



Analysis of the relationship between the Political Organs of the African Union (AU) and the African Commission on Human and Peoples' Rights (the African Commission)

April 2021

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1. Introduction

The year 2015 marked the beginning of a significantly turbulent period in the life of the African Commission on Human and Peoples' Rights (the African Commission). In this period, tensions between the Commission and political organs of the African Union (AU) escalated. The longstanding tensions emanated from perceived clashing priorities between the Commission – intent on inculcating a culture of human rights accountability among African states, and states – focused on defending their sovereignty including defending “African values.” The tensions reached new heights at the Commission's 56th Ordinary Session (OS),¹ exacerbated by the Commission's granting of observer status to the Coalition of African Lesbians (CAL).² Celebrations of the decision's groundbreaking nature as a victory for the representation of sexual minorities in African human rights discourse, and for women's sexual, reproductive health and rights including bodily autonomy,³ were short-lived.⁴ If anything, the decision catalysed long drawn-out contestations between the Commission and political organs of the AU which have had enormous consequences on the Commission's reputation and independence.

The escalated tensions became manifest in June 2015 when the Commission, pursuant to Article

54 of the African Charter,⁵ presented its 38th Activity Report⁶ containing the CAL decision to the Executive Council of the African Union (the Executive Council) (on behalf of the Assembly of Heads of States and Governments (the Assembly) at the African Union Summit of Heads of States and Governments (AU Summit) held in Johannesburg, South Africa. The Executive Council refused to adopt the Activity Report, subject to the withdrawal of CAL's observer status and a review of the Commission's criteria for granting observer status.⁷ These tensions were precluded by internal chaos as the decision to grant CAL's observer status turned the Commission's 56th OS into an open theatre. An unusual, initially private vote on the matter, turned into a second tense public vote. Each Commissioner publicly declared their vote, with some peddling hate speech in their denouncement of the Lesbian, Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) community. Some Commissioners' rejection of CAL's application for observer status were pronounced to great cheer from state representatives present, mirroring the rejection of CAL's previous attempts to gain observer status.⁸ The then vice-Chairperson of the Commission, Commissioner Mohamed Bechir Khalfallah called sexual minorities ‘an imported virus.’⁹ The final public vote saw five Commissioners voting in favour of CAL's application, three against and three abstained or were absent.

Notably, the Commission did not implement the decision of the Executive Council requesting it

1 Held in April 2015 in Banjul, the Gambia.

2 CAL is a feminist, activist and pan Africanist network of 14 organisations in 10 countries in sub-Saharan Africa committed to advancing freedom, justice and bodily autonomy for all women on the African continent and to raise consciousness amongst and strengthen activism and leadership of lesbian women on sexuality and gender.

3 See <https://www.cal.org.za/2015/04/25/statement-on-decision-of-the-african-commission-on-human-and-peoples-rights-to-grant-observer-status-to-the-coalition-of-african-lesbians-cal/>.

4 Observer status would enable CAL to fully participate in the work of the Commission including submitting reports on the human rights situation in Africa for the Lesbian, Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) community at every Ordinary Session of the Commission, submitting shadow reports addressing specific human rights issues in states undergoing review as part of the Commission's State Reporting Procedure, and supporting the Commission's interpretive mandate through the development of Guidelines/General Comments on specific human rights issues.

5 Which places an obligation on the Commission to keep its decisions confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide and to publish the Activity report of the Commission after it has been considered by the Assembly of Heads of State and Government.

6 38th Activity Report of the African Commission, available at <https://www.achpr.org/activityreports/viewall?id=37>

7 Executive Council Decision EX.CL/887(XXVII) https://au.int/sites/default/files/decisions/31762-ex_cl_dec_873_-_898_xxvii_e.pdf.

8 For an account of the history of CAL's advocacy efforts See Ndashe, S. (2011). Seeking the Protection of LGBTI rights at the African Commission for Human and People's Rights. *Feminist Africa* Issue 15.

9 Sekyiamah, N.D. (2015). After Years of Activism CAL Attains Observer Status at ACHPR. AWID Available at <https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr>.

to withdraw CAL's observer status and to review its criteria for granting observer status. Rather, in its resubmission of the 38th Activity Report in its 39th Activity Report, the Commission indicated that it was undertaking a detailed legal analysis extending to developing an understanding of "the notion of African values, the legal basis for the grant[ing] of observer status by the Commission, and the implications of withdrawing or retaining the observer status of NGOs."¹⁰

In response, the Executive Council reiterated its directive for the Commission to withdraw CAL's observer status and ordered the Commission to convene a joint retreat with the Permanent Representatives Committee (the PRC) to address concerns with the Commission's relationships with AU policy organs and Member States.¹¹ The retreat was held in Nairobi Kenya, in June 2018.¹² The recommendations from the retreat were adopted in July 2018, at the AU Summit in Nouakchott, Mauritania, as a binding AU decision. The Decision invoked the language of the 'virtues of historical tradition and the values of African civilisation' and cited these values as the only legitimate basis for the articulation of the concept of human and peoples' rights in Africa. In other words, the Executive Council suggested that the CAL decision was an attempt to impose values contrary to 'African values.'¹³ The Executive Council issued a direct instruction for the Commission to withdraw CAL's observer status,¹⁴ an instruction that the Commission then obeyed in August 2018.¹⁵ The Commission's acquiescence was a sharp reversal of its previous positions. A few months earlier, the Commission

had refused to implement any of the decisions and unequivocally stated that withdrawing CAL's observer status would constitute interference with its mandate and undermine its procedural efficacy given that the decision to grant CAL's observer status was procedurally and substantively sound.¹⁶

2. Background to the African Commission

The African Commission is an integral component of the African human rights system.¹⁷ It is created under the African Charter on Human and Peoples' Rights (the African Charter/the Charter) with a threefold mandate: to promote human rights; ensure their protection; and to interpret the African Charter in accordance with Articles 30 and 45 thereof.¹⁸ The Commission's unique combination of investigative, fact-finding, diplomatic, good offices, and public advocacy competencies, arguably makes it the most critical regional treaty body for the promotion and protection of human rights in Africa.¹⁹

The increasing importance of the Commission has been characterised in some quarters as accidental and symbolic. This narrative argues that African states set the Commission up symboli-

10 39th Activity Report of the African Commission, available at <https://www.achpr.org/activityreports/viewall?id=38>

11 Executive Council Decision EX.C/Dec.995(XXXII) https://au.int/sites/default/files/decisions/33909-ex_cl_decisions_986-1007_e.pdf

12 44th Activity Report of the African Commission, Para 41 Available at https://www.achpr.org/public/Document/file/English/actrep44_2018_eng.pdf.

13 Executive Council Decision EX.CL/Dec.1015(XXXIII) available at https://au.int/sites/default/files/decisions/34655-ex_cl_dec_1008_-1030_xxxiii_e.pdf.

14 Paragraph 8(vii) of EX.CL/Dec.1015(XXXIII).

15 44th Activity Report of the African Commission, Para 42-43 Available at https://www.achpr.org/public/Document/file/English/actrep44_2018_eng.pdf.

16 43rd Activity Report of the African Commission, Para 51, Available at <https://www.achpr.org/activityreports/viewall?id=42>.

17 The African Human Rights System is a combination of norms and institutions put in place under the auspices of the African Union to ensure the promotion and protection of human rights in Africa. It affords redress to victims of human rights violations. It includes normative frameworks such as the African Charter on Human and Peoples' Rights (The Charter) (1981), which establishes the African Commission on Human and Peoples' Rights (the Commission) (1987); the African Charter on the Rights and Welfare of the Child (the Children's Charter) (1990); which establishes the African Committee of Experts on the Rights and Welfare of the Child (the Committee of Experts) (2003), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)(2000) and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (the Court Protocol) (1998) , which established the African Court on Human and People's Rights (the African Court) (2006).

18 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

19 Odinkalu, C. (2013). From Architecture to Geometry: The relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union. *Human Rights Quarterly*, 35(4), 850-869 @869.

cally without meaning to establish it as a strong and effective mechanism.²⁰ In this narrative, the establishment of the Commission, coincided with the end of the Cold War and increased external scrutiny of African governments' treatment of their own citizens by external powers. In particular, the scrutiny of the Europeans and Americans intensified as they were no longer preoccupied with Cold War geo-political manoeuvres and did not need to fall into the good graces of African states by exercising restraint in their criticism of human rights abuses.²¹

A number of brutal regimes including that of Idi Amin in Uganda had shown the depth of depravity that these states could go to without censure or global pressure.²² The narrative of the symbolic beginnings of the Commission thus concludes that the Commission was set up as a mechanism to shut down the increasing external pressures for African states to address their dismal human rights records.²³ This narrative portrays the Commission as an internally propagated institution, reluctantly built by African elites with more of an outward rather than an inward looking focus. The narrative also places the Commission and African political elites, who occupy the political organs of the regional body at odds with each other from inception. The Commission is thus historically tied to certain aspects of the legitimacy of the AU and its predecessor the Organisation of African Unity (OAU). Even though the OAU Charter did not contain explicit provisions on human rights, the agenda for decolonisation²⁴ sought to vindicate the civil

and political rights of majority black populations in the remaining colonies while the agenda for social and economic emancipation²⁵ recognised the immediacy of a socio-economic-cultural revolution to emancipate Africans from the legacy of colonial underdevelopment.

The establishment of the African Commission in 1987 makes it the oldest structure responsible for the promotion and protection of civil, political, social, cultural and economic human rights in Africa. The African Commission's establishment, within a context of significant and widespread human rights violations across the continent, gave the impression that African states were, at least theoretically, willing to address human rights concerns on the continent.²⁶ Under the OAU, the Commission was however less developed and the exercise of its mandate was curtailed by the wide scope of states' defence of their sovereignty guided by the OAU principle of non-interference in the domestic affairs of Member States.²⁷ This principle, first adopted under the OAU, demanded both African and external refrainment from influencing internal matters in any member state.²⁸ DeJuan Bouvean²⁹ argues that non-interference was understood as integral to the concept of respect of the 'sovereignty, territorial integrity and independence' of African states, only to be abrogated upon a state's express consent. Territoriality in the form of territorial integrity, the preservation of colonial borders, non-interference and the exercise of unfettered state power within the territory of states were the key markers of OAU diplomacy.

However the understanding of non-interference was only reserved for the sovereign post-colonial African states. The racist regimes in South Africa

20 Ibrahim, A. A. (2012). Evaluating a Decade of the African Union Promoting Human Rights and Democracy. *African Human Rights Law Journal* 2, 30-68 @ 41- 42.

21 Mutua, M. (2000). The African Human Rights System: A Critical Evaluation, Human Development Occasional Papers (1992-2007). Human Development Report Office (HDRO), United Nations Development Programme (UNDP), 4-6.

22 Odinkalu, C. (2013). From Architecture to Geometry, 862.

23 Keetharuth, S.B. (2009). Major African legal instruments, Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.484.8981&rep=rep1&type=pdf> 163-231@166-168.

Mutua, M. (2000). The African Human Rights System: A Critical Evaluation, Human Development Occasional Papers (1992-2007). Human Development Report Office (HDRO), United Nations Development Programme (UNDP), 4-6.

24 Article II(1)(d) of the OAU Charter.

25 Article II(2)(b), (c) and (d) of the OAU Charter.

26 Mutua, M. (2000). The African Human Rights System, 5-6. See also Bondzie-Simpson, E. (1988). Critique of the African Charter on Human and People's Rights. *Howard Law Journal*, 31(4), 643-666 @644.

27 Bondzie-Simpson, E. (1988). Critique of the African Charter on Human and People's Rights. *Howard Law Journal*, 31(4), 643-666 @644.

28 OAU Charter, Article 111(3).

29 Bouvean, D. (1998). Case study of Sudan and the Organisation of African Unity. *Howard Law Journal*, 41(3), 413-454 @441

and Zimbabwe, castigated for their massive human rights violations against the black populations, became targets of coordinated decolonial efforts which included providing financial, technical, military and logistical support to the freedom fighters.³⁰ These efforts illustrated the OAU's capacity to take action against an African state in the face of human rights abuses.³¹ The failure to take equally commensurate actions against the abuses of the post-colonial governments in Uganda under Idi Amin and the Central African Republic under Jean-Bédél Bokassa, marked the beginnings of the collective dissonance that would characterise post-colonial African elites' attitude to their peers' abuse of human rights.

The concept of non-interference also contributes to the contradiction in the responses of the African Commission and the political organs of the AU when human rights violations occur in any African country. While the Commission's immediate response is to express concern over allegations of human rights, to urge the member state to take remedial actions, followed by thorough investigations to establish the scope of the violations, that of the AU Assembly and the Executive Council is to defend the sovereignty of the Member State against which allegations are made, to give the Member State a chance to explain its actions and only take action in the face of overwhelming evidence that such violations are taking place.

These parallel responses are often the source of

clashes between the Commission and Member States of the AU. Whereas the Commission believes that in so responding, it is meeting the requirements of its mandate, Member States perceive its actions as knee-jerk, reactionary, premature and often ill-informed.³² For instance, from the inception of the war in Darfur in February 2003 the Commission consistently adopted several Resolutions expressing concern with and condemning the human rights violations in Darfur and urging cessation thereof.³³ The Commission was one of the first African institutions to specifically label the violations in Darfur as war crimes and crimes against humanity and urged the arrest and prosecution of the perpetrators.³⁴ In 2004, the Commission carried out a fact-finding mission to Sudan where it established that both government forces and rebels were responsible for serious violations in the Darfur region such as the indiscriminate bombing of civilian populations, the destruction and burning of homes and food sources including livestock, the rape and abduction of women, and wanton killing of defenceless civilian populations.³⁵

30 Bouvean, D. (1998). Case study of Sudan, 442-445.

31 See for example in the African Union Common Repository: Resolution CIAS/Plen.2/Rev.2 on Decolonisation of the Summit Conference of Independent African States meeting, held in Addis Ababa, Ethiopia, from 22 to 25 May 1963 <https://archives.au.int/handle/123456789/6707>;

Resolution CM/223 Report of the OAU Coordinating Committee for the Liberation of Africa to the 11th Session of the Council of Ministers held in Algiers, Algeria in September 1968 <https://archives.au.int/handle/123456789/7318>;

Resolution CM/Res.422 on Sanctions against the White Minority Regimes in Southern Africa, Adopted at the 25th Ordinary Session of the OAU Council of Ministers held in Kampala, Uganda, from 18 to 25 July, 1975 <https://archives.au.int/handle/123456789/6865> ;

Resolution CM/Res.455 (XXVI): Resolution on Southern Africa, Resolution CM/Res.456 (XXVI): Resolution on Namibia, and Resolution CM/Res.457 (XXVI): Resolution on Zimbabwe, All adopted at the 26th Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia from 23 February - 1 March 1976, <http://archives.au.int/handle/123456789/2588>;

32 This was Zimbabwe's argument in rejecting the Commission's fact-finding mission on violations surrounding the land reform process

See ACHPR. (2004). The Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights, <https://www.achpr.org/activityreports/viewall?id=17>.

33 2007 Resolution on Strengthening the Responsibility to Protect in Africa - ACHPR/Res.117(XXXXII)07, Available at <https://www.achpr.org/sessions/resolutions?id=169>

2006 Resolution on the Situation in Darfur - ACHPR/Res.102(XXXX)06, Available at <https://www.achpr.org/sessions/resolutions?id=108>;

2005 Resolution on the Situation of Human Rights in the Darfur Region of Sudan - ACHPR/Res.93(XXXVIII)05, Available at <https://www.achpr.org/sessions/resolutions?id=232>;

2005 Resolution on the Human Rights Situation In Darfur, Sudan - ACHPR/Res.74(XXXVII)05, Available at <https://www.achpr.org/sessions/resolutions?id=79>; and

2004 Resolution on Darfur - ACHPR/Res.68(XXXV)03, Available at <https://www.achpr.org/sessions/resolutions?id=73>.

34 Paragraph 123 and 137 of the Sudan Fact Finding Mission Report, Executive Council Decision EX.CL/364 (XI) Report of the African Commission on Human and Peoples' Rights' Fact-finding Mission to the Republic of Sudan in the Darfur Region (08 TO 18 July 2004) Available at <https://www.achpr.org/states/missionreport?id=50>.

35 Paragraphs 43-45,47, 53-55, 58-64, 67-68, 73-78, 79-83, 86-88 of Sudan Fact Finding Mission Report, Executive Council Decision EX.CL/364 (XI) Report of the African Commission on Human and Peoples' Rights' Fact-finding Mission to the Republic of Sudan in the Darfur Region (08 TO 18 July 2004) Available at <https://www.achpr.org/states/missionreport?id=50>.

Through its state reporting procedure, the Commission also noted the adverse consequences of the bloody and devastating armed conflict and the serious and massive human rights violations arising thereof, and urged the Sudanese government to diligently carry out appropriate investigations and to prosecute the perpetrators of the human rights violations.³⁶ The Assembly on the other hand sharply rebuked those who were labelling events in Darfur as a genocide, retained Sudan's role as Chair of the AU Peace and Security Council (PSC) and hosted both the Assembly's annual Ordinary Session (2006) and the Executive Council Sessions in Khartoum.³⁷

Arguably, the AU political organs' response was indicative of the continuing legacy of non-interference in African diplomacy, even as the AU Constitutive Act introduced a new principle of non-indifference.³⁸ Non-interference sharply contrasted with the central role that promoting human rights and democratic governance had come to occupy in the transition from the OAU to the AU, in July 2002. The AU distinguished itself from the OAU by claiming to make human rights a central feature in its pursuit of peace and security, as well as sustainable development efforts, for the continent.³⁹ The focus on human rights was also accompanied by a demonopolisation of the African Commission's human rights mandate with the establishment of an African Court on Human and Peoples' Rights (the African Court/the Court) taking up a protective role and the introduction of the Peace and Security Council (PSC) with a political mandate to address questions of massive and widespread

human rights violations including war crimes, crimes against humanity and genocide. As Chidi Odinkalu points out, the setting up of these institutions diversified institutional responsibilities for the monitoring of implementation of the rights under the African Charter which had all previously been under the Commission's purview.⁴⁰

3. The significance of the African Commission

Despite the limited capacity at its establishment under the OAU, and the demonopolisation of its mandate under the AU, the African Commission remains the most significant avenue for Africans' vindication of rights at a regional level. Many civil society organisations carry out their work in defence of the human rights of Africans through the Commission, making it an integral part of the African regional human rights system.

The Commission's quasi-judicial nature and its broad mandate renders it comparatively more accessible than both the African Court and the African Committee of Experts on the Rights and Welfare of the Child (the Children's Rights Committee/the Committee) for individuals seeking remedies for human rights violations. The Commission's relaxed procedural processes, its growing body of jurisprudence, its efforts to execute its mandate independently, CSOs' access to it and their ability to make meaningful representations before it also makes it a very attractive avenue for advocacy work.

Regarding its growing jurisprudential spread, the Commission has, over the years, extensively utilised its interpretive powers, to make ground-breaking decisions. One of the most significant decisions is its 2001 ruling in the *Social and Economic Rights Action Center (SERAC) Case*,⁴¹ in which it read several socio-economic

36 See Paragraphs 10 and 28 of the Concluding Observations to Sudan's 2nd Periodic Report, adopted at the Commission's 35th Ordinary Session held from 21 May to 4 June 2004 in Banjul, the Gambia; and Paragraphs 20-30, 43 of the of the Concluding Observations to Sudan's 3rd Periodic Report, adopted at the Commission's 45th Ordinary Session held from 13 to 27 May 2009 in Banjul, the Gambia.

37 Ibrahim, A.A. (2012). Evaluating a Decade of the African Union Promoting Human Rights and Democracy *African Human Rights Law Journal* 2, pp.30-68.

38 Article 4(g) of the Constitutive Act reiterates non-interference in the internal affairs of AU Member States as core principle while Article 4(g) sanctions intervention in cases of war crimes, crimes against humanity and genocide.

39 Ibrahim, A.A. (2012). Evaluating a Decade of the African Union Promoting Human Rights and Democracy *African Human Rights Law Journal* 2, pp.30-68.

40 Odinkalu, C. (2013). From Architecture to Geometry: The relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union, *Human Rights Quarterly*, 35(4), 850-869 at 856.

41 Communication 155/96: The Social and Economic Rights Action Center and the Center for Economic, and Social Rights v Nigeria (2001) ACHPR, available at https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf

rights including the right to food and the right to housing into the African Charter, even though the Charter does not explicitly provide for these rights.⁴² This bold expansion of rights was also accompanied by a reading of socio-economic rights as justiciable rights.

In 2009, the Commission adopted yet another ground-breaking decision in the *Endorois Case*.⁴³ The Case was a challenge to the excesses of the Kenyan state's land allocation, repurposing and distribution patterns and their impact on the indigenous rights of the Endorois, a semi-nomadic pastoralist indigenous community in the Lake Bogoria area of Kenya's Rift Valley Province.⁴⁴ The complainants argued that the pattern of violations, including the 1973 and 1986 forceful evictions of the Endorois from their ancestral lands to make way for a Game Reserve without prior consultation or adequate compensation, as well as the appropriation of land mineral rights in the ancestral lands violated the Endorois' rights to freedom of conscience and religion,⁴⁵ to property,⁴⁶ to culture,⁴⁷ to the free disposition of mineral rights,⁴⁸ and to development.⁴⁹

In its decision, the African Commission not only found Kenya to be in violation of all these rights and its obligations to implement the rights under the Charter but it also recommended the restoration of the Endorois' access to their ancestral lands and recognition and restitution of the En-

drois' rights of ownership to these lands. The Commission also recognised that the interference with the Endorois' spiritual connection to their ancestral lands was a violation of their freedom of conscience, their right to practice their religion and their right to development; and that the government of Kenya had to pay royalties to the Endorois for any economic activity on their land.⁵⁰ One of the lauded aspects of the decision was the Commission's espousal of the concept of 'peoples' whereby the Commission not only embraced international definitions of indigeneity but also drew a nexus between communities' self-identification as indigenous populations through their connection to 'ancestral lands, cultural patterns, social institution and religious systems' and states' obligation to recognise them as such.⁵¹

In 2011, the Commission reached another ground-breaking decision in the *Egyptian Initiative for Personal Rights (EIPR) Case*.⁵² This was the first time ever that the Commission pronounced itself on women's rights, and in particular recognising gender-based violence, perpetrated by both state and non-state actors, as a form of discrimination against women, and a violation of women's human rights. The Commission's decision paved the way for a progressive understanding of state obligations with respect to the right to non-discrimination, which obligations not only required states to prevent discrimination from occurring but also to take remedial action once such discrimination occurred. In the *EIPR Case*, the government of Egypt was found to be in violation of the right to non-discrimination for its failure to prevent violence from happening but also, for failing to take remedial action through the prosecution of perpetrators, guaranteeing medical and psycho-social support for victims and addressing social norms that cause

42 Coomans, F. (2003). The Ogoni Case before the African Commission on Human and Peoples' Rights. *The International and Comparative Law Quarterly*, 52(3) pp. 749-760 @755 & 756.

43 Communication 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya (2009) ACHPR, available at <https://www.achpr.org/sessions/descions?id=193>.

44 The *Endorois Case*, paras 1-6.

45 Article 8 of the African Charter, See paragraphs 76 – 85 of the *Endorois Case*.

46 Article 14 of the African Charter, See paras 86 – 114 of the *Endorois Case*.

47 Article 17(2) and 3 of the African Charter, See paras 115 – 119 of the *Endorois Case*.

48 Article 21 of the African Charter, See paras 120 – 124 of the *Endorois Case*.

49 Article 22 of the African Charter, See paras 125 – 135 of the *Endorois Case*.

50 Para 298 (d) of the *Endorois Case*.

51 Kamga, Serges Alain Djoyou. (2011). The right to development in the African human rights system: The Endorois case. *De Jure Law Journal*, 44(2), 381-391. Retrieved March 29, 2021, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602011000200010&lng=en&tng=en.

52 Communication 334/06: Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt (2011) ACHPR, Available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2011/85>.

gender discrimination to be entrenched and facilitate the prevalence of everyday forms of violence such as sexual harassment in public places.

In 2016, the Commission broke ranks with precedent and took the bold step to award monetary compensation, nearly US \$2.5 million, to the victims and families of victims of state massacres from Kilwa, a small town in the South-Eastern Haut-Katanga Province of the Democratic Republic of Congo.⁵³ The people of Kilwa had fallen prey to disproportionate state sanctioned violence amounting to war crimes and crimes against humanity, including the rape of women, summary executions and destruction of property. The government acted with the logistical support of the Anvil Mining Company - a Canadian-Australian mining company. The Commission's decision recognised the culpability of both the government of the DRC and the Anvil Mining Company despite it being a private actor. In awarding monetary compensation, the Commission ensured that the victims had a clear and enforceable remedy, a step that was meant to address past challenges of non-implementation and partial implementation of its previous decisions.

3.1 Chronic Challenges for the Commission

a. Non-implementation of Decisions

The Commission has faced several challenges historically and contemporarily in effectively executing its mandate. Key among these challenges has been state non-cooperation. Chief among the most damaging forms of such non-cooperation has been the non-implementation of the Commission's decisions. In fact, the question of the Commission's lack of a powerful tool with legal and coercive force to ensure compliance with the human rights norms under the African Charter has always been at the centre of the conversations on its limitations since its early days.⁵⁴

⁵³ Communication 393/10: Institute for Human Rights and Development in Africa (IHRDA), l'Action contre l'impunité des droits humains (ACIDH) and Rights and Accountability in Development (RAID) v DR Congo (2016) ACHPR, Available at <https://ihrda.uwazi.io/ar/document/u51cz7v4z2m?page=2>.

⁵⁴ Bondzie-Simpson, E. (1988). Critique of the African Charter on Human and People's Rights. *Howard Law Journal*, 31(4), 643-666 @662.

The Commission, unlike a domestic court does not have direct means to enforce compliance with its decisions.⁵⁵ The Commission has neither the power to imprison individuals for acting in contempt of its decisions nor can it attach the property of Respondent States in execution of judgments. Implementation of its decisions is thus dependent on the goodwill of states and their willingness to be bound by norms of international law.⁵⁶

Also, the Commission, unlike the African Court, has no set procedure under its establishing statute – the African Charter – for enforcing compliance of its decisions except for decisions in interstate communications. However, through its Rules of Procedure, the Commission crafted its own mechanisms for monitoring the implementation of, and tracing state compliance with its decisions. Where one state brings a communication against another state, the Commission immediately transmits a report to the Assembly upon the conclusion of the case, and in that report, it can make specific recommendations as it deems useful.⁵⁷ It is reasonable to assume that such recommendations may include specific steps on the implementation of the decision.

The African Court on the other hand, has an established relationship with the Executive Council and the Assembly for monitoring implementation of its decisions under its founding statute. The African Court is empowered under Article 31 of the African Court Protocol to submit an annual report on the status of compliance with its decisions to every Ordinary Session of the Assembly. Under Article 29(2) of the African Court Protocol, the Executive Council, on behalf of the AU Assembly, monitors the execution of African Court Judgements brought to its attention by the Court.

A 2007 study of the state of implementation of the Commission's decisions in 44 communications revealed that only 14 percent (6 decisions) had been fully complied with, 32 percent (14

⁵⁵ Viljoen & Louw (2007) 2.

⁵⁶ Viljoen & Louw (2007)3-4.

⁵⁷ Article 53 of the African Charter.

cases) had been partially complied with, while 30 percent (13 cases) had not been complied with.⁵⁸ Implementation of 15 percent (7 cases) was accidental, facilitated by a change of circumstances rather than deliberate state action to fulfil the terms of the Commission's decisions e.g. a change of regime resulting in a change of policy.⁵⁹ The status of compliance in respect of the remaining 9 percent (4 cases) was unclear.⁶⁰

Like any other judicial or quasi-judicial body, the implementation of the Commission's decisions, coupled with its ability to make these decisions independently and without interference from any other parties, is the central measure of its efficacy.⁶¹ It is through compliance with its decisions, that its legitimacy, credibility and effectiveness is measured.⁶² Without such independence and compliance, victims of human rights violations across the continent fail to secure an effective remedy from the Commission and their situations remain unresolved. Both the refusal or failure of states to comply with decisions of the Commission and interference with the mandate of the Commission from various quarters including that of political bodies of the AU undermines the credibility of the Commission.

To victims, litigants, partners and other actors who engage with the various aspects of the Commission's work, the Commission ceases to be a competent body capable of giving meaningful and effective remedies for violations suffered. This is why both in appearance and in fact, the Commission must be seen as an independent body, with the full competence to exercise its mandate without political or other forms of interference, and whose decisions are respected and complied with.

58 Viljoen, E., & Louw, L. (2007). State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004. *The American Journal of International Law*, 101(1), pp. 1-34 @4-5.

59 Viljoen & Louw (2007) 6.

60 Viljoen & Louw (2007) 7.

61 Shany, Y. (2014). *Assessing the effectiveness of international courts*, Oxford: Oxford University Press, p. 117.

62 Shany, Y. (2010). Compliance with decisions of international courts as indicative of their effectiveness: A goal-based analysis. *SSRN Electronic Journal* (October) 5.

Member states of the AU party to the African Charter have an obligation to implement decisions of the Commission as governed by Article 1 of the African Charter, under which they are required to “recognise the rights, duties and freedoms enshrined in the Charter” and to “adopt legislative or other measures to give effect to them.” Given that the same Member States are the constituent members of the Assembly, and that the Assembly is the supreme body of the AU, the Commission resolved under its Rules of Procedure to refer cases of non-compliance to the Assembly as part of the report that it submits in accordance with Article 54 of the Charter.⁶³ Some scholars have expressed scepticism that the Assembly, consisting as it does, of Member States of the AU would act against its own self-interest i.e. against the interests of its membership and actually assist the Commission to Compliance.⁶⁴ However without such altruism, the whole system would be rendered farcical.

The Commission's utilisation of this channel, which effectively leverages the moral and political capabilities of the Assembly to push for implementation of its decisions is innovative.⁶⁵ In so doing, the Commission solicits the support of the Assembly in following up on the implementation of its concluding observations.

b. Financial Constraints

The financial aspects of the African Commission's operations are closely intertwined with its relationship with the African Union Commission (AUC), the Assembly, the Executive Council, and the PRC. While the Commission drafts its own budget, the approval of the budget is the responsibility of the PRC. The AU is technically responsible for covering the Commission's budget integral to its functionality including the salaries of core staff, procurement of services and

63 Rule 125 (8) and (9) as read with Rule 138 of the 2020 Rules of Procedure.

64 Ibrahim, A.A. (2012). Evaluating a Decade of the African Union Promoting Human Rights and Democracy *African Human Rights Law Journal* 2, pp.30-68 @46.

65 Rule 78(3) as read with Rule 77 of the Commission's Rules of Procedure.

allowances for the Commissioners.⁶⁶ Historically the Commission, faced serious challenges funding its full budget at some point struggling to pay for basic communications infrastructure such as telephone bills.⁶⁷ In part, budgetary constraints at the level of the AU, as well as limited investment by Member states into the success of the Commission, contributed to these challenges.⁶⁸

In 2009, the Commission established the Advisory Committee on Budgetary and Staff Matters to address its perennial challenges with funding and to ensure greater efficiency in the design, presentation and defence, execution and accounting of the Commission's budgets and programs.⁶⁹ Although it was initially given a two-year mandate, the Committee remains active having received multiple new leases of life. Altogether, the Committee's mandate has been renewed seven times.⁷⁰ To address its budget deficits, the Commission began to rely heavily on external partners including Western develop-

ment agencies such as the European Union (EU) and the Germany Agency for International Cooperation (GIZ) as well as non-governmental organisations (NGOs) and international non-governmental organisations (INGOs) to support its technical work.⁷¹ Despite its vigorous defence of its own strategic focus, the Commission inevitably had to accommodate the interests of these Agencies, NGOs and INGOs supporting its work. This situation roused tensions between the Commission and States Parties, and by extension, AU political organs who alleged that external funding was rendering the Commission susceptible to the machinations of external forces and that the Commission's independence was being compromised by these external forces using financing as an entry-point.⁷²

The concerns of external interference through funding have at times motivated the Assembly to increase the Commission's budget even though such increases have not resolved the problem of underfunding. These concerns of external interference also underpin the insistence by the Assembly to pay for core costs for the running of the Commission to foster a sense of ownership of the system. To address these concerns, the Commission introduced a new procedure under its 2020 Rules of Procedure to keep the AUC updated of its external funding activities including any proposals to accept funds from funding partners, the amounts involved, details of the projects being executed and the conditions accompanying such funding.⁷³

c. Understaffing

The AU's control of the Commission's budget has historically impacted the Commission's performance, particularly because of understaffing. Recruitment of staff at the Commission could only be done with the necessary budgetary support and at the express permission of the Assembly. With limited funding, the Commission could only support a small staff complement. Without adequate staff, the Commission could

66 Article 41 and 44 of the Charter as read with Rule 22 of the 2020 Rules of Procedure.

67 Ibrahim (2012) See note 60 above.

68 Odinkalu, C. (1998). The individual complaints procedures of the African Commission on Human and Peoples' Rights: Preliminary Assessment. *Transnational Law & Contemporary Problems*, 8(2), 359-406.

69 The Committee was set up following the adoption of the Resolution on the Establishment of an Advisory Committee on Budgetary and Staff Matters - ACHPR/Res.142(XXXV)09, Adopted at the 45th Ordinary Session of the Commission held in Banjul, The Gambia from 13-27 May 2009, available at <https://www.achpr.org/sessions/resolutions?id=226>.

70 Through the adoption of the following resolutions: Resolution ACHPR/Res.188 (XLIX) 2011, adopted at the 49th Ordinary Session of the Commission; Resolution ACHPR/Res.191(L) 2011, adopted at the 50th Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=448>; Resolution ACHPR/Res.256(LIV) 2013, adopted at the 54th Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=276>; Resolution ACHPR/Res.313(LVII) 2015, adopted at the 57th Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=339>; Resolution ACHPR/Res.388(LXI) 2017, adopted at the 61st Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=399>; Resolution ACHPR/Res.425(LXV) 2019, adopted at the 65th Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=456>; and Resolution ACHPR/Res. 464 (LXVI) 2020, adopted at the 66th Ordinary Session of the Commission <https://www.achpr.org/sessions/resolutions?id=495>.

71 Odinkalu (1998) 388-389.

72 Killander, M. (2016). Human rights developments in the African Union during 2015. *African Human Rights Law Journal* 16(2), 538.

73 Rule 73(2) of the 2020 Rules of Procedure.

not carry out its mandate efficiently and effectively, a matter that led to inordinate delays in the completion of processes and procedures such as consideration of state reports and communications. These delays impacted the Member States' attitudes towards the Commission as it increasingly gained a reputation as a slow and unreliable cog machine.

To address these challenges, the Commission has, over the years created technical expert positions funded by its development, NGO and INGO partners. Such technical experts are admitted into the system on condition that they observe the AUC Staff Rules and Regulations which, among other things, demand confidentiality.

d. Political threats to the independence of the Commission

The threat of political interference with the work of the African Commission remains by far its greatest challenge. In fact, political threats pose an existential threat to the African Commission because they undermine the very essence of the Commission, which, without its ability to exercise its mandate independently and effectively, is heavily compromised. A lack of independence or the appearance of it, threatens the Commission's fundamental role as an avenue through which Africans can vindicate their rights. It fosters distrust with stakeholders by creating an atmosphere of unease and suspicion. Consequently, steps by AU political organs that threaten the African Commission or that appear to reduce the effectiveness of the Commission constitute a form of interference with key accountability structures and reverse progress made in improving the African Human Rights System. In the recent past, challenges by the political organs of the AU to the Commission's granting of observer status to the Coalition of African Lesbians (CAL) has been described as the greatest challenge to its independence in its institutional history.⁷⁴ This threat will be discussed in greater detail in ensuing sections.

4. Understanding the Political Organs of the AU

The AU is a complex institution with layers of intersection between the mandates and functions of each of its constituent organs. While the Constitutive Act of the African Union does not define what an organ of the African Union is, it spells out the following as the organs of the AU: the Assembly; the Executive Council; the Pan-African Parliament (PAP); the African Court of Justice which is yet to be established; the AUC; the PRC; the Specialised Technical Committees (STCs); the Economic, Social and Cultural Council (ECOSOCC); and the Financial Institutions which are yet to be established, namely the African Central Bank, the African Monetary Fund and the African Investment Bank.⁷⁵ The list is however not exhaustive as there is room for the establishment of other organs of the AU.⁷⁶ Apart from the African Court of Justice – a judicial organ, the PAP – a legislative body and the financial institutions, the rest of the institutions specified as organs of the AU are the Union's key policy organs. Acting together, these policy organs have wide and far-reaching powers in the functioning of the AU as a whole and the African Commission in particular.

Retaining its nomenclature from the predecessor organisation, the OAU,⁷⁷ the Assembly is the supreme organ of the AU and its primary policy and decision-making organ. Without the Assembly there is no African Union because it is the ultimate representation of the sovereign will of states to form an African regional organisation. All other organs and AU bodies were created by the Assembly. Effectively, the programme of work of the AU is the prerogative of the Assembly as it is responsible for the adoption and implementation of the AU's annual agendas. Without the Assembly's endorsement, any organ of the AU cannot function as the Assembly has the final say on its workings and core budget. The Assembly is responsible for the adoption of the AU budget, including the budget of the Afri-

74 Killander, M. (2016). Human rights developments in the African Union during 2015. *African Human Rights Law Journal* 16(2), 533, 536-538, 553.

75 Article 5(1) of the Constitutive Act.

76 Article 5(2) of the Constitutive Act.

77 OAU Charter, Article VII (1).

can Commission, and it determines where funds are allocated and for what purposes.

The Executive Council (formerly the Council of Ministers),⁷⁸ made up of foreign Ministers of Member States or persons designated by the Governments of Member States, serves as the right-hand arm to the Assembly. It accounts to the Assembly and carries out tasks as assigned by the Assembly. Among its regular tasks is the preparation of Assembly session agendas, drafting Assembly decisions before tabling them for consideration, promoting the African integration agenda by designing policies and modalities of cooperation within Africa, among AU institutions and Regional Economic Communities (RECs), and with other key partners for Africa such as the African Development Bank (AfDB), the UN Economic Commission for Africa (UNECA) and the European Union (EU).⁷⁹

In making decisions on the running of the AUC, the Assembly and the Executive Council often act upon the advice of the PRC, which is responsible for the day to day running of the AUC.⁸⁰ The PRC consists of AU Member States' representatives (ambassadors and plenipotentiaries), resident in Addis Ababa, Ethiopia, the AU's Headquarters where among other things they serve as the communication portal between the AU Headquarters and States' capitals. The PRC monitors implementation of the AU budget and decisions of the Executive Council. It is also responsible for drafting the agendas and decisions of the Executive Council and proposing memberships of permanent and *ad-hoc* AU Committees. The PRC participates in AUC meetings with partners and also contributes to the determination of the AU's programme of activities.⁸¹ It thus wields a lot of power in determining what work and when the AU and all its constituent parts performs.

The Assembly, the Executive Council and the PRC get their work done through the AUC.

78 OAU Charter, Article VII (2).

79 AU Website: <https://au.int/en/executivecouncil>.

80 AU Website: <https://au.int/en/prc>.

81 AU Website: <https://au.int/en/prc>.

Composed of the Chairperson, the Deputy Chairperson, and six Commissioners each with their own portfolio and supported by a significant staff complement. The AUC constitutes the secretariat of the AU.⁸² The AUC in consultation with the PRC, is responsible for doing the day to day work of the AU including the formulation of AU policy on behalf of the Assembly. It also coordinates the efforts of all AU organs and manages the budget of the AU.

4.1 The relationship between the AU policy organs and the African Commission: Mutually Reinforcing?

It is inarguable that the African Commission and the Assembly, the Executive Council and the PRC of the AU, working directly with the Commission and also through the AUC, ought to have a mutually reinforcing relationship. One of the main objectives of the AU is the 'promotion and protection of human rights'.⁸³ Many scholars have noted how the AU's different approach to human rights, including the shift from a policy of non-interference to non-indifference in the case of gross violations of human rights such as crimes against humanity, genocide and war crimes, set it apart from the OAU with the promise of a new era in the history of human rights in Africa.⁸⁴ The objectives of the AU can only be achieved through meaningful cooperation with human rights treaty bodies such as the African Commission, whose mandate is to promote and protect human rights. In fact, one of the core functions of the African Commission is to perform various *ad hoc* tasks at the request of the Assembly.⁸⁵ The Commission, as an independent quasi-judicial body can best fulfil its mandate when it is able to chart its own strategic vision, and execute it, independent of the influences of any other body or institution. The reality is that these institutions' workings are intricately in-

82 AU Website <https://au.int/en/commission>.

83 Article 3(h) Constitutive Act of the African Union.

84 Ibrahim, A.A. (2012). Evaluating a Decade of the African Union Promoting Human Rights and Democracy *African Human Rights Law Journal* 2, pp.30-68 @33-34.

85 Article 45(4) of the African Charter and recognised under Rule 3(7) of the 2020 Rules of Procedure of the ACHPR.

tertained with those of the Commission. This section will outline these linkages.

4.2 Procedural Linkages between the African Commission, the policy organs of the AU and the AUC

From its inception, the African Commission's work was designed to intertwine with that of the policy organs of the AU and the AUC. The Assembly is responsible for the creation of both the African Commission and the AUC and is integrated into their operational procedures and processes. The Assembly is in charge of the election of the Chairperson and Deputy Chairperson of the AUC, as well as the appointment of Commissioners of the AUC including the determination of their functions and terms of office. These functionaries work very closely with the African Commission. In fact, the first session of the African Commission was convened by the Chairperson of the AUC (then known as the Secretary General of the OAU).⁸⁶ The Chairperson of the AUC, through the Office of the Legal Counsel, receives instruments of ratification of all instruments subject to the African Commission's jurisdiction and keeps a record of the status of ratification of such instruments, including any reservations made by member states.⁸⁷

a. Sessions

Further to their collaborative spirit, the Commission grants the AUC Chairperson the power to alter the dates of a session of the African Commission, under the Commission's Rules of Procedure. However, the AUC Chairperson may exercise this power only in exceptional circumstances and, in consultation with the African Commission Chairperson.⁸⁸ The AUC Chairperson may also request the African Commission to hold Extraordinary Sessions.⁸⁹ The AUC can also host sessions of the Commission at the AU

Headquarters.⁹⁰ Such sessions have been held twice, in 1987⁹¹ and 1993.⁹²

Even though they cannot make any substantive contributions in the deliberations of the African Commission, the Chair of the AUC or their representatives can attend sessions of the Commission and deliver a statement.⁹³ Often, this role is taken up by the AUC Commissioner for Political Affairs or a representative from the Department of Political Affairs (DPA).

b. Appointment of the Executive Secretary and other staff

Previously, the Chairperson and Deputy Chairperson of the AUC were responsible for the recruitment of all AU staff, including the Executive Secretary, legal officers and other staff of the African Commission. In recent years, progressive cooperation between the Commission and policy organs of the AU have occurred. For instance, The Executive Council at its 32nd Ordinary session approved the commencement of the exercise for the Commission to align its organogram and staff complement to its mandate⁹⁴ and at its 36th Ordinary Session, the Executive Council directed the PRC to fully cooperate with and assist the Commission to ensure a speedy execution of this exercise.⁹⁵ Following its 65th Ordinary Session, the African Commission expressed its desire to possess the functional authority to autonomously appoint its own staff in its recommendations to the Assembly.⁹⁶ In October

⁸⁶ Article 64(2) of the African Charter.

⁸⁷ Article 63(2) as read with Articles 65, 66 and 67 of the African Charter.

⁸⁸ Rule 28(3) of the 2020 Rules of Procedure.

⁸⁹ Rule 29(2)(b) of the 2020 Rules of Procedure.

⁹⁰ Rule 30(6) of the 2020 Rules of Procedure.

⁹¹ Held in Addis Ababa, Ethiopia on 2 November 1987 See <https://www.achpr.org/sessions/view?id=1>.

⁹² Held in Addis Ababa, Ethiopia from 1-10 December 1993 See <https://www.achpr.org/sessions/view?id=16>.

⁹³ Article 42(5) of the African Charter.

⁹⁴ Executive Council Decision EX.CL/Dec.995(XXXII), adopted at the 32nd Ordinary Session of the Executive Council, 25- 26 January 2018, Addis Ababa, Ethiopia, para 11.

⁹⁵ Executive Council Decision EX.CL/Dec. 1080(XXXVI), adopted at the 36th Ordinary Session of the Executive Council, 6- 7 February 2020, Addis Ababa, Ethiopia, para 5.

⁹⁶ See Paragraph 65 of the Commission's 47th Activity Report Available at <https://www.achpr.org/activityreports/viewall?id=51>.

2020, the Executive Council granted the Commission the autonomy to recruit its own staff.⁹⁷

The AUC is responsible for ensuring budgetary provisions for core staff and other essential services for the running of the Commission.⁹⁸ The linkages between the Commission and the AUC are no more obvious than the fact that the Executive Secretary of the Commission, also serves as the *de facto* Ambassador of the AU to the hosting nation of the African Commission – the Gambia.

As a means to assert its independence, the Commission has developed a procedure whereby the appointment of the Secretary is carried out by the AUC Chairperson in consultation with the Commission Chairperson, and appointment of Commission staff follows prior consultations between the Bureau of the Commission (i.e. the Chairperson and vice Chairperson of the Commission) and the AUC.⁹⁹

The Commission appears to have taken steps to reinforce its independence when it redrafted its Rules of Procedure. Under Rule 3(6) of the 2020 Rules of Procedure, the Commission emphasises its own competence to ensure the efficient and technical organisation and operation of the Secretariat. This Rule, against the backdrop of increasingly invasive involvement of the AU Assembly, Executive Council and PRC in the work of the Commission can be read to constitute pushback by the Commission in asserting its independence.

c. Appointment, Dismissal and Replacement of Commissioners

Both the Assembly and the AUC are critical players in the appointment of Commissioners to the African Commission. Nominations of Commissioners are received and aggregated by the AUC Chairperson who then forwards them to the Assembly for the election.¹⁰⁰ The election is

conducted by secret ballot.¹⁰¹ Where a Commissioner dies, resigns or is deemed by their counterparts to have relinquished their duties, the African Commission Chairperson will inform the AUC Chairperson to declare the seat vacant and call for the election of a new member.¹⁰² In terms of Rule 8(4), the Commission can also seek the support of the AUC to address a situation where a Commissioner has acted in ways that are incompatible with their mandate. To guarantee that individual Commissioners are not punished, politically for any decisions they take, the Commission has taken measures to ensure that none of its members are subjected to reprisals for actions taken in the course of their duties as members of the Commission.¹⁰³

For instance, the Commission lays out grounds for the consideration of incompatibility in the conduct of a member of the Commission with their prescribed mandate. Such questions of incompatibility arise where a Commissioner assumes a physical, financial, political or some such other position that is likely to impact their independence or impartiality. Under the 2020 Rules of Procedure circumstances likely to impede the independence of Commissioners include but are not limited to accepting a ministerial position or any other function in a government ministry or becoming a diplomatic representative or legal adviser of any state.¹⁰⁴ Commissioners also take an oath, to act impartially in the discharge of their functions.¹⁰⁵

The Code of Conduct that guides the work of Commissioners also reflects the Commission's recognition of the solid linkages between itself and the AUC in facilitating each other's work. For example, while the Commission's own rules are designed to take precedence where there is conflict with AUC rules, Commissioners are also expected to conduct themselves in accordance with the principles and codes of conduct of AU

97 Executive Council Decision, Adopted at its 37th Ordinary Session held virtually.

98 Article 41 of the African Charter.

99 Rule 20(3) and 20(4) of the 2020 Rules of Procedure.

100 Article 35 as read with Article 33 of the African Charter.

101 Article 33 of the African Charter.

102 Article 39(1) and (2) of the African Charter as read with Rule 8 and 9 of the 2020 Rules of Procedure.

103 Rule 74 of the 2020 Rules of Procedure.

104 Rule 8(1) of the 2020 Rules of Procedure.

105 Article 38 of the Charter as read with Rule 10 of the Rules of Procedure.

Staff Rules and Regulations, AU Code of Ethics and Conduct and AU Harassment Policy, among others.¹⁰⁶

While there is recognition that the role of the Chairperson of the Commission requires them to carry out functions under the Charter including implementing decisions of the Assembly, the Commission's Rules of Procedure emphasise that in carrying out these functions, the Chairperson remains under the authority of the Commission.¹⁰⁷ This provision is a reiteration of the Commission's independence, namely, that it serves as its own ultimate legal, political and moral compass in instances where its interactions with other AU organs lead to conflicting values.

d. Interstate Communications

The AUC and the Assembly also have a central role in the handling of interstate communications i.e. cases in which a State Party to the African Charter files a complaint of human rights violations against another State Party.¹⁰⁸ The State filing the case is required to address the matter both to the AUC Chair and to the Chair of the African Commission.¹⁰⁹ The final report of the African Commission after considering all the facts in the case is communicated both to the states involved and to the Assembly.¹¹⁰ This in all likelihood is designed to assist in the implementation of the decision and to manage the political tensions arising from the case given that the practise of states suing other states remains the most adversarial form of human rights accountability that exists within the African Human Rights System.

e. Amendment of the African Charter

The African Commission is a creature of statute; without the African Charter's express provision for its creation, it would cease to exist. The Charter itself is a product of various legal and political processes driven by the Assembly with the urging of various CSOs on the African conti-

nent. This origin creates an unequal relationship between the Commission and the Assembly in which the Assembly holds the upper hand. This unequal status is most clearly illustrated in the Assembly's extensive powers to 'uncreate' the Commission or to whittle down its powers and functions through an amendment to the African Charter.

In terms of Article 68 of the Charter, the Assembly can at the behest of a member state, in written form, and with the assent of a simple majority of member states (i.e. 28 of the 55 Member States) amend any provision of the Charter. Although the African Commission has consultative powers in the process of amendment,¹¹¹ ultimately, its opinion on the matter does not carry the decisive power as the Assembly makes the decision *after* consultation with the African Commission rather than *in* consultation with it.

While the exercise of this power is highly undesirable, neorealists would argue that because states remain 'masters of Treaties' with their ability to empower or disempower treaty bodies to exercise adjudicatory powers,¹¹² it is standard for States to have the option to either amend the ways in which a Treaty system works or to completely disengage with it when it no longer serves their interests. This argument however seems to suggest that it would be self-preservatory for the treaty body to at best, advance states' interests and at the very least, desist from antagonising such interests. The danger of such an interpretation is that it renders treaty bodies obsolete given that they are specifically created to temper state excesses and serve as a system of accountability for states.

As it is, the Amendment process under the Charter is a significant tool in the hands of the Assembly to control the Commission, to ensure it does not pass decisions that robustly contradict states' national interests and to force its quiescence. The quasi-judicial nature of the Commission also means that, unlike a court with nearly unassailable legal rights

106 Rule 11 of the 2020 Rules of Procedure

107 Rule 17 of the 2020 Rules of Procedure.

108 Article 47 of the African Charter.

109 Article 47 as read with Article 49 of the African Charter.

110 Article 52 of the African Charter.

111 Article 68 of the African Charter.

112 Alter, K. (1998). Who are the "Masters of the Treaty"? European Governments and the European Court of Justice. *International Organisation*, 52(1), 121-147 @121.

to defend itself from political attacks, the Commission is very vulnerable to such influences.

Procedurally, the process of amendment has been deemed problematic because it creates misnomers in the substantive application of the amendments to the Charter. The Charter provides that the amendments will apply to each state as and when that state accedes to the amendment and three months after the state lodges its acceptance of the Amendment with the AUC Chair (then OAU Secretary General).¹¹³ As Bondzie-Simpson argued, this staggered application of the amendments would mean that different versions of the Charter would apply simultaneously to different states, thereby creating discrepancies and disuniformity and violating the general rule of treaty amendments that they must have general validity to all parties to the Treaty.¹¹⁴ Notably, since its adoption, the African Charter has never been amended. Rather, Member States of the African Union have embraced the approach of adopting Additional Protocols to the Charter to expand both substantive and procedural questions that are not included or adequately covered under the Charter. These are in descending chronological order the Protocol to the African Charter On Human And Peoples' Rights on the Rights of Older Persons in Africa,¹¹⁵ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,¹¹⁶ and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.¹¹⁷

4.3. Substantive Linkages between the African Commission and policy organs of the AU

a. Cases of Massive and Widespread Human Rights Violations

The African Charter empowers the African Commission to consider some cases of human

rights violations as 'serious or massive violations of human and peoples' rights.'¹¹⁸ When it considers them to exist, the Commission is required to draw the attention of the Assembly, as the supreme organ of the AU, to such special cases. While the Assembly can take a variety of actions in response, of its own accord, under the Charter it can request the Commission to 'undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.'¹¹⁹

Over time, the Assembly recognised that while these special cases were a human rights matter, they also raised fundamental peace and security concerns. The Assembly then delegated its powers of responding to cases of massive and widespread violations to the Peace and Security Council (PSC) when the Council became operational in 2004.¹²⁰ This is critical for understanding the African Commission's relationship with both the Assembly and the PSC concerning cases of massive and widespread human rights violations. Arguably, the PSC's political nature renders it more effective in responding to such cases, unlike the Commission which has to seek states' prior permission to carry out fact finding missions.¹²¹

There is evidence that the PSC and the African Commission complement each other's mandates. Their collaboration, guided by the PSC Protocol, requires the "Peace and Security Council [to] seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Se-

¹¹³ Article 68 of the African Charter.

¹¹⁴ Bondzie-Simpson (1988) 664.

¹¹⁵ Adopted on 28 January 2018 and entered into force on 11 September 2018.

¹¹⁶ Adopted on 7 November 2003 and entered into force on 25 November 2005.

¹¹⁷ Adopted on 10 June 1998 and entered into force on 25 January 2004.

¹¹⁸ Article 58(1) of the African Charter.

¹¹⁹ Article 58(2) of the African Charter.

¹²⁰ See the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol), Adopted on 9 July 2002 and came into force on 26 December 2003, Available at https://au.int/sites/default/files/treaties/37293-treaty-0024_-_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf

¹²¹ Odinkalu, C. (2013). From Architecture to Geometry: The relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union, *Human Rights Quarterly*, 35(4), 850-869 at 864.

curity Council any information relevant to the objectives and mandate of the Peace and Security Council.¹²² The PSC recognises the Commission's special investigative skills and, has, in the past, requested the Commission to carry out fact finding missions on its behalf in situations of massive and widespread violations.

b. Adoption and Publication of African Commission Decisions

While the Assembly has no express powers to alter the substantive output of the African Commission, the practical application of Articles 54 and 59 of the African Charter has provided leeway for the exercise of significant altering power. Under Article 54 of the African Charter, the African Commission is required to submit its activity report to the Assembly during every ordinary session. However, the Assembly delegated the consideration and adoption of these reports to the Executive Council. The Commission has often submitted two reports to the Executive Council every calendar year, most-times combining activities from its Ordinary and Extra-Ordinary Sessions in the intervening period.¹²³ These reports and their contents thereof, are kept confidential until the Executive Council passes a decision for their publication following its consideration on behalf of the Assembly.¹²⁴ There have been much academic debates on what the provision in Article 59(3) that the Activity Report of the Commission can only be published "after it has been considered by the Assembly of Heads of State and Government" means. At the centre of these debates are two concerns. The first is the interpretation of the requirement for 'consideration' and the kind of influence it lends the political organs of the AU. The second is the requirement for confidentiality, the scope of its application and the implications of that scope and how it affects the ways in which the Commission functions.

The application of Articles 54 and 59 of the African Charter constitutes one of the biggest threats

122 Article 19 of the PSC Protocol.

123 While previously the Commission held two ordinary sessions in a year and extraordinary sessions, funding permitting, it now holds four ordinary sessions each year, in line with Rule 28(1) of the 2020 Rules of Procedure.

124 Article 59 of the African Charter.

to the Commission's substantive independence. One of the earliest expressions of concern over the practical aspects of these provisions came from Ebou Bondzie-Simpson who argued:

... the Commission's report shall not be published unless it has been considered and its publication sanctioned by the ASHG [Assembly of Heads of States and Governments]. In view of the political nature of the AHSG, coupled with the likelihood that adverse findings may be against some of its measures, the Commission's report may never see the light of day!¹²⁵

While the majority of Commission's Reports did see the light of day without too many impediments, Bondzie-Simpson was right to be concerned about how the Assembly's powers under these provisions could curtail the Commission's unhindered capacity to publicise its decisions. This concern could not be more clearly evident as it is in the current challenges facing the Commission. In the recent past, these provisions have proved to be extremely problematic for the Commission, especially how the Commission's decision to grant observer status to CAL unravelled into a circus between March 2015 when the Commission passed its decision until August 2018, when the Commission reversed its decision and withdrew CAL's observer status.

c. A history of political interference

It is a widely held view that the Commission's decision to withdraw CAL's observer status and to follow the directives of the Executive Council concerning this decision constituted kow-towing to the destructive political power of the Assembly. In particular, the directives in the Executive Council's Decision 1015,¹²⁶ shape the predominant view that the CAL case marks the height of the interference of AU organs into the work of the African Commission. However, there are a few efforts to trace the pattern that shows how

125 Bondzie-Simpson, E. (1988). Critique of the African Charter on Human and People's Rights. *Howard Law Journal*, 31(4), 643-666 @ 662.

126 For a chronological tracking of Decision 1015 see CIAC. (2020). Tracking Decision 1015, Available at https://achprindependence.org/wp-content/uploads/2020/07/Tracking_Decision_1015.pdf

AU political organs have consistently used their powers to bend the Commission to their will for far much longer than the adoption of Decision 1015.

In 1998, at its 34th Ordinary Session held from 8-10 June, 1998 in Ouagadougou, Burkina Faso, the Assembly questioned the criteria for granting observer status by the Commission and “requested” the Commission to review its criteria and to suspend granting observer status until it had effected changes to such criteria.¹²⁷ Despite the framing of the policy change as a request and in the interest of improving the Commission’s efficiency, the decision was in effect, an external directive by a political body – the Assembly – that the Commission – an independent quasi-judicial body – had to follow through. The Commission specifically cited the Assembly’s Decision AHG/dec.126 (XXXIV) as one of its key considerations in changing its criteria.¹²⁸ Changes to the criteria were introduced in the Commission’s Resolution 33¹²⁹ with the effect of formalising the process of applying for observer status for NGOs as well as creating the possibility for the denial of status or the withdrawal of such status for organisations considered to no longer meet the requisite criteria.

At its 5th Ordinary Session, the Executive Council made the drastic decision to suspend publication of the 17th Annual Activity Report of the African Commission following objections by representatives of the Government of Zimbabwe (GoZ) to the Activity Report. The GoZ’s objection to the publication of the report revolved around the Commission’s findings contained in a report on the Commission’s 2002 fact-finding mission to Zimbabwe. The mission investigated widespread reports of human rights violations in Zimbabwe following its Fast-Track Land Reform

Programme (FTLRP).¹³⁰ The mission report confirmed that during the land reform process, state and non-state actors committed human rights violations including political violence, torture in police custody, arbitrary arrests and unlawful detention.

The GoZ’s objections included that: it had not been given adequate notice of the fact finding mission; that the parameters of the fact finding mission had been unclear; that the Commission had not revealed the identities of the sources of the reports alleging human rights violations on which it had relied to enable the state to respond adequately; that once in Zimbabwe, the geographic scope of the Commission’s inquiry, limited as it was to the capital city, was too narrow hence its findings were not representative of the national human rights situation; and that reports upon which the Commission premised its mission likely came from NGOs and their ‘counterparts outside the borders of the country’ without adequate insight nor facts of the situation on the ground.¹³¹

While the GoZ did not completely discredit the Commission’s findings, its engagement with the report’s content represented a direct challenge to the Commission in a bid for inclusion of its narrative of the events alongside the accounts of NGOs and other actors that the Commission had seen on its visit. The GoZ achieved both objectives, by rallying the support of both the AU Assembly and the Executive Council. The GoZ’s objections resulted in the suspension of the publication of the report and an Executive Council directive to the Commission to amend the contents of the 17th Activity Report to reflect the concerns of the GoZ. This process lasted for over half a year; the initial 17th Activity Report was presented in June 2004 but the final version was only adopted in January 2005.¹³² The GoZ’s

127 Decision of the AU Assembly AHG/dec.126 (XXXIV)) para 3

128 See Preambular provisions of the Resolution ACHPR/Res.33(XXV)99.

129 ACHPR/Res.33(XXV)99 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples’ Rights - <https://www.achpr.org/sessions/resolutions?id=38>

130 ACHPR. (2004). The Seventeenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, <https://www.achpr.org/activityreports/viewall?id=17> p.14.

131 ACHPR. (2004). *The Seventeenth Annual Activity Report of the African Commission on Human and Peoples’ Rights*, <https://www.achpr.org/activityreports/viewall?id=17> p. 29-35.

132 EX.CL/Dec.155 (V) Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights adopted by the 5th Ordinary Session of the Executive Council in Addis Ababa, Ethiopia from 25 June – 3 July 2004

political victory over the Commission's legal and technical procedures was significant because it showed that states could alter the substance of the Commission's decisions using the collective power of the Assembly.

In 2006, the Commission faced the same challenge of alterations to its 19th Activity Report as the Assembly authorised the publication of the report subject to the exclusion of Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe.¹³³ The Assembly excluded the Resolutions, which the Commission had adopted at its 38th Ordinary Session, following demands by the concerned States Parties' for a right of response. The demands by Member States, with the indulgence of the Assembly, for a right of response to Resolutions, were extra-procedural as neither the Charter nor the Commission's Rules of Procedure envisaged such eventuality. Following the Assembly's decision, the African Commission granted audiences to three of the concerned States i.e. Ethiopia, Uganda and Zimbabwe which made oral presentations and sought clarifications on the Resolutions at the Commission's 39th Ordinary Session. The written responses and the Resolutions on Ethiopia, Uganda and Zimbabwe were published following the adoption of the Commission's 20th Activity Report.¹³⁴ The Commission's deference to the Assembly in meeting the demands of states compromised its independence by contradicting its own interpretive capacity as previously, the Commission had found that Resolutions were not within the pur-

view of Article 59 of the Charter and therefore not subject to the same rules of publication as the issues covered in Article 59.¹³⁵

In January 2015, the Executive Council instructed the Commission to expunge from its Activity Report provisions relating to Communication 426/12: *Agnès Uwimana-Nkusi and Saidati Mukakibibi v. Rwanda* and Communication 392/10: *Théogène Muhayeyezu v Rwanda*.¹³⁶ Both cases were against Rwanda. The Executive Council also instructed the African Commission to reopen these cases so that Rwanda – involved in both cases – could make additional arguments in oral hearings. The Oral Hearings were actually held during the 18th Extraordinary Session of the Commission held from 29 July to 7 August 2015 in Nairobi, Kenya.¹³⁷ Again, the political manoeuvring of a Member State, enabled by the Assembly and the Executive Council, forced the hand of the Commission to break its own procedural rules and allow reopening of two cases that had already been decided on the merits.

These are but some of the examples of the ways in which the Commission's independence has incrementally been compromised, culminating in the CAL case. It is clear that political considerations played a part in the Commission's 2018 decision¹³⁸ to reverse its 2015 decision¹³⁹ to grant observer status to CAL. The Commission admitted as much, stating that it had reversed CAL's observer status to comply with directives from the Executive Council.¹⁴⁰ The admission only

Assembly/AU/Dec.49(III) Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights – Doc. EX.CL/109 (V) adopted at the 3rd Ordinary Session of the Assembly of the African Union from 6 – 8 July 2004 held in Addis Ababa, Ethiopia

EX.CL/Dec.185 (VI) Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) – Doc. EX.CL/167 (VI) Adopted at the 6th Ordinary Session of the Executive Council held in Abuja, Nigeria from 24 – 28 January 2005

Assembly/AU/Dec.56 (IV) Decision on 17th Annual Activity Report of the African Commission on Human and Peoples' rights (ACHPR), Adopted at the 4th Ordinary Session of the Assembly of the African Union held in Abuja, Nigeria from 30 – 31 January, 2005.

133 Decision on the Nineteenth Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec 101(VI).

134 Paragraph 16

135 Killander, M. (2006). Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights. *African Human Rights Law Journal* 6(2), 579-580.

136 EX.CL/Dec.887(XXVII) Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights - Doc.EX.CL/921(XXVII), Adopted at the 27th Ordinary Session of the Executive Council held in Johannesburg, South Africa from 7 – 12 June 2015.

137 See 39th Activity Report of the African Commission on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/actrep39_2015_eng.pdf p.10.

138 45th Activity Report of the African Commission on Human and Peoples' Rights, <https://www.achpr.org/activityreports/viewall?id=49>, para 61.

139 38th Activity Report of the African Commission on Human and Peoples' Rights, <https://www.achpr.org/activityreports/viewall?id=37>, para 14.

140 45th Activity Report, as above.

served to solidify the seriousness of the Assembly and Executive Council's political interference in the functioning of the Commission. The reversal of CAL's observer status elicited wide responses from actors across the globe working on human rights in Africa. Several Civil Society Organisations (CSOs) put out statements condemning the African Union's interference with the independence of the Commission,¹⁴¹ the Centre for Human Rights at the University of Pretoria convened an advocacy platform comprising former members of the Commission to address the question of the independence of the Commission,¹⁴² and a coalition of CSOs launched a

website tracking developments relating to the independence of the Commission.¹⁴³

In reversing its own decision, scholars and practitioners of human rights reasoned, the ACHPR was bowing to political pressures.¹⁴⁴ The Commission had indeed received several directives from the Assembly and the Executive Council in a series of decisions that instructed it to review its mandate and working methods and to reverse its decision to grant CAL observer status because it was incompatible with 'African values.'¹⁴⁵ Even though it eventually capitulated, the Commission, under different leadership had initially resisted this pressure, underscoring its critical function to promote and protect the rights of everyone without distinction.¹⁴⁶

The Assembly and Executive Council's interference with the Commission's independence was also widely seen as political backlash against

141 Amnesty International (2019) Africa: States frustrate continental rights bodies' efforts to uphold human rights, <https://www.amnesty.org/en/latest/news/2019/10/africa-states-frustrate-continental-rights-bodies-efforts-to-uphold-human-rights/>.

Coalition of African Lesbians (2019) *Statement on the independence of the African Commission and the holding of the 64th ordinary session of the African commission* <https://www.cal.org.za/2019/04/25/statement-on-the-independence-of-the-african-commission-and-the-holding-of-the-64th-ordinary-session-of-the-african-commission/>.

Human Rights Watch (2019) *Strengthen, Not Weaken African Commission Mandate* <https://allafrica.com/stories/201904260139.html>.

Article 19 (2018) ACHPR: Withdrawing Coalition of African Lesbians' observer status threatens civil society participation <https://www.article19.org/resources/achpr-concern-with-decision-to-withdraw-coalition-of-african-lesbians-observer-status/>.

ESCR-Net (2018) *Defending the independence of African human rights body* <https://www.escr-net.org/news/2018/defending-independence-african-human-rights-body>

FEMNET (2018) *Civil Society Joint Declaration on Responding to the Attacks on the Independence of the African Commission on Human and Peoples' Rights (ACHPR) in Banjul, the Gambia* <https://femnet.org/2018/12/civil-society-joint-declaration-on-responding-to-the-attacks-on-the-independence-of-the-african-commission-on-human-and-peoples-rights-achpr-in-banjul-the-gambia/>.

IHRDA (2018) Statement of IHRDA at the 63rd Ordinary Session of the ACHPR, October 2018: Addressing the interference of AU policy organs in the independence and mandate of the ACHPR <https://www.ihrda.org/2018/07/10/statement-of-ihrda-at-the-63rd-ordinary-session-of-the-achpr-october-2018-addressing-the-interference-of-the-au-policy-organs-in-the-independence-and-mandate-of-the-achpr/>.

CAL (2015) *URGENT ALERT: Defend the Independence of the African Commission on Human and Peoples' Rights* <https://caladvocacyblog.wordpress.com/2015/07/01/urgent-alert-defend-the-independence-of-the-african-commission-on-human-and-peoples-rights/>.

142 Centre for Human Rights (2019) *Press Statement: Advocacy platform of former Commissioners established to strengthen the independence of the African Commission on Human and Peoples' Rights*, <https://www.chr.up.ac.za/news-archive/1825-press-statement-advocacy-platform-of-former-commissioners-established-to-strengthen-the-independence-of-the-african-commission-on-human-and-peoples-rights>.

143 Independence of the ACHPR Campaign <https://achprindependence.org/>.

144 Biegon, J. (2018) *The Rise and Rise of Political Backlash: African Union Executive Council's Decision to Review the Mandate and Working Methods of the African Commission*, EJIL: Talk! Blog of the European Journal of International Law <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/>

See also: Viljoen, F. (2017). *African commission turns 30, but threats to its independence remain real*, The Conversation, <https://theconversation.com/african-commission-turns-30-but-threats-to-its-independence-remain-real-85421>.

145 Executive Council of the African Union, Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII), Adopted at the 27th Ordinary Session of the Executive Council held from 7 – 12 June 2015 in Johannesburg, South Africa https://au.int/sites/default/files/decisions/31762-ex_cl_dec_873_-_898_xxvii_e.pdf (Accessed: 7 October 2019).

Executive Council of the African Union, Decision on the African Commission on Human and Peoples' Rights EX.CL/Dec.995(XXXII), Adopted at the 32nd Ordinary Session of the Executive Council held from 25 – 26 January 2018 in Addis Ababa, Ethiopia https://au.int/sites/default/files/decisions/33909-ex_cl_decisions_986-1007_e.pdf (Accessed: 7 October 2019).

Executive Council of the African Union, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) Decision EX.CL/Dec.1015(XXIII) Adopted at the 33rd Ordinary Session of the Executive Council held from 28 – 29 June 2018 in Nouakchott, Mauritania https://au.int/sites/default/files/decisions/34717-ex_cl_dec_1008_-1030_xxxiii_e.pdf (Accessed: 7 October 2019).

146 43rd Activity Report of the African Commission, <https://www.achpr.org/activityreports/viewall?id=42> (Accessed: 7 December 2019) para 51.

the Commission for standing up for the rights of sexual minorities in a broadly homophobic context.¹⁴⁷

a. **The Post-CAL Era: An Acrimonious Affair**

In the aftermath of the conflict between the Commission and the key political organs of the AU over the Commission's decision to grant observer status to CAL, the relationship between them has become so acrimonious that the political organs are issuing challenges to the efficacy of Commission recommendations and decisions on a variety of issues. For instance, Magnus Killander notes that the AU Specialised Technical Committee on Justice and Legal Affairs at its November 2015 meeting, refused to deliberate on the Draft Protocol on the Abolition of the Death Penalty, tabled by the Commission arguing that the Commission had no legal mandate to table such protocols, and yet other protocols such as the Maputo Protocol have been adopted in the same manner in the past.¹⁴⁸

The Commission's 2020 Rules of Procedure point to the institutional dilemma that the Commission finds itself in. While it took decisions succumbing to the pressure of AU political bodies, its Rules suggest that the fight is not over. The Commission emphasises its competence to interpret its own decisions.¹⁴⁹ It also clarifies the rule of confidentiality, stating that the rule only relates to case files i.e. the Communications Procedure of the Commission, and that such confidentiality does not extend to keeping parties to the Communication unaware of developments concerning their case.¹⁵⁰ Further, the

147 Killander, M. (2006). Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights. *African Human Rights Law Journal* 6 pp. 572-581, 535.

See also Killander, M. (2016). Human rights developments in the African Union during 2014. *African Human Rights Law Journal* 16(2), pp. 537-558.

Amnesty International. (2019). *The state of African Regional Human Rights Bodies and Mechanisms*. Amnesty International Ltd: London, 40-42.

148 Killander, M. (2016). Human rights developments in the African Union during 2015. *African Human Rights Law Journal* 16(2), 532-553@ 533-534.

149 Rule 3(4) of the 2020 Rules of Procedure.

150 Rule 24(1) of the 2020 Rules of Procedure.

Commission, cognisant of the disruptive force that states' demands for changes to its Activity reports have become, especially in the past five years, introduced a new Rule guaranteeing its exclusive powers to determine the content of these Activity Reports. In fact under the new Rule, Member States' comments or concerns should not prevent adoption and publication of the Commission's Activity Reports, as is, but are rather incorporated as annexes.¹⁵¹

5. **Is the African Commission an Organ of the AU?**

The question of whether or not the African Commission is an Organ of the African Union remains debatable. It is unclear whether the Commission is an organ of the AU or not. The indeterminacy of the Commission's status as an organ of the AU can be traced back to its inception. As Chidi Odinkalu argues, from its conception, there was no clarity on whether the Commission would be situated within the OAU or in proximity to the OAU.¹⁵² The former would have implied subordinate status within OAU structures while the latter spelled a semi-autonomous affiliate status. The Commission's functional history suggests a vacillation between the two points.

As a quasi-judicial body delivering justice for human rights abuses, the African Commission is supposed to function independently of any institutional, political or individual influences. However, the way the Commission is structured places some of its core functional structures beyond its full control. For instance, the Commission's core budget comes from the AU. Its core staff, until 2020 were recruited by the AU and are subject to the Staff Rules and Regulations of the AU. The Commission's decisions are published following assent by the AU Assembly and Executive Council to publish them. This interdependence, in many ways, renders the Commission subject to the devices of the political actors who populate the Assembly, the Executive Council, the PRC and the AUC.

151 Rule 63 (2) of the 2020 Rules of Procedure.

152 Odinkalu, C. (2013). From Architecture to Geometry: The relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union, *Human Rights Quarterly*, 35(4), 850-869 p. 852

While it is not explicitly recognised as an organ of the African Union (AU) under the Constitutive Act of the African Union (the Constitutive Act), the Commission was incorporated to function within the framework of the AU through a decision of the Assembly of Heads of State and Government (AU Assembly) in 2002.¹⁵³ The Commission is also top of the list of the key judicial, human rights and legal ‘organs’ recognised by the AU on its website.¹⁵⁴ It is not clear whether the use of ‘organs’ in the context of the AU Website is the same as that of ‘organs’ under Article 5 of the Constitutive Act.

5.1 The Commission’s stance

For many years following the transition from the OAU to the AU, and the adoption of the Constitutive Act specifying organs of the AU, the Commission seemed unbothered by its exclusion from the list of AU organs. This was the case despite existential challenges to the Commission coming from some Member States. For instance in 2005, the government of Botswana, challenged the competence of the African Commission to hear communications, arguing that the Commission was not properly legally instituted.¹⁵⁵ Botswana further argued that the non-mention of the Commission under the Constitutive Act meant that it was dismantled with the transition from the Organisation of African Unity (OAU) to the AU and that the African Charter thus constituted a ‘mere instrument of noble ideals... devoid of any operational structures.’¹⁵⁶ The Commission dismissed Botswana’s argument on the basis that the Commission’s mandate neither stemmed from the OAU Charter nor the AU Constitutive Act but the African Charter, which

remained a legally binding instrument through the transition from the OAU to the AU.¹⁵⁷

The Commission, also did not express any desire, to be recognised as an organ of the AU, even as it was excluded from the list of organs under the Constitutive Act, while its cousin – the yet to be constituted - African Court of Justice was included.

In 2013, the Commission rendered an opinion in which it argued that the African Committee of Experts on the Rights and Welfare of the Child (the Child Rights Committee/the Committee), with which it shared many similarities, should not be considered as an organ of the AU. The opinion was precipitated by a request by the Committee to the Court for an advisory opinion on the status of the Committee before the Court in terms of Article 4¹⁵⁸ of the Protocol to the African Charter on Human and Peoples’ Rights in the Establishment of an African Court on Human and Peoples’ Rights (the Court Protocol) . The Committee, in its request, asserted that it had rights as an organ of the AU to request advisory opinions on any matter from the Court, as well as rights to legal standing on any contentious matters before the Court in terms of Article 5(1)(e) of the Court Protocol.¹⁵⁹

Of all submissions pertaining to this Advisory Opinion, the Commission’s opinion was the

153 Decision of the AU Assembly, ASS/AU/Dec.1 (I), para xi, Adopted at the First Ordinary Session of the AU Assembly, held from 9 – 10 July 2002 in Durban, South Africa https://au.int/sites/default/files/decisions/9549-assembly_en_9_10_july_2002_assembly_heads_state_government_first_ordinary_session_0.pdf.

154 See AU Website: <https://au.int/en/legal-organs>.

155 Communication 313/05: Kenneth Good v. Botswana, para 53-55, Available at <http://caselaw.ihlda.org/doc/313.05/view/en/#admissibility>.

156 Communication 313/05: Kenneth Good v. Botswana, para 53-55, Available at <http://caselaw.ihlda.org/doc/313.05/view/en/#admissibility>.

157 Communication 313/05: Kenneth Good v. Botswana para 72-79 Available at Available at <http://caselaw.ihlda.org/doc/313.05/view/en/#admissibility>.

158 Article 4 of the African Court Protocol provides as follows:

1. At the request of a Member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

159 Article 5(1) of the Court Protocol provides as follows:

1. The following are entitled to submit cases to the Court
 - a. The Commission;
 - b. The State Party which has lodged a complaint to the Commission;
 - c. The State Party against which the complaint has been lodged at the Commission;
 - d. The State Party whose citizen is a victim of human rights violation;
 - e. African Intergovernmental Organisations.

only one that dissented with the idea of the Committee being recognised as an organ of the AU. The Commission gave a number of reasons why the Committee's recognition as an organ of the AU was problematic. The Commission noted that Article 5(1) of the Constitutive Act was unambiguous in its specification of which institutions were recognised as 'organs of the AU' and that the Committee was specifically excluded from that list.¹⁶⁰ The Commission also noted that organs by their very nature are 'sub-entities' or 'sub-structures' of a principal entity, subject to the provisions of the legal instrument establishing the principal entity and its amendment procedures.¹⁶¹ The Commission further reasoned that for the Committee to be considered an organ of the AU, it ought to have been created under the Constitutive Act and governed by the Constitutive Act or a subsidiary instrument to the Constitutive Act. The Commission noted that the Committee came into existence under a different and independent instrument, the African Charter on the Rights and Welfare of the Child (the African Children's Charter), which preceded the AU Constitutive Act and outlived the OAU Charter, and thus it did not exist as an appendage of the AU and could not be considered a sub-entity of the AU.¹⁶²

5.2 The African Court's stance and its effects

In its final decision, the Court disagreed with the Commission's assessment as it reached the conclusion that the Committee was indeed an organ of the AU. The Court, in reaching its conclusion¹⁶³ pointed to three things to affirm

160 Opinion of the African Commission on Human and Peoples' Rights to the African Court on Human and Peoples' Rights on the Request for an Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights (African Commission Opinion on the African Committee), para 3.8 and 3.9.

161 African Commission Opinion on the African Committee, para 3.11.

162 African Commission Opinion on the African Committee, para 3.13.

163 Advisory Opinion No 002/2013 available at <http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf>.

the Committee's status as an organ of the AU: the language of a 2002 decision by the Assembly stating that the Committee would now 'operate within the framework of the AU', the views of the states that responded to the advisory opinion asserting that the Committee was indeed an organ of the AU, and specific attributes of the Committee namely its budgeting process, its quasi-judicial nature, and its reporting mechanisms to policy organs of the AU.¹⁶⁴ The Court further expounded that the treatment of the Committee by the AU policy organs including being listed in agendas of the Executive Council and the Assembly and appearing in decisions emanating from the bodies' deliberations confirmed that the Committee was indeed an organ of the AU.¹⁶⁵ The Court did not however elaborate what the significance of the Committee's status as an organ of the AU meant for its operational and substantive independence.

Individuals who served at the Commission also suggest that the Commission's opinion became infamous and roused tensions with both the Court and the Committee. The Commission's opinion had made it clear that it did not wish to be considered an organ of the AU. The Court's decision indicated that it considered the Commission an organ of the AU. Just like the Committee, the Commission was quasi-judicial in nature, shared the same budgeting and reporting mechanisms and was subject to AU policy organs' decisions in the same manner as the Committee, for instance with respect to publication of its decisions.

It is critical to understand the significance of the Commission's 2013 opinion and why it did not desire either itself or the Committee to be considered as organs of the AU. The Commission's motivation was clearly anchored in asserting its independent status as a human rights body and distancing itself from the kind of political influences that its consideration as a sub-entity of a political organisation would attract. The Commission was cognisant of the dangers of having its subordinate status to AU policy organs

164 Advisory Opinion No 002/2013 para 54 & 55.

165 Advisory Opinion No 002/2013 para 55 & 56.

entrenched through judicial precedent. As some scholars previously argued, the Commission should be seen as an autonomous treaty body, albeit one exercising a mandate designed by the AU, rather than be considered an organ of the AU.¹⁶⁶

In more recent times, the Commission seems to have resigned itself to the narrative that it is an organ of the AU and has pronounced itself multiple times claiming its status as an organ of the AU. There are several reasons that could explain these changing perspectives.

One is a philosophical shift within the Commission, explained in part by changes in leadership at the Commission, and how such leadership is choosing to respond to external pressures in different ways. This is a concerning development at a time when the Commission is facing increased pressures to its independent mandate by AU policy organs. For Commission leadership to choose to assert its status as an organ of the AU, a status that can only further subject the Commission to such pressures is not only ill-advised but self-destructive.

The second is a fear of extinction through dissolution of its mandate. This constant and ever-present danger has seen the Commission trying to navigate political threats cautiously through diplomatic means and in some instances, cowering to the demands of political organs of the AU. As discussed in earlier parts of this report, the Assembly has the power to amend the Charter and in so doing alter the Commission's mandate, functions and powers. The Assembly has already shown that it has the power to do this by parcelling out parts of the mandate that were originally of the Commission to other AU bodies. The creation of the African Committee removed children's rights from the Commission's purview. The creation of the African Court with the competence to adjudicate human rights violations forced the Commission to share its protective

mandate. The creation of a Peace and Security Council recast cases of massive and widespread violations as not just a human rights issue but also, and critically, a peace and security issue.

While these sister-institutions can complement the work of the Commission, their creation has often occurred against a backdrop of negative perceptions of the Commission. In particular, the Court's rise, amidst challenges to the Commission's own competence to hear Communications cemented the appearance of hierarchies.¹⁶⁷ Further, the creation of the Court resurrected questions of the Commission's institutional legitimacy as determined by the weight of its decisions. Whereas the African Charter stated that the Commission's decisions were recommendations,¹⁶⁸ the Court Protocol specified that Court decisions were final judgements,¹⁶⁹ exacerbating tensions between the two bodies. The Commission has been at pains to assert that its decisions are binding on states¹⁷⁰ indicating that the differentiation in the language surrounding the Court and the Commission is of concern to the Commission.

The behaviour of the policy organs towards both the Commission and the Court have not helped to assuage the Commission's concerns. Over the years, the Assembly – acting in consultation with the Executive Council, the PRC and the AUC – has tended to allocate bigger budgets to the Court than to the Commission. For instance as Magnus Killander points out, in the 2016 period alone, the Court got USD 10 million, a budget in excess of USD 4 million more than that of the Commission which got USD 5.6 million.¹⁷¹ Again in the allocation of the 2018 Supplemen-

¹⁶⁶ Odinkalu, C. (2013). *From Architecture to Geometry: The relationship between the African Commission on Human and Peoples' Rights and Organs of the African Union*, *Human Rights Quarterly*, 35(4), 850-869.

¹⁶⁷ Odinkalu, C. (2013). *From Architecture to Geometry*, 857-862.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ Murray, R. (2000). *The African Commission on Human and Peoples' Rights and International Law*. London: Hart Publishing p. 54 - 55.

¹⁷¹ Killander, M. (2016). Human rights developments in the African Union during 2015. *African Human Rights Law Journal* 16(2), 532-553@ 535.

Table 1

Organ	Year	Funding from Member States			Funding from Partners		Combined Funding		
		Operations	Programs	Total	Programs	Total	Total Operations	Total Programs	Grand Total
AfCHPR	2018–2019	7,987,200	5,058,246	13,045,446	947,446	947,446	7,987,200	6,005,691	13,992,891
ACHPR	2018–2019	4,778,973	1,539,000	6,317,973	707,138	707,138	4,778,973	2,246,138	7,025,111

tary Budget and the 2019 Budget, the African Commission received much less support than the African Court, as illustrated in Table 1.¹⁷²

This underfunding of the Commission appears to be at worst punitive, and at best restrictive, given that the Commission deals with all 54 states parties to the Charter,¹⁷³ unlike the Court's 30 States Parties to the Court Protocol.¹⁷⁴ Further, the Commission has a broader mandate and deals with a variety of functions besides adjudication of cases, such as fact-finding missions, promotional missions, investigative missions, research and publication, state reporting procedures, interpretation of the Charter through the production of resolutions, general comments and other similar documents. It would be logical for the Commission, as the institution with a broader mandate to receive more funding, yet this is not the case.

However, despite its claims, it still seems that the jury is out on whether the Commission is actually an organ of the AU or not. Under its 2020 Rules of Procedure,¹⁷⁵ the Commission categorically declared, in Rule 3(2) that through a decision of the AU Assembly,¹⁷⁶ it acquired the status of an Organ of the AU. However, a reading of

the AU Assembly decision that the Commission cited, reveals that the Assembly encouraged the Commission to take steps to regularise its status as an organ of the AU, implying that such regularisation had not yet taken place.¹⁷⁷ It is not clear what the steps that the Commission needed to take were, whether they were taken, when and with what effect.

6. Conclusion

This report has examined the relationships between the African Commission and key political organs of the AU, namely the Assembly, the Executive Council and the PRC. It has also shown how certain aspects of its procedural and substantive mandates are linked to the work of other bodies with similar mandates within the African Regional Human Rights System such as the African Court, the African Children's Committee and the PSC. The report focused on aspects of these relationships that impact the functionality and independence of the Commission as the premier human rights treaty body within the African Regional Human Rights System. The report analyses policies, laws, processes and procedures that tie the AU political organs as well as the other bodies with the Commission to determine points of convergence and divergence of agendas, which can enhance or undermine the independence of the Commission.

6.1 Key Findings

Key among the findings that this report made are the following:

1. The African Commission's mandate is intricately tied with that of the political organs of the AU. From its inception, the Commission was

172 Excerpts from Decision Assembly/AU/Dec.699(XXXI), Decision on the 2019 African Union Budget and the 2018 Supplementary Budget, Adopted at the 31st Ordinary Session of the AU Assembly held from 1 to 2 July 2018 in Nouakchott, Mauritania

173 Status of ratification of the African Charter as of 15 June 2017: <https://au.int/sites/default/files/treaties/36390-sl-african-charter-on-human-and-peoples-rights-2.pdf>.

174 Status of ratifications of the Court Protocol as of 15 June 2017: <https://au.int/sites/default/files/treaties/36393-sl-protocol-to-the-african-charter-on-human-and-peoplesrights-on-the-estab.pdf>.

175 The 2020 Rules were adopted by the African Commission on Human and Peoples' Rights during its 27th Extra-Ordinary Session held in Banjul (The Gambia) from 19 February to 04 March, 2020.

176 Decision AU Assembly/AU/Dec.200 (XI) adopted by the Assembly during its 11th Ordinary Session held from 30 June – 1 July 2008 in Sharm El-Sheikh, Egypt.

177 Para 8 of AU Assembly/AU/Dec.200 (XI) Available at <https://au.int/sites/default/files/decisions/9558-assembly-en-30-june-1-july-2008-auc-eleventh-ordinary-session-decisions-declarations-tribute-resolution.pdf>.

designed to be co-dependent on the political organs for its existence, legitimacy and effectiveness, while the political organs also relied on the Commission to lend legitimacy to the overall image of the OAU/AU as a regional body serious about addressing human rights violations.

2. In the absence of direct instructive interference, there is room for the cultivation of mutually beneficial relationships between the Commission and political organs of the AU. For instance, the effective implementation of the Commission's decisions, given its lack of enforcement capabilities, is largely influenced by the political organs of the AU while implementation of such decisions boosts states' and the AU's reputation, it becomes apparent that the retention of a cohesive relationship between the Commission and political organs of the AU is mutually beneficial.

6.2 Recommendations

The report recommends that:

1. the African Commission should continue to assert its independence in executing its institutional mandate while retaining good working relationships with the political organs of the AU.
2. the African Commission utilise its powers under Article 45(3) of the African Charter and issue an advisory opinion asserting its own competence to interpret the Charter, and in particular to articulate the meanings of Articles 54 and 59 as read together, to determine:
 - a) the scope of application of the rule of confidentiality; and
 - b) the kind of influence the Assembly and Executive Council should legally exercise in the publication process of the Commission's Activity Reports.
3. the Assembly, Executive Council and the PRC should observe and respect the African Commission's interpretative mandate and capacities, and if aggrieved by decisions promulgated through the exercise of this mandate, to use legal avenues rather than political ones to challenge such interpretations.

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