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The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism

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1 Introduction

State reporting is a means of ensuring the observance of human rights at the international level as well as ensuring a government's accountability to its own people and the international community. Unfortunately, however, a review of the process under the African Charter on Human and Peoples' Rights (African Charter or Charter) does not depict a very bright picture. This paper therefore argues that, having regard to the nature of the reporting system and the extent of authority that is invested in the African Commission on Human and Peoples' Rights (African Commission or Commission), there is an obvious need for the African Commission to adopt measures that lend increased seriousness to the reporting system and encourage and compel states to respond to their reporting obligations. As will be argued subsequently, the establishment of the African Union (AU) offers a unique opportunity for the introduction of a more effective reporting mechanism.

The African Commission was created by the Organisation of African Unity (OAU).[1] As was stated by Badawi Elsheikh, the African Commission is not a political organ of the OAU.[2] To him, the legal character of the

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1 See art 30 African Charter.

2 I Badawi Elsheikh 'The African Commission on Human and Peoples' Rights' (1989) 7 *Netherlands Quarterly of Human Rights* 283.

provisions of the African Charter, the independent status of the African Commission as well as the independence of its members qualify it to be described as a quasi-judicial body.[3] These notwithstanding, the fact of the matter is that the Commission is required by the African Charter to work in close relationship with the Assembly of Heads of State and Government of the OAU, a political entity. The Commission has a rather complex character and is therefore described as a *sui generis* body.[4] This character of the Commission makes it versatile and, therefore, with some finesse and tenacity it should be in a position to operate as an independent body but in effective collaboration with the various organs of the OAU, and now the AU.

These opinions stand even in the face of article 30 of the African Charter, which states that 'the Commission shall be *established within the Organisation of African Unity* to promote human and peoples' rights and ensure their protection in Africa'.[5] This should not subject the Commission to the unqualified control of the Assembly of Heads of State and Government of the OAU. The extent to which the OAU can affect the independence of the Commission is clearly stated in the Charter in article 59(1): '[A]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.' This obviously was intended to protect the interests of those who wield political authority. The provisions of the Charter are a reflection of the conservative environment in which they were drafted.[6] It is in this respect that a liberal and functional interpretation of the African Charter and the Constitutive Act of the African Union is urged in this work as a necessity for a more effective realisation of state reporting under the Charter.

2 Mandate of the African Commission

The mandate of the Commission as set out in article 45 of the African Charter may be itemised as follows:

- to promote human and peoples' rights;
- to protect human and peoples' rights;
- to interpret provisions of the African Charter;
- any other tasks that may be referred to the Commission by the OAU.

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3 As above.

4 As above.

5 My emphasis.

6 See Proceedings of the Conference on the African Commission on Human and Peoples' Rights, 24–26 June 1991 convened by the Fund For Peace, published by Friedrich Naumann Stiftung (1991) 11.

The function of examining state reports was not assigned specifically to the Commission by the Charter. Article 62 of the Charter provides that:

> Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Clearly the African Commission was not mentioned as the recipient of the reports, neither was anything said about what treatment should be given to reports once submitted. At its 3rd session in 1988, the African Commission considered article 62 and concluded that the Charter did not specifically entrust it with the task of considering periodic reports of the states parties. The Commission thereupon recommended to the Assembly of Heads of State and Government to specifically assign it with this mandate, enabling it to consider and indicate the general orientation as regards the form and substance of the reports.

At its 24th ordinary session, the Assembly of Heads of State and Government of the OAU approved the Commission's recommendations, thereby entrusting the Commission with the task of examining the periodic reports.[7] At the same time the Assembly of Heads of State and Government authorised the Commission to prepare and deliver general guidelines on the form and contents of periodic reports. This delegation of authority to the Commission could be justified under article 45(4) of the Charter, which permits the OAU to assign additional functions to the Commission.

While the Commission was right in claiming what normally in the scheme of things belongs to institutions of its kind, the Commission unwittingly, perhaps, limited its own scope and therefore the effectiveness of the reporting system under the Charter. The recommendation, which was proposed and accepted by the Assembly of Heads of State and Government, simply requested that the Commission be entrusted with the task of 'examining' the periodic reports. Nothing is specifically stated in relation to what is to be done with the conclusions or observations arising from the 'examination', as is the case for instance under the European Social Charter system.

The 1988 Rules of Procedure of the African Commission did not cure these defects either.[8] Whatever force or implementation 'push' that can be implied from the Rules can best be described as an observation to the

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7 Second Annual Activity Report of the African Commission on Human and Peoples' Rights, para 31; reprinted in (1990) 11 *Human Rights Law Journal* 390 394.

8 Even though the Commission adopted the above-mentioned Recommendations at its 3rd session held between 18 and 28 April 1988, its Rules of Procedure, which it had already adopted on 13 February 1988, had elaborate provisions on the reports to be submitted by state parties under art 62 of the African Charter. The Commission took this step possibly because it rightly perceived that it was the only institution that is logically anticipated to perform the function of examination of the reports.

particular state, followed by a report to the states parties. The relevant Rules provided that:

> Rule 85: Examination of Information contained in Reports.
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> 3. If, following the consideration of the reports, and the information submitted by a State party to the Charter, the Commission decides that the State has not discharged its obligations under the Charter, it may address all general observations to the State concerned as it may deem necessary.
>
> Rule 86: Adjournment and Transmission of the Reports.
>
> 1. The Commission shall, through the Secretary-General, communicate to States parties to the Charter for comments, its general observations made following the consideration of the reports and the information submitted by States parties to the Charter. The Commission may, where necessary, fix a time limit for the submission of the comments by the States parties to the Charter.
> 2. The Commission may also transmit to the Assembly, the observations mentioned in paragraph 1 of this Rule, accompanied by copies of the reports to the Charter as well as the comments supplied by the latter, if possible.

The outlined method of dealing with reports, as found in the Rules, is not a system that will work with African governments that are noted for their scant regard and respect for human rights. In formulating the Rules, the Commission should have taken the opportunity to put in place a more effective monitoring mechanism, such as under the European Social Charter system.

In order to assist the states in their reporting, the Commission at its 4th ordinary session in October 1991 adopted the 'General Guidelines for National Periodic Reports'.[9] This set of guidelines is a very detailed document that seeks to explain what is expected in the report as regards to each right guaranteed in the Charter. A careful examination of the guidelines while considering the low level of human rights expertise generally available among African government officials, indicates to even the uninformed observer that these guidelines are more likely to confuse than to guide. Subsequently a less detailed — but equally unhelpful — set of guidelines was adopted.[10] A more basic reporting guideline is attempted later in this article.

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9 Second Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex XII.

10 See F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (1999) 44 *Journal of African Law* 110 112.

3 General basis and philosophy of the reporting mechanism

Writing in respect of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), Leckie bluntly asserts that '[t]he analysis of state reports remains the most important means of monitoring compliance with this instrument at the international level'.[11] Badawi Elsheikh, a former Chair of the African Commission, expressed his belief that 'the reporting procedure is the backbone of the mission of the Commission. Through it, the Commission would be able to monitor the implementation of the Charter and engage state parties in a process of dynamic implementation.'[12] The African Commission itself recognised the importance of the reporting process and therefore emphasised its role in the Mauritius Plan of Action (1996–2001) as follows:[13]

> Periodic reports play a promotional and a protective role. The dialogue initiated by the Commission with governments will most certainly result in an improvement of national legislation or practice related to human rights . . . Public discussions of periodic reports also provide an opportunity for NGOs to make their contribution to the process of dialogue.

Additionally:[14] 'A full debate of situations revealing a good human rights performance is also useful, both because of its educational effect and relevance to the evolution of human rights law in general.'

Following Van Dijk and Van Hoof, the benefits of reporting to the human rights system may be summarised as follows:[15]

- All the contracting states can be controlled.
- Resistance to supervision may be less because all the states are equally subject to examination.
- Because of the possibility of comparison, a more balanced picture may be obtained of the state of affairs with respect to the implementation of the treaty in question within the whole group of contracting states.
- It permits a comprehensive overview of all the rights guaranteed as against the selective examination of individual rights under the complaint procedure.

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11 S Leckie 'The appearance of the Netherlands before the UN Committee on Economic, Social and Cultural Rights' (1989) 7 *Netherlands Quarterly of Human Rights* 308.

12 I Badawi Elsheikh 'The African Commission on Human and Peoples' Rights: Prospects and problems' (1989) 7 *Netherlands Quarterly of Human Rights* 281.

13 Para 28 Mauritius Plan of Action (1996–2001) of the African Commission on Human and Peoples' Rights.

14 *Making reporting procedure under the International Covenant on Civil and Political Rights more effective* (Report by the Norwegian Institute of Human Rights) (1991) 7.

15 See P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 208–209.

- It makes possible continuity in the supervision process as against the *ad hoc* character of the complaint system.[16]

Under the UN Human Rights Committee process, it has been argued by some that 'a state's duties are limited to what can be derived from the Covenant's explicit terms'.[17] From an examination of the International Covenant on Civil and Political Rights (ICCPR) process, however, three types of state duties have been identified:[18] Duties imposed directly by the Covenant under article 40; duties imposed by the Committee acting under its own competence; and duties undertaken by the state representatives while meeting with the Committee during the consideration of a state report.

Having regard to the rather sketchy and incomplete manner in which article 62 of the African Charter was formulated, there exists a need, even more than could be felt in respect of the ICCPR, for the evolution by the Commission of what can be described as additional, implied or inherent duties on the part of states in the performance of their reporting obligations.

The nature of article 62 is bound to give the impression that state reporting is a formal submission by a country of its assessment of its own performance and nothing more. Even the ICESCR, with its more detailed provision on the handling of the report when submitted was, nevertheless, regarded by the states as requiring the reports as a matter of mere formality. Hence the need for the Committee on Economic, Social and Cultural Rights to clearly spell out the objectives of state reporting to serve as a guide to states.

These objectives may be summarised as follows: A first objective is to 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 with the Covenant. A second objective is to 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 being enjoyed by all individuals within its territory or under its jurisdiction. A third objective of the reporting process is to enable a government to demonstrate that principled policy-making has in fact been undertaken. A fourth objective is to facilitate public scrutiny of government policies with respect to the rights in question and to encourage the involvement of the relevant sectors of society in the formulation, implementation and review of the relevant policies. A fifth objective is to 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 Covenant. A sixth objective is to enable the state

16 As above, 209.
17 As above.
18 n 18 above, 26.

party itself to develop a better understanding of the problems and shortcomings encountered in an effort to realise progressively the full range of economic, social and cultural rights.[19] A seventh objective is to enable the Committee, and the state parties as a whole, to facilitate exchange of information and to develop a better understanding of the common problems faced by states and a fuller appreciation of the type of measures which might be taken to promote effective utilisation of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist states, in accordance with articles 22 and 23 of the Covenant.[20]

Irrespective of these laudable objectives, many states do not appreciate the importance of putting together and submitting their state reports as and when due. The first report under the African Charter was submitted by Libya in January 1990.[21] Generally, the rate of reporting is anything but encouraging. As at 9 March 1992, only eight state parties had submitted their initial reports in accordance with article 62.[22] Frustrated over the issue of delayed reports, the African Commission, in its 5th Annual Report, recommended to the Assembly of Heads of State and Government of the OAU to adopt a resolution on overdue reports that was drafted by the Commission.[23] At its 29th ordinary session in Cairo from 28 to 30 June 1993, the Assembly of Heads of State and Government adopted a resolution that *inter alia*:[24]

> (2) Urges the States Parties to the African Charter on Human and Peoples' Rights which have not yet submitted their reports to submit them as soon as possible;
>
> (3) Requests that States should report not only on the legislative or other measures taken to give effect to each of the rights and freedoms recognized and guaranteed by the African Charter on Human and Peoples' Rights but also on the problems encountered in giving effect to these rights and freedoms;
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> (4) Recommends that the States in their periodic reports give information on the implementation of the right to development;
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> (5) Encourages States Parties which encounter difficulties in preparing and

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19 The same may be said of the civil and political rights, but only that the notion of progressive realisation might not apply in this case.

20 These two articles do not have their equivalents in the African Charter; nevertheless, the process whereby the African Commission can also adopt the practice is discussed below.

21 Third Annual Activity Report of the African Commission on Human and Peoples' Rights, para 23.

22 Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, para 11.

23 Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VII.

24 AHG/Res (XXVIII).

> submitting their periodic reports to seek help as soon as possible from the African Commission on Human and Peoples' Rights which will arrange for assistance in this task through its own or other resources.

This method of mere adoption of resolutions will not be enough to change the ingrained negative attitudes of African governments to human rights reporting.

As at 30 March 2000, the state of reporting under the African Charter was appalling.[25] Out of a total of 53 countries, 24 had never submitted a report as at that date and only 12 had no overdue reports. The reporting mechanism requires the existence of the political will by states to report regularly, and with commitment to details and substance.[26]

The non-coercive nature of the reporting procedure is in itself a potential reason for lack of commitment to the reporting process. It is a system that is based 'essentially on self-criticism and good faith'.[27] Unfortunately, commitment to human rights is yet to be fully ingrained into the psyche of African governments.

A more radical system of sanctions and monitoring involving the Executive Council of the African Union and the Pan-African Parliament would be a more effective and meaningful approach.

4 Comparative international experiences of state reporting

The United Nations (UN) and European human rights systems in particular have had some degree of experience in the reporting process. The new AU system is structured along the European Union system. The experience of the European Union organs in their involvement in the report monitoring process could therefore provide some guide in our assessment of the potential inherent in the new AU.

4.1 Reporting experience under the UN

Various reporting mechanisms exist under the UN system. The first is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) adopted in 1965. Others include the ICESCR (1966); the ICCPR (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); the Convention

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25 See Status of Submission of Periodic Reports to the African Commission on Human and Peoples' Rights (as at 30 March 2000) Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex III.

26 See C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 508.

27 J Crawford 'The UN human rights treaty system: A system in crisis' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 1–7.

Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); and the Convention on the Rights of the Child (CRC) (1989). In all cases, the state parties are required to submit reports on measures they have taken to implement the particular convention to the Secretary-General of the UN. The Secretary-General in turn makes them available to the particular committee created by the treaty in question.

The particular committee examines the reports and makes suggestions and general recommendations. Such suggestions and general recommendations are then reported to the General Assembly. Different approaches are followed in respect of other UN bodies.

Under the ICCPR the UN Human Rights Committee receives state reports from the Secretary-General of the UN. After consultations with the Committee, the Secretary-General may transmit parts of the reports to the specialised agencies of the UN. Upon completion of its study of a report, the Committee transmits its comments to the state concerned and also to the Economic and Social Council (ECOSOC).

The reporting examination process under the Convention on the Elimination of All Forms of Racial Discrimination is equally terse. The Secretary-General receives the report for the Committee, after which the Committee examines it and reports to the General Assembly.[28]

The trend under the Convention on the Elimination of Discrimination Against Women[29] and the Convention Against Torture follows a similar pattern.[30]

Article 22 of the ICESCR provides as follows:

> The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

The Committee on Economic, Social and Cultural Rights interpreted article 22 so as to include 'virtually all United Nations organs and agencies involved in any aspect of international development co-operation'.[31]

Even though the African Charter does not contain a direct equivalent of article 22 of the ICESCR, a liberal interpretation of article 45(1)(c) of the African Charter should be enough to give similar authority to the Commission to involve the various organs and agencies of the AU.

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28 See art 9.

29 See arts 18 & 21.

30 See arts 19 & 20.

31 General Comment 2 contained in document E/1990/23.

4.2 Reporting experience under the European system

The reporting procedure under the European Convention on Human Rights as it appears in article 57 is very narrow:

> On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of this Convention.

The article 57 provision gives the Secretary-General the leeway to decide the human rights issues state parties should report upon at a particular point in time. In 1964, therefore, the contracting parties were requested to report on 'how their laws, their case-law and their administration practice give effect to the fundamental rights and freedoms guaranteed by the Convention and its Protocol'.[32] In 1970 the Secretary-General requested reports on article 5(5) only, while a 1975 request focused on articles 8, 9, 10 and 11. The 1983 inquiries were in respect of children and young persons placed in care or in institutions following a decision of the administrative or judicial authorities, and also article 6(1).

It is worth noting that, as a rule, answers supplied to the questions posed by the Secretary-General are published.[33] The fact of publication has been described as an element of sanction for those state parties that have violated the Convention.[34]

Taking into account the problem of the African Commission's lack of resources and its consequent lack of adequate time for consideration of reports, one is tempted to suggest the article 57 reporting mechanism as a method that could be incorporated into the African system. This approach should enable the African Commission to decide on thematic issues for particular years or periods and to request reports on these. The African Commission should be able to adopt that measure without recourse to an amendment of article 62 because that article does not prescribe that the report must cover all of the rights guaranteed in the Charter. All that needs to be done would be an amendment of the Rules of Procedure of the Commission.

Also, under the European Convention, when the reporting system uncovers serious violations, the Secretary-General could bring such serious violation to the notice of the Committee of Ministers, hoping that the Committee will proceed under article 8 of the Statute of the Council of Europe.[35]

The ever existent, although remote, possibility of expulsion from the Council of Europe provides some modicum of compulsion within the

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32 Council of Europe *European Convention on Human Rights — Collected texts* (1987) 235.

33 Van Dijk & Van Hoof (n 15 above) 211.

34 As above.

35 As above, 212.

European system. The relevant article 8 of the Statute of the Council of Europe provides that:

> Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.

The article 3 mentioned therein provides that:

> Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I.

The fear of expulsion from the AU is perhaps one of the sanctions that could eventually compel African states to honour their obligations under the African Charter. Even though the Constitutive Act of the African Union did not go as far as the Statute of the Council of Europe in its prescription of expulsion as a sanction, it is argued that a pro-human rights interpretation of article 23(2) of the Constitutive Act of the African Union will achieve similar results. This article provides that

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

Under the European Social Charter system, state reports must be sent to national trade union and employer bodies for comments. These comments, together with the reports, are then submitted to the Secretary-General of the Council of Europe.[36] The European Social Charter has two supervisory committees — the European Committee of Social Rights and the Governmental Committee. The supervisory mechanism under the European Social Charter operates as follows: The European Committee of Social Rights (formerly the Committee of Independent Experts), made up of seven experts on labour law and social matters, first examines the national report. Their conclusions and the reports are then forwarded to the Governmental Committee which consists of civil servants representing the contracting state parties. This Committee forwards its own report together with an opinion obtained from the Parliamentary Committee to the Committee of Ministers.[37] The Parliamentary Committee and the Committee of Ministers are institutions established within the European Union system.

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36 K Boyle 'Europe: The Council of Europe, the OSCE and the European Union' in H Hannum (ed) *Guide to international human rights practice* (1999) 153.

37 See A Drzemczewski 'The work of the Council of Europe's Directorate of Human Rights' (1990) 11 *Human Rights Law Journal* 89 110.

The Committee of Ministers, basing itself on the three documents, makes specific recommendations to state parties. Although the recommendations are not legally binding, they have over the years resulted in changes in legislation and practices.[38] The Governmental Committee receives the reports of the contracting state parties and the conclusions of the Committee of Experts. These are submitted to its sub-committee known as the Government Social Committee for further examination.[39] The sub-committee is composed of one representative of each of the contracting parties. It has the mandate to invite representatives of international organisations of employers and international trade union organisations. In addition, it can consult no more than two representatives of international non-governmental organisations (NGOs), having consultative status with the Council of Europe.[40]

In 1991, a new protocol, the Turin Protocol, opened for signature. It contained measures aimed at improving the effectiveness of the Charter, particularly the functioning of its supervisory machinery. The major aspects of the Turin Protocol, compared to the original Charter, are the following: The reporting state has a right of reply on the comments that the national NGOs make on the state's report. The Secretary-General has to forward copies of the state reports to international NGOs that have consultative status with the Council of Europe and have particular competence in the matters governed by the Charter. The state reports and comments made thereon by the national and international NGOs are made available to the public on request. Unlike under the original procedure where the comments of the national NGOs are forwarded to the Secretary-General through the state party at the request of the national organisation, the position under the Turin Protocol requires the national NGOs to forward their comments to the Secretary-General to forward these comments together with the state reports to the European Committee of Social Rights.

The conclusions of the European Committee of Social Rights are made public and are communicated by the Secretary-General, not only to the Governmental Committee and Parliamentary Assembly, but also to the relevant national NGOs and to the equivalent international NGOs. The Governmental Committee prepares the decisions of the Committee of Ministers. Here also its report shall be made public. The Committee of Ministers adopts by a two-thirds majority of those voting, a resolution based on the report of the Governmental Committee. Of great significance is the provision that the Secretary-General then transmits to the Parliamentary Assembly the reports of the Committee of Independent Experts and of the Governmental Committee, as well as the resolution

38 As above, 111.

39 Art 27 European Social Charter.

40 As above.

of the Committee of Ministers, with the intention that the Parliamentary Assembly would hold periodical plenary debates on the reports.

When compared to the original procedure, one issue that is significant is the clear intention to open the reporting mechanism to public scrutiny. This is further complemented by the express intention of subjecting the reports and comments to parliamentary debate. Public scrutiny is perhaps the most effective weapon in this supervisory mechanism and full resort is given hereto.

5 Factors inhibiting the effectiveness of the reporting mechanism under the African Charter

Various problems inhibiting the efficient performance of the African Commission in its report examination function have been identified and discussed by commentators. A brief rehash is undertaken here with the objective of laying the basis for understanding the nature of changes required in the reporting mechanism.

5.1 Limited legal framework providing for reporting

The reporting obligation as is found in article 62 of the African Charter is rather terse compared to, for example, the ICCPR provision in article 40. The ICCPR provides that:

1 The State Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect on the rights recognised herein and on the progress made in the enjoyment of those rights:
   a) within one year of the entry into force of the present Covenant for the States Parties concerned;
   b) thereafter whenever the Committee so requests.
2 All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3 The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialised agencies concerned copies of such parts of the reports as may fall within their field of competence.
4 The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with copies of the reports it has received from States Parties to the present Covenant.
5 The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

While the ICCPR requires states to report on 'the measures' they have adopted, the African Charter requires state parties to 'report on the

legislative and other measures . . .' This gives one the impression that a greater emphasis is being placed in the African system on 'legislative' measures adopted than anything else. It has in fact been reported that the Third Committee of the General Assembly of the UN had declared its preference for the word 'measures' rather than for a more specific formulation. That, it was argued, 'would afford States Parties greater freedom to report on the entire range of laws and practices ensuring compliance with the Covenant'.[41] This nature of article 62 of the African Charter must have accounted partly for the unsatisfactory nature of the early reports submitted to the African Commission.

In addition, the African Charter provision falls short of indicating who should receive the reports and what should be done with them. The ICCPR provision is clear on these, as can be deduced from article 40. It is also explicit from the provisions of article 40(4) of the ICCPR that the authority to issue 'general comments' is specifically conferred on the Human Rights Committee. The African Commission, on the other hand, lacks the explicit authority to make 'general comments'. It was out of this realisation that the participants at a 1991 Conference on the African Commission recommended that the Commission should feel able to 'interpret articles 45(1)(b) and 60 of the Charter as providing the Commission with the mandate to perform the functional equivalent of the Human Rights Committee's general comments'.[42] That was a fair implication and very essential for the improvement of the promotional effort.

5.2 Lack of political will and irregular submission of reports

The success of a reporting system, as can be inferred from the experience under the European Social Charter, requires strong in-built control systems to encourage states to honour their reporting obligations, but there is also the need to develop in the member states a realisation of the necessity, responsibility and benefits of reporting.

The irregular submission of reports or outright non-submission, are problems that the African Commission has always complained about. These are not problems that are peculiar to only the African Commission. In fact, apart from the submissions under the European Social Charter system, none of the other reporting systems has had an impeccable reporting routine. Harris describes the enviable record of the European Social Charter reporting system in the following terms:[43] '[A]lthough reports are commonly some months late and the information provided

41 D McGoldrick *The Human Rights Committee* (1994) 63.

42 n 6 above, 46.

43 D Harris 'Lessons from the reporting system of the European Social Charter' in Alston & Crawford (n 27 above) 348.

is not always complete, there has never been a case of a state not submitting a report.'

According to Harris this positive state of affairs can be attributed to the following:[44]

- The member states are generally better equipped administratively and financially to prepare national reports. They also possess greater experience of doing so.
- The Council of Europe is composed of a relatively small and homogeneous group of states whose representatives meet regularly for many Council of Europe purposes; the result is a strong collegiate sense of obligation to comply with the undertakings that go with Council membership.
- The Governmental Committee which is made up of civil servants representing their various countries plays a central role in the enforcement process. Its members who are at some level responsible for the submission of their state's national reports are subjected to questioning by their colleagues on maters of compliance with the reporting obligations. The consequence is that each member ensures that the requisite effort is put into the preparation and early submission of reports.
- The Governmental Committee has, on its own, developed a system of warnings for states that have failed to provide the European Committee of Social Rights with the information needed.

The lesson from this is clearly that if the reporting mechanism under the African system is to improve, there must necessarily be mechanisms that would encourage states to live up to their reporting obligations. The African Union Treaty offers an opportunity for these in-built mechanisms to be developed.

In their efforts to reduce the problems associated with the non-submission of reports, the UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination have developed procedures that enable the examination of a country's situation even when no report has been submitted.[45] This approach would be worthy of consideration by the African Commission, especially when the machinery becomes available for it to have access to sufficient information from alternative sources such as country reports.

5.3 Additional or out of term reports

If the African Commission should adopt a liberal interpretation of article 46 of the Charter, it should be possible for it to adopt investigative measures, even including requests for out-of-term reports from states on

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44 As above.

45 As above. See UN Doc HRI/MC/1995/2 7; UN Doc HRI/MC/1996/2 10–11.

particular human rights issues that it would want to investigate. It has been argued that 'the reticence by the African Commission to exploit the jurisdiction available under article 46 of its Charter has been an obstacle for its success'.[46] It is worth noting, however, that the Commission has been reported as taking steps under article 46 of the Charter to conduct fact-finding missions.[47]

5.4 Lack of seriousness on the part of the Commission and state parties during the reporting process

A brief historical overview demonstrates that the reporting obligations under the African Charter are not taken seriously by either the Commission or the states. For example, the proceedings of the 18th ordinary session of the African Commission in 1995 shows that the agenda of the Commission at the session was very heavy. It covered protective, promotional and administrative matters; and all these were to be undertaken within a period of ten days.[48] With particular regard to state reporting, the picture is reported thus:[49]

> Out of four countries whose state reports under article 62 of the African Charter were scheduled to be examined during the 18th session, only Tunisia sent representatives. Mozambique, Mauritius and Seychelles once again failed to do so. The Commission had to remind a total of 28 countries to submit their initial state reports. Some of these reports are overdue for more than 12 years. Regarding the examination of the Tunisian report some shortcomings regarding the techniques applied by the Commission and the preparation of the discussion have to be observed. While the Tunisian report itself — the second the country has submitted to the Commission — was of high quality, the same cannot be said of its examination. The rapporteur and the commissioners have not been provided with copies of Tunisia's first report or with minutes of its discussion and other relevant documents and background material. The English-speaking commissioners could hardly participate in the discussion, as no English translation of the report could be provided to them. The commissioners rather restricted themselves to listening to the presentation of the Tunisian delegate and to exchanging opinions than posing concrete questions of substance and criticising governmental information or offering assistance and guidance for changes of the Tunisian legislation and administrative practice.

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46 R Murray 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 124.

47 See C Odinkalu *The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment* (1998) 365; see extract in H Steiner & Ph Alston *International human rights in context: Law, politics, morals* (2000) 923–930.

48 See S Malstrom & G Oberleitner '18th ordinary and 2nd extra-ordinary session of the African Commission on Human and Peoples' Rights' (1996) 14 *Netherlands Quarterly of Human Rights* 93.

49 As above, 93–94.

It is reported that the UN Human Rights Committee spends approximately a day and a half in reviewing initial reports.[50] The African Commission at its 9th session in 1991 was recorded as having examined each report within a time period of one and a half hours.[51] This, apart from psychologically undermining the seriousness with which states parties may take the whole process, will not permit a thorough examination to be done. The possible effect has been poignantly pointed out by Gaer — when reviews are reduced to only a few hours, the exercise becomes 'formulaic and ineffective'.[52]

At the 21st ordinary session of the African Commission in 1997, the situation had not changed very much; the state reports of Sudan and Zimbabwe were available only in English, thus eliminating the non English-speaking commissioners from the examination process.[53] Seychelles, which had submitted its state report at the 18th session, again failed to send a representative.[54]

At the 28th ordinary session of the African Commission in Cotonou, Benin in 2000, the reports of Namibia and Ghana were not examined because their representatives did not show up.[55] It is difficult to explain the absence of Ghana, taking into consideration the fact that Ghana is just a few hours away by road from Benin and just a few minutes by air.

In fact, at its 25th ordinary session in 1999,[56] the African Commission was compelled to issue a resolution concerning the Republic of Seychelles' refusal to present its initial report. The resolution noted that the Commission had since its 17th session invited the Seychelles to present its initial report which it had submitted in September 1994. The Commission noted that, despite repeated demands made to its government on several occasions, the government has refused to abide by the Commission's request, under the pretext that the resources to implement such an obligation were not provided by the state. The Commission considered this a breach of article 62 of the African Charter and therefore invited the OAU Assembly of Heads of State and Government to be held in Algiers in July 1999, 'to express their disapproval of such a persistent refusal that amounts to a deliberate violation of the Charter by the Republic of Seychelles'. It further requested the Conference 'to invite Seychelles to abide by the Charter and to consider the appropriate

50 As above.

51 As above.

52 As above.

53 See S Malstrom '21st ordinary session of the African Commission on Human and Peoples' Rights' (1997) 15 *Netherlands Quarterly of Human Rights* 382.

54 As above.

55 R Murray 'The African Commission on Human and Peoples' Rights' (2001) 19 *Netherlands Quarterly of Human Rights* 94.

56 Held at Bujumbura, Burundi, 26 April to 5 May 1999.

measures to be taken against the Republic of Seychelles'. That strong position of the Commission notwithstanding, the Seychelles report could still not be examined at the 26th ordinary session of the Commission because no delegate was there to present it.[57]

Even when representatives are sent by states, they are often unable to provide the required information in response to questions from the Commission.

Ghana was represented by its Charge d'Affairs in Ethiopia when the Commission examined her initial report in 1993.[58] The lack of expertise of the representative warranted the Commission to 'urge the government of Ghana and its representative to submit in writing additional information and response to questions which could not be answered'.[59]

The Commission's own manner of treating the reports has also come up for comment. In its Final Communiqué of the 11th ordinary session, the Commission regretted the lack of conformity of state reports to the orders and questions put to them when they were compiling the report. Thereafter, instead of giving its recommendations, the Commission simply[60]

> hailed the usefulness and appropriateness of the constructive dialogue which had developed between the Commission and the states concerned, and thanked the governments of the Arab Republic of Egypt and of Tanzania for their reports and for their willingness to co-operate with the Commission.

No recommendations on the nature of the reports, nor on the substantive rights were given to serve as guides for other states.

The conclusion on the Zimbabwean report, examined at the 21st ordinary session just simplistically stated that 'after a fruitful debate, the Commission commended Zimbabwe for the good quality of the report'.[61] In a similar vein, the conclusion on the report presented by Sudan recited that '[t]he presentation was followed by a discussion of the report to examine the human rights situation in that country and its compliance with the provisions of the Charter'.[62] There is practically nothing of educational value in these conclusions for any state to benefit from. This lack of incisiveness in its conclusions and recommendations can lead to a reduction of the whole exercise into a rigmarole which the states would come to undertake just as a way of appeasing the

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57 See 26th ordinary session of the African Commission on Human and Peoples' Rights, 1–15 November 1999, Kigali, Rwanda.

58 See Final Communiqué of the 14th ordinary session of the African Commission on Human and Peoples' Rights — ACHPR/FIN/COM(XIV).

59 As above.

60 Final Communiqué of the 11th ordinary session of the African Commission on Human and Peoples' Rights ACHPR/COMM/FIN(XI).

61 See Final Communiqué of the 21st ordinary session of the Commission — 2–11 November 1997, Banjul, The Gambia, DOC OS(XXII).

62 Malstrom (n 53 above) 382.

Commission. As was noted by Malstrom, if the whole reporting process and examination are not to be in vain, then 'it is absolutely crucial that the Commission starts to take the exercise more seriously'.[63]

Cursory consideration of the reports by the Commission can derogate from the seriousness with which the state parties take their reporting obligations. If the reporting procedure is to be taken with seriousness, then the Commission must adopt a more critical examination and assessment attitude than is currently portrayed in the reports on the examinations, in the form of concluding observations.[64] This has to some extent been accomplished when the Commission recently, at its 29th session in 2001, started adopting concluding observations after the examination of state reports. These concluding observations, pointing out positive aspects, areas of concern, and making recommendations to sate parties, were adopted in respect of the reports presented by Algeria, Congo, Ghana and Namibia. Unfortunately, this instance stands isolated, as the Commission has not adopted any subsequent concluding observations.

Mention may also be made of the suggestions by some concerning the two year reporting schedule as too short and likely to place some strain on the Commission in its examination of the reports.[65] As much as that fear might be justified, we should remind ourselves of the comment of Harris in reaction to a similar suggestion that the two-year reporting cycle of the European Social Charter be extended, that[66]

> [a] large part of the role of the supervisory organs is to remind the contracting parties of their obligations so that they will bring their law and practice into line with the Charter. *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 workload of the contracting parties, it would have been sufficient to have outweighed the harmful effect of an essentially six-year cycle.

5.5 Budgetary constraints and secretarial problems

Some of the problems mentioned above, such as the lack of adequate time to consider state reports and non-provision of state reports in all the approved languages, are linked to budgetary constraints and the resulting lack of secretarial support. Problems of finance have contributed to the Commission's inability to keep up with the onerous duty of

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63 As above, 182.

64 See F Viljoen 'Examination of state reports at the 27th session of the African Commission on Human and Peoples' Rights: A critical analysis and proposals for reform' (2001) 16 *South African Journal on Human Rights* 576.

65 See F Viljoen 'Review of the African Commission on Human Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 102.

66 D Harris *The European Social Charter* (1984) 211 (my emphasis).

examination of the reports. Writing on the same problem of lack of adequate resources in respect of the UN Committees, Crawford made the point that:[67]

> If the principle of state reporting and periodic review is right, as has been repeatedly asserted, then the first step must be to allow to all the committees the time, resource and staff to deal effectively with the backlog.

The consequent fall-outs resulting from resource constraints in the case of the UN human rights treaty systems committees, as enumerated by Crawford,[68] apply with even more force in the case of the African Commission. There are consequences in terms of secretariat/personnel constraints; general constraints affecting the effective functioning of the Commission, for example, limited periods of working sessions, inability to make documents available for circulation to those who need them, default in transcription and translation of reports; and the unavailability of easy access to modern communication technology such as e-mail and the internet. These problems exist at the UN level, but are more endemic at the African level.

Financial allocations for the OAU/AU have often declined rather than increased. This, of course, can be attributed to the existent difficulty of the Organisation to recover the total amount of budget contributions from members. The Commission, however, receives grants from organisations such as UN Centre for Human Rights, UNESCO, the EU, DANIDA and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.[69] Sufficient funding is paramount to the effective operation of the Commission.

6 Improving the efficiency of the Commission

6.1 Benefits of NGO participation in the reporting process

The important role of NGOs in the reporting process has been stated as follows by Gaer:[70]

> In order to undertake probing questioning, Commission members must read documentation from NGOs which have often prepared material specifically in response to the government report. Such critiques are recognised as invaluable and have been cited repeatedly by Commission members as essential to the conduct of the reviews. The willingness of the Commission members to review and absorb the material and pose questions based on it is the key factor in whether reviews are serious.

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67 Alston & Crawford (n 27 above) 6.

68 As above.

69 As above.

70 F Gaer 'Examination of periodic state reports' in *Proceedings of the Conference on the African Commission on Human and Peoples' Rights*, 24–26 June 1991, convened by the Fund for Peace, published by Friedrich Naumann Stiftung (1991) 37.

The benefit of the 'shadow' or alternate reports to the reporting system is that they provide the requisite information that will enable the African Commission to engage in constructive dialogue with state representatives when the periodic reports are considered.

Experience at the UN level has also shown that reports are better prepared where the state encouraged inputs from NGOs and also when there is widespread dissemination of the report, making it possible for the public to give comments thereon.[71]

Article 23 of the European Social Charter imposes on governments an obligation to send their periodic reports to national organisations of employers and trade unions. These organisations have the right to comment on the report, and the government has a duty to forward the comments to the monitoring bodies. It is not beyond conjecture that the African Commission would be in the position to adopt into its procedures similar processes as pertains under the European Social Charter system in its dealings with the NGOs.

A strong NGO involvement should not be limited to only the preparation and presentation of reports; NGOs can play the very important role of ensuring that the recommendations are in fact respected by the government. This very important role of NGOs comes into sharp focus when we recollect that the Commission is logistically limited to monitor compliance with its recommendations.

The national human rights institutions that have been granted affiliate status with the Commission will have to put the necessary pressure on their governments to supply their reports as and when due.

If the NGOs and national human rights institutions perform their functions as required of them to the Commission, a more effective monitoring system could be guaranteed.

6.2 Follow-up

The Commission should take conscious steps to propose specific recommendations for promotional and technical assistance.[72] Technical assistance may take the form of making inputs into relevant draft legislation, pushing for the establishment of national human rights institutions and co-ordinating with NGOs to secure the performance of the recommendations arising from the examination of state reports.

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71 See para 5 of General Comment 1 of the Committee on Economic, Social and Cultural Rights, contained in Document E/1988/22.

72 See also Gaer (n 70 above) 38.

7 Integrating the African Union structures into the reporting mechanism

The success of the reporting mechanism will hinge to a great extent on the publicity and possibility of sanctions that are incorporated within it. The African Union system offers the opportunity for that publicity and some degree of sanction through its various organs.

The exposure of non-compliant states to the public may be effective because, from all indications, African governments are never comfortable when given adverse publicity in respect to their human rights records. That clearly explains the inclusion of article 59 of the African Charter which introduces confidentiality into the deliberations of the African Commission. The vehemence with which African governments defend public accusations of human rights abuse is also indicative of the embarrassing nature of their exposure to the public.

At the 73rd ordinary session of the Council of Ministers of the OAU held in Tripoli, Libya in 2001, the Togo delegation, for instance, raised the issue on a report of Amnesty International relating to its country during the 1998 presidential elections. The Amnesty report had alleged that hundreds of people had been killed in connection with the 1998 presidential elections. The Togolese delegation rejected the Amnesty International report.[73]

7.1 Example of the Inter-American experience

The experience of the Inter-American Commission may be a useful guide in any suggested involvement of the political organs of the African Union. A conscious effort was made by the Inter-American Commission in the preparation of the country reports to involve the political organs of the OAS.[74] This stemmed from the realisation that political pressure is often a very essential enforcement mechanism in human rights issues.

It is argued that the involvement of the political organs was to serve two different purposes:[75]

1 To bring documented gross abuse of human rights to the attention of states and non-governmental organisations.
2 To submit the investigated incidence of gross abuse of human rights to a governmental forum that should discuss it with a view to passing resolutions and recommendations to the state concerned. This could go with the putting in place of monitoring measures to ensure compliance.

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73 See R Murray 'The Organization of African Unity' (2001) 19 *Netherlands Quarterly of Human Rights* 202.

74 See C Medina 'The role of country reports in the Inter-American system of human rights' (1997) 15 *Netherlands Quarterly of Human Rights* 458 468.

75 As above.

The OAS experience is that the first objective has been achieved in the fact of public discussion of the reports; the second objective has not materialised. The failure of the second objective flows from what one might describe as the attitude of the states to refrain, though not expressly, from putting the particular state under discussion on the carpet. The approach to the discussion has been described by Medina as follows:[76]

> Debate on country reports often takes the form of a dialogue between the member of the Commission presenting the report and the representative of the state concerned. The latter usually defends the government by attacking the Commission and accusing it of missing its supervisory powers. The rest of the states' representatives express their support for the general work of the Commission, or for the state which has attacked it, but refuse to deal with the issues in the country report which is supposedly being under consideration. States neither refer to the facts in the report or the Commission's assessment thereof, nor debate the possible solution to the violations allegedly committed by the state subject to the report.

This attitude is very typical of African leaders. Any involvement of the political organs of the African Union must therefore be such as would leave the African leaders with no choice other than to effectively participate in the process.

Taking into account the generally known nonchalant attitude of African governments to human rights issues, a loose reporting mechanism as operates under the UN system will definitely not achieve any results. A more detailed and serious mechanism as is found under the European Social Charter reporting system will be much more effective in the African circumstance. The European system has put in place a remarkably well structured supervisory system relating to the reports submitted under the European Social Charter. This is unlike the African system, which is banal. In fact, the nature of article 62 clearly shows that the reporting system was not intended to be of any serious consequence.

7.2 The African Union and the African Charter

Even though article 30 of the African Charter asserts that the African Commission is created within the OAU, the new Constitutive Act did not in any of its 33 articles directly make reference to the African Commission. Article 3 of the AU Treaty, however, mentions among its objectives the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.[77] The underlying conceptual and philosophical basis of the African Union and the African Economic Community (AEC)[78]

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76 As above.

77 See art 3(h) Constitutive Act of the AU.

78 Established under the Abuja Treaty, 1991, reprinted in (1991) 3 *African Journal of International and Comparative Law* 792.

shows a strong commitment to the promotion and protection of human rights. They are meant to complement each other as developmental organisations. According to the Secretary-General of the OAU:[79] 'The cardinal motivation behind the establishment of the African Union was the desire to deepen and enhance the cohesion, solidarity and integration of the countries and peoples of Africa.' According to him:[80] 'The concept of an African Union stemmed from the desire of the Member States to accelerate the process of implementing the Abuja Treaty.'

The two treaties are aimed at integrated political, economic, social and cultural development, and the promotion and protection of human rights. Among the stated principles of the AEC Treaty are the human rights principles of:[81]

(f) peaceful settlement of disputes among member states, active co-operation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic development;
(g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; and
(h) accountability, economic justice and popular participation in development.

In a similar tone, the relevant portions of the Constitutive Act of the African Union provide as follows:[82]

(l) promotion of gender equality;
(m) respect for democratic principles, human rights, the rule of law and good governance;
(n) promotion of social justice to ensure balanced economic development;
(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
(p) condemnation and rejection of unconstitutional changes of governments.

These principles link up with the rights specifically stated in the African Charter.

The OAU established the African Charter and the member states undertook to recognise the rights, duties and freedoms enshrined in the Charter and also to adopt legislative and other measures to give effect to them.[83] To revisit a point made earlier, the African Commission, which is the principal organ under the African Charter, is not strictly speaking an organ of the OAU. Even though it is 'established within the Organisation of African Unity',[84] it is not an organ of the OAU; it is a non-political and

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79 Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union (EAHG/Dec. 1(V)).

80 As above.

81 Art 3.

82 Art 4 Constitutive Act of the AU.

83 See art 1 African Charter.

84 Art 30 African Charter.

independent institution. That notwithstanding, it is designed to collaborate with the Assembly of Heads of State and Government in the execution of its function to promote and protect human rights in Africa. Articles 45(4) and 59 are very clear in this respect. In addition to the functions specifically mentioned in the Charter, article 45(4) of the Charter provides that the Commission shall 'perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government'. Article 59 further emphasises that:

(1) All measures taken within the provisions of the present Chapter shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide.
(2) The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Clearly, therefore, the African Commission was created to operate within the structure of the OAU.

7.3 The African Union as successor to the OAU: Implications

With the intended demise of the OAU and the institutionalisation of the AU in its place, the issue of succession becomes relevant. Without doubt, the AU is the legal successor to the OAU. By article 33 of the AU Treaty, the Constitutive Act of the African Union 'shall replace the Charter of the Organisation of African Unity'.

The Assembly of the African Union, which shall be composed of the Heads of State and Government or their duly accredited representatives, is obviously the successor to the Assembly of Heads of State and Government of the OAU. The African Commission will be within its authority to expect the co-operation of the Assembly of the AU in the discharge of its duties. As a corollary, the Assembly of the AU must co-operate fully with the African Commission, if it is to carry out the very important objectives of the AU and the AEC in relation to the promotion and protection of human and peoples' rights, as guaranteed in the African Charter.

Further, in keeping with the provisions of article 45(1)(c) of the African Charter, which requires the African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights', the African Commission will have to work with the various organs of the African Union and therefore also the AEC in the performance of its duty to promote and protect human and peoples' rights. The relevant organs of the African Union in this respect are:

(a) the Assembly of the Union;
(b) the Executive Council;
(c) the Pan-African Parliament;
(d) the Court of Justice;

(e) the Commission;
(f) the Permanent Representatives Committee;
(g) the Specialised Technical Committees;
(h) the Economic, Social and Cultural Council;
(i) the Financial Institutions.

These organs of the African Union must, in keeping with the principles and objectives of the Constitutive Act of the African Union, co-operate with the African Commission if they do not want to be seen to be failing in their duty to work for the realisation of the objectives of the African Union and the AEC.

Of particular relevance in the process of reporting should be the Assembly of the African Union, the Executive Council, the Pan-African Parliament, the Specialised Technical Committees and the Economic, Social and Cultural Council.

If the Commission acts with ingenuity, it should be in a position to introduce these organs into the system of ensuring that member states meet their reporting obligations regularly and also adopt measures in line with the recommendations of the Commission on the reports. A rather innocuous but far-reaching provision which could be given a liberal interpretation to achieve the said objective is article 45(1)(c) of the African Charter, which calls on the Commission in the course of the performance of its functions to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. This is a general provision which, if given a liberal interpretation, should cover any collaboration with any institution of the African Union for the promotion and protection of human rights. By the nature of their objectives and functions, the Council of Ministers and the Pan-African Parliament should be institutions with the inherent interest in the promotion and protection of human rights in Africa.

7.4 The Assembly of the AU

The Assembly, which is composed of Heads of State and Government of the African Union, is the supreme organ of the Union.[85] Among its powers and functions are:

- to receive, consider and take decisions on reports and recommendations from the other organs of the Union;[86] and
- to monitor the implementation of policies and decisions of the Union as well as to ensure compliance of all member states.[87]

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85 See art 6(1) & (2) Constitutive Act of the African Union.
86 Art 9(1)(b) Constitutive Act of the AU.
87 Art 9(1)(b) & (e) Constitutive Act of the AU.

As argued above, one of the functions of the Assembly of the Union will be to receive reports on the activities of the African Commission as stated for instance in Rule 84(2) of the Rules of Procedure of the African Commission. Rule 84(2) provides that:

> If, after the reminder referred to in paragraph 1 of this Rule, a state party to the Charter does not submit the report or additional information requested pursuant to Rules 81 and 85 of the Rules of Procedure, the Commission shall point it out in its yearly report to the Assembly.

The Assembly has the duty to work for the promotion and protection of human and peoples' rights as is stated in the principles and objectives of the Constitutive Act of the African Union. It will be failing in its responsibilities if it does not 'consider and take decisions' on the report as is expected by article 9. It would be failing, if it does not, in addition, monitor the implementation of the decisions and ensure compliance by the affected member state.[88] Failure to respect any decision of the Assembly on a matter relating to the promotion and protection of human rights would be such grievous breach against the principles and objectives of the African Union as should warrant the sanctions of the Assembly under article 23(2).[89]

Article 23(2) holds the main key to the infusion of the necessary bite into the reporting system. The article provides that:[90]

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

This power of the Assembly to sanction could be compared to article 8 of the EU Treaty that confers authority on the European Council of Ministers to sanction non-complying member states.

It is possible to argue that since the requirement of the provision of an initial report and regular reports at two yearly intervals are specific requirements of the African Charter, failure on the part of any state party to produce these reports as and when due is a breach of the Charter provisions. In that case it becomes the duty of the Assembly of Heads of State and Government of the AU to supervise conformity. The argument was made in respect of the UN Human Rights Committee that:[91]

> [S]ince the initial report within one year of the entry into force of the covenant for the State Party concerned is a direct treaty obligation under article 40(1)(a), . . . it is not the Committee, but the meeting of States Parties, that

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88 See arts 9(1)(b) & (e) Constitutive Act of the AU.

89 Art 23(2) of the Constitutive Act of the AU permits the Assembly to impose sanctions on any member who fails to comply with the decisions and policies of the Union. See also art 5 AEC Treaty.

90 My emphasis.

91 n 14 above, 6.

is competent to remind defaulting States of their unquestionable international obligations.

While this may represent the purely legal situation, it should not be beyond the implied authority of the Commission to demand these reports from defaulting state parties. The Commission should be able to demand the reports even though it has no legal authority to impose sanctions for failure. On the other hand, the full responsibility of ensuring compliance should rest with the Assembly of Heads of State and Government which should, when necessary exercise the power of compulsion.

In the words of Umozurike:[92] 'The Charter is a commitment to sister African states that those rights and obligations will be respected in every state in the spirit of African brotherhood.'

If, indeed, the Charter is such a commitment from each individual member state to the generality of states of the AU, then the generality has the right and the responsibility to ensure that the obligations are respected. The AU generally, and its organs in particular, by their nature possess the capacity to ensure compliance to the obligation and must be seen to be performing that function.

These functions and powers of the Assembly of the Union are latent and must be invigorated by the influence of the Commission. Perhaps it is in the realisation of this fact that the African Commission, meeting at its 29th ordinary session in Tripoli, Libya in 2001, took the decision to set up a three-member working group of the Commission with a mandate to initiate an in-depth discussion on all the implications of the entry into force of the Constitutive Act of the African Union and the African Commission.

7.5 The Pan-African Parliament

The Pan-African Parliament is one of the principal organs of the African Union[93] and the AEC.[94] In accordance with article 17(2) of the Constitutive Act of the African Union and article 14(2) of the AEC Treaty, a protocol has now been put in place defining the composition, functions, powers and organisation of the Pan-African Parliament.[95] An

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92 Umozurike, the then Chairman of the African Commission, in his address to the 26th Session of the Assembly of Heads of State and Government of the OAU (9–11 July 1990); see Third Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

93 Arts 5(c) & 17 Constitutive Act of the African Union.

94 Arts 7(c) & 14 AEC Treaty.

95 The Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament was adopted by the 5th Extraordinary Summit of the OAU in Sirte, Libya on 2 March 2001. By art 22 of the Protocol, it shall come into force 30 days after the deposit of instruments of ratification by a simple majority of the member states.

analysis of the objectives, functions and powers of the Pan-African Parliament will show human rights very high on the list of concerns of the Pan-African Parliament. The first objective for instance is wide enough to encompass the function to promote and protect human rights as guaranteed under the African Charter. The said provision reads that the Pan-African Parliament shall 'facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union'.[96]

With respect to the African Union, the relevant objectives that complement the principles already mentioned above, include:[97]

(f) to promote peace, security, and stability on the continent;
(g) to promote democratic principles and institutions, popular participation and good governance;
(h) to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

The Pan-African Parliament will therefore have the all-important responsibility of monitoring the promotion and protection of human rights in Africa. The functions and powers under article 11 of the Protocol are wide enough to enable it perform similar functions carried out by the European Parliament in respect of the state reporting process of the European Social Charter. Articles 11(1), (4), (6) and (9) of the Protocol on the functions and powers are worth consideration. These provide as follows:

(1) It may examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, *inter alia*, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.

(4) It may make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC.

(6) It may promote the programmes and objectives of the OAU/AEC, in the constituencies of the Member States.

(9) It may perform such other functions as it deems appropriate to achieve the objectives set out in article 3 of this Protocol.

In its specific content as well as general, the functions of the Pan-African Parliament are broad enough to confer the authority on it to operate like the European Parliament and perhaps even more, in respect of the monitoring of the state reporting process by African states.

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96 See art 3(1) Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.

97 Art 3(1) Constitutive Act of the African Union.

Even though the Pan-African Parliament does not as of now possess the power of sanctions as does the Assembly of the African Union, the most potent regulatory mechanism at its disposal would be the element of publicity and the pressure that it can bring to bear on non-conformist governments through the members representing the particular state in the Pan-African Parliament. The power to 'examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly' makes it feasible for the African Commission to develop a working relationship with the Pan-African Parliament without having to obtain an amendment of the African Charter. All that needs to be done is to simply amend the Rules of Procedure of the African Commission and thereby create a working relationship with the Pan-African Parliament.

7.6 The Specialised Technical Committees

The Specialised Technical Committees, anticipated by both the Constitutive Act of the African Union and the AEC Treaty, will become relevant in the reporting process as already anticipated under Rule 82 of the Rules of Procedure of the African Commission. The Rule, which deals with the mode of transmission of the reports, provides that the Secretary may after consultation with the Commission communicate to the specialised institutions concerned, copies of all parts of the reports which may relate to their areas of competence, produced by member states of these institutions. The Commission may then invite the specialised institutions to which the Secretary has communicated parts of the report, to submit observations relating to these parts within a time limit that it may specify.

The specialised institutions should, under the new system, include the Economic, Social and Cultural Council of the African Union. It is to be composed of different social and professional groups of the member states of the Union.[98] In addition, Specialised Technical Committees are created under both the African Union and the AEC systems.

These committees are to be composed of representatives of each member state, preferably of Ministers or senior officials responsible for sectors falling within their respective areas of competence.[99] Among their functions is the mandate to 'submit to the Executive Council, either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of this Act'.[100] This function could be of relevance to the state reporting process. As obtains under the European and the UN systems, if state reports are made available to these specialised committees, their specialist

98 See art 22 Constitutive Act of the African Union.

99 Art 14(3) Constitutive Act of the African Union & art 25(3) AEC Treaty.

100 Art 15(d) Constitutive Act of the African Union & art 26(d) AEC Treaty.

comments on the reports will definitely be of assistance in understanding the problems relating to implementation of the provisions of the African Charter.

The reference to specialised institutions in Rule 82 of the Rules of Procedure of the African Commission must be a reference to the various ministerial conferences established by the Assembly of the OAU to deal with specific sectoral issues. These include the OAU Labour and Social Affairs Commission, which is tripartite in nature (comprising governments, employers and workers) and is organised jointly with the ILO; the Conference of Ministers of Health (organised jointly with Economic Commission for Africa and United Nations Industrial Development Organisation) and the FAO Regional Conference for Africa.[101] It is expected that the AU Specialised Technical Committees would be rationalised along the lines of these other bodies.

Under the ICESCR, recognition is given to the fact of the enormity of the duty to compile the state report; provision is therefore made in article 2 paragraph 1 and articles 22 and 23 of the Covenant for international assistance and co-operation.

From the tone of those provisions, the opportunity exists for some positive steps being taken by the international institutions to provide some assistance to a reporting state in certain respects. In fact, the Committee on Economic Social and Cultural Rights in its General Comment 1 clearly encourages states that[102]

> if the state party concludes that it does not have the capacity to undertake the monitoring process . . . it may note this in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

This hope of assistance may at least in theory serve as some encouragement to the states in meeting their obligations. The suggestion in the case of the African reporting system is that even though the African Charter does not expressly stipulate the provision of such assistance as is envisaged in the ICESCR provisions, it should nevertheless be possible for the African Commission, in collaboration with some institutions of the African Union and other African inter-governmental organisations, to put in place similar means of assistance.

The ICCPR and the ICESCR provide that the specific Committees could transmit state parties' reports to specialised agencies of the UN. The objective herein is to put the expertise and resources of the specialised agencies at the disposal of the reporting states the advantage inherent in this is that the states have the incentive to report.

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101 See Report of the Secretary-General on the Implementation of the Sirte Decision on the African Union (EAHG/DEC. 1(V)).

102 See Document E/1989/22.

The UN Convention on the Rights of the Child empowers the Committee on the Rights of the Child to transmit to the specialised agencies, UNICEF and other competent bodies any reports that contain a request or indicated a need.[103] The Committee on the Rights of the Child goes further in its Rules to provide that it may request information on technical advice or assistance provided and the progress achieved.[104] The African Commission was not given this similar authority in the African Charter itself, and neither did its own rules of procedure attempt to appropriate this function to itself.

Even if the African Commission were to possess those powers, the specialised agencies of the OAU might not, by themselves alone, be resourced to meet the demands that might be passed on through those reports. Nevertheless, a report to them will help to encourage the reporting states to some extent. In addition, it would not be beyond conjecture to advocate that the African Commission should find it within its general mandate of promoting human rights to make reports to the specialised agencies of the UN; after all, the African system is not in competition with the UN system, it is a complement to it.[105]

7.7 Incorporation of the relevant organs of the African Union into the state reporting mechanism

The African Charter might become inoperative if the Constitutive Act of the African Union is not interpreted wide enough to create a working relationship with the relevant organs of the African Union.

The Secretary-General of the OAU had, in a reaction to the non-inclusion of the Mechanism for Conflict Prevention, Management and Resolution[106] into the African Union system, suggested its inclusion by means of a declaration. He gave the example of the same instrument which was in 1993 adopted by the mechanism of declaration. According to him, it was incorporated in 1993 through a declaration that was adopted by the Assembly with the clear intention that it would be a legally binding instrument to be considered as an integral part of the OAU Charter.[107] He accordingly suggested that the same mechanism could be adopted again in order to make the mechanism an integral part of the Constitutive Act, without going through the cumbersome and lengthy procedures of treaty review and amendment.

Following from the above experience, it is not far-fetched to suggest that a proposal should emanate from the African Commission to the

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103 See art 45 Convention on the Rights of the Child.

104 See Rule 74.

105 See art 60 African Charter.

106 This was established in 1993 by the Cairo Declaration.

107 See Report of the Secretary-General on the Implementation of Sirte Decision on the African Union (EAHG/DEC 1(V)) CM/2210(LXXIV) para 39.

Assembly of Heads of State and Government of the African Union requesting the latter to adopt a declaration to incorporate the relevant organs of the African Union in the operational mechanism of the African Commission. A declaration of that nature will be in line with the general letter and spirit of the Constitutive Act of the African Union.

The established methodologies adopted in the interpretation of international law instruments take into account the text, content, object and purpose of the instrument. The 'golden rule' of interpretation in international law is found in article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, 1969:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

In its interpretation of the European Convention on Human Rights, the European Court placed emphasis on the teleological approach.[108] This notion of a liberal interpretation rather than a restrictive interpretation better suits the object and purpose of the African Union treaty and the African Charter, especially as they deal with human rights issues. Only an interpretation that will improve the promotion and protection of human rights should be allowed to hold sway.

The objectives and principles of the African Union support the promotion and protection of human rights as provided for under the African Charter. Any interpretation to be adopted in respect of the Constitutive Act of the African Union and the African Charter must be one that should make possible the realisation of maximum effectiveness of the principles and objectives of both instruments. By the general principles of interpretation, it is possible to graft the African Charter onto the Constitutive Act of the African Union and thereby enable the African Commission to enhance its effectiveness by utilising the organs created under the African Union. The African Commission can achieve that without necessarily subjecting itself to the control of those organs. If anything at all, the African Commission will rather be assisting those organs to achieve one of the objectives of their creation which is, the promotion and protection of human and peoples' rights as are guaranteed in the African Charter.

8 Suggested state reporting process under the AU system

Arising from an analysis of the new African Union and the African Charter, it is possible to construct a workable reporting mechanism that would

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108 See D Harris *The European Social Charter* (1984) 12.

incorporate within its structure the importance of publicity and some degree of political pressure from the relevant organs of the AU. The following process is suggested:

1 As a first step the African Commission would enlist the help of the Pan-African Parliament to put political pressure on the states that delay or fail to submit reports. Persistent pressure from the Pan-African Parliament and exposure to the public should make states meet their obligations of submitting regular reports to the Secretary of the African Commission.
2 The reporting states would send a copy of their reports to relevant local NGOs that have observer status with the African Commission. Upon receipt of the report the local NGOs would review the report and send their comments thereon to the Secretary to the African Commission. The Secretary would submit a copy of the NGO comments to the reporting state. This should enable the state representative to prepare enough for the subsequent dialogue with the African Commission on the report.
3 The Secretary to the Commission would make the reports available to the relevant International NGOs that have observer status with the African Commission.
4 The Secretary would transmit the state reports together with the NGO comments to the African Commission.
5 The African Commission would examine the report and enter into dialogue with the representative of the reporting state.
6 Thereafter the Commission transmits relevant portions of the report to the specialised agencies of the African Union.
7 The Commission would transmit the state report together with its own observations and recommendations thereon to the Pan-African Parliament.
8 The Pan-African Parliament will consider the state report together with the observations and recommendations of the African Commission. It may adopt some of the recommendations of the African Commission.
9 The recommendations of the Pan-African Parliament would be forwarded to the Assembly of Heads of State and Government of the AU. The Assembly would debate these recommendations and adopt those that the state concerned shall be made to rectify or ensure that it is respected.
10 The decision of the Assembly of Heads of State and Government would be sent to the Pan-African Parliament, which shall through political pressure ensure that the state government concerned conforms. Where necessary the Pan-African Parliament should draw the attention of the Assembly to the need to exercise the ultimate sanctions inherent in Article 23 of the Constitutive Act of the AU.

This suggested report examination process takes from the experiences of the European Social Charter process and the new African Union. It is, however, based on the belief in the ability of a determined Commission to use for its advantage the structures of the new African Union, especially the Pan-African Parliament.

9 Suggested report form

The fact of inadequate reporting has been identified.[109] The problem of inadequate reporting is not limited to only the African Commission; the experience at the UN Human Rights Committee was that earlier reports turned to be rather brief. It was, however, observed that after a comprehensive review of the reports by the Committee, countries return with more comprehensive subsequent reports. The example was given of Rwanda, which had submitted a two-paged report to the Committee in 1979. Its report for the second review in 1987 was 33 pages long.[110]

The UN Human Rights Committee from time to time issues general comments designed to guide government officials involved in the country report drafting process.[111] According to Pocar:[112]

> These guidelines are intended to provide guidance to States parties in their reporting activities and to avoid general and incomplete presentations. They are further designed to ensure that reports are presented in a uniform manner and that they offer a complete picture of the situation in each State regarding the implementation of the rights contained in the Covenant.

General comment No 2 and the 1991 UN Manual on Human Rights Reporting provide a comprehensive reporting code as a guide for the state reporting officer. The general comments depict the educational role that the UN Human Rights Committee had undertaken with the objective of ensuring that the reporting system produces the best of reports. Article 40(4) of the ICCPR provides the basis of the authority of the Committee to issue general comments.

Reports under the European Social Charter are prepared in accordance with a Report Form adopted for the purpose by the Committee of Ministers. This form was designed by the Committee of Ministers in exercise of the authority conferred on it by Article 21 of the European

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109 See, eg P Tigere 'State reporting to the African Commission: The case of Zimbabwe' (1994) 38 *Journal of African Law* 64.

110 See Gaer (n 70 above) 36.

111 See M 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' (1994) 16 *Human Rights Quarterly* 517.

112 F Pocar 'The International Covenant on Civil and Political Rights' in United Nations *Manual on human rights reporting* (1991) 80.

Social Charter. The African Charter does not mention any such form. However, nothing prevents the African Commission from creating such a form if it will improve the quality of reporting.

In response to a question on why some countries had not, as at 1991, yet ratified the African Charter, the reason was given to include a lack of personnel qualified enough to seriously review the Charter and to educate the government about the ramifications and benefits of subscription to its principles.[113] This fact underscores the basic problem of lack of adequately qualified persons to undertake effective reporting.

The general opinion on the first reporting guidelines adopted by the African Commission may be summed up as being that:[114]

> [t]he guidelines are too lengthy (25 pages) and too detailed in some parts while too vague in others. They are particularly confusing because they do not discuss rights in the order in which they appear in the Charter.

The first reporting guideline in respect of article 26 of the Charter provides an illustration:

> The Article requires the State to take steps to guarantee the independence of the judiciary with regards to the following:
>
> (a) Establishment of a legal educational system designed to protect human and peoples' rights and respect for the rule of law;
> (b) A legal educational system directed at training independently-minded lawyers;
> (c) Appointment of judges to be based purely on merit and qualifications;
> (d) Judges to be assured tenure of office and not to be lightly removed save for misconduct after a recommendation by a special commission appointed for the purpose of investigating the misconduct;
> (e) Encourage formation of institutions charged with the responsibility to promote and protect rights guaranteed by the Charter.

These guidelines are in the nature of general comments that may be a bit difficult for direct answers to be provided.

The African Commission has amended the reporting guideline, reducing it to a two-page document that lists 11 points that states should consider in the compilation of their reports.[115]

The reporting format should be one that does not make reporting too arduous but rather comfortable for government officials in their reporting process. The suggested report form should give opportunity to the states to make general comments on the changes in the law and practice on the improvement of the rights generally. The suggested questions that follow, in respect of articles 5, 6 and 7 of the Charter, have been

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113 Proceedings of the Conference on the African Commission on Human and Peoples' Rights, 24–26 June 1991 (n 6 above) 11.

114 As above, 47. For a general discourse on the defects of the guidelines, see E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996).

115 Viljoen (n 10 above) 112–113. See Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties DOC/OS/27(XXIII).

formulated, taking into account some of the questions put to countries by the Commission at report examination stages and also the Commission's interpretation of the Charter provisions in its decisions on complaints filed with it. These suggested questions serve as illustrations, and have been elaborated for all articles, but are not all published here for considerations of space.

Article 5

- Whether there has been any inspection of prisons during the coverage period of the report. If any, attach a copy of the report. If not, indicate measures taken during the coverage period of the report to guarantee the protection of the human rights of prisoners.[116]
- Whether there have been any cases of torture or other inhuman treatment in prisons, police cells, military or paramilitary cells generally during the coverage period of this report. If yes, how many, and has any law enforcement officer involved been prosecuted or disciplined in respect of each such incident?
- Whether there have been any reported incidence of torture, cruel, inhuman or degrading punishment and treatment by any of the security agencies in the country and what remedies were provided if, any.
- Are there any forms of slavery existing in your country? If yes, what measures have been put in place to stop the practice?

Article 6

- Whether there have been any reported incidence of arbitrary arrests of individuals and what remedies were provided in each case.
- Whether the laws of your country guarantee that a person arrested shall be informed at the time of the arrest, in a language that he or she understands of the reason for the arrest and the charge against him or her.[117]
- Are there any political detainees in your country?
- Was there any state of emergency declared during the coverage period of this report?[118] If yes, what was the reason for the declaration of the state of emergency? How promptly were those detained under the emergency brought to trial? What was the procedure that governed their trial? Were such detainees afforded the right to counsel? Had they any right of appeal?

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116 See Resolution on Prisons in Africa, adopted by the African Commission at its 17th ordinary session held from 13 to 22 March 1995, Lome, Togo, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VI.

117 Resolution on the Right to Trial, adopted at the 11th ordinary session from 2 to 9 March 1992 in Tunis, Tunisia, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

- Whether the laws of your country make provision for compensation to victims of unwarranted detention. If yes, has anybody unlawfully detained been awarded some compensation during the coverage period of this report?

Article 7

Article 7(1)(a)

- Whether the laws of your country prohibit detention without trial.
- Whether the laws of your country guarantee equal access of all before the courts of law.[119]
- Whether the laws of your country guarantee to persons convicted of an offence the right of appeal to a higher court.[120]

Article 7(1)(b)

- Whether the laws of your country guarantee for anyone charged with a criminal offence the presumption of innocence until proven guilty by a competent court.[121]

Article 7(1)(c)

- Whether the laws of your country guarantee to an accused person adequate time and facility for the preparation of his or her defence.[122]
- Whether the laws of your country guarantee to an accused person the right to be represented by counsel of his or her choice or where he or she cannot afford it, to representation by counsel provided by the state.[123]
- Whether there are any institutions that provide free legal aid when necessary.

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118 Question from the African Commission at the examination of a report by Egypt, reproduced in A Danielsen *State reporting under the African Charter*, Danish Centre for Human Rights (1994) 75.

119 Resolution on the Right to Trial (n 117 above).

120 See Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

121 See Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV. See also question from the African Commission at the examination of a draft report by Ghana, reproduced in Danielsen (n 118 above) 78.

122 n 120 above.

123 See Communication 64/92, 68/92, 78/92, *Achutan (on behalf of Aleke Banda), Amnesty International (on Behalf of Orton and Vera Chirwa) Amnesty International (on Behalf of Orton and Vera Chirwa) v Malawi*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

Article 7(1)(d)

- Whether the laws of your country guarantee trial within a reasonable time and the grant of bail for a person arrested or detained.[124]
- Whether there have been any reported cases of detention without trial for any period beyond that permitted by the law. If any, what steps have been taken to address it and to prevent future recurrence?[125]
- Whether there have been any reported complaints about the lack of impartiality of a court of law. If any, what was the basis of the complaint and what steps have been taken to correct it?[126]
- Whether the laws of your country guarantee the right to the accused person to examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witness against him or her.[127]
- Whether the laws of your country guarantee the free assistance of an interpreter if he or she cannot speak the language used in court.[128]

Article 7(2)

- Whether there has been any law that seeks to retroactively prohibit any act that constitutes a legally punishable offence.[129]

10 Conclusion

The main objective of this work is to examine the extent to which the effectiveness of the African Commission can be enhanced by incorporating its monitoring functions into the AU structure.

The African Commission should be very aware of its own history and realise that it was a grudge creation, and that if it does not wrestle power for itself, nobody, at least not the Heads of State and Government of Africa, will give it power. Fortunately it has the authority to interpret the provisions of the African Charter. It also has very wide powers as conferred in article 60 of the Charter.

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124 n 120 above.

125 Communications 147/95 & 149/96, *Jawara v The Gambia*, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V.

126 See Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IV.

127 n 120 above.

128 As above.

129 n 125 above.

The reporting procedure need not be perceived as a process that has its scope only within the ambit of the African Charter; it must of necessity be understood as an integral part of the African system of human rights. In this respect, the relevant institutions of the African Union, the African Economic Community, the African Convention on the Rights and Welfare of the Child and, of course, the African Charter itself should be utilised to achieve a more effective working of the reporting mechanism.