



Exploring the Impact of State Behaviour on the African Commission's Autonomy

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Developed by: Dr Mariam Kamunyu

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1. Background

For more than three decades now, the African Commission on Human and Peoples' Rights (African Commission) has been the leading regional treaty body responsible for supervising State compliance with and implementation of the African Charter on Human and Peoples' Rights (African Charter). Operational since 1987, the African Commission has steadily grown into maturity. In the early years of its existence, it was a rather timid and overly cautious institution in its engagement and interaction with States. It was not only hesitant to adopt a liberal and progressive interpretation of the African Charter, but it also remained silent or dragged its feet in responding to and condemning human rights violations committed by states.¹ This posture was understandably frustrating and disappointing for victims, human rights groups and scholars that reasonably expected stronger and bolder action. It follows that they were the most vocal critics of the African Commission in those initial years, with Makau Mutua, for instance, describing the African Commission as "a façade, a yoke that African leaders have put around our necks"²

Towards the end of the 1990s, the African Commission began to turn the corner, a process that gained significant impetus when the Organization of African Unity (OAU) was replaced by the African Union (AU) in 2002. Unlike the OAU, the AU had a specific and robust mandate to intervene in matters of human rights.³ This new dispensation created the environment necessary for the African Commission to be assertive and audacious in executing its promotional and protective mandate. In the years that have followed, the Commission, amongst other things, has issued strongly worded resolutions condemning human rights violations and delivered landmark

decisions that affirmed its leadership in interpreting and expanding the corpus of the African Charter. In effect, the African Commission is today no longer the "toothless bulldog" it was derisively said to be;⁴ it is now thought that its image more accurately fits that of a cat, even a lion.⁵ While this new stance has been welcomed and cherished by victims, human rights groups and scholars, states have been enraged by it. The result has been a deluge of mostly unfounded and unfair state criticism of the African Commission in recent years. More importantly, states have taken deliberate and proactive steps to undermine and weaken the African Commission. In this context, Decision 1015, adopted by the AU Executive Council in June 2018, stands out as the most intrusive and consequential state-led political backlash yet against the African Commission.⁶

In the period immediately following its adoption, Decision 1015 created a tense and acrimonious relationship between the African Commission and AU member states. Indeed, Decision 1015 exemplifies what has been termed as a turn towards a more belligerent and disdainful attitude against the Commission by states.⁷ In the long term, however, it has come to be appreciated that Decision 1015 reflects a broader pattern of state actions and inactions that undermine the institutional independence and autonomy of the African Commission. Indeed, a much wider pattern of state erosion of the effectiveness and

1 See U Umozurike 'The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness' (2007) 13 *Annual Survey of International and Comparative Law* 179.

2 M Mutua 'The African human rights system in a comparative perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5, 11.

3 See generally R Murray *Human rights in Africa: From the OAU to the African Union* (2004).

4 N Udombana 'Towards the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45, 64.

5 See F Viljoen 'From a cat into a lion? An overview of the progress and challenges of the African human rights system at the African Commission's 25 year mark' (2013) 7 *Law Democracy and Development* 298.

6 See J Biegon '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*, 2 August 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!](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-ejil-talk/) ([ejiltalk.org](https://www.ejiltalk.org)) (accessed 4 May 2021).

7 L Mute 'Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: Leveraging the roles of National Human Rights Institutions', June 2021, available [NHRIs-ACHPR_EN.pdf](https://www.achpr.org/publications/working-papers/working-paper-1015-2021/) ([achprindependence.org](https://www.achpr.org)) (accessed 20 July 2021).

credibility of existing institutions of the African human rights system has been at play. By way of example, states have in the last four years not only hit back at the African Court on Human and Peoples' Rights (African Court) for issuing out certain judgments, but they have gone ahead to withdraw the right of individuals and Non-Governmental Organizations (NGOs) to directly access the Court.⁸ These actions have effectively thrown the African Court into an existential crisis.⁹

Against the above backdrop, this paper examines how state behaviour undermines the African Commission's ability and capacity to effectively function and execute its mandate. The paper is based on a detailed desk analysis of relevant documents of the African Commission and AU policy organs. It also draws upon scholarly reviews of the interactions between the African Commission and states. The paper is structured as follows. Following this introduction, section 2 sketches a general typology and frame for analysing and understanding state behaviour in their engagement with international human rights treaty bodies such as the African Commission. Section 3 traces the evolution of the African Commission's relationship with states. It focuses on key events that have defined states' attitudes and actions relating to the Commission. Section 4 assesses specific forms of state behaviour that have undermined the African Commission's promotional and protective mandate. Section 5 provides a brief comparative analysis. It presents a synopsis of good practices from other regional human rights systems in regard to the relationship between states and the respective human rights treaty bodies in those systems. Section 6 draws the paper to a conclusion.

2. Unpacking state behaviour in regional spaces

Human rights treaty bodies are an embodiment of a fundamental paradox that is inherent in

international human rights law and practice. They are created and funded by states who are the primary human rights duty bearers as well as the principal violators of those rights. The nature of the work of human rights treaty bodies demands that they scrutinise, condemn and publicly call out those states that violate human rights. Yet, without coercive powers to enforce treaty obligations, human rights supervisory bodies depend on the cooperation and good faith of these very states. From a general legal standpoint, state parties to a human rights treaty that creates a supervisory body are duty bound to cooperate with the supervisory body. In this context, the African Commission has held that by ratifying the African Charter, state parties have signified their "commitment to cooperate with the African Commission".¹⁰ The AU itself has also stated that the Commission's "impact as an effective human rights organ of the African Union depends primarily on the support and cooperation it receives from Member States".¹¹

The 2020 Rules of Procedure of the African Commission stipulates some specific areas that state cooperation is expected. For instance, Rule 76(2) provides that "State Parties shall facilitate the undertaking of promotion missions, including by responding promptly to any request for authorisation to undertake such a mission". Rule 87 further provides that during such in-country missions, state parties are expected to guarantee free movement of the members and staff of the Commission, provide the Commission with any required documentation and provide security to the delegation. Rule 92 addresses state cooperation in the context of the communications procedure. It provides that "the parties to a communication have a duty to cooperate fully in the conduct of the proceedings before the Commission and, in particular, to take such action within their power as the Commission considers necessary for the proper administration of justice".

In practice, state cooperation with and behaviour vis-à-vis human rights treaty bodies, and in this

8 Between 2016 and 2020, four states (Benin, Cote d'Ivoire, Rwanda and Tanzania) withdrew the right of individuals and NGOs to directly access the African Court.

9 See H Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1.

10 *Democratic Republic of Congo v Burundi* (2004) AHRLR 19 (ACHPR 2003) para 53.

11 Annual report on the activities of the African Union and its organs 2017, para 75.

case the African Commission, is more nuanced and complex. In most cases, states' engagement with the African Commission runs along some form of a continuum. For purposes of this paper, as shown in the diagram below, four typologies of state behaviour vis-à-vis the African Commission are identified: the cooperative state; the supportive state; the hostile state; and the disengaged or indifferent state. It is important to note that state behaviour is not static. It changes with time and is dependent on a myriad of factors, including the human rights situation at the domestic level and changes in government or the country's leadership. In this light, a longstanding cooperative state may disengage or even become hostile. The reverse is true. A perennially hostile or disengaged state may change and become cooperative or supportive. In other cases, a state may be cooperative in respect of one issue and hostile in respect of another (see Figure 1).

The typology of state behaviour vis-à-vis treaty bodies is not unrelated to the reasons why states ratify and commit to human rights treaties in the first instance. Studies have shown that states, particularly perennial perpetrator states, often engage in "insincere ratification or commitment".¹² In other words, they do not genuinely believe in the norms and values contained in a human rights treaty, but they nevertheless go ahead to ratify it because of the benefits that may come with ratification. Benefits may include positive publicity or even tangible benefits such as access to aid and funding. Perpetrator states also ratify human rights treaties to avoid criticism and deflect internal pressure. It follows that the behaviour and attitude of such states towards the supervisory body is most likely to be less than cooperative.

2.1. The cooperative state

The cooperative state routinely collaborates with the African Commission. It submits its periodic reports, even if irregularly. It attends most sessions of the African Commission and

12 B Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 77-80; H Smith-Cannoy *Insincere commitments: Human rights treaties, abusive states, and citizen activism* (2012) 17-24.

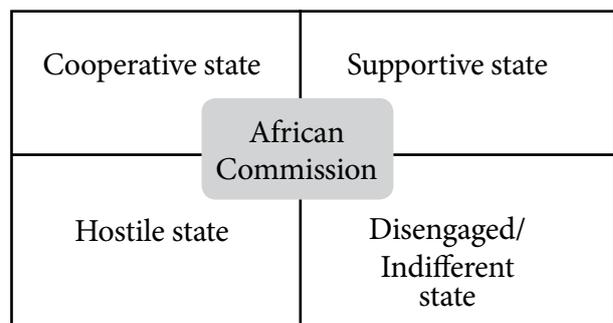


Figure 1

occasionally consents to promotional or fact-finding missions. The cooperative state may also go as far as to fully comply with specific recommendations of the African Commission, such as concluding observations or recommendations emanating from the Commission's communications procedure. In reality, though, the cooperative state is a rare state. It is an outlier. Most states, if not all, cooperate with the African Commission on some aspects and not others.

2.2. The supportive state

The supportive state goes beyond cooperation. It proactively seeks to support the African Commission to ensure it is effective in executing its promotional and protective mandate. In other words, a supportive state is an ally of the Commission. It may, for instance, defend the work of the Commission or fend off attacks against it during deliberations of AU policy organs such as the Executive Council and the Permanent Representatives Committee (PRC). A classic example of direct support was seen during the 8th ordinary session of the Executive Council held in July 2006. At this session, Zimbabwe bitterly complained that the African Commission was acting at the behest of NGOs that it alleged funded some of its activities.¹³ In defence of the Commission, and manifesting elements of a supportive state, South Africa argued that the blame lied on the AU for its failure to adequately fund the African Commission. South Africa

13 See Response by the Government of the Republic of Zimbabwe to the Resolution on the Human Rights Situation in Zimbabwe Adopted by the African Commission on Human and Peoples' Rights During its 38th Ordinary Session Held in Banjul, The Gambia, from 21 November to 5 December 2005, EX.CL/279(IX) Annex III, p. 106.

went ahead to pledge and second an officer to the African Commission to boost its technical capacity.¹⁴

2.3. *The hostile state*

The defining mark of a hostile state is its concerted political attacks against a human rights treaty body, in this case the African Commission. The hostile state deliberately seeks to undermine the independence, credibility and legitimacy of the treaty body. This usually happens in a context in which the treaty body has raised concerns about the human rights situation in the concerned state. Instead of addressing these concerns, the state in question attacks the treaty body with a view to discredit it and question its authority to act as it did. In this sense, the hostile state exhibits a common tactic that is used by perpetrator states to deflect criticism of its human rights situation. In his seminal work on state responses to human rights reports, Cohen has identified three forms of typical responses: denial, counter offensive and acknowledgment.¹⁵ The hostile state often resorts to not just denial that human rights violations have occurred in the country as stated by the treaty body, but it also launches a counteroffensive.

In recent years, Egypt has set itself apart as a particularly hostile state in its engagement with the African Commission. It was at the centre of the adoption of Decision 1015 and the problematic provisions contained therein insofar as the independence and autonomy of the African Commission is concerned.¹⁶ In other instances, Egypt has openly refused to engage in proceedings before the African Commission. For instance, in August 2019, Egypt categorically stated that it

will not participate in a communication pending before the Commission.¹⁷

2.4. *The disengaged or indifferent state*

The disengaged or indifferent state does not engage in any way with the treaty body. It does not respond to correspondence from the African Commission. Neither does it react to condemnation of its human rights record by the Commission. In many instances, the indifferent state has little capacity to engage at the international or regional level because of the prevailing domestic situation, such as an armed conflict. In other instances, the disengaged state has in place a government that has adopted an official policy of indifference to international bodies and institutions. Some of these states completely shut out the world. In the words of Cohen, “they shut their shells and withdraw from any engagement”.¹⁸

With about two decades of a largely self-imposed diplomatic isolation from the international community, including the AU, Eritrea has long stood out as a classic example of a disengaged state in its interaction and relationship with the African Commission. Until 2012, Eritrea kept away from the sessions of the African Commission, and more importantly, it responded to the Commission’s decisions and resolutions regarding the human rights situation in the country with a deafening silence.¹⁹ Eritrea started attending the Commission’s sessions in 2012, but it was not until 2018 when it submitted its initial state party report, 19 years after it acceded to the African Charter. Eritrea’s non-cooperation with the African Commission is indeed a reflection of a larger indifference to or disengagement from the international human rights system. It has long refused to cooperate with UN human rights

14 J Biegon, *The impact of the resolutions of the African Commission on Human and Peoples’ Rights*, Unpublished LLD Thesis, University of Pretoria, 2016, p 215.

15 S Cohen ‘Government responses to human rights reports: Claims, denials and counterclaims’ (1996) 18 *Human Rights Quarterly* 517.

16 See Amnesty International, ‘Egyptian President’s chairmanship must not undermine African Union’s commitment to human rights’, 8 February 2019, [Egyptian President’s chairmanship must not undermine African Union’s commitment to human rights | Amnesty International](#) (accessed 4 July 2021).

17 Egypt observations on the 46th Activity Report of the African Commission on Human and Peoples’ Rights, available at [Egypt Observation on 46th Activity Report of ACHPR ENG. pdf](#) (accessed 4 July 2021).

18 S Cohen ‘Government responses to human rights reports: Claims, denials and counterclaims’ (1996) 18 *Human Rights Quarterly* 517, 521.

19 See *Zegveld v Eritrea*, Communication 250/2002, African Commission on Human and Peoples’ Rights, Seventeenth Annual Activity Report (2003 -2004) and Article 19 v Eritrea, Communication 275/2003, African Commission on Human and Peoples’ Rights, Twenty-second Activity Report (2007).

mandate holders or bodies, including the Commission of Inquiry on Human Rights in Eritrea, the Working Group on Arbitrary Detention, and Special Rapporteurs.²⁰ Like Eritrea, there are several other countries that have rarely, if at all, engaged with the Commission. They include Comoros, Equatorial Guinea, Guinea Bissau, Sao Tome and Principe, Somalia, and South Sudan.

3. Tracing the African Commission's independence: Relevant history and key narratives

With the African Charter having entered into force in October 1986, the African Commission was established by the Organisation of African Unity (OAU) in its 23rd Summit held in Addis Ababa in July 1987.²¹ This section aims to trace the historical evolution of narratives and events that exemplify either the safeguard or undermining of the African Commission's independence from inception to date.

3.1. The seat of the African Commission

The Commission attained full functionality in 1989 when its Secretariat was inaugurated in Banjul, the Gambia. Two apparent reasons have been advanced as reasons for selecting Banjul as the seat: firstly, as a tribute to the city in which most of the drafting of the African Charter took place, hence its popular reference as the Banjul Charter; and secondly because at the time The Gambia was deemed to be one of Africa's long-standing democracies.²²

The foregoing notwithstanding, given the far-flung location of Banjul, the selection of the

Commission does attract scrutiny in terms of the OAU's motives. The African Commission on its part recommended for its seat to be established in a country which has ratified the African Charter and a country other than the one hosting the political and administrative organs of the OAU (i.e., Ethiopia), in a move clearly meant to establish its independence. The Commission also requested for a host country that would be able to offer it substantial support in order to carry out its mandate effectively.²³ On this last point only, given the commonplace complaints among Commission frequenters on the remoteness of Banjul and its infrastructural challenges in present day, is it possible to fairly submit that Banjul satisfied the venue suitability test 34 years ago? It is unlikely. Was Banjul then selected for a lack of other suitable choices?

By 1987, at least 32 states had ratified the African Charter,²⁴ therefore making many of them potential hosts for the African Commission and therefore eliminating the possibility of limited options. Perhaps then it is possible as has been suggested by many that Banjul "was chosen as a way of consigning the Commission to neglect, a struggle against the odds of inaccessibility and fragile infrastructure, and possible oblivion."²⁵ Right from the Commission's embryonic stage therefore, it would not be far-stretched to insinuate on the part of the OAU, a lack of good will at worst, and at best a lack of commitment towards the potential success of the then fledgling African Commission. This indictment on the part of the OAU can be further supported by early claims of non-support for the Commission's work. As early as 1989, the African Commission's Vice-chairman writing in his personal capacity complained:²⁶

20 The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment issued a visit request to Eritrea in 2005, 2007, 2010, 2017 and 2018 while the Special Rapporteur on the rights to freedom of peaceful assembly and of association issued a visit request in 2018 and 2020. See Report of the Special Rapporteur on the situation of human rights in Eritrea, Human Rights Council, Forty-seventh session (2021).

21 1st Activity Report of the African Commission on Human and Peoples' Rights 1987-1988 and 'Establishment of the African Commission on Human and Peoples' Rights' (1987) 19 *SIM Newsletter* 89-90.

22 See further: F Viljoen, 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 426 - 427 and F Viljoen *International human rights law in Africa* (2012) 291.

23 1st Activity Report of the African Commission on Human and Peoples' Rights 1987-1988, Annex VI 'Recommendation on the Headquarters of the African Commission on Human and Peoples' Rights'.

24 Mali, Togo, Senegal, Guinea, Congo, Sierra Leone, Rwanda, Nigeria, Gambia, Zambia, Tanzania, Egypt, Burkina Faso, Somalia, Guinea-Bissau, Uganda, Sudan, Sao Tome, Sahrawi Arab Democratic Republic, Niger, Mauritania, Libya, Gabon, Equatorial Guinea, Comoros, Chad, CAR, Botswana, Benin, DRC, Cape Verde, Algeria (arranged in order of ratification).

25 F Viljoen *International human rights law in Africa* (2012) 291.

26 I Badawi El-Sheikh 'The African Commission on Human and Peoples' Rights: Prospects and problems' (1989) 7 *Netherlands Quarterly of Human Rights* 277 - 278.

The Secretary-General of the OAU, right from the beginning, pledged his full support for the Commission. However, there has been a lack of human and financial resources available to the Commission... The Commission requested that a number of professionals be assigned to its Secretariat, but that request has not been met. Thus, up till now, the Commission's Secretariat is deprived of professionals or means to conduct research or any other activities... An effective Secretariat is vital for the proper functioning of the Commission.

The foregoing claim serves to provide overall context and point to evidence of OAU's recalcitrance in enabling the African Commission's functionality and effectiveness from inception.

3.2. Identity and mandate clarity

In the early days, it appears that the African Commission may have grappled with clarity over its *identity* and *mandate*. Regarding identity, in its very 1st Activity Report, the Commission described itself as "quasi-legislative".²⁷ This description was ostensibly premised on the description of its mandate in article 45 of the African Charter which calls on the Commission:²⁸

To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.

While such a description is not detrimental and is factually accurate, the Commission is more accurately described as a quasi-judicial organ particularly given its protective mandate which includes the individual and inter-state communications procedure. In fact, this realisation must have occurred to the Commission as there are no other sightings of it referring to itself as quasi-legislative. Nevertheless, this initial mischaracterisation where the Commission did not immediately realise its judicial role especially

given the fact that at the time there was no other continental judicial organ,²⁹ is quite telling and would in fact prove ominous. It is indeed the judicial mandate of the Commission that has been the subject of greatest attack with conduct from states ranging from noncompliance to indifference to open hostility.

Further on identity, the Commission has also frequently been referred to as a *sui generis* body signalling its unique identity. While it has judicial function, it is not a supra-national court and while it relates so closely to and relies heavily on the AU, it is not a political organ. What is clear is that it is an independent organ. As early as 1989, speaking to the Commission's judicial nature and relationship with the AU Assembly of Heads of State and Government, the Commission's first Vice-Chairman warned that, "the Commission will have to perform its tasks with tact and vigour."³⁰

On mandate clarity, the African Commission seems to have been unclear on one of the most vital mandates of a treaty monitoring body, the mandate of state reporting. In their 1st Activity Report, the Commission notes that article 62 of the African Charter creates an obligation to states to submit periodic reports. Curiously, the Commission then notes further that while there is a state reporting mandate, it is unclear to which organ of the OAU this work should be entrusted. Based on this purported mandate gap, the Commission then proceeds to the Assembly of the Heads of State and Government to authorise the OAU General Secretariat to receive state reports and for the Commission to be entrusted with the task of examining state reports.³¹ Even at such a nascent stage, it was wholly evident based on a holistic reading of the African Charter and an understanding of treaty monitoring bodies generally that the task of state reporting naturally fell to the treaty monitoring body. In fact, the two articles that precede article 62 on state reporting

27 1st Activity Report of the African Commission on Human and Peoples' Rights 1987-1988.

28 African Charter on Human and Peoples' Rights, article 45(1) (b).

29 This is said in reference to the later day continental judicial organ, the African Court on Human and Peoples' Rights.

30 I Badawi El-Sheikh 'The African Commission on Human and Peoples' Rights: Prospects and problems' (1989) 7 *Netherlands Quarterly of Human Rights* 283.

31 1st Activity Report of the African Commission on Human and Peoples' Rights 1987-1988.

and Chapter IV of the Charter where these provisions are contained were specifically addressing the African Commission on the applicable principles in undertaking their work. The seeming lack of mandate clarity therefore as evidenced in their Activity Report is less indicative of opacity in understanding their mandate and more indicative of deference to Addis Ababa.

The Commission's request to be bestowed with the mandate to examine state reports can also be said to set a risky precedent as it planted in the psyche of the OAU that they were the mandate giver. Yet in truth, the Commission clearly possessed this treaty bestowed mandate. The African Commission's mandate is treaty based and not given through executive resolution. An alternative approach would have been by way of a notification to the OAU with a request for requisite support in facilitating this mandate. This scenario is described as a risky precedent since a mandate giver can also act as a mandate taker. Further, the overall lack of mandate clarity is particularly significant for this work because it points to an overly deferential attitude on the part of the Commission to the OAU that may have contributed to cement the unequal power dynamics that besiege the two institutions to date, with the Commission's independence threatened as a result.

In fact, the foregoing posture on the part of the Commission may explain the initial difficulties with state reporting. For instance, initially, the Commission did not issue 'concluding comments' or 'concluding evaluation' of state reports.³² The practice initially was that sometimes individual commissioners would express their views but for a long time (into the 2000s) no uniform position was adopted by the Commission.³³ The Commission would conclude the examination of state reports by thanking the state representative present and send them on their way without formal concluding observations as is the case presently. This practice of not issuing concrete remarks to states on how to improve

their human rights situations was a bane of the state reporting procedure for far longer than it needed to be, and it compromised the Commission's ability to better fulfil their mandate of protection and promotion of human rights.

It is important to note here that all the foregoing historical narratives are not submitted as criticism since the novelty of the Commission and the context of the times informed the Commission's actions, rather these arguments are submitted in order to provide a historical context of the relationship between the Commission and AU Executive organs.

3.3. *Calls for an African Court*

Barely a decade into the inception of the African Commission, there was mounting pressure to improve the human rights system.³⁴ The enforcement mechanism was weak, and this did not go without notice.³⁵ South Africa, for example, while acceding to the Charter, observed that "there should be consultation between States parties to the Charter, *inter alia*, to consider possible measures to strengthen the enforcement mechanisms of the Charter".³⁶

The limitations of the African Commission only served to fan the flame of the above-noted pressure. The Commission's attendant limitations included lack of adequate funding. The Commission, on several occasions, decried the inadequacy of the funds availed by the African Union for execution of its mandate.³⁷ The Commission consequently had to rely on additional funding from donors and such reliance has had the effect of the Commission being accused of being

32 G Mugwanya 'Examination of State Reports by the African Commission: A critical appraisal' (2001) *African Human Rights Law Journal* 2.

33 As above.

34 G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51/1 *Journal of African Law* at 152.

35 M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012), 10.

36 R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 20.

37 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

influenced by foreign actors as a result of the notion that he who pays the piper calls the tune.³⁸

A further constraint on the effectiveness of the African Commission is the lack of enforcement and implementation of its recommendations³⁹ which when coupled with the additional limitation of a lack of a formal follow-up mechanism⁴⁰ is almost enough to render the Commission nugatory. Moreover, communications often take several years to be finalised, largely owing to the short period of time Commissioners have for consideration of these communications.⁴¹ The Commission sits twice a year in its ordinary sessions⁴² (15-21 days per session) but the consideration of communications is usually slotted for roughly two or three days per session.⁴³ The lack of scheduled sessions for the hearing and determination of communication in turn restricts the capacity of especially poor and marginalised groups to institute cases at the Commission.⁴⁴

38 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

39 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 470-471.

40 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

41 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

42 Each session was previously 15 days but has since been increased to 21 days. See Decision on the African Commission on Human and Peoples' Rights, EX.CL/Dec.995(XXXII), 32nd ordinary session of the Executive Council, 25-26 January 2018, Addis Ababa, Ethiopia.

43 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

44 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

Despite the above-noted limitations of the African Commission, the option of a court was not the only possibility floated. In fact, it was mooted that the option of replacing the Commission with a court was not suitable as a court is "not well-suited to promote human rights by conducting studies or organising conferences".⁴⁵ A dual system of complementarity thus became preferable.⁴⁶ Nonetheless, some states were still opposed to the notion of having a court as the same would serve as a challenge to their judicial sovereignty⁴⁷ while other states reasoned that African culture favoured conciliation as opposed to judicial settlement of disputes.⁴⁸

Calls for an African Court cannot be solely attributed to the challenges faced by the Commission.⁴⁹ In the late 1980s and 1990s, protection of human rights began to take centre stage in African countries as it became a pre-condition for the granting of aid.⁵⁰ In addition, the sweeping wave of democratization on the continent necessitated the straightening of a crooked human rights records⁵¹ brought about by 'corrupt, authoritarian and incompetent dictatorships'.⁵²

45 M Mbondenyi 'Investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system' PhD thesis, University of South Africa, 2008 at 354.

46 G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51/1 *Journal of African Law* at 153.

47 A Dieng 'Introduction to the African Court on Human and Peoples' Rights' (2005) 15 *INTERRIGHTS Bulletin* at 3.

48 M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012), 10.

49 M Mbondenyi 'Investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system' PhD thesis, University of South Africa, 2008 at 354.

50 G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51/1 *Journal of African Law* at 153.

51 M Mbondenyi 'Investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system' PhD thesis, University of South Africa, 2008 at 354.

52 G Wachira 'African Court on Human and Peoples' Rights: Ten years and still no justice' <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> (accessed 6 July 2021).

The campaign for a regional human rights court received political backing with the then Secretary General of the OAU stating that “the time had come for an African Court on Human Rights”.⁵³ Consequently, in 1994, the Assembly of Heads of States and Government passed a Resolution authorising the Secretary General to consider the establishment of an African Court on Human and Peoples’ Rights⁵⁴ which eventually culminated in the adoption of the Protocol to the African Charter Establishing the African Court on Human and Peoples’ Rights (Protocol to the African Charter), in Ouagadougou, Burkina Faso on 9th June, 1998.

3.4. Ratification trends

As stated above, states’ attitude towards the African Commission is not unrelated to their decision to ratify the African Charter which establishes the Commission. Indeed, it bears recalling that although the African Charter is ground-breaking in many respects and is the normative foundation of the regional system as a whole, its adoption in June 1981 was an anti-climax of a kind; as Viljoen notes, the Charter was adopted “with little fanfare ... with no debate or even a formal vote”. A historical analysis of the ratification trend of the African Charter (see table, graph and chart below) indeed reveals its slow and ambivalent acceptance. It took close to five years for the Charter to receive the required number of ratifications to allow it to enter into force. The greatest number of ratifications was recorded in 1986, the year the Charter entered into force. After 1986, there was a significant decline in the number of ratifications, with notable spikes only seen in 1989 and 1992 when five and eight ratifications were recorded respectively. The Charter initially received universal ratification in 1999 when Eritrea acceded to the Charter. After becoming an independent state in 2011, South Sudan acceded to the Charter two years later in

2013. Today, Morocco which re-joined the AU in 2017, is the only country that is not a state party to the African Charter (see Table 1 and Figures 2 and 3).

4. State behaviour: Assessing actions undermining or safeguarding the Commission

This section assesses the behaviour of member states in relation to the Commission’s core mandate of protective and promotional activities. If the Commission’s mandate were to be analogised using the carrot and stick theory, its promotional mandate represents the carrot where states are coaxed, encouraged, guided and motivated in their human rights endeavours. Its protective mandate on the other hand represents the stick where the pursuit of state accountability is the central theme particularly where human rights violations are threatened or alleged. Ideally, it is through this protective mandate where consequences for established human rights violations can be imposed on states. It is in the foregoing sense that the Commission is truly quasi-judicial in nature, able to deploy both promotional and judicial approaches albeit with more success recorded for the former.⁵⁵

4.1. Protective mandate: The role of states in enhancing or undermining state accountability

As introduced, the Commission’s protective mandate is centred on the pursuit of state accountability where human rights are threatened or violated. This is particularly through the Commission’s communications procedure and its associated mechanisms such as urgent appeals and protective visits. The role of states in enhancing or undermining state accountability is accordingly discussed specifically through the prism of the individual communications procedure. A

53 F Viljoen ‘A human rights court for Africa and Africans’, (2004) 30(1) *Brooklyn Journal of International Law* at 4.

54 Resolution on the African Commission on Human and Peoples’ Rights, AHG/Res. 230 (XXX), 13th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, Tunis, Tunisia, 13–15 June 1994.

55 See further:

M Kamunyu ‘The gender responsiveness of the African Commission on Human and Peoples’ Rights’ unpublished PhD thesis, University of Pretoria, 2018, Amnesty International *The state of African regional human rights bodies and mechanisms: 2018 – 2019* (2019), Amnesty International *The state of African regional human rights bodies and mechanisms: 2019 – 2020* (2020).

Table 1

Ratification Year	# of Ratifications	Country Names	Notes
1981	1	Mali	
1982	4	Togo, Senegal, Guinea, Congo	
1983	5	Sierra Leone, Rwanda, Nigeria, Gambia	
1984	4	Zambia, Tanzania, Egypt, Burkina Faso	
1985	2	Somalia, Guinea-Bissau	*Big jump from 1985 to 1986 ratification wise
1986	14	Uganda, Sudan, Sao Tome, Sahrawi Arab Democratic Republic, Niger, Mauritania, Libya, Gabon, Equatorial Guinea, Comoros, Chad, CAR, Botswana, Benin	*Most ratifications within a year. *States more eager to ratify, with a significant decline until 1992
1987	3	DRC, Cape Verde, Algeria	
1989	5	Mozambique, Malawi, Ghana, Cameroon, Burundi	
1990	1	Angola	
1991	1	Djibouti	
1992	8	Seychelles, Namibia, Mauritius, Madagascar, Liberia, Lesotho, Kenya, Cote D'Ivoire	*Second most ratifications within a year.
1994	1	Eswatini	
1996	1	South Africa	*2 years after independence
1998	1	Ethiopia	
1999	1	Eritrea	
2013	1	South Sudan	*2 years after independence

Figure 2: Patterns of Ratification

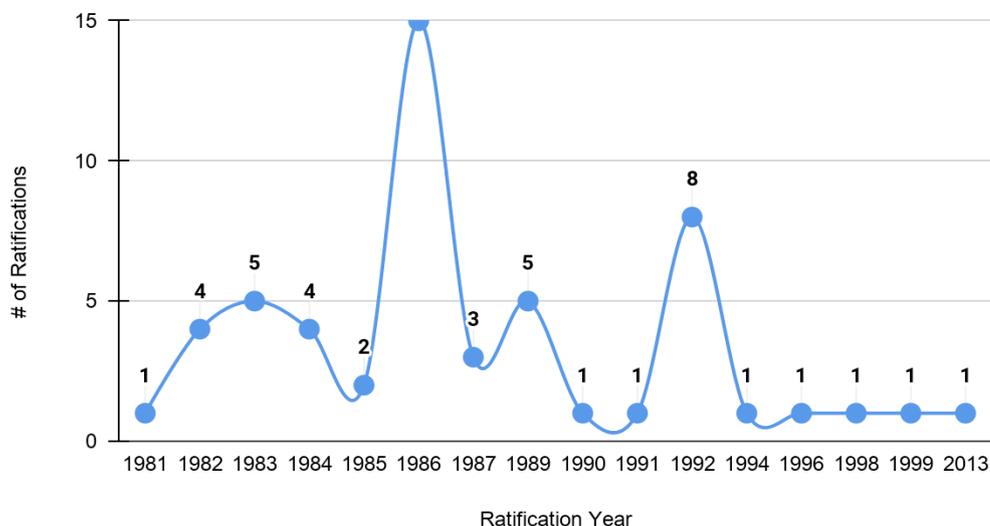
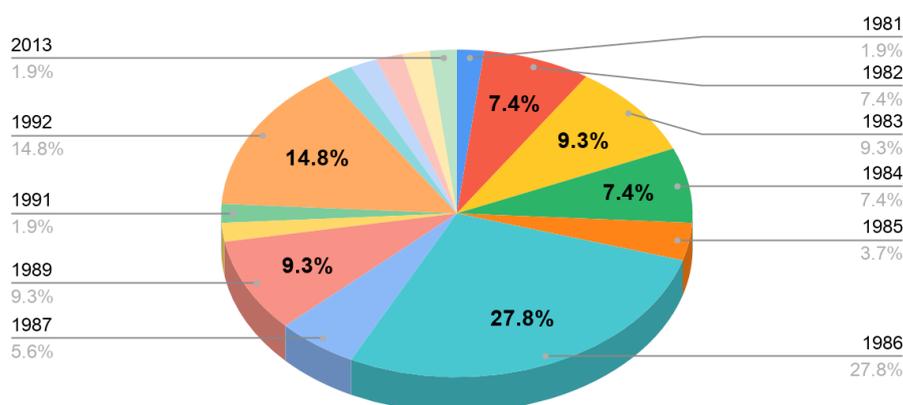


Figure 3: Patterns of ratification



panoramic assessment reveals interference with the individual communications procedure and state non-compliance with recommendations/decisions as the most significant discussion points in this regard.

4.1.1. Interference with the individual communications procedure and other protective activities via article 59

The individual communications procedure provides one of the clearest opportunities for individuals and other non-state actors to pursue state accountability for human rights violations. As noted in the historical overview section, the individual communications procedure has been fraught with challenges ranging from indifference in the early days and escalating into direct interference. This sub-section focuses on instances of direct interference with the individual communications procedure, since such state behaviour amounts to a direct attack on the Commission's independence.

State interference has predominantly been enabled through a restrictive interpretation of article 59 of the African Charter which article therefore provides the first line of inquiry in this sub-section. The impugned article provides:⁵⁶

- All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.**

⁵⁶ African Charter on Human and Peoples' Rights, article 59 (emphasis mine).

- However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
- The report on the activities of the Commission shall be published by its Chairman after it has been considered** by the Assembly of Heads of State and Government.

The inclusion of such a provision to begin with is unique, compared for instance to treaties establishing UN human rights treaty bodies.⁵⁷ Its inclusion is perhaps most indicative of the political environment in which the African Charter was incubated. While there was some initial critical support such as from the Senegalese and Gambian presidents, the OAU had within its ranks a strong old guard contingent that displayed less enthusiasm for the impending human rights wave as expressed in their reluctance and indirect obstruction (through non-participation) of the finalisation and entry of the African Charter.⁵⁸ In fact, article 59 was not contained in the initial drafts of the African Charter such as the M'baye draft. Neither did confidentiality feature in the recommendations made by an earlier UN convened meeting where the recommended text was to the extent that the African Commission

⁵⁷ Killander describes the provision as being: 'In sharp contrast to other international human rights treaties...'. In M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 573.

⁵⁸ See F Viljoen, 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 158 – 161.

should “make reports with appropriate recommendations to the OAU concerning alleged violations” and that it should submit an annual activity report to the Assembly.⁵⁹

Away from the history behind the introduction of the provision, article 59 subjected to a favourable interpretation is in and of itself quite innocuous. In relation to confidentiality and the use of the term ‘considered’ in article 59(3), see for instance the understanding propounded by the Commission’s inaugural Vice-Chairman.⁶⁰

It is true that the Commission’s recommendations concerning the communications and the protection activities in general would require the endorsement of the Assembly of Heads of State and Government of the OAU for follow-up action or publicity.⁶¹

However, such control does not impinge on the independence of the Commission in relation to the substance of the recommendations submitted to the Assembly for action. On the contrary, in relation to the promotional activities, the bulk of the Commission’s activities could be fully undertaken and completed by the Commission without any need for endorsement by the Assembly. In any case, I believe that the Commission could capitalize on its relationship with the Assembly of Heads of State and Government of the OAU to obtain the maximum political support for its activities in the field of human rights.

This last sentiment (on political support) in fact more correctly points to the more progressive spirit of the provision. A progressive interpretation of article 59 could point to the initial cooperation and assistance that was envisaged by the OAU towards the African Commission in fulfilling its mandate. Early commentators also support this position arguing that, while there are provisions in the African Charter that create accountability channels between the Commission

and the OAU/AU the only corollary to be drawn from this is that “the OAU/AU should therefore be the final port for the enforcement of the Commission’s decisions and some of the responsibility for doing so should rest with it [the OAU/AU]”.⁶² This position has found expression in the work of current scholars who opine that the any ‘consideration’ by the AU should be done in furtherance of the objects and purpose of the African Charter, to wit, the protection and promotion of human rights.⁶³ As such, the Assembly of Heads of State and Government must take on an enforcement role that favours victims of human rights violations while the Executive Council must cease to act a platform through which member states can lodge appeals against decisions of the Commission.⁶⁴

Given the foregoing understanding, the AU’s role in regard to article 59 should range from cooperation at best and formalistic endorsement at worst. In fact, the early relationship between the African Commission and the OAU/AU represents the latter of this envisaged scenarios (formalistic). Initially, the Commission’s activity reports (in line with article 59) were typically adopted as the last order of business, without much ado or even discussion with this latter element attracting criticism since a complete lack of engagement with the report diminished the report’s effectiveness.⁶⁵ Such a scenario (complete disengagement), denies the Commission the support that this writer posits is owed to the Commission by the OAU/AU. In fact, the extent to which the OAU/AU treated its article 59 role as a formality is further evidenced by the fact that in those early days, it is the African Commission that would draft the Assembly resolutions on its own activity reports.⁶⁶

59 M Killander ‘Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 573.

60 I Badawi El-Sheikh ‘The African Commission on Human and Peoples’ Rights: Prospects and problems’ (1989) 7 *Netherlands Quarterly of Human Rights* 274-275 (emphasis mine).

61 See, for example, Article 58(2), and 59(1) and (2) of the Charter.

62 R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 57.

63 J Biegon ‘Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of activity reports of the African Commission on Human and Peoples’ Rights’ (2018) *Global Campus Africa Policy Briefs* https://repository.gchumanrights.org/bitstream/handle/20.500.11825/580/PolicyBrief_Africa_ok.pdf?sequence=6&isAllowed=y (accessed 15 July 2021).

64 As above.

65 As above 58.

66 R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 60.

Over time, there seems to have developed an incorrect understanding that the term “considered” as utilised in article 59(3) denotes a requirement of approval of the substantive contents of the Commission’s report by the OAU/AU, as opposed to endorsement. Such an understanding is what has led to the utilisation of article 59 to usurp the Commission’s independence. In attempting to explain the basis of this incorrect understanding, the writer proffers the following suggestions. Firstly, as has already been stated, the framing in article 59 is in itself atypical for an international human rights treaty and its resultant body. Secondly, the power dynamics between the Commission and the OAU/AU seem to have been skewed almost right from the onset in favour of the OAU/AU. This is perhaps owing both to the political nature of the OAU/AU as well as the Commission’s deference, resultant or otherwise, towards the OAU/AU.

In the early years, the African Commission is in itself guilty of having taken a strict approach to confidentiality in regard to communications where in purported conformity to article 59, it would omit names of cases in its report and referring vaguely only to the number of cases dealt. The Commission was however lobbied out of this strict stance by NGOs.⁶⁷ The same cannot be said for the Commission’s narrow interpretation of article 59 post-decision. The African Commission is seemingly shifting its strict approach to confidentiality pre-decision to post-decision processes and procedures. While there are various post-decision considerations that may necessitate confidentiality, article 59 does not demand a blanket approach to confidentiality, especially given that requirements such as the measures adopted by states to implement recommendations arguably fall out of the communication procedure.⁶⁸

The first possible instance of interference recorded relates to a fact-finding report on Zimbabwe by the Commission. Since the Commission

submitted its fact-finding report without the comments of the concerned state party, the Executive Council recommended and the Assembly endorsed a decision to suspend the publication of the Commission’s 17th Annual Activity Report.⁶⁹ Yet it was clear that the Zimbabwean government had been given an opportunity to respond to the report after it was adopted by the Commission and it failed to do so.⁷⁰ The suspension of the report on this account therefore set a poor precedent as it opened up an avenue for government representatives to arbitrarily and unprocedurally interfere where they are displeased with reports or findings against their governments. This avenue was later utilised to undermine the Commission’s protective mandate where state representatives challenged the contents of the Activity Report and actually withdrew decisions issued against their state parties claiming non-consultation. Take for example the Executive Council’s adoption of the contents of the Commission’s 20th Activity Report save for the decision on Zimbabwe⁷¹ and later, its request to the African Commission to expunge two decisions rendered against Rwanda.⁷² Overall, the consideration of the Commission’s activity reports by AU political organs has become a constant source of friction. As observed by Zewudie, for instance, “[a] critical look at the Ordinary Sessions of the PRC shows a great deal of antagonism between the members of the PRC and the Commission.”⁷³

4.1.2. Non-compliance with decisions and the potential role of the AU

As part of fulfilling its protective mandate, the African Commission considers matters (communications) of alleged violations of the African

67 M Killander ‘Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 578.

68 R Murray ‘Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples’ Rights’ (2019) 19 *African Human Rights Law Journal* 24.

69 Decision on the Seventeenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, Assembly/AU/Dec 49 (III).

70 M Killander ‘Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 575.

71 See Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) EX.CL/Dec 310 (IX), 2006.

72 See Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) Activity Report 37, 2015.

73 T Zewudie ‘Human rights in the African Union decision-making processes: An empirical analysis of states’ reaction to the activity reports of the African Commission on Human and Peoples’ Rights’ (2018) 2 *African Human Rights Yearbook* 295, 302.

Charter. Upon consideration of such communications, the Commission may either find that there was no violation of any right(s) in the circumstances under consideration or arrive at a finding of violation of a right/rights as guaranteed in the African Charter. In the latter scenario, the Commission will subsequently issue a decision as well as recommendations highlighting the appropriate remedies.⁷⁴ This section discusses states' non-compliance with these recommendations, additional enforcement challenges facing the Commission, and states' response to urgent appeals issued by the Commission.

Compliance deficit

Member states' action or inaction relating to compliance with decisions of the African Commission emanating from the communications procedure has direct and indirect implications for the credibility and legitimacy of the regional body. On this issue, the African Court has aptly observed that "compliance with a court's judgment is essential to the success of any justice system and the proper administration of justice" and that "non-compliance not only destroys the very *raison d'être* of a court but undermines the public confidence in the justice system".⁷⁵ This statement is equally true in respect of the African Commission. Indeed, the African Commission has also observed that "compliance of State Parties to [sic] its recommendations will contribute to the enhancement of the work of the Commission as well as to the improvement of the conditions of the population under their jurisdiction and also contribute to the enhancement of the rule of law in Africa".⁷⁶

Member states' compliance with decisions of the African Commission has been historically

74 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 466.

75 Activity Report of the African Court on Human and Peoples' Rights, 1 January – 31 December 2019, EX.CL/1204 (XXXVI), para 58.

76 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97(XXXX)06, adopted during 40th ordinary session, Banjul, The Gambia, 15-29 November 2006.

low. Indeed, compliance has been the exception rather than the rule. In 1998, Odinkalu and Christensen observed that "in those few cases that have been decided on their merits there remains, as yet, no evidence that the states complied either habitually or at all with the views of the Commission".⁷⁷ Close to ten years later, the situation had not meaningfully improved. A 2007 seminal study by Viljoen and Louw found a full compliance rate of 14% only.⁷⁸ In recent activity reports, it has become common for the Commission to lament about non-compliance with the different forms of its decisions. For example, in the latest activity report covering the period from November 2019 to December 2020, the Commission notes that "the level of compliance by State Parties with the Commission's decisions, requests for provisional measures and letters of urgent appeal remains low".⁷⁹ Since 2019, the African Commission has recorded only a single case of full compliance with a decision emanating from its communications procedure. This is in respect of its decision in the case of *Mbiankeu Genevieve v Cameroon*.⁸⁰

Reminders sent by the African Commission to states urging them to comply with specific decisions of the African Commission have almost always fell on deaf ears. Some states, such as Botswana, have openly refused to comply with the Commission's decision. Following the decision of the Commission in the case of *Kenneth Good v Botswana*,⁸¹ the government of Botswana wrote to the Commission and unequivocally stated that it would not comply with the decision

77 Chidi Odinkalu & Camilla Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communications Procedure' (1998) 20 *Human Rights Quarterly* 235, 279-280.

78 Frans Viljoen & Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights' (2007) 101 *American Journal of International Law* 1.

79 Combined 48th and 49th Activity Report of the African Commission on Human and Peoples' Rights, para 42.

80 Communication 389/10. See 47th Activity Report of the African Commission on Human and Peoples' Rights (adopted during the 36th Ordinary Session of the AU Executive Council, Addis Ababa, Ethiopia, 6-7 February 2020) EX.CL/1205(XXXVI) para 33.

81 (2010) AHRLR 43 (ACHPR 2010).

as it was not bound by it.⁸² Other states have indicated that they would comply with a decision of the Commission but subsequently failed to make good that commitment. In respect of the decision of the Commission in the case of *Centre for Minority Rights Development and Others v Kenya (Endorois decision)*,⁸³ repeated promises by the state have not resulted in full compliance more than 10 years since the decision was issued. This is despite the fact that in 2013, the Commission adopted a resolution specifically asking the Kenyan government to comply with the decision.⁸⁴

The prevalence of non-compliance with the decisions of the African Commission is exacerbated and encouraged by the AU Executive Council's abdication of its duty to enforce compliance. Under the Constitutive Act of the AU, the Assembly of Heads of State and Government has the power to "monitor the implementation of policies and decisions of the Union as well as ensure compliance by all member states".⁸⁵ It has delegated this power to the Executive Council. However, the Executive Council has perennially failed to hold states to account, even in instances where the African Commission has reported to it cases of open defiance as in the example of Botswana that has been described above. In the words of Amnesty International, the Executive Council "always does nothing beyond the rhetoric of regularly encouraging or urging states to comply with the decisions of the regional human rights mechanisms".⁸⁶

Additional enforcement challenges

The prevalent attitude of state parties over the history of the Commission has been to ignore the recommendations. This behaviour has been

enabled by several factors, key among them is the fact that there are no consequences attached to the failure to adhere to the recommendations.⁸⁷

The contested nature of the Commission's recommendations has further compounded the problem of enforcement. Neither the African Charter nor the Rules of Procedure of the Commission articulate the nature of the Commission's recommendations. Nonetheless, the Commission itself has adopted the position that its communications are binding, in keeping with the international law principle of *pacta sunt servanda* which is applicable to the African Charter as a treaty.⁸⁸ Simply put, it would be "paradoxical to undertake obligations under a treaty and thereafter to refuse to comply with decisions which are made in furtherance of those undertakings".⁸⁹ However, this view has been challenged by some scholars who opine that the recommendations tendered by the Commission are not binding and thus states are not legally bound by them.⁹⁰ Another view held by scholars is that the nature of recommendations is not so much a legal one as it is a political one.⁹¹ This is because the implementation of the recommendations is largely tied to a state's political will.⁹²

82 Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples' Rights, para 24.

83 (2009) AHRLR 75 (ACHPR 2009).

84 Resolution Calling on the Republic of Kenya to Implement the Endorois Decision, ACHPR/Res.257 (LIV)2013, adopted during 54th ordinary session, Banjul, The Gambia, 22 October – 5 November 2013.

85 Constitutive Act of the African Union, Article 9(e).

86 Amnesty International *The state of African regional human rights bodies and mechanisms 2018-2019* (2019) 37.

87 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 466.

88 See *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) and *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

89 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* at 37-38.

90 See G Naldi 'Future trends in human rights in Africa: The increased role of the OAU' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 - 2000* (2002) and R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights, on compliance of state parties to adopted recommendations of the African Commission: A legal approach* (2001) 355.

91 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 466.

92 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* at 466.

Yet another enforcement challenge faced by the Commission is the lack of an “institutionalised follow-up system” as may be found in other human rights bodies.⁹³ It should be nonetheless noted that the Commission has undertaken *ad hoc* follow-ups and other measures albeit inconsistently.⁹⁴ Rule 125 of the Rules of Procedure of the African Commission provides for a system for following up on the Commission’s recommendations. However, despite this legal provision, the Commission has failed to come up with a coherent strategy for responding to pressing cases.⁹⁵ This is worsened by the lack of adequate resources – both financially and in terms of staff in the Commission.⁹⁶ It has been suggested that the Commission’s recommendations, as reflected its Activity Reports, be adopted as binding decisions of the African Union.⁹⁷ Mere consideration of the Activity Reports does little to nothing to foster a culture of enforcement. Instead, the AU Assembly and the Executive Council ought to adopt the decisions and recommendations of the Commission and tow the line that concerned states must take certain steps so as to be in conformity with the provisions of the African Charter.⁹⁸

On the other hand, it is suggested that for there to be a transformation of the African Commission’s

supposedly non-binding recommendations to binding AU decisions, the AU Assembly and the Executive Council must not simply approve the activity report but must also expressly adopt a decision, the wording of which must be clear in that the state(s) concerned in each given case must take steps to implement the Commission’s recommendations.⁹⁹ By adopting this interpretation, it is expected that the decision must be premised on the recommendations of the Commission and must clearly require the states concerned in the activity report to take certain steps to bring them in line with their obligations under the African Charter.

Response to urgent appeals

Urgent Appeals are one of the actions that the Commission may undertake on matters of emergency.¹⁰⁰ They are also one of the working modalities available to the Special Mechanisms of the African Commission. These Special Mechanisms (Rapporteurs, Working Groups and Committees) may issue urgent appeals in response to emergency situations as envisaged in the Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples’ Rights.¹⁰¹ Urgent appeals are aimed at preventing “irreparable harm to victims” as they require states to act so as to end or prevent the violation causing harm.¹⁰² To that extent, the Special Mechanisms issue urgent appeals in cases where the alleged violation(s) are “time-sensitive, or where they are causing imminent or ongoing damage of a grave nature to

93 G Wachira & A Ayinla ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’ (2006) 6 *African Human Rights Law Journal* at 466.

94 V Dankwa ‘The promotional role of the African Commission on Human and Peoples’ Rights’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986 - 2000* (2002) at 345. The Commission has also been criticized for lacking a coherent approach to monitoring implementation. See R Murray and others ‘Monitoring implementation of the decisions and judgements of the African Commission and Court on Human and Peoples’ Rights’ (2017) 1 *African Human Rights Yearbook* 150.

95 F Viljoen *International human rights law in Africa* (2012) 158.

96 C Okoloise ‘Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples’ Rights’ (2018) 18 *African Human Rights Law Journal* at 45.

97 G Wachira & A Ayinla ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’ (2006) 6 *African Human Rights Law Journal* at 466.

98 C Okoloise ‘Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples’ Rights’ (2018) 18 *African Human Rights Law Journal* at 49.

99 As above.

100 Rules of Procedure of the African Commission on Human and Peoples’ Rights, 2020 adopted by the African Commission on Human and Peoples’ Rights during its 27th Extra-Ordinary Session held in Banjul from 19 February – 4 March, 2020 (originally adopted by the African Commission on Human and Peoples’ Rights during its 2nd Ordinary Session held in Dakar from 2 – 13 February 1988, revised initially during its 18th Ordinary Session held in Praia from 2 – 11 October 1995 and once again during its 47th Ordinary Session held in Banjul from 12 – 26 May 2010).

101 Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples’ Rights, 25.

102 Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples’ Rights, 27.

victims”.¹⁰³ Urgent appeals may take the form of requests for provisional measures in cases already before the Commission but they may also be made in cases where there is no communication before the Commission.¹⁰⁴ States that are subject to urgent appeals are required to provide substantive responses, which are usually included in the Special Mechanism’s activity reports.¹⁰⁵

In the period between 1st January, 2018 and 30th June, 2019, the Commission issued a total of 83 urgent appeals, directed to situations across 28 states.¹⁰⁶ The Democratic Republic of Congo and Egypt received the highest number of urgent appeals, at 11 and 10 urgent appeals respectively.¹⁰⁷ Out of the 83 issued urgent appeals, only 23 responded with written replies.¹⁰⁸ This figure can be compared to the 14 urgent appeals issued in the period between 1st July, 2019 and 30th June, 2020, for which there were only 4 responses.¹⁰⁹ Put in other words, less than half of the issued urgent appeals received a response in the periods under consideration. The lack of replies is not novel but rather continued state practice as over the years, states have remained generally unresponsive to not only urgent appeals but also to provisional measures.¹¹⁰

103 Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples’ Rights, 26.

104 M Killander ‘The African Commission on Human and Peoples’ Rights’ in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights* (2012) at 242.

105 Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples’ Rights, 28.

106 Amnesty International ‘The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019’ <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

107 Amnesty International ‘The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019’ <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

108 Amnesty International ‘The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019’ <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

109 Amnesty International ‘The State of African regional Human Rights Bodies and Mechanisms 2019 – 2020’ <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0130892020ENGLISH.PDF> (accessed 6 July 2021).

110 Amnesty International ‘The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019’

Perhaps the most infamous refusal to act following the issue of an urgent appeal is in respect of the matter concerning Ken Saro-Wiwa and others, where the Nigerian government ignored an urgent appeal issued by the Commission and went ahead to execute the human rights defenders despite the case of Mr. Saro-Wiwa and other already being before the Commission.¹¹¹ There was also the disregard by Botswana of the urgent appeal issued in respect of Mariette Bosch who had been found guilty of murder and was consequently to be executed amid rising calls against the death penalty.¹¹² The disregard of urgent appeals is not a preserve of the 1990s or early 2000s. This practice continues to date¹¹³ and has not gone without notice. The African Commission, in its 47th Activity Report which covers the period from 14th May to 10th November, 2019, observed that the level of compliance by states with issued letters of urgent appeal is relatively low.¹¹⁴

Usually, the Commission refrains from publishing urgent appeals as well as any state responses thereto. Instead, the Commission avails short summaries in its activity reports. However, details of urgent appeals issued by the Commission particularly in the 1990s are scant as the same were excluded in the Commission’s Activity Reports for the period.¹¹⁵ Despite any questionable confidentiality sought, this practice does little to paint a picture of quality of state responses

<https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

111 See <https://www.refworld.org/cases/ACHPR,3ae6b6123.html> (accessed 6 July 2021) for more details.

112 See *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*, Communication 240/11, African Commission on Human and Peoples’ Rights, Seventeenth Annual Activity Report (2003-2004).

113 Egypt, for example, continues to ignore the urgent appeals issued by the African Commission in respect of human rights defenders. See Press release by the Special Rapporteur on human rights defenders on the appeal verdict in the case of Yara Sallam and Sanaa Seif (2015) <https://www.achpr.org/pressrelease/detail?id=181> (accessed 15 July 2021) for more details.

114 African Commission on Human and Peoples’ Rights ‘47th Activity Report of the African Commission on Human and Peoples’ Rights’.

115 See African Commission on Human and Peoples’ Rights ‘8th Activity Report’ to African Commission on Human and Peoples’ Rights ‘13th Activity Report’.

as well as the swiftness of such responses to the threats or actual violations of rights.¹¹⁶

4.2. Promotional mandate: The role of states in enhancing or undermining the Commission's ability to foster an enabling environment for human rights promotion

4.2.1. Decision 1015 and NGO observer status

The African Commission has long enjoyed a dynamic and cordial relationship with NGOs. As a constituency, NGOs have been instrumental in supporting the Commission in various ways and are rightly credited for the growth and consolidation of the regional body.¹¹⁷ The African Commission began granting observer status to NGOs during its third ordinary session held in 1988 when three NGOs were granted this status. Since then, the number of NGOs with observer status has grown exponentially to reach 535 by the beginning of May 2021.¹¹⁸ These NGOs enjoy certain rights by virtue of their observer status, including participating and making oral statements during public sessions of the African Commission.

Although NGOs are active in collaborating with the Commission and are said to be the most visible group of stakeholders during sessions of the Commission,¹¹⁹ their admission and participation has always been contested and resisted by states. In particular, states participating in the sessions of the Commission have sometimes raised objections during the Commission's consideration of applications for observer status by NGOs. For example, during the

Commission's 21st ordinary session held in April 1997, the host state, Mauritania, unsuccessfully tried to block the granting of observer status to a Mauritanian organization.¹²⁰ The following year, 1998, the OAU Assembly of Heads of State and Government went a step further and directed the Commission to review its criteria for granting observer status and to suspend the granting of observer status until a new criteria was in place.¹²¹ The Commission duly obliged as it did not only suspend the granting of observer status during its 24th and 25th ordinary sessions, but it also adopted a revised set of criteria.¹²²

State resistance against NGOs' engagement with the Commission indeed sits at the heart of Decision 1015 adopted by the Executive Council in June 2018 and in which it directed the African Commission to withdraw the observer status granted to the Coalition of African Lesbians (CAL).¹²³ Up until Decision 1015, states through the Executive Council had only contested matters of procedure. However, Decision 1015 required the Commission to change a substantive decision that it had taken and which the Commission had already explained was in accordance with the African Charter and its Rules of Procedure. In addition to issuing an ultimatum for the Commission to withdraw CAL's observer status, Decision 1015 contains problematic policy decisions and statements that strike at the heart of the independence and autonomy of the African Commission.

116 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019' <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

117 F Viljoen *International human rights law in Africa* (2012) 383. See also N Mbele 'The role of non-governmental organizations and national human rights institutions at the African Commission' in M Evans & R Murray (eds) 'The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006' (2008) 289.

118 See Final Communique of the 68th ordinary session of the African Commission on Human and Peoples' Rights, para 70, available at [African Commission on Human and Peoples' Rights Sessions \(achpr.org\)](https://www.achpr.org/press/communique/68th-ordinary-session) (accessed 8 July 2021).

119 F Viljoen *International human rights law in Africa* (2012) 383.

120 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 90-91.

121 Decision on the annual activities of the African Commission on Human and Peoples' Rights, AHG/Dec.126 (XXXIV), adopted during the 24th ordinary session of the OAU Assembly of Heads of State and Government, 8-10 June 1998, Ouagadougou, Burkina Faso.

122 See Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human and Peoples' Rights, ACHPR/Res.33 (XXV)98, adopted during the African Commission's 25th ordinary session, Bujumbura, Burundi, 26 April – 5 May 1999.

123 See J Biegon J Biegon '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*, 2 August 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! \(ejiltalk.org\)](https://www.ejiltalk.org/african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/) (accessed 4 May 2021).

In particular, Decision 1015 was premised on the notion that “the independence enjoyed by ACHPR is of a functional nature and not independence from the same organs that created the body”. In making this assertion, the Executive Council mischaracterised the nature of the Commission’s independence. As Biegon has argued, the Commission’s independence is “more than functional; it enjoys absolute independence from external actors in the discharge of its mandate”.¹²⁴ In other words, the Commission is independent in questions relating to the interpretation of the African Charter as well as in determining its working methods. Following the adoption of Decision 1015, the Commission itself has sought to clarify the nature of its interpretive mandate. In Resolution 402 adopted in November 2018, the Commission has reiterated that its interpretive mandate is “inherent in its promotion and protection mandates as set out by the Charter”.¹²⁵ More recently in its 2020 Rules of Procedure, the Commission has unequivocally stated that it is “an autonomous treaty organ”.¹²⁶

This understanding of the Commission’s autonomy and independence does not negate the fact that the political organs of the AU have a role to play in relation to the African Commission, such as approving its activity reports and allocating annual budgets to it. However, as Murray has aptly noted, the involvement of AU political organs is limited to administrative issues:¹²⁷

Whilst there is a recognition that there must be some political involvement in order for these independent mechanisms to function properly, it is also recognised that this must not go too far. The

124 See J Biegon J Biegon ‘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*, 2 August 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! \(ejiltalk.org\)](#) (accessed 4 May 2021).

125 Resolution on the Interpretive and Protective Mandates of the African Commission on Human and Peoples’ Rights, ACHPR/Res.402 (LXIII) 2018, adopted during the African Commission’s 63rd ordinary session, Banjul, The Gambia, 24 October – 13 November 2018.

126 ACHPR Rules of Procedure 2020, Rule 3(1).

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

independence of the organ must be maintained in order for it to achieve its aims of promotion and protection. The concern is, however, that this balance is often not achieved. In this regard the African Commission has been criticised for its lack of independence.

To the extent that Decision 1015 led to the Commission’s withdrawal of CAL’s observer status, Decision 1015 illustrates an instance of substantive interference which is beyond procedural interference. Decision 1015 is hence monumental on the disruptive scale in light of its substantive interference.

4.2.2. State reporting and related state behaviour

Article 62 of the Banjul Charter mandates every state party to submit reports every two years on “legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter”.¹²⁸ Despite laying down this obligation, the Charter offers no further guidance on the recipient of such reports and any action that may be taken upon receipt of the reports. Viljoen observes that perhaps Article 62 was left “deliberately vague” so as not to “jeopardize ratification”.¹²⁹ During its third session, the African Commission adopted a Resolution in which it recommended that the Assembly of the OAU receive the state reports and “communicate them to the Commission without delay”.¹³⁰ On its part, the OAU Assembly conferred on the Commission the mandate to receive state reports.¹³¹ Consequently, the Commission adopted guidelines for state reporting.¹³² The fact that the Commission even requested for a mandate that clearly belonged to it has been discussed earlier in this research.

128 African Charter on Human and Peoples’ Rights, Article 62.

129 F Viljoen ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ (2000) 44 *Journal of African Law* at 110.

130 Adopted in Libreville, Gabon in 1988 and contained in Annex IV of the African Commission on Human and Peoples’ Rights 1st Annual Activity Report.

131 See African Commission on Human and Peoples’ Rights ‘2nd Annual Activity Report’.

132 See African Commission on Human and Peoples’ Rights ‘2nd Annual Activity Report’, Annex XII (Guidelines for National Periodic Reports).

Table 2

Status	State Party
Up to date: 6	Benin, Cameroon, Malawi, Mauritius, Niger and Zimbabwe
1 Reports overdue: 3	Egypt, The Gambia and Lesotho
2 Reports overdue: 9	Angola, Botswana, Chad, Côte d'Ivoire, Democratic Republic of Congo, Eritrea, Nigeria, Rwanda and Togo
3 Reports overdue: 10	Algeria, Burkina Faso, Djibouti, Ethiopia, Kenya, Mauritania, Namibia, Senegal, Sierra Leone and South Africa
More than 3 Reports overdue: 20	Burundi, Cape Verde, Central African Republic, Congo, Gabon, Ghana, Guinea Republic, Liberia, Libya, Madagascar, Mali, Mozambique, Sahrawi Arab Democratic Republic, Seychelles, Sudan, Eswatini, Tanzania, Tunisia, Uganda and Zambia
Never submitted a Report: 6	Comoros, Equitorial Guinea, Guinea Bissau, Sao Tome and Principe, Somalia and South Sudan

Source: Combined 48th and 49th Activity Report of the African Commission on Human and Peoples' Rights

The Combined 48th and 49th Activity Report Of The African Commission, Which Accounts For The Period Between 11th November, 2019 And 3rd December, 2020, Details The Status Of State Reports Appear In Table 2.

A Report By Amnesty International Details That For The Period Between 1 January, 2018 To 30th June, 2019, The African Commission Reviewed 8 State Reports In The Course Of Its 62nd, 63rd And 64th Sessions.¹³³ The Countries Under Review Were: Angola [6th Periodic Report (2011-2016)]; Botswana [2nd And 3rd Periodic Report (2011-2015)]; Egypt [9th – 17th Periodic Report (2001-2017)]; Eritrea [Initial Report (1999- 2016)]; The Gambia [4th – 15th Periodic Report (1995-2018)]; Lesotho [2nd – 8th Periodic Report]; Nigeria [6th Periodic Report (2015-2016)]; And Togo [6th, 7th And 8th Periodic Report (2011-2016)].¹³⁴ As Is Evident, Many Of The Submitted Reports Were Well Overdue With Eritrea Submitting Its Initial Report 19 Years After Its Ratification Of

the Banjul Charter. Additionally, some reports, such as Botswana's, have also been faulted for not presenting an updated account of the human rights situation of the respective country.¹³⁵ An additional report, with the period of review being 1st July 2019 – 30th June 2020, details a significant drop in the reports considered by the Commission.¹³⁶ The Commission considered a total of two reports as a result of the COVID-19 pandemic which resulted in the postponement of sessions.¹³⁷ The Commission had scheduled the consideration of four reports for April/May 2020 during its 66th Ordinary Session but was only able to review one report when the session moved online.¹³⁸

133 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019' <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

134 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019' <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

135 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2018 – 2019' <https://www.amnesty.org/download/Documents/AFR0111552019ENGLISH.PDF> (accessed 6 July 2021).

136 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2019 – 2020' <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0130892020ENGLISH.PDF> (accessed 6 July 2021).

137 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2019 – 2020' <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0130892020ENGLISH.PDF> (accessed 6 July 2021).

138 Amnesty International 'The State of African regional Human Rights Bodies and Mechanisms 2019 – 2020' <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0130892020ENGLISH.PDF> (accessed 6 July 2021).

The lack of adherence to reporting timelines is, however, not the only problem faced by the Commission.¹³⁹ More often than not, states do not follow the reporting guidelines, provide incomplete information lacking in critical self-reflection, and government representatives have been absent when reports have been scheduled for examination.¹⁴⁰ The Commission has over the years responded to these challenges by adopting Resolutions which call on states to submit their reports, writing letters to states which have failed to submit their reports and requiring individual Commissioners to raise issues of non-compliance while on promotional visits to states.¹⁴¹ The Commission additionally authorised the combination of several reports into one.

The Commission has been criticised of viewing reporting as a means to involve states in its work as opposed to being an “effective monitoring tool”. Evans and Murray observed that the Commission “appears to be trying to foster the interest of States in its work, and building a relationship with them before taking a more critical approach to a State’s compliance with human rights”.¹⁴² The resultant question begging to be posed is thus whether the Commission has achieved the correct balance.¹⁴³

4.2.3. Standard setting: Non-participation and obstruction

The African Commission has been at the forefront of formulating new regional human rights instruments and standards. It has played a leading role in the drafting and development of protocols to the African Charter, particularly the Protocol on the Establishment of an African Court (African Court Protocol), Protocol on the Rights of Women in Africa (Maputo Protocol),

Protocol on the Rights of Older Persons in Africa, and the Protocol on the Rights of Persons with Disabilities in Africa. The Commission has also led the way in formulating and developing soft law instruments, such as general comments, guiding principles, declarations, and resolutions.

The Commission’s achievements relating to standard setting have been realized not because of cooperation and support from states, but in spite of the lack of it. In recent years, the Commission has established a practice of inviting states and the public at large to comment on draft soft law instruments that it is developing. Few states, if any, ever submit such comments. In the absence of state participation in standard setting initiated by the Commission, NGOs have become the primary allies of the Commission. Yet, states have often complained about the Commission’s practice of allowing NGOs to contribute to standard setting, particularly in proposing country-specific resolutions.

In 2006, for example, Zimbabwe and Ethiopia complained that the Commission had been improperly influenced by the NGO Forum in respect of country-specific resolutions that it had adopted during its 38th ordinary session.¹⁴⁴ The complaints recorded by these two countries, as well as the complaints by Sudan, Eritrea and Uganda, resulted in the Executive Council’s decision not to authorize the publication of the resolutions concerning these countries as annexures to the activity report of the Commission.¹⁴⁵

On other occasions, states have played an even more obstructionist role to the standard setting initiatives of the African Commission. This was particularly the case in respect of the Draft Protocol on the Abolition of the Death Penalty in Africa. This Draft Protocol was adopted by the African Commission in May 2015 and submitted to the relevant AU policy organs for consideration and adoption. However, member states

139 F Viljoen ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ (2000) 44 *Journal of African Law* at 111.

140 F Viljoen ‘State reporting under the African Charter on Human and Peoples’ Rights: A boost from the south’ (2000) 44 *Journal of African Law* at 111.

141 M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights* (2009) 56.

142 M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights* (2009) 56.

143 M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights* (2009) 56.

144 See Annex III, 17th Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/279 (IX).

145 Decision on the 19th Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/236 (VIII), adopted during the 8th ordinary session of the Executive Council, 16-21 January 2006, Khartoum, Sudan.

blocked further discussion and consideration of the Draft during a meeting of the AU Specialized Technical Committee on Legal Affairs that took place in November 2015.¹⁴⁶ Since then, progress in formulating a regional treaty on the abolition of the death penalty has effectively stalled.

4.2.4. *Fact-finding and promotional visits*

Refusal to authorise fact-finding and promotional missions has been another tactic deployed by states to undermine the African Commission. Under Article 46 of the African Charter, “[t]he Commission may resort to any appropriate method of investigation”. Pursuant to this provision, the African Commission may conduct in-country visits in the form of fact-finding or protective missions to investigate specific reports or allegations of human rights violations. Pursuant to its promotional mandate as stipulated in Article 45(1) of the African Charter, the Commission may also undertake promotional visits to raise awareness about the African Charter and the work of the African Commission. However, these visits or missions are dependent on states’ consent and authorization.

Every year, the Commission sends out tens of requests for authorization of missions, but very few of these ever take place. According to Amnesty International, the Commission requested to undertake 26 promotional missions between January 2018 and June 2019, but only five of these took place, representing a mere 19% of the requested missions.¹⁴⁷ In a recent case, Ethiopia has unequivocally rejected a commission of inquiry established by the African Commission to investigate reports of human rights violations committed in the context of the ongoing conflict in the Tigray region of the country.¹⁴⁸ In a stern

statement issued a day after the African Commission launched the commission of inquiry, Ethiopia has described it in scathing terms, such as unfortunate, unhelpful and misguided.¹⁴⁹ Overall, it is telling that none of the 54 state parties to the African Charter has ever issued a standing invitation to the African Commission to undertake in-country missions.

Another way that states undermine fact-finding or promotional missions of the African Commission is by failing to implement the recommendations contained in the reports of these missions. Reports of the Commission’s fact-finding missions, including in respect of Sudan (2005), Mali (2013) and Burundi (2015), remain unimplemented many years after the reports were published. There has also been at least a single instance when a country, Zimbabwe, successfully pushed for the Executive Council to temporarily suspend the publication of a report of a fact-finding mission.¹⁵⁰

5. Comparative analysis: Good practices from other regions

This section explores a limited comparative analysis to the extent of presenting any good practices from the two other main regional human rights systems. The good practices are explored in regard to the relation of states and the respective human rights bodies in the InterAmerican and European human rights systems.

5.1. *Lessons learned from the Inter-American Commission on Human Rights (IACHR)*

The Inter-American Commission on Human Rights (IACHR) operates as a quasi-judicial

146 Amnesty International, Oral statement on the state of the death penalty in Africa, delivered during the 58th ordinary session of the African Commission on Human and Peoples’ Rights, 12 April 2016, available at [Africa: Oral statement on the state of the death penalty in Africa at the 58th Ordinary Session of the African Commission on Human and Peoples’ Rights | Amnesty International](#) (accessed 20 July 2021).

147 Amnesty International *The state of African regional human rights bodies and mechanisms 2018-2019* (2019) 38.

148 See Resolution on the Fact-Finding Mission to the Tigray region of the Federal Democratic Republic of Ethiopia, ACHPR/Res.482 (EXT.OS/XXXII) 2021, adopted during 32nd extraordinary session (virtual), 12 May 2021.

149 ‘Ethiopia calls on AU to stop commission of inquiry on rights abuse in Tigray, says outside scope of agreement, lacks basis’, Addis Standard, 17 June 2021, available [News: Ethiopia calls on AU to stop commission of inquiry on rights abuse in Tigray says outside scoop of agreement, lacks legal basis - Addis Standard](#) (accessed 8 July 2021).

150 See Decision of the 17th Activity Report of the African Commission on Human and Peoples’ Rights, EX.CL/Dec. 155 (V), adopted during the 5th ordinary session of the AU Executive Council, 25 June – 3 July 2004, Addis Ababa, Ethiopia. See also F Viljoen ‘Recent developments in the African regional human rights system’ (2004) 4 *African Human Rights Law Journal* 344.

body of the Inter-American Human Rights Protection System. Currently, the Commission has a mandate rooted in the Organization of American States (OAS) Charter and is complemented by dispositions outlined in the American Convention on Human Rights. Over time, the Commission has evolved to perform a wide scope of action, including thematic reports, on-site visits and individual petition system. For many member States, the IACHR has played a critical role as the last judicial remedy in many Latin American states during periods of transition and processes of transitional justice.

Discussions centring the independence and autonomy of the IACHR first arose during the creation of the Special Working Group to Reflect on Workings of the Inter-American Commission in 2011. Sponsored by the OAS Permanent Council, the objective of this group was to strengthen and reform existing systems. The process included contention between CSOs, academics, and member states that opposed reform ideas, and the IACHR was a critical part of ensuring all parties were heard. Outcomes aimed at maintaining the independence and autonomy of the IACHR included a proposal for transparency and reform in the choice of Commission members. Prior to this discussion, the Commission was composed of seven members elected by the General Assembly of the OAS from a list of candidates proposed by member states. This process reflected a lack of accountability and meant member states could potentially propose representatives that may not always be independent members committed and capable of carrying out the mission of the IACHR.¹⁵¹

In 2013 changes to this process were proposed to reflect a more robust system of accountability, with all candidates required to give presentations about their background, primary concerns for the Commission, and address questions prepared by member states and CSO representatives. This presentation style was said to, 'allow civil society and the public in general who watched the event on the OAS webcast to get to

know the candidates better'.¹⁵² Specifically, this opportunity allowed CSOs an additional basis for their advocacy considering the commitments made by candidates during this interactive time. While this presentation structure has not formally been institutionalized in either the IACHR's Rule of Procedure or American Convention, improving the transparency of the election process illustrates one way in which the IACHR can better assert its autonomy. One of the primary concerns around institutionalising this process is resource constraints. A lack of attention paid to ongoing structural deficiencies within the Commission during the strengthening process could undermine the ability of the IACHR to perform, a lack of additional resources means actions may be based more on what is possible given resource limitations, rather than what is necessary.¹⁵³

5.2. Lessons learned from the European Human Rights System

In 1998, the European human rights system was reformed to eliminate the European Commission of Human Rights, which was charged with deciding the admissibility of complaints to the European Court of Human Rights (the Court), oversaw friendly settlements, and referred some cases to the Court. The following year, the Commissioner for Human Rights (the Commissioner), an independent and impartial non-judicial institution was established by the Council of Europe to promote awareness of and respect for human rights in European member States. The function of the Commissioner includes, in addition to dealing with individual complaints, the provision of information and advice to the public and an *amicus curia* role of this party interventions in the European Court of Human Rights.

Unlike the Court, which operates within a specific treaty-based mandate, the monitoring mechanism used by the Commissioner allows for a high degree of flexibility. The Commissioner's formal terms of reference is based on a resolution of

151 R Cetra & J Nascimento 'Counting coins: funding the inter-American human rights system' (2016) *Inter-American* 128-132.

152 L Varela 'Por primera vez, candidatos a la CIDH se presentan en foro público organizado por la OEA' [For the first time, IACHR candidates appear at public forum organized by the OAS], 2 May 2013, available at: <http://www.justicia>.

153 R Cetra & J Nascimento (n 131 above) 129.

the Committee of Ministers, namely Resolution 99(50).¹⁵⁴ In principle, the Committee of Ministers could alter the existing mandate outlining the rights and responsibilities of the Commissioner, potentially limiting the Commissioners independence. However, the Commissioner has been granted an indirect convention-based mandate through the Court in Protocol No.14 to the European Convention on Human Rights.¹⁵⁵ This institutionalization of the Commissioner allows for a more impartial and independent human rights process.

The Commissioner is elected for a non-renewable six year term of office by the Parliamentary Assembly from a list of three candidates drawn up by the Committee of Ministers, based on candidatures submitted to the Secretary General.¹⁵⁶ Candidates must be nationals of a member State, a 'high moral character,' and a public record of attachment to the values of the Council of Europe along with the personal authority necessary to discharge the Commissioner's functions effectively.¹⁵⁷

The Commissioner carries out visits to all member states to monitor and evaluate the human rights situation. Through meetings with the government, parliament, the judiciary, civil society, national human rights structures, higher education institutions, as well as individual people, country reports are created to assess current human rights concerns. The Commissioner's Office is funded through the overall budget of the General Secretariat of the Council of Europe, helping alleviate any funding related independence concerns.

The selection process, institutionalisation of the Commissioner's role, and the distinction between the Court and the Commissioner all reflect ways in which the European human rights

system has taken steps to ensure impartiality and independence in human rights decisions.

6. Conclusion

In the 2006 Banjul Declaration on the 25th Anniversary of the African Charter, AU members committed to "undertake the necessary measures to respect and guarantee the independence of the ACHPR, as well as to provide it with the necessary human and financial resources, in order to enable it effectively discharge its functions".¹⁵⁸ Written in 2021, when the African Charter marks its 40th anniversary, this paper shows that member states have hardly honoured the commitment they made 15 years ago in the Banjul Declaration. Instead, there are a myriad of instances in which member states have actively undermined the credibility, independence and functioning of the African Commission. The height of member states' interference with the independence and autonomy of the African Commission came in June 2018 with the adoption of Decision 1015. Yet, this decision is but a reflection of a broader pattern of state actions and inactions that is making it arduous for the African Commission to execute its mandate and achieve the core objectives for which it was established.

This paper shows that the majority of member states are less than cooperative or supportive in their engagement and interaction with the African Commission. They are late and irregular in submitting their periodic reports, they rarely accept requests for fact-finding or promotional missions, they ignore invitations to comment on soft law instruments being developed by the Commission, and routinely fail to comply with provisional measures, concluding observations, urgent appeals and decisions of the Commission emanating from its communications procedure. Some states are actually out rightly hostile to the Commission. As reflected in Decision 1015 and other manoeuvres documented in this paper, such states have engaged in deliberate efforts to curtail the powers and authority of the

154 Resolution (99)50 of the Committee of Ministries on the Council of Europe Commissioner for Human Rights adopted on 7 May 1999.

155 Protocol N0. 14 to the European Convention on Human Rights entered into force on 1 June 2010.

156 Articles 9 and 11, Resolution 99(50) of the Committee of Ministers.

157 Articles 9 and 10, Resolution 99(50) of the Committee of Ministers

158 Banjul Declaration on the 25th Anniversary of the African Charter on Human and Peoples' Rights, Assembly/AU/Decl. 3 (VII), adopted during the AU Assembly's 7th ordinary session, 1-2 July 2006, Banjul, The Gambia.

Commission. Yet, other states are indifferent or completely disengaged from processes that are steered by the African Commission.

The negative impacts of the actions and inactions of states in undermining the African Commission have been exacerbated by the failure of the AU to defend and protect the African Commission as an institution operating under its auspices. Instead, AU policy organs, such as the Executive Council and the PRC, have become the sites for launching political attacks on the Commission. Moreover, the Executive Council has abdicated its duty to ensure compliance with the various forms of decisions of the African Commission.

It is critical to recall that while this paper describes the overt tactics used to weaken the Commission, there are other more subtle ways through which member states and AU policy organs have often used to undermine the Commission. For instance, the Commission has been perennially underfunded, such that it has always operated on a limited and inadequate budget. It is particularly worrying, for instance, that in some years, no funds at all have been allocated to African Commission's programme activities.¹⁵⁹ The African Commission has also been perennially understaffed. In its 43rd Activity Report, the African Commission lamented that it was so

¹⁵⁹ See e.g. Executive Council's Decision on the 2020 African Union budget, adopted during the 35th ordinary session of the Executive Council, 4-5 July 2019, Niamey, Niger, EX.CL/Dec.1069(XXXV).

understaffed such that "many units do not have staff at all or are one-person units".¹⁶⁰ Since late 2020, the African Commission has been granted the authority to manage the recruitment of its own staff. This is a significant stride forward in terms of ensuring that the Commission has adequate human resources. However, the tangible benefits of this step are yet to be seen in practice.

The 40th anniversary of the African Charter offers an opportunity for member states to renew their commitment regarding supporting and cooperating with the African Commission. States must move beyond the rhetoric; they must mobilise the necessary political will to honour their obligations under the African Charter, including their duty to cooperate with the Commission as well as the obligation to comply with its decisions and recommendations. The African Commission also has a role to play in shaping how states interact and engage with it. This paper shows that in the early years, the African Commission was excessively deferential to states, a practice that may have helped to set the stage for aggressive state interference with its independence as seen in recent years. The 2020 Rules of Procedure seeks to clearly delineate the role of the Commission and the obligations of states in relation to implementing the African Charter and its Protocols. The African Commission should thus faithfully and consistently implement the Rules of Procedure.

¹⁶⁰ 43rd Activity Report of the African Commission on Human and Peoples' Rights, para 44.

Dr Mariam Kamunyu is a feminist human rights lawyer and gender equality expert with a specialisation in the African human rights system.
