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Diffusing Tension, Building Trust: Proposals on Guiding Principles Applicable during Consideration of the Activity Reports of the African Commission on Human and Peoples' Rights



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Diffusing Tension, Building Trust: Proposals on Guiding Principles Applicable during Consideration of the Activity Reports of the African Commission on Human and Peoples' Rights

Japhet Biegon¹

EXECUTIVE SUMMARY

As the most active regional human rights supervisory mechanism in Africa, the African Commission on Human and Peoples' Rights (ACHPR) has increasingly become the target of political backlash. The African Union (AU) Executive Council and the Permanent Representatives Committee (PRC) have on a number of occasions reacted angrily to decisions taken by the ACHPR in the discharge of its mandate. In the process, they have overstepped their role to consider the activity reports of the ACHPR. In particular, they have purported to alter substantive decisions of the ACHPR or direct how it should perform its independent and autonomous functions. This policy brief seeks to clarify the limits and boundaries of the involvement of AU political organs in mandate-related functions of the ACHPR. It proposes a set of five guiding principles that should be applied by the Executive Council and the PRC during their consideration of the activity reports of the ACHPR. In particular, it proposes that: (a) consideration of activity reports should not erode or undermine the role of the ACHPR as an independent and autonomous interpreter of the African Charter; (b) the competence to consider activity reports should be understood in light of the overriding object and purpose of the African Charter; (c) consideration of activity reports should take into account the fact that the African Charter contains safeguards for ensuring ACHPR's internal independence; (d) the process of considering activity reports should not serve as a platform for member states to lodge appeals against decisions of the ACHPR; and (e) consideration of activity reports should foster the principles of separation of powers and rule of law within the AU.

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INTRODUCTION

Since its inception in 2002, the African Union (AU) has taken pride in the fact that it places the concept of human rights at the core of its *raison d'être*. This rhetoric is not without justification. One of the stated objectives of the organization is to promote and protect human rights.² The AU has taken a number of initiatives in fulfillment of this objective. It has adopted an impressive list of human rights treaties as well as soft law standards.³ It houses three regional human rights treaty bodies: the African Commission on Human and Peoples' Rights (ACHPR or African Commission); the African Committee of Experts on the Rights and Welfare of the Child (ACERWC); and the African Court on Human and Peoples' Rights (African Court). In 2011, it adopted the Human Rights Strategy for Africa,⁴ a document that sets out a five-year (2012-2016) action plan for strengthening the African human rights system. It declared 2016 as the "African year of human rights with particular focus on the rights of women" and the 10-year period between 2016 and 2025 as "the human and peoples' rights decade in Africa".⁵ It is currently preparing a 10-year human rights action plan.⁶ In Agenda 2063, the organization's 50-year strategic framework for the socio-economic transformation of the continent, the AU has committed to ensuring that it works towards an Africa in which respect for human rights is the norm rather than the exception.⁷

Yet, specific AU political organs, mainly the

Permanent Representatives Committee (PRC) and the Executive Council,⁸ seem to be two-faced on the work of the regional human rights treaty bodies, supporting such work on some occasions and undermining it in others. Within the structure of the AU, the PRC is responsible for the consideration of activity reports of regional human rights treaties. It then passes them over to the Executive Council for formal adoption. This is a delegated function from the AU Assembly of Heads of State and Government, which is designated in the African Charter on Human and Peoples' Rights (African Charter) to consider the activity reports.⁹ In performing this role, the PRC and the Executive Council have traditionally shown appreciation and support for the work of the regional human rights treaty bodies. They have on numerous occasions called on member states to implement the decisions and recommendations of these bodies.¹⁰ Lately, however, the PRC and the Executive Council have taken a series of decisions that have undermined and eroded the independence and autonomy of the regional human rights treaty bodies, particularly the ACHPR.

As the most active regional human rights supervisory mechanism, the ACHPR has increasingly become the target of political backlash. The Executive Council and the PRC have reacted angrily to decisions taken by the ACHPR in the discharge of its mandate on a number of occasions. In the process, they have overstepped their role to consider the activity reports of the ACHPR. In particular, they have purported to al-

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

3 Human rights treaties adopted by the AU in the last 16 years include the following: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); African Youth Charter (2006); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016); and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

4 Available at https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf (accessed on 9 May 2018).

5 Declaration of the Assembly on the Theme of the Year, Assembly/AU/Decl.1(XXVII) Rev. 1.

6 See www.africahuripplan.org (accessed 6 May 2018).

7 African Union *Agenda 2063: The Africa we want* (2016) para 28.

8 The PRC is composed of all the permanent representatives of member states to the AU. The PRC conducts the day-to-day business of the AU. It reports to the Executive Council, which is composed of all the ministers of foreign affairs of member states. The Executive Council coordinates and takes policy decisions. It reports to the AU Assembly of Heads of State and Government.

9 African Charter, Article 54.

10 See eg Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.344(x).

ter substantive decisions of the ACHPR or direct how it should perform its independent and autonomous functions. This kind of meddling has led to a sharp deterioration in the relationship between the ACHPR, on the one hand, and the PRC and the Executive Council, on the other. A June 2015 directive of the Executive Council has come to epitomize both the bad state of this relationship and the height of political interference in the affairs of the ACHPR. In this directive,¹¹ the Executive Council directed the ACHPR to withdraw the observer status it had granted to the Coalition of African Lesbians (CAL), a South African-based NGO working on women's rights, including the rights of lesbian women.¹² It also directed the ACHPR to review its criteria for granting observer status to NGOs.¹³

Although this is not the first of its kind,¹⁴ the June 2015 directive is the most serious political backlash in the 30 years of the ACHPR's existence, due to the stalemate it has triggered. In November 2015, CAL and the Center for Human Rights (University of Pretoria) submitted a request to the African Court for an advisory opinion on the statutory limits placed on AU political organs' involvement in the affairs of the ACHPR. The African Court would have probably resolved the stalemate, but in September 2017, it ruled that it did not have jurisdiction to give an opinion on the matter as the applicants lacked the requisite legal standing before it.¹⁵ In January 2018, the ACHPR explained to the Executive Council that if it were to withdraw CAL's observer status, then it would be failing in its duty to protect the rights of every individual in society, regardless of their status or circumstance.¹⁶ The

Executive Council ignored this explanation and insisted that the ACHPR should comply with its earlier directive.¹⁷ The Executive Council also called on the PRC and the ACHPR to hold a joint retreat to resolve the stalemate and reflect on the relationship between the ACHPR and AU political organs.¹⁸

The ACHPR/PRC joint retreat is scheduled to take place from 4th to 5th June 2018 in Nairobi, Kenya. This policy brief aims to contribute to the deliberations that will take place at the retreat. It seeks to clarify the limits and boundaries of the involvement of AU political organs in mandate-related functions of the ACHPR. More importantly, it proposes a set of five guiding principles that should be applied by the Executive Council and the PRC during their consideration of the ACHPR activity reports. The overall aim of these guiding principles is to ensure that the independence and autonomy of the ACHPR, as an expert body charged with monitoring compliance with and implementation of the African Charter, is respected and maintained at all times. The policy brief has two main parts. The first part looks into the relationship between the ACHPR and the AU political organs. The second part outlines the proposed guiding principles.

RELATIONSHIP BETWEEN THE ACHPR AND AU POLITICAL ORGANS

The African Charter, adopted in 1981 by the AU's predecessor, the Organization of African Unity (OAU), is the principal human rights treaty in Africa, and upon it, the roots of the regional human rights system are embedded. This legal

11 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.887(XXVII) (June 2015 Directive).

12 June 2015 Directive, para. 7.

13 Ibid.

14 In June 1998, the OAU Assembly of Heads of State and Government directed the ACHPR to "review its criteria for granting observer status and to suspend further granting of observer status until the adoption of new criteria". In conformity with this directive, the ACHPR adopted a new set of criteria for granting observer to NGOs in October 1998. See Resolution on Annual Activities of the African Commission on Human and Peoples' Rights, AHG/Dec.126(XXXIV), para 3.

15 African Court on Human and Peoples' Rights, Request for Advisory Opinion by the Centre for Human Rights at the University of Pretoria and the Coalition of African Lesbians, Request No. 002/2015, Advisory Opinion issued on 28 September 2017.

16 43rd Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/1058(XXXII), para. 51.

17 Decision on the African Commission on Human and Peoples' Rights, EX.CL/Dec.995(XXXII), para 3.

18 Decision on the African Commission on Human and Peoples' Rights, EX.CL/Dec.995(XXXII), para. 4.

text came into force in 1986. It has been ratified by all AU member states except Morocco. In addition to containing a catalogue of rights that all individuals and peoples in African states are entitled to, the African Charter establishes an independent and autonomous 11-member quasi-judicial body, the ACHPR, to monitor the extent to which state parties observe their treaty obligations. Operational since 1987, the ACHPR has grown into an incredibly dynamic body. It has generated a sizeable body of jurisprudence, adopted an impressive catalogue of normative documents such as thematic resolutions and general comments, and perhaps more importantly, spoken out in the face of egregious human rights violations.¹⁹

Although the ACHPR is an autonomous body, it operates under the auspices of the AU. As clearly stated in Rule 3 of its Rules of Procedure, the ACHPR is “an autonomous body working within the framework of the African Union”. It is an AU body for all intents and purposes. The African Charter gives the AU political organs some responsibilities related to the functioning of the ACHPR. To begin with, the AU Assembly is mandated to elect and appoint members of the ACHPR.²⁰ In practice, the Executive Council conducts the election and then forwards the names of the successful candidates to the AU Assembly for formal appointment. The AU Commission (AUC) Chairperson is responsible for appointing the secretary and staff of the ACHPR.²¹ However, the ACHPR is mandated by its Rules of Procedure to propose the organizational structure of its secretariat and to place the proposal before the AU for approval.²² The operational costs as well as the emoluments and allowances of the members of the ACHPR are borne by the AU.²³ As discussed below, the ACHPR has presented and defended its proposed budget before the PRC since 2008.

The above responsibilities are straightforward in their nature and scope. Not so with one additional responsibility given to the AU under the African Charter – the responsibility to “consider” the activity reports of the ACHPR. Article 54 of the African Charter requires the ACHPR to “submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities”. This requirement and practice is not unique as human rights treaty bodies in the European, Inter-American and United Nations (UN) human rights systems also submit activity reports to the political intergovernmental body under which they operate. What is unique in the African Charter is the restriction placed on the publication of the activity reports of the ACHPR. Article 59(3) provides as follows: “The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government”.

The OAU Assembly of Heads of State and Government considered and adopted the first ACHPR activity report in 1988. With the advent of the AU, this role has officially been delegated to the Executive Council.²⁴ In actual practice, the PRC considers the activity reports, then forwards them to the Executive Council for formal adoption. What it means exactly to ‘consider’ these activity reports is at the heart of the current tension in the relationship between the ACHPR, on the one hand, and the Executive Council and the PRC, on the other. The Executive Council and the PRC have increasingly used the power under Article 59(3) to undermine the authority of the ACHPR or curtail its powers. The most common form of interference has been to require the ACHPR to give specific states additional opportunity to respond to a decision, resolution or report of the ACHPR while ignoring the fact that in most cases such states had already been

19 See F Viljoen ‘From a cat into a lion: An overview of the progress and challenges of the African human rights system at the African Commission’s 25-year mark’ (2013) 17 *Law Democracy & Development* 298.

20 African Charter, Article 33.

21 African Charter, Article 41.

22 ACHPR Rules of Procedure, 2010, Rule 17.

23 African Charter, Articles 41 & 44.

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

NOTABLE DECISIONS OF THE EXECUTIVE COUNCIL RELATING TO THE ACTIVITY REPORTS OF THE ACHPR, 2004-2018

June 2004: The Executive Council suspended the publication of the entire ACHPR's 17th Activity Report after Zimbabwe claimed that it had not been given an opportunity to respond to a fact-finding mission report that had been annexed to the Activity Report. It directed the ACHPR to give Zimbabwe an opportunity to comment on the report of the fact-finding mission.

January 2006: The Executive Council blocked the publication of texts of five resolutions contained in the ACHPR's 19th Activity Report against Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe after these countries claimed that they had not been given an opportunity to comment on the resolutions. It directed these countries to file their comments within three months.

June 2006: The Executive Council blocked publication of the text of a decision contained in 20th Activity Report on a communication against Zimbabwe after it claimed that it had not been given an opportunity to respond to the communication. Zimbabwe was given two months to file its responses.

January 2011: The Executive Council declined to authorize the publication of ACHPR's 29th Activity Report, ostensibly because some unnamed states had challenged some facts in the report.

June 2011: The Executive Council deferred the consideration of ACHPR's 29th Activity Report without giving any reason.

January 2015: The Executive Council expunged two decisions on communications against Rwanda referred to in the 37th Activity Report and directed that the country be offered the opportunity to make oral submission on the two cases.

June 2015: The Executive Council directed the ACHPR to withdraw the observer status it had granted to CAL and to review its criteria for granting observer status to NGOs.

January 2018: The Executive Council reiterated its earlier directive that the ACHPR should withdraw CAL's observer status

granted that opportunity. Accompanying this requirement has been a decision to either block publication of the entire activity report or specific parts of it, thus concealing them from public scrutiny for months on end.

In June 2015, the Executive Council pushed its interference a notch higher, when it required the ACHPR to revise its decision concerning the observer status granted to CAL. In so doing, the Executive Council was second-guessing the ACHPR and purporting to determine for it what its decision should be. This is the most aggressive and intrusive form of interference to date as it openly usurps the power of the ACHPR to interpret and apply the African Charter.

PROPOSALS ON GUIDING PRINCIPLES APPLICABLE DURING CONSIDERATION OF ACHPR ACTIVITY REPORTS

There is an urgent need to defuse the tension in the relationship between the ACHPR and the political organs of the AU, and more importantly, to safeguard the independence and autonomy of the ACHPR. As the Chairperson of the AUC observed in his address during the opening ceremony of the 30th AU Assembly of Heads of State and Government on 28th January 2018 in Addis Ababa, Ethiopia, the independence of regional human rights treaty bodies, such as the ACHPR, is at the core of Africa's fulfillment of its human

rights aspirations as envisaged in Agenda 2063 and other policy documents.²⁵ The PRC and the ACHPR must use the opportunity presented by the upcoming joint retreat to affirm the importance of ACHPR's independence and autonomy. They should also clarify the scope of the powers of the PRC and the Executive Council in relation to the functioning of the ACHPR. This section proposes a minimum set of guiding principles that the PRC and the Executive Council should always take into account when considering the activity reports of the ACHPR.

1. Consideration of activity reports should not erode or undermine the role of the ACHPR as an independent and autonomous interpreter of the African Charter

The primary function of the ACHPR is to promote and protect human rights in Africa through monitoring compliance with and implementation of the African Charter. The performance of this function is essentially an exercise in the independent interpretation of the normative content of the rights guaranteed in the African Charter and the nature and scope of state obligations. As such, all routine activities undertaken by the ACHPR in execution of its mandate, including review of state party reports, consideration of individual and inter-state complaints, preparation of country and thematic reports, publication of resolutions and press statements, and the issuing of urgent appeals, inherently entail the independent interpretation of the African Charter. All these tasks involve a careful analysis of the provisions of the African Charter and their applicability to a particular set of facts. As will be discussed below, the ACHPR has the competence to

interpret the African Charter as it is composed of individuals with expertise in human rights. Moreover, the African Charter and the ACHPR's Rules of Procedure contain relatively sufficient safeguards to ensure that the ACHPR is independent and impartial in the discharge of its mandate.

The ACHPR does not share its interpretative role with the AU or state parties. The latter are allowed under Article 45(3) of the African Charter to request for ACHPR's interpretation if they are unsure about the meaning of a specific provision of the African Charter. The only body with which the ACHPR shares this interpretative role is the African Court because it is not very dissimilar to the ACHPR in its composition, mandate and modus operandi. In any event, the African Court's primary mandate is to complement the protective mandate of the ACHPR.²⁶ Unlike the ACHPR and the African Court, the political organs of the AU are composed of political actors whose "mandates and worldviews are heavily dependent on international relations and geopolitics" and are "not necessarily attuned to human rights".²⁷

The OAU/AU has in the past affirmed the independence and autonomy of the ACHPR to interpret the African Charter and perform its functions without undue influence. The OAU Assembly of Heads of State and Government, on meeting in May 1988 at the seat of the OAU in Addis Ababa, Ethiopia, accepted Gambia's offer to host the ACHPR in its capital city Banjul.²⁸ In so doing, the OAU Assembly of Heads of State and Government acted in line with the ACHPR recommendation that in order to protect it from political interference, its headquarters should be in a country "other than the one hosting the political and administrative organs of the OAU".²⁹ The headquarters of the ACHPR

25 Speech by the Chairperson of the Commission of the African Union, H.E. Moussa Faki Mahamat, 30th Ordinary Session of the Assembly of the African Union, 28 January 2018.

26 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 2.

27 F Viljoen *International human rights law in Africa* (2012) 186.

28 Declaration on the Offer of the Republic of the Gambia to Host the Secretariat of the African Commission on Human and Peoples' Rights, adopted at the 24th Ordinary Session of the OAU Assembly of Heads of State and Government, Addis Ababa, Ethiopia, 25-28 May 1988.

29 Recommendation on the Headquarters of the African Commission on Human and Peoples' Rights, adopted at the 3rd Ordinary Session of the African Commission on Human and Peoples' Rights, Libreville, Gabon, 18-28 April 1988.

was inaugurated in Banjul in June 1989. Since then, the sheer distance between Banjul and Addis Ababa has served as a kind of a buffer against political interference with the ACHPR. In line with the ACHPR's precedent, the seat of the African Court is located in Arusha, Tanzania. Negotiations are currently underway to relocate the secretariat of the ACERWC from Addis Ababa, Ethiopia.³⁰ It is indeed a common practice across the globe for international judicial and quasi-judicial bodies to be located away from the seat of their parent intergovernmental organization.³¹

In yet another act recognizing the importance of ACHPR's independence and autonomy, in 2007, the Executive Council directed that the ACHPR from then on present and defend its own budget before the PRC.³² Until then, the budget of the ACHPR was subsumed under that of AU's Department of Political Affairs (DPA). Several AU meetings, such as the First AU Ministerial Conference on Human Rights in Africa (May 2003, Kigali, Rwanda) and the Brainstorming Meeting between the PRC and the ACHPR (May 2007, Maseru, Lesotho), have also specifically called for or discussed ways of strengthening the independence and autonomy of the ACHPR.³³

2. The competence to 'consider' activity reports should be understood in light of the overriding object and purpose of the African Charter

The political organs of the AU should always take into account the objective or special character of the African Charter, the treaty upon which they draw the competence to consider activity re-

ports of the ACHPR. Human rights treaties, such as the African Charter, are special international law instruments. They are distinct from other international treaties because their primary object and purpose is to specify the rights of third parties rather than those of the contracting parties. The third parties in this case are individual human beings under the jurisdiction of the contracting parties. The Inter-American Court of Human Rights offered an excellent description of this special character of human rights treaties in a 1982 advisory opinion. It observed as follows:

Modern human rights treaties ... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.³⁴

It follows that in undertaking the tasks accorded to them under the African Charter, AU political organs must bear in mind and seek to fulfill the overriding object and purpose of the treaty. In relation to the consideration of the activity reports of the ACHPR, this means the focus should fall on ensuring the effective protection and promotion of the rights of individuals. Decisions taken during this process should not be

30 See Executive Council Decision on the Report of the Commission on the Hosting of the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), EX.CL/Dec.991(XXXII).

31 D Shelton 'Legal norms to promote the independence and accountability of international tribunals' (2003) 2 *Law and Practice of International Courts and Tribunals* 27, 30.

32 Decision on the 21st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.344(X), para. 2(iv).

33 Kigali Declaration adopted by the First AU Ministerial Conference on Human Rights in Africa, May 2003, Kigali, Rwanda, para. 24; Decision on the 22nd Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.372(XI), para. VIII.

34 Inter-American Court of Human Rights, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 & 75), Advisory Opinion OC-2/82 of September 24, 1982, para. 29. See also O Schutter 'The status of human rights in international law' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* 39, 53-55.

to the detriment of victims of human rights violations. The June 2015 directive on withdrawal of CAL's observer status is a clear example of a decision with the potential to violate the object and purpose of the African Charter. If implemented, it will amount to open discrimination against CAL as an organization, but even more importantly, it will send the message that the rights of certain categories of individuals, in this case sexual minorities, are protected neither by the African Charter nor by the ACHPR. Yet, Article 2 of the African Charter provides that "every individual" is entitled to the Charter rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune or other status". It is for this very reason that in January 2018, the ACHPR explained that it could not withdraw CAL's observer status without at the same time violating the letter and spirit of the African Charter.

In all the cases in which it has blocked or suspended the publication of an activity report of the ACHPR, the Executive Council was more concerned with the objections of the concerned states than with the rights of the individuals affected by the delay in releasing the decisions of the ACHPR contained in those reports. For instance, in relation to its June 2006 decision to block the publication of the text of a decision contained in 20th Activity Report on a communication against Zimbabwe, it has rightly been observed that the Executive Council "allowed too much deference and leeway to the state" because "there were clear indications that the government had already been granted an opportunity to respond".³⁵

For the process of consideration of the ACHPR's activity reports to result in effective protection and promotion of the rights of individuals, the PRC and the Executive Council must deliberately turn their attention to their role as en-

forcement bodies of state obligations under the African Charter. This role should be at the core of considering the ACHPR's activity reports. The PRC and the Executive Council have so far soft-pedaled on this role, limiting themselves to simply urging all states in general to comply with the decisions and recommendations of the ACHPR or encouraging those that have not submitted their periodic reports to the ACHPR to do so as soon as possible. The Executive Council has been particularly unmoved even when the ACHPR has drawn its attention to specific cases of non-compliance,³⁶ as it did in 2012 when it cited Botswana for explicitly refusing to implement a decision of the ACHPR.³⁷ Similarly, while it is explicitly mandated to enforce the judgments of the African Court,³⁸ the Executive Council is yet to impose any sanction on non-compliant states.

3. Consideration of activity reports should take into account the fact that the African Charter contains safeguards for ensuring ACHPR's internal independence

The African Charter provides for safeguards that are intended to ensure that the ACHPR exercises objectivity and independence in its interpretation of the African Charter. It does so in at least five ways:

1. It requires that members of the ACHPR be of specific standing in society, and in particular, that they be "African personalities of the highest reputation, known for their high morality, integrity and impartiality".
2. It requires members of the ACHPR to be competent in "matters of human and peoples' rights". This provision seeks to ensure that the ACHPR's interpretation of the African Charter, and its work in general, is grounded

35 F Viljoen *International human rights law in Africa* (2012) 188.

36 ACHPR Rules of Procedure, 2010, Rule 112(8) provides that "The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situation of non-compliance with the Commission's decisions".

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

38 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 29(2).

in sound and solid human rights knowledge and expertise.

3. It is clear that the 11 members of the ACHPR serve in their personal capacity.³⁹ This provision binds ACHPR members not to seek or accept directions from anyone in relation to any matter before them. This provision also means that ACHPR members do not represent their respective countries. For this reason, individuals with close ties with especially the executive arm of their governments are deemed not to be eligible to serve as members of the ACHPR. At every election of new members, the AU Commission (AUC) had made it a tradition to advise states that individuals serving in the following capacities are ineligible to be members of the ACHPR: minister or under-secretary of state; diplomatic representative; ministry official; and legal adviser to a foreign office. In other words, a candidate for the position of member of the ACHPR should not be in an employment or politically binding relationship with the state nominating him or her.
4. It provides that before taking up his or her role, a member of the ACHPR must make a solemn declaration committing to discharge the mandate of the ACHPR impartially and faithfully.⁴⁰
5. It provides that in discharging their duties, the members of the ACHPR are entitled to enjoy diplomatic privileges and immunities in accordance with the General Convention on the Privileges and Immunities of the OAU.⁴¹ The provision of the Convention applicable to the members of the ACHPR provides, *inter alia*, that they are immune from legal process of every kind in respect of words spoken or written and acts done in the course of the performance of their mandate.⁴² They are also shielded from personal arrest or detention, official interrogation, and from inspection or seizure of their personal baggage. These

immunities and privileges are not accorded to the ACHPR members for their personal benefit but to ensure that they are able to execute their mandate without any fear of reprisal. The immunities and privileges give them special protection that reinforces their independence and impartiality.

In recognition of the fact that the independence of its members is integral to its credibility, the ACHPR has laid down additional guarantees of independence in its 2010 Rules of Procedure.

1. Rule 7(1), entitled “incompatibility”, is categorical that a member should not engage or participate in any activity that might interfere with or compromise his or her independence or impartiality. If such a case arises, the Chairperson of the ACHPR is required to notify the Chairperson of AUC so that the seat may be declared vacant.⁴³
2. Rule 101 provides for instances during which a member may be barred from taking part in the examination of a complaint or communication pending before the ACHPR. In particular, a member is barred from examining a communication if he or she: is a national of the state party concerned; has any personal interest in the case; is engaged in any political or administrative activity or any professional activity that is incompatible with his or her independence or impartiality; has participated in any capacity in any decision at the national level in relation to the communication; or has publicly expressed opinions that might be interpreted as reflecting lack of impartiality with respect to the communication.
3. Rule 102 allows a member to voluntarily withdraw, for whatever reason, from the consideration of a communication.

As a matter of practice, members of the ACHPR do not usually participate in the review of state party reports submitted by their own coun-

39 African Charter, Article 31.

40 African Charter, Article 38.

41 CAB/LEG/24.2/13.

42 General Convention on the Privileges and Immunities of the OAU, Article VII(b).

43 ACHPR Rules of Procedure, 2010, Rule 7(3).

tries of origin. This practice is meant to eliminate any perception of bias.

Consideration of the ACHPR's activity reports should take into account the above safeguards. The PRC and the Executive Council should always proceed on the basis that with the above internal control mechanisms, the ACHPR generally acts in good faith and is professional and objective in the discharge of its mandate.

4. The process of considering activity reports should not serve as a platform for member states to lodge appeals against decisions of the ACHPR

The consideration of ACHPR's activity reports is an administrative or political function. It should not be construed as affording states an opportunity to lodge appeals against the decisions of the ACHPR through the backdoor. Yet, states have occasionally seemed to treat the process as their opportunity to do exactly that. On matters relating to its substantive mandate, decisions of the ACHPR are final and no appeals lie to any other body of the AU. In accordance with Rule 118 of its Rules of Procedure, the ACHPR may submit cases of non-compliance with its communications decisions or provisional measures to the African Court. The ACHPR is yet to invoke this Rule in practice. If it ever does, the African Court will not sit as a court of appeal. It will instead sit to enforce the decision of the ACHPR.

In considering activity reports, the PRC and the Executive Council should bear in mind that all decisions of the ACHPR are taken after an elaborate process of analysis and verification of information. Where applicable, states are given a right of reply and the opportunity to challenge

contentious matters or to advance a particular interpretation of the African Charter.

Decisions on communications are taken after the ACHPR has received written and/or oral submissions at the various stages of examining such communications. In keeping with the principles of natural justice, the communications procedure allows both parties to a case to be heard. In this regard, the ACHPR's Rules of Procedure are very generous. On the question of the admissibility of a communication, the respondent state is allowed 90 days to file written submissions,⁴⁴ 90 days to comment on the other party's admissibility submissions,⁴⁵ and 90 days to submit further observations if the ACHPR deems it necessary.⁴⁶ The respondent state may also be allowed to make oral submissions on this one question.⁴⁷ If the complainant raises a preliminary objection, the respondent state has 30 days to respond. At the merits stage, the respondent state has 60 days to respond to the merits submissions of the complainant.⁴⁸ Rule 111 of the ACHPR's Rules of Procedure further provides an avenue for a party to a case to seek for a review of a decision taken by the ACHPR in its communications procedure. In practice, many states fail to fully and effectively participate in the communications procedure.⁴⁹ Repeated reminders to states to respond to communications against them are usually ignored. As a result, the ACHPR on many occasions relaxes its timelines and bends backwards to accommodate states.

In relation to mission reports, the ACHPR's Rules of Procedure allows concerned states to comment on the report within 60 days of receipt of the report.⁵⁰ The ACHPR then publishes the report "with the comments of the State Party, if any".⁵¹

In considering activity reports, the PRC and

44 ACHPR Rules of Procedure, 2010, Rule 88(1).

45 Ibid.

46 ACHPR Rules of Procedure, 2010, Rule 88(5).

47 ACHPR Rules of Procedure, 2010, Rule 88(6).

48 ACHPR Rules of Procedure, 2010, Rule 108(1).

49 J Biegon 'Non-participation in the communications procedure of the African Commission on Human and Peoples' Rights' (2014) 2 *Africa Nazarene University Law Journal* 1.

50 ACHPR Rules of Procedure, 2010, Rule 60(4).

51 Ibid.

the Executive Council should also pay close attention to the clear distinction drawn in the African Charter between ACHPR's protective activities (such as consideration of communications and undertaking of on-site or fact-finding missions) and promotional activities (such as review of state party reports, adoption of resolutions and issuance of urgent appeals). Protective activities are triggered when a complaint is filed before the ACHPR for formal adjudication. During the adjudication, both parties are given an opportunity to file written and/or oral pleadings in support of their claim or position. The end-result is a finding or reasoned decision on whether or not the concerned state has violated the African Charter. The law on and procedure for undertaking protective activities is covered under Chapter III of the African Charter. Article 59(1) provides that measures taken under this Chapter "shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide". Beyond their purpose, the confidentiality of protective activities is what primarily distinguishes them from promotional activities.⁵²

Promotional activities do not result in the finding of a violation. They are aimed at educating the public about the African Charter and bringing particular issues to the attention of concerned states. Resolutions, for instance, are adopted on "matters or urgency, informed by circumstances and the available information, to focus attention on a matter of immediate concern".⁵³ Urgent appeals serve a similar purpose. If the ACHPR were to obtain the views of states before issuing resolutions or urgent appeals, as the Executive Council has on occasion directly or impliedly suggested,⁵⁴ the very purpose of issuing these documents would be effectively de-

feated. The processes of adopting resolutions or issuing urgent appeals are triggered by ACHPR's inherent jurisdiction to assess the human rights situation in Africa. Promotional activities are not confidential, as they fall outside the ambit of Article 59(1) of the African Charter. The ACHPR has in fact clarified that it can publicly disseminate its resolutions without any restrictions whatsoever.⁵⁵ The ACHPR's practice of adopting resolutions and urgent appeals is similar to the practice of other international human rights bodies or mechanisms.

5. Consideration of activity reports should foster the principles of separation of powers and rule of law within the African Union

The twin principles of separation of powers and rule of law apply both at domestic and international level. At the domestic level, governments are ordinarily composed of three branches: the executive, legislature and judiciary. These branches constitute a system of checks and balances. Intergovernmental organizations are structured in a similar fashion. The implication is that in the same way the judiciary at the domestic level is designed and required to be independent from the executive, so should a judicial or quasi-judicial body at the international level be independent from the political organs of its parent intergovernmental organization. As a former registrar of the European Court on Human Rights has pointed out:

The institutional framework within which an international court or tribunal functions more often than not includes as a repository of some legislative and/or executive power not only the Contracting States to the relevant treaty but also the international organisation under whose aegis the

52 See M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 572.

53 F Viljoen *International human rights law in Africa* (2012) 188.

54 See eg Executive Council Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.257(VIII), para 1(iii) calling upon the ACHPR to "ensure that in future, it enlists the responses of all parties to its Resolutions and Decisions before submitting them to the Executive Council and/or the Assembly for consideration".

55 'Account of Internal Legislation on Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 467.

court or tribunal operates. Where this is the case, therefore, in so far as the principles of judicial independence give rise to obligations on the part of other actors in the institutional framework, those obligations must, as a matter of logic, extend to the parent international organisation and its organs.⁵⁶

The Burgh House Principles on the Independence of the International Judiciary, adopted in 2004 by the International Law Association (ILA) Study Group on the Practice and Procedure of International Courts and Tribunals, are particularly instructive for the present discussion although they relate to international courts and tribunals. The Principles assert unequivocally that:

Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.⁵⁷

There is no discernable reason why with necessary changes, the above principle would not apply to international quasi-judicial bodies such as the ACHPR. The principle certainly applies to ACHPR because the AU is institutionally organized to give effect to the principle of separation of powers: “although it functions as a system of intergovernmental governance, the AU’s institutional structure to some extent reflects the trias politica of national governments”.⁵⁸ For the present discussion, it suffices to note that the Executive Council and the PRC play an executive or political role while the ACHPR plays a quasi-judicial role. The political role of the Executive Council and the PRC involves negoti-

ating and adopting relevant human rights treaties, such as protocols to the African Charter, electing members of the ACHPR, resourcing the body, and monitoring the implementation of its decisions. The quasi-judicial role of the ACHPR primarily entails interpreting the legal provisions of the African Charter and its relevant protocols. The consideration of activity reports should always seek to ensure that this division of labour is maintained and that the political organs do not encroach into the functional realm of the ACHPR.

CONCLUSION

It is ironic that the ACHPR is under attack at a time in the history of Africa when the majority of governments have embraced democratic and human rights principles, albeit for rhetoric purposes in most instances. It is equally baffling that this attack is happening when the AU’s frequency of pronouncements of its commitment to human rights is at an all-time high. As it gave little attention to human rights, the OAU, by default rather than design, rarely meddled in or interfered with the independent functioning of the ACHPR. The OAU Assembly of Heads of State and Government adopted the ACHPR’s activity reports almost always as a matter of course, without much scrutiny or debate.⁵⁹ Limited interaction between the ACHPR and the OAU political organs meant that there was little friction between them.

With the advent of the AU, and more specifically the involvement of the PRC and the Executive Council in the consideration of the activity reports of regional human rights treaty bodies, closer scrutiny and charged debates on the content of ACHPR reports have become common. This new practice is not unwelcomed. It reflects the growing importance of human rights within the AU and its member states. However, consideration of activity reports should not un-

56 P Mahoney ‘The international judiciary: Independence and accountability’ (2008) 7 *Law & Practice of International Courts and Tribunals* 313, 319.

57 The Burgh Principles on the Independent of International Judiciary, Principle 1.2.

58 F Viljoen *International human rights law in Africa* (2012) 170.

59 R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 58.

dermine the authority of the very bodies mandated to promote and protect human rights in the region. This policy brief has suggested a set of five guiding principles to ensure that the line between consideration and interference is not crossed. These are:

1. consideration of activity reports should not erode or undermine the role of the ACHPR as an independent and autonomous interpreter of the African Charter;
2. the competence to consider activity reports should be understood in light of the overriding object and purpose of the African Charter;
3. consideration of activity reports should take into account the fact that the African Charter contains safeguards for ensuring ACHPR's internal independence;
4. the process of considering activity reports should not serve as a platform for member states to lodge appeals against decisions of the ACHPR; and
5. consideration of activity reports should foster the principles of separation of powers and rule of law within the African Union.

These principles specifically apply to the consideration of the activity reports of the ACHPR. In reality, they extend to the review of activity reports of the other two regional human rights treaty bodies: the African Court and the ACERWC. For these bodies to effectively discharge the mandate granted to them, their independence and autonomy must be respected. Therefore, at stake during the upcoming PRC/ACHPR joint retreat is the future of the ACHPR and the integrity of the African human rights system as a whole. Both parties must use the opportunity presented by the joint retreat to affirm the importance of ACHPR's independence and autonomy.

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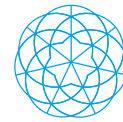
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