



C I A A C
Coalition for the Independence
of the African Commission

Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: leveraging the roles of national human rights institutions

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1 Introduction

This paper, which is commissioned by the Coalition for the Independence of the African Commission (CIAC), aims to explore how National Human Rights Institutions (NHRIs) may contribute towards supporting the African Commission on Human and Peoples' Rights ('African Commission' or 'Commission') to execute its mandate. CIAC seeks to address the very real concern that the independence of the African Commission to function independently in the performance of its mandate is being threatened or undermined.¹ The African Commission '... has increasingly become the target of political backlash ...'² notably from the Political Organs of the African Union (AU) including the Permanent Representatives Committee (PRC) and the Executive Council.

NHRIs and the African Commission have analogous mandates and indeed face comparable adversities, respectively, at the domestic and continental levels. NHRIs hence are in an apposite place to support the work of the African Commission. The study aims to explore how NHRIs may contribute to safeguarding the mandate and independence of the African Commission. The study's thesis is that inestimable opportunities exist for enhancing mutually beneficial relationships between the African Commission and NHRIs. Failing to leverage this relationship will exacerbate the erosion of the Commission's independence thereby diminishing its capacity for mandate-execution. Both the African Commission and NHRIs should, therefore, work to strengthen their engagements in the short-term as well as the long-term.

This paper draws from secondary sources for purposes of its explication, conclusions and recommendations. The paper also relies on background context from the author who was a par-

ticipant in some of the key events and decisions relevant to this study.³

The paper is segmented into this introduction and four other sections. Section two provides the normative and institutional context for the discordant relationship between the African Commission and the Political Organs of the AU. Section three of the paper establishes the character of NHRIs as credible bodies and illustrates the relationship of symbiosis between NHRIs and the Commission. Section four assesses how the strategic relations of the Commission and NHRIs may be enhanced towards the mutual benefit of both actors. Section five draws some overall conclusions.

2 Convergences and Divergences – the African Commission and the African Union

2.1 Normative and institutional context

The mandate of the African Commission compels it to promote human and peoples' rights and ensure their protection, pursuant to Article 1 of the African Charter on Human and Peoples' Rights ('African Charter' or 'Charter')⁴ which obligates its 54 States Parties (States) to recognise the rights, duties and freedoms enshrined in the Charter and to take necessary measures to give effect to them. The default expectation is that the promotion and protection of human and peoples' rights benefits the whole continent, including individuals and States.

The Charter addresses a broad gamut of human rights. It covers civil and political rights, such as the right to liberty and security of person, freedom of conscience, the right to expression and to receive information, and the right of citizens to participate freely in the government of their

1 <<https://achprindependence.org/>>

2 Japheth 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' (August 2 2018) ><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/>>

3 Lawrence Murugu Mute was a member of the African Commission from 2013 to 2020, the Commission's Vice Chairperson from 2017 to 2019, Chairperson of the Committee for the Prevention of Torture from 2013 to 2017, and Special Rapporteur on Freedom of Expression and Access to Information in Africa from 2017 to 2020.

4 African Charter on Human and Peoples' Rights (OAU 1981) <<https://www.achpr.org/legalinstruments/detail?id=49>>

country.⁵ The Charter also provides for economic, social and cultural rights, such as the rights to work and education.⁶ States are also obligated to implement third-generation rights including the right to development⁷ and the right to a satisfactory environment.⁸ These Charter rights apply both to individuals and peoples, and they are supplemented by a host of duties covering relations of individuals with their families, society, the state and the international community.⁹

In his erudite exposition of the drafting of the African Charter, Hassan Jallow explains the consensus amongst the Charter's drafters for the creation of machinery at the continental level both to promote respect for and protect human rights.¹⁰ He then notes:

... the Experts concluded that rather than seek refuge in the dogma of absolute state sovereignty and respect for the domestic jurisdiction, it was time to roll back the frontiers of such jurisdiction to make African States accountable to a continental organ for the way they treat their nationals and all other persons within their jurisdiction. The whole struggle for self-determination and against apartheid had been based on the need for such accountability.¹¹

Hence, Article 30 of the Charter provides that:

An African Commission on Human and Peoples' Rights ... shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Execution of the Commission's mandate to promote and protect human rights through monitoring the Charter's implementation involves exer-

cise of independent interpretation of the rights guaranteed in the Charter as well as respect of state obligations.¹² Yet decisions of the Political Organs of the AU have over time sent mixed affirming and negating signals, on one hand encouraging the Commission to execute its mandate while at the same time neutering its ability to perform its mandate with effectiveness and credibility. As the paper will show, the normative and institutional framework for promoting and protecting human rights has been used and abused either to back or undermine the independence of the African Commission. The African Commission has categorised the areas of particular relevance for ensuring its independence under three headings: mandate-execution; work conditions (human, technical and financial requirements); and institutional relationships.¹³ Conceptually, independence is understood as bearing two limbs: substantive independence and functional independence, although the two may not be mutually-exclusive.¹⁴

Substantive independence is formalised in a legal instrument detailing an institution's mandate and functions. In other words, this is the imperative of independence through legal autonomy.¹⁵ In the instance of the African Commission, the Charter as its founding legal instrument provides the Commission with clear legal stipulations establishing its independence, mandate and powers. Article 45 of the Charter establishes the Commission's promotive, protective and interpretive functions which may not be changed without the Charter being amended. Another aspect of the Commission's substantive independence is the imperative of independence

5 Ibid Articles 6, 8, 9 and 13 respectively.

6 Ibid Articles 15 and 17 respectively.

7 Ibid Article 22.

8 Ibid Article 24.

9 Ibid Articles 27-29.

10 Hassan B Jallow *The Law of the African (Banjul) Charter on Human and Peoples' Rights (1988-2002)* (Trafford Publishing 2007) chapter 1.

11 Ibid.

12 Japheth Biegon 'Diffusing Tension, Building Trust: Proposals on Guiding Principles Applicable During Consideration of the Activity Reports of the African Commission on Human and Peoples' Rights', Policy Briefs 2018.

13 African Commission on Human and Peoples' Rights 'Proposals Relating to the African Union Institutions Reform', amended submissions to AU Institutions Reform Unit, 25th Extraordinary Session, 19 February-5 March 2019 (on file with author).

14 see Principles Relating to the Status of National Institutions (Paris Principles) (UNGA 1993) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx#:~:text=1.,and%20its%20sphere%20of%20competence.>>

15 Ibid.

through appointments – that the appointment of the Commission’s members is anchored on statute with clear directions on recruitment, competencies, terms, conduct, etc.

Functional independence derives from the Commission’s actual functions and its ability in practice to perform such functions autonomously for the effective implementation of its mandate. This is the imperative of independence through operational autonomy¹⁶ – that the African Commission is able to execute its mandate without external interference, control, influence or obstruction from AU Political Organs and States or indeed individuals, NGO and development partners. The imperative of independence through composition and pluralism¹⁷ anticipates that the Commission’s membership is representative of the continent’s civilian forces involved in the protection and promotion of human rights. Finally, the imperative of institutional and organisational capacity requires that the African Commission should have the human, technical and financial resources to execute its mandate effectively.

The African Charter does indeed legislate the letter or sometimes the essence of these imperatives. Notably, members of the Commission are drawn from ‘... African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples’ rights ...’¹⁸ and they serve in their personal capacity.¹⁹ As well, the Commission elects its Chairperson and Vice Chairperson.²⁰ Quite significantly, the Commission lays down its rules of procedure.²¹ The charter also provides that while the Chairperson of the AU may attend and address meetings of the Commission, he or she may neither participate in deliberations nor be entitled to vote.²²

Other Charter provisions, whose benign application would be understood as establishing appropriate regulatory checks for effective execution of the Commission’s mandate, have in their malign usages also provided key players with opportunities to undermine the Commission’s effectiveness. This is notably the case in relation to administrative matters as well as in the substantive processing of the Commission’s work by the Political Organs of the AU. Notably, the Chairperson of the AU appoints the Commission’s Secretary, and provides ‘... the staff and services necessary for the effective discharge of the duties of the Commission ...’, while the AU bears the cost of the Commission’s cost and services.²³ The emoluments and allowances of members of the Commission are provided for in the AU’s regular budget.²⁴ Finally, the Charter requires the Commission to submit to each Ordinary Session of the AU Assembly a report of its activities²⁵ which shall be published by the Commission ‘... after it has been considered by the Assembly of Heads of State and Government.’²⁶

The other distinct but related normative factor which impacts the mandate of the African Commission is the Constitutive Act of the African Union.²⁷ The objectives of the AU pursuant to the Constitutive Act include promoting and protecting human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments.²⁸ The AU even has the right to intervene in a Member State in respect of the grave circumstances of war crimes, genocide and crimes against humanity.²⁹ The AU is also undergirded by the principle of respect for democratic principles, human rights, the rule of law and good governance.³⁰

16 Ibid.

17 Ibid.

18 Supra African Charter Article 31(1).

19 Ibid Article 31(2).

20 Ibid Article 42(1).

21 Ibid Article 42(2).

22 Ibid Article 42(5).

23 Ibid Article 41.

24 Ibid Article 44.

25 Ibid Article 54.

26 Ibid Article 59(3).

27 Constitutive Act of the African Union (AU 2000) <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>

28 Ibid Article 3 (h).

29 Ibid Article 4 (h).

30 Ibid Article 4 (m).

Particular contention has arisen because the Constitutive Act did not specifically list the African Commission as one of its organs.³¹ The African Commission over time successfully made the case that it too was an organ of the AU, and it should as such have greater autonomy for example in the recruitment and management of its staff.³² Although the Executive Council indeed accordingly resolved that the African Union Commission (AUC) and the PRC should regularise the Commission as an independent organ of the AU,³³ implementing this decision however has been wrought with many difficulties and the Commission has continued to face consequent disadvantages which have undermined its effectiveness.³⁴

It would be expected that the totality of the provisions in the Charter and the Constitutive Act would support the promotion and protection of human rights on the continent and that the two

key contending institutions, the African Commission and the AU's Political Organs, would not be diametrically conflicted with each other. The African Commission indeed is closely linked to the Political Organs in multiple regards,³⁵ and toxic relations would indeed undermine the overall human rights agenda articulated in key policy instruments of the AU such as the 2063 Agenda whose aspirations include an Africa of good governance, democracy, respect for human rights, justice and the rule of law.³⁶ Yet, the Commission has continued to face great adversity while executing its mandate. As the study will show in the next subsection, functional independence anticipates a high level of political willingness to create the right enabling environment for human rights bodies to execute their mandates effectively.³⁷ It has indeed been noted thus:

Often dialogues between the Commission and the Executive Council lead to erosion of the guarantees provided for in the African Charter and the established practices. This happens mainly because of Executive Council's recurrent excessive use of its discretion which has been manifested, for example, through its decisions requesting amendment to the Commission's reports and recommendations, refusing the authorization of the publication of activity reports and allowing censorship of the Com-

31 Ibid Article 5.

32 Comparatively, the African Court on Human and Peoples' Rights includes explicit provisions empowering it to appoint its Registrar and other staff in accordance to its Rules of Procedure – Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights (OAU 1998) <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>>

33 Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/887(XXVI), Decisions and Recommendations of the 26th Ordinary Session of the Executive Council (23 – 27 January 2015, Addis Ababa, Ethiopia) EX.CL/Dec.851-872(XXVI) <<https://au.int/en/decisions-5>>

Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/1089(XXXIII), Decisions of the 33rd Ordinary Session of the Executive Council (28-29 June 2018, Nouakchott, Mauritania) EX.CL/Dec.1008-1030(XXXIII) <<https://au.int/en/decisions/decisions-thirty-third-ordinary-session-executive-council>>

Decision on the 47th Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/1205(XXXVI), Decisions of the 36th Ordinary Session of the Executive Council (06 – 07 February 2020, Addis Ababa, Ethiopia) EX.CL/Dec.1073-1096(XXXVI) <<https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council>>

34 Most recently, the Commission found it necessary to clarify its status when it revised its Rules of Procedure of 2010. Its new Rule 3 provides that the Commission is '... an autonomous treaty organ ...' (sub-rule 1) and that it is an organ of the AU (sub-rule 2). Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 (ACHPR 2020) <<https://www.achpr.org/legalinstruments/detail?id=72>>

35 For example, the AU Assembly has adopted at least two human rights instruments initially adopted by the African Commission following preparation by its Working Group on Older Persons and Persons with Disabilities in Africa; and the Executive Council regularly tasks the African Commission to undertake protection missions, as the paper will show, in States such as Burundi.

See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (AU 2016) <https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf>

Also see Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (AU 2018) <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>>

36 Aspiration 3 of Agenda 2063: The Africa We Want (AU) <<https://au.int/en/agenda2063/overview>>

37 UNDP and NANHRI *Study on the State of National Human Rights Institutions (NHRIs) in Africa* (2016) <www.undp.org/dam/rba/docs/Reports/St...>

mission's decisions by states before their inclusion in the activity reports.³⁸

2.2 Mandate-execution as site of conflict

The African Commission necessarily has to manage vertical and horizontal relationships in its demands for state accountability pursuant to the Charter, and its mandate-execution has over time become doubly onerous. Vertically, States have incessantly pleaded their sovereignty to rebuff the Commission's demands for accountability, while individuals and peoples across the continent have clamoured vociferously for the Commission to implement its human rights promotion and protection mandates. At the same time, horizontally, relations between the African Commission and counterpart continental organs, notably the Political Organs of the AU, have complicated mandate-execution.³⁹ Some members of AU Political Organs have been overly defensive, preferring to engage the Commission on trivia or technicalities rather than addressing the substance of raised human rights violations. They nit-pick and grandstand while by and large not responding to substantive human rights concerns.

The PRC's response to the 42nd Activity Report of the African Commission⁴⁰ provides ample illustration of this situation. After highlighting positive developments in the exercise of human rights on the continent,⁴¹ the Commission's Activity Report set out concerns such as:

1. Conflict and internal displacement of people;
2. Hunger and food insecurity;
3. The deaths of African migrants, including children;

38 Tilahun Adamu Zewudie 'Toward an Effective African Human Rights System: The Nature and Implications of the Relationship between the African Union Policy Organs and Human Rights Bodies' in Michael Addaney, Michael Gyan Nyarko and Elsabé Boshoff (eds) *Governance, Human Rights and Political Transformation in Africa* (Cham, Palgrave Macmillan 2020).

39 See generally *ibid*.

40 42nd Activity Report of the African Commission on Human and Peoples' Rights (January-May 2017), submitted to the AU policy organs in accordance with Article 54 of the African Charter <<https://www.achpr.org/activityreports/viewall?id=41>>

41 *Ibid* Para. 42.

4. Xenophobic attacks against foreign nationals;
5. Forced evictions of indigenous populations in favour of development projects;
6. Acts of violence, discrimination, stigma and social exclusion directed at persons with albinism;
7. Arrests and harassment of journalists and human rights defenders; and
8. Acts of torture, cruel and degrading treatment of persons.⁴²

Responses of the PRC members to the Activity Report were arguably quite disingenuous. Members:

1. Protested the information's authenticity;
2. Demanded the establishment of a restrictive accreditation criteria for NGO;
3. Demanded that the Activity Report should not be adopted;
4. Asked that particular information be expunged from the Report;
5. Stated that particular violations occurred under the preceding rather than current reporting period; and
6. Demanded the sources of certain information.⁴³

Adoption of the Commission's activity reports to the Political Organs became particularly fraught over time. Early on, the political organs were quite conscious of the autonomous character of the Commission. For example, in 2013, the Executive Council with consummate diplomacy encouraged the Commission '...to respect its procedures when considering reports submitted to it, and consult Member States concerned, as appropriate prior to the issuance of its resolutions'.⁴⁴ Later, the tone of the Political Organs, in this author's experience, became more belligerent and even disdainful. At its 26th Ordinary Session, in January 2015, the Executive Council invited the Commission: '... to provide the Member

42 *Ibid* Para 43.

43 Compilation of issues raised by the PRC during consideration of the 42nd Activity Report of the African Commission (on file with author).

44 Decision on the 32nd and 33rd combined Activity Reports of the African Commission on Human and Peoples' Rights, Para. 11, Decisions of the 22nd Ordinary Session (21 - 25 January 2013, Addis Ababa, ETHIOPIA) EX.CL/Dec.726-766(XXII)<<https://au.int/en/decisions-13>>

States concerned by certain paragraphs of the report and the communications therein for such amendments as are deemed necessary and justified.⁴⁵ At its 27th Ordinary Session, in June 2015, matters became even more fractious. The Executive Council requested the Commission:

... to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, **REQUESTS** the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African Values.⁴⁶

The Commission deflected the request to withdraw the NGO observer status of the Coalition of African Lesbians (CAL) from 2015 to 2018 on technical bases;⁴⁷ but by the Council's 32nd Ordinary Session, its dissatisfaction with the Commission concretised into a decision that the Commission and the PRC should undertake a joint retreat to resolve various concerns expressed about the relationship between the African Commission, the Political Or-

gans and States.⁴⁸ Finally, when the Political Organs issued the deadline that the withdrawal should happen no later than 31 December 2018, the Commission succumbed to the unrelenting pressure and withdrew CAL's NGO observer status in time for the 34th Ordinary Session of the Executive Council to take note of the withdrawal and to request the Commission '... to stop any cooperation with this organisation'.⁴⁹

It should be noted however that even as the Commission withdrew CAL's observer status, its 43rd Activity Report to the Political Organs had indicated and clarified the following:

1. The decision on the grant of observer status was properly taken in terms of the Commission's established processes and criteria.
2. The Commission was mandated to give effect to the African Charter under which everyone is entitled to the rights and subject to the duties spelt out in the Charter, and the Commission had the duty to protect those rights in line with the mandate entrusted to it under Article 45 of the Charter, without any discrimination because of status or other circumstances.
3. While fulfilling this mandate, the Commission remained alive to and mindful of the imperative not to encroach on domestic policy matters that fall outside its purview.
4. The Commission would continue to scrutinize the notion of 'African Values' within the framework of its mandate to interpret the African Charter.⁵⁰

45 Supra Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights.

46 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/921(XXVII), Para. 7, Decisions and Recommendation of the 27th Ordinary Session of the Executive Council (7 – 12 June 2015, Johannesburg, SOUTH AFRICA) Doc. EX.CL/Dec.873-897(XXVII) <<https://au.int/en/decisions-0>>

47 It reported severally to the Political Organs that the matter was *sub judice* since two NGO had applied for an advisory opinion on the matter before the African Court on Human and Peoples' Rights. Unfortunately the Court declined to issue an opinion apparently for want of jurisdiction, but in the author's view possibly because the Court did not wish to become entangled in the political minefield of expressing an opinion on an organisation covering the question of lesbian persons. See African Court on Human and Peoples' Rights, *Request for Advisory Opinion by Centre for Human Rights and Coalition of African Lesbians*, No. 002 2015 Advisory Opinion, 28 September 2017 <<http://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf>>

48 Decision on the African Commission on Human and Peoples' Rights Doc. EX.CL/1058(XXXII), Para. 4, Decisions of the 32nd Ordinary Session of the Executive Council (25 – 26 January 2018 Addis Ababa, ETHIOPIA) EX.CL/Dec.986-1007(XXXII) <<https://au.int/en/decisions/decisions-thirty-second-ordinary-session-executive-council>>

49 Decision on the 45th Activity Report of the African Commission on Human and Peoples' Rights.Doc. EX.CL/1127(XXXIV), Para. 2, Decisions of the 34th Ordinary Session of the Executive Council (07 – 08 February 2019, Addis Ababa, ETHIOPIA) EX.CL/Dec.1031-1056(XXXIV) <<https://au.int/en/decisions/decisions-thirty-fourth-ordinary-session-executive-council>>

50 43rd Activity Report of the African Commission on Human and Peoples' Rights (June-November 2018), submitted to the AU policy organs in accordance with Article 54 of the

This is the context within which at its 33rd Ordinary Session held in Nouakchott, Mauritania, the Executive Council, in its Decision 1015, underlined ‘... that the independence enjoyed by ACHPR is of a functional nature and not independence from the same organs that created the body.’⁵¹ As this paper has already explained, the African Commission in fact has substantive (statutory) independence which the Council could not impeach unless it instigated States to amend the African Charter.⁵² The Commission also indeed has functional independence which the Council if it so desired could seek to undermine by projecting political ill-will. The paradox, therefore, was that the Executive Council acknowledged the Commission’s functional independence and yet proceeded to undermine both the Commission’s substantive and functional independence by the decisions and requests it made. For example, Decision 1015 expressed concern on the tendency of the Commission to act as an appellate body ‘... thereby undermining national legal systems.’⁵³ The Commission in fact had already explained to the PRC⁵⁴ that it executes its protection mandate in accordance with the African Charter which sets out the procedure for Inter-State and Individual Communications, including spelling out the criteria for admitting a Communication. The Commission does not serve as an appellate body to overrule determinations of national courts, but rather determines if states parties are in compliance with the African Charter.⁵⁵ Decision 1015 as well sought to in-

terfere with the Commission’s independence by requesting it to submit to the policy organs for consideration and adoption the revised criteria for granting and withdrawing observer status for NGO, and as already discussed in the paper, to withdraw the accreditation of CAL, at the latest by 31 December 2018.⁵⁶

Finally, though, it should be stressed that the Executive Council has also over the years laboured to facilitate the Commission’s work. Apart from intervening to require States to implement their Charter obligations, the Council has addressed the Commission’s working conditions. For example, it resolved that the AU should ensure adequate funding for the Commission,⁵⁷ and increase budgetary allocation to the Commission to prevent its dependency on partner funds for performance of its functions.⁵⁸ The AUC should expedite recruitment of Commission staff,⁵⁹ and

(ACHPR 2011) ³⁶ <<https://www.achpr.org/sessions/decisions?id=236>>

56 Supra Decision 1015 Para. 8.

57 Supra Decision on the 32nd and 33rd Combined Reports of the African Commission on Human and Peoples’ Rights. Decision on the 35th Activity Report of the African Commission on Human and Peoples’ Rights Doc. EX.CL/824(XXIV), Decisions and Recommendations of the 24th Ordinary Session of the Executive Council (21 – 28 January 2014, Addis Ababa, ETHIOPIA) EX.CL/Dec.783-812(XXIV) EX.CL/Recom.(XXIV) <<https://au.int/en/decisions-10>>

Decision on the activities of the African Commission on Human and Peoples’ Rights (ACHPR) Doc. EX.CL/998(XXX), Decisions and Recommendation of the Thirtieth Ordinary Session of the Executive Council (25 – 27 January 2017 Addis Ababa, ETHIOPIA) EX.CL/Dec.939 – 964(XXX) <<https://au.int/en/decisions/decisions-and-recommendation-thirtieth-ordinary-session-executive-council>>

Supra Decision on the 44th Activity Report of the African Commission on Human and Peoples’ Rights.

58 Decision on the 36th Activity Report of the African Commission on Human and Peoples’ Rights Doc. EX.CL/856(XXV), Decisions of the 25th Ordinary Session of the Executive Council (20 – 24 June 2014, Malabo, EQUATORIAL GUINEA) EX.CL/Dec.813-850(XXV) <<https://au.int/en/decisions-9>>

Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples’ Rights.

59 Decision on the 34th Activity Report of the African Commission on Human and Peoples’ Rights Doc. EX.CL/796(XXIII), Decisions of the 23rd Ordinary Session of the Executive Council (19-23 May, Addis Ababa, ETHIOPIA) EX.CL/Dec.767- 782(XXIII) <<https://au.int/en/decisions-12>>

Supra Decision on the 35th Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 37th Activity Report of the African Commission on Human and Peoples’ Rights.

African Charter.

51 Decision 1015 on the Report on the Joint Retreat of the Permanent Representatives’ Committee (PRC) and the African Commission on Human and Peoples’ Rights (ACHPR) Doc.EX.CL/1089(XXXIII)I Para. 5 <https://au.int/sites/default/files/decisions/34655-ex_cl_dec_1008_-1030_xxxiii_e.pdf>

52 See *ibid* Para. 7 where the Council urged States to ‘conduct an analytical review of the interpretative mandate of ACHPR to in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence’.

53 Supra Decision 1015 Para. 5.

54 ‘Internal Technical Paper for the Joint Retreat between African Commission on Human and Peoples’ Rights and the Permanent Representatives Committee of the African Union’, (ACHPR, June 2018) (on file with author).

55 Communication 375/09: *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v Kenya*

the AU should also provide adequate emoluments and allowances for officials of the Commission⁶⁰ and insurance cover,⁶¹ and harmonise emoluments of elected officials.⁶² As well, the Gambia should build a permanent headquarters for the Commission.⁶³ These resolutions of the

Executive Council however by and large were either partially implemented or remained unimplemented.

3 Character of National Human Rights Institutions

3.1 Normative basis

NHRI are independent bodies funded by the state with constitutional and/or legislative mandate to promote and protect human rights.⁶⁴ They advance and defend human rights at the national level, and they support states to ‘... bridge the implementation gap between their international human rights obligations and actual enjoyment of human rights on the ground.’⁶⁵ Although NHRIs are not government departments, civil society organisations or courts, they do undertake the sorts of functions ordinarily implemented by these institutions.⁶⁶

NHRIs are required to possess the following four essential characteristics established in the Principles Relating to the Status of National Institutions (Paris Principles):⁶⁷

1. NHRIs must abide by the principle of competence and responsibilities. They must have the

Decision on the 39th Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) Doc. EX.CL/938(XXVIII), Decisions of the 28th Ordinary Session of the Executive Council (23 – 28 January 2016, Addis Ababa, ETHIOPIA) EX.CL/Dec.898 – <918(XXVIII)Rev.1https://au.int/en/decisions-4>

Decision on the report of the activities of the African Commission on Human and Peoples’ Rights Doc. EX.CL/968(XXIX), Decisions and Recommendation of the 29th Ordinary Session of the Executive Council Session (13 – 15 July 2016, Kigali, RWANDA) EX.CL/Dec.919-925 and 928-938(XXIX) <https://au.int/en/decisions-1>

Supra Decision on the 42nd Activity Report of the African Commission on Human and Peoples’ Rights.

60 Supra Decision on the 32nd and 33rd Combined Reports of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 35th Activity Report of the African Commission on Human and Peoples’ Rights.

61 Supra Decision on the 34th Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 35th Activity Report of the African Commission on Human and Peoples’ Rights.

62 Supra Decision on the 34th Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 42nd Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 44th Activity Report of the African Commission on Human and Peoples’ Rights.

63 Supra Decision on the 32nd and 33rd Combined Reports of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 37th Activity Report of the African Commission on Human and Peoples’ Rights.

Supra Decision on the 39th Activity Report of the African Commission on Human and Peoples’ Rights.

Decision on the report of the activities of the African Commission on Human and Peoples’ Rights Doc. EX.CL/968(XXIX), Decisions and Recommendation of the Twenty-Ninth Ordinary Session of the Executive Council Session (13 – 15 July 2016 Kigali, RWANDA) EX.CL/Dec.919-925 and 928-938(XXIX) <https://au.int/en/decisions-1>

Decision on the activities of the African Commission on Human and Peoples’ Rights (ACHPR) Doc. EX.CL/998(XXX), Decisions and Recommendation of the Thirtieth Ordinary Session of the Executive Council (25 – 27 January 2017 Addis Ababa, ETHIOPIA) EX.CL/Dec.939 – 964(XXX) <https://au.int/en/decisions/decisions-and-recommendation-thirtieth-ordinary-session-executive-council> **Also see:** Decision on the Forty- Second Activity Report of the African Commission on Human and Peoples’ Rights, Doc. EX.CL/1030(XXXI), Decisions and Recommendation of the Thirty-First Ordinary Session of the Executive Council (27 June – 1 July 2017 Addis Ababa, ETHIOPIA) EX.CL/Dec.965-985(XXXI) <https://au.int/en/decisions/decisions-and-recommendation-thirty-first-ordinary-session-executive-council>

Also see: Decision on the African Commission on Human and Peoples’ Rights Doc. EX.CL/1058(XXXII), Decisions of the Thirty-Second Ordinary Session of the Executive Council

(25 – 26 January 2018 Addis Ababa, ETHIOPIA) EX.CL/Dec.986-1007(XXXII) <https://au.int/en/decisions/decisions-thirty-second-ordinary-session-executive-council>

Decision on the Activity Report of the African Commission on Human and Peoples’ Rights Doc. EX.CL/1205(XXXVI), Decisions of the 36th Ordinary Session of the Executive Council (06 – 07 February 2020 Addis Ababa, Ethiopia) EX.CL/Dec.1073-1096(XXXVI) <https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council>

Decision on the Activity Report of the African Commission on Human and Peoples’ Rights (ACHPR) – Doc. EX.CL/1259(XXXVIII), Decisions of the 38th Ordinary Session of the Executive Council (03 – 04 February 2021 Addis Ababa, Ethiopia) EX.CL/Dec.1107- 1125(XXXVIII) <https://au.int/en/decisions/decisions-thirty-eighth-ordinary-session-executive-council>

64 Office of the High Commissioner for Human Rights National Human Rights Institutions: History, Principles, Roles and Responsibilities (Geneva, United Nations 2010).

65 Global Alliance of National Human Rights Institutions (GANHRI) General Observations of the Sub-Committee on Accreditation, adopted by the GANHRI Bureau on 21 February 2018, Para. 2.

66 Gauthier De Beco and Rachel Murray *A Commentary on the Paris Principles of National Human Rights Institutions* (Cambridge, Cambridge University Press 2015) 34.

67 Supra Paris Principles.

competence to promote, protect and monitor human rights which should be set out in the Constitution or statute.

2. They must abide by the principle of composition and guarantees of independence and pluralism. NHRIs must be constituted through procedures that ensure the pluralist representation of the state and other diverse social forces involved in the promotion and protection of human rights.
3. NHRIs must abide by minimum requirements of methods of operation. They must determine their working methods independently and without interference.
4. Finally, they may have court-like powers such as the adjudication of complaints covering specific situations and providing remedies in forms such as recommendations for law reform.

The drafters of the African Charter had great prescience on the importance of NHRIs four decades ago when these bodies were globally in their very embryonic stages and over a decade before the Paris Principles were enunciated. Article 26 of the Charter provides that:

State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

This provision is given detail in the Commission's Rules of Procedure⁶⁸ as well as Res. 370: 'Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa.'⁶⁹ The Commission grants affiliate status to NHRIs '... established by States Parties and functioning according to

internationally and regionally recognized norms and standards ...'⁷⁰ Although mention of international norms and standards is an allusion to the Paris Principles, the Commission does not simply provide affiliate status to institutions accredited with category A-status by the Global Alliance of National Human Rights Institutions (GANHRI). In this author's experience, the Commission has tended towards taking the pragmatic approach of erring on the side of inclusion rather than exclusion with the expectation thereby of bringing more States into its human rights fold where gradual positive change is consequently anticipated both to strengthen weak NHRIs and bring States with errant human rights records to heel.

Pursuant to the criteria established by the Commission in Res. 370, an applicant entity must:

1. Be duly established by law.
2. Be an NHRI or other specialised human rights institution of a State Party to the African Charter. This provision extends affiliate status to bodies such as Equality Commissions and Gender Commissions.
3. Its independence shall be guaranteed by law.
4. It shall have as broad a mandate as possible, capable of promoting, protecting and monitoring human rights through various means.
5. It shall be characterised by effective functioning.
6. It shall be adequately funded and not subject to financial control.
7. It shall be accessible to the general public.
8. It shall be composed of diverse membership representative of the society.⁷¹

NHRIs with affiliate status are invited to the Commission's sessions, and they participate, without voting rights, in deliberations on issues of interest to them and submit proposals to the Commission.⁷² Their responsibilities are to assist

68 Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 (ACHPR 2020) <<https://www.achpr.org/legalinstruments/detail?id=72>>

69 ACHPR/Res.370(LX)2017: 'Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa' <<https://www.achpr.org/sessions/resolutions?id=412>>

70 Supra Rules of Procedure Rule 71.

71 'Criteria for the Granting of Affiliate Status to National Human Rights Institutions and Other Specialised Human Rights Institutions with the African Commission on Human and Peoples' Rights', annexed to supra ACHPR Res. 370, para. 2.

72 Ibid para. 4.

the African Commission in the promotion and protection of human rights at the national level, and to present their activity reports to the Commission every two years.⁷³

3.2 *The value of National Human Rights Institutions*

States as well as other stakeholders have held NHRIs in high regard over the years, trusting that they can and do make critical positive differences in the enjoyment of human rights at domestic⁷⁴ and continental levels. States have not been averse to NHRIs being given affiliation by the African Commission. This is unlike the accreditation of NGO which has quite often generated great opprobrium from States. The Executive Council has indeed urged the Commission to avoid interference by NGO and other third parties in its activities,⁷⁵ and to review criteria for granting observer status to NGO,⁷⁶ and representation before the Commission by non-African individuals and groups.⁷⁷

The first AU Ministerial Conference on Human Rights in 1999 welcomed the grant of affiliate status to NHRIs, underscoring that cooperation between the African Commission and NHRIs would greatly enhance respect for human rights in Africa.⁷⁸ The Executive Council has encouraged states to allocate adequate resources to NHRIs and to create them where they do not exist.⁷⁹ More substantively, illustratively, the

2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa urged that NHRIs should, among others:

1. Undertake studies, monitor and report on economic, social and cultural rights;
2. Scrutinise existing laws and administrative acts and make submissions to Parliament on bills relating to economic, social and cultural rights;
3. Publish and distribute their reports on economic, social and cultural rights;
4. Establish regional networks /coalitions and involve NGO in these coalitions;
5. Apply for affiliate status with the African Commission, if they had not done so;
6. Raise awareness on economic, social and cultural rights among particular groups such as the public service, the judiciary, the private sector and the labour movement and encourage governments to integrate human rights in school curricula;
7. Examine complaints of infringements of economic, social and cultural rights and make recommendations on redress, and where possible file cases before national courts; and
8. Conduct follow up activities in the implementation of recommendations of international treaty bodies and publicise their reports, especially on economic, social and cultural rights.⁸⁰

3.3 *A symbiotic relationship?*

The case which this paper makes is that the concerted protection of the mandate and autonomy of the African Commission relies on all its stakeholders leveraging their niches to hone and enhance strategies for ensuring human rights in Africa. How this may work is dependent on multiple factors, some of which are beyond the scope of the paper. Leveraging the relationship between the African Commission and NHRI is contingent on factors such as the effectiveness imperative (whether NHRIs have necessary infrastructure), and the strategic imperative

⁷³ Ibid para. 5.

⁷⁴ For example, for work of NHRI on economic, social and cultural rights, see Chris Maina Peter (ed) *The Protectors: Human Rights Commissions and Accountability in East Africa* (Kampala, Fountain Publishers 2008).

⁷⁵ Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights.

⁷⁶ Supra Decision on the 42nd Activity Report of the African Commission on Human and Peoples' Rights.

⁷⁷ Supra Decision on the 39th Activity Report of the African Commission on Human and Peoples' Rights.

⁷⁸ Grand Bay (Mauritius) Declaration and Plan of Action, 12-16 April 1999, Para. 23 <<https://www.achpr.org/legalinstruments/detail?id=44>>

⁷⁹ Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/921(XXVII) Para. 4.

Also see: First AU Ministerial Conference on Human Rights in Africa (Kigali Declaration), 8 May 2003, Kigali, Rwanda,

Para. 27 <<https://www.achpr.org/legalinstruments/detail?id=39>>

⁸⁰ Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004 <<https://www.achpr.org/legalinstruments/detail?id=35>>

(whether they have the credibility and savvy to become ‘honest-brokers’ with key relevant players).

As the paper shall show in the next section, the African Commission has harnessed the niches of NHRIs towards ensuring human rights on the continent. ON their part, NHRIs make statements on various agendas of the African Commission’s public sessions. Yet their participation in such sessions is quite limited. Indeed, one study notes that some NHRIs do not have resources to attend Commission meetings, on occasion getting resources to attend GANHRI meetings in Geneva but not Commission meetings in Banjul.⁸¹

The umbrella continental body of NHRIs, the Network of African National Human Rights Institutions (NANHRI), has also leveraged its mandate to partner with the Commission on various human rights issues as well as to engage with other relevant human rights actors including the Political Organs of the AU. NANHRI issues a statement at each public session of the African Commission. NANHRI has conducted studies, held joint conferences, and even sought the creation of an NHRI Forum to discuss improvement of relations between the Commission and NHRIs.⁸² It has also published multiple advocacy and capacity-building material.⁸³

81 NANHRI *Litigation Capacities, Gaps and Opportunities for NHRIs: Baseline Study* (Nairobi, NANHRI 2019) <<https://www.nanhri.org/2020/06/06/litigation-capacities-gaps-and-opportunities-for-african-national-human-rights-institutions-web/>>

82 <<https://www.nanhri.org/our-work/thematic-areas/cooperation-with-regional-human-rights-mechanism/>>

83 For example:
NANHRI *Litigation Capacities, Gaps and Opportunities for NHRIs: Baseline Study* (Nairobi, NANHRI 2019) <<https://www.nanhri.org/2020/06/06/litigation-capacities-gaps-and-opportunities-for-african-national-human-rights-institutions-web/>>

NANHRI National Human Rights Institutions and African Regional Mechanisms: Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples’ Rights and Judgements of the African Court on Human and Peoples’ Rights (Nairobi, NANHRI 2016) <https://nhri.ohchr.org/EN/ExternalPublications/Guidelines%20on%20Implementation%20of%20decisions%20of%20Regional%20Human%20Rights%20Organs%20English%20Version.pdf>
NANHRI *The Role of National Human Rights Institutions in Strengthening the African Commission on Human and Peoples’*

An attestation of the quite significant symbiotic relationship between the African Commission and NHRIs relates to the Commission’s adoption in 2014 of its Res. 275: ‘Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity’.⁸⁴ The gist of Res. 275 is that every human being possesses human dignity which may not be violated on any count including their sexual orientation or gender identity. Res. 275 employed freedom from torture as the segue for affirming that the African Charter establishes respect and protection of all persons despite their sexual orientation or gender identity. It accordingly establishes State obligations and actions, notably that States should take legislative and other measures to prohibit, investigate and punish all forms of violence targeting persons on the basis of their imputed or real sexual orientation or gender identities; and that they should ensure that human rights defenders may address sexual minorities work in an enabling environment that is free of stigma, reprisals or criminal prosecution.⁸⁵ Res. 275 became the spearhead for the Commission indeed as for NHRIs to advance protection of persons of diverse sexual orientations or gender identities. Subsequent to its adoption, NHRIs and other stakeholders adopted the Ekurhuleni Declaration on Practical Solutions on Ending Violence and Discrimination against Persons Based on Sexual Orientation and Gender Identity and Expression.⁸⁶ The Declaration welcomed Res. 275 and proceeded to establish guidance to support states in addressing and eliminating violence and discrimination on the basis of sexual orientation, gender identity and expression. The guidance covered matters

Rights (Nairobi, 2009) <<https://www.nanhri.org/wp-content/uploads/2016/03/role-of-anhris-in-strengthening-the-achpr.pdf>>

84 ACHPR/Res.275(LV)2014: ‘Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity’ <<https://www.achpr.org/sessions/resolutions?id=322>>

85 Ibid.

86 Ekurhuleni Declaration on Practical Solutions on Ending Violence and Discrimination against Persons Based on Sexual Orientation and Gender Identity and Expression, Johannesburg, 5 March 2016 <<https://www.oursplatform.org/resource/ekurhuleni-declaration-practical-solutions-ending-violence-discrimination-persons-based-sogie/>>

such as changing perceptions and creating awareness; and addressing violence and discrimination in education settings.⁸⁷ Subsequent to that, NANHRI instituted multiyear advocacy work on building the capacities of NHRI on Res. 275 involving five human Rights commissions: Commission for Human Rights Administration and Justice (Ghana), Kenya National Commission on Human Rights, Malawi Human Rights Commission, South African Human Rights Commission, and Uganda Human Rights Commission.⁸⁸ NANHRI even published a guide which NHRIs and other stakeholders could use for implementing Res. 275.⁸⁹

What is clear from the foregoing is that NHRIs are well-placed to bear the baton of pushing

forward important human rights work which would otherwise be easily dismissed when fronted by NGOs. Indeed, they are in an apt position to understand the sorts of pressures and demands which the African Commission may face from its different stakeholders.

On whether NHRIs bear adequate credibility and effectiveness, a study which found that the establishment of 54% of Africa's NHRIs was anchored in Constitutions either singly or alongside statutes or decrees also noted that the powers, mandate and existence of NHRIs established by presidential decrees can be fettered at the instance of presidential whimsy or caprice.⁹⁰ To what extent, then, have individual NHRIs actually (Table 1) worked with the Commission?

Table 1: Level of participation by National Human Rights Institution in activities of the Commission

No.	STATE	NHRI	Grant of Commission affiliation ¹	GANHRI accreditation category ²	Level of participation in Commission sessions ³
1.	Algeria	L'Observatoire National des Droits de l'Homme d'Algérie ⁴	27th Ordinary Session (2000)	A	
		Conseil National Consultatif de Promotion et de Protection des Droits de l'Homme en Algérie (CNCPPDH)	33rd Ordinary Session (2003)	-	7 Sessions
2.	Burkina Faso	Commission Nationale des Droits Humains du Burkina Faso	35th Ordinary Session (2004)	-	0
3.	Burundi	Commission Nationale Independante des Droits de l'Homme	53rd Ordinary Session (2013)	B	2 Sessions
4.	Cabo Verde	Comissao Nacional para Direitos Humanos e a Cidadania (CNDHC) de Cabo Verde	67th Ordinary Session (2020)	-	0
5.	Cameroon	Comité National des Droits de l'Homme du Cameroun/ National Committee for Human Rights	31st Ordinary Session (2002)	-	
		National Commission for Human Rights and Liberties of Cameroon ⁵	42nd Ordinary Session (2007)	A	3 Sessions
6.	Chad	Commission Nationale des Droits de l'Homme du Tchad	29th Ordinary Session (2001)	B	0

continues

⁸⁷ Ibid.

⁸⁸ The significance of this Res. 275 advocacy was brought home to this author when it was intimated to him as part of the Commission's Bureau that a State, Malawi, had requested the inclusion on the agenda of the 65th Ordinary Session of the Commission a panel on Res. 275. The panel included representatives from the government and Malawi Human Rights Commission, and it discoursed on progress and challenges of implementing Res. 275.

⁸⁹ NANHRI *A Guide for African National Human Rights Institutions for Implementing Resolution 275* (Nairobi, 2020) <<https://cfnhri.org/wp-content/uploads/2020/12/NANHRI-Guide-for-NHRIs-on-Implementing-Resolution-275.pdf>>

⁹⁰ Supra UNDP and NANHRI Study on the State of National Human Rights Institutions

No.	STATE	NHRI	Grant of Commission affiliation ¹	GANHRI accreditation category ²	Level of participation in Commission sessions ³
7.	Cote d' Ivoire	La Commission Nationale des Droits de l'Homme de Côte d'Ivoire	56th Ordinary Session (2015)	A	5 Sessions
8.	Democratic Republic of Congo	Commission Nationale des Droits de l'Homme (CNDH)	36th Ordinary Session (2004)	A	0
9.	Ethiopia	Ethiopian Human Rights Commission	40th Ordinary Session (2006)	B	1 Session
10.	Ghana	Commission on Human Rights and Administrative Justice	56th Ordinary Session (2015)	A	0
11.	Kenya	Kenya National Commission on Human Rights	36th Ordinary Session (2004)	A	6 Sessions
12.	Malawi	Malawi Human Rights Commission	27th Ordinary Session (2000)	A	2 Sessions
13.	Mali	Commission nationale des droits de l'homme du Mali	42nd Ordinary Session (2007)	B	0
14.	Mauritania	National Human Rights Commission of Mauritania	47th Ordinary Session (2010)	A	5 Sessions
15.	Mauritius	National Human Rights Commission of Mauritius	31st Ordinary Session (2002)	A	1 Session
16.	Niger	Commission Nationale des Droits de l'Homme et des Libertés Fondamentales Rue du Plateau, Niamey	31st Ordinary Session (2002)	A	8 Sessions
17.	Nigeria	National Human Rights Commission, Nigeria	32nd Ordinary Session (2002)	A	6 Sessions
18.	Rwanda	Commission Nationale des Droits de l'Homme du Rwanda	27th Ordinary Session (2000)	A	7 Sessions
19.	Sahrawi Arab Republic	Commission Nationale Sahraouie des Droits de l'Homme (CONASADH)	58th Ordinary Session (2016)	-	4
20.	Senegal	Comité Sénégalais des Droits de l'Homme	28th Ordinary Session (2000)	B	1 Session
21.	Sierra Leone	National Commission for Democracy and Human Rights	28th Ordinary Session (2000)	-	1
22.	South Africa	South African Human Rights Commission	32nd Ordinary Session (2002)	A	5 Sessions
		Commission for Gender Equality of the Republic of South Africa	62nd Ordinary Session (2018)	-	3
23.	South Sudan	South Sudan Human Rights Commission	63rd Ordinary Session (2018)	-	2 Sessions
24.	Sudan	National Commission for Human Rights, The Sudan	58th Ordinary Session		3 Sessions
25.	Tanzania	Commission for Human Rights and Good Governance of Tanzania	35th Ordinary Session (2004)	A	1 Session
26.	Togo	Commission Nationale des Droits de l'Homme du Togo	31st Ordinary Session (2002)	A	1 Session
27.	Uganda	Uganda Human Rights Commission	40th Ordinary Session (2006)	A	3 Sessions
28.	Zambia	Permanent Human Rights Commission of Zambia	35th Ordinary Session (2004)	A	0
29.	Zimbabwe	Zimbabwe Human Rights Commission	60th Ordinary Session	A	Sessions

The following is notable from the above data:

1. As of 2020, the African Commission had provided affiliate status to 30 entities from 29 countries, i.e. 29 NHRI and one Gender Equality body.
2. Of the 30 entities, 23 participated in at least one session of the Commission. Niger's NHRI participated in eight sessions of the Commission, while Algeria and Rwanda's NHRI participated in seven sessions. The NHRI of Kenya

and Nigeria participated in six sessions, while those of Cote d' Ivoire, Mauritania and South Africa participated in five sessions.

3. Of 29 NHRI, 17 (being 58.6%) had GANHRI Category-A accreditation while five (being 17.2%) had Category-B accreditation. The accreditation status of seven NHRI (being 24.13%) was uncertain.
4. Quite interestingly, having Category-A GANHRI accreditation did not necessarily improve an NHRI's participation in Commission activities. While Niger's NHRI, with the highest level of participation in Commission activities, has GANHRI Category-A accreditation, the NHRI of Ghana and the Democratic Republic of Congo with GANHRI Category-A accreditation had not participated in Commission activities.
5. Quite clearly, though, NHRI with GANHRI Category-B accreditation participated minimally in Commission activities, with Burundi's NHRI participating twice while the NHRI of Ethiopia and Senegal participated once, and those of Chad and Mali did not participate at all.
6. Finally, using the parameters of participation in Commission sessions and GANHRI accreditation, the most credible NHRI, therefore, were Niger, Rwanda, Algeria, Kenya, Nigeria, Cote d' Ivoire, Mauritania and South Africa. Surprisingly, Uganda's NHRI with Category-A accreditation participated in only three sessions of the Commission.

4 Assessing Sites of and Strategies for Protecting the Mandate and Autonomy of the African Commission

4.1 Functions

The African Commission undertakes its mandate through a number of functions which are set out in Article 45 of the African Charter. First, it promotes human and peoples' rights, notably by:

1. Collecting documents, undertaking studies and researches on African problems in the field of human and peoples' rights, organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples' rights and giving its views or

- making recommendations to governments;
2. Formulating and laying 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 legislation; and
3. Cooperating with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

Second, the Commission ensures the protection of human and peoples' rights, principally by determining communications, undertaking protection or fact-finding missions and responding to emergent situations of human rights violations through provisional measures, urgent appeals and public statements. Third, the Commission interprets the Charter's provisions at the request of a State, an institution of the AU or an African organisation recognised by the AU. Finally, the Commission may '... perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.'⁹¹

4.2 Periodic reporting before the Commission

The Commission uses the periodic reporting procedure under the African Charter and two other instruments⁹² to evaluate the extent to which States are fulfilling their obligations to ensure human rights. The Executive Council has on a regular basis urged States to submit overdue periodic reports in accordance with Article 62 of the Charter.⁹³ As of 30 June 2020, only 11% of states Parties

91 Charter Article 45(4).

92 Charter Article 62; Article 26 of supra Maputo Protocol; Article 15 of African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (AU 2009) <<https://au.int/sites/default/files/treaties/36846-sl-AFRICAN%20UNION%20CONVENTION%20FOR%20THE%20PROTECTION%20AND%20ASSISTANCE%20OF%20INTERNALLY%20DISPLACED%20PERSONS%20IN%20AFRICA%20%28KAMPALA%20CONVENTION%29.pdf>>

93 Supra Decision on the 34th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 39th Activity Report of the African Commission on Human and Peoples' Rights.

to the Charter were up-to-date in their reporting obligations; 48% of States had three or more overdue reports; and six States had never fulfilled their Article 62 reporting obligations: Comoros, Equatorial Guinea, Guinea Bissau, Sao Tome and Principe, Somalia and South Sudan.⁹⁴

The periodic reporting procedure offers significant opportunities for the Commission to enhance mutually-beneficial working relations with NHRIs towards ensuring human rights. The African Commission has used information from NHRIs to support its conclusions and recommendations to States, for example in the instance of the Uganda Human Rights Commission in relation to the high number of torture cases in Uganda.⁹⁵ The Commission has also urged States to establish and provide adequate support to NHRIs. For example in the case of Mozambique where the African Commission urged that the Mozambique Human Rights Commission should enjoy full independence and that it should be provided necessary human, material and financial resources to carry out its mandate effectively in accordance with the Paris Prin-

ciples.⁹⁶ Yet, throughout this author's near seven-year stint at the African Commission, not a single NHRI in his experience submitted an alternative or shadow report to the Commission, a situation quite unlike many instances where NHRIs submit alternative or shadow reports to global human rights treaty committees.⁹⁷

Hence:

1. NHRIs should submit alternative or shadow reports to the Commission.
2. NHRIs should carve a more independent path during the dialogue between the Commission and reporting States. This is anticipated in the Rules of Procedure which require the Commission, during its consideration of a State periodic report, to explore '... all the pertinent information relating to the human rights situation in the State concerned, including reports by international, regional and national human rights organs as well as statements and shadow reports from National Human Rights Institutions and non-governmental organisations.'⁹⁸
3. The African Commission should even provide NHRIs with formal opportunities to address it during the consideration of State periodic reports.
4. The Commission should make more concerted efforts to engage with NHRIs from States

Decision on the activities of the African Commission on Human and Peoples' Rights (ACHPR) Doc. EX.CL/998(XXX), Decisions and Recommendation of the Thirtieth Ordinary Session of the Executive Council (25 – 27 January 2017 Addis Ababa, ETHIOPIA) EX.CL/Dec.939 – 964(XXX) <<https://au.int/en/decisions/decisions-and-recommendation-thirtieth-ordinary-session-executive-council>>

Supra Decision on the 42nd Activity Report of the African Commission on Human and Peoples' Rights.

Decision on the African Commission on Human and Peoples' Rights Doc. EX.CL/1058(XXXII), Decisions of the 32nd Ordinary Session of the Executive Council (25 – 26 January 2018 Addis Ababa, ETHIOPIA) EX.CL/ Dec.986-1007(XXXII) <<https://au.int/en/decisions/decisions-thirty-second-ordinary-session-executive-council>>

Supra Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights.

Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) – Doc. EX.CL/1259(XXXVIII), Decisions of the 38th Ordinary Session of the Executive Council (03 – 04 February 2021 Addis Ababa, Ethiopia) EX.CL/Dec.1107- 1125(XXXVIII) <<https://au.int/en/decisions/decisions-thirty-eighth-ordinary-session-executive-council>>

94 Amnesty International *State of African Human Rights Bodies and Mechanisms Report 2019-2020* (Amnesty International 2020) <<https://www.amnesty.org/en/documents/afr01/3089/2020/en/>>

95 Concluding Observations and Recommendations on the Fifth Periodic State Report of the Republic of Uganda (2010-2012) (ACHPR 2015) PARA. 59 <<https://www.achpr.org/states/statereport?id=95>>

96 Concluding Observations and Recommendations on the Second and Combined Periodic Report of the Republic of Mozambique on the Implementation of the African Charter on Human and Peoples' Rights (1999-2010) (ACHPR 2014) para 79 <<https://www.achpr.org/statereportsandconcludingobservations>>

Also see Concluding Observations and Recommendations on the Initial and Combined Report of the Gabonese Republic on the Implementation of the African Charter on Human and Peoples' Rights (1986-2012) (ACHPR 2014) para 66 <https://www.achpr.org/public/Document/file/English/concluding_observations_gabon_eng.pdf>

See Concluding Observations and Recommendations on the Initial, First, Second, Third and Fourth Periodic Report of the Federal Democratic Republic of Ethiopia (ACHPR 2010) para 70 <https://www.achpr.org/public/Document/file/English/achpr47_conc_staterep1234_ethiopia_2010_eng.pdf>

97 For example see KNCHR 'Alternative Report to the Committee on Elimination of all Forms of Racial Discrimination', March 2017 <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/KEN/INT_CERD_IFN_KEN_27238_E.pdf>

98 Supra Rules of Procedure of the African Commission on Human and Peoples' Rights

with outstanding periodic reports so that they may chivvy their governments to expedite submission of their periodic reports.

5. Most recently, the African Commission has instituted a process to develop guidelines on shadow reporting,⁹⁹ and it will be necessary that the resulting guidelines and other interventions provide NHRIs with further opportunities for proactive engagements.

4.3 The communications procedure

The African Commission uses the communications procedure under which individuals or States may lodge complaints for adjudication as a means of ensuring the protection of human rights. State compliance with the Commission's decisions, however, encounters difficulties. The Executive Council has on multiple occasions implored States to furnish the African Commission with information on implementation of recommendations made in determined communications,¹⁰⁰ and the 36th Ordinary Session of the Executive Council commended the rare

example of Cameroon which had furnished the Commission with a report on the implementation of the decision in Communication 389/10.¹⁰¹ The Council has also reminded States to comply with provisional measures issued by the Commission.¹⁰² On the other hand, in a clear instance of interference with the Commission's independence, the Executive Council called on the Commission to 'expunge' communications 426/12 and 392/10 concerning the Government of Rwanda from its Activity Report for the period June-December 2014 until Rwanda was offered the opportunity of oral hearing on the two cases '... as requested through various correspondence to the ACHPR'.¹⁰³

The African Commission and NHRIs have common interests in the execution of their mandate of monitoring the implementation of human rights. Not unlike the Commission, some NHRIs even have quasi-judicial redress procedures for adjudicating human rights violations or abuses. It is not clear whether or the extent to which NHRI take conscious account of the rich jurisprudence emanating from the Com-

99 ACHPR/Res. 436 (EXT.OS/ XXVI1) 2020: 'Resolution on the Need to Develop Guidelines for Shadow Reporting' <<https://www.achpr.org/sessions/resolutions?id=467>>

100 Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights. Decision on the activities of the African Commission on Human and Peoples' Rights (ACHPR) Doc. EX.CL/998(XXX), Decisions and Recommendation of the Thirtieth Ordinary Session of the Executive Council (25 – 27 January 2017 Addis Ababa, ETHIOPIA) EX.CL/Dec.939 – 964(XXX) <<https://au.int/en/decisions/decisions-and-recommendation-thirtieth-ordinary-session-executive-council>>
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101 Communication 389/10: *Mbiankeu Genevieve v Cameroon* (ACHPR 2015) <https://www.achpr.org/public/Document/file/English/communication_389.10_eng.pdf>

102 Supra Decision on the 35th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 42nd Activity Report of the African Commission on Human and Peoples' Rights. Decision on the African Commission on Human and Peoples' Rights Doc. EX.CL/1058(XXXII), Decisions of the 32nd Ordinary Session of the Executive Council (25 – 26 January 2018 Addis Ababa, ETHIOPIA) EX.CL/ Dec.986-1007(XXXII) <<https://au.int/en/decisions/decisions-thirty-second-ordinary-session-executive-council>>
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103 Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights. One of the expunged Communications was eventually determined by the Commission in 2020 – Communication 426/12: *Agnes Uwimana-Nkusi and Saidati Mukakibibi v Rwanda* (ACHPR 2019) <<https://www.achpr.org/states/detail?id=38>>

mission's decisions. On its part, the Commission has in the past not taken full advantage of the facilitative support which NHRIs could provide towards the enforcement of its communications decisions. Quite recently, it has begun to assign such specific facilitative roles to some NHRIs. In *Thomas Kwoyelo v Uganda*,¹⁰⁴ the African Commission found Uganda liable for violating the victim's rights under Articles 3 and 7(1) (a) and (b) of the Charter. It ordered Uganda to pay the victim adequate compensation to be determined on the basis of international norms and practices on the payment of compensatory damages. Apart from availing its good offices to facilitate the implementation of the compensation order, the Commission as part of the decision urged the Uganda Human Rights Commission to use its statutory powers under section 52 (1)(h) of the Constitution of Uganda to monitor the Government's compliance with the decision.¹⁰⁵

Clearly, this formal approach to an NHRI has to be guided by the Commission's sense of the credibility of particular human rights commissions;¹⁰⁶ but the practice of laying this responsibility on NHRI has now been concretised in the Commission's Rules of Procedure. Rule 125(2) provides that: 'The Commission may request a national or specialized human rights institution with affiliate status to inform it of any action it has taken to monitor or facilitate the implementation of the Commission's decision.' This provision was crafted with care to leverage the monitoring niche of NHRIs while at the same time not shifting the burden of implementation from the State to NHRIs which would have been quite unconscionable.¹⁰⁷

104 Communication 431/12: *Thomas Kwoyelo v Uganda* (ACHPR 2018) <<https://www.achpr.org/sessions/descions?id=265>>

105 Ibid Para. 295.

106 Instructively, in another instance where the African Commission could have formally sought the assistance of an NHRI, it opted not to do so, perhaps since it did not deem the particular human rights commission properly kitted for the task. See Communication 290/2004: *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon* (ACHPR 2019) <https://www.achpr.org/public/Document/file/English/Communication%20290-04%20-%20OSJI%20v%20Cameroon_ENG.pdf>

107 This author's recollection during the drafting process.

NHRIs should also take a view in defence of the protective and interpretive mandates of the African Commission which have in recent times faced pushbacks from those whose viewpoint is that the African Court on Human and Peoples' Rights (Court)¹⁰⁸ should determine cases of human rights violations or abuses to the Commission's exclusion. The essence of their argument is that the Court is better placed to determine cases while the Commission focuses on the promotion mandate. Implicit in this approach is that the Commission would become a conduit for processing cases for determination by the Court. The Executive Council perhaps rather conveniently lurched onto this view with its call on States to undertake an analytical review of the interpretative mandate of the Commission in light of the similar mandate exercised by the Court and the potential for conflicting jurisprudence.¹⁰⁹ Countering this view are responses which explain that the primary mandate of the Commission is protective and interpretive as much as it is promotive, and it is the Court under its establishing Protocol which complements the Commission's protection mandate.¹¹⁰ The contentious protective mandate of the Commission may be accessed by all in the 54 States Parties to the Charter and no other African institution provides such continent-wide access.¹¹¹

In the final analysis:

1. Each affiliated NHRI should liaise with the African Commission to compile a list of their State's determined merit communications, subsequent to which the NHRI should alongside the Commission regularly seek implementation status reports.
2. The Commission should regularise implementation hearings for each communication

108 Established pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (OAU 1998) <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>>

109 Supra Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights.

110 Supra Court Protocol Article 2.

111 ACHPR/Res. 402 (LXIII) 2018: 'Resolution on the Interpretive and Protective Mandates of the African Commission on Human and Peoples' Rights' <<https://www.achpr.org/sessions/resolutions?id=421>>

which could be led in terms of Rule 125(5) of the Rules of Procedure by the responsible Rapporteur and in which NHRIs could provide key evidential and logistical support.

3. The Commission should also continue to assign specific monitoring tasks to NHRIs.
4. The African Commission's procedures should anticipate the option of copying NHRIs onto provisional measures sent to states for their information as well as their possible follow-up.

4.4 Promotion missions

The African Commission undertakes promotion missions to receive information on the legislative and other measures put in place to give effect to the rights and freedoms enshrined in the African Charter, sensitise States on various human rights aspects, and follow up on implementation of the Commission's decisions and recommendations.¹¹² The Executive Council has urged States to authorise promotion missions requested by the Commission and to indeed provide it with standing invitations to undertake promotion missions.¹¹³ The Commission's keenness on obtaining standing invitations seeks to mitigate against the realities of the extreme bureaucracy and non-responsiveness which the Commission encounters each time it attempts to undertake a promotion mission. In the author's experience, the bulk of requests for promotion missions made by the Commission stay unheeded. Members of the Commission have indeed increasingly resulted to undertaking advocacy visits which are not constrained by the bureaucracy that accompanies promotion missions.¹¹⁴

112 'Guidelines on the Format of Promotion and Protection Mission Reports of the African Commission', Para. 3 (ACHPR 2018) (on file with author). Also see Rule 76 of the Rules of Procedure of the African Commission, *supra*.

113 *Supra* Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights.

Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights.

Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/1205(XXXVI), Decisions of the 36th Ordinary Session of the Executive Council (06 – 07 February 2020 Addis Ababa, Ethiopia) EX.CL/Dec.1073-1096(XXXVI) <<https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council>>

114 As Special Rapporteur on Freedom of Expression and Access to Information in Africa, this author undertook advocacy

While the Commission has not used NHRIs to conduit formal requests for promotion missions, NHRIs to their great credit have played critical on-the-ground facilitative roles to support promotion missions. Their roles have been varied, but NHRIs have generally gone out of their way to be supportive. Illustratively, NHRIs have spoken truth to power during promotion missions by giving voice to human rights violations or abuses entailing peculiar national discomfiture. This was the case for example when the National Human Rights Commission of Mauritania told a promotion mission that laws prohibiting slavery in the country had not been applied in practice, and stressing the need for positive discrimination in favour of communities and individuals affected by slavery.¹¹⁵ In turn, the Commission has responded positively in support of NHRIs. The Commission's promotion mission to Angola, for example, urged the State to take appropriate measures to ensure that the recommendations of the Office of the Ombudsman were implemented.¹¹⁶

The bottom-line, then, is that:

1. Whenever it requests authorisation for promotion missions, the African Commission should inform relevant NHRIs which may then as necessary use their good offices to support the Commission's requests.
2. Working more proactively with NHRIs may also dampen concerns that promotion missions may be hampered by the assumed partiality of host government-provided logistics machinery.

visits, in the case of Nigeria organised by a government ministry with close support from civil society and in the case of Namibia organised fully by civil society. In both instances, the Rapporteur met top State officials, including the President of Namibia and the Vice-President of Nigeria. In the instance of Nigeria, he issued a key outcome document on access to information. See Special Rapporteur on Freedom of Expression and Access to Information in Africa 'Ensuring Effective Implementation of the Freedom of Information Act 2011: Advisory Paper Prepared for the Federal Government of Nigeria' (December 2018) <<https://www.achpr.org/news/viewdetail?id=209>>

115 'Report of the Promotion Mission of the Committee for the Prevention of Torture in Africa to the Islamic Republic of Mauritania, 26 March-1 April 2012', Para. 37 <https://www.achpr.org/public/Document/file/English/mission_report_mauritania_cpta_eng.pdf>

116 'Report of Joint Human Rights Promotion Mission to the Republic of Angola, 3-7 October 2016', Para. 168 <<https://www.achpr.org/states/missionreport?id=96>>

3. Finally, the Commission should reflect more deeply to propose more than the template recommendations which it usually makes relating to NHRIs, such as urging States to enhance the effectiveness of NHRIs by strengthening their human, technical and financial capacities.¹¹⁷

4.5 Protection or fact-finding missions

The African Commission has faced incessant stalemate in endeavours to undertake protection missions, also referred to as fact-finding missions, to investigate reports of widespread human rights violations in a State.¹¹⁸ Illustratively, despite multiple requests from the Commission and even decisions from the Executive Council, the Commission has been unable to undertake protection missions to Libya¹¹⁹ and the Sahrawi Democratic Arab Republic under the control of Morocco.¹²⁰ More broadly, the Executive Council has urged States to facilitate the Commission to undertake protection or fact-finding missions as necessary to investigate alleged violations of human rights.¹²¹

NHRIs have leveraged their eminent positions to share material information with the Commis-

sion and to impress on their States the importance of putting in place necessary protocols to enable the Commission to undertake protection missions. During the Commission's protection mission to Burundi in 2015, the National Human Rights Commission of Burundi provided it with credible information confirming the ransacking of radio stations, and the perpetration of acts of civilian torture and extra-judicial killings, and also providing important nuance and context on the factors spurring the prolonged detention of arrested protesters.¹²² One of the consequent recommendations of the Commission for purposes of stemming human rights violations and abuses required Burundi to enable the National Human Rights Commission and other relevant actors to '... regularly investigate, document and report on all acts of violence, human rights violations and other abuses irrespective of its source without impediment.'¹²³ The Commission's protection mission to Mali recommended that Mali should provide the National Human Rights Commission with necessary human and material resources to effectively implement its mandates. The mission also urged the Human Rights Commission to continue to advocate for the Malian Government to implement the Paris Principles, and to implement its mandate in an impartial manner and continue to work with the entire Malian civil society.¹²⁴

In the final analysis, whenever the Commission decides to undertake a protection or fact-finding mission on its own motion, it should liaise with relevant NHRIs which usually would be invaluable as credible sources of information as well as for logistical wherewithal.

4.6 Responding to emergency human rights situations

The African Commission responds to credible allegations of human rights violations requiring

117 For example see 'Report of the Human Rights Promotion Mission to the Gabonese Republic, 13-18 January 2014', Para. 279 <https://www.achpr.org/public/Document/file/English/achpr54os_misrep_promo_gabon_2014_eng.pdf>

118 Supra 'Guidelines on the Format of Promotion and Protection Mission Reports of the African Commission on Human and Peoples' Rights', Para. 4. Also see Rule 86 of the Rules of Procedure of the Commission supra.

119 45th Activity Report of the African Commission on Human and Peoples' Rights', May-November 2018, Para. 47 <https://www.achpr.org/public/Document/file/English/45th%20Activity%20Report_ENG.pdf>

120 For example, see Decision on the African Commission on Human and Peoples' Rights Doc. EX. CL/1058(XXXII) Para. 8 <https://au.int/sites/default/files/decisions/33909-ex_cl_decisions_986-1007_e.pdf>

46th Activity Report of the African Commission on Human and Peoples' Rights', November 2018-May 2019, submitted to the Policy Organs of the AU, Para. 60 <https://www.achpr.org/public/Document/file/English/46th%20Activity%20Report%20ACHPR_%20ENG.PDF>

121 Supra Decision on the Forty-Fourth Activity Report of the African Commission on Human and Peoples' Rights. Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc. EX.CL/1205(XXXVI), Decisions of the 36th Ordinary Session of the Executive Council (06 – 07 February 2020 Addis Ababa, Ethiopia) EX.CL/Dec.1073-1096(XXXVI) <<https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council>>

122 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi, 7-13 December 2015' <<https://www.achpr.org/news/viewdetail?id=198>>

123 Ibid, Para. 169 (g).

124 'Report of the Fact-Finding Mission to the Republic of Mali, 3-7 June 2013' <https://www.achpr.org/public/Document/file/English/misrep_factfinding_mali_2013_eng.pdf>

quick interventions through letters of urgent appeal addressed to a head of state or government or through other interventions such as public statements calling on the concerned State to take measures to prevent irreparable harm and seeking relevant information.¹²⁵ Of 14 urgent appeals issued by the Commission in 2019-2020, only four received official responses, a rate of 29%.¹²⁶ The Executive Council has called on States to respond to urgent appeal letters issued by the Commission.¹²⁷ Yet it has also asked the Commission to review its Rules of Procedure notably in relation to provisional measures and letters of urgent appeal.¹²⁸

If there is one instance where initiative by NHRI has been quite underwhelming considering their immense domestic comparative advantage, it is their near total failure to engage the Commission in response to emergency human rights situations. In this author's experience as Chairperson of the Committee for the Prevention of Torture in Africa and Special Rapporteur on Freedom of Expression and Access to Information in Africa, not even a single NHRI sought to move him to intervene in a situation where an individual or group were in eminent danger of suffering irreparable harm on account of an actual or apparent human rights violation.

Hence:

1. The African Commission should change its standard operating procedures to copy letters of urgent appeal to the relevant NHRI so long as it has affiliate status with the Commission.
2. NHRIs should in turn use their good offices to urge State authorities to respond to letters of urgent appeal.

4.7 Resolutions

The African Commission regularly issues themat-

¹²⁵ In accordance with Article 46 of the African Charter.

¹²⁶ Supra Amnesty International State of African Human Rights Bodies and Mechanisms Report 2019-2020.

¹²⁷ Supra Decision on the 35th Activity Report of the African Commission on Human and Peoples' Rights. Supra Decision on the 36th Activity Report of the African Commission on Human and Peoples' Rights.

¹²⁸ Supra Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights

tic or country-specific resolutions to express its formal opinions on theme-specific, country-specific or administrative issues. As this author has explained elsewhere:

Resolutions issued by the Commission have sought to clarify Charter provisions or offer new interpretations of particular normative aspects of the Charter, while other resolutions have expressed the Commission's concerns on and exhortations about particular human rights violations or abuses on the continent or in specific countries. Still others have established administrative measures to ensure the better realisation of the Charter.¹²⁹

The Commission has used resolutions to address important human rights matters, such as when it encouraged NHRIs and other actors '... to increase efforts towards the sustainable preservation, protection and promotion of indigenous languages.'¹³⁰ Yet the Executive Council made out as if it does not understand how resolutions are generated when it called on the African Commission to consult concerned States before issuing its resolutions.¹³¹

Unlike NGOs which work hard to persuade the Commission to adopt resolutions of interest, NHRIs have invariably been more reticent to propose resolutions which the Commission may consider adopting. Yet the paper has already

¹²⁹ Lawrence Murugu Mute 'Ensuring Freedom from Torture under the African Human Rights System' in Malcolm D Evans and Jens Modvic (eds) *Research Handbook on Torture: Legal and Medical Perspectives on Prohibition and Prevention* (Cheltenham, Edward Elgar Publishing 2020).

¹³⁰ ACHPR/Res.430(LXV)2019: 'Resolution on the Recognition, Promotion and Protection of Indigenous Languages', Para. 3 <<https://www.achpr.org/sessions/resolutions?id=461>>

This resolution resonates with the Commission's interventions of as long ago as 2005 when its promotion mission to Botswana WHICH engaged seriously on the Basarwa community's marginalisation and the difficulties the Basarwa encountered in using their language in education. See Report of the African Commission's Working Group on Indigenous Populations/Communities, 15-23 June 2005, Para. 13.48-13.50 <https://www.achpr.org/public/Document/file/English/achpr38_misrep_specmec_indpop_botswana_2005_eng.pdf>

¹³¹ Supra Decision on the 32nd and 33rd Combined Reports of the African Commission on Human and Peoples' Rights.

shown that the Rules of Procedure specifically establish this as one of the rights of NHRIs.

Hence:

1. NHRIs should be more proactive in suggesting country or thematic resolutions for consideration by the Commission.
2. The Commission should circulate the guidelines it uses for purposes of processing its resolutions.

4.8 *Soft-law instruments*

The African Commission through its soft-law instruments recognises the facilitative, regulatory or oversight roles which NHRI can and do play towards ensuring human rights in diverse spheres and contexts. The Commission is aware of its limitations in specifically monitoring the implementation of these various instruments on account of scarcity of resources, and that NHRIs are critical domestic partners in the dissemination and promotion of soft-law instruments and for monitoring their implementation.¹³² In their relationship of symbiosis, the African Commission and NHRI have indeed used the Commission's soft-law instruments to bridge legally-binding obligations and state practice.¹³³ In illustration:

1. The Commission has appointed NANHRI as a member of a group to support the Special Rapporteur on Human Rights Defenders to promote and monitor the effective imple-

mentation of the Guidelines on Freedom of Association and Assembly in Africa.¹³⁴

2. In the instance of implementation of Articles 21 and 24 of the Charter, the Commission has called on States to create conditions for the effective role of NHRIs in promoting and protecting human rights at the national level towards monitoring and enforcing fiscal, environmental, labour, health and human rights observance standards by third parties including business establishments particularly in extractive industries and joint-ventures where the State is a partner.¹³⁵
3. The Commission also expects that NHRIs should be involved in the active promotion and enforcement of economic, social and cultural rights as well as in the development and monitoring of implementation policies, including the setting of national benchmarks and indicators.¹³⁶
4. The African Commission has employed the Paris Principles template to propose criteria for establishing statutory National Gender Equality Institutions. These criteria cover composition, independence, powers, referrals, and complementarity and coordination.¹³⁷
5. The African Commission recognises that the right to protection against intimidation, retaliation and reprisals, which is an integral component of victims' right to redress and a condition precedent to obtaining justice, applies to victims as well as being extended to investigators, lawyers, health-care personnel, human rights defenders, monitoring bo-

132 ACHPR/Res. 406 (LXIII) 2018: 'Resolution on the Establishment of a Group to Support the Mandate of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa for the Promotion and Monitoring of the Effective Implementation of the Guidelines on Freedom of Association and Assembly in Africa', Preamble <https://www.achpr.org/sessions/resolutions?id=426>

Also see ACHPR-Res.471: 'Resolution on the Mandate Renewal of the Support Group of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa for the promotion and effective implementation of the Guidelines on Freedom of Association and Assembly in Africa' <<https://www.achpr.org/sessions/resolutions?id=503>>

133 Debra Long and Rachel Murray *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge, Cambridge University Press 2015) 76-77.

The study, however, also noted the trend of referencing United Nations instruments far more than instruments of the African Commission '... notwithstanding the rhetoric that African States want to resolve African Problems using African Solutions.' 77.

134 *Supra* ACHPR Res 406 Para. 2.

135 State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment (ACHPR) Para. 47 <<https://www.achpr.org/public/Document/file/English/Articles%2021%20&%2024%20State%20Reporting%20Guidelines.pdf>>

136 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (ACHPR) Para. 49 <https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf>

137 Guidelines on Combatting Sexual Violence and its Consequences (ACHPR 2017) guidelines 70-74 <https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combatting_sexual_violence_and_its_consequences.pdf>

dies such as NHRIs and National Preventive Mechanisms and other individuals or institutions assisting victims in accessing redress.¹³⁸

6. States are required to provide NHRIs access to places of detention.¹³⁹

5 Conclusion

The thesis of this paper is that NHRIs as well as other stakeholders should support or participate in addressing issues which trigger or manifest discord between the Commission and the AU Political Organs. The paper has shown that decisions of the Executive Council have over time sent mixed affirming and negating signals, on one hand encouraging the Commission to execute its mandate while at the same time thwarting its ability to perform its mandate with effectiveness and credibility.

From the totality of the preceding sections, it is clear that ensuring full implementation of the African Charter calls for the concerted initiatives of the African Commission, the AU Political Organs and other stakeholders including NHRIs. NHRIs can play notable critical functions to further solidify the Commission's ability to execute its mandate.

A critical key for unlocking ongoing concerns is continuous candid engagements anchored on political goodwill. The Political Organs should be impelled to implement their duty of engaging the Commission as an independent organ of the AU and not resorting to threats or blackmail.¹⁴⁰ Insightful proposals have already been made for purposes of processing contentious issues. Notably, adoption of the Commission's Activity Re-

ports should be guided by the principle of not eroding or undermining the role of the Commission as an independent and autonomous interpreter of the African Charter.¹⁴¹ The Political Organs and, notably the AU Assembly, should reinvigorate interactions with the African Commission and more generally with other human rights organs.

NHRIs could petition the Assembly to prioritise the work of the Commission to address issues not resolved satisfactorily by the Executive Council, and to institutionalise regular engagement with the Commission and establish a concrete strategy on their relationship.¹⁴² In this regard, it is doubly positive that the Commission has recently cultivated relations with other AU institutions, such as the formalisation in 2019 of consultative arrangements with the AU's Peace and Security Council.¹⁴³

NHRIs remain better placed than other stakeholders to empathise with the African Commission when it takes difficult decisions. NHRIs should play this role more prominently towards the overall goal of sustaining the Commission whenever it faces pressure from other interlocutors including dissatisfied States or NGOs. On occasion it may even be prudent for NHRIs to speak where delicate diplomatic considerations constrain the Commission from communicating in a forthright manner. In illustration, despite repeated calls by the Political Organs, Gambia has still not built permanent premises for the Commission, over three decades since this commitment was made. NHRIs may be better placed than the Commission to reframe this matter as amounting to breach of the agreement under which Gambia got the right to host the Commission's headquarters. NANHRI could even call on the

138 General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (ACHPR 2017) Para. 29 <<https://www.achpr.org/legalinstruments/detail?id=60>>

139 Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (ACHPR 2014) Guideline 42 <https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_toolkit.pdf>

140 This was the experience of this author during the 2018 Nairobi Retreat when members of the African Commission resisted extreme overt and covert pressure applied on them by the Chairperson of the PRC in an endeavour to wring an on-the-spot decision on withdrawal of the NGO observer status of CAL.

141 Supra Japheth 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'

142 Supra Tilahun Adamu Zewudie 'Toward an Effective African Human Rights System: The Nature and Implications of the Relationship between the African Union Policy Organs and Human Rights Bodies.'

143 For example see discussion in supra Amnesty International State of African Human Rights Bodies and Mechanisms Report 2019-2020.

AU and the African Commission to consider moving its headquarters to another state if Gambia fails to build the permanent headquarters expeditiously.

Finally, while the scope of this paper has been limited to the role of NHRI, one of its underlying arguments is the imperative for all human rights stakeholders to support the African Commission in spearheading what has been referred to as vernacularizing human rights.¹⁴⁴ As shown, one of the greatest drawbacks to the Commission's mandate-execution has been the charge that its human rights work goes against the grain of what the African Charter has referred to variously as '... the values of African civilisation ...',¹⁴⁵ '... morals and traditional values ...',¹⁴⁶ and '... positive African cultural values ...'.¹⁴⁷ Far too often this charge has been laid by state representatives (usually also sitting in influential AU Political Organs) simply as a ruse for stymying the Commission's work. Yet human rights scholarship and practice should join battle against the dangers of essentialist cultural relativist positions whose effect would be to undermine the universally-applicable human rights norms established in the Charter. Vernacularizing human rights seeks to ground universal human rights norms in local communities by affirming and delineating the scope of human rights in different cultural contexts.¹⁴⁸ As Bonny Ibhawoh explains:

Vernacularizing human rights requires seeing human rights in specific situations rather than as the application of abstract principles. In this sense, vernacularization refers to the interaction between established international human rights principles and local norms to produce hybridized legal and normative frameworks for human rights protection.¹⁴⁹

144 Bonny Ibhawoh *Human Rights in Africa* (Cambridge, Cambridge University Press 2018) 225.

145 *Supra* African Charter Preamble.

146 *Ibid* Article 17(3); Article 18(2).

147 *Ibid* Article 29(7).

148 *Supra* Bonny Ibhawoh 225-226.

149 *Ibid*.

African human rights instruments have indeed anchored the preservation of African values on the universal principles of equality, peace, freedom, dignity, justice, solidarity and democracy.¹⁵⁰ This resonates with the caution given by one of the fathers of the African Charter, President Leopold Sedar Senghor, to its drafters, that humanity was one and indivisible and that the protection of freedoms and rights was not constrained by race or frontier. Yet Africans should neither copy nor strive for originality for the sake of originality.¹⁵¹ NHRIs as well as networks such as CIAC must play pivotal roles in this process of vernacularizing human rights.

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and Assembly in Africa.'

(Footnotes)

- 1 List as of 2020 (on file with author).
- 2 As at March 2021.
- 3 Determined by number of Sessions at which entity made statements from 2013 to 2020.
- 4 During the 33rd Ordinary Session, the African Commission granted affiliate status to Conseil National Consultatif de

- 5 Promotion et de Protection des Droits de l'Homme en Algérie (CNCPPDH) which had replaced the Observatoire National des Droits de l'Homme de l'Algérie (ONDH) <https://www.achpr.org/sessions/info?id=65>
Replaced the National Committee for Human Rights with Observer Status granted during the 31st Ordinary Session

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