

## Examination of state reports by the African Commission: A critical appraisal

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### 1 Introduction

The adoption on 27 June 1981 of the African Charter on Human and Peoples' Rights (African Charter or Charter),<sup>1</sup> which anchors the African regional human rights system, was an important step towards the protection of human rights on the African continent. However, while the contribution of regional human rights systems in Europe and the Americas to the global system established under the auspices of the United Nations (UN) is widely accepted, this is not the case in respect of the African system.

Virtually all African states have been and continue to be the most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa. Changes in some African states have created room for optimism. One thinks here of movements towards democratisation and constitutionalism, such as those in South Africa, Malawi, Uganda and Namibia. However, generally human rights conditions remain critically precarious on the continent. Even within largely 'democratic' or 'liberal' African states, governments have acted and continue to act in ways antithetical to their international human rights obligations. This perennial state of affairs continues to illuminate the challenge of the African regional human rights system.

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<sup>1</sup> Adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc CAB/LEG/67/3/Rev 5 (1981), reprinted in (1982) 21 *International Legal Materials* 52 and I Brownlie (ed) *Basic documents on human rights* (1992) 551. The Charter has been ratified by all the OAU's 53 member states, the last to ratify being Eritrea.

Doubts about the adequacy of the regional African human rights system are multi-faceted, surrounding not only the normative, but also the institutional and procedural aspects of the African Charter.<sup>2</sup> The Charter may be applauded for its significant contribution to the human rights corpus, including its codification of all three categories of rights,<sup>3</sup> the innovative concept of peoples' rights,<sup>4</sup> the imposition of duties on individuals,<sup>5</sup> but even these and other aspects raise various controversies. For instance, commentators point to 'claw-back' clauses as undermining or watering down the contents of the rights, saying that they invest states with unfettered powers to restrict human rights.<sup>6</sup> Other commentators

<sup>2</sup> See generally H Steiner & P Alston *International human rights in context: Law, politics and morals* (1996) 689; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa' (1995) 26 *California Western International Law Journal* 1; P Amoah 'The African Charter on Human and Peoples' Rights — An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226; CE Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43.

<sup>3</sup> The Charter brings together the three dimensions of human rights under one roof, namely, civil and political rights, economic, social and cultural rights and 'peoples' rights', sometimes also called collective or solidarity rights.

<sup>4</sup> These are rights which an individual can only enjoy in a collective sense, as a member of the community. See W Benedek 'The rights of peoples: The main issues' (1991) 16(56) *Bulletin of Australian Society of Legal Philosophy* 71–79; RN Kiwanuka 'The meaning of 'peoples' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80. Under the Charter, peoples' rights include: equality of all peoples (art 19); the right of all peoples to existence and to self-determination (art 20); the right to permanent sovereignty over wealth and natural resources (art 21); the right to development (art 22); the right to peace and security (art 23); and the right to a general satisfactory environment (art 24).

<sup>5</sup> These duties are towards his or her family and society, the state and the international community. See African Charter arts 27–29.

<sup>6</sup> A *prima facie* interpretation of the claw-backs clauses may mean that the guarantees in the Charter are subject or equated to the domestic law of states parties. See F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 50. Also, it may mean that the content of domestic laws restricting the rights may not be impugned. State parties are given more or less unlimited powers to determine the nature and extent of the limitations to the rights as distinguished from both the European and American human rights instruments which require states to limit rights *as necessary in a democratic society*. See arts 8–11 of the European Convention on Human Rights and arts 15 & 16 of the American Convention of Human Rights. The jurisprudence of the African Commission rejects the notion that states have unfettered powers to limit the rights in the Charter. The Commission has clarified the implications of claw-back clauses in the Charter, more specifically with respect to the right to freedom of association in art 10(1) of the Charter. Under this article, the right to freely associate is conditional on the requirement that one abides by the 'law' enacted by the states. Without defining the standards such domestic law must conform to, the clause may be interpreted as conferring unfettered powers on states to infract the right to free association. The Commission, however, has rejected this interpretation. In its resolution on the right to associate (adopted at its 11th session), the Commission calls on states

point to the potential abuse of the language in which duties are phrased.<sup>7</sup>

Even more critical are the doubts about the effectiveness and adequacy of the African Charter's enforcement system. The African Charter creates the African Commission on Human and Peoples' Rights (African Commission or Commission) as the primary institution to supervise state parties' compliance,<sup>8</sup> but certain aspects of the African Charter tend to limit the African Commission's competence.<sup>9</sup>

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not to 'enact provisions which would limit the exercise of this right'. The resolution stresses that states' regulation of the right to associate should be consistent with their obligations under the Charter. It follows that no-party or single-party regimes are infractions of the freedom of political association, assembly and speech. Through the communications procedure, the Commission has also strictly interpreted limitations to rights. In Communication 103/93, *Alhassan Abubakar v Ghana*, Tenth Annual Activity Report, the Commission strictly construed the claw-back clause in art 6, holding that a state is not absolved from liability by merely stating in general terms that the complainant violated some law and was arrested and detained under such law without providing substantive information to support such allegations.

<sup>7</sup> See generally R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667. For an extensive justification for the rights-duties conception, see generally Mutua (n 2 above).

<sup>8</sup> Art 30 of the African Charter. The Commission was inaugurated on 2 November 1987. See Second Annual Activity Report of the African Commission on Human and Peoples' Rights para 4.

<sup>9</sup> For instance, the Commission is not conferred with the power to enforce its decisions. Under art 59, the Assembly of Heads of State and Government may veto the findings of the Commission. The Charter is silent on whether or not the Commission's decisions are binding, prompting some analysts to argue that they are declaratory and recommendatory in nature. See eg G Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431 432; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 348. The Commission's decisions possess legal significance, and states should comply with them in good faith on the basis of the international law principle of *pacta sunt servanda*. But the absence of an explicit provision on the powers of the Commission to issue binding and enforceable judgements means that compliance with the Commission's decisions depends more on the good faith of the state in question. The Commission's protective mandate includes adjudication of both inter-state (arts 47-54) and individual communications (art 55). Individual communications are essential in redressing violations, but many states do not co-operate in enforcing the Commission's findings. See IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' (1997) 9 *African Journal of International and Comparative Law* 943 945. Through activism and creativity, the Commission has sought to address these limitations, but its effectiveness is still hindered by the above factors. The activism and creativity of the Commission includes: enhancing publicity of the Commission's work beyond the fetters of art 59 of the Charter; interaction and partnership with non-governmental organisations (NGOs) both local and international; augmenting the Commission's protective mandate by adjudicating cases alleging also isolated and not only massive violations of human rights; flexibility towards admissibility requirements laid down in art 56 of the Charter; drawing upon international human rights law; strictly construing claw-back clauses; appointment of special rapporteurs and carrying out

The basic functions of the African Commission are both promotional and protective, but the latter mandate is limited by various provisions of the African Charter.<sup>10</sup> More concretely, the Charter entrusts the African Commission with three principal functions: examining state reports,<sup>11</sup> considering communications alleging violations of human rights from both individuals and states,<sup>12</sup> and a so-called interpretative function aimed at expounding the African Charter.<sup>13</sup>

The African Commission started off cautiously and continues to face several challenges. Over time it has become an important instrument for the promotion and protection of human rights in Africa. In analysing the functioning of the Commission, this article disagrees with those advocating its abolition, and supports relentless efforts to strengthen it and the African system as a whole. The article evaluates the functioning of the African Commission with regard to the examination of state reports, and assesses the role of this function in the promotion of human rights in Africa. It identifies factors inhibiting the effectiveness of state reporting and presents proposals for improving the system of examining state reports.

## 2 The African Commission's legal competence to examine state reports

While obligating states to submit biennial reports on the legislative and other measures adopted to give effect to the African Charter, the African Charter failed to identify the organ competent to review these reports.<sup>14</sup> This omission 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 (OAU Assembly), or the Council of

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on-site visits to states parties; recommending remedies for violations of the rights in the Charter; and attempts by the Commission to carry out follow-ups of its decisions. See generally GW Mugwanya 'Realising universal human rights norms through regional human rights systems: Reinvigorating the African system' (1999) 10 *Indiana International and Comparative Law Review* 34 43–45; Viljoen (n 6 above) 54.

<sup>10</sup> Viljoen (n 6 above).

<sup>11</sup> Art 62 African Charter.

<sup>12</sup> Arts 47 & 55 African Charter.

<sup>13</sup> Art 45(3) African Charter.

<sup>14</sup> The American Convention on Human Rights (1969) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) do not require states to submit regular reports, but various UN human rights instruments requires states to submit regular reports, and mandate specific organs to deal with these reports. See generally T Buergenthal *International human rights in a nutshell* (1995) 21–247; P Alston 'Critical appraisal of the UN human rights regime' in P Alston (ed) *The United Nations and human rights: A critical appraisal* (1992) 1.

Ministers (OAU Council of Ministers) could be mandated to receive and examine state reports.<sup>15</sup> Allowing a 'political' body lacking independence, impartiality and human rights virtuosity to review reports would have undermined the benefits of state reporting. Inspired by the latter conviction, the African Commission at its 3rd session adopted a resolution requesting the OAU Assembly to entrust it with the task of reviewing state reports.<sup>16</sup> The African Commission rightly noted that 'it [was] the only appropriate organ of the OAU capable not only of studying the said periodic reports, but of making pertinent observations to state parties'.<sup>17</sup> In response to the African Commission's request, the OAU Assembly entrusted the Commission with the task of considering state reports.<sup>18</sup>

### 3 Guidelines for reporting and examining state reports

Under article 62 of the African Charter states are obliged to submit biennial reports on legislative and other measures they adopted in order to give effect to the provisions of the Charter. These reports are presented to the Commission for examination.

When the African Commission began its examination of state reports, it had no clear procedure. The Commission has now evolved a practice of examining state reports, although each examination may still have a distinct character, influenced by the framework set out by each state's report, the background and the preparation of the state representative. The Commission's practice in considering state reports may be summarised as follows:<sup>19</sup>

- A member of the African Commission is assigned as 'special rapporteur' with respect to the state whose report is to be examined. The special rapporteur usually drafts the questions to be asked.
- These questions are then sent to the state before the report is considered.

<sup>15</sup> Some analysts argue that the omission was intentional, so as not to jeopardise ratification. See eg CE Welch *Protecting human rights in Africa* (1995) 154; Viljoen (n 6 above) 56.

<sup>16</sup> First Annual Activity Report of the Commission (1987–1988) 28.

<sup>17</sup> n 16 above 28.

<sup>18</sup> Second Annual Activity Report of the Commission (1998–1989) 20.

<sup>19</sup> Viljoen (n 6 above) 95–96; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110; E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 90–107; Danish Centre for Human Rights *The African Commission on Human and Peoples' Rights Examination of state reports: Egypt and Tanzania (11th session)* (1995) 7.

- At the session, the chairperson or the special rapporteur initiates the report's examination proceedings.
- Thereafter, the state's representative introduces the report.
- This is followed by observations and questions of the special rapporteur.
- Other members of the African Commission also address questions and observations to the state representative.
- The state representative is granted an opportunity to prepare a response.
- After the response from the state representative, the African Commission summarises the proceedings and usually a note of thanks is made to the state representative.

The Commission scrutinises the report to determine the extent to which the state has taken steps to comply with the African Charter, the problems faced, and the ways to overcome them. State reporting, as the chairperson of the Commission has stressed,<sup>20</sup>

[i]s a non-contentious and non-judgmental proceeding allowing states to present a comprehensive picture of the human rights situation in a country and engage in constructive dialogue with the Commission with a view to assist states to enhance their human rights standards.

Through this dialogue the difficulties to the realisation of human rights and possible ways to address them are identified.<sup>21</sup> Thus, states benefit from advice on how to improve their human rights situation from independent international experts.

The UN Committee on Economic, Social and Cultural Rights has highlighted the purposes of state reporting which may also inspire the state reporting mechanism under the African system. These objectives are to:<sup>22</sup>

- ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity;
- ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territories or under its jurisdiction;
- provide the basis for the elaboration of clearly stated and carefully

<sup>20</sup> R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights — 21st and 22nd sessions: 15–25 April and 2–11 November 1997' (1998) 19 *Human Rights Law Journal* 181.

<sup>21</sup> The African Commission on Human and Peoples' Rights *State reporting procedures* Information Sheet 4 5–7.

<sup>22</sup> Committee on Economic, Social and Cultural Rights: *Report on the 3rd session* (6–24 Feb 1989) UN Doc E/1989/22 165–185.

targeted policies and to enable the government to demonstrate that such principled policy-making has in fact been undertaken;

- facilitate public scrutiny of government policies and to encourage the involvement of the various sectors of society in the formulation, implementation, and review of the relevant policies;
- provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the International Covenant on Economic, Social and Cultural Rights;
- enable the state party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realise progressively the rights in the Covenant;
- enable the Commission and the state party to facilitate the exchange of information among states to develop a better understanding of the common problems faced by states and a fuller appreciation of the possible measures to be taken to promote the effective realisation of each of the rights contained in the Covenant.

The African Commission itself has spelt out the advantages or benefits of state reporting, including:<sup>23</sup>

- Through the reporting system the implementation of the African Charter by states within their domestic systems is monitored. Through the examination of state reports, the African Commission is afforded the opportunity to understand the problems encountered by states in transforming the Charter into reality, and the Commission may make recommendations which may be taken by states to address the problems and promote effective realisation.
- The reporting system enables states to constantly check the whole government machinery as it requires all relevant government institutions and departments to evaluate legal regulations, procedures and practices in terms of the provisions of the Charter.
- State reporting permits the African Commission to collect information on common experiences, both good and bad, from state parties so that states may learn from each other.

On the basis of the above, states should be honest in their reporting, presenting the true picture of their human rights situation in order to benefit from the good offices of the African Commission.

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<sup>23</sup> The African Commission on Human and Peoples' Rights *State reporting procedure* Information Sheet No 4 6–7.

Like UN treaty bodies, the Commission has drawn up guidelines for national periodical reports.<sup>24</sup> These guidelines are intended to aid state parties to submit reports that are clear, organised, adequate in scope and sufficient in detail.<sup>25</sup> However, unlike guidelines issued by UN treaty bodies, which are brief and are arranged in the order of the specific rights in each instrument, the African Commission's first guidelines were voluminous and not arranged in a similar order. Instead, they were arranged under six subject matters, namely: civil and political rights; economic and social rights; peoples' rights; elimination of all forms of racial discrimination; suppression of apartheid; and elimination of all forms of discrimination against women. The Commission has subsequently issued additional simplified guidelines.<sup>26</sup>

The initial guidelines have shortcomings, but they may be credited for clarifying some ambiguous provisions of the African Charter, and for deepening normative understanding thereof. For instance, while the Charter has no derogation clause, the guidelines require states to report on whether there is a provision in their laws for derogation and under what circumstances derogations are possible.<sup>27</sup> Moreover, the guidelines are detailed on the information states must furnish to demonstrate that they have taken appropriate measures to give effect to individual and group rights, thereby deepening the normative understanding on the scope of these rights and the obligations of states. For instance, as regards peoples' rights to equality under article 19, the guidelines require states to state the constitutional framework which protects the different sections of national community.<sup>28</sup> Thus, to comply with the African Charter, states are under an obligation to proscribe tendencies of some sections of the community dominating others.

In reporting on the right to self-determination in article 20, states are required to provide information on legislative and administrative machinery ensuring that all communities are allowed full participation in political activities and equal opportunities in the economic activities of their country.<sup>29</sup> Thus, independent African states are to guarantee the right

<sup>24</sup> Guidelines on national periodic reports, Second Annual Activity Report of the African Commission on Human and Peoples' Rights Annex XII. These guidelines are reprinted in G Naldi *Documents of the Organisation of African Unity* (1992) 155. After serious debates over these guidelines, the Commission adopted the simplified guidelines as summarised below. See Viljoen (n 19 above) 111–113.

<sup>25</sup> Ankumah (n 19 above) 82.

<sup>26</sup> See generally Viljoen (n 19 above) 112–113.

<sup>27</sup> Guideline II 4(i). However, without laying down detail as to what standards states must conform to when they derogate from their obligations or the circumstances that must exist before derogations are made, this reporting requirement is inadequate.

<sup>28</sup> Guideline III (2).

<sup>29</sup> Guideline III (4)(i).



to self-determination. Denying certain communities the right to participate in the political or economic activities of the country amounts to oppression and violates the right to self-determination.

Guideline III (11), dealing with reporting on peoples' right to a satisfactory environment, amplifies the provisions of article 24. Guideline III (11) provides that the aims of article 24 are to protect the environment and keep it favourable for development (thereby incorporating the concept of sustainable development in environmental protection); to establish a system to monitor effective disposal of waste in order to prevent pollution and to obligate nations to co-operate to prohibit and penalise disposal of waste on African soil by any company. The guideline further defines the obligation of state parties by requiring them to furnish certain information in their initial and periodical reports.

The guidelines require state parties to indicate in their initial reports the principal legislative and other measures taken to fulfil the intention of the African Charter regarding the prohibition of pollution and efforts to prevent international dumping of toxic waste or other waste from industrialised countries. For their periodical reports, the guidelines require state parties to indicate continuation of development to curb waste and removal of pollution on land, water and air. State parties are also required to furnish information with respect to the right to take part in cultural life under article 17(2) of the Charter. The guidelines define in detail the obligations state parties are to discharge in order to give effect to the right.<sup>30</sup>

Additionally, the guidelines clarify the scope of economic and social rights as well as the obligations resting on state parties. For instance, in respect of the right to work under article 15 of the Charter, the guidelines require state parties to provide information on free choice of means of living, protection from arbitrary termination of employment and also to indicate policies they have pursued to achieve steady economic and social development and full employment.<sup>31</sup> In order for state parties to comply with the right to work, they are to take steps to ensure the right to equal pay for equal work, the right to safe and healthy working conditions, equal opportunity for promotion, rest, leisure, limitation on working hours and holiday with pay.<sup>32</sup>

Despite the African Charter's omission of trade union rights in its guarantee of free association under article 10 and the right to work in article 15, the guidelines require state parties to report on the right to form trade unions, the right of trade unions to federate and function freely, and the right of workers to strike.<sup>33</sup>

<sup>30</sup> Guideline III (11) & (14).

<sup>31</sup> Guideline II (4).

<sup>32</sup> Guideline II (6).

<sup>33</sup> Guideline II (10).

The guidelines have clarified and deepened the normative understanding of the Charter. Moreover, in their initial and periodical reports on economic and social rights, the guidelines require state parties to report on various protection mechanisms, including the right to social security and social insurance, the right to protection of the family, the right to the highest attainable standard of physical and mental health, the right to education, the right to compulsory primary education and the right to economic development.<sup>34</sup>

#### 4 Analysis

Since its 9th session in March 1991, when it considered the reports of Libya, Rwanda and Tunisia, up to the end of its 25th session in April 1999, the African Commission has had occasion to examine reports of 21 countries.

The Commission has had opportunity to address various human rights issues affecting different African countries.<sup>35</sup> The examination of state reports has served as a forum for wide-ranging discussions that give a valuable indication on how the African Commission gives normative understanding to the African Charter through interpretation of its provisions.

Infrequent and inadequate reporting by states, however, has undermined the role of reporting in realising human rights in Africa. A decade since the Charter took effect in respect of the majority of state parties, only 24 of the 53 state parties to the Charter had submitted reports; only four states had submitted second reports and only Zimbabwe had submitted a third report. No state had submitted a fourth report. Many state parties had not yet submitted their first reports which were long overdue.<sup>36</sup> By the 25th session, there were over 200 state reports due.

<sup>34</sup> Guidelines II (A)–(B).

<sup>35</sup> See generally Ankumah (n 19 above) 79–109; Viljoen (n 6 above) 91–102.

<sup>36</sup> These states are Botswana, Burkina Faso, Central African Republic, Cameroon, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Sahrawi Arab Democratic Republic, Sao Tomé and Príncipe, Sierra Leone, Somalia, Swaziland, Tanzania, and Zambia. See Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights Annex II (Status of Submission of State Reports) 68th ordinary session of the OAU Council of Ministers 1–6 June 1998 CM/208 (LXVIII). For a summary of the status on submission of state periodical reports under art 62 of the Charter between March 1987 to the 21st session of the Commission, 15–25 April 1997, see Viljoen (n 6 above) 92–94; Murray (n 20 above) 181–184. At the 21st session, the Commission examined the initial report for Sudan, and combined the second and third reports of Zimbabwe. For a summary of the status on submission of state periodic reports under art 62 of the Charter as at the 25th session, see Annex III, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights, 24th and 25th ordinary sessions, 26 April to 5 May 1999, Banjul, The Gambia, <<http://www1.umn.edu/humanrts/africa/12thannex3.html>> (accessed 4 August 2001).

Partly because of the failure to submit reports, the African Commission has not fully succeeded in enhancing the protection and promotion of human rights through the examination of state reports. Reasons for the lack of compliance by states with their reporting obligations include a general lack of political will on the part of state parties; secondly the fact that state parties have to file reports under other international human rights instruments to which they are signatories; and thirdly the lack of a co-ordinated effort between state departments and the complexity of the first reporting guidelines issued by the African Commission.

Additionally, many of the reports filed have revealed a lack of seriousness in carrying out introspective self-evaluation. An example is Nigeria's report (of six pages in total) which consisted of a few brief remarks and a photocopy of the table of contents of its partially suspended constitution.<sup>37</sup> Commissioners, however, have expressed satisfaction with some reports, such as those of The Gambia, Mozambique and Algeria.<sup>38</sup> Even those so-called good reports, however, may be imperfect in view of the fact that they are being compared with totally inadequate reports from other countries. Moreover, some countries may use comparatively good quality reports to conceal their poor human rights records.<sup>39</sup>

The African Commission does not issue 'concluding comments' or a 'concluding evaluation' of state reports. Individual commissioners express views in the course of examining state reports but no uniform position is taken by the Commission on the various issues raised. The examination of state reports usually ends with profuse thanks or encouragement to the state representative. The Commission does not adequately advise state parties on how to improve their human rights situations.<sup>40</sup> The Commission needs to remedy these anomalies in order to enhance the impact of the state reporting procedure in protecting and promoting human rights in Africa.

<sup>37</sup> Vijoen (n 6 above) 95.

<sup>38</sup> Vijoen (n 6 above) 95. See also Ankumah (n 19 above) 90–107.

<sup>39</sup> Vijoen (n 6 above) 95.

<sup>40</sup> In examining South Africa's report, the set of questions prepared by the African Commission's rapporteur, Commissioner Rezzag-Bara, as well as information supplied to the Commission by South African NGOs, enabled the Commission to identify several issues affecting South Africa's human rights regime, including the *status quo* of the African Charter in South Africa's legal system, the role of customary law and its relation to human rights, realising 'compulsory' education when this education is not free, the independence of the Independent Electoral Commission, the funding of political parties, the effectiveness of the National Crime Prevention Strategy, police brutality, measures to reduce the number of trial-awaiting prisoners, the role of victims in the administration of justice, the role and powers of the Council of Traditional Rulers, the structure of the legal profession and the rationalisation of courts. Ideally the Commission should have advised South Africa on these issues by adopting concluding comments or concluding views. See generally Vijoen (n 19 above) 110. Initially the UN Human Rights Committee examining reports under art 40 of the ICCPR used not to adopt concluding comments or concluding views about state

## 5 Proposals to invigorate state reporting

State reporting under the African system is essential to the promotion and protection of human rights, but its effectiveness is undermined by several factors which need to be remedied. While the first guidelines for state reporting played an important role, they were deficient in some respects.

The guidelines were too detailed, lengthy and in some areas repetitive and unnecessarily complex. Additionally, the first guidelines were not arranged in a logical and coherent manner. The simplified guidelines follow a more logical sequence and more clearly provide for state parties to report on each right and duty enshrined in the African Charter. Furthermore, as regards racial and gender discrimination, while the first guidelines should be commended for drawing inspiration from similar guidelines adopted by the UN organs under the UN Convention Against Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the simplified guidelines are quite precise in requiring states to report on actions they have taken to protect vulnerable groups. With regard to women, state parties should comprehensively report on the predicaments that afflict women on the continent, including female genital mutilation, domestic violence and the abuse of widows.

In the course of examining state reports, the African Commission should avoid spending too much time on technical issues and be decisive on issues. For instance, whether or not a state representative must attend the session when a state's report is examined, is an issue that has in the past caused the postponement of examination of state reports.<sup>41</sup> This issue has remained unresolved. The issue of the suitability of the representative (whether he or she should possess technical legal expertise) has also caused delays and confusion, and the Commission has not yet decisively resolved these.<sup>42</sup> The Commission should not require specific qualifications of state representatives and may proceed to consider a state's report in the absence of its representative to avoid a backlog of

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reports, but from 1992 it changed this practice to issue Agreed Final Comments at the conclusion of the consideration of each report. These comments also contain recommendations to the state on the possible actions to take to improve its compliance with human rights obligations under the Covenant. According to the Committee, Agreed Final Comments serve the following purposes: (a) to make each state's experience available for the benefit of all state parties in order to promote their further implementation of the Covenant; (b) to draw their attention to insufficiencies disclosed by a large number of reports; (c) to suggest improvements in the reporting procedure and to stimulate the activities of these states and international organisation in the promotion and protection of human rights. See Report of the Human Rights Committee A/36/40 107.

<sup>41</sup> Such as those of Nigeria and Benin. See Viljoen (n 6 above) 98.

<sup>42</sup> Viljoen (n 6 above) 98.

reports. The Commission should then send its comments to the state and require a state's response on unanswered issues.

The frequent non-attendance of government representatives causing the examination of state reports to be postponed, and at times the non-attendance of commissioners assigned as rapporteurs in respect of the state reports leading to a waste of time while looking for substitutes, are creating a backlog.<sup>43</sup> The limited time available to the commissioners at each session, coupled with delays arising from the failure of the Secretariat to translate the reports in all the official languages of the Commission, aggravate the situation.<sup>44</sup> The Commission should fight these problems relentlessly.

The benefits of the state reporting procedure may be enhanced by affording sufficient time to the examination of each report. Compared to other international human rights bodies, the African Commission disposes of reports very quickly, initially in approximately 45 minutes.<sup>45</sup> The Commission has made efforts to remedy this, but more needs to be done to allow state representatives adequate time to respond.<sup>46</sup> On several occasions, the practice pursued by the Commission is one of asking a series of questions to the representative, followed by 'a statement in defence' of the report.<sup>47</sup> The danger is that the representatives will not be able to give definite answers to each of the questions, and may omit pertinent issues. A question-answer approach should be adopted.

Moreover, the African Commission may enhance the impact of the state reporting mechanism by frequently referring to the information presented to it by non-governmental organisations (NGOs) as well as alternate reports. NGOs should not only participate in the processes of preparing state reports, but should also be encouraged to supplement these reports, thereby providing the Commission with additional information. They should also be present at the examination of state reports. The 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 states to remedy violations to avoid embarrassment before the Commission. The Commission has only so far to a very limited extent taken cognisance of alternate reports.

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<sup>43</sup> Vijoen (n 6 above) 100.

<sup>44</sup> Vijoen (n 6 above) 102.

<sup>45</sup> As above.

<sup>46</sup> The UN Human Rights Committee usually allows state representatives a day to prepare replies. See M O'Flaherty 'The reporting obligations under article 40 of the International Covenant on Civil and Political Rights: Lessons to be learned from the consideration by the Human Rights Committee of Ireland's first report' (1994) 16 *Human Rights Quarterly* 515-517.

<sup>47</sup> Vijoen (n 6 above) 100.

The Commission should also create a follow-up mechanism to deal with unanswered queries or unsatisfactorily answered questions by state representatives during the examination of state reports. A follow-up is possible if the Commission issues concluding comments and if NGOs are encouraged to monitor how state parties implement these recommendations in practice.

At the end of the examination of each state report the African Commission should endeavour to make a general evaluation of the report and issue concluding comments. Such an approach not only enables the Commission to suggest improvements in the human rights practice of the state in question, but its recommendations are made available for the benefit of other states. Moreover, concluding comments supplement the Commission's elaboration of the African Charter's norms and deepen the normative understanding of the Charter. While the views expressed by each individual commissioner in the course of examining state reports are informative, they are not sufficient to provide a uniform position or opinion of the Commission as a whole on various issues the Commission confronts in the examination of state reports. These issues include the death sentence,<sup>48</sup> the implications of state domination of the media to freedom of expression and the press, the legality of proscribing publications that propagate the views of political parties and the *status quo* of special tribunals other than regular courts to the right to a fair trial.<sup>49</sup>

Infrequent reporting by state parties has also limited the role of state reporting. The African Commission may deal with non-co-operative states through the appointment of special rapporteurs to investigate the human rights situation in countries and make recommendations on how to improve them. In addition, the Commission may request state parties with overdue reports to submit reports presented to UN treaty bodies, examine them and seek clarification or supplementary reports where necessary. The use of special rapporteurs may not only invigorate state reporting, but may also serve as an alternative to state reporting. In addition, they also play an important protective function.

The African Commission has in the past relied on article 46 of the African Charter<sup>50</sup> to appoint special rapporteurs and carry out on-site

<sup>48</sup> For instance, this issue arose in the Commission's examination of the reports of The Gambia and Senegal at the Commission's 12th session, and one commissioner, Beye, emphasised that he was personally opposed to the death penalty. See Viljoen (n 6 above) 106.

<sup>49</sup> These are some of the issues for instance that arose in the Commission's examination of The Gambia's second report at the Commission's 16th session. See generally African Society of International and Comparative Law *Report on the 16th Session* (1996) 36–42.

<sup>50</sup> Art 46 of the African Charter mandates the Commission to resort to any appropriate means of investigation.

missions to state parties, but this system needs strengthening. While the use of special rapporteurs in the African system is not yet fully developed, and is hindered by financial constraints,<sup>51</sup> it constitutes an important method for the protection of human rights. Special rapporteurs in the African system seem to have wide mandates,<sup>52</sup> although they may be inhibited by restrictions on publicity.

The African Commission has also enhanced its protective mandate through initiating on-site visits or missions of good offices to the state parties. These on-site visits may also be essential in serving as an alternative to state reporting. The essence of these missions is to try to secure an amicable resolution of communications that the Commission has declared admissible, but the Commission may effectively use it to get information on the state's human rights problem. In the case of Mauritania, on receipt of communications against that state which revealed 'disturbing violations of human rights',<sup>53</sup> the Commission sent a fact-finding mission to Mauritania with a view to finding an amicable resolution to put an end to the situation.<sup>54</sup> Other missions have been carried out in Senegal, Burundi, Sudan and Nigeria.<sup>55</sup>

During these missions, the commissioners can carry out an in-depth study of the problem, meet with parties, engage in constructive dialogue with a view to resolving the problem, and make recommendations on

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<sup>51</sup> The Commission relies on funding from NGOs and other institutions. See Ninth Annual Activity Report 7.

<sup>52</sup> For instance, the mandates of both the Special Rapporteur on Extrajudicial or Arbitrary Executions and the Special Rapporteur on Prisons and Conditions of Detention encompass taking preventive measures and also promoting state compliance with international human rights norms and standards. See *Report on Extra-Judicial, Summary or Arbitrary Executions* (by Hatem Ben Salem, Special Rapporteur) Tenth Annual Activity Report Annex VI, and *Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st Session of the African Commission on Human and Peoples' Rights* Tenth Annual Activity Report, as above, Annex VII. At the 22nd session, the Special Rapporteur on Extrajudicial or Arbitrary Executions reported, among others, his attempt to intervene on behalf of an individual in the Comoros. The Comoros, however, executed the individual. He also reported on his futile request to the UN Commissioner for Human Rights, asking that the Special Rapporteur of the African Commission be part of the mission of the UN Committee investigating executions in Zaïre. See generally Murray (n 20 above) 176. Although these attempts were futile, they demonstrate the role the African system can play. There is a need to widely publicise states' non-compliance as this may serve as a shame and may pressure states into compliance.

<sup>53</sup> *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights* 19–27 June 1996, Tenth Annual Activity Report, Annex IX.

<sup>54</sup> As above. It was further stressed by the head of the mission that the goal was not to decide whether what was encountered was wrong or right, but above all to listen to all sides with the objective of bringing clarification to the Commission in its contribution to the search for an equitable solution through dialogue.

<sup>55</sup> See generally Viljoen (n 6 above) 60; D Shelton 'The promise of regional human rights systems' in BH Weston & SP Marks (eds) *The future of international human rights* (1999) 385.

the course of action. On-site missions increase the public knowledge of the regional system and the mere presence of human rights officials from an intergovernmental organisation may deter violations.<sup>56</sup> On the above basis, on-site missions may not only be used to strengthen state reporting, but may also constitute an alternative system of reporting.<sup>57</sup>

Owing to challenges facing the above mechanisms, especially the lack of sufficient funding, the African Commission may wish to consider adopting the so-called 'review of implementation'<sup>58</sup> procedure even in the absence of a state report. Under this procedure, the Commission obtains independent information such as from NGOs, reports submitted by that country to UN bodies and their comments, about the implementation of the African Charter by the state in question. Thereafter, a state representative is invited for a dialogue with the Commission. These proactive methodologies have the potential of dealing adequately with state parties that fail to submit reports.

## 6 Conclusion

The examination of state reports by the African Commission has the potential of enhancing respect for human rights in Africa. The Commission has undertaken issue-analysis and deepened the normative understanding of the African Charter through its guidelines to state reporting, but several problems continue to inhibit the effectiveness of state reporting. These problems need to be addressed to improve the system of state reporting rather than abandoning the system in its entirety. The Commission's regular reviews of the enforcement of human rights in countries are essential in encouraging states to carry out self-examination and in enabling it to scrutinise reports to determine state compliance with the African Charter.

State reporting may enable the Commission to offer advice to states on how to improve their human rights situations. Moreover, states not complying with the Charter may be exposed to international embarrassment. The presence of NGOs at the examination of state reports and their alternate reports may help to put pressure on state parties not to make misrepresentations in their reports. State parties may take steps to remedy violations to avoid international embarrassment.

Efforts are needed, however, to encourage states to file their reports regularly. There is also a need for the Commission to enhance its role by issuing concluding comments. If at the end of examining each state's report, concluding comments and recommendations are made in

<sup>56</sup> Shelton (n 55 above) 385.

<sup>57</sup> Viljoen (n 6 above) 61.

<sup>58</sup> Viljoen (n 19 above) 117.



respect of areas for improvement, when the Commission next considers a report of that country, these comments and recommendations could provide the basis upon which to evaluate a state's efforts, if any, to improve its human rights record. Thus, concluding comments and recommendations may play a vital role in the Commission's follow-up efforts.

With improved state reporting, a backlog of unexamined state reports may aggravate the situation over time. The African Commission needs to establish procedures to deal with such backlogs. As noted above, the Commission should proceed to consider a state's report in the absence of its representative to avoid backlog of reports. The Commission should then send its comments to the state and requiring a state's response on unanswered issues. Because the Commission also deals with individual communications, which may reduce the time available to state reports, it needs to adopt procedures that dispose of communications expeditiously.