



African Union
Reforms Engagements

COMPARATIVE PERSPECTIVES ON REFORM PROCESSES IMPLICATING HUMAN RIGHTS SYSTEMS: FOR NGOS ENGAGING WITH THE AFRICAN UNION REFORM PROCESS



initiatives for
human rights



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1. INTRODUCTION

Reform denotes major changes to the operation of a mechanism (as opposed to minor changes which are a continuous part of any mechanism and evolution of practice), even if it may not involve change in international instruments.¹ This paper focuses on comparative perspectives from reform processes that had implications on human rights mechanisms. Three case studies are presented: the UN Human Rights Council reform (from the previous Commission for Human Rights), the Interlaken reform process of the European Court of Human Rights and the Inter American system 'Strengthening' reform process of the Inter American Commission of human Rights.

Through the case studies, the reasons and drivers behind reforms are explored, and the processes of reform are analysed with the aim of extracting lessons learnt, best practices and recommendations which are listed for every context after each case study. Thereafter comparative perspectives are highlighted on some key asks that CSOs working with the African human rights system have identified as priority issues to engage with in the reform including; compliance and implementation; election of judges and commissioners; transparency and access to information and the need to strengthen meaningful and effective CSO engagement with regional mechanisms.

The purpose of this comparative analysis is not to suggest that Africa's regional (human rights) system should be modeled on the basis of the systems discussed here, since the political, socio-economic and institutional environments are different. Rather, it offers an opportunity to examine other existing practices and experiences to determine whether there are lessons to be learnt or some features that might be applied in Africa's context.

Although the comparative contexts are different from Africa, there are similar challenges facing human rights systems across the board. These include resistance to, and delegitimization of international human rights systems, states withdrawing from human rights mechanisms, backlash from advancements made, the rise of emboldened anti-rights actors, resource constraints, backlog and gaps in terms of capacity to function effectively.

In the Inter American system; In 2012, after several judgments handed down by the IACtHR, Venezuela denounced the American Convention (& later in 2017 withdrawal

¹ Hampson, Francoise J. "An overview of the reform of the UN human rights machinery." (2007): 7-27.

from the OAS) just as Trinidad & Tobago did in 1998, and Peru did partially in 1999.² In 2014, the Constitutional Court of the Dominican Republic ruled against its State's acceptance of the Inter-American Court's compulsory jurisdiction. The highest court argued that reason for this 'back door denunciation' was that the instrument allowing the jurisdiction of the court was unconstitutional because congress had not approved it. This backlash came a few weeks after a decision asking the Dominican republic to stop violating citizenship rights of persons of Haitian descent.³ In 2017, the Argentinian Supreme Court blatantly refused to comply with a binding decision of the Inter American Court stating that the Court lacked the authority to order the revocation of a domestic judgement. In 2018 – an ultra-conservative pastor in Costa Rica (Fabricio Alvarados)- went from being hardly known to very famous and almost won the presidency by campaigning he would pull Costa Rica out of the InterAmerican Court Jurisdiction.⁴ The Former Chief Justice of Chile's Constitutional Court said "the Inter-American Court has steadily transformed into a supranational tribunal with powers that go beyond what States intended when they adopted the American Convention ... national judges are displeased because the Court is actually reviewing our decisions."⁵

In Europe, when the ECtHR issued the decision on *Hirst vs UK (2005)* against the blanket ban on prisoners right to vote, Theresa May a member of parliament at the time said that the UK should leave the European Charter of Human Rights (ECHR). When the ECtHR gave a decision in *Markin v Russia* granting parental leave to a man who had served in the army on the basis of a gender based-discrimination, Russia started a process to enact a national law to give its constitutional court powers to veto over decisions of the ECtHR.⁶ In November 2023 when the UK supreme Court found that the Rwanda scheme which intended to send asylum seekers to Rwanda to have their claims decided there is unlawful due to the real risk of ill-treatment as a result of "refoulement" which is prohibited by many international legal instruments including the ECHR, Prime minister Rishi Sunak said that Britain may leave the ECHR and other international treaties.⁷

In the African human rights system recent events such as the challenge to the independence of the African Commission on Human and People's Rights through

² Contesse, Jorge. "Resisting the Inter-American Human Rights System." *Yale Journal of International Law*. 44 (2019): 179.

³ *Expelled Dominicans and Haitians v. Dominican Republic* Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014).

⁴ Contesse n 2.

⁵ Ibid.

⁶ *Markin v. Russia*, App. No. 30078/06, 48, ECtHR 2010; Pomeranz, William E. "Uneasy Partners: Russia and the European Court of Human Rights." *Hum. Rts. Brief* 19 (2011): 17.

⁷ Michael Holden and Sam Tobin *UK's Sunak suffers major blow as Rwanda migrant scheme is declared unlawful*, 15 November 2023 Accessible at <https://www.reuters.com/world/uk/uk-sunak-learn-fate-rwandan-migrant-deportation-plan-2023> Reuters

Executive Council decision 1015,⁸ and the decision of the African Commission to deny observer status to three human rights organisations because the African Charter does not include protections based on sexual orientation,⁹ are examples of distortion of human rights, delegitimisation and undermining of international legal frameworks for the protection of human rights, human rights defenders and our human rights frameworks as a whole.

Thus, when engaging with reform processes that have implications for human rights mechanisms, CSOs should develop strategies and define priority areas for intervention based on a consciousness of this context.

⁸ Decision by the Executive Council of the African Union on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR). Doc.EX.CL/1015(XXXII).

⁹ ACHPR Final Communiqué of its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022.

2. CASE STUDY 1: UN HUMAN RIGHTS COUNCIL

The Human Rights Council is the main intergovernmental body within the United Nations responsible for human rights.¹⁰ It was established in 2006 by the General Assembly following a reform process that replaced the Commission for Human Rights, which was established in 1946. The HRC is responsible for strengthening the promotion and protection of human rights around the globe.¹¹

Although debates on reforming the United Nations and its human rights mechanisms have been ongoing throughout the first six decades of its existence, concrete reform processes were notably accelerated by the 2005 UN Secretary General report *In larger freedom*.¹² In this report Kofi Annan emphasized that human rights must be an integral part of the overall reform of the UN as a key pillar in line with the UN Charter. In seeking to resolve the often-competing interests of security, economics, development and human rights protection, Kofi Annan combined all three elements – security, development and human rights – in order to propose a comprehensive reform of the United Nations’ system.¹³ For example, any peace building commission or rule of law assistance unit should have a strong human rights component.

The Secretary-General proposed that the UN Commission of Human Rights (CHR/ the Commission) be transformed into a Human Rights Council (HRC/ the Council) seeking to give human rights a more authoritative position, next to security and development.¹⁴

For the human rights machinery, the reform proposal was to replace the CHR with a smaller and upgraded Council. Unlike the Commission, HRC was to be a sub-organ of the General Assembly and no longer a functional commission under ECOSOC.¹⁵ This was seen as an elevation in status, and there was a promise of the possibility

¹⁰ UN General Assembly Resolution 60/251 *Human Rights Council* adopted on 15 March 2006 at the Sixtieth session. UN Doc A/60/251, 3 Apr 2006. This resolution was adopted with a vote of 170 in favor, 4 against (Israel, Marshall Islands, Palau, and United States) and 3 abstentions (Belarus, Iran and Venezuela).

¹¹ Ibid, para 1-3.

¹² GA Rep 59/2005. *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, 21 Mar 2005. The Secretary General report was advancing from The High-level Panel on Threats, Challenges and Change addressed the Secretary-General, 2 Dec 2004 GA Rep 59/565. They proposals were also examined by the UN High Commissioner for Human Rights (UNHCHR) in her speeches to the CHR on 14 March 2005 and 22 April 2005, and in her 26 May 2005 report. The thread was picked up subsequently by the Outcome Document emanating from the World Summit held in September 2005 (United Nations 2005) in observance of sixty years of the United Nations.

¹³ Rathgeber, Theodor. *Reforming the UN Commission on Human Rights: Perspectives for Non-governmental Organisations*. Friedrich-Ebert-Stiftung, Geneva Office, 2005.

¹⁴ In *Larger Freedom* Report at n 12.

¹⁵ The CHR was established by the UN Economic and Social Council at its first meeting in 1947 and came to serve as one of its nine commissions.

of further elevation to the position of a principal organ (like the General Assembly and ECOSOC) after the five-year review. Perspectives on this elevation were mixed. While some saw this as the long-awaited recognition of the primacy of human rights within the UN, others saw it as an opportunity for the General Assembly to exercise more direct control over the HRC.¹⁶

2.1. UN HRC: Main Reasons and Underlying Drivers for Reform

There were genuine gaps and challenges that needed to be addressed in the Commission – overburdened agenda, unreasonably long resolutions to pass and operational issues.¹⁷ However, the main trigger for the reform was a buildup in the belief that the Commission has become politicised.¹⁸ This was no longer seen as a claim or perception, but as a fact. Thus, the main reasons for reform were concerns on selectivity, double standards and increased politicisation (political considerations far from human rights aspects) as well as crippling of the Commission's processes brought about by obstructive regional divisions.¹⁹

These obstructions made it difficult to adequately addressing serious human rights violations related to particular countries. In addition, some Member States had sought membership of the body not to strengthen human rights but to protect themselves from criticism.²⁰ Further, states were using procedural ploys to prevent debate on human rights concerns. The CHR political nature had become detrimental to its normative standard setting functions, making the body increasingly paralysed in addressing human rights violations around the world.

Most Non-Governmental Organisations (NGOs) shared the concerns that the Commission on Human Rights (CHR) which is the most prominent UN institution on human rights, lacked credibility and efficiency particularly seen from the viewpoint of victims suffering human rights violations.²¹ There were also concerns raised by the High Commissioner for Human Rights that the Commission had been slow to address grave abuses.

¹⁶ Murthy, C. S. R. "New phase in UN reforms: establishment of the Peacebuilding Commission and Human Rights Council." *International Studies* 44, no. 1 (2007): 39-56.

¹⁷ Hampson, Françoise J. "An overview of the reform of the UN human rights machinery." (2007): 7-27.

¹⁸ Ibid.

¹⁹ Murthy at n 16.

²⁰ Zifcak, Spencer M. "United Nations reform: Heading north or South?" *Global Change, Peace & Security* 18, no. 3 (2006): 135-152.

²¹ Rathgeber at n 13

Yet, there were observers who argued that the fact that the Commission is political, should not have been surprising at all. It was as obvious as the grass is green and the sky is blue since the Commission's work is largely composed of state representatives who engage in diplomatic negotiations.²² This is obviously political work. Hampton argues that there were underlying reasons driving the reform – for instance resistance to human rights machinery by states who had received specific resolutions targeted at their countries.

In addition, the reform was opportunistic, happening in the moments leading up to the sixtieth anniversary of the UN. Since there had been several failed reform processes in the UN before, most notably reforms regarding the composition of the UN security council²³, the UN Human Rights Machinery became the opportunity for the UN to show reform can happen at least somewhere. In this way the UN human rights machinery became the victim of the failure of reform elsewhere in the system.

2.2. UN HRC: The Reform Process

Civil Society's analysis of the reform process highlighted two main tendencies in process.²⁴ The first tendency was as a genuine effort to strengthen the CHR and its procedures in order to make it an effective instrument for the promotion and protection of human rights. The second tendency was one that sought to use the term 'reform' as pretext, to weaken the CHR and its mechanisms. The latter was prominently represented by the informal 'Like-Minded Group' (LMG) bloc with China as its speaker.²⁵ The LMG group approach was to present contributions for purposes of '*rationalization of work*'.²⁶ In this regard the Asian group developed a document which has become known as the 'Asian non-paper' containing proposals which tended to severely weaken the CHR role on human rights protection.²⁷ This discussion paper which was circulated in Geneva in late 2004 and contained 21 recommendations of the reform of Special Procedures in order to 'enhance' their effectiveness through providing rights to state parties and duties to the special mandates such as guidelines for performing their functions, a code of conduct,

²² Hampton at n 17.

²³

²⁴ Rathgeber at n 13.

²⁵ Ibid. The analysis shows that the LMG states include among others, Algeria, Cuba, China, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Pakistan, Sri Lanka, Sudan, Syria, Tanzania, Tunisia, Uganda and Zimbabwe.

²⁶ Rathgeber at n 13.

²⁷ Ibid. Asian Group *Enhancing the Effectiveness of the Special Mechanisms of the Commission on Human Rights* Discussion Paper 2004 Geneva and Peter N. Prove (2005); Threats, Challenges and Change: Prospects for the future of the UN Commission on Human Rights. German Yearbook on Human Rights, Berlin: DGVN in Rathgeber at n 13. Note: to confirm in empirical conversations source of these cross-references.

and criteria for admissibility of allegations before they are considered human rights violations.

The rationalization approach as a strategy was not new, it was similarly used as part of previous review projects. At the mid-term review of the 1993 Vienna Conference which established the Special Procedures within the CHR, the CHR adopted a decision to 'enhance the effectiveness' of the mechanisms of the CHR, which watered down the agreements made at the Vienna conference.²⁸ In addition, the CHR adopted a resolution entitled '*Restructuring the Agenda of the Commission on Human Rights*' and introduced the '*Rationalisation of the Work of the Commission*' as a separate agenda item.²⁹ One of the key elements of this rationalisation process was excising country specific resolutions from the mandate of the SubCommission on Human Rights.³⁰ Since 2000, the Sub-Commission could no longer adopt country specific resolutions nor mention a country in thematic resolutions. This contributed towards building a mood at the CHR what went to abolishing the so called 'naming and shaming' through country resolutions under Item 9 and to stop the scrutiny of states by the Special Procedures.³¹

For CSOs in Africa, it is imperative that our analysis of the current AU reform process is informed by a mapping of states, their positionality and underlying interests, whether individually or as part of a bloc, to inform the strategies for engagement. In addition, any proposals for rationalization of the human rights mechanisms must be scrutinized from the perspective of the users of the mechanisms, to assess what the intended outcomes of such proposals are. This assessment should go beyond top-down or 'system- centered' analysis to questioning the practical impact such proposals would have on the ground – in terms of victim's and rights holders access to protection and accountability systems to redress human rights violations.

In the HRC reform process a lot of state positions on the reform were unknown since correspondence was not made public, especially correspondence expressing skepticism of the reform process.³² The analysis by CSOs and academics was made possible through reviewing state positions drawn from statements made by states in an informal meeting on reform during the 61st session,³³ and from direct interviews with states during that session. CSOs mapped countries that supported transparent working processes for the mechanisms, better implementation and improved NGO

²⁸ Decision 1998/122

²⁹ Restructuring of the agenda of the Commission on Human Rights C.H.R. res. 1998/84, ESCOR Supp. (No. 3) at 279, U.N. Doc. E/CN.4/1998/84 (1998).

³⁰ Rathgeber at n 13.

³¹ Ibid.

³² Ibid at p 6.

³³ Report of the 61st session of the Commission on Human Rights (14 March-22 April 2005).

participation. These were Bulgaria, Cameroon, Canada, Côte d'Ivoire, Croatia, Iceland, Japan, Liechtenstein, Maldives, Norway, Republic of Korea, Senegal, Switzerland, Turkey, United States, New Zealand.³⁴ They also mapped countries that had explicitly negative comments to the proposed strengthened human rights council, which included Algeria, Bangladesh, Cuba, Egypt, Singapore, Tunisia and Zimbabwe.³⁵

Negotiations in the reform process were largely political and even substantive questions on merits or demerits of any reform proposals were discussed and interpreted within wider political contexts.³⁶ This reminds us that reform projects happen in the context of multiple competing demands and interests and CSOs in Africa should collaborate effectively across sectors, identify common issues and harmonise areas of intervention. Part of the reform process and review of the HRC seems to have been a transparent process with a website where all stakeholder contributions are published for public access.³⁷

The entire reform process seems to have been consultative at the international level at least,³⁸ however most of the CSO engagement occurred through statements developed by organisations individually and in various collectives and groupings.³⁹ The main concerns raised by CSOs were⁴⁰:

1. A general concern of the risk that the discussion on reforms may encourage those countries which would like to undermine the challenging system of human rights mechanisms, as the above mentioned 'Asian-Non-Paper' tends to be.
2. Access of NGOs to the new council. Although NGOs expected that the current standard of fully participating in the work would be maintained at the same level. The widespread participation of NGOs to even informal hearings was one of the strongholds of the CHR compared to other UN bodies. Given that the Council would no longer be subject to ECOSOC Rules of Procedure, clarity

³⁴ Rathgeber at 13.

³⁵ Ibid.

³⁶ Zifcak at n 20.

³⁷ See for example this website of the Human Rights Council review process <https://www.ohchr.org/en/hr-bodies/hrc/hrc-review#:~:text=When%20creating%20the%20Human%20Rights,level%20of%20the%20General%20Assembly>. NB: Question for further empirical verification

³⁸ For example, a space was created where some of NGOs' concerns were discussed in an informal interactive hearing organised by the UN General Assembly held with non-governmental organisations, civil society organisations and the private sector at United Nations Headquarters, 23-24 June 2005, in New York. NB: Need for empirical verification of the particulars of CSO engagement.

³⁹ See for example Joint statement on UN Reform, Amnesty International, Public Statement, AI Index: IOR 41/034/2005 (Public), News Service No 089, 12 Apr 2005; Joint statements by CONGO (Conference of NGOs in consultative status with the UN, a Geneva based network of NGOs); and Statement by South Asia Human Rights Documentation Centre 2005.

⁴⁰ Rathgeber at n 13.

on processes was required to guarantee the space that NGOs enjoy at the present CHR.

3. Transparency in the operations of the HRC including ways for petitioners and NGOs to have information on
4. Concerns on the frequency of sessions of a standing Human Rights Council and whether CSOs especially from the global south would have resources to participate in the sessions in Geneva.
5. That the problem of the 'politicisation' of CHR would not likely be resolved if the Council would continue to be directly subject to exclusive political management by States under the General Assembly.
6. Whether the existence of the UN Sub-Commission on human rights providing independent expertise would be maintained.
7. The lack of coherence in reform where the relationship with the UN system as a whole like the treaty bodies is not considered as a holistic approach in order to avoid competition or duplication.
8. The need to evaluate and follow up the implementation of decisions and recommend- dations from Special Procedures, the council itself and treaty bodies

In a personal reflective paper, Hampson – a member of the former CHR Sub-commission on human rights – argued that although there were genuine reasons for reform, by allowing the whole Commission to be called into question, the reform process created a situation where states which intentionally wished to reduce scrutiny of human rights situations in their countries to make proposals to weaken the mechanism. She states: *“There is no presumption in favour of the status quo. This means that, now, maintaining the status quo will be a real triumph, It would be hard to think of a better example of shooting oneself in the foot.”*⁴¹

2.3. Outcome of the HRC Reform Process

This reform process was considered remarkable because it resulted in the complete replacement of an existing organ. Historically, previous UN reforms had entailed the addition of new bodies, or enlargement of existing bodies but not their abolition. In that sense, the establishment of HRC is unprecedented.⁴²

⁴¹ Hampson at n 17 p4.

⁴² Murthy at n 16

The outcomes of the reform focused on the size, matter of election of members and its working methods.⁴³ Not all things about the Commission were negative or done away with, the HRC drew on the Commission's system of special procedures, expert advisers and complaints procedure/the 1503 procedure.⁴⁴ The process resulted in adoption of GA resolution 60/251 which generally set out the future of the reform and handed over full responsibility to the newly set up Human Rights Council and set a timeline of 1 year for actualization of the details. This approach of moving the process of defining reform details from New York to Geneva resolved an underlying tension that had built up since the process started. This geographical concern arose when Diplomats in Geneva complained that major immersive human rights work happens in Geneva, yet the locus of the reform was initially happening in New York. Fortunately, the hand over process resolved this issue.

The Resolution established that the Council is to be composed of 47 members who cannot serve for more than two consecutive terms, and meet for not fewer than three sessions a year for a total duration of no less than 10 weeks. The Council was required to maintain a system of special procedures, expert advice and a complaint procedure, and create a system of universal periodic review.⁴⁵

In the of selection of members to the HRC, states were now required to take into account 'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'.⁴⁶

The HRC's functioning was expected to be 'transparent, fair and impartial' to promote a 'genuine dialogue' and a 'result-oriented' follow-up. It is to be guided by the principles of 'universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation' with a view to promoting and protecting all human rights, 'including the right to development'.⁴⁷

In the end, the size of HRC was not substantially different from the Commission. With 47-members, less than the previous 53 but more than the proposed 30.⁴⁸ This was due to a suspicion about smaller bodies, and the urge to reinforce the principle of universality and broad representation.

The members are 'elected directly and individually by secret ballot by the majority of the members' of the Assembly, instead of the two-third majority as was

⁴³ Ghana, Nazila. "I. From UN Commission on Human Rights to UN Human Rights Council: One step forward or two steps sideways?" *International & Comparative Law Quarterly* 55, no. 3 (2006): 695-705.

⁴⁴ Murthy n 16.

⁴⁵ UNGA Res. 60/251, 3 April 2006.

⁴⁶ Ibid para 8.

⁴⁷ UNGA Res. 60/251, 3 April 2006.

⁴⁸ Ibid.

recommended by the Secretary-General and supported by the United States and western countries.⁴⁹ Notably the tradition of allowing automatic representation to the five permanent members was removed. Members need to contest and get elected to serve on the HRC, if they conform to the eligibility criteria of membership. A member can be suspended from the membership of the Council by the Assembly by a two-third majority if such a member is found to be committing gross and systematic human rights violations. In terms of access to the Council, a provision was made for participation of non-members of HRC, specialized agencies, other inter-governmental organizations and national human rights institutions, as well as non-governmental organizations as observers.⁵⁰

As part of the reform process, the UNGA resolution 60/251 had an inbuilt periodic review mechanism. At the 5-year review of the mechanism, the outcome was meagre.⁵¹ Observers note that there was an over emphasis on the question of elevating the status of HRC as a principle organ of the UN, opposed to review of substantive or procedural questions of strengthening the mechanism.⁵² Yet, while the status of the HRC as a subsidiary body is indicative of the problem, it is not the root of the issue. The main problem is the lack of political will by states to prioritise human rights over political and economic interest. It is also the lack of political cost for states who continue to violate human rights, especially Council members. CSOs argued that instead of belaboring the question on status, 'we should use this (review) opportunity to ask how we can generate more political will, and how to ensure that human rights win in the balance of political, economic and security interests'.⁵³

One useful intervention by CSOs is that they developed a framework for review which called back the review process to be done in a way that goes to the mandate and substance of the Council.⁵⁴

Years after the reform process CSOs have noted valuable results from engaging with the HRC, including the value and relevance of the council in responding to human rights crises, creation of Commissions of Inquiry and fact-finding missions and positive engagement with thematic and country specific special rapporteurs.⁵⁵ The

⁴⁹ Ibid.

⁵⁰ Murthy n 16

⁵¹ Human Rights Council Sixteenth session, Organizational and procedural matters A/HRC/RES/16/21 General 12 April 2011. Review of the work and functioning of the Human Rights Council

⁵² International Service for Human Rights *HRC40 | Strengthening Human Rights Council needs political will, not bureaucratic review* 2019 accessed at <https://ishr.ch/latest-updates/hrc40-strengthening-human-rights-council-needs-political-will-not-bureaucratic-review/>

⁵³ Ibid.

⁵⁴ Joint NGO Proposal on the Structure for the 2011 Review of the Human Rights Council's Work and Functioning 6 may 2010 accessed at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/NGOProposalCouncilReviewProcessMay2010.pdf>

⁵⁵ Amnesty International, Human Rights Watch and the International Service for Human Rights 'Strengthening The UN Human

UPR has especially been found as a valuable tool for advancing and encouraging a wide range of human rights based on the process of flagging state obligations.⁵⁶ Despite these positive changes, there are still gaps including, the erosion of the council's credibility, when states responsible for gross human rights violations are elected as members despite the criteria that disallows this practice. There is still council's attacks on special procedures mandate holders; polarization, selectivity and politicization resulting in some countries with geopolitical sway escaping scrutiny for serious human rights violations⁵⁷; attempts by some states to limit CSOs participation; reprisals against human rights defenders engaging with the Council and UN mechanisms; lack of visibility of the council's work on the ground and challenges in implementation of the council's recommendations, resolutions and other outcomes.⁵⁸

The HRC Complaint Mechanism has remained mainly behind closed doors with gaps in transparency based on how confidentiality has been interpreted in this context.⁵⁹ Cases submitted are deliberated only between the HRC and states behind closed doors. In some instances when states refuse to engage constructively by seeking a normative solution, the HRC has the power to decide to make public the information on proceedings and the decisions taken.⁶⁰ This approach is rare and the large number of cases received are hardly finalised, and petitioners hardly get information concerning their pending matters, which makes it difficult for NGOs to be involved and to organise political pressure.

A critical reflection from experience after the 5-year review of the HRC reform is strengthening of a mechanism does not always require institutional challenges.⁶¹ Those who work with the mechanisms have found that incremental and practical improvements have achieved more than 'formal reform processes which are time and resource intensive.⁶²

Over a decade after the reform, CSOs have continued to organise and strategies

Rights Council From The Ground Up Report of a one-day dialogue, held on 22 February 2018, hosted by The Permanent Mission of Canada to the UN Geneva, and co-sponsored by permanent missions of Uruguay and United Kingdom. Report accessed at <https://www.amnesty.org/en/documents/ior40/8262/2018/en/>

⁵⁶ Rathgeber, Theodor. "Performance and challenges of the UN Human Rights Council." (2013).

⁵⁷ Ghana n 43.

⁵⁸ Amnesty International et al n 55.

⁵⁹ Rathgeber 2013 n 56; Hampson n 17.

⁶⁰ For instance, in 2012 the council decided, for the first time, to transfer the confidential complaint against the government of Eritrea to a public procedure and to establish the mandate of a Special Rapporteur to follow up, although the government of Eritrea denied any such need. The country mandate was introduced by Djibouti, Nigeria and Somalia. See Human Rights Council Twentieth session, Agenda item 4, Human rights situations that require the Council's attention (A/HRC/RES/20/20).

⁶¹ International Service for Human Rights n 52.

⁶² Ibid; Amnesty International et al n 55.

on better ways to strengthen the mechanism. For instance, in a 2018 collective dialogue between ally states and NGOs who use the HRC mechanism to discuss *'Strengthening the Human Rights Council from the Ground Up'* four main issues were identified as key to work on, that is, credibility, visibility, accessibility as well as effective response to human rights violations and accountability and actionable recommendations were proposed.⁶³

2.4. UN HRC: Summary of Lessons Learnt, Best Practices and Recommendations

1. There is need to have a long-term strategy to engagement with reforms that have implications to human rights mechanisms. Reform processes are contentious and lengthy and there is value in remaining engaged through viewing reform processes as part of broader ongoing interventions to strengthen human rights mechanisms.
2. Contextual analysis is key in the process of engaging multi-national reforms. Even in instances where reforms are needed, the reasons why the reform process is embarked upon may have nothing to do with improving human rights machinery. Recognising that the context in which reform negotiations are being conducted is not conducive to improving the protection of human rights, enables CSOs to organise and engage in a relevant way.
3. Reform of a multi-national system should be considered holistically. For instance, in the case of the HRC reform, the debates on reforming the treaty monitoring bodies⁶⁴ were not included as part of the process, or at least, as something that should be linked-in at some stages of the reform thinking. The disconnect makes it difficult for what emerges after a reform process to be a coherent whole.
4. The benchmark for reforms is that nothing should be done to harm the existing protection of human rights (not the existing machinery but the existing protection) and that, if possible, any proposals for reform should represent progress.⁶⁵
5. Any proposals for must be practical. There is no value in making recommendations that are not realistically achievable, even if they are ideal. e.g., if the

⁶³ Ibid.

⁶⁴ Schmidt, Markus G. "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform." *International & Comparative Law Quarterly* 41, no. 3 (1992): 645-659; Morijn, John. "Reforming United Nations Human Rights Treaty Monitoring Reform." *Netherlands International Law Review* 58, no. 3 (2011): 295-333.

⁶⁵ Hampson n 17

reforms would require a 10-fold increase in budget, or an amendment to a contentious provision of an international instrument which would never be forthcoming. However, proposals for reform should not always be bound within existing budgetary constraints. A case should be made with justifications where reasonable increases are necessary.

6. Incremental and practical improvements over time can achieve as much as more formal reform processes, which are more time consuming and resource intensive.
7. Institutional reform processes can result in a less rather than more effective and accessible mechanism, especially in the context of discussions on 'efficiency', which may prioritise neoliberal models of analysis that de-center the lived realities of rights holders and victims of human rights violations.
8. To be credible any reform or review for the 'strengthening' of any human rights mechanism, should focus primarily on enhancing its promotion and protection of human rights- i.e., its human rights impact on the ground .
9. CSOs engagement with the reform process should include articulation of specific interests and issues that they would like to see in the strengthening process across the entire reform process, beyond the aspect of strengthening CSO participation.
10. CSO engagement with reform processes can help in defining the principles that should guide reform and review processes, for example, CSOs engaging with the HRC reform noted:⁶⁶
 - a) The effectiveness of mechanisms should be measured against their mandate, and not in a vacuum. For example, for the UN HRC the mandate includes "promoting universal respect for the protection of all human rights and fundamental freedoms for all without distinction of any kind, and in a fair and equal manner", "addressing situations of violations of human rights including gross and systemic violations" and "promoting the effective coordination and mainstreaming of human rights within the UN system".
 - b) Measures to strengthen human rights efficiency should not be separated from efforts to enhance its effectiveness. This requires an approach that centers right's holders, victims of human rights violations, users of the human rights mechanisms.
 - c) To be credible, any discussions on 'strengthening' or 'reforming' the

⁶⁶ Amnesty International et al n 55.

system (including those of “efficiency” measures) should be fully inclusive of key stakeholders . Without this the process is unlikely to result in a mechanism that is fit for purpose.

- d) No reform should be adopted that would unduly limit or disadvantage civil society and human rights defenders from effective participation with human rights machinery.

3. CASE STUDY 2: COUNCIL OF EUROPE REFORMS: A FOCUS ON THE EUROPEAN COURT'S INTERLAKEN PROCESS

Although this case study focuses on the ECHR reform process, a brief background to clarify how the Court and the Council of Europe (CoE) is situated differently from the European Union (EU) may be useful for CSOs seeking to use this comparative analysis to inform their strategies for engaging with the AU reforms.

The EU is a supra-national institution composed of 27 European member states with more focus on political and economic integration processes.⁶⁷ The CoE is an International organisation, based in Strasbourg, created in 1949 and now includes 46 European countries.⁶⁸ All members states to the CoE are party to the European Convention on Human Rights(ECHR) and it is thus the home for the Convention and the ECtHR.

The EU itself has been subject to multiple reform processes since the 1957 Rome Treaty which established the European Economic Community, to the 1992 Maastricht Treaty establishing EU integration with a focus on strengthening mainly foreign & security policies, to the 2007 Treaty of Lisbon, which is sometimes referred to as the "Reform Treaty". Human rights was not part of the conceptualisation of the EU originally. However, this latest Treaty of Lisbon (among other changes) made the EU Charter of Rights(which is modelled after the ECHR) legally binding. It also established the legal personality of the EU enabling it to the ECHR and other CoE conventions. Despite this progress, it is important to note differences between the EU and AU. The EU is a supranational body that primarily focusses on economic integration/single market, labour, free movement, common currency, security, foreign policies where human rights are periphery and it operates in ways that EU laws have supremacy in light of domestic laws. The AU of the other hand is an intergovernmental body which places key importance on sovereignty & interdependence, democratic governance, peace and security, economic development, and human rights. Promotion and protection of human rights is central to the AU objectives.⁶⁹

⁶⁷ https://european-union.europa.eu/index_en

⁶⁸ <https://www.coe.int/en/web/portal/european-union>

⁶⁹ Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000

A key difference in the context of these two regions is that while Europe has two separate multi-governmental systems – one dealing more directly with political, security and economic integration as a supra-national body (the EU),⁷⁰ while another is entirely focused on human rights since it is an inter-governmental body built directly around the Convention of Human Rights (the CoE), in Africa all these functions are held within the AU. There is no parallel regional body that specifically brings together state parties to the African Charter of Human and people's rights as the CoE does. This context is important when thinking through implications of broader regional reform processes to human rights mechanisms, especially where competing interests are often weighted leading to human rights being de-centred.

In the 2017 AU report adopting the 2016 Kagame report,⁷¹ an analysis of comparative analysis called 'External benchmarks' was presented. This analysis was done internally by the AU to understand what best practices may apply to the African Union in the reform process. The regional bodies selected as having "themes which closely mirror the AU"⁷² focus on ideological priorities that hardly include human rights, and only include political and economic indicators. One of the examples given UNASUR has been described by those who work in the Inter-American system as a sub-regional grouping that works to delegitimize their regional human rights system, as discussed further below in case study 3. While one may appreciate the decolonial intention to find examples from the global south for closer comparability, the examples given rather closely mirror the EU than the AU.

It is concerning that these regional bodies are listed as positive examples in the context of defining 'strategic priorities' for the AU. The de-prioritization of human rights when considering priority areas for the AU go contrary to the Constitutive Act.⁷³ This reform recommendation to narrow down the work of the AU towards political and economic ideologies is provided in response to the challenge of fragmentation because the Union works on many areas, covering 'many topics from peace and security to rural economy and agriculture, to women and gender development.'⁷⁴ This is a flawed analysis because human rights are not only cross-cutting and indivisible from questions of economics, development, security and politics, but they are fundamental to the realization of these other goals.

⁷⁰ Bogdandy, A. von. "The European union as a human rights organization." *Human rights and the core of the European Union* 37 (2000): 1308.

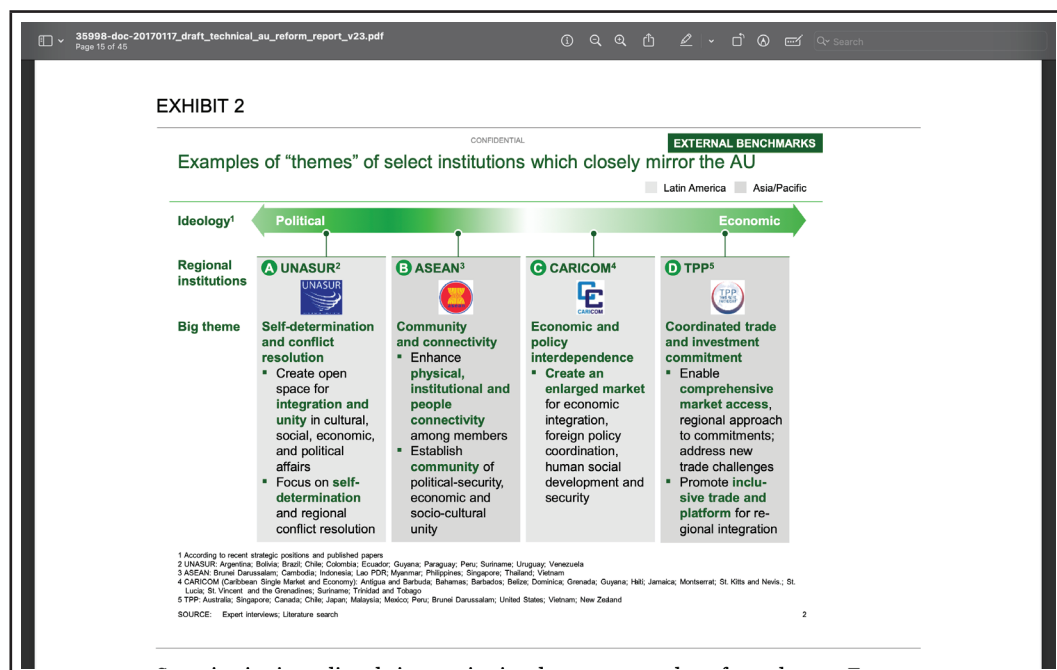
⁷¹ African Union Building A More Relevant African Union January 2017.

⁷² Ibid at p 13

⁷³ Constitutive Act of the African Union art 3.

⁷⁴ AU Building a more relevant AU n 71 at p12.

The AU external benchmarks are illustrated below:



3.1. The ECtHR Reform Process

Since 1959 member states of the CoE have adopted several Protocols to strengthen its supervisory human rights mechanisms.⁷⁵ One of the major institutional reform processes was in 1998 was the merger of the Commission and Court, and replacement by one single full-time Court.⁷⁶ Prior to the merger the Commission played a basic filtering function for the court, which involved considering the admissibility of petitions, establishing the facts, promoting friendly settlements and, if appropriate, to give an opinion as to whether or not the petitions reveal a violation of the Convention.⁷⁷ The overall procedure was too long taking up to 10 years sometimes and often work done by the Commission was repeated by the Court.⁷⁸

The main reason for this structural reform was due to a significant growth in the number of complaints being lodged with the Commission (which had increased from 404 to 2037 in around 10 years). There was also a significant increase new

⁷⁵ ECtHR History of the ECHR's Reforms accessed at <https://www.echr.coe.int/reform-of-the-court>

⁷⁶ CoE Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994

⁷⁷ Explanatory Report – ETS 155 – Human Rights (Protocol No. 11)

⁷⁸ Bernhardt, Rudolf. "Reform of the control machinery under the European Convention on Human Rights: Protocol no. 11." *American Journal of International Law* 89, no. 1 (1995): 145-154.

States joining the CoE system as parties to the ECHR, which had tripled. There was a rising backlog in the Commission's cases and a significant increase in the number of cases being referred from the Commission to the Court, from under 25 before 1988 to 93 in 1991 which is about triple in three years. The reforms were to shorten the length of proceedings, avoid delays and strengthen the judicial elements of the system.

The process was contentious, and several options were deliberated including a two-tier system where the Court would function as an appellate body for the Commission. The reform process was spearheaded by the Steering Committee for Human Rights, an inter-governmental body of that provides legal expertise to the CoE Committee of Ministers in the field of human rights.⁷⁹ Once the decision to merge was taken, it was clear that the fundamental character of the reform of the control mechanism necessitates approval by all States Parties to the Convention. Therefore, Protocol No. 11 was conceived as an *amending* protocol rather than an *optional* protocol, in respect of which all States Parties must express their consent to be bound in order for it to enter into force.⁸⁰ This Protocol also excluded the making of any reservations. The Protocol was opened for signature in May 1994 and entered into force in November 1998.

As soon as Protocol 11 on the merger entered into force, it was clear that it would generate problems due to the expanded scope of a single mechanism.⁸¹ Contrary to the belief that the merger would be the answer to all problems in the system, another reform process was started, sometimes called the "the reform of the reform"⁸² to respond to the challenges of considerable increase in the number of applications and the Court's backlog. The reform led to the adoption of Protocol No. 14 in 2010 which introduced new judicial formations for the simplest cases. It established a single-judge formation, committees, Chambers and Grand Chambers and a new admissibility criterion (existence of a "significant disadvantage" for the applicant). It also extended the judges' term of office to 9 years (not renewable).⁸³ Both protocol 14, like Protocol 11 before it delayed in ratification by the time it came into force, the Court's backlog had grown so much that the rationalisations they offered were not going to be sufficient to deal with the problem.⁸⁴

⁷⁹ Steering Committee For Human Rights (CDDH) Terms of Reference and the DH-SYSC (2024-2027) accessed at <https://rm.coe.int/mandat-cddh-2024-2027-en/1680adcb0e>

⁸⁰ Explanatory Report Protocol 11.

⁸¹ Caflisch, Lucius. "The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond." *Human Rights Law Review* 6, no. 2 (2006): 403-415.

⁸² Ibid at p 406

⁸³ Protocol No. 14 To The Convention For The Protection Of Human Rights And Fundamental Freedoms, Amending The Control System Of The Convention, CETS No. 194.

⁸⁴ Molbæk-Steensig, Helga. "The Copenhagen Declaration: Wrapping up the Interlaken Reform?" In *Theory and Practice of the European Convention on Human Rights*, pp. 55-78. Nomos Verlagsgesellschaft mbH & Co. KG, 2021.

3.2. Interlaken Reform Reasons, Drivers and the Process

The above context is what paved way for the Interlaken Reform Process undertaken over 10 years, named after the first high level conference (in a series of four) held at Interlaken, Switzerland in 2010.⁸⁵

The main reason for the reform was to resolve the challenge of backlog and insufficient capacity of the Court to deliver judgements as fast as the applications came in.⁸⁶ By 2010 the backlog had reached over 100,000 cases.⁸⁷ This was no longer just an issue of procedural delays, the legitimacy of the court was in question, especially its inability to respond to urgent matters. Molbæk-Steensig argues that cases took so long the court itself would have been found in violation of article 6 of the Convention on the right to a fair trial, if it were a state.⁸⁸ The case load was unsustainable and the future of the Court was in jeopardy.⁸⁹ Questions of the need for a larger budget to deal with the larger case load and the need for a case filtering mechanism were raised.

Although the main issue in this reform was backlog, the President of the court at the time went on to propose other wide-ranging issues on how states can take more ownership of the Convention, including⁹⁰; a proposal that Court decisions should be binding on parties to a matter as well as all member states; that citizens should be allowed to invoke the Convention before domestic courts who would then adjudicate on the basis of the Court's jurisprudence which would in-turn increase compliance with the subsidiarity principle; the need for states to take practical measures to implement the Convention rights at the national level as well as speedily implement and execute the Courts decisions. The arguments were that these issues are interconnected and that they would reduce backlog by leading to the reduction of cases.

Altogether the Interlaken processes involved five High Level Conferences, and the main output of the reform process were the five Declarations emerging from these

⁸⁵ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration 19 February 2010 accessed at https://www.echr.coe.int/documents/d/echr/2010_Interlaken_FinalDeclaration_ENG

⁸⁶ Ibid.

⁸⁷ Council of Europe *The Interlaken Process* Measures taken from 2010 to 2019 to secure the effective implementation of the European Convention on Human Rights accessed at <https://rm.coe.int/processus-interlaken-eng/1680a059c7#:~:text=The%20Interlaken%20Process%2C%20steered%20by,of%20well%2Destablished%20case%20law.>

⁸⁸ Molbæk-Steensig n 84.

⁸⁹ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration 19 February 2010.

⁹⁰ Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference (2009), para.4.

conferences undertaken by the respective Chairmanships of the Committee of Ministers including⁹¹;

1. Interlaken (Switzerland) in 2010
2. Izmir (Turkey) in 2011
3. Brighton (United Kingdom) in 2012
4. Brussels (Belgium) in 2015
5. Copenhagen (Denmark) in 2018

These Declarations made visible the political positions throughout the reform since they were the official mouthpiece of Member States. An analysis of these Declarations reveals the interplay between the political and the judicial tensions in terms of how such reforms can impact both human rights machinery and human rights protection. The initial Interlaken Declaration was hardly controversial and it focused on developing an action plan and road map which contained clear tasks for Member States and for the Court. Some of the key issues raised through the other declarations include:

1. The development of an advisory mechanism. This was later addressed through adoption of Protocol No. 16 to the Convention which allows the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
2. Issues of interim measures and how they get affected in the context of backlog, that the Court should not become a fourth-instance court or an immigration appeals tribunal.
3. Issues relating to processing of applications, and how rules could be revised to deal with backlog and insufficient capacity. Key here was the questions under Protocol 15 which proposed reduction of the timelines allowable for applications to be filed after the final national decision from six months to four months.
4. National implementation and execution of judgments.
5. The pilot judgment procedure –which required that in order to lower case load, cases which have the same structural problem could be bundled together.

⁹¹ All declarations can be accessed at the Interlaken Reform Website <https://www.echr.coe.int/reform-of-the-court>

6. Establishment and clarification of the role of National Human Rights Institutions
7. Dialogue between domestic authorities and the Court
8. Budget implications for reduction of the caseload.
9. Clarity and consistency of the Court's interpretations
10. The selection and election of judges of the highest quality
11. The accession of the EU to the Convention to avoid the existence of contradictory jurisprudence between the EU Court of Justice and the CoE Court of Human Rights.

A major issue that arose in the reform process was conceptualisation of the principle of subsidiarity, and its meaning relative to principle of margin of appreciation. This issue became an avenue that was used to delegitimize the Court.

The Brighton Declaration contained a critique of the judges and judgments of the Court and provided detailed suggestions for how the Court should apply the principle of subsidiarity. The conceptualisation of subsidiarity propagated here was mainly as a *right for States*, using the 'the better-placed argument' pointing to the notion of sovereign democratic mandate. The Brussels Declaration also weighed in on the issue of subsidiarity but it conceptualised subsidiarity as a *duty for states* to ensure protection of rights in their jurisdictions and to provide remedy for human rights violations.

The Copenhagen Declaration was the most contentious one. It took the meaning of subsidiarity from the Brighton Declaration as a right for states and linked it with statements challenging the independence of the Court.⁹² The framing was that rights are 'secured and determined' at the national level and should be "protected predominantly" at national level "in accordance with their constitutional traditions and in light of national circumstances", contrary to the universality of human rights. The Court was directed to engage with asylum and immigration matters only in 'exceptional circumstances.' It directly asked the Court to develop its jurisprudence in particular ways - in a 'careful and balanced manner', apply a more "robust" application of the principles of subsidiarity and the margin of appreciation. There were calls for more direct dialogue between the court and the state parties, and statements that the Court's interpretation of the Convention rights is conditional on the general agreement of State Parties and other stakeholders, which insinuated the need for alignment between the court to policy organs.

⁹² Draft Copenhagen Declaration 2018 available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf

Analysis by academics showed that the regressive positions in the Brighton and Copenhagen declarations were fuelled by UK and Denmark's far right political visions to delegitimise the regional human rights mechanisms.⁹³

CSOs intervention was critical in responding to these attempts to weaken the human rights mechanism.⁹⁴ CSOs challenged proposals for 'dialogue' between the Court and State Parties. They highlighted that this would risks undermining independence of the Court and breeding ground for political pressure. That engagement should be kept to engaging in legal proceedings. They called for a specific section of the final declaration affirming the need to respect and protect the independence of the Court and raised concern with the emphasis on subsidiarity and the interpretations given to it. They also raised concern with use of language like 'State Parties and their populations' which may be used to claim that interpretation of Convention rights should be based on majority views. They clarified that subsidiarity is not about challenging the authority of the Court to scrutinise state compliance with the convention or about allocation of jurisdiction on Convention rights between State Parties and the Court. They argued that subsidiarity is about the respective responsibilities of State Parties to implement rights and the mandate of the Court to supervise this implementation, in relation to the entire range of Convention rights.

CSOs pushed back on the wide application of 'margin of appreciation' principle, and the idea that rights are 'determined' at national level in ways that can be contrary to the Convention. They also called out the inappropriateness of singling out a thematic area that the court should not touch - asylum and Immigration - which tampers with the independence of the court. CSOs also called for more and better emphasise the importance of execution of judgments, and its close links with national implementation.

The Court itself responded to these challenges and reiterated the division of power and responsibilities in the Convention system and the importance of judicial independence.⁹⁵ The Parliamentary Assembly of the Council of Europe(PACE) also responded to challenge the politicisation of the issue of subsidiarity and argued that '[t]hrough repeatedly highlighting one aspect of subsidiarity, the Draft Declaration gives the impression that the Court's role should be essentially deferential, or

⁹³ Molbæk-Steensig n 84. For instance, backlash from a 2006 decision on *Sørensen and Rasmussen v Denmark* (applications nos. 52562/99 and 52620/99) on freedom from being compelled to join exclusive trade unions under article 11

⁹⁴ See Joint statements by Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre, the International Commission of Jurists, Interights, Justice and Liberty, *Council Of Europe: Comments On Follow-Up Of The Interlaken Declaration*. December 2010; The AIRE Centre, Amnesty International, the European Human Rights Advocacy Centre, the European Implementation Network, Fair Trials, the International Commission of Jurists, Open Society Justice Initiative and the World Organisation Against Torture (OMCT), Joint NGO Response to the Draft Copenhagen Declaration, 13 February 2018.

⁹⁵ ECtHR, Opinion on the draft Copenhagen Declaration. Adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018, 2018,

even subordinate to that of national authorities. PACE also directly warned that the Copenhagen Draft's reference to national considerations could harm the universality of human rights.⁹⁶

Another useful tool that brought interpretive clarity on the question of subsidiarity in the reform process is the *juris consult* role, which provided a comprehensive expert paper or note on the conceptualisation of principle of subsidiarity and the margin of appreciation in the follow up to Interlaken.⁹⁷ This was useful in addressing any efforts to misconstrue such judicial interpretation tools.

From the beginning of the reform process CSO involvement and consultation was embedded as a priority of the process in the Interlaken Declaration.⁹⁸ Access to information about the reform also seems to have been good enough given the reform website on the Court's reform.⁹⁹ However, it is important to note that Draft Declarations were not always available. In fact, stakeholders were only able to engage meaningfully with the Brighton Declaration when it was leaked, published by *The Guardian*. It has since been withdrawn from the internet.

The reform process had a review mechanism to track progress through the Steering Committee for Human Rights. This Committee conducted a mid-term review of the reform and end-term review to assess whether the reform had resulted in developing effective solutions to the challenges leading to the reform.¹⁰⁰ The Court itself also published consistent periodic reports on the reform and how it was affecting its functionality and ability to be effective and sustainable.

3.3. Outcomes of the Interlaken Reform Process

Throughout the reform, there was a reduction in backlog despite new applications being filed within the 10 years. By the time the Copenhagen Declaration was adopted, the backlog was less than half the size it was in the worst year 2011, although the number of cases pending before a judicial formation was still a

⁹⁶ PACE, Declaration on the Draft Copenhagen Declaration on the European Human Rights system in the future Europe, 16 March 2018, AS/Per (2018) 03, para. 5.

⁹⁷ ECtHR *Principle of Subsidiarity*, Note by the Jurisconsult in follow up to Interlaken, 2010.

⁹⁸ Interlaken CSO engagement.

⁹⁹ Available at <https://www.echr.coe.int/reform-of-the-court>. It is unclear when the website went up. NB Transparency of the reform process to be confirmed empirically.

¹⁰⁰ Steering Committee for Human Rights Contribution of the CDDH to the evaluation provided for by the Interlaken Declaration adopted by the CDDH at its 92nd meeting (26-29 November 2019), R92Addendum2; The longer-term future of the system of the European Convention on Human Rights (2015). The Steering Committee for Human Rights (CDDH), CDDH(2015)R84 Addendum I.

worryingly high at 56,350.¹⁰¹ This diminishing of cases throughout the reform, is mostly attributed to Protocol 14 for instance through enabling a single judge to process clearly inadmissible cases. What the reform process helped on this aspect is the establishment of a filtering section in the registry which took on the heavy load of processing inadmissible cases speedily.

The Interlaken process intensified dialogue between different actors in the Convention system.¹⁰² In the course of the reform States introduced numerous domestic remedies addressing breaches of the Convention, notably compensatory remedies for excessive length of judicial proceedings or for the non-enforcement of domestic court decisions¹⁰³ and NHRI were established in majority of the states.¹⁰⁴ The reform also resulted in development of manuals and toolkits for instance the Committee of Ministers launched a Toolkit to inform public officials about the State's obligations under the European Convention on Human Rights, prepared by the CDDH.¹⁰⁵

The reform brought expansion in how information is made available to applicants on the scope of the protection provided by the Convention. The Court updated and considerably expanded the information in these respects on dedicated web pages for applicants. The process of supervising execution of judgements was strengthened through development of new working methods in 2011, increased prioritization in the process of supervising implementation; speedier publication of documents increased transparency and access to information. There were some changes to rules of procedure directly from the Interlaken process, for instance rules on filtering applications introduced a stricter approach in interpreting a valid application as one where all fields are completed.

On resourcing the court, the process resulted in improving working methods of the Court registry in management of budget and human resources; the court received extra additional support in the form of secondment of judges and legal experts; a special account was created for the court and a fund for additional lawyers to support cases. On selection and appointment of judges Guidelines were adopted on the selection of candidates for the post of judge 2012 and it was updated in 2014.¹⁰⁶ It also established an Advisory Panel of Experts on Candidates for Election.¹⁰⁷

¹⁰¹ Molbæk-Steensig 84

¹⁰² CDDH 2019 Evaluation Report n 100

¹⁰³ Ibid para 42

¹⁰⁴ Ibid para 61

¹⁰⁵ Available at: <https://www.coe.int/en/web/echr-toolkit>.

¹⁰⁶ See the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights of 29 March 2012, as updated on 26 November 2014.

¹⁰⁷ CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the Europe-

Two Protocols were adopted by the CoE through the reforms. Protocol 15 introduced changes to the Convention by shortened the time limit within which an application must be launched after a final national decision from six to four months, and Protocol 16 which extended the jurisdiction of the Court to give advisory opinions to national courts. Although these Protocols do not directly address the issues of unsustainable case load and backlog, could be seen as indirectly recusing backlog over time.

The reform provided platforms for in-depth detailed discussions of key issues which led to innovative solutions. For example, there were detailed discussions on pilot judgement procedure – which requires that in order to lower case load, cases which have the same structural problem could be bundled together –especially their execution. As a result of these discussions, in 2014 the Court put in place the so-called WECL (well-established case-law) procedure, backed up by an advanced IT workflow system, which enables it to deal with these applications in a simplified and rapid manner.

At the end of the reform process most of the CSOs concerns were taken into account and the final Declaration had removed the issues challenging the independence and legitimacy of the Court. In 2020 the Committee of Ministers adopted decision 130/4 which was progressive in the way it addressed issues of subsidiarity, execution of decisions, independence, and resources needed by the Court to be effective.¹⁰⁸ In the end the 2019 expert report by the Steering Committee for Human Rights largely impacted the decision 130/4 of 2020. On the issue of backlog some believe that the process did not deliver what the court needed to deal with high case load and backlog.¹⁰⁹

The extensive debates on the principle of subsidiarity and how it should be applied in the convention system hijacked the reform process which deviated from focusing on restructuring the Court or increasing its budget, or other operation issues to which were the main reasons for the reform.

The Interlaken reform not only had a fixed timeline, but it was a long-term reform process by design. The first declaration designed the road map as an action-based reform process, that focused on active implementation of Protocol 14 and any other agreed proposals in the course of the Interlaken Process. The intention was that at the end of the 10 years the Committee of Ministers was to decide whether

an Court of Human Rights of 10 November 2010; and for further information on the functioning of the Panel <https://www.coe.int/en/web/dlapil/advisory-panel>

¹⁰⁸ CoE Committee of Ministers, *130th Session of the Committee of Ministers* (Videoconference, Athens, 4 November 2020). 4. Securing the long-term effectiveness of the system of the European Convention on Human Rights, CM/Del/Dec(2020)130/4.

¹⁰⁹ PACE, Copenhagen Declaration, appreciation and follow-up, 24 April 2018, Doc. 14539, para. 4.

these measures would have been sufficient to assure a sustainable functioning of the control and oversight mechanism for the Convention or whether more radical and profound changes are necessary.¹¹⁰ In 2020, at the recommendation of the Steering Committee for Human Rights, the Committee of Ministers decided that no new major changes of the system are needed. What appeared important is rather to allow the Convention system as it has emerged from the Interlaken process and Protocol No. 14, provided with sufficient resources which the States Parties have committed themselves to provide, to demonstrate fully its potential.

3.4. Interlaken Reform: Summary of Lessons Learnt, Best Practices and Emerging Recommendations

1. Reform processes do not happen in a vacuum. There are usually other external but interlinked processes that may be happening parallel to the formal reform process. It is important to draw linkages between these other 'external' processes and the reform in order to have coherent outcome for the system. Note the Protocols adopted, changes to rules of procedure and amendments to the Convention as a result of the Interlaken Reform.
2. There is great value when the different organs of a multi-governmental system engage substantively with reform processes. Judicial and quasi-judicial bodies, Parliamentary bodies and specialized committees, such as the way in which the Steering Committee for Human Rights engaged in this case study. This is especially important because as other stakeholders such as CSOs engage to call out issues that contradict protection and promotion of human rights, statements from these other bodies can mirror the concerns to create needed pressure, even though they may be articulated differently. The interplay of the Steering Committee for Human Rights, PACE and the Court itself was useful in raising critical concerns about issues that sought to weaken the Court through reforms.
3. It is important to consider contextual analysis of political environments at the national levels and how these may fuel underlying drivers in the reform process, as was the case in Denmark leading up to the Copenhagen Declaration.
4. Reform processes and their implications can take a long time. Instead of stumbling into a protracted reform process, it may be useful to define a road map with clear actionable tasks for various bodies over a generous but fixed term, such as the 10-year Interlaken process.

¹¹⁰ See the Interlaken Declaration n 89 Implementation of the Action Plan, point 6.

5. It is critical to have a review mechanism within a reform process based on its substantive goals. The mid-review and end-review report developed by the Steering Committee For Human Rights under the Committee of Ministers was very useful in tracking exactly what the reform is achieving along the proposed road map.

4. CASE STUDY 3: THE INTER-AMERICAN SYSTEM 'STRENGTHENING' REFORM PROCESS

In June 2011, the Organisation of American States (OAS) initiated a process to strengthen the Inter-American Human Rights System with a focus on the Inter-American Commission of Human Rights (IACHR/the Commission). The General Assembly instructed the Permanent Council *"to deepen the process of reflection on the workings of the IACHR against the backdrop of the American Convention on Human Rights and its Statute, with a view to strengthening IAHRs and submitting its recommendations to the member states as soon as possible."*

The OAS Permanent Council established a Special Working Group to make recommendations. This was a 2-year process that was concluded in 2013. Many academics, CSOs and other stakeholders saw this as a process to weaken and undermine the system despite being named a 'strengthening' process.¹¹¹ For instance Ernesto de la Jara argues that although there were genuine reasons for reform, it was strange that this reform only targeted the Commission, and excluded the Court yet it is part of the human rights system, and even stranger that a more holistic OAS reform and reflective process was not being proposed yet, it has been clear for a long time that the OAS reform is overdue.¹¹²

To understand the reasons that led to this reform process, a contextual analysis of events leading up to the reform is important. There were two main triggers for the reform. However, these triggers happened as part of a context where there was always growing tension between member states and the organs of the Inter-American system. The triggers were simply detonators in a context where civic space was shrinking based on critics from states like Venezuela, Nicaragua and Bolivia.¹¹³

First trigger was that the Commission had issued a precautionary measure against Brazil to protect Indigenous populations living near the Belo Monte Dam construction in Brazil's Xingu River Basin. The Commission initially requested Brazil to halt the construction of the hydroelectric plant.¹¹⁴ Brazil was furious, it recalled its ambassador to the OAS and formally announced its decision not to present a Brazilian candidate to the Commission, and suspended its financial contributions to the Commission

¹¹¹ Aportes DPLF The Reform of the Inter-American Commission on Human Rights Number 19, year 7, April 2014.

¹¹² Ernesto de la Jara 'A New IACHR for a New Context' in Aportes DPLF *The Reform of the Inter-American Commission on Human Rights* Number 19, year 7, April 2014 at 28.

¹¹³ Angelita and san-diago/ DPLF

¹¹⁴ Brazil's Xingu River Basin case

and the OAS as a whole.¹¹⁵ The animosity expressed by Brazil found reception in States that had been uncomfortable with the Commission's performance for years, such as Venezuela, Colombia, Ecuador and Nicaragua.¹¹⁶ These states among others started to question the efficiency and legitimacy of the entire system and more specifically, of the Commission. An opportunity was created where repressive states were emboldened.¹¹⁷

A second trigger was tension created from the question of who has power to appoint the Commission's Executive Secretary, is it the Commission or OAS secretary general?.¹¹⁸ In practice the Commission selected the candidate and the Secretary General appointed. Tension was growing because the rules were vague. The Executive Secretary, who was there at the time, had served since 2001 for about 11 years. His leadership and commitment to the Commission at the time had been instrumental in strengthening the mechanism. He was trying to propose the development of a detailed time-bound criteria, structure and transparent process for the appointment to this role. But tension rose from these proposals because they attempted to curtail political meddling in the appointment process.¹¹⁹

The reform process was initially supported mainly by Argentina, Brazil, Colombia, Ecuador, and Mexico. Behind every criticism of the Commission there was always a specific decision that the governments disliked, independently of their own particular ideology: a report after a visit, or a precautionary measure, a decision to refer a case to the IACtHR, or a press release of the Special Rapporteur on Freedom of Expression.¹²⁰

The subject focus of the reform was on issues that states were uncomfortable with including precautionary measures, the admissibility of petitions against states, the inclusion of certain states under section IV of the Commission's Annual report – the so called 'black-list' of countries that violate human rights in a systemic manner – and the independence of the Special Rapporteur on Freedom of Expression.¹²¹ There were also questions raised on whether the Commission should have a protection mandate or only focus on promotional activities, in light of the existence of the Court.

¹¹⁵ Santiago Canton and Angelita Baeyens 'Polishing the Crown Jewel of the Western Hemisphere The Inter-American Commission on Human Rights' in Sabatini, Christopher, ed. *Reclaiming Human Rights in a Changing World Order*. Rowman & Littlefield, 2022.

¹¹⁶ Contesse n 2.

¹¹⁷ Douglass Cassel 'The Perfect Storm: Count and Balance' in DPLF n 111.

¹¹⁸ DPLF n 111.

¹¹⁹ Interview with expert working in Inter American System 17th December 2023.

¹²⁰ Canton and Baeyens n 115.

¹²¹ Contesse n 2.

4.1. IACHR: The Reform Process

The reform process was highly transparent and consultative majorly due to the Commission itself taking initiative to shape the narrative of the reform process that targeted it. It was clear from the beginning that once the reform started it could not be stopped, therefore the Commission decided to take leadership. The Commission conducted broad consultations with a wide range of stakeholders. They also provided lengthy and constructive analysis of the recommendations, using tactful diplomacy, accepting some concessions while firmly maintaining its independence.

One of the main dilemmas in the reform process was whether the Commission's Statute would be re-opened "putting the Commission's future up for political grabs at an unpropitious time"¹²² or instead whether the Commission would make whatever reforms might be advisable by amending its own Rules of Procedure. To avert this main concern the Commission announced shortly after the process started that it would be revising its rules of procedure and invited wide stakeholder participation.

CSOs interventions in the reform was through statements, research and documentation of the process completing questionnaires where the Commission invited feedback on the reform processes and engaging within the forums organised as part of the consultation processes.¹²³

In 2012 a group of 90 CSOs submitted a statement and called for a more transparent process and made inputs. Later, International Coalition of Human Rights CSOs made submissions to the recommendations. CSO interventions focused on flagging issues that were omitted in the reform working group report, such as

1. Merit-based criteria and transparent procedures for electing members of the Commission and Court.
2. The need for States to adopt domestic laws and mechanisms to meet their human rights responsibilities.
3. The need for a mechanism to facilitate execution of judgments of the Court.
4. The need for a forum for open OAS debate to consider the most pressing human rights issues facing the hemisphere.

The Commission developed position papers, and responses to the proposals of the reform working group, not only to clarify the changes being proposed in the

¹²² Cassel n 117.

¹²³ Interview with expert n 119.

rules but discussing the reform in context of its mandate and the need to strengthen its independence and functionality generally. Submissions by CSOs were often reiterated by the Commission to strengthen its arguments.¹²⁴

The reform process saw separate groupings of state parties convening on the sidelines. There were separate meetings held by State parties to the American Convention on Human Rights, separate from OAS. While this could be seen as a progressive way for state to engage due to a shared human rights normative framework, much like the CoE in Europe, observers have noted that this was not the case because of how the meetings happened. The tight secrecy of the process raised doubt as to their true intent is to improve the system.¹²⁵

In addition, there were processes by the Union of South American Nations (UNASUR) for the creation of a new sub-regional mechanism at the same time that debates on the reform of the regional system was happening. UNASUR's efforts were viewed by some states and CSOs as the direct substitution of the inter-American human rights system by a new and different framework within UNASUR—or at the least, its indirect substitution through delegitimization.¹²⁶

Although there had been a genuine need for reform that had been called for over a decade by the Commission and CSOs to address pertinent substantive issues, mainly issues of universality, compliance, and budget increase, these concerns were never taken seriously by the OAS.¹²⁷ With the wrong drivers for reform, it was almost expected by some that at best, the reform would result in minor, symbolic changes.

4.2. IACHR: Outcomes of the Reform process

The reform resulted in changes to rules of procedure and the Constitutive act was not re-opened. In 2011 the Commission adopted an open, merit-based competition process for selecting the Executive secretary nominee, and thereafter forwards it to the Secretary General for appointment. The Working Group acquiesced to the new procedure.

¹²⁴ IACHR Submissions in relation to the Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American System for the Protection of Human Rights, 2012.

¹²⁵ Daniel Cerqueira 'The Conferences of States Parties to the American Convention on Human Rights: Form over Substance' in DPLF n 111.

¹²⁶ Gabriela Kletzel 'The Inter-American System in View of the New Regional Institutional Framework for Human Rights' in DPLF

¹²⁷ Cantón, Santiago A. "To Strengthen Human Rights, Change the OAS (Not the Commission)." *Hum. Rts. Brief* 20 (2012): 5.

On the issue of promotion vs. protection: The Commission neatly side-stepped this debate. It pledged to strengthen its promotional activities but pointed out that many of its protective activities, such as recommendations of guarantees of non-repetition, also serve a promotional function. On the issue of Country reports, while agreeing to refine the criteria and modalities for its annual country reports, the Commission declined to eliminate them, especially section IV. It also declined to undertake the mission impossible of drafting an annual report on every OAS Member State every year. The Commission pointed out that it does in fact report on all OAS countries through its petition system and thematic rapporteur ship.

On precautionary measures strict and detailed guidelines were adopted for when the Commission may grant precautionary measures, along with the duty to publish the opinions of all members of the Commission, especially *if* some of them disagree with the measures issued. On the issue of thematic rapporteurs, the Commission found a way to be even handed among the rapporteurs without diminishing the impact of the Special Rapporteurship for Freedom of Expression. It agreed to incorporate brief summaries of all rapporteur reports in its Annual Report and to send to the OAS General Assembly not only the annual report of the Special Rapporteur for Freedom of Expression, but also all reports produced during the year by any thematic rapporteur

As a result of the reform there has been a dramatic fall in the number of precautionary measures granted since the reform in 2013. Under pressure from the governments such as Ecuador, Mexico, and Venezuela the IACHR started to exert more control over the work of the Special Rapporteur, including through the Commission's Executive Secretariat. Ultimately the reform resulted in symbolic changes, mainly oriented toward pleasing the Member States.

10 years after the reform process, there is a sense of a chilling effect left by the reform process in practice, where the Commission could be perceived by some as being more deferential.¹²⁸ Much of what CSOs called for in terms of substantive strengthening were not included. Gaps remain in terms of the main challenges of universality, compliance, and budget increase.

4.3. IACHR: Summary of Lessons Learnt, Best Practices and Recommendations

9. It is critical for bodies that are subject to reform in human rights systems to take leadership of the narrative and priority setting. The Commission's leadership

¹²⁸ Interview with expert n 119.

in recognising that it needed to take a place at the table and engage the mechanism was critical in ensuring that the reform process did not result in worse outcomes.

10. Reform processes are a platform that creates opportunity for factors to coincide to create a perfect storm. Likely and unlikely partnerships and blocs may arise in reform processes to weaken a human rights system. In this context, there are states who had different concerns with the human rights system, each for its own reasons. These different reasons coincided in their desire to restrict the reach and powers of the Commission and also to send a warning signal to the Court.
11. Strategic partnerships are necessary to safeguard the protection and promotion of human rights in a reform process. Partnerships between CSOs, users of the mechanism and the Commission, (including the secretariat of the Commission) were useful in strengthening the analysis to push back against the weakening of the human rights system. A range of tactics including diplomacy, analysis and CSO mobilisation of movements were used.

5. THEMATIC INSIGHTS ARISING FROM THE COMPARATIVE PERSPECTIVES

5.1. Compliance and Implementation of Decisions

In the Council of Europe, the Committee of Ministers supervises execution of decisions.¹²⁹ This approach has been effective because it provides a political peer process which provides support to the judicial pronouncements on human rights. The importance of this political pressure in implementation can be seen when contrasting the African human rights system and the inter-American human rights system on one hand and the European system on the other. While in the former contexts the judicial bodies are left to their own devices to secure implementation, the task in the European system is performed by the Committee of Ministers of the Council of Europe. Once the European Court of Human Rights makes a decision, it is transmitted to the Committee of Ministers to supervise its execution. The reason why this system is effective is because the CoM does not call into question the decision of the ECHR, their role is simply to give effect to the court's determinations.

CoE also has a Department of Execution of Judgements of the EctHR which operates together with the Committee of Ministers to support their supervisory role. Collective CSO efforts have also been instrumental in strengthening the implementation of ECtHR decisions. The Interlaken Reform Process recognised the role of the European Implementation Network (EIN).¹³⁰ The EIN combines advocacy at the national level, with engagement with the supervision process at the Council of Europe. From the Interlaken reform process gaps were made visible about the even the often-lauded process of supervision by the CoM, including lack of political will, room to improve on transparency where public has access to documents should be made speedily available, gaps in resources; technical capacity gaps, challenges of implementing of decisions that involve complex structural problems and lack of alignment within national political formations including disagreements on the scope of execution.

Within the UN HRC, some have proposed that the UPR mechanism can be used with the same intention as the CoE system as a space where supervision for execution of HRC decisions is done.¹³¹ Amongst UN treaty bodies there are established 'focal

¹²⁹ Committee of Ministers CoE. See also See the CDDH Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid, 13 September 2017, document CM(2017)92.

¹³⁰ Available at <https://www.einnetwork.org/>

¹³¹ Hampson n 17.

points' to pursue implementation. They include special rapporteurs on follow-up or working groups, who gather information about implementation, and grade the degree of states' compliance.¹³²

In the Inter-American system, the Court routinely holds Court hearings to follow up on enforcement of its decisions. There has been a proposal that the Commission should appoint a Special Rapporteur on Compliance. The Rapporteur should not only get information about the state of compliance but should also provide support and communicate between the States and the organs of the System to ensure full compliance with decisions. The Special Rapporteur should present its findings to a Special Meeting of the Permanent Council, which should be open to the active participation of victims and their representatives.¹³³

5.2. Election and Appointment of Commissioners /Judges

A cross-cutting best practice is the existence of an independent advisory panel responsible for vetting or giving expert opinion on candidates for quasi-judicial or judicial bodies.¹³⁴ Panel members are often experts with seeming impartiality like academics as well as former judges or/and national judges.

In the CoE, each state Party nominates 3 candidates and the Parliamentary Assembly (PACE) elects 1 From each member state. Within PACE is a Special Committee for the Election of Judges and National independent advisory Committee. The Interlaken reform called for improving the transparency and quality of the selection procedure at both national and European levels.¹³⁵ In the Inter American System, the OAS General Assembly elects Commissioners from a list of nominees that have been proposed by OAS Member States. There is a level of transparency in the Guide, Civil society can engage with information on nominated candidates up for election in advance of the session when elections will take place. The OAS General Assembly publishes information about the candidates, including their names and Curriculum Vitae, on its "Preparatory Committee" webpage.

In the Americas the practice that has emerged is that CSOs collaborated with

¹³² Schmidt, Markus G. "Follow-up mechanisms before UN human rights treaty bodies and the UN mechanisms beyond." In *The UN Human Rights Treaty System in the 21 Century*, pp. 233-249. Brill Nijhoff, 2000.

¹³³ Canton n 127.

¹³⁴ EU Court of Justice : EU CoJ: The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties; In the CoE On 10 November 2010, the Committee of Ministers adopted Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights ("the Advisory Panel") accessed at <https://www.coe.int/en/web/dlapil/advisory-panel>

¹³⁵ CDDH report n 100.

academic institutions to drive the process of forming such independent expert review panel. Beyond vetting the candidates, sometimes this panel invites the candidates for unofficial 'interviews' and they comply. There are experiences of other CSO formations that work on specific thematic areas which also establish their own vetting panels which then review candidates, produce reports and invite the candidates for interviews.

From these systems, to ensure competency and independence, common criteria for qualification as Commissioners or Judges include: Recognised competence in the field of human rights; Must either possess the qualifications required for appointment to high judicial office or be jurisconsults; (CoE); have knowledge of public international law and of the national legal systems as well as proficiency in at least one official language; fully independent and not represent national interest ; chosen from individuals whose independence is beyond doubt; high moral character; sit in their individual capacity; not engage in other work that is incompatible with a Commissioner's function as an independent and neutral member and that during their term of office they not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.

The critical issues to note in the election process is that the first stage of the process at the national level nomination is the most important. Even where advisory panels, transparency and other measures exist at the regional level, after nomination of candidates it is often already very late in the process for consultations, inclusion and qualitative vetting.

Further, advisory panels can just as well consolidate hierarchies of (political) interest and state power. They can limit full transparency and broader inclusive CSO engagement.

Beyond strengthening election and appointment processes for Judges and Commissioners, it is important to pay attention to the staff who work in these bodies. They are the 'unseen hands and minds' behind the substantive outputs of human rights bodies including normative standard setting and judicial work. Competency is critical here. Comparative perspectives show that other regions are paying close attention to this issue, for instance through robust and comprehensive processes to employ the right legal officers and researchers.¹³⁶

¹³⁶ See for example Robust process under *European Personnel Selection Office (EU)* <https://eu-careers.europa.eu/en/about-epso#tab-4>

5.3. Transparency and promoting access to information

The Council of Europe has a good transparent public record on most issues including clear information on procedures, practices as well as legal processes. For instance, access to list of pending cases and hearings coming up¹³⁷; knowledge sharing and access through the online platform- ECHR-KS and HUDOC; They provide statistics of cases, annually and sometimes monthly.¹³⁸ The Committee of Ministers discussions on implementation measures may be in absence of victim, but they are published together with submissions of parties. The CoE Committee on Legal Affairs and Human Rights also adopts reports on the implementation of judgments.

In the Inter American system, for states that have not accepted the Inter-American Court's jurisdiction the process is confidential. The Commission will consider whether the state has taken adequate measures to comply with its recommendations and, if it has failed to do so, after a vote of an absolute majority of the Commission's members the report on the merits will become public. Where the state has accepted the Court's jurisdiction, if the Commission considers that the state has complied with its recommendations, it can choose whether to publish the report on the merits. The Commission also makes public in its Annual Report under section IV information on states with systemic violations of human rights.

All the UN treaty bodies consider communications in closed sessions so that the oral deliberations and summary records remain confidential. Once views on the communication have been formulated it is standard practice for these to be sent to the individual and the state party concerned. The text of any final decision on the merits of the case or of a decision of inadmissibility is posted on the website of the Office of the High Commissioner for Human Rights (OHCHR) as part of the treaty bodies' jurisprudence. The UN treaty bodies also include information on follow-up in their annual reports. However, it can be difficult to find specific information on the activities of the Special Rapporteurs on follow-up, whose reports to the respective Committees are noted in the annual report but not necessarily annexed, presumably due to restrictions imposed on the length of the treaty bodies' reports.

As discussed earlier, the UN Human Rights Council processes are not as transparent as the other regions. For instance, the complaints mechanism's 'confidentiality' approach is interpreted as a secret process that happens behind closed doors with the objective being to use dialogue and cooperation to strengthen the capacity of the state towards compliance.¹³⁹

¹³⁷ Available at <https://www.echr.coe.int/calendar-of-hearings#>

¹³⁸ Available at <https://www.echr.coe.int/statistical-reports>.

¹³⁹ Hampson n 1.

5.4. Independence

The question of independence is intricately tied to the issue of election and appointment processes discussed here. Across the comparative systems, processes designed to ensure that competent and independent candidates are elected goes a long way to secure the independence of the system as a whole. In both the CoE and the Inter-American system, the issue of 'collaboration' and need for 'dialogue' between the judicial bodies and states has also been used to erode independence. For instance, in the Inter-American System- 'dialogue language' remained in the final reform resolutions. By forcing the IACHR to adopt new rules and regulations with specific and detailed guidelines, States effectively demonstrated that they retained the power to guide, if not control, many of the Commission's powers. In the CoE the amendments which changed the term of judges to 9 years non-renewable terms, has been seen as an avenue which will strengthen independence because no candidates will not be coming up for re-election.

5.5. CSOs engagement before regional/international multi-national bodies & human rights mechanisms specifically

Section to be included after all the interviews.

5.6. Regional and Sub-regional cooperation and integration

Tensions between the regional and sub-regional exists across all comparative contexts. Cooperation and integration between these regions is important for purposes of ensuring consistency in the development of human rights norms and jurisprudence.

The case study of the Inter American system showed an example in the contexts of human rights systems where sub-regional multi-national organisations attempt to separate for purposes of delegitimizing the regional system. Tensions within regions are often informed by national interests, therefore it is important that processes to strengthen this coordination includes measures to strengthen integration at the national level too. Two examples from the CoE may be useful in this regard. First is the work of the Congress of Local and Regional Authorities which is responsible for strengthening local and regional democracy across member states, assessing the application of the standards and it acts as the voice of Europe's municipalities and

regions.¹⁴⁰ Another good example is the CoE Superior Courts Network where the European Court of Human Rights networks intentionally with 105 superior courts from member states to enrich dialogue between the Court and national judicial systems. In the African human rights system, such a Court's network for substantive deliberation could be envisaged not just at the national level, but among the regional and sub-regional judicial mechanisms like the ECOWAS Court.

¹⁴⁰ See <https://www.coe.int/en/web/congress/overview>

6. CONCLUSION

It is clear from the comparative perspectives that the human rights systems as well as the entire idea of international legal order is facing challenges and attacks that stem from various sources ranging from diverging interpretations to direct intentions to cripple accountability systems. CSOs have a clear role in actively defending the protection and promotion of human rights as well as accountability mechanisms. They do so by mobilising to engage collectively and meaningfully with reform processes and surfacing mischief behind reforms. CSOs engage with reforms of human rights mechanisms as part of broader context in their regional system context. Across the regions, progressive states parties have also been champions of human rights and through allyship with CSOs have been impactful in changing the direction of reforms from risky terrain to productive outcomes.



**African Union
Reforms Engagements**