conscience and free practice of religion (art. 8), the right to express and disseminate one's opinions (art. 9), and the right to free association (art. 10). See *Amnesty Int'l and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

⁹⁵ Hansungule, *supra* note 14, at 17.

⁹⁶ See Viljoen, *supra* note 24, at 95.

the HRC adopted the practice of issuing General Comments to guide government officials involved in the drafting process.⁹⁷ The Commission has not developed any comparable procedure.

Nevertheless, at times, the Commission has received some qualitatively better reports. In relation to the latest submissions from Algeria, The Gambia, Mauritius, Mozambique, Senegal, South Africa and Zimbabwe, the Commission expressed its satisfaction with the quality of the reports.⁹⁸ While it is hoped that this is the beginning of a consistent trend of good reports from state parties, commentators have warned that the Commission's praise of the quality of the reports may mask other problems. According to Viljoen:

[t]he danger is that the Commission may react positively to a rather imperfect report, just because it shines in comparison with totally inadequate precedents. It may also be blinded by the comparatively good quality of the report and lose sight of the inherently poor human rights record of the country in question.⁹⁹

Accordingly, the general picture of the qualitative value of the state reports to the Commission is poor. As a result, they contribute very little, if at all, towards the cultivation of a human rights culture on the continent.

III.A.2 The Presentation of Reports

The timely submission of reports is only the first requisite element for the effective functioning of the reporting process. The next element concerns the presentation and discussion of that report. In order for a constructive dialogue to be fruitful, it is essential that not only the delegates of the reporting state be present, but also that the delegation be able to respond to all the questions posed during the examination of the report. The Commission has faced serious problems with the latter, as with the former. Not only do many states fail to send representatives to present the reports already submitted, but even when the delegation is present their ability to engage in a dialogue turns out to be questionable.

⁹⁷ Michael O'Flaherty, *The Reporting Obligation Under Article 40 of the International Covenant on Civil and Political Rights: Lessons to Be Learned From Consideration by the Human Rights Committee of Ireland's First Report*, 16 HUM. RTS. Q. 515-36 (1994).

⁹⁸ See e.g., Mugwanya, *supra* note 25, at 278.

⁹⁹ Viljoen, *supra* note 24, at 95.

The Seychelles, the “most persistent offender to date,”¹⁰⁰ submitted its first report in 1994¹⁰¹ but has failed to send its representative despite repeated reminders from the Commission. The Chairperson of the Commission, Commissioner Dankwa, paid a promotional visit to the Seychelles in 2001 with the specific purpose of persuading the state to send delegates to present the report, which the county promised but failed to do.¹⁰² Chad submitted its report in 1997¹⁰³ but failed to send a representative until the 25th Session in 1999. The reports of Cape Verde, Nigeria and Togo were not examined at the 12th Session since there were no representatives present from these states. Similarly, the representatives of Mauritius and Mozambique were absent from the 17th Session. The report of Mozambique was considered only at the 19th Session and that of Mauritius at the 20th Session. The examination of the reports submitted by Ghana and Namibia had to be postponed because representatives did not attend the Sessions at which their reports were due to be considered (the 27th Session in April 2000 and the 28th Session in October 2000, respectively).¹⁰⁴

The absence of representatives from reporting states has resulted in the Commission’s deferral of the examination of the reports. This means that in some cases, as in that of the Seychelles, the human rights situation might have considerably changed between the submission of the reports and their presentation to such an extent that the report may be outdated and may no longer reflect the current situation in the particular country.

On several occasions, the Commission has stated that it will examine reports at subsequent sessions if states fail to send their representatives.¹⁰⁵ But the Commission has failed to follow through with this threat. In contrast, UN treaty-body Committees, particularly those of the HRC and the CESCR, have insisted on examination even in the states’ absence.¹⁰⁶

Representatives, even when present, lack the ability to engage in constructive dialogue with the Commission which is “dependent on two

¹⁰⁰ Evans, Ige & Murray, *supra* note 64, at 42.

¹⁰¹ See STATUS ON SUBMISSION, *supra* note 66.

¹⁰² Interview with E.V.O. Dankwa, Chairperson of the African Commission on Human and Peoples’ Rights (Sept. 13, 2003).

¹⁰³ See STATUS ON SUBMISSION, *supra* note 66.

¹⁰⁴ Evans, Ige & Murray, *supra* note 64, at 42.

¹⁰⁵ For comments from Commissioners Kisanga and Janneh, see Examination of State Reports, *supra* note 92.

¹⁰⁶ International Human Rights Instruments, Report of the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, U.N. Doc. HRI/MC/2005/4 (May 25, 2005), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G05/422/35/PDF/G0542235.pdf?OpenElement>.

communicating partners who are able to enter into discussion about issues with which both of them are familiar and about which both are able to express opinions."¹⁰⁷ It is significant that the Assembly recommended that the state parties designate high ranking officials capable of acting "as focal points in the relation between the Commission and the States as such . . . focal points would facilitate the follow-up on the Commission's recommendations and contact between States and the Commission."¹⁰⁸ Thus, the prerequisite here is "a synthesis of 'influence' and 'legal expertise.'"¹⁰⁹

It is unfortunate that "most frequently states designate either a high ranking (political) figure not sufficiently conversant with the legal issues, or a legal expert devoid of any potential impact in the higher echelons of government,"¹¹⁰ and indeed, this has been the case from the examination of the first state report where Libya sent its ambassador to present. Apart from very rare exceptions, representatives of states "have not always possessed the requisite qualifications which would enable them to have a constructive dialogue with the Commission."¹¹¹ In some cases, officials who made the presentation had not participated in the drafting of the reports and were not fully conversant with the subject.¹¹²

Thus, under the circumstances, the reporting system yields very little by way of inspection and introspection in the absence of effective presentation of the reports and dialogue with the Commission. When viewed from the standpoint of the states' performance, the state reporting procedure is in a precarious position and is in need of renewed commitment from state parties.

III.B The Role of the Commission: Gauging the Level of Inspection

Although the timely submission by state parties of accurate and complete reports and the presentation of the reports in a balanced and open fashion are indispensable ingredients for the efficacy of the reporting procedure, they are not sufficient to make the system effective. The system remains ineffective if the forms of scrutiny to which the reports are subjected

¹⁰⁷ Viljoen, *supra* note 24, at 99.

¹⁰⁸ Resolution on the African Commission on Human and Peoples' Rights, 29th Ordinary Sess. of the Assembly of Heads of State and Government of the Organization of African Unity (June 28-30, 1993), available at <http://www1.umn.edu/humanrts/africa/resafchar29th.html>.

¹⁰⁹ Viljoen, *supra* note 24, at 99.

¹¹⁰ *Id.*

¹¹¹ EVELYN ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES* 97 (1996).

¹¹² Heyns & Viljoen, *supra* note 6, at 23.

are perfunctory or ill-informed. The degree of inspection conducted by the Commission is a controlling factor and is at the heart of the process.

III.B.1 Guidelines for Reporting

Following the authorization it received from the Assembly, the Commission adopted the Guidelines for state reporting so as to “ensure that the reports are made in a uniform manner, [to] reduce the need for the Commission requesting additional information and for it to obtain a clearer picture of the situation”¹¹³ in the reporting state. Unfortunately, the Guidelines adopted by the Commission were “complex, repetitive and lengthy.”¹¹⁴ According to Viljoen, this “creates a perception that reporting is burdensome and it has certainly been a factor inhibiting swift compliance”¹¹⁵ of states with their duty to report under Article 62 of the Charter. The Commission itself has realized that the Guidelines are “too lengthy and probably serve as a disincentive to . . . states to report on their human rights conditions.”¹¹⁶

Additionally, the organization and structure of the Guidelines are difficult to follow. Initial and periodic reports are repeatedly discussed under each subject, such that a report on a section of the Guidelines appears to be a complete report in its own right. Initial reports and subsequent reports are to be submitted on different occasions; moreover, the former deals with similar information from every state and is to be submitted only once by any one state. The repeated discussion of the initial report under each heading is redundant, if not bad drafting. It would be more practical to have separate sections on initial reports and periodic reports, describing the information required in relation to specific rights and duties in the Charter.

Furthermore, the Guidelines do not follow the order of specific rights enshrined in the Charter. There is not unanimous agreement on the thematic method used to categorize rights into families. Opinions differ as to whether a particular right belongs to one cluster of rights rather than another. For example, the right of individuals to take part in cultural life is inherent in the individual under Article 17,¹¹⁷ however the Guidelines address the right as a people’s right. In order to avoid such confusions, the

¹¹³ Guidelines for National Periodic Reports, *supra* note 11, at I(2).

¹¹⁴ Evans, Ige & Murray, *supra* note 64, at 45.

¹¹⁵ Viljoen, *supra* note 24, at 96.

¹¹⁶ Guidelines to Periodic Reporting Under the African Charter, at pmbll., OAU DOC/05/27 (XXIII) (April 1998).

¹¹⁷ The Charter, *supra* note 1, at art. 17 (“1. Every individual shall have the right to education. 2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”).

Guidelines should be amended to cover the Charter on a right-by-right basis.

Mindful of these difficulties, in 1998 the Commission came up with a short, severely abbreviated 11 point guideline. This guideline has been invariably criticized as “brief to the point of being vacuous.”¹¹⁸ Thus, it has failed to inform and guide states on the concise information needed and how it should be presented. Further, the relationship between the former and the latter guidelines is far from clear. The question of whether the latter repeals the former is left unanswered and, as such, creates confusion.¹¹⁹ Nevertheless, neither of the guidelines has prompted compliance and the practice of states’ reports lies somewhere between the two.¹²⁰

The two sets of guidelines have common weaknesses. Both are silent on the role and participation of NGOs in the process of preparation and presentation of state reports and follow-up. There is a lack of any form of concluding observations or comments in both guidelines. They are silent as to the quality of state parties’ delegations and the need to update the reports with facts that have occurred subsequent to the submission of the report but before its consideration. The lesson is that a shorter, comprehensive, and user-friendly guideline covering all rights is a necessity.

III.B.2 Absence and Inadequacy of Government Representatives

As stated previously, the absence of a reporting state’s representatives at the examination of a report has always caused the deferral of the examination of the report concerned. While this has become one of the major obstacles to the timely examination of reports, thereby causing examination backlog, there is little that the Commission can do to alleviate the problem. The Commission issues resolutions and sends reminders to the states concerned to call upon them to submit and present reports. Commissioners also raise the matter on their promotional missions. For instance, as previously mentioned, the Chairperson of the Commission was mandated to go to the Seychelles in 2001 to ensure that a delegate would present the report at the session following the visit. Yet, the Commission’s efforts have been met with little success, if any. Poor presentation of reports by government representatives is still another problem.

In dealing with the lack of attendance and inadequacy of government representatives, the Commission has always been ambivalent and has failed to take decisive action. The possibility of examination of state re-

¹¹⁸ Evans, Ige & Murray, *supra* note 64, at 45.

¹¹⁹ *Id.*

¹²⁰ *Id.*

ports in the absence of representatives was suggested at the 9th Session but no conclusive decision was made. The issue of considering a report in the absence of government representative came up once again at the 13th Session when Benin failed to send a representative despite reminders from the Commission. The issue is still awaiting the Commission's decision.

Earlier debates on the issue have led to disagreement among the Commissioners. Commissioner Badawi, referring to "'compelling logic' dictated by the 'spirit and the sense of the exercise of discussing the report,'"¹²¹ argued that "the consideration of state reports 'is a process which involves the presence of the state, establishing a dialogue with the state.'"¹²² In disagreement, Commissioner Umozurike rightly argued that the Charter does not require the presence of a state's representative.¹²³ The Rules of Procedure (Rules) merely "authorise"¹²⁴ the reporting state's representative to "participate in a specific Session"¹²⁵ and, as such, the presence of a state's representative is not a prerequisite for the examination of the reports.

The need for conducting a constructive dialogue dictates the examination of the report in the presence of a representative. Equally, the needs to compel defaulting states to attend the Commission's sessions, to prevent backlog, and to consider a report before the information contained in the report becomes outdated, require the Commission to examine reports even in the absence of a representative of the reporting state. In contrast to the Commission's current practice, the UN treaty bodies, especially the HRC and the CESCR, do examine a report when a state fails to send a representative.

Another controversial issue awaiting resolution is the inadequacy of the state representatives. The Rules provide that "representative[s] should be able to reply to questions put to him/her by the Commission and make statements on reports already submitted by this State."¹²⁶ The HRC's guidelines require that the state party's delegation should include persons who, "through their knowledge of and competence to explain the human rights situation in that State, are able to respond to the Committee's written and oral questions and comments concerning the whole range of Covenant

¹²¹ Viljoen, *supra* note 24, at 98.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Rules of Procedure of the African Commission on Human and Peoples' Rights, at Rule 83, OAU document ACHPR/RP/XIX (June 10, 1995), available at http://www.hrni.org/files/instruments/HRNi_EN_926.html [hereinafter Rules].

¹²⁵ *Id.*

¹²⁶ *Id.*

rights.”¹²⁷ Advisedly, the Commission should adopt this approach and it should comment on the adequacy of representatives in concluding observations.¹²⁸

III.B.3 Dealing with the Failure to Submit or the Late Submission of Reports

The problems of the failure to submit and late submission have been identified and the situation is worsening rather than showing progress. Whereas the Guidelines are silent on what to do under such circumstances, the Rules allow the Commission to send a reminder to the state party concerned and, in the event the state fails to submit a report, to point this out to the General Assembly of the OAU/AU.¹²⁹

The Guidelines do not provide for the consideration of a state’s human rights situation in the absence of a report, and neither does the Commission, in practice. It is noted that

[t]he consideration of a state in the absence of a report, has a different set of goals, including:

- a) encouraging the production of a report in the future
- b) highlighting the states’ record of compliance for the international community and providing an international forum for a human rights review in the absence of a national arena
- c) producing a set of recommendations which might encourage reform
- d) equal treatment of ratifying parties to the treaty.¹³⁰

The experience of the UN treaty bodies shows that “[s]tates do send delegations to engage in a dialogue with the committee in the absence of a report when their states’ record is scheduled.”¹³¹ This certainly results in

¹²⁷ UN Human Rights Committee, Consolidated Guidelines for State Reports Under the International Covenant on Civil and Political Rights, at G.3, CCPR./C/66/GUI/Rev.2 (Feb. 26, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR.C.66.GUI.Rev.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR.C.66.GUI.Rev.2.En?Opendocument).

¹²⁸ One may attribute the high quality of Zimbabwe’s presentation of its second report to the express disapproval by some Commissioners, notably Commissioner Nguema, of the poor presentation of its initial report.

¹²⁹ Rules, *supra* note 124, at Rules 81, 84-85.

¹³⁰ Bayefsky, *supra* note 87, at 13.

¹³¹ *Id.*

some form of dialogue, and limited dialogue is better than none. A recommendation coming out of such consideration “can serve as [a] vehicle[] for constructive change through actors at the national level.”¹³² Equally important, “[a] perception of equal treatment of states parties encourages those states which do report to continue to take the process seriously.”¹³³ Thus, the Commission needs to adopt this procedure if the failure to submit and the late submission of reports are to be discouraged. For that purpose, the Commission may be assisted by NGOs and may access the state’s recent report to UN treaty bodies, if any.

III.B.4 Failure of Appointed Commissioners to Attend

The Commission’s *modus operandi* is such that a Commissioner is assigned beforehand as a Special Rapporteur and then drafts questions for the state to address. At the examination stage, the Special Rapporteur leads the discussion, although other Commissioners also ask questions. The absence of the Special Rapporteur disrupts the examination process as he is expected to familiarize himself with the report and ask very probing questions.

There have been instances when the Special Rapporteur’s absence gave rise to serious difficulties. At the 9th Session, Commissioners Ndiaye and Beye, who were to act as Special Rapporteurs, did not attend the Session. No substitute had been appointed and the state report had not been made available to the Commissioners before the Session. Further, the state reports had not been translated into the working languages of the Commission. Thus, Commissioner Nguema had to prepare two state reports overnight. At the 12th Session, Commissioner Mokama was the Special Rapporteur for the initial report of Zimbabwe but he could not attend the Session. Commissioner Kisanga had to take over at very short notice.

III.B.5 The Nature of the Dialogue: Questions and Responses

The stage at which the Commission poses questions and makes its observations to state representatives is “the core of the examination process.”¹³⁴ “The types of questions asked and observations made by the Commission can have a significant impact on the effectiveness of the examination process”¹³⁵ and, in fact, it is the essential peg upon which constructive dialogue can be hung.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ ANKUMAH, *supra* note 111, at 99.

¹³⁵ *Id.*

However, the quality of the dialogue during the Commission's examination of state reports has been marred by numerous obstacles. In many instances, the Special Rapporteur received the report only shortly before the examination and thus found it difficult to familiarize himself with the contents of the report.¹³⁶ Furthermore, in most cases the Secretariat has failed to translate the reports into the Commission's working languages. Thus, those Commissioners who do not understand the language in which the report has been submitted are effectively eliminated from active participation in the discussion. The inadequate presentation of reports by government representatives has again weakened the dialogue.

The nature of the dialogue itself "has so far tended to be subdued."¹³⁷ According to Commissioner Nguema, the representatives have been handled with too much deference and respect. He commented, "I thought we should engage in a dialogue, in other words we should not treat [the state representatives] as diplomats but rather as technicians of law that should be able on technical issues to elicit the responses."¹³⁸

The questions put to the state representatives have in many instances been too general and diplomatic, partly due to the relative lack of independence on the part of the Commissioners. The 11 member Commission is presumably composed of state party nationals "chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights."¹³⁹ Although they are nominated and elected by state parties, they are supposed to "serve in their personal capacity,"¹⁴⁰ and not as government representatives. Consequently, the Commissioners should be independent and impartial and, thus, be free from improper influences and biases.

In many instances, the practice relating to the composition of the Commission is at odds with expectations and at variance with Article 31 of

¹³⁶ A classical example is the case of Nigeria's state report. The Rapporteur, Commissioner Janneh, said:

I am the Rapporteur and it is madness really, because I have just been given this for the first time I hope that all Commissioners will join in asking quite a few questions. I would have been very happy if I had gotten this document earlier. But we cannot let the ambassador go without dealing with the report.

Examination of State Reports, *supra* note 92.

¹³⁷ Frans Viljoen, *Overview of the African Regional Human Rights System*, in *HUMAN RIGHTS LAW IN AFRICA 1998* 189, 190 (C. Heyns ed. 2001).

¹³⁸ Viljoen, *supra* note 24, at 100.

¹³⁹ The Charter, *supra* note 1, at art. 31(1).

¹⁴⁰ *Id.*

the Charter. Some Commissioners hold ministerial or ambassadorial positions or are Attorney Generals. This has been a source of conflict and confusion that affects their ability to function as independent experts. Thus, it is extremely difficult, if not impossible, for an individual holding such a position in government to act concurrently as an independent member of a body that is to hold the same government accountable for its actions.

Even where the concerned Commissioners are actually free and independent in discharging their duties, outsiders are given a different impression. Referring to the composition of a Nigerian Special Tribunal, the Commission itself commented that “[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality.”¹⁴¹ The same can be said of the Commission.

Additionally, the factor of time is a major problem contributing to the subdued nature of the dialogue. Compared to other international monitoring bodies, the African Commission dispenses reports quite quickly.¹⁴² Initially, reports were released in approximately 45 minutes, though a longer amount of time is now devoted to the matter.

The experience of the HRC shows that one of the most important ways of establishing a meaningful dialogue between the Committee and state representatives is the suspension of proceedings after questions.¹⁴³ The government representative is then given a day to prepare replies. The Commission could not adopt this procedure perhaps due to its financial repercussions since the Commission lacks the resources to keep it in session for more than 15 days at any one meeting.

III.B.6 Lack of Concluding Observations and Follow-Up

Although the Guidelines do not provide for concluding observations, Rule 85(3) of the Procedure empowers the Commission to issue general observations.¹⁴⁴ In practice, the Commission did not issue concluding observations until the 29th Session in 2001. This may be partly attributed to the issue of Commissioners’ independence since many would presumably avoid ending the scrutiny of a report with any form of decision, verdict

¹⁴¹ The Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples’ Rights, ¶ 14 Comm. No. 87/93 (1995).

¹⁴² Viljoen *supra* note 4, at 254.

¹⁴³ O’Flaherty, *supra* note 97, at 517.

¹⁴⁴ Rules, *supra* note 124, at Rule 85(3) (the Commission “may address all general observations to the State concerned as it may deem necessary.”). Note, however, that general observations are to be issued only when the “Commission decides that the State has not discharged some of its obligations under the Charter.” *Id.*

or even final conclusions. Since the 29th Session, however, concluding observations have become a feature of the Commission's response to the presentation of a state report.¹⁴⁵

It is of paramount importance to note that concluding observations are yardsticks by which the Commission can measure the progress between past and present compliance of a state. Concerns and recommendations that emerged from the previous reports are to be addressed in subsequent reports, thereby forming the basis for a continuing dialogue and follow up. Thus:

[a]ny meaningful follow-up remains elusive without observations that could serve as a basis for NGOs to lobby for improvements domestically, and as a yardstick to the Commission itself when evaluating the next report from that state. . . . Such recommendations, contained in "concluding observations," can serve as clear guidance to the government about how to improve implementation of the African Charter.¹⁴⁶

Thus, the lack of concluding observations had been a crucial shortcoming of the examination process of the Commission. This must have partly contributed to the lack of seriousness on the part of the states towards their reporting obligations under the Charter.

III.B.7 Secretarial Problems

The lack of translation of state reports has been one of "the most nagging problems"¹⁴⁷ at the level of the Secretariat. This has been attributed, *inter alia*, to inadequacy of human and financial resources.¹⁴⁸ The Procedure provides for the Secretary to "endeavour to translate all reports and other documents of the Commission into the working languages."¹⁴⁹

¹⁴⁵ Interview with E.V.O. Dankwa, Chairperson of the African Commission on Human and Peoples' Rights (Sept. 13, 2003).

¹⁴⁶ Viljoen *supra* note 71, at 117.

¹⁴⁷ Viljoen, *supra* note 4, at 252.

¹⁴⁸ ANKUMAH, *supra* note 111, at 100 ("This is due to the fact that many reports are not translated into all three working languages due to the inadequacy of human and financial resources.").

¹⁴⁹ Rules, *supra* note 124, at Rule 80. The working languages "shall be, if possible, African languages, Arabic, English, French and Portuguese." *See* The Act, *supra* note 62, at art. 25.

The inclusion of the phrase “endeavour” suggests “cognizance of the seemingly insurmountable difficulties presented by reality.”¹⁵⁰

No French or Arabic translations of the Gambian and Zimbabwean reports were available at the 12th Session.¹⁵¹ No English translation of reports was available in the case of Togo’s report.¹⁵² The lack of secretarial efficiency and cooperation in making copies and distributing the updated report of Zimbabwe to the Commissioners and NGOs prompted the Zimbabwean ambassador to comment that it was “[m]ost unfortunate that there seems to be a total lack of communication and management skills. We do hope that something can be done pretty quickly, because this is a shame on Africa and on the African race.”¹⁵³

Likewise, at the 9th Session, where the reports from Tunisia and Libya were examined, a copy was given only to the Special Rapporteur. On many occasions only some of the Commissioners had received the reports. In many instances the commissioners receive reports only on the day of the examination, and often shortly before the beginning of the session.

III.C The Role of Non-State Actors

Obviously, all stages of the reporting process contribute towards the achievement of the purposes of reporting. The level of consultation and self-evaluation during the preparation of the report, the degree of inspection during examination of the report, and the concluding observations that emerge from the examination process, together play a pivotal role towards that end.

NGO participation in the reporting process may occur at four stages: before submission of a report, following its submission and prior to its consideration by a treaty body, in the context of its examination by the treaty body, and following the conclusion of the examination. Before the submission of the report, ideally, NGOs encourage and pressure states to submit reports in a timely fashion and assist the state in the drafting process.

NGOs may disseminate information about the Commission’s actions, resolutions and calls for reporting directed to a state with regard to the reporting duties, and create public awareness about the obligation and governmental record in this regard. Skillful dissemination and employment

¹⁵⁰ Viljoen, *supra* note 4, at 252.

¹⁵¹ Commissioner Beye had to apologize in advance for his inability to participate in the examination of the report. *See Examination of State Reports, supra* note 92.

¹⁵² *Id.*

¹⁵³ *Id.*

of all relevant information by NGOs can do much to encourage tardy states to meet their reporting obligations. In cases where states lack the technical expertise to compile reports, NGOs can provide technical cooperation to assist in overcoming such difficulties. For states facing financial constraints, NGO involvement will help to minimize the financial burden.¹⁵⁴

Moreover, NGOs might contribute to the report drafting process either by making submissions to the government or by actively participating in the actual drafting process. Furthermore, they can assist the examining Commissioners who generally have neither the resources nor the depth of knowledge of local circumstances to be able to monitor systematically. Hansungule noted that “[i]t is not possible for Commissioners to be abreast with every aspect of the human rights situation in a [s]tate party they do not hail from.”¹⁵⁵ Cognizant of this reality, “the Commission has often invited NGOs to provide information in advance of a State Party report being considered.”¹⁵⁶

In addition to channeling unofficial reports (also known as shadow or alternate reports) in confidence to the Commissioners, the NGOs’ submissions and interventions during the examination of reports help to identify difficulties overlooked and/or unidentified and to complement the state report. No matter how good a state report might be, oversights and lacunae are unavoidable. Thus, there is always room for improving the quality of a report by channeling independent information to the Commissioners. Shadow reports can also serve as references against which a state report can be tested.

Generally, governments do not readily provide a critical analysis of negative aspects pertaining to human rights protection in their countries. In such cases, NGOs “keep the system honest when governments and international bureaucrats fail to tell the truth or otherwise become entangled in diplomatic niceties.”¹⁵⁷ Further, “[t]he fact that states are aware that NGOs are present and ready to furnish the Commission with information may check dishonest or incomplete state reporting, besides putting pressure on

¹⁵⁴ ANKUMAH, *supra* note 111, at 81.

¹⁵⁵ Hansungule, *supra* note 14, at 18.

¹⁵⁶ Ahmed Motala, *Non-governmental Organizations in the African System*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000* 246, 260 (Malcom Evans & Rachel Murray eds. 2002).

¹⁵⁷ Gudmundur Alfredsson, *Concluding Remarks: More Law and Less Politics*, in *INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOR OF JAKOB TH. MOLLER* 925 (Gudmundur Alfredsson et al. eds., 2001).

states to remedy violations to avoid embarrassment before the Commission.”¹⁵⁸

Moreover, if the Commission is to embark on considering a defaulting state without a report or a representative of a state where states fail to send one after submitting a report, NGOs help the Commission to have a deeper insight of the country’s human rights situation. In these circumstances, “without NGO information, supervisory bodies would hardly be able to go about the consideration of states’ reports in a meaningful manner.”¹⁵⁹

After the examination of the report, NGOs can pressure the government to respect the recommendations of the Commission, monitor compliance of the state with the Commission’s concluding observations, and press the government to submit timely subsequent report on the progress made in the interim period. They can locally publicize concerns of the Commission in relation to the state concerned and provide the Commission with information on compliance of the state and the progress made following the preceding recommendations of the Commission, thereby enabling the Commission to follow-up its own conclusions and recommendations. Furthermore, NGOs can provide financial and secretarial assistance to the ever-financially constrained Commission.

Despite some criticisms directed against the Commission on the ground of insufficient involvement of NGOs,¹⁶⁰ the Commission has from time to time established a strong relationship with NGOs. In fact, “from the 11th Session, the Commission started to refer publicly to documentation and other information presented to them by NGOs.”¹⁶¹ The Commission works with NGOs with observer status. The Commission’s decision to accord such a status was welcomed by the First OAU Ministerial Conference on Human Rights in Africa.¹⁶² However, secretarial problems at the Commission made it difficult for the NGOs to know of the date of examination and to get copies of state reports.¹⁶³ This precludes effective NGO contribution to the examination process.

¹⁵⁸ Mugwanya, *supra* note 25, at 280.

¹⁵⁹ Bert G. Ramcharan, *Follow-up of Treaty Body Conclusions by the Treaty Bodies and the UN Mechanisms Beyond*, in *THE HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* 277, 282 (Anne F. Bayefsky ed. 2000).

¹⁶⁰ Mugwanya, *supra* note 25, at 280.

¹⁶¹ Viljoen *supra* note 24, at 99.

¹⁶² See OAU Ministerial Conference on Human Rights in Africa, Grand Bay (Mauritius) Declaration and Plan of Action, ¶ 25 (Apr. 12-16, 1999), available at <http://www.africanreview.org/docs/rights/grandbBay.pdf>.

¹⁶³ Motala, *supra* note 156, at 260.

Regrettably, many states ignore NGOs or preclude their involvement in the process of compilation, drafting and submission of a report. "The Commission has unceasingly asked reporting states not only whether local NGOs have been informed, but whether these NGOs [have] been invited to take part in the drafting of reports."¹⁶⁴ In Egypt, for instance, NGOs play no role in the reporting process.¹⁶⁵ Senegal and South Africa have increasingly involved NGOs in the process of preparing reports and, as such, are exceptions in this respect.¹⁶⁶

III.D From OAU to AU: Implications on State Reporting

The principal motive behind the creation of the OAU in 1963 was not the promotion and protection of human rights on the continent. Its members states were only required to have due regard to the UN Charter and the Universal Declaration of Human Rights.¹⁶⁷ In fact, "[n]one of the five specialist commissions established under Article 20 of the OAU Charter was devoted to human rights."¹⁶⁸ Priority was given to the security and inviolability of states, and efforts were concentrated on "dismantling the relics of colonialism and fighting apartheid."¹⁶⁹ Thus, issues of human rights "in the OAU Charter were considered only in the context of self-determination and in the ending of colonial rule."¹⁷⁰

Nearly 20 years had to elapse before the OAU adopted an instrument solely devoted to the protection of human rights. The adoption of the Charter in June 1981, and the consequent creation of the Commission and reporting procedure was a new chapter in its existence. In practice, however, state parties have failed in their reporting obligations. Yet, the OAU never condemned a country for failing to report to the Commission.

The OAU failed to provide essential human and material resources to the Commission. For the financial year 1996-1997, for instance, the budget allocated to the Commission by the OAU was 1.95 percent of its

¹⁶⁴ Institute for Human Rights and Development in Africa, *Procedures of the African Regional Human Rights System: Workshop Materials* 60 (2003).

¹⁶⁵ Heyns & Viljoen, *supra* note 6, at 506.

¹⁶⁶ *Id.*

¹⁶⁷ The Charter, *supra* note 1, at pmb1.

¹⁶⁸ Viljoen, *supra* note 24, at 47.

¹⁶⁹ Robert Eno, *The Place of the African Commission in the New African Dispensation*, 11 *AFRICAN SECURITY REVIEW* ¶ 1 (2002), available at <http://www.iss.co.za/pubs/ASR/11No2/Eno.html>.

¹⁷⁰ AMNESTY INT'L, *AFRICAN UNION: A NEW OPPORTUNITY FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA*, at Part 1 ¶ 7, available at <http://web.annesty.org/library/print/ENGIOR630022002>.

total annual budget of the year.¹⁷¹ Due to budget limitations, “donor funding is being used to employ key personnel.”¹⁷² The Commission also had to reduce the length of its meetings “as a result of the reduction of its budget by the OAU Secretariat.”¹⁷³ Regrettably, the Commission received greater support from outside sources than from the OAU.¹⁷⁴ Thus:

[t]he Commission has survived on handouts from inter-governmental and non-governmental foreign institutions Financial matters and survival strategies have taken up substantial spaces at the Commission’s bi-annual sessions, instead of the Commission using those limited periods to deliberate on important aspects of its mandate.¹⁷⁵

Weaknesses in the management and functioning of the Secretariat, provided by the OAU Secretary-General, had a significant impact on the overall performance of the Commission.

Given such failures of the OAU, it is noted: “it may well turn out that the transition of the OAU into the AU is as important as the United Nations replacing the failed League of Nations after World War II.”¹⁷⁶

The Constitutive Act of the AU¹⁷⁷ (Act) expresses member states’ determination to “promote and protect human and peoples’ rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law”¹⁷⁸ in accordance with the Charter and other relevant human rights institutions. Unlike the OAU Charter which contained limited provi-

¹⁷¹ AMNESTY INT’L, ORGANIZATION OF AFRICAN UNITY: MAKING HUMAN RIGHTS A REALITY FOR AFRICANS, at Part 2 ¶ 1, available at <http://web.amnesty.org/library/print/ENGIOR630011998>.

¹⁷² *Id.* at Part 2.4 ¶ 2.

¹⁷³ *Id.* at Part 2.4 ¶ 3.

¹⁷⁴ Victor Dankwa *The Promotional Role of the African Commission on Human and Peoples’ Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000 337 (Malcom Evans & Rachel Murray eds. 2002).

¹⁷⁵ Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT’L L. REV. 1177, 1251 (2002), available at <http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp07/CourseDocs/XIITheAfricanUnionTreatyandHumanRights.pdf>.

¹⁷⁶ *An Idea Whose Time Has Come*, BBC FOCUS ON AFRICA MAGAZINE 48 (July-Sept. 2001).

¹⁷⁷ The Act, *supra* note 62.

¹⁷⁸ The Act, *supra* note 62, at pmbl.

sions on human rights, the Act attaches a particular significance to human rights in a more comprehensive manner.¹⁷⁹

Organizationally, “[t]he AU is loosely modelled on the European Union”¹⁸⁰ in which there has never been a case of a state not submitting a report.¹⁸¹ In the latter, the administrative and financial conditions and the fear of sanction or expulsion of recalcitrant states from the membership, *inter alia*, contribute to the successes of the procedure.¹⁸² In Africa, there has not been any mechanism for sanctioning for the failure to report within the OAU framework. However, the Act introduced a mechanism for sanction. Under Article 23(2):

any Member State that fails to comply with the decisions and policies of the Union may be subjected to . . . sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.¹⁸³

As the promotion and protection of human rights on the continent is one of the principal policies of the AU, failure of the state to report on its human rights situation will violate the policies of the AU and may entail sanctions including expulsion. While this certainly constitutes a progress over the OAU legal framework, the degree of applicability and the fear it will engender are yet to be seen in practice.

Notwithstanding these developments, the Act never mentions or expressly incorporates the Commission. The AU incorporated the African Commission within its framework only in 2002, and it did so through a resolution.¹⁸⁴ The proliferation of organs of the AU and its duplication and financial repercussions are worrisome. Baimu has noted that “the proliferation of human rights institutions could lead to diversion of attention and

¹⁷⁹ The Act, *supra* note 62, at art. 3.

¹⁸⁰ Evarist Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa?*, 1 AFRICAN HUM. RTS. L.J. 299, 306 (2001).

¹⁸¹ Harris *supra* note 44, at 348.

¹⁸² *Id.*

¹⁸³ The Act, *supra* note 62, at art. 23(2).

¹⁸⁴ See AU Assembly, Decision on the Interim Period, Ass/AU/Dec. 1(I) ¶ xi (July 9-10, 2002), available at http://www.au2002.gov.za/docs/summit_council/audecis1.htm (“That the African Commission on Human and Peoples’ Rights and the African Committee of Experts on Rights and Welfare of the Child shall henceforth operate within the framework of the African Union.”).

resources allocated to the existing human rights institutions.”¹⁸⁵ In short, OAU-AU transition has generated both hope and concern in regards to state reporting.

Nevertheless, through the processes of succession, the AU has replaced the OAU and the Commission is entitled to expect the cooperation of the AU.¹⁸⁶ It is required under Article 45(1)(C) of the Charter to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.”¹⁸⁷ Hence, the Commission must work with the relevant organs of the AU.¹⁸⁸

IV. CONCLUSIONS AND A WAY FORWARD

This study shows that the state reporting procedure under the Charter is facing an implementation crisis of dangerous proportions and is marred by many problems. Thus, a single solution will not cure all the ills of the system and a single-causal explanation of the situation is extremely inadequate.

The reporting performance of states reveals an embarrassing failure. Many of them have failed to submit a single report to date, only one state has submitted a timely report, and most reports lack introspective value. Generally, the reports “tend to be descriptive, formalistic, legalistic and self-congratulatory, rather than reflective and focused on substance and practical realities, and problems encountered.”¹⁸⁹

States’ refusals to present their reports to the Commission have led to deferrals of the consideration of the reports while inadequate presentation resulted in subdued dialogue, thereby watering down the purposes sought to be achieved through reporting. The Commission’s less probing and more diplomatic questions have also contributed to the lack of effective dialogue.

The Commission should consider states’ human rights performance even in the absence of states’ report and/or representatives. Consideration of a defaulting state’s human rights situation in the absence of a report or of representatives adds to the Commission’s seriousness about reporting, creates the perception of equal treatment of all states, encourages those which

¹⁸⁵ Evarist Baimu, *Human Rights in the NEPAD and its Implications for the African Human Rights System*, 2 AFRICAN HUM. RTS. L.J. 301 (2002).

¹⁸⁶ The Act, *supra* note 62, at art. 33(1) (“This Act shall replace the Charter of the Organization of African Unity.”).

¹⁸⁷ The Charter, *supra* note 1, at art. 45(1)(C).

¹⁸⁸ For a detailed analysis, see QUASHIGAH, *supra* note 26.

¹⁸⁹ Heyns & Viljoen, *supra* note 6, at 25.

report to continue to do so, and compels the tardy ones into compliance. It has been correctly argued:

states should not exercise an implicit veto power by refusing to submit reports or to attend meetings. . . . The Commission has the potential to examine reports, compare them with its own findings and other available information, and draw necessary conclusion even in states' absence to prevent the reporting system from becoming a high-minded but totally ineffective means of promotion and protection.¹⁹⁰

The recently emerging trend of issuing concluding observations is an encouraging start, but secretarial problems and financial constraints preclude the Commission from taking sufficient time to thoroughly discuss the reports and issue well considered observations. The AU should provide essential human and material resources to enable the Commission to fulfill its promotional and protective mandate. The Commission must also continue working with NGOs which could provide it with financial assistance.

Silence relating to the power to issue concluding observations and the absence of a clear requirement of reporting on progress achieved are parts of the Achilles' heel of the Charter. Requiring states to report on all the rights, duties and freedoms at once is too burdensome in the context of the economic realities of African states. The Commission should be able to receive periodic thematic reports on a problem area faced by a particular state rather than requiring states to report on all rights, duties and freedoms. The two year reporting period is also too ambitious and too idealistic for state parties to comply with. From the prevailing reporting experiences, the reporting period under the Charter should be extended to a four year reporting cycle. A mechanism should also be devised whereby the Commission requires states to submit urgent reports where there seem to be gross and systematic violations of human rights in the state concerned. Thus, there are many compelling reasons to amend Article 62 of the Charter.

¹⁹⁰ Gerd Oberleitner & Claude E. Welch, Jr., *15th Session of the African Commission on Human and Peoples' Rights*, 12 NETHERLANDS Q. HUM. RTS. 331, 333 (1994).