



Win some, lose some:

**The 2020 Rules of Procedure of the African Commission
on Human and Peoples' Rights**



INITIATIVE FOR STRATEGIC
LITIGATION IN AFRICA

Introduction



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1. Introduction

On July 7, 2020, the African Commission on Human and Peoples' Rights (African Commission) announced the publication of its revised Rules of Procedure (RoP),¹ which entered into force on June 2, 2020 in terms of Rule 145 thereof.² The Rules were adopted at the Commission's 27th Extra-Ordinary Session, held from February 19 to March 4, 2020, pursuant to Article 42(2) of the African Charter on Human and Peoples' Rights (African Charter). The 2020 RoPs replaces the 2010 RoPs,³ which was adopted during the 47th Ordinary Session, in May 2010.

While the RoPs incorporate existing provisions in the 2020 RoPs, it also revised certain provisions as well as added new ones. Some of the changes relate to the mandate and status of the Commission, code of conduct, sessions of the Commission, role of National Human Rights Institutions (NHRIs), communication procedure and relationship with the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).⁴

This review makes a comparison between the 2010 and 2020 RoPs and considers the extent to which the well-reasoned submissions made to the Commission's Secretariat by civil society including the Initiative for Strategic Litigation in Africa (ISLA) were incorporated.⁵ In addition, this commentary highlights possible red flags in the 2020 RoPs that could potentially hinder litigation and advocacy before the African Commission on human rights issues including sexual rights and women's human rights.

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¹ African Commission on Human and Peoples' Rights (ACHPR) 'Press Release on Publication of New Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020' (July 7, 2020) <https://www.achpr.org/pressrelease/detail?id=518> (accessed October 23, 2020).

² The new rules are available here: <https://www.achpr.org/legalinstruments/detail?id=72>.

³ See analysis of Decision 1015 by the Coalition for the Independence of the African Commission (CAIC), <https://achprindependence.org/decision-1015/> (accessed July 28, 2020). The Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd Ordinary Session held in Dakar (Senegal) from 2 to 13 February, 1988, revised initially during its 18th Ordinary Session held in Praia (Cabo-Verde) from 2 to 11 October 1995 and once again during its 47th Ordinary Session held in Banjul (The Gambia) from 12 to 26 May, 2010.

⁴ See generally, S Nabaneh 'Maintaining The Independence Of The African Commission On Human And Peoples' Rights: A Commentary On The Rules Of Procedure, 2020' Coalition for Independence of the African Commission (CIAC), August 24, 2020, <https://achprindependence.org/maintaining-the-independence-of-the-african-commission-on-human-and-peoples-rights/> (accessed October 20, 2020), pp. 1-9.

⁵ This was a joint submission which included the following organisations: Dullah Omar Institute, the Institute for Human Rights and Development in Africa (IHRDA), the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), Synergia – Initiatives for Human Rights, the AIDS and Rights Alliance for Southern Africa (ARASA) and Coalition of African Lesbians (CAL).

2. Differences between the old 2010 RoPs and the New 2020 RoPs

As noted above, the 2020 RoPs did add or move provisions necessitating the need to compare the 2010 and 2020 rules. The 2020 Rules contain 145 provisions, while the 2010 Rules contain 132. Some of the more significant substantial differences are discussed below:

I. Definitions

Minor changes were made to the definitions section of the 2020 RoPs. For instances, while maintaining most of the definitions of the 2010 RoPs, the 2020 RoPs introduces definitions for, 'Amicus curiae', 'Peace and Security Council', and 'third party with a direct interest' in line with new additions that have been included in the 2020 Rules.

II. Mandate and status of the African Commission

The 2010 RoPs had a single provision (Rule 3) on the status of the Commission; the 2020 RoPs broke it into several parts:⁶

- **Rule 3(1) – specifically and clearly stipulates that 'the African Commission is an autonomous treaty organ' with mandate to promote and protect human rights in Africa in terms of Articles 30 and 45 of the Charter.**
- **Rule 3(2) – draws the connection between the Commission and the Assembly of Heads of States.**
- **Rule 3(3) – sets out the Commission's competencies i.e. power to interpret the Charter, including giving advisory opinions.**
- **Rule 3 (4) – on the status of the Commission provides that "The Commission shall be competent to interpret its own decisions.**
- **Rule 3 (5) – The Commission shall lay down its Rules of Procedure pursuant to Article 42 (2) of the Charter.**
- **Rule 3 (6) – sets out that the Commission shall have the competence to ensure the efficient and technical organization and operation of the Secretariat**
- **Rule 3 (7) – The Commission shall perform any other tasks which the Assembly may entrust to it pursuant to Article 45(4) of the Charter.**

This expansion provides greater clarity as it used to be one continuous rule now broken into several parts. In addition, given the recent attacks on the Commission's independence and decision-making powers by political bodies and the subsequent directives for these decisions to be altered to reflect the leanings of the political organs, Rule 3(4) for instance addresses this issue. It reiterates the independence and competence of the Commission, which can also serve as a monitoring tool of the Commission's independence by Non-Governmental Organisations (NGOs).⁷

⁶ Nabaneh (n 4 above), p. 2.

⁷ Nabaneh (n 4 above), p. 2.

III. Functions of members of the Commission

The 2020 RoPs introduces a new rule (Rule 7) on the functions of members of the Commission clarifying what activities Commissioners are expected to engage in or may be assigned to. These include attending sessions of the Commission; carrying out promotion activities; and participating in the consideration and adoption of communications. Clearly articulating the functions of members of the Commission is important especially given the mandate of the Commission to ensure the protection of human rights in Africa through its communication procedure.

IV. Incompatibility

Rule 7 of the 2010 RoPs provides that the position of a member of the Commission is incompatible with any activity that might interfere with the independence or impartiality of such a member in accordance with Article 31(1) & (2) and 39(2) of the African Charter. Where this occurs, the Chairperson of the Commission shall inform the Chairperson of the African Union Commission, who shall declare the seat vacant. While maintaining similar rules on incompatibility, the 2020 RoPs now introduces an additional sub-rule (Rule 8(3)), which requires the Commission to first give a Commissioner whose activities are deemed incompatible with their function as a Commissioner a hearing before referring same to the Chairperson of the African Union Commission. This addition now creates safeguards for the right to be heard and an opportunity for a Commissioner to defend him or herself against the Commission's declaration of incompatibility.

V. Code of conduct

Rule 11 of the 2020 RoPs on code of conduct is a new addition. It requires members of the Commission through the operative term "shall" to observe the principles and codes of conduct stipulated in the Rules as governing the terms and conditions of their service, including the principles relating to recusal and confidentiality, as well as relevant provisions of the AU Staff Rules and Regulations, the AU Code of Ethics and Conduct and the AU Harassment Policy. However, the term 'relevant' is not defined thereby making the provision ambiguous. It further stipulates that where there is conflict between the relevant AU Staff Rules and Regulations, Rule 11(2) states that the RoPs will take precedence.

VI. Diplomatic immunities

The 2020 RoPs introduces a new rule (Rule 12) which highlights that Commissioners enjoy diplomatic privileges and immunity in the performance of their functions in accordance with article 43 of the African Charter. The 2010 RoPs was silent on this issue.

VII. Composition, structure and status of the Secretariat

While Rule 17(1) of the 2010 RoPs mandated the Commission to design the organizational structure of the Secretariat and seek the approval of the African Union Commission (AUC), Rule 20(1) of the 2020 RoPs now stipulates that the Commission, when seeking such an approval, the Commission needs to specify the staff and services necessary for the effective discharge of the Commission's duties. However, the ambiguity in the language might be interpreted to mean that the Commission could be precluded from preparing a proposal without the express approval of the AU to do so. This can potentially limit the independence of the Commission.

Furthermore, Rule 20 of the 2020 RoPs on the appointment procedure for the Secretary to the Commission by the AU Chair changes the procedure. The appointment is now done in consultation with the Commission's Chair, unlike what was previously provided in Rule 17 (3) of

the 2010 RoPs, which stipulated that the appointment was to be made by the AU Chair after consultation with the African Commission's Chair. The change of language in the new rules illustrate that the decision to appoint a Secretary is made together between the Chairpersons of the AUC and the Commission rather than the decision-making power squarely laying on the AUC Chair who may accept or reject the views of the African Commission's Chair. Another additional rule is Rule 20(4), which requires the Bureau of the Commission to consult with the AUC prior to the appointment of any staff.

Rule 21(f) of the 2020 Rules (formerly Rule 18(f)) removes the requirement for the Secretary to work in consultation with the African Commission's Chair, amongst other things, in the preparation of draft agendas for each session. This ensures that the process is streamlined through the Secretary including eliminating/minimising delays in finalizing the agenda. The problem arises where the Secretary can take things off the agenda arbitrarily. A new rule was also added (Rule 21(f)(l)) which assigns any other tasks to the Secretary without clearly stipulating by whom, a power which might compromise the independence of the office.

VIII. Confidentiality of the work of the Commission

Rule 24(2) of the 2020 RoPs maintains the wordings of Rule 22 of the 2010 RoPs which states that "The staff of the Secretariat must observe the principle of confidentiality in all matters that the Commission considers confidential as stipulated." Rule 24(1) of the 2020 RoPs now creates an obligation on the Commission to guarantee the confidentiality of all its case files, including pleadings except with parties to the cases. Critical issues of concern remain relating to the requirement for confidentiality, which has promoted a veil of secrecy over the Commission's complaints handling procedure, obscures information on cases submitted to the Commission and prevents interested parties from meaningfully contributing to existing processes. This is discussed further below.

IX. Sessions of the African Commission⁸

Rule 27 of the 2020 RoPs maintains Rule 25(1) and Rule 25 (2) of the 2010 RoPs on general principles. However, it added two sub-rules, 25 (3) on live transmission of session proceedings when possible and 25(4) on the adoption of a communique for the public at the end of the session. These are important additions given the current situation with the pandemic. For example, the 66th Ordinary Session of the Commission, which was scheduled to be held from 22 April to 12 May 2020 in The Gambia, was postponed. The session was held from 13 July to 7 August 2020 via zoom with a special focus on COVID-19.⁹ The 28th Extra-Ordinary Session of the Commission was also earlier held virtually from 29 June to 1 July 2020.¹⁰

Rule 28 (1) of the 2020 RoPs now increases the ordinary sessions of the Commission from 2 to 4 sessions each year. This is timely given the inadequacy of the previous sessions to cover the Commission's very extensive programme of work.

Rule 28 (2) further vests decision-making power on convening of sessions in the hands of the Chairperson of the Commission in consultation with other members of the Commission and removes the requirement for consultation between the African Commission's Chair and the AUC

⁸ Culled from Nabaneh (n 4 above), pp. 3-4.

⁹ On the potential of virtual sessions to generate more accessible and inclusive Commission sessions, see J Biegon 'Can the virtual sessions of the African Commission generate more civil society participation?' OpenGlobalRights, October 26, 2020 <https://www.openglobalrights.org/can-the-virtual-sessions-of-the-african-commission-generate-more-civil-society-participation/?lang=English> (accessed October 28, 2020).

¹⁰ Final Communiqué of the 28th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, <https://www.achpr.org/sessions/info?id=325> (accessed July 28, 2020).

Chair in the setting of such session dates under Rule 26 (2) of the 2010 RoPs. Where programmes of the AUC and Commission clash, it is better that negotiations take place in all collegiality but the AUC Chairperson should not have integral power in terms of the rules to call off, postpone or delay a Commission's meeting.

It is important to note that Rule 26(3) of the 2010 RoPs is retained under Rule 28 (3) of the 2020 RoPs where "in exceptional circumstances, the Chairperson of the AUC may change the opening date of a session, in consultation with the Chairperson of the Commission." This provision appears to be a compromise for the removal of the AUC Chair's powers in convening the Commission's sessions. It partially limits the power of the AUC Chairperson to possibly alter session dates only in exceptional circumstances and always in consultation with the Chairperson of the Commission.

The wording under Rule 29 on Extraordinary Sessions (EOS), which is stipulated under Rule 27 of the old Rules, now changes from "shall" to "may", thereby making the holding of EOS optional rather than compulsory. Rule 29(3) of the 2020 RoPs also further removes the obligation for the Commission's Chairperson to set dates for EOS in consultation with the AUC Chair and limits the consultation only to members of the Commission. This is a positive step as the decision to hold EOS should lie with the Commission without involvement of the AUC.

Rule 30 of the 2020 RoPs (formerly Rule 28) now changes the title from "Place of Meetings" to "Venue of Sessions." Rule 30(3) is particularly important as the State party agreeing to host a session shall guarantee the unfettered participation of all individuals attending the session. This is important in light of past situations where the participation of civil society organisations (CSOs) were denied or not guaranteed by the host country. For example, during the 38th forum of the NGO Forum preceding the 64th session of the ordinary session in Sharma El Sheikh in Egypt, the forum expressed their deep concerns and frustration at the unfair treatment meted on them by the Egyptian government.¹¹ Other issues included the fact that identification badges for NGO participants at the 64th session were issued by officials from the Arab Republic of Egypt rather than the secretariat of the Commission, which is the norm.

Generally, this Rule failed to emphasize that the African Commission should ensure that a State Party inviting it to hold a session within its territory is not generally seen as, or obviously, a violator of human rights within its territory in accordance with its obligations under the African Union Constitutive Act, the African Charter and any other human rights instruments it is a party to.

Rule 30(4) also now creates a firmer obligation on a State Party offering to host a session of the Commission to be bound under Article 62 of the Charter and any supplementary legal instruments. This addresses the complications that have arisen in circumstances where states have offered to host sessions of the Commission but have reneged on meeting the obligations that come with hosting e.g. removing barriers for NGOs coming to the session, meeting financial obligations towards Commissioners, making translation/interpretation services available in all AU languages.

On notification of the opening date of a session, Rule 31(1) reduces the notice period for ordinary sessions from 60 to 45 days. The change in wording in Rule 31(2) with regard to the notice period for the holding of EOS from as soon "as possible before the beginning of the session" to "as soon as practicable" remains vague and does not allow for CSO planning around EOS dates.

¹¹ African Defenders "ACHPR64: Protest petition against the treatment accorded to CSOs during the NGO forum" 24 April 2019, <https://africandefenders.org/achpr64-protest-petition-against-the-treatment-accorded-to-csos-during-the-ngo-forum/> (accessed July 28, 2020).

X. Provisional Agenda for an Ordinary Session

The 2020 RoPs generally maintains the provisions of the 2010 rules (Rule 32) on agenda for sessions. However, a few changes have been made. For instance, Rule 33(4) now reduces the time period for any party wishing to request the placement of items on the Commission's provisional agenda for ordinary sessions from 60 to 45 days before the session.

Rule 33(5) reduces the notice period for notifying a person or institution requesting the inclusion of an item on the agenda from one month to 14 days. Similarly, Rule 34(1) reduces the time limit for giving Commissioners notice of the provisional agenda from 60 days to 14 days prior to the opening of the session. Rule 34(2) reduces the period for notifying State Parties, the Chair of the AUC, affiliate institutions and observers of the provisional agenda from 45 days to 7 days, while Rule 34(3) and 34(4) reduces the time period for distributing the provisional agenda and posting same on the website for the purposes of the general public to 7 days.

While these shorter time frames may be advantageous in some instances, in general, the short notification period concerning agenda for sessions could also have negative implications as it could make it difficult for the relevant stakeholders to have sufficient time to plan and participate in the sessions of the Commission. For example, the reduction in time will inconvenience a lot of NGOs and create difficulties in terms of planning. Such drastic cuts in the minimum time frame for notification means that parties may not have enough time to peruse the documents and engage substantively with their contents during the session affecting quality of engagement during the sessions. The old RoP(Rule 32(6) on the content that should be included on the Provisional Agenda of an Extraordinary Session is also removed, which is not helpful for litigants and NGOs .

In terms of transmission and distribution of the provisional agenda that was initially provided in Rule 33 and now found under Rule 34, there are several reductions in the time duration for the distribution of working documents. For example, Rule 34(1) now reduces the minimum period for distribution to Members of the Commission from 60 days to 14 days; for the AU, NGOs with observer status, NHRIs with affiliate status, States Parties and other interested parties, Rule 34(2) reduces the duration from 45 to 7 days; and Rule 34(3) reduces the time duration for the distribution of essential documents from 30 days to 7 days.

XI. Working languages of the Commission

Rule 38(3) of the 2020 RoPs is similar to the old Rule 36(3) that anyone wishing to address the Commission in a language that is not the AU language should be responsible for their own interpretation and/or translation of their address into any of the working languages of the Commission. However, it adds a positive exception that witnesses giving testimonies before the Commission in terms of Rule 101(5) and 103(2) will not be responsible for their own translation/interpretation.

XII. Repeat votes on the same issue

Rule 62 of the 2020 RoPs is a new rule, which provides that unless there are compelling reasons, the Commission shall not vote more than once on the same issue at the same session.

XIII. Reports of the Commission

The 2020 RoPs retains the same provisions as provided in the 2010 RoPs concerning reports of the Commission with a few additions. For instance, Rule 64 of the 2020 RoPs require individual

Commissioners to report on their activities at each ordinary session of the Commission with public hearings.

Quite significantly, unlike Rule 61 of the 2010 RoPs, Rule 66 of the 2020 RoPs appears to remove the requirement for the publication of some reports to be in compliance with Article 59(2) of the African Charter.

XIV. Distribution of reports and other official documents

Rule 66 (1) amends the old Rule 61(1) through the removal of the second part which States "Upon their adoption by the Commission, reports shall be published in accordance with Article 59(2) of the Charter." Article 59 (2) of the Charter provides that the report (Activity Report of the Commission) shall be published by the Chairperson of the Commission upon the decision of the Assembly of Heads of State and Government. This has been one of the contentious provisions regarding the independence of the Commission and its ability to make its own decisions without the interference of the political organs of the AU.

XV. Relationship with States Parties, NHRIs, NGOs and funders

The 2020 RoPs maintain many of the provisions of the 2010 RoPs with a few additions

a. Participation of States Parties

Participation of States Parties was provided in Rule 64 of the 2010 RoPs but is now under Rule 69, which basically retains it. However, it added sub-rule 69(3) which provides that the "Commission shall interact with States Parties through their respective designated department and official(s) acting as the Government Focal Point and Agent(s) responsible for processing correspondence and other communications from the Commission as well as for responding on behalf of the State. In specific circumstances additional or alternative channels of interaction may be used as the most effective means of communication." The 2010 RoPs was silent on this. This is a good development as it centralises the communication channels between the Commission and States Parties and has the potential of curing the mischief of States constantly claiming not to have received correspondence from the Commission, which caused inordinate delays and challenges in the handling of complaints.

b. National and specialised human rights institutions

Concerning National Human Rights Institutions (NHRI), Rule 71 of the 2020 RoPs removes the requirement under Rule 67(3) of the 2010 rules which prohibited the Commission from granting affiliate status to more than one NHRI from a State Party.

c. Non-Governmental Organisations (NGOs)

Similarly, the inability of a CSO to engage with the Commission or to submit its activity reports in a context of dwindling funding for CSOs and shrinking civic spaces globally only serve to further marginalise CSO voices. The Rule does not seem to comply with principles of natural justice as it does not guarantee NGOs the right to be heard nor make any provision on the recourse that NGOs who are subject to such 'measures' can take, other than having to resubmit a new application for observer status.

Rule 72 of the 2020 RoPs maintains the provisions of Rule 68 of the 2010 RoPs indicating that the Commission will grant observer status to NGOs based on its Resolution on Granting Observer Status.¹² As noted elsewhere:¹³

The Commission's decision to assert its independence through this rule would likely be deemed as contrary to the decision of the Council, which noted that the Commission should apply its criteria for the granting of observer status to NGOs in line with existing AU accreditation criteria "which take African values and traditions into account." This crisis arose as a result of the 2015 incidence when the AU Executive Council directed the African Commission to reverse its decision of according observer status to the NGO Coalition of African Lesbians (CAL). Given that admitting NGOs is part of the Commission's functions, even under 'functional independence' as declared by the Executive Council, this should be solely the Commission's decision to make.

It is worth pointing out that the 2020 RoPs further introduces Rule 72(3) which strips CSOs with observer status of their special status if the Commission considers that such an observer "no longer fulfils the criteria or defaults on its obligations." Whilst this Rule may be aimed at ensuring active CSO participation and engagement with the Commission, the context in which it has been introduced raises concerns. Similarly, inability of a CSO to engage with the Commission or to submit its activity reports in a context of dwindling funding for CSOs and shrinking civic spaces globally only serve to further marginalize CSO voices. The Rule does not seem to comply with principles of natural justice as it does not guarantee NGOs the right to be heard nor make any provision on the recourse that NGOs who are subject to such 'measures' can take, other than having to resubmit a new application for observer status.

XVI. Protection from reprisals¹⁵

The Commission added a new rule of protection from reprisals in the 2020 RoPs, which was not previously addressed in the old rules. Rule 74 is targeted at State Parties to ensure that they do not take any kinds of reprisals against individuals or entities that provide the Commission with information, testimonies or evidence or against members of the Commission or its staff in connection with the performance of their duties. This is a very critical rule given the many stakeholders that the Commission depend on for its work. It speaks to the independence of the Commission in addressing possible instances of reprisals including Commissioners not getting re-elected due to an adverse finding on a State, or CSOs being afraid to work with the Commission.

XVII. Promotion missions

While the 2020 RoPs maintain most of the provisions from the 2010 RoPs it introduces requirements that States Parties shall facilitate promotion visits (rule 76(2)) and guarantee the free movement of members of the mission, provide them with relevant documentation and security for the mission, in terms of rule 87. Rule 76(5) also allows a Commissioner who is a citizen of a state party being visited to be present during the mission, even though such Commissioner is prohibited from taking part in the deliberations of the mission report.

¹² See Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa, ACHPR/Res.361(LIX)2016, <https://www.achpr.org/sessions/resolutions?id=373> (accessed August 3, 2020).

¹³ Nabaneh (n 4 above), p. 4 & 5.

¹⁴ Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), Doc. EX.CL/1089 (XXXIII) (2018) https://au.int/sites/default/files/decisions/34655-ex_cl_dec_1008_1030_xxxiii_e.pdf (accessed October 24, 2020), para 8(iv).

¹⁵ Nabaneh (n 4 above), p. 5.

XVIII. Transmission and consideration of State Reports and related contributions

The 2020 RoPs makes significant changes on the provisions (rule 74 of the 2010 RoPs) relating to the transmission of State reports. Rule 71(1) requires the Chairperson of the Commission, through the Secretary, to request States' confirmation that they will submit State reports. The requests should be filed at least 180 days before the Ordinary Session at which the State Report will be considered. Rule 79(2) also requires the report to be submitted at least 120 days before the session at which it will be considered. This is helpful in that it provides a follow-up mechanism for the Commission to remind States that are due to submit their reports to enable the Commission plan more effectively.

Rule 80(5) clarifies that a Commissioner who is a national of a State Party whose report is under consideration shall not participate in the deliberations.

On non-submission of Reports, new Rule 81 (2) now introduces the requirement for the Commission to not only remind States of outstanding reports but to give them timelines by which they should submit these reports. This is a useful monitoring mechanism to ensure that States adhere to their reporting obligations.

XIX. Concluding observations

Rule 82(4) of the 2020 RoPs makes a minor but significant addition, by requiring the Commission to furnish NHRIs with affiliate status of a State Party whose report has been considered with the concluding observations. This could be an important avenue for ensuring that NHRIs becomes partners in following up on the implementation of concluding observations.

Additionally on follow-up of implementation of Concluding Observations (formerly Rule 78), new Rule 83(2) now makes it possible for the Commission to request or take into account contributions by interested parties or invited institutions, on the extent to which states are implementing recommendations under its concluding observations.

XX. Protection missions

The 2020 RoPs makes some changes to the provisions on protection missions. Rule 86 of the 2020 RoPs, unlike Rule 81 of the 2010 RoPs, contains no provision on the obligation on States Parties to provide an open invitation to the Commission to undertake protection missions and to respond promptly to the Commission when such request is made. In addition, Rule 86(4) of the 2020 RoPs now specifically allows members of the Commission to authorise any of its members to participate in any protection mission undertaken by other African or international organisations.

XXI. The communications procedure of the African Commission

Chapter 3 of the 2020 RoPs deals with consideration of communications extensively. Rule 88 changes the title from "Records of Communications under Articles 47, 48, 49 and 55 of the Charter" to 'Register of Communications under Articles 47, 48, 49 and 55 of the Charter.' This Rule now introduces a more systematic record keeping system in the form of a register. This is particularly important for CSOs in monitoring of complaints procedure e.g. updates to this register on progress on complaints and useful for clarifying availability of decisions as per the current status of complaints on the register.

a. Duty to cooperate

Rule 92 on the duty to cooperate with the Commission is a new addition. The Rule introduces an obligation on the parties to a Communication to cooperate fully with the Commission for the proper administration of justice. This is an important addition given States' increased non-cooperation with the complaints handling procedure before the Commission. Such non-cooperation has included false claims that submissions were never received, delays in filing responses, refusal to implement provisional measures, boycotting proceedings, etc

b. Working Groups and Rapporteurs on Communications

Rule 93 of the 2020 RoPs codifies existing practice by introducing the idea of working groups to decide on the seizure and admissibility of communications. It further eliminates the powers of the Rapporteur to request information on complaints from the States Parties concerned or transmit information of the complaint or prepare a report on the admissibility or inadmissibility of a complaint. This might be based on criticism of such a practice, which has been considered tokenism given that the Secretariat does all the work.

c. Recusal of a member of the Commission from taking part in the examination of a Communication

Rule 94 of the 2020 RoPs maintains the provision of Rule 101 in the 2010 RoPs. It provides that Commissioners shall be recused from the consideration of a communication if the Commissioner:

- a. Is a national of the State Party concerned;
- b. Has any personal interest in the case;
- c. Is engaged in any political or administrative activity or any professional activity that is incompatible with his/her independence or impartiality;
- d. Has participated in any capacity in any decision at the national level in relation to the Communication;
- e. Has expressed publicly opinions that are objectively capable of adversely affecting his/her impartiality with respect to the Communication; or if the Commission
- f. Finds, for any other reason, that his/her impartiality is capable of being adversely affected."

Case law on how the Commission has handled allegations of bias suggests that a more general rule for recusal, under which anyone with interest in the case has the means to request the recusal of a Commissioner whom they allege holds sufficient interest in the case to constitute bias, would be desirable.

In Communication 428/12: Dawit Isaak v Eritrea (2015),¹⁶ the Government of Eritrea filed a preliminary objection accusing the then Chairperson and Special Rapporteur on Freedom

¹⁶ Dawit Isaak v Eritrea (Communication 428/12) [2018] ACHPR 135; (27 APRIL 2018).

of Expression and Assembly, Commissioner Pansy Tlakula of bias in the determination of the case. The Eritrean Government's complaint related to Commissioner Tlakula's writing of a preface to a CSO report on the erosion of freedom of expression in Eritrea as well as her pronouncements at an ordinary session seminar at which the CSO report was launched.¹⁷ In that case, the Commission applied the two tier test of bias i.e. subjective approach which seeks to ascertain the actual existence of bias by assessing the personal conviction of a given adjudicator in a given case, followed by the objective approach which asks whether the same adjudicator offered guarantees sufficient to exclude any legitimate doubt of impartiality.¹⁸ The Commission dismissed the Respondent State's preliminary objection on grounds of bias, breach of confidentiality and politicisation of the matter.¹⁹

d. Investigative measures

Rule 101 of the 2020 RoPs introduces a new procedure on investigative measures which allows the Commission to conduct on-site investigations on the Commission's own initiative or at the request of a party, with the aim of clarifying the facts of the case. Through an investigative mission, the Commission may hear oral submissions or receive written submissions from experts or witnesses and may also request documents from relevant persons, institutions or organisations.

e. Intervention by amicus curiae

Under Rule 2 on definitions, an 'amicus' is defined as a 'third party having no interest in the outcome of a Communication.' However, given that an amicus is a third party to the complaint, they are generally allowed to take legal and or factual positions for or against the positions of either of the parties to the complaint and therefore need not be completely disinterested. In other cases, the person who files an amicus brief may be directly or indirectly impacted by the outcome of the communication. The definition should have simply left it at 'third party' not directly involved in the communication.

Rule 104 further provides the modalities for intervention by an amicus curiae in several ways. Firstly, it provides that an amicus can request to intervene by making a written or oral submission at any moment after the Respondent state has been asked to make its submissions on a case where previously it was not clear when such briefs could be submitted. The Rule articulates that amicus briefs may be submitted by interested parties of their own accord or at the invitation of the Commission. Secondly, it lays down clear procedures in that requests to intervene should be sent to the Secretariat, contact details of the author and motivation on how the submission can be useful to the Commission. It can also not be longer than 10 pages.

If the request to intervene as amicus curiae has been decided and a leave is granted to intervene in the case by making written or oral submissions, Rule 105 on procedure to intervene will then become applicable. Previous criticism of the Commission's approach

¹⁷ Decision of the African Commission on Human and Peoples Rights on the Preliminary Objection Communication 428/12 – *Dawit Isaak v Republic of Eritrea*, para 24.

¹⁸ As above.

¹⁹ As above, para 61.

to amicus curiae has been that the Commission does not elaborate on the type or form of the information that can be submitted in the amicus brief, and the procedure is generally undefined.²⁰ In an attempt to address this, the Commission, by virtue of Rule 105 (4), shall do the following:

- a. Share the parties' pleadings with the amicus curiae;
- b. Require the amicus curiae to file an amicus brief within thirty (30) days; and
- c. Share the amicus brief with the parties and require them to file their responses within thirty (30) days.

Additionally, the author of the brief may be able to address the Commission only if the Commission gives its express consent for them to make such oral presentations, as well as the possibility of the brief being published on the Commission's website.

f. Intervention by a third party with a direct interest in the case

The introduction of Rule 106 enables the Commission to receive submissions from third parties with an interest in the case "prior to the merits stage of the communication under consideration." The third party must demonstrate how he or she will benefit or directly suffer from the outcome of the communication.

g. Protection from reprisals

Protection from reprisals during the procedure for hearings on communications is now a standalone rule, which was previously provided under Rule 99(15) & (16) of the 2010 RoPs. New Rule 107 requires State Parties to ensure that no reprisals befall persons who engage the communications procedure of the Commission, including applicants, witnesses and experts.

h. Decisions by Default

The 2020 RoPs now makes it clear that the Commission will proceed to make a decision by default if the respondent state does not make submissions at any state of the communications process. In this regard, rules 111(2), 114 (2), 118(2) and 120(2) makes provisions on how the Commission is to proceed at various stages where the respondent state does not make the required submissions.

i. Seizure of Communications submitted under Article 55 of the African Charter

The 2020 RoPs introduces new provisions on seizure of complaints submitted by CSOs and individuals. Rule 115(2)(e) now requires a complainant to provide evidence that the victim consents to being represented or provide justification why such consent could not be sought. This is a deviation from the Commission's well-established rule of *actio popularis*. On the positive side Rule 115(5), which replaces old Rule 93(5) now provides that decision on seizure is an administrative act which is to be performed by the Secretary, which must be made within 60 days of receipt of a communication in terms of Rule

²⁰ Frans Viljoen & Adem Kassie Abebe, 'Amicus Curiae Participation Before Regional Human Rights Bodies in Africa' (2014) 58 *Journal of African Law* 22, pp. 30–31, 34.

115(8). The Commission may however, reverse a decision of the Secretary to decline seizure in terms of rule 115(10).

j. Review of a decision on admissibility

Rule 119 of the 2020 RoPs now make elaborate provisions on the circumstances under which the Commission may review a decision on admissibility. While this was previously covered in Rule 107(4) of the 2010 RoPs, the provision was quite scanty. Rule 119, among others, requires that a request for review be submitted within 180 days of the complainant discovering new facts and not later than 3 years of the decision being transmitted to the complainant declaring a complaint inadmissible. In the case of a respondent State seeking the review of a decision declaring a complaint admissible, such request for review must be made within 60 days of the decision having been communicated to the parties. A respondent State which fails to make submissions on admissibility is deemed to have forfeited a right to request a review except in exceptional circumstances.

k. Decision on merits

Rule 114(2) now explicitly authorises the Commission to make a decision on default where the respondent State fails to submit its response to a complaint. This is a positive development as it has the potential to encourage States to submit their response to communications. However, it drops the definitive time period of 12 months within which the Commission ought to have taken a decision in the old Rule 92(1). The lack of definitive timelines would likely cause continuous inordinate delays in the finalisation of communications under Article 53 of the Charter.

Rule 114 (5) further notes that the decision shall be communicated to the States Parties and the Assembly.²¹ However, it does not address what the Commission would do in an instance where the complainant is not a State Party. Such a lacuna might lead to a miscarriage of justice as the Respondent State will have access to the decision, by virtue of being part of the Assembly while the Complainant will be kept in the dark on the contents of the Commission's decision. However, the Commission, through its own working group on communications, has indicated that the rule does not apply to parties to the case, as parties to communications may obtain such information by writing to the Secretariat of the Commission.²²

l. Decision on reparations and costs

Rule 121 introduces new provisions which allows the Commission to decide not to include its ruling on reparation and cost as part of the merits decision. The Commission may now request parties to make additional submissions and hold hearings before making its ruling on reparations and costs.

²¹ This is done in terms of art. 59 of the African Charter, which provides that "all measures taken within" the Charter's provisions must remain confidential until the Assembly decides otherwise.

²² Inter-session activity report (November 2016- May 2017) of Hon Commissioner Lucy Asuagbor, Chairperson of the Working Group on Communications presented at the 60th Ordinary Session of the African Commission on Human and Peoples' Rights Niamey, Niger, 8 – 22 May 2017 <https://www.achpr.org/sessions/inter-session?id=274> (accessed August 1, 2020), para 15.

m. Review of decisions on merit

Rule 122(4) introduces a new provision that precludes a respondent State from accessing the review jurisdiction of the Commission if that State does not make any submissions on the merits, except in exceptional circumstances.

n. Withdrawal, strike-out and relisting

Rule 124 introduces new provisions on withdrawal and striking out of complaints, which allows a complaint to withdraw and complaint and the Commission to strike out a complaint for failure to diligently prosecute 'or where the Commission, for any other reason, concludes that it is no longer justified to continue the examination of the Communication'.

o. Follow-up on implantation

Rule 125 of the 2020 RoPs reinforces the provisions of rule 112 of the 2010 RoPs with some modifications. The modifications include the provision in rule 125(2) which empowers to Commission to request NHRIs to monitor or facilitate the implementation of its decisions. Rule 125(10) also now requires the Commission to publish information on state compliance with its decisions on its website.

XXII. Interpretation and advisory opinion

Rule 127 makes provisions on interpretations and advisory opinions, specifically on interpretation of the Charter, which reflects Rule 116 of the 2010 RoPs. However, it expands the list of individuals to be notified when the Commission receives a request for interpretation of the Charter/an advisory opinion under Article 45(3) beyond the president of the African Court to include States Parties, and any other interested entity. A corresponding duty exists for the Commission to notify the same parties when it finalises its interpretation or opinion. While it is not clearly stipulated, it is hoped that NGOs and the NGO Forum is covered under 'any other interested entity.'

XXIII. Relationship with the African Court

The 2020 RoPs reenact many of the provisions of the 2010 RoPs concerning the relationship between the Court and the Commission. However, there are some notable omissions in the 2020 RoPs. For instance, rules 116 and 117 of the 2010 RoPs concerning interpretation of the Charter and advisory opinion have been omitted in the 2020 RoPs. Rule 116 of the 2010 RoPs required the Commission to notify the Court of a request for interpretation received by the Commission while rule 117 enabled to Commission to be heard before the Court when the Court receives a request for advisory opinion.

Similarly, unlike Rule 118 of the 2010 RoPs, Rule 130 of the 2020 RoPs only allows the Commission to seize the jurisdiction of the Court by referring cases of which it has not already ruled on admissibility. This potentially means that the Commission now only considers itself capable of referring a case to the Court before it decides on admissibility, limiting the possibility of approaching the Court on other instance such as when a respondent state fails to comply with its recommendations or provisional measures.

XXIV. Relationship with other AU organs and institutions

a. Relationship with the African Committee of Experts on the Rights and Welfare of the Child

Rule 137 makes provision for the relationship between the Commission and the Children's Committee which was omitted in the 2010 RoPs.

3. Snapshot of whether proposals were incorporated into the 2020 RoPs

This section gives a brief overview of some of the proposed changes (as submitted to the Secretariat) and the 2020 RoPs. Some of the proposals of the Secretariat include the following:²³

On the content of State Report:

Given the noncompliance of States in reporting on the Maputo Protocol, it was suggested that Article 26(1) of the Maputo Protocol should be explicitly stated as part of state reporting obligations as previously provided in Rule 73 of 2010 RoPs. However, in the 2020 RoPs, it generally maintains this provision in Rule 78(1), but removes the reference to article 26 of the Maputo Protocol.

On transmission of State Reports and related contributions:

While it was acknowledged that Rule 79(1) which now requires State reports to be submitted at least 120 days before the session at which it will be considered is a welcome development, there were some loopholes. It was pointed out that a deadline should be established for publication on the website as such a procedure ensures that NGOs are able to access these reports that is essential in the submission of shadow reports. However, such a deadline was not included in the current 2020 RoPs.

On Concluding Observations on State Reports:

On the one hand, it was proposed that a deadline for the adoption of the Concluding Observations be set indicating that "concluding observations should be adopted at the ordinary session following the consideration of State Periodic report." This language was adopted in Rule 82(1). On other hand, the importance of setting a deadline for the publication of the Concluding Observation on the website of the African Commission with a proposal of 60 days was highlighted. This was not adopted as Rule 82(3) of the 2020 RoPs now provides that the concluding observations shall be published on the Commission's website once it has been transmitted to the State Party.

As can be deduced above, some proposals were incorporated into the adopted 2020 RoPs while other proposals were not accepted. The lack of these necessary changes has implications. For example, while it is acknowledged that the improved rule on the review of decisions on admissibility, the lack of clarification raises certain issues. First, there is currently no right of appeal

²³ See annexure 1.

is provided in the RoPs despite arguments that that States can exploit the examination of the Commission's Activity Report that is submitted to the AU Executive Council via the Permanent Representatives' Committee (PRC) as a way 'to appeal against the Commission's decisions,' which is contrary to the object and purpose of the African Charter. For instance, Viljoen argues that the Executive Council's decision to the publication of the text of a decision contained in the Commission's 20th Activity Report on a communication against Zimbabwe was favourable and a positive response to the state's demand despite "clear indications that the government had already been granted an opportunity to respond."²⁴ Beigon further notes that this erodes the principles of separation of power and rule of law within the AU.²⁵ Second, Commissioners' omissions and errors on law and facts are sometimes inevitable.

Focus on Amicus curiae procedure and confidentiality rules

A significant part of the joint submission that focused on the definition on amicus appears to have been reflected in the RoPs. For instance, the RoPs do not include reference to 'disinterested' party in reference to the definition of amicus as stipulated in the Revised Clean Draft for Public Consultation,²⁶ even though it indicated that an amicus is a 'third party having no interest in the outcome of a Communication'. This is a good compromise even though a preferred phrasing would have been a third party having no 'direct interest', in the outcome of the communication.

In a similar vein, references to an amicus being a person or entity active in the field of human and peoples' rights have been received. As rules 2 and 104 of the RoPs stand, any person or entity that is capable of assisting the Commission in the determination of the facts or law regarding a particular communication may submit an amicus brief. This appears to be a wholesale acceptance of the submissions made in this regard.

Regarding confidentiality, the RoPs appear to have ignored most of the submissions. For instance, Rule 24 maintains that all aspects of the Commission's work remain confidential, including pleadings. Rule 120(4) also maintains that decision on merit remains confidential and shall only be shared with the parties after the activity report of the Commission has been considered by the Assembly which puts the respondent state in an advantage as all state parties are part of the Assembly. In this regard, the Commission could be pressured by the Assembly to modify its decision in a Communication without the knowledge of the complainant.

4. Red flags in the 2020 RoPs that can hinder litigation and advocacy before the Commission

Although, the Commission's efforts to address longstanding concerns and enhance the performance of its mandate as reflected in the 2020 RoPs are acknowledged, it contains several red flags, which can serve as a barrier to advocacy and litigation on violations of women's human rights and sexual rights.

a. Confidentiality

Throughout the Rules, the Commission insists that all process relating to the communications procedure and other procedures, including pleadings (Rule 24), are subject to the confidentiality provisions of article 59 of the African Charter.

²⁴ F Viljoen *International human rights law in Africa* (2012), p. 188.

²⁵ See 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*.

²⁶ Available here: https://www.achpr.org/public/Document/file/English/Draft%20Revised%20Rules%20of%20Procedure_ENG.pdf

The Commission's inflexible adherence to confidentiality has the potential to stifle advocacy and litigation.

b. Requirement for consent of victims

The Commission's deviation from its *actio popularis* rule to the requirement of consent from victims could also potentially be an impediment to litigation especially in cases where victims are not readily available or situations involving several victims. Even though the rule allows the applicant to provide justification on why victims consent cannot be sort, it is quite unclear how liberal the Commission will be in accepting such justifications.

c. Amicus procedure

While Rule 104 of the 2020 RoPs elaborates on the amicus procedure, the provision could potentially be an impediment to litigation before the Commission. For instance, the requirement that leave should first be granted before an amicus brief can be filed will limit access and contribute to further delays in the Communications procedure. Similarly, even though the rule now allows the Commission to furnish an amicus with the pleadings of the parties, this can only be done after leave has been granted. This leaves one to wonder how the Commission expect that the potential amicus will have sufficient information to make submissions in the request for leave to intervene, where the amicus is required to motivate on the contribution to be made. This will only further encourage collusion between amicus and parties to the case.

d. Decision on reparations and costs

Rule 121 introduces new provisions which allows the Commission to decide not to include its ruling on reparation and cost as part of the merits decision. The Commission may now request parties to make additional submissions and hold hearings before making its ruling on reparations and costs. While not necessarily an impediment per se, it has the potential to cause further delays in the completion of communications.

e. Withdrawal, strike-out and relisting

As indicate earlier, Rule 124 (2) empowers the Commission to strike out a complaint for failure to diligently prosecute 'or where the Commission, for any other reason, concludes that it is no longer justified to continue the examination of the Communication'. This gives the Commission almost unfettered power to strike out a communication for reasons unrelated to the complainant's lack of diligence in prosecuting the case and may lead to arbitrariness.

Complementarity between the Commission and the Court

As indicated earlier, Rule 130 of the 2020 RoPs now only allows the Commission to seize the jurisdiction of the Court by referring cases of which it has not already ruled on admissibility. This limits the instances under which complainants can motivate the Commission to refer a communication to the Court, further potentially dwindling the possibility of the Commission referring cases to the Court.

5. Conclusion

The above discussion focuses on changes that were incorporated in the 2020 RoPs, paying particular attention to the submissions made to the Secretariat of the Commission and the reasons that were advanced in favour of the specified changes. Some of the well formulated reasoned proposals were accepted by the Commission, while other critical ones, as highlighted above, that could have made the rules better were not accepted. However, ultimately, the 2020 RoPs is expected to ensure an operating framework that makes the African Commission more efficient and effective in the execution of its mandate under the African Charter. In addition, civil society can continue to play an essential role in holding states accountable for commitments made through ratifying human rights treaties.



INITIATIVE FOR STRATEGIC
LITIGATION IN AFRICA

Annexure



Annexure 1:

Snapshot of proposals submitted to the Secretariat and whether they were incorporated into the 2020 RoPs

Theme	Proposal	2020 RoPs
State reporting procedure	It was essential that Article 26(1) of the Maputo Protocol is explicitly stated as part of state reporting obligations, which was previously provided given the noncompliance of States in this regard.	Maintains Rule 73 of the 2010 RoPs, but it removes the reference to article 26 of the Maputo Protocol.
Transmission of State Reports and related contributions	Welcomed positive development	Rule 79(1) requires State reports to be submitted at least 120 days before the session at which it will be considered.
	A deadline should be established for publication on the website as such a procedure ensures that NGOs are able to access these reports that is essential in the submission of shadow reports.	Rule 79(2) provides that "upon receipt the Secretary shall promptly publish it on the Commission's website and indicate when the Report will be examined by the Commission."
	It was argued that the use of the word "may" suggest that the Commission has discretionary powers to publish or not publish such contributions. Publishing them is in the best interests of all including citizens following the proceedings. It was recommended that a language edit be made from "may publish" to "shall publish."	Didn't incorporate language change. Maintained that contributions from interested parties or institutions "may" be published on the Commission's website.
Concluding Observations on State Reports	It was proposed that a deadline for the adoption of the Concluding Observations be set indicating that "concluding observations should be adopted at the ordinary session following the consideration of State Periodic report."	This language was adopted in Rule 82(1).

Theme	Proposal	2020 RoPs
Concluding Observations on State Reports	The importance of setting a deadline for the publication of the Concluding Observation on the website of the African Commission with a proposal of 60 days was highlighted.	Rule 82(3) provides that the concluding observations shall be published on the Commission's website once it has been transmitted to the State Party. There is no specific time period as the 60 days proposal was not incorporated.
Definition of <i>amicus curiae</i>	Based on best practices, ²⁷ it was proposed that the definition be changed to a third party who can potentially assist the Commission in a communication.	Rule 2 on definitions maintained the definition of <i>amicus curiae</i> as a 'third party having no interest in the outcome of a communication.'
Seizure of the Commission	It was recommended that a sub-rule be added that states: "The Secretary to provide written communication on seizure to the parties within 30 days of receiving the complaint."	This has not been incorporated in Rule 109.
Review of a decision on admissibility	Highlighted the need to clarify the situations in which review can be sought.	Rule 119 does not provide such a clarification.
Review of a decision on the merits	Proposed that the language of old Rule 111(2) (c) on review of a decision on the merits be maintained to allow either party to request a review for "any other compelling reason or situation that the Commission may deem appropriate or relevant to justify review of admissibility of a with a view to ensure fairness, justice and respect for human and peoples' rights."	Rule 122 (2) stipulates the criterion set out in Rule 119(3) which instead notes that review maybe granted based upon the discovery of a decisive fact which was not known to the party seeking review and not due to negligence.

²⁷ See generally, C Moyer, The role of *amicus curiae* in the Inter-American Court of Human Rights, Secretario de la Corte Interamericana de Derechos Humanos; P Harvey, Third Party Interventions before the ECtHR: A Rough Guide, (February 24, 2015) Available on <https://strasbourgothers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>.

Notes

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. In the bottom right corner, there is a decorative green diagonal stripe that runs from the bottom edge towards the right margin. The paper appears to be a standard notebook or worksheet template.



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