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Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights

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Summary

An extensive literature has evolved around the relationship between the African Commission on Human and Peoples' Rights and non-governmental organisations with observer status. Not much has been written about the nature of the relationship between the African Commission and national human rights institutions. This article seeks to scrutinise this relationship. In particular, it examines the role of national human rights institutions in the activities of the African Commission and, concomitantly, how their role could be strengthened in order to enhance human rights protection in Africa. The paper further examines the rationale behind their greater participation in the workings of the African Commission and ascertains whether there is a need for a more elaborate and meaningful relationship.

1 Introduction

There is increased interaction between the African Commission on Human and Peoples' Rights (African Commission) and national human rights institutions (NHRIs). This interaction presents opportunities and

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challenges in the promotion and protection of human rights in Africa. More than 30 African countries have national human rights institutions, with a greater or lesser degree of independence depending on the situation in a particular country.[1] The number of NHRIs with affiliate status before the African Commission is currently 21.[2] Their relationship with the African Commission stands in stark contrast to the more robust and unique relationship of the African Commission and non-governmental organisations (NGOs). The relationship between the African Commission and NHRIs draws its legitimacy from articles 26 and 45(1)(c) of the African Charter on Human and Peoples' Rights (African Charter).[3] Article 26 of the African Charter places a duty on states to establish appropriate national institutions entrusted with the promotion and protection of rights embodied by the Charter, whilst section 45(1)(c) equally enjoins the African Commission to work with such institutions once established.

NHRIs are then supposed to interact with the African Commission in accordance with the Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa, adopted in 1998 (1998 Resolution on Affiliate Status).[4] This Resolution sets out the rights and duties of NHRIs as well as the requirements necessary for a national human rights institution to attain affiliate status before the African Commission. Accordingly, NHRIs are to assist the African Commission in the promotion and protection of human rights at the national level.[5] NHRIs are given affiliate status if they conform to the United Nations (UN) Principles Relating to the Status of National Human Rights Institutions (Paris Principles).[6] Their 'affiliate status' — as conferred upon them by the 1998 Resolution on Affiliate Status — does not clearly define their role and relationship with the African Commission[7] and remains to be clarified.[8]

Apart from the lack of clarity as to the role of NHRIs in the workings of the African Commission by the aforementioned instruments, there are a number of issues that affect both NGOs and NHRIs, such as their role in the drafting of state reports and their participation during the state reporting process. It is due to this anomaly that, at the 43rd session of the African Commission, the South African delegation called for a

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1 CH Heyns & M Killander *Compendium of key human rights documents of the African Union* (2007) 269.

2 Para 14 26th Activity Report AU Doc EX CL/529(XV).

3 F Viljoen *International human rights law in Africa* (2007) 412.

4 Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa (1998 Resolution on Affiliate Status), adopted at the Commission's 24th session, Banjul, The Gambia, 22-31 October 1998.

5 1998 Resolution on Affiliate Status, para 4(d).

6 n 5 above, para 4(a).

7 Viljoen (n 3 above) 412.

8 Viljoen (n 3 above) 413.

proper model that could better espouse the interface between the African Commission and NHRIs.[9] Among other things, the South African delegation called for the adoption of general guidelines to regulate the relationship between the African Commission and NHRIs.[10]

Whilst there are calls for the development of a more detailed relationship between the African Commission and NHRIs, there is an ongoing debate as to the nature and role of such institutions at international and regional levels. Although the role of NHRIs domestically does not admit of any doubt, their participation at the international and regional sphere is not at all clear.

Against the preceding background, the first section of this article takes a look at issues that affect and afflict the relationship between NHRIs and the African Commission. The second section of the article traces the trajectory of NHRIs and focuses on their origins, nature and role as well as their international and regional formal standing in the light of the Paris Principles. Third, a discussion on the emerging status of NHRIs as global actors is proffered by examining their engagement with the African Commission. The fourth section, forming the crux of this article, takes a detailed look at the participation of NHRIs in the workings of the African Commission. The fifth section investigates areas of possible collaboration between the African Commission and NHRIs. The final section is a summary of the conclusions drawn from the article.

2 The trajectory of national human rights institutions

Nudged on and supported by donors and the UN, NHRIs started flourishing in Africa in the 1990s.[11] This proliferation of NHRIs may easily be attributed to the recommendation by the African Commission to states urging them to establish institutions that will conduct studies and research.[12] Perhaps, also, this was due to the recognition that international and regional institutions cannot in themselves suffice as the primary sites of the struggle(s) for human rights.[13] Quashigah is of the view that these institutions are a product of the resurgence of democratisation in many parts of the world, and in Africa in particular.[14]

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9 Para 61 24th Activity Report AU Doc EX.CL/466(XIII).

10 As above.

11 Viljoen (n 3 above) 412.

12 As above.

13 OC Kafor & SC Agbakwa 'On legalism, popular agency and "voices of suffering": The Nigerian National Human Rights Commission in context' (2002) 24 *Human Rights Quarterly* 663.

14 K Quashigah 'National human rights institutions in Africa: Functions, strengths, and weaknesses' quoted in HS Kanzira 'The independence of national human rights bodies in Africa: A comparative study of the CHRAJ, UHRC and SAHRC' (2002) 8 *East African Journal of Peace and Human Rights* 176.

2.1 Origins, nature and role of national human rights institutions

2.1.1 Defining national human rights institutions

While recognising the inherent difficulties with definitions, the UN has defined NHRIs as a 'body which is established by a government under the constitution or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights'.[15] Carver's report to the International Council on Human Rights Policy has defined them as a hybrid category that includes many different varieties within, such as human rights commissions, ombudsmen, *Defensores del Pueblo*, and procurators for human rights.[16] Accordingly, this 'hybrid category' excludes a government department, on the one hand, such as a human rights office in the foreign ministry, and obviously an NGO, on the other.[17]

Reif defines NHRIs as ombudsmen, human rights commissions or hybrid human rights ombudsmen.[18] Cardenas simply defines them as government agencies whose purported aim is to implement international norms domestically.[19] Suffice to point out that the definition of NHRIs seems to be contextual, and varies, depending to a large extent on the nature of the study and the purpose for which the study is being undertaken. That is why Hatchard defines them, in the context of the Commonwealth, as 'bodies established by a national constitution or by statute and which promote and protect the fundamental political values of the Commonwealth that are enshrined in the Harare Commonwealth Declaration'.[20]

NHRIs have taken various forms in different countries, including, but not limited to, offices of ombudspersons, national human rights commissions, or a combination of the two,[21] anti-corruption commissions and equality and other specialist commissions.[22] At present, the majority of NHRIs fall into one of two broad categories: human rights

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15 Kafor & Agbakwa (n 13 above) 663.

16 International Council on Human Rights Policy *Performance and legitimacy; National human rights institutions* (2004) 3; ESCR Committee General Comment 10, 'The role of NHRIs in the protection of economic, social and cultural rights' (1998) Doc E/1999/22.

17 International Council on Human Rights Policy (n 16 above) 3.

18 LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 2.

19 S Cardenas 'Emerging global actors: The United Nations and national human rights institutions' (2003) 9 *Global Governance* 23.

20 J Hatchard *Report on the inter-relationship between Commonwealth human rights commissions and other national human rights institutions* (2003) 7.

21 Eg Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) fused a Human Rights Commission, an Ombudsman and an Anti-Corruption Agency.

22 Hatchard (n 20 above) 7.

commissions or ombudsperson institutions.[23] The primary function of the latter institutions is to oversee fairness and legality in public administration. More specifically, the office of the ombudsperson exists to protect the rights of individuals who believe themselves to be victims of unjust acts on the part of public authorities.[24] Initially NHRIs were mainly concerned with the protection of persons against all forms of discrimination and with the protection of civil and political rights.[25] However, they are now encouraged to protect socio-economic rights,[26] with some institutions such as the South African Human Rights Commission (SAHRC) constitutionally mandated to promote and protect socio-economic rights.[27]

For the purposes of this article, NHRIs shall refer to permanent and independent bodies established by way of constitutional authority or through legislation and established for the specific purpose of promoting and protecting human rights.[28] Thus, the article takes a look at those NHRIs which have come to be widely known as national human rights commissions (NHRCs) established in accordance with the Paris Principles.[29]

2.1.2 The role of national human rights institutions at the domestic level

As mentioned before, the role of NHRIs is catalogued in several documents, namely, the Paris Principles, the Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights, the UN Fact Sheet 19: National Institutions for the Promotion and Protection of Human Rights, as well as the 1978 Guidelines on the Structure of National Institutions for the Protection and Promotion of Human Rights. The Best Practice Handbook is a guide to setting up NHRIs, staffing them, defining their mandates and practical roles as well as ensuring that they are accountable and accessible.[30]

In sum, these documents set out the role of NHRIs to include the competence to promote and protect universal human rights standards

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23 Kanzira (n 14 above) 174.

24 Centre for Human Rights *National human rights Institutions: A handbook on the establishment and strengthening of national human rights institutions for the promotion and protection of human rights* (UN Handbook) UN Professional Training Series 4 (1995) 8.

25 Centre for Human Rights (n 24 above) 7.

26 ESCR Committee (n 16 above).

27 Sec 184(3) South African Constitution (1996).

28 AE Pohjolainen *The evolution of national human rights institutions – The role of the United Nations* (2006) 6.

29 M Gomez 'Sri Lanka's new Human Rights Commission' (1998) 20 *Human Rights Quarterly* 281.

30 Para 1 Paris Principles.

domestically.[31] They provide the minimum standards and guidelines for the establishment and evaluation of NHRIs.[32] Even though these instruments lay out the recommended framework for the establishment of NHRIs, much still depends upon the scope of constitutional rights and the size, structure and history of the state itself.[33] The Paris Principles set out some key paradigms which must be at the core of an NHRI.[34] The six key criteria in the Paris Principles are the following: independence of the institution guaranteed by statute or constitution; autonomy from government; pluralism; inclusivity in membership; a broad mandate based on universal human rights standards; adequate powers of investigation;and adequate resources.[35] As a result, most of these institutions have advisory, promotional and protective roles predominantly within the national sphere.

Most NHRIs carry out similar work, but the difference lies in the weight given to their particular functions. Hence, NHRIs differ in a number of significant respects, the main difference being the scope of their mandate.[36] The mandate of the Kenya National Commission of Human Rights, the SAHRC and the Ugandan Human Rights Commission allows them, *inter alia,* to investigate upon receiving complaints about the violation of human rights, to visit places of detention, to inform and educate the public about human rights and to act as the chief agent of the government in ensuring compliance with its obligations under international treaties and conventions on human rights.[37]

NHRIs are also vested with the responsibility to advise government on matters concerning the promotion and protection of human rights[38] and are mandated to offer advice on the conformity or otherwise of existing or proposed legislation with international human rights norms.[39] They are mandated to examine complaints alleging infringements of applicable international human rights instruments by

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31 As above.

32 C Idike 'Deflectionism or activism? The Kenya National Commission on Human Rights in focus' (2004) 1 *Essex Human Rights Review* 43.

33 J Hatchard *et al Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern perspective* (2004) 211.

34 International Council on Human Rights Policy (n 16 above) 1-2.

35 Roundtable of national human rights institutions and national machineries for the advancement of women, Ouarzazate, Morocco, 15-19 November 2004 3-4.

36 M Sekaggya 'Value of human rights institutions: Human rights commission processes' in CM Peter (ed) *The protectors: Human rights commissions and accountability in East Africa* (2008) 72.

37 LM Mute 'Infusing human rights in policy and legislation: Experiences from Kenya National Commission on Human Rights' in CM Peter (n 36 above) 29; secs 16(1)(a)-(i) KNCHR Act.

38 Para 2 Paris Principles; eg sec 16(1)(d) KNCHR Act.

39 Paras 1(a)-(g) Paris Principles.

individuals, associations of trade unions and other representatives.[40] In fact, most of them enjoy wider remedial powers.[41] NHRIs are also supposed to ensure the effective implementation of national legislation and international instruments that impose human rights obligations on the government.[42] NHRIs are further responsible for encouraging states to ratify or accede to all the relevant international human rights instruments[43] and to take part in the state reporting process by way of the submission of shadow reports.[44] NHRIs are also supposed to assist in the formulation of educational and information programmes designed to enhance awareness and understanding of human rights principles through education and all press organs.[45] They are expected to co-operate with the relevant international bodies.[46]

The mandate of NHRIs also differs from one institution to one another, depending on the manner in which they are established. The SAHRC and the Ugandan Human Rights Commission both derive their mandate from the respective Constitutions.[47] Some NHRIs, such as the Benin Human Rights Commission and the Kenya National Commission of Human Rights, are established by acts of parliament,[48] whilst the Nigerian National Human Rights Commission was established by a military decree.[49]

Suffice to point out that, even though some successful NHRIs were established by an act of parliament or some other means, a constitutional foundation remains the foremost guarantee of legitimacy for national human rights institutions as constitutions are generally hard to tamper with.[50] Hence, it is advisable that a newly-established NHRI should derive its mandate from the state's constitution.[51]

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40 Part IV Paris Principles; UN Handbook (n 24 above) 34; Kafor & Agbakwa (n 13 above) 671; eg secs 16(1)(h)-(i) KNCHR Act.

41 Eg secs 19(2)(a)-(c) KNCHR Act.

42 Paras 3(b) & (c) Paris Principles; eg sec 16(1)(f) KNCHR Act.

43 Para 3(c) Paris Principles.

44 Para 3(d) Paris Principles; eg sec 16(1)(f) KNCHR Act.

45 Para 3(g) Paris Principles; eg sec 16(1)(c) KNCHR Act.

46 Para 3(e) Paris Principles.

47 Sec 181(1)(b) Constitution of the Republic of South Africa; art 51(2) Constitution of Uganda; UHRC Act of 1995.

48 B Lindsnaes *et al National human rights institutions; articles and working papers: Input to the discussions on the establishment and development of the functions of national human rights institutions* (2001) 14.

49 National Human Rights Commission Decree of 1995.

50 M Mohamedou 'The effectiveness of national human rights institutions' in Lindsnaes *et al* (n 48 above) 51.

51 CM Fombad 'Limits of power to amend constitutions: Recent trends in Africa and their impact on constitutionalism' (2007) 6 *University of Botswana Law Journal* 27.

2.2 International and regional formal standing of national human rights institutions and the Paris Principles

It is well accepted that the Paris Principles provide guidelines as to the establishment, management, role and participation of NHRIs largely within the domestic arena. Their participation within the national — legal or otherwise — framework is not questionable, as they were initially and specifically crafted for that purpose. However, there is not sufficient literature situating the justification for their participation in the regional and international arena within the Paris Principles or any of the aforementioned documents on the nature and functions of NHRIs. The Paris Principles advocate the co-operation of NHRIs with the relevant international and regional human rights mechanisms. The extent of the co-operation remains to be clarified and is now a matter of interpretation, sparking a debate among international human rights scholars.

By formal standing of NHRIs in the context of the present paper I refer to the recognition of NHRIs as actors — and not as mere expedient partners — by any international or regional human rights mechanism. Such recognition will have to be express and may be in the form of resolutions — as is the case with the African Commission — or located in a treaty as is the case with the African Court of Justice, or may be located within the documents within which NHRIs derive their legitimacy. Such recognition will as a matter of course exclude the *de facto* recognition of NHRIs as actors. Therefore, by international or regional formal standing of NHRIs, I refer to the international or regional recognition of NHRIs — in one or more of the aforementioned ways — as actors at that level.

To a larger extent, the documents within which NHRIs derive their legitimacy do not envisage a NHRI that is actively and/or directly involved in the international *fora*. As it will be shown later, their participation at regional and international levels remains questionable. In fact, international human rights scholars have adopted what can be considered a liberal interpretation of these documents.[52] In particular, the Paris Principles have been interpreted to accommodate a larger participation of these institutions at international and regional levels. Through such interpretation, albeit inconsistent, NHRIs have been given the latitude to appear and participate at these forums.

NHRIs have been allowed to form networks with international and regional institutions and are beginning to acquire formal international standing. It appears, however, that the role that was envisaged for NHRIs, in particular by the Paris Principles, at international and regional levels was that of co-operation with the relevant international bodies. None of the instruments cited above specifically gives NHRIs a formal

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52 R Murray *The role of national human rights institutions at the international and regional levels: The experience of Africa* (2007) 7.

international standing, nor does any enabling legislation of these institutions perused during this study. In fact, NHRIs were initially established as liaison points for the UN, where the UN would be able to utilise their proximity to national authorities and populations to publicise human rights-related activities,[53] thus allowing easier implementation of international human rights principles and norms domestically.[54]

It is the metamorphosis of the 'purported aim' of the establishment of NHRIs, initially for forging the implementation of international human rights norms domestically, that is intriguing. It is apparent that the definitions highlighted above do not on the face of it perceive these institutions as international actors. They presuppose that NHRIs are by and large mandated to implement international norms domestically. The transformation of the role of these institutions exposes definitions of a NHRI, such as Cardenas's definition, as being a too simplistic view of the very nature and role of contemporary NHRIs.

3 Is the devil in the details? An analysis of the rise of national human rights institutions as new global actors

The mandate conferred upon NHRIs by the Paris Principles has been widely interpreted to accommodate them as actors at the international and regional levels. The issue of international formal standing aside, the main question remains: What is the main agenda of NHRIs at the international and regional levels? Espousing the rationale behind their emerging status as international actors, this section of the article highlights what appears, in the words of Cardenas, to be a double-edged phenomenon presenting both opportunities and challenges for the local protection of human rights norms.[55] It presents a discussion of their emerging status as global actors by examining their engagement with the African Commission.

Representatives of NHRIs are increasingly seen as actors in their own right at international human rights conferences and at times during convention negotiations.[56] It is not far-fetched to say that hardly any international conference or seminar takes place without their involvement.[57] Osogo is of the view that this is not accidental and it

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53 JO Ambani 'Oval slides in triangular spaces? Anchoring national human rights institutions in "tripartite" Commonwealth Africa' unpublished LLM dissertation, University of Pretoria, 2006 8.

54 Ambani (n 53 above) 12.

55 Cardenas (n 19 above) 23.

56 J von Doussa 'The potential role of national human rights institutions in the Pacific' paper presented at the Australian Law Reform Agencies conference, Port Villa, Vanuatu, September 2008 http://www.hreoc.gov.au/about/media/speeches/speeches_president/index.html (accessed 9 October 2008).

57 Ambani (n 53 above) 12.

is very well within their mandate.[58] However, as highlighted above, this participation is contentious. Certainly, it should not be taken for granted that they are well within their mandate by virtue of them participating at the international and regional levels. There is a need to interrogate the rationale behind their participation at those levels, with the aim of ascertaining whether they are indeed a necessary actor in the international arena.

3.1 The rationale behind the participation of national human rights institutions at the international and regional levels

As already mentioned, the justification and role of NHRIs at the domestic level — either alone or in collaboration with other international or regional organisations — admits of no doubt. This is largely because NHRIs, as their name suggests, were crafted for the promotion and protection of human rights at the domestic level. It is the rationale for their participation at the international and regional levels that is more often than not questioned. Justifications for the participation of NHRIs at the international and regional levels evoke arguments akin to those of permitting NGOs to do the same.[59] In fact, the reasons are so similar that one might conclude that giving them any international formal standing will be tantamount to unnecessary duplication of international actors. Despite this possible objection, the following discussion pinpoints the reasons for allowing national institutions to have a greater performance at international or regional levels. The rationale for their participation at the international and regional levels could, arguably, be situated within the competence and responsibilities of NHRIs as espoused by the Paris Principles. For example, in the Paris Principles it is foreseen that NHRIs have a role to play in relation to reports that the state is supposed to submit to international and regional mechanisms.[60]

The involvement of NHRIs creates an important interface between the two levels of human rights protection. That is why one of the arguments advanced by proponents of clothing NHRIs with international formal standing is that their participation at these levels can better ensure states' compliance with international obligations.[61] In particular, Murray asserts, they can be seen as the national machinery designed for the implementation of the decisions and recommendations of international bodies.[62] Some observers have argued that NHRIs are the

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58 As above.

59 Murray (n 52 above) 11.

60 Para A(3)(d) Paris Principles. The UN CERD Committee has in its General Recommendation 28 (2002) recommended that NHRIs assist their member states in complying with their reporting obligations.

61 Murray (n 52 above) 11.

62 Murray (n 52 above) 12.

only realistic means of addressing a vast majority of domestic issues.[63] Perhaps to say that they are the 'only' means is an exaggeration. It is, however, true to say that their mandate is all-encompassing and allows them to do more. The important role of NGOs, ombudspersons as well as other institutions with the mandate of protecting human rights should not be forgotten.[64]

NHRIs may also be counted on to assist with the submission of reports by states to international bodies. Even though there is controversy surrounding the participation of NHRIs in the state reporting process,[65] their involvement, whether directly or indirectly, will provide a reliable source of information.[66] The participation of NHRIs in international and regional mechanisms can also provide them with platforms to air their views and advance the quest for the protection of the citizenry and of human rights defenders.[67]

NHRIs can provide a level of expertise on human rights through their contribution at international and regional levels.[68] It is within that context that NHRIs are able to assist international or regional bodies in any fact-finding missions or prison facilities inspections as is normally the case and assist, if allowed by the relevant body's procedural rules of fact-finding missions, with their on-site observations.[69] Such assistance will also be relevant for special mechanisms, such as Special Rapporteurs.[70]

Another reason for NHRIs to participate at the international and regional levels is to influence the shaping of international policies, especially those with a bearing on the enjoyment of human rights by the citizens of a particular state. They may also become the focal point for submitting individual complaints to treaty bodies, such as the Afri-

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63 M Kjærum *National human rights institutions implementing human rights* (2003) 19 http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/n_h_r_i_h_fte_eng.pdf (accessed 20 August 2008).

64 In the case of South Africa, this would be the other ch 9 institutions, namely, the Commission for Gender Equality, the Public Protector and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; sec 181 South African Constitution.

65 Viljoen (n 3 above) 370; Murray (n 52 above) 16-18; Hatchard (n 33 above) 231; M Nassali 'Economic and social rights: drawing the threads together' in Peter (n 36 above) 98.

66 M Evans *et al* 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' rights: The system in practice, 1986-2000* (2002) 57.

67 Murrray (n 52 above) 21.

68 Murray (n 52 above) 18; ML Schweitz 'NGO participation in international governance: The question of legitimacy' (1995) 89 *American Society of International Law Proceedings* 419.

69 Centre for Human Rights *Opinion to the African Commission on Human and Peoples' Rights on the conduct and procedure of joint promotional and protective fact-finding missions with the United Nations and any other organisations* (2008) 5 (on file with author).

70 Viljoen (n 3 above) 393.

can Court on Human and Peoples' Rights (African Court), the African Commission and the UN Committee on the Elimination of All Forms of Discrimination (CERD Committee).[71] There have been a few cases where NHRIs have themselves taken cases to international or regional bodies under the communication procedure.[72] This role, it could be argued, is well within their mandate.

Most NHRIs devote considerable energy and resources to human rights education programmes. Human rights education not only sensitises people about their rights, but it also makes the state aware of its obligations under international legal standards.[73] Information and education are the only ways in which the African Charter and other instruments can become a dynamic part of the democratic process.[74] In fact, some international and regional bodies have both protective and promotional mandates.[75] As a result, NHRIs can partner with international or regional bodies to carry out the dissemination of information and the promotion of human rights at the domestic level. It thus makes sense for NHRIs to participate at the international and regional levels, in order to better carry out human rights education programmes in close co-operation with the protective mechanisms.

The relationship between NHRIs and regional and international human rights mechanisms raises a number of other interesting issues. Like other institutions in a globalising world, NHRIs can have both beneficial and perverse consequences.[76] Having highlighted the advantages of the participation of NHRIs at the international or regional levels above, the following section looks at the other side of the coin. It considers what has come to be known as the 'perverse consequences' of affording NHRIs international or regional formal standing.

3.2 The latent danger of national human rights institutions as international or regional actors

One of the daunting challenges is the ambiguity of NHRIs: Are they state or non-state actors?[77] This ambiguity seems to stem from a narrow understanding of the true nature of NHRIs as state institutions or government machinery which have the responsibility to hold governments accountable. They are supposed to be independent from government, and yet they are set up by the government and acting

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71 Kjærum (n 63 above) 19.

72 NHRIs lodge petitions with the Inter-American Commission on Human Rights after domestic remedies have been exhausted; Murray (n 52 above) 13.

73 As above.

74 Lindsnaes (n 48 above) 120.

75 SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 191.

76 Cardenas (n 19 above) 36.

77 Murray (n 52 above) 59.

as quasi-governmental organisations.[78] The question is whether they should be regarded as state actors or non-state actors, or whether they should be treated as *sui generis.* Coupled with this ambiguity is the issue of the accountability of NHRIs. Precisely who is accountable, between NHRIs themselves and the state, for actions of a NHRI at international and regional level?[79]

A full discussion of these issues is beyond the scope of this paper. Suffice to point out that these conceptual dilemmas are no doubt the most critical issues that need to be addressed in order to ensure that NHRIs have a significant and distinctive place at the international and regional arena.[80] This dilemma is, as Viljoen rightly points out, most apparent in matters of state reporting.[81] Their participation at the international and regional levels therefore needs to be scrutinised, lest they will be used by states to conceal violations of human rights by the state from an international body.[82]

Cardenas rightly argues that NHRIs could lead to the reassertion of state authority and a dampening of the role of civil society.[83] That of course is likely to arise where NHRIs are used by the government to improve its international image. The creation of the Nigerian National Human Rights Commission by the dictatorial Abacha regime is an oft-cited example of an institution created to keep up appearances.[84] The danger posed by similarly co-opted NHRIs to the human rights struggle is real. Through such institutions, states will move to displace non-state actors, particularly civil society. The use of NHRIs as the voice of the state usually happens when those leading the institution are appointed along political lines. This can easily be avoided by ensuring — among other things — that commissioners are properly remunerated so as to avoid cases of corruption,[85] have security of tenure, are answerable to the legislature, not the executive, and have financial autonomy to the extent that they will be able to determine their priorities and activities.[86]

Further, as NHRIs acquire more formal international powers, they may begin to compete with civil society actors and also help states control the human rights agenda by silencing calls for accountability

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78 P de Vos 'Experience of human rights in Africa: Challenges of implementing economic, social and cultural rights' in Peter (n 36 above) 27.

79 C Scott 'Accountability in the regulatory state' (2000) 27 *Journal of Law and Society* 60; Murray (n 52 above) 69-88.

80 RE Kapindu 'Book review: *The role of national human rights institutions at the international and regional levels: The experience of Africa* by Rachel Murray' (2008) 125 *South African Law Journal* 198.

81 Viljoen (n 3 above) 393.

82 International Council on Human Rights Policy (n 16 above) 100.

83 Cardenas (n 19 above) 7.

84 Kafor & Agbakwa (n 13 above) 665-666.

85 International Council on Human Rights Policy (n 16 above) 12-13.

86 As above.

at the international and regional levels.[87] It is possible that the roles of NHRIs and civil society actors could come into conflict, particularly in respect of dissent when it comes to the policies of the government and their implications for human rights.[88] The Paris Principles recognise that the relationship with civil society can help NHRCs to protect their independence and pluralism.[89] Thus, establishing close links or working relationships with NGOs and the larger network of civil society is important because civil society is most of the time involved directly with those in need of the services of a national Institution.[90] Through extensive and systematic co-operation with civil society, NHRCs can easily empower civil society participation and the advocacy on human rights protection and help fill human rights implementation gaps at the national level.

Finally, it has been argued that NHRIs are not necessarily experts necessitating their receiving formal international status on that basis.[91] In most states, they do not have the resources, unlike NGOs which are normally donor-funded, to obtain all the information relating to human rights violations in the respective country.[92] However, Kapindu argues to the contrary and asserts that 'perhaps the problem is not inherent in the very concept of an NHRI, but rather in some of the people who have thus far been appointed to such organisations'.[93] He concludes by pointing out — rightly so — that the very nature of an NHRI requires that the people who are appointed should possess the necessary expertise in the area of human rights.[94]

4 Participation of national human rights institutions in the workings of the African Commission

Consistent with international best practices, the African Charter encourages states to establish appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed

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87 Cardenas (n 19 above) 37.

88 CR Kumar 'National human rights institutions: Good governance perspectives on institutionalization of human rights' (2003) 19 *American University International Law Review* 297; see also MA Olz 'Non-governmental organisations in regional human rights systems' (1997) 28 *Columbia Human Rights Law Review* 326-321.

89 Para 1(a) Paris Principles, Composition and Guarantees of Independence and Pluralism.

90 Training Series 12 *Economic, social and cultural rights: A handbook for national human rights institutions* (2005) 38.

91 Murray (n 52 above).

92 Kumar (n 88 above) 297; interview with Roselyn Karugonjo-Segawa, Director, Monitoring and Inspections, Uganda Human Rights Commission, Kampala, Uganda, 14 October 2008.

93 Kapindu (n 80 above) 199.

94 As above.

under the Charter.[95] Before NHRIs were given the opportunity to obtain affiliate status with the African Commission in 1998, a Co-ordinating Committee of African National Institutions (now renamed the Network of African National Human Rights Institutions) was formed in 1996 in Yaoundé, Cameroon, where the first African National Institutions Conference was held.[96] The Yaoundé Declaration was a decision by NHRIs present at the conference to, among other things, negotiate for a proper representative status at the African Commission.[97] The second conference of a similar nature was held in 1998 in Durban, South Africa, where another declaration was adopted.[98] The Durban Declaration urged the African Commission to adopt — at its next session — an appropriate resolution on the effective participation of national institutions in the work of the African Commission.[99]

NHRIs were offered the opportunity to apply for affiliate status with the African Commission through the 1998 Resolution on Affiliate Status. The Resolution did no more than endorse the Paris Principles as the criteria applicable for determining the status of affiliated institution and imposed a few obligations on these institutions.[100] The decision to grant NHRIs affiliate status by the African Commission was welcomed by the Organization of African Unity (OAU) in its Grand Bay (Mauritius) Declaration and Plan of Action.[101] It appears that NHRIs themselves pushed hard for recognition and eventual affiliate status with the African Commission. The relationship between NHRIs and the African Commission after the 1998 Resolution on Affiliate Status will be the focus of the next section of this article.

4.1 Beyond the Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa (1998)

The term 'affiliate status' adopted by the 1998 Resolution does not clearly define the role of NHRIs and fails to sufficiently demarcate the nature of the role of NHRIs at the African Commission. The Resolution merely requires that these institutions assist the African Commission in the promotion and protection of human rights at the national level.[102] That notwithstanding, their affiliate status entitles NHRIs to be present at and to participate 'without voting rights' in African Commission

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95 Art 26 as read with art 25 African Charter.

96 http://www.newsite.co.ke/hr/index.php?option=com_content&task=view&id=8&Itemid=3 (accessed 11 October 2008).

97 Para 17 Yaoundé Declaration.

98 Durban Declaration.

99 Para 14 Durban Declaration.

100 Para 4 Resolution on Affiliate Status.

101 Para 24 Mauritius Declaration and Plan of Action.

102 Para 4(d) Resolution on Affiliate Status to National Human Rights Institutions in Africa, adopted at the Commission's 24th session, Banjul, The Gambia, 22-31 October 1998; Viljoen (n 3 above) 413.

sessions.[103] The Activity Reports of the African Commission catalogue, albeit inconsistently, the relationship after the 1998 Resolution on Affiliate Status. NHRIs are afforded time to speak after states and before NGOs. They speak under the agenda item 'co-operation and relationship between Commission with NHRIs and NGOs' during the public sessions of the African Commission.[104] NHRIs are permitted to make any presentations on any issue that is of relevance to them and their presentations are usually preceded or followed by consideration by the African Commission of applications for affiliate status from NHRIs. NHRIs which care to attend the African Commission sessions take this opportunity to request a more involving relationship between the African Commission and NHRIs.[105] They have also been given the opportunity to give a statement, through a representative of NHRIs, at the opening ceremony of the Commission's sessions.[106]

The Interim Rules of the African Commission now make specific reference to NHRIs under Rule 72. Unfortunately, the Interim Rules restate the 1998 Resolution on Affiliate Status and do not marshal any new improvements. Unlike NGOs with observer status, it is not mentioned what will happen when a NHRI fails to submit its bi-annual report to the Commission. Further, it appears that NGOs with observer status can be invited to be present at private sessions of the Commission, whilst the same opportunity appears not to have been extended to NHRIs.

The participation of NHRIs in the sessions of the African Commission is as a result erratic. The Activity Reports indicate that a high water mark of attendance was reached at the African Commission's 39th ordinary session, when 19 NHRIs attended.[107] The number decreased sharply to five at the following session.[108] The 41st ordinary session was graced by 11 NHRIs.[109] Four institutions attended the 42nd session[110] and the 43rd ordinary session was attended by three NHRIs.[111] The 44th ordinary session was attended by nine NHRIs,[112] while the 45th ordinary session was attended by eight NHRIs.[113]

Apart from these sessions, the collaboration of NHRIs with the commissioners is usually in the form of promotional missions in respect of the duties that they have been assigned to do, mostly in their capacity

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[103] Para 4 1998 Resolution on Affiliate Status; Viljoen (n 3 above) 413.
[104] Murray (n 52 above) 49.
[105] n 9 above.
[106] Murray (n 52 above) 51.
[107] Para 7 20th Activity Report, AU Doc EX.CL/279(IX).
[108] Para 7 21st Activity Report, AU Doc EX.CL/322(X).
[109] Para 9 22nd Activity Report, AU Doc EX.CL/364(XI).
[110] Para 12 23rd Activity Report, AU Doc EX.CL/466(XIII).
[111] Para 10 24th Activity Report.
[112] Para 8 25th Activity Report, AU Doc EX CL/490(XIII).
[113] Para 6 26th Activity Report.

as Special Rapporteurs.[114] Frankly, the commissioners are not doing much in terms of establishing a more formal link between the African Commission and NHRIs. These promotional activities are mostly in the form of workshops or panel discussions, relegating this affiliate status to nothing more than a 'talk shop'. Otherwise any working relationship between the African Commission and NHRIs in any other forum or form, if any, remains invisible.

There is simply no proper co-ordination and communication between the two. In the first instance, despite assertions by the African Commission that it values the relationship,[115] it has failed to follow up on the submission of reports by NHRIs as required by the 1998 Resolution on affiliate status.[116] This is despite the fact that once such a follow up is consistently done, NHRIs and the African Commission will be kept abreast of the workings of each other. It will further allow the African Commission to ensure that African NHRIs comply with the Paris Principles.

The African Commission is simply not pro-active, has left much to chance and to a large extent depends on the efforts of NHRIs. It does not even play a protective role in supporting NHRIs' commissioners that face government pressure or reprisal for their work. The African Commission has not reprimanded NHRIs that are weak or state-compliant.[117] This is despite a scathing report on NHRIs entitled 'Protectors or Pretenders; Government Human Rights Commissions in Africa' published by Human Rights Watch in March 2001.[118] Furthermore, several recommendations made by NHRIs to the African Commission remain unimplemented.[119] Despite this unfruitful relationship, the African Commission continues to confer affiliate status on those institutions which have applied and it continues to encourage states to establish such where none exists.[120]

How and in what form this operational gap can be closed is discussed in detail later in this article. Suffice to point out that the participation of NHRIs may 'be limited to their issuing of common positions on thematic issues as regards human rights implementation, including their

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114 Para 58 23rd Activity Report.

115 Paras 47 & 49 African Commission's Mauritius Plan of Action 1996-2001.

116 Murray (n 52 above) 87.

117 Human Rights Watch 'Protectors or pretenders? Government human rights commissions in Africa' http://www.hrw.org/reports/2001/africa summary (accessed 10 May 2008).

118 The report charges that many African NHRIs serve as apologists for government violations of human rights, lack independence and are generally, with a few exceptions, ineffective; Human Rights Watch (n 117 above) summary; MH Abdiwawa 'Empowering people on their rights in Tanzania' in Peter (n 36 above) 44.

119 Second AU conference on NHRIs which was held to discuss the role of NHRIs in the African Commission resulted in recommendations which remain unimplemented; para 18 20th Activity Report; Viljoen (n 3 above) 413.

120 Murray (n 52 above) 51.

own role and achievement of it'.[121] NHRIs can strengthen the national human rights institutions forum during the sessions of the African Commission at which strategies, resolutions as well as partnerships will be created. The national human rights institutions forum may only be strengthened by regular attendance of the sessions of the African Commission by NHRIs. Despite the possible involvement of a NHRI in the drafting of the state report, NHRIs should take an active part in assisting commissioners with questions that should be posed to the delegation of the reporting state. They should be more involved in the drafting of the African Commission's operating documents, such as its rules of procedure and its state reporting guidelines.

In the light of the non-existent efforts by the African Commission, efforts by NHRIs themselves cannot go unnoticed. NHRIs continue to hold conferences geared towards fostering a meaningful relationship. It is at these meetings that NHRIs could share their experiences, activities and difficulties with regard to the protection of human rights at the national level.[122] African NHRIs have also established the Network of African National Human Rights Institutions (NANHRI/Network), formerly known as the Co-ordinating Committee of the African National Human Rights Institutions.[123] The constitution of NANHRI governs, among other things, the Co-ordinating Committee of NANHRI.[124] Registered under Kenyan law as an independent legal entity, the Co-ordinating Committee co-ordinates the activities of the network through the Secretariat based in Kenya.[125]

NANHRI was conceived as a means of fostering relationships between NHRIs, regional and international human rights protection bodies as well as a way of strengthening NHRIs in Africa.[126] As Karugonjo-Segawa has pointed out, the network is willing and it is trying to improve relations between NHRIs in Africa and the African Commission.[127] The most unfortunate thing to happen would be for the network to concentrate on maintaining a good relationship with the International Co-ordinating Committee of National Human Rights Institutions (ICC) and other UN Charter-based mechanisms to the exclusion of the African Commission. Commissioner Bahame Nyanduga has already lamented the fact that the Constitution of NANHRI does not mention the African Charter, yet

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121 G de Beco 'Networks of European national human rights institutions' (2008) 14 *European Law Journal* 860-877 869.

122 De Beco (n 121 above) 864.

123 http://www.newsite.co.ke/hr/index.php?option=com_content&task=view&id=8&Itemid=3 (accessed 11 October 2008).

124 As above.

125 As above.

126 Arts 2 & 3 Constitution of NANHRI.

127 Interview (n 92 above).

member states draw reference from the Charter.[128] He further pointed out that there is a need for the modalities of co-operation between the African Commission and NANHRI to be looked into.[129]

4.2 Post-mortem: Understanding the stillbirth of the relationship between the African Commission and national human rights institutions

One need not belabour the point with regard to this sad reality. As evidenced above, the lack of co-ordination between the African Commission and NHRIs is, to a larger extent, the cause of all the woes that have befallen the relationship between the two. Despite repeated calls for the establishment of one,[130] there is still no focal point for NHRIs within the Secretariat of the African Commission. This is despite the foregone conclusion that once such a co-ordination point is established, there will be an improved relationship. Such a focal point is likely to enhance their affiliate status as well as lead to the development of a clearer working relationship.[131] NHRIs do not attend the meetings of the African Commission because of the way the proceedings are being conducted and the lack of clarity on the agenda.[132] Hansungule questions the competence of NHRIs in assisting states' compliance with international obligations and points out that in certain cases they do not possess the relevant skills to play that role.[133] On the contrary, Karugonjo-Segawa posited that most NHRIs now have the capacity and indeed appreciate the workings of the African Commission.[134] Possibly, in certain cases, NHRIs are staffed with people who have no prior experience or training in human rights standards or work,[135] making it impossible for them to appreciate the work of the African Commission.

The poor relationship between the African Commission and NHRIs may be attributable to a lack of interest in the workings of the African Commission by NHRIs themselves, a lack of interest in the work done by NHRIs by the African Commission and, fatally, a lack of communication of the African Commission's activities to NHRIs.[136] Other problems

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128 Conference Report, Sixth Conference of African National Human Rights Institutions, 8-10 October 2007, Kigali, Rwanda, 34.

129 As above.

130 n 9 above; Report of the retreat of members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights (OHCHR), African Union Conference Centre, Addis-Ababa, Ethiopia, 24-26 September 2003 http://www.nhri.net/pdf/ACHPR-Retreat-Report-Final.pdf (accessed 22 February 2010).

131 As above.

132 Murray (n 52 above) 53.

133 M Hansungule 'R Murray *The role of national human rights institutions at the international and regional levels*' (2007) 7 *African Human Rights Law Journal* 592.

134 Interview (n 92 above).

135 Human Rights Watch (n 115 above) summary.

136 Interview (n 92 above).

that may be cited as hindrance include, in some cases, a lack of political space necessary for the NHRI to operate effectively or, where there is space, self-censorship by the NHRI. Some, like the Ugandan Human Rights Commission, do not take part in the workings of the African Commission due to financial difficulties. NHRIs may also be flawed at inception, hobbled by statute, or controlled through funding or staffing.[137] Additionally, this inaction may be due to an understanding of their (NHRIs') role as being limited to the domestic arena and not concerned with the international or regional human rights mechanisms.

The relationship between NHRIs and other human rights bodies in Africa is also important because it has the potential to ensure the more effective protection of human rights on the continent. Unfortunately, at the time of this study, there was no established relationship between NHRIs and other African human rights mechanisms. The Protocol to the African Charter Establishing the African Court on Human and Peoples' Rights (Court Protocol) does not explicitly refer to NHRIs. According to its Interim Rules of Procedure, only NGOs with observer status have access to the Court.[138] However, African NHRIs will only be able to submit communications to the African Court of Justice and Human Rights (African Court of Justice) once it becomes operational.[139]

5 Closing the gap: A dynamic approach to the relationship between the African Commission and national human rights institutions

As already highlighted, the basis for reforming the relationship between the African Commission and NHRIs is to address the issue of poor co-ordination and communication of their initiatives. That can only be addressed by establishing and strengthening links between the African Commission and NHRIs in Africa.

In so far as strengthening co-operational links is concerned, the African Commission could establish a focal unit within its Secretariat designed to co-ordinate all its relations with NHRIs. The establishment of such a focal point has been recommended as a way of strengthening the relationship between the African Commission and NHRIs.[140] As Hansungule points out — though in the context of the African Peer Review Mechanism (APRM) — a 'focal point is a critical link ... It is deci-

[137] Human Rights Watch (n 115 above) summary.

[138] Art 5(3) Court Protocol, as read with Rule 33 of the Interim Rules of Procedure of Court.

[139] Art 30 Protocol on the Statute of the African Court of Justice and Human Rights (2008).

[140] Report of the retreat of members of the African Commission on Human and Peoples' Rights (n 130 above); n 9 above.

sive to the success of the mechanism. An inaccessible focal point means stakeholders cannot communicate.'[141]

A focal point within the Secretariat of the Commission is likely to ensure, among other things, proper dialogue between the African Commission and NHRIs. Through such a focal point, the African Commission can ensure that NHRIs comply with the Paris Principles and can therefore easily assess their effectiveness. Working with NHRIs, the focal point will support their work through a number of training and development activities and act as the point of contact between the African Commission and NHRIs. The NHRI unit may be tasked with ensuring that NHRIs submit their bi-annual activity reports as required by the 1998 Resolution on Affiliate Status. Such a body could also be used to implement the recommendations made to the African Commission pertaining to its relationship with NHRIs. A NHRI unit could also be mandated to consider applications for affiliate status. This will also grant the African Commission the opportunity to make the process of granting NHRIs affiliate status more thorough and less time-consuming. Karugonjo-Segawa points out that it took three applications to the African Commission for the Ugandan Human Rights Commission to be granted affiliate status.[142]

Additionally, such a unit could be a point where the African Commission and NHRIs convene to make decisions and implement resolutions that were adopted mainly by the African Commission. Such a body may, but does not necessarily need to, be the decision-making body of the partnership. Considering that this may have budgetary implications, it is advisable that in the interim a focal person be appointed to act as the link between the African Commission pending the establishment of such a focal point, obviously in the form of a permanent office within the Secretariat of the Commission.

Such a unit would also not be the first of its kind. The UN Office of the High Commissioner for Human Rights (UNOHCHR) has a similar unit. The UNOHCHR has also established a National Institutions Unit (NI Unit), tasked with co-ordinating activities between the UNOHCHR, the International Co-ordinating Committee of National Human Rights Institutions (ICC) and other UN treaty bodies.[143] The NI Unit is also the secretariat of the ICC[144] and provides advisory services relating to the

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141 M Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: Opportunities and constraints in implementation' (undated) 15.

142 Interview (n 92 above).

143 Rule 2 International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Rules of Procedure.

144 The ICC co-ordinates NHRIs at national level, organises ICC conferences and ensures regular contact with the OHCHR and other international organisations. The ICC is also responsible for accrediting NHRIs that are in compliance with the Paris Principles; R Murray (n 52 above) 31.

establishment and management of these institutions.[145] It also facilitates NHRIs' participation in the UN and UN Charter treaty bodies.[146]

Another route could be for the Network of African National Human Rights Institutions to take up this role and facilitate closer co-operation between the African Commission and its members. Having recognised the importance of such co-operation — particularly in relation to co-operation with UN bodies — NHRIs around the world have forged regional networks. Within Latin America, there is the Network of the Americas' National Institutions for the Promotion and Protection of Human Rights, which was created in 2000.[147] In the Asian region there is the Asia Pacific Forum of National Human Rights Institutions (APF).[148] Among other things, the APF provides practical support for the establishment and strengthening of NHRIs in the Asia Pacific region.[149] The APF also provides support to its members and assists them in their role of promoting, monitoring and protecting human rights.[150] The APF thus offers a wide range of services and support for its members. These services include, among other things, co-ordination of the participation of member institutions in the UN, ICC and other international and regional mechanisms. Just like NANHRI, its membership consists of NHRIs in the region and its activities are by far involved with human rights protection institutions in the region. Furthermore, just like NANHRI, full membership is limited to NHRIs which comply with international standards set out in the Paris Principles.

NHRIs can and should strive to establish a co-ordinated relationship. They can collaborate in many areas, including, but not limited to, capacity building through training,[151] co-operation through the exchange of information[152] as well as the organisation of regional workshops.[153] It is through networking that NHRIs can better participate in the formulation of policies and human rights protection initiatives in Africa.

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145 Effective functioning of human rights mechanisms: National institutions and regional arrangements. Paras 5-6 Report of the Secretary-General, 24 January 2006 E/CN.4/2006/101.

146 Rule 4(a) Rules of Procedure of the ICC.

147 http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/other-human-rights-institutions/americas.pdf (accessed 23 September 2008).

148 Asia Pacific Brochure http://www.asiapacificforum.net (accessed 23 September 2008).

149 As above.

150 As above.

151 The APF has a good exchange programme and has gone a long way to training the staff of member institutions.

152 The APF has a website in place (http://www.asiapacificforum.net) that is used for the dissemination of information pertaining to the activities carried out by NHRIs. NANHRI, although still at the nascent stages, has a similar website (http://www.nanhri.com) which can be used effectively for the dissemination of information.

153 Remarks of Mr Justice R Rajendra Babu, Chairperson, National Human Rights Commission of India, 12th Annual meeting of APF, 26 September 2007.

5.1 Establishing and strengthening co-operational links: The way forward

For there to be a meaningful and sustainable relationship, there is a need for clarity in the normative framework and at present the term 'affiliate status' does not adequately explain the role of NHRIs in the workings of the African Commission. The African Commission should therefore revisit the 1998 Resolution on Affiliate Status in order to clarify the position of NHRIs within its hierarchy, if any, of human rights actors. Further, the African Commission should introduce guidelines on the relationship between the African Commission and NHRIs just as it is the case with the Abuja Guidelines on the relationship between parliaments, parliamentarians and Commonwealth NHRIs.[154] The guidelines should explicitly spell out what the Commission can do to support the work of a NHRI and conversely what NHRIs can do to support the workings of the Commission. Equally, NHRIs should strengthen the Network of African National Human Rights Institutions, as earlier recommended.

The two should therefore identify areas of strategic interest and draw up a plan of action. Areas of possible support and collaboration include the submission of cases before the African Commission; collaboration in fact-finding missions; the inspection of prisons and detention facilities; and the organising of symposia, workshops, promotional visits, follow-up of decisions of the African Commission, preparation of state reports as well as shadow reporting. Collaboration on such activities should be organised through a focal point established within the African Commission Secretariat.

Thus, areas for collaboration between the African Commission and NHRIs can be either protective or promotional.

5.2 Protective-based co-operation

Under article 45(2) of the African Charter, the African Commission is mandated to protect human rights in Africa. This function has several aspects, which include individual communications,[155] inter-state communications and 'on-site' or 'fact-finding' missions by the African Commission.[156] NGOs have been regarded as partners of the African Commission as they have engaged critically with the African Commission on its working methods as well as in its working groups.[157] For example, NGOs have been instrumental in the submission of communications and the development of the communications procedure[158]

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[154] Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth NHRIs (2004).

[155] Arts 47- 59 African Charter.

[156] Art 46 African Charter.

[157] Viljoen (n 3 above) 407.

[158] As above.

and they have also facilitated fact-finding and promotional missions of the African Commission.[159]

The African Commission and NHRIs can certainly elevate their relationship to the same level as that of the African Commission and NGOs. In respect of communications, NHRIs could start by developing a culture of submitting communications to the African Commission. This has been done before[160] and needs only to be encouraged further, as the Rules of Procedure of the African Commission do not prevent NHRIs from submitting cases before the African Commission. In fact, NHRIs lodge petitions with the Inter-American Commission on Human Rights after domestic remedies have been exhausted.[161]

As regards 'on-site' or 'fact-finding' missions by the African Commission,[162] NHRIs could provide assistance to the missions sent by the African Commission, acting under article 46 of the African Charter, to investigate allegations of human rights violations.[163] They can partner with the Special Rapporteur on Prisons and Detention Facilities in Africa, for example, to inspect prisons and detention facilities.[164] This is ideal, especially as the mandate of most NHRIs involve the investigation of alleged human rights violations. Such inspections could also act as a vital pre-emptive measure which is important for vulnerable persons in the hands of state organs.[165] Furthermore, it could help the African Commission overcome some of the problems the delegates encounter during fact-finding missions, such as time constraints and the inability to collect enough evidence during their fact-finding missions.[166]

5.3 Promotion-based co-operation

Article 45 of the African Charter mandates the African Commission to promote human and peoples' rights on the continent.[167] In particular,

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159 As above.

160 *Commission Nationale Des Droits de l'homme et des Libertés* v *Chad* (2000) AHRLR 66 (ACHPR 1995); Murray (n 52 above) 13.

161 L Reif *The Ombudsman, good governance and the international human rights system* (2004) ch 6.

162 T Mutangi 'Fact-finding missions or omissions: A critical analysis of the African Commission on Human and Peoples' Rights and lessons to be learnt from the Inter-American Commission on Human Rights' (2006) 12 *East African Journal of Peace and Human Rights* 1, for a detailed discussion on fact-finding missions of the African Commission.

163 Report of the retreat of members of the African Commission (n 130 above) 9.

164 F Viljoen 'The Special Rapporteur on Prisons and Conditions in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 125-171.

165 CM Peter 'The way forward for the East African Human Rights Institutions' in Peter (n 36 above) 324.

166 Mutangi (n 162 above) 37.

167 Art 45(1) African Charter; Yeshanew (n 75 above) 191.

the African Commission may collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, and disseminate information.[168] Accordingly, the African Commission is mandated to co-operate with African and other international institutions concerned with the promotion of human and peoples' rights.[169]

Over the years, the African Commission has made efforts aimed at realising the goals of its promotional mandate and appears to have properly organised itself for promotional activities.[170] The African Commission has thus been involved in the dissemination of information and the organisation of conferences, workshops, seminars and symposiums to discuss the relevant issues. In so far as the promotional mandate of the African Commission and co-operation between the Commission and NHRIs are concerned, there seems to be a movement in the right direction. The Activity Reports of the African Commission shows that commissioners do attend seminars and workshops organised by NHRIs to discuss issues relating to human rights as part of the promotional mandate of the African Commission.

Despite the controversy surrounding the extent of their participation in the state reporting process, NHRIs should be involved in one way or another in the state reporting process.[171] This is well within their monitoring mandate. They should, for example, be involved in the preparation of country reports and should send shadow reports to the African Commission so as to help bring to the fore facts that can only be obtained through investigative work at the national level.[172] Such reports are likely to better exhibit the reality of the human rights situation of the country. NHRIs can further 'provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners"'.[173] In fact, that was the recommendation made at a retreat of the members of the African Commission where the role of NHRIs in the workings of the African Commission was discussed.[174] The African Commission should build the capacity of NHRIs on issues relating to state reporting.

Another area of collaboration between the African Commission and NHRIs could be in the area of follow-up of country-specific

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168 Art 45(1)(a) African Charter.

169 Art 45(1)(c) African Charter.

170 VOO Nmehielle *The African human rights system: Its laws, practices and institutions* (2001) 176-179.

171 Viljoen (n 3 above) 371; Report of the Brainstorming Meeting on the African Commission, 9-10 May 2006, Banjul, The Gambia, AU Doc ACHPR/BS/01/010,9 May 2006 (20th Activity Report, Annex II).

172 As above.

173 G Alfredsson *et al* (eds) *International human rights monitoring mechanisms* (2001) 825.

174 Report of the retreat of members of the African Commission (n 130 above) 3.

resolutions, decisions of the African Commission, and concluding observations on reports made to the African Commission by states.[175] Collaboration in this area can strengthen the African Commission's practice regarding the follow-up of recommendations and decisions of the African Commission. This is because of the pressure that NHRIs can exert at the national level as well as the fact that follow-up may be considered a form of investigation within the context of the communication procedure.

6 Conclusion

The participation of NHRIs in the workings of the African Commission, even though controversial, is not a hindrance to the establishment of any working relationship. Their participation is controversial because the Paris Principles and other documents outlining the nature and functions of the NHRI do not envisage an NHRI that is actively and/or directly involved at the international or regional level. At present there is no proper working relationship between the African Commission and NHRIs. This is largely attributable to two main factors. Firstly, there is no proper agenda, direction or framework as to what form the relationship should take. Secondly, there is absolutely no co-ordination or communication of events and initiatives of the two, making collaboration inconsistent, erratic and largely in the form of workshops, symposia and presentations by commissioners.

NHRIs can assist the African Commission through the submission of cases, collaboration in fact-finding missions, the inspection of prisons and detention facilities, organising of symposia, workshops, promotional visits, the follow-up of decisions of the African Commission, and the preparation of state reports as well as shadow reporting. In order to further strengthen its collaboration with NHRIs, the African Commission should establish a focal point within its Secretariat. The proposed unit should be tasked with co-ordinating activities between the African Commission and NHRIs. It can also be used for monitoring the effectiveness, independence and compliance with the Paris Principles by African NHRIs. It has been suggested that, pending the establishment of a focal point within the African Commission Secretariat, there be appointed a focal person responsible for co-ordinating activities between the African Commission and NHRIs. Equally, NHRIs should strengthen the Network of African National Human Rights Institutions in order to develop a functional and working relationship between the African Commission and NHRIs in Africa.

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175 F Seidensticker *Examination of state reporting by human rights treaty bodies: An example of follow-up at the national level by national human rights institutions* (2005).

Closer collaboration between the African Commission and NHRIs, although faced with many challenges, would bring about effective human rights protection in Africa. It would also ensure that the efforts of the African Commission trickle down to the citizenry. One cannot overemphasise the importance of overhauling the manner in which the African Commission and NHRIs relate. Ten years since NHRIs were afforded affiliate status, it is appropriate that the two take this relationship beyond mere rhetoric and paper-based affiliate status.