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Reforming the Role of the African Commission on Human and Peoples' Rights in Advancing Democratic Principles and Human Rights in African Countries: An Examination Using the Lens of Swaziland/ eSwatini

Jeremy Sarkin

<https://orcid.org/0000-0002-9424-6874>

Distinguished Visiting Professor of Law and member of CEDIS at NOVA University Lisbon, Lisbon, Portugal, Attorney, South Africa and Attorney, New York, United States, BA LLB LLM LLD, former Chair-Rapporteur, United Nations Working Group on Enforced or Involuntary Disappearances, Research Fellow, University of the Free State, South Africa
JSarkin@post.harvard.edu

Abstract

This article explores the role of the African Commission on Human and Peoples' Rights and the role it plays regarding human rights in individual country situations in Africa. It specifically examines the extent to which it has been able to advance a human rights agenda in countries with long-standing human rights problems. The article uses Swaziland/ eSwatini as a lens to examine the matter, because of the longstanding problems that exist in that country. This is done to indicate how the institution works over time on a country's human rights problems. The article examines a range of institutional structural matters to establish how these issues affect the role of the Commission in its work. The article examines the way in which the Commission uses its various tools, including its communications, the state reporting processes, fact-finding visits, and resolutions, to determine whether those tools are being used effectively. The article examines how the Commission's processes issues also affect its work. Issues examined negatively affecting the Commission are examined, including problems with the status of its resolutions and communications, limited compliance with its outcomes, and inadequate state cooperation. Reforms necessary to enhance the role and functions of the Commission are surveyed to determine how the institution could become more effective. The African Union's (AU) Kagame Report on AU reform is briefly reviewed to examine the limited view and focus of AU reform processes and why AU reform ought to focus on enhancing human rights compliance. The article makes various suggestions on necessary institutional reforms but also as far as the African Commission's procedures and methods of work to allow it to have a far more effective role in the

promotion and protection of human rights on the continent. It is noted that political will by the AU and African states is the largest obstacle to giving the Commission the necessary independence, support and assistance that it needs to play the role in Africa that it should.

Throughout Africa, the victims of injustices are waiting; waiting for us to keep our word. They notice when we use words to mask inaction. They notice when laws that should protect them are not applied. We can do better. We must do better.¹

Keywords: African Commission on Human and Peoples' Rights; African Union; Swaziland/ eSwatini; democratic principles; human rights violations; Africa; Kagame Report; institutional reform

Introduction

The African human rights situation has improved to some degree over the years but many problems remain present.² While improvement was on a steadily rising trend until a decade ago³, the last decade has seen an erosion of some of the hard fought gains made before then.⁴ The upward trajectory as far as peace and security were concerned a decade ago, has not continued as between 2007 and 2014⁵ the number of serious internal wars grew from 4 to 11 globally.⁶ This trend is also borne out in Africa.⁷ In a range of countries across the region there are tremendous problems. Many states continue to be undemocratic. Civil and political rights violations continue

¹ Opening speech by the then Chairperson of the African Commission on Human and Peoples' Rights, Catherine Dupe Atoki, at the 51st ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 2012.

² Shirley de Villiers, 'An Overview of Conflict in Africa in 2014' (2015) *African Security Review* 89–100.

³ On the decline in peace globally see Therese Pettersson and Peter Wallensteen, 'Armed Conflicts, 1946–2014' (2015) 52(4) *Journal of Peace Research* 536–550; and Lotta Themnér and Peter Wallensteen, 'Armed Conflicts, 1946–2013' (2014) 51(4) *Journal of Peace Research* 541–554.

⁴ Sebastian Von Einsiedel, *Major Recent Trends in Violent Conflict* (United Nations University Centre for Policy Research 2014).

⁵ Some argue the war trend in Africa decreased from the 1990s and only began increasing again since about 2013. See David Burbach and Christopher Fettweis, 'The Coming Stability? The Decline of Warfare in Africa and Implications for International Security' (2014) 35 (3) *Contemporary Security Policy* 421–445.

⁶ Von Einsiedel (n 4) 2.

⁷ Charles Fombad, 'The Context of Justice in Africa: Emerging Trends and Prospects' (2013) 1 in Evelyn Edroma (ed), *The Role of Law and Justice in Africa's Development* (UNDP 2013) 3–23.

as a matter of course in a range of internal armed conflicts, perpetrated by both the State as well as non-state actors.⁸

To deal with these problems, the African Union (AU) has created a range of institutions and processes, and adopted a raft of policies including a commitment to non-indifference instead of respecting principles of sovereignty and non-interference.⁹ This has not, however, always entailed action where there are problems. The AU has been good at establishing policy, institutions and processes but not so good at following through and implementing the plans that emerge from these activities.¹⁰

To specifically promote peace and stability the AU has created a number of institutions. One such body, the Peace and Security Council, may be the most important development to enhance collective security through conflict prevention, peacekeeping, peace-making and peace-building efforts. Others include the AU Continental Early Warning System,¹¹ the Panel of the Wise, the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism.¹²

In addition to the peace and security architecture that exists in the African Union, it also has several institutions to protect and promote human rights across the continent. These include the African Commission on Human and Peoples' Rights, the African Court on Justice and Human Rights and the African Committee on the Rights and the Welfare of the Child.¹³ There are also a number of sub-regional systems that do not fall under the AU but add to the regional protection of human rights because they have judicial mechanisms to adjudicate on such matters.¹⁴ These include the Court of Justice of the Economic Community of West African States (ECOWAS), the East

⁸ Morten Pedersen and David Kinley, *Principled Engagement: Negotiating Human Rights in Repressive States* (Routledge 2016).

⁹ Annemarie Peen Rodt, 'The African Mission in Burundi: The Successful Management of Violent Ethno-political Conflicts?' (2011) *Ethnopolitics Paper*, No 10, 1–21, 2.

¹⁰ See the opening chapter entitled 'The African Human Rights System and the Implementation Gap' (2015) in Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015).

¹¹ Alexander Noyes and Janette Yarwood, 'The AU Continental Early Warning System: From Conceptual to Operational?' (2013) 20(3) *International Peacekeeping* 249–262.

¹² Porto Joao Gomes and Kapinga Yvette Ngandu, 'The African Union, Preventive Diplomacy, Mediation, and the Panel of the Wise: Review and Reflection on the Panel's First Six Years' (2014) *African Security Review* 181–206.

¹³ On the interaction between the court and the commission see Annika Rudman, 'The Commission as a Party before the Court-Reflections on the Complementarity Arrangement' (2016) 19(1) *Potchefstroomse Electronic LJ* 1–29.

¹⁴ See for example James Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2014) 24 *Duke Journal of Comparative and International Law* 249.

African Court of Justice (EACJ) and the Southern African Development Community (SADC) Tribunal.¹⁵

This article explores the role of one AU institution: the African Commission on Human and Peoples' Rights (ACHPR/ Commission) and the role it has played regarding individual country situations on the continent. It specifically examines the extent to which the ACHPR has been able to advance a human rights agenda in countries with long-standing human rights problems.

The situation of Swaziland (called the Kingdom of eSwatini from 2018 after a declaration by the King) is used to determine how effective the process has been in enabling countries to become more democratic and embracing of human rights. Swaziland is chosen to conduct this review, as it contains one of the longest running, repressive political systems (an absolute monarchy that permits no political parties or trade unions to operate) in the world. It has been so for many years. It has also, generally speaking, been able to escape international attention to the extent that an article written in 2013 by Chatham House, dealing with the country's problems, defined Swaziland as a 'forgotten crisis'.¹⁶

Swaziland is a useful country to examine the role of the ACHPR as it is small state with little geopolitical gravitas in the region and its leadership model is archaic and unique (it is an absolute monarchy which does not permit political parties or trade unions and suppresses a range of human rights). Because of this it might be assumed that the ACHPR would be more forthcoming in its sanctions, yet it has remained extremely timid in relation to the country. Therefore, the questions relating to the Commission's role have an application for many other countries where there exist human rights concerns.

This article thus attempts to shine a light on the role that the ACHPR has played and the extent to which it has been effective in the promotion and protection of human rights in states across the region over many years. This is an important evaluation. Often the role of the Commission is examined from a continental point of view and not so much about how it specifically remediates human rights problems in states. This is vexing, since to neglect the methodology used by the ACHPR at an individual country level and the impact that it has had in such places is to overlook the root

¹⁵ Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) 53(1) *Journal of African Law* 1–33 and; Mia Swart, 'Alternative for Human Rights Protection: An Evaluation of the Human Rights Mandates of the African Sub-Regional Courts' (2013) *Tydskrif vir die Suid-Afrikaanse Reg* 437–452.

¹⁶ Christopher Vandome, Alex Vines and Markus Weimer, *Swaziland: Southern Africa's Forgotten Crisis* (Chatham House 2013).

causes of its inefficacy. It is hoped this examination is useful, especially since the Commission celebrated its fortieth year of existence in 2017.

The article firstly explores the human rights situation in Swaziland. It then examines a range of institutional structural matters, such as appointments¹⁷ to the Commission, and the fact that commissioners are part-time, to establish how these issues affect the role of the Commission. The article then examines the way in which the Commission has used its tools of communications, fact-finding visits, resolutions, using the situation in Swaziland to determine whether those tools have been used effectively.

The next part of the article examines how process issues affect the work of the Commission, possibly undermine its work, and have a major effect on the role it plays. Thus, an issue examined is how its decisions and its recommendations are not final until approved by the African Union. Also explored is how state non-cooperation and limited state compliance limits the effectiveness of the Commission. These concerns are once again scrutinized using Swaziland as an example.

The reforms necessary to enhance the role and functions of the Commission are surveyed to determine how the institution could become more effective. It must be noted that procedural deficiencies in the way the Commission works are in large part due to institutional problems in the AU, and the mandate given to the Commission, and a range of matters related to that, as surveyed in this part of the article. Thus part of the article also briefly studies the AU reform process and the Kagame Report, named for President Paul Kagame of Rwanda who was given the mandate by the AU in 2016 to investigate how the AU ought to reform itself. The article notes the limited view and focus of AU reform contained in that report, and how human rights and democratisation matters have been excluded from institutional transformation processes. The examination of the Kagame Report determines that, while there have been calls for the deficiencies in the institutional mandates of the various human rights bodies within in the AU to be remedied for a long time, there is no mention in the Kagame report about these issues. In fact, the human rights institutions are not mentioned in the report at all, other than the need to finalise the merger of the African Court of Human Rights and the African Court of Justice.

The article makes suggestions on what reforms should occur at the African Commission, both institutionally, but also in its methods of work to allow it to play a

¹⁷ On the importance of appointments in general and for truth commissions specifically see Jeremy Sarkin and Ram Kumar Bandari, 'Why Political Appointments to Truth Commissions Cause Difficulties for These Institutions: Using the Crisis in the Transitional Justice Process in Nepal to Understand How Matters of Legitimacy and Credibility Undermine Such Commissions' (2019) 2 *Journal of Human Rights Practice* (forthcoming).

more impactful role.¹⁸ The article critically examines the extent to which the Commission is cautious in its work and whether it needs to be more active and assertive in its approach to dealing with individual countries. It argues that the ACHPR does not always use the tools it has, that sometimes it uses those tools in limited ways and at times only uses those tools after others have intervened on the specific problem. The article argues that these matters are reflective of built in architectural or structural and other deficits, including within the Commission's mandate. These restrictions limit its role and functioning and particularly undermine its ability to have a greater effect in states where there are on-going human rights problems. The argument is that the institutional structure of the Commission and the processes of the AU undermine an independent and more dynamic role for the institution. Suggestions are therefore made for reforms that could enhance the functioning of the Commission specifically to remediate the human rights situations in African states.

Human Rights in Swaziland

A former British protectorate, Swaziland gained its independence in 1968. It is an absolute monarchy, ruled by¹⁹ King Mswati III since 1986.²⁰ The King is responsible for appointing the Prime Minister, the Cabinet and several of the members to both the House of Assembly and Senate.²¹ As part of his executive authority, he also has the power to summon and dissolve Parliament, sign and assent to bills and to declare a state of emergency.²² Whilst elections to political offices do occur in Swaziland, candidates have to stand as individuals and political parties are prohibited from participating under the country's constitution.²³ The King, even in 2016, has defended the political system in the country as democratic.²⁴ However, Swaziland is a country where democracy and human rights are in short supply.²⁵ The courts are not

¹⁸ For an evaluation of how the ACHPR views its problems and what it intends to do about them see African Commission on Human And Peoples' Rights 'Delivering Better' Strategic Plan 2015 – 2019 <http://www.achpr.org/files/pages/about/strategic-plan/achpr_strategic_plan_2015_19.pdf>

¹⁹ Amy McKenna (ed), *The Britannica Guide to Africa: The History of Southern Africa* (Rosen Education Service 2010) 180–186.

²⁰ *ibid.*

²¹ The Government of the Kingdom of Eswatini, 'The Executive' <http://www.gov.sz/index.php?option=com_content&view=article&id=406&Itemid=211> accessed 10 December 2016.

²² McKenna (n 19).

²³ The Constitution of the Kingdom of Swaziland (2005). Chapter VII, 79, 'System of Government'. See generally Charles Fombad, 'The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?' (2007) 23 South African Human Rights LJ 100.

²⁴ African News Agency, 'Swaziland's King Rebrands Monarchy as Democracy', *Mail & Guardian* (2016) <<http://mg.co.za/article/2016-06-02-00-swazilands>>.

²⁵ Dwayne Woods, 'Monarchical Rule in Swaziland: Power is Absolute but Patronage is (for) Relative (s)' (2015) *Journal of Asian and African Studies* 497–513.

independent and the rule of law is often subverted.²⁶ Various draconian laws exist.²⁷ For example, the Sedition and Subversive Activities Act of 1938 foresees that if a person speaks or publishes anything intended to bring the King, his family, or the government into disrepute, that person is committing a crime. It is also a crime under this Act to criticize the judiciary in their administration of justice.²⁸ In fact, the scope of the Act is incredibly broad and its provisions capture all written and printed matter. Another law that seriously curtails freedom of expression²⁹ is the Proscribed Publications Act of 1968. This Act provides the Minister for Public Service with the authority to prohibit publications which may be deemed 'prejudicial or potentially prejudicial' in the interests of public safety, order, morality, or public health. Also of note is the Official Secrets Act of 1968 that makes it a crime for anyone apprised of information by a government official from transmitting it to any unauthorised person or retaining it in any way that can be deemed prejudicial to the safety or interests of Swaziland. In addition to the aforementioned acts, the Cinematograph Act of 1920 grants the Minister of Public Service and Information the power to censor images that in his belief can be described as showing contempt for the King or the armed forces.³⁰

Moreover, in 2008 the Swazi legislature enacted the Suppression of Terrorism Act, which has since been employed to suppress any activity deemed a threat to the State or the King.³¹ In the wake of the Act, scores of political meetings and demonstrations were cancelled and political activists and journalists arrested and in some cases imprisoned under the Act.³² In 2014, the Swazi Government adopted a resolution that demanded that all trade unions and employer federations within the country stop operating immediately.³³ This far-reaching prohibition effectively put an end to trade unionism with the country. While the Government purportedly chose to take action

²⁶ International Commission of Jurists, 'The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland – ICJ Trial Observation Report 2015' (ICJ 2015).

²⁷ Lomcebo Dlamini, 'Interesting Times in the Kingdom of Swaziland: The Advent of the New Constitution and the Challenge of Change' in Minnie J (ed), *Outside the Ballot Box Preconditions for Elections in Southern Africa, 2005–2006* (MISA 2005) 167–180.

²⁸ See generally Maxine Langwenya, 'The Judiciary under Siege in Swaziland: Re-Engendering a Unique Democracy' (2012) 14 *University of Botswana LJ* 95.

²⁹ See further Richard Rooney, 'The New Swaziland Constitution and its Impact on Media Freedom' (2008) 2(1) *Global Media Journal* 53–65.

³⁰ Freedom House, 'Swaziland: Freedom of the Press 2016' <<https://freedomhouse.org/report/freedom-press/2016/swaziland>> accessed 16 December 2016.

³¹ Alex Perry, 'How Swaziland's King Mswati Is Out of Step' *Time International* (New York) 3 October 2011, v 178, n 13, 1.

³² Article 19, 'Swaziland: Counter-Terrorism not a Pretext for Repression' (Press Statement 2008) <<http://www.article19.org/pdfs/press/swaziland-counter-terrorism-not-a-pretext-for-repression.pdf>> accessed 16 December 2016.

³³ ITUC-CSI, 'Swaziland – Monarchy Bans All Union and Employer Federations' (9 October 2014) <<http://www.ituc-csi.org/swaziland-monarchy-bans-all-union>> accessed 16 December 2016.

here to correct the lacuna in its labour laws,³⁴ many believe that the real reason for the government's ban on trade unions was punitive and designed to scotch any further protests and strike action by trade unions and federations.³⁵ In this regard, the Government has resorted to the police force to attack and intimidate protesters exercising their right to strike, and to disperse meetings with no reason being given.³⁶ This adds to evidence of the contempt of the current regime for basic civil and political rights such as the freedom of assembly and association.

Human rights abuses thus abound in the country.³⁷ The security forces are ruthless in their suppression of the people.³⁸ Abuses by the police in detention centres and prisons are rife.³⁹ In their 2016 World Report, Human Rights Watch (HRW) found that in the year 2015 'respect for human rights and the rule of law continued to decline in the Kingdom of Swaziland.'⁴⁰ The country is the antithesis of a constitutional democracy where human rights prevail.⁴¹ Political parties have been disallowed to operate since 1973, and the absolute monarch suppresses democratic expression and a range of other rights.⁴² While Swaziland has a democratic constitution that supposedly protects rights, in reality, human rights come a distant second to state fiat⁴³ and are often violated in range of areas.⁴⁴ The Swazi people are excluded from decision-making. There is a great wealth gap⁴⁵ between the King and the impoverished people.⁴⁶ There

³⁴ *ibid.*

³⁵ Tula Connell, 'Swaziland Bans Unions' (Solidaritycenter.org. 2015)

<<http://www.solidaritycenter.org/swaziland-bans-unions/>> accessed 16 December 2016.

³⁶ Freedom House, 'Freedom in the World 2013 – Swaziland' (3 June 2013)

<<http://www.refworld.org/docid/51aefab114.html>> accessed 16 December 2016.

³⁷ Bongani Masuku and Peter Limb, 'Swaziland: The Struggle for Political Freedom and Democracy' (2015) 43 *Review of African Political Economy* 518–527.

³⁸ USA, 'Country Reports on Human Rights Practices for 2014' United States Department of State-Bureau of Democracy, Human Rights and Labor 2–6.

³⁹ Amanda Dissel and Cheryl Frank, *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (African Minds 2012) 149–150.

⁴⁰ Human Rights Watch, 'World Report 2016' <<https://www.hrw.org/world-report/2016/country-chapters/swaziland-0>> accessed 16 December 2016.

⁴¹ Amnesty International, 'Annual Report Swaziland 2015/2016'.

⁴² See further Masuku and Limb (n 37).

⁴³ Musa Njabulo Shongwe, 'Protection of Children's Rights in the Swaziland Legal System: Achievements and Challenges' (2016) 17(1) *Child Abuse Research in South Africa* 58–67.

⁴⁴ Angelo Dube and Sibusiso Nhlabatsi, 'The King Can Do No Wrong: The Impact of The Law Society of Swaziland v Simelane NO & Others on Constitutionalism' (2016) *African Human Rights LJ* 265–282.

⁴⁵ Amy Robinson, 'Poverty and Hunger in Swaziland' (2014) *The Borgen Project* <<http://borgenproject.org/poverty-hunger-swaziland/>> accessed 10 December 2016.

⁴⁶ Angelique Nindi and Nicholas Odhiambo, 'Poverty and Economic Growth in Swaziland: An Empirical Investigation' (2015) 13(1) *Managing Global Transitions* 59–74; Lindsey Ice and Mathew

are high levels of diseases including HIV/AIDS,⁴⁷ and sexual violence is a serious problems.⁴⁸

Swaziland has surprisingly supported the implementation of the Responsibility to Protect (R2P) without seemingly understanding the irony in doing so and why R2P should be applicable to their circumstances. Swaziland's ambassador to the United Nations in 2009, in a statement reacting to the 2009 Secretary-General's Report on Responsibility to Protect delivered to the General Assembly, noted the following:

I wish to add the voice of my government on the implementation of the responsibility to protect. I thank the Secretary General for his extensive report providing a conceptual basis on how responsibility to protect should be implemented and we commend him for a job well done... My delegation believes the depth of R2P relies on a number of virtues. Governance, Sound Institutional Building, Human Rights Protection, Protection of the Rights of Women and Minorities all play out to the responsibility of states to protect its populations as rightly referred by the report of the SG. The vicissitudes of a successful R2P institutionalization lies on many preliminary programs that are closely related to development and security. The fight against and other challenges is linked to the responsibilities of governments to their populations.⁴⁹

What is unsurprising is that the only reference to R2P in Swaziland in the statement is about how the country has dealt in the past with displaced populations and refugees from other states. There is no understanding in the statement by the Swazi Ambassador that R2P and even the issues he mentioned (Governance, Sound Institutional Building, Human Rights Protection, Protection of the Rights of Women and Minorities) were directly applicable to his country. Thus, as with other international issues, Swaziland signs up to instruments and processes, but regards them as inapplicable to its own situation.

Samrick, 'Swaziland: A Proposed Development Plan' (2012) 18(1) *Review of Human Factor Studies* 79–108.

⁴⁷ Eileen Yam, Zandile Mnisi, Xolile Mabuza and others, 'Use of Dual Protection Among Female Sex Workers in Swaziland' (2013) 39(2) *International Perspectives on Sexual and Reproductive Health* 69–78.

⁴⁸ Alexander Tsai, Karen Leiter, Michele Heisler and others, 'Prevalence and Correlates of Forced Sex Perpetration and Victimization in Botswana and Swaziland' (2011) 101(6) *American Journal of Public Health* (2011) 1068–1074.

⁴⁹ Swaziland, 'Statement by Mr. Joel M Nhleko Permanent Representative of the Kingdom of Swaziland to the United Nations on the Secretary-General's Report on Responsibility to Protect', *International Coalition for the Responsibility to Protect* (2009).

The Architectural Deficiencies of the African Commission on Human and People's Rights

The African Commission on Human and Peoples' Rights has had mixed reviews of its performance over the years. It has been criticised for not being as robust as it could and should be.⁵⁰ This is a key focus of this article. Because of those problems, the Commission has been called a 'paper tiger'⁵¹ and a 'toothless bulldog'.⁵² One critic noted, in 1993, that the 'commission has proved to lack any bite let alone a bark that is noticeable.'⁵³ While some of these comments were made a few years ago, some of them are more recent in nature. Therefore, over the years there has been some consistency in the views about the role of the ACHPR. As recently as 2013, it was noted that the ACHPR was 'cautious like a cat'.⁵⁴ In 2007, the same author had noted that the ACHPR would probably be 'more successful at accomplishing its largely non-confrontational promotional mandate.'⁵⁵ Both those comments seem to be accurate in that the Commission is often reticent in its approach and it operates in a far better way when it undertakes its promotional role. Obiora Okafor seems to agree with these assessments when he noted in 2007 that the ACHPR had achieved some modest successes with quiet diplomacy approach in the three branches of government in some African states.⁵⁶

It is true is that the ACHPR is generally cautious in its approach. This can be seen in the comment made by Sarkin in a 2016 article that reviews the ACHPR's decision on the declawing of the SADC Tribunal. There it was noted that:

⁵⁰ Timothy Yerima, 'Over Two Decades of the African Commission on Human and Peoples' Rights: Flying or Fledging' (2012) 12(12) *Global J of Human Social Science Arts & Humanities* 55–68.

⁵¹ Anne Pieter van der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Protection Mechanism for Africa?' (2005) 18(1) *Leiden J of International Law* 113–29, 117.

⁵² Nsongurua Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights and Development LJ* 45, 64.

⁵³ Chris Peter, 'The Proposed African Court of Justice-Jurisprudential, Procedural, Enforcement Problems and Beyond' (1993) 1(2) *East African J of Peace & Human Rights* 117–136, 122.

⁵⁴ Frans Viljoen, 'From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Rights System at the African Commission's 25 Year Mark' (2013) 17 *Law, Democracy and Development* 298–316, 314.

⁵⁵ Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2007) 297.

⁵⁶ Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces, and International Institutions* (Cambridge University Press 2007) 272.

caution and trepidation are still the Commission's hallmarks ... The Commission has a long way to go to become the dreaded, powerful, lion-like institution which Africa needs and is entitled to.⁵⁷

In this context, this section of the article reviews some of the main architectural issues that limit the ACHPR's ability to be more effective in the promotion and protection of human rights across the continent. Not all the structural issues are dealt with in this part of the article. Some of those issues are touched on in later sections when the tools that the Commission uses to impact human rights matters and other issues that limit the effectiveness of the institution, are discussed.

The predominant problems that impede significantly the work of the institution are a lack of independence, and a lack of transparency and openness. These are discussed below, but are also discussed later in the article, as they are crosscutting problems in all the matters affecting the Commission.

Appointments

An issue that directly feeds into the ACHPR's independence, and a reason for its often-restrained approach, is who the commissioners are, and the way they are elected.⁵⁸ Problematically, the eleven part-time commissioners are nominated by Member States and then elected by the Executive Council of the AU.⁵⁹ This has a direct effect on the ability of the ACHPR to play its promotional and protectionist human rights mandate.⁶⁰ While Commissioners are elected for a six-year period they can, and often are, re-elected and critically, there are no term limits. Commissioners continue to serve at the pleasure of their states and the AU Heads of State that appoint them. Thus, both the political appointment process and the reappointment methodology limit the independence of commissioners and therefore of the institution itself. The practise of ongoing re-election ensures that commissioners who wish to be reappointed need to have appeased their political masters. This undermines their

⁵⁷ Jeremy Sarkin, 'A Critique of the Decision of the African Commission on Human and Peoples' Rights Permitting the Demolition of the SADC Tribunal: Politics Versus Economics and Human Rights' (2016) *African J of International and Comparative Law* 215–241, 240–241.

⁵⁸ In the book Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights: Two Volume Set* (SAGE 2014) it is stated that this was a problem until 2005 but since then Governments have been asked by the AU to nominate people independent of the State. However, the independence of some commissioners is still an issue. (56).

⁵⁹ Articles 31–40 African Charter on Human and Peoples' Rights, 28 June 1981; Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (Intersentia 2013) 123.

⁶⁰ Articles 45 African Charter on Human and Peoples' Rights, 28 June 1981.

independence and their potential to be robust in their work. This has undermined the effectiveness and role of the institution.⁶¹

While commissioners are chosen ‘from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people’s rights, particular consideration being given to persons having legal experience,’⁶² many Commissioners are not sufficiently independent to play the role they ought in holding states to account. For instance, it specifically affects the extent to which they are willing to be more confrontational on tough human rights matters with states and the AU because they come from a political milieu and also because they usually seek reappointment. A number of them have even held senior government positions even while serving as members of the Commission.⁶³ Long periods of service are not uncommon. One commissioner served for 24 years, and another for 16 years. The fact that commissioners are routinely re-elected suggests that states are not unhappy with what Commissioners do. While such long terms are not as common today as they were earlier, re-electing members is still the norm. The ACHPR is not robust, at least in part, because of the proximity of Commissioners to the AU, their sub-regional processes and African states in general.

This issue will be taken up in much greater depth later, but for the time being, suffice to say the issue of appointments and its process is not an academic issue but one that has severe practical implications. It affects how the Commission interacts and works with states like Swaziland. Since Commissioners are usually close to their own states, and would otherwise not be nominated by them, means that state interest could be a factor. Their states, particularly in the sub-regions where they are located, have particular spheres of interest. In the realm of African politics, it would not be unexpected for pressure to be brought to bear on the processes where human rights matters are being evaluated, to ensure that criticism is rare, and that when it occurs it will not be less than robust.

Thus, part of the reason for the cautious role of the institution is its makeup. Politically biased appointments undermine its independence and ensure that the body will continue to remain restrained in its approach. These are discussed below, such as the fact that decisions need to be presented to the AU before being finalised.

⁶¹ Mireille Affa’a Mindzie, ‘The African Commission on Human and Peoples’ Rights’ in John Akokpari and Daniel Shea Zimbler (eds), *Africa’s Human Rights Architecture* (Jacana Media 2008) 204, 206.

⁶² Okafor (n 56) 66.

⁶³ George Wachira, ‘International African Court on Human and Peoples’ Rights: Ten Years on and Still No Justice’ (MRG 2008) 10.

The Effect of Having Part-Time Commissioners

Another key problem affecting the ability of the Commission to function effectively is the fact that Commissioners work on a part-time basis. The effectiveness of Commissioners is also reduced because they usually have two or three roles within the body, besides having other roles in their home countries. While the ACHPR has several Special Rapporteurs and Working Groups, they are staffed from a limited pool.⁶⁴ For example Commissioners also are country rapporteurs, and are responsible for five countries. Thus, Commissioner Pansy Tlakula from South Africa has overseen Swaziland for many years. Tlakula has held various state leadership positions in South Africa, including being the head of the Electoral Commission for many years. In 2017, she was responsible for five other countries, in addition to Swaziland, while also serving as Chairperson of the Commission. She also serves as Special Rapporteur on Freedom of Expression and Access to Information, while working as South Africa's newly appointed full time Information Regulator. The situation of commissioners having so many responsibilities seriously undermines the effectiveness of the institution. As will be noted Commissioners are not really able to spend much time on their country mandates. Having five countries each or more means they spend very little time on each country. They are certainly not able to visit each very regularly. This is returned to below when the issue of fact-finding visits are discussed.

The Problems in the Way the Commission Works with Individual States, Focusing on Swaziland

The role that the ACHPR plays, and the reason it is criticised, can be assessed in how it involves itself with the human rights situation in domestic states. Swaziland is used as a vehicle to explore this in more detail.

Generally speaking, the ACHPR has impacted the human rights situation in Swaziland very little. It has tools that it can use to promote and protect human rights. But generally, it has failed to use those tools effectively. This section has two parts. The first part reviews the use of the various tools at its disposal. The second part examines a range of procedural shortcomings that hamper its agency.

Tools Available to the Commission to Ensure Human Rights Compliance by States

This section evaluates the various tools available to the Commission to deal with human rights issues that arises in different states. The tools that will be considered are communications, state reporting, fact-finding missions and resolutions. I will then

⁶⁴ Rachel Murray, 'The Special Rapporteurs in the African System' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights. The System in Practice 1986–2006* (Cambridge University Press 2008) 373.

determine if these tools are being effectively used to promote and protect the human rights of people in African states, using Swaziland as a case study.

Communications

The African Charter permits complaints, that the Commission terms ‘communications’, to be levelled by individuals or groups against individual states. The Commission is empowered in terms of articles 55 to 58 of the African Charter to investigate such complaints.

While an interstate complaint mechanism exists for states to complain about the conduct of other states, that procedure has only ever been used once.⁶⁵ The fact that this process is almost never used indicates the lack of political will by states to deal with problems between them publicly. The fact that Swaziland’s human rights problems have gone on for decades and no state has been willing to take the country to the ACHPR reinforces this. This bolsters the viewpoint that there is no desire for states to accuse each other of violations openly and strengthens the perspective that the notion of African solidarity between African states exists to the detriment of human rights across the continent.

As far as individual complaints are concerned the Commission has dealt with relatively few cases over the years of its existence. In its approximately 25 years of dealing with cases, it has dealt with only 442 communications, 361 of which were concluded.⁶⁶ Very few, as will be discussed have been taken up against Swaziland. The reasons for this are discussed later, but suffice to say, the Commission has not always inspired confidence for potential complainants to use this process. This can be seen in the fact that the Commission hears relatively few cases each year, usually only a dozen or so.⁶⁷ Even those cases are not dealt with expeditiously, and in fact, there is a sizeable backlog of cases. However, many of the cases presented to the Commission fail the admissibility criteria of the Commission. In fact, about half of all cases transmitted to the Commission have been ruled inadmissible.⁶⁸ This gives the impression that the Commission uses the admissibility process to weed out many cases that it does not want to hear.

Inadmissibility was the fate of a recent Swaziland case. In case 414/12, *Lawyers for Human Rights (Swaziland) v Swaziland*, the ACHPR declined to hear the case against

⁶⁵ In the case of the Democratic Republic of the Congo against Burundi, Rwanda, and Uganda.

⁶⁶ Viljoen (n 54) 307.

⁶⁷ Jeremy Sarkin, ‘The African Commission on Human and Peoples’ Rights and the Future African Court of Justice and Human Rights: Comparative Lessons from the European Court of Human Rights’ (2011) *South African J of International Affairs* 284.

⁶⁸ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014) 143.

Swaziland (on the drafting of the 2005 Swaziland Constitution)⁶⁹, declaring it inadmissible because it had been submitted close to three years after the exhaustion of domestic remedies, even though the ACHPR does not have a set period for such submissions as it decides on a case by case basis.⁷⁰ However, this particular length of time was held not to be 'within reasonable time' in terms of article 56(6) of the African Charter.⁷¹ This was the decision despite the Commission having at times made exceptions to exhaustion rules, stating in a number of other cases that the complainant does not have to follow the rule.⁷² The issue of exhaustion should be carefully reviewed and not be as much of an obstacle as it has been in the past.

Such obstacles have an enormous effect on how potential complainants view the Commission, and whether they deem it worthwhile to file complaints. Such technical hurdles can limit complaints and play a negative role in the way the body is perceived. States may also perceive these impediments as a way to avoid the chastisement that they would otherwise have received should the case have proceeded. Added to this, these outcomes further add to the view that cases are not likely to proceed, and if they do, they will be dealt with very slowly and the results will not be too harsh on the state in question.

An example of the way the Commission is viewed by states can be seen in the SADC Tribunal case, correctly known as the case of *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola*.⁷³ In 2013, the Commission heard the complaint about whether the SADC decision to remove the Tribunal's complaints procedures without consultation and in secret, violated the African Charter and other international instruments. It decided against the applicants. Of importance is that while there were 14 state defendants, including Swaziland, only two states (Tanzania and Seychelles) submitted a reply on admissibility,⁷⁴ and only one state

⁶⁹ On the constitutional process see Thulani Maseko, 'The Drafting of the Constitution of Swaziland, 2005' (2008) African Human Rights LJ 312–336.

⁷⁰ See generally on exhaustion of domestic remedies Cesare PR Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschiero, Tulio Scovazzi, Cesare Pitea and Chiara Ragni (eds), *International Courts and the Development of International Law* (TMC Asser Press 2013) 561–572. On its application by three sub-regional courts in Africa see Andreas von Staden, 'Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts' (2016) *The International J of Human Rights* 1113–1131.

⁷¹ Communication 414/12, *Lawyers for Human Rights (Swaziland) v The Kingdom of Swaziland*.

⁷² Takele Soboka Bulto, 'Exception as Norm: The Local Remedies Rule in the Context of Socio-Economic Rights in the African Human Rights System' (2012) *The International J of Human Rights*, 564–566.

⁷³ Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola*.

⁷⁴ Paragraph 45 of the decision.

(Mauritius) responded on the merits of the complainant's submissions.⁷⁵ The other ten states, including Swaziland, never responded in any way, or even corresponded with the Commission on the case. A defendant must be confident not to submit anything when a case is filed, nor to rebut the arguments made. One has to wonder why most of the fourteen states never corresponded with the Commission concerning the case, both on admissibility and on the merits. It gives the impression that they were not concerned about the outcome of the case because they either believed that the case would not go against them or if it did, it did not matter. Either possibility is problematic and deeply concerning. Such preconceptions over communications reinforce the negative perceptions about the Commission and this is probably applicable to Swaziland as well. This bolsters the view that the Commission is not sufficiently respected by the country and only a little of what it does will have a tangible impact within the country.

The case also reflects the Commission's lack of jurisprudential argument in some of its decisions and the fact that at times it avoids or does not give due credence to all the legal questions. The level of legal research in some cases is limited and the depth of the analysis not what it could be. In many cases much deeper argumentation and depth of the legal analysis would be helpful. At times it can be argued that the reasoning fits in with the outcome. The reasoning, for example, in the SADC case is specifically found wanting. The issue of legal skills and legal reasoning by the Commission will be taken up again in the section on reforming the commission.

The SADC case is also important due to the fact that the Commission did not refer such an important case, and did not give reasons for not doing so, to the African Court, also begs questioning. In fact, the Commission ought to be referring more cases to the Court. This should be applied to the Swaziland situation, since the country has never complied with Commission findings and its processes.

Generally, the overall effect of these outcomes serve to undermine how complainants across the continent view the role of the Commission. It also ensures that the Commission, because of those perceptions, has an extremely limited deterrent effect with respect to human rights violations that may be committed by states. These outcomes frustrate the needs of people who suffer state violations. It puts the reliability and standing of the Commission at great risk.⁷⁶ Consequently, victims are advised that approaching the Commission may not be the best use of their resources and going to other supra-national bodies may be more advantageous. This could

⁷⁵ Paragraph 121 of the decision.

⁷⁶ Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36(2) Human Rights Quarterly 349–372, 372.

explain why there are only a few cases from Swaziland and indeed from elsewhere in Africa.

Despite many human rights violations in Swaziland, only a few cases have been brought against the country at the African Commission compared to cases from other countries. For example, by mid-2016, the African Commission had issued thirteen decisions against Sudan. Other countries with much higher numbers of cases against it are Cameroon, Zimbabwe, Democratic Republic of the Congo and Nigeria.⁷⁷

An indication of the lack of appetite for cases that the Commission deals with is that the Commission attempts to gain very little prominence from them. In fact, generally the Commission does not appear to seek much attention. It is inefficient at self-promotion, for example by issuing only sporadic press releases. Most similar organisations want their work to be in the public eye because they want to showcase their achievements and be seen as hardworking and effective institutions in exercising their mandates. This is simply not the case with the Commission. Indeed, the Commission usually shrouds its cases and processes in secrecy. While this further corrodes its authority when issuing communications, at a macro level, the effect is that the ACHPR lacks much needed visibility in states across Africa.⁷⁸ This affects the role it plays and negatively affects its ability to impact the human rights situation across the region.

Confidentiality surrounding the Commission's proceedings tends to limit openness so much so that questions often arise relating to its role, independence and transparency.⁷⁹ The Commission releases very limited amounts of information about the cases before it or the communications received. This is certainly true about the Swazi communication cases before the Commission. References are buried in Communiqués or meeting reports, and are usually terse, simply stating that a matter was discussed. No further information is given about the facts of the matter or the decision that was taken. While it is agreed that confidentiality should be maintained while the matter is being heard and recommendations discussed, the Commission appears to release far too little information. Even its reports contain very little other than broad headlines.

The same can be said for the Commission's website. It contains very little information about the human rights situation on the continent and in each state. There are no links

⁷⁷ Lutz Oette, 'Litigation Before the African Commission on Human and Peoples' Rights and the Struggle Against Torture in Sudan' (2016) 54 *Sudan Studies for Sudan and South Sudan* 20–33, 23.

⁷⁸ Murray and Long (n 10) 74.

⁷⁹ Solomon Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) *European Journal of International Law* 672.

to other organisations where such details could be found. Simply putting up the reports of others or providing links to them should not be seen as the ACHPR endorsing such reports, but would certainly make such information more accessible. It will also ensure that more people consult the website of the Commission, which at present is very underwhelming.

The lack of information on the part of the Commission seems purposeful: it fits the argument that part of the ACHPR's intrinsic functioning is to avoid confrontation towards states.

Vital reform is needed in this area. Greater levels of transparency can be achieved by broadcasting, on the radio or across the various media channels, including its own website, the processes of the Commission. Most useful would be information about dates that communications are being heard or when states are under review.⁸⁰ This information will not only serve to make the Commission more transparent, but could also enhance the reputation of the Commission and put pressure on states to meet their obligations. Greater availability of the information would bring greater state accountability. It may play a deterrent role for states like Swaziland whose human rights situation remains off the international agenda and beyond public consciousness.

While it could be argued that it is not the function of the ACHPR to provide such information, at least more information relating to the work carried out by the Commission should be available on its website. At present, not even all of the official ACHPR communications are uploaded.

A major problem with the role the Commission plays, in general and with communications specifically, is that it has, as Gina Bekker has noted, a 'generally deferential attitude... towards the State.'⁸¹ Until recently, the Commission has been reluctant, even where it found violations, to order states to pay compensation for the violations committed. This is reflective of how it is often submissive towards states and their human rights situations, as is evident in its many stances against Swaziland. While there have been a few interventions, these have occurred only in exceptional circumstances. In considering the total extent and magnitude of the on-going violations in Swaziland, the Commission has been silent.

Even on occasions when the Commission took decisions against a state for human rights violations, the matters appear to have remained by and large, unresolved. For example, in its *Endorois* decision against Kenya in 2010, a case concerning

⁸⁰ Magnus Killander and Adem K Abebe, 'Human Rights Development in the African Union during 2010 and 2011' (2012) African Human Rights LJ 222.

⁸¹ Gina Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13(3) Human Rights LR 499–528, 510.

indigenous land rights, the Commission made strong findings and observations against the state.⁸² This case has been termed a jurisprudential landmark⁸³ because the ACHPR was strong in its criticisms of the violations that had perpetrated by the Kenyan state. However, other than establishing a task force to address the issues raised in the decision, Kenya has failed to implement the findings of the Commission.⁸⁴

Overall, it would seem that the Commission uses the admissibility procedures as a means at times to avoid difficult cases against a state and if it is clear that a case meets its admissibility criterion but is deemed to be ‘political’, as was the case in the *SADC* decision, it often does not make a negative finding.

It would seem that there is a difference in the way the Commission tackles and exposes economic, social and cultural rights issues,⁸⁵ versus civil and political rights matters. This is especially the case if the civil and political rights issue is seen to be very sensitive. The Commission seems to be more willing to make findings and statements in second-generation rights cases, but not so willing where there are first-generation rights problems, especially if the state is perpetrating crimes on its citizens.

It also seems as though the Commission is willing to take bold steps where there is already an outcry over the situation. This occurred, for example, in Swaziland when trade unions leaders were arrested in 2014. The Commission commented on the matter only after many others had done so.

It is rare for the Commission to react first to human rights events or issues. When it does so, it responds more often when a non-state actor has committed a human rights violation. If a state were involved, it appears as though the Commission is less likely to act proactively in raising the tough issues of its own accord.

⁸² *Centre for Minority Rights Development v Kenya* (2009) African Human Rights Law Reports 75 (ACHPR 2009)

⁸³ Gaetano Pentassuglia, ‘Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples’ Rights: Some Reflections’ (2010) 3 University College London Human Rights Review 150, 154.

⁸⁴ Resolution Calling on the Republic of Kenya to Implement the Endorois Decision, ACHPR/ Res.257 (LIV) 2013. The UN Committee on Economic, Social and Cultural Rights found in its Concluding Observations in 2016 that Kenya still had not implemented the decision. E/C.12/KEN/CO/2-5 Economic and Social Council 6 April 2016 Committee on Economic, Social and Cultural Rights Concluding observations on the combined second to fifth periodic reports of Kenya.

⁸⁵ *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001). See generally, Manisuli Ssenyonjo, ‘The Development of Economic, Social and Cultural Rights under the African Charter on Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights’ (2015) International Human Rights LR 147–193.

This is somewhat confirmed by the fact, as has been noted, that the Commission prioritises its promotional work over its protectionist role.⁸⁶ It seems that the Commission is more comfortable taking a less confrontational stance so that it does not antagonise the AU and the African states. Indeed, this could possibly be because the Commission is not positively regarded within the AU and receives very little protection and support in general from the AU. It seems to be specifically reluctant to go out on a limb and make strong findings against states unless this has been part of a communications process that has been through all of the ACHPR and AU procedures.

Given its broad mandate, the Commission should be playing a leading role in the promotion and protection of human rights on the continent rather than being a reluctant follower. The continent needs a vibrant institution that can robustly represent the millions of people in Africa whose rights are regularly violated.

State reporting

As far as state reporting processes of the ACHPR are concerned, there are equally significant problems. These reports are meant to contain the measures and legislation that the states have adopted to give effect to the African Charter, but due to the fact that these reports have not been reviewed, for a number of reasons, this is not the case.⁸⁷ While the Commission is meant to review state reports every two years, this has not always been possible because so many states are late with their reports. For example, Swaziland, Cape Verde, Chad, the Central African Republic (CAR), Egypt, The Gambia, Ghana, Guinea, Lesotho, Mali, Mauritania, Seychelles and South Africa are all outstanding by three reports. These countries are not even in the worst category. Some states, such as Comoros, Equatorial Guinea, Eritrea, Guinea-Bissau, Sao Tome and Principe, and Somalia have never submitted a report.⁸⁸

Of those states that are delinquent in their reporting obligations, many are countries with some of the worst human rights records. There is a connection between why some of the most delinquent states in this regard are also some of the worst transgressors of human rights: it is an attempt to avoid scrutiny and accountability. For this reason, if the Commission was committed to impacting the situation in those countries, it ought to be ensuring that these reports are delivered and reviewed timeously. Failing the arrival of the state report, the review process should continue, as happens in other processes that are not dependent on the arrival of a report, or attendance by the state concerned. But avoiding scrutiny is exactly what they seek to achieve. If the Commission was committed to scrutinising states, it would be in their

⁸⁶ Viljoen (n 54) 313.

⁸⁷ Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing 2000) 16.

⁸⁸ 37th Activity Report of the African Commission on Human and Peoples' Rights.

interest to hold public hearings and allow others to deliver their reports regardless of whether the state delivered its own report and regardless of whether the state arrived at the review process or not. This would ensure some degree of accountability and would put pressure on the delinquent states to ensure that they meet their obligations by presenting their state reports.

Swaziland delivered its first and only periodic report in 2000. It was nine pages long. It is interesting to note the report concluded that: ‘The Kingdom of Swaziland also welcomes recommendations and technical assistance from treaty monitoring bodies in the promotion of human rights and it is hoped that the African Commission on Human and Peoples’ Rights will pinpoint areas where it is believed much effort has to be applied in order to redress any given situation.’⁸⁹ Yet, this has not been the case. Some nineteen years later there has been little progress on the general human rights situation in the country, despite the ACHPR providing recommendations and attempting various processes in the country. These are affected by a range of issues that are dealt with, some mentioned earlier, and others below: such as the ability to avoid scrutiny, delays in the process, non-compliance and a lack of measures to ensure compliance and transparency. The concluding observations of the ACHPR on Swaziland are not even on its website.

Fact finding visits

To promote and protect human rights in a particular African country, the Commission is mandated to do state visits.⁹⁰ However limited resources have meant relatively few visits and when they occur, they are often only for very short periods. The limited resource issue limits the functioning of the Commission.

The ACHPR has visited Swaziland on a number of occasions over the last decade. At the request of the ACHPR, the Government of Swaziland invited the African Commission to undertake a human rights promotion mission to the country, which occurred from 21 to 25 August 2006.⁹¹ The mission comprised one commissioner, Pansy Tlakula and one staff member. It is interesting to note that the mission did not meet with the leaders of the country. Seemingly, the three top officials snubbed the delegation. In their report it is noted that, ‘[d]ue to their busy schedule, the delegation could not meet the Speaker of Parliament, the Prime Minister and His Majesty the

⁸⁹ Swaziland Periodic Report 1995 – 2000 Date Submitted: 1 February 2000 Session Considered: 27th Ordinary Session (27 April – 11 May 2000, Algiers, Algeria)
<<http://www.achpr.org/states/swaziland/reports/1st-1995-2000/>>

⁹⁰ Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 295. See also Conrad Bosire, ‘Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realisation of Human Rights in Africa’ (2011) *African Human Rights LJ* 168.

⁹¹ African Commission on Human and Peoples’ Rights, *Report of the Promotional Mission to the Kingdom of Swaziland* (21–25 August 2006).

King.⁹² This is an example of the Commission not always being accorded the respect it deserves or the willingness by states to cooperate with it.

The Commission's statement at the conclusion of their 2006 mission to Swaziland made no findings on the human rights situation in the country. All the statement did was set out what been told to the delegation during its interviews and to suggest that the issues raised must be investigated. Unsurprisingly, the statement said, 'It will be premature at this point for the delegation to make any pronouncement on its findings.'⁹³ However, this would have been a perfect opportunity for the Commission to drill down and investigate the factual human rights situation in the country and to push the government to become more compliant with its human rights obligations.⁹⁴ By being more direct and forceful in their statements and fact-finding missions, greater support could be given by the Commission to the human rights movement in Swaziland and indeed in all countries on the African continent. Fact-finding missions and other visits could be a very effective and important tool in exposing human right atrocities in the places they visit.

As noted above, levels of compliance with ACHPR findings and recommendations are critically low. Fact finding missions appear to be more diplomatic visits rather than important tools to investigate the real human rights issues in the specific state visited. The Commission is often excessively deferential towards African states and sometimes, particular for states with long-term problems, a tougher approach is needed.⁹⁵ This does not always have to be the approach. Where the soft diplomatic approach is achieving results, there is no need for the tough robust public role that could be used. But always using a soft hand is a mistake since it almost never leads to positive reform in a state where human rights violations are ongoing. It also gives impetus to the state to continue along the same path. They can be emboldened by this type of approach that gives them little reason for pause in the atrocities that are being committed.

The Commission undertook another mission to Swaziland from 7 to 11 March 2016. Again, Pansy Tlakula, then the Chairperson of the Commission, participated in the mission, in addition to another commissioner, Solomon Dersso, and two legal officers. This time, the mission met with senior officials including the Prime Minister and

⁹² African Commission on Human and Peoples' Rights, 'Press Conference by Advocate Pansy Tlakula, Member of the African Commission on Human and Peoples' Rights Promotional Mission to the Kingdom of Swaziland' (21 August 2006) <<http://www.achpr.org/press/2006/08/d44/>>

⁹³ *ibid.*

⁹⁴ See Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994–2004' (2007) 101 *American Journal of International Law* 1–34.

⁹⁵ Bekker (n 81).

Deputy Prime Minister, the Chief Justice, the Speaker of Parliament, many cabinet ministers, as well as other officials and people from a range of other sectors.⁹⁶ Interestingly, the mission met with the Law Society of Swaziland that had a pending case against Swaziland, concerning the then Chief Justice, for 6 years, as mentioned earlier in this article. However, no mention was made of this case in the Press Release. The press release noted that Swaziland has outstanding reports owed to the “ACHPR” that it (Swaziland) intended to remedy within the year. This did not happen. The mission’s press release was slightly different to the 2006 mission statement as it did set out a whole host of issues that existed in the country that needed to be addressed. As with the earlier mission, the statement did not make any negative findings against the country other than the issues it raised. Even though the Commission fell short of a negative finding against the state, it is gratifying, at least, to see that the extensive list of issues raised dealt with many of the democratic and human rights violations that exist in the country.⁹⁷ The Commission’s statement started out commending the Swazi government for the actions they have already taken. Only after this, did they raise the violations reported. This seems to be a general approach of the ACHPR, even though levels of compliance with their findings and recommendations by states are very low.⁹⁸ In fact, the Commission, at times, sends positive messages to state parties possibly to give encouragement and keep channels of communication open. Thus, on 5 July 2011, Pansy Tlakula, as ACHPR Special Rapporteur on Freedom of Expression and Access to Information in Africa, sent a letter of appreciation to King Mswati about the creation of a Media Complaints Commission (MCC) in the country. She stated that this accomplishment was ‘a mark of the Government of the Kingdom of Swaziland’s commitment to promote and protect Freedom of Expression and Access to Information in the country.’ She did, however, urge Swaziland to ensure that there would be continuing dialogue about proposals to make the MCC function better.⁹⁹ This communication could also have been employed to raise various human rights problems and encourage the state to conduct a range of reforms. Thus, a sorely needed opportunity was lost. In fact, the Commission ought to be using press releases and other communication strategies far more often if they want to have greater effectiveness and have greater impact. Yet, this is not the case. In keeping with its non-confrontational approach, often its reports, press releases, and other documents are not directed at non-compliant states. Specifically targeted communications about

⁹⁶ ACHPR Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples’ Rights to the Kingdom of Swaziland (11 March 2016).

⁹⁷ African Commission on Human and Peoples’ Rights Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples’ Rights to the Kingdom of Swaziland (11 March 2016).

⁹⁸ See Viljoen and Louw (n 94).

⁹⁹ ACHPR, Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa Adv. Pansy Tlakula presented during the 50th Ordinary Session of the African Commission on Human and Peoples’ Rights (24 October – 7 November 2011 Banjul, The Gambia).

state human rights violations are rare. When they do make reference to a specific state, it is regarding a positive development or due to a violation committed by a non-state actor. Even reports issued after Commission meetings do not usually detail discussions concerning violations being committed by states.¹⁰⁰ When state violations are mentioned, it is usually because the matter has already been dealt with by the AU or is exogenously gaining public attention. This can be seen with the case of South Sudan, which is referenced in the Final Communiqué of the 60th Ordinary Session of the African Commission on Human and Peoples' Rights held in Niamey, Republic of Niger from 8 to 22 May 2017. Swaziland is almost never mentioned in such reports.

What is clear from the fact-finding missions undertaken by the ACHPR to Swaziland and other countries is that the Commission needs greater organisation, more people to participate in such missions and more engagement with senior government officials. The missions also need to reach more people on the ground from a range of different sectors in the country.¹⁰¹ Some of the initiatives undertaken by the mission could include holding seminars, press conferences and workshops at universities and other educational and civil institutions. The objectives of these initiatives would be twofold: promoting human rights awareness and gaining information from people at grassroots level.

While lack of resources is a definite obstacle to the impact of such missions, political will is also a hindrance. In this regard the then Chairperson of the ACHPR in 2012 noted that the 'ineffectiveness of the African Commission has also been attributed to many other factors including in particular, lack of political will by States Parties, inadequate follow-up mechanisms on decisions or recommendations and lack of sufficient publicity and awareness.'¹⁰² Missions need to be better planned and have greater outcomes. The case of Swaziland is an example where little actual effect can be seen as a result of the missions and other processes of the Commission. Rhetorically there have been promises made, but the truth is that little has changed on the ground. Democracy and human rights are still in short supply in Swaziland.

¹⁰⁰ See for example ACHPR, Final Communiqué of the 60th Ordinary Session of the African Commission on Human and Peoples' Rights (8 – 22 May 2017 Niamey, Republic of Niger).

¹⁰¹ See for example Ebenezer Durojaye, 'The Role of the African Commission on Human and Peoples' Rights in Developing Norms and Standards on HIV/AIDS and Human Rights.' (2007) *Global Jurist* 3.

¹⁰² Opening Speech by the Chairperson of the African Commission on Human and Peoples' Rights, Her Excellency Honourable Commissioner Catherine Dupe Atoki Delivered at the Opening Ceremony of the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights (9 – 22 October 2012 Yamoussoukro, Côte d'Ivoire).

Resolutions

Resolutions are decisions adopted by the Commission concerning a specific state. The ACHPR adopts and issues these resolutions each year. Over the years, a few have been issued for Swaziland.¹⁰³ In 2012 a resolution against the state was adopted at the ACHPR's 51st Ordinary Session, in Banjul, The Gambia. In a very rare admonition against a state for non-compliance,¹⁰⁴ the Commission noted that it was '[a]larmed by the failure of the Kingdom of Swaziland to implement the decision of the African Commission in Communication 251/2002 *Lawyers for Human Rights v Swaziland*, and the recommendations in the report adopted by the African Commission following a promotional mission to the country in August 2006.'¹⁰⁵ The 2002 decision had been taken by the ACHPR in a case before the Commission that Swaziland had, again, not cooperated with. The statement by the ACHPR in 2012 was that 'the African Commission is of the view that the Kingdom of Swaziland by its Proclamation of 1973 and the subsequent Decree No. 3 of 2001 violated Articles 1, 7, 10, 11, 13 and 26 of the African Charter.'¹⁰⁶ It should be noted that this statement did not address a human rights situation in Swaziland, but only addressed the failure of Swaziland to comply with its ruling. This was another missed opportunity and is further proof that the ACHPR issues few country resolutions and these are almost always mild in nature and do not tackle the major human rights issues.

Similar to communications, resolutions are often adopted late, sometimes long after the particular problem has surfaced and simmered. At times, resolutions are adopted long after the issue is of importance. The Commission does not act quickly and does not get their resolutions approved until a long time has passed. This affects the ability of such resolution to influence the occurrence in question and perpetuates the perception that it not a threat to deviant states.

In 2014, the ACHPR approved country-specific resolutions on eight countries: the Central African Republic, the Democratic Republic of Congo, Egypt, Nigeria, Sahrawi Arab Democratic Republic, Somalia, South Sudan, and Swaziland.¹⁰⁷ This time the statement on Swaziland was much stronger. The press release of 27 March 2014, noted their concern about restrictions on freedom of expression, judicial harassment, persecution, as well as arbitrary arrests and detention in Swaziland. The Commission

¹⁰³ Killander and Abebe (n 80) 199–222.

¹⁰⁴ Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2015) 286. See Bekker (n 81) 521.

¹⁰⁵ African Commission on Human and Peoples' Rights 216: Resolution on the Human Rights Situation in the Kingdom of Swaziland (2 May 2012).

¹⁰⁶ Adopted by the African Commission on Human and Peoples' Rights at its 37th Ordinary Session (27 April – 11 May 2005 Banjul, The Gambia).

¹⁰⁷ Magnus Killander, 'Human Rights Developments in the African Union during 2014' (2015) 15 African Human Rights LJ 537–558, 541.

urged the Government of Swaziland to immediately and unconditionally release two detainees and to withdraw all charges. They also urged Swaziland to halt all ‘acts of judicial harassment and intimidation carried out against human rights defenders.’¹⁰⁸ This was issued three days after the Special Rapporteur Pansy Tlakula had sent a letter of appeal to King Mswati regarding the two detainees.¹⁰⁹

Thus, the Commission is able, on occasion, to take more direct and forceful action such as adopting and issuing resolutions against state parties. The stronger stance adopted in 2014 could have been as a result of the international furore that was gaining momentum to encourage the release of a number of detained trade unionists who protested on May 1, 2014 the situation concerning the banning of trade unions in the country. Such tough calls are rare but ought to be more commonplace. Ideally, the Commission should take the lead and issue more resolutions and public statements against state human rights abuses rather than being only willing to intervene after many others have already done so. The Commission, it seems, is more willing to make a finding when it is presented with a case through a communication even though it has been generally reluctant to issue communications. This can be seen in the example of Sudan where the Commission has found that the state committed violations in seven out of thirteen cases.¹¹⁰ Still in six of the thirteen the Commission found no violations.

Process Matters Affecting the Work of the Commission

The work of the Commission is critically affected by hindrances to the tools set out above and institutional processes within the Commission and the AU. These obstructions limit the ability of the various available tools to effectively address human rights problems in states such as Swaziland.

This section examines some of the process problems that inhibit the tools discussed in the previous section from actually achieving the goals of preventing human rights violations in domestic states. Again, the lens of Swaziland is used where possible to discuss these issues but so are other matters that affect its work. Problems examined include: how decisions and recommendations are not final until approved by the Commission; the effects of this; and how non-cooperation by states and limited compliance with the decisions of the ACHPR undermine its role.

¹⁰⁸ ACHPR Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Human Rights Defenders in Africa on the arrest of Mr Thulani Rudolf Maseko and Mr Bheki Makhubu (27 March 2014).

¹⁰⁹ Activity Report of Adv Pansy Tlakula as The Special Rapporteur on Freedom of Expression and Access to Information in Africa presented during the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights (28 April – 12 May 2014).

¹¹⁰ Oette (n 77) 23.

Status of Decisions and Recommendations

To promote the effective independence, openness and transparency of the Commission, changes are required in the way the AU works. In particular, major reforms are needed to the mandate, independence and role of the institution. These can be justified by a critical examination of the status of Commission's decisions and recommendations.

The African Charter provides in article 59 that 'all measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of States and Government shall otherwise decide.' Thus, only after approval by the AU Assembly are findings completed.¹¹¹ This means that ACHPR processes, including communications, remain confidential sometimes for years. Rather than allowing the conclusions of the ACHPR to have an impact, the fact that outcomes are released years later dramatically reduces their ability to impact the situation in question.

The process of attaining AU approval of Commission decisions severely undermines the independence of the ACHPR.¹¹² Notwithstanding the direct interference this process has on the work of the Commission, it is a continual sword of Damocles that hangs over the ability of the institution to operate impartially. It affects how the Commission conducts itself because it must continually second-guess itself about how its work will be perceived and whether it will be accepted by the AU. In several instances, this process has degraded its autonomy. In 2011 and 2012 the AU declined to authorise the release the Commission's Activity Report as some states contended that the report contained unsubstantiated facts.¹¹³ In 2015, the Executive Council requested the Commission to 'expunge' two merits decisions from its Activity Report that the Commission had agreed to concerning Rwanda, until the latter had had the opportunity of convening an oral hearing.¹¹⁴ This issue also came to the fore over the determination by the Commission as to whether it was going to grant observer status to the Coalition of African Lesbians (CAL). The Executive Council requested that the Commission:

take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard REQUESTS the ACHPR to review its

¹¹¹ See further the problems relating to findings, 'The African Human Rights System and the Implementation Gap' in Rachel Murray and Debra (n 10).

¹¹² Rachel Murray and Mottershaw (n 76) 349.

¹¹³ Killander (n 107) 532–553, 539.

¹¹⁴ Executive Council of the African Union, Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.864(XXVI) para 8.

criteria for granting observer status to NGOs and to withdraw the observer status granted to the organisation called CAL, in line with those African values.

Not only was this request in itself deeply problematic for being discriminatory on the basis of sexual orientation, it is also extremely troubling because it attempts to control who the ACHPR cooperates with. It is an attempt to undermine the Commission's independence by deciding who the Commission excludes from its work. These issues ought to be in the purview of the Commission only. Problematically, the Executive Council also indicated in its Report that it was also unhappy with some of the decisions the Commission had taken on complaints and asked the Commission to review its procedures, particularly those on provisional measures and urgent appeals. It further intimated that there was interference by NGOs and others in the work of the Commission and recommended that the Commission ought to take steps to guard against this. In fact, the Executive Council in its Report recommended that the Assembly only authorise the publication of the 38th Report 'after its update and due incorporation of the proposals made by Member States and agreed upon, within that report, as reflected in these conclusions.'¹¹⁵ In other words, publication of the Report could only occur after the Report had been rectified and met the demands of the state members. Therefore, it is clear that the AU controls the work of the Commission taking away its independence and fundamentally compromising its role as protector and promoter of human rights in Africa.

While the broad issue of reform is discussed below, it is important to note that changes to the Commission's various processes and procedures to ensure greater compliance have already been clamoured for on many occasions.¹¹⁶ These appeals have been to no avail. For example, the matter was raised again at the 2nd International Symposium on Human Rights Defenders in Africa held in Johannesburg between 27 March and 1 April 2017. The document, the *Cotonou Declaration on Strengthening and Expanding the Protection of All Human Rights Defenders in Africa*, emanated from the symposium. It made various suggestions, including a call on the African Union to '[e]ncourage and support full collaboration with national, regional and international human rights mechanisms and refrain from undue interferences in the work of these

¹¹⁵ Executive Council of the African Union, Decision on the 37th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.864(XXVI) para 11.

¹¹⁶ See for example Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 35–85. They also note low levels of compliance in Inter-American human rights system. See further Damian A González-Salzberg, 'Do States Comply with the Compulsory Judgments of the Inter-American Court of Human Rights? An Empirical Study of the Compliance with 330 Measures of Reparation' (2013) 13 *Revista do Instituto Brasileiro de Direitos Humanos* 93.

mechanisms.’ Interestingly, and maybe tellingly, the *Declaration* is to be found on the website of the ACHPR.¹¹⁷

As far as the status of cases against Swaziland are concerned, the *Masuku* case (*Communication 444/13 concerning Justice Thomas S. Masuku*) (*Represented by Lawyers for Human Rights (Swaziland) v Swaziland*) has not been finalised for many years.¹¹⁸ In its activity reports, the Commission ruled the case admissible in 2014. The case concerned the suspension of Justice Masuku for various offences, including an allegation that he insulted the King in his ruling in the case of *Aaron Mkhondvo Maseko v King*.¹¹⁹ While the ACHPR’s decision on the merits of the Masuku case has not been released, it has been referred to by the ACHPR in another of the body’s communications.¹²⁰ That later ruling determined that the ACHPR had found in the *Masuku* case that “the availability of a remedy entails both its existence in law and its accessibility in practice, namely that provisions for redressing complaints must exist in the municipal legal order both substantively and procedurally and be accessible to the victim without any unjustifiable obstructions.”¹²¹ Thus, it may be safe to deduce that the Masuku case ruling was not released possibly because it found against Swaziland.

The other case against Swaziland, which has been outstanding for eight years already, is that submitted in 2011 by the Law Society of Swaziland regarding the conduct of the then Chief Justice, Michael Ramodibedi. It concerned the Chief Justice’s handling of the dismissal of Judge Masuku, the case referred to above. In a Practice Directive sent out to all courts, the Chief Justice barred all courts from accepting any action that sought to commence legal action against the King.¹²² The actions of the then Chief Justice led to a four-month boycott by lawyers of the courts in the country. The outcome of this case remains outstanding eight years after it was filed at the Commission. This delay has given further impetus to Swaziland to continue acting with impunity.

Interestingly, it seems as though the case was discussed by the ACHPR in March 2014 as is evident in a Draft Agenda item under the name of Pansy Tlakula.¹²³ However, the ACHPR only notified the Law Society through correspondence dated 28 August 2014,

¹¹⁷ Cotonou Declaration on strengthening and expanding the protection of all Human Rights Defenders in Africa (Cotonou, Benin 2017) <<http://www.achpr.org/news/2017/06/d293/>>

¹¹⁸ On the importance of the case see Tabeth Masengu, ‘The Vulnerability of Judges in Contemporary Africa: Alarming Trends’ (2017) 63 *Africa Today* 2–19.

¹¹⁹ *Maseko v Commissioner of Police* (1778/09) [2011] SZHC 66 (17 January 2011);

¹²⁰ *Communication 477/14 Crawford Lindsay von Abo v The Republic of Zimbabwe*.

¹²¹ *ibid* para 80.

¹²² Dube and Nhlabatsi (n 44) 265–282.

¹²³ 15th Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights (7–14 March 2014 Banjul, The Gambia) <http://www.achpr.org/files/sessions/15th-ec/info/achpreo15_agenda_2014_eng.pdf/achpreo15_agenda_2014_eng.pdf>

that during its 16th Extra-Ordinary Session held in Rwanda from 20 to 29 July 2014, it had been decided that the Swaziland case concerning the Chief Justice was admissible.¹²⁴ At the same meeting (March 2014), the other Swaziland case concerning Justice Masuku was ruled inadmissible.

Thus, at the meeting in March 2014, both Communications 406/11 (*The Law Society of Swaziland v Kingdom of Swaziland*) and Communication 414/12 (*Lawyers for Human Rights v Swaziland*) (*Admissibility*) were discussed. Since then only the admissibility of case 414/12 was released and determined to be inadmissible. The 2011 complaint by the Law Society of Swaziland against Swaziland remains pending.¹²⁵ This is not unusual for the Commission as there are many outstanding cases that remain pending against other states as well. For example, in 2016 there were at least 10 cases outstanding against Sudan.¹²⁶

It is crucial that these types of cases are resolved quickly as they could have a critical impact on the societies they emerge from. However, long delays and limited publicity mean that they remain largely hidden from public attention and thus have little effect on the country and its citizens. Even if no decisions have been made or finalised, the Commission should be allowed to publish matters that are outstanding, including some information about the facts of the matter. This would engage the public domestically and internationally and put pressure on the Commission and other role players to deliver a final decision timeously. Such outcomes will also positively reinforce to civil society that their work is having an impact using democratic channels of opposition.¹²⁷

Delays do not inspire confidence in the Commission and undoubtedly further undermine the perceptions that exist about it. Delays also frustrate victims in their efforts to achieve an outcome that remains relevant to them and society.

It is therefore deeply problematic that ACHPR decisions are only made public, if and when the AU Assembly approves them.¹²⁸ The direct effect of this process, beyond its effect on issues such as independence, means that cases in general are delayed for

¹²⁴ Philani Ndebele, 'African Union Agrees to Try Ramodibedi – Swazi Observer, 28 September' (1 October 2014) < <http://www.sdcampaign.org/african-union-agrees-to-try-ramodibedi-swazi-observer-28-september/> > accessed 10 December 2016.

¹²⁵ International Commission of Jurists Justice Locked Out: Swaziland's Rule of Law Crisis International Fact-finding Mission Report (ICJ 2016) 10.

¹²⁶ Oette (n 77) 20–33, 23.

¹²⁷ On enhancing relationships with the ACHPR see Bonolo Dinokopila, 'Beyond Paper-based Affiliate Status: National Human Rights Institutions and the African Commission on Human and Peoples' Rights' (2010) 10 African Human Rights LJ 26.

¹²⁸ Ebobrah (n 79) 672; Jeremy Sarkin, 'The African Commission on Human and Peoples' Rights and the Future African Court of Justice and Human Rights: Comparative Lessons from the European Court of Human Rights' (2011) South African Journal of International Affairs 284.

years and outcomes can become largely irrelevant frustrating the victims and civil society as a whole. Urgent reform is needed in this regard.

State Non-Cooperation

State cooperation with the Commission has not always been forthcoming. In fact, many 'states have indirectly and often directly challenged the reach and findings of the Commission'¹²⁹ has been a perennial problem for oversight processes. It is, however, the extent of the lack of cooperation that is particularly problematic as far as the ACHPR is concerned. States tend only to cooperate to a very limited extent.

The extent of non-cooperation can be assessed by the fact that many states simply do not comply with Commission communication findings. For example, despite the Commission making its highest number of findings against Sudan, that state has not acted on any of those recommendations.¹³⁰

Swaziland has generally cooperated very little with the ACHPR. The country did not cooperate with the Commission at all in the SADC Tribunal communication.¹³¹ In fact, almost all the states in that case did not cooperate with the Commission. As far as the 2011 communication against Swaziland is concerned, the ACHPR has attempted to get Swaziland to respond on several occasions to the issues raised in the case, but Swaziland has not done so. The Commission has thus noted that, 'Through a note verbale dated 10 May 2013, the Secretariat made a final request for the Respondent State to submit its observations and arguments on admissibility, however no response was received, and in light of this, the commission took a decision to proceed with the decision on admissibility.'¹³² As a result of this case and others, Swaziland was castigated by a number of civil society organisations at the African Commission in 2013. These organisations complained about Swaziland not complying with the recommendations of the African Commission.¹³³

Dlamini and Hlatshwayo in 2016 found that Swaziland had also 'not given any exposure to or disseminated the findings of the African Commission.' This is another way that states avoid the outcomes of these processes: they are side-lined ensuring that

¹²⁹ Dorothy L Hodgson, 'The Implementation of the Findings of the African Commission on Human and People's Rights by Rachel Murray and Debra Long' (2016) 59 *African Studies Review* 219–220.

¹³⁰ Oette (n 77) 30.

¹³¹ Communication 406/2011, *Law Society of Swaziland v The Kingdom of Swaziland*.

¹³² Ndebele (n 124).

¹³³ Richard Lee, 'Swaziland Under Fire at the African Commission' (*allAfrica* 29 October 2013) <<https://allafrica.com/stories/201310290548.html>> accessed 23 June 2017.

they have little impact in their countries.¹³⁴ Thus, generally speaking, African states often ignore the Commissions' work and specifically its recommendations.

Non-cooperation undermines the ability of the ACHPR to remediate the human rights situations because states are able to frustrate attempts by victims to achieve a result by non-compliance following guilty verdicts. The failure by the Commission to finalise such cases without the input from states can only again be seen by victims as the Commission bending over backwards to accommodate the states concerned. This undermines the institution's standing.¹³⁵

Non-cooperation has exacerbated the delays in dealing with and finalising cases and other matters as well. Cases sometimes take years to resolve and the Commission has not addressed that problem to any great extent.¹³⁶ Non-cooperation ought to be addressed by the Commission because it has become a usual state tactic to frustrate victims in their attempts to attain justice and ultimately, it undermines the work of the Commission. A more robust approach, including more forceful findings against those states found to be infringing human rights as well as a dynamic enforcement mechanism could dramatically change a state's actions with regard to its human rights responsibilities.

Limited State Compliance

While all member states of the AU have ratified or acceded to the African Charter on Human and Peoples' Rights, compliance with the terms of the Charter remain wanting. Thus, it would seem that ratification of the Charter is seen to be sufficient by states without further action to ensure that their domestic laws adhere to the terms of the Charter. Compliance with the terms of the African Charter is a major problem as well as decisions handed down by oversight bodies such as the Commission.

A lack of real intention by Swaziland to comply with international law and international processes can be observed in the aftermath of the UN Universal Periodic Review (UPR) process in 2011. The major impact of the 2011 UPR process was that in 2012 Swaziland ratified 29 international treaties.¹³⁷

¹³⁴ Dumsani Dlamini and Sizakele Hlatshwayo, 'Swaziland' in Victor Oluwasina Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria University Press 2016) 233.

¹³⁵ Murray and Long (n 10).

¹³⁶ *ibid* (n 131).

¹³⁷ On why states ratify treaties see Richard Nielsen and Beth Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?' (2015) 59 *International Studies Quarterly* 197–208.

The treaties ratified included: the International Covenant on Economic, Social and Cultural Rights; the African Charter on the Rights and Welfare of The Child; the Protocol to the African Charter in Human and People's Rights of Women in Africa; the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, the Protocol Against the Smuggling of Persons By Land, Sea and Air; the Convention on Law of the Sea; the Convention Against Transnational Organised Crime and the Convention on Cluster Munition; the Optional Protocol to The Convention on The Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the Convention on the Rights of Persons With Disabilities; the Optional Protocol to the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; and the SADC Protocol on Gender and Development.

However, it is unheard of for such a large number of treaties to be ratified by a single country in one year. This is especially the case for a small country like Swaziland. For the state to have ratified so many treaties so quickly can only mean that very little if anything was done to ensure that the laws of the country complied with all those treaties before they were ratified. Thus, it would seem that the ratification process could only have been pro forma. The intention of the Swazi authorities in ratifying so many treaties must have been to simulate a commitment to human rights. However, the reality is that there could not have been a genuine intent to make those treaties actually applicable in their legal system, since synchronising such a large number of treaties with local law would have almost certainly taken more than a year. Thus, actually complying with those treaties was probably not a priority when they were ratified. It was simply an exercise to mimic their engagement to comply with human rights standards and with the UPR process.

As far as complying with the ACHPR is concerned, generally speaking, it seems that Commission recommendations are not often taken seriously by states. This said, on occasion, there has been full compliance with its decisions.¹³⁸ As noted in the first part of the article, Swaziland has largely failed to comply with decisions and recommendations of the Commission and was admonished by the latter in 2012 for not doing so.¹³⁹ These recommendations had been provided to Swaziland in 2002 and

¹³⁸ Bossman Asarem and Peter Sekyere, 'An Appraisal of Institutions of Global Governance: The Case of the African Human Rights System' (2016) 9 *Journal of Pan African Studies* 221–241.

¹³⁹ African Commission on Human and Peoples' Rights 2012, '216: Resolution on the Human Rights Situation in the Kingdom of Swaziland' taken at its 51st Ordinary Session (18 April–2 May 2012 Banjul, The Gambia) <<http://www.achpr.org/sessions/51st/resolutions/216>>

2006.¹⁴⁰ Thus, Swaziland had, for more than 15 years, avoided complying with these decisions. When Swaziland was questioned as to why it had not complied with the recommendations of the ACHPR, the responsible minister's response was that the government had not received official communication by the Commission on those outcomes and that it had only 'learnt of the decision by chance.'¹⁴¹ These issues have still not been complied with more than a decade later.

The matter of state compliance with the decisions of the ACHPR is an enormous problem. State compliance with its decisions between 1993 and 2004 have been found by one group of researchers to only have been at the rate of fourteen percent.¹⁴² In this regard, in 2012, the then Chairperson of the ACHPR noted that an issue that has 'haunted the Commission for a long time was once the Commission reaches a decision on the Merits of a case, it has no effective mechanism to enforce its judgment. *Actually, the situation has not improved much.* Consequently, some African states have ignored the Commission with impunity.'¹⁴³ (my emphasis)

The various processes that the ACHPR uses are meant to ensure some degree of accountability by states for what they have done and what they are meant to do in light of their human rights obligations. The fact that the Commission has been largely complicit in allowing state non-compliance of its rulings reflects an unwillingness to confront state parties for their inaction.

Non-compliance has been a long-standing problem. Supposedly to counter that the ACHPR organised two workshops in 2017 entitled 'Implementation of the Decisions of the Commission.' The funding for these workshops came from the Joint EU-AU Cooperation Programme 2017-2019.¹⁴⁴ The reliance on donor funding for this initiative, as well as many others, could be reflective of a lack of commitment by the AU to the ongoing problems experienced by the Commission. But the question remains whether workshops will promote compliance? More specific actions against states are needed to ensure greater levels of compliance. This is because the underlying problem with why there is non-compliance with the recommendations of

¹⁴⁰ Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press 2008) 80.

¹⁴¹ Dlamini and Hlatshwayo (n 134) 233–248.

¹⁴² See Viljoen and Louw (n 34) 1–34. Amnesty International finds that there probably has not been an improvement since then. The Commission noted in 2013 that '[m]ember States generally do not comply with the decisions of the Commission or implement its recommendations. They also do not respect provisional measures issued by the Commission to prevent irreparable harm to victims.' See Amnesty International, 'Counting Gains, Filling Gaps: Strengthening African Union's Response to Human Rights Violations Committed in Conflict Situations' (2017) fn 113.

¹⁴³ See (n 102).

¹⁴⁴ ACHPR, 'Press Release: Regional Seminar on Implementation of the Decisions of the Commission' <<http://www.achpr.org/press/2017/08/d363/>>

the ACHPR is that there are almost no Commission processes to ensure compliance and no penalties or sanctions for states for not doing so. Therefore, states have little reason to follow directives issued by the Commission. This has undermined the standing and influence of the body to play a meaningful role in remediating human rights and democratic deficiencies that are found in many African countries.¹⁴⁵ In this regard Bulto has noted that:

There is therefore a yawning gap between African states' seriousness about human rights monitoring at the African level and at the UPR level. Clearly, African states are more actively engaged with the UPR than with the regional mechanism, despite the fact that the regional mechanism is cheaper, geographically proximate, more familiar and two decades older ... African states have clearly given scant attention to their regional human rights system and its monitoring procedures.¹⁴⁶

This is quite telling about the way in which African states generally view the ACHPR and its reporting requirements. African states do not take compliance seriously because there are no consequences for not doing so. More ought to be done by the Commission (as well as the AU) to ensure that states comply with the recommendations. The ACHPR should be calling on the AU for support to ensure that states comply. The AU ought to introduce measures or penalties to deal with states fail to conform to the recommendations made.

State reactions to findings and recommendations of other bodies such as the Universal Periodic Review have been different. Thus, for example, Swaziland has attempted to meet some of the recommendations made by this mechanism. Crucially, and contrary to its actions when called upon by ACHPR, Swaziland has always appeared at UPR and made many efforts to comply with its outcomes.

Issues around enforceability are not distinct to ACHPR; it is an issue for other human rights bodies in the United Nations and elsewhere. It does however appear that the measures to ensure compliance are far more effective at the UN than at the AU. More steps are taken and there is more follow up to ensure compliance. This is an issue that is particularly acute for the Commission. Without an enforcement mechanism or the threat of state sanction, states will ignore or fail to implement recommendations.¹⁴⁷ This is dealt with more fully later.

¹⁴⁵ George Mukundi Wachira, 'Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy' (2016) *African Human Rights LJ* 467.

¹⁴⁶ Takele Soboka Bulto, 'Africa's Engagement with the Universal Periodic Review: Commitment or Capitulation?' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 235–255, 240–241.

¹⁴⁷ Murray and Mottershaw (n 76) 349–372.

Reforming the African Commission and the African Union Architecturally and Functionally to Achieve Optimal Human Rights Protection

What is clear from an examination of the human rights situation in Swaziland dealt with at the beginning of this article, and the way that the Commission has dealt with Swaziland over the years, using a multitude of tools and interventions, is that not much success has been achieved. Therefore, it can be argued that the Commission needs a change in its approach. As has been set out in this paper, much can be done to enhance and improve its visibility and reputation, and a range of options are available to enhance its work and ensure that it becomes a champion for the human rights cause within the region. However, perhaps the most critical reform has to be its absolute independence, in its mandate and functioning that will critically affect the role that the ACHPR plays.

For one, the Commission can seek to enhance the quality of its legal reasoning and the quality of its findings, since these are often seen to be weak and insufficient.¹⁴⁸ For example, as far as its SADC decisions evidence, it has been noted that '[c]onclusions are reached on the merits with almost no reasoning. Almost no case law is cited.'¹⁴⁹ Much more needs to be done to enhance the judgements and make them richer with jurisprudence that develops the African Charter in ways that promotes and protects human rights across Africa. The AU has a pivotal in how it supports the ACHPR. It seems that states flout the Commission's findings they know that there will be no consequences for doing so.

While the Commission has a multitude of tools at its disposal, these are not used very effectively. On occasion the tools ought to be used on an urgent basis where massive or ongoing violations are occurring. Far too often the role of the Commission comes very late in the process. The Commission should publicise its ongoing processes and findings and create better relationships with the media in all its forms including social media to enhance local and international coverage of its.

Another tool available to the Commission that could be used in other instances, including with Swaziland, is its powers in terms of Article 58 of the African Charter.

Article 58 states that if the Commission concludes that one of its communications 'reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and

¹⁴⁸ Murray and Long (n 10) 112.

¹⁴⁹ Jeremy Sarkin, 'A Critique of the Decision of the African Commission on Human and Peoples' Rights Permitting the Demolition of the SADC Tribunal: Politics Versus Economics and Human Rights' (2016) *African Journal of International and Comparative Law* 215–241, 224.

Government to these special cases.’¹⁵⁰ The Commission may also bring emergencies to the attention of the AU.¹⁵¹

The Article 58 procedure has seldom been used despite many examples of ‘serious or massive’ human rights violations in Swaziland and other African countries. Amnesty International has argued that there is an urgent need to restart this procedure but notes that the ACHPR is presently ‘somehow reluctant to invoke Article 58 and the provision is nearly gone into a state of disuse.’¹⁵² In one recent case, despite the complainant requesting that this procedure be used, the Commission found that it was not necessary.¹⁵³ As a result, there have been calls for it to be used more often.¹⁵⁴ While it is not likely that the tool impact the problems currently facing the Commission faces, its major benefit would be to draw public attention to the problem. Again, the reluctance of the Commission to use this valuable process reflects its own lack of will to take on transgressing states and its subordination to the AU’s oversight.

Generally speaking, a soft approach towards those states that show some level of compliance, or where states attempt to follow the processes recommended, makes good sense. This diplomacy will build strong ongoing relationships. However, where a state does not act in a way that indicates a willingness to be more democratic and respectful of a human rights approach, a stronger approach needs to be adopted. This is clearly the case with Swaziland. The soft approach should have made way for a robust, frequent and publicly disseminated message that its failure to comply is unacceptable. The Commission should engage with the media and civil society to ensure that all parties are aware of the transgressing states and the levels of human rights abuses.

While there exists a range of organisational and jurisdictional problems in the Commission, as dealt with in this article, another significant setback that undermines the effectiveness of the institution is its lack of resources. This further undermines the effectiveness of the Commission. The Commission’s budget has increased noticeably over the past few years to approximately six million dollars¹⁵⁵ in 2015.¹⁵⁶ While there is some discrepancy in the amounts that it supposedly has at its disposal, the budget is

¹⁵⁰ Article 58(1).

¹⁵¹ Article 58(3).

¹⁵² Amnesty International, ‘Counting Gains, Filling Gaps: Strengthening African Union’s Response to Human Rights Violations Committed in Conflict Situations’ (2017) 32.

¹⁵³ *Sudan Human Rights Organization v Sudan* (Darfur Case) (2009) AHRLR 153 (ACHPR 2009).

¹⁵⁴ Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the Constitutive Act of the African Union, Principle 18.

¹⁵⁵ In comparison, the African Court had a budget of about \$10 million in 2015.

¹⁵⁶ AU Assembly Dec. 544 (XXIII) (26–27 June 2014).

still woefully inadequate to fully deliver on its mandate.¹⁵⁷ This impacts a range of operations including fact-finding missions, staff recruitment and ability to meet more often in the year. The Commission meets twice a year for two weeks at a time. Another important shortfall as a result of budgetary constraints is the inability to hire more qualified legal and research staff that seriously inhibits the role that it can play.¹⁵⁸

The AU has a crucial role to play in supporting the ACHPR to fully realise its mandate. If it were serious about the Commission being more effective, it would devote more resources and support to the institution over and above the basic financial and technical support provided by the European Union.¹⁵⁹ Furthermore, what the ACHPR really needs is political support to allow it to be more robust in its approach, reforming its mandate and changing the way it operates. This is also in the hands of the AU.

There is however recognition within the AU that it needs to transform itself.¹⁶⁰ However, much of that focus is on the way the AU works internally and not really on the substantive matters it works on and how it deals with those matters. To that end, the Retreat of Heads of State and Government, the Ministers of Foreign Affairs and Ministers of Finance held in Kigali, Rwanda on 16 July 2016, decided that there was a need to conduct a study on institutional reform of the AU. Therefore, clearly there exists an acceptance that reform is needed. President Paul Kagame of Rwanda was tasked with drafting such a report. One might question whether Kagame was the right person to tackle this project because Rwanda itself is guilty of human rights transgressions.

Kagame's report entitled 'The Imperative to Strengthen our Union: Proposed Recommendations for the Institutional Reform of the African Union' was submitted to the 2nd Retreat of Heads of State and Government held at AU Headquarters in Addis

¹⁵⁷ Magnus Killander, 'Human Rights Developments in the African Union during 2012 and 2013' (2014) *African Human Rights Law Journal* 277.

¹⁵⁸ Murray and Long (n 10) 133.

¹⁵⁹ In terms of the 12th AU-EU Human Rights Dialogue. In November 2016, the European Commission gave €2.5 million to the African Commission on Human and Peoples' Rights (ACHPR) and €2 million contract to the African Court on Human and Peoples' Rights to strengthen their work. <https://eeas.europa.eu/delegations/african-union-au/15617/joint-press-release-eu-provides-support-to-the-african-commission-on-human-and-peoples-rights-and-the-african-court-on-human-and-peoples-rights_en>

¹⁶⁰ Mwangi Kimenyi, 'An African Union For An Emerging Continent: Reforms To Increase Effectiveness' *Brookings Institutions* (2016) <<https://www.brookings.edu/wp-content/uploads/2016/07/African-Union-Kimenyi-2.Pdf>> accessed 10 December 2016.

Ababa, Ethiopia on 29 January 2017. The AU deemed the Report excellent, and its recommendations were accepted, after some feedback by member states.¹⁶¹

Crucially, however, the Kagame Report does not address human rights at all, other than to mention it in the name of the African Court of Human and Peoples' Rights. This would have been a perfect opportunity to discuss a revitalised and enhanced role for the Court on human rights issues. Instead, the report only discusses the need to finalise the merging of the African Court of Justice with the African Court of Human and Peoples' Rights. In addition, the report makes no mention of the African Commission on Human and Peoples' Rights,¹⁶² and specifically how that institution could play an enhanced role on the continent. Institutional reform to the mandates and functioning of the Court and the Commission are vitally needed for them to play a more useful role.¹⁶³ This was not touched on at all in the report.

While it could be argued that there was no need to deal with democracy and human rights matters as the report is about institutional reform, a clear mandate of some African Union institutions is the enhancement of democracy and human rights protection. It is telling that the Kagame Report in its background and introduction section notes that, 'the African Union has accomplished a lot on the political, peace and security, and socio-economic fronts.'¹⁶⁴ Again, there is no mention of democratic advancement and human rights and the role of the AU in that regard. Some might defend this on the basis that those issues could be seen to fall within the area of 'peace and security', which was referred to in the report. But, it is argued, that these areas must be addressed openly and directly in the agenda because of the democratic and human rights violations that exist on the continent in general, and in many countries specifically. Reform has to aim directly at addressing the issues where the AU is not doing what it should do to achieve peace and security. Democratic shortfalls and human rights violations are interconnected with both the reasons and consequences for the lack of peace and security in the region and in many states.

¹⁶¹ AU Assembly of the Union Twenty-Eighth Ordinary Session, in Addis Ababa, Ethiopia, Decision on the Outcome of the Retreat of the Assembly of the African Union on the Institutional Reform of the African Union, Assembly/AU/Draft/Dec.14(Xxviii)Rev.1 (30–31 January 2017) 1 (Kagame Report) <https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec_1_-_19_xxviii_e.pdf>

¹⁶² This omission could be purposeful, but could be rationalized by the status of the Commission within the AU. The opportunity for reforming the AU should mean that these matters should be taken up so as to address these issues.

¹⁶³ See for example Joseph M Isanga, 'The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation' (2012) 11 Santa Clara Journal of International Law 267–302.

¹⁶⁴ Kagame Report 2 (n 161).

While the Kagame Report is focused on institutional matters, the background and introduction sections of the report note a range of issues that are affecting the region. It is stated that, ‘effectively confronting issues such as climate change, violent extremist ideologies, disease pandemics, or mass migration requires close cooperation with others, mediated in many cases by focused and effective regional organisations.’ Once again, there is no reference to recurring human rights issues and violations, or for that matter, peace and security. This will be dealt with below but it can be stated, in the report’s defense, that the report does not focus on substantive, but process issues. In other words, the report deals with laying down methods through which institutional reform can make the AU work better. However, to some extent, part of the problem with the organisation is specifically that it most often focuses on procedural matters and not on substantive ones. While various substantive matters are referenced in different ways in the report, as noted above, there is no mention of reforming the organisation to achieve a reduction in human rights violations. The closest the report deals with such matters is that one of the problems of the organisation is noted as ‘Underperformance of some organs and institutions due to unclear mandates or chronic underfunding.’ In this regard, it is interesting to highlight that the report blames ‘unclear mandates.’ However, on human rights matters this is not the problem. Rather, blame should be cast on the failure to set out expanded and independent mandates, for instance for the ACHPR.¹⁶⁵ It is also about the general failure of AU institutions to exercise their mandates in a more robust way. The mandates of the human rights mechanisms of the AU need to be enhanced, and they need to be given more independence and an ability to play more critical roles. Reform is most needed in the uptake of matters that impact the situation on the ground more effectively. Reform must focus on advancing an agenda of democratisation and human rights protection generally in the region, and specifically in states where there are such problems. Usefully, the report does state that the AU should focus more on a smaller number of issues, and includes peace and security as a priority item. The report does therefore deal with peace and security reform, of which human rights are an intrinsic part, however, a more direct approach would have been more useful. This omission may be a result of the flawed view that that at times peace must be pursued at the expense of human rights. Also, the peace and security agenda needs to be reformed to ensure that the role played by the African Union’s various systems, as far as peace and security are concerned, are more usefully and widely employed rather than the more limited role it plays at present. In order to become truly effective, the AU needs to reform its approach to human rights issues in African countries.¹⁶⁶

¹⁶⁵ The call to reform the mandate and way the Commission works is not new. See for example from 15 years ago, Shadrack Gutto, ‘The Reform and Renewal of the African Regional Human and Peoples’ Rights System’ (2002) 1 African Human Rights LJ 175–184.

¹⁶⁶ Thomas Kwasi Tiekou, ‘Governing Africa: 3D Analysis of the African Union’s Performance’ (2017) 208.

While the report makes reference to the African Peer Review Mechanism (APRM), nothing is mentioned on how it could be more effective in playing a heightened role as far as human rights are concerned. All the report states is that the APRM could be ‘strengthened to track implementation and oversee monitoring and evaluation in key governance areas of the continent.’ The reform focus therefore is for it to ‘track implementation’ and ‘oversee monitoring and evaluation.’ However, a more enhanced role for the APRM as far as dealing better with democracy and human rights matters could bring far better results in countries and for the region. The APRM is in need of reform, but the real reform that is needed ought to be about how it actually affects the situation in the countries where it conducts the reviews. In this regard, it has been noted that:

The AU political organs continue to rhetorically support the human rights organs in their resolutions, but not much is done to exercise peer pressure on states that fail to live up to what they have committed to.¹⁶⁷

Peer pressure ought to be a key tool of the AU given its nature and mission. It has to be an essential tool that must be institutionally weaponised to induce co-operation. The AU has stated that peer pressure does work but this is often more at the level of rhetoric. Much more pressure ought to be applied if real change is to occur.

As far as peace and security is concerned, the report only focuses on the role of the Peace and Security Council (PSC). It states that the reform ‘could include (a) reviewing the PSC’s membership, in line with Article 5(4) of the PSC Protocol, (b) strengthening the PSC’s working methods, and (c) strengthening the PSC’s role in prevention and crisis management.’ Hopefully, there will be a greater focus on item (c), as enhancing the role of the PSC in prevention and crisis management, in regards to what issues they work on and how they do so, is essential. Its role needs to be augmented dramatically in many more places than it operates at present. However, it should not only be the role of the PSC that is dramatically improved as far as peace and security matters are concerned. Many other institutions of the AU need dramatic improvement. The emphasis ought to be on improving what they do substantively.

Furthermore, the report notes that ‘[c]ontinuing to defer necessary reforms to the future is an implicit decision to do nothing.’¹⁶⁸ While this phrase is not directed at dealing with democracy and human rights matters, it is most certainly true thereof. There is an urgent need to reform the AU institutions, especially the main political organs to play a more direct in democracy and human rights advancement in the

¹⁶⁷ Magnus Killander and Bright Nkrumah, ‘Human Rights Developments in the African Union During 2012 and 2013’ (2014) 14 African Human Rights LJ (2014) 275–296, 296.

¹⁶⁸ Kagame Report 10.

region, in particular the many problem states. This has not been the case very often until now.

Swaziland is a strong example of an African country that has been able to avoid oversight, avoid cooperation and avoid compliance with the African mechanisms. It has not been held accountable for these failures because the AU has ignored these matters. More broadly, Swaziland has not been held to account for its democratic and human rights problems. The AU in this way capacitates the unabated continuation of democratic deficits and human rights problems in the country.

Conclusion

Conflicts and human rights violations are characterising Africa's second decade of the twenty-first century. Several mass atrocities have occurred in the recent past. At the same time over the last few decades there has been an explosion in courts and human rights mechanisms to deal with these issues. However, at times there has been a backlash against these bodies.¹⁶⁹ This has occurred against the International Criminal Court by African states,¹⁷⁰ as well as against sub-regional courts in Africa,¹⁷¹ such as the decimation of the SADC Tribunal by SADC after a number of robust rulings mainly against Zimbabwe.¹⁷²

In this context, the African Commission has developed its role and grown in stature since its inception. Initially it played a relatively minor part in the human rights situation in the region. Today it plays a much larger role. Some however argue that 'it is justifiable to claim that the African human rights system's effectiveness is rather limited.'¹⁷³ It is true however that its evolution has allowed it to be called a 'significant tool for promoting and protecting human and people's rights across the continent.'¹⁷⁴ The Commission is no doubt more successful today than in its past in exercising its mandate. It has, for example, played a crucial role in developing the jurisprudence on the African Charter. However, its jurisprudence is at times somewhat tentative. It is not as robust against states as it could be and inadmissibility is often used to exclude important cases.

While the Commission is hamstrung by a lack of resources, it is also limited by a number of operational issues. Added to this, it is not robust in its work and plays a

¹⁶⁹ Laurence Helfer, 'Backlash Against International Courts in West, East and Southern Africa' (2015) 109 Proceedings of the Annual Meeting (American Society of International Law), Adapting to a Rapidly Changing World 27–30.

¹⁷⁰ Kamari Clarke, Abel Knotnerus and Eefje de Volder, *Africa and the ICC* (CUP 2016).

¹⁷¹ Helfer (n 169).

¹⁷² Sarkin (n 15).

¹⁷³ Asare and Sekyere (n 138) 221–240, 234.

¹⁷⁴ Mindzie (n 61) 204, 206.

much more subordinate role than required by its mandate. For this reason, the institution needs greater independence both institutionally but also as a matter of practice. The Commission needs to assert its independence more if it wishes to play a greater role in the promotion and protection of human rights in Africa.

While the Commission is indeed somewhat outspoken on occasion, it is not usually too forceful in its criticisms.¹⁷⁵ The ACHPR is a human rights body and must conduct itself in ways that fully promotes and protects a human rights agenda. Reform of the Commission and the way it works is needed to ensure that it effectively plays this role on the African continent. The support of the AU for this reform is imperative. Without the AU support, states like Swaziland will simply continue to ignore the Commission.

The ACHPR has shown its potential as a robust defender of human rights on a few occasions. However, these have been far and few between, preferring a much more placid approach. They have often simultaneously sung the praises of a country while raising difficult issues and violations, lessening the clarity of their incriminations. As a result, neither the ACHPR nor the AU have been at the forefront of the process to achieve reform in Swaziland or any of the African states. It has rather been regional actors from other parts of the world and states outside of Africa that have played a more pivotal role.

As the Kagame report states in its very last paragraph (although for different reasons and directed at different issues),

[u]ltimately, the decision to change lies in the choices that African leaders make. The choice to change and the choice to remain committed to it. And most importantly, the choice to provide our citizens with a continent in which they can thrive.¹⁷⁶

African citizens will thrive if their lives are not affected by anti-democratic practices and human rights violations. Changing the way that the AU functions institutionally will have little impact on their lives. Real reform must go beyond procedural reform to have major direct effects on all Africans wherever they live on the continent. The undemocratic and anti-human rights situation that exists in Swaziland, and many other countries needs a more direct approach by the AU.

To add to the idioms that have been used to describe the Commission: while it has been described as a ‘toothless bulldog’,¹⁷⁷ or ‘cautious like a cat’,¹⁷⁸ at the moment it

¹⁷⁵ Inger Österdahl, *Implementing Human Rights in Africa: The African Commission on Human and Peoples’ Rights and Individual Communications* (2002) 72 *Nordic Journal of International Law* 309–311.

¹⁷⁶ Kagame Report (n 161).

¹⁷⁷ Nsongurua J Udombana, ‘Towards the African Court on Human and Peoples’ Rights: Better Late Than Never’ (2000) 3 *Yale Human Rights and Development LJ* 45, 64.

often acts like a scaredy-cat and is usually meek like a lamb when it comes to the human rights situation on the continent. It is too often as quiet as a mouse when it needs to be more like a watchdog that barks loudly and bares its teeth. But it also needs to bite. As a protector of human rights, it should therefore be when required an attack dog rather than a paper tiger. While the AU is often as blind as a bat when it comes to human rights matters, the ACHPR needs to get out of the doghouse, as far as civil society on the continent is concerned. While it may become the black sheep of the AU family, if it becomes more assertive, it should not be afraid of this. It should be assertive, but measured, not like a bull in a china shop. In this regard, it needs to indicate that unlike a leopard, it can change its spots. It should be the lion of Africa, which is courageous and strong when dealing with the vast array of human rights violations that are occurring across the length and breadth of the continent. However, trying to get the AU to reform the ACHPR and loosen the reigns may be likened to flogging a dead horse.

¹⁷⁸ Viljoen (n 54) 298–316, 314.

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