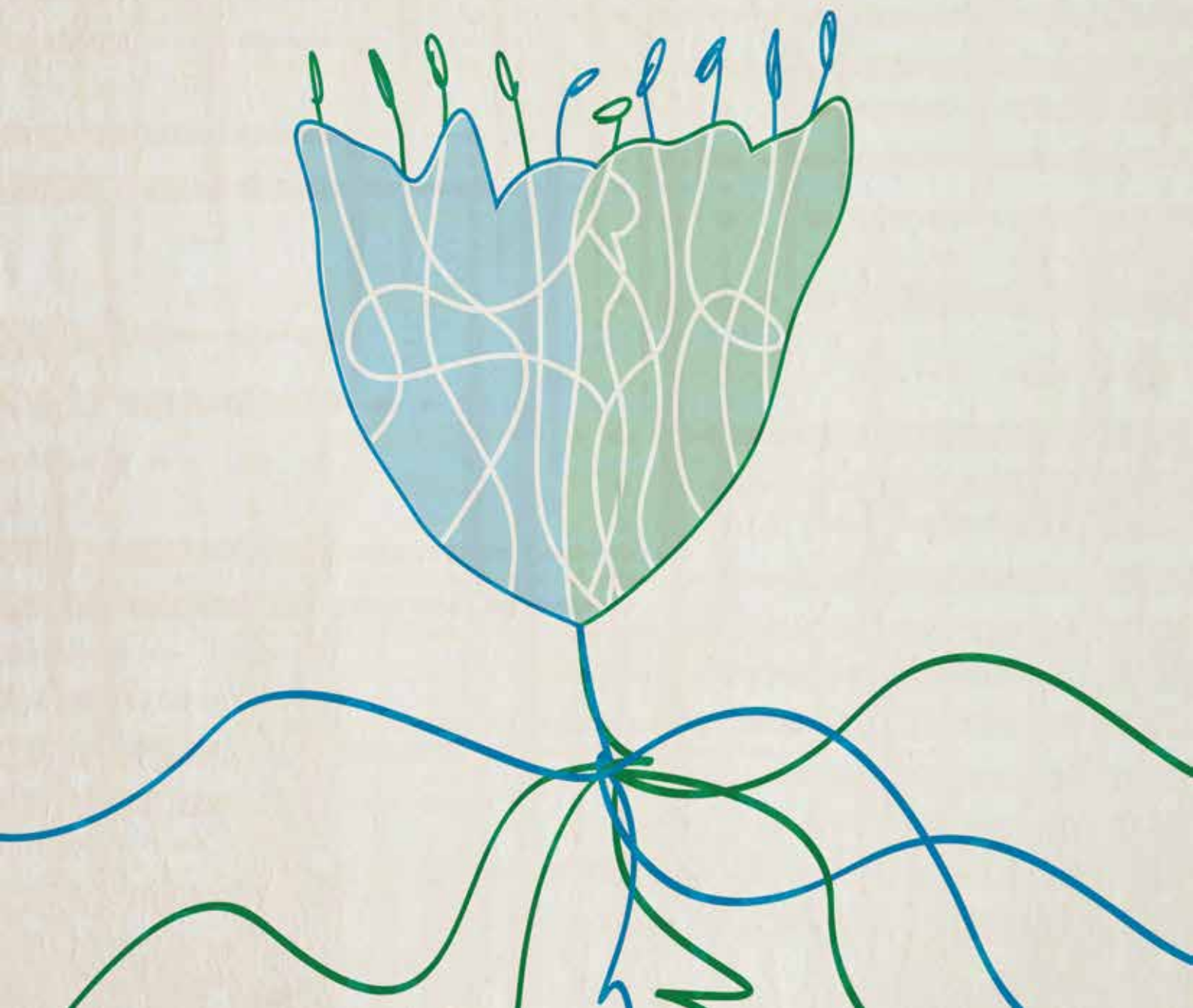


**THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS**

 ARAB-EUROPEAN HUMAN RIGHTS DIALOGUE  
برنامج حوار حقوق الإنسان العربي-الأوروبي

**NHRIs'  
INDEPENDENCE  
AND  
ACCOUNTABILITY**



## **ABBREVIATIONS**

**DIHR:** The Danish Institute for Human Rights

**AEHRD:** The Arab-European Human Rights Dialogue

**NHRI:** National Human Rights Institution

**VDPA:** Vienna Declaration and Programme of Action

**SCA:** Sub-Committee on Accreditation

**PP:** Paris Principles for NHRIs

**GOs:** General Observations of the Global Network of NHRIs

## **THE LOGO ON THE FRONT COVER**

The roots represent the core and fundamental principles (i. e. Independence and Accountability) for NHRIs to function effectively, which together with the other UN Paris Principles would bring about growth to NHRIs' work; displayed in the logo by the flower and its growing buds.

# NHRIS' INDEPENDENCE AND ACCOUNTABILITY

## THE EIGHTH ARAB-EUROPEAN HUMAN RIGHTS DIALOGUE

Edited by: **Mu'ayyad Mehyar**

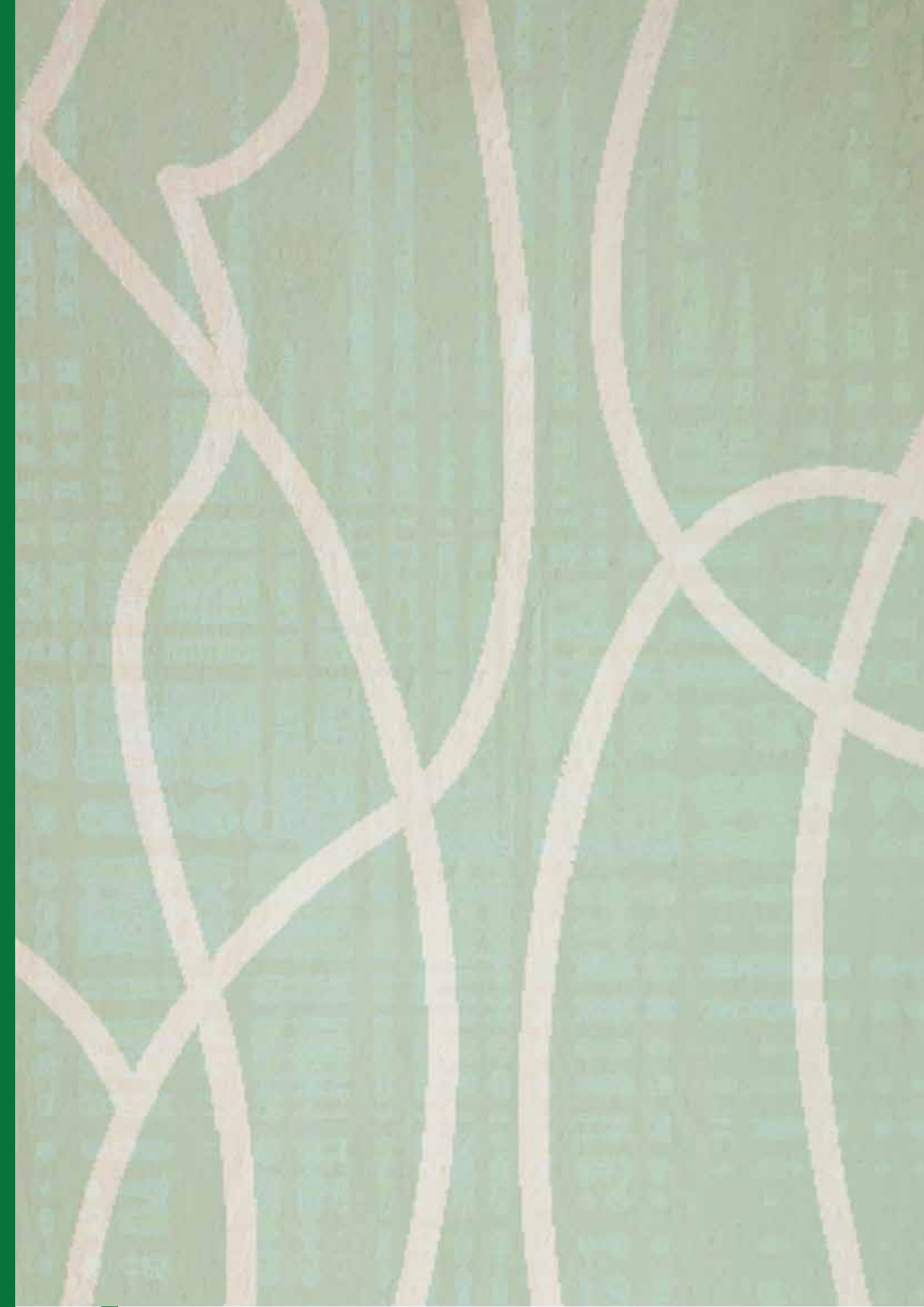
For a NHRI to play an effective role, it must function in accordance with the UN Paris Principles. A crucial principle and condition for the effectiveness of every NHRI is; its independence, as it will be in a better position to fulfil its mandate without interference. A Further crucial principle is its accountability.

We, at DIHR, aim from this publication to set some standards and guidelines for how NHRIs maintain their independence while at the same time consult regularly with all stakeholders and how they use indicators to evaluate their performance. We hope that further studies could be prepared by other NHRIs and stakeholders for NHRIs to know how to construct elements that would contribute to their effectiveness and also to assess that by setting benchmarks and indicators. Eventualully, we hope that NHRIs share their best practices and challenges in maintaining their independence and effectiveness including accountability practices

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Denmark's National Human Rights Institution  
Wilders Plads 8K  
DK-1403 Copenhagen K  
Phone +45 3269 8888  
[www.humanrights.dk](http://www.humanrights.dk)

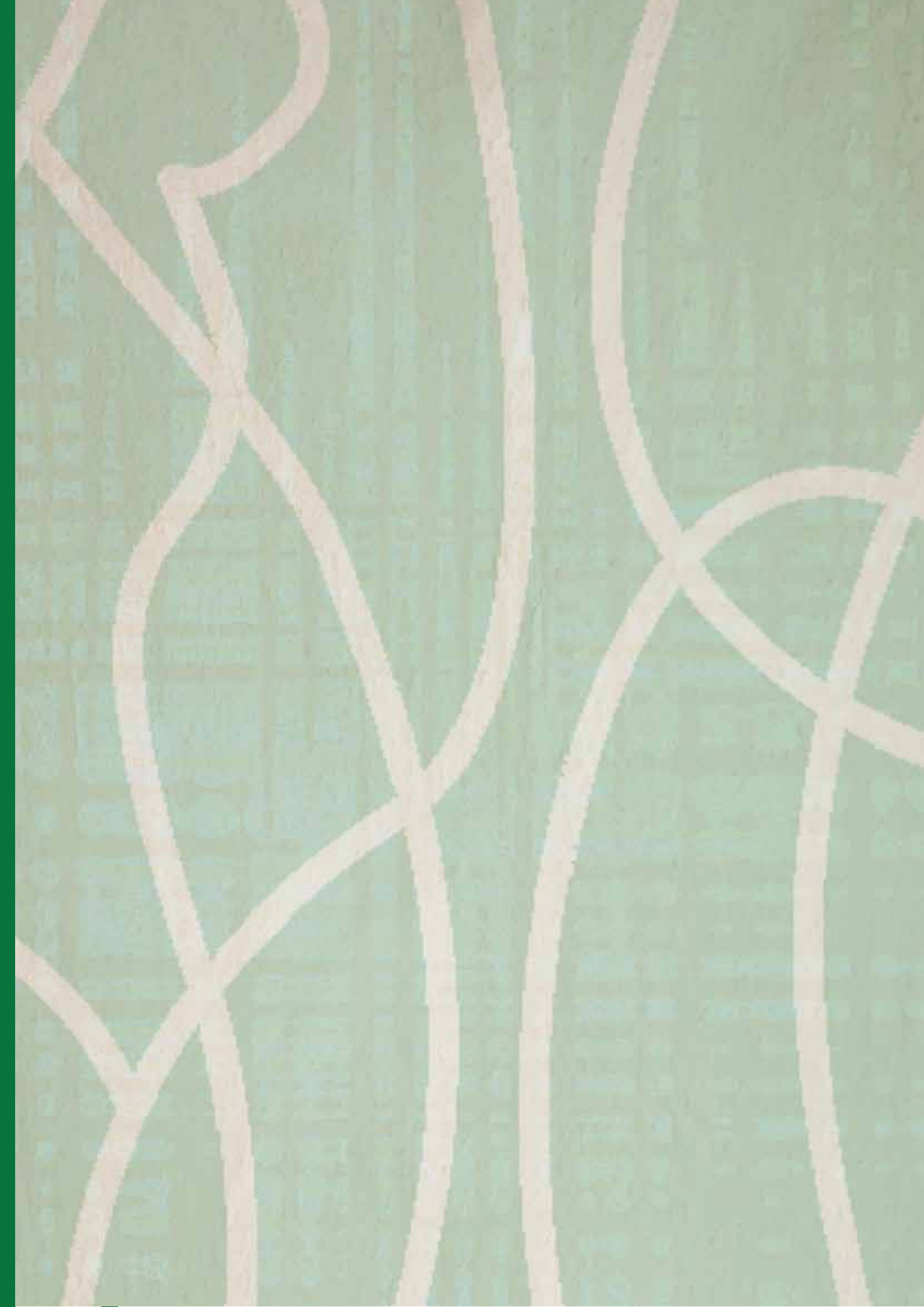
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# INTRODUCTION

By: **Mu'ayyad Mehyar**; Projects Manager and MENA Regional Advisor at DIHR

National Human Rights Institutions (NHRIs) are globally recognized as independent actors in the protection and promotion of human rights. In order for NHRIs to meet their mandate as per the UN Paris Principles (See **Annex B** for Paris Principles Relating to the Status of NHRIs), they need to put at the forefront the principles of independence and accountability as foundational principles that need to be streamlined in their work while promoting and protecting human rights in their respective countries, but what does that really mean? The principle of independence that NHRIs should enjoy and uphold can be assured through legal, operational and financial means, democratic and open appointment and dismissal procedures, and well defined, agreed to and consistent processes in the setting of annual financial allocations.

A NHRI must be able to set its priorities according to a legislatively defined mandate which could include powers to independently, free from direction by the government, investigate violations of human rights, monitor the observance of human rights, and carry out other activities with a view to furthering the promotion and protection of human rights. It must

also be able to manage its own finances through agreed to budgetary allocations without interference from various government ministries. The ability to set its financial priorities will provide for greater independence of the institution.

This publication comprises four key papers that were presented and discussed at the Eighth Arab-European Human Rights Dialogue (AEHRD). Of particular emphasis, participating NHRIs discussed financial independence, operational independence, and independence in appointment procedures in their respective NHRIs' laws as well as in practice; mapping gaps, challenges, best practices and lessons learned. In addition they discussed Accountability issues as elaborated in the regional papers, by experts from both Europe and the Arab World. We hope that they will be put to positive use in an effort to ensure that NHRIs meet their obligations, and expectations, effectively.

On the other hand, the principle of accountability entails that NHRIs have and enjoy institutional effectiveness that requires the development of a system of accountability based on specific, ascertainable goals. Besides legal and financial accountability to the government and/or parliament, a NHRI also needs to find ways to be accountable to the general

public; in particular to those groups and individuals in society who are most vulnerable. NHRI procedures and processes should, for example, be visible and transparent; decision-making processes should be open, rational, consistent and shared. Developing mission and values statements, strategic objectives and plans, staff codes of ethics, quality service standards and procedural handbooks can be important tools for the NHRI to ensure, communicate and be accountable for high standards of achievement.

Self and public evaluations of a NHRI's performance, including annual reporting on its activities, results and use of its resources, will further contribute to the institution's public accountability. These evaluations should be subjected to open scrutiny, comment and debate.

The authors of the articles in this publication are experts who worked extensively on human rights promotion and protection especially in their respective capacities working with NHRIs.

**M. L. Mushwana**; Chairman of the Global Network of NHRIs and President of the South African Human Rights Commission, emphasised that the theme of the Eighth AEHRD meeting on NHRIs' Independence and Accountability is so important because independence and accountability are the foundations upon which all NHRIs must be built. Mr. Mushwana, reminded us that 20 years have passed since the UN General Assembly adopted the Paris

Principles which define the appropriate qualities, status and functioning of NHRIs as promoters and protectors of human rights. Also Mr. Mushwana reminded us that 20 years have passed since the Vienna Declaration and Programme of Action (VDPA) was adopted, which affirmed the universality, indivisibility and interdependence of all human rights and helped set the stage for the rapid increase in the formation and establishment of NHRIs across the world.

The recently concluded conference in Vienna aptly titled "Vienna +20: Advancing the Protection of Human Rights" highlighted the important role that NHRIs play and can continue to play as key actors within the international and regional human rights spheres of the UN system.

Mr. Mushwana highlighted the importance of the AEHRD process, which fosters the mutual development of NHRIs across the Arab and European regions. He sees it as a model that should, where appropriate, be replicated in other regions and sub regions of the Global Network of NHRIs.

In her analysis, **Frauke Lisa Seidensticker**, Former Deputy Director of the German Institute for Human Rights and currently Director of Seidensticker Coaching and Consulting, explained how independence is a concept of much greater complexity than the Paris Principles may suggest, and that accountability could serve as a deeper source of inspiration than most of NHRIs think, but she emphasised that



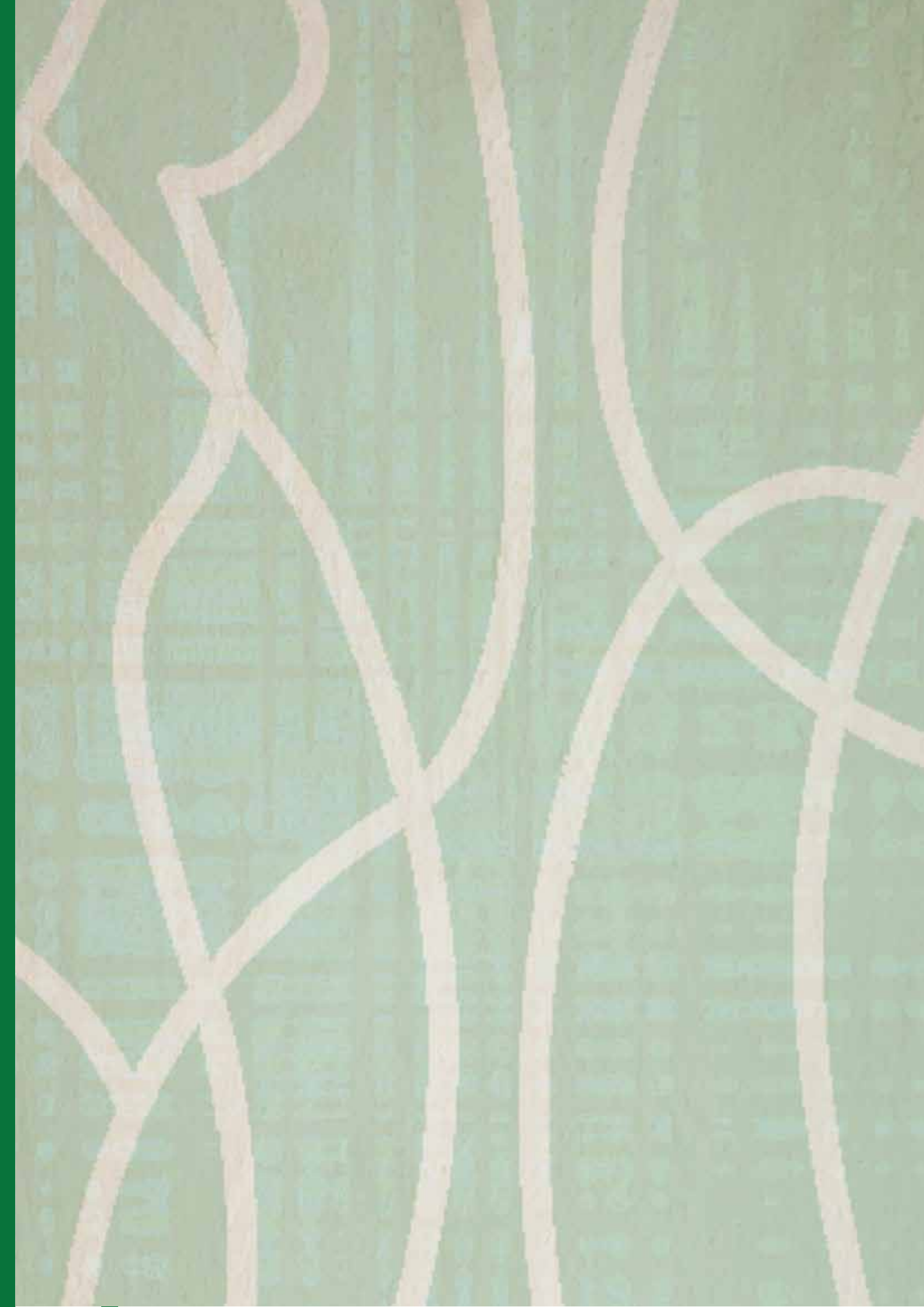
discussing such concepts and principles are hard but necessary to be addressed if NHRIs are to fulfil their potential. She provided some concrete examples from Europe on how NHRIs are challenged to work independently and effectively. This issue is also taken up by expert and lawyer **Georges Assaf** where he mapped some concrete examples from the Arab World on the implications of the principles of independence and accountability for the work of NHRIs including challenges, which Arab NHRIs are facing and experiencing to maintain their independence and accountability as set out in the UN Paris Principles.

The discussion from the civil society representatives suggested that NHRIs prioritize the democracy agenda next to the human rights mandate. Moreover, they suggested that NHRIs discuss their definition of civil society while being aware that this implies a political stand delimiting their civil society partners. In addition they suggested that NHRIs discuss the political nature of their work, as no human rights promotion and protection work takes place in a political vacuum.

In conclusion, Arab and European NHRIs, in their Eighth AEHRD Meeting on NHRIs' Independence and Accountability, have reflected more about independence than about accountability. They have concluded that good financial governance is key to independence and accountability -- but respective regulations can also cripple an institution, operationally and with respect

to independence, while in theory serving a noble end (i.e. accountability).

Finally, participants in the Eighth AEHRD on NHRIs' Independence and Accountability have consensually concluded, after thorough discussion, Copenhagen Declaration on NHRIs' Independence and Accountability, which can be read in **Annex A** of this publication.



# CHAPTER 1

## HOW THE GLOBAL NETWORK OF NHRIs FOSTERS THE WORK OF ITS MEMBERS AS INDEPENDENT AND EFFECTIVE ACTORS IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

By: **Adv. M. L. Mushwana**; Chairman of the Global Network of NHRIs and President of the South African Human Rights Commission

As the Chairperson of the Global Network of NHRIs, I indeed feel delighted to participate in what appears to me to be a progressive and innovative initiative ever to be conceived by members of the Global Network of NHRIs and which to me seems to be a move closer to the realisation of the concept “unity in diversity” which to me seems to be one of the rationale for which the Global Network of NHRIs stands for.

This concept is all the more important and indeed needed for a world that is forever one and forever diverse, forever opaque and indeed unpredictable.

I am reminded that it was this concept “unity in diversity” that, amongst others, held South Africans together in their path to a peaceful transcendence to democracy in 1994.

I am further reminded that along with being a longstanding member of the Global Network of NHRIs’ Bureau, Denmark also provided a previous Global Network of NHRIs’ Chair followed by Morocco and Jordan respectively.

It is noteworthy therefore that members of the Arab European Human Rights Dialogue have been well represented in the leadership of the Global Network of NHRIs and has helped built the Global Network of NHRIs to where it is today.

One of the greatest strengths of the Global Network of NHRIs is the diversity of its membership of NHRIs from all over the world which brings together different expertise, knowledge and experience that is shared amongst its members.

The interaction at a regional level is important, but we also need important processes such as the Arab- European Human Rights Dialogue to foster and promote understanding between different sub-regions.

This process, which fosters the mutual development of NHRIs across the Arab and European regions, is a model that should, where appropriate, be replicated in other regions and sub regions of the Global Network of NHRIs.

2013 is a particularly important year for all NHRIs whose primary task and function is the promotion and protection of human rights in their respective nationalities and within the UN system as a whole.

This is particularly so as it is now 20 years that the UN General Assembly adopted the Paris Principles which defines the appropriate qualities, status and functioning of national institutions for the promotion and protection of human rights.

It was also 20 years ago that the Vienna Declaration and Programme of Action (VDPA) was adopted which affirmed the universality, indivisibility and interdependence of all human rights and helped set the stage for the rapid increase in the formation and establishment of NHRIs across the world.

The recently concluded conference in Vienna aptly titled “Vienna +20: Advancing the Protection of Human Rights” highlighted the important role that NHRIs play and can continue to play as key actors within the international and regional human rights spheres of the UN system.

This Arab European Human Rights Dialogue affords us yet another opportunity to consider ways in which we as members, and our partners, can advance the protection of human rights in the decades to come.

On an occasion such as this one it may be appropriate to look back in retrospect on the past successes; achievements; challenges and indeed failures, and thereafter take and dedicate some moment and time, and then develop and design corrective measures to enhance and improve the future functioning and performances of NHRIs in their role of protecting and promoting human rights in their respective regions.

We must celebrate the 20<sup>th</sup> anniversary of the formation and establishment of our global association of national human rights institutions, the Global Network of NHRIs; its successes; achievements and its exponential growth.

Over the last few years it has grown from a small loose network of institutions to become an internationally renowned and recognised body that is the only non-UN body that has the power to accredit its members to function and operate directly within the UN system.

From just a handful in 1993 (again I note that the Danish Institute is one of the oldest NHRIs, dating back to 1987), we now have 104 members of the Global Network

of NHRIs, with a number of others being created, or applying for membership. However, only 69 of those members have been accredited as fully compliant with the Paris Principles.

That is why the topic of the Eighth Arab-European Human Rights Dialogue is so important – **independence and accountability are the foundations upon which all NHRIs must be built.**

Our unique standing within the UN system is something that we must cherish. It also places a duty on us to be robust in the way we conduct our peer-review process of accreditation.

On the 26<sup>th</sup> of Sep. 2013, as I was addressing a group of African Ambassadors who are in their respective permanent missions in Geneva, one singular challenge they kept on raising was the process of accreditation, raising questions about its transparency and openness.

As can be expected; some of those who raised such questions are those whose NHRIs happened to have lost their “A” Status.

It is important for me to reiterate the importance of the accreditation process and to state that the process has been strengthened through the development and adoption of new General Observations (GOs), including engagement with civil society during the assessment of effectiveness NHRIs. Improvements in the

accreditation process have also enhanced the transparency of the process.

It is important that we continue to improve as the Sub-Committee on Accreditation (SCA) is the guardian of our legitimacy as a network and as NHRIs.

The Global Network of NHRIs’ strategy of strengthening the capacities of NHRIs on the one hand and also seeking more recognition for NHRIs within the international and regional human rights within the UN system has been a great success and achievement following on the VDPA. The possibilities for NHRIs to have increased direct impact on the human rights processes at the UN level are increasing.

Through the efforts of a number of NHRIs, regional networks and the Global Network of NHRIs Geneva Representatives, the Global Network of NHRIs has gained visibility both in New York and Geneva.

New opportunities for National Human Rights Institutions have been opened to proactively engage with UN bodies and structures such as the Human Rights Council, Special Procedures and Treaty Bodies.

We are also making small inroads towards the extending NHRI participation opportunities in the UN General Assembly, which will soon be considering a new resolution on NHRIs.

Key human rights instruments have

formally recognized the role that NHRIs, in compliance with the Paris Principles, can play in monitoring the implementation of human rights norms and standards.

In particular the Optional Protocol to the Convention against Torture (OPCAT) encourages States to consider the Paris Principles when establishing a national preventive mechanism.<sup>1</sup>

The Convention on the Rights of Persons with Disabilities (CRPD) in Article 33 (2) provides that States should take the Paris Principles into account when designating or establishing an independent mechanism to promote, protect and monitor the implementation of the Convention.

The ongoing discussion on the possibility of adopting an international instrument to protect the rights of Older Persons is an opportunity for NHRIs to make a further mark by participating actively to ensure that the process for promulgation of this instrument is fast tracked.

Regional human rights mechanisms are also increasingly making use of the role that NHRIs can play in promoting and protecting human rights.

For instance, the African NHRIs have been granted participation and speaking rights before the African Commission for Human and People's Rights. The Network of African National Human Rights Institutions is also engaging with the African Court for Human and People's Rights to allow NHRIs

to bring cases on human rights violation for adjudication before it. European NHRIs are currently engaging with the complex array of regional mechanisms in Europe such as the Council of Europe, European Union, and OSCE.

Further, European NHRIs regularly make *amicus curiae* submissions to the European Court of Human Rights, and have on a number of occasions made joint submissions on behalf of the European Network of NHRIs.

They have also played an important role in the reform of the regional mechanisms, engaging in the high level summits that will set the course of regional human rights mechanisms over the coming years.

I understand that our European colleagues will soon be attending a joint meeting of NHRIs and regional mechanisms, which we will monitor with keen interest.

The creation of more NHRIs within the Arab region and the discussions about possible Arab regional mechanisms are exciting and I look forward to hearing more about recent developments from you during the course of this gathering.

While we celebrate our successes, we must also recognise the numerous challenges facing NHRIs and think through solutions to deal with such challenges. While both the Paris Principles and the VDPA have had a profound impact on the legitimacy and credibility of NHRIs, these institutions



are still considered relatively new actors in the human rights field and their potential important role is not sufficiently recognized.

After twenty years of the adoption of the Paris Principles only just over half of UN Member State has NHRIs and of those 104 NHRIs, only 69 are Paris Principles compliant. It is important that all existing NHRIs to urge states to ensure that they establish national human rights institutions that are in conformity with the Paris Principles.

Through the processes such as the Universal Periodic Review NHRIs must monitor the implementation of particular human rights norms and standards and indeed the implementation of resolutions of UN bodies and structures including the implementation of previous UPR recommendations. We must also avoid becoming victims of our own successes.

By asking for more opportunities to be allowed speaking and participatory rights within UN bodies and structures when we do not have adequate capacity to participate on such structures can be counterproductive. We therefore must make sure that NHRIs have the capacity to live up to the raised expectations. We must therefore find ways and means to assist small NHRIs with limited budgets to also exercise their participatory rights.

A 2009 survey carried out by the OHCHR of 61 NHRIs reported that only 21 of

those surveyed considered that they had a sufficient budget to carry out their functions.

The survey also indicated that this may be a downward trend, with 10% reporting that their budget had significantly decreased in recent years.<sup>2</sup>

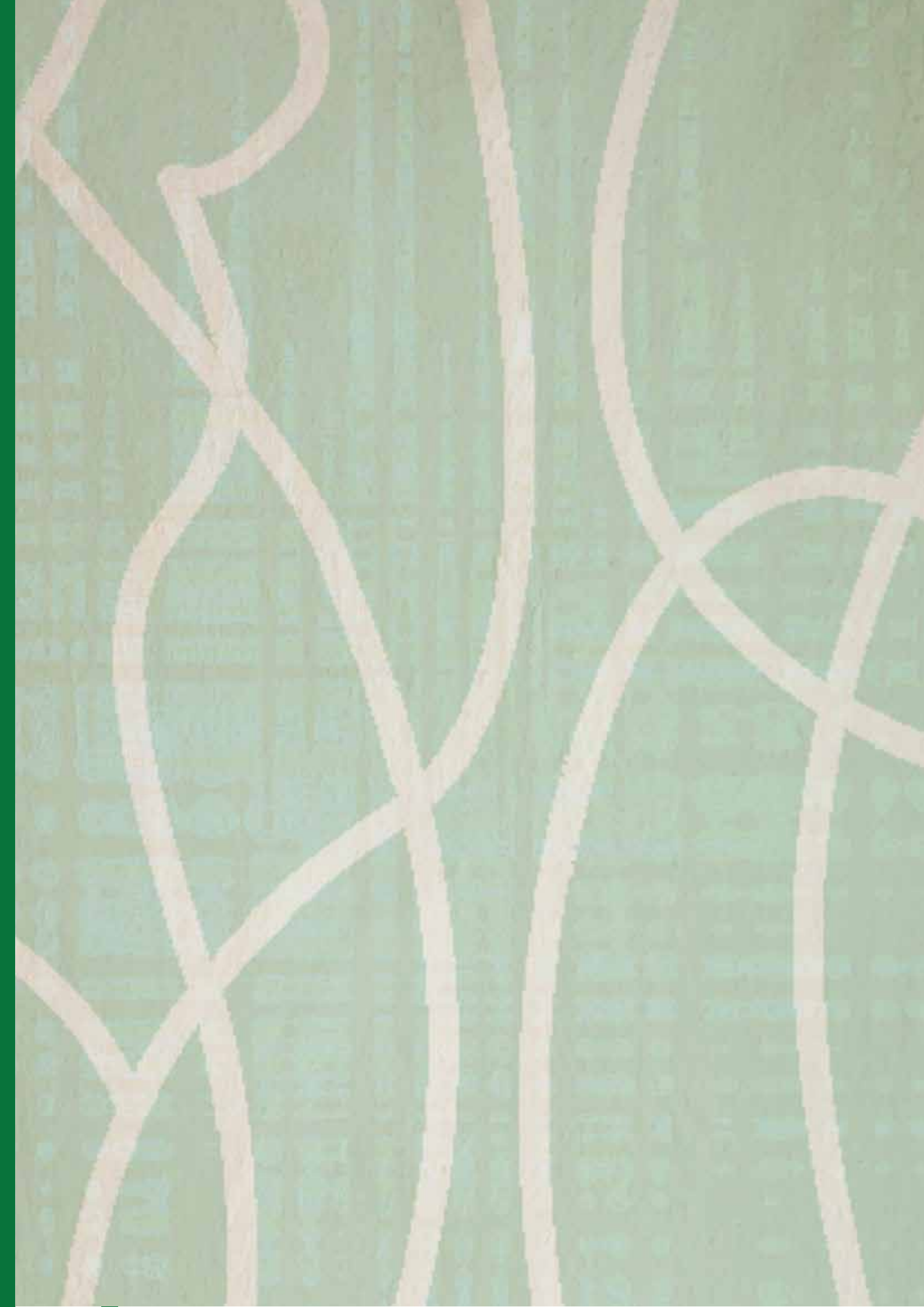
The economic downturn affecting many European countries may further exacerbate this situation.

This creates a challenge when NHRIs are being expected to meet high expectations of engagement with regional and international mechanisms as well as fulfil their function at domestic level.

There is still need to continue engaging with Member States to ensure that the role that NHRIs can play in promoting and protecting human rights is fully appreciated and realised. In conclusion, NHRIs have a lot to celebrate, but we also have our work cut out for the next few years if not decades to come.

The Global Network of NHRIs must remain focused on its vision and mission and strengthen its internal structures so as to be better placed to provide sustained and effective support for its member institutions.

Let us spend time rallying around those issues that unite us and shun those that divide us and make the Global Network of NHRIs a unifier of NHRIs.



## CHAPTER 2

# INDEPENDENCE AND ACCOUNTABILITY OF NHRIs: A EUROPEAN PERSPECTIVE

By: **Frauke Lisa Seidensticker**; Director,  
Seidensticker Coaching and Consulting

### 1. Introduction

It is a great pleasure to be among so many colleagues again. Thank you all so much for the invitation to speak at the occasion of the NHRIs' Eighth Arab-European Human Rights Dialogue on the topic of NHRIs' Independence and Accountability.

As some of you know I spent the first decade of this century in a NHRI – I built and co-headed the German Institute for Human Rights from 2001 to 2010. As NHRIs still were a young kind of institution all of us – we in the German Institute for Human Rights as much as my colleagues from all over the world - spent a lot of time developing and clarifying our understanding of the concept of a NHRI.

Independence and accountability were at the core of our discussions. During my time in the accreditation committee of the Global Network of NHRIs ( i.e. SCA) my understanding of these concepts deepened. The Sub-Committee developed further thinking in form of its so called GOs, and each session of the SCA

would offer opportunities to explore independence from a new angle. I also learned how far our understanding can diverge from the perspective of colleagues in other political systems and world regions. What seemed an indispensable condition of independence for colleagues from Africa or the Commonwealth – the granting of immunity for NHRI leaders – was out of the question for some European NHRIs such as the Luxemburg or the French Commission or the German Institute. On the other hand, for us in Germany it was hard to understand that quite a few of the Commonwealth NHRIs did not have any problem with the obligation to submit their annual report to the Prime Minister.

But for our colleagues in these institutions this was just how things worked in their countries, no threat to their independence at all, in their view.

In comparison to the issue of independence, accountability is less contested among NHRIs – while everybody accepts that we are accountable for our activities, you find much less on the topic when you look through the reports of the Sub-Committee for Accreditation.

The Sub-Committee's focus is on our founding laws and regulations, and here accountability plays a smaller role than independence. Some of us are accountable to the national parliament or to the prime minister – normally on a formal level. But accountability mainly is a matter of performance, and this plays a minor role for the SCA. In practice though, European institutions do apply a great variety of concepts of accountability as well, relating to different stakeholders. All NHRIs though have an obligation to handle their financial resources correctly according to the regulations for public funds – the challenge here lies in the distinction between financial accountability to the tax payer and the independence from the government. On the topic of accountability, I'd like to add that the purpose of an NHRI itself is to serve as an institution of accountability. We hold our respective governments accountable to their human rights obligations – basically within a horizontal procedure whereas the constituency acting through elections represents a vertical mechanism. It is obvious that we ourselves have a similar obligation toward the public to perform in a transparent and accountable fashion.

So, independence is a concept of much greater complexity than the Paris Principles may suggest, and accountability could serve as a deeper source of inspiration than most of us think. Please allow me now to take you through both principles in greater depth, starting from the Paris Principles. As literature on both of our

topics – independence and accountability of NHRIs in Europe – is amazingly scarce, I basically refer to the countless conversations I had and have with former and present colleagues on the subject and to the debates all of us have with the Sub-Committee on Accreditation. Its view is expressed within the recommendations issued for individual NHRIs as well as in its General Observations of the SCA, adopted by the International Coordinating Committee of NHRIs. These serve as interpretive tools of the PP. They have just recently been revised. The body of guidance developed by the SCA in the reports and the GOs is, in my view, as inconsistent as it is rich, and these, in their own way, are characteristics of lively and vital processes.

## 2. Independence

### 2.1 Paris Principles References and General Observations

Within the Paris Principles (PP), we do find references to independence. The first one points to the distinction between governments and NHRIs with regard to the reporting cycle to treaty bodies. This is an obvious one, for most of us, but how many institutions have to explain to their governments that they are not supposed to do the reporting to discharge governments! Further down within the text of the PP, an entire chapter is dedicated to guarantees of independence.

**Pluralism:** This chapter addresses the topic of pluralism - itself a key to independence,

in the view of the “mothers and fathers” of the PP. The PP list a few societal groups who could serve as members, such as human rights organizations, trade unions, the academia, and they do include government representatives in the list.

But these should only take part in an advisory role. The new General Observations (GOs) acknowledge that pluralism may take different forms in different types of NHRIs, and, as some models of NHRIs are run by one person or a small executive board, pluralism cannot only be realized within the governing body but also in the staff composition and cooperation of the NHRI with civil society.

The Paris Principles also name members of parliament as one of the stakeholder groups who should be represented among the members of the governing board of an NHRI. The SCA has, on occasions, expressed the view that members of parliament, i.e. of political parties should take part in advisory capacity only – if they belong to the governing party. This is now, after the recent revision of the General Observations, a part of the GOs. For us in Germany, parliament is legislative power only and not executive power; so, to us, the limitation of voting rights of Members of Parliament from the ruling party sounds strange. To me this is an area where further discussion may be fruitful.

**Infrastructure and Funding:** The second key according to the Principles is the NHRI’s material independence, in practical

terms the allocation of sufficient funding and infrastructure but also a financial control that does not affect independence. The GOs specify that financial autonomy is decisive here, and they also reaffirm that core funding must be provided by the state.

No donor should replace the key funding obligations of the national government.

**Security of Tenure:** Thirdly, the PP refer to a “stable mandate” of the members of the institution. Change of government should not be a reason for the exchange of members or leaders of the NHRI. For many of us, the position of independent judges serves as a model for NHRI leaders.

Detailed suggestions for the selection and appointment of the governing body and security of tenure in the GOs complete the PP stipulation. Stressing a stable position of the individual members and leaders as one of the key elements of independence, the GOs state that “grounds for dismissal must be clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate” and, furthermore, formulate procedural requirements for dismissal of an NHRI leader or member. The requirement of functional immunity for NI leaders in order to protect them from legal liability further backs their security of tenure.

Beyond these explicit references in the PP and the GOs, in the view of many,

independence is the most central characteristic for a well-functioning NHRI, covering our relations to civil society and academia, as well and serving as a source of inspiration for our strategies.

But let us first take a look at how the cornerstones of independence unfold within European institutions.

## **2.2 Cornerstones of Independence: European Examples**

**Pluralism:** Pluralism is taken very seriously by the French commission. Its founding law stipulates in article 1, “La commission exerce sa mission en toute indépendance.”

As outlined in article four of the commission's law, the composition of the commission is broad, with 64 members who have voting rights plus government representatives without voting rights. Appointment and the right of representation are regulated clearly by law; broadly half of the members are to be nominated by important associations in the field of human rights and humanitarian law; the other half being composed of individuals with a high degree of relevant expertise; and finally a few positions following different appointment procedures. In the Statute of the German Institute for Human Rights, we find an article similar to the French law: The composition of the board of trustees is listed in great detail.

While the French members are highly

involved into daily work of the commission, the 18 members of the German board of trustees meet twice a year. The day-to-day activities are steered by the executive board consisting of two people.

This is what made the SCA challenge the pluralism in the GIHR in its feedback in 2008. Given the important role of staff within the institute, the SCA encouraged to increase diversity particularly on staff levels. This has visibly improved in the last years. We found it interesting that the SCA obviously applies a broad understanding of pluralism – referring to staff composition in ombudsman and research institutions where a small leadership of one or two people cannot possibly meet the criteria of pluralism.

Finally, let us take the example of the Luxembourg Commission - Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg CCDH – that had long debates with the SCA, last but not least on the topic of pluralism. The SCA acknowledged that the CCDH is, indeed, composed of members coming from different political, ideological and religious backgrounds, but found fault with the legal basis of the commission: Neither the Regulations nor the Draft Law provide any legal requirements to ensure the pluralism of the institution's membership and staff composition.

It just defines the composition of 21 members with voting rights and a government representative in advisory



capacity, and stipulates that members should be chosen from civil society for their independence and their competency and engagement for human rights.

### **Material Independence**

One of the most sophisticated characteristics of NHRIs, with regard to their independence, is the fact that we are supposed to be funded by the state and independent from it (and from other sources) at the same time. The PP say, "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence." How often do we have to explain this construction? Dependent on government funds to ensure our independence! This looks like a paradox for outsiders and it is not easy to understand, indeed. But where NHRIs found good solutions with the government, it works. Quite a few European NHRIs operate on a comparably solid budget that allows a decent amount of promotion and protection activities.

### **A few Examples from Europe.**

A key concern for NHRIs and the SCA alike is the amount of funding received from the government. Does it really allow smooth conduct of affairs? We find many examples of this, some cases

representing a continuous problem, others representing a temporary one. I remember how astonished we were in the SCA when examining the Parliamentary Advocates and Centre for Human Rights of Moldova, also known as the Human Rights Centre of Moldova (HRCM), in November 2009. In the report of our session we noted, "The lack of adequate funding is a structural problem of the HRCM. Despite the significant efforts made by the institution, inadequate funding undermines the capacity of the HRCM to hire staff, make use of equipped premises and carry out activities.

The HRCM should be equipped with adequate resources in order to ensure the gradual and progressive realization of the improvement of the organization's operations and the fulfilment of its mandate." This sounds harmless in comparison to what we saw on paper in the budget – it looks as if the HRCM runs on next to nothing. So, we asked the head of the institution during our phone call how on earth she managed to run a capable institution because the Centre does quite impressive work with these scarce resources. Her answer was, "We are a former Soviet Union country. We can handle anything."

The Human Rights Centre of Moldova was designated to run the National Preventive Mechanism according to the Optional Protocol of the Convention Against Torture without any additional funds being allocated. Others, such as

the Polish Ombudsman, had to fight for additional resources to successfully run the Monitoring Mechanism under the UN-Convention for the Rights of Persons with Disabilities. In cases like these, the attribution of additional powers and functions, not accompanied by any allocation of additional resources, can weaken the institution and severely hamper its effectiveness.

For other NHRIs such as Ireland or Greece, concerns arise about funding related to budget cuts of the institution as a result of austerity measures in the country. This was a relevant issue for the Greek Commission that had, at a certain stage, even achieved more adequate funding and greater budgetary autonomy. But today, the commission suffers from even more severe cuts as a result of the austerity measures by the Greek government.

It is not always the amount of funding that causes problems but the particular system of funding. The SCA noted about the Luxembourg Commission that “It is uncertain whether the budget allocations of the CCDH are such as to ensure, to a reasonable degree, the gradual and progressive realization of the improvement of the organization’s operations and the fulfilment of its mandate. The CCDH should be in a position to exercise autonomous and unfettered control over its budgetary allocation.” And while examining the Human Rights Ombudsman of Bosnia and Herzegovina, the SCA suggested, “Financial systems should be such that an NHRI has

complete financial autonomy. This should be a separate budget line over which it has absolute management and control.”

The Ombudsman, in 2010, told the SCA that it had lobbied successfully for greater financial independence. In summary, financial independence is an issue of serious concern for many NHRIs in Europe.

### **Members: Guarantee of Tenure**

The third criterion for independence according to the PP is the stable mandate for commission members or leaders, “... effected by an official act which shall establish the specific duration of the mandate.” The appointment procedure of NHRI leaders as much as the definition of grounds for dismissal of members and leaders have been a central issue for many institutions in Europe and their accreditation – for the Irish commission as much as for the Luxemburg commission or the German Institute. And indeed, these procedures can only work if all aspects of the appointment and dismissal guarantee the selection of an able and committed personality – or a group, if we are talking about a commission – and secure him, her or them the freedom to focus on human rights issues which may be controversial in their home country. Some institutions clearly state grounds for dismissal of leaders. The Irish Human Rights Commission explicitly lists bankruptcy, sentence for imprisonment, conviction of a criminal offence, failure to discharge one’s own function for a certain period of time and inability to exert one’s function, and

the law adds a general clause referring to “any other reason”.

The Act establishing the Polish Ombudsman lists inability or then refusal to perform as potential grounds for dismissal by the Parliament as well as acting “against the oath”, adds though a quota required for dismissal of the ombudsman. This is a solution for many institutions so that they don’t need to enumerate specific reasons for dismissal, and it was for the German Institute. In our early years, we amended the Statute by increasing the quota required to dismiss members of the Executive Board.

### **2.3 Challenges to Independence: European Examples**

European NHRIs have not always found it easy to maintain their independence – I personally remember several incidents of pressure against the heads of institutions.

Let me give you two examples. In 2001, a conservative majority won the elections in Denmark. The one institution these political parties would have liked to see eradicated from the surface of Denmark was the Danish Institute for Human Rights, particularly because of their firm stand on human rights of asylum seekers and migrants. The news of a decision to close Denmark’s NHRI was broken to its then-director Morten Kjærum in 2002 when he was on his way to attend a meeting of UN Ambassadors related to his candidacy for the UN-Committee on the Elimination

of Discrimination in New York. And it came as a shock. National stakeholders as much as the international human rights community loudly protested against the threat and expressed their concern about this attack against an institution with a high reputation. Complex negotiations followed one of which was the proposal of a merger of the institute with institutions working on foreign policy. The director stood up for the independence of the institute. Ultimately, he even had to apply for his own job again – and was re-assigned his old position by the board. In the end, the Danish Institute was successful. Today, the former director says that the entire process strengthened his position and the reputation of the Danish Institute for Human Rights. Today, the Danish Institute is established by law and not any longer by Parliamentary decree, and it was assigned with further tasks related to equality. It was a very difficult and challenging process though.

Similarly, the Secretary General Michel Forst of the French Commission for Human Rights was threatened in his position in 2009. Normally, he has a three-year-contract which is prolonged following a proposal by the Commission’s President.

In 2009, quite unexpectedly, he was informed that his contract would not be prolonged any more – he was to be replaced by an official. The President of the French Commission intervened with the Prime Minister, initially to no avail. With a letter from the 7<sup>th</sup> of July, Special Rapporteur on Human Rights Defenders,

Margaret Sekaggya, then expressed her concerns to the French Ambassador at the United Nations in Geneva, referring to the UN Declaration on human rights defenders. She particularly pointed to her concern that the refusal to prolong Forst's contract may be related to his criticism of some changes in the French asylum law and his support of a member of the French Commission who defended a Congolese man who was to be deported to his country of origin where he might be exposed to torture or ill-treatment.

In the end, it was this letter that made the difference – the Foreign Minister himself explained to the French Cabinet what a bad example France would give if an SG of the French Commission would be dismissed because he had defended human rights. Michel Forst's contract was prolonged, and last year it was prolonged again. But he confirms as much as our former Danish colleague – his position was definitely strengthened after these events.

These are impressive examples of direct and explicit threats against two well established institutions. In Europe, we have one institution which faces quite a different challenge to its independence.

It is the Norwegian Centre for Human Rights. After being accredited with A-status for quite a few years, this institution was, in November 2012, accredited with B-status. The reason is not its dependency on the Norwegian government but on another institution – the University of

Oslo. We could ask how this could be such a problematic affiliation – is not academia supposed to be independent anyway? And nothing in the SCA report gives us a hint where the problem really is. So I called the head of the institution, our colleague Kristin Hogdahl, and asked for her view. Her answers are most enlightening. What the Centre experienced was and is a conflict between academic independence and the independence and the role of a national institution. Academic independence is normally attributed to the individual researcher, not to her or his university. She is free to express her view, based on her findings, and then to defend this view – quite independently from its political implications. The independence of the national institution is, however, much more defined by the necessity to repel external interference. Internally, heads of the institution in cooperation with experts and researcher, will wrestle with a coherent position of the entire institution on any issue. The development of a strong, coherent human rights based position of an NHRI is very different from the independent academic point of view of a researcher – the NHRI, in the end, will develop a position of political nature – even if our politics are human rights politics only.

Thus, a NHRI cannot guarantee academic independence of the individual researcher but needs, quite the contrary, to shape strong and coherent positions to influence public debate and government policy in favour of human rights.

It was the incompatibility of the nature of a university with the role of a NHRI which led to the B-status of the Norwegian Centre. The Centre, by the way, is an excellent institution with a high reputation. We all hope that its struggle for a different, powerful format will succeed in the nearest future.

### 3. Accountability

#### 3.1 Paris Principles and General Observations

The PP are silent about accountability. Even the obligation to issue an annual report, a requirement for accreditation and re-accreditation, is not part of the PP. The GOs of the SCA have been relatively quiet on the topic until recently. But now, with the 2012 revision of the GOs, we have quite a few references to accountability.

#### A Reading in the General Observations:

A “NHRI must be established in a constitutional or legislative text with sufficient detail to ensure the National Institution has a clear mandate and independence. In particular, it should specify the Institution’s role, functions, powers, funding and lines of accountability....”

We do not learn from the GOs what exactly these lines are supposed to be; they could refer to internal reporting lines as much as to external reporting obligations, e.g., to the national parliament. In the sixth GOs the Global Network of NHRIs develops a

whole strategy for NHRIs on how to publish annual or thematic reports and to then make sure in a “rigorous and systematic” way that relevant authorities follow up on the NHRI’s recommendations. This looks to me like a strategic suggestion applying something like a system of accountability between the government and the NHRI alike. I will examine this GOs further down in light of some examples of the practice of accountability of European NHRIs.

Then, in the 10th GOs’s new version, we find a reference to financial accountability which is not seen as interference of the state into the NHRI’s independence, “While a National Institution should have complete autonomy over the allocation of its budget, it is obliged to comply with the financial accountability requirements applicable to other independent agencies of the State.” In the 11th GOs, we finally find recommendations for the annual report, very specific as well, “The importance for a National Institution to prepare, publicize and widely distribute an annual report on its national situation with regard to human rights in general, and on more specific matters, is stressed. This report should include an account of the activities undertaken by the **NHRI** to further its mandate during that year and should state its opinions, recommendations and proposals to address any human rights issues of concern.”

Here, once again, the GOs suggest in great detail a modality of how a NHRI could

exert its functions. Many institutions draw a distinction though between thematic reports, annual reports and general reports on the human rights situation in the country, and I don't see how they would be less effective than those who combine their account with an overview of the situation in their country.

So, with the new GOs, the Global Network of NHRIs issued a whole new way of thinking on accountability, covering reporting lines, financial obligations and strategic suggestions. And how do NHRIs in Europe apply accountability?

### **3.2 Models of Accountability: European Examples**

Most European NHRIs have some sort of regulation on their financial accountability – I leave out this aspect as it seems so obvious to me that NHRIs have an obligation to spend taxpayer's money with diligence. Only a few of the European NHRIs' founding laws refer to a formal accountability of the NHRI on the substance of their work. The Irish Human Rights Commission is one of those: Its founding act comprises detailed stipulations of the Chief Commissioner's accountability towards the Parliament and its Sub-Committees on their request.

The British Equality and Human Rights Commission's internal governance handbook along with the Commission's "Framework Document" unfold a whole system of accountability which explicitly

obliges the Commission to contribute to the "Government's system of democratic accountability". And indeed many of the countless regulations for the Commission's members – whether on board or on staff level – could be categorized as parts of an overall system of ambitious and excellent governance, committed to transparency, effectiveness and efficiency.

Most European NHRIs acts or founding laws include a stipulation on the publication of an annual report, but the majority of these refer to a classic activity report, not to a format which covers the implementation of human rights in the country. This applies, for example, to the British Equality and Human Rights Commission whose annual report clearly is an account on the implementation of strategic priorities and on proper management procedures, alongside a detailed financial report. The French Commission issues a report on the human rights situation in France bi-annually since 2009. In addition, it publishes an annual report covering all thematic areas relevant for the Commission in the respective year, a number of facts and figures; and, representing nearly half of the volume, all opinions submitted to the government and the government's responses. This is interesting as it allows to not only to follow the arguments of the Commission in detail but, where a response was received, the view of the government, often backed with valuable information.

The German Institute opted for a simple



format, covering all activities of the institute plus the annual accounts, until 2010. For the year 2011 the Executive Board decided to change the design and produced a thematic publication, offering opinion pieces, interviews and practical information on the main topics of the year, again completed by the annual accounts.

The Danish Institute for Human Rights is one of the rare institutions with a different practice. In addition to the regular annual report on the Institute's activities, the Danish colleagues publish, since more than ten years, a Status Report on human rights in Denmark. Until recently, this was basically a "compilation, describing and summarizing published human rights material within the respective year"<sup>3</sup>.

Now the design has been adapted into a more strategic format, structured in thematic chapters which provide relevant information but end in offering recommendations addressing decision-making and legislative powers. Only with its new Act from 2012, the Institute has a formal obligation now to address its report to the Danish Parliament. For a final example, there is the Spanish Ombudsman.

Here we find a reporting obligation of the NHRI to the national parliament as well, and the Spanish Ombudsman presents a very detailed and interesting report to the Spanish Parliament completed quickly in the beginning of the following year. This is the key publication of the Ombudsman, and it is as informative as it is strategic.

It clearly combines an activity report with substantive reporting on the human rights situation of the country. The degree of detail in which the Ombudsperson's strategies are explained, as well as reactions of public institutions addressed by the Ombudsman's recommendations, makes this an exciting document.

Now let us go back for a moment to the ideas on accountability developed by the SCA. And once again – financial systems of accountability seem to be well established all over the place; all institutions seem to be very aware that taxpayer's money has to be handled diligently. If the SCA expresses any concern in this area, it mostly relates to the scarcity of funding for an NHRI. The Committee, firstly, refers to lines of accountability detailed in the founding law of an NHRI. This can be found in some laws but certainly not in all, and in very different levels of detail.

Many institutions prefer to lay out their internal reporting lines in their internal regulation – an outstanding example is the governance policy of the British Equality and Human Rights Commission mentioned above.

Finally, we have two GOs referring to the annual report and to systematic follow-up of the recommendations of the NHRI. As we have seen, European NHRIs do write annual reports – as far as I see, all of them – but they don't necessarily combine their annual activity report with an overview on the human rights situation of the country.

They creatively apply many different modalities, issuing thematic reports, state reports and opinions, and in my view, this is just fine. I do not see a need to combine the analysis of the overall human rights situation in the country with their annual report – in particular as most institutions do not have the capacity to work on all human rights issues they find relevant.

Similarly, I do not find many examples of the “rigorous” follow-up among European NHRI’s recommendations suggested in the 6<sup>th</sup> GOs. As illustrated with examples from Spain and France, NHRIs do find possibilities to inform the public of their government’s reactions to its recommendations. I have not observed a “rigorous follow-up” though and assume this may look inappropriate in several political contexts within Europe. First of all, the NHRI simply is neither the executive nor the legislative power, and it is not meant to be. No NHRI can impose its own recommendations. And why should it? There may be situations of urgency where an outcry, followed by an uncompromising catalogue of recommendations, is appropriate. But this is not enforcement.

Within a European context, creative dialogue between the NHRI, civil society and the government seems to be appropriate and effective.

### **3.3 Challenges to Accountability: European Examples**

While the SCA-reports contain, as we

have seen, quite a few passages relating to independence, a major concern of the SCA, we find much fewer references to accountability. The reason is obvious: Independence can be built into the legal act establishing the institution, through structures and guarantees. Performance and daily practice can strongly contribute to independence, but the legal guarantees play a major role. Accountability though is, as a concept, relying much more on a daily practice and part of the performance of a NHRI. Up to now, the SCA has not found a way to assess the performance of NHRIs; on the contrary, it rather consciously abstains from such an evaluation as this would require much more resources. Let me give you one of the rare examples, initiated by a UN human rights treaty body who occasionally comment on the performance of NHRIs:

In 2011, the SCA undertook a special review of the Ombudsman in Azerbaijan.

I include this example here as Azerbaijan is a member of the Council of Europe. The review was related to the Ombudsman’s performance – the Sub-Committee stated, “In particular, the SCA has not been provided with adequate information to confirm that the HRCA has undertaken in-depth monitoring and rigorous investigation, nor provided critical advice to government or systematic follow up of its recommendations and findings on alleged human rights violations. Such activities together comprise a key part of its mandate.” The entire issue had

been brought up because of concerns expressed by the UN - Committee Against Torture. In the current of the review, the SCA expressed satisfaction with the interventions of the Ombudsman on alleged human rights violations. It remained concerned though that the information provided by the Ombudsman on its activities, reports, recommendations, and follow-up are not widely known or publicized within Azerbaijan, and encourages the institution to undertake in-depth monitoring, rigorous investigations and to make known its critical assessments and recommendations. This was an attempt by the SCA to enter into monitoring of the performance of a NHRI, related to the Ombudsman's accountability to rights holders: We, as NHRIs, are accountable towards those who suffer from human rights violations and also to the public who is entitled to learn from the NHRI where it identified problems in the country. The institution cannot treat cases as a secret deal with the government. We are not the International Committee of the Red Cross which, as a rule, operates confidentially.

#### **4. Beyond the Paris Principles: Independence and Accountability as Guiding Values**

As we have seen, we do find valuable elements both of integrity and of accountability in the Paris Principles and the General Observations. These are, in my view, helpful and necessary steps to build an independent and accountable NHRI. But there is much more to say about these

values so central to our institutions. The evaluation of NHRIs undertaken by the SCA basically looks at their legal basis, further regulations and a few annual reports. The Committee does not have the resources to assess the effectiveness and the performance of a NHRI. This would need a thorough evaluation of each institution which normally requires 15 or 20 work days at least.

It is interesting to look beyond accreditation requirements. There is more potential in the concept of independence of a NHRI, and in the concept of its accountability.

**First**, independence from the government can certainly be strengthened by certain conditions such as the advisory role of government representatives on the board of trustees. Most NHRIs will set up regulations to ensure financial independence while keeping accountability for the proper use of taxpayer's money.

For quite a few NHRIs, logistical factors play a role, in addition, such as the location in a building separate from the government or from a political party. But all these factors, as helpful and important as they are, cannot ensure continuous independence. Vigilance is part of our daily work. Interference by a ministry or a political party can happen any time, as most of us know through experience. It can arise in the current of negotiations on our founding law or possible amendments of this law. Interference may also take place

with regard to a single project, where all of a sudden a ministry is more than interested in the position we are going to take. We have to stay alert, diplomatic and firm at the same time – this will remain true for the lifetime of an NHRI.

Secondly, the concept of independence, and this is well recognized, is much broader than the requirement of independence from the government. Independence from the government is a necessary prerequisite for the quality of the advice we offer to the government, based on human rights considerations only and not on political considerations such as the approval of the constituency, powerful stakeholders and diplomatic concerns. But independence relates to other actors as well. There is civil society. Most human rights organizations follow a specific agenda, often with a strong advocacy and campaigning approach. NHRIs will often cooperate with NGOs, but our point of view will always be based on thorough research and a balanced point of view, taking into account a broad human rights perspective and current political debates. Then, of course, we want to be independent from political parties. In Germany, we heard from one political party: We are the ones to push your issues in the parliamentary committees! Well, great, thank you, but this always implies the danger that we as well might be seen as those who push the issues of this party.

What is the answer? Keeping the same distance to all parties? Or is it possible to

be so profoundly rooted in human rights thinking that we can interact freely with all sides and respond adequately to all views presented to us? And then there is the point of substantial independence – independent thinking, which allows us to develop the best strategies. To be curious enough to read the most recent publications on the topic we are examining. To listen to our own ideas and to think them through. To present them to a colleague and to listen to his or her independent thinking and comment.

This is where our work becomes exciting.

The depth of independent and profound thinking leads us beyond teaching and preaching to those options which will lead to the implementation of human rights norms on all levels of society.

We are challenged to think through the matter at hand, ahead of current debates, and this is what we ultimately want, isn't it? Similarly, accountability can serve as such a source of inspiration.

There is one dimension of accountability which could be called openness to see the most urgent human rights problems in the country. This means following the news, it also implies openness to those who come to our offices and present a problem we had not been aware of. While we all have limited resources, we are accountable to those affected by human rights violations and deprived of their rights. So, while we are following our strategic plans and

priorities, we have to remain alert for upcoming new challenges and may choose to adapt our agenda if there is an urgent matter arising. This is what most of us do – but we need to stretch our resources and, on occasions, be ready to skip a project to be able to immediately address a more urgent human rights problem which comes to our attention. A dramatic case of a refugee family rejected at our borders. A racist incident in the countryside. Police violence during a manifestation on wages. Or – and this may happen too – a systemic problem such as discrimination of persons with disability comes to our attention and as the parliament is holding a related debate we have to develop a position on the topic. We are accountable for the agenda we are setting. What do we observe, and how do we respond? Another aspect of accountability is related to our readiness to face criticism and diverging opinions from people who feel deprived of their rights or from NGOs who think we do too little on a grave human rights problem. Many of us receive complaints not only of a formal nature but letters, interventions or even public activities pointing at areas where others perceive us as weak. Much of this may look unjustified, in our view. But we have to take this seriously. The very minimum is to show real interest in the critic's point of view, and a willingness to enter into a discussion. This may ultimately even lead to a change of our agenda, but at the very least we offer interaction and debate to those who think differently. A minority urges us to take up their case, people in

psychiatric institutions complain of ill-treatment, a transnational company based in our country seems to be involved in violations of land rights in South America – if we don't have the resources to take up these matters, we at least have to explain why! Occasionally, this can be burdensome and a lot of work, but we are not a private think tank. We are accountable.

And finally accountability implies a high degree of neutrality. We have to remain accessible to all groups of society and send a signal of openness to all political and societal groups. This requirement has many implications as well! While we may appreciate the position of one political party on a particular issue, we have to remain open for the human rights potential within other political groups. We should not come too close to any political faction anyway, but as we need to interact with nearly all of them – with exception of those whose agenda is clearly incompatible with human rights – we have to make sure all political groups perceive us as a serious partner for human rights debate.

The requirement of neutrality also relates to accessibility – on the physical level this means that persons in a wheelchair or without eyesight should find their way to and within our offices. On our website, texts should be understandable for those who are not experts on human rights! The same is true for our big conferences – while I do see space for expert workshops on occasions, we should avoid being perceived as a closed club. That implies

the use of simple and understandable language, central and accessible locations, an agenda that takes many views on board, leaves space for discussion and finally, accountability also implies the willingness to listen where others would not take the time.

We are partisan for human rights, but at the service of all human beings. A truly independent and accountable NHRI is a beautiful gem in the institutional landscape of a country: Attentive. Awake. Alert.

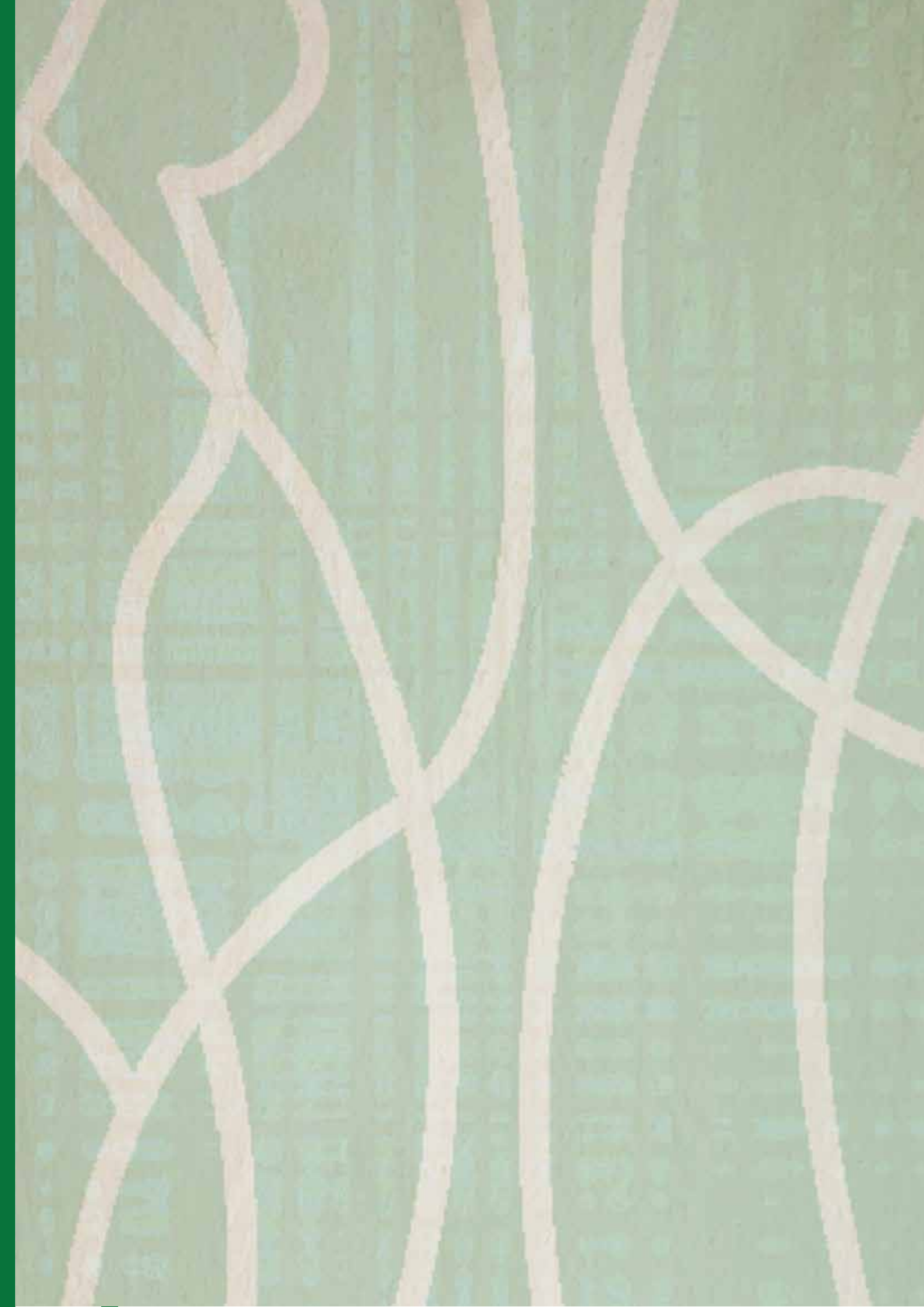




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## CHAPTER 3

# INDEPENDENCE AND ACCOUNTABILITY: THE CHALLENGES FACED BY NHRIs IN THE MENA REGION

By: **Georges J. Assaf**, Ph.D, Attorney at law

For the past ten years or so, I have been involved as a consultant to the European Union in working with National Human Rights Institutions notably in Jordan and Morocco, also in conducting a long term programme aiming at the creation of a NHRI in Yemen.

I have also acted on behalf of the civil society with various branches of government in Lebanon to the effect of creating an ombudsman institution. More recently, I actively contributed to the still on-going process of creating also in Lebanon a NHRI including a National Preventive Mechanism as per the CAT Optional Protocol.

The MENA region has experienced in the past two decades several models of national independent institutions. Each of these models can conform to the Paris Principles to various degrees and could have certain relative advantages and disadvantages.

Institutions that are **Ombudsperson**-like, for example the Mediator of the Republic in **Lebanon**, lack the pluralistic character specific to NHRIs but are easier to create and operate in that they are headed by a single person, This facilitates decision-making., but supposes a large administration for the handling and follow-up of complaints On the other hand, **Consultative Commissions** have a wide representation of social forces that makes them difficult to operate.

They lack effectiveness in that they are not mandated to investigate individual complaints for violations of human rights and risk focusing on research and advice-giving at the expense of effective protection of human rights. **Morocco** has made good use of this type of institution to deal with the transitional justice program initiated by the King before “elevating” it recently to the status of independent institution.

**Human Rights Commissions** appear to be both pluralistic and more effective especially if they have investigative power

and the authority to seek resolution of human rights violations cases, not only issue recommendations. This authority makes them more expensive and complicated to operate and may create an imbalance between promotion activities and protection activities. This is the case of **Jordan's** NCHR where the monitoring of places of detention took at one point more importance than all other activities.

Only an institution with a specific authority to investigate individual cases and seek enforcement, a typical character of NHRIs, as in **Jordan**, can be satisfactory in the MENA region because of the great need for remedial processes in the absence of other effective alternatives . this is due to lack of sufficient knowledge or understanding of international human rights law by legal professionals ,and to delays in disposing of cases because courts do not have the capacity to deal with caseloads..

The unknown parameter in the process of creating an NHRI in the countries of the MENA region is the degree to which the State, despite an apparently positive position with regard to the creation of an independent national human rights institution, is willing to act upon its promises.

**Yemen** for example made public at the United Nations Human Rights Council in 2009 its will to create an independent institution with enforcement capacities and has not gone further towards materializing this will.

**Lebanon** created in 2005 an independent oversight body after the French model of the now defunct *Médiateur de la République* with a mandate to address maladministration. It has not been organized since, the government being wary of the financial implications of setting this institution, not to mention political considerations that delayed for several years the enactment of the law creating this institution.

## INDEPENDENCE AND ACCOUNTABILITY ISSUES

We all know that **independence** is a burning issue for NHRIs in the MENA region where most political regimes remain, behind a liberal *façade*, often authoritarian.

In these countries, the independence of national human rights institutions relates to the nature of the political system and thus to political will.

The creation of independent national human rights institutions is also linked to national priorities, to budget constraints, and to the level of development of the country and of its civil society.

**Accountability**, on the other hand, is an important issue that is tied to independence: the more a NHRI is autonomous, and disposes of an extended mandate and sufficient resources, the more it is bound to provide information on its accounts and to effectively discharge

its tasks and to regularly communicate with the authorities, the public and to the international human rights community and feed its relevant mechanisms with its reports on the national human rights situation and the activities conducted thereto.

Although one could think that accountability is about respect of the rules that command the functioning of an institution, in reality, this issue is very much tied to transparency and effectiveness of the work of NHRIs: it is value for money with regard to quality and quantity of tasks discharged, of complaints handled, of reports completed, of support provided to government institutions for the completion of reports to the treaty bodies, of relations established with the local and international human rights communities.

In one word, accountability is about success far from bureaucracy or undue influence.

## ASPECTS OF INDEPENDENCE OF NHRIS IN THE MENA REGION

**Independence** from government control and interference, especially institutional and financial autonomy, appears in the wording used in the enabling texts. It can be measured with markers such as the breadth of the mandate, the form of appointment and dismissal of commissioners and the eventual immunity

given to them in performing their duties, among other indicators.

### **Institutional Independence**

The first aspect of NHRI independence is that of institutional independence that stems from the constitutional or the legislative enabling provisions.

None of the NHRIs in the MENA region originate in a constitutional provision<sup>4</sup>.

They were all created by law and lack constitutional protection.

However, a nuance should be brought to this statement regarding the situation in as much as respect of human rights is embedded in constitutional texts and is referred to, together with The Paris Principles, in NHRI enabling texts.

For example, according to the Preamble of the Constitution of **Lebanon**, the State recognises all obligations that result from international human rights conventions and commits to translate these in all domains without exception.

Such constitutional provisions however do not necessarily reflect the reality of mechanisms. The recent draft law proposal filed to Parliament for the purpose of creating a NHRI refers to this constitutional commitment.

**In Morocco**, the Royal Decree that created the National Human Rights Council expressly states in its Explanatory Note

that it is a “*constitutional duty*” to promote and protect universally recognised human rights.

Institutional or structural independence, as reflected by enabling NHRI texts in the MENA region encompasses:

- the pluralistic composition of the council or commission that presides over the functioning of the institution
- the method of appointment and dismissal of members and immunity given with regard to discharging their functions
- functional independence.

The **pluralistic composition** is a common feature to NHRIs organic texts in the MENA region, at least formally speaking.

However, some of these texts, such as the Royal decree governing **Jordan’s** NCHR, do not expressly mention pluralism in the composition of the council. In the **Moroccan context**, pluralism is expressed under headings which are not specific enough to ensure the required diversity.

Article 33 of the Moroccan Royal Decree, a text considered by the international community as the most advanced, compared to the other enabling texts of NHRIs in the MENA region, reads:

*“The members of the Council shall be chosen from among persons of recognised impartiality, integrity, genuine commitment to the values and principles*

*of human rights, outstanding contribution to the protection and promotion of human rights, intellectual competence, expertise and experience, in particular in matters relating to human rights and groups rights that have priority in public policies as well as those provided for in international conventions which the Kingdom has ratified or to which he has acceded”*

Except for mandatory women and regional membership, these are broad criteria for eligibility. Strictly speaking, they do not ensure pluralism or independence.

**On the other hand**, the method of appointment and dismissal of governing council and staff in NHRIs of the MENA region raises concern because of the politicised manner by which such selection and appointment of commissioners take place. This makes the institution wholly or partially dependent on the executive branch of the government.

For example, the President and members of **Morocco’s** NHRI are appointed by Royal Decree. It is true that only eight of them are selected by the King. However, eight other members are proposed by the two houses of Parliament while eleven are nominated by non-governmental organisations active in all classes of human rights. In **Jordan**, the commissioners are appointed by Royal Decree upon nomination by the Prime minister with no voice to the civil society in this process.

They benefit however of immunity in performing their tasks.

In **Egypt**, the weak impact of the NCHR on the situation of human rights is the direct consequence of its composition.

Egypt's NCHR is affiliated to the Upper House of the Parliament (Majlis AlShura) one third of whose members are appointed by the executive. Its composition appears to be carefully designed in such a way that members are close to the political establishment.

The formal representation of NGOs and the domination of the ruling party in the composition of the NCHR until the Revolution made the majority of two-thirds necessary to take decisions a purely formal issue and led representatives of the civil society to resign one after the other.

The arbitrary method of appointment of commissioners by the Shura Council in September 2012 upon rise to power of the Muslim Brothers, led civil society groups seeking a new council formation to call for amending NCHR law 94/2003 and to support the decision by Interim President Adly Mansour to restructure the National Council for Human Rights (NCHR) putting forward a set of criteria for selecting new council members in compliance with the Paris Principles.

To this effect civil society groups insisted the new Council members should reflect the entirety of society and should

include representatives from non-governmental organisations, trade unions, social organisations and human rights activists, the latter with no less than 40% representation.

In this respect, they asked that human rights organisations be given the opportunity to nominate their members as representatives within the council and that the council's deputy head and secretary general be both elected by council members, and come from a human rights background. On the other hand, the issue of independence has also to do with the degree of independence of the persons appointed, their independence from political parties and from civil society institutions.

**FUNCTIONAL INDEPENDENCE** is limited by the necessary approval of the way the institution is managed or the administrative and financial means to fulfil its mandate. This is the case in **Morocco** where the approval of the King is needed for the adoption of the rules of procedures drafted by the Council, the delegation by the president of some of his prerogatives, the creation of committees to deal with specific issues, the adoption of the agenda for the council's meetings among other decisions.

**The essence of functional independence lies in the effectiveness of a complaints system that is not simply a complaints box.**

This is intimately linked to the mechanisms for registration and processing of complaints, the criteria in use for that, the forms that are made available to citizens for submitting complaints, and, most of all, the possibility to go beyond conciliation and mediation to judicial procedures with the objective to set precedent once identifying systemic violations of human rights.

Such quasi –jurisdictional power is not recognized to **Morocco's** NCHR.

Likewise **Egypt's** NCHR can only have recourse to conciliation or mediation with the authorities to resolve complaints about human rights violations.

Human rights groups now campaigning for a reform of the statutes of the NCHR in **Egypt** stress the importance of giving the NCHR a wider jurisdiction. They also plead for the Council to go beyond being an intermediary between citizens and governmental institutions, acting only as a complaint box and not offering any solutions to human rights problems.

On the contrary the statutes of **Jordan's** NCHR allow the initiation of judicial procedures on behalf of victims of human rights violations. Jordan's NCHR has revamped in the last few years its complaints management system with the help of the European Union and has now competent legal professionals, the majority

of whom are active lawyers employed as consultants. However, no funds are made available by the government for them to actively engage in litigation on behalf of victims.

**FINANCIAL AUTONOMY** is another key aspect of independence. All of the NHRIs in the MENA region rely on government for their budgets. They prepare their annual budget and submit it to the authorities, in general the executive branch of government. NHRIs budgets are part of the state budget and subject to a public accountant control.

The **Lebanon** NHRI draft law proposal provides for financial independence rather than autonomy. The **Yemen** draft law has the same features. It gives the institution a mandate to set its annual budget and allocate it according to its operational needs, with no administrative scrutiny by oversight institutions of the State. This budget is to be included as a separate item of the State Budget, consisting of a percentage share of the said budget which does not vary except by virtue of a specific law.

Years after their creation, national institutions in the MENA region have not succeeded in securing the funds necessary for them to fulfil their obligations as per the Paris Principles.

They continue to receive limited budgets mostly directed towards payment of salaries.



Scarce funds make it difficult if not impossible for these institutions to discharge their tasks in dealing with complaints, monitoring the human rights situation and reacting to violations of human rights.

Complex procedures for disbursement of funds further erode the effectiveness of NHRIs in reacting to human rights violations in a timely manner.

Access to additional funds from independent donors is restricted in some cases as in **Morocco** where it is mandatory for the institution to obtain the approval of the government for funds offered by foreign donors.

In the case of **Jordan**, where the National Centre for Human Rights' (NCHR) statutes allows for additional sources of funds, it has proven difficult to tap such sources.

When available, such funds appear to answer the policies of the donors rather than the needs of the institution and have resulted in distorting the institution's action plan..

Moreover, in the latter situation, the NCHR has to compete with NGOs active in the field of human rights. This has resulted in growing antagonism from NGOs which look at the NHRI as a semi-governmental institution and an instrument of the government to divert funds. This warns of a danger that the NCHR becomes a tool for expressing critique as to the role and work

of NGOs and for defusing the activism of the civil society.

**ACCOUNTABILITY** to the State and accountability to the public materialize through monitoring of the human rights situation and issuing accordingly specific reports and an Annual Report covering all aspects, internal and external, of the operations of the NHRI.

NHRI statutes in the MENA region provide for elements of accountability as per the Paris Principles notably the duty to submit an annual report to government and Parliament, eventually to a President or a King.

Such statutes also provide for the drafting of ad hoc or special reports upon identifying patterns of human rights violations with recommendations for redress. The duty to inform the public, although not presented as mandatory, is tackled through a variety of provisions which suggest the possible means of communication that can be used. However, such means have not been really been put to contribution by NHRIs which, in my opinion, remain somehow poor on communication and conservative as regards the use of information technology.

In the matter of accountability to the public, public awareness about NHRIs' complaints systems appears to be quite insufficient and commands developing the necessary skills to reach victims in need of help.

Generally speaking, accountability as a principle needs to be tackled through a strategic plan, something that NHRIs in the MENA region have not put in practice unless we consider action plans to be strategic plans.

**In concluding,**

There is a specific role for national human rights institutions to play in the current period of transition in Arab countries, more so in the countries that have witnessed revolution.

**Egypt** is a case in point.

I remember meeting in 2010 Ambassador Kotb, the Secretary General of the NCHR, in his office in Cairo and discussing the performance of this institution.

He gave me examples of what Egypt's NCHR was able to do with regard to influencing law drafting in line with international standards such as the law on building places for religious cult proposed by the NCHR with standard regulations and criteria for building the said places without discrimination between Muslims and Christians, also the initiative that the Council took in raising the issue of the uninterrupted martial law since the sixties and the necessity to restrict its use in such a way that individuals be protected against the arbitrariness of Law Enforcement Agents.

Ambassador Kotb presented education on human rights as holding great value for the

promotion of human rights among future generations, stressing on the fact that the mere existence of the Council was valuable in itself. A period in the history of **Egypt** is now over.

Civil society has taken upon itself to press for reform of the law governing the NCHR, with no obstacle from the authorities.

There is no doubt that a new law will better answer the Paris Principles and will give a significant role to play to the civil society prolonging in so doing the waves of the revolution.

**Morocco** has followed a similar path.

The Kingdom had initiated a program of transitional justice ensuring collective and individual reparations and preserving the memory of the "*Years of Lead*".

Impunity however was not or could not be addressed as part of this transitional justice scheme.

The Advisory Council on Human Rights, which succeeded to the ministry of Human Rights, that had been created to reduce pressure on the Kingdom from the international community, was put to contribution in implementing this program.

As a result of its successful performance, it was "*elevated to the status of National Council on Human Rights,... alongside the King*". Despite shortcomings in the organic text that created the Council, the staffing

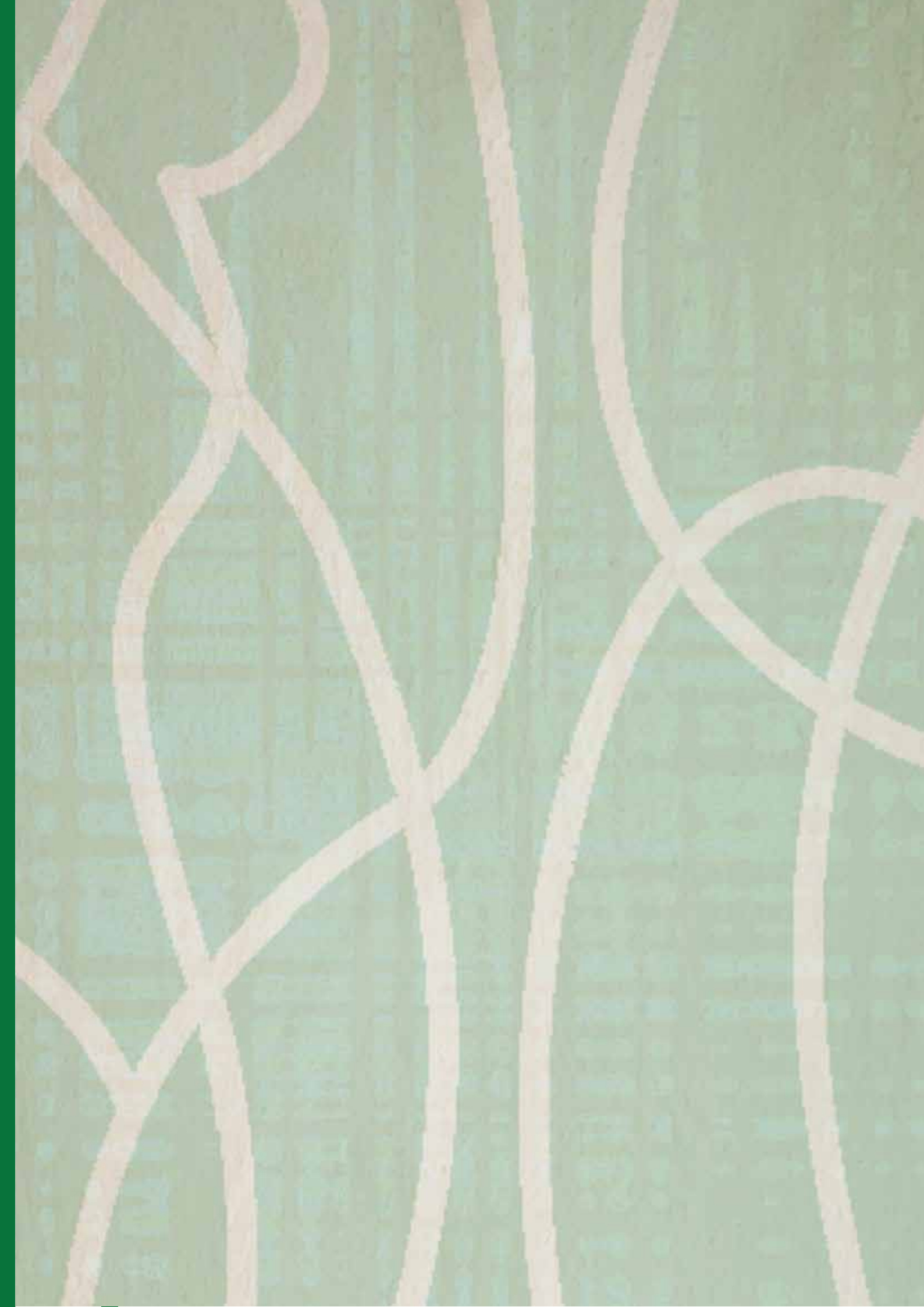
of the Council by long time human rights activists will certainly give a new impulse to this institution.

More to the east of the Mediterranean, the draft law proposal for creating a NHRI in **Lebanon** (2012) is the exclusive result of appropriation by stakeholders of the process up to the Parliament.

This comprehensive draft reflects the particularities of the Lebanese multicultural society and the necessity to involve civil society at large in manning an independent national human rights institution. Such is not the priority of the political parties nor of the confessional communities. Enacting the draft law will involve as a preliminary, the screening of the draft by the relevant parliamentary committees with a real risk of stripping the proposed NHRI of its primary attributes of independence and effectiveness.

***“One step at a time”*** could be the motto for NHRIs in the MENA region.

In this respect, the Arab-European Human Rights Dialogue mechanism is a blessed initiative that still needs to reach out to both governments and civil society groups in the MENA countries.



## ANNEX A: COPENHAGEN DECLARATION ON NHRIS' INDEPENDENCE AND ACCOUNTABILITY Copenhagen the 27th of Sep. 2013

### Preamble

**Valuing the positive participation of** the members of the Arab-European Human Rights Dialogue; both National Human Rights Institutions (NHRIs) and Observer members from UN, EU, Arab League agencies and the Global Network of NHRIs,

**Reaffirming that** NHRIs should protect human rights, be attentive to national human rights agendas, actively discharge their mandate to promote human rights, and be accountable for their actions,

**Recognising that** Independence and Accountability are two key Paris principles that govern NHRIs' work **Calling upon**

**government authorities**, political parties and others, including donors, to desist from any undue interference in the work of NHRIs to promote and protect human rights, **Recognising that** independence of NHRIs cannot be guaranteed without adequate funding or infrastructure, and that budget cuts and austerity measures may affect and possibly undermine the independence and effectiveness of NHRIs,

**Reaffirming that** independence calls for effectiveness, professionalism, transparency and accountability in the

discharge of NHRIs' mandate, **Also cognizant of** "Vienna Declaration and Program of Action", that states the need for regional and cross-regional cooperation, as well as the important and constructive role that independent NHRIs can play in initiating and promoting a culture of dialogue both at regional level and nationally, The members of the Arab-European Human Rights Dialogue in their Eighth dialogue on **NHRIs' Independence and Accountability**, who are convening in the Capital of Denmark; Copenhagen, on 25-27 September 2013, therefore agree to effectively strive for and protect their independence and at the same time hold themselves accountable to the general public and the parliament. **To this end, they hereby consensually declare the following:**

1. The independence of NHRIs, their mandate, regulations, procedures of appointment and allocation of budget should be guaranteed explicitly by law
2. NHRIs shall review and identify gaps in existing laws, regulations and administrative practices regulating

- independence and accountability and exchange best practices in this regard;
3. Pluralism and diversity are indispensable to independence and should be ensured in the law, composition of and the methods of appointment of boards, governing bodies and other key structures of NHRIs;
  4. Procedures for appointment and dismissal of commissioners and governing bodies must ensure independence, be clear, transparent and regulated by law, and should provide security of tenure sufficient to safeguard against political interference;
  5. Sufficient funding and infrastructure should be provided for NHRIs to ensure their independence and effective functioning. Allocation of budgets should be regulated by law and measures of financial control should not affect the independence of NHRIs;
  6. NHRIs should have the full mandate to promote and protect all human rights, and the ability to discharge this mandate, set priorities and pursue them, without political interference. They should be able to investigate cases of human rights violations and freely publicise all their findings, opinions and critical statements without fear of repercussions ;
  7. Maintaining their independence from both government and other actors, NHRIs should closely cooperate with civil society and open up to the public to ensure the broadest possible inclusion of their priorities and in their discharge of activities;
  8. with a view to furthering promotion and protection of human rights, NHRIs should hold themselves accountable to the parliament and the public, while planning and implementing their activities, in particular to victims of human rights violations and to those groups and individuals in the society who are most vulnerable
  9. NHRIs should establish and facilitate transparent accountability arrangements through periodic communication with all stakeholders;
  10. The Global Network of NHRIs should continue to be rigorous in its accreditation and review procedures and ensure to uphold NHRIs to standards of independence and accountability.

## ANNEX B: PARIS PRINCIPLES RELATING TO THE STATUS OF NHRIs<sup>5</sup>

### Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

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(a) To 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, as well as any prerogative of the national institution, shall relate to the following areas:

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(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;



- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
- (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- (d) 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 for their independence;
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and

research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

### **Composition and Guarantees of Independence and Pluralism**

4. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- 
- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;

- (d) Parliament;
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

5. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

6. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

### Methods of Operation

Within the framework of its operation, the national institution shall:

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- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

### **Additional Principles Concerning the Status of Commissions with Quasi-Judicial Competence**

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organizations.

In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

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- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
  - (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
  - (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
  - (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties

encountered by the persons filing the petitions in order to assert their rights.

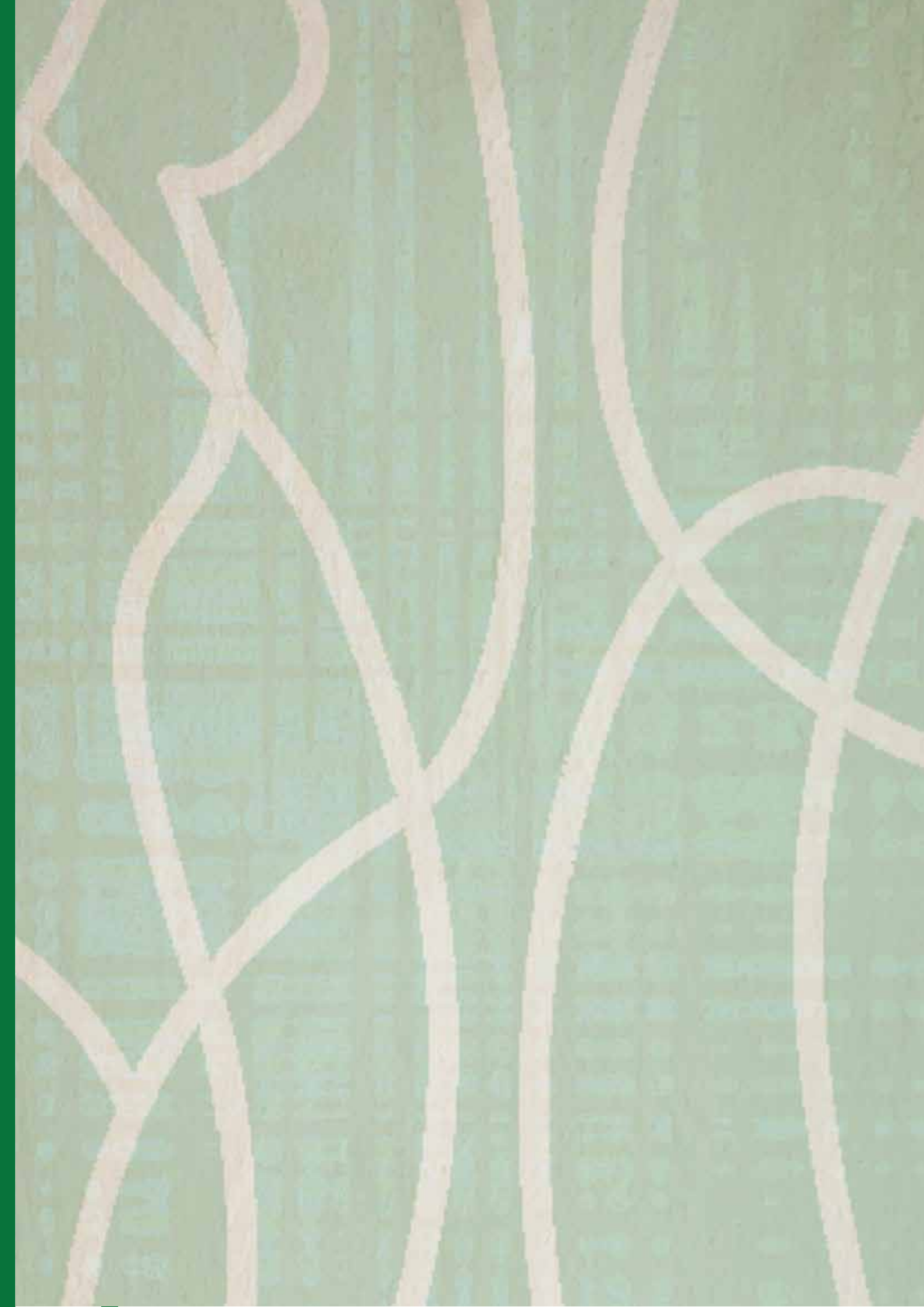


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# ENDNOTES

1. Article 18 (4) When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights

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2. OHCHR, Survey on National Human Rights Institutions (Geneva, July 2009), available at: <http://www.nhri.net/2009/Questionnaire%20-%20Complete%20Report%20FINAL-edited.pdf>, p. 17.

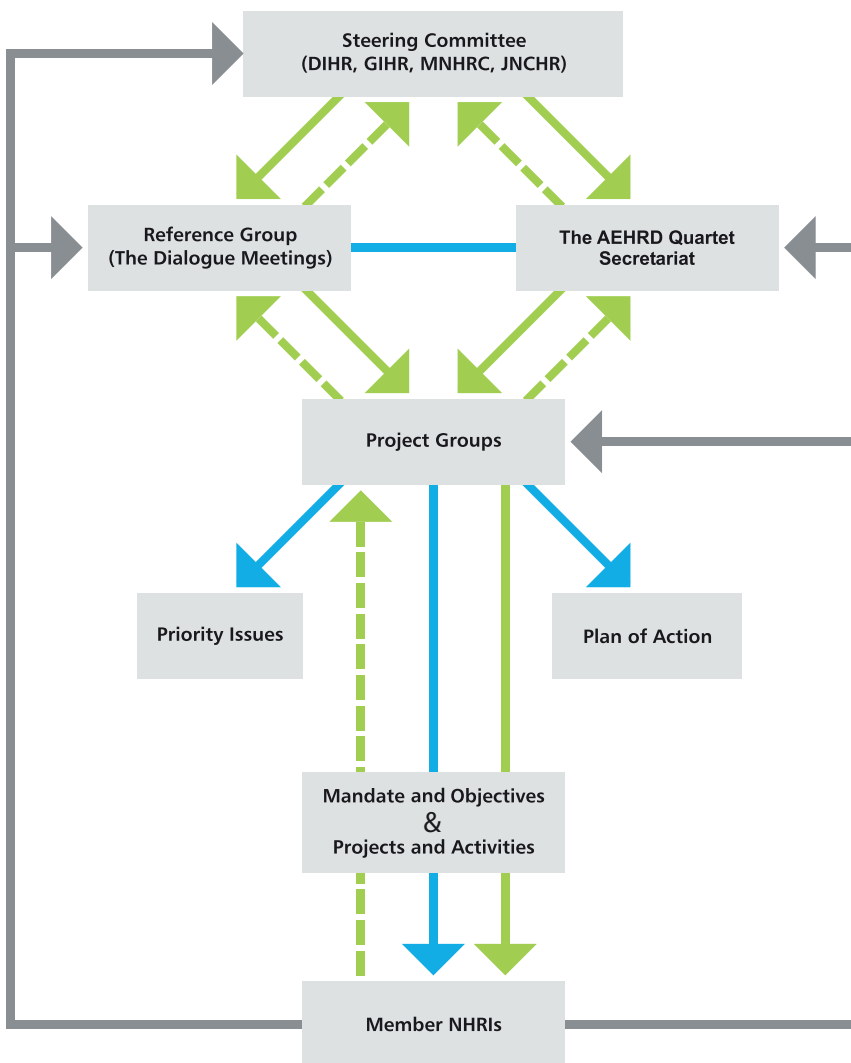
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3. Christopher Badse 2013, The Danish Institute for Human Rights, in: National Human Rights Institutions in Europe, Jan Wouters, Katrien Meuwissen (eds.), Intersentia, Cambridge, Antwerp, Portland, p. 44.

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4. The creation of an Iraqi NHRI was provided for in the 2005 Constitution however the “operationalizing” of this NHRI can be questioned due to the situation in this country. This remark is also valid for the Libyan NHRI. The Moroccan National Council for Human Rights was provided for in the 2011 constitution, but was initially created by law as a consultative council later “elevated” by the King to its new status.

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5. Paris Principles defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.

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# AEHRD Structure



The Steering Committee (SC) is comprised of the Director of the Danish Institute for Human Rights, Deputy Director of the German Institute for Human Rights, Commissioner General of the NCHR in Jordan and Secretary General of the National Human Rights Council (NHRC) in Morocco. The SC provides the overall policy guidance to the Secretariat. It also contributes to the Plan of Governance, Follow-on Strategy and Fund-raising, including coordination with UN, EU and Arab League Agencies and International donors.

The AEHRD Quartet Secretariat supports the SC, as well as the Project Groups and is responsible for the overall management of the AEHRD Platform, administration, coordination, reporting etc. Comprised of the Dialogue Programme Manager at DIHR, who is the prime responsible person for the implementation of the programme, and coordinators from the GIHR, JNCHR, and MNHRC.

Project Groups are formed in the Dialogue Meetings to follow up on the Dialogue Meetings' recommendations including conducting studies and implementing projects in full consultation with the Dialogue Secretariat and the respective NHRIs, as well as other relevant organizations and resource persons.

## Legend

- DIHR The Danish Institute for Human Rights
- GIHR German Institute for Human Rights
- JNCHR Jordanian National Centre for Human Rights
- MNHRC Moroccan National Human Rights Council