

Human rights in the African Union decision-making processes: An empirical analysis of states' reaction to the Activity Reports of the African Commission on Human and Peoples' Rights

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ABSTRACT: More than any other time in the history of the African Union, the past five years have witnessed discord and division between the African Commission on Human and Peoples' Rights and the states that comprise the AU. Instead of constructive dialogue, confrontation and antagonism have prevailed during the consideration of the Commission's Activity Reports, provoking adverse decisions that erode the standards in the African Charter on Human and Peoples' Rights. Drawing in part on the author's personal empirical observation of the dialogues before AU policy organs, the article endeavours to divulge states' observations on the content of the Commission's Activity Report as reflected during Ordinary Sessions of AU policy organs and to evaluate their appropriateness in light of the African regional human rights standards. It identifies that occasionally states conduct diplomacy adverse to human rights by deliberately advocating against the standards elaborated in the African Charter. Often, states use the consideration process of the Commission's Activity Reports as a platform to control the Commission and censure its decisions rather than support it. Confrontation has been states' favourite tactic to shield themselves from human rights accusations, reducing the impact of the Commission's Activity Reports on domestic human rights in Africa.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Les droits de l'homme dans les processus décisionnels de l'Union africaine: Un aperçu de la réaction des États aux rapports d'activités de la Commission africaine des droits de l'homme et des peuples

RÉSUMÉ: Plus que tout autre moment de l'histoire de l'Union africaine (UA), les cinq dernières années ont été marquées par des discordes et des divisions entre la Commission africaine des droits de l'homme et des peuples (Commission africaine) et les États membres de l'Union africaine. Au lieu d'un dialogue constructif, la confrontation et l'antagonisme ont prévalu lors de l'examen des rapports d'activités de la Commission, provoquant des décisions défavorables qui érodent les normes de la Charte africaine des droits de l'homme et des peuples. S'appuyant en partie sur l'observation personnelle de l'auteur lors des dialogues menés devant les organes politiques de l'UA, cet article s'efforce de présenter les observations des États sur le contenu du rapport d'activités présenté par la Commission lors des sessions ordinaires des organes politiques de l'UA et d'évaluer leur pertinence à la lumière des normes régionales africaines des droits de l'homme. L'article relève que parfois les États mènent une diplomatie contraire aux droits de l'homme en plaidant délibérément contre les normes élaborées dans la Charte africaine. Les États utilisent souvent le processus d'examen des rapports d'activités de la Commission comme une plate-forme permettant de contrôler la Commission et de censurer ses décisions au lieu de les appuyer. La confrontation est la tactique de prédilection des États pour se

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protéger des accusations relatives aux droits de l'homme, réduisant ainsi l'impact des rapports d'activités de la Commission sur la situation nationale des droits de l'homme en Afrique.

KEY WORDS: African Union, Activity Reports, consideration, states, policy organs, African Commission

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1 INTRODUCTION

As an organ that functions within the framework of the African Union (AU), the African Commission on Human and People's Rights (Commission) submits its regular Activity Reports to the AU.¹ The regular reporting is meant to update policy organs (the Assembly of Heads of State and Government, the Executive Council and the Permanent Representatives Committee (PRC) in its advisory role), and through them, states, on the prevailing human rights issues, on the way the Commission conducts its functions, and on the structural, administrative and financial situation of the Commission, in order for them to provide practical policy directions.² The reporting is premised on the fact that the 'AU [policy] organs have to support and complement the primary human rights institutions in the exercise of their mandates'.³

The impact of the Commission's Activity Report lies in states' positive reaction reflected among others in constructive comments on its content during its consideration and through subsequent decisions of policy organs, as the latter 'represent the interest of individual states'.⁴ There are rising concerns that policy organs make decisions that erode the standards provided in the AU human rights instruments.⁵ As decisions of policy organs are the cumulative outcomes of observations of AU member states, it is imperative to examine the nature and intensity of dialogues during the consideration

1 Art 54 African Charter on Human and Peoples' Rights.

2 Rules 59, 77(3), 90(8), 112(9), 115(3), 125 of the Rules of Procedures of the African Commission.

3 F Viljoen *International human rights law in Africa* (2012) 169.

4 N Udombana 'The institutional structure of the African Union: a legal analysis' (2002) 33 *California Western International Law Journal* 133.

5 Centre for Human Rights, University of Pretoria 'Statement at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights' (2015)

of the Commission's Activity Report. In this regard, there is evidence strongly suggesting a rising negativity of state reactions on the content of the Commission's Activity Report.⁶ This trend affects the badly-needed supportive decision from policy organs.⁷ As Biegon correctly observed, in recent years, the consideration process of the Commission's reports has been conducted in a manner that is contrary to the overriding object and purpose of the African Charter on Human and Peoples' Rights (African Charter), eroding the Commission's autonomy and internal independence and undermining 'the principles of separation of power and rule of law within the AU'.⁸ States misused the platform 'to appeal against the Commission's decisions'.⁹

This article endeavours to divulge states' observation on the content of the Commission's Activity article Report as reflected during ordinary sessions of policy organs and evaluates their appropriateness from the standpoint of the African regional human rights standards. The aim is to contribute to the human rights discourse in Africa by revealing the actual behaviour and motives of AU member states. The analysis focuses on the five-year period from 2014 to 2018. In order to provide a clear context, the article starts by highlighting the place accorded to the human rights agenda in the AU. That is followed by an analysis of states' observation on the themes that form the Activity Report of the Commission focusing on matters that have attracted significant controversy in the AU's recent discourse on the human rights agenda.

2 HUMAN RIGHTS IN THE AFRICAN UNION

2.1 Discrepancies between AU human rights promises and practices

As 'the flipside of the coin of legitimate resistance',¹⁰ human rights are intertwined with the struggle for decolonisation, self-determination

<http://www.chr.up.ac.za/index.php/centre-news-a-events-2015/1551-Statement-by-the-centre-for-human-rights-at-the-57th-session-of-the-african-commission-on-human-and-peoples-rights-.html> (accessed 25 March 2016).

6 Report of the 29th Ordinary Session of the Permanent Representatives' Committee (PRC), PRC/Rpt (XXIX) para 120. (2015) [https://portal.africa-union.org/DVD/Documents/DOC-AU-WD/PRC%20Rpt%20\(XXIX\)%20_E.pdf](https://portal.africa-union.org/DVD/Documents/DOC-AU-WD/PRC%20Rpt%20(XXIX)%20_E.pdf) (accessed 7 January 2019); Draft report of the 31st Ordinary Session of the PRC, PRC/Draft/Rpt (XXXI) para 93. (2016) [http://archive.au.int/collect/oau-council/import/English/PRC%20Rpt%20\(XXXI\)%20_E.pdf](http://archive.au.int/collect/oau-council/import/English/PRC%20Rpt%20(XXXI)%20_E.pdf) (accessed 25 March 2018).

7 Viljoen (n 3) 187.

8 J Biegon 'Diffusing tension, building trust: proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' (2018) Global Campus Policy Briefs. https://globalcampus.eiuc.org/bitstream/handle/20.500.11825/580/GCPolicyBrief_Biegon_ok.pdf?sequence=1&isAllowed=y (accessed 20 July 2018).

9 As above.

10 C Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (2001) 171.

and independence in Africa.¹¹ Determined to further strengthen these struggles, the Heads of State and Government of the member states of the Organization of African Unity (OAU) incorporated the promotion and protection of human and peoples' rights as a cardinal objective and founding principle of the AU.¹² The inclusion of human rights in the operative part of the AU Constitutive Act reflects the centrality of human rights in the agenda of the AU, creating binding obligations on AU member states to improve their human rights record.¹³ The AU has also immensely contributed to international human rights law through the adoption of distinctive human rights treaties.¹⁴ Having developed a set of binding norms and institutions, the AU architecture enjoys a well-established system to promote and protect human and peoples' rights on the continent.

Nevertheless, the AU has been heavily criticised for not living up to its promises as far as human rights are concerned. Despite the establishment of human rights mechanisms, the AU, as a collective of states, has played an inadequate role in supporting and encouraging them.¹⁵ Discrepancies between AU's decisions and actions concerning its relation with the Commission led some scholars to conclude that the AU 'does not wish to see the Commission to become more effective and forceful'.¹⁶ The AU has put inadequate effort in liberalising and democratising its members and in promoting human rights on the domestic level.¹⁷ It has also been observed to focus more on protecting leaders than the human rights of ordinary people.¹⁸ Constantly placing 'key policy issues' such as integration, peace and security and development at the centre of their discussions,¹⁹ leaders occasionally ignore grave human rights issues that warrant their special attention.²⁰

11 B Gawanas 'The African Union: concepts and implementation mechanisms relating to human rights' in A Bösl & J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009) 135.

12 Preamble, arts 3(h), 4(m) AU Constitutive Act.

13 M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 22.

14 As above, 23.

15 A Ibrahim 'Evaluating a decade of the African Union's protection of human rights and democracy: a post-Tahrir assessment' (2012) 12 *African Human Rights Law Journal* 42-43.

16 Viljoen (n 3) 297.

17 J Sarkin 'The need to reform the political role of the African Union in promoting democracy and human rights in domestic states: making states more accountable and less able to avoid scrutiny at the United Nations and at the African Union, using Swaziland to spotlight the issues' (2018) 26 *African Journal of International and Comparative Law* 84-107.

18 D Bekele 'Africa: Failure of leadership at the AU Summit' *All Africa* 12 October 2013 <http://allafrica.com/stories/201310130066.html> (accessed 2 June 2018).

19 AU Assembly, Decision on streamlining of the AU Summits and the Working Methods of the African Union, Assembly/AU/Dec.582 (XXV).

20 Bekele (n 18).

Furthermore, the AU human rights discourse is often critiqued as incompatible with the human rights principles and standards provided in the AU treaties.²¹ A prime example in this regard is in its constant failure to take concrete measure to prevent human rights abuses under the guise of protecting 'African traditional values' and defending the imposition of 'western values.'²²

The year 2016 was declared the 'African Year of Human Rights with Particular Focus on the Rights of Women',²³ raising considerable optimism among human rights actors. It was envisaged that the year would offer an opportunity to move from rhetoric to action and entrench a true human rights culture in Africa.²⁴ However, for a year so bold in its ambitions, very little was achieved.²⁵ More recently, the decade 2017 to 2027 has been declared the 'African Decade of Human Rights.'²⁶ Respect for human rights is a key aspiration of Agenda 2063, a continental plan that envisions 'an integrated, prosperous and peaceful Africa' by the year 2063.²⁷ Despite these attempts to bring human rights to the fold, the AU has been unwilling to satisfactorily speak 'up about human rights abuses by dictatorial regimes'.²⁸ Dialogues during the meetings of policy organs have been predominantly superficial and ineffective in responding to the appalling human rights challenges across the continent.

2.2 Making human rights an agenda of policy organs: Consideration of the Activity Reports of the Commission

Human rights feature in the meetings of policy organs in many ways. One way is the submission of activity reports by human rights bodies for consideration by policy organs during their ordinary sessions.

As the supreme organ of the AU, the Assembly is mandated to ensure the realisation of the human rights objectives of the AU by, amongst other actions, considering these activity reports, and making

21 T Kasambala 'Challenging negative discourse on human rights' (2014) South African Institute of International Affairs Policy Briefing 104 1.

22 Kasambala (n 21) 2.

23 African Union '2016: African Year of Human Rights with Particular Focus on the Rights of Women' <https://au.int/en/pressreleases/19615/2016-african-year-human-rights-particular-focus-rights-women> (accessed 2 June 2018).

24 Amnesty International 'From rhetoric to action; sever recommendations to the 27th Summit of the African Union (10-18 July 2016)' <https://www.amnesty.org/download/Documents/AFRO144072016ENGLISH.PDF> (accessed 15 June 2018).

25 M Nyarko & A Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 319.

26 African Union (n 23).

27 African Union 'Agenda 2063: The Africa we want' <https://au.int/en/agenda2063> (accessed 24 June 2018).

28 Institute for Security Studies 'What happened to the AU theme for 2016?' <https://issafrica.org/pscreport/addis-insights/what-happened-to-the-au-theme-for-2016> (accessed 2 June 2018).

decisions based on reports and recommendations submitted to it by other AU organs.²⁹ Among the organs that function within the AU framework is the Commission, the principal human rights body mandated to 'promote and ensure the protection of human and people's rights' in the continent.³⁰ The African Charter, the foundational document of the Commission, provides that the Commission must submit to each ordinary session of the Assembly a report on its activity³¹ upon which the latter gives policy direction. By requiring the Commission's report to be considered by the highest organ of the AU, the African Charter elevates the stature of human rights within the AU.

Nevertheless, the practice in the past 15 years shows that the Assembly has seldom deliberated on the Commission's Activity Reports. This trend evolved following the decision of the Assembly in 2003, delegating the Executive Council to consider the Commission's report and prepare a short report thereof.³² This transfer of power to the Executive Council was observed to have led to a wider dialogue on the Commission's reports, but also to a more frequent refusal to authorise the publication of the Commission's Activity Report by the Executive Council stemming from the growing adverse reaction by states to the report's content.³³

The existing decision-making process on the Commission's activity reports involves two stages: consideration by the PRC, followed by a decision by the Executive Council. The actual 'consideration' of the Commission's report is done by the PRC.³⁴ The Executive Council does not discuss the Commission's Activity Report; it only considers the report of the PRC.³⁵ Often, the decisions of the Executive Council are verbatim reproductions of the recommendations of the PRC. As an organ that follows up on the day-to-day activity of the AU, the PRC might be better positioned to easily understand the activities of the AU organs. But since what is required from the policy organs is administrative and political direction, a higher and authoritative political organ would be more appropriate to consider the Commission's Activity Report than the PRC.

Furthermore, the process of consideration of the Commission's Activity Report reveals several imprecisions. One main issue about which there is a lack of clarity is the scope of policy organs' power to consider the Commission's Activity Report. Does consideration of the

29 Art 9(b) Constitutive Act of the African Union.

30 Art 30 African Charter.

31 Art 54 African Charter.

32 AU Assembly, Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec.11 (II)(2003).

33 Viljoen (n 3) 187.

34 See for example the Draft Agenda of 35th Ordinary Session of the PRC https://au.int/sites/default/files/newsevents/agendas/sc21251_e_-_draft_agenda_pr_-_rev.2_1.pdf (accessed 11 August 2018).

35 Consideration of the Commission's Activity Report has not been an Agenda item of the Council's recent Ordinary Sessions. See for example the Draft Agenda of the 33rd Ordinary Session of the Executive Council. https://au.int/sites/default/files/documents/34368-doc-draftex_cl_xxxiii_e.pdf (accessed 11 August 2018).

reports only involve deliberation and discussion of the reports, or does it also include making decisions that may require changes on the Commission's substantive activities?³⁶ This can be inferred, for example, from states' frequent request for amendment to the Commission's activity reports³⁷ and Executive Council's recent decisions requesting the Commission to withdraw the observer status of NGO called Coalition of African Lesbians (CAL).³⁸ Another imprecision involves the division of labour between political organs when considering the Commission's reports. Although the Assembly is legally mandated to consider the Commission's report, the eventual *de facto* transition of the mandate from the Assembly to the Executive Council and then to the PRC has created divergence between law and practice. This devolution and diffusion of responsibility has hindered the effort to establish a formal and institutionalised engagement between the Commission and the concerned political organ.

Generally, the consideration of the Commission's Activity Report is a suitable process to understand the place accorded to human rights in the policy organs' agenda. Owing to the magnitude and openness of the dialogue, perhaps the finest place to easily identify the nature of states' reaction on the Commission's reports is the Ordinary Session of the PRC. This is dealt with in the following section.

3 ORDINARY SESSIONS OF THE PERMANENT REPRESENTATIVES COMMITTEE: A SHOWCASE PLATFORM FOR STATES' DELETERIOUS REACTION

The PRC is an advisory body of the Executive Council.³⁹ Responsible to the Executive Council and acting under its instruction, the PRC prepares the agenda and draft decisions of the Executive Council and

36 See Advisory Opinion, Request 2/2015, 3 October 2015, <http://www.african-court.org/en/index.php/basic-documents/46-list-of-all-cases-2/721-request-no-002-2015-the-centre-for-human-rights-university-of-pretoria-chr-the-coalition-of-african-lesbians-cal> (accessed 24 June 2018).

37 See for example the written concern of Tunisia on the 42th Activity Report of the Commission, 42nd Activity Report, annex 2; Comments of Libya, Ethiopia, Democratic republic of the Congo (DRC) on the 40th Activity Report of the Commission, annex 1. <http://www.achpr.org/activity-reports/> (accessed 18 October 2018).

38 AU Executive Council, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) paras 7, 12(2) & (3); AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(vii). The Commission withdrew CAL's observer status on 8 August 2018 (A Cooper 'African lesbian network removed from human rights commission' <https://www.intomore.com/impact/african-lesbian-network-removed-from-human-rights-commission> (accessed 18 October 2018)); see further sections 3 and 4.2.3 below.

39 Rule 4(1)(a) of the Permanent Representatives Committee Rules of Procedure.

the Assembly and monitors the implementation of their decisions.⁴⁰ As highlighted in the previous section, the PRC undertakes a preliminary consideration of the Commission's Activity Report and provides recommendations to the Executive Council.

Consideration of the Commission's activity reports by the PRC serves many purposes. Aimed at creating common understanding and identifying areas of disagreement, the preliminary consideration of the Commission's Activity Report by the PRC can ease the task of the Executive Council, thereby facilitating the AU's decision-making process.⁴¹ The PRC allocates more time for the consideration of the Commission's report than the Executive Council. The PRC has developed a practice of undertaking preparatory meetings ahead of its Ordinary Sessions.⁴² This gives the PRC a broader chance to deliberate on the Commission's report and prepare relevant recommendations to the Executive Council. Furthermore, as an organ that undertakes the day-to-day business of the AU, and representing the policy organs, the PRC is better positioned to potentially understand the challenges of the Commission. Being auxiliary to other policy organs, the status of the PRC could also create a more favourable atmosphere for a more open and frank dialogue. In addition, as an advisory body that drafts the decisions of the Executive Council, the PRC can use its mandate to shape the decisions of policy organs to the better.

Despite the above avenues, the consideration process of the Commission's Report by the PRC does not always proceed smoothly. A critical look at the Ordinary Sessions of the PRC shows a great deal of antagonism between the members of the PRC and the Commission.⁴³ It is also common to see states proposing amendments to the substantive content of the Commission's Report, which the Commission usually considers as unsuitable.⁴⁴ In total disregard of the Commission's autonomy implied under the African Charter, states occasionally get policy organs to make decisions that request the Commission to undo substantive human rights activities already underway.⁴⁵ Lacking an accurate perception of the Commission's mandate, the PRC has used its advisory function to provide to the Executive Council recommendations and draft decisions that require amendment on the substantive activities and working methods of the Commission.

During the 26th AU Summit held in June 2016, a general consensus was reached that since the PRC does not have the mandate to amend the Commission's Activity Report its members should desist from making excessive statements that require amendment to the

40 Article 21(2) of the AU Constitutive Act.

41 Viljoen (n 3) 191.

42 [http://archive.au.int/collect/oaucounc/import/English/PRC%201%20\(XXI\)%20_E.pdf](http://archive.au.int/collect/oaucounc/import/English/PRC%201%20(XXI)%20_E.pdf) (accessed 27 July 2018).

43 40th Activity Report, Annex 1, Annex2; 42nd Activity Report, Annex 1.

44 As above.

45 Executive Council, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 7.

Commission's report.⁴⁶ The intention was not to stop states from expressing their concerns on the Commission's report; it was rather aimed at encouraging state delegates to provide constructive opinions taking into consideration the Commission's autonomy. The understanding was that since the Activity Reports cannot be amended, states can submit their concerns, which would be annexed to the Commission's Activity Report and published upon authorisation by the policy organs.⁴⁷ Accordingly, some states did submit their concerns in writing, which were then published in the form of annex to the Commission's Activity Reports.⁴⁸ However, not all states were favourable to the submission of written reservations, perhaps because they foresaw that the publication of their indefensible concerns would expose them to further criticism. Setting aside the previous consensus, some states opted to insist on their 'right' to propose amendments to the Commission's report.⁴⁹ Occasionally states openly insist that the essence of consideration of the Commission's report is to enable them to discuss the Commission's report and make the 'necessary' amendment in a manner that would reflect 'the facts on the ground'.⁵⁰

By making such excessive observations, members of the PRC overlooked the functional autonomy of the Commission and attempted to grant it a *de facto* supervisory function over the Commission. Emphasising their profile as Extraordinary and Plenipotentiary Ambassadors to the AU, members of the PRC appeared to believe that the PRC has a legitimate mandate to supervise the Commission's activities. In reality, the PRC's *ultra vires* actions are not exclusive to matters involving the Commission. A study conducted on the 'AU institutional reforms' confirms that 'in practice, the PRC has assumed the role of supervising the day-to-day work of the [African Union] Commission (AUC)'.⁵¹ The study also underscores that the 'unwarranted role of the PRC' has resulted in a decrease in the implementation efficiency of the AUC as well as delay of important decisions by the Assembly.⁵² The consequence of the PRC's 'unwarranted role' is more serious in the case of the Commission as the latter is an autonomous legal body unlike the AUC, which is the institutional voice of policy organs.

46 The Chairperson of the PRC highlighted this during the consideration of the 41st Activity Report of the Commission. See 42nd Activity Report, para 5.

47 Draft report of the 34th Ordinary Session of the PRC, PRC/Draft/Rpt (XXXIV) para 89(11) (on file with author).

48 n 43 above

49 n 43 above; Draft report of the 31st Ordinary Session of the PRC, PRC/Draft/Rpt (XXXI) para 88(2).

50 Libya, South Sudan and Tunisia made such submissions during the consideration of the Commission's 42nd Activity Report. <http://www.achpr.org/activity-reports/42/> (accessed 10 August 2018).

51 P Kagame 'The Imperatives to Strengthen our Union: Report on the Proposed Recommendations for the Institutional Reform of the African Union' (2017) 9. <https://au.int/sites/default/files/pages/32777-file-report-20institutional20reform20of20the20au-2.pdf> (accessed 10 August 2018).

52 As above.

By requesting the PRC for bilateral discussion and participation in its Ordinary Sessions,⁵³ the Commission wanted to resolve concerns through dialogue and reduce the bitterness of the PRC during the process of consideration of its activity reports.

As the relationship between the Commission and policy organs deteriorated, the Executive Council in January 2018 requested the PRC and the Commission to hold a joint retreat to resolve concerns raised about the relationship between the Commission and policy organs and member states, find modalities for enhanced cooperation and collaboration, and bring recommendations.⁵⁴ The two organs undertook the joint retreat in June 2018 and came up with a broad list of joint recommendations, which were subsequently turned into a decision of the Executive Council.⁵⁵ One of the contentions to come out of the joint retreat is the recognition given to the Commission's independence.⁵⁶ In the Executive Council decision, the Commission's independence was restrictively construed as 'functional in nature and not independence from the organs that created it'.⁵⁷ Such a restrictive understanding of the Commission's independence has no place in the African Charter as the object of the Chapter is for the Commission to have 'absolute institutional independence' from any third party including from policy organs in discharging its function.⁵⁸ In the decision, the Executive Council reiterated its earlier request for the Commission to withdraw the observer status of CAL, which was granted observer status at the Commission in 2014.⁵⁹ Similarly, the Executive Council requested the Commission to submit 'for consideration and adoption by policy organs' a reviewed version of its Rules of Procedure and criteria for granting observer status to NGOs.⁶⁰ This is also another flaw, because as a set of internal rules through which the Commission undertakes its professional task, the Commission's Rules of Procedure cannot be changed or modified by another external body.

53 43rd Activity Report para 59.

54 AU Executive Council, Decision on the African Commission on Human and Peoples' Rights EX.CL/995(XXXII) para 4.

55 AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 3.

56 AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 5.

57 As above.

58 J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission' *EJIL: Talk!* <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/> (accessed 2 August 2018).

59 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(vii).

60 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(iv).

The Executive Council also decided that the Commission's work should be aligned with decisions of policy organs.⁶¹ However, this cannot be done lawfully where those decisions contradict the object and purpose of the African Charter.⁶² Hence, policy organs' decisions should first be aligned with the African Charter before aligning the Commission's work with their decision.

Based on the recommendation of the joint retreat, the Executive Council further requested a 'review of the interpretative mandate of the Commission in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence'.⁶³ As Biegon correctly observed, this decision seems harmless but its underlying motive entails a grave backlash against human rights.⁶⁴ Overlap and duplication of functions is inevitable if there is no clearly defined relationship between the Commission and the Court.⁶⁵ However, what may well be intended by the Executive Council in the above decision is to strip the Commission of its protective mandate, and not to methodically rationalise the mandates of the Court and the Commission. Reviewing the Commission's protection mandate requires amendment of the African Charter and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). As it stands now, the Executive Council's decision is inconsistent with the provisions of Charter and the Court's complementary function provided under article 2 of its constituting Protocol.⁶⁶ Theoretically, there may be no problem in transitioning the Court from a body whose essential function is to complement the Commission's protective mandate to a sole continental human rights litigation forum. However, it raises serious practical challenges. Stripping the Commission of its protective mandate while the Court is still not directly accessible to individuals and while the Court Protocol is ratified only by 30 states will definitely narrow avenues of human rights redress.⁶⁷

61 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 6(i).

62 These include Executive Council, Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.864 (XXVI) para 7.

62 Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 3; Executive Council, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) paras 7, 12(2) & (3).

63 AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 7(iii).

64 Biegon (n 8).

65 M Mbondenyi *International human rights and their enforcement in Africa* (2011) 448.

66 Mbondenyi (n 65) 453.

67 n 59.

4 SPECIFIC REACTIONS OF STATES TO ACTIVITY REPORTS

The Commission's Activity Reports encompasses a range of issues involving its promotion, protection and interpretation mandates. This section focuses on the parts of the Reports that deal with 'human rights situation on the continent', the Commission's decisions, requests for interim measure and observer status of NGOs, which are perhaps the most contentious issues at present due to their emotive content that triggers state reaction.

4.1 'Human Rights situation on the continent': unconstructive observations of states

As part of its monitoring responsibility and based on the decision of the Executive Council, the Commission has developed a practice of incorporating in its Activity Reports 'the status of human and people's rights in the continent'.⁶⁸ In this section of its reports, the Commission outlines positive human rights developments as well as 'areas of concern', actual human rights violations or situations that may lead to possible human rights violation observed in the continent during the reporting period.⁶⁹ The Commission draws its report on the human rights situation in the continent from its interactions with State Parties, national human rights institutions (NHRIs) and NGOs during Ordinary Sessions of the Commission, and supplements it by information it gathers through its monitoring activities of the human rights situation in the State Parties during the intersession period'.⁷⁰

During the consideration of the Commission's report, 'areas of concern' attract more attention than positive developments. More often than not, states whose names are mentioned in the 'areas of concern' section make predominately defensive statements about the concern raised.⁷¹ As AU member states are not in the habit of criticising each other,⁷² delegates often focus on issues in their respective country, leaving aside concerns raised in other countries. For example, of the 18 state delegates who made intervention during the consideration of the Commission's 40th Activity Report, 16 states—Burundi, Angola, Libya, Eritrea, Ethiopia, Malawi, Tanzania, Congo, Democratic Republic of Congo, Saharawi, Zimbabwe, Sudan, Egypt, Equatorial Guinea, Rwanda, Burkina Faso – spoke about specific concerns raised

68 AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 2.

69 See 31st-43rd Activity Reports. <http://www.achpr.org/activity-reports/> (accessed 7 June 2018).

70 44th Activity Report, para 36.

71 See for example, 40th Activity Report, Annex http://www.achpr.org/files/activity-reports/40/annex_40_actrep_eng.pdf (accessed 7 June 2018).

72 Mbondenyi (n 65) 393.

concerning their respective country, seven of them – Burkina Faso, Democratic Republic of Congo, Libya, Ethiopia, Congo, Egypt and Rwanda – protesting the concerns raised, while only two – Ghana and Algeria – addressed general human rights issues.⁷³ During the consideration of the 42nd and 43rd Activity Reports of the Commission by the PRC, 11 and 18 states respectively have spoken about the human rights concerns mentioned in the reports.⁷⁴ From the 18 States that the Commission reported to have made statements during the consideration of the 42nd Activity Report, 13 states raised objection on the human rights concerns involving themselves.⁷⁵ Complete denial of the presence of human rights concerns raised in the Commission's Activity Reports has been the predominant form of state reaction.⁷⁶ Phrases such as 'unfounded allegation', 'do not reflect the fact on the ground', 'unacceptable and preposterous', 'is not a major problem' and 'totally rejects' feature frequently in the interventions of State delegates.⁷⁷ Thus, although the Executive Council has previously requested the Commission to regularly reflect on the status of human rights on the continent, the dialogues indicate that states do not actually want the Commission to expose domestic human rights concerns.

States' dissenting statements are often followed by requests for deletion of the contested issue from the Commission's report without even waiting for explanation from the Commission.⁷⁸ The requests are antithetical to the Commission's functional autonomy and competence to 'give its views or make recommendations to governments' by any suitable means.⁷⁹ The determination of the content of its Activity Reports is set as the exclusive mandate of the Commission.⁸⁰

Adopting a predominantly defensive and protectionist approach,⁸¹ states have generally shown little readiness to address human rights concerns raised in the Commission's report. The Commission itself has complained several times that states have given little attention to the areas of concern mentioned in its Activity Reports.⁸² A side by side look at the Commission's recent Activity Reports shows that often certain human rights concerns appear in two or more consecutive Activity

73 n 72 above.

74 Draft report of the 34th Ordinary Session of the PRC, PRC/Draft/Rpt (XXXIV) para 88(ii); 42nd Activity Report, annex 2; Draft report of the 35th Ordinary Session of the PRC PRC/Draft/RPt(XXXV) para 113(x).

75 42nd Activity Report, annex 2.

76 n 43.

77 See the Statements of Eritrea, Ethiopia, Egypt, Libya, and Burundi on the 40th, 42nd Activity reports of the Commission annexed to the reports. <http://www.achpr.org/activity-reports/> (accessed 19 August 2018).

78 n 43; Draft report of the 34th Ordinary Session of the PRC, PRC/Draft/Rpt (XXXIV) para 113(x).

79 Art 45(1)(a) African Charter.

80 Rule 59(2) of the Rules of Procedures of the African Commission on Human and Peoples' Rights.

81 n 43.

82 36th Activity Report, para 32 (xviii); 39th Activity Report, para 44(xxiv).

Reports⁸³ hence indicating the inadequacy, if not total absence, of measures taken to address the concerns in due time. This comes as no surprise as states from the outset demonstrated little willingness to accept the concerns.

The authenticity of the information that the Commission incorporates in its Activity Reports is another contentious issue that states often complain about. Occasionally states argue that the Commission does not have a mechanism to verify certain human rights issues it raises against State parties in its Activity Report.⁸⁴ Accordingly, the Executive Council in June 2016 requested the Commission 'to rely on credible and verified sources of information in reporting on the situation of human rights in Member states and to indicate the said source in its Activity Report'.⁸⁵ In this regard, one needs to acknowledge that the Commission should strive to strengthen its information collection and verification mechanism and explain to how it collects and verifies the information it incorporates in its reports. Only then will the Commission obtain the full confidence in its work. Yet, although the decision might appear to be acceptable on its face, it was not motivated by good faith as states showed little inclination to help the Commission strengthen its mechanism by providing timely and accurate information during the Commission's information collection and verification process. For example, recent trends show that only in a few cases did states send replies to the Commission's Requests for Provisional Measures and Letters of Urgent Appeals.⁸⁶ Evidently, the Commission's information verification system cannot be effective without the cooperation of states.

In July 2018 the Executive Council urged the Commission to exercise due diligence with concerned states before including concerns against State parties in its reports.⁸⁷ However, the Commission does not always catch states by surprise when it incorporates certain issues in its Activity Reports. For example, in its requests for provisional measures, the Commission usually informs the concerned State party that the issue would be included in its upcoming Activity Report. Furthermore, it often releases in its website a general notice of the Letters of Appeal sent to State Parties.⁸⁸

The prevailing antagonistic debate during the consideration of the Commission's Activity Reports and the subsequent decisions of the Executive Council, including the one requesting the Commission 'to rely on credible and verified sources of information and to indicate the

83 See 36th to 43rd Activity Reports.

84 42nd Activity Report, annex 1, paras 6, 10, 11; Draft report of the 34th Ordinary Session of the PRC, PRC/Draft/Rpt(XXXIV) para 88(iv).

85 Executive Council, Decision on the 42nd Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.974(XXXI).

86 See for example 41st Activity Report, paras 25, 28.

87 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(v).

88 African Commission on Human and Peoples' Rights <http://www.achpr.org/search/?q=urgent+appeal> (accessed 8 June 2018).

said source in its Activity Report', casts doubt on states' confidence in the Commission's work.⁸⁹ In a statement annexed to the 42nd Activity Report of the Commission, Ethiopia alleged that the inclusion of concerns, which it claimed were unsubstantiated, raise questions on the credibility of the Commission.⁹⁰ Trust and confidence between the Commission and the states is a necessary condition for an effective human rights work. The fact that members of the Commission are persons 'of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people's rights,'⁹¹ implies that states should posit full confidence and trust on the Commission's work and consider it positively.

4.2 Decisions, requests of provisional measures and letters of urgent appeals

4.2.1 Decisions

In its reporting practice, the Commission incorporates a list of Communications that it already considered during the reporting period. State noncompliance with the Commission's decisions has been a serious challenge that the Commission often reflects in its Activity Reports.⁹² This goes with the quest for an effective mechanism to follow up on State compliance with the Commission's decisions.

In 2006, the Commission decided to submit a report on State compliance with its decisions as part of its Activity Report to the Executive Council.⁹³ As part of the existing follow-up process, a State against which a decision is made is required to send the Commission on the measures it has taken to implement the Commission's decision upon notification by the Commission.⁹⁴ In case of non-compliance, the Commission has to submit the matter to the concerned committee of the PRC or the Executive Council.⁹⁵ Furthermore, based on its pronouncement to include a section that gives a detailed account of the response of states on its decisions,⁹⁶ the Commission recently started dedicating a section on 'state compliance' in its Activity Reports.

89 Executive Council, Decision on the 42nd Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.974(XXXI) para 8.

90 Statement of Concern of Ethiopia annexed with the 42th Activity Report of the Commission.http://www.achpr.org/files/activity-reports/42/annex_2.responses_from_States.pdf (accessed 7 June 2018).

91 Art 31 African Charter.

92 39th Activity Reports, par 39; 40th Activity Report, para 17; 41th Activity Report, para 24; 42nd Activity Report, para 35; 43rd Activity Report, para 28.

93 African Commission, Resolution 97 (Resolution on the importance of implementation of the recommendations of the African Commission on Human and People's Rights), adopted at the 40th Ordinary Session in Banjul, the Gambia, 15-29 November 2006, ACHPR/Res97/2006 <http://www.achpr.org/sessions/40th/resolutions/97/> (accessed 11 July 2018).

94 Rule 112(2), (3)

95 Rule 112(8).

96 36th Activity Report, para 27.

However, the content of this section has been too general and sometimes silent as to which state is not compliant, hence difficult for policy organs to identify specific challenges and take concrete decisions.⁹⁷ It has also reduced the scale of dialogue on compliance but minimised possible state discontent.

Although the Commission has been taking the above measures as a follow up on its decisions, they are practically proven ineffective. There is, therefore, a need for a more effective mechanism. In its recent Activity Reports the Commission highlighted that there has been inadequate cooperation from states on the Commission's follow-up activities concerning its decisions.⁹⁸ In its 39th to 43rd Activity Reports the Commission indicated that for the most part states do not give information on measures taken or being taken to implement the Commission's decision, hence ignoring the requirement provided under Rule 112(2) of the Commission's Rules of Procedure.⁹⁹ Since the Commission's follow-up procedure is reliant on information obtained from states,¹⁰⁰ a lack of prompt replies creates a gap in the protection of human rights in Africa.

In June 2018, the Executive Council decided to operationalise the PRC Sub-Committee on Human Rights, Democracy and Governance 'to follow up on implementation of the Commission's decisions and recommendations.'¹⁰¹ This implies that this sub-committee is expected to serve the purpose envisaged by Rule 112(8) of the Commission's Rules of Procedure.¹⁰² It implies that the mechanism will involve the AUC and the PRC. This initiative was first brought to the attention of the PRC during the PRC consultation on the African Governance Architecture (AGA) held in 2015.¹⁰³ While this is a good initiative, it is unlikely to effectively address the implementation challenge. As Murray and Long suitably put it, 'effective follow up requires multi-tiered approach that involves as many stakeholders as possible'.¹⁰⁴ As a process with the interdependent objectives of assessing and monitoring status of compliance and implementation, follow-up of decisions of regional human rights bodies involves actions that require

97 See for example 43th Activity Report, para 27-28; 44th Activity Report, para 25-26. 39th Activity Report, para 44(b)(XXV).

98 39th Activity Report, para 44(b)(XXV); 43rd Activity Report, para 28.

99 As above.

100 R Murray & D Long *Implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 133.

101 AU Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 7(iv).

102 Rules 112(8) & 125(2) of the Rules of Procedures of the African Commission.

103 Outcome Document of the AU Permanent Representative Committee consultation on the African Governance Architecture and the State reporting processes under the African Charter on Democracy, Elections and Governance 2-4 September 2015 (on file with the author).

104 Murray & Long (n 100) 138.

the joint efforts of states and key organs of the parent organisation within which the human rights body functions.¹⁰⁵ In the African context, the practical challenges of the Commission, such as limited resource and staffing, and the reliance on information obtained from states, do not allow the Commission to effectively assume this role.¹⁰⁶ Thus, taking into account the challenges faced by the Commission, a comprehensive follow-up mechanism in which more authoritative policy organs, namely the Assembly and the Executive Council would directly be involved and other AU organs such as the Pan African Parliament, the Commission, the Peace and Security Council and the Secretariat of the Commission could participate, would prove more impactful.¹⁰⁷

Occasionally, instead of accepting the decisions of the Commission and deliberating on the possible implementation mechanism, states use the ordinary sessions of policy organs to complain against the work of the Commission.¹⁰⁸ This defeats the nature and purpose of ordinary sessions of the policy organs, which were designed to inform states and policy organs about the work of the Commission and the prevailing human rights situation on the continent and so as to develop new policy directions, rather than provide a platform for debate on substantive aspects of the Commission's decisions.¹⁰⁹ A state can effectively use the avenues provided for in the African Charter and the Commission's Rules of Procedure to discuss its concern with the Commission instead of questioning the decisions of the Commission during the process of considering the Commission's Activity Reports.¹¹⁰

4.2.2 Requests for provisional measures and letters of urgent appeals/interim measures

The Commission incorporates in its Activity Reports a list of Requests for Provisional Measures (RPM), requesting a State to take urgent action to prevent irreparable harm to a victim of an alleged human rights violation until a final decision is given by the Commission, and Letters of Urgent Appeals (LUA), letters requesting a State (usually addressed to the Head of State or Government) to intervene and prevent an imminent violation of a grave nature, that it issued during the reporting period.¹¹¹ In addition, the Commission has developed a

105 Murray & Long (n 100) 133.

106 As above.

107 L Louw 'An analysis of state compliance with recommendations of the African Commission on Human and Peoples' Rights' LLD thesis, University of Pretoria, 2005 317.

108 Biegon (n 8) 12.

109 As above.

110 Biegon (n 8) 12.

111 Rules 80(2) & 98 of the Rules of Procedures of the African Commission. See also letters of urgent appeal and requests for provisional measures by the Commission at <http://www.achpr.org/search/?q=urgent+appeal> (accessed 9 June 2018).

practice of dedicating a section of its Activity Report to highlight the status of state responses to its orders for provisional measures.¹¹²

Based on the information collected from the Commission's 36th to 44th Activity Reports, the status of state response to requests for interim measures is presented in the Table below.

Table 1: Status of state responses to requests for interim measures

Reporting period	RPM issued	State reply	LUA issued	State reply
Nov 2013-May 2014	1	0	-	-
Jun-Dec 2014	4	0	8	2
Jan-May 2015	5	1	9	3
May-Nov 2015	8	1	10	3
Dec 2015-Apr 2016	8	5 (one state)	3	2
May-Nov 2016	8	0	12	2
Jan-May 2017	7	0	4	1
Jun-Nov 2017	2	1	8	0
Nov 2017-May 2018	5	0	36	7

As can be observed from the Table above, state responses to the RPM and LUA are at a very low level. Since November 2013 the Commission the issuing of 48 RPM and 90 LAP. States have replied only to eight (16.7%) RPM and 20 (22%) LUA. Although the Table does not show the full picture of the status of compliance with RPM and LUA, the insignificant number of replies states give to the request of the

Commission by itself is one instance of non-compliance. It also indicates the inadequate attention states have given to RPM and LUA. As the Commission developed a practice of detailing the status of compliance and implementation of RPM in its Activity Report, the reaction of states became more adverse. The states' reaction features in the key ways described below.

Occasionally, states challenge the Commission's competence to issue RPM and LUA and the method it employs in approaching the concerned State. For example, during the consideration of the Commission's 38th report, Ethiopia contested the issuance of provisional measures in line with its earlier response to the RPM issued regarding Communication 507/15, *Andargachew Tsege and Yemsrach Hailemariam v Ethiopia*.¹¹³ In this connection, the conception of such states was that the Commission cannot issue RPM and LUA as the African Charter does not explicitly authorise the Commission to do so.¹¹⁴ Hence, the absence of a clear provision in the African Charter concerning these interim measures has presented a favourable ground for states to question the Commission's competence. Although the silence of the African Charter may be seen as 'a by-product of its ambiguous position on individual complaints',¹¹⁵ the Commission's competence to issues these interim measures is implied in its mandate to use 'any appropriate method of investigation'.¹¹⁶ Besides, the Commission's competence to issue such measures is reaffirmed in its Rules of Procedure, which was subsequently endorsed by the AU policy organs.

Sometimes states challenge the way the Commission addresses these requests to them.¹¹⁷ For example, during the consideration of the 40th Activity Report of the Commission, Egypt argued that the Commission 'should direct all its requests through the ordinary diplomatic channel and not to the President of the Republic'.¹¹⁸

Occasionally states deny receipt of the Commission's letters requesting interim measures.¹¹⁹ In the absence of conclusive evidence that substantiates receipt of the Commission's request by the concerned State, it would be challenging to determine whether the State has complied with the request for provisional measure or not, or whether it has violated the African Charter or not.¹²⁰ In *Interrights et*

113 38th Activity Report, para 32.

114 This position was openly held by the Ethiopian delegation.

115 Viljoen (n 3) 306.

116 Art 46 African Charter.

117 38th Activity Report, para 9; Report of the 29th Ordinary Session of the Permanent Representatives' Committee (PRC), PRC/Rpt (XXIX).

118 40th Activity Report, annex 1, para 2(xiii).

119 Ethiopia for example denied receipt of a LUA sent concerning the arrest of Zone 9 Bloggers. *Committee to Protect Journalists* <https://cpj.org/awards/2015/zone-9-bloggers-ethiopia.php> (accessed 20 October 2018).

120 D Juma 'Provisional measures under the African human rights system: the African Court's order against Libya' (2012) 30 *Wisconsin International Law Journal* 360.

al (on behalf of Mariette Sonjaleen Bosch) v Botswana,¹²¹ the Commission observed that it could not find violation of rights as it could not verify that the Commission's request for provisional measure was indeed received by the President of the respondent state. States should demonstrate good faith by acknowledging receipt of the Commission's request.

States occasionally assert that they have taken measures to address human rights concerns within their domestic system although they did not send a reply to the request of the Commission. For example, during the consideration of the Commission's 36th Activity Report, Ethiopia stated that although it did not send a formal reply within the time frame to the Commission's RPM in respect of Communication 461/13, *Eskinder Nega and Reeyot Alemu v Ethiopia* addressed to its Prime Minister to intervene in the matter to ensure that Ms Reeyot is examined by an independent medical expert without delay, Ms Reeyot was given 'the relevant' treatment guaranteed in Ethiopia's Constitution.¹²² Although resolving the initial human rights concerns is necessary, it cannot absolve states from responsibility for non-compliance with the Rules of Procedure of the Commission.

Generally, objections against the Commission's competence to issue provisional measures and the modalities it applies are indefensible. As the Commission observed in the *Saro-Wiwa case*, failure to comply with obligations to institute provisional measures is a violation of article 1 of the African Charter.¹²³ Furthermore, the legality and procedure of issuing RPM and LUA were endorsed by the Executive Council as part of the Rules of Procedure of the Commission in 2010.¹²⁴ In the same decision, the Executive also requested the Commission to comply with the Rules of Procedure in conducting its activities.¹²⁵

The predominantly defensive approach states take to the interim measures in the Commission's reports has triggered adverse decisions by policy organs. For example, following the a series of state concerns, the Executive Council in June 2015 made a decision requesting the Commission to consider amending its Rules of Procedure, in particular those concerning requests for provisional measures and letters of urgent appeals.¹²⁶ Read in tandem with the preceding statements made

121 *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR, 2003), paras 50 & 52.

122 While in prison, Ms Reeyot was suffering from breast tumours. Her condition was worsened by the inadequate medical treatment provided to her by the prison administration. She was released on 9 July 2015. <https://www.mediadefence.org/news/ethiopian-journalist-reeyot-alemu-released> (accessed 19 October 2018).

123 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 122.

124 Executive Council, Decision on the 28th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.583(XVII) para 4. https://au.int/sites/default/files/decisions/9631-council_en_26_30_january_2009_executive_council_fourteenth_ordinary_session.pdf (accessed 1 August 2017).

125 As above.

126 Executive Council, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 12(ii).

by states, the decision was meant to discourage the Commission from issuing interim measures.

4.4.3 Applications for affiliate or observer status

The Commission performs its functions in collaboration with a multitude of actors including NGOs and NHRIs. The Commission's relationship with these organisations has been guided by resolutions that entitle them to participate without voting rights in the Commission's Ordinary Sessions and make statements at the open sessions.¹²⁷

Recently, the role and participation of NGOs has increased significantly. During the 62nd Ordinary Session of the Commission, 56 NGOs with observer status have made statements on the human rights situation in Africa.¹²⁸ As at May 2018, 518 NGOs have been accorded observer status and 28 NHRIs have been granted affiliate status by the Commission.¹²⁹

As the role and participation of NGOs increase, the Commission's relation with NGOs attracted greater criticism by states. This has largely been observed during the consideration process of the Commission's Activity Reports. The most controversial issue occurred during the consideration of the Commission's 38th Report after the Commission included in the report its earlier decision granting observer status to CAL. Several states condemned the Commission's decision contending that it contravenes the African Charter. As a result, the Executive Council made a decision requesting the Commission to withdraw CAL's observer status and to review its criteria for granting observer status to NGOs stating that the Commission's decision contradicts 'African traditional values and traditions' and hence the African Charter.¹³⁰ As the Commission refuses to implement the decision of the Executive Council, the political pressure increased. During its 33rd ordinary Session, the Executive Council again requested the Commission to withdraw CAL's observer status latest by 31 December 2018.¹³¹ Accordingly, the Commission withdrew CAL's

127 African Commission Resolution 361 (Resolution on the criteria for granting and maintaining observer status to non-governmental organisations working on human and peoples' rights in Africa), adopted at its 59th Ordinary Session in Banjul, the Gambia, 21 October-4 November 2016 ACHPR/Res/361(LIX) 2016; and Resolution 370 (Resolution on the granting of affiliate status to national human rights institutions and specialised human rights institutions in Africa), adopted at its 60th Ordinary Session in Niamey, Niger, 8-22 May 2017 ACHPR/Res.370(LIX)2017.

128 African Commission 'Final Communiqué of the 62nd Ordinary Session of the African Commission on Human and Peoples' Rights' para 21. http://www.achpr.org/files/sessions/62nd_os/info/communique62/en_final_communique_62os.pdf

129 As above, paras 24, 25.

130 Executive Council, Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) para 7.

131 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(vii).

observer status on 8 August 2018.¹³² The decisions of the Executive Council indicate the AU's selective and discriminatory approach to human rights. It has been criticised as 'the most serious attack' on the Commission's autonomy, which is guaranteed by the African Charter.¹³³ The argument that CAL's objective to advance the rights of lesbian women is inconsistent with African values and that of the African Charter is a tactic states raise to shield themselves from responsibility for human rights abuses.¹³⁴

Policy organs had never raised any objection against the Commission's decision on the observer status of NGOs until June 2015 when CAL was granted observer status. This indicates that the AU is primarily guided by unfolding events and imperatives, not by the principles enshrined in its treaties and earlier decisions.

Beyond the observer status of CAL, the matter gave rise to questions on the interpretation of policy organs' power to 'consider' the Commission's Activity Reports as provided under article 59(3) of the African Charter. Policy organs' understanding is that their power to 'consider' reports includes making any kind of change on the report as well as on the Commission's substantive activities. This is however incompatible with the spirit of the African Charter. The competence of policy organs foreseen by the African Charter is to deliberate upon the Commission's Activity Report in order to 'identify and encourage State action on the basis of the Commission's decisions, not to second guess or replace the Commission's interpretation of the African Charter.'¹³⁵

More perturbing is the Commission's decision in August 2018 withdrawing CAL's observer status in compliance with the decision of the Executive Council. In fact, in the first three years the Commission had declined to accept such interpretation and refused to implement the Executive Council's decision by reaffirming that the grating of observer status to CAL 'was properly taken in terms of the Commission's established processes and criteria' and its duty to protect human rights without discrimination as provided in the African Charter.¹³⁶ Nevertheless, as the pressure mounted, the Commission failed to defend its autonomy and consolidate its exclusive authority to entertain substantive human right issues. Yet, the Commission's withdrawal of CAL's observer status does not necessarily mean that it has accepted the Executive Council's interpretation that the latter can lawfully amend the report of the Commission or put prescription regarding the Commission's substantive activities. To avoid further imprecision, the Commission should clarify this matter in its activity report. Nevertheless, the Commission's decision withdrawing CAL's

132 n 38.

133 M Killander 'Human rights developments in the African Union during 2015' (2015) 15 *African Human Rights Law Journal* 535.

134 Kasambala (n 21) 104.

135 Statement by the Centre for Human Rights, University of Pretoria, 29 April 2018 <https://www.up.ac.za/media/shared/10/CHR/files/2018/centre-calls-for-autonomy-and-independence-of-african-commission-to-be-reaffirmed-and-for-action-on-came-roon-and-eritrea.zp151000.pdf> (accessed 22 July 2018).

136 43rd Activity Report, para 51.

observer status in line with the instruction of the Executive Council shows its unfaithfulness to the African Charter. The presence of political pressure from states cannot absolve the Commission of responsibility, as the decision is a grave compromise on the principle of non-discrimination provided under article 2 of the African Charter.

Based on the author's personal empirical observation of the dialogues during the process of consideration of the Commission's 36th, 37th, 38th, 39th, 41st and 42nd Activity Reports, states by and large do not want a robust collaboration between NGOs and the Commission. Many reasons might have inspired this. The most apparent reason is that states that champion such views are guided by their poor domestic human rights policies and practices. States with draconian civil society laws inspired by deep suspicion of NGOs have not shown change in their position when it comes to the AU. For example, Ethiopia, which banned some NGOs that have observer status to the Commission, such as Amnesty International and Human Rights Watch, from operating in its territory, did not approve of the Commission's collaboration with these NGOs as that would amount to indirect engagement with them. Accordingly, these states use the platform to promote their internal human rights policy and to collect support for their position. At the same time, States that have progressive domestic legal system and human rights record such as South Africa lack the will to speak up as they fear that such human rights diplomacy at the AU might damage their diplomatic relations with 'sisterly African countries'. The silent approach followed by relatively democratic states pave the way for the unreasonable positions of undemocratic states to get the advantage of constituting the final decision of policy organs.

Implied in states' antagonistic reflections during the consideration of the Commission's Activity Report is a desire to disallow the Commission from granting observer status to NGOs. This is evidenced, for example, during corridor conversations among State representatives before and after the formal meetings where they occasionally talk of transferring the mandate to grant observer status to NGOs to a political organ in which states can play a more dominant role. However, it appears that States are caught up in confusion on how to make this possible and to which organ to bestow the task.

Meanwhile they preferred to limit the role of NGOs within the Commission. A prime example is the Executive Council's decision that requires the review of the Commission's criteria for granting observer status to be undertaken 'in line with the criteria on the accreditation of NGOs to the AU'.¹³⁷ This is a typical prescription of the modalities on how the Commission should undertake its activities, which is an apparent contradiction of the Commission's right to employ any appropriate means in discharging its function.¹³⁸ Furthermore, the

137 Executive Council, Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission on Human and Peoples' Rights, EX.CL/1015(XXXIII) para 8(iv).

138 Art 46 African Charter.

decision is meant to tighten the criteria for accreditation of NGOs to the Commission. This is part of the effort to reduce the presence of NGOs at the Commission. This is because the accreditation process of NGOs to the AU is by far more rigorous than the criteria for observer status at the Commission as the former, contrary to the latter, requires an NGO to be registered in an AU member state as an African or an African Diaspora Civil Society Organization and that 'at least two thirds' of its funds 'be derived from contributions of its members'.¹³⁹

4.2.4 Unfair discrimination among NGOs and politicisation of their role

Besides the apparent discrimination against NGOs that primarily work on the rights of sexual minorities, it is not a secret that states are more suspicious towards NGOs that are based outside Africa than on the continent. The fact that both African-based and non-African based NGOs enjoy equal status and similar privileges at the Commission has become a serious concern of states. In January 2016, the Executive Council made a decision requesting the Commission to review its working method with respect to 'representation of non-African individuals and groups'.¹⁴⁰ This was informed by states' general perception that Western-based NGOs have a tacit missionary function that promote values at odds with 'African tradition' and the agendas of countries that want to impose neo-liberal policy on Africa.¹⁴¹ The concern escalated as NGOs that are based outside Africa, using their relative advantages of established experience, visibility and funding, played a dominant role in the AU.¹⁴² Such a discriminatory approach against NGOs based outside Africa has been observed as a tactic that states use 'to deflect attention from their human rights obligations'.¹⁴³ It shows the negative human rights discourse in the AU¹⁴⁴ whereby African leaders hide themselves from accountability for human rights abuses under the guise of protecting 'African traditional values' and defending the imposition of 'western values'.¹⁴⁵

In a nutshell, measured against the imperative role NGOs have been playing 'in the growth and consolidation of the Commission',¹⁴⁶ their unfair vilification dilutes the Commission's effectiveness. Of course, this is not unknown by states, in fact, this politicisation of

139 AU Executive Council, Report of The PRC and Legal Experts on various Legal Matters (July 2005), Annex IV, s 5, 7. <http://www.peaceau.org/uploads/ex-cl-195-vii-e.pdf> (accessed 4 August 2018).

140 Executive Council, 39th Activity Report of the African Commission on Human and Peoples' Rights, Doc. EX.CL/938(XXVIII) para 7.

141 S Matthews 'The role of NGOs in Africa: Are they a force for good?' 25 August 2017 *The Conversation*. <http://theconversation.com/the-role-of-ngos-in-africa-are-they-a-force-for-good-76227> (accessed 13 July 2018).

142 Viljoen (n 3) 386.

143 Viljoen (n 3) 386.

144 Kasambala (n 21) 2.

145 As above.

146 Viljoen (n 3) 383.

NGOs' roles is a deliberate incapacitation of the Commission. For an effective promotion and protection of human rights in the continent, NGOs' role in the Commission should be depoliticised.

5 CONCLUSION

This article analysed the place of human rights in the AU by examining how Member states behave during the process of consideration of the Activity Report of the Commission. It has been identified that a predominately defensive and protectionist approach has been followed by states during the consideration of the Commission's reports. Antagonism rather than constructive engagement has been the prevailing feature of the dialogue between states and the Commission.

Marked by unconstructive comments of states, the political environment under which the Activity Report of the Commission has been considered is far from favourable for human rights. The role of the AU, as a collective of states in supporting and complimenting the Commission has been insufficient and sometimes negative. Unlike the conventional rhetoric state delegates make during ceremonial conferences of the AU, their actual role during the process of consideration of the Commission's Activity Reports is not up to scratch. Mostly, States use the consideration process of the Commission's Activity Reports as a platform to control the Commission and censure its decisions rather than to support it. Occasionally, states conduct bad human rights diplomacy by deliberately advocating against the standards provided in the African Charter. States often come up with predetermined positions barely showing flexibility during the process of consideration of the Commission's reports. Enhancing the Commission's efficiency and effectiveness has been a greater priority of NGOs than it has been for the states making up the African Union.

Having been, in practice, the principal organ that considers the Commission's Activity Reports, the PRC has played an adverse role in the AU decision-making process. While the PRC has tremendous relative advantages by which it could positively influence the AU decision-making process, it has altered the opportunities to provoke decisions that erode AU human rights principles and standards. Unconstrained by its legally given facilitator role, the PRC has been practically supervising the Commission's substantive activities under the guise of considering its Activity Reports. This goes against the Commission's autonomy and the principle of separation of power.

Confrontation has been states' favourite tactic to defend themselves from human rights accusations. Thus, beyond the conventional legal reasoning, the Commission should employ a diplomatic and flexible approach while engaging with states. The best strategy would be a combination of rules and flexibility; the Commission should remain resolute to the human rights standards enshrined in the African Charter and demand states respect these rules, but stay flexible in its strategy to ensure the respect of these rules taking into account the behaviour of the government and domestic realities in the State concerned. In situations where its relation with certain states is

unfriendly, the Commission can promote human rights by proxy by pushing states that are relatively cooperative and have better domestic human rights records to put pressure on those that do not.