

Notes and comments

Compliance with reporting obligations under international law: Where does South Africa stand?

Introduction

International law is a legal system traditionally criticised for its lack of effective enforcement mechanisms. This is particularly true in the field of international human rights, where supranational standards for the protection of individual rights are laid down by means of treaties. Even though individuals do not enjoy international legal personality, they are the beneficiaries of rights bestowed by international human rights agreements.¹ By prescribing to states how to treat their citizens, human rights treaties limit absolute state sovereignty which is still regarded as the cornerstone of modern international law. Enforcement of these multilateral treaties moves dangerously close to the Charter-based prohibition on intervention in the domestic affairs of a United Nations member state.²

Despite the complexities of human rights treaties, it often occurs that states take on treaty obligations without fully considering the impact this would have on their domestic law, or without the political will or ability to fully effect domestic application. International criticism of human rights violations committed by state parties, often amounts to no more than a slap on the wrist. Concrete involvement of the international community in addressing human rights abuses is a complex matter and can only be considered once human rights violations have reached gross and systematic dimensions.

It is within this context that the system of reporting was established through the major international human rights instruments as the central element in monitoring the full and effective national implementation of international human rights standards.³ Reporting is not limited to human rights agreements,

¹Orakhelashvili 'The position of the individual in international law' (2001) 31/2 *Spring California Western International Law Journal* 276.

²Art 2(7).

³The system of reporting was first introduced by the ILO. Parties to ILO conventions are obliged to report periodically on the application of international standards they had accepted and also when so requested by the ILO's governing body, on the position of unratified conventions and recommendations. See Van Boven 'The international system of human rights: An overview' in

but has also been introduced as a method of self-monitoring by members of the African Union of standards of governance and accountability under the African Peer Review Mechanism. Information on South Africa's compliance with its reporting obligations is not readily available and reporting generally appears to be conducted in an *ad hoc* and fragmented way. This discussion provides an update of where South Africa stands in terms of reporting under human rights agreements and the African Peer Review mechanism.

Reporting to monitor compliance with human rights obligations

The following UN treaties require the submission of reports:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- 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 Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC); and
- International Convention on the Protection of the Rights of All Migrant Workers and their Families.

South Africa is a party to all these agreements with the exception of the International Covenant on Economic, Social and Cultural Rights⁴ and the Convention on the Protection of the Rights of Migrant Workers.

The system of supervising compliance started with CERD in 1965 and was followed by the two covenants in 1966. The compulsory submission of reports by state parties to independent expert bodies, forms part of the obligations imposed by the treaty itself and establishes a government's international accountability with regard to its treaty responsibilities.⁵ Reporting underlines the internationalisation of human rights, where the international community has a legitimate stake in the compliance of parties with their obligations imposed by international human rights agreements. International control procedures as envisaged by compulsory reporting, do not replace national methods of human rights implementation, but rather play a supplementary role.

According to Van Boven, human rights agreements impose a 'regular supervisory system', which is mainly non-contentious in nature and involves

Manual on human rights reporting, United Nations, Geneva, (1997) at 12.

⁴South Africa signed on 3 October 1994 but has not yet ratified.

⁵See *Manual on human rights reporting* United Nations, Geneva (1997) at iii.

constructive dialogue. This system involves different supervisory procedures and control mechanisms, including quasi-judicial and political procedures; country and thematic procedures; and treaty- and Charter-based procedures.⁶ Ideally speaking the various forms of procedures should coexist with reporting obligations states may have within the framework of regional organisations such as the Organisation for African Unity. Where the same right is covered by more than one treaty or treaties from different organisations, it is important to maintain a consistency of interpretation and assessment.⁷

Self-assessment under the African Peer Review Mechanism

Self-monitoring by means of reporting was also introduced by a Memorandum of Understanding on the African Peer Review Mechanism (MOU), concluded in 2002. The MOU establishes a self-monitoring mechanism through the submission to periodic peer reviews and is open to (voluntary) accession by member states of the African Union.⁸ The mandate of the African Peer Review Mechanism (APRM) encourages participating states to ensure that their policies and practices conform to the agreed political, economic and corporate governance values, codes and standards and to achieve mutually agreed objectives in socio-economic development.⁹ The primary purpose of the peer review is to foster the adoption of policies, standards and practice that lead to political stability, high economic growth, sustainable development, and accelerated sub-regional and continental integration.¹⁰ The process involves the development of a National Programme of Action in which trade unions, women, youth, civil society, the private sector, rural communities and professional associations participate. Country reports will be reviewed after a country review visit by members of the Panel of Eminent Persons.¹¹ In the completion of the review process recommendations will be made which participating states must implement within a specified time and integrate in their respective National Programmes of Action.¹² Participating states also 'Accept that constructive peer dialogue and persuasion would be exercised, where necessary, in order to encourage improvements in country practices and policies in compliance with agreed African and international best practices where recommended'.¹³

⁶Charter-based procedures owe their existence to decisions, usually in the form of resolutions, taken in terms of the legal authority of the United Nations Charter. See van Boven n 3 above at 15.

⁷*Id* at 16.

⁸Par 7 of the MOU.

⁹*Id* par 6.

¹⁰*Id* par 8. The principles of the African Peer Review Mechanism appear in 'The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism (APRM)' AHG/235(XXXVIII) Annex II, adopted by the Assembly of Heads of State and Government at the 83rd Ordinary Session of the AU, 8 July 2002.

¹¹Established by par 3 of The African Peer Review Mechanism Organisation and Processes, 9 March 2003 NEPADHSGIC/03-2003/APRM Guidelines/O&P.

¹²Par 24 of MOU.

¹³Par 26 of MOU.

There is a close relationship between the APRM and the New Partnership for Africa's Development (NEPAD). In NEPAD's Declaration on Democracy, Political, Economic and Corporate Governance,¹⁴ the African Peer Review Mechanism is identified as an objective of the African Union along with democracy and good political governance; economic and corporate governance; and socio-economic development.¹⁵ Adoption of the latter declaration, is required before participation in the African Peer Review process.¹⁶

The APRM process provides for four types of review:

- A country review carried out within eighteen months of a country becoming a party to the APRM process.
- A subsequent periodic review every two to four years.
- A review at the request of a member country which is not part of periodically mandated reviews.
- A review may be called for by participating heads of state or government at the early signs of impending political or economic crisis.¹⁷

Although peer review is not compulsory for all AU members, it is a manifestation of an emerging trend towards international accountability expected by the AU of its member states. Geldenhuys points out that peer review is a voluntary but highly intrusive process 'as it probes both the structures and functioning of a participating state's entire political system'.¹⁸ Peer review introduces significant inroads into the traditional approach to sovereignty and non-intervention favoured by post-colonial African states.

Where does South Africa stand in terms of reporting?

Human rights reporting

As mentioned above, South Africa is a party to all but two of the UN conventions requiring compulsory reporting. In addition, the African Charter on Human and Peoples' Rights and the African Charter on the Rights of the Child, to which South Africa is a party, also require reporting. Reporting is a time consuming, labour intensive, expensive and specialised process, involving inputs and participation from a wide spectrum of both governmental and non-governmental role players. It is therefore likely that problems will occur in submitting timely and accurate reports. The South African experience shows that this has indeed been the case and that the current state of reporting is far from running smoothly.

¹⁴AHG/235 (XXXVIII) Annex 1 adopted by the Assembly of Heads of State and Government at the 83rd Ordinary Session of the AU, 8 July 2002.

¹⁵Par 6.

¹⁶Par 5 Annex II.

¹⁷Par 14 Annex II.

¹⁸Geldenhuys 'Brothers as keepers: Africa's new sovereignty regime' (2006) XXVII 1/May *Strategic Review for Southern Africa* 15.

At the moment there is a huge backlog in South Africa's reports. According to United Nations records drawn on 1 October 2006, South Africa has no fewer than seven reports outstanding: 1 for CAT, 2 for the ICCPR, 2 for CEDAW, 1 for the CRC, and 1 for the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. The responsibility for writing the reports currently lies with the Chief Directorate: International Legal Relations of the Department of Justice and Constitutional Development, the Office of the President, and the South African Police Service. They attribute this backlog to a lack of capacity and personnel.

The position with regard to each particular convention is as follows:

Convention on the Rights of the Child (CRC) and its two optional protocols

The CRC was one of the first human rights conventions to be signed and ratified by South Africa and is symbolically very significant for the country. After signature on 29 January 1993, the CRC was ratified on South African Youth Day¹⁹ in 1995. South Africa signed the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict on 8 February 2002, and acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on 30 July 2003. The CRC provides that a compulsory report must be submitted two years after entry into force of the Convention, and thereafter every five years.²⁰ The reports are submitted to the Committee on the Rights of the Child.²¹ The CRC provides for general measures of implementation in article 4:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Reports should indicate factors and difficulties affecting the degree of fulfillment of the obligations under the Convention.²²

South Africa's initial compulsory report was due on 17 July 1997 and was submitted in December 1997.²³ The initial report was considered by the

¹⁹16 June.

²⁰Art 44(1).

²¹Art 43.

²²Art 44 (2).

²³This was the country's first report under any of the multilateral agreements to which it had become a party after 1993.

Committee in January 2000, who commended South Africa for the timely submission of the report.²⁴ The South African government was granted the opportunity to reply in writing to a list of questions raised by the Committee before the Committee submitted its report.

In its concluding observations,²⁵ the Committee welcomed positive aspects such as the law reform which has taken place since the adoption of the South African Constitution to cement the protection of children in the South African legal system; the establishment of various bodies instituted to oversee the implementation of the CRC, such as the National Programme of Action (NPA), the NPA Steering Committee, responsible for the identification of plans, the coordination and evaluation of programmes, and submission of periodic progress reports to cabinet, and the involvement of various NGOs and UNICEF. The legacy of apartheid is acknowledged as a factor impeding the full implementation of the CRC.

The Committee expressed concern and made recommendations regarding the following general measures of implementation:

- Domestic law, particularly customary/indigenous law, does not fully conform to the Convention. South Africa is encouraged to ratify the ICESCR, which will strengthen the position of children in the country. Effective measures should be taken to ensure implementation of the Convention at rural and community level.
- The Committee was concerned at the absence of a clear procedure to register and address complaints from children concerning violation of their rights under the Convention. It recommended that a system of data collection should be developed to cover particularly vulnerable children including girls, children with disabilities; child labourers; children living in remote rural areas including the Eastern Cape, Kwa Zulu-Natal and the Northern Province, as well as disadvantaged communities; children belonging to the Khoi-Khoi and San communities; children working and living on the streets; children living in institutions, and refugee children. It recommended that efforts be increased to ensure implementation of the principle of non-discrimination particularly as it relates to vulnerable groups. The Committee further encouraged South Africa to prioritise budgetary allocations and distributions to ensure implementation of the economic, social and cultural rights of children to the maximum extent of available resources and, where needed, within the framework of international cooperation.

Other areas of concern include:

- Child victims of police brutality
- The increasing number of child-headed households and the lack of adequate support mechanisms in this regard.

The Committee further recommended:

²⁴CRC/C/51/Add 2;HRI/CORE/1/92;CRC/C/QSAFR.1.

²⁵CRC/C/15Add 122.

- An expansion of the Child Support Grant Programme for children up to the age of 18 years who are still at school.
- Establishment of proper monitoring procedures for both domestic and inter-country adoptions, and the introduction of adequate measures to curb the abuse of the practice of traditional informal adoptions.
- Development of a comprehensive strategy to prevent and combat domestic violence, ill-treatment and abuse of children including sexual abuse within the family within a child friendly judicial procedure.
- Adoption of effective measures to prohibit by law corporal punishment in care institutions.
- Allocation of resources and the development of policies and programmes to improve the health of children, particularly in the rural areas. This should include greater access to primary health services, the reduction of maternal, infant and child mortality, and the prevention and combatting of malnutrition. Access to safe drinking water and sanitation.
- Protection of the health of boys subject to the cultural practice of circumcision, and the launching of a study on virginity testing to assess its physical and psychological impact on girls.
- Promotion and facilitation of school attendance, particularly among previously disadvantaged children, girls, and children from economically disadvantaged families. Effective measures should be undertaken to make free primary education available to all.
- The rehabilitation and integration of children affected by armed conflict.
- Improvement of the monitoring and enforcement of child labour laws and the protection of children from sexual exploitation
- Protection of the cultural, religious and language rights of children belonging to minority groups.
- Additional steps were regarded as necessary to implement a juvenile justice system in conformity with the Convention

South Africa's second report was due in 2002, but has not yet been submitted. The Optional Protocol on Children in Armed Conflict requires the submission of a comprehensive report to the Committee on the Rights of the Child on steps taken to implement the Protocol within two years following its entry into force, and every five years thereafter.²⁶ South Africa's report on the Optional Protocol on the Sale of Children has been overdue since 30 July 2005.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

CERD was signed by South Africa on 3 October 1994 and ratified on 10 December 1998. In terms of the provisions of the CERD, parties undertake to submit a report for consideration by the Committee on the Elimination of Racial

²⁶Art 4.

Discrimination²⁷ on the legislative, judicial, administrative and other measures they have adopted to give effect to the provisions of CERD within one year after entry into force, and thereafter every two years, as well as whenever the Committee so requests.²⁸ South Africa's initial report was due on 9 January 1999. South Africa's initial to third periodic reports,²⁹ due in 2000, 2002 and 2004, were submitted in a single document on 19 May 2005. The comprehensive sixty-eight page report deals with the various dimensions of racial discrimination past and present in South Africa, identifies obstacles hampering the implementation of the Convention, and reiterates the country's commitment to attaining a non-racial democracy.³⁰ In considering the report, the Committee raised questions, which were in turn replied to by the South African delegation at the Committee's 1767th meeting.³¹ The South African delegation explained that the Convention could not be invoked directly before domestic courts in the absence of enabling legislation. The Promotion of Equality and Prevention of Unfair Discrimination Act 2000, goes some way to implementing the Convention, but provides only for civil remedies. It was added that domestic courts commonly use international treaty law in their interpretation of domestic legislation.³²

One of the questions raised asked for clarification on the concept of 'fair discrimination'. The South African delegate responded that

The concept of 'fair discrimination' had been developed by the Constitutional Court during the negotiation of the political settlement in South Africa ... The affirmative action policy had been criticized at the time and even more vocally subsequently. There was still a debate in legal circles about what constituted legitimate affirmative action ('fair discrimination') and whether it could itself be considered discriminatory.³³

The Committee responded that special measures aimed at remedying a specific situation were not discriminatory under the Convention and in appropriate circumstances were even mandatory.³⁴ In its concluding observations the Committee points out that affirmative action may not lead to the maintenance of separate or unequal rights for designated groups, after the objectives of the policy have been achieved.³⁵

The Committee noted that the government had eliminated *de iure* discrimination and apartheid, but that racist attitudes still persisted in various

²⁷Established in terms of art 8 of CERD.

²⁸Art 9.

²⁹CERD/C/461/Add 3.

³⁰<http://www.unhchr.ch/tbs/doc.nsf>.

³¹CERD/C/SR.1767 (Summary record).

³²See par 13.

³³Par 22.

³⁴Par 27.

³⁵Concluding observations of 22/11/2006 CERD/C/ZAF/CO/3 par 10.

sectors. Committee members raised concern over the treatment of indigenous peoples and xenophobia which should be addressed more vigorously. The Committee noted that affirmative action was needed to reduce the persisting gaps between whites and non-whites.

The South African Human Rights Commission handed in a shadow report and participated in the discussion with the Committee. The report dealt with the integration of various aspects of CERD in domestic law³⁶ (particularly those embodied by articles 2, 3, 5, 6 and 7). The Committee remarked in conclusion that no nation had suffered as much as South Africa on account of institutionalised racial segregation and discrimination. Its feedback was not altogether without criticism. It did, however, express itself as encouraged by the delegation's assurance that future reports would be more comprehensive and ensure greater participation by the South African Human Rights Commission. The Committee specifically pointed out that it was concerned over the ethnic composition of the different components of the judicial system. It would welcome more carefully considered answers in future. The confusing picture regarding the place of race in the current non-racial constitutional democracy in South Africa is further reflected by the concluding statement of a Committee member:

There was a lack of conceptual clarity in answers on the ethnic composition of the population, for example the use of the terms 'nationalities' when referring to 'Blacks, Whites the Khoi and San, Indians and Colours'.³⁷

In its concluding observations the Committee recommends that South Africa submits its fourth, fifth and sixth periodic reports in a single report by January 2010 and that it addresses the various points of concern raised by the Committee.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW was signed on 29 January 1993 and ratified without reservations on 15 December 1995. The reporting obligations of the Convention are as follows: Reports shall be submitted to a Committee on the Elimination of Discrimination against Women³⁸ on the legislative, judicial, administrative or other measures adopted by a party to give effect to the provisions of the Convention and progress made³⁹ one year after entry into force, and thereafter at least every four years, as well as whenever the Committee so requests. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the Convention.⁴⁰

³⁶See pars 33-39.

³⁷See par 46.

³⁸Established in terms of art 17.

³⁹Art 17.

⁴⁰Art 18.

South Africa's first report was due on 14 January 1997 and was only submitted on 5 February 1998. The Committee considered South Africa's report in June 1998.⁴¹

The South African delegation was headed by the Minister of Welfare and Population Development, and included representatives of non-governmental organisations. The Committee noted various positive efforts undertaken by government to improve the position of women in South Africa. The Committee's principal areas of concern include the following:

- (i) Improper incorporation of the Convention into domestic law. The inclusion of the Convention's definition of discrimination on the basis of sex in the Constitution was recommended. Legislation should be adopted as a matter of priority guaranteeing women's *de iure* and *de facto* equality. It was noted that where legal measures were in place, *de facto* implementation had yet to be achieved in many areas. The adoption of a uniform family code in conformity with the Convention was recommended in which unequal inheritance rights, land rights and polygamy are addressed, with the aim of abolishing them.
- (ii) The Commission on Gender Equality, and other national machinery aimed at the protection of women, lacked sufficient financial and human resources.
- (iii) The unacceptably high level of various forms of violence against women should receive priority and requires a comprehensive approach.
- (iv) Temporary measures, including quotas, are required to increase the number of women in decision-making posts, government, and the judiciary, and in job creation schemes.
- (v) Special programmes for vulnerable groups of women in rural areas are required.

South Africa's second and third reports were due in January 2001 and February 2005 but have not yet been submitted.⁴²

The Convention against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT)

CAT was signed by South Africa on 29 January 1993 and ratified on 10 December 1998. The Convention establishes a Committee against Torture⁴³ who must consider compulsory reports from parties on measures taken to give effect to their treaty obligations, one year after entry into force.⁴⁴ Supplementary reports shall be submitted every four years thereafter on new measures taken, or on matters requested by the Committee. South Africa's first report was due on 18 January 2000 and the second on 28 January 2004.

⁴¹See A/53/38/Rev 1 pars 100-137 for Concluding Observations/Comments.

⁴²For a table of the recent reporting history of states, see <http://www.ohchr.org>

⁴³Established under art 17 of CAT.

⁴⁴Art 19.

South Africa's initial report, due in 2000, was eventually submitted on 28 June 2005.⁴⁵ The report gives an elaborate and colourful account of the suffering and torture occurring in a racist pre-1994 South Africa as reflected in the foreword by President Mbeki:

The Charter of the United Nations states that the purposes of the United Nations include respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Despite the fact that the whites-only Government was party to the Charter, the apartheid regime was introduced in 1948. This was contrary to the Charter and the Universal Declaration of Human Rights (1948). The apartheid regime's mission was to elevate colonial racism and racial discrimination to the central doctrine of all State policies in our country. Torture and other cruel, inhuman or degrading treatment or punishment was central to the implementation of racist policies and laws. These methods were used to suppress the quest by the oppressed black majority for a democratic South Africa.

The liberation movements were forced to go into exile as a result of the massive repression of the early 1960s. At the height of the struggle African women protested against the pass laws and were met with untold police brutality, which included torture, death and other forms of abuse. The savage response of the apartheid regime to the democratic demands culminated in the incarceration of our leaders, including former President Nelson Mandela. In 1963 the international community responded by declaring that racism and racial discrimination, especially apartheid, constituted a violation of fundamental human rights and a threat to international peace and security.

As far as the status of international instruments, including CAT, is concerned, the report remarks 'On ratification or ratification and subsequent enactment into law, a convention becomes binding on South African law as part of international law'. Reference is made to section 231(4) of the Constitution as authority for this statement. It is further said that the Convention cannot 'be invoked before, or directly enforced' before it has been translated into South African laws or administrative regulations. *AZAPO v President of the Republic of South Africa*⁴⁶ is cited as reference for this statement.

The report proceeds to underline the important role of section 39 and 233 of the Constitution, in the process confusing treaty incorporation with the role of international law in the interpretation of the Bill of Rights. Provisions of a Convention cannot be invoked before, or directly enforced by the courts, other tribunals or administrative authorities. They have to be translated into South African laws or administrative regulations to be enforced by the authorities concerned. Section 39 of the Constitution strengthens the role of international law in the interpretive process, as it obliges courts to apply international law where it is applicable. By requiring a court to consider international law when

⁴⁵CAT/C/52/Add.3 25 August 2005.

⁴⁶1996 8 BCLR 1015 (CC).

interpreting the Bill of Rights, section 39(b) paves the way for South African courts to consult all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, including international conventions, whether general or particular, establishing rules expressly recognised by states. Section 233 of the Constitution requires judges to strive to reconcile national law with international law standards without prejudice to the principle of the supremacy of the Constitution. Such international law will include CAT.⁴⁷ No reference is made to domestic application of treaties in terms of section 231(4) of the Constitution.

The report proceeds by discussing how various examples of discriminatory legislation had been repealed after 1993, to bring the law in line with current constitutional requirements.

According to the Department of Justice and Constitutional Development, the report covering the period 1999-2002 will probably be presented in November 2006. The Task Team responsible for preparation of the report should give priority to developing an addendum covering the period 2003 to 2006. This should be finalised by 15 September 2006.

International Covenant on Civil and Political Rights (ICCPR)

South Africa ratified the ICCPR on 10 December 1998. The Covenant points out that each state party has to take the necessary steps, in accordance with its constitutional processes and the provisions of the Covenant, to adopt legislative and other measures required to effect to the rights recognised in the Covenant.⁴⁸ Parties to the First and Second Optional Protocols to the ICCPR shall include in their reports to the Human Rights Committee made in terms of the provisions of the Covenant, information on steps they have taken to give effect to the Protocol.

The first report is due one year after entry into force of the Covenant for the state concerned, and thereafter whenever the Committee so requests. The reports will be considered by a Human Rights Committee established in terms of article 28, and must indicate the factors and difficulties affecting the implementation of the Covenant. South Africa's first report was due in January 2000 and the second in January 2005.⁴⁹

The Department of Justice and Constitutional Development reports that the matter is currently receiving attention. The initial report was considered by the responsible cluster of ministers in January 2005. However, the Office of the

⁴⁷Pars 63-65.

⁴⁸Art 40(1).

⁴⁹<http://www.unhchr.ch/tbs/doc.nsf/newhvalrepyconv>.

President is still looking at the foreword. The report is also outdated since it covers the period 1999-2001. Since the report has not yet been finalised and submitted to the UN, it should be revised *in toto* so as to cover the period 1999-2006. The revised report would be one document, comprising the initial report and several periodic reports (this practice is allowed by treaty bodies so as to address the issue of backlogs).⁵⁰

Core document

A Core Document, which forms part of the various specific reports under all the above conventions, was submitted to the United Nations by South Africa on 23 August 1998.⁵¹ It contains information on South Africa's past, the structure of government, geography, people, economy, income distribution, unemployment, religion, languages and population growth.

African Charter on Human and Peoples' Rights

Article 62 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.

South Africa ratified the Charter on 9 July 1996. Its first report was due in September 1998, the second in 2001, and the third in 2003. Only the first report was submitted in October 1998 and considered in May 1999.

African Charter on the Rights and Welfare of the Child

South Africa signed the Charter on 10 October 1997 and ratified it on 7 January 2000. Article 43 provides for the following reporting procedure

- 1 Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:
 - (a) Within two years of the entry into force of the Charter for the State Party concerned: and
 - (b) and thereafter, *every three years*.
- 2 Every report made under this Article shall:
 - (a) Contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
 - (b) Shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

⁵⁰Memo received from the Department of Justice June 2006.

⁵¹HRI/CORE/1/Add.92.

- 3 A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph I(a) of this Article, repeat the basic information previously provided.

No information could be obtained on compliance with the reporting obligation.

Dealing with the backlog

According to the Chief Directorate: International Legal Relations of Department of Justice and Constitutional Development,⁵² there is a need to develop a methodology for dealing with the reports which were due by 31 March 2006. In order to achieve this, the establishment of three sub task teams was suggested to attend to the reports as follows:

CERD		
ICCPR	→	Sub Task Team to be led by Department of Justice and Constitutional Development
ACHPR		
CRC		
CEDAW	→	Sub Task Team to be led by the Presidency
CAT	→	Sub Task Team to be led by the SAPS

It remains the responsibility relevant government departments to deal with specific articles of the treaties falling under their line functions to provide accurate information on enforcement. It is noted that there will be a need for training in order to discharge this mandate.

In preparing the consolidated reports referred to above, other sources should be consulted, including South Africa's Peer Review Mechanism report, South Africa's yearly reports, SAHRC reports and the Ten Years Review report. It should also be borne in mind that regular contact with NGOs is of great importance as this will make us aware of shortcomings, thus enhancing the quality of the reports.

African peer review of South Africa

South Africa acceded to the APRM process on 9 March 2004 and handed in its Country Self Assessment (CSAR) report in 2006.

In compiling the CSAR report, the South African government invited submissions from South Africans and organised various regional consultative

⁵²Memo received on 08/08/2006.

forums to obtain information and assess perceived problems at grass roots level. The report specifically mentions that it applies a gender-sensitive approach to reflect the challenges raised by South African women. It points out matters on which there were consensus, as well as where there were divergent views raised in submissions.⁵³ It is not stated how consensus is determined. The questionnaire provided by the APRM was used as basis for inviting inputs, which were collated in a Technical Assessment Report, and finally summarised in a draft Country Report. The report was validated by the Second National Consultative Conference held at Kliptown, Soweto by 1 700 delegates from all over South Africa. The final report was drafted with the help of four selected Technical Support Agencies, Quality Assurance Agencies, The Human Sciences Research Council, and the Auditor General. The APRM process in South Africa was run by the National Governing Council (NGC), a body comprising representatives of civil society⁵⁴ and government,⁵⁵ and led by the Minister for the Public Service and Administration.

Despite its broad-based participation, the report identifies as limitations in its compilations, inadequate or lack of participation by stakeholders such as local governments. The Report was submitted to the APRM in 2006. The APR Secretariat has simultaneously developed a background document on the country and prepared an Issue Paper to guide the country review process. The stage to follow will be a visit of the APR team to consult with all stakeholders before they draft a report based on all information gathered to date. The APR Team's report will then be submitted to the APR Secretariat and APR Panel. After deliberation by the APR Panel, the report will be submitted to the APR Forum for consideration and formulation of necessary actions. The final stage is reached six months after consideration by the Forum, where the report is tabled in key regional and sub-regional structures.⁵⁶

Conclusion

At first glance South Africa's wide ratification of human rights treaties, without reservations, on top of its adherence to the APRM create the impression of a state that has a high regard for international law, adherence to international standards for the protection of human rights, good governance, and democracy. A closer look reveals a more complex picture. South Africa has over the past twelve years encountered first hand the burden report writing places on a state. It is a process

⁵³CSAR 18.

⁵⁴Including the disability sector, women, the youth, religious leaders, cultural workers and business and labour representatives. In total there were 20 representatives from civil society and 9 from government.

⁵⁵CSAR 19.

⁵⁶The five stages of the APR process are set out in the NEPAD questionnaire. See www.nepad.org.

which requires resources, data, technical expertise, trained report writers, and most of all, the political will and support from role players over the whole spectrum of government activities. It is not uncommon for a state to underestimate this challenge, resulting in late report submissions or no submissions at all. Once a state has fallen behind with report submissions, it becomes very difficult to catch up and simultaneously meet its current obligations. South Africa's poor track record in this regard is due to a combination of the above factors and may to some extent be attributed to teething problems. In addition, it appears that report writing in South Africa is not well planned and managed. Preparation of all reports could be better managed if centrally coordinated and dealt with by the same pool of officials who have attended the many report writing courses presented by the United Nations. As these officials become involved in consecutive reporting exercises, the process should become less cumbersome. There are numerous areas of commonality between the various human rights reports, and also between human rights reports and the APRM report. If cross fertilisation takes place, it will not be necessary to gather all the information from scratch for each new report. Report writing will also never be feasible or effective if the responsible body, of which there appear to be three at present, namely the Department of Justice and Constitutional Development, the Presidency, and the SAPS, do not enjoy full support from other departments. Reporting necessarily spans the line functions of various different departments. Without the cooperation of the ministers and Directors-General of relevant departments, it will be an impossible task to obtain the necessary departmental information in time. Having had the opportunity to learn from past mistakes, the time has come to make a serious commitment to present proficient reports in time.

In the preparation of future reports, it is important that criticism and comments of the treaty monitoring bodies to previous South African reports be taken to heart. There are certain remarks which are common to most reports. One of these aspects is the committee's consistent reference to the importance of domestic incorporation of the relevant treaty provisions. In more than one report, the monitoring committees have identified inadequate domestic legislation, not giving full effect to treaty provisions. Even though the South African Constitution is quite clear on this point, there appears to be some confusion in the reports and answers by South African delegates. International agreements will fall within the scope of section 231(2) of the Constitution, requiring parliamentary approval as they require ratification or accession and are not of a technical, administrative or executive nature. In addition they require legislative incorporation to the extent that treaty provisions are not already in line with existing South African law or could be regarded as self-executing as envisaged by section 231(4).⁵⁷ When explaining the

⁵⁷Strydom sums up the position as follows: 'The self-executing nature of a treaty is usually derived from a characteristic inherent to the provisions that can be directly applied by the national courts and authorities ... In practice the anomalous position exists that the direct applicability of treaty provisions is determined by national constitutional law.' Strydom 'The international law openness of the South African Constitution' in Carpenter (ed) *Suprema Lex*:

status treaties enjoy in South African law, reports emphasise their role as an interpretative aid for the Bill of Rights in terms of section 39 of the Constitution. Little discussion is devoted to the role of section 231(4) in this respect.

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The African Union and the right to intervention: Is there a need for UN Security Council authorisation?

Introduction

The basic assumption of equal sovereignty implies that states may not intervene in one another's domestic affairs.¹ The principle of non-interference has subsequently been diluted,² however, notably by the development of international human rights law. Hence, the doctrine of reserve domain is nowadays regarded 'as merely an academic ideal that no longer reflects the reality of today's globalised world'.³

Recently, African states decided to advance this shift in the basic principles of international law even further. Historically, because of their weakness and vulnerability these states were reluctant to tamper with the sacrosanct principles of sovereignty and non-intervention.⁴ But, when African states adopted the Constitutive Act of the African Union (AU) in 2000,⁵ they moved from one end of the spectrum of international law to the other. In a bold step they included a provision granting the Union an unprecedented right of humanitarian intervention.⁶ States which had formerly posed the strongest opposition to humanitarian

Essays on the Constitution presented to Marinus Wiechers (1997) 93.

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¹Brownlie *Principles of public international law* (2003) 290.

²Cf Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1177 at 1202-1206.

³*Id* at 1203.

⁴Normatively as well as in practice, for the former see Charter of the Organisation of African Unity art III(1)-(3) (1963) 2 *ILM* 768. For the latter consider the inaction *vis-à-vis* grave human rights abuses in Amin's Uganda, Bokassa's Central African Republic, or Mobutu Sese Seko's Zaire: Udombana n 2 above at 1208-1212. See also Levitt 'The evolving intervention regime in Africa: From basket case to market place?' (2002) 96 *American Society of International Law Proceedings* 136 at 136 and Cowling 'The African Union – an evaluation' (2002) 27 *SAYIL* 193 at 197-98.

⁵The Constitutive Act entered into force on 26 May 2001. See for its development Maluwa 'Reimagining African unity: Some preliminary reflections on the Constitutive Act of the African Union' (2001) 9 *African Yearbook of International Law* 3 at 6-23.

⁶Constitutive Act art 4(h). Art 4(j) gives the AU the right to intervene on request of a member state. Although such a right of humanitarian intervention is unprecedented on regional level, it was codified on a sub-regional level in the framework of ECOWAS. See ECOWAS Mechanism for