

**AN APPRAISSAL OF THE MECHANISM OF STATE REPORTING IN THE
AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: TOWARDS A
MORE EFFECTIVE ENFORCEMENT REGIME**

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DECLARATION

I, **NANCY MAKOKHA BARAZA** do hereby declare that this project is my original work and has not been submitted either in part or in whole and is not currently being submitted for a degree in any other university.

Signed.....

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This project has been submitted for examination with my approval as University of Nairobi supervisor.

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CITED CASE

Ireland vs. United Kingdom, 23 European Court of Human Rights (Ser. A) (1978),
reported in 17 I.L.M. 680 (1978)

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESR	(UN) Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention on the Protection of Human Rights
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICESCR	International convention on Economic, Social and Cultural Rights
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)
UNDP	United Nations Development Programme

DEDICATION

To my mother
Racheal Nabifwo
and in memory of my
father the late
Nathan Makokha

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To my supervisor, Dr. Kithure Kindiki, thank you for accepting to supervise this thesis. To my two research assistants, Dan Oduor Juma and Fidelis Wangata, thank you for your hard work. To my two sons Michael and Yuri, thank you for urging me on.

CHAPTER ONE

INTRODUCTION

1.0 Prologue

Most African States have been accused of being egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa. Generally, human rights conditions remain critically precarious on the continent. More critical are the doubts about the effectiveness and adequacy of the enforcement mechanisms under the various international and regional human rights instruments, the African Charter of Human and Peoples' Rights¹ in particular. Legal mechanisms for the protection of human rights in Africa operate in the context of the practices and attitudes of those in Africa who deal with human rights on a daily basis: government officials, lawyers, non governmental organisations, academic and the civil society. The ultimate test for any legal system that purports to deal with human rights is its effectiveness in enhancing the respect for and fulfillment of those rights.² Africa has always been criticised on account of its human rights record and the effectiveness of the African Charter in particular for its inability to improve the situation. During the period in which the Charter was drafted, Africa was emerging from colonialism, apartheid was alive, the cold war was raging and the idea of human rights had only received tentative acceptance. These conditions led to the drafting of a Charter that has not effectively guaranteed the protection of human rights in Africa.

Under the Charter, member States are obliged to submit biennial reports on legislative and other measures adopted in order to give effect to the provisions of the Charter.³ The reports are presented to the African Commission on Human and Peoples' Rights Commission (hereinafter the Commission) for examination. The Commission in accordance with the African Charter was set up on 29th July 1998 "to promote human and peoples' rights and ensure their protection in

¹ The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981) [hereinafter called the African Charter].

² C. Heyns, The African Regional Human Rights System: In Need of Reform? (2001) 2 African Human Rights Law Journal 156.

³ Article 62 of the African Charter.

Africa.” At the outset, the Commission had no clear procedure, but has now evolved a practice of examining State reports. While obligating States to submit biennial reports on the legislative and other measures adopted to give effect to the African Charter, the African Charter failed to identify the organ competent to review the reports.⁴ This omission created the possibility that a body composed of either independent experts, such as the African Commission, or government representatives, such as the Organisation of African Unity Assembly of Heads of State and Government (OAU Assembly), or the Council of Ministers (OAU Council of Ministers) could be mandated to receive and examine State reports.⁵ Some analysts argue that the omission was intentional, so as not to jeopardise ratification⁶. Arguably, allowing a political body lacking independence, impartiality and human rights virtuosity to review reports would have undermined the benefits of State reporting. Subsequently, the African Commission at its 3rd session adopted a resolution requesting the OAU Assembly to entrust it with the task of reviewing State reports. The Assembly conceded to the request.⁷ The Commission evaluates the report to determine the extent to which the State has taken steps to comply with the African Charter, the problems faced, and the ways to overcome them. As has been emphasised by the Commission, State reporting

...is a non-contentious, non-judgmental proceeding allowing states to present a comprehensive picture of the human rights situation in a country and engage in a constructive dialogue with the Commission with a view to assist States to enhance their human rights standards.⁸

⁴ It is the practice in the drafting of human rights treaties that where States are required to submit regular reports, the instruments mandate specific organs to deal with these reports and the objectives and procedure for examining such reports.

⁵ G. W. Mugwanya, “Examination of State Reports by the African Commission: A Critical Appraisal,” (2001) 2 African Human Rights Law Journal, 272.

⁶ See e.g. C E Welch *Protecting Human Rights in Africa* (1995) 154, F. Viljoen, “Review of the African Commission on Human and Peoples’ Rights” 21 October 1986 to 1 January 1997” in C Heyns (ed) *Human Rights Law in Africa 1997* (1999) 56.

⁷ Second Annual Activity Report of the Commission (1987-1988) 20.

⁸ R. Murray, ‘Report on the 1997 sessions of the African Commission on Human and Peoples’ Rights – 21st and 22nd sessions: 15-25 April and 2-11 November 1997’ (1998) 19 Human Rights Law Journal at 181.

1.1 Problem Statement

The instrument of State reporting is recognised as an important human rights enforcement tool under most international and regional human rights instruments, including the African Charter. This is because the State is the central institution with the capacity to implement internationally recognised civil, political, economic and social human rights. The State is further obligated under the social contract theory to promote and protect the human rights of its citizens. Yet as important as State reporting mechanism is in the promotion and protection of human rights, for various reasons, it has not been efficient in discharging this duty, especially under the African Charter. The reasons, as will be discussed later in this thesis, range from political expediency on the part of States parties to the Charter to poor or unclear enforcement concept of the mechanism under the Charter.⁹

Through the instrument of State reporting, it was intended that it should be possible to identify the difficulties of the realisation of human rights and possible ways to address them. Thus it is intended that States benefit from advice on how to improve their human rights situation from independent international experts. It is however doubtful that States have benefited immensely from this process. Equally doubtful is whether the human rights situation in the concerned countries has improved owing to the participation of the countries in the instrument of State reporting.

Partly due to failure to submit reports by State parties to the Charter, the African Commission which is the human rights enforcement organ under the Charter, has not fully succeeded in enhancing the protection and promotion of human rights through the examination of State reports. Reasons for such non-compliance by States includes a general lack of political will on the part of State parties; State parties have also to file reports under other international human rights instruments to which they are signatories; and thirdly, the lack of a coordinated effort between State departments and the complexity of the first reporting guidelines issued by the African Commission.

⁹ The designers of the Charter seem to have formulated weak provisions on State reporting and they overlooked the utility of such reports in ensuring implementation of the Charter. Refer to article 62 of the Charter.

State reporting is subject to political expediency of governments and their political interests. The implementation of State obligations with respect to human rights is dependent on political will and good offices of the ruling elites, in so far as this does not threaten their hold on power. This is best shrouded behind the veil of State sovereignty and the international law principle of non-interference in the domestic affairs of a State.

Also, many of the reports filed have revealed a lack of seriousness in carrying out introspective self-evaluation. An example is Nigeria's report (of six pages in total), which consisted of a few brief remarks and a photocopy of a table of contents of its partially suspended constitution.¹⁰ While Commissioners have expressed satisfaction with some reports, such as those of The Gambia, Mozambique and Algeria, these so called good reports may be imperfect as they are compared with totally inadequate reports from other countries. Moreover, some countries may use comparatively good reports to conceal their poor human rights records.

It is also noteworthy that the African Commission does not issue "concluding comments" or "concluding evaluation" of State reports. Individual commissioners express views in the course of examining State reports, but no uniform position is taken by the Commission on the various issues raised. Neither does the Commission adequately advise State parties on how to improve their human rights situation.¹¹

Further, the fact that the proceedings are non-contentious and non-judgmental makes the whole process a mockery of the real human rights situation on the ground. Usually States are required to assess themselves on steps taken towards the realisation of human rights. An honest evaluation is usually unlikely as the State is the main violator of human rights. It is also the institution charged with the responsibility to take legislative measures on various aspects of human rights.

¹⁰ G. W. Mugwanya, *supra* note 5 at p. 278.

¹¹ Initially, the UN Human Rights Committee in examining reports under article 40 of the International Covenant on Civil and Political Rights (ICCPR) used not to adopt concluding comments or concluding views about state reports, but from 1992 it changed the practice to issue Agreed Final Comments at the conclusion of the consideration of each report. These comments also contain recommendations to the State on the possible actions to take to improve its compliance with human rights obligations under the Covenant.

Most countries score very poorly on these issues. Often, State obligations conflict with and are inconsistent with the promotion and realisation of human rights. It is the contention of this thesis that theoretically the State exists *inter alia*, to protect individuals and families from violations of human rights, yet at the national level, the abuse of human rights is in most cases actuated by the State or its agents. For some African States in particular, poor governance, corruption under authoritarian regimes over the years and outright breach of human rights has been the hallmark of their survival. How can they therefore assess themselves honestly with a view to raising human rights standards in their countries? Even if any advice is given to such State during the proceedings under the various international human rights instruments and the African Charter in particular, it is non-binding on the State. There are no guarantees therefore that the States shall heed and or implement any such advice offered it. To a large extent, State reporting generally and specifically under the African Charter, is thought to be ineffective, given the magnitude of human rights violations on the continent.

To make human rights effective within the international system, the subject of human rights, the individual, should be given the fullest possible ability to realise the human rights, and be able to meaningfully, effectively seek the vindication of their rights, where these are violated. To achieve this objective, there is need for a leap towards the full development, and implementation of the individual-based mechanisms and especially the individual case system as complimentary mechanisms to State reporting as cardinal measures for the protection and promotion of human rights.

A consideration will be taken of the European and American human rights systems and emerging practice in recent international human rights covenants and optional protocols as a pointer to the paradigm shift towards individual case mechanisms. The thesis thus presents proposals for seeking the realisation of human rights through not only an improved State reporting mechanism but also through other complementary mechanisms especially the individual case system¹² and an improved individual reporting mechanism.

1.2 Objectives of the Study

¹² This will be realised through the operationalisation of the African Court of Human Rights.

1.2 Objectives of the Study

The thesis aims at achieving the following objectives:

- a) Examine the efficacy of the instrument of State reporting under the African Charter on Human and Peoples' Rights and to consider the factors contributing to or undermining its effectiveness;
- b) Reflect on the philosophical underpinning of the State and the philosophy of human rights and to examine the effect of the disparity in the two theories on the effective enforcement of human rights through the instrumentality of State reporting;
- c) Examine the best practices with regard to the promotion and vindication of human rights globally. Specifically, note shall be taken of the growing trend for establishment of independent national human rights institutions as the main bulwark for human rights in complementing State reporting. This is a departure from the traditional approach where the promotion and protection of human rights was the exclusive domain of the State;
- d) Make a case for a departure from over-reliance on State reporting to adoption of facilitative individual-based mechanisms for individual complaints as the ultimate instrument for the realisation and vindication of human rights, especially under the African charter.¹²

1.3 Hypotheses

The thesis aims at testing the following hypotheses:

- i. That State reporting generally and specifically under the African Charter, is ineffective, given the magnitude of human rights violations on the continent; and that the practice of African countries with regard to State reporting is poor, erratic and at best, a mere formality;¹³

¹³ See Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights Annexe II (Status of Submission of State Reports) 68th Ordinary Session of the OAU Council of Ministers 1-6 June 1998 CM/208 (LXVIII).

- ii. That there exists a contestation between the theory and philosophy of State and that of human rights. Consequently, the ability of States to honestly assess themselves and report on their human rights record is severely undermined. Often, an honest evaluation is usually unlikely as the State is the main violator of human rights;
- iii. That there is need for a leap towards the full development, and implementation of the individual case system as a complimentary mechanism to State reporting as the cardinal measure for the protection and promotion of human rights.
- iv. That there is growing jurisprudence towards establishment of independent institutions separate from the State as the main safeguards for the promotion and protection of human rights.

1.4 Research Questions

- a) Does an inherent and fundamental jurisprudential incompatibility that exists between the theories of State and that of human rights undermine the efficacy of the instrumentality of State reporting?
- b) Is there need for alternative or complimentary enforcement mechanisms to State reporting under international human rights law to strengthen the enforcement of human rights generally?
- c) What reforms should be undertaken to improve and strengthen State reporting under the African Charter?

1.5 Literature Review

Since the coming into force of the Universal Declaration of Human Rights and other international human rights instruments, numerous studies have addressed the regimes for the enforcement of these instruments.¹⁴ There are, however, very few studies that have sought to analyse the functioning of the State reporting mechanism in ensuring compliance with these instruments.¹⁵ Even fewer studies have analysed the State reporting mechanism under the African Charter on Human and Peoples' Rights. The most advanced studies in this area have been studies by United Nations bodies and experts.¹⁶ These studies have among other issues, sought to examine the working of the African Commission on Human and Peoples' Rights.¹⁷ No particular studies have sought to systematically demonstrate how the State reporting mechanism in the enforcement of human and peoples' rights in Africa has functioned under the African Charter.

In a volume edited by Merali and Oosterveld, Puta-Chekwe and Flood¹⁸ examine the State reporting system, albeit under the International Covenant on Economic, Social and Cultural Rights (ICESR). The writers note that State compliance with reporting obligations under the ICESR remains relatively poor. Similarly, Alston's and Crawford's seminal treatise focuses on the enforcement mechanisms for human rights under the ICESR and the International Covenant on Civil and Political Rights (ICCPR).¹⁹ The subject of State reporting in International Human

¹⁴ See for example J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), ch. 1; J. W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987); J. Donnelly, *International Human Rights*, Second ed. (Boulder: Westview Press, 1998), ch. 4; and D. P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), ch. 3.

¹⁵ See J. Donnelly, *International Human Rights*, Second ed. (Boulder: Westview Press, 1998), ch. 4; D. P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), ch. 3. For an authoritative examination of international human rights reporting, see P. Alston and J. Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).

¹⁶ See various reports at <<http://www.unhchr.ch>> on the subject.

¹⁷ *Ibid.*

¹⁸ C. Puta-Chekwe and Nora Flood, "From Division to Integration: Economic, Social, and Cultural Rights as Basic Rights," in I. Merali and V. Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights*. Philadelphia: University of Pennsylvania Press, 2001.

Rights Law has also been discussed by the work of Mugwanya,²⁰ Welch,²¹ Viljoen and Heyns.²² At the academic level of, one recent thesis by Lifongo²³ and Awori- Matheka²⁴ are some of the few publications on the subject of State reporting.

These works generally address the theory of the enforcement of international human rights law. Further, the discussions are in a general context rather than with specific reference to regions for example the African human rights system, and in particular the State reporting mechanism. While squarely on the issue of enforcement, the other above-mentioned works contain few contributions, which delve into a discussion of the African case in particular. An example of an exception in this regard are the works of Mugwanya, Viljoen and Heyns, cited above, although they have focused on the entire functioning of the Charter and in particular, the African Commission on Human and Peoples' Rights. This study therefore contributes in giving more focus to the question of State reporting under the African Charter.

1.6 Study Methodology

The research seeks to analyse the State reporting system under the African Charter. The study seeks to explore quantitative and qualitative methods of data collection and analysis in testing the research problem, questions, objectives, theoretical foundations and hypotheses. Specifically,

¹⁹ P. Alston and J. Crawford, *The Future of Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).

²⁰ G. W. Mugwanya, *supra* note 5 at p. 268-284.

²¹ C.E. Welch, Jr., "African Commission on Human and Peoples' Rights: a five-year report on assessment," *Human Rights Quarterly*, 1992. 14 (1), 43-61.

²² F. Viljoen, "Review of the African Commission on Human and Peoples' Rights: 21 October to 1 January 1997," in C Heyns, (ed) *Human Rights Law in Africa 1997* (1999).

²³ W. M. Lifongo, *International Human Rights Monitoring Mechanisms and their Effectiveness: Emphasis on the Human Rights Committee, The African Commission and The I.L.O.*, Unpublished Master of International Human Rights and Humanitarian Law Thesis, Faculty of Law, Lund University.

²⁴ N. Awori- Matheka, *The African Charter on Human and Peoples' Rights and the Human Rights Question in Kenya*, LL.M Thesis, Faculty of Law, Lund University, (2002).

the following methods and techniques will be used in the collection and analysis of data from both primary and secondary sources.

- **Library Research Method**

Library and electronic methods will be used in the collection of secondary information from sources such as libraries, archives, information resource centers, public registries, websites and other institutional and individual sources of information. This will involve desk analysis of various texts, communications and reports of the African Commission on Human and Peoples' Rights, research findings, journals, books, periodicals and other gray materials.

The review of literature will involve a process of rigorous analysis aimed at:

- a) Identifying theoretical and practical gaps in the study of the enforcement of human rights under international human rights law.
- b) Identifying the functional strengths and weaknesses of the State reporting mechanism as an instrument for ensuring compliance with international and regional human rights law and specifically under the African Charter.
- c) Identifying the other models of enforcement mechanisms and the contexts for their success and how they can be used to complement the State reporting mechanism.

1.7 Limitations of the study

The subject of enforcement of human rights under international human rights law is a very wide one encompassing a wide range of mechanism and actors that would merit a broader field of inquiry. However the focus of this study is with reference to the State reporting mechanism under the African Charter, thus avoiding an array of other mechanisms and international and regional human rights instruments relevant to the question of enforcement of human rights. In

the attempt to delimit the study to the African context, the case study places a focus on the African Charter. This is in light of the availability of literature on the question of recent adoption of the protocol establishing an African Court. This inevitably leads to a generalised picture. Suffice to say that it would have been more appropriate to assess the examples of a number of compliance of individual African States in reporting under the Charter.

The subject of enforcement of human rights violations invites an in-depth study of both the legal and political (informal) approaches to the issue. In the interests of time and space, the study is limited mainly to the legal approaches on the subject and thus avoids an otherwise legitimate detailed discussion of the political approaches to the questions of State reporting, State sovereignty and universalism.

1.8 Summary of Chapters

The study is divided into four chapters. Chapter one provides the context in which the study is set, the focus and objectives of the study, its significance and other preliminary issues including the hypothesis, research questions and the literature review. Chapter two seeks to delimit the meaning, content and evolution of human rights. This chapter also provides a brief overview of the mechanisms for the enforcement of international human rights law under various international legal instruments. These include State reporting, the individual complaints system, Special Rapporteurs, Courts and Tribunals. Chapter three, which is the nucleus of this study, discusses the instrumentality of State reporting generally, its nature, scope and shortcomings under the African Charter on Human and Peoples' Rights. In this chapter, the philosophy of the State and especially the contractarian theory and the philosophy of human rights are also reviewed. The fourth and final chapter seeks to draw some conclusions and give recommendations on the way forward for the State reporting mechanism.

CHAPTER TWO

HUMAN RIGHTS AND THEIR ENFORCEMENT IN INTERNATIONAL LAW

2.0 Human Rights Conceptualised

In order to locate this work within a clear analytical framework, this chapter introduces the concept and practice of human rights and discusses the mechanisms for enforcement under international human rights law. This chapter will mainly be devoted to basic principles recognising that the success of any thesis requires conceptual clarity as a guideline throughout the work. The conceptualisation will therefore seek to exposit the legal and meta-legal foundations of human rights theory and practice. A normative foundation is also required in order to bring in perspective the indivisibility and inalienability of human rights.

Human rights are universally recognised set of norms and standards for ensuring human development, well-being, and dignity of every person. The dignity of the human person signifies that every human person has the right to be respected for the very fact that he is a human being.²⁵ The main function therefore of rights is to establish recognition which is an important necessity for the constitution of self. The imperative of rights is to be a person and to respect others as persons. As an absolute yardstick, human rights constitute the common language of humanity. In recognising entitlements and upholding human dignity, human rights and fundamental freedoms allow the development and use of human qualities, intelligence and conscience to satisfy the human spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being is respected and protected.

²⁵ J. Maritain, *The rights of man and natural law* (Trans Danson) (1943) 65 and Jack Donnelly, *The Concept of Human Rights* 5 (1985). See also J. Donnelly, *The Universal Declaration Model of Human Rights: A Liberal Defence*, Human Rights Working Papers, Number 12, available at <http://www.du.edu/humanrights/workingpapers/papers/index.html> (visited on 10 December 2004). According to Donnelly, "[h]uman rights are . . . the rights one has simply because one is a human being" (p. 1).

Human rights are also universal. The universality of human rights refers to either universal validity or universal application.²⁶ In the first sense, the claim is that the rights are held to be valid by all (or virtually all) human societies, or within all major cultural, philosophical, and religious traditions. Alternatively, universality can refer to the applicability of a given norm to human beings everywhere. These two meanings are indeed mutually inclusive and supportive, as human rights are both universal in validity and application. This is best captured by the declaration at the conclusion of the World Conference of Human Rights held in Vienna in 1993, where it was stated that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”²⁷ This means that human rights apply to *all* human beings without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁸ The universality of human rights explains why these principles have been codified in international law in the form of treaties and in most constitutions. Virtually every country in the world has chosen to be bound by the terms of at least one of the major human rights treaties. The effect of these treaties is to create specific obligations on the part of governments to protect, promote, and fulfill human rights, and to create a monitoring system to measure compliance.

The present discourse of human rights has its roots in Western²⁹ traditions of natural law. Natural law doctrine upholds the objectivity of justice, grounded on the capacity of reason to discover reason in human nature. “Human rights” is a synonym for “natural rights” which are valid by virtue of their rationality or God’s will.³⁰ They are the content of justice that every

²⁶ A. A. An-Na’im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, *Emory International Law Review*, available at www.law.emory.edu/EILR/volumes/spg97/ANNAIM.html (visited on 10 December 2004).

²⁷ United Nations General Assembly, A/CONF.157/23, 12 July 1993, *Vienna Declaration and Programme of Action*, par. 5 In recent times, there has been an academic debate that national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind in construing/conceptualizing human rights, with a divide between cultural relativists and universalists. For arguments on cultural relativism and universalism, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, (NY: Cornell Univ. Press, 1989), A. Pollis, “Cultural Relativism Revisited: Through a State Prism”, in *Human Rights Quarterly* (Vol. 18), pp. 316-343. C. M. Cerna, “Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts” in *Human Rights Quarterly* (Vol. 16), pp. 741-755 and Y. Ghai, “Universalism and Relativism: Human Rights as a Framework for negotiating Interethnic Claims” in *Cardozo Law Review* (Vol. 21) February 2000, Number 16.

²⁸ Article 1 of the Universal Declaration of Human Rights.

²⁹ The claim bears some further examination because it has been disputed that human rights is a Western concept. The identification of human rights with Western philosophy has given rise to academic debate over the universality of human rights. See generally J. Donnelly, *The Concept of Human Rights*, supra note 23.

³⁰ G. P. Martinez, *Fundamental Rights: Between Morals and Politics*, *Ratio Juris*, Vol. 14 No. 1 March 2001 at

positive law ought to achieve. They are not created by positive law, but are prior to it.³¹ Various renditions of the natural law doctrine exist, but these cannot be discussed here in detail.³² Broadly speaking, natural law theories locate claims of human rights in the context of a general theory of the good in human life, and of right and wrong in human choices and actions. The historical origins of the idea of natural law are commonly traced back to Ancient Greece, particularly the works of Aristotle and Plato's ethical theories. Plato proposed that in the realm of ethics, there exist abstract, eternal and universal truths that are elements of an 'unchanging natural order,'³³ a view which was criticised by advocates of the various forms of relativism, who have suggested that ethical values are particular, contingent and contextual, rather than universal and absolute.

Whereas Plato's ideas were associated with the idea of an "unchanging natural order," it did not emphasise the "human nature" approach, based on the thesis that objective and prescriptively binding principles of right conduct (or right reason) are derived from certain "facts" about human nature and existence.³⁴ Aristotle laid the foundations for this approach, suggesting that it is possible to reject the Platonic search for universal values based on the idea of an "unchanging ethical order" and methods of abstract reasoning, without sliding into relativism - by invoking human nature. In Aristotle's view, humans are distinguished by the capacity to reason and to exercise rational choices, and these general features of human nature can provide foundations for accounts of human flourishing or well-being, human good and good political arrangements.³⁵ Although Aristotle has been criticised in the modern literature on political liberalism, and in the modern literature on equality, democracy and rights, his work can be interpreted as setting the stage for subsequent theories of individual rights based on appeals to human nature. Following these thoughts, the theories of natural law

p. 65.

³¹ *Ibid.*

³² It is often suggested that the modern idea of human rights is based on, or has evolved from, the ideas of natural law and natural rights.

³³ See Plato ([c.360 B.C.]) *Theaetetus*: Translated by R.A.H. Waterfield. London, Penguin, 1987.

³⁴ *Ibid.*

³⁵ See Aristotle ([350 BC]). *Politics*: Translated by Ernest Barker. Revised with an Introduction and Notes by R.F. Stalley. Oxford, Oxford University Press, 1995 and Aristotle, ([c.330 B.C.]) *The Nicomachean Ethics*: Translated with an Introduction by D. Ross Revised by J.L. Ackrill and J.O. Urmson, Oxford, Oxford University Press, 1998.

and natural rights were subject to a process of re-interpretation and historical development in three main stages, namely the Roman, Medieval and Early Modern periods.³⁶

In the Roman period, philosophers reinforced the notion of natural law and natural rights. Cicero, for example, postulated “that true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions.”³⁷ The idea of natural law was also central to philosophical and theological debates during the medieval period. It was invoked to justify and promote many different theories and agendas among them the early ideas about human rights. The theologian Aquinas is remembered for his humanising and liberalising influences on natural law thinking.³⁸ Aquinas also argued that natural law is that part of eternal law revealed to rational beings in the form of reason, and has its basis in human nature. By the end of the medieval period, important statements of the idea of *prima facie* rights had emerged from these jurisprudential and theological debates. This is the idea that was carried forward in theories of natural rights in the seventeenth and eighteenth centuries.³⁹

The ideas of natural law and natural rights continued to develop in the Early Modern period. As in previous periods, these ideas were invoked to promote and justify many different theories and agendas - from absolute rule, the divine right of kings and obedience, to human rights. Grotius focused on the problem of how to develop a moral framework that could govern relations based on principles of natural law.⁴⁰ These principles, with their basis in human nature and human rationality, could be accepted universally. In elaborating this proposition, Grotius appealed to the idea of an individual right as a capacity or power. This idea was buttressed by the thoughts of English philosopher Hobbes who placed the idea of natural rights at the center of a far-reaching political theory.⁴¹ His theory suggested that individuals are endowed with natural rights that are independent of society, including the

³⁶ P. Vizard, *Antecedents of the Idea of Human Rights: A Survey of Perspectives*, Human Development Report 2000 Background Paper, available at <http://hdr.undp.org/publications/papers.cfm> at 1 (visited on 10 December 2004).

³⁷ T.E.Page, E.Capps, W.H.D.Rouse (eds) (*The Loeb Classical Library*, London, Heinemann).

³⁸ See P. Vizard, *Antecedents of the Idea of Human Rights: A Survey of Perspectives*, supra note 36 at p. 4.

³⁹ *Ibid.*

⁴⁰ J. B. Scott, *The Classics of International Law* (Oxford, Clarendon Press).

⁴¹ T. Hobbes, [1651] *Leviathan*.

fundamental right to self-preservation. However, individuals in the state of nature cannot enforce their natural rights effectively. Therefore, in order to achieve the benefits of order and security, people voluntarily agree to submit to government. A social contract is arrived at whereby individuals transfer their natural rights to a sovereign power, and agree to submit to sovereign rule. This idea was refined by Locke who introduced the idea of natural rights in relation to a “state of nature”; that individuals are endowed with natural rights that are prior to, and independent of, the existence of a government.⁴² Significantly, Locke characterised the social contract as an outcome of free and voluntary individual action. Other significant contributions ensued, including propositions by Paine, Kant and influential contemporary thinkers such as Rawls to name a few. Discussing all these here may not be practical; indeed, it would comprise volumes.

It should be noted that although the western philosophy and writings have been significantly influential in shaping the modern notion of human rights, it cannot be purported that the notion of natural human rights is to be traced to the western civilisation alone. African notions of human dignity and rights did exist, although conceptualised as having been largely communitarian.⁴³ As Umozurike concludes:

Traditionally, the rights of full members of the society were fully integrated into the rights of the society as a whole; they were not held against the society but were complementary with societal rights. Human rights were conceptually linked with the traditions of the people, the observance of which was of immense interest to the people. Thus, human rights, at any rate those that were recognised by the community, were effectively enforced, but for the benefit of the members of the society.⁴⁴

And in western philosophy which is claimed to be the origin of the theory and practice, there is no uniformity with respect to human rights. Alongside the philosophical proponents of rights, one may find many prominent western philosophies whose ideas are less compatible with the contemporary notion of human rights. Aristotle, for example, argued for the priority of the State. Rousseau, argued that individual rights were subordinate to the general will. Bentham, the founder of utilitarianism and of much liberal thought, dismissed the notion of

⁴²J. Locke, [1689/90] *Two Treatises of Government*.

⁴³ For instance JB Ojwang outlines the African or Africanist notion of human rights in his work, “Laying a Basis for Human Rights,” *Holdsworth Law Review*, Vol. 15, No. 1 (1991-92) 96. See also I. Shivji, *The Concept of Human Rights in Africa*, 1989. According to Shivji,

[t]he prevailing rights discourse [in Africa] is fundamentally within the idealist philosophical world outlook. It is abstracted from social history and thereby arrives at conclusions which make human rights both the *eternal in historical and universal in social space*. (Emphasis mine)

⁴⁴ U. O. Umozurike, *The African Charter on Human and Peoples’ Rights*, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers, The Hague, 1997 at 12.

natural rights as “nonsense upon stilts.”⁴⁵ Furthermore, Burke and Bentham challenged the validity and coherence of human rights with Marx attacking the egotism and atomism of natural rights.⁴⁶

The natural school of law is not without detractors.⁴⁷ Accordingly, other postulations have been advanced as the foundation of human rights. An examination of the positivist school will illustrate this. The positivist school of legal thought posits that law is an essential attribute of the sovereign power of the State. If natural law identified “validity with justice and only considered valid law that which is just law, positivism only considers law that which is valid law.” Extreme versions of this thought assert that valid law is held not only to be valid, but also just.⁴⁸ Under this scheme, anything can be a human right if that is what the sovereign lays down in the positive laws. This school too has not escaped criticism. Sterilising a minority or killing dissidents could be considered as an exercise of human rights if this is prescribed in positive laws, however absurd and inimical they are to the human person.

Despite the gravity of human rights, it is surprising that there is no general ideological consensus on human rights. The contradictions in the way natural law and doctrine and positivism lay foundations for human rights clearly shows that the debate about human rights is far from over. Indeed, human rights law and practice remains a highly contentious subject. There is however consensus that

rights have their origin in the field of morality. They are an historical concept of the modern world that was born in the field of moral values, that is, in the field of the rules that guide the whole development of human beings. If they do not have the support of the State, they will not be turned into positive law, thus, will lack the force to guide the social living in a favourable way to its moral aim: the progress of the human condition. ...rights are, in short, the meeting point of the different parts of morality, democracy [and] the rule of law.⁴⁹

⁴⁵ See J. Waldron *Nonsense Upon Stilts. Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987).

⁴⁶ Bowring W, ‘Forbidden Relations? The UK’s Discourse of Human Rights and the Struggle for Social Justice’, 2002 (1) *Law, Social Justice & Global Development Journal (LGD)* at 4.

⁴⁷ See G. P. Martinez, *supra* note 30 at 68. According to Martinez, “[n]atural law doctrine is based on a great illusion: It denies the historical evolution of the fundamental values of existence and the influence of technical, economic, social, cultural and political evolution.” Martinez points to the “progressive increase” in fundamental rights throughout history and the emergence of rights that were “impossible to foresee in the ages of Aquinas, Grotius or Thomasius,” as an affront to the natural law doctrine.

⁴⁸ See T. Hobbes, *Leviathan* (1997).

⁴⁹ See G. P. Martinez, *supra* note 30 at 68.

The morality in this context is the morality of liberty and equality.⁵⁰ Human beings, though conditioned by the historical circumstances under which they live and by economic, social, political and cultural dynamics, nonetheless have a free will. Human rights help that moral goal by setting up areas of autonomy where human beings can act freely. This is captured by the words of Hegel as follows:

[M]an is recognised and treated as a rational being, as free, as a person; and the individual, on his side, makes himself worthy of his recognition by overcoming the natural state of his self consciousness and obeying a universal, the will that is in essence actuality will, the law; he behaves, therefore, towards others in a manner that is universally valid, recognising them...as free, as persons.⁵¹

The question of morality brings to the fore contemporary discourse in human rights in three main areas. First, the debate as to universalism and cultural relativism: are human rights really the property of all human beings everywhere and at all times, or are they historically determined and culturally specific? Second, the odious notion of the ‘clash of civilisations’, between two cultures that share the same roots, and the ideas of cross-cultural approaches to human rights developed by some jurists.⁵² Third, the recent suggestion that the so-called ‘third-generation rights of peoples’, were an effusion of the seventies’ radicalism and have had their day is also contestable.⁵³ Of course these cannot be discussed here in all their complexity. Indeed, an examination of these could constitute volumes of literature.⁵⁴

Human rights aim to acknowledge and protect the central and immutable characteristics of human nature. These attributes may differ from philosopher to philosopher, ranging from the need for self-preservation in Hobbes to rational freedom and moral responsibility in Kant, but their absolute character makes them universal, establishes the priority of rights over duties and determines the content of legal rights.⁵⁵ The first statements of natural rights, the ‘first

⁵⁰ *Ibid* at 69.

⁵¹ G.W. Hegel, quoted in A. Honneth, *The Struggle for Recognition* (1995, tr. J. Anderson) 108.

⁵² See for example A. An-Na'im, Christina M. Cerna, Y. Ghai, *supra* note 26. See also A. A. An-Na'im (ed.) *Human Rights Cross-Cultural Perspectives: A Quest for Consensus* (Univ. of Pennsylvania Press, 1992).

⁵³ See for example P. Alston (ed) *Peoples Rights*, (Oxford, 2001).

⁵⁴ For an analysis of group rights, see J. Donnelly, “Human Rights, Individual Rights and Collective Rights” in Jan Berting (ed.) *Human Rights in a Pluralist World: Individuals and Collectivities*, pp. 39-62.

⁵⁵ C. Douzinas, Identity, Recognition, Rights or What Can Hegel Teach us about Human Rights, *Journal of Law and Society*, Vol. 29 No. 3, September 2002 at 380.

generation' of civil and political rights, are to be found in the revolutionary documents of the French and American Revolutions.

In conceptualising human rights, we can identify three main components. Rights presuppose a universalistic system under which the people extend respect to each other because they are aware of the imperatives of rights and duties and their foundations.⁵⁶ Secondly, the recognition of the other a legal person is the effect of the fact he enjoys free will, moral autonomy and responsibility and possesses legal rights. This type of recognition is usually called respect for human dignity.⁵⁷ Human rights rest on a moral vision of a life of equality and autonomy and present an effective response to several major threats to human dignity posed by modern States and markets.⁵⁸ Finally, legal recognition leads to self-respect and personal responsibility moral choices. However, this does not imply that the legal recognition is what creates these rights; human rights have a moral content that is not absolvable in positive law, and thus have a prepositive validity. They exist, so to speak prior to political communities and they constitute the reference point for criticising positive rights.⁵⁹ To illustrate,

[e]ven if human rights can be realised only within the framework of the legal order in the nation State, they are justified in this sphere of validity as rights for all persons...⁶⁰

Thus human rights can be morally justified, but they are also embedded in positive, legal norms, as judicially enforceable rights. When enacted or positivised, they are turned into justiciable fundamental or basic rights.⁶¹ They become legally binding on all right holders and confer upon all the legal duty to respect the law and thus grant all the consociates the same rights. What is more, human rights should be thought of as possessions or as innate protections of private interests, rather as what compatriots recognise as reposing in each other mutually when they are to govern their co-existence by law. Human rights are not only an

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ J. Donnelly, *Universal Human Rights*, supra note 14.

⁵⁹ E. O. Eriksen, *Why a Charter of Fundamental Human Rights in the EU?* *Ratio Juris* Vol. 16 No. 3 (2003) 352-373 at 364.

⁶⁰ J. Habermas, "Kant's idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight," in J. Bohman and M. Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Idea*, 113-52, Cambridge MA, MIT Press at 138.

⁶¹ *Ibid.*

instrument of for the collective will formation, but have an absolute status. They have a “value in themselves.”⁶² They precede and limit collective will-formation, at the same time as they must be justifiable in a democratic society. In concluding the debate on the concept of human rights, the words of Boutros-Ghali, the then UN Secretary General, at the 1993 World Conference on Human Rights held in Vienna are particularly relevant. He said:

The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond the apparent divisions, our temporary differences, our ideological and cultural barriers. In sum...human rights are not the common lowest denominator among all nations, but rather what I should like to describe as the ‘irreducible human element,’ in other words, the quintessential values through which we affirm together that we are a single human community.⁶³

2.1 The Development of Human Rights Law

The illumination of the concept of human rights law arose relatively recently, dating from the liberal revolutions that took place throughout Europe and North America at the end of the 18th century.⁶⁴ Historically, the concern for the protection of human rights became a project almost exclusively at the domestic level, where “prevailing power structures resisted acceptance...of the very notion of human rights, the dignity of the human person and the humanity of man and woman.”⁶⁵ Massive and egregious violations of human rights occurred and were wide ranging, leading to popular upheavals, an example being the events that led to the granting of the *Magna Carta* in England in 1215. In the later years, the French Revolution undoubtedly lent a sense of legitimacy to the idea of human rights through the ratification of the *Déclaration des droits de l’homme et du citoyen* in 1789 and the American Declaration of Independence that culminated into the American Bill of Rights (1791). These developments ignited the human rights movement and today influence the subsequent thinking and action on human rights.⁶⁶

⁶² *Ibid.*

⁶³ Address by the former UN Secretary General; Boutros Boutros Ghali at the opening of the World Conference on Human Rights at Vienna, Austria, on 14th June 1993. See UN Doc A/ CONF 157/22, 12th July 1993.

⁶⁴ This does not mean that there were no attempts to acknowledge certain human rights before the 18th century.

⁶⁵ T. Maluwa, Discourses on Democracy and Human Rights in Africa, in the *African Journal of International and Comparative Law*, 1997 at 58.

⁶⁶ *Ibid.*

The subsequent developments were however confined to the domestic plane: notions of human rights were “no more than selective extensions of certain rights which powerful nations wanted their nationals to enjoy elsewhere.”⁶⁷ Thus rights and duties were recognised in commercial transactions, not because of ethical, moral or legal considerations, but rather due to the practical need to safeguard one’s own national interests. Because of this, the human rights were regarded as a preserve of national systems and “inappropriate for regulation by international law.”⁶⁸ It is only after the First World War that the beginnings of universality emerged, although still limited in scope until after the Second World War.

2.2 Human Rights Today: The International Context

Protection of basic human rights is one of the most pressing and yet most elusive goals of the international community. As noted above, international law protecting human rights was sparse before World War II. States limited their international legal obligations to declarations of intent and to a small number of treaties and conventions. Adoption of the 1945 UN Charter and the Universal Declaration of Human Rights three years later, however, provided a window of opportunity for States, international organisations, and civil society actors and organisations to mobilise to place human rights on the international legal agenda. Today, these efforts have culminated in the creation and expansion of a worldwide system of international human rights law designed to identify and protect a growing number of basic human rights.⁶⁹ This has been referred to elsewhere as the *internationalisation* of human rights.⁷⁰

The preoccupation of the corpus of substantive and procedural rules of international human rights law is the protection of internationally guaranteed rights of individuals against violations by governments. Two branches may be identified therein: first, the so-called

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ E. Hafner-Burton and K. Tsutsui, Human Rights in a Globalising World: The Paradox of Empty Promises, Forthcoming in the *American Journal of Sociology*, at 2. (On file with the author.)

⁷⁰ See Y. Ghai, Human Rights and Social Development: Toward Democratisation and Social Justice, UNRISD Publications, Geneva, 2001 available at www.unrisd.org (visited on 20 December 2004).

normative system, and second, the international protection system.⁷¹ The normative system is a set of international rules recognising human rights, providing for their scope and contents, and giving criteria for their permissible restriction and derogation in times of emergency. The international protection system is a set of rules establishing legal mechanisms for the supervision and control of States parties' obligations.⁷² It is this international system that this thesis will concentrate on.

The international system, together with the regional and national human rights protection regimes constitute the global system of rights. Historically, the concept and practice of human rights developed in national systems.⁷³ Before the establishment of the United Nations, a number of States provided for the protection of rights in their constitutions or canons. The League of Nations and the International Labour Organisation facilitated the internationalisation of specific rights of workers and minorities, but it is only since the existence of the United Nations that there has been an exponential growth in international human rights law.⁷⁴ Due to these developments, the subject of human rights is now the concern of citizens within nations and the international community alike.

The growth of conventions and institutions at the international level was paralleled by the establishment national and regional human rights systems. The European Convention of Human Rights⁷⁵ was adopted on 4th November, 1950, providing the first instance of the protection of rights at the regional level. Since then, regional systems of human rights have been established for Africa⁷⁶ and the Americas,⁷⁷ though there are differences in the scope of

⁷¹ M. Pinto, Fragmentation or unification among International Institutions: Human Rights Tribunals, *International Law and Politics* [Vol. 31:833] (1999) at 1.

⁷² *Ibid.*

⁷³ See Y. Ghai, Human Rights and Social Development: Toward Democratisation and Social Justice, *supra* note 70 at 6.

⁷⁴ *Ibid.*

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. The original system was superseded by the protection system established by Protocol 11, March 20, 1952, 213 U.N.T.S. 262.

⁷⁶ The African Human Rights System is founded mainly on the African Charter on Human and Peoples' Rights and other regional human rights instruments.

⁷⁷ The American Human Rights System is founded mainly on the American Convention on Human Rights and other regional human rights instruments. See the American Convention on Human Rights [hereinafter American Convention], in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, OEA/Ser.L.V/ II.82, doc.6, rev.1 (OAS General Secretariat 1992).

rights and the method of enforcement. Another regional system has developed in recent years under the auspices of the Organisation for Cooperation for the Security of Europe (OSCE), in which Canada and the United States also participate.⁷⁸

2.3 The Enforcement of Human Rights under International Human Rights Law

The nature, content and anatomy of human rights obligations trigger the need for specific implementation measures to stimulate, monitor and enforce compliance with these obligations.⁷⁹ The effectiveness of any human rights system depends to an important degree upon its ability to 'enforce' respect for the legal norms set within it. It is therefore quite typical for international human rights treaties to provide for particular implementation mechanisms and measures as an essential part of the treaty. But the very practice of 'such international enforcement is controversial and resisted by a significant number of governments' (a few of which do so overtly while the majority do so through subtle methods).⁸⁰ It is therefore not surprising that there is no agreement on the concept of enforcement.⁸¹ Some claim that 'enforcement' amounts to the use of force or the threat of use of force, economic or other sanctions or armed force.⁸² Attempts to define 'enforcement' have been merely an elaboration of one standard, yet wide definition propounded by Bernhardt. According to Bernhardt, 'enforcement' comprises 'all measures intended and proper to induce respect for human rights.'⁸³

Without doubt, the measures anticipated to enhance the realisation of human rights occur in the domestic plane. Compliance with international law takes place within a State and depends on the legal system, on its courts and other official bodies. Generally, States observe

⁷⁸ The Organisation for Cooperation for the Security of Europe (OSCE), Office for Democratic Institutions and Human Rights available at www.osce.org/odihr (visited on 10 December 2004).

⁷⁹ A.O. Adede, "International Human Rights Law: Lessons for Treaty making and Implementation," in A.A. Yusuf (ed), *African Yearbook of International Law* Vol. 3 (Kluwer Law International, 1995) at 106.

⁸⁰ H Steiner and P Alston, *International Human Rights in Context: Law, Politics and Morals*, 2nd ed., (Oxford, Oxford University Press, 2000) at 593.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ R. Bernhardt, 'General Report' in Bernhardt and Jolowicz (eds) *International Enforcement of Human Rights*, 1985, at 5.

international law for three main reasons: their commitment to order and the rule of law; because States have an interest in (less than perfect) compliance; and because of the availability of ‘horizontal enforcement’, that is, deterrence from violation by reason of anticipated sanctions.⁸⁴ But sadly, Henkin concludes that these ‘inducements’ do not work for international human rights law. According to the international law scholar,

The general culture of enforcement is less effective for human rights law...States have not yet wholly assimilated the fact that they have an international obligation to respect rights of citizens...Compliance with international human rights obligations is more responsive to domestic constitutional culture...The causes of human rights violations are cultural, political, internal...an underdeveloped commitment to constitutionalism, the rule of law...In such circumstances, external inducements to comply with international rights law are remote and not readily felt.⁸⁵

Paradoxically, it is these reasons that trigger the establishment of specific enforcement mechanisms for international human rights. The reality with the enforcement of human rights is that there is a wide chasm between norms and practice.

2.4 Rationale for specific enforcement mechanisms

Human rights law is embodied in legal rules that derive, in part, from declarations and treaties. A small group of human rights treaties (both general and specific in scope, and both universal and regional in reach) establishes international enforcement systems designed to ensure that States parties comply with their obligations. These systems usually consist of a monitoring body, which is composed of a given number of experts acting in their personal capacities.⁸⁶ The body is endowed with a range of functions, including the power to receive and consider individual petitions.

It is however notable that while the international community has attained considerable success in creating international norms to regulate protection and promotion of human rights, it has not been able, understandably owing to inherent weakness of international law, to provide for effective international mechanisms to enforce those norms. This has been sadly

⁸⁴ L. Henkin, *International Law: Politics, Values and Functions*, Hague Academy of International Law 13 (Vol. IV, 1989) at 251.

⁸⁵ *Ibid.*

⁸⁶ Various international and regional human rights instruments are unequivocal that members of the monitoring or dispute settlement bodies serve in their personal capacity. See for example article 31(2) of the African Charter.

manifest in the frequent non-observance of human rights norms by many States in relation to their nationals. While international judicial and quasi-judicial mechanisms have not developed sufficiently to deal with violation of human rights in State territories, the municipal or domestic legal system has remained so far largely unused to enforce international human rights in respective territories.⁸⁷

Nevertheless, the international community has established two main regimes for the protection and promotion of human rights, namely the charter based and the treaty based procedures. The charter-based procedures of is a system of monitoring human rights through supervisory mechanism that do not necessarily find their basis in a specific human rights treaty. These procedures and mechanisms have been established by resolutions of the Economic and Social Council of the United Nations and, therefore, are ultimately based on the Charter of the United Nations. As a result, these procedures have become known as charter-based procedures. The treaty-based procedures, on the other hand, are based on specific supervisory mechanisms established within the context of specific human rights treaties, hence the label treaty- based procedures. These include State reporting procedures, individual communications, courts and tribunals, Inter - State complaints and special Rapporteurs,⁸⁸ analysed below in outline.

2.5.1 The Reporting Procedures

The reporting procedure is the most common enforcement mechanism in all the international and regional human rights instruments. Under the reporting procedures, States are required to submit reports on their compliance with the treaty obligations.⁸⁹ According to Adede, the reporting procedure consists of two elements: the furnishing of information and the

⁸⁷ In principle, given that the norms of international law are legal and binding in character, it is not inappropriate for domestic courts to apply international law directly, if it does not contradict domestic norm. However, there seems to be inertia on the part of courts to apply international law, particularly international human rights law. It is only the courts in the countries of Europe that have espoused the application of international law, largely because these national courts have jurisdiction to apply the European community law. Indeed, the decisions of the European Commission, the European Court of Justice and the European Court of Human Rights have greatly influenced the jurisprudence of judicial decisions of the member-states.

⁸⁸ See A.O. Adede, *supra* note 79 for a discussion of the various treaty-based and Charter-based mechanisms.

⁸⁹ See for example article 42 of the American Convention on Human Rights, to the American Commission; article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, to the Committee on the Elimination of Discrimination Against Women; and under article 44 of the Convention on the Rights of the Child, to the Committee on the Rights of the Child.

processing of information and data submitted or received.⁹⁰ The first one is framed in terms of an obligation of the States parties. States undertake to take the necessary steps or measures to give effect to the provisions of the instrument and to submit reports on the measures they have adopted, the progress made and the factors and difficulties they face in implementing their obligations. Normally, reports have to be submitted periodically, State party concerned, followed by regular intervals.⁹¹ The second one is determined by the competence or the mandate given to the treaty organ.⁹²

Generally, a reporting mechanism is part of an implementation system.⁹³ It supplies information from each State party on the operation and implementation of a treaty by that State. One way of supplying information is by a self-evaluating report. Self-evaluating reports are assessments of a State's performance by that State, not by other States or by independent agents, such as Special Rapporteurs or non-governmental organisations, through these may later play a role in verifying the data received. Under this scheme, the information thus obtained is submitted to an international institution having a supervisory role. The key tasks of an international supervisory institution are those of gathering information and data by receiving, for example, self-evaluating State reports, of facilitating independent monitoring and inspection, and acting as a forum for reviewing the performance of States or the negotiation of further measures and regulations. Such institutions may thus acquire semi-official law-enforcement and law-making functions. Law-enforcement consists in requiring States to be accountable to other Member States, i.e., imposing a form of collective or communal supervision.

⁹⁰ A.O. Adede, *International Human Rights Law: Lessons for Treaty making and Implementation* at p 108,109.

⁹¹ *Ibid*

⁹² Different treaties, protocols and/or guidelines establish specific organs charged with the responsibility of receiving, considering and making recommendations to secure the promotion of human rights within the particular regimes. These include the Human Rights Committee- article 28 of the International Covenant on Civil and Political Rights; Committee on the Elimination of all forms of Racial Discrimination (CERD)- Article 8 of the International Convention on the Elimination of all forms of Racial Discrimination; the Committee Against Torture (CAT)- article 19 of the Convention Against Torture; the Committee on the Rights of the Child- article 44 of the Convention on the Rights of the Child; Committee on the Elimination of All Forms of Discrimination against Women- article 18 of the Convention on the Elimination of All Forms of Discrimination against Women and the African Commission on Human and Peoples' Rights- Article 62 of the African Charter on Human and Peoples' Rights.

⁹³ A Comparison of Self-evaluating State reporting systems: Part Two, available at www.icrc.org.

Supervision and monitoring of this kind also entails the negotiation and drafting of detailed rules, standards or practices, usually as a means of giving effect to the more general provisions of treaties. Not only does this form of law-making or international regulation facilitate treaty implementation, it also gives treaties a dynamic character and enables the parties to respond to new problems or priorities. Thus, the combination of regulatory and supervisory functions in the hands of international institutions is of importance in making international agreements operate more effectively. The absence of any provision for institutional supervision or regulation is, by contrast, often a sign that the treaty in question is bound to remain ineffective. As was communicated by the Human Rights Committee, the function of the reporting procedure is “to promote the further implementation of the covenant; to draw their (States parties) attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organisations in the promotion and protection of human rights.”⁹⁴ However, it has been noted that the reporting procedure cannot replace a fact-finding procedure focusing on a specific case, other dispute settlement procedures or enforcement measures directed to correct establishment violation of human rights.⁹⁵

2.5.2 Individual complaints

The individual complaint procedure is yet another important remedy in the vindication of human rights. Although limited to deciding on individual cases, this complaints procedure nevertheless contributes to the legal interpretation and adjustment of international human rights standards.⁹⁶ Under this procedure, a body is granted competence to receive complaints from individuals or groups claiming to be victims of violations of the parent treaty.⁹⁷ An innovation in the case of the Committee on the Elimination of all forms of Racial Discrimination (CERD) is that groups of people can make complaints against States parties.

⁹⁴ Report of the Human Rights Committee (A/36/40), p. 107

⁹⁵ See generally A.O. Adede, *International Human Rights Law: Lessons for Treaty making and Implementation*, supra note 90 above.

⁹⁶ A.O. Adede, *International Human Rights Law: Lessons for Treaty making and Implementation*, supra note 90 above

⁹⁷ These are in most cases the bodies charged with managing the reporting procedures. For example, the Optional article 14 of the Convention against all forms of Racial Discrimination; Optional article 22 of the Convention Against Torture; Optional article 25 of the of the European Convention on human Rights; Article 44 of the American Convention; and Article 55 of the African Charter.

However, it is important to note that before the Committee can receive the complaint, the State concerned must have made a declaration allowing it to do so.⁹⁸ This is also the case with the Optional Protocol one to the Covenant on Civil and Political Rights. In exercising its protective mandate under the Protocol, the Human Rights Committee is competent to entertain applications from individuals alleging violations of the Covenant, provided that a State-party to the Covenant has ratified the Optional Protocol.⁹⁹ The European system also requires specific recognition by States before the Commission can accept individual petitions.¹⁰⁰

Individual complaints represent a new form of inquiry procedure with quasi-judicial elements.¹⁰¹ In order to protect the individual complainant as well as encouraging individuals to utilise the mechanism, the bodies charged with the responsibility of receiving the complaints investigate in confidentiality. Thus when a complaint is received, it is brought to the attention of the State concerned without revealing the identity of the complainant. Under the Convention on the Elimination of all forms of Racial Discrimination, for instance, the Committee on the Elimination of all forms of Racial Discrimination (CERD) communicates to the State concerned requiring it to give an explanation on the violation. The Committee then examines the complaint and the response in a quasi-judicial manner. Thereafter, the Committee makes its views, suggestions and recommendations as to the most amicable solution.¹⁰² This is then transmitted to the complainant and the State party. After the State response (or lack thereof), the replies and accompanying documents are then made known to the petitioner, who is then required to submit observations and contrary evidence. The State concerned then has some days to make its final observations. This is followed by investigations whereupon a decision is made.

⁹⁸ Article 14 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD)

⁹⁹ Information on the status of these treaties may be found on the following UN websites, <<http://www.untreaty.un.org> and <<http://www.unhchr.ch>>.

¹⁰⁰ Article 46.

¹⁰¹ A.O. Adede, *International Human Rights Law: Lessons for Treaty making and Implementation*, supra note 90.

¹⁰² Notice the use of the terms “recommendation”, “suggestion”, “opinion” and “views” as used in the conventions. However, under the system of the European Convention (article 48) and the American Convention (article 51), the case may be referred to the Court of Human Rights which renders binding decisions. See A.O. Adede, supra note 79 above at P. 109.

The Committees and Commissions have different procedural means of investigation.¹⁰³ A prominent feature of the mechanism is that the arbitrators work with the parties to achieve a friendly settlement of the dispute, either at the request of the parties or on its own initiative, where suitable or necessary. The result of the procedure, while framed in the form of a judgment, is in general recommendation to the State concerned. The decisions of the Human Rights Committee, for instance, are called “views”¹⁰⁴ and do not have a binding force of a ruling of a court of law but have rather a persuasive quasi-legal authority.¹⁰⁵ The European Convention and the American Convention¹⁰⁶ provide for a follow-up in order to enforce decisions of their Commissions taken in the individual complaint procedure whereas the procedure under the Optional Protocol to the Covenant on Civil and Political Rights does not provide for any follow-up measures. This is of course an obvious setback to the enforcement of international human rights. Another setback of the individual communications mechanism is that the process is not prompt and moreover, the reports are not legally binding. Nonetheless, the flexibility in the mechanism” gives States the opportunity to rectify the situations that have occasioned the complaints.”¹⁰⁷

2.5.3 Courts/ Tribunals

The European System is perhaps the most illustrative case of the use of judicial procedures in the enforcement of human rights. The European Court of Human Rights established by the Convention for the Protection of Human Rights and Fundamental Freedoms is the arbitrator of disputes concerning noncompliance with human rights obligations under the Council of

¹⁰³ Some hold a hearing and request oral and written statements and any other pertinent information from the parties. If necessary, an on-site investigation within the respondent country’s territory may be conducted.

¹⁰⁴ Article 5(4) of the Optional Protocol to the Covenant on Civil and Political Rights

¹⁰⁵ See P. Alston (ed) *The United Nations and Human Rights* (Oxford OUP 1992) 369, at 421; J Rehman *International Human Rights Law* (Harlow Longman 2003) 91, who describes the views as having ‘moral and political’ force.

¹⁰⁶ After the period set by the Commission for the government to adopt the recommendations in its report expires, the Commission determines whether the State has fulfilled its obligation and whether to publish the report. Additionally, the report may be submitted to the General Assembly of the OAS as part of the Commission’s Annual Report. If the Member State involved has acceded to the jurisdiction of the Court, the Commission may refer the case to the Court after it transmits the initial report to the government. See arts. 47-48 of the American Convention.

¹⁰⁷ M. F. Cosgrove, *Protecting The Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, Case W. Res. J. Int’l L. [Vol. 32:39] 42.

Europe treaties. In addition, the judiciary at the national level can consider the provisions of the European Convention since virtually all member States have incorporated the Convention into national law. The Council of Europe has however made it clear that the European Court of Human Rights is not a substitute for national courts, but is subsidiary to national systems that safeguard human rights. For these reasons, individuals and groups alleging violations of human rights provisions are required to first exhaust local remedies before a case can be considered admissible by the European Court.

The European Court is the longest-standing international human rights court.¹⁰⁸ Both individuals and NGOs of member States have a right to petition the European Court of Human Rights and the final judgments of the Court are legally binding on the State concerned. The jurisprudence of the Court has been highly influential in the development of human rights norms, even beyond the Council of Europe system. Although the Court has been careful not to infringe upon the authority of national tribunals, it also examines domestic law and policies. For this reason, some consider the European Court of Human Rights to perform the function of a constitutional court for Europe.¹⁰⁹

The Inter-American Court on Human Rights is yet another judicial mechanism in the enforcement of human rights at the regional level.¹¹⁰ The Court has two forms of jurisdiction: Advisory jurisdiction and ‘contentious’ (adjudicatory) jurisdiction.¹¹¹ Under its advisory jurisdiction, the member States and organs of the Organisation of American States may consult the Court on issues related to the interpretation of the American Convention and other treaties “concerning the protection of human rights in the American States,”¹¹² allowing the Court to render a non-binding decision concerning the issue. Unlike its advisory jurisdiction, the Court’s adjudicatory jurisdiction does not apply to a State party unless that State has

¹⁰⁸ Established in 1950 and merged with the Commission by Protocol 11 in 1998 to form one full-time Court

¹⁰⁹ See S. Greer, *Constitutionalising Adjudication under the European Convention on Human Rights*, Oxford Journal of Legal Studies, Vol. 23, No. 3 (2003) 406. Greer argues that “constitutional judgements” are not merely judgements delivered by courts with a constitutional or ‘quasi-constitutional’ status, but because they apply a Constitution.

¹¹⁰ Articles 52-54 of the American Convention on Human Rights. The Court is composed of seven judges, who may be nationals of any OAS Member State. Judges are elected only by the States Parties to the American Convention for a six-year term.

¹¹¹ M. F. Cosgrove: *Protecting The Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, supra note 109 at 44.

¹¹² Article 64 of the American Convention.

ratified the American Convention and specifically acceded to the Court's jurisdiction.¹¹³ Upon considering the evidence in a case under its adjudicatory jurisdiction, the Court may render a binding judgment, award damages to an injured party, and order that a breach of the American Convention be remedied.¹¹⁴ In the course of considering cases before it, the Court may order a government to take interim measures to prevent "irreparable damage to persons" where the cases of extreme gravity and urgency.¹¹⁵

Even though the court plays an important role in upholding human rights in the Americas, it has been plagued by serious substantive and procedural problems.¹¹⁶ As Picado, former Vice-President for the Court, stated

"[i]t takes a lot of time and money to exhaust the domestic remedies, to then go to Washington to the Commission, and then, if the Commission so decides (and in many cases it does not), to take the case to the Court." Governments often delay justice for victims of human rights abuses by exploiting the Commission's procedures. States may refuse to respond to requests for information until the last possible moment or exceed their allotted reply period by "promising" to reply if another extension is granted. These tactics can result in significant delay before the Court even receives a case. For example, [a] petition, which was forwarded to the Court on April 24, 1986, had been received by the Commission on October 7, 1981.¹¹⁷

2.5.4 Inter-State Complaints

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms became the first international legal instrument to grant the right to file petitions for human rights violations.¹¹⁸ The original system was superseded by the protection system established by Protocol 11, March 20, 1952, 213 U.N.T.S. 262. It provided for an Inter-State complaint system that became effective upon its entry into force for the State party. The

¹¹³ Art. 62(3) of the American Convention.

¹¹⁴ Art. 63(1).

¹¹⁵ See art. 63(2) of the American Convention and the Rules of Procedure of the Inter-American Court of Human Rights.

¹¹⁶ See M. F. Cosgrove *supra* note 113 above, *Protecting The Protectors: Preventing the Decline of the Inter-American System for the Protection of Human Rights*, Case W. Res.J. Int'L (Vol. 32:39) P 44.

¹¹⁷ Quoted in L. E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 180 (1992).

¹¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221

European Commission, however, could only receive individual petitions against States that had made separate declarations recognising its jurisdiction over such complaints.¹¹⁹

The American Convention on Human Rights permits individual petitions against any State party. The Inter-State system established by the American Convention further requires a declaration recognising the IACHR's competence to deal with these complaints.¹²⁰ Treaty bodies adopted under U.N. auspices, such as the Human Rights Commission, require a separate declaration recognising their jurisdiction, and thus lie somewhere in between the European and Inter-American systems.¹²¹ Local trust and homogeneity explain some of the differences in approach between the regional and global human rights mechanisms.¹²² Generally, the Inter-State procedure has never taken off in either the U.N. treaty system or in the Inter-American system.¹²³ Only the European system has seen a significant number—around a dozen—of Inter-State complaints. Some of these complaints have generated truly leading opinions, such as *Ireland v. United Kingdom*.¹²⁴

As a matter of fact, the Inter-State complaint system is weak and does not go far beyond being a conciliation machinery.¹²⁵ As such, it is closer to the peaceful settlement of disputes of general international law than to the petition system of international human rights law. Another setback is that most regimes that have been accused of systemic or massive have always invoked the principle of State sovereignty to shield themselves from scrutiny by the international community. Yet this principle is weakening today particularly in the realm of

¹¹⁹ European Convention, arts. 24-25.

¹²⁰ See arts. 44-45.

¹²¹ See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, arts. 11-14, 660 U.N.T.S. 212, 226-32; International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 41, 999 U.N.T.S. 171, 182-83; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 21-22, 1465 U.N.T.S. 113, 118-19.

¹²² See generally supra note 68 above.

¹²³ *Ibid*

¹²⁴ 25 Eurpean.Court of Human Rights (ser. A) (1978), reprinted in 17 I.L.M. 680 (1978).

¹²⁵ M. Pinto, supra note 71 P 836 INTERNATIONAL LAW AND POLITICS [Vol. 31:833.

human rights protection, as illustrated by recent developments such as the establishment of the International Criminal Tribunals and the International Criminal Court.

2.5.5 Special Rapporteurs

The use of special Rapporteurs in the promotion of human rights is an innovation because most of the international human rights treaties do not provide for their appointment. Special Rapporteurs (and sometimes working groups)¹²⁶ have been appointed under the United Nations and regional human rights systems to address specific categories or clusters of human rights issues.¹²⁷ The appointment of Special Rapporteurs is an innovation, therefore, considering that in most cases it is undertaken where the provisions of a charter or convention are vague or silent.¹²⁸ According to Harrington, this innovation is not only meant to fill a procedural or substantive inadequacies or vacuum, but also to give credibility to the human rights systems.¹²⁹

The mandates of Special Rapporteurs are usually to examine, monitor and publicly report on either human rights situations in specific countries or territories (country mandates) or on major phenomena of human rights violations worldwide (thematic mandates). Country or regional Special Rapporteurs have been appointed particularly in transitional or failed States where democratic change is often inhibited by weaknesses in judicial and enforcement institutions-the legacy of dictatorship, poverty, and lack of resources.¹³⁰ On the other hand, the recent adoption of numerous specific international human rights instruments has seen the

¹²⁶Sometimes additional procedures and mechanisms to the Special Rapporteurs are undertaken either by 'working groups' composed of experts acting in their individual capacity or by 'Independent Experts', or 'Special Representatives'.

¹²⁷ As at 2001, there were three Special Rapporteurs appointed under the aegis of the African Charter- a Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions; a Special Rapporteur on Prisons and Conditions of Detention in Africa and a Special Rapporteur on the Conditions of Women in Africa. At the same time, the UN had 14 Special Rapporteurs appointed under the auspices of the UN Human Rights Commission. In all these cases, there is hardly any text authorising the said appointments.

¹²⁸ See J. Harrington, *Special Rapporteurs of the African Commission on Human and People's Rights*, (2001) 2 AHRLJ.

¹²⁹ *Ibid.*

¹³⁰ The appointment of Special Rapporteurs under the Inter-American Human Rights System at a time when many South American regimes were in a state of democratic decline, for instance illustrates this point

appointment of thematic Special Rapporteurs with specific mandates to ensure the promotion and protection of certain specific rights or problems.¹³¹

Generally, Special Rapporteurs are appointed to complement the reporting procedure and the individual complaints procedure.¹³² Additionally, Special Rapporteurs may be seen to be more responsive to violations, but also more proactive and 'simultaneously less threatening' to States than the examination of cases brought by individuals.¹³³ The work of Special Rapporteurs has been instrumental in dealing with human rights situations and problems, especially in cases of massive or systemic human rights violations. It must however be pointed out that the appointment of Special Rapporteurs has held a combination of pitfalls, linked to, or even duplicating, the very pitfalls of the conventional enforcement mechanisms.¹³⁴ In some cases, there has been lack of clarity on the mandate of the Special Rapporteur¹³⁵ whereas in some cases, individuals appointed have either not been proactive or lacked the technical expertise.¹³⁶

2.6.0 Conclusions

That revolutionary progress has been made in the field of human rights particularly since the establishment of the United Nations 1945 cannot be denied. Of the many achievements of the last century, some stand out in particular. In the first place, the objective of the founders of the United Nations to add a human dimension to international law and international relations

¹³¹ Under the UN human rights system, for instance, there are country procedures established with respect to over 16 states and more than twenty thematic Rapporteurs appointed to deal with such issues as disappearances, torture, religious intolerance, violence against women, education and the rights migrant workers among others at present.

¹³² It would appear that the appointment of Special Rapporteurs is reactive to a particular human rights situation which may need monitoring or quick redress.

¹³³ See J. Harrington, *Special Rapporteurs of the African Commission on Human and Peoples' Rights*, supra 132 note at p 252

¹³⁴ See supra note 132 above at p. 249.

¹³⁵ For instance, the first Special Rapporteur of the African Commission on Human and Peoples' Rights, on Summary, Arbitrary and Extrajudicial Executions was appointed without a clear mandate, necessitating the assignment of the task of drafting the terms of reference in the subsequent session, and adopted one year after the appointment of the Special Rapporteur. See Final Communiqué of the 16th session, ACHPR/RPT/XVI.

¹³⁷ See generally, supra note 146 above.

has become a reality.¹³⁷ This has largely been facilitated by the evolution and the illumination of the concept of human rights in the last few decades. Even though there is no consensus on the ideology of rights, there is now substantial agreement that the purpose of human rights is to protect human dignity.¹³⁸ The point of divergence is that there are different views on the source of that dignity. The principal difference lies between those who seek a (super)natural basis for that dignity, and those who seek a secular basis.¹³⁹ There is a widespread perception that the origins of the concept of human rights lie in Western, individualist or liberal philosophy, and for that reason some in the East argue that it is alien to their own cultures. Even in the West there is criticism of the individualistic bias of human rights.¹⁴⁰

There are also historical and pragmatic explanations for rights, the former consisting of an analysis of the growth of classes and their relationship to the State, and the latter justifying rights in terms of fairness, stability and peace. These differences bear on the acceptance and realisation of rights, but perhaps their importance has diminished with the elaboration of rights under the auspices of the United Nations.¹⁴¹ Today, there is a broad agreement on the scope and substance of rights, and the key international instruments have been ratified by a large number of countries adhering to differing religions and cultural traditions. These instruments have become an important instrumentality in promoting respect for and observance of human rights and fundamental freedoms. These developments have been reinforced by regional instruments, embodying individual rights and duties, and obligations on States to respect human rights and to account to the international community for the

¹³⁷ C. Flinterman and J. Gutter, *The United Nations and Human Rights: Achievements and Challenges*, UNRISD Publications, Geneva, 1999 available at www.unrisd.org (visited on 20 December 2004).

¹³⁸ C. Flinterman and J. Gutter, *The United Nations and Human Rights: Achievements and Challenges*, UNRISD Publications, Geneva, 1999 available at www.unrisd.org (Visited on 20 December, 2004).

¹³⁹ *Ibid*

¹⁴⁰ Y. Ghai, *Supra* note 70 above, P 3.

¹⁴¹ *Ibid*

¹⁴² *ibid*

performance of this responsibility. Under these legal regimes, juridical bodies and mechanisms have been established to ensure the implementation of these rights.¹⁴²

Secondly, as a result of the expansion of international human rights law, the accountability of all States and other non-State actors for their respect (or lack of respect) for human rights has become established in a firm juridical framework. Here, it should be emphasised that the obligations of States to ensure the enjoyment, fulfillment and respect for human rights has been recognised by the international community as an important step towards the enforcement of international human rights law. Primary responsibility in the field of human rights has not only been accorded to States, because they are a potential threat to human rights, but also because they are the most important guarantors of human rights. However, there is still a lot to be achieved; important lacunae need to be filled and ways and means must be found to respond to new challenges and concerns.

CHAPTER THREE

THE MECHANISM OF STATE REPORTING UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

3.0 The State and the Enforcement of International Human Rights

The basic function of human rights law generally is to recognise rights and impose duties for the good of humanity. At the international and regional levels, the purpose of human rights regimes is to impose binding obligations on States which are parties to it. The duty of the State to ensure the promotion, protection and enforcement of individual human rights generally is located in the social contract theory. Although an old theory, the social contract theory holds water today. Social contract theories, in one form or another, were the heyday of the rights discourse. This was no accident, as it was during this period that "the people" were on the rise against the absolute and arbitrary authority of monarchs and tyrants. The idea therefore of the social contract theory was to hold governments accountable and to protect and enhance the natural rights of the governed.

The basic political purposes of social contract theories were to (1) politically legitimise the claims for liberty, human freedom, the freedom and rights of human individuals; (2) to oppose absolutist rulers and governments by limiting the powers of the State and its leaders (e.g., by rejecting the doctrine of divine right of sovereigns); (3) to assert the value of justice and fairness and to reject the view that might makes right; (4) to uphold the related view that society and/or government is based on mutual agreement rather than force; and (5) to affirm that societies and/or governments are not natural, not the products of blind, natural forces, but are artificial arrangements designed and agreed-to by human beings acting freely and rationally.¹⁴³

There are two different kinds, or levels, of contract theories. The most basic type is the contract that brings *society itself* into existence. Without the contract, people would live outside civilised society. The second type supposes that society already exists and proceeds to constitute a particular *government* or *state*, through a *constitution*. Thus the American

¹⁴³ See generally P. Vizard, *supra* note 36.

colonies were already a society in the 1770s, when, in 1789 they adopted a new constitution that supposedly amounts to a social contract among all the past and present citizens of the country to have a government of a the sort described therein. The first kind of social contract is particularly relevant to the human rights discourse and in particular this Chapter. The contract holds among the citizens, who agree to give up their rights and sovereignty to the government, effectively becoming subjects.¹⁴⁴ But the government acts as a kind of trustee in this arrangement,¹⁴⁵ and binds itself to “to honor human rights”, which include “such basic rights as the right to life and security, to personal property, and the elements of the rules of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration.”¹⁴⁶ This is best captured in the *American Declaration of Independence* (1776):

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it...¹⁴⁷

In social contractarian terms therefore, the State is the free choice of self-determining individuals and communities. The social contract theory suggests that rights-bearing individuals alone cannot effectively implement their rights or make for themselves a life worthy of human beings; there must be social provision. The *social contract*, as a political theory, explains the origin and purpose of the State, and of human rights. In fact, the interests of the people, and any plausible conception of human rights, are seen to require the harnessing of the immense power and reach of the modern state. According to Donnelly,

[T]he human rights theory of State has had two principal dimensions. *Negatively*, human rights prohibit a wide range of State interferences in the personal, social, and political lives of citizens, acting both individually and collectively. No less important, however, is the *positive* empowerment of the people, who are seen as above and in control of their government. Political authority is vested in a free citizenry endowed with extensive rights of political participation (universal suffrage, freedom of association, free speech, etc.).¹⁴⁸

¹⁴⁴ T. Hobbes, *Leviathan*, 1651.

¹⁴⁵ J. Locke, *Two Treatises on Government*, 1690.

¹⁴⁶ Rawls, *Law of Peoples* at 68.

¹⁴⁷ *American Declaration of Independence* (1776) available at www.ushistory.org (visited on 10 December 2004).

¹⁴⁸ J. Donnelly, *Ethics and International Human Rights* (1999), Human Rights Working Papers Number 1, at 18 available at <http://www.edu/humanrights/workingpapers/index.html>(visited on 10 December 2004)

3.1.1 State responsibility under international human rights instruments

To ensure the realisation of human rights within the domestic level, international rights instruments contain explicit obligations for States to take effective measures to respect, protect, fulfill and promote and to prevent violations of human rights.¹⁴⁹ This delineation of the State's duty to respect, protect, fulfill and promote human rights entails a composite of both negative and positive duties of the State. From the social contract theory, State responsibility extends not only to the acts of the State but also to third parties over whom the State should have control.¹⁵⁰ Generally, it is considered that civil and political rights emphasise freedom from the interference from the State, while economic, social and cultural rights require the positive involvement of the state. But human rights instruments also require that different measures be adopted. For instance, the guarantee of the right to a fair trial also necessitates the positive measures adopted by the State.

This categorisation of duties of the State in relation to human rights has now acquired some consensus form academics.¹⁵¹ For instance, Hoof, a human rights scholar has observed that the States undertake four "layers" of obligations under the International Covenant on the Economic, Social and Cultural Rights, which may be described as "an obligation *to respect*, an obligation *to protect*, an obligation *to ensure*, and an obligation *to promote*. The obligation *to respect* forbids the state itself to act in any way to encroach upon recognised rights and freedoms, which, therefore, closely resembles what in the traditional scheme was called an obligation of non-interference. The obligation *to protect* goes further, in the sense that it forces the State to take steps – through legislation or otherwise - which prevent or prohibit (the third persons) from violating recognised rights and freedoms. The obligation *to ensure* requires more far-reaching measures on the part of the State in that it has to actively create conditions aimed at the achievement of a certain result in the form of a (more) effective realisation of recognised rights and freedoms. The obligation *to promote* is also designed to

¹⁴⁹For example, ICCPR, Art 2 (3)(a); CEDAW, Art 2(e); CERD, Art 2 (e); ECHR, Art 1; African Charter, Art 2; American Convention on Human Rights.

¹⁵⁰ For instance, in the CESR's Concluding Observations in regard to Iran's initial State Report in 1993 where the Committee stated thus, "While appreciating that fatwahas are issued by the religious authorities and not by State organs *per se*, the question of State responsibility clearly arises in circumstances in which the State does not take whatever measures are available to it to remove clear threats to the rights applicable in Iran in consequence of its ratification of the Covenant".

¹⁵¹ See for instance Louis Henkin, "A Post-cold War Human Rights Agenda", 19 Yale J, Int'l L. 249, 1994, p. 250 and A. Eide, "Economic, Social and Cultural Rights as Human Rights", in Economic Social and Cultural Rights: A Textbook, A. Eide, C. Krause and A. Rosas, eds., M. Nijhoff Pub. 1995, pp. 35 - 40.

achieve a certain result, but in this case it concerns more or less vaguely formulated goals, which can only be achieved progressively or in the long term. The obligation *to ensure* and that *to promote* together encompass, *inter alia*, what are called “programmatic” obligations within the framework of economic, social and cultural rights.”¹⁵²

The preceding argument particularly reinforces the argument on the domestic enforcement of international human rights law, which generally enjoin States to respect, protect and fulfill human rights. Although the creation of human rights norms has been internationalised, implementation remains largely with sovereign States. The State is seen not simply as a potential threat to human rights but not less importantly as the central institution with the capacity to implement internationally recognised civil, political, economic, and social human rights.¹⁵³ Human rights, in addition to seeking to prevent certain State-based wrongs, require the State to provide certain goods, services, and opportunities and to protect individuals and families from violation of human rights. This positive role of the State is as central for civil and political rights as for economic and social rights. Effective implementation of the right to nondiscrimination, for example, often requires extensive positive actions. Even procedural rights such as due process entail considerable positive endeavors by police, courts, and administrative agencies. The State must not merely refrain from certain harmful actions but create a social and political environment that fosters the development of active, engaged, autonomous citizens.

3.2.0 The Objectives and Scope of State Reporting Generally

The standard-setting activities initiated by the United Nations and other functional or regional organisations may certainly be labeled revolutionary.¹⁵⁴ It is obvious, however, that standard-setting alone is not enough to promote and protect human rights. There is another, equally important, side of the very same medal of the promotion and protection of human rights. This other side relates to the international supervision¹⁵⁵ of the implementation of human rights

¹⁵² G.J.H. van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views”, in P. Alston and K. Tomaševski, eds., *The Right to Food*, Dordrecht/Utrecht: M. Nijhoff/SIM, 1984, pp. 106-107.

¹⁵³ J. Donnelly, *supra* note 92.

¹⁵⁴ C. Flinterman and J. Gutter, *supra* note 98 at 11, 12.

¹⁵⁵ This term has been used here interchangeably with the term “enforcement.”

and fundamental freedoms. The promotion and protection of human rights would be meaningless without the existence of supervisory mechanisms. The solemn commitments and pledges that States have accepted and consolidated in human rights instruments both of a universal and a regional nature “are not to remain printed words on a piece of paper, they are to be implemented and respected.”¹⁵⁶ Thus international supervision is of the utmost importance. It is to ensure that the implementation of human rights and fundamental freedoms is taking place in an effective manner.

The basic thrust of international supervision is to establish the separate and joint accountability of all States and non-State actors for the implementation of human rights. Different types of supervisory procedures may be distinguished as follows: reporting procedures, State complaint procedures, individual complaint procedures and inquiry procedures. It should however be noted that this classification is by no means inclusive.¹⁵⁷ Within the context of the African Charter, there are three main enforcement mechanisms, namely the individual communications, inter-state complaints¹⁵⁸ and reporting procedures.¹⁵⁹ The provisions regarding the interstate complaints mechanism remain derelict, as they have hardly been invoked by any state. For practical purposes, it will not be possible to undertake a viable analysis of all these mechanism here. What shall be considered, in line with the title of the thesis is the State reporting procedure.

Throughout the international and regional human rights regimes, State reporting remains one of the most important means of monitoring compliance with the recognised norms and principles at the international level. The reporting procedure is a State responsibility to the international community as well as an accountability mechanism for human rights to its own people. It is an “an integral process of the continuing process and an opportunity for governments to reaffirm their commitment to respect the rights of their citizens both internationally and domestically.”¹⁶⁰ Through it, the bodies charged with considering the

¹⁵⁶ C. Flinterman and J. Gutter, *supra* note 148 at 11.

¹⁵⁷ See A.O. Adede, *supra* note 79.

¹⁵⁸ Article 47 read together with article 49 of the African Charter.

¹⁵⁹ Article 62.

reports are able to monitor the implementation of human rights and engage States in a process of dynamic implementation.

State reports play a protective and promotional role. The purpose of the reporting procedure is to establish a dialogue between the State party concerned and the relevant treaty body on the legislative, administrative and other policy measures taken to give effect to the objectives of the treaty. The advantage of such dialogue is that since the consideration of the State reports is done in public, the process may result in an improvement of national legislation or practices related to human rights. It also provides an opportunity for both sides, including non-governmental organisations to be engaged in obtaining a better view of the implementation of the treaty as a whole in national jurisdictions. Furthermore, the open exchange of ideas and experiences assists “the winnowing out of reasonably justifiable or unintended failures to fulfill commitments ... and the identification and isolation of the few cases of egregious and willful violation.”¹⁶¹ In this process, it may also get a clearer view of the difficulties involved in the full realisation of human rights and may take these difficulties into account when formulating its recommendations. The reporting procedure clearly is not geared at providing relief for individual victims of violations of human rights; it is largely promotional.

But what is the scope of State reporting? What are the duties of a State in relation to the reporting procedure? Even though most international human rights instruments only provide that States shall undertake to submit reports on the legislative or other measures taken to give effect to the rights guaranteed, there seems to be some consensus that the duties of the States goes beyond the mere reporting. The procedure must include the antecedent processes, the actual reporting and any matters resulting from the examination and decision making on the subject matter of the reports. This is why perhaps most of the procedures of the treaty bodies provide powers to request for more information from States on the content of their reports. In fact, during the examination of these reports, States representatives are invited to attend the sessions. This thesis springs from the argument that States have a responsibility towards its

¹⁶⁰ I., Tokunbo, *The Role of Jurists in the Determination of State Responsibility For the Realisation of Economic, Social and Cultural Rights*, in ICJ Report of a Regional Seminar on Economic, Social and Cultural Rights, 1999, at 153 quoted in K. Quashigah, *ibid*.

¹⁶¹ A. Chayes & A. Chayes, *New Sovereignty: Compliance With International Regulatory Agreements* 25 (1995).

citizens to ensure the realisation of human rights. State reporting is no doubt part of this enterprise.

According to Adede, the reporting procedure consists of two elements: the furnishing of information and the processing of information and data submitted or received.¹⁶² The first one is framed in terms of an obligation of the States parties. States undertake to take the necessary steps or measures to give effect to the provisions of the instrument and to submit reports on the measures they have adopted, the progress made and the factors and difficulties they face in implementing their obligations. Normally, reports have to be submitted periodically, with an initial report within one or two years of the entry into force of the instrument for the State party concerned, followed by regular intervals.¹⁶³ The second one is determined by the competence or the mandate given to the treaty organ.¹⁶⁴

Under the reporting procedures in the International Covenant on Civil and Political Rights, there are three types of State's duties that have been identified under the reporting obligation as follows: duties imposed directly by the covenant under article 40; duties imposed by the Committee acting under its competence; and duties undertaken by the State representatives while meeting with the Committee during the consideration of a State report.¹⁶⁵ Even though the latter two duties are not provided for in direct terms in the instrument, they are implied or inherent duties on the part of the States in the performance of their reporting obligations, and the overall enforcement and implementation of human rights.

¹⁶² See A.O. Adede, *supra* note 79 at p. 108,109.

¹⁶³ *Ibid.*

¹⁶⁴ Different treaties, protocols and/or guidelines establish specific organs charged with the responsibility of receiving, considering and making recommendations to secure the promotion of human rights within the particular regimes. These include the Human Rights Committee- article 28 of the International Covenant on Civil and Political Rights; Committee on the Elimination of all forms of Racial Discrimination (CERD)- Article 8 of the International Convention on the Elimination of all forms of Racial Discrimination; the Committee Against Torture (CAT)- article 19 of the Convention Against Torture; the Committee on the Rights of the Child- article 44 of the Convention on the Rights of the Child; Committee on the Elimination of All Forms of Discrimination against Women- article 18 of the Convention on the Elimination of All Forms of Discrimination against Women and the African Commission on Human and Peoples' Rights- Article 62 of the African Charter on Human and Peoples' Rights.

¹⁶⁵ See also U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 3 - The nature of States parties' obligations (art. 2 of the Covenant), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 5th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at www1.umn.edu/humanrts/gencomm/epcomm3.htm (visited on 10 December 2004).

Generally, a reporting mechanism is part of an implementation system.¹⁶⁶ It supplies information from each State party on the operation and implementation of a treaty by that State. One way of supplying information is by a self-evaluating report. Self-evaluating reports are assessments of a State's performance by that State, not by other States or by independent agents, such as special Rapporteur or non-governmental organisations, through these may later play a role in verifying the data received. Under this scheme, the information thus obtained is submitted to an international institution having a supervisory role. The key tasks of an international supervisory institution are those of gathering information and data by receiving, for example, self-evaluating State reports, of facilitating independent monitoring and inspection, and acting as a forum for reviewing the performance of States or the negotiation of further measures and regulations.

Supervision and monitoring of this kind also entails the negotiation and drafting of detailed rules, standards or practices, usually as a means of giving effect to the more general provisions of treaties. Not only does this form of law-making or international regulation facilitate treaty implementation, it also gives treaties a dynamic character and enables the parties to respond to new problems or priorities. Thus, the combination of regulatory and supervisory functions in the hands of international institutions is of importance in making international agreements operate more effectively. The absence of any provision for institutional supervision or regulation is, by contrast, often a sign that the treaty in question is bound to remain ineffective.

As was communicated by the Human Rights Committee, the function of the reporting procedure is "to promote the further implementation of the covenant; to draw their (states parties) attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these states and international organisations in the promotion and protection of human rights."¹⁶⁷ However, it has been noted that the reporting procedure cannot replace a fact-finding procedure focusing

¹⁶⁶ A Comparison of Self-evaluating State reporting systems: Part Two, available at www.icrc.org (visited on 20th December 2004.)

¹⁶⁷ Report of the Human Rights Committee (A/36/40) at p. 107.

on a specific case, other dispute settlement procedures or enforcement measures directed to correct establishment violation of human rights.¹⁶⁸

3.3.0 The African Charter on Human and Peoples' Rights: An Overview

As noted in Chapter two, the notion of human rights was not alien to the African setting. Human rights were part and parcel of African life. Despite this, human rights enjoyment in Africa has not had a happy history. Within traditional systems of governance, there existed many practices which were inimical to individual human rights, sometimes justified as necessary for the good of the wider community. The period of the slave trade with its suppression and desecration of human rights also undermined human dignity. Later, the colonial period, that saw the deconstruction or denigration of African religion, culture, languages and traditions weakened African roots, was partly responsible for the continent's backwardness and underdevelopment. As has been noted, slave trade and colonialism had such devastating effect on human rights that it required decades of redemptive work to revive the tradition of respect for human rights in Africa.¹⁶⁹

With the liberation of Africa, there were high hopes for the protection and promotion of human rights and for the restoration of African dignity. Constitutions and legal systems were adopted, and Bills of Rights were entrenched as part of the new constitutional orders. However, with a few exceptions, the hopes never materialised. On the contrary, many of the practices from the colonial period reappeared, and the democratic development failed, opposition groups were suppressed and military leadership became prevalent.¹⁷⁰ In many places, the rule of law changed to the rule of force. Indeed, respect for human rights reached a low watermark on the continent at the end of the 1970s, and deteriorated in the nineties.¹⁷¹ The worst of these excesses were the atrocious violations of human rights in Uganda under

¹⁶⁸ A.O. Adede, *supra* note 79 at p. 110.

¹⁶⁹ U.O. Umozurike, "International Law and Colonialism in Africa," *Howard Law Review* (1971) at pp.334-349.

¹⁷⁰ Danish Centre for Human Rights, *The African Commission on Human and Peoples' Rights: Evaluation* (1999) available at <http://www.humanrights.dk/publications> (visited on 10 December 2004) at p. 16.

¹⁷¹ Umozurike, *supra* note 119 at p. 335.

Amin, Central African Republic under Bokassa and Nguema of Equatorial Guinea, to name a few.¹⁷²

As things worsened, counter-forces developed. As early as 1961, a first inter-African meeting took place among jurists who made important recommendations on the improvement of human rights in Africa.¹⁷³ The meeting “invited African governments to study the possibility of adopting an African Convention on Human Rights and creating a court of appropriate jurisdiction”¹⁷⁴ to which individuals and groups might have recourse. This idea was later developed at a number of professional meetings and later also politically under the auspices of the Organisation of African Unity (OAU). The OAU and its member States were, however, very reluctant to accept the proclamation of individual rights for African people. They justified their reluctance by relying on “the domestic jurisdiction principle” and the preoccupation with maintaining the African countries’ political sovereignty and territorial integrity.¹⁷⁵ It is to be noted that at its inception,¹⁷⁶ the focus of the OAU was shaped by the major concerns of the independent African States of the time. Human rights considerations *per se* were not the direct concerns of the African States at the time of the formation of the OAU.¹⁷⁶ After strong pressure from the African public, Non Governmental Organisations and the international community, the African Charter on Human and Peoples’ Rights¹⁷⁷ was finally adopted by the 18th Ordinary Session of the Assembly of Heads of State and Government of the OAU, in June 1981. The Charter came into force in October 1986 upon ratification by a simple majority of member States of the Organisation of African Unity (OAU).

¹⁷² I.A. Dada of Uganda, J. B. Bokasa of the Central African Republic, and M. Ngueso of Equatorial Guinea.

¹⁷³ Danish Centre for Human Rights, *The African Commission on Human and Peoples’ Rights: Evaluation* (1999), *supra* note 120 at p. 16.

¹⁷⁴ Review of the Previous Efforts and Recommendations for the possible Establishment of a Commission on Human Rights for Africa, in *A Report on the United Nations Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa - held at Unity Conference Centre, Monrovia, Liberia, September 10-12, 1979.*

¹⁷⁵ E. A. Ankumah, *The African Commission on Human and Peoples’ Rights: Practice and Procedures*, M. Nijhoff Publishers, The Hague, 1996.

¹⁷⁶ G.J. Naldi, “Future Trends in Human Rights in Africa: The Increased Role of the OAU,” in M. Evans and R. Murray (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986- 2000* Cambridge University Press (2000) at p. 1, 2.

¹⁷⁷ *The African Charter on Human and Peoples’ Rights*, *supra* note 1.

With its ratification, the African Charter joined two other instruments that deal with human rights on a continental basis, namely the European Convention for the protection of Human Rights and Fundamental Freedoms (1950)¹⁷⁸ and the American Convention on Human Rights (1969).¹⁷⁹ The growth of regional systems of human rights, although with differences in the scope of rights and the method of enforcement, has been largely attributed to the development of conventions and institutions at the international level for the protection of human rights. Although complementary to the national and international systems, there are many advantages associated with regional systems: for instance, they take the load off the international system, and bring the pressure of friendly, neighbouring States to bear on offending states. Equally important, they represent the consensus of the States as to the standards of government behaviour acceptable in the region.¹⁸⁰

The African Charter is composed of four sections, a preamble and three main parts. The first part, Articles 1-30, lists human and peoples' rights and duties. These rights range from civil and political rights to social, economic and cultural rights and group rights. These include principles and norms such as equality, liberty and the inviolability of the human person, human dignity, fair trial rights, right to vote, freedom of expression, right to property and right to life among other rights and freedoms. Chapter two of this part contains the duties of the individual in relation to the ideals of the Charter. The second part, Articles 31-62, contains the safeguard measures, specifically the establishment and organisation of the African Commission on Human and Peoples' Rights. This part also defines the mandate, functions and procedure of the Commission. Finally, the third part, Articles 63-68, deals with general administration.

Normatively, the African Charter is an innovative human rights instrument.¹⁸¹ The African Charter reflects, to a great extent, the discourse on human rights prevailing internationally at the time of its development. It also contains a number of distinctive features, in many ways reflecting an African philosophy of law and conception of human rights and an attempt to

¹⁷⁸ The European Convention, *supra* note 75.

¹⁷⁹ The American Convention, *supra* note 77.

¹⁸⁰ Y. Ghai, *supra* note 70 at p. 6.

¹⁸¹ M. Mutua, *The African Human Rights System: A Critical Evaluation*, (1999) available at <http://hdr.undp.org/publications/papers.cfm> at 5 (visited on 10 December 2004.)

embrace all three branches of human rights.¹⁸² In particular, the argument that groups take precedence over the individual¹⁸³ and the fact that the right to development has been elevated to juridical status, are regarded as giving the Charter its specific African character.¹⁸⁴ The most important feature of the communitarian perspective in the Charter is the presence of “Peoples” in the title, which refers to third generation group rights or collective rights. Because of these basic features, it has been described elsewhere as “autochthonous.”¹⁸⁵ As Okoth-Ogendo has argued, many African leaders “[f]elt the need to develop a scheme of human rights norms and principles founded on the historical traditions and values of African communities rather than simply reproduce and try to administer norms and principles derived from the historical experiences of Europe and the Americas.”¹⁸⁶

Despite its innovations and strides, the African Charter has also had its share of criticism, and in particular due to its apparent inability to improve the human rights situation in Africa.¹⁸⁷ These criticisms are mainly attributed to normative deficiencies and the weak enforcement mechanisms established by the Charter. To begin with, one of the most controversial provisions of the African Charter is the imposition of duties upon the individual towards the State and community. The Charter links the concepts of human rights, peoples’ rights and correlative duties on individuals.¹⁸⁸ The drafters of the African Charter seem to have taken the view that individual rights cannot make sense in a social and political vacuum; they must be coupled with duties on individuals.

Unlike other human rights treaties, many of the individual rights guaranteed by the Charter contain “claw-back” clauses, restricting some rights. Accordingly, they have been pointed to

¹⁸² The traditional distinction has been between first generation, civil and political rights; second generation economic, social and cultural rights and third generation group rights.

¹⁸³ Article 27(2) of the African Charter.

¹⁸⁴ N. Awori- Matheka, *supra* note 24 at 10.

¹⁸⁵ C.E. Osita, “African Concept of Human Rights,” in A.U. Kalu and Y. Osinbajo (eds), *Perspectives on Human Rights*, Info data Bureau Services, Lagos, 1992 at pp. 8-31.

¹⁸⁶ H.W.O Okoth-Ogendo, “Human and Peoples’ Rights: What Point is Africa trying to Make?” in R. Cohen, G. Hyden and W. Nagin (eds) *Human Rights and Governance in Africa*, Gainesville, FL: University Press of Florida, 1993 at p. 76.

¹⁸⁷ C. Heyns, *supra* note 2 at p. 156.

¹⁸⁸ M. Mutua, *supra* note 185 at 5.

as a major normative weakness of the Charter.¹⁸⁹ They have been used by African States, where most domestic laws are a relic of the colonial heritage and therefore highly repressive and draconian. A common aspect of these States is the restriction of most civil and political rights, particularly those pertaining to political participation, free expression, association and assembly, movement, and conscience.

Yet another weakness with the Charter is that it does not provide for a general derogation clause.¹⁹⁰ The upshot of this is that the Charter effectively permits States “through the claw-back clauses to suspend, de facto, many fundamental rights in their municipal laws.”¹⁹¹ In any event, the Charter does not contain any reference to derogation from certain rights during national “emergencies,”¹⁹² a common feature in Africa’s political landscape. This is a serious omission, and some scholars have called for the reform of the Charter, to include *inter alia*, a “fully defined general limitation clause.”¹⁹³

3.3.1 The African Commission on Human and Peoples’ Rights

In accordance with the African Charter, a Commission known as the African Commission on Human and Peoples’ Rights was set up on 29 July 1987 “to promote human and peoples’ rights and ensure their protection in Africa.”¹⁹⁴ The basic functions of the Commission are both promotional and protective. Under article 45 of the Charter, the functions of the Commission are:

¹⁸⁹ See C. Heyns, *supra* note 2 at pp. 160, 161.

¹⁹⁰ The African Commission on Human and Peoples’ Rights has largely assigned this role to article 27(2) of the Charter, which does not seem to have been drafted to play the role of a general limitation clause. It reads: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

¹⁹¹ M. Mutua, *supra* note 185 at p. 8.

¹⁹² In comparative terms, the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, article 15 provides that “[I]n time of war or any other public emergency threatening the life of the nation and any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the emergencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.” Similarly, the International Covenant on Civil and Political Rights, 1966 provides under article 4 *inter alia*, that “[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from the present Covenant...”

¹⁹³ C. Heyns, *supra* note 2 at p.161 and Mutua, *supra* note 130 at p.8.

¹⁹⁴ Article 30 of the African Charter.

- To promote Human and Peoples' Rights and in particular:
 - (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
 - (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
 - (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
- Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
- Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU.
- Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

In order to discharge this 'enormous' mandate, the Commission meets twice a year originally for 15 days but at present, due to lack of funds, for only 10 days,¹⁹⁵ in Banjul, the Gambia where it has a secretariat. The Commission has a secretariat whose main function is to assist it in effectively carrying out its mandate, by handling all the technical and administrative work. This includes, among other tasks the preparation of State reports to be examined by the Commission and all preparatory work for promotional and protectional activities.¹⁹⁶

It follows then that the three principal functions of the Commission are the examination of State reports, adjudication on communications¹⁹⁷ alleging human rights violations and the interpretation of the African Charter.¹⁹⁸ Functionally, the primary concern has been the

¹⁹⁵ Danish Centre for Human Rights, *The African Commission on Human and Peoples' Rights: Evaluation* (1999), supra note 174 P 19

¹⁹⁶ *Ibid* at p. 19, 20.

¹⁹⁷ Articles 47 and 55 of the African Charter.
¹⁹⁸ Article 45(3)

examination of State reports and “other” (individual) communications. It should however be noted that the Charter did not specify the Commission as the repository of powers to examine State reports.¹⁹⁹ This was indeed a serious omission, although it was later addressed. The African Commission on Human and Peoples' Rights may also receive communications from sources other than States parties, including individuals. This procedure does not, however, lead to the adoption of an opinion in individual cases. Rather, the aim of the procedure is to analyse individual cases in order to detect “the existence of a series of serious or massive violations of human and peoples' rights.” In this respect, the envisaged establishment of an African Court of Human Rights should be welcomed as an significant step forward following the examples of the Inter-American Court of Human Rights and the European Court of Human Rights both of which may give binding decisions in individual cases.

3.4.0 State Reporting Under the African Charter

The structure, objectives and functions of State reporting under the African Charter is more or less modeled along the lines of the reporting procedures in the International Covenant on Economic, Social and Cultural Rights and largely the International Covenant on Civil and Political Rights. Under the former instrument, for instance, the Committee on Economic, Social and Cultural Rights²⁰⁰ is primarily responsible for overseeing the periodic reporting procedure. In its First General Comment, it formulated the functions or objectives served by the reporting procedure, namely initial review, monitoring, policy formulation, public scrutiny, evaluation, acknowledging problems, and transmitting information and enhancing awareness.²⁰¹ Based on existing practices under the Covenant, the results of the reporting procedure may include:

- determining of violations of the Covenant;

¹⁹⁹ Under article 62 of the Charter, each State Party shall undertake to submit every two years, from the date the present Charter comes into force (October 21 1986), 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.

²⁰⁰ This Committee was not established in the Covenant itself owing to the politics that saw the adoption of the Covenant. Accordingly, the Committee was created through the Economic and Social Council Resolution 1985/17, Para. (a), UN ESCOR, Supp. (No. 1) at 15, UN Doc. E/1985/85, (1985).

²⁰¹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 1 – Reporting by states parties, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 3d Sess., U.N. Doc.E/1989/22, Annex III.

- urging the adoption of new legislation;
- urging the repeal of existing legislation;
- encouraging implementation of new legislation;
- encouraging preventive action to avoid violations of the Covenant;
- urging the implementation of NGO-devised plans;
- recommending the substantive provision of rights; and
- recommending specific policy measures.²⁰²

The benefits of the reporting procedure are manifold. First, it allows the treaty body to influence the activities of contracting states in the area of human rights, especially through its recommendations following the examination of a State report. Additionally, resistance to international supervision through this instrumentality may be less because “all the States are equally subject to examination.”²⁰³ Because of the possibility of comparison by the treaty body, a more balanced picture may be obtained of the State of affairs with respect to the implementation of the treaty in question within the whole group of contracting States. This is particularly important for pursuing reforms for enhancing the effectiveness of the instrument. Additionally, the reporting procedure has the advantage of permitting a comprehensive overview of all the rights guaranteed as against the selective examination of individual rights under the complaint procedure.²⁰⁴ It also makes possible continuity in the supervision process as against the ad hoc character of the complaint system.

Unlike the international and other regional human rights systems, the African Charter does not specifically confer the power on a specific treaty body to examine country reports. The key tasks of a treaty body are those of gathering information and data by receiving State reports, facilitating independent monitoring and inspection, and acting as a forum for reviewing the performance of States or the negotiation of further measures and regulations. While obligating States parties to submit biennial reports on the legislative or other measures to give effect to the rights and freedoms in the Charter, the African Charter failed to grant

²⁰² See S. Leckie, *The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform*, in *The Future of UN Human Rights Treaty Monitoring*, P. Alston and J. Crawford, eds., Cambridge University Press, 2000, pp. 137-142.

²⁰³ G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Veenter-Boston; Kluwer Law and Taxation Publishers, 1990) at p.208.

²⁰⁴ *Ibid.*

competence on a body to examine these reports. Thus some argued that this function be granted to the Council of Ministers or the Assembly of Heads of State and Government.²⁰⁵

It was however apparent, based on comparative practice and the nature of the exercise that the examination of State reports ought to be carried out by an independent, impartial and technical body with the relevant expertise. Yet all these elements would not be found in the Council and the Assembly, which are largely political structures. Thus the main treaty body, namely the African Commission on Human and Peoples' Rights requested the Assembly of Heads of State and Government to grant it the authority to consider State reports. It is to be recalled that article 45(4) of the Charter permits the OAU to assign additional functions to the Commission. In response to the Commission's request, the OAU Assembly of Heads of State and Government assigned the Commission the task of reviewing State reports under the African Charter,²⁰⁶ although it did not clarify the procedures, the goal of the State examination and what actions should be taken after such evaluation of State report as it considered that the Commission would develop general its own guidelines. Yet being the preeminently political process that the reporting procedure is, the guidelines should have been developed by the Assembly, at least in outline. And we could posit that this would have resulted in considerable success in compliance with the State obligation of reporting.

Following the empowerment of the Commission to examine State reports, the first reports were examined in 1991. The Commission began its first examinations with no clear procedure. By learning from the experiences of the existing treaty bodies, the Commission therefore sought to develop procedures and guidelines for state reporting under the Charter. In particular, the Commission seems to have relied on the procedures and practices by the Human Rights Committee, the treaty body that oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR). The Commission adopted "Guidelines"²⁰⁷ which were supplemented by "General directives," an unpublished document that was sent to foreign ministers of States parties in 1990 as a précis of the Guidelines.²⁰⁸

²⁰⁵ See an analysis in G. W. Mugwanya, *supra* note 5 at pp. 269- 272.

²⁰⁶ Second Annual Activity Report of the Commission, (1988-1989) 20.

²⁰⁷ "Guidelines for National Periodic Reports," Second Annual Activity of the African Commission on Human and Peoples' Rights, Annex III, 1989, AFR/COM/ HPR.5/ (VI).

²⁰⁸ M. Mutua, "The Construction of the African Human Rights System: Prospects and Pitfalls," in S Power and G Allison (eds) *Realising Human Rights: Moving from Inspiration to Impact* (St. Martin Press, New York) p. 149.

Although the initial Guidelines were criticised as having been complex and largely unhelpful in the reporting procedures, they were also credited for “clarifying some provisions of the African Charter.”²⁰⁹ Throughout the years, a *modus operandi* evolved, but each examination had a distinct character, influenced by the framework set out by the report, the background and preparation of the State representatives.²¹⁰ These practices and the earlier procedures informed the drafting of “The Rules of Procedure of the African Commission on Human and Peoples’ Rights” which were adopted by the Commission on October 6, 1995. This set the stage for meaningful examination of State reports as the rules sought to aid States parties in submitting clear, objective and comprehensive reports on the human rights situation in their territories.

But as expected of any human rights regime, there was apparent inertia on the part of states in fulfilling their obligations in respect of submitting State reports. The Commission soon suffered from a significant numbers of overdue reports. A decade after the Charter took effect, thirty of the fifty-one States parties to the Charter had failed to submit a single report, and all other states, except Zimbabwe, were in arrears.²¹¹ By the 25th Session in 1999, there were over 200 State reports due. Odinkalu notes that States parties generally have not been cooperative on this enterprise. In addition to failing to fulfill their reporting obligations, many refuse to respond to the Commission’s requests for information. In one case, the Commission sent twenty unanswered inquiries to Zaire requesting a response to allegations contained in complaints of gross violations of human rights.²¹²

3.5.0 Meeting the objectives of the Reporting Procedures: A Critical Analysis

It is not in dispute that the tenor of international and human rights law is the protection of human rights and dignity of the individual person and groups. The primary objective of the norms, principles, rules and mechanisms established by international human rights law is to secure the protection of human rights at the international and domestic level. But where there

²⁰⁹ G. W. Mugwanya, *supra* note 5 at p. 272.

²¹⁰ *Ibid.*

²¹¹ C. A. Odinkalu, “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment,” *Transnational Law and Contemporary Problems*, Vol. 8, p. 367 (1998) at p. 401.

²¹² *Ibid.*, at p. 402.

are rights, there are also duties.²¹³ Whereas States and governments exist to serve their populations, they have a sacrosanct duty to ensure that human rights and freedoms flourish in their jurisdictions. More importantly, States have obligations to ensure the protection and promotion of these rights, and to implement and enforce them through its organs. As has been emphasised in Chapter two and the prefatory observations in this Chapter:

The *raison d'être* of the State is to serve the needs of the population under its jurisdiction and that the ultimate function of human rights as a feature of modern international law is to provide the basis of holding that State accountable to its own population and *the international community* for its treatment of individuals and groups.²¹⁴ (Emphasis mine)

Having said that, the question is how to ensure compliance by States in ensuring respect for and the realisation of these rights. It is now common that international and regional human rights regimes have specific monitoring and supervisory bodies charged with the relevant structures and procedures to evaluate compliance. This is the context of the State reporting mechanism under the African Charter. In a preliminary assessment of the mechanism under the said Charter, El-Sheikh, a former member of the African Commission, expressed his belief that:

[t]he reporting procedure is the backbone of the mission of the[African] Commission [on Human and People's Rights]. Through it, the Commission would be able to monitor the implementation of the Charter and engage States parties in a process of dynamic implementation."²¹⁵

A reading of this quotation would invite instantly some questions pertinent to this study. Has this expectation been met? Has State reporting been the Commission's mainstay? And how effective has the mechanism of State reporting achieved the implementation and enforcement of the rights and freedoms set out in the African Charter? If not, what are the bottlenecks facing the State reporting procedures under the African human rights system? These questions are indeed the core subject of this analysis.

²¹³ See generally Hohfeld.

²¹⁴ V.A. Kartashkin and S.P. Marks, *International Law for the Post Cold-War Era*, 1995 at pp. 284-5.

²¹⁵ B. El-Sheikh, *The African Commission on Human and Peoples' Rights: Prospects and Problems in 7 Netherlands Quarterly on Human Rights Vol.3 1989* at p. 281.

D) Comprehensive review of national laws and practices

The primary objective of State reporting is to enable the treaty body to evaluate a country's compliance with an international human rights regime through a comprehensive review of its constitution, national legislation, administrative rules, procedures and practices. This implies that the reporting must be adequate, comprehensive and factual. The report must state the precise constitutional, statutory and other measures taken by the State in question has taken to give effect to the rights set forth, and any difficulties or problems constituting an obstacle to the implementation of the instrument. In order achieve this objective, the African Commission operates in the following manner. First, it appoints a Rapporteur to study a State report and to prepare a list of preliminary questions to be inquired from the government representative of the reporting State.²¹⁶ Thereafter, examination takes place at a time and place appointed by the Commission, normally at the Commission's headquarters in Banjul. Business is conducted in the form of dialogue between the Commissioners and the representatives of the reporting State, and the participating inter-governmental and non-governmental organisations with observer status granted under Rules 72 and 74 of the Rules of Procedure of the Commission. An innovation in other human rights systems, which has not flourished under the African Charter, is the presentation of "shadow" or "parallel" by such organisations. Generally, these organisations have participated largely verbal interventions. This obviously has its limitations. The time allocated for such interventions is hardly enough, and the contributions therefore limited.

Examinations begin with the State representative delivering an overview of the report. One Commissioner, the designated Rapporteur, who has studied the report in depth by this time, then makes some observations on the report and puts questions to the representative to open the discussion. The floor is open to all Commissioners to ask questions. The State representative answers as many of these as possible. The Commission's procedures make it open to civil society participation, in most cases providing more information.²¹⁷ Where the information is inadequate, the Commission may direct that additional information be

²¹⁶ C. Anyangwe, "Obligations of States Parties to the African Charter on Human and Peoples' Rights," *African Journal on International and Comparative Law*, 10 (1998) at 638.

²¹⁷ See Rule 32 of the Rules of Procedure of the Commission.

furnished by the reporting State. Following these discussions, the special Rapporteur is supposed to summarise and conclude.

The purpose of this design was to ensure that the Commission would obtain a balanced picture of the human rights situation in the reporting State. It is to be noted that the above eS. As it has turned out, it is a mere audit of the ways in which the reporting State has discharged its obligations under the Charter.²¹⁸ The Commission has indeed emphasised the point that “its purpose of examining State reports is not to condemn a State for its conduct, but to engage in a ‘constructive dialogue’ with the State about ways of overcoming the difficulties and responsibility of implementing the Charter.”²¹⁹ Furthermore, after considering the reports, the Commission may pursuant to Rule 85(3) of the Rules of Procedure “address all the general observations to the State concerned as it may deem necessary,” which are not legally binding on the reporting State.

This is a rather weak mechanism, since all responsibility falls primarily on the State to submit information, and because the Commission’s powers are quite limited. With such a weak formulation, the State reporting system has played a very limited role in promoting (and protecting) human rights in Africa. The non-coercive nature of the reporting procedure is in itself a major reason for lack of commitment to the reporting process. Because of this State of affairs, African countries do not seem to have taken the mechanism seriously, and the observations of the Commission upon the consideration of State reports has not had any positive effect on States parties to the Charter. Some States have adopted practices that have undermined the reporting procedures.

The objective of comprehensive review has particularly been elusive owing to structure, content and manner transmission of some reports. Some reports have merely regurgitated the legal framework for human rights in their jurisdictions without any evaluation or discussing the details on the States’ measures to ensure the implementation of rights and freedoms under the Charter. In some cases, the reports are inadequate, such as the Nigerian report (of six pages in total), which consisted of “a few brief remarks of and a photocopy of the table of its

²¹⁸ C. Anyangwe, *supra* note 218 at p. 638.

²¹⁹ *Ibid.*

partially suspended constitution.”²²⁰ The initial report for Ghana was only a five pages while that of Egypt only described some legislation without any commentary on the State of human rights in the country.²²¹ Yet others are voluminous but vague, and some are comparatively good quality reports done by experts to conceal the States’ poor human rights records. Some reports are submitted just before the date that they are scheduled for examination, making the examination process mechanical and perfunctory.²²²

Furthermore, the two sessions, each of which lasts about two weeks, are hardly sufficient to enable meaningful comprehensive review of the reports, let alone the other functions. It must be borne in mind that the agenda of the Commission at each session may always include protective, promotional, administrative matters and of course ‘any other business’ as common in the structure conventional organisations. It is therefore far from exaggeration to aver that the period of two weeks is insufficient for a meaningful, detailed analysis of the reports submitted by the States. This has been the reason for the Commission’s considerable delay in the examination of the periodical reports. Naturally, it could also be said that this may have led to cursory consideration of the reports by the Commission in a bid to be seen to be functional.

Surprisingly, it has been argued that the Commission has no consistent trend of questioning that would enable it review the reports comprehensively.²²³ Other factors that impede the detailed examination of State reports include language factors as the main languages of the OAU are English, Arabic and French, and most of the Commissioners are not acquainted with all the three dialects. Where the Report is in a language that cannot be understood by a Commissioner and there is no translation, it goes without saying that the individual Commissioner’s contribution to the examination process would be minimal. A case in point is the examination of the Tunisian Report at the 18th Session of the Commission, which report

²²⁰ F. Viljoen, “Review of the African Commission on Human and Peoples’ rights: 21 October 1986 to 1 January 1997,” *supra* note 21 at p. 95.

²²¹ E. A. Ankumah, *supra* note 179 at pp. 91-92.

²²² C. Anyangwe, *supra* note 218 at p. 639.

²²³ E. A. Ankumah, *supra* note 179 at p. 92.

Quashigah noted “was of high quality, [but] the same [could not] be said of its examination.”²²⁴ He writes:

The Rapporteur and the Commissioners were not provided with copies of Tunisia's first report or with minutes of its discussion and other relevant documents and background material. The English-speaking Commissioners could hardly participate in the discussion, as no English translation of the report could be provided to them. The Commissioners rather restricted themselves to listening to the presentation of the Tunisian delegate and to exchanging opinions than posing concrete questions of substance and criticising governmental information or offering assistance and guidance for changes of the Tunisian legislation and administrative practice.²²⁵

Although the above is a basic outline, it is clear that the State reporting mechanism as presently constituted under the African Charter is simply not working. Enhancing the implementation of human rights under the African Charter through comprehensive review of national laws, procedures and practices has been largely dysfunctional owing to design and attitudinal problems. The designers of the Charter and the Rules of Procedure seem to have formulated weak provisions on State reporting. Although obligating States to submit biennial reports, the Charter overlooked the utility of such reports in ensuring implementation of the Charter. The design question should have summoned the need for a scheme that answers the imperatives of effectiveness and efficiency. That some have called for a coercive model of sanctions in cases of violation of State obligations.²²⁶ But of course the problems with State reporting relate to the States parties too as they have been generally reluctant in providing information that would facilitate comprehensive review of their systems in order to evaluate compliance with the Charter.

(II) Regular Monitoring of Compliance

The promotion of a culture of human rights discourse and practice at the national level is indeed the major motivation for the establishment of the regional or international systems of human rights. While there are certainly significant benefits that flow from a regional approach to human rights protection and enforcement, ultimately, human rights must be enforced at the national level. This can only take place through the process of encouraging individual governments to establish the necessary legal frameworks and institutional mechanisms for promoting and protecting human rights.

²²⁴ Quashigah, *supra* note 109.

²²⁵ *Ibid.*

²²⁶ Quashigah, *supra* note 163 above P 109.

The objective of State reporting within this scheme is to ensure that the international or regional treaty body monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within under a State's jurisdiction. The essence of human rights is to afford certain goods, services and protections to the individual and groups thereby imposing duties particularly on the State. Traditionally, the State and its organs have been largely inimical to human rights thereby requiring monitoring by independent national, regional and international oversight mechanisms. It is this sphere of monitoring that State reporting is located as a device for ensuring compliance at the domestic level and accountability at the international level.

In general terms, human rights instruments enjoin States to submit periodic reports, usually an initial report followed by regular reports to be submitted in specific intervals. Additional reports may also be submitted upon request by the treaty body. Initial reports are usually brief but the periodic report must be detailed as to enable the treaty body to evaluate a State's compliance with the instrument. Turning to specific instrument under consideration, article 62 of the African Charter enjoins each State party to submit every two years, from the effective date of the Charter, 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 Charter therefore ordains biennial State reporting. This is in line with most treaties which require States to submit reports in certain intervals as a promotional as well as protectional tool in some cases.²²⁷ The purpose of these formulations is to provide an opportunity for both sides and especially for the Commission to obtain a regular picture of the implementation of the treaty as a whole in national jurisdictions. Thus, it may also get a clearer view of the difficulties involved in the full realisation of human rights and may take these difficulties into account when formulating its recommendations.

However, it is now apparent from the preceding discussion and academic contributions that this objective of regular monitoring has not been met. This is partly because States have

²²⁷ For example, under Article 40 of the ICCPR, states parties are required to submit reports within one year of the entry into force of the Covenant and thereafter whenever the Committee so requests; Under Article 18 of CEDAW, states parties undertake to submit initial reports within one year after the entry into force for the State concerned and thereafter at least every four years and further whenever the Committee so requests; and under Article 44 of the CRC, within two years of the entry into force of the Convention and thereafter every five years, to name a few.

failed to submit reports on a regular basis. In fact, some States have never submitted any report. In a regional human rights system that boasts of ratification of the Charter by all member States of the African Union, this is no doubt a sad story. As at 2003, eighteen countries had never submitted any report as required by article 62 of the Charter.²²⁸ It is therefore difficult to avoid the conclusion that overdue reports have seriously impeded the Commission's ability to monitor the implementation of the Charter. Even then, between its inaugural consideration of State reports at its 9th Session in 1991, up to the end of its 25th Session in April 1999, the Commission had only examined the reports of 21 countries.²²⁹

What is more, some of these reports have been considered long after they were submitted thereby negating the necessity for regularity. Even where the examination is done, the Commission "does not adequately advise State parties on how to improve their human rights situations,"²³⁰ nor does the Charter or Rules of Procedure provide for a mechanism for encouraging and tracking State compliance with its observations. It could also be argued that this objective of monitoring was greatly negated during the normative stages of the Commission when most of its members were senior government officials, thus creating a conflict of interest. This argument is, of course, alive to the fact that Commissioners serve in their personal capacity, but it must be considered that this notwithstanding, the possibility of external pressure or bias by a Commissioner with respect to the examination of a report of a state to which he is a citizen is real.

(III) Public Scrutiny of Measures Taken by States

A fundamental objective of the reporting process is to facilitate public scrutiny of government policies with respect to the rights and freedoms and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. Publicity is an important tool in the realisation of human rights not just at the international level but also at the domestic plane. Governments generally are very reluctant to allow documented human rights

²²⁸ Danish Centre for Human Rights, *The African Commission on Human and Peoples' Rights: Evaluation* (1999), *supra* note 172 at pp. 2-3.

²²⁹ G. W. Mugwanya, *supra* note 5 at p. 277, 278.

²³⁰ *Ibid.*

abuses in their countries to be published. In certain cases, countries are prepared to embrace positive change by stopping the criticised actions as a means of avoiding the publication of their declining human rights standards. State reporting therefore is a strategy for inducing States to honour their obligations in ensuring respect for and the implementation of the rights stipulated in the human rights instrument.

In order to meet this goal, the examination of State reports under the African Charter is conducted in public. These sessions are open to individuals and organisations participating in the promotion and protection of human rights in Africa. The participation and alternative or parallel reports of NGOs in particular has raised publicity and pressure on States not only to refrain from making misrepresentations in their reports, but also to adopt best practices in implementing the protections enshrined in the Charter. The State reporting mechanism may have also deterred States from violation of individual human rights to avoid international embarrassment.

It is however little comfort to find refuge in the practice so far under the African Charter. Even though a major player in the reporting systems under the African Charter and in other systems generally, NGOs have not discharged their responsibility as a check-and-balance institution. A strong NGO involvement should not be limited to only the preparation and presentation of shadow reports; NGOs can play the very important role of ensuring that the recommendations are implemented or respected by the government. Additionally, these reports are usually within limited and confidential circulation within the sphere of the agency charged with preparing them. What is more, even after their consideration, these reports are not available as the Commission has not instituted a system adopted by other supervisory bodies such as the Committee on Economic, Social and Cultural Rights to publish annual reports or summary reports for public scrutiny.

(IV) Self Evaluation and Review of Progress

Another objective of State reporting is to provide a basis on which the State party itself, as well as the treaty body, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the instrument. The function, therefore,

of State reporting is not just to enable the treaty body to assess whether the States have respected their undertakings, but also to enable States parties undertake some “soul searching” in relation to compliance with their obligations under the human rights instrument in question. Thus the reports are an assessment of States’ performance by the states themselves, not by other States or by independent agents, such as special Rapporteur or NGOs. The essence of this arrangement is to enable States to own not only the process but also the rights and freedoms sought to be protected by that human rights system.

Effective monitoring of a treaty regime depends on adequate information, much of it supplied by these State reports. But the reporting mechanism, by its nature, requires a very high degree of political will and commitment to the cause of human rights by States. Thus treaty bodies should not be confined to a passive role as recipients of information. They should conduct further fact-finding or research. From a comparative perspective, the most assertive method of monitoring allows international institutions to undertake inspections (in-country or on-site) to verify compliance with international agreements and standards. Some systems have a follow-up procedure, e.g., technical assistance, field missions or field representatives, or there are subsidiary procedures to correlate the information received in the reports and from various sources and on-site missions.

Having noted that the reporting system is based essentially on self-criticism and good faith, it is obvious that it has several practical limitations. First, States are generally reluctant to be evaluated on their performance on human rights by treaty bodies, leave alone themselves. This explains why there has been a growing number of overdue reports in the UN human rights system and regional human rights systems. Second, the development of international human rights law has largely been attributed to inimical acts and omissions of the State and its agencies which constitute a violation of human rights. It is therefore very optimistic at the very least to entrust States with the duty of evaluating themselves in the State reporting procedures. Furthermore, the non-coercive nature of the reporting procedure is in itself a potential reason for lack of commitment to the reporting process. In the practical State of affairs such a system will succeed only if the subjects of the system are committed to the process.

From the analysis of State reporting under the African Charter, it follows that the objective of self-evaluation and effective monitoring has not been achieved. States are generally not honest in their reporting and evaluating themselves on their progress in the realisation of the Charter. Practices such as some of those cited above of submitting six-page or vague reports can only be labeled dishonest. The participation of NGOs has also not been very helpful in supplementing information on these reports to ensure a balanced picture on human rights situations in the African states. The fact that NGOs are present and ready to furnish the Commission with additional information may particularly deter States from submitting dishonest or incomplete evaluations of their human rights records. Yet the Commission has so far taken very limited cognisance of “shadow” reports by NGOs.²³¹

The problem of self-evaluation is not just confined to the attitude of the States alone. The drafters of the Charter seemed to have not taken cognisance for the need for specificity on the State obligations under the Charter. The use of the expressions “legislative or other measures” under article 62 of the Charter is in our opinion wide, making it subject to abuse. Generally, the more specific the reporting requirements, the more likely it is that meaningful reports will be produced. The Commission has also been blamed for “lacking the capacity to evaluate and what is more, even though the objective of the reporting procedure is make an evaluation of the reporting State’s compliance with the Charter, the Commission only makes general observations and conclusions. It has been particularly pointed out that the Commission is under-funded and as a result it has retained a skeletal secretariat. But it cannot be overemphasised that an effective secretariat is essential for requesting reports, organising the meetings and distributing the papers, but also for carrying out research into reporting States and making specific inquiries, where necessary. The secretariat could also assist States in producing reports.

(V) Exchange of Information among States and Peer Review

State reporting also enables the treaty body and the States parties as a whole to facilitate the exchange of information among themselves and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective utilisation of each of the rights contained in the human rights regime. As noted above, the examination of State reports generally takes place in the

²³¹ G. W. Mugwanya, *supra* note 5 at 280.

public. Of relevance is the practice where the treaty body concerned engages the reporting State and other participants in “constructive dialogue.” The objective here is to encourage debate on the enforcement of human rights under the instrument.

In examining State reports, treaty bodies also provide guidance in interpreting the rights of the treaty they monitor. Through the formulation of “General Comments,” these bodies help guide State compliance to the treaty provisions. These “General Comments” or recommendations especially under the UN human rights system usually focus on a particular article of the treaty, and articulate in more detail the standards governments must live up to in implementing that right. Since the treaty body issuing the general comments is the body established to enforce the treaty, its interpretive guidance is highly authoritative, although generally not legally binding. Through such review, States are able to learn the ways and means, and even the difficulties involved in implementing the rights under the instrument in question.

It bears noting that the reporting system under the African Charter has not largely achieved the objective of peer review and exchange of information among States with the view to achieving the human rights and freedoms enshrined in the instrument. As has been noted above, the reporting mechanism has proved inadequate and intermittent. States have not taken the procedure with the gravity that it deserves. By logical inference, the motivation of these States to participate in this process would not be for the purpose of peer review or exchange of information, but merely as a perfunctory exercise. This is to be inferred from the low quality of the reports, the failure to submit (overdue) reports and non-attendance by States during the examination of the State reports by the Commission. Even when representatives are sent by the States, they are often incompetent to provide the required information in response to questions from the Commission.

Notably, the fact that the Commission has not been issuing legally binding decisions but merely conclusions and recommendations with no particular jurisprudential content has also negated the capacity of the reporting procedure to be used as a learning process. Upon the examination of State reports, the Commission has merely commended some States for the good quality of their report and of course condemned some States whose reports they

consider a sham. There is practically nothing of educational value in these conclusions for any other State to benefit from. This may have reduced the process into a mere performance of a treaty obligation. What is more, there have been ambivalent views expressed by individual Commissioners in the course of the dialogue that ensues during the consideration of State reports. Yet State reporting may be an important tool for the development of an African jurisprudence on human rights in Africa. This is indeed a confusing state of affairs.

6.0 Conclusion: State Reporting under the African Charter: Opportunities and Challenges

As was noted in Chapter two, considerable progress has been made in the field of human rights over the past two decades. Of the many achievements, some such as development of international and regional human rights law must be pointed out. Regional and international human rights law have become important in promoting respect for and observance of human rights and fundamental freedoms by individuals and groups. This period has also seen international concern for human rights and improved accountability of States for respect for, protection and promotion of human rights. But the story is only impressive up to this moment. There are, no doubt, serious defects and shortcomings in the enforcement of international human rights law. Both the United Nations and the regional human rights systems remain largely weak, especially in monitoring compliance through the reporting procedures. Even though the examination of State reports under the African Charter has the potential of enhancing the promotion and respect for human rights in Africa, the analysis here is that the reporting system has been stifled by several problems, legal, institutional, political and attitudinal.

Against this background, there are still considerable normative challenges that need to be addressed, both with respect to the African Charter and the entire framework of the African Union. In this respect, it has been noted that the African Charter is in dire need of reform. It is today trite that no legal system can work over time without summoning the need for reform. As the social interactions become more complex, the need arises for adjustments to adapt to new challenges and opportunities.²³²

²³² D. Juma, "Constitution making and Democratisation Trends in Africa- The Kenyan Case," in the East African Law Journal, Vol. 1 (2004) at 45.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

4.2.0 Recommendations

It is acknowledged that while the instrument of State reporting has proved largely ineffectual, it is still a useful tool to monitor the promotion and protection of human rights. To ensure that the reporting mechanism achieves its intended goals, and to be able to overcome the challenges posed to the system, we propose the following recommendations for the improvement of the system, and offer alternatives to complement the instrument to promote and safeguard human rights on the African continent. To realise these improvements, reform of the Charter is inevitable to allow the African Commission overcome the challenges it faces in its functions and to enable it take full advantage of the opportunities posed by the African Union, other United Nations Treaty bodies and growing human rights jurisprudence generally.

(a) Need for enforcing Individual Case system and strengthening the Individual Communications Mechanism

The individual complaints system, in some jurisdictions named the case system has acquired an important role, becoming one of the most valuable tools for the protection and promotion of individual human rights. This system allows individuals to file a petition with the Commission, alleging a violation of their human rights by the government of a member State. Under the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights for instance, the Commission can hear the individual's case and publish a report, establishing the violation of human rights by a member State. The Commission may also decide to refer the case to the Court for adjudication if the State has accepted the Court's compulsory jurisdiction.²³³ In addition to dispensing justice in concrete cases, the individual complaints or case system is a means to avoid regression, expand democracy, and articulate regional human rights standards. The case system also serves as an early warning mechanism, based on the rationale that a single human rights violation could

²³³ Art. 62(3) of the American Convention.

be the first indication of a process that, if allowed to proceed, could result in regression to authoritarianism.

We also noted that even though the State has the onus to respect, promote and protect human rights in terms of the social contract theory, its acts and omissions have always been inimical individual human rights and freedoms. The State, by its very nature and philosophical basis, cannot be entrusted with the primary duty of vindicating human rights. Most States have routinely failed to faithfully and effectively discharge their obligation requirements under various human rights systems generally, and under the African Charter specifically. The manner in which States parties treat the reporting system under the African Charter is testament to this. At the national level, the abuse of human rights is in most cases actuated by the State or its agents. Thus Mutua has asserted that "...the State is a predator that must be contained. Otherwise it will devour and imperil human freedom."²³⁴ Thus a system that relies primarily on the State as the protector of human rights is likely to be ineffective in realising its protective and promotional goals.

Against this background, we recommend that the individual case system under the African Charter should be revived in order improve the human rights system in Africa. To make human rights effective within the international system, the subject of human rights, the individual, should be given the fullest possible ability to realise the human rights, and be able to meaningfully and effectively seek the vindication of these rights, where they are violated. To achieve thus objective, there is need for a leap towards the full development, and implementation of the individual-based systems such as the establishment of the African Court of Human Rights to complement the State reporting mechanism as the cardinal measures for the protection and promotion of human rights.

The African Commission should adopt more standardised procedures including registration of complaints, rulings on admissibility, fact gathering, the promotion of amicable settlements, adoption of reports, publication of decisions, and referrals to the proposed African Court. The Commission should rule on admissibility prior to reaching the merits of the case, so that there are more focused hearings that address the merits after procedural issues have been decided. New procedures on fact gathering, including using visits *in loco* to gather evidence for cases

²³⁴ M. Mutua, Human Rights: A Political and Cultural Critique, 2002, p 22.

before the Commission should be adopted to increase access to information and improve the quality of the Commission's decisions on individual cases. In order to address the backlog of cases, the Commission should place itself at the disposal of the parties in all cases and provide a settlement- friendly atmosphere that allows parties to negotiate mutually agreeable settlements, which would ultimately shorten procedures and increase the likelihood of compliance.

In appropriate cases, the African Commission should consider the application of interim measures in order to hold the *status quo* or prevent irreparable prejudice against a complainant pending the examination or determination of a communication. It should also be noted that while the Charter provides that States parties must accede to its jurisdiction, the Commission's jurisdiction is far from compulsory and its enforcement powers are limited to only making recommendations to the Assembly of Heads of States and Government. In this regard, the Commission should be granted with power to make binding decisions on individual cases.

To complement and reinforce the protective mandate of the African Commission, the proposed African Court on Human and Peoples' Rights²³⁵ will enhance access by aggrieved individuals. The establishment of the Court is perhaps supportive of our recommendation for the strengthening of the individual complaints mechanism in remedying the violation of human rights as it shows a shift towards an emphasis on the individual. This has also been the case with the European system of human rights and the international human rights system, having acknowledged the shortfall of the State- centered mechanisms.

b) Need for the African Commission to rely on country reports submitted by States Parties under the United Nations treaty Bodies

To ease the burden of multiple reporting, States should be encouraged to use the same information they have provided in reports to the United Nations Treaty bodies to prepare their reports to the African Commission. In this regard, it is proposed that the African Commission and UN Treaty bodies should develop a more systematic working relationship to facilitate the

²³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

sharing of information, joint action and programming. This would ease the burden of State reporting and facilitate the work of the monitoring mechanism especially in relation to follow-up to recommendations.

The Commission has recognised that States' inability to comprehensively report on steps taken with regard to their reporting obligations under the Charter is partly due to lack of user-friendly and model reports to serve as precedents. It is also recognised that some countries find the biennial reporting requirement very burdensome. To ameliorate this, it is recommended that the African Commission should develop user-friendly guidelines and model reports to serve as precedents and assist States in preparing their reports. We also recommend that only initial reports should be comprehensive and include background, political and other information. Subsequent reports may be submitted every four years and comprise specific information about progress made since the initial report. To achieve this, article 62 of the ACHPR would have to be amended.

c) Infusing rigour in the examination of reports and follow-up action by the Commission

The African Commission has been criticised as not being sufficiently serious in the way in which it deals with State reports. Their conclusions and recommendations on the State reports are often not explicitly stated in the final communiqué. cursory consideration of the reports by the Commission may seriously undermine the seriousness with which State parties take the reporting process. It is therefore recommended that the Commission should take a more critical examination and assessment attitude than is currently portrayed in the reports on the examination.

Further, the African Commission could infuse some degree of seriousness into the whole reporting system by taking conscious steps to propose specific recommendations for promotional and technical assistance. Technical assistance may take the form of making inputs into relevant draft legislation, pushing for the establishment of National Human Rights Institutions and coordinating with NGOs to secure the performance of the recommendations arising from the examination of State reports.

d) Tackling resource constraints of the African Commission

Resource limitations have contributed to the many challenges faced by the African Commission in its functions. These problems have led to serious secretarial incapacitation, and constrained the Commission's ability to have adequate time to consider State reports. Non-provision of State reports in all approved languages has undermined the full participation of all Commissioners in the exercise of consideration of reports. The duty to provide adequate resources to the African Commission in the discharge of its mandate rests with the African Union Commission. It is therefore recommended that the AU should take responsibility for providing adequate resources to the African Commission for the discharge of its mandate. There is also need for dialogue between the African Union Commission and the African Commission regarding the effectiveness of the Secretariat of the African Commission and issues of staffing and funding.

It is also to be noted that the current number of eleven Commissioners is too small and their meeting period of 30 days per year is grossly inadequate to meet the responsibilities linked to the mandate of the Commission. In this regard, it is proposed that the AU should urgently look into the need to increase the number of Commissioners to between 15 and 18 members while adhering to the principles of geographic and gender representation²³⁶.

e) Integrating the African Union Structures into the Reporting mechanism

Article 45(1) (c) of the ACHPR calls on the Commission in the course of the performance of its functions to "co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights". In this regard, the African Commission will have to work with the various organs of the African Union and in the performance of its duty to promote and protect human and peoples' rights.

To a great extent, the success of the reporting mechanism will depend on the publicity and minimum degree of sanctions that are incorporated within it. The African Union system

²³⁶ See the Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (ACHPR) facilitated by the Office of the High Commissioner for Human Rights (OHCHR), African Union Conference Centre, Addis Ababa, Ethiopia, 24th to 26th September 2003.

offers the opportunity for that publicity and some degree of sanction through its various organs²³⁷.

i) Exposure of non-compliant states

The exposure of non-compliant States to the public may be effective because African governments are never comfortable when given adverse publicity in respect to their human rights records. That clearly explains the inclusion of Article 59 of the ACHPR, which introduces confidentiality into the deliberations of the African Commission. The vehemence with which African governments defend public accusations of human rights abuse is also indicative of the embarrassing nature of their exposure to the public. As noted earlier, governments, especially in the contemporary political climate, are very reluctant to allow documented human rights abuses in their countries to be published. In certain cases, countries are prepared to make amends by stopping the criticised actions as a means of avoiding the publication of the report.

One of the principal organs of the African Union is the Pan-African Parliament. It will have responsibility of monitoring the promotion and protection of human rights in Africa. The most potent regulatory mechanism at its disposal is the element of publicity and the pressure that it can bring to bear on non-conformist governments through the members representing the particular state in the Pan-African Parliament. It is urged that the African Commission should enlist the help of the Pan-African Parliament to put political pressure on the states that delay or fail to submit reports. Persistent pressure from the Pan-African Parliament and exposure to the public should make States meet their obligations of submitting regular reports to the Secretary of the African Commission.

ii) The Fear of Sanctions

A consideration of the European Convention in this regard is useful. Under the European Convention, when the reporting system uncovers some serious violations, the Secretary-General could bring such serious violations to the notice of the Committee of Ministers, hoping that the Committee will proceed under Article 8 of the Statute of the Council of

²³⁷ See K. Quashigah, African Charter on Human and Peoples' Rights: Towards a More Effective Reporting Mechanism, Centre for Human Rights Occasional Paper 13, University of Pretoria, April 2002

Europe to sanction non-conformist states. The ever existent, no matter how remote, possibility of expulsion from the Council of Europe provides some modicum of compulsion within the European system²³⁸.

The African Union is the legal successor to the OAU. The principles of the Constitutive Act of the African Union are a declaration of their commitment to the promotion and protection of the rights specifically stated in the ACHPR. This commitment is clearly stated among the objectives of the African Union as, to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments²³⁹. The underlying conceptual and philosophical basis of the African Union shows a strong commitment to the promotion and protection of human rights.

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

The said Article provides that:

²³⁸ The relevant Article 8 of the Statute of the Council of Europe provides that: "Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine."

The Article 3 mentioned therein also provides that: "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

²³⁹ The relevant portions of principles of the Constitutive Act of the African Union provide as follows:

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

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

Since the requirement of the provision of an initial report and regular reports at two yearly intervals are specific requirements of the ACHPR, failure on the part of any State party to produce these reports as and when due is a breach of the Charter provisions. In that case it becomes the duty of the Assembly of Heads of State and Government of the OAU to supervise conformity.

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

f) Examination of a country's situation when no State reports are submitted

The African Commission should, in responding to the problems associated with non-submission of reports by States, establish machinery that would make it possible for the Commission to make an examination of a country's situation even when no report has been submitted. These may take the form of shadow reports by national Human Rights Institutions and NGOs, and Missions and Country reports.

i) Use of Shadow/parallel Reports

Progressively, more and more countries are establishing independent National Human Rights Institutions (NHRIs) as the bulwark for the protection of human rights. Most NHRIs have oversight functions with regard to the promotion, protection and vindication of human rights domestically. NHRIs are established in recognition of the need for an autonomous body to monitor the governments' handling of human rights on the domestic arena. As noted earlier, it is accepted that governments have the primary responsibility of promoting and protecting human rights. But governments are also the main violators of human rights, hence the need to

establish autonomous institutions in the style and design of NHRIs as a check and balance on the government.

What role should NHRIs play with regard to State reporting therefore? Should they also be involved in the preparation of the State reports? We contend that State reporting as designed was intended for States to report on the legislative and other measures taken by the State to give effect to each of the rights and freedoms recognised and guaranteed by the ACHPR. It is an obligation upon States on their duties and obligations under the ACHPR. We therefore posit that States should continue to prepare and submit reports under article 62 of the Charter. We however recommend that such reports must be shared with NHRIs and NGOs before they are submitted by the State to the African Commission. This would allow the NHRIs and NGOs to prepare meaningful and critical shadow/ parallel reports as a useful assessment of the State's performance of Charter obligations.

Allowing the participation of NGOs and NHRIs will infuse the requisite degree of seriousness in the reporting process. Then the Commission must, at the examination session, be incisive in its questions as well as being constructive. But in order to undertake probing questioning, Commission members must read the shadow reports prepared by the NGOs and the NHRIs. Experience at the UN level has shown that reports are better prepared where the State encouraged input from NGOs and the NHRIs and also where there is widespread dissemination of the report making it possible for the public to make comments thereon²⁴⁰.

The African Commission should adopt into its procedures similar processes as pertains under the European Social Charter system in its dealings with the NGOs. Article 23 of the European Social Charter imposes on governments an obligation to send their periodic reports to national organisations of employers and trade unions. These organisations have the right to comment on the report, and the government has a duty to forward the comments to the monitoring bodies.

A strong NGO involvement should extend beyond the preparation and presentation of reports; NGOs can play the very important role of ensuring that the government in fact

²⁴⁰ *Supra*, note 2. In 1991, the Secretariat of the Commission was urged to make the conscious effort to encourage NGOs in Africa to apply for observer status with the African Commission and to "participate actively in the work of the Commission by submitting information concerning periodic reports, communications and other information and assistance to the Commission".

respects the recommendations. This is especially so as the Commission is logistically limited to monitor compliance to its recommendations.

The use of shadow/ parallel reports by National Human Rights Institutions (NHRIs) and NGOs would serve as useful sources of information on the human rights situations. To this effect, it is urged that NHRIs and NGOs should be encouraged to prepare and submit shadow reports to the Commission. Furnished with such shadow reports, the Commission could utilise them alongside other sources of information to prepare reports and conclusions on the human rights situations especially in States that do not submit reports.

It is therefore recommended that the African Commission should provide NHRIs with enhanced affiliate status and develop a clear working relationship, especially in the area of follow-up to the decisions, observations and recommendations of the Commission. The UN human rights system has developed similar relationship with the NHRIs. This would greatly promote the African Commissions' monitoring function.

ii) Missions

The ACHPR confers the authority on the Commission to undertake missions, (i) for promotional activities and (ii) for the collection of information on communications submitted to it. By Article 45(1) (a) the Commission has the duty to promote human and peoples' rights among other means, to undertake studies and researches on African problems in the field of human and peoples' rights. The Commission should seek the assistance of non-governmental organisations and institutions to facilitate conduct of such missions and it should bring its intention to conduct missions to the knowledge of the public. It could give publicity to the findings of such mission and speak out on States that have been unwilling to cooperate with the Commission in this respect.

i) Country Reports

The ACHPR does not specifically confer the power on the African Commission to undertake country reports. Nothing prevents the African Commission from ascribing to itself the power to commission or initiate country reports. Article 45(1)(a) of the ACHPR could conveniently

serve the purpose²⁴¹. This ability to undertake country reports will provide added scope to the reporting mechanism. It will create the opportunity for the Commission to initiate thematic area studies thus helping to focus on particular human rights issues that may be of special interest at particular times. Country reports could become relevant when a particular State party persistently neglects to prepare and submit its State report. The Commission should be able to examine the situation in that country based on its own country report supplemented with parallel reports of local NGOs. The fact of the State's refusal to produce the report should make resort to this method even more justified²⁴².

g) Requirement of synergy between individual governments and their academic communities

There is no doubt that institutions such as universities and others of higher learning are endowed with intellectuals well versed in international and human rights law who, if consulted would be of great assistance to states in the preparation of reports. In Kenya for example, there is little or no consultation between the government and the intellectual communities on issues affecting the State in its international obligations under international law. Whereas it is obvious that the government lacks the capacity to enable it to prepare reports well enough or at all to be able to report under the various international human rights instruments, no effort is ever made to involve the university community with its rich array of intellectual to assist. It would obviously be useful if the relevant ministries while preparing reports could engage the services and contribution of this resource. Healthy and rigorous debate can be generated on the various government reports before they are submitted. A country like Holland has a standing Committee within its foreign affairs ministry reserved for intellectuals who use it as a forum to advise and assist the country in discharging its obligations under international law. American Universities have direct working relationship with the government and hence input into various report preparations and other intellectual contribution in the American reports under international law.

²⁴¹ Article 45(1) (a) of the ACHPR provides that the functions of the Commission shall be: 1. to promote the Peoples' Rights and in particular: (a) to collect documents; undertake studies and researches on African problems in the field of human and peoples' rights...

²⁴² *Supra*, note 2

This is a concept that Kenya and indeed other African countries could use in order to overcome the deficiencies in the preparation and timely submission of State reports under the African Charter and under other international human rights instruments. The Commission could in the same manner recommended above in treating NHRIs and NGOs participation in the individual country reports, require member countries of the AU to use their local intelligentsia in the preparation of their reports. This would not only improve the quality of the reports but also enable countries to comply with reporting conditions in time. Further, this would be good use of the African intelligentsia who currently prepare to migrate to the West to escape underutilisation in their home countries or run away from persecution by their governments, most of which have not been comfortable with this class of their citizenry. A good example is Kenya during the Kenyatta and Moi regimes when the government is perceived to have presided over the systematic persecution and prosecution of university lecturers over trumped up criminal charges, causing many of them to flee the country to West where they remain to date.²⁴³

4.2 Conclusion

As experience has demonstrated, most African States have been and continue to be egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in the continent. Africa has always been criticised on account of its human rights record and the effectiveness of the African Charter on Human and Peoples' Rights in particular for its inability to improve the situation.

This work has examined the various human rights enforcement mechanisms. Specifically, we considered the effectiveness of the instrument of State reporting in the promotion, protection and vindication of human rights with specific reference to the African Charter on Human and Peoples' Rights. The introduction of the thesis provided the context, focus and objectives of the study, its significance, the hypotheses and the literature review. Chapter one described the meaning, content and evolution of human rights. The philosophy of the State in relation to human rights and the contract theory were discussed. Chapter Two gave an overview of State reporting, the individual complaints system, Special Rapporteurs, Courts and Tribunals as the mechanisms for the enforcement of international human rights law under various

²⁴³ See B. Sihanya, How to curtail the brain drain in Kenyan Universities: <http://www.nationaudio.com/DailyNation/1611o2oo3/News/Nwes%20Features:1-html> (accessed on 3/8/2005)

international legal instruments. Chapter Three was a critical appraisal of the mechanism of State reporting under the African Charter on Human and Peoples' Rights. It considered the challenges and opportunities posed to State reporting under the African Charter on Human and Peoples' Rights *vis-a-vis* the objectives of State reporting.

We noted that the obligations of States to ensure the enjoyment, fulfillment and respect for human rights has been recognised by the international community as an important step towards the enforcement of international human rights law. Monitoring bodies have also been established to complement national human rights mechanisms while also supervising compliance with State obligations for human rights protection and implementation. The primary responsibility in the field of human rights has been accorded to States as guarantors of human rights, but there have also been deliberate attempts to check the States at the regional and international levels because they are a potential threat to human rights.

States are obliged to submit biennial reports on legislative and other measures they have taken to give effect to each of the rights and freedoms recognised and guaranteed by the African Charter. But as noted earlier, there exists contestations in the philosophical underpinning of the State and the theory and philosophy of human rights, and the two are disparate and conceptually different. Owing to this fundamental conceptual and philosophical difference, the instrument of state reporting has not only proved very ineffectual in the promotion and protection of human rights, it has actually served to stifle the vindication of human rights. The State, by its very nature and philosophical basis, cannot be exclusively entrusted with the duty of reporting on the realisation and vindication of human rights, as it is itself the main violator of human rights.

Through the instrument of State reporting, it was intended that it should be possible to identify the difficulties of the realisation of human rights and possible ways to address them. Thus it is intended that States benefit from advice on how to improve their human rights situation from independent international experts. There is little evidence, however that States have benefited immensely from this process. Similarly, the human rights situation in most African countries has not significantly improved owing to the participation of the countries in the instrument of State reporting. Infrequent and inadequate reporting by States has

undermined the role of reporting in realisation, promotion and protection of human rights locally, regionally and on the African continent generally.²⁴⁴

Various factors inhibiting the efficient performance of the African Commission in its report examination function have been identified. They include the failure to submit reports by State parties. Reasons for such non-compliance by States includes a general lack of political will on the part of State parties; State parties have also to file reports under other international human rights instruments to which they are signatories; lack of a coordinated effort between State departments and the complexity of the first reporting guidelines issued by the African Commission. It is also noteworthy that State reporting is subject to political expediency of governments and their political interests. The implementation of State obligations with respect to human rights is dependent on political will and good offices of the ruling elites.

Also, many of the reports filed have revealed a lack of seriousness in carrying out introspective self-evaluation. Some countries may also use comparatively good reports to conceal their poor human rights records. An honest evaluation is usually unlikely as the State is the main violator of human rights. It is also the institution charged with the responsibility to take legislative measures on various aspects of human rights. States can hardly assess themselves honestly with a view to raising human rights standards. Even if any advice is given to such State during the proceedings, it is non-binding on the State. There are no guarantees therefore that the States shall heed and or implement any such advice offered it. The fact that the proceedings are non-contentious and non-judgmental has also diminished the effectiveness of the instrument of State reporting.

It is therefore fair to state that to a large extent, State reporting generally and specifically under the African Charter, is ineffective, given the magnitude of human rights violations on the continent

Despite all these shortcomings that have more or less rendered the effectiveness of the reporting mechanism illusory, the instrument is still the most important mechanism for the realisation of human and peoples' rights envisaged under the African Charter. Effecting the

²⁴⁴ See Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights Annexe II (Status of Submission of State Reports) 68th Ordinary Session of the OAU Council of Ministers 1-6 June 1998 CM/208 (LXVIII).

recommendations made in this thesis could go a long way to improving the instrument of State reporting and help to turn it into the rigorous and efficient tool for the promotion and protection of human rights under the African Charter.

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