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## Understanding the nature, scope and standard operating procedures of the African Commission's special procedure mechanisms

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**Summary:** *Special procedure mechanisms form an important aspect of the human rights architecture of the African Commission. Although introduced gradually, these mechanisms have grown in both size and scope. This article considers the overall nature, scope and standard operating procedures of the African Commission's special procedure mechanisms in light of development and evolution by reference to its composition; selection and appointment of mandate holders, code of conduct of mandate holders (that is, independence and conflict of interest), working modalities, immunities and privileges and procedure. It also identifies and analyses possible areas of reform in this system.*

**Key words:** *African Union; African Commission; human rights; special procedure mechanisms; standard operating procedures*

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## 1 Introduction

With the creation of its first special procedure mechanism in 1994 – the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions – one may argue that the African Commission on Human and Peoples' Rights (African Commission) marked the beginning of an alternate route of human rights protection and promotion in the African regional human rights system. The Commission has since expanded its special procedure mechanisms and used these as a subsidiary means in fulfilment of its article 45 functions. Although the African Commission had other means of human rights protection and promotion, such as its communications and state reporting procedures, shortcomings existed within these procedures.<sup>1</sup> Its special procedure mechanisms seemed well positioned to fill some of these gaps and, thus, may be viewed as complementing and reinforcing the existing procedures of the African Commission. It did so to a greater extent; so much so that now it is a legitimate and accepted apparatus of the African regional human rights architecture.

While there has been wide acceptance of the African Commission's special procedure mechanisms; its standard operating procedures and nature remains relatively unknown. This is understandable. Despite existing differences, the intertwined nature of the African Commission with its special procedure mechanisms often gives the impression that they are one and the same. When compared to the special procedures of the United Nations (UN) Human Rights Council (HRC), the African Commission's special procedure mechanisms have not reached a level of systemisation and autonomy, contributing heavily to misconceptions, misinterpretations and misunderstandings of these mechanisms, especially when taken as a whole. Accordingly, this article examines the generic question of what the nature and overall scope of the African Commission's special procedure mechanisms are within its human rights architecture. In considering this broad question, the focus is on the special procedure mechanisms of the African Commission as a whole and not on specific mechanisms.

The question of the nature, scope and standard operating procedures of the African Commission is important. First, an understanding of the nature of these special mechanisms is a prerequisite for engaging and accessing these mechanisms. It is only when one understands how a system or mechanism works that one can fully engage, explore and access it. Moreover, such an

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<sup>1</sup> F Viljoen *International human rights law in Africa* (2012) 369.

understanding may also be important as it gives us an insight into the 'extra-conventional' nature and thus 'special character' of these mechanisms and how they affect both state and non-state actors in the international human rights system.

Moreover, a theoretical grounding of the African Commission's special procedure mechanisms may also be imperative because, as Domínguez-Redondo once suggested, 'many of the challenges faced by human rights bodies, including [special procedure mechanisms] remain linked to the misalliance between their conception in origin and their organic growth'.<sup>2</sup> Second, although the special procedure mechanisms of the African Commission hold great potential for human rights advancement, direct engagement by individuals, other than that by non-governmental organisations (NGOs), remains relatively limited. A lack of understanding and education on the system generally contributes to this limitation. Lastly, those concerned and working within the international human rights framework, especially those uninitiated and unfamiliar with the African regional human rights system, often assume that the African Commission's special procedure mechanisms work and function in the same way as those of the global system. However, this is far from the truth. True, there are similarities between these systems but the variances are even more. To begin with, the geo-politics between these systems are relatively different. Each are informed by their own needs and conditions. It therefore is important that the nuances that exist between these systems be set out.

Using a desk-top method and relying on a theoretical approach, this article considers the standard operating procedures of the African Commission's special procedure mechanisms. Accordingly, in addition to this introduction the article briefly examines in the second part the geo-political determinants that contributed to the creation of the special procedure mechanisms of the African Commission; its legal basis, functions and complementary role in the Commission's operations. In the third part I consider the general nature and scope of the Commission's special procedure mechanisms by reference to its (i) composition; (ii) selection and appointment of mandate holders; (iii) code of conduct of mandate holders (that is, independence and conflict of interest); (iv) working modalities; (v) immunities and privileges; and (vi) (constructive dialogue) procedure. The fourth part concludes the article.

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2 E Domínguez-Redondo 'The history of the special procedures: A "learning-by-doing" approach to human rights implementation' in N Aoife, R Freedman & T Murphy (eds) *United Nations special procedures* (2017) 16.

## 2 Creation and evolution of the special procedure mechanisms of the African Commission

The establishment of the first special procedure mechanism of the African Commission took place in 1994. Since then, additional mechanisms have been created, some altered and others merged over the years. The determinants – political, legal, or otherwise – leading to the creation of the African Commission’s special mechanisms are not always a straightforward matter. In fact, the initial reasons for the creation of the Commission’s special mechanisms are not known. The Commission never pronounced itself on this matter, leaving those interested in its work in suspense. This has provoked speculation among scholars, with some attributing the failures of the African Commission’s state reporting procedure as a focal point that led to the creation of the Commission’s special mechanisms.<sup>3</sup> Others have suggested that it was a means aimed at cementing the credibility and legitimacy of the then embryonic and still fledgling African Commission.<sup>4</sup> Pressure from NGOs, especially regarding the lack of action on the political challenges on the continent, particularly the genocide in Rwanda, may well have been another reason for the creation of the African Commission’s special mechanisms.<sup>5</sup>

The African Commission’s special procedure mechanisms are prisoners to their political history. This is because, as Heyns once argued, human rights, generally, and, by extension, its mechanisms, processes and institutions, developed as a response to specific historical circumstances and should be understood primarily not as the pursuit of abstract notions of justice, but rather as a reaction to concrete experiences of justice.<sup>6</sup> It started in an *ad hoc* fashion and expanded and developed over time. For the most part, the establishment of the Commission’s special procedure mechanisms was necessitated by political and social circumstances on the African continent. Certainly, the first special mechanism was triggered by the Rwandan genocide. As the foremost human rights organ of the African Union (AU), the African Commission was expected to respond to and be seen as doing something about this and other delicate human rights situations on the African continent. Although

3 Viljoen (n 1) 369.

4 J Harrington ‘Special Rapporteurs of the African Commission on Human and Peoples’ Rights’ (2001) 1 *African Human Rights Law Journal* 248.

5 The overt reality was that a considerable number of non-governmental organisations have repeatedly been attending the Commission’s sessions, and have been pressurising the Commission to be more choral on the human rights developments at the domestic level.

6 C Heyns ‘A struggle approach to human rights’ in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2006) 15-16.

this political situation served as a determinant for the birth of the African Commission's first special mechanism, time and again, each of the subsequent mechanisms created was based on some sort of 'political' human rights situation on the continent. In a sense, then, the African Commission's special mechanisms are a reaction to prevailing human rights situations, which first and foremost are not adequately covered or addressed by existing procedures and machinery of the Commission. Henceforth, the special mechanisms of the African Commission play a complementary role, aimed at filling the gaps left by the primary apparatuses and procedures used by the African Commission.

With the diversity of the arguments on the motivations behind the special mechanisms of the African Commission, one may argue that it was rather the geo-political context within which the Commission at the time found itself that gave rise to the steady emergence of its special mechanisms. Such an argument may be cogent when one has regard to the creation of the African Commission's first thematic special mechanism on extrajudicial, summary or arbitrary executions created in 1994 which was largely birthed out of the political developments of the time. Historically, the political unrest in Southern Africa, particularly apartheid in South Africa (and, to a lesser extent South-West Africa (now Namibia)) and the systematic killings of Tutsi and Pygmy Batwa in Rwanda, were typical developments to which the African Commission could not respond through its existing working methods. However, this was not the only political reality. In fact, since the inception of the Organisation of African Unity (OAU) in 1963, civilian unrest marked the continent from almost all corners. This was even to a greater extent corroborated by colonialism that was still prevalent on the continent. A notable development worth mentioning that left an imprint on the state of human rights protection on the continent were the erratic atrocities of the Amin regime in Uganda (1971-1979) which was marked by political repression, ethnic cleansing and the general commission of crimes against humanity. Events of this nature not only shed light on the dire state of human rights on the continent but equally placed pressure on the stakeholders of the OAU to act on atrocious human rights situations without delay. Accordingly, institutions such as the African Commission were left with not much option but to explore means and more 'flexible' methods to address some of these challenges. 'Flexibility' in this regard boiled down to more speedy and unconventional approaches and techniques of responding to human rights situations.

Although not introduced immediately, the special mechanisms of the African Commission gave meaning to the much sought 'flexible' responses of human rights protection. Given the political realities of the time stated above, it also is not surprising that predominantly there was no active state resistance to the creation of special procedure mechanisms of the African Commission. At least, no state has expressly questioned the legitimacy of the special mechanisms of the African Commission, which is reflective of the wide acceptance of these mechanisms by AU member states. The relative acceptance by member states and the African Commission itself of these mechanisms is understandable, given the fact that many states viewed the existing working mechanisms of the African Commission, particularly the communication procedures of the Commission, as confrontational, and an intrusive invasion of state sovereignty. It should also be borne in mind that in as much as there may have been several explanations for the creation of special mechanisms under the African Commission's work, each individual mechanism was triggered by its own context and motives, requiring a certain level of appreciation for each on its own merits.

Much of the uncertainty around the establishment of the African Commission's special procedure mechanisms stems from the fact that, at least at the time of the creation of the first special procedure mechanism, it had no explicit legal basis in the primary legal instruments of the AU. However, through a purposive reading of the African Charter on Human and Peoples' Rights (African Charter), the formation of the Commission's special procedure mechanism can be traced to article 45(1) of the African Charter. Article 45(1) deals with the mandate of the African Commission to promote and protect human and peoples' rights.

The overt linking of article 45(1) to the African Commission's special mechanisms may be an overstretched reading of the African Charter, one that may not truly reflect and accurately captivate the legal basis of these mechanisms. Instead, it is in article 46 of the African Charter that a legal basis should be sought which provides that '[t]he Commission may resort to *any appropriate method of investigation*; it may hear from the Secretary-General of the Organization of African Unity [now Chairperson of the African Union] or any other person capable of enlightening it'.<sup>7</sup> As recourse, it is to Rule 25 (and Rule 23 of the old Rules of Procedure and Rule 28 of the 1988 Rules of Procedure) of the 2020 Rules of Procedure of the African Commission

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<sup>7</sup> See generally Viljoen (n 1) 370, who argues that arts 45(1)(a), 46 and 66 of the African Charter can be a possible legal basis of these mechanisms.

that the legal basis should be attributed. Rule 25 explicitly 'creates subsidiary mechanisms' but mentions very little as to the nature and scope of these mechanisms. Rather, the technical aspects of these special mechanisms are detailed in the recently-concluded Standard Operating Procedures on the Special Mechanisms of the African Commission.<sup>8</sup>

Although the Commission should be acknowledged for its innovation in creating the special mechanisms of the African regional human rights system,<sup>9</sup> the lack of explicit provision of these mechanisms in the legal framework of the African Commission at the time of their institutionalisation signals the weak efficacy of the system. It raises questions as to its legitimacy, role, and impact as a human rights response mechanism of the African regional human rights system. The swift yet fluid manner in which these mechanisms were created is a clear indication that they were almost never intended and/or anticipated as part of the African Commission's working methods by the drafters of the African Charter.

Even with the recent formalisation through the adoption of the Rules of Procedure of the African Commission, it became clearer through practice that these mechanisms were created not with the intention of serving as independent mechanisms for human rights response in the African human rights system, but rather as complementary apparatuses aimed at providing support to the African Commission. It may therefore be compelling to argue that their creation in principle is one of innovation triggered by legal-political necessity as opposed to substance. However, one may counter this argument and suggest that historically these mechanisms were always part and parcel of the African Commission since its formation. This counter-argument finds corroboration if one has due regard to the African Commission's first Rules of Procedure adopted in 1988. Chapter VI of these 'old' Rules permitted the establishment of subsidiary bodies.

Although not of a neat legal basis, but rather creatures of innovation, it is undoubtedly clear that special mechanisms are now an entrenched part of the African Commission's human rights architecture. So far the African Commission has initiated 15 special

8 Adopted during the 27th extraordinary session of the African Commission, held from 19 February to 4 March 2020 in Banjul, The Gambia, [https://www.achpr.org/public/Document/file/English/SOP%20on%20the%20Special%20Mechanisms%20of%20the%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights\\_ENG.pdf](https://www.achpr.org/public/Document/file/English/SOP%20on%20the%20Special%20Mechanisms%20of%20the%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights_ENG.pdf) (accessed 22 May 2020).

9 Harrington (n 4) 248.

mechanisms,<sup>10</sup> starting with those with a focus on civil and political rights and, of recent, those oriented around socio-economic rights. Each of these special procedure mechanisms is initiated with a specific mandate informed primarily by its thematic focus and resolution establishing it. However, collectively the roles and responsibilities of mechanisms are standardised. In terms of clause two of the Standard Operating Procedure (SOP) the Commission's special procedure mechanisms generic roles and responsibilities include –

- (1) seeking, receiving, examining and taking action on information related to their mandate area;
- (2) cooperating and engaging with state parties, national human rights institutions, relevant intergovernmental organisations, international and regional mechanisms, and civil society organisations;
- (3) setting standards and developing strategies for the better promotion and protection of human and peoples' rights; and
- (4) submitting reports at each ordinary session of the African Commission.

In fulfilling the above stated overall mandate, the special procedure mechanisms primarily complement the African Commission in the discharge of its article 45 function. In this complementary role, the special procedure mechanisms of the African Commission play an important role in filling the actual and potential gaps left by the African Commission in its state reporting and communications procedures.<sup>11</sup> This is because of its malleable nature, hence the adage 'special' in special mechanisms. For example, without adequate follow-up, state party reports or individual communications made to the African Commission may be overlooked or soon forgotten. Special Rapporteurs or working groups often undertake this follow-up role during country visits to states. Special mechanisms also give 'life' to the work of the African Commission by engaging directly with victims of human rights violations through field visits and

10 These are the Special Rapporteur on Prisons and Conditions of Detention (1996); the Special Rapporteur on the Rights of Women (1998); the Working Group on Indigenous Populations and Communities in Africa (2000); the Special Rapporteur on Freedom of Expression and Access to Information (2004); the Special Rapporteur on the Situation of Human Rights Defenders (2004); the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (2004); the Working Group on Economic, Social and Cultural rights (2004); the Working Group on specific issues related to the work of the African Commission (2004); the Committee for the Prevention of Torture in Africa (2004); the Working Group on the Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa (2005); the Working Group on Rights of Older Persons and People with Disabilities (2007); the Working Group on Extractive Industries and Human Rights Violations in Africa (2009); the Advisory Committee on Budgetary and Staff Matters (2009); and the Committee on the Protection of the Rights of People Living with HIV and those at risk, vulnerable to and affected by HIV (2010).

11 Viljoen (n 1) 369.



those NGOs that may not enjoy observer status with the African Commission or have the resources to always engage with the African Commission because of its remote location. As rightly suggested by Long and Muntingh:<sup>12</sup>

The special mechanisms procedure is particularly popular with NGOs because it has proved to be an effective way [and arguably the only way] for NGOs to ensure that a particular issue that they are promoting has a sustained profile within the activities of the African Commission.

With the article 34(6) declaration in place, which requires states to accept the competence of the African Court on Human and Peoples' Rights (African Court) to receive cases under article 5(3) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights, most states have excluded individual accountability, thus limiting access to the African Court.<sup>13</sup> The special procedure mechanisms can be a contributing factor to meet the shortcomings brought about by this limitation, in addition to the communications procedure of the African Commission, and the subsequent option of the African Commission to refer cases to the African Court.<sup>14</sup>

A common feature of all the special procedure mechanisms of the African Commission is the guidance sought from international law. Thus, in the discharge of their duties all special procedure mechanisms of the African Commission 'draw inspiration' from (public) international law, whether hard or soft, concerning human and peoples' rights.<sup>15</sup> As a basis, such inspiration shall be primarily centred on the provisions of various African instruments on human and peoples' rights, beginning with the Charter of the Organisation of African Unity (now replaced by the AU Constitutive Act). Such reliance on African instruments, however, does not exclude the possibility of reliance on instruments beyond the AU as well as those

12 D Long & L Muntingh 'The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The potential for synergy or inertia?' (2010) 7 *International Journal on Human Rights* 109.

13 A Tsunga & S Ebobrah 'Withdrawal of states from the African Court a blow to access to justice in the region' (2020) *International Commission of Jurists Reports* 1-2, <https://www.icj.org/wp-content/uploads/2020/05/Ivory-Coast-Statement-Advocacy-ENG-2020.pdf> (accessed 1 November 2020); See also F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63.

14 This could be achieved if the various special procedure mechanisms can institute *amicus* briefs on behalf of complainants or the African Commission. This is something worth exploring by the special procedure mechanisms mandate holders of the African Commission.

15 Art 60 African Charter.

'adopted by African countries in the fields of human and peoples' rights'.<sup>16</sup>

More in tune with article 38(1) of the Statute of the International Court of Justice, article 61 of the African Charter further provides that the African Commission

shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'.

Although worded and directed to the African Commission as a whole, these provisions in principle are attributable to all the mechanisms, institutions and processes of the African human rights system, including the African Commission's special procedure mechanisms.

While generally informed by international (human rights) law, in principle mandate holders of the various special procedure mechanisms also have the privilege of relying on any relevant sources of law in the discharge of the mechanisms mandate. This unrestricted use of information allows mandate holders of the various special procedure mechanisms to ensure that whatever allegations they raise remain substantiated with authority.

### **3 Nature and scope of the African Commission's special procedure mechanisms**

#### **3.1 Composition**

The special procedure mechanisms in the African Commission take one of three forms, differentiated predominantly only by composition and mandate, namely, (i) Special Rapporteurs; (ii) working groups; and (iii) committees. The difference between these mechanisms is not neatly demarcated. However, in practice there appears to be definite differences between them, distinctions suggestive of some sort of hierarchy. Hoene, in the context of the UN special procedures, argued that the different references to and labels of these mechanisms indicate 'an unstated hierarchy commensurate with the gravity of

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<sup>16</sup> As above.

the situation'.<sup>17</sup> The same argument may be extended to the special procedure mechanisms of the African Commission. In practice, one notices that the thematic mechanisms that are either technical in nature or require specialised expertise often resort under the banner of 'working groups'. Matters internal to the African Commission or its special mechanisms are often classified as 'committees'.

Special rapporteurship is held by individual mandate holders who are also commissioners. In contrast, the composition of working groups and committees consists of commissioners and external experts. Such composition usually is comprised of a maximum of eight members, three of whom must be commissioners.<sup>18</sup> One of the commissioners who form part of a working group or committee chairs such a mechanism.

Ironically, the African Commission's special procedure mechanisms consist only of thematic mechanisms, but in practice each commissioner is allocated several countries as respondents for human rights protection and promotion, including monitoring. Country-specific mechanisms, therefore, are not unique to the special procedure mechanisms of the African Commission but rather an overall and 'internal' arrangement of the African Commission as a whole. The reluctance to robustly embark on a system of country-specific mechanisms within the system of special procedure mechanisms, apart from country-specific responsibilities allocated to commissioners, may be attributed to a lack of resources and the overall attention already given to geographical situations, particularly in cases of peace and security, by the AU.

In the calls for application to memberships concerning special procedure mechanisms, and since the adoption of the SOP, due consideration is increasingly given to gender, linguistics and geographical representation in the composition of special procedure mechanisms. So, too, consideration is given to appropriate representation of different legal systems.

### 3.2 Appointment of mandate holders

As a logical part of any process of appointment, the African Commission has not neglected to appoint persons it deems most appropriate to hold a rapporteurship, or membership in its

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17 O Hoene 'Special procedures of the new Human Rights Council: A need for strategic positioning' (2007) 4 *Essex Human Rights Review* 92.

18 Clause 3.6 of the Standard Operating Procedures (SOP).

working groups or committees. In terms of clause 8 of the SOP, the appointment of members of the working groups and committees of the special mechanisms of the African Commission shall be through a published call for applications,<sup>19</sup> with the requirement that prospective applicants possess proven skills and experience in the thematic area of a special mechanism.<sup>20</sup> No similar provision is made for the appointment of Special Rapporteurs, leaving their appointment entirely to the subjective judgment of the African Commission.<sup>21</sup> Mandate holders are appointed for a period of two years, which may be renewed twice.<sup>22</sup> It is also reserved for nationals of a state party to the African Charter,<sup>23</sup> who possess proven skills and experience in the thematic area of a special procedure mechanism.<sup>24</sup>

The selection procedure of mandate holders arguably is a major area of weakness of the African Commission's special procedure mechanisms. This is because it is primarily an internal process of the African Commission, exclusive of any input from any of the external stakeholders of the African regional human rights system. Moreover, there are no clear criteria set both in terms of the Rules of Procedure and SOP for the allocation of a mechanism to a commissioner.<sup>25</sup> However, a reasonable presumption would be that the individual interest of commissioners and, possibly, their professional background, experience, expertise and availability inform the Commission's allocation of mandates to mandate holders.<sup>26</sup>

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19 Clause 8 SOP.

20 Clause 10 SOP. If one may make reference to one of its most recent calls for nominations relating to the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, it is clear that the Commission's appointment of such experts is based on related experience, expertise and record of publication in a given field or area of focus, advocacy and written skills, ability to commit time and language requirements. See, eg, the call for applications for the nomination of expert members to serve on the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, <https://www.achpr.org/news/viewdetail?id=132> (accessed 16 December 2019).

21 However, a reasonable argument may be advanced that these are also the criteria guiding the nomination and eventual appointment of Special Rapporteurs of the African Commission.

22 Clause 4.13 SOP.

23 Clause 3.11 SOP.

24 Clause 3.10 SOP.

25 In contrast, the Manual of Standard Operating Procedures of the Human Rights Council's special procedures clearly sets out criteria of consideration when appointing mandate holders. See generally clause 9 of the Manual of Operations of the Special Procedures of the Human Rights Council (2008) 6-7.

26 One may here refer to the appointment of Commissioner Hatem Ben Salem, the African Commission's first Special Rapporteur on Extrajudicial Executions, as a case in point. The failures of the Commission's first special mechanism raised concerns about both the methods of appointment and calibre of candidates appointed to special mechanisms. See, generally, Harrington (n 4) 253-254.

Over the years, and through practice, the African Commission has reserved 'special rapporteurship' exclusively to sitting members of the African Commission, while its working groups have been opened to include independent experts from outside the African Commission, though again under the stewardship of a sitting commissioner. Consequently, all Special Rapporteurs have been sitting commissioners of the African Commission. This is uncommon in the UN's special procedures system and therefore a distinguishing feature from its mother system. Whether the African Commission should keep to its current 'hybrid' arrangement is a complex matter. One may advance arguments on both sides of the spectrum.

On the one hand, the thinking could be that the current arrangement is an acceptable trend that should not summarily be dismissed, though it has severe consequences on the effective functioning of the African Commission's special mechanisms. This is because the special procedure mechanisms of the African Commission are subsidiary to the African Commission as a whole and, therefore, would need to be under its close oversight. Therefore, outsourcing independent external experts would derail from the subsidiary nature of the special mechanisms and as such detach it from its 'mother body', contrary to the intention and the manner in which the system was engineered. A material shortcoming of this stream of thinking is that it lends to the reality of conflation between the dual role of commissioners as 'members of the African Commission', on the one hand, and as 'special mechanism mandate holders', on the other.

The dual role of commissioner and special rapporteurship can be extremely challenging and, if not safeguarded, can lead to the neglect of the mandate that commissioners hold as Special Rapporteurs. To give an example, at some point one of the former Special Rapporteurs on the Rights of Women in Africa had three roles. At the 42nd ordinary session of the African Commission, Commissioner Soyata Maiga was not only appointed as the Special Rapporteur but also given the role to serve as member of the Working Group on Indigenous Populations/Communities, as well as the country rapporteurs for Central African Republic, Niger, Guinea, Libya and Gabon.<sup>27</sup> While the multi-concurrent appointment of Commissioner Maiga, in light of this example, may be seen as evidence of her demonstrated ability and professional track record, which other commissioners with concurrent mandates certainly have, the concern

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27 Final Communiqué of the 42nd ordinary session of the African Commission on Human and Peoples' Rights (28 November 2007), Brazzaville, Republic of Congo, [https://www.achpr.org/public/Document/file/English/achpr42\\_fincom\\_2007\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr42_fincom_2007_eng.pdf) (accessed 12 May 2020).

one can advance is that with an overburdened workload some of her roles will undoubtedly have to suffer. Whether such overburdening had an effect on the mechanisms of the Special Rapporteur cannot fully be comprehended but the possibility of such a reality looms large and can certainly not be denied. The same can be said of other commissioners who serve multiple mandates. Cognisant of the challenges of having multiple mandates, the Human Rights Council in its standard operating procedures has adopted the 'principle of non-accumulation of human rights functions at a time' to safeguard the work of its special procedures.<sup>28</sup> This is something worth simulating in the African Commission's special procedure mechanisms system.

The counter-argument to be made is that even the strongest mandate stands and falls with the choice of an individual mandate holder. A total surrender or outsourcing of the Special Rapporteur on the Rights of Women in Africa and, by extension, the other mechanisms of the African Commission, would be ideal. In fact, this recommendation finds resonance when one has regard to the trends and practices that have marked the African Commission's special mechanisms for close to three decades. Much of the African Commission's special mechanisms' failures and successes have been dependent on the personalities that hold these mandates. Others have used the moral command that comes with these mandates to put pressure on states in addition to the Commission's state reporting procedures. They have been proactive and have sought funding and capacity support to drive their mandates in light of the chronic financial circumstances permeating the AU system generally and have produced resounding reports and findings that contribute modestly to norm setting and human rights promotion on the continent.<sup>29</sup> Others have been extremely passive, contributing in part to the discontinuation or reframing of some mandates.<sup>30</sup> In such rare but persistent instances the ultimate consequence has been the weakening of the systemisation aspirations of the African Commission's special mechanisms.

The outsourcing of these mechanisms is a reachable possibility if only the African Commission would admit to its current state of work overload and seek solace by sharing some of its heavy loads with

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28 See clause 9 of the Manual of Standard Operating Procedures of the Human Rights Council's Special Procedures (2008) 6.

29 See, eg, the appraisal made by E Durojaye 'The Special Rapporteur on the Rights of Women in Africa 2007-2015' (2018) 16 *Gender and Behaviour* 10700.

30 See, generally, Harrington (n 4) 267, who argues that the attempt by the Commission to designate Special Rapporteurs in order to circumvent the constraints of the institution as a whole can only meet with success where the chosen individual has greater willingness than the Commission to devote energy to the task and to risk states' displeasure.

experts with the necessary experience, expertise and charisma to drive some of its mandates. The unease of the African Commission to expand its special mechanisms to external parties is to some extent understandable and should not be completely dismissed. The African Commission is established in terms of article 30 of the African Charter. Its members, who serve as commissioners for a period of six years, subject to eligibility for re-election,<sup>31</sup> are directly 'elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by states parties'.<sup>32</sup> Whether commissioners elected by, and accountable to, a political organ have the power to outsource its duties to external parties is highly contestable. It could possibly amount to an *ultra vires* act. Even more potent is the fact that such outsourcing could be interpreted and seen as the African Commission's abdication of responsibility, let alone undermining its own members' competence.

On the other hand, the UN system, which supposedly is a model of the African Commission's special mechanisms, has always been open to engaging external experts. In fact, right from the onset of its first special mechanism in 1967, the UN has outsourced its mechanisms to external experts, bearing in mind the 'principle of non-accumulation of human rights functions at all times'.<sup>33</sup> The same approach can be adopted by the African Commission. In the past, the African Commission has contemplated outsourcing the Special Rapporteur on the Rights of Women in Africa to external stakeholders. The African Commission had designated Commissioners EVO Dankwa and Vera VD Duarte-Martins to oversee the Special Rapporteur on the Rights of Women in Africa together with an external appointee before the mechanism was formally introduced in 1999, more along the trends now visible in the working groups of the African Commission.<sup>34</sup> However, this was not sustained after the mechanism had been formally initiated despite the interest shown by external candidates to head the mechanism. Instead, the African Commission chose a closed-up approach with sitting commissioners as its first choice for these mandates. What may have hindered the African Commission to retract its intention of outsourcing the mandate is not clear, but it surely speaks to the politicisation of its role and its constant submission, if not caution, to the political organs of the

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31 Art 36 African Charter.

32 Art 33 African Charter.

33 Clause 8 of the United Nations Human Rights Council (UNHRC) *Manual of operations of the special procedures of the Human Rights Council* (2008) 6.

34 African Commission 'Chapter 9: Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-1996' (1996) para 9, [https://archives.au.int/bitstream/handle/123456789/2082/9e%20Rapport%20Annuel\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2082/9e%20Rapport%20Annuel_E.pdf?sequence=1&isAllowed=y) (accessed 14 December 2019).

AU, to which it is ultimately accountable. Moreover, by limiting or holding its mandates under closer scrutiny with the Commission, the Commission may be seen as taking up a neutral position aimed at safeguarding the possibility of it exceeding or, at least, being seen as exceeding its core mandate of human rights protection and promotion. To this end, the selection and appointment procedure of mandate holders is an area that calls for reconsideration or reform.

### 3.3 Code of conduct

#### 3.3.1 Independence

It is an undisputed fact that the strength of the special procedure mechanisms, whether at the universal or regional level, lies in its impartiality and independence as a system.<sup>35</sup> However, such independence is not an automated aspect of such systems. It is largely dependent on the safeguards extended to ensure such independence as well as the firm position to uphold impartiality on the part of mandate holders.<sup>36</sup> First, independence within the special mechanisms of the African Commission has been one of its most daunting challenges.

The initial shortcoming with the African Commission's special mechanisms can be traced to the fact that the institutional independence of the African Commission's special mechanisms is not completely guaranteed since it is merely an extension of the African Commission and, therefore, only functions semi-autonomously. However, there is some basis of such a guarantee. Clause 14(a) of the Standard Operating Procedures on the Special Mechanisms of the African Commission requires mandate holders to 'act in an independent capacity and not seek or accept instructions from any governmental or non-governmental entity or any individual in the execution of their mandate'. Furthermore, since the African Commission's special mechanisms are spearheaded by sitting commissioners, independence can be indirectly implied from the overall independence guaranteed these commissioners in the African Charter. In this regard, article 38 of the African Charter stipulates that 'after their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially

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35 M Lempinen *Challenges facing the system of special procedures of the United Nations Commission on Human Rights* (2001) 40. See also J Connors 'Special procedures: Independence and impartiality' in A Nolan et al (eds) *The United Nations special procedures* (2017) 52.

36 Connors (n 36) 52.



and faithfully'. Whether independent experts who form part of the working groups of the Commission's special mechanisms undertake a similar declaration is doubtful but, in the absence of any guiding document on the part of the African Commission, should be implied as an inherent part of their functioning.

Second, the independence of the African Commission's special mechanisms is also questionable considering the extensive reliance on donor support and the industry of NGOs. Such support often comes with conditions – passively implied conditions and with a particular interest and agenda on the part of the NGOs.<sup>37</sup> In most cases it is a give-and-take situation. As the article indicates in the next part, NGOs are the lifeblood of the African Commission's special procedure mechanisms.

While NGO support to the African Commission's special mechanisms is crucial, especially as far as sustaining these mechanisms financially and profiling them positively are concerned, it could also be interpreted negatively. Extreme NGO involvement, especially when the contours of the support these NGOs provide have not been made clear and no proper boundaries are drawn between their role and responsibilities towards a specific mandate, they can be characterised as influencing the mandate. Such influences, whether for the good or made with positive motives, as seldom is the case,<sup>38</sup> amount to a weakening of the complete independent functioning of the mechanism.

Although most NGOs may have reasonably fair motivations and unquestionable commitment to human rights in Africa generally, the African Commission will have to strike a balance between the interests and involvement of these stakeholders in its special mechanisms and engage these NGOs with due circumspection, if it is to maintain independence within its special mechanisms. At all material times the special mechanisms of the African Commission should, for the lack of a better phraseology, be viewed, as Pinheiro has stated, 'independent of mind and action',<sup>39</sup> to ensure complete objectivity and impartiality, and moreover to ensure states' and the general public's confidence in its work. It is also a crucial determinant

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37 J Oloka-Onyango 'Modern-day missionaries or misguided miscreants? NGO's, the women's movement and the promotion of human rights in Africa' in W Benedek (ed) *Human rights of women: International instruments and African experiences* (2002) 289.

38 As above.

39 P Pinheiro 'Being a Special Rapporteur: A delicate balancing act' (2011) 15 *International Journal of Human Rights* 166.

for the credibility of both the African Commission and its special procedure mechanisms.

A central question worth considering is whether, given the current nature and structure of the African Commission's special mechanisms, they function independently; in other words, whether the confluences between the African Commission's commissioners and their *ex officio* role as Special Rapporteurs and members of the working groups and committees affect the independent functionality of the special mechanisms of the African Commission. This question is worth interrogating not only to ensure the integrity and feasibility of the special mechanisms of the African Commission but more so in light of the common argument often advanced that the failure of the African Commission to afford its special mechanisms a distinct identity, one that is separate yet interrelated from the institutional framework of the African Commission, may also be seen as weakening the independence of its special mechanisms. Time and again, the African Commission has been criticised for its reluctance to appoint external experts to serve as Special Rapporteurs, although it has steadily opened up its doors to such experts for sittings on working groups and committees.<sup>40</sup> In this regard Murray makes the following point:<sup>41</sup>

There are a number of difficulties with appointing members of the Commission as special rapporteurs. Despite the belief that having these roles occupied by its own members will ensure that the Commission would have a degree of control over their functioning, the Commission has, ironically, although unsurprisingly, found it difficult and uncomfortable to have to reprimand its own members for any shortcomings. It might be less reticent in doing so if the individual in question were answerable to the Commission but were not a part of it. In addition, adding further burdens to Commissioners who already only act in that capacity on a part-time basis is wholly unrealistic, compounded by their being required to function in areas that may be far removed from their full-time professional expertise.

The argument is not that sitting commissioners do not hold the required expertise to spearhead mechanisms. The strenuous process of appointment of commissioners disproves any such suggestion. Rather, the argument is that because the work of the African Commission remains demanding, commissioners generally are not able, as they should be, to dedicate ample time to their mandates. Adding to this shortcoming is the fact that the African Commission

40 Viljoen (n 1) 370.

41 R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 373.

now has more mandates than can be exhausted by the available commissioners and, therefore, some commissioners hold on average two to three mandates. Clearly, with such an overburdening of mandates, the sound discharge of mechanism duties remains compromised. As suggested before, the non-accumulation of human rights mandates, as is the case under the Human Rights Council's special procedures, is a viable option that can be invoked to address this state of affairs. Alternatively, the African Charter can be amended to increase the number of commissioners to meet the increases in mandates created.

Moreover, the fear is also that commissioners may give preference to their work as members of the African Commission and side-line their mandates as secondary. In the past, logistical and substantive challenges have occurred that may prove this point. In the rare but actual instances where a commissioner's work as member of the African Commission clashes with its mandate as Special Rapporteur, the activities of the special mechanisms are sacrificed at the expense of the work and activities of respective commissioners.<sup>42</sup>

### 3.3.2 *Conflict of interest*

Mandate holders are generally required to conduct themselves in a manner that furthers the interests of their mandates without compromise. In fact, it may be argued that their appointment is based purely on this assumption. Therefore, at all material times and in the furtherance of their mandates, mandate holders must avoid any conflict of interest. Such conflict of interest can be actual or potential. It is actual when mandate holders' conduct or interest is not evidently compatible with their mandate. In contrast, it is titular when the reasonable person apprehends a conflict based on the conduct or interest of a mandate holder. This can happen when perceptions arise as to the impartiality or objectivity of a mandate holder.

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42 Eg, in 2014 the Working Group on Extractive Industries, Environment and Human Rights Violations had to cancel its long overdue country visit to Liberia because of a conflict in the schedule of its then Chairperson, Commissioner Manirakiza, who had to subsequently participate in a commission of inquiry on the situation in South Sudan on behalf of the AU. See also African Commission on Human and Peoples' Rights *Inter-session Report Commissioner Pacifique Manirakiza* (12 May 2014) presented at the 55th ordinary session of the African Commission on Human and Peoples' Rights, Luanda, Angola, <http://www.achpr.org/sessions/55th/inter-session-activity-reports/extractive-industries/> (accessed 12 March 2018).

Special procedure mandate holders, especially Special Rapporteurs, are appointed on the basis that they are 'personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights'.<sup>43</sup> Although this is a requirement for appointment as commissioners of the African Commission, it can be extended to the Commission's special procedure mechanisms, given that all commissioners form part of these mechanisms. The general presumption that may be advanced is that 'outsiders' appointed to serve on the Commission's special procedure mechanisms must fairly also meet the same 'highest reputation' standard.

Implicit in this general standard is the fact that mandate holders must not use their office or knowledge acquired from their functions as mandate holders for private gain, financial or otherwise. This includes benefits to acquaintances, close associates or third parties, which is something likely to happen given that the stakeholders in the African regional human rights systems have close connections and ties with one another. In terms of the SOP, mandate holders may 'not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of their mandate, if doing so would appear to call into question their integrity or relationship with the entity offering the gift'.<sup>44</sup> This requirement does not in itself prevent any entity or individual from showing gratitude to a mandate holder. Gratitude can be shown by means of gifts or honorariums. In practice this is common. However, the expression of gratitude should be done prudently and openly. The existence of a conflict of interest will depend on the circumstances of the case or situation, but the end result should be the declaration of such interest. The basic aim with the declaration of interest is to protect the integrity of the 'system' of the special procedure mechanisms and, by extension, the African Commission and the individual mandate holder. The old public law adage that justice must not only be done, but must also be seen to be done is applicable here. Tokens, therefore, should in principle not undermine the work of the mandate or be geared towards silencing or interfering with the work of mandate holders. Ideally, a mandate holder, regardless of the value of the token, should declare same to the Commission in its annual reports for transparency purposes.

To circumvent a conflict of interest several checks and balances have been put in place in terms of the African Commission's legal

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43 Art 38(1) African Charter.

44 Clause 14 (g) SOP.

framework. For example, commissioners and those appointed from outside the Commission to serve on its special procedure mechanisms serve in their personal capacity.<sup>45</sup> Thus, even though some commissioners may be senior government officials in their respective states, whether in the past or present, their service to the Commission's special procedure mechanisms is done as independent experts, separate and autonomous from their civic or other roles. Furthermore, mandate holders must disclose any interest, whether direct or indirect, which may be considered to be in conflict with their mandate. The discretion for such disclosure primarily lies with the mandate holder, but nothing prevents other stakeholders, including states, to require a mandate holder to disclose any conflict of interest. In fact, as part of requests for invitations for country visits, states can require a mandate holder to disclose any actual or potential conflict of interest, even though this has not been the practice.

Another measure in place is the invocation of the 'principle of recusal', when an actual or potential conflict of interest is established. Applied within the framework of the special procedures system, where a mandate holder discloses his or her actual or potential conflict of interest, ideally such a mandate holder must recuse, that is excuse, themselves from that particular process or activity. This is in order to erase any loss of public confidence, including on the part of state parties, in the system. The legitimacy of the African Commission's special procedure mechanisms to a large extent depends on the perceptions and apprehensions of those who engage the system. These include the wider public, NGOs, civil society, international organisations and state parties.

These measures notwithstanding, the circumvention of conflict of interest remains one of the challenging issues within the Commission's special procedure mechanisms. It is charged because conflict of interest is not always easy to establish. Moreover, viewed in light of the fact that most often mandate holders, by virtue of them being sitting commissioners, serve on a part-time basis, the likelihood of incompatible interest or bias can never be totally eliminated.

### 3.4 Working methods

In its working methods the African Commission's special mechanisms rely on roughly five modalities, dependent on the violation or issue being dealt with. These include (i) actions on allegations, which can include urgent appeals, letters of concern, letters of appreciation,

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<sup>45</sup> Art 38(2) African Charter.

public or press statements, and resolutions; (ii) engagements during periodic state reporting; (iii) country visits, whether promotional or fact-finding; (iv) engagements concerning thematic reports, studies and norm elaboration; and (v) awareness raising.

In carrying out its mandate through one or more of the general working methods, the mandate holders are not bound to obtain prior authorisation from the African Commission or the political organs of the AU in applying any of the working methods.

In the discharge of their mandates, special procedure mechanism mandate holders require certain basic guarantees depending on the working method used.<sup>46</sup> These include freedom of movement; freedom of inquiry and to seek information; security and intelligence support; and assurance of the protection of victims, NGOs and other institutions and actors, during and after interaction that may furnish information to a mandate holder.<sup>47</sup> Since the Rules and Procedures of the African Commission are to apply *mutatis mutandis* to the proceedings of its subsidiary mechanisms,<sup>48</sup> mandate holders are to carry out their mandates using the various working modalities at their disposal with the highest degree of 'morality, integrity, impartiality and sound competence'.<sup>49</sup> Moreover, the working modalities must be undertaken with due regard to the constructive dialogue procedure.<sup>50</sup>

### 3.5 Immunities and privileges

The African Commission's special procedure mechanisms are shielded with immunities and privileges for work carried out within the parameters of their mandates. Although this is relatively settled, it has not thus far been invoked by any mandate holder. It seems on face value that the special mechanisms of the African Commission, including the Special Rapporteur on the Rights of Women in Africa, enjoy the broad immunities and privileges provided by the 1965 OAU General Convention on Immunities and Privileges. Such privileges are derived from article VI immunities (relating to officials of the OAU/AU) and article VII immunities and privileges (relating to experts on missions) of the said instrument. That the special procedure mechanisms of the African Commission enjoy these privileges and

46 See also Lempinen (n 32) 19.

47 As above.

48 Rule 26 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2020).

49 See also art 31(1) of the African Charter.

50 Clause 5 SOP.

immunities is further corroborated by the 1999 Advisory Opinion of the International Court of Justice on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the High Commission on Human Rights,<sup>51</sup> which serves as an authoritative precedent under international law. In terms of this opinion, special mechanism holders enjoy immunity from legal processes provided the cause of action giving rise to a dispute of legal interest was carried out as part of fulfilling mandate terms and references.

As far as the scope of the protection, privileges and immunities enjoyed are concerned the special procedure mechanisms mandate holders are immune from, among others, legal processes in respect of words spoken, written and all acts performed by them in their official capacity;<sup>52</sup> enjoy exemption from taxation on salaries and emoluments paid to them by the OAU;<sup>53</sup> immigration restrictions and alien registration and finger printing;<sup>54</sup> and, where applicable, are given, together with their spouses and relatives residing with and dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys.<sup>55</sup>

In terms of article VII of the 1965 OAU General Convention on Immunities and Privileges, experts such as the mandate holders of the various special procedure mechanisms of the Commission 'shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions'.<sup>56</sup> These include immunities, among others, from personal arrest or detention or any legal processes of any kind, any official interrogation and from inspections or seizure of their personal baggage;<sup>57</sup> in respect of words spoken, written or votes cast and acts done by them in the course of the performance of their mission;<sup>58</sup> inviolability for all papers and documents; and for the purpose of their communications with the OAU/AU;<sup>59</sup> and further the right to use codes and to receive papers or correspondence by courier or in sealed bags.<sup>60</sup> While special mechanisms mandate holders broadly enjoy these rights and privileges, it is worth noting that 'such

51 See also the ICJ *Applicability of Article VI, sec 22 of the Convention on the Privileges and Immunities of the UN*, Advisory Opinion ICJ Reports (1989) 177 (order delivered on 10 August 1998).

52 Art VI 2(a) of the OAU General Convention on Immunities and Privileges (GCIP).

53 Art VI 2(b) GCIP (n 56).

54 Art VI 2(d) GCIP.

55 Art VI 2(f) GCIP.

56 See generally art VII 1 GCIP.

57 See generally arts VII 1(a) and (b) GCIP.

58 Art VII 1(b) GCIP.

59 Art VII 1(c) GCIP.

60 Art VII 1(d) GCIP.

privileges are granted to experts in the interests of the OAU/AU and not for the personal benefit of the individuals themselves'.<sup>61</sup> Among others, this may be interpreted to mean that special mechanism mandate holders may be required to account for particular actions or conduct taken in their private or personal capacity. It can also mean that at any given time the Chairperson of the AU can waive the privileges accorded any expert, if in his or her opinion the extension of immunity or privileges would impede the course of justice or be detrimental to the interests of the OAU/AU.<sup>62</sup> Generally, these possibilities are meant to avoid a *carte blanche* enjoyment of the vast immunities provided in the OAU General Convention on Immunities and Privileges, which can lead to absurdities. The immunities and privileges outlined in this section apply with much more importance to the fact-finding role of the mandate holders carried out through country missions, whether protective or promotional.

### 3.6 Procedure

In its engagements with stakeholders, especially states, the special procedure mechanisms of the African Commission are premised on a constructive dialogue procedure.<sup>63</sup> Hence, the mandate holders of the special procedure mechanisms of the African Commission have maintained a systematic and interactive discourse with states, human rights institutions, international and regional human rights organisations, individuals and NGOs. The constructive dialogue approach has been particularly core to the country visits and missions undertaken by mandate holders.

It is not surprising that the African Commission's special procedure mechanisms centre on constructive dialogue. To begin with, the international human rights system is generally rooted in constructive engagements between the various stakeholders. State reporting procedures, the African Peer Review Mechanism, and so forth, are all mechanisms modelled on a constructive dialogue approach. As rightly stated by Alston, sovereign states, that by far are the primary subjects of international law, can hardly be coerced by monitoring mechanisms with no binding authority.<sup>64</sup> Thus, positive and engaging dialogues, which form the epicentre of the constructive dialogue procedure, can sway the often uneven power dynamics to states by making them feel valued and treasured in the process

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61 See generally art VI 4, read together with art VII 2 of GCIP.

62 As above.

63 Clause 50 SOP.

64 P Alston 'The purpose of reporting' in OHCHR *Manual on human rights reporting* (1997) 20.



of human rights monitoring. The constructive dialogue procedure, as opposed to the confrontational adversarial system, gives states room for engagement and thus recognises their sovereignty. In a sense it is a diplomatic approach and, thus, more acceptable to most states given that diplomacy forms a central hallmark of states' engagements with one another. Domínguez-Redondo and McMahon argue that constructive dialogue mechanisms generally provide a 'theoretical and pragmatic framework conciliating between universalist and relativist conceptual approaches to human rights, accommodating and integrating views that call for compliance with international human rights law as well as those emphasising respect for sovereignty'.<sup>65</sup>

There has been no open confrontation and condemnation of the special procedure mechanisms of the African Commission directly from states. This could be interpreted as a progressive or regressive sign. On the one hand, it could mean that the constructive dialogue approach of the special procedure mechanisms is working and relatively accepted and appealing to states. However, the converse could also be the case, namely, that this procedure has ritualised this system with no effective impact. Whether or not the constructive dialogue procedure of the Commission's special procedure mechanisms is effective has not been fully established and needs thorough scholarly research. Nonetheless, and arguable as is the case with any procedure, surely this technique also has its setbacks. As stated before, constructive dialogue procedures levels power balance in favour of states. This is because inherently it is a diplomatic procedure and diplomacy is the art of states. States can easily manipulate discussions because they are skilled in diplomatic engagements. Put differently, there is a power imbalance in the constructive dialogue procedure relatively in favour of states. Moreover, given its diplomatic character, the possibility of these dialogues ritualising into one of them being that the process of engagement becoming ceremonial engagements can loom large. This often leaves untapped the more desired answers to some of the pressing human rights issues raised during engagements with state parties.

Since constructive dialogue procedures have no parameters, other than that the two parties should dialogue and positively engage each other, state parties can easily provide condescending responses to important questions and issues raised, say, during missions by

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65 E Domínguez-Redondo & ER McMahon 'More honey than vinegar: Peer review as a middle ground between universalism and national sovereignty' (2016) 15 *Canadian Yearbook of International Law* 61.

mandate holders. A terse example from the 2014 joint mission to the Republic of Gabon can serve as one example. During this mission, which was jointly undertaken by Commissioner Kayitesi Zainabo Sylvie (at the time Chairperson of the African Commission and commissioner assigned to the Republic of Gabon), the Special Rapporteur on the Rights of Women in Africa and the Chairperson of the Working Group on Indigenous Populations (at the time Commissioner Soyata Maiga), the then Gabonese Minister of Justice (Attorney-General, Human Rights and Relations with Constitutional Issues),<sup>66</sup> asked about the state of violence against women, including domestic violence or the maltreatment of widows in Gabon, acknowledged the existence of violence against women in Gabon, but narrated that there is a huge challenge in addressing violence against women in Gabon because of the failure of the victims of such acts to expose perpetrators as a result of cultural factors and traditions.<sup>67</sup> Typical of state party responses, it is interesting to note how the Minister's reaction put the blame on victims, thereby diverted attention from the government and the measures it ought to take to protect victims of gender-based violence. Although the Minister did mention some initiatives currently undertaken by the government, such as sensitisation campaigns,<sup>68</sup> no concrete response as to specific legislative and technical measures was provided. Despite this unsatisfactory response, the Special Rapporteur on the Rights of Women in Africa failed to react to the narration of the Minister, a move symbolic of the non-confrontational stance taken by Special Rapporteurs and, in fact, the African Commission, when engaging states. While the diplomatic and constructive dialogue approach is an admirable method followed by the African Commission's special procedure mechanisms mandate holders, at times it can lead to no fruitful outcomes as it leaves room for a more generalised and opaque dialogue and process of engagement. Although utter confrontation may not be ideal in engaging states, a nuanced approach blended somewhat between an open confrontation and dialogue may yield outcomes and even out the imbalances between states and mandate holders during constructive dialogue procedures.

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66 At the time Ms Ida Reteno Assounuet was the Minister. The particular courtesy visit included ten senior officials from her ministry.

67 *Report of the human rights promotion mission to the Gabonese Republic* (2014) para 37, [https://www.achpr.org/public/Document/file/English/achpr54os\\_misrep\\_promo\\_gabon\\_2014\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr54os_misrep_promo_gabon_2014_eng.pdf) (accessed 12 April 2020).

68 As above.

## 4 Conclusion

From the assessment made in this article, it is clear that the special procedure mechanisms form an important element of the human rights architecture of the African Commission. Their rapid expansion speaks to their rich and distinct contribution to human rights protection the world over. However, this growth did not come about automatically. It was influenced by numerous extra-legal determinants, predominantly geo-political developments, as discussed in the article. The need for their introduction, therefore, reinforced the point that either the then existing human rights mechanisms were not adequate to deal with the human rights situations of the time, or that they were well placed to complement and reinforce the pre-existing human rights apparatuses and approaches of the African Commission.

The African Commission's special mechanisms are malleable. To a large extent, the nature and scope of the African Commission's special procedure mechanisms allow them to navigate and complement existing mechanisms of the African human rights system in pursuit of the realisation of fundamental human and peoples' rights in Africa. The challenge, however, is that these mechanisms do not operate in a systemic manner nor distinctly separate from the African Commission. In this regard, there is a need for incremental reforms within the African Commission's special mechanisms. The call for reforms within the Commission's special procedures is not novel. Time and again, scholars have made this animated call to the African Commission.<sup>69</sup> However, reforms in and of themselves do not guarantee positive change and, if considered and undertaken by the Commission, should be done with great assessment and care. Reforms go hand in hand with complementarity, both internally within the Commission and externally with other similar mechanisms outside the Commission. Although there are indications of joint action between the special procedures of the Human Rights Council and those of the African Commission, more can be done in light of the Addis Ababa RoadRoad, which charts avenues for cooperation and complementarity between the two systems.<sup>70</sup>

69 See generally C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 175; Viljoen (n 1) 369-378; Nyanduga (n 34) 379-405; Murray (n 39) 344.

70 See, generally, Dialogue between Special Procedures Mandate-Holders of the UN Human Rights Council and the African Commission on Human and Peoples' Rights Framework Document (2012) 7, [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_UNHRC\\_ACHPRRoad%20Map.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_UNHRC_ACHPRRoad%20Map.pdf) (accessed 16 December 2017).