



Maintaining the independence of the African Commission on Human and Peoples' Rights: A commentary on the Rules of Procedure, 2020

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Introduction

The African Commission on Human and Peoples' Rights (African Commission) has faced serious threats to its independence and autonomy over the past few years.

Notably, in June 2018, the African Union (AU) Executive Council, during its 33rd Ordinary session in Nouakchott, Mauritania, declared under paragraph 5 of Decision EX.CL/Dec.1008-1030(XXXIII) of the AU Executive Council (Decision 1015) that the African Commission only had "independence of a functional nature, and not independence from the same organs that created the body."¹ This does not seem to be aligned to the purpose and spirit of the African Charter on Human and Peoples' Rights (African Charter) as it attempts to severely limit the autonomy of Commissioners and the independence of the Commission as a quasi-judicial body. It erroneously interprets the independence of the Commission as being 'functional' rather than acknowledging its full independence, which includes institutional independence in the discharge of its mandate. As a principal and autonomous organ of the African human rights system, the Commission's mandate to promote and protect human rights in the

continent is provided for in Article 45 of the Charter. Political interference with the Commission's work is extremely problematic, in that it undermines its independence and autonomy.

Further, the Council requested the African Commission, amongst other instructions, to revise the Rules of Procedure, 2010 (2010 RoPs).² Thus, during its 27th Extra-Ordinary Session, held from 19 February to 4 March 2020, the African Commission adopted its new Rules of Procedure, 2020 (2020 RoPs).³ The Rules were adopted pursuant to Article 42(2) of the African Charter and came into force on 2 June 2020, in terms of Rule 145 thereof.

From the foregoing, this commentary reviews the 2020 RoPs in the light of Decision 1015 and whether it has further strengthened or undermined the Commission's independence.

1 Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) - Doc. EX.CL/1089 (XXXIII) https://au.int/sites/default/files/decisions/34655-ex_cl_dec_1008-1030_xxxiii_e.pdf (accessed 28 July 2020), para 5.

2 See analysis of Decision 1015 by the Coalition for the Independence of the African Commission (CAIC), <https://achprindependence.org/decision-1015/> (accessed July 28, 2020). The Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd Ordinary Session held in Dakar (Senegal) from 2 to 13 February, 1988, revised initially during its 18th Ordinary Session held in Praia (Cabo-Verde) from 2 to 11 October 1995 and once again during its 47th Ordinary Session held in Banjul (The Gambia) from 12 to 26 May, 2010.

3 African Commission on Human and Peoples' Rights "Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020" (2020), <https://www.achpr.org/legalinstruments/detail?id=72> (accessed July 28, 2020).

Analysis of the 2020 RoPs in relation to the Commission's independence

As noted above, the 2020 RoPs revises the 2010 rules. While not offering an exhaustive list, this article identifies some aspects of the 2020 RoPs and analyses whether they are key to preserving the autonomy of the Commission.

a. Mandate and status of the African Commission

The 2010 RoPs had a single provision (Rule 3) on the status of the African Commission, which was defined as 'an autonomous treaty body within the framework of the African Union to promote human and peoples' rights and ensure their protection in Africa'.

The 2020 RoPs now, however, has several parts:

- Rule 3(1) - specifically and clearly stipulates that 'the African Commission is an autonomous treaty organ' with a mandate to promote and protect human rights in Africa in terms of Articles 30 and 45 of the Charter.
- Rule 3(2) - draws the connection between the Commission and the Assembly of Heads of States.
- Rule 3(3) - sets out the Commission's competencies i.e. power to interpret the Charter, including giving advisory opinions.
- Rule 3 (4) - on the status of the Commission provides that "The Commission shall be competent to interpret its own decisions.
- Rule 3 (5) - The Commission shall lay down its Rules of Procedure pursuant to Article 42 (2) of the Charter.
- Rule 3 (6) – sets out that the Commission shall have the competence to ensure the efficient and technical organisation and operation of the Secretariat
- Rule 3 (7) - The Commission shall perform any other tasks which the Assembly may entrust to it pursuant to Article 45(4) of the Charter.

Generally Rule 3 is vital in terms of discussion around the independence of the Commis-

sion, especially in light of recent attacks on its independence. For instance, in clarifying the relationship between the Commission and the Assembly of Heads of States, this can serve as a monitoring tool of the Commission's independence by Non-Governmental Organisations (NGOs). In addition, Rule 3(4) is a significant provision given the recent controversy over interferences with the Commission's decision-making powers by the AU political bodies and the subsequent directives for these decisions to be altered to reflect the leanings of the political organs.

b. Code of conduct

Rule 11 of the 2020 RoPs on code of conduct uses the operative term "shall" to require Members of the Commission to observe the principles and codes of conduct stipulated in the Rules as governing the terms and conditions of their service, including the principles relating to recusal and confidentiality, as well as relevant provisions of the AU Staff Rules and Regulations, the AU Code of Ethics and Conduct and the AU Harassment Policy. However, the term 'relevant' is not defined thereby making the provision ambiguous.

The likely difficulty posed with this Rule is that Commissioners in certain circumstances would be treated as staff of the AUC, thereby affecting the exercise of Commissioners' independent mandate, free from political interference and other influences such as withholding of benefits, financial or otherwise, through threats of disciplinary procedures for conduct compliant with their functions but deemed unfavourably by political actors.

However, in an attempt to clarify the relation between the RoPs and the relevant AU Staff Rules and Regulations, Rule 11(2) states that the RoPs will take precedence where there is a conflict. This can contribute towards strengthening of the Commission's independence and autonomy.

c. Sessions of the African Commission

Rule 27 of the 2020 RoPs maintains Rule 25(1) and Rule 25 (2) of the 2010 RoPs on general principles. However, it added two sub-rules, 25 (3) on live transmission of session proceedings when possible and 25(4) on the adoption of a communique for the public at the end of the session. These are important additions given the current situation with the pandemic. For example, the 66th Ordinary Session of the Commission, which was scheduled to be held from 22 April to 12 May 2020 in The Gambia, was postponed. The session was held from 13 July to 7 August 2020 via zoom with a special focus on COVID-19. The 28th Extra-Ordinary Session of the Commission was also earlier held virtually from 29 June to 1 July 2020.⁴

Rule 27 (1) of the 2020 RoPs now increases the ordinary sessions of the Commission from 2 to 4 sessions each year. This is timely given the inadequacy of the previous sessions to cover the Commission's very extensive programme of work.

Rule 27(2) further vests decision-making power on convening of sessions in the hands of the Chairperson of the Commission in consultation with other members of the Commission and removes the requirement for consultation between the ACHPR Chair and the AUC Chair in the setting of such session dates under Rule 26 (2) of the 2010 RoPs. Where programmes of the AUC and Commission clash, it is better that negotiations take place in all collegiality but the AUC Chairperson should not have integral power in terms of the rules to call off, postpone or delay a Commission's meeting.

It is important to note that Rule 26(3) of the 2010 RoPs is retained under Rule 27 (3) of the 2020 RoPs where "in exceptional circumstances, the Chairperson of the African

Union Commission may change the opening date of a session, in consultation with the Chairperson of the Commission." This provision appears to be a compromise for the removal of the AUC Chair's powers in convening the Commission's sessions. It partially limits the power of the AUC Chairperson to possibly alter session dates only in exceptional circumstances and always in consultation with the Chairperson of the Commission.

Under Rule 29 on Extraordinary Sessions (EOS), the wording is changed from "shall" to "may", thereby making the holding of EOS optional rather than compulsory. Rule 29(3) of the 2020 RoPs also further removes the obligation for the Commission's Chairperson to set dates for EOS in consultation with the AUC Chair and limits the consultation only to members of the Commission. This is a positive step as the decision to hold EOS should lie with the Commission without involvement of the AUC.

Rule 30 of the 2020 RoPs now changes the title from "Place of Meetings" to "Venue of Sessions." Rule 30(3) is particularly important as the State party agreeing to host a session shall guarantee the unfettered participation of all individuals attending the session. This is important in light of past situations where the participation of civil society organisations (CSOs) were not guaranteed or denied by host country. For example, during the 38th forum of the NGO forum preceding the 64th session of the ordinary session in Sharma El Sheikh in Egypt, the forum expressed their deep concerns and frustration at the unfair treatment meted on them by the Egyptian government.⁵ Other issues included the fact that identification badges for the Non-Governmental Organisation (NGO) participants at the 64th session were issued by officials from the Arab Republic of Egypt rather than the secretariat of the Commission, which is the norm.

⁴ Final Communiqué of the 28th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, <https://www.achpr.org/sessions/info?id=325> (accessed 28 July 2020).

⁵ African Defenders "ACHPR64: Protest petition against the treatment accorded to CSOs during the NGO forum" 24 April 2019, <https://africandefenders.org/achpr64-protest-petition-against-the-treatment-accorded-to-csos-during-the-ngo-forum/> (accessed 28 July 2020).

Generally, this Rule failed to emphasise that the African Commission should ensure that a State Party inviting it to hold a session within its territory is not generally seen as, or obviously, a violator of human rights within its territory in accordance with its obligations under the African Union Constitutive Act, the African Charter and any other human rights instruments it is a party to.

Rule 30(4) also now creates a firmer obligation on a State Party offering to host a session of the Commission to be bound under Article 62 of the Charter and any supplementary legal instruments. This addresses the complications that have arisen in circumstances where states have offered to host sessions of the Commission but have reneged on meeting the obligations that come with hosting e.g. removing barriers for NGOs coming to the session, meeting financial obligations towards Commissioners, making translation/interpretation services available in all AU languages.

On notification of the opening date of a session, Rule 31(1) reduces the notice period for ordinary sessions from 60 to 45 days. Rule 31(2)'s change of wording with regard to the notice period for the holding of EOS from as soon "as possible before the beginning of the session" to "as soon as practicable" remains vague and does not allow for CSO planning around EOS dates.

d. Reports of the Commission

Rule 63 of the 2020 RoPs retains the same provisions as provided in Rule 59 of the 2010 RoPs. It requires the Commission to submit its report to the Assembly and to publish the report on the website only after it has been considered by the Assembly. This Rule undermines the independence of the Commission as it has been the main source of the current crisis of independence that the Commission has been facing vis a vis its relationship with political organs of the AU.

This would continue to unduly benefits States Parties who have access to informa-

tion through their engagement with Commission procedures as part of the AU Assembly of Heads of States and diminishes the Commission's standing as its procedures are seen as part of an unaccountable system that fails to expose human rights violations as a matter of public record.

e. The role of National Human Rights Institutions (NHRIs) & Non-Governmental Organisations (NGOs)

Rule 71 of the 2020 RoPs now amends 69(1) of the 2010 RoPs by specifying the legal basis for the granting of affiliate status to NHRIs and allowing those without affiliate status to attend sessions as observers.⁶ Rule 72 (1) further amends 70(1) of the 2010 RoPs by specifying the legal basis for the granting of observer status.⁷ These are generally good additions following existing practice of the Commission and provides a counterpoint to States' queries into the legal basis for such powers.

The Commission's decision to assert its independence through this rule would likely be deemed as contrary to the decision of the Council, which noted that the Commission should apply its criteria for the granting of observer status to Non-governmental Organisations (NGOs) in line with existing AU accreditation criteria "which take African values and traditions into account."⁸ This crisis arose as a result of the 2015 incident when the AU Executive Council directed the African Commission to reverse its decision of according observer status to the NGO Coalition of

6 See Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa - ACHPR/Res.370(LX)2017, <https://www.achpr.org/sessions/resolutions?id=412> (accessed 3 August 2020).

7 See Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organisations working on Human and Peoples' Rights in Africa, ACHPR/Res.361(LIX)2016, <https://www.achpr.org/sessions/resolutions?id=373> (accessed 3 August 2020).

8 N 1 above, para 8(iv).

African Lesbians (CAL). Given that admitting NGOs is part of the Commission's functions, even under 'functional independence' as declared by the Executive Council, this should be solely the Commission's decision to make.

It is worth pointing out that the 2020 RoPs further introduces Rule 72(3) which strips CSOs with observer status of their special status if the Commission considers that such an observer "no longer fulfils the criteria or defaults on its obligations." Whilst this Rule may be aimed at ensuring active CSO participation and engagement with the Commission, the context in which it has been introduced raises concerns. The inability of a CSO to engage with the Commission or to submit its activity reports in a context of dwindling funding for CSOs and shrinking civic spaces globally only serve to further marginalise CSO voices. The Rule does not seem to comply with principles of natural justice as it does not seem to make any provision on the recourse that NGOs who are subject to such 'measures' can take.

f. Protection from reprisals

The Commission added a new rule of protection from reprisals. Rule 74 is targeted at State Parties to ensure that they do not take any kinds of reprisals against individuals or entities that provide the Commission with information, testimonies or evidence against members of the Commission or its staff in connection with the performance of their duties. This is a very critical rule given the many stakeholders that the Commission depend on for its work. It speaks to the independence of the Commission in addressing possible instances of reprisals including Commissioners not getting re-elected due to an adverse finding on a State, or CSOs being afraid to work with the Commission.

g. The communications procedure of the African Commission

Chapter 3 of the 2020 RoPs deals with consideration of communications extensively.

Rule 88 changes the title from "Records of Communications under Articles 47, 48, 49 and 55 of the Charter" to 'Register of Communications under Articles 47, 48, 49 and 55 of the Charter.' This Rule now introduces a more systematic recordkeeping system in the form of a register. This is particularly important for CSOs in monitoring the complaints procedure e.g. updates to this register on progress on complaints and it is useful for clarifying availability of decisions as per the current status of complaints on the register.

Working language

Rule 89 on the language of submissions is new. It allows complainants to submit complaints in any of the AU's working languages i.e. English, French, Portuguese, Arabic and Kiswahili. This is a positive development, although it needs to be accompanied by improved translation services.

Duty to cooperate

Rule 92 on the duty to cooperate with the Commission is a new addition. The Rule introduces an obligation on the parties to a Communication to cooperate fully with the Commission for the proper administration of justice. This is an important addition given States' increased non-cooperation with the complaints handling procedure before the Commission. Such non-cooperation has included false claims that submissions were never received, delays in filing responses, refusal to implement provisional measures, boycotting proceedings, etc.

Working Groups and Rapporteurs on Communications

Rule 93 of the 2020 RoPs codifies existing practice by introducing the idea of working groups to decide on the seizure and admissibility of communications. It further eliminates the powers of the Rapporteur to request information on complaints from the States Parties concerned or transmit information of the complaint or prepare a report on the admissibility or inadmissibility of a complaint. This might be based on criticism

of such a practice, which has been considered tokenism given that the Secretariat does all the work.

Recusal of a member of the Commission from taking part in the examination of a Communication

Rule 94 of the 2020 RoPs maintains the provision of Rule 101 in the 2010 RoPs. It provides that Commissioners shall be recused from the consideration of a communication if the Commissioner:

- a. Is a national of the State Party concerned;
- b. Has any personal interest in the case;
- c. Is engaged in any political or administrative activity or any professional activity that is incompatible with his/her independence or impartiality;
- d. Has participated in any capacity in any decision at the national level in relation to the Communication;
- e. Has expressed publicly opinions that are objectively capable of adversely affecting his/her impartiality with respect to the Communication; or if the Commission
- f. Finds, for any other reason, that his/her impartiality is capable of being adversely affected.

Case law on how the Commission has handled allegations of bias suggests that a more general rule for recusal, under which anyone with interest in the case has the means to request the recusal of a Commissioner whom they allege holds sufficient interest in the case to constitute bias, would be desirable.

In Communication 428/12: *Dawit Isaak v Eritrea* (2015),⁹ the Government of Eritrea filed a preliminary objection accusing the then Chairperson and Special Rapporteur on Freedom of Expression and Assembly, Commissioner Pansy Tlakula of bias in the determination of the case. The Eritrean Government's complaint related to Commissioner Tlakula's writing of a preface to a CSO report on the erosion of freedom of expression in Eritrea as well as her pronouncements at an

ordinary session seminar at which the CSO report was launched.¹⁰ In that case, the Commission applied the two tier test of bias i.e. subjective approach which seeks to ascertain the actual existence of bias by assessing the personal conviction of a given adjudicator in a given case, followed by the objective approach which asks whether the same adjudicator offered guarantees sufficient to exclude any legitimate doubt of impartiality.¹¹ The Commission dismissed the Respondent State's preliminary objection on grounds of bias, breach of confidentiality and politicisation of the matter.¹²

Intervention by amicus curiae

Under Rule 2 on definitions, an amicus is defined as a 'third party having no interest in the outcome of a Communication.' However, given that an *amicus* is a third party to the complaint, they are generally allowed to take legal and or factual positions for or against the positions of either of the parties to the complaint and therefore need not be completely disinterested. In other cases, the person who files an amicus brief may be directly or indirectly impacted by the outcome of the communication. The definition should have simply left it at 'third party' not directly involved in the communication.

Rule 104 further provides the modalities for intervention by an *amicus curiae* in several ways. Firstly, it provides that an *amicus* can request to intervene by making a written or oral submission at any moment after the Respondent state has been asked to make its submissions on a case where previously it was not clear when such briefs could be submitted. The Rule articulates that *amicus* briefs may be submitted by interested parties of their own accord or at the invitation of the Commission. Secondly, it lays down clear procedures in that, requests to inter-

9 *Dawit Isaak v Eritrea* (Communication 428/12) [2018] ACHPR 135; (27 APRIL 2018).

10 Decision of the African Commission on Human and Peoples Rights on the Preliminary Objection Communication 428/12 – Dawit Isaak v Republic of Eritrea, para 24.

11 As above.

12 As above, para 61.

vene should be sent to the Secretariat, and should include contact details of the author and motivation on how the submission can be useful to the Commission. It can also not be longer than 10 pages.

If the request to intervene as *amicus curiae* has been decided and a leave is granted to intervene in the case by making written or oral submissions, Rule 105 on procedure to intervene will then become applicable. Previous criticism of the Commission's approach to *amicus curiae* has been that the Commission does not elaborate on the type or form of the information that can be submitted in the *amicus brief*, and the procedure is generally undefined.¹³ In an attempt to address this, the Commission by virtue of Rule 105 (4) shall do the following:

- a. Share the parties' pleadings with the *amicus curiae*;
- b. Require the *amicus curiae* to file an *amicus brief* within thirty (30) days; and
- c. Share the *amicus brief* with the parties and require them to file their responses within thirty (30) days.

Additionally, the author of the brief maybe able to address the Commission only if the Commission gives its express consent for them to make such oral presentations, as well as the possibility of the brief being published on the Commission's website.

Intervention by a third party with a direct interest in the case

The introduction of Rule 106 enables the Commission to receive submissions from third parties with an interest in the case "prior to the merits stage of the communication under consideration." The third party must demonstrate how he or she will benefit or directly suffer from the outcome of the communication.

Decision on merits

Rule 114(2) now explicitly authorises the

¹³ Frans Viljoen & Adem Kassie Abebe, '*Amicus Curiae Participation Before Regional Human Rights Bodies in Africa*' (2014) 58 *Journal of African Law* 22, 30–31, 34.

Commission to make a decision on default where the respondent State fails to submit its response to a complaint. This is a positive development as it has the potential to encourage States to submit their response to communications. However, it drops the definitive time period of 12 months within which the Commission ought to have taken a decision in the old Rule 92(1). The lack of definitive timelines would likely cause continuous inordinate delays in the finalisation of communications under Article 53 of the Charter.

Rule 114 (5) further notes that the decision shall be communicated to the States Parties and the Assembly.¹⁴ However, it does not address what the Commission would do in an instance where the complainant is not a State Party. Such a lacuna might lead to a miscarriage of justice as the Respondent State will have access to the decision, by virtue of being part of the Assembly while the Complainant will be kept in the dark on the contents of the Commission's decision. However, the Commission, through its own working group on communications, has indicated that the rule does not apply to parties to the case, as parties to communications may obtain such information by writing to the Secretariat of the Commission.¹⁵

It is certainly arguable that this particular Rule further undermines the Commission's independence as its decisions are first presented to the scrutiny of the Assembly and to the likely possibilities of pressure from the AU political organs. The role of the Assembly should be seen as an administrative task that should not in any way accord the Assembly powers, assuming the role of an

¹⁴ This is done in terms of art. 59 of the African Charter, which provides that "all measures taken within" the Charter's provisions must remain confidential until the Assembly decides otherwise.

¹⁵ Inter-session activity report (November 2016- May 2017) of Hon Commissioner Lucy Asuagbor, Chairperson of the Working Group on Communications presented at the at the 60th Ordinary Session of the African Commission on Human and Peoples' Rights Niamey, Niger, 8 – 22 May 2017 [https://www.achpr.org/sessions/ intersession?id=274](https://www.achpr.org/sessions/intersession?id=274) (accessed 1 August 2020), para 15.

Appellate body or a vetting process capable of changing or altering decisions of the Commission.¹⁶ Article 42(2) of the African Charter empowers the Commission to lay down its own rules of procedure, while Article 45(3) gives the Commission the powers to interpret the provisions of the Charter. The Commission is thus enabled by the Charter to exercise its adjudicatory powers independent of the political organs of the AU.

Conclusion: Challenges persist to the Commission's independence

The above discussion focuses on some of the key changes in the 2020 RoPs of the African Commission. To the extent that these issues have been highlighted, this contribution has attempted to discuss whether these changes strengthen or undermine the independence of the Commission.

On the one hand, the 2020 RoPs have made some improvements towards strengthening the Commission's independence. As shown above, there are a number of positive developments that allows for smoother processes and affirms the independence of the ACHPR from the AUC. One of such is the provision that places the power on convening of sessions in the hands of the chairperson of the ACHPR in consultation with fellow members of the Commission and removes the requirement for consultation between the Commissions Chair and the AUC Chair in the setting of such session dates. Also critical is the Commission's decision to maintain its own rules on granting of observer status to NGOs in the face of the Executive Council's Decision 1015 of 2018. Nonetheless, there needs to be safeguards in place for guaranteeing

NGOs the right to be heard in reinstating their status without going through the process of re-applying for observer status and waiting a very long time again.

Further, whilst the protection from reprisals is timely, this same principle of non-reprisals should be addressed in Chapter II relating to the general Status of the Commission as a whole in particular to protect its institutional integrity against actors, institutions and bodies such as the Executive Council from taking actions that undermine its independence.

On the other hand, there are also a number of debatable provisions that undermine the independence of the Commission. A key issue is the relationship between the Commission and other political organs of the AU. The Commission's decision to maintain provisions in the RoPs that require them to submit activity reports to the 'consideration' of the Assembly remains problematic and does not in any way solve the Commission's independence crisis. Notably, this could be said to be in line with article 59(3) of the African Charter, which the Commission has not yet been able to navigate. Thus, the question of what the term 'consideration' by the Assembly means vis a vis the Commission's mandate would come to the fore once again. Does 'consideration' mean that the Assembly has the power to request the Commission to include or exclude certain items in its report? Does it mean having the power to direct the Commission on how it should apply its rules in the making of decisions contained in the report? Does it mean having the power to withhold the release of the report until it reflects the wishes of the Assembly? From the foregoing, it is submitted that the 2020 RoPs do not provide these answers as it still contains contentious provisions that undermine the independence of the Commission and its ability to make its own decisions without the interference of the political organs of the AU.

¹⁶ See J Biegon 'Diffusing tension, building trust: proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' (2018) Global Campus Policy Briefs. https://repository.gchumanrights.org/bitstream/handle/20.500.11825/580/PolicyBrief_Africa_ok.pdf?sequence=6&isAllowed=y (accessed 2 August 2020).

The Commission must remain effectively independent if it is to execute its role in promoting and protecting human rights. In safeguarding the Commission's interest, the Assembly's role in considering reports by the Commission should be deemed an administrative task, a mere formality and should not in any way accord powers to the Assembly assuming the role of an Appellate body or a vetting process capable of changing or altering decisions of the Commission.

In the current climate, there is a need by the Commission to develop strategies and make concrete proposals to the AU Assembly on their relationship in protecting the independence of the Commission and effectively protect and promote human rights in the continent. In its own functioning, the African Commission, as an autonomous interpreter of the African Charter, should ensure that it safeguards its own independence and autonomy and better protect the rights of Africa's peoples on a continent rife with human rights violations.

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