

**INFREQUENT AND INADEQUATE REPORTING UNDER THE
AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE
AFRICAN PEER REVIEW MECHANISM AS A SOLUTION**

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
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DECLARATION

I **Inonge Kwenda** hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

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DEDICATION

I dedicate this work to my parents, the greatest source of inspiration in my life;

To my husband, for his understanding; and

To my daughter Mbololwa, the 'jewel in my crown'

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LIST OF INSTRUMENTS

UNIVERSAL INSTRUMENTS

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention on the Elimination of All Forms of Discrimination Against Women

Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Protection of the Rights of All Migrant Workers

Convention on the Rights of the Child

International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights

REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights

American Convention on Human Rights

European Convention on the Protection of Human Rights and Fundamental Freedoms

European Social Charter

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
APRM	African Peer Review Mechanism
AU	African Union
DDPECG	Declaration on Democracy, Political and Corporate Governance
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CMW	Convention on the Protection of the Rights of All Migrant Workers
CRC	Convention on the Rights of the Child
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ESC	European Social Charter
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non Governmental Organization
OAS	Organisation of American States

OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations

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CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The promotion and protection of human rights is important both at the national and international level. However, at the national level, several factors including government excesses tend to negatively affect the status of implementation of human rights. This has led to national human rights situations being measured against international standards. In this regard, different strategies have been developed to ensure compliance with international norms, the most basic of which is that of state reporting.¹

According to Quashigah:

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.²

This procedure is found in various international and regional human rights instruments. Examples are treaties in the United Nations (UN), European, inter-American and African human rights systems. In the African system, the African Charter on Human and Peoples' Rights is the core human rights instrument. The African Charter is seen as a 'unique' document that represents the 'African' concept of rights.³ Murray elaborates as follows:⁴

This uniqueness is illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one document treating them as indivisible; and the drafting of provisions relating to the latter and to duties of the

¹ M Evans, T Ige & R Murray 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights – The system in practice, 1986-2000* (2002) 37.

² K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) Vol 2 No 2 *African Human Rights Law Journal* 261.

³ R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 10.

⁴ As above.

individual in considerable detail. This has led some to claim that it is the most interesting of the regional instruments.

Under article 1 of the Charter, state parties undertake to adopt legislative and other measures to give effect to the rights in the Charter. Article 62 obliges each state party to submit every two years, from the date the Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter. The organ responsible for evaluation of reports is the African Commission on Human and Peoples' Rights (African Commission).

In terms of the relationship between an international instrument and its supervisory bodies, Evju notes that:⁵

The effectiveness of any international instrument in protecting human rights, in making a difference in peoples' lives when and where it matters, is largely contingent on the nature and competence of the bodies entrusted with supervision.

It should be noted from the outset that the African Commission's competence to ensure effective implementation of the African Charter by member states has been affected due to various problems affecting the state reporting system. The most endemic of these include infrequent and inadequate reporting.

1.2 Problem statement

The reporting system under the African Charter has since inception been largely characterised by failure to report on the part of many state parties. In this respect, Louw recently noted as follows:⁶

The failure of state parties to submit reports or to do so within the time frame specified in the Charter is merely one of the problems hindering the effective functioning of the state reporting system.

⁵ S Evju 'The European Social Charter' in R Blanpain (ed) *The Council of Europe and the challenges of the XXIst Century* (2001) 22.

⁶ Unpublished: L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished PhD thesis, University of Pretoria, 2005 139.

The African Commission's outline on status of submission of state reports shows that as at May 2003, out of approximately 320 reports that were due from state parties as a whole, only 15 percent had been submitted to the Commission⁷. In addition, at least 19 countries had not submitted any report at all. This trend of infrequent reporting is today still a major issue. For instance, Uganda and Zambia have just recently submitted their first periodic and initial reports, respectively despite the fact they ratified the African Charter on 10 May 1986 and 10 January 1984.⁸ Uganda in its report acknowledges the late submission by stating as follows:⁹

Given that we have three pending reports, Uganda humbly requests the Commission to grant us the indulgence of presenting this report as an amalgamated one to cover the outstanding reports as indicated in the above mentioned letter. We sincerely apologise for any inconveniences caused.

The subject reports of Uganda and Zambia will be examined by the African Commission at its 40th ordinary session scheduled to take place from 15 to 29 November 2006.¹⁰

Another related problem is inadequate reporting. Viljoen outlines this problem in the following manner:¹¹

When reports were prepared, indications are that in most instances they were not the product of serious introspection, but rather the formalistic fulfilment of what was regarded as a bureaucratic obligation.

In this regard, according to Nmehielle, many reports turn out to be either too brief and not sufficiently detailed, or unnecessarily voluminous and without providing adequate and sufficiently accurate information to enable the Commission to effectively examine them.¹²

⁷ <http://www.achpr.org> (accessed on 14 May 2006).

⁸ First Periodic Report of the Republic of Uganda to the African Commission on Human and Peoples' Rights, and Initial Report of the Republic of Zambia to the African Commission on Human and Peoples' Rights, <http://www.achpr.org> (accessed on 15 September 2006)

⁹ First Periodic Report of the Republic of Uganda to the African Commission on Human and Peoples' Rights, 2.

¹⁰ <http://www.achpr.org> (accessed on 15 September 2006).

¹¹ F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa – International human rights law in Africa* Vol 1 (2004) 469.

¹² VOO Nmehielle *The African Human Rights System – Its laws, practice and institutions* (2001) 196.

Odinkalu sums up the problems of infrequent and inadequate reporting under the African Charter as follows:¹³

The African Charter mechanisms are uniquely reliant on the state parties and non-state entities such as NGOs and individual victims and advocates for their deployment and efficacy. Unless the Commission receives periodic reports, the reporting procedure in Article 62 of the Charter is of little use. Even when they do so, states may well choose to prepare and submit scanty or uninformative reports, thereby calling the credibility and efficacy of the entire procedure into question.

1.3 Aims and objectives of the study

The study seeks to investigate how the African Peer Review Mechanism (APRM), a structure within the ambit of the African Union (AU), may be employed as a possible way of helping the African Commission resolve infrequent and inadequate reporting under the African Charter. In this regard, the study shall:

- 1.3.1 Analyse the role of the AU and its structures in the African Charter reporting system. This shall be done with the aid of a comparative analysis of other international and regional reporting systems with a view to establishing whether the AU can draw any lessons or guidance from their experiences.
- 1.3.2 Analyse the objectives, mandate and processes of the APRM in relation to the structure's potential contribution to addressing the problems of infrequent and inadequate reporting under the Charter.
- 1.3.3 Make recommendations on how the APRM and the African Commission can coordinate in order to address the problems in issue.

1.4 Relevance of study

This study is very significant because the problem of infrequent and inadequate reporting under the African Charter is one that is yet to be fully resolved. This means that the African Commission's task of ensuring that states are implementing the Charter in their domestic jurisdictions has been adversely affected. If this state of affairs is

¹³ CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 367.

allowed to go on unresolved, the likelihood is that states will either consciously or unconsciously lower their human rights standards. The African human rights system as a whole would be affected in this regard. Therefore, state reporting should be seen as a major component of this system and any problems associated with reporting ought not to be left to the African Commission to resolve on its own. As shall be shown in this study, the APRM has a common mandate with the African Commission in terms of review of implementation of the African Charter and the group of states to be reviewed. Further, the APRM also has inbuilt processes that can be employed to help the African Commission resolve the problems of infrequent and inadequate reporting under the Charter.

1.5 Literature survey

Several writers have identified some major causes of infrequent and inadequate reporting under the African Charter. Most of these writers have proceeded to suggest solutions to these problems.

1.5.1 Infrequent reporting

Mugwanya identifies some reasons for infrequent reporting under the African Charter as, general lack of political will on the part of states, the burden of filing reports under other human rights treaties apart from the Charter, and lack of coordinated effort between state departments.¹⁴ He suggests that the African Commission should 'request state parties with overdue reports to submit reports presented to UN treaty bodies, examine them and seek clarification or supplementary reports where necessary.'¹⁵

Quashigah also identifies lack of political will on the part of state parties as a major cause of irregular submission of reports.¹⁶ He proposes the development of procedures like those under the UN 'that enable the examination of a country's situation even when no report has been submitted.'¹⁷ He also suggests exertion of pressure on governments to submit reports, by national human rights institutions, and also the Pan-African

¹⁴ G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) Vol 1 No 2 *African Human Rights Law Journal* 275.

¹⁵ Mugwanya (n 14 above) 281.

¹⁶ Quashigah (n 2 above) 274.

¹⁷ Quashigah (n 2 above) 275.

Parliament.¹⁸ Viljoen identifies causes of infrequent reporting similar to those advanced by Mugwanya. He emphasises that commissioners should coax their own countries' inactive governments into compliance. He also suggests that commissioners generally can encourage states to submit reports while on promotional visits.¹⁹

1.5.2 Inadequate Reporting

The reasons given for infrequent reporting under the ACHPR have also been generally attributed to inadequate reporting under the Charter, in the literature reviewed. This of course means that even solutions suggested are similar. However, Ankumah identifies two other factors: insufficient human and material resources on the part of governments²⁰ and governments' failure to adequately involve Non-Governmental Organisations (NGOs) in the process of preparation of reports.²¹ In relation to the former, she suggests mobilisation of resources by governments through NGOs²², and in terms of the latter, she suggests preparation of reports in cooperation with NGOs.²³

Finally, Quashigah identifies lack of training of government officials involved in the country report drafting process as a major cause of inadequate reporting.²⁴ He suggests the development of a report form by the African Commission that would serve as guidance to reporting officers in the preparation of reports.²⁵

From the literature surveyed so far, it is clear that some major causes of infrequent and inadequate reporting under the African Charter reporting system are lack of political will on the part of states, multiple reporting obligations, lack of coordinated effort between state departments, lack of training of state reporting officers, insufficient human and material resources, and inadequate NGO participation.

¹⁸ Quashigah (n 2 above) 281, 294.

¹⁹ F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 11 above) 468.

²⁰ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedure* (1996) 81.

²¹ Ankumah (n 20 above) 82.

²² Ankumah (n 20 above) 81.

²³ Ankumah (n 20 above) 82.

²⁴ Quashigah (n 2 above) 296.

²⁵ As above.

The solutions suggested in the literature reviewed are comprehensive but mainly place the burden of resolving infrequent and inadequate reporting on either individual states or the African Commission, with hardly any specific mention of active assistance from the AU and its organs (except Quashigah's suggestion of involvement of the Pan-African Parliament). In this regard, this paper as mentioned above, shall discuss the APRM, as an AU structure that has the potential to effectively coordinate with the African Commission to help address the problems in issue.

1.6 Methodology

The study shall include literature review, based on library research on the subject as well as the internet. International and regional human rights instruments shall also be relied upon together with the APRM primary documents.

1.7 Limitations of proposed study

The first limitation is that the APRM which is a key object of analysis in this study is still in its infancy and therefore insight on the operation of the structure will be based more on its primary documents than actual activities. The second limitation is that some of the information found on internet sites relevant to the study has not been updated for some time. Therefore, there may be a limitation on the currency of such information which shall therefore be analysed with caution.

1.8 Overview of chapters

Chapter one introduces the study, the framework of the problem that the study seeks to address and the methodology to be employed. Chapter two discusses the concept of state reporting, how the system works under the African Charter and the challenges therein. A comparative analysis of other international and regional reporting systems is also made with the chief objective of identifying how they deal with state reporting problems. Chapter three presents an overview of the APRM which includes an analysis of the human rights aspects of the mechanism. Chapter four critically analyses how the APRM can be utilised to help the African Commission address the problems of infrequent and inadequate reporting under the African Charter, and chapter five contains the conclusion and recommendations of the study.

CHAPTER TWO

STATE PARTY REPORTING – AN OVERVIEW

2.1 Introduction

In chapter one, the problems and causes of infrequent and inadequate reporting under the African Charter have been identified. As explained, this paper proposes the APRM as a possible solution to these problems. However, before a discussion in this respect can be undertaken, it is important to first understand the concept of state reporting and how the African system has operated in this regard. It is also pertinent to understand, on a comparative basis, how the different international and regional reporting systems have dealt with problems in their relevant systems and how this can be applied to the African situation.

2.2 Concept and rationale of state party reporting

The process of state party reporting entails that a state party to a treaty submits regular reports to a designated body on the measures it has undertaken to implement the provisions of the relevant treaty. The process is normally provided for under the treaty itself. Several writers have given their views on what the basis of state party reporting is. The views given are similar and are summarised in a recent publication by the UN Secretariat as follows:²⁶

2.2.1 The process of reporting provides an opportunity for an individual state party to conduct a comprehensive review of the measures it has taken to bring its national law and policy into line with the provisions of the treaties to which it is a party.

2.2.2 The preparation of reports provides a platform for national dialogue on human rights amongst the various stakeholders in a state party. It also encourages and facilitates public scrutiny at the national level of government approaches to implementation and stimulates constructive discussion with civil society of ways

²⁶ Concept paper on UN High Commissioner for Human Rights' [UNHCHR] proposal for a unified standing treaty body, Report by Secretariat, 22 March 2006 para 8.

to advance the enjoyment by all of the rights laid down in the various conventions.

2.2.3 Consideration of the reports by treaty supervisory bodies, through constructive dialogue with state parties, allows individual states and states as a whole to exchange experiences on the problems faced in implementation of the instruments, and good practices that facilitate enhanced implementation. It also allows for international scrutiny, which underlines states' responsibility and accountability for human rights protection.

The foregoing aims and objectives of the state party reporting procedure can only be achieved in the presence of several factors. These include; the willingness and capacity of states to report regularly, frankly and engage in a dialogue with national stakeholders before and after submission of reports; the awareness, knowledge and interest of national constituencies to participate in the process; and the lapse of time between submission and consideration of a report, the quality and fairness of the dialogue, concluding observations and recommendations and any follow-up action that may occur.²⁷

These factors as presented above are very important in the analysis of how a particular state reporting system has fared.

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

The African Charter was adopted by the Organisation of African Unity (OAU) in Nairobi, Kenya, in June 1981 and entered into force in October 1986.²⁸ It has been ratified by all members of the OAU/AU.²⁹ 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.

²⁷ Concept paper on UNHCHR's proposal for a unified standing treaty body, (n 26 above) para 10.

²⁸ Compendium of key human rights documents of the African Union, African Charter on Human and Peoples' Rights (2005) 20.

²⁹ F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) Vol 44 No 1 *Journal of African Law* 110.

However, this article does not state who is to receive and review the reports.³⁰ For some writers, including Viljoen, this was left deliberately vague so as not to jeopardise ratification.³¹ In any event, at its 3rd ordinary session in April 1988, the African Commission requested the OAU to specifically assign it with the mandate to consider the reports and to indicate the general orientation as regards their form and substance. This recommendation was adopted at the 24th ordinary session of the OAU Assembly of Heads of State and Government.

Two sets of guidelines for state reporting were adopted by the Commission at its 4th and 23rd ordinary sessions respectively.³² The first guidelines have been criticised as being too detailed, lengthy and repetitive,³³ while the second ones are said to be too brief.³⁴ Nevertheless, it has been said that the relationship between the two sets of guidelines is not clear and practice, inevitably, lies somewhere between the two extremes.³⁵

The African Commission's information sheet on state reporting outlines the procedure for examination of reports as follows:³⁶

2.3.1 Receipt of Reports

Upon receipt of a report, the Secretariat sends copies to all the commissioners, and informs or sends copies to prominent human rights institutions for their comments. The Secretariat prepares questions to be asked at examination and transmits them beforehand to the state concerned and to all commissioners. The Secretariat also provides the rapporteur who will lead discussion on the report with any further information.

³⁰ M Evans, T Ige & R Murray 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 1 above) 39.

³¹ Viljoen (n 29 above) 110.

³² F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 11 above) 470.

³³ Mugwanya (n 14 above) 279.

³⁴ M Evans, T Ige & R Murray 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 1 above) 45.

³⁵ As above.

³⁶ African Commission on Human and Peoples' Rights state reporting procedure, Information Sheet No 4.

2.3.2 Examination of reports

The examination of state reports is done in open sessions of the Commission. The state representative makes the presentation and is questioned by the rapporteur and the other commissioners. The line of questioning is not limited to the questions prepared by the Secretariat. After the question and answer process, the rapporteur sums up and the Chairperson concludes the discussion.

2.3.3 Follow-up

After the examination of a state report, the Commission may send a letter to the state concerned, summing up the examination and putting in writing the questions that were not given satisfactory answers, if any. The state is then requested to submit additional information that it may require. The Commission may transmit to the AU Assembly, the observations accompanied by copies of the reports it has received from the states as well as the comments supplied by the latter if possible.

It goes without saying, however, that the reporting process under the African Charter faces challenges. Other than infrequent and inadequate reporting, there are other problems including a backlog of reports due for examination, inadequacy or non-attendance of state representatives at examination and inconsistency by the Commission in adopting concluding observations.³⁷ As earlier explained in chapter one, the focus of this paper shall be on infrequent and inadequate reporting. At a retreat facilitated by the UN, the African Commission, in conjunction with various stakeholders, identified several steps that it can take to address the challenges under the African Charter reporting system. In terms of infrequent and inadequate reporting, some steps identified included: use of NGO shadow reports and other information to prepare reports and conclusions on the human rights situation in states that fail to submit periodic reports; encourage states to use the same information they have provided in reports to the UN treaty bodies to prepare their reports to the African Commission in order to ease the burden of multiple reporting; establish a follow-up mechanism for its recommendations to state reports; carry out regular training of state officials at sub-

³⁷ See eg, F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 11 above)463-477; Quashigah (n 2 above) 273-281.

regional levels; and request the AU to provide it with adequate funding for the reporting process.³⁸

Although the steps outlined above are commendable, the African Commission needs the active input of the AU and its institutions in order to successfully carry out these and other measures designed to improve the state reporting system. The AU's responsibility in this respect arises first, from the fact that article 30 of the African Charter establishes the African Commission 'within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa'. Second, article 3(h) of the Constitutive Act of the AU sets out one of the objectives of the AU as promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments. Third, the African human rights system, to which reporting is a major part, is a creation of the OAU/AU³⁹

In this regard, the AU has within its organisational set up several organs and structures that can coordinate not only with each other but also with other bodies like the African Commission, to address specific problems facing the African human rights system. Infrequent and inadequate reporting is one of such problems. By way of illustration of this point, a comparative analysis shall be made of how improvement efforts have been made in other international and regional state reporting systems through active support and integration of the relevant systems within the larger human rights structure, by major political organs.

2.4 International comparative analysis of state party reporting

The analysis shall be based on the UN, European and inter-American systems.

2.4.1 The United Nations system

The focus of the discussion on the UN reporting system shall be on the UN Office of the High Commissioner for Human Rights (OHCHR)'s recent proposals for a unified standing treaty body to address the problems caused by fragmentation of the reporting

³⁸ Report of the retreat of members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights, AU Conference Centre, Addis Ababa Ethiopia, 24 to 26 September 2003, 3-4.

³⁹ C Heyns 'The African regional human rights system: The African Charter' (2004)108 *Penn State Law Review* 679.

system.⁴⁰ The OHCHR was established to oversee the entire UN human rights programme.⁴¹ This includes integrating human rights standards throughout the UN⁴² and operating as a service institution for the UN's many human rights organs, especially the treaty monitoring bodies.⁴³ The treaty monitoring bodies are established as Committees under the seven major UN human rights treaties which are the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC) and the Convention on the Rights of All Migrant Workers and Members of their Families (CMW).⁴⁴

One of the functions of the treaty monitoring bodies or Committees is the examination of state reports submitted through the UN Secretary General under the relevant treaties.⁴⁵ Committees issue concluding observations and recommendations whose status of implementation must be reflected in the concerned state's follow-up report.⁴⁶ In general, states have cooperated in this area. This aspect is confirmed by Heyns and Viljoen who provide a list of some countries and the legislative reforms they have undertaken in response, not only to the norms of the relevant UN human rights treaties, but also to the recommendations of the Committees in some cases.⁴⁷

However, the UN reporting system also has challenges, some of which are similar to those under the African system. These include infrequent and inadequate reporting, and a backlog of reports to be considered by the various committees.⁴⁸ However, one major problem specific to the UN reporting system is the growth in the number of treaty bodies

⁴⁰ See Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above).

⁴¹ M Nowak *Introduction to the international human rights regime* (2003) 133.

⁴² H Hannum 'Human rights in conflict resolution: The role of the Office of the High Commissioner for Human Rights in UN peacemaking and peacebuilding' (2006) 28 *Human Rights Quarterly* 8.

⁴³ Nowak (n 41 above) 133.

⁴⁴ Nowak (n 41 above) 78-94.

⁴⁵ See arts 16 & 17 ICESCR, art 40 ICCPR, art 9 CERD, art 18 CEDAW, art 19 CAT, art 44 CRC, and art 73 CMW.

⁴⁶ Nowak (n 41 above) 99.

⁴⁷ C Heyns & F Viljoen 'The impact of the UN human rights treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 500-502.

⁴⁸ Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) paras 16, 18 & 24.

which has resulted in overlap of competencies and duplication.⁴⁹ In this regard, several member states, including Australia and Colombia, have expressed their confusion in the ways in which the different committees operate.⁵⁰ This has resulted in some states failing to report. For instance, Heyns and Viljoen report that changes in the CRC structure of reporting requirements have been cited as a reason for a late report from South Africa.⁵¹

Some attempts have been made by the various Committees to harmonise in some areas following several Chairperson and Inter-Committee meetings. However, the different Committees still largely adopt different approaches in their procedures which continues to make them ineffective.⁵²

Therefore, considering the OHCHR's responsibility to coordinate UN human rights activities, including those of the treaty bodies, it has developed proposals for the creation of a unified standing treaty body in order to streamline and strengthen the treaty body system.⁵³ In this regard, one of the features of the unified body will be the implementation of harmonised guidelines on reporting to all treaty bodies so that the treaty bodies can operate as a unified system.⁵⁴ Further, another major improvement which the unified system is intended to bring is greater integration of the reporting system into the UN system as a whole. Thus according to the UN:⁵⁵

A unified standing treaty body could encourage greater practical engagement by United Nations specialised agencies, programmes and funds in the reporting process, at all phases of the reporting cycle, both at the national and at the international levels. As in the current system, the unified standing treaty body could invite specialised agencies and other parts of the United Nations system to provide written reports with country-specific information on states parties, and could adopt standard guidelines to facilitate this process.

⁴⁹ Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) para 17.

⁵⁰ Heyns & Viljoen (n 47 above) 520.

⁵¹ Heyns & Viljoen (n 47 above) 509.

⁵² Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) para 19.

⁵³ Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) para 1.

⁵⁴ Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) para 4.

⁵⁵ Concept paper on UNHCHR's proposal for a unified standing treaty body (n 26 above) para 55.

Therefore, although some commentators have expressed doubts about the efficacy of the proposed UN standing treaty body,⁵⁶ the enhanced and specialised input of the relevant UN organs which it is intended to bring is very likely to give the reporting system a boost. Information and technical assistance obtained through these organs will serve to enhance the treaty body's work. The proposed unified treaty body also signifies the OHCHR's initiative to resolve the problems created by fragmentation of the UN reporting system which include the standard problems of infrequent and inadequate reporting, and the specific problem of duplication of treaty bodies' work.

2.4.2 The European system

The Council of Europe (Council) is the main political organ in the European human rights treaty regime. The Council has established two major human rights treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950 and the European Social Charter (ESC) of 1961/1996. The ECHR protects civil and political rights and the ESC protects economic, social and cultural rights.⁵⁷ Consequently, the two treaties have separate reporting procedures which nevertheless operate within the structures of the Council.

The discussion on the European reporting system shall, however, be based on the ESC. Compared to the ECHR, the ESC's reporting process has undergone several reforms which provide a more comprehensive analysis.

The European Social Charter

The Council has over a number of years initiated reforms to the reporting system under the ESC. This is because for a long time, the system had been facing several challenges which were mainly caused by its organisational structure. Before the reforms, the reporting system operated as follows: A Committee of Independent Experts (CIE) assessed state reports submitted by member states and sent its conclusions with copies of the reports to a Subcommittee of the Governmental Committee of the Council (GC). The conclusions of the Subcommittee were sent to the Council of Ministers whose

⁵⁶ For instance, that a single report to all treaty bodies summarising a state's implementation of all of the treaties to which it is a party would not have the level of detail or specificity required to fulfil its reporting obligations. (International Women's Rights Action Watch Asia Pacific, Treaty body reform following the UN Secretary General's proposal, NGO NON-PAPER [1], 24 June 2003) <http://www.iwraw-ap.org/news/archive08.htm> (accessed on 26 September 2006).

⁵⁷ Nowak (n 41 above) 160.

role was to make recommendations to states on their reports, after consultation with the Parliamentary Assembly of the Council.⁵⁸

The ESC reporting system faced some challenges similar to the ones currently prevalent under the African Charter. These include, infrequent reporting, an overload of work due to a large number of ratifications, inadequate resources, and limited NGO participation. A further problem under the ESC reporting system was duplication of work amongst the supervision organs, especially the CIE and the GC.⁵⁹ The Council of Ministers depended on the findings of these organs to make its recommendations on reports. Their lack of coordination therefore led to the former's failure to make recommendations on state reports.⁶⁰ Vandamme elaborates on this problem as follows:⁶¹

One of the first criticisms [against the ESC supervision system] related to the slowness of the procedure whereby several bodies acted in succession, each of them giving its opinion on the national situation and on the reports of the bodies preceding it. This has not enabled the Committee of Ministers to exercise its responsibilities [for instance, making recommendations].

Two major reforms were initiated by the Council to revitalise the ESC reporting mechanism. The first was a protocol amending the ESC (the Turin Protocol) of 1991.⁶² Although it brought important changes like the enlargement of the CIE, broadened NGO participation, and clarification of the roles of the supervision bodies,⁶³ it is still not in force because it has to be ratified by all member states. It has therefore been superseded by the Revised European Social Charter of 1996 which entered into force in 1999.⁶⁴

The revised ESC represents the second major initiative of the council to strengthen the supervision mechanism of the ESC. In the words of Vandamme.⁶⁵

⁵⁸ F Vandamme 'The revision of the European Social Charter' (1994)133 *International Labour Review* 636.

⁵⁹ M Mohr 'The Turin Protocol of 22 October 1991: A major contribution to revitalising the European Social Charter' (1992) 3 *European Journal of International Law* 367-368.

⁶⁰ Nowak (n 41 above) 175.

⁶¹ Vandamme (n 58 above) 639-640.

⁶² M Mikkola 'The European Social Charter and the CEE-Countries' in R Blanpain (ed) *The Council of Europe and the social challenges of the XXIst century* (2001) 33.

⁶³ Mohr (n 59 above) 363, 366.

⁶⁴ Nowak (n 41 above) 175; T V Banning, M Sepulveda, G Gudmundsdottir & C Chamoun *Human Rights Instruments* (2004) 186.

⁶⁵ Vandamme (n 58 above) 641.

The revision of the [ESC] was underpinned by two major political considerations, namely the desire to strengthen further the role of the Council of Europe in the area of human rights and...the prospect of new ratifications [by Central and Eastern Europe] undeniably justified at least a revision of its system of supervision so as to prevent it from becoming totally ineffective.

In this regard, the revised ESC has greatly improved the reporting system by mainly bringing in coordination between the relevant organs involved in the process. It has defined their competences. For instance, assessment of reports from a legal stand point is done by the European Committee of Social Rights (ECSR) - former CIE.⁶⁶ The fact that the organs involved in the reporting system have specific and defined competencies has made it easier for the Council of Ministers to use their findings on state reports to make recommendations. Thus, in the period 1993 to 2003, the Council was able to make more than 30 recommendations to several member states including Italy, Greece, Austria, Turkey and France.⁶⁷

Further, as a result of the reforms, the ESC reporting system is now said to have an enviable record of success. For instance, although reports are commonly some months late and the information provided is not always complete, there has never been a case of a state not submitting a report.⁶⁸ The success of the reporting system has been attributed to several factors including the active involvement of the Council and its organs in the reporting process. For instance, due to peer pressure, each member of the GC ensures that the requisite effort is put into the preparation and early submission of his or her country's report.⁶⁹

The foregoing shows that the Council has played a very important role in the reporting system by initiating reforms to resolve the various challenges which were facing the ESC reporting system, including infrequent reporting. The Council has also ensured that different organs, including those within its structure, are able to contribute to the effective running of the reporting system by defining their competences through the Revised ESC.

⁶⁶ Nowak (n 41 above) 175

⁶⁷ As above.

⁶⁸ D Harris *Lessons from the reporting system of the European Social Charter* (2000) quoted in Quashigah (n 2 above) 274-275.

⁶⁹ Harris (n 68 above) 275.

2.4.3 The Inter-American system

The Organisation of American States (OAS) is the main regional organ of the inter-Americas. The OAS initiated the drafting of the American Convention on Human Rights (ACHR) which entered into force in July 1978.⁷⁰ Unlike the ECHR, which includes mainly civil and political rights, the ACHR, in a separate Additional Protocol ('Protocol of San Salvador'), guarantees economic, social and cultural rights. The Protocol of San Salvador was adopted by the General Assembly of the OAS on 17 November 1988, and it entered into force on 16 November 1999.⁷¹

For monitoring of states' compliance with the rights under it, the Protocol of San Salvador introduced a state reporting procedure based on the model of the UN and the ESC.⁷² The procedure is provided for in article 19 of the protocol. Periodic reports are submitted to the Secretary General of the OAS who then transmits them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture for examination. The Secretary General also sends a copy of the reports to the Inter-American Commission of Human Rights,⁷³ and specialised organisations of the inter-American system so that each can assess and report on the reports' compliance with the provisions of the protocol within its respective field of activity.⁷⁴

In terms of actual practice, the reporting system under the Protocol is still in its infancy. The General Assembly of the OAS recently adopted 'Standards for the preparation of periodic reports pursuant to article 19 of the Protocol of San Salvador'⁷⁵ On 6 June 2006, it instructed the OAS Permanent Council to work with the Inter-American Commission on Human Rights and the Inter-American Institute of Human Rights to develop the structure of the monitoring mechanism and progress indicators to be used in the process.⁷⁶ It is clear therefore that not only did the OAS ensure through the Protocol

⁷⁰ General Secretariat of the OAS 'Basic documents pertaining to human rights in the inter-American system' (2003) 9.

⁷¹ Banning, Sepulveda, Gudmundsdottir & Chamoun (n 64 above) 152.

⁷² Nowak (n 41 above) 195.

⁷³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', art 19(2).

⁷⁴ 'Protocol of San Salvador' (n 73 above) art 19(3) & (4).

⁷⁵ OAS General Assembly Resolution AG/RES.2074 (XXX-O/05), <http://www.oas.org> (accessed on 23 October 2006)

⁷⁶ OAS General Assembly Resolution AG/RES.2178 (XXXVI-O/06) <http://www.oas.org> (accessed on 23 October 2006).

that different organs of the inter-Americas with specialised competences would participate in the reporting process, it is also actively coordinating these organs to ensure that they help develop standards and procedures that will make the process more effective.

2.4.4 Lessons to be learnt from the UN, European and Inter-American reporting systems

The foregoing comparative analysis has shown that in the different international and regional systems, political organs and their structures have taken an active part in their respective reporting systems in order to resolve standard reporting problems like infrequent and inadequate reporting, and other problems specific to their systems.⁷⁷ Although, each system has used structures to suit its own peculiar circumstances, the general trend has been to integrate the reporting process into the larger human rights system to make it more effective.

2.5 Involvement of the AU in the African Charter reporting system

Murray aptly describes the OAU/AU's role in the work of the African Commission as follows:⁷⁸

As with the European, Inter-American and UN human rights mechanisms, the ACHPR and its Commissions are established under the auspices of a political body, in the case of Africa the OAU. The Commission's effectiveness in promoting and protecting human rights therefore depends, to a certain extent on whether the necessary support is provided by the OAU.

However, unlike in the other reporting systems discussed above, the AU as the main political organ of the African human rights system has not been actively involved in the African Charter reporting system. This detachment has been described as follows:⁷⁹

Rule 81(3) of the Commission's Rules of Procedure provide for the Commission to go through the Secretary General to inform states of its wishes on what should be in the reports, and Rule 86 enables general observations of the article 62 reports from the

⁷⁷ Particularly the UN and European systems.

⁷⁸ R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 51-52.

⁷⁹ Murray (n 78 above) 60-61.

Commission to be transmitted to the Assembly, which it has started to do. In this regard, one would expect the Assembly at least to have a more active role. However, all the OAU/AU organs appear to have done is to comment briefly and make general statements for states to submit their reports 'as soon as possible if they have not done so' and to seek help from the Commission if they were having trouble doing so.

The failure of the AU to seriously provide the African Commission with the necessary support it needs to effectively carry out its state reporting mandate is clearly compounding the problems that the system is already facing. The AU needs to draw a lesson from the general integration and coordination approach of the UN, European and inter-American systems. It needs to become more actively involved in the reporting system. Arguably, the African Commission needs a greater level of coordination with the AU compared to the coordination between the other treaty monitoring bodies of the UN, European and inter-American systems, and their respective systems' main political bodies. This is because compared to the other monitoring bodies, the African Commission has a broader mandate, the largest number of states to deal with,⁸⁰ and less economic resources,⁸¹ all compounded by the fact that the reporting problems under the African Charter are more endemic than in the other systems.

The legal framework of the African system provides ample opportunity for the active involvement of the AU, its organs and related programmes in the state reporting process. First, article 45(1)(c) of the African Charter makes provision for the Commission, in its functions, to 'cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights'. As Quashigah observes, a liberal interpretation of this article should be enough to give authority to the Commission to involve the various organs and agencies of the AU.⁸²

In addition, the Rules of Procedure of the African Commission have a provision similar to that found in the UN and inter-American human rights treaties for the involvement of 'specialised institutions' in the reporting process.⁸³ Although 'specialised institutions' is not defined, it may reasonably be interpreted to include relevant AU organs, institutions and related programmes.

⁸⁰ I Osterdahl *Implementing human rights in Africa* (2002) 28-29.

⁸¹ Osterdahl (n 80 above) 29.

⁸² Quashigah (n 2 above) 269.

⁸³ Rules of Procedure of the African Commission on Human and Peoples' Rights, rule 82.

2.6 Conclusion

In this chapter, it has been shown that the guidance to be obtained by the AU from the experiences of other reporting systems is that, as the main political organ in the African human rights system, it ought to take an active role in helping the African Commission address the problems of infrequent and inadequate reporting. These problems have not been resolved so far because the African Charter reporting system has been isolated from the larger African human rights system. The AU therefore can draw inspiration from the integration and coordination approach in the other reporting systems by ensuring that the African Commission receives help from its structures. Within its ambit, the AU has the APRM to help the African Commission in this respect. As a starting point, the APRM as shall be shown, already has a review mandate in terms of the African Charter similar to that of the African Commission. Further, the APRM already has an inbuilt process that can address specific causes of infrequent and inadequate reporting. This point is given impetus by the fact that, in the words of Kanbur, the APRM has the comparative advantage of being an Africa-wide initiative that is self-consciously democratic in its roots.⁸⁴

⁸⁴ R Kanbur 'The African Peer Review Mechanism (APRM): An assessment of concept and design' Cornell (2004) 2, <http://www.cornell.edu/pages/sk145> (accessed on 15 August 2006).

CHAPTER THREE

THE AFRICAN PEER REVIEW MECHANISM

3.1 Introduction

This study has so far identified the APRM as a possible solution to the problems of infrequent and inadequate reporting which are currently being faced in the African Charter reporting system. In this context, it is important to first understand the creation of the APRM as a structure within the AU, its objectives, human rights mandate, processes and prospects. This shall be the purpose of this chapter.

3.2 Background of the APRM

The APRM is an implementation program of the New Partnership for Africa's Development (NEPAD). NEPAD was conceived, developed and consolidated within the AU and is therefore part of the AU's structure.⁸⁵

As part of the new initiatives for African development, a draft for a Strategic Policy Framework of the New African Initiative (NAI) and a Programme of Action were adopted by the AU Heads of State and Government (HSG) meeting at Lusaka in July 2001. Soon thereafter, NAI was renamed New Partnership for Africa's Development (NEPAD).⁸⁶ The NEPAD Declaration of 2001 provides the basis of NEPAD as:⁸⁷

A pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic. The program is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world.

⁸⁵ See E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) Vol 2 No 2 *African Human Rights Law Journal* 311.

⁸⁶ C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) Vol 4 No 1 *African Human Rights Law Journal* 131-132.

⁸⁷ The New Partnership for Africa's Development (NEPAD) Declaration (2001) para 1.

The AU identified the following priority areas for NEPAD: Establishing conditions for sustainable development by ensuring; peace and security; democracy and good political, economic and corporate governance; regional co-operation and integration; and capacity building.⁸⁸ A Heads of State and Government Implementation Committee (HSGIC) was appointed to promote NEPAD. According to the NEPAD Declaration, the functions of this committee consist of: Identifying strategic issues that need to be researched, planned and managed at the continental level; reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays; and setting up mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed standards.⁸⁹

The APRM was set up as one such mechanism for reviewing progress. It was provided for in the Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG), agreed to by members of the AU at a summit meeting held in Durban in July 2002.⁹⁰ An APRM Base Document was attached to the DDPECG.

3.3 Aims and objectives of the APRM

The APRM Base Document defines APRM as ‘an instrument voluntarily acceded to by member states of the African Union as an African self-monitoring mechanism.’⁹¹ The mandate of the APRM is:⁹²

To ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

Further, the primary purpose of the APRM is stated as follows:⁹³

⁸⁸ Stals (n 86 above) 132.

⁸⁹ NEPAD Declaration para 201.

⁹⁰ Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG) (2002) para 28; also see C Mbazira ‘A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa’s Development’ (2004) Vol 4 No 1 *African Human Rights Law Journal* 42.

⁹¹ African Peer Review Mechanism (APRM) Base Document (2003) para 1.

⁹² APRM Base Document, para 2.

⁹³ APRM Base Document, para 3.

To foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs of capacity building.

In pursuance of the realisation of the APRM mandate and purpose, the HSGIC adopted further documents on the structure of the APRM in March 2003.⁹⁴ These are the Organisation and Processes of the APRM, and the Objectives, Standards, Criteria and Indicators for the APRM. The objectives, standards and indicators were developed over the following months into a questionnaire to be used by participating countries as a tool for preparing a 'self assessment' in the APRM process.⁹⁵

Participation in the APRM is open to all members of the AU.⁹⁶ It is voluntary but subject to a participation agreement to be signed by the Head of State of the concerned country (the Memorandum of Understanding on the APRM).⁹⁷ In addition, a participating state may terminate its participation in the APRM by giving written notice to this effect to the NEPAD Secretariat, which will in turn inform the participating states in writing.⁹⁸ The current APRM participating countries are Algeria, Angola, Benin, Burkina Faso, Cameroon, Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda and Zambia.⁹⁹ As of May 2006, Djibouti and, Sao Tome and Principe had already expressed their intention to accede to the APRM.

3.4 Structure of the APRM

The APRM has four distinct organisational components. These are:¹⁰⁰

⁹⁴ B Manby 'The African Union, NEPAD and human rights: The missing agenda' 26 *Human Rights Quarterly* (2004) 992.

⁹⁵ Manby (n 94 above) 992. The document is referred to as the Country Self-assessment for the African Peer Review Mechanism (2004).

⁹⁶ APRM Base Document, para 5.

⁹⁷ Stals (n 86 above) 134.

⁹⁸ Memorandum of Understanding on APRM (2003) para 32.

⁹⁹ <http://www.nepad.org> (accessed on 26 September 2006). Sudan and Zambia are the latest to join the APRM. They formally acceded on 22 January 2006 at the 4th Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism held in Khartoum Sudan, <http://www.nepad.org> APRM Communiqué issued on 22 January 2006.

¹⁰⁰ See the African Peer Review Mechanism Organisation and Processes, NEPAD/HGSIC-3-2003/APRM/Guideline/O&P, 9 March 2003, 1.

- 3.4.1 The Committee of Participating Heads of State and Government (APRM Heads of State Forum or APRM Forum) which is the highest decision-making authority in the APRM. The Chairperson of the APRM Forum, as at 22 January 2006, was Chief Olusegun Obasanjo, President of Nigeria.¹⁰¹
- 3.4.2 The Panel of Eminent Persons (APRM Panel) which oversees the review process to ensure the integrity of the process, to consider review reports and to make recommendations to the APRM Forum. As at January 2006, the APRM Panel was chaired by Ambassador Bethuel Kiplagat from Kenya. The other members included Prof Adebayo Adedeji (Nigeria), Prof Mohammed Babes (Algeria), Dr Dorothy Njeuma (Cameroon), Ms Marie-Angelique Savane (Senegal), and Dr Chris Stals (South Africa).¹⁰²
- 3.4.3 The APRM Secretariat which provides the secretarial, technical, coordinating and administrative support services for the APRM. The Secretariat is located in South Africa.¹⁰³
- 3.4.4 The Country Review Team (APRM Team) constituted only for the period of the country visit, which visits a country to review progress on that country's Programme of Action, as envisaged in paragraph 13 of the APRM Base Document, and produces the APRM report on the country.

3.5 The APRM Process

According to the APRM Base Document¹⁰⁴, the APRM process is as follows:

3.5.1 Stage One

This stage involves a study of the political, economic, corporate governance and development environment in the country to be reviewed, based principally on up-to-date

¹⁰¹ Communiqué issued at the end of the 4th Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism, 22 January 2006, Khartoum, Sudan, para 1, <http://www.nepad.org> (accessed on 2 October 2006).

¹⁰² Communiqué of the 15th Meeting of the African Peer Review Mechanism panel of Eminent Persons, 19-20 January 2006, Khartoum, Sudan, 1.

¹⁰³ As above.

¹⁰⁴ APRM Base Document, paras 18 – 28.

background documentation prepared by the APRM Secretariat and material provided by national, sub-regional, regional and international institutions.

3.5.2 Stage two

In stage two, the review team visits the country concerned where its priority order of business is to carry out the widest possible range of consultations with the government and different non governmental groups including civil society. The first APRM country review mission was conducted in Ghana between 4 and 16 April 2005.¹⁰⁵

3.5.3 Stage three

Stage three is the preparation of the Team's report. The report is prepared on the basis of the briefing material prepared by the APRM Secretariat and the information provided in-country by official and unofficial stakeholders. The report must be measured against the applicable political, economic and corporate governance commitments made and the Programme of Action. The report is discussed with the government to ensure accuracy and the government's responses are appended to the Team's report. The Team's report must also identify any problems, the government's will to rectify them and the resources required for this purpose.

3.5.4 Stage four

The fourth stage begins when the Team's report is submitted to the APRM Forum through the APRM Secretariat. The consideration and adoption of the final report by the Forum, including their decision in this regard, marks the end of this stage. On 22 January 2006, the APRM Forum considered the report on Ghana, the first country review report since the inception of the APRM. The Forum noted both the best practices and weaknesses in Ghana. It observed that Ghana had many best practices which could be learned by other African countries. Finally, the Forum directed the APRM Panel and Secretariat to monitor and report on the implementation of the Programme of Action in Ghana.¹⁰⁶

¹⁰⁵ Brief report issued at the end of the African Peer Review Mechanism country review mission to Ghana, 4-16 April 2005, Accra, Ghana (APRM Secretariat) para 1, <http://www.nepad.org> (accessed on 2 October 2006).

¹⁰⁶ Communiqué issued at the end of the 4th Summit of the Committee of Participating Heads of State and Government in the APRM (n 101 above) paras 6-15.

3.5.5 Stage five

Six months after the report has been considered by the APRM Forum, it is to be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, and the Economic, Social and Cultural Council (ECOSOCC) of the African Union. This constitutes the fifth stage of the process.

3.5.6 Period for country review

The APRM Base Document also provides that the review process per country should not be longer than six months, commencing on the date of the inception of stage one up to the date the report is submitted for the consideration of the APRM Forum.¹⁰⁷ As at January 2006, the participating countries that were still undergoing review included Algeria, Benin, Kenya, Mauritius and Rwanda.¹⁰⁸

3.5.7 Enforcement

If the concerned government shows a demonstrable will to rectify shortcomings identified during the process, the participating governments should assist it in whatever way they can and also urge donor governments and agencies to provide aid. However, if the necessary political will is not forthcoming from the government, the participating states should engage it in constructive dialogue, offering in the process technical and other appropriate assistance. If dialogue proves unavailing, the APRM Forum may put the government on notice of their collective intention to proceed with appropriate measures by a given date. All considered, such measures are always to be utilised as a last resort. Due to the infancy of the APRM review process, it is not yet clear what form these measures would take. Ngamau suggests the possibility of a recommendation of donor funding withdrawal and economic sanctions under the AU.¹⁰⁹

3.5.8 Funding

The APRM Base Document provides that funding for the APRM will come from assessed contributions from participating member states.¹¹⁰ However, donor funding is

¹⁰⁷ APRM Base Document, para 26.

¹⁰⁸ Communiqué issued at the end of the 4th Summit of the Committee of Participating Heads of State and Government in the APRM (n 101 above) para 14.

¹⁰⁹ R Ngamau 'Regional integration: Comparative Experiences: The role of NEPAD economic regulation and interpretation' (2004) 10 *Law and Business Review of the Americas* 515.

¹¹⁰ APRM Base Document, para 27.

also envisaged to a limited extent. The APRM Organisation and Processes document clarifies the issue of funding as follows:¹¹¹

It is essential, however, that APRM does not rely on external partners for funding, although such partnerships could be welcomed if they are managed in a way that clearly respects African ownership of the APRM and its processes. Support from external partners should be sought mainly for the implementation of the Country Programme of Action and capacity building to improve performance in the weak areas.

The APRM is to be reviewed once every five years.¹¹² Considering its infancy, such reviews will offer an opportunity to strengthen the APRM in line with the experiences that will be gained as and when various peer reviews are conducted.

3.6 The APRM and Human Rights

One of the major components of the AU agenda, as can be seen from its objectives as set out in the Constitutive Act, is the promotion and protection of human rights.¹¹³ However, the Constitutive Act has been criticised for its failure to adequately provide implementation and monitoring mechanisms to pursue these human rights objectives.¹¹⁴ In this regard, NEPAD, through the APRM offers one of the necessary frameworks to fill this gap in the AU Agenda.¹¹⁵ Thus, Murray writes as follows:¹¹⁶

So far the focus of the OAU/AU has been on setting standards. While this is important, it has not been backed up in practice with a clear enforcement mechanism. NEPAD and the processes established under it offer some indication of moves in this direction...NEPAD provides for an APRM which may actually facilitate a more integrated approach to human rights and development issues.

The NEPAD Declaration sets out democracy, human rights and good governance as key aspects of NEPAD.¹¹⁷ In this regard, the DDPECG, which establishes the APRM, contains an undertaking by participating states to enforce various human rights issues

¹¹¹ APRM Organisation and Processes, 16-17.

¹¹² APRM Base Document, paras 26-28.

¹¹³ See for instance arts (f), (g) and (h) of the Constitutive of the African Union (2000/2001).

¹¹⁴ D Olowu 'Regional integration, development and the African Union Agenda: Challenges, gaps and opportunities' (2003) 13 *Transnational Law and Contemporary Problems* 211.

¹¹⁵ Olowu (n 114 above) 211.

¹¹⁶ Murray (n 78 above) 264.

¹¹⁷ NEPAD Declaration, para 49.

such as the rule of law; equality of all citizens before the law and the liberty of the individual; individual collective freedoms, including the right to form and join political parties and trade unions; equality of opportunity for all; and inalienable right of the individual to participate in elections.¹¹⁸ The standards to be used by the APRM participating states in enforcing human rights include the African Charter and various other regional and international human rights instruments.¹¹⁹

The importance of the APRM as an implementation tool for human rights under NEPAD and the AU is stated as follows by Manby:¹²⁰

The combined effect of the African Union and NEPAD documents is that African leaders have in principle undertaken to be jointly responsible for democratic development in Africa. They have undertaken to promote the principles of the AU and NEPAD—including respect for human rights—not only in their own countries but in neighboring countries as well. If implemented as originally proposed, the peer review mechanisms would allow a previously unthinkable degree of intrusion into matters hitherto regarded as hidden behind barriers of state sovereignty. No other regional grouping has committed itself to similar peer review on political as well as economic governance issues (The OECD has developed the concept of peer review furthest to date, and has put in place mechanisms for a peer review of a range of economic issues, including development assistance. The OECD does not, however, review human rights or political governance performance) Above all, the AU and NEPAD commitments open up a political space in which issues of democracy and the rule of law can be more openly discussed than ever before.

However, the manner in which NEPAD's human rights provisions are framed has been a subject of some criticism. One notable criticism relates to how it provides for civil and political rights on one hand, and social, economic and cultural rights on the other. For instance, Baimu's view is that while NEPAD might be African, 'its human rights content is largely Eurocentric in perspective, especially in its overly strong focus on civil and political rights.'¹²¹ Mbazira adds that the NEPAD document only vaguely refers to economic, social and cultural rights 'in terms of greater access to services instead of as

¹¹⁸ DDPECG, para 7.

¹¹⁹ Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism, NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 9 March 2003, 5-10.

¹²⁰ Manby (n 94 above) 998.

¹²¹ Baimu (n 85 above) 309.

concrete inherent rights.¹²² A perusal of the NEPAD Declaration and the DDPECG documents does indeed add some legitimacy to Baimu and Mbazira's criticism of NEPAD. However, it is important to note that the human rights provisions of these documents have been further elaborated under the Objectives, Standards, Criteria and Indicators for the APRM which shall be used in the actual implementation of human rights in the peer review process.

In this respect, this document attempts to provide sufficient coverage for both civil and political rights, and economic social and cultural rights. In terms of both categories of rights, there is a specific objective for the 'promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments.'¹²³ Various all embracing criteria are given in respect of this objective. For instance, 'what has the government done to implement the various international instruments guaranteeing respect for economic, social, cultural, civil and political rights to which it has acceded and ratified?'¹²⁴ The APRM Country Self-assessment document also provides further indicators on the level of implementation of both categories of rights. These include equal access to employment, education, health, freedom of speech, freedom of religion, and accessible and affordable housing.¹²⁵

Clearly, therefore, the human rights provisions under the various NEPAD documents are to a large extent elaborated under the APRM implementation documents. In this respect, Manby for instance refers to the APRM Country Self-Assessment Questionnaire as being 'more detailed in its line of inquiry than the original NEPAD documents'.¹²⁶

3.7 Prospects for the APRM

The APRM is a fairly new and unique mechanism in the African human rights system and has, not surprisingly attracted a lot of debate. Apart from criticisms on the NEPAD human rights provisions, the APRM has also been specifically criticised for various reasons, some major ones being the following:

¹²² Mbazira (n 90 above) 50.

¹²³ Objectives, Standards, Criteria and Indicators for the APRM, 9.

¹²⁴ Objectives, Standards, Criteria and Indicators for the APRM, 9.

¹²⁵ Country Self-Assessment for the APRM, 32-33.

¹²⁶ Manby (n 94 above) 992.

First, that the APRM's effectiveness would depend on the willingness of African governments to allow their governance policies to be reviewed and their willingness to accept and implement recommended changes¹²⁷. This criticism, however, does not take into consideration the power of peer pressure. In the words of Pagani, "the effectiveness of peer review relies on the influence and persuasion exercised by the peers during the process."¹²⁸ Thus any reluctant government is likely to still comply as a result of peer pressure from other participating states. Further, as observed by Ngamau, "the APRM includes, by its very nature, the waiver of absolute sovereignty of the member to provide for APRM implementation of the member at the national level."¹²⁹ Therefore, since APRM participating states willingly waive their sovereignty to accommodate peer review, they are more likely to comply with the peer review process than if it were otherwise.

Another criticism of the APRM is that since participation in the APRM is voluntary very few African leaders will ever come under the scrutiny of the mechanism¹³⁰. In this respect, it is important to note that to the contrary, the number of APRM accessions is growing steadily. As at 22 January 2006, there were 25 APRM member countries.¹³¹ Considering that this is already almost half the number of AU states, and that the APRM is still in the initial stages of its development, the likelihood is that the majority of African countries will sooner or later become part of the process. In any case, scrutiny of some countries under the APRM is better than no scrutiny at all.

A further criticism is that since the APRM is not based on a binding legal instrument, this may weaken existing legal obligations by relegating them to 'aspirational' principles¹³². It may be argued that the non-legally binding nature of the APRM founding documents means that they contain 'soft law'. Contrary to the criticism in issue, soft law has some advantages over binding law. For instance, according to Meron, soft law usually has a more developed normative content than an instrument of a formally binding character

¹²⁷ CFJ Doebbler 'A Complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and other African Union initiatives affecting human rights' (2003) 13 *Transnational law and Contemporary Problems* 7.

¹²⁸ F Pagani 'Peer Review: A tool for cooperation and change – An analysis of the OECD working method' OECD SG/LEG (2002) 1, <http://www.oecd.org/dataoecd/33/16/1955285.pdf> (accessed on 14 May 2006).

¹²⁹ Ngamau (n 109 above) 515.

¹³⁰ Olowu (n 114 above) 211.

¹³¹ <http://www.nepad.org> (accessed on 26 September 2006). Sudan and Zambia are the latest to join the APRM. They acceded on 22 January 2006 at the 4th Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism held in Khartoum Sudan, <http://www.nepad.org> APRM Communiqué issued on 22 January 2006.

¹³² Doebbler (n 127 above) 7.

(such as a convention).¹³³ Further, that respect for soft law is ensured by public opinion and encouraged by international governmental organisations and NGOs.¹³⁴ Therefore, the non-legally binding nature of the APRM standards may actually encourage compliance. In this regard, Udombana writes as follows:¹³⁵

The collective action, mutual learning, and support implicit in such a mechanism [APRM] can have great benefits, demonstrating to African citizens and the international community that African countries have the political will and commitment to abide by codes and standards that they set for themselves.

Therefore, further benefits that are associated with the APRM like technical assistance and an image of being pro-democratic by accepting to be peer reviewed, will encourage states to comply with the standards under the APRM. This will in turn ensure that the APRM operates as a mechanism that entrenches accountability on the part of states by requiring them to account how far they have gone to achieve the objectives of NEPAD,¹³⁶ and consequently of the AU, especially in terms of human rights.

3.9 Conclusion

The analysis of the nature of the APRM, its processes and human rights mandate has shown that it offers the AU an opportunity to strengthen some important aspects of the African human rights system. The APRM is flexible enough to effectively coordinate with other human rights organs within the African system. In the previous chapter, it was established that the APRM could coordinate with the African Commission in order to help the latter resolve the problems of infrequent and inadequate reporting. The following chapter will discuss how this coordination can be achieved.

¹³³ T Meron *Human rights in internal strife: Their international protection* Grotius, Cambridge (1987) quoted in Murray (n 3 above) 142.

¹³⁴ Meron (n 133 above) 137.

¹³⁵ NJ Udombana 'A harmony or cacophony? The music of integration in the African Union and the New Partnership for Africa's Development' (2002) 13 *Indiana International and Comparative Law Review* 185.

¹³⁶ Mbazira (n 90 above) 43.

CHAPTER FOUR

THE ROLE OF APRM IN STATE PARTY REPORTING

4.1 Introduction

Some fundamental causes of infrequent and inadequate reporting in the African Charter reporting system were identified in chapter one. In chapter two, it was established through a comparative analysis of the UN, European and inter-American systems that active involvement of major political organs and their structures is important to help address both standard and specific reporting problems in the relevant system. In this respect, efforts have been made to coordinate and integrate the reporting system into the larger human rights structure. In Africa, the problems of infrequent and inadequate reporting have remained unresolved chiefly because the reporting system and indeed the African Commission have been generally isolated.

In the APRM, the AU has an 'African' answer to helping the Commission resolve the problems in issue through coordination. Indeed the APRM has already taken cognizance of these problems. In the recent APRM review on Ghana, the APRM Team expressed concern at Ghana's failure to submit reports regularly to the African Commission.¹³⁷ This chapter shall therefore discuss the specifics of the possible coordination between the APRM and the Commission. First, their common mandate will be highlighted followed by an analysis of the APRM processes and their inbuilt potential to specifically address the identified causes of infrequent and inadequate reporting.

4.2 The common mandate of the APRM and the African Commission

The APRM and the African Commission operate in the realm of the African human rights system which is, to a large extent, a creation of the OAU/AU. The APRM through NEPAD is an initiative of the OAU/AU and so is the African Charter which establishes the African Commission¹³⁸. The APRM has a mandate to ensure implementation of

¹³⁷ African Peer Review Mechanism Country Review Report of the Republic of Ghana (2005) 15, <http://www.nepad.org> (accessed on 2 October 2006).

¹³⁸ The African Commission is established by article 30 of the African Charter on Human and Peoples' Rights (1981/1986).

human rights standards by participating states (who are also AU members) as provided for under the DDPECG.¹³⁹ The African Charter establishes the human rights mandate of the African Commission to include ensuring ‘the protection of human and peoples’ rights under conditions laid down by the present Charter.’¹⁴⁰ All members of the AU have ratified the African Charter.¹⁴¹

The APRM and the African Commission both have a specific mandate to review the relevant members’ implementation of the African Charter. Under the APRM, as part of the review process, participating states are required to outline legislative, policy or institutional frameworks that have been put in place to implement the African Charter¹⁴², and also to ‘outline the challenges experienced and the steps taken to address shortfalls and capacity constraints.’¹⁴³ This review is to be conducted every two to four years.¹⁴⁴ Similarly, each state party to the African Charter is obliged to submit to the African Commission every two years ‘a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.’¹⁴⁵

The foregoing provisions show that the APRM and the African Commission have a common mandate in terms of review of the relevant member states’ implementation of the African Charter. This common mandate also relates to the fact that the same group of states are subject to review by both the APRM and the African Commission. This common mandate can be used as a spring board for the coordination in state reporting between the two structures. In the process, coordination will also avert any possible overlaps and duplication in the work of the APRM and the Commission. The negative consequences of overlaps and duplication have been presented as follows by Baimu:¹⁴⁶

The creation of more institutions and mechanisms at the regional level is likely to present problems to African states regarding how to allocate resources and personnel to deal

¹³⁹ APRM Base Document, para 2 read together with paras 7-15 of the DDPECG), the section on ‘Democracy and good political governance.’

¹⁴⁰ African Charter on Human and Peoples’ Rights (1981/1986), article 45(2).

¹⁴¹ Viljoen (n 29 above) 110.

¹⁴² Country Self-assessment for the APRM, paras 2.2 and 3(iii).

¹⁴³ Country Self-assessment for the APRM, para 3(iv).

¹⁴⁴ Although three other periods are provided for, 2 to 4 years is the regular one. APRM Base Document, para 14.

¹⁴⁵ African Charter on Human and Peoples’ Rights, art 62.

¹⁴⁶ Baimu (n 85 above) 316.

with obligations arising from their involvement in these institutions and mechanisms. For example, the APRM is to develop a review procedure, which is similar to the state reporting under the African Charter, thus adding yet another reporting burden on the bureaucracies in the African states.

Doebbler adds another dimension by observing that:¹⁴⁷

The worst case scenario will be one in which the African human rights bodies, as well as those of more general jurisdiction, compete in a way that effectively disables human rights protections.

Since the APRM and the Commission would be coordinating, rather than operating separately in terms of state reporting, the dangers of overlap or duplication in their work will very likely be a non-issue. Indeed, by way of illustration, this is the underlying reason behind the proposal for the creation of a unified standing treaty body in the UN. The APRM and the Commission should also take advantage of the fact that their constituent documents already provide opportunities for them to coordinate.

4.3 Existing provisions facilitating coordination between the APRM and the African Commission

The African Commission has expressed its desire to work with the APRM in the following terms:

The NEPAD African Peer Review Mechanism (APRM) makes provision for the participation of the African Commission in its process. The African Commission should therefore develop guidelines for a working relationship with the APRM review process, where applicable.¹⁴⁸

Indeed, the APRM founding documents provide an opportunity for the APRM and the African Commission to work together. Similarly, so do the African Charter and the African Commission's Rules of Procedure. In terms of the APRM, first the DDPECG provides as follows:¹⁴⁹

¹⁴⁷ Doebbler (n 127 above) 7.

¹⁴⁸ Report of the retreat of members of the African Commission (n 38 above) 8.

¹⁴⁹ DDPECG, para 15.

To promote and protect human rights, we have agreed to support the Charter, African Commission and Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights.

Second, on matters relating to human rights, democracy and political governance, the African Commission is one of the major institutions that may be requested by the APRM Forum to conduct technical assessments on countries to be reviewed.¹⁵⁰ Third, in the fifth and final stage of the peer review process of a country, the Review Team's report should be formally and publicly tabled before key regional and sub-regional structures including the African Commission.¹⁵¹

The provisions of the African Charter and the African Commission's Rules of Procedure also offer an opportunity for the Commission to work with the APRM. As discussed in chapter two, article 45(1)(c) provides for the African Commission to 'cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights', which may be interpreted to include the APRM.

Further, under rule 82 of the African Commission's Rules of Procedure, the Commission may invite 'specialised institutions' to submit observations on state party reports produced by member states of these institutions, on matters that relate to their areas of competence. A reasonable and progressive interpretation of this provision may include the APRM being invited to submit such observations in relation to the state party reports of APRM member states.

The foregoing discussion has shown that the APRM and the African Commission already have an opportunity to work together to strengthen the African Charter reporting mechanism. Consideration should now be given of how this may be achieved, particularly to address the problems of infrequent and inadequate reporting.

4.4 Coordination options and their implications

The dynamic nature and flexibility of the APRM, coupled by the silence of article 62 of the African Charter in terms of who is to receive and review state reports, present

¹⁵⁰ APRM Organisation and Processes, paras 6.1 & 6.3.

¹⁵¹ APRM Base Document, para 25.

several coordination options with the African Commission. Three of the major ones and their implications will be discussed in this section. For this purpose, each option will be discussed in terms of how the different stages of reporting will be allocated, that is, initiation, preparation, submission and examination of the report, and follow up, with the objective of the APRM helping the African Commission. It should be noted that these options relate only to parties to the African Charter who are also APRM participants.

4.4.1 Option one

In the first option, the reporting process under the African Charter would be left as it is but with the added input of the APRM in terms of exerting the necessary pressure on APRM participating states to submit timely and adequate reports to the African Commission. Therefore, initiation and preparation of the report would still be done by states, followed by submission and examination before the African Commission, and follow-up by the Commission. There would be no separate APRM review of implementation of the African Charter. The main advantage of this option is that it would not necessitate any amendments to the Rules of Procedure of the African Commission, nor to the African Charter or the APRM Base Document, for that matter.

Under normal circumstances, the pressure exerted by the APRM Forum on states to submit timely and adequate reports would have the desired effect. However, pressure would not be sufficient in this case because states would still be faced with the challenges that are causing them to report infrequently and inadequately, for instance, insufficient human and material resources, and inadequate NGO participation in the preparation of reports.

4.4.2 Option two

The second option would be for all the stages of reporting to be carried out through the APRM process, with no separate review by the African Commission. Therefore, reports would be initiated and prepared through the APRM process, submitted for examination before the APRM Forum (to be examined jointly by the Forum and the African Commission), and recommendations followed up through the APRM. A positive outcome of this option would be that the APRM's full participation in the stages of reporting would ensure timely and adequate reports. However, although the involvement of the APRM Forum in the submission and examination of reports would

most likely ensure that the reports are examined promptly and that recommendations are given and followed up, this arrangement may have several burdensome implications.

First, even though the examination of reports would be done in conjunction with the African Commission, neither the APRM Forum nor any other APRM organ, including the Panel itself, have the necessary experience and expertise acquired by the Commission over the years in terms of examination. This may retard proceedings. Further, the independence of the Commission may be undermined especially were the Commission and the APRM Forum fail to agree on the status of implementation of particular provisions of the Charter by a state in issue, either in the course of examination of the report or when making recommendations. As stated by Murray, although coordination with political organs (like the APRM Forum in this case) is necessary, the independence of the African Commission 'must be maintained in order for it to achieve its aims of promotion and protection.'¹⁵²

In addition, although the involvement of the APRM Forum in the examination of reports might not necessary imply the need to amend the African Charter (considering its silence on who is to receive and examine reports), there would be need to amend Chapter 15 of the Commission's Rules of Procedure which gives exclusive jurisdiction over receipt and examination of reports to the Commission. Further, the grant of this exclusive jurisdiction was facilitated by the OAU/AU Assembly¹⁵³ and therefore consultations with this organ would be necessary.

4.4.3 Option three

The third option would be a hybrid of the first two options. The main purpose would be to incorporate the advantages of the latter, but avoid their pitfalls. In this regard, reports would be initiated and prepared through the APRM process, submitted and examined before the African Commission, and followed up through the APRM. There would be no separate review of implementation of the African Charter under the APRM. This arrangement would ensure, first that reports are initiated and prepared timely and adequately through the APRM process, and enforced accordingly. Second, the

¹⁵² Murray (n 78 above) 52.

¹⁵³ See Chapter two, section 2.3.

independence of the African Commission would be maintained through submission and examination of reports before that expert and experienced body.

Third, there would be no need to amend the African Charter, APRM Base Document or the Rules of Procedure of the Commission to facilitate this arrangement. The report would be initiated, prepared and enforced through the APRM process in line with the provisions of the APRM Base Document, and would be submitted and examined before the Commission in accordance with its Rules of Procedure. The only necessary formality may be for the APRM and the African Commission to enter into a memorandum of understanding on how they would coordinate, or for the AU Assembly to pass a resolution facilitating the envisaged coordination between the two.

Therefore, this paper shall take this third option as the most appropriate to ensure that the APRM and the African Commission coordinate effectively to address the problems of infrequent and inadequate reporting.

4.5 Incorporation of state reporting in the APRM process to address infrequent and inadequate reporting

In accordance with option three above, the coordinated state reporting process would be: Initiation, preparation and enforcement of reports through the APRM process and submission and examination thereof before the African Commission. The details of this procedure will be discussed in this section. Particular attention shall be given to how each stage of the process would address specific and identified causes of infrequent and inadequate reporting which are lack of political will on the part of states, multiple reporting obligations, lack of coordinated effort between state departments, lack of training of state reporting officers, insufficient human and material resources, and inadequate NGO participation. It should be noted again that the APRM is an 'African' answer to these specific problems of reporting.

4.5.1 Initiation of preparation of the state report

In order to ensure that a state report is prepared in time for submission before the Commission every two years as prescribed by the African Charter, the APRM Forum could use its mandate to call for a review that is not part of the periodically mandated reviews under paragraph 14 of the APRM Base Document. It would not be ideal to use

the periodically mandated reviews because they involve a wide variety of 'values, codes and standards as outlined in the [DDPECG].'¹⁵⁴ Clearly in order to ensure that a review is comprehensive and specifically for the preparation of the state report under the African Charter, this would have to be called for separately by the Forum. Preparation of reports through the periodically mandated APRM reviews would therefore only be in exceptional circumstances with the added necessary caution in terms of ensuring a comprehensive report. It should be noted nevertheless that the cycle of periodically mandated reviews is similar to the two year period under the African Charter.¹⁵⁵

In light of the envisaged cooperation between the APRM and the Commission, the latter could formally request the APRM forum to call for a review as and when a specific country's state report is due for submission.

Timely initiation of a report is an important step in addressing the problem of infrequent reporting. In the words of Viljoen, 'the first, obvious requirement is that the process of drafting a report has to be initiated and completed.'¹⁵⁶ At this point, the APRM Forum would contribute to the former. A large number of state parties to the African Charter have failed to initiate the drafting of state reports on time therefore leading to the current problem of infrequent reporting. As discussed in chapter one of this paper, this has been attributed mainly to lack of political will on the part of states, multiple reporting obligations and lack of coordinating effort between state departments. The last point was recently noted in the APRM country review report of Ghana as being a major reason for Ghana's failure to submit timely reports under the African Charter to the African Commission.¹⁵⁷ The problem was presented as follows:¹⁵⁸

State parties to the African Charter on Human and Peoples' Rights are required to submit state reports to the African Commission pursuant to the Charter every second year. After having avoided this obligation for a number of years, Ghana submitted its second report to the Commission in March 2000. Since then, the country has not been to the

¹⁵⁴ APRM Base Document, para 15.

¹⁵⁵ APRM Base Document para 14.

¹⁵⁶ F Viljoen 'Introduction to the African Commission and the regional human rights system' in Heyns (n 11 above) 463.

¹⁵⁷ APRM Country Review Report of the Republic of Ghana (n 137 above) 15.

¹⁵⁸ As above

Commission. This is a major weakness in the internal systems of the Ministries of Foreign Affairs and Justice.

Initiation of the process to draft the state report through the APRM Forum would first address the problem of political will by ensuring that the process begins whether a government is willing or not. Second, the APRM Forum's decisive role of initiating reports would help those governments which are willing but are prevented from initiating the process because they have to worry about other reporting obligations, or because there is no coordination between their departments.

4.5.2 Preparation of the state report

The report would be prepared through the stages of the APRM process as provided for in the APRM Base document¹⁵⁹ as follows:

4.5.2.1 Stage one

As a prerequisite to preparing the state report, a study of the political, economic, corporate governance and development environment of the subject country would be conducted through the APRM Secretariat. This study is very important because it adds to the adequacy of the report once incorporated therein. The study would provide an understanding of the general framework in which human rights are protected in the country. Such an understanding is important when it comes to the assessment of how the government has implemented specific provisions of the African Charter. The specialised compilation of the background information by the APRM Secretariat would specifically address one of the major causes of inadequate reporting, which is lack of training of government reporting officers.

It should be noted that although some state reports so far submitted to the African Commission have included some form of background information on the political, economic and development environment of the country, this information has generally been written without much critical assessment. This is perhaps not surprising considering that the reports are prepared by the governments themselves. Recent

¹⁵⁹ Paras 18-25.

examples are the state reports of Uganda and Zambia.¹⁶⁰ Therefore the compilation of this background information through the APRM Secretariat would also ensure that it is more objective especially considering the fact that the background study would also be based on independent information from national, sub-regional, regional and international institutions.¹⁶¹

The completion of this background study would mark the end of stage one of the process of preparing the state report.

4.5.2.2 Stage two

In this stage, the APRM Review Team (led by members of the Panel) would visit the subject country. The purpose of the visit would be to carry out the widest possible range of consultations with the government and civil society. These consultations are already provided for in the APRM review process.¹⁶² Some members of the African Commission could be invited on these visits to offer the necessary technical assessment during consultations. Consultation with both governmental and non-governmental sources would ensure the production of a balanced and adequate state report that encompasses a wide range of views. As shown in chapter one, insufficient involvement of NGOs in the reporting process has been identified as one of the major causes of inadequate reporting.

Evans, Ige and Murray highlight the importance of NGOs in reporting as follows:¹⁶³

Given their knowledge of the actual human rights situation in the various state parties to the Charter or concerning various groups, NGOs can be a reliable source of information which the Commission could utilise, particularly to verify aspects of states' reports.

Depending on the area of competence of each organisation consulted, the Team would aim to gather information on implementation of specific provisions of the African Charter.

¹⁶⁰First Periodic Report of the Republic of Uganda to the African Commission on Human and Peoples' Rights, 10-12, and Initial Report of the Republic of Zambia to the African Commission on Human and Peoples' Rights, 28-53 (n 7 above).

¹⁶¹ APRM Base Document, para 18.

¹⁶² APRM Base Document, para 19.

¹⁶³ M Evans, T Ige & R Murray "The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 1 above) 57.

The specificity of this information once incorporated would significantly make the report more comprehensive.

4.5.2.3 Stage three

After concluding the above mentioned consultations, the Team's task would then be to draft the state report in conjunction with the representatives of the concerned government. This is because not only is the government the chief implementer of the Charter in the country, it will also be examined as to the contents of the report by the African Commission. In turn, the government would benefit from the specialised input of the Team as this would address any problems of insufficient human or material resources, and untrained government reporting officers, which have been identified as some of the major causes of inadequate reporting. It would be essential for the Team to also invite NGOs to select representatives who would be part of the drafting team. NGOs would aid the APRM Team in presenting the necessary critical analysis thus adding to the adequacy of the report.

As provided for by the APRM Base Document, the report would be drafted based on 'the information provided in-country by official and unofficial sources during the wide-ranging consultations and interactions with all stakeholders.'¹⁶⁴ The APRM Secretariat's background information prepared in stage one of the process would also be incorporated.¹⁶⁵ Further, specific information would also be included on any identified shortcomings, government's responses thereto and resources necessary to rectify these shortcomings.¹⁶⁶ The African Commission has encouraged states to provide such information in reports in order to assist it understand the special circumstances of each state.¹⁶⁷

Were applicable, the indicative criteria as contained in the APRM Objectives, Standards, Criteria and Indicators would be used to highlight specific measures in relation to the African Charter. The African Commission's guidelines on state reporting would also be used to ensure that the report adequately covers the provisions of the African Charter.

¹⁶⁴ APRM Base Document, para 20.

¹⁶⁵ APRM Base Document, para 20.

¹⁶⁶ APRM Base Document, para 22.

¹⁶⁷ African Commission on Human and Peoples' Rights state reporting procedure, Information sheet No. 4.

The Commission, through its Secretariat would be consulted for any clarifications in terms of the guidelines.

Once a draft of the report has been completed, the drafting team would make it available for public comment. Ankumah notes the significance this as follows:¹⁶⁸

This would ensure that reports submitted to the African Commission are satisfactory to all concerned parties. If the above recommendations are followed, the quality of state reports can be enhanced.

Ankumah further notes that generally, states do not solicit public comments on reports and this negatively affects the quality of their reports.¹⁶⁹ Therefore in this stage, the public comments obtained would be incorporated in the draft report.

It should also be noted that were the public, particularly civil society are given the opportunity to see the report before it is submitted, it gives them an opportunity to prepare shadow reports if they deem it necessary. These alternative reports provide information that enables the Commission engage in constructive dialogue with state representatives during examination of reports.¹⁷⁰

The incorporated draft report would mark the end of stage three.

4.5.2.4 Stage four

In this stage the draft report would be submitted to the APRM Forum through the APRM Secretariat.¹⁷¹ The main function of the Forum at this stage would be to verify that the report was prepared in accordance with the APRM process as elaborated above. This is very important because the report would only reflect the desired quality if the prescribed process is followed. Currently, when governments prepare their state reports, there is no clear or effective mechanism to ensure that these reports are adequate before they are submitted to the Commission. As has been discussed above, NGOs that can be useful in this regard are not adequately consulted by government.

¹⁶⁸ Ankumah (n 20 above) 82.

¹⁶⁹ As above.

¹⁷⁰ Quashigah (n 2 above) 281.

¹⁷¹ APRM Base Document, para 23.

The APRM Forum's endeavor to ensure that the necessary process was followed in the preparation of the report is therefore very vital. In this respect and by way of verification, the Forum would seek specific clarifications from the APRM Team (including members of the Panel) and the APRM Secretariat. Of utmost importance too would be for the Forum to get the concerned government's views on whether the procedure was followed since the said government would have to answer questions in relation to the contents thereof before the African Commission.

If the APRM forum is not satisfied that the necessary process was followed in the preparation of the report, it would recommend that this be rectified depending on the default identified. For instance, if the finding is that the APRM Team did not involve government and/or NGOs in the actual drafting of the report, it could recommend that their respective representatives be consulted so that necessary amendments be made if need be. On the other hand, if the APRM forum is satisfied that the process as provided for was followed in the preparation of the report, then it would recommend that it be submitted to the African Commission for examination.

4.5.3 Submission and examination of the report before the African Commission

The final report would be submitted to the African Commission through the APRM Secretariat so that it would be scheduled for examination. The importance of the government being actively involved in the process of drafting the report as outlined above would become very apparent at examination. This is because it is the government representatives who would have to present the report before the Commission and answer questions arising thereof. States have made an undertaking under article 62 of the African Charter to report on the measures they have taken to implement the Charter and therefore should be examined accordingly by the Commission. The obligation of the government in this regard would be to send competent state representatives. However, members of the APRM Panel could also be present at the examination in case the Commission or the government needs their assistance in clarifying an issue concerning the report. After examination, the African Commission would issue its concluding observations and recommendations.

4.5.4 Implementation of recommendations and follow-up

In accordance with the option taken in terms of coordination between the APRM and the African Commission, follow-up on implementation of recommendations would be undertaken by the APRM. Effective implementation and follow-up on the recommendations of the African Commission would ensure that subsequent reports which are prepared are more adequate for they would take due account of the observations of the Commission.

Currently, the African Commission has no effective mechanism to ensure that its recommendations on state reports are implemented by state parties. The Commission has noted this problem and has expressed its intention to 'establish a follow-up mechanism for its recommendations to state reports.'¹⁷² The Rules of Procedure of the African Commission provide for the Commission to transmit its general observations on reports to the Assembly of the AU.¹⁷³ However, the AU Assembly has not been forthcoming in ensuring that any recommendations contained therein are implemented. As noted by Evans, Ige and Murray :¹⁷⁴

As its parent body therefore, the OAU has an obligation to ensure the implementation of the provisions of the Charter. Unfortunately, minimal efforts have hitherto been made to ensure meaningful implementation of these obligations by the OAU.

Quashigah proposes that taking the AU in its generality, other organs within the AU also have the responsibility to ensure the implementation of the rights and obligations under the African Charter.¹⁷⁵ In this respect, since the Assembly has not been effective this far, the APRM Forum can ensure compliance with the recommendations of the African Commission on state reports using the APRM process. The advantage is that the APRM Base document already contains an inbuilt implementation procedure.

¹⁷² Report of the retreat of members of the African Commission on Human and Peoples' Rights (n 38 above) 4.

¹⁷³ Rules of Procedure of the African Commission on Human and Peoples' Rights, rule 86(2).

¹⁷⁴ M Evans, T Ige & R Murray 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 1 above) 58.

¹⁷⁵ Quashigah (n 2 above) 288.

As provided for in the Base Document,¹⁷⁶ the first step would be for the APRM Forum to formally table the state report together with the Commission's recommendations before key regional and sub regional structures including the various organs and agencies of the AU for their comments. The key NGOs in the concerned country could also be availed the report and recommendations. The comments received would be particularly helpful because they would relate to the specific organisations' areas of competence.

The APRM Forum would use these comments when taking further decisive steps towards the implementation of the African Commission's recommendations. Thus, in accordance with paragraph 24 of the Base Document, the Forum would act as follows:

4.5.4.1 If the concerned government shows a demonstrable will to rectify the shortcomings identified in the recommendations, then the Forum would ensure that participating governments as well as donors provide the government with necessary assistance. Follow-ups and progress reports in this regard could be made by the APRM Panel and Secretariat.¹⁷⁷

4.5.4.2 However, if the necessary political will is not forthcoming from the government, then the Forum could engage it in constructive dialogue, offering in the process technical and other appropriate assistance.

4.5.4.3 If dialogue proves unavailing, the Forum could put the government on notice of its collective intention to proceed with appropriate measures by a given date. 'Appropriate measures' is not defined and therefore this would be in the discretion of the Forum. Ngamau, as mentioned in chapter three, suggests a donor funding withdrawal recommendation or economic sanctions under the AU.¹⁷⁸ Suspension of the government's representation rights in the APRM or even expulsion from the APRM may also be considered. Depending on the gravity of the identified shortcomings, it could be possible for the Forum to make

¹⁷⁶ APRM Base Document, para 25 (Stage five of APRM process).

¹⁷⁷ For instance, after considering the APRM country review report of Ghana in January 2006, the APRM Forum directed the APRM Panel and Secretariat to monitor and report on the implementation of Ghana's Programme of Action and also requested the Panel to provide a progress report on this exercise within two years. 'Communiqué issued at the end of the 4th Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism, 22 January 2006, Khartoum, Sudan,' para 15.

¹⁷⁸ Ngamau (n 109 above) 515.

a recommendation to the AU Assembly for the defaulting government's expulsion from the AU.¹⁷⁹

The notice period above would provide the government with a further opportunity to address the identified shortcomings under a process of constructive dialogue. Therefore, 'appropriate measures' would be a last resort to be undertaken if even this further opportunity fails to yield cooperation from the government.

The outcome of the follow-up and enforcement process in relation to a particular report would be taken account of in the preparation of the subsequent report to ensure adequacy. Further, the outcome would also be communicated by the APRM to the African Commission so that it can use the information when assessing the particular state's next periodic report.

4.6 Conclusion

As has been shown in the foregoing sections, initiation, preparation and enforcement of state reports through the APRM process would greatly help the African Commission address the problems of infrequent and inadequate reporting. The involvement of the APRM in the said stages of the reporting process would also particularly ensure continuity. As stated by Heyns and Viljoen:¹⁸⁰

Reporting is widely seen as an ad hoc activity, a once-off burden that the state has to deal with every few years, and not a continuous effort that involves an ongoing cycle of reporting, the dissemination of concluding observations, implementation, and the drafting of a new report, etc.

Notably too, the APRM's objectives as reflected both in the Base Document¹⁸¹ and its processes meet the objectives of state reporting as outlined in chapter two which are, comprehensive review of national measures of implementation, national dialogue, public scrutiny, and sharing of good practices. This would add to the APRM's effectiveness in addressing the problems in issue.

¹⁷⁹ Quashigah suggests that a 'pro-human rights' interpretation of article 23(2) of the Constitutive Act of the African Union which provides for the implementation of sanctions and other measures against a defaulting AU member, could include expulsion as a sanction. Quashigah (n 2 above) 271.

¹⁸⁰ Heyns & Viljoen (n 47 above) 519.

¹⁸¹ See paras 2 & 3 of the APRM Base Document.

Indeed and furthermore, the APRM has the added advantage of peer pressure among participating states which is similar to that exercised by members of the Governmental Council of the Council of Europe to ensure that each government representative is responsible for the timely submission of adequate reports by his or her government. It should be noted in this regard that the resolution of infrequent and inadequate reporting under the African Charter would also serve the APRM's objective of ensuring the accountability of participating states in the implementation of human rights norms in their jurisdictions.

Therefore, although the APRM would not be solving all the problems of reporting under the African Charter, its intervention would definitely be welcome not only to the African Commission, but also to the APRM itself as a human rights review mechanism.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The problems of infrequent and inadequate reporting are a major challenge to the reporting system under the African Charter. The effectiveness of the African Commission as the body mandated to examine states on their implementation of the Charter has been adversely affected due to these problems. Although the reporting system is part of the African human rights system as a whole, the African Commission has not received active assistance from the AU, its organs or structures in trying to resolve infrequent and inadequate reporting. A comparative analysis of other international and regional reporting systems has shown that they have made progress in addressing similar problems and those specific to their relevant systems through active participation of political organs and their structures in the reporting system.¹⁸² The strategy generally has been to integrate the reporting system within the larger human rights system through coordination with structures adapted to meet the particular circumstances of the reporting system. For example in the UN, and as discussed in chapter two, the OHCHR has proposed the creation of a unified standing treaty body to harmonise the reporting procedures of various UN treaties and also to enhance the specialised input of other UN bodies in the reporting system.

In this regard, this paper has shown that the APRM, a structure within the ambit of the AU under the auspices of NEPAD, constitutes inbuilt processes that can be used to help the African Commission address the problems of infrequent and inadequate reporting. The APRM and the African commission also have a common mandate in terms of review of the African Charter and the countries subject to review, which could facilitate coordination between the two even more quickly and effectively. The proposed coordination between the APRM and African Commission would be limited to APRM participating states but it is encouraging to note that accessions to the APRM are

¹⁸² For instance, the OHCHR in the UN, and the Council of Europe in Europe.

growing steadily such that it can be envisaged that more African Countries will be subject to this arrangement.

By helping to resolve the problems of infrequent and inadequate reporting, the APRM would not be addressing all the problems of the African Charter reporting mechanism, let alone those of the African human rights system. However its contribution will be part of the larger solution. The APRM is a new, unique and flexible instrument which has the potential to coordinate with various African human rights bodies in resolving the numerous problems afflicting the system. Therefore, through the APRM, the AU has the opportunity to improve different aspects of the African human rights system. This paper has identified but one of these aspects, which is state reporting. In this regard, Olowu aptly states as follows:¹⁸³

Taken together, the various instruments of the AU, the existing regional human rights instruments and monitoring mechanisms, and the organs created and envisaged by the AU as well as NEPAD instruments, hold the promise of dramatically increasing the capacity of the African continent to rally together in addressing the core issues of democratisation, human rights, sustainable regional peace and stability, and socio-economic advancement.

For instance, a matter worth exploring would be the role of the APRM in the African Commission's protective mandate or indeed in the functioning of the African Court on Human and Peoples' Rights.

5.2 Recommendations

The first recommendation in light of the issues discussed in this paper is that the AU should take a more active role in trying to resolve the problems of infrequent and inadequate reporting under the African Charter.

The second recommendation which arises out of the first one is that the AU should facilitate coordination between the APRM and the African Commission for the specific purpose of addressing the problems in issue. This paper has suggested a possible coordination option which would be effective in addressing the said problems.

¹⁸³ Olowu (n 114 above) 211.

In this regard, the third recommendation is that the AU could formally facilitate the coordination between the APRM and the African Commission through either a declaration by the AU Assembly or a memorandum of understanding between the African Commission and the APRM, outlining the details of the envisaged coordination. This would include a definition of the specific roles and competences of the parties in terms of each stage of the reporting process starting from initiation of reports to follow-up of recommendations. This would help to avoid duplication of efforts. Also to be included would be provisions for regular reviews of the coordination to take stock of any problems encountered and how they can be resolved to make the coordination more effective. Regular reviews would also be an opportunity to accommodate other circumstances like a growing number of APRM accessions.

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