

# NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS

By Morten Kjærum \*



**Det Danske Center for Menneskerettigheder**

NATIONAL HUMAN RIGHTS INSTITUTIONS IMPLEMENTING HUMAN RIGHTS

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# 1. Introduction

In 1990 there were eight national human rights institutions (NHRI) worldwide,<sup>1</sup> a number that had increased to 55 by 2002. The development has been global in the sense that all regions have seen an increase in the number of new institutions. Thus, it is no exaggeration to say that this is indeed a remarkable development.<sup>2</sup>

The end of the cold war provided new opportunities for strengthening human rights as a number of Communist countries and other totalitarian states began a democratization process. From 1990 to 1996 over 60 countries were democratized. This global wave brought about great changes at the domestic level, including democratic elections as well as the establishment of national parliaments and democratic institutions. In the initial phase, democracy and human rights were closely linked in the political rhetoric. Yet, human rights quickly came to play a secondary role, with the main focus being on creating multi-party elections and formal democracies.<sup>3</sup> The absence of a democratic culture or a culture of human rights was at this early stage not taken seriously into account or believed to change as transition went along.

However, as Asbjørn Eide wrote in 1991 on the protection of minority rights and self-determination: “probably the best avenue is to develop and strengthen the general system for the protection of individual rights, promoting consolidation everywhere of non-discrimination, openness, rule of law and pluralist democracy”.<sup>4</sup> This interrelated understanding eventually gained ground, and in the mid-1990s human rights were recognized as important building blocks in the new democracies. Out of this development grew the need for a new type of organization mandated to monitor and raise awareness and understanding of human rights, and to play a catalytic role in creating a culture of human rights. A role which human rights NGOs were not in a position to fulfill since their mandate and working methodology had been developing in a more partisan direction for decades. The few national human rights institutions, which existed at that time, came to play a model role in filling this gap.

The development took its outset in the new democracies in Africa, Asia and Eastern and Central Europe. However, there was also an important spill over into Western Europe where human rights came to play an increasingly important role in domestic politics and law. During the cold war, human rights were perceived to form part of the foreign policy of most Western European countries, whereas in the last decade they have to a larger extent become an integral part of the domestic legal body. The latter prompted the setting-up of a growing number of national human rights institutions in Western Europe during the late 1990s.

This article will look into the development of the doctrine of national institutions in implementing human rights at the national level. Potential stumbling blocks will be addressed, in particular in relation to how these institutions strike the balance between politics and their legitimate advisory and monitoring functions. Furthermore, their role in terms of bridging the gap between the local community and international treaty bodies will be discussed to illustrate the significance of the new comprehensive human rights machinery.

## 2. What is a national human rights institution?

In 1991 the First International Workshop on National Institutions for the Promotion and Protection of Human Rights<sup>5</sup> was held in Paris. The outcome of this workshop was a set of principles guiding the work and structure of national institutions. These guidelines were endorsed by the UN Commission on Human Rights<sup>6</sup> the following year and adopted by the UN General Assembly in December 1993.<sup>7</sup> However, the idea of establishing national institutions can be traced back to the second session of the UN Economic and Social Council in 1946 where it was decided to invite member states to “consider the desirability” of establishing local bodies in the form of “information groups or local human rights committees” to function as vehicles for collaboration with the UN Commission on Human Rights.<sup>8</sup>

In the period between 1946 and 1991 the issue of creating mechanisms to implement the increasing volume of new human rights instruments was raised at seminars, in UN bodies such as the Commission on Human Rights, and in the General Assembly. It is also recommended in legal texts such as, for example, in article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (ICERD). During this period the profile of the institution was not clear as it ranged from being a service organ for the UN Commission on Human Rights in the ECOSOC resolution, to a specialized body dealing with complaints about racial discrimination under the ICERD. Moreover, some texts<sup>9</sup> even embrace institutions remotely concerned with human rights. Given the above circumstances, a clarification of the specific structure and mandate of these institutions was called for.

The clarification came with the formulation of the so-called Paris Principles in 1991. The Principles establish in particular the competence and responsibilities of a national institution as well as its composition and guarantees of independence and pluralism. According to the Principles the institution shall be given as *broad a mandate* as possible in order for it to be able to promote and protect human rights. This implies that institutions with a singular human rights mandate will normally not be categorized as a national institution but rather as a specialized institution,<sup>10</sup> e.g., ombudsman against ethnic discrimination, institutions dealing with human rights issues related to disabled persons, children or other groups. However, the International Coordination Committee of National Institutions (ICC)<sup>11</sup> has recognized that a group of specialized institutions can collectively be recognized as a national institution since they jointly cover a broad range of key human rights issues.<sup>12</sup> Further to the scope of the mandate, nothing in the Paris Principles rules out that a national institution can deal with human rights related international issues and the foreign policy of its respective country. However, without the domestic dimension the institution would not qualify as a national institution. This is relevant for many European institutions since they have traditionally mainly perceived their role as one of addressing human rights issues abroad, or in international bodies rather than domestically.

The Paris Principles list a number of responsibilities for national institutions, which fall under five headings. First, the institution shall *monitor* any situation of violation of human rights, which it decides to take up. In order to carry out this function the institution needs sufficient staff to follow developments in any part of the country, and it must furthermore not be limited in its access to any NGO, group or individual, which may be threatened or possess knowledge about violations.

Second, the institution shall be able to *advise* the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and its compliance with international human rights instruments, and on the implementation of these instruments. Thus, some channels of communication should be established, formally or informally between the institution and the relevant state organs. It would hamper the work of the institution if the primary channel of communication would be via the media.

Third, the institution shall *relate to regional and international organizations*. The Government shall be encouraged by the national institution to ratify human rights instruments, and the institution shall contribute to the reports which States are required to submit to regional and international institutions or committees. The cooperation with regional and international bodies shall be broadly based and be without specific limitations.

Fourth, the institution shall have a mandate to *educate and inform* in the field of human rights. It shall assist<sup>13</sup> in the formulation of educational human rights programmes and in human rights research, and take part in their implementation at schools, universities and in professional circles. Finally, the institution shall be able to prepare and publicize reports on any human rights matter and make use of all press organs. The Paris Principles underscore in particular the important role that national institutions can play in relation to combating all forms of discrimination, in particular racial discrimination, by raising public awareness.

Fifth, some institutions are given a *quasi-judicial competence*. Whereas an institution can hardly be recognized as fulfilling the Paris Principles if one of the first four elements is left out of its mandate, it is facultative to give it the mandate to hear and consider individual complaints and petitions. Notwithstanding the latter, the development in this area is moving towards more institutions having this mandate as well.<sup>14</sup>

The key elements of the composition of a national institution are its independence and pluralism. In relation to the *independence* the only guidance in the Paris Principles is that the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act, establishing the specific duration of the mandate, which may be renewable. In the UN Handbook on National Human Rights Institutions<sup>15</sup> these criteria are further elaborated to contain elements such as nationality, profession and qualifications, which persons are entitled to dismiss members and for what reasons, privileges and immunities. Furthermore, a principle of continuation is developing in practice, stipulating that there shall be a continuation of the individuals manning the institution, aimed at situations where the law governing an institution is changed without bringing about any obvious improvements. This serves to prevent a government from being able to silence an institution by changing the law and then manning the institution with individuals with more pro-government views. Looking at the existing institutions there are a variety of ways to ensure the independence of the institution, often following local legal traditions for that kind of administrative bodies or courts.<sup>16</sup>

An often-neglected element in relation to the independence of national institutions is the regional and international networks and structures. These networks may help mobilize an international reaction and thereby provide a *de facto* safety net against unfriendly governmental attacks on an institution. Viewed in this way these regional and international networks should be perceived as an element in establishing the independence of a national institution.

One of the ways in which national institutions differ from traditional ombudsman institutions is in relation to the *pluralist representation* in the governing structures. The appointment procedures shall ensure pluralist representation of the social forces involved in the promotion and protection of human rights. The Paris Principles specifically point to the representation of NGOs, trends in philosophical or religious thought, universities and qualified experts, parliament and government departments. If government departments are represented they should participate in the deliberations in an advisory capacity only. The pluralist representation ensures input from different sectors in society and thus offers an opportunity for the institution to detect possible human rights violations as well as different perspectives offer an opportunity to broaden the inventiveness in responding to the violations. Furthermore, it provides channels for information and education to specific target groups. If the pluralist composition is not taken seriously, a national institution runs the risk of being self-contained in a narrow circle of like-minded persons from the urban and academic elite. Thus, neglecting issues related to, for example, rural areas, minority groups or certain sectors.

These basic principles for national institutions constitute the international normative platform for a variety of institutions. The diversity in the composition and mandate of the institutions underlines the different legal traditions in the world.<sup>17</sup> Nonetheless, the existing recognized institutions can be categorized in five different groups.<sup>18</sup> The French Human Rights Commission, which is the oldest from 1948, is a good example of a *consultative commission*. It is a broad-based commission with a membership consisting of key NGOs, the academia, representatives from different religious communities and others – all together 119 institutions and individuals. The members take an active part in the decisions of the Commission. The Commission does not deal with individual complaints. This type of institution is found in Greece and in a number of francophone African countries, including Morocco.

*Commissions with judicial competence* are seen in a number of common law countries, for example, India, Ireland as well as in South Africa. However, the model has also been a source of inspiration in countries such as Latvia and Nepal. These institutions have a number of full-time or part-time commissioners appointed according to different criteria. An important function is the handling of individual complaints about human rights violations. In some countries the mandate of this type of institution is expanded to cover the mandate of a traditional ombudsman as well and it thereby becomes a *commission with judicial and ombudsman competence*. This is the case in Ghana, Mexico, Mongolia and Tanzania.

*National human rights centres* have developed in Northern Europe, e.g., Denmark, Germany and Norway, the oldest of which is the Danish Centre for Human Rights established in 1987. In many ways this type of institution resembles the consultative commission with the broad membership base. However, the work of the institutions is research-based, and the members play a less active role in the specific work of the institutions as they mainly serve to give policy directions to the management. In general, institutions of this nature do not deal with individual complaints.<sup>19</sup>

Finally, in the gray zone a number of *human rights ombudsmen* have obtained formal status as national institutions. As mentioned above this has, e.g., been the case in Sweden where specialized ombudsmen have been recognized collectively. Moreover, ombudsman institutions in Latin America and in some Eastern and Central European countries often

have such a strong human rights mandate that they have been recognized as national institutions. This is the case despite the fact that these institutions often fall short of the formal institutional input from civil society. Nonetheless many of them have a very dynamic interaction with civil society groups.

With the adoption of the Paris Principles, the profile of the national human rights institutions became more distinct. Occasionally, the issue is raised whether to adjust the Principles following a decade of experience. However, since they have so far proven to serve their purpose as a common frame of reference in establishing these institutions, such a process of revision may be premature and only serve to open Pandora's box.<sup>20</sup> In an historical perspective national institutions are still young and before opening the box it might be advisable to gain more experience on strengths and weaknesses, opportunities and threats.

### 3. Monitoring and advising – law or politics?

Why would it be like opening Pandora's box to look at a revision of the Paris Principles? Human rights regulate the relation between the State and the citizens within its jurisdiction, and human rights put limitations on how far the Government can intervene in the integrity and autonomy of the individual. In this way human rights are a living reality for politicians and civil servants, and sometimes they are perceived as a severe limitation in the law-making process or in the administration of laws. With the increased attention on the implementation of human rights during the last decade at all levels of the state administration, this feeling of being limited in the art of making politics has increased among some politicians. In this regard a national institution will be an obvious target, since the institution will often be the messenger of the information that a specific law or an administrative decision is not in conformity with the international human rights obligations of the State. Thus, some States could be inclined in a process of revision to narrow the mandate of the Paris Principles and even try to hamper the independence of these institutions.<sup>21</sup>

An element in this potential conflict between organs of the State and a national institution is to define the borderline between carrying out the mandate according to the Paris Principles on the one hand, and politicizing on the other. In the chapter on competence and responsibilities (paragraph 3 (a)) of the Paris Principles it is said that a national institution shall submit

to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports ....

In paragraph 3 (a) (i) it is noted that the institution "shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures". It is further mentioned in paragraph 3(g), particularly in relation to combating all forms of discrimination, that the institution shall make use of "all press organs".

Thus, the Paris Principles give a mandate to national institutions that is broader than just applying human rights law to a specific piece of legislation or a particular case. The institutions are mandated to make recommendations and proposals, and in this way the mandate is much wider than that of traditional courts or other parts of the established judicial system. Furthermore, the national institutions have the option to recommend new legislation or amendments to existing laws, which is a wider mandate than that of most traditional ombudsmen. An ombudsman will normally be excluded from intervening in the legislative process unless the specific intervention is related to laws directly affecting the ombudsman institution itself. These differences in the mandates of ombudsmen and national human rights institutions follow logically from the fact that parliamentary ombudsmen are appointed by the Parliament to monitor, on their behalf, the executive, while the national institution is called upon directly to address the responsibility of the State to fulfill its human rights obligations. Since an important part of the implementation of human rights concerns the legislation of the country, a national institution cannot be excluded from this area.

Furthermore, as mentioned in paragraph 3 (g), a national human rights institution is mandated to take part in the public debate as it unfolds in the public media and elsewhere. This is an important part of raising public awareness in relation to human rights in general as well as in relation to specific human rights issues. To develop a human rights based democratic society, an open debate on human rights related issues is a precondition for creating understanding and respect for these standards. Human rights are often protecting those individuals or groups in society who are perceived as outcasts, criminals or just generally disliked. If a national institution remains silent in relation to such unpopular cases, it does not fulfill its mandate in relation to the victims, nor does it take its mandate seriously by underscoring that human rights are for everyone.

Nonetheless, it is often in the midst of fulfilling their mandate by taking part in the public debate or addressing problems in relation to new laws or existing legislation, or specifically proposing changes, that national institutions are being criticized for politicizing. The more controversial the issue is, the more the institution runs the risk of being caught in middle of a political struggle between opposing parties. This has been the experience in many countries in relation to issues dealing with different minority groups, in particular ethnic minorities, indigenous groups or refugees and asylum seekers.<sup>22</sup>

When national human rights institutions take a position on a particular issue, or in a particular case, they do so on the basis of internationally agreed norms, ratified by the State in which the specific institution operates and its constitutional and legislative provisions. In short, it is based upon the institutional wisdom in the human rights field. However, human rights norms are often open to interpretation, as is the case with any legal text, and when there is no case law interpreting the norm, or the case law is open for different interpretations, the national institution is obliged to table all the uncertainties in relation to the specific issue.

An example from Denmark serves to illustrate this point. A discussion has been going on for a number of years in relation the extensive use of solitary confinement during pre-trial detention. Several studies have been made which document the severe psychological effects of solitary confinement. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has criticized the Danish Government on this issue.<sup>23</sup> However, the European Court of Human Rights has in several decisions found that solitary confinement does not constitute a violation of article 3 of the European Convention on Human Rights (ECHR). Thus, in the work of the Danish Centre for Human Rights the views of the CPT and the ECHR are described for the politicians to make the relevant decisions on whether to use solitary confinement or not – and if so – to what extent.

Where there is no case law and only a vague human rights norm to take into consideration, the national institution can still contribute to defining the scope of legal obligations as, according to the Paris Principles, it has a legitimate role to play in recommending ways to solve a particular problem by law or by administrative decisions. In its approach to finding a solution, the institution uses general human rights values, human rights methods of interpretation, and soft law that may have been developed in that particular area.<sup>24</sup> In Denmark, for instance, a law was passed which permitted the police to keep DNA profiles of not only people who have been sentenced for certain crimes, but also people who have been acquitted. This is an issue of the right to privacy in article 8 of the ECHR. However, this norm and the case law from the European Court of

Human Rights do not offer sufficient guidance in relation to this issue. In 1992 the Committee of Ministers made a recommendation,<sup>25</sup> stipulating that DNA profiles should only be stored in cases relating to persons who were eventually convicted. Denmark had however, made a reservation to that specific paragraph of the recommendation. Nonetheless, the Danish Centre for Human Rights in its advisory opinion to the Government (outlining the legal basis, privacy aspects, and the Danish reservation to the recommendation) came to the conclusion that it would best conform with the right to privacy to register only persons who had been convicted.<sup>26</sup> In other cases it would be possible to indicate a number of different avenues that would result in a higher level of conformity with human rights.

Another issue that should be kept in mind is that a national institution will always be under some sort of economic constraint, and like any other institution it is forced to prioritise the use of its resources. When doing so it should not select issues of primary interest to one or another political party or grouping, but bring up issues which are of general interest to a broad range of people or an area which may be seen as neglected. Furthermore, when outlining solutions to problems, the suggestions should as much as possible be non-biased in relation to party politics. The institution should avoid direct criticism of political parties or persons, but relate directly to the issue itself. When operating in the political sphere, these three guidelines are not always easy to uphold, in particular if one issue dominates the political discourse for a longer period of time or if one or more parties have greater human rights sensitivity than others.

The pluralism of national institutions is one of the elements that may prevent the institution from becoming politically biased in its work. Though the purpose of the pluralist representation in the governing structures of the institution is primarily to ensure independence from government, it ensures similar independence from any other political, religious or other groups with special interests.<sup>27</sup> A transparent and learning institution, which openly tables all its advice, recommendations and opinions, will adjust along the way if it is willingly or unconsciously leaning in a particular political direction. Thus, there is a large gray zone between law and politics in the human rights area, and a national institution which takes its mandate seriously will hardly be able to avoid being blamed for politicizing by those who disagree with the human rights solutions to a particular problem. Nonetheless, the institution should always be aware of the pitfalls and adjust its approaches accordingly.

## 4. National institutions and ESCR?

For decades economic, social and cultural rights have caused many controversies both of an ideological and technical nature. Are they in fact rights or mere political statements? And in case of the former, are they justiciable or non-enforceable aims?<sup>28</sup> This discussion has been going on despite the fact that the indivisibility and interdependence of civil and political rights and economic, social and cultural rights has, since the adoption of the Universal Declaration on Human Rights in 1948, been the principled starting point for human rights work. This was reiterated once again at the World Conference on Human Rights in 1993.<sup>29</sup>

National institutions may be instrumental in taking the discussion further by concretising economic, social and cultural rights, especially because they face specific problems related to economic and social issues in their daily work. The question remains however, whether they do have a mandate in this regard in national legislation or in international principles and law. National institutions have for the most part been occupied with issues related to civil and political rights.<sup>30</sup> The Paris Principles do not contain explicit references to neither civil and political rights nor economic, social or cultural rights, but merely state “a national human rights institution shall be vested with competence to promote and protect human rights”. Furthermore, the institution shall be given “as broad a mandate as possible”. In reality, institutions are to a still larger extent addressing economic and social issues from a rights perspective. A few examples can serve to illustrate how national human rights address the issues of economic, social and cultural rights<sup>31</sup> in concrete terms.

*The South African Human Rights Commission* is explicitly mandated to monitor economic, social and cultural rights, such as rights to access to education, housing, health care, food, water, social security and a clean environment. In reinforcing the protection of these rights, the Commission must investigate, report and carry out research on the observance of economic and social rights, take steps to secure appropriate redress where these rights have been violated, and educate state organs and members of the public on the need for the protection and promotion of these rights. Every year the Commission must request relevant state organs to provide it with information on the measures taken towards the realization of socio-economic rights. On the basis of this input a report on the State’s realization of economic and social rights in South Africa is published. The Commission has also conducted a survey on the public perception of social and economic rights in South Africa and held public “poverty hearings” in many parts of the country, as well as several consultative and educational workshops for government officials and civil society organizations.

In the Asia-Pacific region, the *National Human Rights Commission of India* probably has the most extensive experience. It has addressed various aspects, including the linking of the issue of child labour with the right to compulsory education free of charge. The basis of such actions is various Supreme Court decisions making the right to education justiciable. The Commission used these decisions, in conjunction with reports on government officials employing child labourers as domestic servants, to issue a set of recommendations for prohibiting such employment in the rules of conduct of government servants. This illustrates the choice of a national human rights institution in terms of adopting a seemingly effective strategic combination of reaction as well as prevention.

Finally, the *Danish Centre for Human Rights* has taken up several issues related to economic, social and cultural rights. The right to education was addressed in relation to children of asylum seekers in Denmark. These young boys and girls did not receive appropriate primary school education while waiting for the authorities to make a decision in their asylum cases. Often these children would be outside the formal education system for 2-3 years. This was addressed with reference to the right to education in the International Covenant on Economic, Social and Cultural Rights, and the situation was subsequently improved. Other economic and social rights issues brought up by the Danish Centre for Human Rights have been targeting problems affecting, *inter alia*, prisoners and elderly people.

The Paris Principles are vague in relation to economic, social and cultural rights. The most important statement in this area is the General Comment 10 (1998) adopted by the UN Committee on Economic, Social and Cultural Rights.<sup>32</sup> Sparked by the finding of the Committee that one of the means whereby States can fulfill their obligation according to art. 2, paragraph 1, of the Covenant “to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means”, is through the work of national human rights institutions. The Committee further noted that, “national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights”, and that “it is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions”. It finally called on States parties “to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights”.

The Comment mentions some of the activities already set forth in the Paris Principles. In addition, a number of activities are listed, including:

- the promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights. Such programmes should target the general population as well as particular groups such as the public service, the judiciary, the private sector and the labour movement;
- providing technical advice or undertaking surveys in relation to economic, social and cultural rights;
- identifying national-level benchmarks for measuring compliance with the Convention; and
- conducting research and inquiries in order to assess the extent to which economic, social and cultural rights are being realized, either within society as a whole, in particular areas, or in relation to particular vulnerable groups.

Since 1999 the *UN Commission for Human Rights* has endorsed the crucial role of national institutions in promoting and ensuring the indivisibility and interdependence of all human rights, and called upon States to ensure that all human rights are appropriately reflected in the mandate of their national human rights institutions when established.<sup>33</sup>

Other organisations than the United Nations have also addressed the issue of national human rights institutions and economic, social and cultural rights. For example, in 2001,

the *Commonwealth Secretariat* issued a book on best practices for national human rights institutions<sup>34</sup> on the basis of an extensive process of discussions and consultations with institutions from all over the world. In relation to economic, social and cultural rights, it stated that:

- a NHRI should employ all available means to respond to inquiries related to the advancement of economic, social and cultural rights, whether or not its enabling statute or national constitution recognizes economic, social and cultural rights as justiciable;
- a NHRI should advise the government on the development and implementation of economic policies to ensure that the economic, social and cultural rights of people are not adversely affected by economic policies, *e.g.*, structural adjustment programmes and other aspects of economic management; and
- a NHRI should work towards facilitating public awareness of government policies relating to economic, social and cultural rights and encourage the involvement of various sectors of society in the formulation, implementation and review of relevant policies.

The Commonwealth Secretariat moves somewhat further by underscoring that notwithstanding a country's formal recognition of economic, social and cultural rights, national institutions should be well versed in those rights. Finally, it stated that, with respect to general complaints procedures, the enabling legislation of a NHRI, specifying the subject matter of admissible complaints, should include civil, political, economic, social and cultural rights in addition to various vulnerable groups.<sup>35</sup>

National institutions have also addressed the issue of economic, social and cultural rights, most comprehensively in regional meetings.<sup>36</sup> Apart from exchanging best practices, one of the conclusions is that a way of fulfilling the responsibility to protect and promote economic, social and cultural rights would be to encourage Governments as well as non-state actors to adopt a rights-based rather than a needs- or welfare-based approach in dealing with these issues.

The doctrine of national institutions has developed throughout the last decade on a general basis<sup>37</sup> as well as specifically in relation to the promotion and protection of economic and social rights. Reverting to the examples mentioned in the introduction to this part, it is clear that national human rights institutions are slowly beginning to incorporate a particular focus on economic, social and cultural rights in their work, using different approaches. Most importantly, the discussions as well as the examples given above indicate that as more and more governments struggle to provide their citizens with basic health, education, housing and sanitation, national human rights institution can be a particularly useful partner for their Government in the process of strengthening the fulfillment of these rights. Such cooperation can span from general advisory, monitoring and consultative activities, to concrete assistance in the form of education and awareness-raising among the general public as well as professional groups, surveys and hearings and other initiatives that can help bridging the gap between the Government and civil society. Finally, the refinement of economic, social and cultural rights by national institutions through their handling of individual cases influences the courts and gives them greater confidence in applying these rules. In all parts of the world case law on these issues is increasing.

## 5. The role of national institutions in relation to regional and international human rights mechanisms

As previously illustrated, national institutions at the domestic level are working both with strictly legal issues as well as fulfilling their obligation to promote human rights in general. This dual mandate is also reflected in the work of national institutions in relation to regional and intergovernmental organizations.

In the preamble to the Universal Declaration on Human Rights the States proclaim that they will ensure respect for the rights and freedoms in the declaration by “progressive measures, national and international, to secure their universal and effective recognition and observance ...”. At the World Conference on Human Rights it was recalled that, “the promotion and protection of human rights is a legitimate concern of the international community”.<sup>38</sup> To give substance to these declarations, organs and specialized agencies have been developed since 1948 at the regional and international levels with the sole purpose of monitoring and advising states in relation to their human rights obligations. With the recent development of stronger independent national institutions, ties are developing between the international human rights machinery and the national institutions. The collaboration is developing in relation to the general promotion of human rights as well as in relation to treaty bodies. It is developing both in bilateral relations between individual national and international bodies as well as with the representative bodies of national institutions and international bodies.

In 1993 the national institutions present at the Second International Workshop in Tunis decided to establish the *International Coordination Committee of National Institutions* (ICC). The Committee has subsequently been endorsed by the UN Commission on Human Rights<sup>39</sup> as the principal representative of national institutions at the global level. It is not an independent organization with policies and programmes of its own, but rather a loose mechanism for coordination of and liaison among national institutions. The ICC has 16 members; four from each of the four regions,<sup>40</sup> and the Office of the High Commissioner for Human Rights assists in its work.<sup>41</sup> The ICC has three areas of responsibility: (1) liaison among institutions at the global level and with the UN; (2) accreditation of national institutions that comply with the Paris Principles; and (3) organization of the international conference every second year. Until recently the ICC has not had the role or capacity to develop common policy positions for national institutions beyond advocating for their recognition in UN fora. It did however, play a significant role in relation to the World Conference against Racism held in Durban, 2001 and in developing the Copenhagen Declaration on the Role of National Institutions in Combating Racism and Xenophobia, which was the outcome of the Sixth International Conference for National Institutions in 2002.<sup>42</sup>

The international and regional networks play an important role in the exchange of information on best practices and new developments.<sup>43</sup> Furthermore, the accreditation of new institutions is crucial in terms of securing their trustworthiness when they are represented in international and regional fora. Right from the beginning of the 1990s the issue of which status national institutions should be accorded at UN meetings and conferences was discussed. Should they represent their country and speak from that seat,

should they be recognized as NGOs according to the ECOSOC rules of procedure, or should they be recognized as a third category of institutions in the international arena?<sup>44</sup> At the UN World Conference on Human Rights in 1993 national institutions were for the first time allocated time to speak in their own capacity. It took until 1998 before the same right was granted in the UN Commission on Human Rights as an interim practice.<sup>45</sup> At its 56<sup>th</sup> session the Commission decided that the arrangement “which allows national institutions to address the Commission from a special section of the floor set aside specifically for this purpose, behind the nameplate “National Institutions”, should be continued”,<sup>46</sup> however only in relation to item 18 (b) on the agenda addressing the issue of national institutions. At the World Conference Against Racism, Xenophobia and Related Intolerance in Durban, 2001 national institutions were again entitled to address the conference.

In relation to the world conferences, the possibility of addressing the conference is discussed as part of the preparation of the conferences and finally written into the conference rules of procedure. As regards the Commission, the right to speak is based on the resolutions of the Commission itself and not established by the ECOSOC rules of procedure. A majority in the Commission may decide to alter this practice. At the 58<sup>th</sup> session in 2002 such an attempt was made, explained by general time constraint, but the possibility to address the Commission was maintained albeit with severe limitations on the time allocated.

Some observers have criticized the possibility of national institutions addressing the Commission since it has in practice caved into the time available for NGOs.<sup>47</sup> The practice seems however, to be broadly recognized.<sup>48</sup> A more complicated issue is whether national institutions also in the future will be limited to speak only under the agenda item on national institutions and not be mandated to address other substantive items. Time constraints speak against opening up the agenda for national institutions, which would add a number of new speakers to the list. Furthermore, it could be argued that as States and NGOs present a wide spectrum of views already, there is no need for a third perspective from national institutions. On the other hand, the unique position of national institutions gives them an in-depth insight into specific human rights problems which neither States nor NGOs possess or are willing to table. With the special status of national institutions, their positions are more difficult to sideline than those of NGOs. An active presence of national institutions may help to create a more open and less defensive dialogue on specific human rights issues than what is often currently the case in the Commission. The time issue is merely of a technical and organizational nature, which can be dealt with if there is a willingness to listen to contributions from national institutions.

Finally, there is the issue of which institutions should be permitted to speak. Here there seems to be divergent views between the Commission and the ICC. The Commission is inclined to let anyone speak who wants to enlist as a national institution, whereas the ICC would like to limit the speakers to those institutions that are fully accredited as national institutions according to the Paris Principles. The Commission may have a problem by not having its own accreditation system, only relying on the accreditation made by the ICC as an external partner. This could however, be solved by formalizing the participation in the ECOSOC Rules of Procedure whereby the accreditation could formally be carried out in collaboration with the ICC or delegated entirely to the ICC. This would demand a careful scrutiny of all national institutions not only in relation to their formal mandate, but also their performance.

It is not only at the international level that national institutions have a formal representation. It is also the case at the regional level. In 1997 a formal roundtable between the Council of Europe and the European national institutions was established to institute regular meetings to exchange views and experiences on the promotion and protection of human rights.<sup>49</sup> The first roundtable was held in 2000. As a follow-up to this closer dialogue, the European Coordinating Group was in 2001 granted observer status to the Council of Europe Steering Committee for Human Rights (CDDH). In Africa, the African Commission on Human and Peoples' Rights passed a resolution in 1998 on granting observer status to national human rights institutions.<sup>50</sup> None of the other regions have similar arrangements.

It is noteworthy that according to the resolution of the African Commission national institutions can participate, without voting rights, in deliberations on issues that are of interest to them, and can submit proposals that may be put to vote at the request of any member of the Commission. In the CDDH the European institutions may as well address any issue of interest. Thus, at the regional level the dialogue between States and national institutions has moved further than on the international level. If States are gaining confidence in the dialogue at the regional levels, this may in time influence the arrangement in the UN Human Rights Commission. These developments in the human rights work of the UN and regionally may slowly lead to an acceptance of national institutions as a third party besides governments and NGOs.

As described above national institutions are creating a platform to promote human rights at the regional and international levels. A parallel development is taking place in relation to the less political and more legal human rights mechanisms. In relation to the work of the *UN* and *regional treaty bodies* national institutions can contribute in four areas: (1) provide information on the situation in the country; (2) monitor the implementation of recommendations; (3) engage in dissemination of information and education on the work of the treaty bodies; and (4) assist in submitting individual complaints to treaty bodies.

In the Paris Principles it is foreseen that national institutions have a role to play in relation to *providing information to treaty bodies*. It is stated that national institutions have the responsibility to contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect to their independence. The UN Committee on the Elimination of all Forms of Racial Discrimination has in its general recommendation 28 (2002)<sup>51</sup> recommended that national human rights institutions assist their respective States in complying with their reporting obligations. There are two approaches to the fulfillment of this obligation. One approach is that the Government mandates the national institution to write the entire state report, or otherwise contribute to the official report. Another approach is for the national institution to make a separate supplementary report or to collaborate with specialized institutions or NGOs in reporting. For the members of the treaty body it is often more beneficial to receive a supplementary report, highlighting the problems as perceived by the national institution. When national institutions are submitting their input to the official report, valuable information is often filtered out in the process of editing the final State report.<sup>52</sup> However, there are examples of State reports that in a frank and open way include highly critical elements received from national institutions. The main issue is not the format of the reporting, but rather whether the relevant information reaches the experts in the treaty body, which is what the national institution has to ensure. Finally, referring to the

discussion above about the borderline between politics and law it is noteworthy that the Paris Principles open up for national institutions to “express an opinion on the subject”. Thus, it is legitimate to go beyond the mere statement of facts and make an informed analysis of the particular area of concern.

The concluding observations and recommendations from treaty bodies relate to how the State fulfils its obligations under the relevant convention. Thus, in the general *monitoring function* of a national institution the observations and recommendations become useful tools in ensuring compliance.<sup>53</sup> The national institution can use the authoritative status of the treaty body in its endeavors to make the Government comply with its obligations. A co-operative relationship with the international treaty machinery will facilitate the work of national institutions, thus a more dynamic and structured flow of information both ways is needed. The secretariats of the treaty bodies should keep national institutions informed about dates for examination and automatically forward concluding observations and recommendations to national institutions. This is also a precondition for national institutions to carry out general *information campaigns* on the work of treaty bodies as well as more targeted information and education. In some cases treaty body members participate in public meetings with national institutions on their specific concluding observations and recommendations, which is a way to create a better understanding of the role and function of the treaty body as well as an understanding of the concerns of the body.

Finally, a national institution can become the *focal point for submitting individual complaints to treaty bodies* with this particular mandate, like the UN Human Rights Committee and the UN Committee on the Elimination of all Forms of Racial Discrimination. This function can be carried out irrespective of whether the institution itself has the competence to deal with individual complaints. The establishment of such a focal point is foreseen in article 14 (2) of the UN Convention on the Elimination of all Forms of Racial Discrimination. The advantage is that the specialized human rights knowledge built-up in the institution may help the victim to address the competent body in the right manner. Furthermore, the institution may look into whether the formal criteria, such as the exhaustion of local remedies, have been fulfilled.

The new Optional Protocol to the UN Convention against Torture<sup>54</sup> reflects the development of a closer interaction between treaty bodies and national institutions. The draft text suggests that national institutions or a specialized body can carry out on-site inspections on behalf of a sub-committee on the prevention of torture established under the UN Committee against Torture. It is realized that the sub-committee itself will not be able to visit all countries for financial and practical reasons. Therefore it is suggested that national institutions can do the inspection with the same mandate as the sub-committee and with the possibility to report to the Committee. However, the national institution should not be seen as an alternative to the creation and functioning of an independent international mechanism. Rather, effective national institutions established according to the Paris Principles should be seen as useful complementary mechanisms to an international mechanism.

## 5. Concluding remarks

The 10th anniversary of the Paris Principles is celebrated in December 2003. At that time the question will undoubtedly be raised whether or not they should be subject to amendments. Some will claim that we have now gained experience within the legal framework of national institutions, and that the principles should be adjusted and be given greater clarity according to practical experience. Others again will caution because they will fear that the standards may be lowered. As illustrated, the Paris Principles are flexible to the extent that they can accommodate a heterogeneous group of institutions shaped according to local legal traditions. At the same time, they are so distinct that a family of institutions has been created with a fairly uniform identity.

Additional to the Paris Principles, a body of doctrine is substantiating the work of national institutions and is giving guidance to their work. At the domestic level national institutions are demarcating their particular area of competence outside of the jurisdiction of the classical ombudsman institution, thereby supplementing his or her work rather than duplicating. In some countries the two institutions are merging into one body. The combined functions of the national institution and the ombudsman offer a strong protection of the individual when the institutions perform according to their mandate and do not shy away from the thorny issues and cases. And when Governments are willing to listen to their advice. If this is not the case, the more cumbersome and costly procedures in courts will have to take over and perform their particular role in safeguarding the rights of the people.

With the increased globalization in the post-1990 era, interaction between the local and international institutions has intensified. This is also the case between national institutions and treaty bodies. At the national and international/regional levels these mechanisms are continuing their efforts to create a comprehensive human rights monitoring system. One is dependent on the other, and jointly they represent a stronger protection and promotion regime than we have previously had. This comprehensive system underlines that the concern for human rights protection does not stop at the frontier, but is a universal commitment.

In the aftermath of the cold war, human rights have had a strong tailwind and democratization processes have been dynamic in all regions of the world. National institutions were fostered in this particular period, and human rights moved from being part of the foreign policy to becoming an integral part of domestic politics and law. The question is how far will human rights in the time to come be allowed to influence domestic policies? Or phrased in another way: how strong will governments permit monitoring systems to become? The post-9/11 anti-terrorism legislation in many Western countries and the still more restrictive laws and practices in relation to immigrants and refugees<sup>55</sup> may be indicative of diminishing support for human rights. National institutions may become a target because they will often be the messengers of the unpopular analysis or be defending the case of a marginalized individual or minority. In light of the above-mentioned developments, it is imperative to recall the validity of what Asbjørn Eide wrote in 1991 about the relationship between human rights and democracy – and that national institutions are part of this general system.

# Noter

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- 1 Australia (1981), Canada (1962), Denmark (1987), France (1947), Guatemala (1984), Mexico (1990), New Zealand (1978) and Philippines (1987).
  - 2 The UN Office of the High Commissioner for Human Rights has played a pivotal role in promoting the establishment of new institutions as well as assisting in the creation of these. This task has been recognized for a number of years in the annual Human Rights Commission Resolution on National Institutions for the Promotion and Protection of Human Rights.
  - 3 Katarina Tomasevski, *Between Sanctions and Elections*, Pinter 1997, pp. 157-179.
  - 4 Asbjørn Eide, *National Movements, Protection of Minorities and the Prevention of Discrimination, in the Future of Human Rights Protection in a Changing World*, Universitetsforlaget, Oslo, 1991, p. 232.
  - 5 In 2002 the 6th International Conference on National Institutions for the Promotion and Protection of Human Rights was held in Copenhagen.
  - 6 UN Commission on Human Rights Resolution 1992/54.
  - 7 General Assembly Resolution 48/134 (20 December 1993), Annex.
  - 8 ECOSOC Resolution 2/9 of 21 June 1946. Birgit Lindsnaes and Lone Lindholt, "National Human Rights Institutions – Standard Setting and Achievements", in Lindsnaes *et al.* (eds.), *National Human Rights Institutions – Articles and Working Papers*, Danish Centre for Human Rights, Copenhagen (2001), pp. 5-9.
  - 9 First and second reports from the UN Secretary General, A/36/440 of 9 October 1981 and A/38/416 of 24 October 1983.
  - 10 The Declaration and Programme of Action, UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 2001, clearly differentiate between national institutions and specialized institutions against racism.
  - 11 See p. 305.
  - 12 This is the case with the Swedish Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination on Grounds of Sexual Orientation.
  - 13 *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, United Nations (1995), paras. 78 and 79.
  - 14 The UN Commission on Human Rights in Resolution 2002/83 took note "with satisfaction of the efforts of those States that have provided their national institutions with more autonomy and independence, including through giving them an investigative role or enhancing such a role, and encourages other Governments to consider taking similar steps". In the *Declaration and Programme of Action, UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban (2001), para. 90, States are urged to establish national institutions with the competence and capacity for "investigation, research, education ...". It is noteworthy that investigation is mentioned as the first element.
  - 15 *Supra* note 13.
  - 16 Kristine Yigen, "Guarantees of Independence of National Human Rights Institutions: Appointment and Dismissal Procedures of Leading Members" in Lindsnaes *et al.* (eds.), *National Human Rights Institutions – Standard Setting and Achievements, in National Human Rights Institutions – Articles and Working Papers*, Danish Centre for Human Rights, Copenhagen (2001), pp. 59-81.
  - 17 The UN Commission on Human Rights in Resolution 2002/83 recognized "that it is the prerogative of each State to choose, for the establishment of a national institution, the legal framework that is best suited to its particular needs and circumstances to ensure that human rights are promoted and protected at the national level in accordance with international human rights standards". The wording is an elaboration of the Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993, I:36.

- 18 The constitution of most national human rights institutions can be found on <www.nhri.net>, a specialized Website for national institutions, jointly made by the UN Office of the High Commissioner for Human Rights and the Danish Centre for Human Rights in 2001. For a somewhat different typology, see *Performance and legitimacy: national human rights institutions, International Council on Human Rights Policy, Versoix, Switzerland* (2000), pp. 3-4.
- 19 From 2003 the Danish Centre for Human Rights will, as the first national human rights centre, get an expanded mandate to offer individual advice to victims of racial discrimination as well as the option to carry out mediation between conflicting parties.
- 20 Emmanuel Decaux, "Evolution and Perspectives for National Institutions for the Promotion and Protection of Human Rights: Their Contribution to the Prevention of Human Rights Violations" in L. A. Sicilianos (ed.), *The Prevention of Human Rights Violations, Kluwer Law International* (2001), p. 236.
- 21 *Performance and legitimacy, supra* note 18, pp. 66-67.
- 22 See reports: *The Work and Practice of Ombudsmen and National Human Rights Institutions* (articles and studies), the Danish Centre for Human, Copenhagen, 2002; and the Sixth International Conference for National Human Rights Institutions, Copenhagen and Lund 10-13 April 2002, the Danish Centre for Human Rights, Copenhagen, 2002.
- 23 CPT/Inf (97) 4.
- 24 Alain Bacquet, *Les Actions de Promotion et de Sensibilisation des Institutions Nationales*, Sixth International Conference for National Human Rights Institutions, Copenhagen and Lund 10-13 April 2002, Danish Centre for Human Rights, Copenhagen (2002).
- 25 Recommendation 1992.1 on the use of analysis of deoxyribonucleic (DNA) within the framework of the criminal justice system.
- 26 *Human Rights in Denmark, Status 2000, Danish Centre for Human Rights, 2000.*
- 27 Alain Bacquet, *supra* note 24.
- 28 Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in Asbjørn Eide *et al.* (eds.), *Economic, Social and Cultural Rights, a textbook*, 2nd revised edition, Martinus Nijhoff Publishers (2001), pp. 9-29.
- 29 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 1993, I:5.
- 30 Birgit Lindsnaes and Lone Lindholt, *supra* note 8, pp. 39-42, and p. 47. General Comment No. 10 (1998), The role of national human rights institutions in the protection of economic, social and cultural rights, adopted by the Committee on Economic, Social and Cultural Rights, Official Records of the Economic and Social Council, 1999, Supplement no. 2 (E/1999/22), annex V.
- 31 <www.nhri.net/national>; *Performance and legitimacy, supra* note 18, pp. 74-77.
- 32 General Comment No. 10 (1998), *supra* note 30. In 2002 the Committee on the Rights of the Child tabled a draft General Comment on the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, which contains several references to economic, social and cultural rights.
- 33 UN Commission on Human Rights Resolutions 1999/72 and 2002/83.
- 34 *National Human Rights Institutions, Best Practice, Commonwealth Secretariat, 2001, pp. 33-34.*
- 35 *Ibid.*, p. 20.
- 36 In 2000 the European institutions discussed their role in promoting and protecting economic, social and cultural rights at the third European Meeting of National Institutions, and the Asia Pacific Forum of National Human Rights Institutions hosted a regional Workshop on the same issue in 2001. The reports from these meetings can be found at <www.nhri.net> under "regional" and "Europe" or "Asia-Pacific".
- 37 Emmanuel Decaux, *supra* note 20, p. 239.
- 38 Vienna Declaration and Programme of Action, UN World Conference on Human Rights, Vienna, 1993, I:4
- 39 The Commission on Human Rights Resolution 1994/54 OP7 and subsequent resolutions.
- 40 The Rules of Procedure endorsed by the Fifth International Workshop in 2000. The Asia-Pacific Forum established in 1996 in Australia is the oldest and most developed regional network. The African Coordination Committee of National Institutions was established by the Yaounde Declaration in 1996, and

the European Coordination Group was established shortly after by the Copenhagen Declaration – For the Future – in 1997. Finally, the Americas established the Network of National Institutions in Mexico in 2000. All the declarations can be found on <www.nhri.net> “regional”. The regional members of the ICC are as of April 2002: Africa: Malawi, Morocco (chair), Togo, Uganda; the Americas: Canada, Colombia, Costa Rica, Mexico (vice-chair); Asia-Pacific: Australia, Fiji, India, the Philippines; Europe: Denmark, France, Poland, Sweden.

- 41 UN Commission on Human Rights Resolution 2002/83 OP 12 and 16.
- 42 The Declaration can be found at <www.nhri.net>.
- 43 An example of exchange of best practices is the report from the 6th International Conference, *supra* note 22.
- 44 Report by the UN Secretary General concerning the participation of national institutions in United Nations meetings dealing with human rights, E/CN.4/1998/47.
- 45 Commission on Human Rights Resolution 1998/55 OP13.
- 46 Commission on Human Rights Resolution 1999/72 OP15.
- 47 *Performance and Legitimacy*, *supra* note 18, pp. 100-101
- 48 See, *e.g.*, Commission on Human Rights Resolution 2002/83 OP8, which welcomes the practice of national institutions participating in an appropriate manner in their own right in meetings of the Commission and its subsidiary bodies.
- 49 Council of Europe, Committee of Ministers Resolution (97) 11.
- 50 Resolution of the African Commission on Human and Peoples’ Rights, Banjul, 31 October 1998. See also *Protectors or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch, 2001, pp. 67-72.
- 51 General Recommendation 28, 2002 Follow-up on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Committee on the Elimination of all Forms of Racial Discrimination OP13.
- 52 *Performance and Legitimacy*, *supra* note 18, p. 100.
- 53 Paris Principles, Competence and responsibilities, 3(b) and General Recommendation 28, 2002 Follow-up on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Committee on the Elimination of all Forms of Racial Discrimination OP13.
- 54 E/CN.4/2002/WG.11/CRP.1, 17.01.2002. The Protocol was still being negotiated by July 2002.
- 55 Morten Kjaerum, “Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?”, 24 *Human Rights Quarterly* 513-536 (2002).

