

# Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009

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## Summary

*The article examines the results of and insights from the Pretoria Gender Expert Meeting which was convened with the primary purpose of developing state reporting guidelines under the African Women's Protocol. The focus of the article is the draft guidelines that were adopted at the end of the meeting, and the process and deliberations that yielded that draft. The Pretoria Draft Guidelines clears up the uncertainty regarding how a report under the Protocol should be grafted into a report under the African Charter in terms of article 26 of the Women's Protocol. As a set of guidelines, it seeks to achieve clarity and precision in three ways: by requiring states to report in terms of a list of measures of implementation; by drawing a clear distinction in the nature of information required in respect of first and subsequent reports; and by grouping the provisions of the Protocol into thematic clusters for reporting purposes. In the final analysis, it is concluded that the Pretoria Draft Guidelines provide a promising platform for the invigoration of the African Commission's state reporting mechanism and, by extension, the promotion and protection of women's rights in Africa. However, it has been noted that the effectiveness and impact*

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*of the reporting guidelines (and that of the reporting system as a whole) will depend on at least three other factors: the effective dissemination of the guidelines; the harmonisation of reporting guidelines; and the general reform of the African Commission's reporting mechanism.*

## 1 Introduction

The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) in November 2005 was greeted with much enthusiasm throughout Africa and beyond. Writing shortly after it entered into force, Banda noted that '[t]he African Protocol is a cause for celebration, but not complacency'.<sup>1</sup> While it is debatable whether this statement still holds true, it is apparent that the potential lying within the African Women's Protocol is yet to be fully tapped. While there have been significant improvements in recent years towards the promotion and protection of women's rights in Africa, women continue to experience discrimination and gender abuse. Efforts by the African Commission on Human and Peoples' Rights (African Commission) to monitor the implementation of the Women's Protocol have been undermined by several factors, chief among which are the confusion and ambiguity that surround state reporting obligations under the Protocol.

State reporting under the Protocol is closely linked to the reporting process under the African Charter on Human and Peoples' Rights (African Charter). Specifically, state parties to the African Women's Protocol are required to submit reports under the Protocol 'in their periodic reports submitted in accordance with article 62 of the African Charter'.<sup>2</sup> As such, the form which state reports under the African Women's Protocol should take has never been clear and no consistent practice has been established. Therefore, there has long been a need to develop reporting guidelines that would bring clarity and precision to the reporting process under the African Women's Protocol. Motivated by this need, the Centre for Human Rights at the University of Pretoria organised and hosted the Gender Expert Meeting on State Reporting on the Protocol on the Rights of Women in Africa (Pretoria Gender Expert Meeting), which was held from 6 to 7 August 2009 with the primary aim of drafting reporting guidelines for reports under the Women's Protocol. The article examines the results of and insights gained from this meeting. The main focus of the article is the draft guidelines (Pretoria Draft Guidelines) that were adopted following the conclusion of the meeting, as well as the process and deliberations that yielded that draft.

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<sup>1</sup> F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-84.

<sup>2</sup> African Women's Protocol, art 26.

The article is divided into six sections, with this introduction being the first. The second section briefly explains the role and place of guidelines in state reporting. The third section provides an exposition of state reporting under the African Charter, which is the parent treaty of the African Women's Protocol and to which state reporting under the Protocol is linked. The fourth section focuses on the main subject of this article: developing guidelines for state reporting under the African Women's Protocol. Here, the need for guidelines under the Protocol is highlighted, and the output of and insights from the Pretoria Gender Meeting are reviewed. In the next section, the author makes suggestions on how the effectiveness and impact of the guidelines in particular and that of the reporting mechanism in general may be improved and reformed. The final section draws the work to a conclusion. For ease of reference, the Pretoria Draft Guidelines are annexed to the article.

## 2 Place of guidelines in state reporting

State reporting has evolved into an essential tool in monitoring states' implementation of human rights instruments. Its place in the field of human rights has been described in glowing terms. The United Nations (UN) considers state reporting as lying at the very heart of the international system for the promotion and protection of human rights.<sup>3</sup> Nowak describes it as an 'essential pillar of international human rights monitoring',<sup>4</sup> while Symonides views it as an 'indispensable component of the overall strategy of the implementation of the human rights treaties'.<sup>5</sup> Thus, the requirement that states periodically submit reports to designated human rights supervisory bodies on the 'measures' and 'steps' they have taken to 'give effect' to human rights treaties is now an established feature of international human rights monitoring.<sup>6</sup> While it first developed within the auspices of the International Labour Organisation (ILO) and later under the UN system,<sup>7</sup> state reporting has since, with the emergence and development of regional human rights systems, trickled down to the regional levels.<sup>8</sup>

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<sup>3</sup> United Nations *United Nations action in the field of human rights* (1988) 313-314.

<sup>4</sup> M Nowak *CCPR commentary* (2005) 713-714.

<sup>5</sup> J Symonides *Human rights: International protection, monitoring, enforcement* (2003) 59.

<sup>6</sup> State reporting is a mandatory requirement of the nine core UN human rights treaties. Each of these treaties requires states to submit initial reports, to be followed by periodic reports, indicating the measures they have taken to implement the rights enumerated in the treaties. See generally United Nations *Manual on human rights reporting* (1997).

<sup>7</sup> See P Alston 'The purposes of reporting' in United Nations (n 6 above) 19-20.

<sup>8</sup> On regional human rights systems, see D Shelton (ed) *Regional protection of human rights* (2008).

The effectiveness and impact of state reporting as a human rights monitoring mechanism depend upon a variety of factors, one of which is the clarity and precision of the reporting obligation. Generally, treaties are couched in broad terms and, in respect to state reporting, the focus is usually on the period within which states are required to submit their reports. In the same vein, in stipulating the expected content of state reports, treaties usually use such broad and ambiguous terms as 'measures' and 'steps'. As such, it has necessarily fallen on human rights treaty monitoring bodies to articulate the detailed and precise reporting obligations under the various human rights treaties. These bodies have undertaken this task by adopting guidelines for state reporting under the various treaties, which in the main seek to help states in discharging their reporting obligations. It is through these guidelines that states get to understand and appreciate what is expected of their state reports. With such an understanding and appreciation, states are in a position to put adequate and relevant information in their reports.<sup>9</sup> Moreover, these guidelines provide the yardstick on which reports are examined. Thus, if followed by states, reporting guidelines not only make the work of the monitoring bodies easier, but they also infuse a sense of uniformity in the reporting process.<sup>10</sup> Ultimately, such guidelines would serve to enhance the effectiveness and impact of the reporting process.

The essence and role of guidelines for state reporting should be seen within the broader philosophy that underlies the concept and practice of state reporting. Unlike other mechanisms for human rights monitoring, such as complaints procedures, which are inherently adversarial, the state reporting procedure is non-adversarial in nature. It is intended to initiate a constructive dialogue between states and treaty-monitoring bodies, with the main aim of helping states comply with treaty obligations. Thus, according to Alston, 'the assumption underlying the entire procedure is that the primary aim is to assist governments rather than just to criticise their performance'.<sup>11</sup> Therefore, guidelines for state reporting serve this broader purpose, that is, assisting governments to implement the rights which they have undertaken to guarantee. In sum, if the state reporting process ensures 'introspection' nation-

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<sup>9</sup> According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), human rights treaty bodies adopt guidelines on the form and content of state reports 'in order to ensure that reports contain adequate information to allow the committees to do their work'. See OHCHR *The United Nations human rights treaty system: An introduction to the core human rights treaties and the treaty bodies* (2005) 18.

<sup>10</sup> In its Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights, the UN Human Rights Committee notes that compliance with the guidelines 'will reduce the need for the Committee to request further information when it proceeds to consider a report; it will also help the Committee to consider the situation regarding human rights in every state on an equal basis'.

<sup>11</sup> Alston (n 7 above) 20.

ally and 'inspection' internationally, as contended by Viljoen,<sup>12</sup> then reporting guidelines are the beacon that direct these processes in the right and desired direction.

It is not always the case, however, that reporting guidelines will achieve their intended results. Their potential to do so, just like the effectiveness and impact of the process of state reporting, depends on, amongst other factors, the clarity and precision of the guidelines. In essence, guidelines can stir confusion and ambiguity just as much as they can bring clarity and precision. The drafting of state reporting guidelines, therefore, is a significant process that largely defines the extent to which the resultant guidelines will achieve their intended results. In sum, guidelines play an important role in defining the success or otherwise of a state reporting mechanism.

### 3 State reporting under the African Charter on Human and Peoples' Rights

The African Charter, being the main canvas upon which Africa's continental catalogue of rights (and duties) is painted, is rightly said to lie at the heart of the African human rights system.<sup>13</sup> State reporting under the African Charter is anchored in article 62 under which state parties have undertaken to submit biennial reports on the 'legislative or other measures' they have taken to give effect to Charter rights. These reports are submitted to and examined by the African Commission, which is the African Charter's monitoring body.<sup>14</sup> They are examined in public during the Commission's ordinary sessions which are held twice a year.<sup>15</sup> The notion of constructive dialogue underlies the reporting process,<sup>16</sup> although a 'true' dialogue is yet to be

<sup>12</sup> F Viljoen *International human rights law in Africa* (2007) 37.

<sup>13</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155 156.

<sup>14</sup> Art 62 of the African Charter does not expressly confer on the African Commission the duty of receiving and examining state reports under the Charter. Its authority to do so was entrusted on it by the Organisation of African Unity Assembly of Heads of State and Government after the African Commission submitted to it a resolution asserting itself as the appropriate organ capable of examining state reports under the African Charter. See Second Annual Activity Report of the African Commission (1988-1989) 20.

<sup>15</sup> For an elaborate exposition of the African Commission's state reporting procedure, see A Danielsen *The state reporting procedure under the African Charter* (1994); M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 49.

<sup>16</sup> See African Commission on Human and Peoples' Rights *State reporting procedure: Information sheet No 4*.

achieved.<sup>17</sup> The African Commission examined the first batch of state reports in 1991<sup>18</sup> and by the end of May 2009 it had examined a total of 74 reports.

Recognising the essence and role of guidelines in state reporting, and taking a cue from UN human rights treaty bodies, the African Commission adopted the first set of guidelines for state reporting under the African Charter in April 1989.<sup>19</sup> The guidelines, entitled Guidelines for National Periodic Reports (1989 Guidelines), were intended to ensure that state reports 'are made in a uniform manner'.<sup>20</sup> If complied with, it was envisaged that they would 'reduce the need for the Commission requesting additional information and for it to obtain a clearer picture of the situation in each state regarding the implementation of the rights, fundamental freedoms and duties of the Charter'.<sup>21</sup> The Guidelines fall within the African Commission's broader desire to establish a system of periodic reports that would create a channel for constructive dialogue between the states and the Commission on human and peoples' rights.<sup>22</sup> In practice, however, the Guidelines have failed to elicit these results.

Studies of state reports submitted to and examined by the African Commission following the adoption of the 1989 Guidelines reveal a general pattern of non-compliance with the Guidelines.<sup>23</sup> While states are guilty of ignoring them, it is the lack of clarity and precision in the Guidelines that has been blamed for non-compliance. While they were elaborate, the 1989 Guidelines were 'too detailed, lengthy and in some areas repetitive and unnecessarily complex'.<sup>24</sup> As such, they were found not to be user-friendly.<sup>25</sup> According to Quashigah, the Guidelines are more likely to confuse than to guide.<sup>26</sup> For these rea-

<sup>17</sup> Viljoen (n 12 above) 379, observing that 'the procedure adopted by the Commission is also hardly conducive to true dialogue. A series of questions is posed in quick succession by each of the 11 commissioners, followed by responses to some of these questions by an often-bewildered representative. The process is more akin to a series of critical statements, followed by a statement in defence of the report.'

<sup>18</sup> It was at its 9th session in March 1991 that the African Commission considered its first batch of state reports from the states of Libya, Rwanda and Tunisia.

<sup>19</sup> See African Commission Second Annual Activity Report 1988-1989 ACHPR/RPT/2nd. The Guidelines are reprinted in C Heyns (ed) *Human rights law in Africa* (2004) 507-524.

<sup>20</sup> The 1989 Guidelines, para 2 under the 'general guidelines regarding the form and contents of reports from states on civil and political rights'.

<sup>21</sup> As above.

<sup>22</sup> The 1989 Guidelines, para 2 under 'Introduction'.

<sup>23</sup> Viljoen (n 12 above) 373.

<sup>24</sup> G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 268 279.

<sup>25</sup> F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110 111.

<sup>26</sup> K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261.

sons, it has been contended that the Guidelines might have deterred reporting and constructive dialogue.<sup>27</sup> In the words of Viljoen, the 1989 Guidelines are 'very elaborate, but also too lengthy and complicated, making compliance a matter of impossibility'.<sup>28</sup>

The above criticisms compelled the African Commission to adopt, in 1998, a new set of guidelines that comparatively were clearer and more precise than the 1989 Guidelines.<sup>29</sup> In adopting the new guidelines — the 1998 Guidelines — the African Commission conceded that the 1989 Guidelines were too lengthy and that they had probably served to discourage states from reporting.<sup>30</sup> The 1998 Guidelines, comprising of 11 questions that are meant to guide states in preparing their reports, are short, precise and to the point.<sup>31</sup> The 1998 Guidelines have nevertheless invited their share of criticism. If the 1989 Guidelines were found to be too lengthy and complex, then the 1998 Guidelines have been criticised for being too brief and vague. According to Evans and Murray, the 1998 Guidelines are 'so vaguely constructed that they might fail to give sufficient guidance on the material that the Commission requires — or should be requiring — if the dialogue is to have substance'.<sup>32</sup> In the same vein, Quashigah has noted that, in comparison to the 1989 Guidelines, the 1998 Guidelines are 'a less detailed — but equally unhelpful — set of guidelines'.<sup>33</sup> Perhaps lending credence to these criticisms, there is little tangible evidence to suggest that states have followed the 1998 Guidelines in preparing their reports. With the exception of a few reports that have complied with the Guidelines,<sup>34</sup> the majority of reports submitted by states thus far are too varied in form and content that it is difficult to extract a particular pattern. As such:<sup>35</sup>

<sup>27</sup> Danielsen (n 15 above) 49.

<sup>28</sup> Viljoen (n 12 above) 372.

<sup>29</sup> 'Guidelines for periodic reporting under article 62 of the African Charter on Human and Peoples' Rights' by UO Umzurike, adopted at the African Commission's 23rd session (1998), Doc/OS/27(XXIII); reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 169.

<sup>30</sup> The 1998 Guidelines, Preamble.

<sup>31</sup> Viljoen (n 12 above) 373. In addition to the 1998 Guidelines, there is in existence an undated third set of guidelines prepared by Commissioner Dankwa. These guidelines are essentially an elaboration of the 1998 Guidelines and they are usually sent out to governments together with the 1998 Guidelines. These Guidelines, however, have never been officially adopted by the Commission and the status of the Guidelines is therefore unclear. See 'Simplified Guidelines for State Reporting under article 62 of the African Charter on Human and Peoples' Rights' printed in Viljoen (n 25 above) 112-113.

<sup>32</sup> Evans & Murray (n 15 above) 63.

<sup>33</sup> Quashigah (n 26 above) 264.

<sup>34</sup> The South African initial report and the Zimbabwean report are lauded as among the few reports that have complied with the 1998 Guidelines. See Viljoen (n 25 above).

<sup>35</sup> Evans and Murray (n 15 above) 62-63.



Although reports in more recent years have tended to be of greater length, they have always varied hugely in their quality and style, and this has continued under the new Guidelines. It is therefore not clear that States have in fact obtained or followed the simplified Guidelines. Indeed, some States say that they have not obtained a copy of them.

In sum, the 1989 and the 1998 Guidelines have had little impact. The failure of the Guidelines to achieve their intended goals must, however, be seen within the broad spectrum of challenges that beset state reporting under the African Charter. To begin with, the rate of non-submission of reports by state parties is so high that it has become a 'chronic problem'.<sup>36</sup> While all the 53 African states are state parties to the African Charter, only 12 states, representing 23% of all the states, are up to date in the submission of their reports.<sup>37</sup> Of the remaining 77%, 12 states (or 23%) have never submitted a report since they ratified the African Charter, while 23 others (or 43%) have overdue reports ranging from one to six overdue reports.<sup>38</sup> Six states (or 11%) are posed to present their reports during the next session of the African Commission in November 2009.<sup>39</sup> Other problems facing state reporting under the African Charter include the poor quality of state reports; inconsistency in the adoption of concluding observations coupled with their poor dissemination; and the lack of a credible follow-up mechanism. For these reasons, it is contended that, even with the improvements in recent years, the reporting system under the African Charter cannot be considered a success.<sup>40</sup>

Thus, the development of reporting guidelines under the African Women's Protocol is cast against a dim background: a reporting system that is beset with numerous challenges, one of which is the failure of reporting guidelines to achieve their purpose. This background nevertheless provides vital lessons for developing guidelines under the Women's Protocol, which lessons the Pretoria Gender Expert Meeting, it should be presumed, was mindful to take advantage of. It is to the purpose of that meeting — developing reporting guidelines under the African Women's Protocol — to which I now turn.

#### 4 Developing guidelines under the African Women's Protocol

The African Women's Protocol was adopted in July 2003 and entered into force on 25 November 2005. As of 30 June 2009, the Protocol

<sup>36</sup> J Biegon & M Killander 'Human rights developments in the African Union during 2008' (2009) 9 *African Human Rights Law Journal* 295 300.

<sup>37</sup> 26th Activity Report of the African Commission, EX CL/529(XV), para 134.

<sup>38</sup> As above.

<sup>39</sup> As above.

<sup>40</sup> Shelton (n 8 above) 544.



had been ratified by 27 African states, all of which are also state parties to the African Charter. The adoption of the Women's Protocol was necessitated by the African Charter's insufficiency to provide for women rights, and the failure of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to address the particular plight of the African woman. The African Women's Protocol breaks new normative ground for being the first treaty to cover such issues as polygamy,<sup>41</sup> medical abortion,<sup>42</sup> domestic violence<sup>43</sup> and HIV/AIDS.<sup>44</sup> By and large, it presents a progressive normative framework for the promotion and protection of women's rights in Africa.<sup>45</sup>

The potential of the Women's Protocol, however, remains untapped. While there is a growing awareness of women's rights in Africa, gender inequalities still abound on the continent. In a line, the presence of the Women's Protocol is yet to be substantively felt by the African woman for whom it was adopted. Efforts by the Protocol's monitoring body, the African Commission, to promote women's rights by the adoption of resolutions,<sup>46</sup> and through its Special Rapporteur on the Rights of Women,<sup>47</sup> have not yielded much. Similarly, monitoring the Protocol's implementation through the state reporting procedure has been elusive. As will be discussed below in detail, the lack of clarity that surrounds the format and content of state reports under the Women's Protocol has undermined its monitoring through state reporting. It is against this background that the convening of the Pretoria Gender Expert Meeting and the development of state reporting guidelines under the Protocol should be viewed.

#### 4.1 The need for guidelines

Over and above the essence and role of guidelines highlighted earlier, there are pressing reasons for developing guidelines for state reporting under the African Women's Protocol. The Protocol, like human rights

<sup>41</sup> African Women's Protocol, art 6(c).

<sup>42</sup> Art 14(2)(c).

<sup>43</sup> Art 4(2).

<sup>44</sup> Arts 14(1)(d) & (e).

<sup>45</sup> See Banda (n 1 above); D Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on women's rights' (2006) LIII *Netherlands International Law Review* 63.

<sup>46</sup> The African Commission has adopted the following resolutions touching on women's rights: Resolution on maternal mortality; Resolution on the right to a remedy and reparation for women and girl victims of sexual violence; Resolution on the health and reproductive rights of women; Resolution on the situation of women in the Democratic Republic of Congo; Resolution on the status of women in Africa and the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and Resolution on the situation of women and children in Africa.

<sup>47</sup> See generally R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 15 above) 344.

treaties before and after it, imposes on state parties a reporting obligation. This obligation is tied to the parent treaty, to the effect that 'in their periodic reports submitted in accordance with article 62 of the African Charter', state parties should indicate the legislative and other measures they have undertaken to give full realisation of the rights contained in the Protocol. As such, the Protocol does not envisage an independent report under its ambit, but one that is subsumed in a periodic report under the African Charter. However, how such a report should be 'grafted' into a periodic report under the African Charter is subject to speculation. Indeed, the compatibility of the stock (a report under the African Charter) and the scion (a report under the Women's Protocol) is yet to be tested.

The problem is compounded by the fact that states are already required to report, under the African Charter, on the 'legislative and other measures' they have taken to give effect to women's rights. In particular, article 18(3) of the African Charter imposes a dual obligation on state parties to 'ensure the elimination of every discrimination against women' and to 'ensure the protection of the rights of the woman'. Should a report under the African Women's Protocol, therefore, be grafted into a report under the African Charter through article 18(3)? Or should it be an annexure? Or should it be afforded a section within the report under the African Charter? In the absence of guidelines, answers to these questions are speculative.

The practice of the African Commission in examining state reports has not shed any meaningful light to dispel these speculations. During the examination of state reports, questions relating to women's rights have been posed to representatives of states, primarily by the Special Rapporteur on the Rights of Women, without specifically referring to the Protocol. This practice tends to suggest that the African Commission, perhaps knowing it is to blame for not developing reporting guidelines, has not expected states to comply with their reporting obligation under the Protocol. If it has expected states to do so, then it is utterly surprising that it has consistently failed to specifically refer to the Women's Protocol during the examination of state reports.

The practice of states has been equally unhelpful. Since it came into force, seven state parties to the Protocol have submitted and presented their reports under the African Charter.<sup>48</sup> However, an examination of these reports shows that they have not dealt with the provisions of the Protocol. They have instead restricted reference to women's rights to the requirements of article 18(3) of the African Charter. It thus appears that, in the absence of guidelines, states have simply ignored their reporting

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<sup>48</sup> These states are Benin, Libya, Nigeria, Rwanda, Tanzania, Zambia and Zimbabwe. The Republic of Seychelles, whose report was examined in 2006, has been excluded from this list because its report had been prepared and submitted to the African Commission long before the country had ratified the Protocol and before the Protocol had come into force.

obligations under the Protocol or, alternatively, they have erroneously presumed that the obligation is duly discharged when they deal with article 18(3) in their report. Thus, according to the background paper to the Pretoria Gender Expert Meeting:<sup>49</sup>

As for state practice, the reports of state parties to the Women's Protocol almost universally omit any specific discussion on the measures taken to give effect to the Women's Protocol. Women's rights are mostly dealt with as part of the report under article 18(3) of the Charter.

In a few instances, non-governmental organisations (NGOs) have sought to fill the gap in state reports by preparing shadow reports exclusively focusing on the African Women's Protocol. For instance, in respect to Benin's periodic report presented during the African Commission's 45th ordinary session, the Centre for Human Rights prepared and submitted a shadow report primarily on the Protocol. While more of these reports are welcome, they do not substitute states' reporting obligations under the Protocol. In essence, guidelines that would clear the confusion and ambiguity that shroud the reporting obligation under the Protocol are long overdue. The need for such guidelines cannot be overemphasised.

#### 4.2 The Pretoria Gender Expert Meeting: An overview

It was on the premise discussed above, that is, the need for reporting guidelines under the African Women's Protocol, that the Pretoria Gender Expert Meeting was convened. Funded by the Germany-based donor organisation, Heinrich Böll Stiftung, the meeting was organised under the auspices of the African Commission in conjunction with and hosted by the University of Pretoria's Centre for Human Rights (CHR) with the specific purpose of developing the guidelines. The meeting's overall objective was to 'strengthen the capacity of the African Commission to promote and protect women's rights in Africa through monitoring implementation of the Protocol'.<sup>50</sup> It was inspired by CHR's identification of the need to support the African Commission in the development of reporting guidelines under the Protocol.<sup>51</sup> While the Commission had mandated the office of the Special Rapporteur on the Rights of Women to develop the guidelines, no concrete steps had been taken several years after the office was established. As such, the Pretoria Gender Expert Meeting was the first concrete step towards the development of reporting guidelines under the Women's Protocol.

<sup>49</sup> Centre for Human Rights 'Background paper: Towards the adoption of reporting guidelines under the African Women's Protocol' [http://www.chr.up.ac.za/centre\\_projects/gender/docs/Background-paper-protocol-29July2009.doc](http://www.chr.up.ac.za/centre_projects/gender/docs/Background-paper-protocol-29July2009.doc) (accessed 18 October 2009).

<sup>50</sup> Centre for Human Rights 'Concept note for Gender Expert Meeting on 6 and 7 August at the Farm Inn, Pretoria, South Africa' [http://www.chr.up.ac.za/centre\\_projects/gender/docs/concept%20note%20\(2\).doc](http://www.chr.up.ac.za/centre_projects/gender/docs/concept%20note%20(2).doc) (accessed 18 October 2008).

<sup>51</sup> Centre for Human Rights (n 49 above).

The meeting brought together 14 gender experts from across Africa, amongst them three commissioners of the African Commission, including the incumbent Special Rapporteur on the Rights of Women.<sup>52</sup> The meeting ran for two consecutive days, during which period proposals on the form and content of reports under the Protocol were deliberated intensely. The discussion was initially based on a draft proposal prepared by Master of Laws (LLM in Human Rights and Democratisation in Africa) students at CHR — the LLM Draft Proposal. At the end of the first day of the meeting, discussions on the LLM Draft Proposal yielded a set of draft guidelines which were further deliberated upon on the second day of the meeting. The final result of the meeting was a set of draft guidelines — the Pretoria Draft Guidelines. A review of the Pretoria Draft Guidelines follows below.

It must be noted here that the drafting of reporting guidelines under the African Women's Protocol is essentially part of the African Commission's broader initiative to 'unpack', by way of guidelines or declarations, the content of rights guaranteed under the African Charter and the Women's Protocol. In this regard, the African Commission has adopted several sets of guidelines relating to various thematic human rights issues on the continent. These include the Declaration of Principles on Freedom of Expression in Africa;<sup>53</sup> Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa;<sup>54</sup> and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>55</sup> Most recently, the African Commission has prepared the Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights which, upon finalisation and adoption, would serve as 'additional guidelines for the submission of state party reports to the Commission'.<sup>56</sup>

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<sup>52</sup> The commissioners who participated in the meeting are Commissioner Soyata Maiga (Special Rapporteur on the Rights of Women in Africa), Commissioner Pansy Tlakula (Special Rapporteur on Freedom of Expression and Access to Information in Africa) and Commissioner Dupe Atoki (Chairperson of the follow-up committee on the Robben Island guidelines). The full list of participants is available at [http://www.chr.up.ac.za/centre\\_projects/gender/docs/participants.doc](http://www.chr.up.ac.za/centre_projects/gender/docs/participants.doc) (accessed 18 October 2008).

<sup>53</sup> ACHPR/Res 62 (XXXII) 02, adopted during the African Commission's 32nd ordinary session, Banjul, The Gambia, from 17 to 23 October 2002; reprinted in Heyns & Killander (n 29 above) 279-283.

<sup>54</sup> ACHPR/Res 61 (XXXII) 02, adopted during the African Commission's 32nd ordinary session, Banjul, The Gambia, from 17 to 23 October 2002; reprinted in Heyns & Killander (n 29 above) 284-288.

<sup>55</sup> Adopted during the African Commission's 33rd ordinary session, Niamey, Niger, 15-29 May 2003; reprinted in Heyns & Killander (n 29 above) 288-311.

<sup>56</sup> Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights [http://www.achpr.org/english/other/Draft\\_guideline\\_ESCR/Draft\\_Pcpl20&%20Guidelines.pdf](http://www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl20&%20Guidelines.pdf) (accessed 19 October 2009).

### 4.3 Pretoria Draft Guidelines: A review

The drafting of state reporting guidelines is a complex endeavour. It calls for a balancing act: The guidelines ought to be concurrently concise and comprehensive. The criticisms levelled against the Charter Guidelines testify to the difficulty in achieving this criterion — a concise set of guidelines may be regarded 'brief and vague', while a comprehensive one may be considered 'lengthy and complex'. In essence, it is difficult to draft a perfect set of guidelines. In drafting the Pretoria Draft Guidelines, the experts nevertheless sought to come up, as much as they could, with a concise and comprehensive set of guidelines.

To achieve clarity and precision, and probably to escape the criticisms that have been levelled against the Charter Guidelines, three particular approaches were adopted. First, the Guidelines provide a list of 'measures of implementation' which are essentially indicators that show the extent to which the provisions of the African Women's Protocol have been given effect. Secondly, the Guidelines draw a clear distinction in the nature of information required in respect of first (initial) and subsequent (periodic) reports. Finally, the Guidelines break up the provisions of the Women's Protocol into thematic clusters under which states would be required to provide information on implementation. The features of the Pretoria Draft Guidelines are discussed in detail below.

#### 4.3.1 Format of state reports

The first issue that the Pretoria Gender Expert Meeting had to tackle is the manner in which a report under the African Women's Protocol would be grafted into a periodic report under the African Charter. Three options were available for consideration: first, integrating a report under the Protocol through article 18(3) of the African Charter; second, incorporating details of women's rights into each article of the African Charter; and last, having a separate report under the Protocol which would be part of the African Charter report. The first two options were rejected. It was noted that the Protocol would not be accorded the attention it deserves if its provisions were dealt with under article 18(3) of the African Charter or if women's rights were read into each article of the Charter.

It was observed that, although the Protocol is a supplement to the African Charter, it is nevertheless a treaty in its own right and, therefore, calls for particular attention. It was thus the consensus of the meeting that the provisions of the Protocol should be dealt with separately, but within a report of the Charter as required by article 26 of the Protocol. In line with the recommendation of the LLM Draft Proposal, it was agreed that for state parties to the Women's Protocol, their periodic reports under the African Charter would be structured into two parts. Part A would cover all the rights in the African Charter, while Part B

would cover all the rights under the African Women's Protocol. Thus, the Pretoria Draft Guidelines state as follows:

A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol.

While the above position was reached with relative ease, an issue that dominated the subject on the format of state reports is the relationship between state reports under the Women's Protocol and state reports under its sister instruments — CEDAW, the African Union (AU) Solemn Declaration on Gender Equality in Africa, and the South African Development Community (SADC) Protocol on Gender and Development. According to the LLM Draft Proposal, it was important for the Pretoria Gender Expert Meeting to consider the relationship in the reporting mechanisms under these instruments since 'the extent of potential overlap in obligations is evident'.

The LLM Draft Proposal, therefore, proposed that, rather than preparing entirely new reports under the Women's Protocol, states should attach their recently submitted reports under the sister instruments to their African Women's Protocol reports. It then suggested that the guidelines for reporting under the Protocol should stipulate the additional aspects, unique to the African Women's Protocol, on which states have to report. This approach, it was submitted, would address 'the recurrent apprehension of states about being overburdened by reporting obligations' and that it would help in avoiding 'unnecessary duplications'. In proposing this approach, inspiration was drawn from the guidelines for state reporting under the African Charter on the Rights and Welfare of the Child (African Children's Charter), which allow states to attach their reports under the Convention on the Rights of the Child (CRC) to their reports under the African Children's Charter. According to the guidelines:<sup>57</sup>

A state party that has already submitted its report to the UN Committee on the Rights of the Child is required to re-submit such report to the African Committee together with a supplementary report devoted to the provisions of the Children's Charter not duplicated in the CRC.

After much deliberation, the proposal to attach the reports of sister instruments to the report was rejected. It was noted that, while the idea behind the proposal was noble, its adoption would create extra work for the commissioners, as they would have to read through three other reports. It was also observed that states too would find it a difficult task to make cross-references between the reports. Further, it was noted that, since the provisions of the African Children's Charter and those of CRC are largely similar to each other, it was easier for the guidelines under the African Children's Charter to allow states to attach

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<sup>57</sup> Guidelines for initial reports of state parties to the African Charter on the Rights and Welfare of the Child, Cmttee/ACRWC/2 II Rev 2, para XI, provision 24.

their CRC reports to the Children's Charter report. A similar match does not exist between the African Women's Protocol and its sister instruments. It was thus advised that the reports under the sister instruments may form a 'background pack' of information that may be used by the African Commission during its examination of reports under the Women's Protocol. The Special Rapporteur on the Rights of Women was thus advised to maintain a database of state reports under sister instruments.

Another issue that the meeting sought to address concerned the appropriate terms to be used in describing reports under the African Women's Protocol. The Charter Guidelines have been criticised for failing to draw a clear distinction between initial and periodic reports. For instance, Viljoen has observed that the distinction between initial and periodic reports is not followed through consistently in the Charter Guidelines.<sup>58</sup> Thus, in practice, confusion characterises the use of the terms 'initial' and 'periodic' reports to the extent that, in some instances, reference has been made to 'initial periodic report'.<sup>59</sup> To avoid this confusion, the term 'first reports' is used in the Pretoria Draft Guidelines to refer to reports that states would submit under the Women's Protocol for the first time. The term 'first report' is preferred over the term 'initial report'. Ordinarily, an initial report broadly covers the historical background of a country and, most importantly, its overall legal, institutional and policy framework for the realisation of treaty rights. In the case of a first report under the Women's Protocol, this extensive information would not be required since states would have already presented their initial reports under the African Charter. As such, a report presented under the Women's Protocol for the first time would not be an initial report in the conventional sense of the word, hence the preference of the term 'first report'. Moreover, the Pretoria Draft Guidelines uses the term 'subsequent reports' to refer to reports that would be submitted by states following the submission of the first reports. The difference between first and subsequent reports is further reinforced by the fact that the Draft Guidelines draw a clear distinction in the nature of information that is required from states in respect of the two kinds of reports.

### 4.3.2 Content of state reports

Understandably, a considerable amount of time was spent during the Pretoria Gender Expert Meeting discussing the expected content of state reports. As was recommended in the LLM Draft Proposal, three particular approaches were adopted in order to ensure that states are clearly and precisely guided as to the nature of information they should

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<sup>58</sup> F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 385.

<sup>59</sup> As above.



include in their first and subsequent reports. First, the Pretoria Draft Guidelines outline what was referred to in the LLM Draft Proposal as 'measures of implementation'. These are indicators which would guide states in demonstrating the extent to which the rights in the Protocol have been implemented. In respect to each right, states would be required to provide information on how they have given effect to that right in accordance with the measures of implementation. These measures cover 10 main areas: legislation; administrative measures; institutions; policies and programmes; public education; any other measures; remedies; challenges experienced; accessibility; and disaggregated statistics. For clarity, questions have been posed regarding the measures to give the exact picture of what information is required. For instance, under accessibility, states are required to indicate whether the Women's Protocol rights are accessible to all women, especially rural and impoverished women.

Secondly, the Pretoria Draft Guidelines draw a clear distinction in the nature of information required in respect to first and subsequent reports. In relation to first reports, the LLM Draft Proposal explained that they are the reports by which state parties introduce to the African Commission all information relevant to the African Women's Protocol. As such, first reports form the background information for and the foundation of subsequent reports. The Draft Guidelines, therefore, require states to provide the following information when they report for the first time under the Protocol:

- (a) the extent to which civil society, in particular individuals and organisations working on gender issues, were involved in the preparation of the report;
- (b) a brief description of the state's overall legal framework as it relates to women's rights (such as the Constitution, other laws, policies and programmes);
- (c) an explanation as to whether the Protocol is directly applicable before national courts or if it is incorporated into domestic law. Information on whether in practice the provisions of the Protocol have been invoked before national courts and tribunals (with some examples of the most important cases) should be included;
- (d) if the state has entered any reservations to the Protocol, it should provide an explanation including the effect of the reservation(s) on the enjoyment of the Protocol rights;
- (e) a brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation;
- (f) general information on gender budgeting;
- (g) information on gender mainstreaming, including any policy and capacity-building efforts; and
- (h) information on any gender audit laws or legal reform efforts undertaken from a gender perspective.

In respect of subsequent reports, the LLM Draft Proposal explained that they should only cover the developments of the period — ideally two years — following a previous report of a state party. Information provided in the first report need not be repeated in subsequent reports.

In this regard, the Pretoria Draft Guidelines require subsequent reports to cover the following issues:

- (a) measures taken to implement recommendations in the concluding observations of the Commission emanating from the examination of the previous report;
- (b) measures taken to publicise and disseminate the concluding observations adopted after the examination of the previous report;
- (c) progress made in the implementation of the Protocol since the last report;
- (d) the challenges faced in the implementation of the Protocol since the last report, and steps taken to address these challenges; and
- (e) future plans in regard to the implementation of the Protocol.

Finally, the Pretoria Draft Guidelines divide the substantive provisions of the African Women's Protocol into thematic clusters. Thus, using the measures of implementation highlighted above, states would be required to report on all the substantive provisions of the Protocol under thematic clusters rather than on an article-by-article basis. In grouping the Protocol rights into clusters, the Pretoria Gender Expert Meeting went through each of the rights to ensure that no right had been alienated. Eight clusters were identified: equality/non-discrimination; protection of women from violence; rights relating to marriage; health and reproductive rights; economic, social and cultural rights; the right to peace; protection of women in armed conflicts; and the rights of especially protected women's groups. For clarity, the Guidelines indicate which of the Protocol rights fall under each of the clusters. For instance, under the cluster 'economic, social and cultural rights', states are required to report on articles 13, 15, 16, 17, 18 and 19, which deal with: economic and welfare rights; the right to food security; the right to adequate housing; the right to positive cultural context; the right to a healthy and sustainable environment; and the right to a sustainable environment.

In adopting this approach, the Pretoria Gender Expert Meeting noted that this underscores the indivisibility and interdependence of women's rights. It was also observed that the approach would, on the one hand, help minimise cross-referencing in state reports and, on the other hand, enhance the logical flow of the dialogue between the African Commission and representatives of state parties during the examination of state reports. Evidently, it appears that the inspiration to adopt the thematic rather than the article-by-article approach was drawn from the guidelines and practice of the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The CRC Guidelines group the provisions of CRC into nine clusters for purposes of state reporting. The Guidelines explain the rationale of this approach as follows:<sup>60</sup>

<sup>60</sup> General guidelines regarding the form and content of periodic reports to be submitted by state parties under art 44, para 1(b) of the Convention, CRC/C/58/Rev 1, para 3.

The present guidelines group the articles of the Convention in clusters with a view to assisting State parties in the preparation of their reports. This approach reflects the holistic perspective on children's rights taken by the Convention: ie that they are indivisible and interrelated and that equal importance should be attached to each and every right recognised therein.

The guidelines for state reporting under the African Children's Charter take a similar approach. It groups the provisions of the Children's Charter into 10 sections, 'equal importance being attached to all the rights and welfare recognised by the Children's Charter'.<sup>61</sup> The first two state reports — that of Egypt and Nigeria — to be examined by the African Children's Committee have been well received by both the Committee and civil society.<sup>62</sup> The report of Nigeria has been described as 'very comprehensive' and as following the 'outline given in the African Committee guidelines closely'.<sup>63</sup> Sloth-Nielsen and Mezmur note that the examination of the report of Egypt was 'an exceptionally lively and thorough session'.<sup>64</sup> It is to be hoped that the first states to present their reports under the African Women's Protocol would equally set a positive precedence in relation to compliance with the reporting guidelines and willingness to engage with the African Commission in the spirit of a true constructive dialogue.

#### 4.3.3 Length of state reports

The length of an ideal state report, in terms of pages, is an issue that eludes consensus and, as it would be expected, invoked considerable debate during the Pretoria Gender Expert Meeting. The discussion swung between those who advocated a maximum page limit for state reports to be set, and those who opposed the idea. The LLM Draft Proposal had recommended that initial reports should not exceed 50 pages, whereas periodic reports should not exceed 30 pages. It was on the basis of this proposal that the debate on the length of state reports was conducted. Those who advocated for a maximum page limit, on the one hand, argued that state reports should be as concise as possible. It should only bring within its fold the relevant information required by the reporting guidelines. In other words, a report should limit its reach to such information that would enable a constructive dialogue to ensue between the African Commission and the state concerned. It was observed that many reports submitted to the Commission thus far

<sup>61</sup> Guidelines for initial reports of state parties, Committee/ACRWC/2 II Rev 2, para 7.

<sup>62</sup> See J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336 342-346.

<sup>63</sup> Save the Children Sweden & Plan International *Advancing children's rights: A guide to civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child* (2009), cited in Sloth-Nielsen & Mezmur (n 62 above) 344.

<sup>64</sup> Sloth-Nielsen & Mezmur (n 62 above) 342.

have been lacking in this feature,<sup>65</sup> a fact that is partly to blame for the poor performance of the state reporting mechanism.

Those who opposed the idea of setting a maximum page limit argued that such a limitation would not augur well with states that have much to report about. They contended that it would be difficult for such states to summarise all it would wish to report about within the maximum pages allowed. As such, an emphasis on the length of state reports may deflect its drafters from focusing in its quality. In any event, a good report may well exceed the maximum number of pages, while a bad report may fall far below the page limit. In essence, the focus should be on the quality rather than on the length of a report. Therefore, the meeting wished for a set of guidelines that emphasised the quality of state reports without necessarily putting a ceiling on the number of pages.

As is apparent from the above exposition, both schools of thought presented well-reasoned arguments and legitimate concerns. In the end, therefore, a compromise had to be reached to the effect that, while the guidelines would set a limit on the number of pages, the limit would not be couched as a strict condition, but rather as the preferred maximum length of state reports. It was thus agreed that the guidelines would indicate that it would be preferable if, as the LLM Draft Proposal had recommended, first and subsequent reports were limited to 50 and 30 pages respectively. The relevant part of the Pretoria Draft Guidelines, therefore, reads as follows: 'A state's first report under Part B must, preferably, not exceed 50 pages and subsequent reports should not exceed 30 pages.' So far, huge volumes of state reports have posed a translation challenge to the African Commission, in addition to heavily burdening the commissioners who have had to read through reports that run into hundreds of pages. So it is expected that when it considers the Pretoria Draft Guidelines, the African Commission likely will be inclined towards the retention of the limitation on page numbers.

If the limitation is retained as expected, then the guidelines for state reporting under the African Women's Protocol will join the ranks of reporting guidelines that impose a page limit on state reports. The UN Committee on the Rights of the Child requires state reports under CRC to be limited to 120 regular-size pages.<sup>66</sup> Reports are required to be 'concise, analytical and focused on key implementation issues'.<sup>67</sup> Similarly, the Harmonised Guidelines on Reporting under UN human rights treaties impose page limits on state reports, although recognis-

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<sup>65</sup> The 1989 and the 1998 Guidelines do not set a limit on the number of pages. As a consequence, reports submitted to the African Commission have varied vastly in length, ranging from reports of less than 10 pages to those that run into hundreds of pages.

<sup>66</sup> Decision 5 (2002) CRC/C/148.

<sup>67</sup> As above.

ing concerns similar to those which were raised by those opposing the setting of page limits during the Pretoria Gender Expert Meeting. The relevant clause states as follows:<sup>68</sup>

Although it is understood that some States have complex constitutional arrangements which need to be reflected in their reports, reports should not be of excessive length. If possible, common core documents should not exceed 60 to 80 pages, initial treaty-specific documents should not exceed 60 pages, and subsequent periodic documents should be limited to 40 pages.

It is evident from the above clause that these page limits are not strict conditions, but that they are only applicable in so far as it is possible to contain all relevant information in the pages allowed. This position resonates with the one adopted under the Pretoria Draft Guidelines. However, in comparison with the CRC decision and the Harmonised Guidelines on Reporting, the Pretoria Draft Guidelines set lower page limits both for initial and periodic reports. The LLM Draft Proposal did not explain how the 30 and 50 page limits were arrived at, and neither was this issue discussed during the Pretoria Gender Expert Meeting. Thus, if the Pretoria Draft Guidelines are officially adopted by the African Commission, it would be left to practice to demonstrate whether the page limits set therein are reasonable or not.

## 5 Beyond the adoption of guidelines for state reporting

Beyond the adoption of guidelines with clear and precise directives, the reporting mechanism under the African Charter is without doubt in dire need of urgent improvement and reform, geared towards enhancing its effectiveness and impact. While guidelines for state reporting are important, they cannot solely guarantee the success of a reporting mechanism. As Evans and Murray observe, '[t]he most important factor is not the Guidelines, but the will of the state to engage fully with the reporting process'.<sup>69</sup> Improvement of the African Charter's reporting mechanism, which includes harnessing the will of the states, as Evans and Murray suggest, calls for the commitment, co-operation and collaboration of all relevant stakeholders in the African human rights system: the African Commission, governments, national human rights institutions (NHRIs), civil society organisations (CSOs) and donor organisations, amongst others. Highlighted below are some suggestions which, if implemented, would harness the effectiveness

<sup>68</sup> Harmonised Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Core Document and Treaty-Specific Documents, HRI/GEN/2/Rev 5, para 19.

<sup>69</sup> Evans & Murray (n 15 above) 64.

and impact of the African Women's Protocol guidelines and that of the African Commission's reporting mechanism as a whole.

### 5.1 Dissemination of guidelines

A perennial problem that has long undermined the effectiveness and impact of the African Commission in general, and of its reporting mechanism in particular, is the lack of or poor dissemination of information about the Commission. While it will soon celebrate its Silver Jubilee, the existence of the Commission is little known on the continent. Its visibility is limited to a few government officials, human rights activists and academics. Thus, while efforts have been made in the recent past to improve its visibility, the African Commission remains an elite institution. It mainly disseminates information through its website, effectively locking out a huge percentage of Africa's population which is yet to access the internet as a medium of information. In any event, the Commission's website is only occasionally updated and, as such, it is not the most reliable source of information about the Commission. As Viljoen laments:<sup>70</sup>

[T]he question must be asked as to how information about the Commission's activities could be expected to permeate the public domain if the main authoritative source of its activities, its Activity Report, is (for years after its adoption) not accessible on the Commission's own website.

If the dissemination of the African Commission's Activity Reports has been poor, then that of its reporting guidelines cannot be expected to be any better. As it has been observed in respect of the 1998 Guidelines, 'the Commission has no clear strategy for ensuring that the Guidelines are properly disseminated'.<sup>71</sup> Considering the high prevalence of non-compliance with the 1989 and the 1998 Guidelines, it is doubtful whether these guidelines were effectively disseminated, if at all, to all state parties to the African Charter. According to Evans and Murray, some states have indicated that they never obtained a copy of the 1998 Guidelines.<sup>72</sup> It cannot, therefore, be emphasised that upon adoption, the reporting guidelines under the African Women's Protocol would need to be disseminated to all state parties and relevant stakeholders. The guidelines should also be made available on the Commission's website as soon as they are adopted. In addition, hard copies of the guidelines should be made and distributed to representatives of state parties and other stakeholders during the Commission's ordinary sessions. At the national level, NHRIs and CSOs should take the initiative to popularise the guidelines amongst relevant government officials and, most importantly, to advocate for compliance with the guidelines.

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<sup>70</sup> Viljoen (n 12 above) 415-416.

<sup>71</sup> Evans & Murray (n 15 above) 64.

<sup>72</sup> Evans & Murray (n 15 above) 62-63.

## 5.2 Harmonisation of state reporting guidelines

As had been discussed earlier, the 1989 and the 1998 Guidelines have been found lacking in clarity and precision. This shortcoming has been complicated by the fact that it has never been clear which of the two sets of guidelines should be followed in the preparation of state reports. The relationship between the two sets of guidelines is at best vague and it has, therefore, fallen on the discretion of states to choose which guidelines to follow. Consequently, even where states have complied with the African Commission's Guidelines, disparity has still persisted in the form and content of state reports. It has been suggested that the simultaneous existence of the 1989 and the 1998 Guidelines points to the probable fact that the Commission is more interested in states submitting their reports with sufficient detail and critique than in the uniformity of those reports.<sup>73</sup> But it is difficult to see how state reports would be of 'sufficient detail and critique' when states are torn between two sets of guidelines; one considered as lengthy and complex, the other regarded as brief and vague.

There is, therefore, an urgent need to replace the 1989 and the 1998 Guidelines with a new single set of guidelines. This need will be more imperative with the adoption of guidelines under the African Women's Protocol. Assuming that the structure suggested in the Pretoria Draft Guidelines is adopted in the final guidelines for state reporting under the Protocol, then Part A of the report would be regulated by the 1989 and the 1998 Guidelines and Part B by the Protocol guidelines. This would give rise to an absurdity, since the guidelines for the different parts of the report take entirely different approaches in what they require of state reports. Thus, as a participant put it during the Pretoria Gender Expert Meeting, the guidelines under the Protocol and those under the African Charter should 'speak to each other'. If the guidelines are to speak to each other, then the Charter guidelines should take the same approach as the Protocol guidelines. In particular, the provisions of the Charter should be broken into clusters or themes under which states would be required to provide details of implementation.

## 5.3 Reform of the state reporting procedure

It was earlier indicated that the state reporting mechanism under the African Charter faces numerous challenges. These challenges must be tackled if the mechanism is to ever operate effectively and have a meaningful impact on the promotion and protection of human rights in Africa. To begin with, the Commission must seek to address the high prevalence of non-submission of reports by states. In conjunction with NHRIs, CSOs and donor organisations, the African Commission must double its efforts in lobbying states to fulfil their reporting obligations

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<sup>73</sup> Evans & Murray (n 15 above) 63.



under the Charter. However, resolving the problem of the non-submission of reports goes beyond encouraging states to submit their overdue reports. Indeed, if all states were to submit all their overdue reports before its next session in November 2009, the African Commission would have a total of 184 reports to examine. However, if each state consolidates its overdue reports into one report, then the Commission would have a total of 23 reports to examine. On average, the Commission examines six reports per year and, as such, it would take it four years to examine 23 reports, by which time there will be a new backlog of overdue reports. Thus, what was said of the UN reporting system rings true of the reporting mechanism under the African Charter:<sup>74</sup>

[The] present reporting system functions only because of the large-scale delinquency of states which either do not report at all, or report long after the due date. If many were to report, significant existing backlogs would be exacerbated, and major reforms would be needed even more urgently.

Thus, the lobbying of states to submit their overdue reports must be accompanied with structural reforms of the reporting mechanism with a view to encouraging the timely submission of reports and their expeditious examination. The African Charter's requirement that states report biennially has proved not only ambitious, but also impossible for compliance. The ideal solution to this problem would have been to amend the African Charter to extend the reporting cycle to more than two years. In this regard, valuable lessons would have been borrowed from the practice of the UN human rights treaty bodies where the reporting cycle is generally four or five years. However, amending the African Charter is a complex and lengthy process. Therefore, the more pragmatic solution lies in boosting the capacity of the African Commission to examine more reports annually than it currently does. Presently, the Commission examines state reports during its ordinary sessions which are held twice a year, each session lasting about two weeks.<sup>75</sup> These sessions are usually a beehive of activity, resulting in a shorter time allocated for state reporting and, sometimes, a postponement of the examination of reports. To ensure that more reports are examined by the Commission, the ordinary sessions should be extended to last for more than two weeks or more than two ordinary sessions should be held yearly. To implement these changes, the AU would need to significantly increase its budgetary allocation for the African Commission.

In addition to the above reforms, the African Commission must also commit itself to a culture of consistent and prompt adoption of concluding observations and their effective dissemination. So far, the practice of the Commission in adopting concluding observations

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<sup>74</sup> Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, E/CN.4/1997/74, para 48.

<sup>75</sup> Rules of Procedure of the African Commission, 1995, Rule 2(1).

has been inconsistent, an aspect that has been accompanied by poor publicity and dissemination of the observations. Moreover, to ensure the implementation of concluding observations, the Commission must establish a credible follow-up mechanism. In this regard, the Working Group on Specific Issues Relevant to the African Commission has a particular role to play. In particular, the Working Group should, by borrowing lessons from other reporting systems, devise a means of tracking the implementation of concluding observations.

NHRIs and CSOs have a role, too, in ensuring the implementation of concluding observations by states. Borrowing from the initiative and experience of the German Institute for Human Rights,<sup>76</sup> NHRIs and CSOs may organise 'national meetings on concluding observations' following the examination of a report of the state in which they are based. Following the examination of Germany's state reports by UN treaty bodies, the German Institute for Human Rights has established a tradition of organising national meetings of experts and 'influential actors concerned with the implementation of human rights legislation and human rights practice' in which the focus is the concluding observations issued by the treaty bodies.<sup>77</sup> In these meetings, concluding observations are distributed and ways of implementing them are explored. In the experience of the German Institute for Human Rights, these meetings have resulted in 'intense and high quality dialogues between civil society, thematic experts and ministry representatives'.<sup>78</sup> NHRIs and CSOs in Africa may do well to borrow a leaf from the experience of the German Institute for Human Rights.

## 6 Conclusion

The Pretoria Gender Expert Meeting provided the first concrete step towards the development and adoption of reporting guidelines under the African Women's Protocol. The product of the meeting, the Pretoria Draft Guidelines, will form the basis of the guidelines that will ultimately be adopted by the African Commission. If the substance of the Draft Guidelines is adopted without alteration, then state parties to the Women's Protocol would structure their periodic reports under the African Charter into Parts A and B, covering Charter rights and Protocol rights respectively. These Guidelines have sought to achieve clarity and precision in three particular ways: by requiring states to report in terms of a list of measures of implementation; by drawing a clear distinction in the nature of information required in respect of first and subsequent reports; and by grouping the provisions of the Protocol into thematic

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<sup>76</sup> F Seidensticker *Examination of state reporting by human rights treaty bodies: An example of follow-up at the national level by national human rights institutions* (2005).

<sup>77</sup> Seidensticker (n 76 above) 11.

<sup>78</sup> Seidensticker (n 76 above) 16.

clusters for reporting purposes. To ensure that state reports are concise, the Guidelines recommend that first and subsequent reports should respectively be restricted to a maximum of 50 and 30 pages. Thus, the Pretoria Draft Guidelines provide a promising platform for the invigoration of the African Commission's state reporting mechanism and, by extension, the promotion and protection of women's rights in Africa.

However, as it has been argued in this article, the effectiveness and impact of the reporting system under the African Charter and the African Women's Protocol turn on a number of factors that go beyond the adoption of reporting guidelines. The guidelines must be disseminated effectively; the confusion stirred by the co-existence of the 1989 and the 1998 Guidelines must be cleared by the adoption of a new single set of guidelines; and the reporting system under the Charter must be reformed. In this regard, it has been suggested that to allow more time to examine state reports, the African Commission must extend its ordinary sessions to last for more than two weeks or more than two ordinary sessions which must be held annually. It has also been recommended that the Commission not only effectively disseminates its concluding observations, but it also establishes a credible follow-up mechanism. NHRIs and CSOs have been implored to organise national meetings on concluding observations modelled around the initiative and experience of the German Institute for Human Rights. In the final analysis, however, it must be appreciated that at the core of a functioning reporting mechanism is the political will of states to engage with the system, and it is in harnessing this political will that a greater challenge lies.

## **Annexure: The Pretoria Draft Guidelines**

### **Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

Pursuant to article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol), read together with article 62 of the African Charter on Human and Peoples' Rights (the African Charter), each state party to the Protocol has agreed to submit every two years, from the day the Protocol comes into force, a report on the legislative, judicial, administrative and other measures taken with a view to ensure full realisation of the rights and freedoms contained in the Protocol.

A state party to the African Charter and the Protocol must submit its report in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol. A state's first report under Part B must, preferably, not exceed 50 pages and

subsequent reports should not exceed 30 pages. In the preparation of Part B, state parties should follow the following guidelines:

### **First reports**

When states report for the first time under the Protocol, they must provide the following:

### **Process of preparation**

- 1 To what extent was civil society, in particular individuals and organisations working on gender issues, involved in the preparation of the report?

### **Background information**

- 1 A brief description of the state's overall legal framework as it relates to women's rights (such as the Constitution, other laws, policies and programmes).
- 2 An explanation as to whether the Protocol is directly applicable before national courts or if it is incorporated into domestic law. Information on whether in practice the provisions of the Protocol have been invoked before national courts and tribunals (with some examples of the most important cases).
- 3 If the state has entered any reservations to the Protocol, it should provide an explanation indicating the effect of the reservation(s) on the enjoyment of the Protocol rights.
- 4 A brief description of state institutions, if any, relevant to the Protocol and information on their budgetary allocation.
- 5 General information on gender budgeting.
- 6 Information on gender mainstreaming, including any policy and capacity-building efforts.
- 7 Information on any gender audit of laws or legal reform efforts undertaken from a gender perspective (attach relevant documents).

### **Specific provisions of the Protocol**

In respect of each of the provisions of the Protocol (which have been thematically structured below), states should explain the measures of implementation that they have undertaken with regard to the following:

- a Legislation (What legislative measures has the state taken to give effect to the particular right guaranteed in the Protocol?)
- b Administrative measures (What administrative measures, including budgetary allocations, has the state taken to give effect to the particular right guaranteed in the Protocol?)

- c Institutions (What institutional mechanisms are in place to ensure that the particular right guaranteed in the Protocol is given effect?)
- d Policies and programmes (What policies and programmes has the state adopted in order to give effect to the right in question?)
- e Public education (What public education and awareness-raising activities has the state undertaken with respect to the right?)
- f Any other measures (What other general measures, which are not covered in the points above, has state adopted to ensure the protection of the particular right?)
- g Remedies (judicial and administrative (extra-judicial)) (What are the available avenues for redress in the event of a breach of the particular right provided in the Protocol? Have any cases been decided in respect to each of the right; and if so, have these decisions been implemented?)
- h Challenges experienced (What are the challenges that the state has faced in the implementation of the particular right, and what steps have been taken to overcome these challenges?)
- i Accessibility (Is the particular right accessible to all women, especially rural/impooverished women?)
- j Disaggregated statistics (Where relevant, the state should provide relevant data and statistics disaggregated by gender in so far as the right in question is concerned.)

With reference to the measures of implementation above, states must report on all the provisions of the Protocol, preferably as grouped under the following eight (8) themes:

- 1 Equality/Non-discrimination
  - 1.1 Elimination of discrimination (article 2)
  - 1.2 Access to justice, including legal aid and the training of law enforcement officials (article 8)
  - 1.3 Political participation and decision-making (article 9)
  - 1.4 Education (article 12)
- 2 Protection of women from violence
  - 2.1 Bodily integrity and dignity, including sexual violence, trafficking of women and medical and scientific experimentation (article 3 & 4)
  - 2.2 Practices harmful to women, including female genital mutilation (article 5).
  - 2.3 Female stereotypes (article 4(2)(c))
  - 2.4 Sexual harassment
  - 2.5 Domestic violence (article 4(2)(a))
  - 2.6 Support to victims of violence, including health services and psychological counselling (article 5(c))
- 3 Rights relating to marriage (articles 6-7)

- 3.1 Marriage and its effect on property relations, nationality, name (article 6(e) to (j))
- 3.2 Minimum age of marriage (article 6(b))
- 3.3 Registration of marriages (article 6(d))
- 3.4 Protection of women in polygamous marriages (article 6(c))
- 3.5 Protection of women during separation, divorce or annulment of marriage (article 7)
- 3.6 Protection of children in the family (article 6(i) &(j))
- 4 Health and reproductive rights
  - 4.1 Access to health services (article 14(2)(a))
  - 4.2 Reproductive health services, including the reduction of maternal mortality (article 14(1)(a) & (b))
  - 4.3 Provision for abortion (article 14(2)(c))
  - 4.4 HIV/AIDS (article 14(1)(d))
  - 4.5 Sex education (article 14(1)(g))
- 5 Economic, social and cultural rights
  - 5.1 Economic and welfare rights (article 13)
  - 5.2 Right to food security (article 15)
  - 5.3 Right to adequate housing (article 16)
  - 5.4 Right to positive cultural context (article 17)
  - 5.5 Right to a healthy and sustainable environment (article 18)
  - 5.6 Right to sustainable development, including the right to property; access to land and credit (article 19)
- 6 Right to peace (article 10)
  - 6.1 Women's participation in peace and conflict prevention and management (article 10(1)) and in all aspects of post-conflict reconstruction and rehabilitation (article 10(2)(e))
  - 6.2 Reduction of military expenditures in favour of social spending (article 10(3))
- 7 Protection of women in armed conflicts (article 11)
  - 7.1 Indicate measures of protection for asylum seekers, refugees, internally displaced women and ensure the punishment of all violators of such protection (article 11(1) – (3)).
  - 7.2 Protection that no child especially girls take a direct part in hostilities and no child is recruited as a soldier (article 11(4))
- 8 Rights of specially protected women's groups
  - 8.1 Widows, including their inheritance rights (articles 20 & 21)
  - 8.2 Elderly women (article 22)
  - 8.3 Women with disabilities (article 23)
  - 8.4 Women in distress (article 24)

**Subsequent reports**

Subsequent reports should cover the following:

- Measures taken to implement recommendations in the concluding observations of the Commission emanating from the examination of the previous report.
- Measures taken to publicise and disseminate the concluding observations adopted after the examination of the previous report.
- Progress made in the implementation of the Protocol since the last report.
- The challenges faced in the implementation of the Protocol since the last report, and steps taken to address these challenges.
- Future plans in regard to the implementation of the Protocol.