

THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN STRENGTHENING THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS



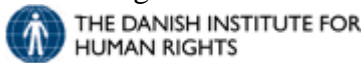
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©May 2009

Acknowledgement:

This publication was realized with the financial support of the Danish Institute for Human Rights.



The Network of African National Human Rights Institutions (NANHRI) is a regional organization that brings together 32 independent African National Human Rights Institutions. The mission of the Network is to support through national, sub-regional, regional and international co-operation, the establishment, strengthening and development of national human rights institutions in order to enable them to effectively undertake their mandate of human rights monitoring, promotion, protection and advocacy.

FOREWORD

“Human rights, our collective responsibility...”

The above quote is the watchword of the African Commission on Human and Peoples’ Rights (the “Commission” or the “African Commission”), which is the premier regional institution responsible for the promotion and protection of human and peoples’ rights in Africa. This watchword no doubt reflects the spirit of the African Charter on Human and Peoples’ Rights (the “Charter” or the “African Charter”) which calls for collective responsibility in the struggle for human rights and particularly for cooperation between the Commission and local and National Human Rights Institutions (“NHRIs”).

Similarly, African NHRIs, being bodies responsible for the promotion and protection of human rights at state level, are enjoined by the Paris Principles to cooperate with the regional institution competent in the area of promotion and protection of human rights, in this case the Commission. NHRIs are therefore intended to partner with the Commission in the realisation of the latter’s mandates and in general in the realisation of human rights in Africa. The recognition of NHRIs in the work of the Commission is envisaged in the Charter, expressed in the Commission’s Resolution on Granting Affiliate Status to NHRIs, in the Commission’s Rules of Procedure (the “Rules”), and confirmed by the Commission’s practice. NHRIs are thus essential partners in the implementation of the Charter at national level.

The collective efforts of the Commission and the African NHRIs are essential for effective human rights protection and for building a culture of human rights in Africa, because the protection of human rights requires complementary and multi-layered enforcement mechanisms. Even the Universal Declaration of Human Rights, the first universal human rights instrument, envisaged collective responsibility by states and ‘other organs of society’ to implement human rights. Therefore, close relationships among and between these human rights bodies are inevitable.

Presently, NHRIs enjoy affiliate status with the Commission, but the level of involvement of NHRIs in the work of the Commission remains minimal. There is thus a need for both the Commission and NHRIs to deepen their cooperation and consolidate their relationship by further exploring the numerous possibilities offered by such alliance. It is for this reason that the Network of African National Human Rights Institutions (“the Network”) has commissioned this report (“Report”), with a view to analyze, review and improve the relationship between NHRIs and the Commission, and to identify some of the many possible means for NHRIs and the Network to further contribute to the work of the African Commission on Human and Peoples’ Rights as partners in progress, and *vice versa*.

We would like to extend our appreciation to Professor Michelo Hansungule and Ms. Abiola Idowu-Ojo who have worked hard to write and edit this report. Professor Hansungule is an International Human Rights Law professor at the Center of Human Rights at the University of Pretoria. We would like to also thank the NHRIs in Africa, friends and partners of the Network of African National Human Rights Institutions who made this report possible through their cooperation, sharing of information, comments and guidance.

It is hoped that this Report will serve as a useful guide to the future co-operation between NHRIs and the African Commission on Human and Peoples' Rights in order to fulfil their common mandates of promoting and protecting human rights in Africa.



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December 2008

ACRONYMS

ACHPR	-	African Commission on Human and Peoples' Rights
AHSG	-	Assembly of Heads of State and Government of the African Union
AU	-	African Union
IGO	-	Inter-Governmental Organisations
NHRI	-	National Human Rights Institutions
NGO	-	Non-Governmental Organisations
UDHR	-	Universal Declaration for Human Rights
UN-OHCHR	-	UN-Office of the High Commissioner for Human Rights

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BACKGROUND

National Human Rights Institutions (“NHRIs”) play a major role in developing and sustaining fundamental human rights and freedoms by actively promoting and protecting the same at the domestic level, which is the level closest to the rights bearers. As creations of the states which are governed by international principles, NHRIs occupy a strategic position in the framework for human rights protection as they have the mandate to protect the interest of the citizens by safeguarding their human rights from indiscriminate violations, as well as the mandate to advise the state on its human rights obligations.

Traditionally, states have the responsibility to safeguard the rights and freedoms of citizens. However, in the process of governance states often violate the rights of its citizens. Furthermore, society, independently of state, may perpetrate ideas, beliefs, traditions, cultures and practices which could collide with human rights. For example, a centuries’ old cultural practice which generations have practiced in the genuine belief that it is right may in fact conflict with one or more basic rights and the state may recognize or fail to eliminate such societal practices which violate human rights. In this regard, the judiciary is the classical branch of the state normally entrusted with the responsibility to protect victims of human rights violations. This is achieved through a variety of factors including existence of a law providing for the human rights and of course a judiciary that is independent, impartial, adequately funded, and which is provided with sufficient mandate and jurisdiction to enable it to discharge its functions effectively.

The judiciary is easily not the right facility in all instances requiring protection of human rights as the role of the judiciary is often limited to providing redress after violations of human rights have occurred, except where the victims seeks and obtains some form of injunctive relief. More so, by its very nature, the judiciary cannot actively propagate human rights and is not expected to indulge in dissemination/promotion of human rights. Additionally, it is not normally positioned to play an advisory role to the other branches of the state on human rights issues, except upon request. A court must be seen to be impartial which limits the steps it can take when adjudicating matters, including human rights cases.

On the other hand, NHRIs are structured to actively propagate human rights of citizens and have the duty to actively assist human rights victims to access justice. It is noted in this regard that Africa is home to a large population of illiterate persons who are unaware of their human rights or the mechanisms for enforcing the same. The various international human rights protection mechanisms and even the state judiciary mean nothing to this group of persons. NHRIs, through their promotional mandate, engage in educating these uninformed citizens about their human rights and help them to seek redress when their rights are violated. Promoting and educating about human rights may involve the NHRIs informing the public about the NHRIs’ own functions and purposes, provoking

discussion about various important questions in the field of human rights, organizing seminars, holding counseling services and meetings, and producing and disseminating human rights publication. NHRIs are therefore essential to the realization of human rights at the state levels, and they complement state judiciaries and other mechanisms for safeguarding the human rights of citizens.

At the international level, NHRIs serve as the bridge between the state, citizens, and international enforcement mechanisms. This is because they are governed by international standards and principles¹ and relate with various international and regional bodies. They are therefore better positioned to bring the applicable international human rights standards nearer home by reminding the states of their international human rights obligations, enforcing the international human rights treaties in the domestic courts where possible, and litigating on behalf of human rights victims in the international fora. They are also able to serve as the mouths and the eyes (the relay mechanisms) of the various international human rights bodies in their respective countries as these international bodies cannot possibly have direct presence in all African states.

Particularly in relation to the African Commission, NHRIs are enjoined by the Paris Principles² to cooperate with the regional institutions competent in the areas of promotion and protection of human rights. Similarly, the African Commission decided to grant a special ‘Affiliate’ status to African NHRIs³, in recognition of their position as essential partners for the effective implementation of the African Charter at the national level. However, there has been very little cooperation between the African Commission and the African NHRIs since 1998, when this resolution was adopted. Only few of the thirty-two NHRIs that exist in Africa⁴ attend the bi-annual sessions of the Commission, and only five of the twenty⁵ affiliate NHRIs have submitted their reports to the Commission as requested for affiliated institutions. Therefore, the Commission’s objective of setting up a cooperation framework with NHRIs has not been realized.

In order to boost the cooperation between the African Commission and African NHRIs, the Network of African National Human Rights Institutions decided to commission a study to analyse the role that NHRIs can play in different aspects of the work of the African Commission with a view to strengthen the Commission and ultimately to

¹ The Paris Principles, a set of principles approved by the United Nations General Assembly Res. 48/134 of 1993, setting out principles meant to safeguard, among other things, the independence and effectiveness of NHRIs. See Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights, www.unhchr.ch/html/menu/6/2/fs19.htm.

² *Ibidem*.

³ **Resolution 31 (XXIV) 98 on Granting Affiliate Status to National Human Rights Institutions in Africa** adopted at the 24th Ordinary Session of the African Commission, held from 22 to 31 October 1998, in Banjul, The Gambia.

⁴ <http://www.nhri.net>, the website of the International Coordinating Committee of NHRIs.

⁵ This was the figure as at the 44th Session of the Commission, held in Abuja, Nigeria, November 2008, and the available data at the Commission as at the date of report, being 17 December, 2008. We were informed by the officials of the Commission that no NHRI has been granted affiliate status since the 42nd Session. The table of NHRIs with affiliate status provided by the Commission is attached as Annex 1 to this report. The NHRIs which have submitted their activity reports are also indicated in the table.

implement the African Charter at the state level. The Terms of Reference for the study called for a complete change of paradigm in the relationship between the African Commission and the NHRIs from what currently prevails and had the following objectives:

- Provide a clear understanding of the meaning and the legal aspects of the affiliate status granted to African NHRIs by the Commission and the other elements of the ***Resolution 31 (XXIV) 98 on Granting Affiliate Status to National Human Rights Institutions in Africa***;
- Raise awareness on the part of the African Commission on the need to recognise African NHRIs as privileged partners in the effective implementation of the African Charter at the national level; and
- Strengthen the capacity of African NHRIs to be fully involved in the work of the African Commission to better help implementing the African Charter.

This Report is the product of the study. In its first chapter, the Report gives an overview of the different levels of human rights protection and highlights the origin and significance of NHRIs in Africa. Its second chapter briefly examines the mandate and structure of the African Commission, while the third chapter examines the current relationship between the African Commission and NHRIs. Its fourth chapter examines the mandates/responsibilities of the African Commission side-by-side with that of the NHRIs and based on these mutually complementary mandates/responsibilities, it makes practical recommendations on the ideal working relationship between the African Commission and the African NHRIs.

The significance of this Report therefore lies in its contribution to and consolidation of existing cooperation between the African Commission and the NHRIs, particularly in its provision of concrete proposals on the possible forms of increased and improved cooperation between the African Commission and the NHRIs.

CHAPTER 1

THE LEVELS OF HUMAN RIGHTS PROTECTION AND PROMOTION AND THEIR INTERRELATEDNESS

1.1 Overview of the African human rights system

Since the adoption of the Universal Declaration on Human Rights in 1948, the protection of human rights has become an issue of international concern leading to the adoption of a range of human rights bodies and instruments to protect and promote human rights and fundamental freedoms. Originally, these formal expressions of human rights concerns in the international fora were solely affairs of the United Nations. However, the combined effect of Articles 52, 53, 54 and 56 of the Charter of the United Nations encourage the creation of regional arrangements or agencies for dealing with matters related to the maintenance of international peace and security⁶. Consequent to these provisions, there are currently three regional human rights systems of human rights protection running parallel to the United Nations system. These are the European, Inter-American and African human rights systems⁷.

For the African continent, the African Charter on Human and Peoples' Rights⁸ formed the basis of the regional human rights system⁹, and it in turn created the African

⁶ One of the arguments for the establishment of the regional systems as parallel to the global system of the United Nations were that enforceability of the decision amongst regional organizations within the same geographical, historical and even cultural zones appears to be more positive than within the universal system.

⁷ It is noted that although there are some efforts in other regions, i.e. the Arabic and Asian regions, they have not culminated into recognized regional human rights systems.

⁸ OAU Doc. AHG/102/XVII; this was adopted in 1981, and came into force on 21 October 1986. The Charter has been since been unanimously ratified by all 53 member States of the AU.

The African Charter is the main human rights instrument in Africa and arguably the most interesting of all regional instruments, demonstrating a uniqueness illustrated by the following: (1) Its recognition of the indivisibility and interrelatedness of human rights by combining civil and political rights and economic, social and cultural rights in one document unlike other regional human rights documents. (2) It accords recognition to collective rights such as the right to development, self-determination, and environment. (3) It recognises the concept of 'duties' as being a correlative of 'rights' of the individual. It thus recognises the duties of the individual towards his family, society and the state. (4) The African Charter places emphasis on African tradition. This finds expression in its Preamble which talks about "*[African] historical tradition and the values of African civilisation which should inspire and characterise the [ir] reflection on the concept of human and peoples' rights*".

⁹ Even though the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, which is a human rights instrument, had been adopted since 1969, it was a singular treaty, which did not create a systematic approach to variants of human rights issues arising on the continent, i.e. a regional human rights system.

Commission¹⁰, a quasi-judicial body of eleven experts charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent and appointed by the Assembly of Heads of State and Government of the AU¹¹ (“Commissioners”). To complement the mandates of the Commission, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights¹² created the African Court on Human and Peoples’ Rights¹³, authorised to make binding decisions.

Other components of the African human rights system are the African Charter on the Rights and Welfare of the Child of 1990¹⁴, which in turn created the Committee of Experts on the Rights of the Child; and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹⁵, whose implementation is also to be monitored by the Commission¹⁶.

Further to these regional systems, a domestic level of human rights protection has emerged¹⁷, largely in the form of NHRIs and the enactment of domestic bills of rights in national constitutions. Some states have gone further to domesticate international human rights treaties such that these are directly applicable in their domestic courts, as is the case in Nigeria, which has domesticated the Charter in its federal laws and Rwanda which has integrated into its constitution of 2003 all the Treaties and International Agreements regularly ratified including the African Charter.

The position of NHRIs is significant in this multi-layered international community of human rights institutions because of their hybrid nature, being:

- Voluntary creations of states which are governed by international principles;
- Independent, yet structured to have a close working relationship with the governments of the states unlike NGOs;
- A link between the international and domestic human rights fora.

The 1993 Vienna Declaration (the “Declaration”) also reiterated the importance of NHRIs in ensuring effective promotion and protection of human rights. The Declaration and its Programme of Action noted *‘the important and constructive role played by*

¹⁰ The African Commission was established by article 30 of the African Charter and was inaugurated in November 1987. Its headquarters is in Banjul, The Gambia.

¹¹ Article 30, African Charter.

¹² OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III); adopted on 10 June 1998, and in force on 25 January 2004.

¹³ The first judges of the Court were sworn in on 2 July 2006, at the 7th AU Summit, in Banjul, The Gambia. The Court’s headquarter is in Arusha, Tanzania.

¹⁴ OAU Doc. CAB/LEG/24.9/49 (1990). It was adopted by the Heads of State and Government of the OAU on 11 July 1990, and came into force on 29 November, 1999.

¹⁵ Assembly/AU/Dec.19 (II), adopted in July 2003 and in force on 25 November, 2005.

¹⁶ As above, Article 26.

¹⁷ Notably, at the African regional level one can also explore the potential role that Africa's sub-regional institutions can play in the protection and promotion of human rights although, the sub-regional institutions are mainly concerned with economic activities.

national human rights institutions for the promotion and protection of Human Rights, in particular in their advisory role to the competent authorities, their role of remedying human rights violations, in the dissemination of information and education in human rights’.

Indeed, the emergence of NHRIs is a significant development in the field of human rights enforcement which further strengthens the overall global protection mechanism.

1.2 The origin of National Human Rights Institutions

The concept of NHRIs is fairly recent in origin and was born out of sustained international and regional efforts. Although existing prior to 1992, the concept was consolidated on the international scene in 1992, when the UN Human Rights Commission (now replaced by the UN Human Rights Council)¹⁸ approved through Resolution 1992/54 a set of ‘Principles relating to the Status of National Institutions’, popularly known as the Paris Principles, which was later unanimously endorsed by the General Assembly of the UN. The Paris Principles constitute the basic international framework for the structure and mandates of NHRIs. Furthermore, in 1993 the World Conference on Human Rights took the concept of NHRIs to the practical level by granting a formal status to the International Committee for Coordination of National Institutions (the “Committee”), consequent to which the United Nations directed the Committee to organize biennial world meetings of NHRIs. Catapulted into action by the World Conference, NHRIs have since mushroomed across the world, with thirty-two currently in Africa.

More importantly in this context, the origin of the concept of NHRIs in Africa can be traced back to in 1981, when the Organisation of African Unity (OAU) adopted the African Charter on Human and Peoples’ Rights (the “Charter” or “African Charter”), and provided in its Article 26 that “*States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter*”. The African Charter is therefore very important to African NHRIs because at the time of drawing the Charter African states foresaw the necessity of making provision for NHRIs.

At least in the African context, Article 26 had no precedent at the time of its establishment. Besides the general references to human rights in various instruments, only the African Charter at that time made specific provision to “*appropriate national institutions*” which it urged states to establish and to entrust with the promotion and protection of human rights. The Charter even predates the Paris Principles.

Both the Charter and its Article 26 came as a complete surprise considering that at the time, there were only a handful of states on the continent that truly respected their

¹⁸ For the Human Rights Council, see www.unhchr.org.

citizen's human rights as the Charter came in the era of widespread dictatorial and oppressive regimes in Africa, when human rights did not matter. It was even more surprising that barely five years after its adoption, more than enough states had ratified the Charter to bring it into force. By these acts, not only were African states suddenly ready to entertain human rights, but even to open up their respective territories to the inspection by bodies created by their own governments and largely to be funded by these same governments.

Since the Charter, African states have begun, albeit reluctantly, to warm up to human rights, and often as a symbol of transition to a democratic state NHRIs have more recently become part of the African constitutional and statutory order. The establishment of these institutions has been spurred by the advent of democracy in Africa, and they have developed as features of democracy mainly because they have been found necessary to underpin democratic values and support democracy as government voluntary creations specially mandated to promote the cause of human rights in the respective states. Consequently, NHRIs have often been established to mark and identify the transition from dictatorship to democracy, and the absence of an NHRI is often perceived as a mark of a non-liberal state¹⁹.

To support democracy for instance, post-apartheid South Africa established the South African Human Rights Commission and the Gender Commission. Similarly, the Rwandan Human Rights Commission²⁰ followed the change of the Rwandese society from a genocidal racist government to one committed to national unity. In the same spirit, authorities in Ghana established the Ghana Commission for Human Rights and Administrative Justice²¹ to oversee the transition from military dictatorship to democracy. Literally the same thing happened in Malawi²² and Uganda²³, which both had troubled political histories from their independence; when they changed to a democratic structure, they established human rights commissions to underpin that change. Though not as troubled as in open dictatorships, movement from a one-party to a plural system of government led to the same development in Zambia²⁴. This does not mean that the establishment of a NHRI will instantly lead to an improved situation on human rights in that country. By no means, the actual task of ensuring human rights in practice will take much longer. However, in most of these jurisdictions, democratic transition was the defining feature for the establishment of a NHRI.

¹⁹ Notably, even with their subscription to international and regional human rights standards, most African states are still hesitant about the idea of opening up their backyards to foreign states and institutions in the name of human rights; and some can still not embrace even the idea of establishing their own human rights watchdog.

²⁰ www.unhcr.ch/html/country/rwanda.htm

²¹ www.chrajghana.org

²² www.malawihumanrightscommission.org

²³ www.uhrc.ug. The Uganda Human Rights Commission has developed to become one of Africa's shining examples of what can be achieved through resolve and collective efforts to safeguard human rights.

²⁴ www.hrc.org.zm.

NHRIs have thus continued to spring up in African states, although, at a snail speed, and Africa is currently home to thirty-two NHRIs²⁵. Even some of the countries that do not yet have NHRIs have plans to establish such institutions²⁶.

Ideally, and as noted above, the establishment of NHRIs is symbolic of states that have embraced human rights, at least in principle. Therefore, ideally too, it would not be realistic to think of these bodies in an environment that is bereft of a minimum level of democracy, but even in some states this has been the case. Strangely, these institutions have not only been established in evolving democracies, but even in the most unexpected situations of dictatorial regimes. For example, it was during the reign of the late Nigerian military dictator General Sani Abacha that Nigeria established the current Nigerian Human Rights Commission (“NHRC”)²⁷.

In other words, just like the word ‘democracy’, the concept of NHRIs can be exploited or even abused by dictators with ulterior motives of projecting the image of a democratic state; or simply because it is fashionable to have an NHRI. Indeed, when NHRIs appeared on the African continent in the early 1990s, several states without a scintilla of human rights established them, when in fact these institutions were not given the necessary powers to discharge the functions of NHRIs. Once again, reference is made to the example of the NHRC, which was established by the late President Abacha, and which he controlled through the appointment of its commissioners and senior staff.

However, some NHRIs which were principally formed with ulterior motives or which were established under dictatorial regimes, have managed over the years to transform into bodies relevant to the needs of their societies. A shining example is the Kenya National Commission on Human Rights (“KNCHR”)²⁸. The KNCHR was easily dismissed and criticized by commentators, given the context in which it was formed. However, the KNCHR has by all accounts, surpassed expectations and risen to be one of the outstanding features of Kenya’s democracy. Similarly, the Cameroon Commission²⁹ has managed to establish itself as a respected institution in the eyes of the general public. Although the NHRC fell short of its mandate throughout the military dictatorship, many years later today, under a more democratic system, Nigeria relies on the same institution that was established by the military ruler.

The above examples show the potential of even such ill-formed institutions when manned by individuals who have the requisite will to make them work, even in the face of hostile political environments; and shows that that it is possible to transform a NHRI from a tool in the hands of a dictator into a tool for advancing the ideals of democracy.

²⁵ Fn 4, above.

²⁶ Swaziland and Zimbabwe have recently announced plans to establish their own NHRIs.

²⁷ www.nigeriarights.gov.ng.

²⁸ www.knchr.org

²⁹ For example, see: www.allafrica.com.

CHAPTER 2

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS – MANDATE AND STRUCTURE

As discussed in the previous chapter, the African Commission was established by Article 30 of the Charter, for the purpose of promoting human and peoples' rights and ensuring their protection in Africa.

Although the roles and responsibilities of the African Commission are spelt out in various parts of the Charter, the core mandates of the Commission are stipulated in Article 45 of the Charter.

Article 45 of the African Charter defines the functions of the Commission as follows:

“To promote Human and Peoples’ Rights and in particular to:

- *Collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to Governments;*
- *Formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislations;*
- *Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights;*
- *Ensure the protection of human and peoples’ rights under conditions laid down by the present Charter;*
- *Interpret all the provisions of the present Charter at the request of a State party, an institution of the Organisation of African Unity (OAU) [now African Union] or an African organisation recognised by the Organisation of African Unity [now African Union]; and*
- *Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.”*

From the foregoing provisions, the mandates of the Commission are at least four-fold:

- The promotion of human and peoples’ rights;
- The protection of human and peoples’ rights;
- The interpretation of the African Charter on Human and Peoples’ Rights; and

- Performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government of the African Union.

To perform these tasks, Articles 31-40 of the Charter provides for the appointment of members of the Commission, i.e. the Commissioners, by the Assembly of Heads and Government of the African Union (then OAU) for the purpose of discharging the mandate of the Commission. Furthermore, Article 41 of the Charter establishes the Secretariat of the Commission and provides for the appointment of a Secretary for the Commission and the provision of staff and services necessary for the effective discharge of the duties of the Commission, with the African Union responsible for the cost of such staff and services. Furthermore, and pursuant to Article 45(1) (b) of the Charter, the Commission has established a series of thematic mandates which refer to the special procedures or mechanisms developed by the Commission to deal with specific (thematic) human rights issues of concern to the Commission and the continent as a whole. They are in the forms of Special Rapporteurs, Working Groups and Committees. There are currently³⁰ five Special Rapporteurships³¹ and five Working Groups³² at the Commission.

³⁰ As at the 44th Session of the Commission, held in Abuja, Nigeria, in November 2008.

³¹ Prisons and the Conditions of Detention in Africa, Rights of Women in Africa, Human Rights Defenders, Freedom of Expression and Internally Displaced Persons, Migrants and Asylum Seekers in Africa.

³² The Working Groups on Specific Issues Relevant to the Work of the African Commission; Death Penalty; Rights of Indigenous Populations/Communities in Africa; Economic, Social and Cultural Rights; and the Prevention and Prohibition of Torture. Other thematic issues include Fair Trial (with the ACHPR Fair Trial Guidelines 2002), Political Rights, and Racism, Racial Discrimination, Xenophobia and Related Intolerance.

CHAPTER 3

THE CURRENT RELATIONSHIP BETWEEN NHRIS AND THE AFRICAN COMMISSION

Having outlined the institutional and operational framework of the African Human Rights protection system, it is now pertinent to examine its current relationship with and relevance to other human rights bodies, in this case particularly NHRIs.

3.1 Introduction to affiliate status

Articles 45 (1) (a) and (c) of the Charter mandate the Commission in carrying out its functions to “*encourage local and national institutions concerned with Human and Peoples’ Rights*” and to “*cooperate with other African ... institutions concerned with the promotion and protection of human and peoples’ rights*”. The Commission is thus supposed to develop a unique relationship with other key players in the protection of human rights in Africa and in particular with NHRIs. NHRIs as African institutions concerned with the promotion and protection of human rights have a recognized position in the African human rights enforcement framework.

Specifically relating to NHRIs, the Commission currently grants affiliate status to NHRIs which meet the stipulated criteria pursuant to **Resolution 31 (XXIV) 98 on Granting Affiliate Status to National Human Rights Institutions in Africa** (the “Resolution”)³³. The significance of this Resolution is that NHRIs have a specially designated relationship with the Commission. Unlike NGOs who are granted “observer” status, NHRIs enjoy “affiliate” status with the Commission. However, the meaning and import of this affiliate relationship between NHRIs and the Commission is not fully understood and has not been fully explored by either party.

Besides the five categories of rights and responsibilities attached to this status that are prescribed by the Resolution on the Affiliate Status,³⁴ the “affiliate” status has not been further clarified, and NHRIs granted this affiliate status by the Commission do not have a detailed understanding of the nature and extent of their rights and responsibilities towards the African Commission as a result of this status. Similarly, the Commission does not make much use of its relationship with NHRIs and seems equally not to have a clear idea of what the relationship between itself and its affiliates should entail. This apparent confusion of NHRIs is more so in view of the fact that as opposed to NHRIs, the Commission grants a different status of ‘observer’ to NGOs, but has neither explained the

³³ Fn 3, above.

³⁴ As will be discussed below.

import of both ‘affiliate’ and ‘observer’ statuses, nor explained the distinction between the two.

In drafting this Report, several stakeholders were consulted in a bid to clarify this affiliate status, but none was able to help clarify this relationship³⁵. Meanwhile, twenty African-based NHRIs have been granted ‘affiliate’ status by the Commission³⁶ which has found them to meet the minimum conditions defined and prescribed by the Resolution³⁷; and others, including the Nairobi-based umbrella body of African NHRIs, the Network³⁸, are hoping to acquire the status. It is somewhat ironical that NHRIs have continued to vigorously subscribe for this ‘affiliate’ status notwithstanding the lack of clarity of the status.

Perhaps the origin of the unclear state of the ‘affiliate’ relationship can be traced to the procedure leading to the Commission’s decision to start granting this status and the adoption of the Resolution. The procedure did not involve NHRIs in the process of determining the relationship that should exist between them and the Commission, but was rather based on the report of a study which was initiated by the Commission and undertaken by two of its then Commissioners³⁹. What would have been ideal would have been for the Commission and NHRIs (or representatives of NHRIs) to reason together and determine and elaborate on the framework of their ideal relationship. The active engagement of NHRIs in the process would have indeed been beneficial to the process and its outcome, not least because NHRIs were the ones who called for a special or specific relationship with the Commission through the *Yaoundé Declaration*⁴⁰ and the *Durban Declaration*⁴¹, and they would thus have been better positioned to propose ideas of how best they can work with the Commission. There is inadequate literature on this subject to scavenge through for the clarification of this status.

From the above analysis it would appear that there is a case to be made for the Commission to liaise with NHRIs in order to review and clarify their ‘affiliate’ relationship. However, what is more important is for both the Commission and the NHRIs to build upon and explore the present relationship to the fullest and for the common good of Africa, while at the same time progressively seek to clarify this relationship. This is why the Network decided to embark on self-help by commissioning this Report.

³⁵ These included some Commissioners of the African Commission, officials of NHRIs, NGOs and academics.

³⁶ Fn 3 above.

³⁷ Although defined by the Commission, these conditions are universal in character having originally been defined by the world community through the Paris Principles as mentioned above.

³⁸ www.nanhri.org.

³⁹ See Paper presented by Commissioner Rezag-Bara from Algeria, at the 21st Ordinary session of the Commission held in Nouakchott, Mauritania in April 1997; and the mandate given to Commissioner Barney Pityana of South Africa at the 22nd Session held in Banjul in November 1997.

⁴⁰ 1st Conference of the African National Human Rights Institutions, 5 to 7 February, 1996, www.nhri.net

⁴¹ 2nd Conference of the African National Human Rights Institutions Durban, South Africa, 1st to 3rd July, 1996.

In this regard, it is worth noting that it is through self-help and active efforts of NGOs that the ‘observer’ status relationship between the African Commission and NGOs has been clarified beyond any doubt. NGOs are currently implementing their ‘observer’ status before the Commission in ways that have enormously benefited the cause of human rights in Africa. Among other things, NGOs have an institutionalized forum before every session of the Commission; they issue public statements against human rights abuses during the African Commission sessions; they draft and propose resolutions on human rights issues in Africa; and they participate in some ad-hoc committees or working groups of the Commission. This is an example nearest home to the NHRIs and the Commission itself, which may provide inspiration in clarifying the affiliate status. NHRIs may also draw inspiration from their similar ‘consultative status’ relationship with the UN and its treaty-bodies.

From a review of dictionaries, the word “affiliate” is found to be synonymous with “associate”, “partner”, and “colleague”. In contrast, the “observer” status of NGOs is synonymous with “spectator”, “bystander”, “witness”, and “onlooker”. Therefore while “affiliate” implies active engagement in the work of the Commission by NHRIs, “observer” implies that NGOs are expected to merely witness the work of the Commission. However, the opposite is the case in reality as NGOs have consolidated their relationship with the Commission.

A survey of equivalent practices world-wide also shows that ‘affiliates’ are intended to be partners-in-progress. For example, the Alliance for New Jersey Environmental Education (the “Alliance”)⁴² states that “*affiliate groups or organizations are formed for the purpose of developing or enhancing shared interest...*” and that “*Affiliate’s mission and activities must have a discernible relationship with the Alliance’s goals*”. Furthermore, just like the African Commission’s affiliates, the Alliance requires affiliates to provide annual activity and financial reports. In other words, an affiliate is required to satisfy the basic rules of transparency as a condition for the status. Also, drawing analogy from the highly rated professional body, Association of Chartered Certified Accountants, its affiliates (students) have access to a wide range of services, support and communication⁴³.

This brief analysis of the literal and contextual definition of the ‘affiliate’ status reveals clearly that NHRIs are intended to be close partners of the Commission and to work hand-in-hand with the Commission in the realisation of the latter’s mandates.

From the text of the Resolution on granting observer status, the following are the current rights of NHRIs with affiliate status with the Commission:

- a) Right to invitation to the session of the Commission according to Rule 6 of the Commission’s Rules of Procedures;

⁴² Alliance for New Jersey Environmental Education, www.anjee.net

⁴³ www.accaglobal.com.

- b) Right to representation in public sessions of the Commission and its subsidiary bodies;
- c) Right to participate, without voting rights, in deliberations on issues which are of interest to them and to submit proposals which may be put to the vote at the request of any member of the Commission.
- d) The responsibility of submitting reports of its activities to the Commission every two years; and
- e) The responsibility of assisting the Commission in promoting and protecting human rights at the national level.

Furthermore, the Rules of Procedure of the Commission (the “Rules”)⁴⁴ and the various strategic plans and plans of action of the Commission⁴⁵ confirm the significance of NHRIs to the work of the Commission, as they include co-operations with NHRIs, especially those with affiliate status.

Presently, few NHRIs, with or without affiliate status, participate in the work of the Commission in the following ways:

3.2 Participation in the Commission's session

Generally, under Rule 72 of the Commission’s Rules of Procedure, the Commission may invite ‘any organisation’ capable of enlightening it to participate in its deliberations without voting rights. More specifically, under Rules 75 and 76, NGOs having observer status at the Commission are allowed to participate in the public sessions of the Commission and its subsidiary bodies such as committees, and the Commission may consult NGOs either directly or through its committees in respect of the Commission’s work. While the Commission is yet to specifically make similar provisions in respect of NHRIs, it may be inferred that a combined reading of Rules 72, 75 and 76 confer the same privileges on NHRIs. Furthermore, Rule 6(5) (a) is to the effect that NHRIs may also propose the inclusion of an item on the agenda of the Commission in respect of any of its sessions. More so, some of these rights are replicated in the Resolution granting affiliate status to NHRIs.

Consequently, in practice, NHRIs have representation at the Commission’s public sessions, although not as much as that of NGOs. NHRIs in attendance can also make statements on all items that are opened for contribution at the public session of the Commission, including the regular items on relationships of the Commission with NGOs/NHRIs, reports of individual Commissioners, reports of Special Rapporteurs, and hearings on the human rights situation in Africa. However, NHRIs have not maximized

⁴⁴ Adopted at the 18th Ordinary Session of the Commission, held at Praia, Cape Verde, 6th October, 1995.

⁴⁵ The Commission’s Strategic Plans and Plans of Action are documents prepared by the Commission which define the business and goals of the Commission and serve as a tool for measuring its progress and challenges within an identified period. The Commission has since its inception adopted: an initial Plan of Action (1988 to 1992); the Plan of Action (1992-1996); the Mauritius Plan of Action (1996-2001); the Strategic Plan (2003-2006); and the current Strategic Plan 2008-2012, adopted at the 42nd Session of the ACHPR in Congo Brazzaville, November 2007.

the opportunities presented by attendance at the session. Notably, NGOs have through their bi-annual NGO forum held days before each session of the Commission been involved in the formulation of resolutions and the provision of technical support to the Commission. NHRIs are yet to take advantage of this possibility. It is in light of this that the Commission has recently proposed in its Strategic Plan 2008 – 2012 to initiate and support an NHRI forum prior to each Session of the Commission, similar to the NGO Forum.⁴⁶

There have also been instances where NGO members have, through this forum, been involved in the thematic mandates of the Commission. For example, Interights is a member of the Commission's Working Group on Specific Issues Relevant to the Work of the African Commission. It is hoped that when the NHRI forum eventually takes off, NHRIs will use the platform to get actively involved in these specialised committees of the Commission.

3.3 Submission of Individual Communications

In line with its protective mandate, the African Commission is mandated by Articles 47 – 55 of the Charter to consider complaints (“Communications”) which may be brought both by State Parties (“State Communications”) and by entities or individuals other than State Parties (“other Communications”); and to make recommendations thereon to the State Party (ies) concerned and the Assembly of Heads of State and Government on measures to redress the human rights violation(s).

Notwithstanding the silence of the Charter and the Commission's Rules of Procedure on persons who may bring a Communication before it (*locus standi*), the Commission has adopted an expansive approach to the concept to include, among others, NHRIs. Accordingly, the jurisprudence of the Commission reveals that Communications have been filed by NHRIs, irrespective of any status with the Commission⁴⁷.

It is nonetheless trite that the Commission's Communications procedure remains underutilised by NHRIs and proposals on the possible role of NHRIs in increasing the utilisation and efficacy of this procedure are discussed hereunder.

3.4 Participation in State Reporting

Article 62 of the African Charter mandates each state party to the Charter “*to submit every two years ... a report on the legislative or other measures taken with a view to giving effect to the rights and freedom recognised and guaranteed by the ... Charter*”.

⁴⁶ Information obtained from Mr. Francis Ngarhodjim, a Legal Officer at the Commission (and former Legal Expert on Strategic Planning for the Commission) on 17th December, 2008.

⁴⁷ See *Communication 74/92 Commission Nationale des Droits de l'Homme et des Libertés/Chad*, 9th Annual Activity Report: 1995 -1996.

Although the Charter does not expressly mandate the Commission to examine state reports, in practice the Commission has added to its functions the mandate to examine state reports submitted by states under article 62 and to issue Concluding Observations thereon. It can be argued that the examination of state reports is a necessary corollary to the Commission's mandate to ensure the protection of human and peoples' rights under the conditions laid down in the Charter. The Commission's Guidelines on State Reporting (the "Guidelines") identify the goal of the reporting procedure as being "*to create a channel for constructive dialogue between the States and [the Commission] on human and peoples' rights*".

NHRIs are expected to be an integral part of the preparation of state reports to be submitted to treaty bodies. NHRIS must therefore take a proactive approach to this responsibility in view of the fact that states typically lack the requisite political will to submit the required reports or to involve the relevant NHRIs in the preparation of the reports, where submitted..

CHAPTER 4

PROPOSED FRAMEWORK FOR FURTHER COOPERATION BETWEEN THE COMMISSION AND NATIONAL HUMAN RIGHTS INSTITUTIONS

The analyses in the preceding chapters reveal that the Commission and NHRIs have mutually complementary responsibilities and that the work of NHRIs remains important in the development of an effective scheme of human rights enforcement in the African Region. For this reason, there is a need for both the Commission and the NHRIs to deepen their cooperation and consolidate their relationship by further exploring the numerous possibilities offered by such an alliance. For this reason, this Report seeks to identify some of the possible means for NHRIs to further contribute to the work of the Commission.

As earlier described, the Paris Principles and the Resolution on Affiliate Status list a number of responsibilities for NHRIs and it is on the basis of these responsibilities that the Report proceeds to examine a framework for further cooperation between the Commission and NHRIs.

4.1 General provisions

Before we proceed to the specifics, it is worth mentioning that the broad mandate of NHRIs under Principle 1 of the Paris Principles is similar to the broader mandate of the African Commission, save that the territorial scopes of their application vary. Principle 1 stipulates that “[a] national institution shall be vested with competence to promote and protect human rights”. This is the broad mandate of NHRIs in their respective countries. Since the Commission’s territorial scope of protection and promotion of human rights covers all member states of the African Union, there is thus an overlap between the mandates of the Commission and the NHRIs in respect of their respective states. This fact verifies that the active engagement of NHRIs in the work of the Commission is vital to the latter’s fulfilment of its mandates in the respective state parties to the Charter. Furthermore, Principle 3(e) enjoins NHRIs to “cooperate with ... the regional institution ... competent in the areas of promotion and protection of human rights”.

Flowing from these provisions and analyses, the proposed framework for further cooperation between the Commission and NHRIs is that of a partnership, where the NHRIs on the one hand actively seek to identify, get involved in and complement every aspect of the work of the Commission, while the Commission on the other hand carries NHRIs (either individually or through the Network) along in its activities.

4.2 Application for Affiliate Status

While NHRIs need not have affiliate status with the Commission to be involved in certain aspects of its work such as initiating Communications and attending its Sessions, it is clear from our analysis above that the conferment of an affiliate status on an NHRI better

positions it to actively engage in the work of the Commission. In this light, it would be highly beneficial for the Commission to confer affiliate status on the Network in order to have a formal working relationship with the umbrella-body of NHRIs, which would facilitate the dealings of the Commission with both affiliate and non-affiliate NHRIs. It would no doubt be easier for the Commission to have a central NHRI body to deal with in a lot of cases, for instance in formulating cooperation programs with NHRIs, for receiving proposed items for its session agenda from NHRIs, in disseminating information about its country mission support requirements, in disseminating its reports (in which case, the Network can be the repository of information for all African NHRIs), and in sending out its session invitations.

As earlier noted, there are currently twenty NHRIs with affiliate status with the Commission, while NGOs with observer status with the Commission are at present⁴⁸ more than fifteen times this number! As set out above, affiliate status is necessary to actively engage in the work of the Commission for example in suggesting items for its agenda at its sessions, taking the floor and contributing to deliberations at its public sessions and participation in its committees and other thematic mechanisms, among others.

NHRIs have however often complained about the long delays experienced in obtaining the affiliate status. In this regard, it is advised that the Commission should streamline its procedure and facilitate the timely grant of affiliate status.

4.3 NHRI forum

As discussed under 3.2 above, the Commission has, in its current Strategic Plan, proposed to initiate and institutionalize a NHRI forum prior to each Ordinary session of the Commission. Similarly, the Strategic Plan for the Network⁴⁹ also contemplates a NHRI forum proceeding each session of the Commission. This fact is a positive indicator that the two institutions are gravitating towards deepening their cooperation. However, the responsibility of bringing this idea to reality rests on both the Commission and the Network as the umbrella body of African NHRIs. Indeed, the Network has a strategic role to play in the realisation of this ideal in view of its position as the coordinator of the affairs of NHRIs at the continental level, and its established relations with certain African NHRIs.

In this regard, the position of the Network is noted as the umbrella body for African NHRIs, which provides practical assistance and support to its individual member institutions to enable them to more effectively undertake their own human rights mandates. More importantly, it provides a platform for the formulation of the goals and

⁴⁸ As verified from a staff of the Secretariat of the Commission on Tuesday 30 September 2008, the number of NGOs with observer status at the Commission is currently 380.

⁴⁹ See Key Area 3, Objective 2, paragraph 3.3.3 of the Strategic Plan for the Network of African National Human Rights Institutions, 2009 – 2011, adopted by the NANHRI's General Assembly on 23 October 2008.

programs of African NHRIs and will no doubt serve as a useful platform for the formulation and monitoring of cooperation frameworks and programs with the Commission. It can also serve as a platform for raising the necessary finances to assist in organizing the NHRI forum and facilitating certain NHRI/Commission cooperation programs. In light of this key position of the Network, as it has been proposed in paragraph 4.2 above, the Commission needs to consider according affiliate status to the Network itself so as to have a direct working relationship with the umbrella-body of NHRIs.

The importance of such an NHRI forum cannot be overemphasized. It is through this forum that NHRIs may put items on the agenda of the Commission, propose resolutions for adoption by the Commission and generally influence the outcomes of sessions and the overall work of the Commission. More so, the participation of the Commissioners of the Commission in the NHRI forum, similar to that which obtains in the NGO forum will allow for a free exchange of views, including those which are critical to the enhancement of the relationship between the Commission and NHRIs.

This type of forum has to date consolidated the position of NGOs in the work of the Commission, and it is believed that it will achieve the same feat for NHRIs.

4.4 Technical support to/exchange with the Secretariat of the Commission

NGOs have over time provided technical support to the Secretariat of the Commission by seconding or funding interns at the Secretariat to address the problem of shortage of staff and by volunteering and getting involved in the thematic mandates of the Commission. Furthermore, IGOs such as the OHCHR have undertaken staff exchange programs with the Commission in the past whereby the staff members of the Commission have undergone trainings at the OHCHR office. NHRIs can also second their staff members to the Commission on exchange programs in order to study the workings of the Commission. This will serve the double purpose of strengthening the staff of the Commission and assisting the relevant NHRI to better understand and utilize the promotion and protection mechanisms of the Commission.

4.5 Shadow Reporting and general provision of information to the Commission

NHRIs are positioned to serve as vital sources of information to the Commission on the state of human rights in their respective countries. Principle 3(a) of the Paris Principles states that NHRIs may submit reports on any matters concerning the promotion and protection of human rights to any competent body, either on an advisory basis or at the request of the body concerned. The Commission is such competent body contemplated by this Principle.

NHRIs may thus serve as a reliable source of information for the Commission. Particularly and further to paragraph 3.4 above on state reporting, we note that the Commission has over time adopted the practice of receiving shadow or alternate reports

or commentaries from NGOs in respect of state reports that are considered at its sessions. These shadow or alternate reports assist the Commission in its consideration of state reports by providing information that the Commission can use to verify, scrutinize and seek clarifications on aspects of states' reports. It also informs the Commission of the prevalent human rights issues in the State Party concerned.

These shadow/alternate reports are also significant in light of the failure of many state parties to the Charter to meet their state reporting obligations. It is noted that the Human Rights Committee (the treaty body for the International Covenant on Civil and Political Rights) has adopted the practice of considering verified information gathered from other sources and issuing concluding observations on these, where a state continuously fail to submit their state reports. The approach of the Human Rights Committee is progressive and a good example for the Commission to emulate as many state parties to the Charter are yet to meet their state reporting obligations.

While the current practise is that the alternate/shadow reports submitted to the Commission are prepared by NGOs because NHRIs are expected to be actively involved in the preparation/drafting of State Reports presented to the Commission, NHRIs may also prepare shadow/alternate reports or more appropriately (and better politically couched) 'commentaries' on states' reports (of their respective countries) to the Commission where they are denied the required active involvement in the preparation of state reports.

Fortunately, the Commission has recently adopted the progressive practice of publishing state reports on its website prior to their consideration at its sessions. This enables NHRIs to be availed of the content of such reports, prepare their commentaries and submit the same to the Commission prior to the sessions, since NHRIs and NGOs do not publicly contribute to the consideration of state reports at the Commission's sessions.

Notably, the Commission is yet to adopt a policy and guidelines on shadow reporting. This is an important area that the Commission needs to focus on, as it needs to develop programs to train states, NHRIs and NGOs on shadow reporting.

4.6 The Communications procedure

Further to paragraph 3.3 above, it is noted that the Commission's Communications' procedure is currently underutilized⁵⁰ given the few number of Communications that the Commission has received over the past 21 years. Consequently, the Commission has been advised to increase its efficacy as a recourse mechanism for the protection of human rights in Africa, particularly in view of its Communications Procedure⁵¹.

⁵⁰ Frans Viljoen & Lirette Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", 48 *Journal of African Law*, 2(2004).

⁵¹ As above.

Under the Paris Principles, NHRIs may generally hear any person and obtain information and any documents necessary for assessing situations falling within its competence. Furthermore, where vested with a quasi-judicial competence under the Principles, NHRIs may hear and consider complaints and petitions alleging human rights abuses committed in violation of existing national law. NHRIs are thus well placed to utilize the Communications procedure of the Commission where victims of human rights violations have not found relief at the domestic level.

4.7 Promotional activities

The promotion of human and peoples' rights is fundamental to ensure respect and protection of the rights recognised in the Charter. The Commission conducts its promotional mandate through education and publicity in designated countries. The main purpose of promotional activities is to sensitise the public on human rights issues. Generally Commissioners as Country Rapporteurs or Special Rapporteurs visit human rights organisations, universities and other institutions to give lectures on various issues including the work of the Commission. The Commission also organises seminars and symposia to provide a forum for discussion.

In furtherance of its promotional mandate, the Commission usually lists a series of activities in its strategic plans, and it is expected that such have been listed in the current Strategic Plan 2008-2012. NHRIs also have the mandate to educate and inform in the field of human rights and may therefore identify areas of cooperation in this regard.

4.8 Interpretation of the Charter and the elaboration of principles and standards

The Commission is mandated to interpret the provisions of the Charter. Under article 45(3), the Commission may interpret any provision of the Charter at the request of a state party, an institution of the OAU or an African organisation recognised by the OAU. To date no such request has been made. The Commission has, however, on its own initiative or at the instigation of NGOs interpreted some of the provisions of the Charter by adopting resolutions. For example, the Commission at its 11th session adopted the Resolution on the right to recourse procedure and fair trial in which it interpreted article 7 of the Charter to include the right to legal aid. The Commission has also adopted interpretative resolutions on freedom of association, the military and slavery. The Commission has taken this approach particularly to clarify some of the vague and ambiguous provisions of the Charter.

There are still ambiguous and sometimes, controversial provisions of the Charter and related human rights issues that are yet to be interpreted or pronounced upon by the Commission such as peoples' rights, equality issues, gender minority issues, disabled peoples' rights, and freedom of religion and religious intolerance. NHRIs may request the interpretation of such provisions and pronouncements on such issues. NHRIs may also

assist in the elaboration of principles and standards that give content to the provisions of the Charter and strengthen the regime of human rights protection.

4.9 Provisional/Interim Measures

Rule 111(3) of the Rules of Procedure vests the Chairperson of the Commission with the power to make provisional or interim measures of redressing human rights violations in cases where there is the possibility of irreparable damage being done to the victim. The Chairperson is thereby authorised to take any action on behalf of the Commission when the Commission is not in session, after which he/she is required to report any such action taken to the Commission as soon as the latter convenes the next session. These interim measures allow a meaningful consideration of the Commission's eventual findings aimed at the protection of human rights in Africa and they are in pursuance of the protective function of the Commission.

NHRIs are better positioned than the Commission to be informed about threatening human rights situations in the domestic arena, and where the government of the affected state has failed to take charge of such emergencies, or is unrepentantly responsible for such emergencies, the NHRIs should as quickly as possible engage the emergency mechanism of the Commission.

4.10 Enforcement of the Commission's Recommendations on Individual Communications

The Charter provides in article 59 that all measures taken within the provisions of the Charter shall remain confidential until such time as the Assembly of Heads of State and Government shall decide. This provision which was initially suspect has since changed and the Commission's communication procedures are now published with the rationale for recommendations furnished in details.

Notably, very little is known about the process that follows once the Commission has found a state party in violation of the African Charter under the individual complaints procedure as the Commission has no mechanism in place to follow up on the steps taken by state parties to implement its Recommendations⁵². As a result, the Commission has no record of the status of state compliance with its recommendations. However, it is empirically proven that commonly states do not comply with the recommendations of the Commission⁵³.

⁵² The Commission in this regard has adopted a series of ad-hoc follow-up mechanisms. It has on a few occasions attempted to follow-up on the implementation of its recommendations through promotional and protective missions to state parties or by incorporating follow-up measures as part of its findings on individual communications. It has also enquired, during the examination of state reports, as to the status of implementation of recommendations given by the Commission against states concerned. In view of the fact that these follow-up efforts have been inconsistent, no established practice on follow-up has been developed.

⁵³Fn 50 above.

NHRIs based in the affected state parties should act as watchdogs for monitoring state-compliance and provide information either voluntarily or at the request of the Commission on the status of their respective states' compliance with the Commission's recommendations. NHRIs may also include such information in their shadow reports or commentaries on state reports. Additionally, although 'the implementation of the Commission's decisions' is yet to become an item on the agenda of the Commission, it is proposed that NHRIs may also give information on the status of compliance with the Commission's decisions during public sessions.

4.11 Publication of the Commission's Reports and other publications of the Commission

The Commission also promotes its work through transparency and visibility of its procedures and outputs by various means of publication, particularly on its website. However, there is still the need for a wider distribution of the work of the Commission at the domestic levels, such that the reports of the work of the Commission are accessible to and widely known by the African people.

There are two basic reports that the Commission prepares: the activity report and the mission reports. Other Commission's reports include the report of the activities of Special Rapporteurs and Working Groups, Concluding Observations on state reports, and reports of studies undertaken by the Commission. The reports prepared by the Commission are important in many respects. Firstly, the reports provide a basis for the Assembly of Heads of State and Government (AHSG) to monitor the Commission's operations and evaluate its progress in promoting and protecting human rights. Secondly, the preparation of reports provides the Commission itself with an opportunity to take stock of its achievements and failings (introspection). Finally, the reports provide a mechanism for follow-up in situations of apparent serious or massive violations of human rights.

Other publications of the Commission include the various AU human rights instruments, the Commission's Resolutions, Guidelines and Declarations, General Comments, final communiqués and newsletters.

NHRIs may serve as a dissemination medium for the Commission's reports and other publications.

4.12 Education on the African human rights system ("Human Rights Education")

Closely related to paragraph 4.11 above, NHRIs have the wider obligation to educate the local populace and NGOs on the mechanisms for the protection and promotion of human rights in Africa and the works of the Commission in general.

4.13 Cooperation in the implementation of the Strategic Plan 2008-2012

As referred to above, the Commission has an operational Strategic Plan, which serves as its business guide for the years 2008 to 2012. The Strategic Plan sets out the objectives

and activities of the Commission for this period as well as the resources necessary for carrying out the activities and achieving the objectives. Notably, in view of the vastness of the mandates of the Commission and the broad range of activities mapped out in the Strategic Plan to effect these mandates on the African continent, the implementation of the present Strategic Plan is not the exclusive responsibility of the Commission, but rather of all the stakeholders in the human rights system of the continent, including, among others, the African NHRIs. The African Commission depends on the support of all these stakeholders for the effective realization of its objectives and the Strategic Plan therefore envisages different forms of cooperation with these stakeholders, including the African NHRIs.

NHRIs should therefore familiarise themselves with the Strategic Plan of the Commission, once made a public document, such that they may channel their efforts towards the realization of the indicated common strategic objectives.

4.14 Assistance with Missions

The Commission during its country missions, whether investigative or promotional, typically meet with NHRIs as stakeholders in the protection and promotion of human rights at the domestic level. However, NHRIs should learn from NGOs and increase measures to assist the Commission in its missions.

This may include assistance of the Commission in the preparation for its missions by providing suggested guidelines that would form the framework for missions; provision of current information on the country that would enable Commissioners participating in the mission to understand the context in which they are working; provision of details of relevant government officials that the Commissioners should meet and for what purpose; and the provision of details on and organization of a forum of local NGOs.

4.15 Cases of serious or massive violations of human rights

The Charter envisages cases of widespread, massive or systematic violation of human rights and makes provisions for dealing with such situations. Article 58 of the Charter mandates the Commission to draw the attention of the AHSG to special cases which reveal the existence of serious or massive violations of human and peoples' rights that the Commission may discover in the process of examining Communications.

Where there is such a special case or an emergency, the AHSG may request the Commission to undertake an in-depth study of such a case.

Principle 3 (a) of the Paris Principles obliges NHRIs to draw the attention of the Government to situations in any part of the country where human rights are violated, make proposals for initiatives to put an end to such situations, and where necessary express an opinion on the positions and reactions of the Government. Where NHRIs fail to achieve the desired result at the domestic level, they should provide such information to the Commission immediately for the latter's onward transmission to the AHSG.

4.16 Creation of National Human Rights Institutions Unit (“NIU”)

At this point, it is noted that although this report has identified many possible ways of cooperation between NHRIs and the Commission, these will not be achievable unless the Commission adopts a structured approach towards its dealings with NHRIs. It is therefore proposed that the Commission should establish a National Human Rights Institutions Unit (“NHRI Unit”), similar to the United Nation’s OHCHR which has created the National Institutions Unit (“NIU”).

The OHCHR/NIU works in consultation with the geographic units and field offices of the OHCHR. Also, at the request of member states of the UN, tailored advice is provided to a growing number of countries on appropriate constitutional or legislative frameworks regarding the establishment of NHRIs and on the nature, functions and powers and responsibilities of NHRIs. Comparative analyses, technical cooperation, needs assessment, project formulation and evaluation missions are also undertaken.

If established, the NHRI Unit of the Commission will serve the dual purpose of:

- Providing a formal framework for NHRI/Commission cooperation, by providing focal persons to deal with, and a special unit to coordinate, monitor and evaluate common projects of the Commission and NHRIs; and
- Serving as the repository of information or data room on African NHRIs from which states, NHRIs, academics etc. can get relevant information on NHRIs and NHRI/Commission cooperation.

For the purpose of setting up this Unit, it is noted that the Commission already has certain legal officers for promotion of human rights who handle the applications of NHRIs for affiliate status. Such legal officers and selected Commissioners could be constituted as a NHRI Unit.

Another important step towards the successful realisation of these significant goals would be for the Commission to meet with the Network in order to discuss the framework for and adopt a coordinated approach to the cooperation between the Commission and NHRIs. Such discussions should ideally be guided by the strategic plans of the Commission and the Network and the related cooperation strategies discussed in this Report.

Without such a discussion and mutual agreement on the cooperation framework, alas, the cooperation goals of the two institutions and the ultimate goal of bringing human rights near home to the African people might remain a chimera.

CHAPTER 5

CONCLUSION

This Report has analyzed the present and potential relationship between African NHRIs and the African Commission and made practical recommendations, which if implemented, would no doubt inject more life into the relationship between the African Commission and NHRIs. The proposed areas of cooperation in this Report are not presented as exhaustive of the possibilities, and both the Commission and NHRIs may continue to seek newer ways of deepening their cooperation.

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ANNEX 1

LIST OF NHRIs WITH AFFILIATE STATUS WITH THE AFRICAN COMMISSION AND THE RECORDS OF SUBMISSION OF THEIR ACTIVITY REPORTS⁵⁴ (Updated: May 2008)

Name of the NHRI	Ref. Number	Date when Affiliate Status was granted	Date when Reports were/are due	Reports submitted and date when they were submitted
1. Commission Nationale des Droits de la Personne du Rwanda	(1)	May 2000 27 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 rd report May 2008	1 st report October 2001 2 nd report July 2005 3 rd report May 2006 4 th report May 2007
2. Malawi National Human Rights Commission	(2)	May 2000 27 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 rd report May 2008	
3. Conseil National Consultatif Permanent de Promotion et de Protection des Droits de l'Homme d'Algérie	(3)	May 2000 27 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 th report May 2008	
4. Commission Nationale des Droits de l'Homme et des Libertés Fondamentales du Niger	(4)	October 2000 28 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 th report May 2008	

⁵⁴ As obtained from the Commission on 17th December, 2008. Overdue reports are put highlighted in bold and italics.

5. The National Commission for Democracy (Sierra Leone)	(5)	October 2000 28 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 th report May 2008	
6. Comité Sénégalais des Droits de l'Homme	(6)	October 2000 28 th Ordinary Session	1 st report May 2002 2 nd report May 2004 3 rd report May 2006 4 rd report May 2008	1 st report May 2002 2 nd report July 2005
7. Commission Nationale des Droits de l'Homme du Tchad	(7)	May 2001 29 th Ordinary Session	1 st report May 2003 2 nd report May 2005 3 rd report May 2007 4 th report May 2009	
8. Commission Nationale des Droits de l'Homme du Togo	(8)	May 2002 31 st Ordinary Session	1 st report May 2004 2 nd report May 2006 3 rd report May 2008	1 st report May 2006
9. National Committee for Human Rights of Cameroon	(9)	May 2002 31 st Ordinary Session	1 st report May 2004 2 nd report May 2006 3 rd report May 2008	1 st & 2 nd report February 2007
10. National Human Rights Commission of Mauritius	(10)	May 2002 31 st Ordinary Session	1 st report May 2004 2 nd report May 2006 3 rd report May 2008	
11. National Human Rights Commission of Nigeria	(11)	October 2002 32 nd Ordinary Session	1 st report Oct 2004 2 nd report Oct 2006 3 rd report Oct 2008	
12. South African Human Rights Commission	(12)	October 2002 32 nd Ordinary Session	1 st report Oct 2004 2 nd report Oct 2006 3 rd report Oct 2008	

13. Permanent Human Rights Commission of Zambia	(13)	May 2004 35 th Ordinary Session	1 ^s report May 2006 2 nd report May 2008 3 rd report May 2010	
14. Commission Nationale des Droits Humains du Burkina Faso	(14)	May 2004 35 th Ordinary Session	1 st report May 2006 2 nd report May 2008 3 rd report May 2010	1 st report March 2007
15. Commission for Human Rights and Good Governance of Tanzania	(15)	May 2004 35 th Ordinary Session	1 st report May 2006 2 nd report May 2008 3 rd report May 2010	
16. Kenya National Commission on Human Rights	(16)	December 2004 36 th Ordinary Session	1 ^s report May 2006 2 nd report May 2008 3 rd report May 2010	
17. L'Observatoire Nationale des Droits de l'Homme de la République Démocratique du Congo	(17)	December 2004 36 th Ordinary Session	1 st report May 2006 2 nd report May 2008 3 rd report May 2010	
Ethiopian Human Rights Commission	(18)	40 th Ordinary Session November 2006	1 st report November 2008	
Uganda Human Rights Commission	(19)	40 th Ordinary Session November 2006	1 st report November 2008	
Commission Nationale des Droits de l'Homme du Mali	(20)	Nov. 2007 42 nd Ordinary Session	1 st report 2009	
The National Commission for Human Rights and Liberties of Cameroon ⁵⁵		Nov. 2007 42 nd Ordinary Session	1 st report 2009	

⁵⁵ The National Committee for Human Rights of Cameroon was replaced by the National Commission for Human Rights and Freedoms of Cameroon which was granted affiliate status by the African Commission, during its 42nd Ordinary Session held in Brazzaville, Congo from 14 to 28 November 2009.

ANNEX 2

TERMS OF REFERENCE

INTERNATIONAL CONSULTANT ANALYSIS OF THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN STRENGTHENING THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

BACKGROUND AND JUSTIFICATION

At the first conference of African National Human Rights Institutions (NHRIs), held in Yaoundé, Cameroon, from 5 to 7 February 1996, participants adopted the Yaoundé Declaration which commended the creation of new NHRIs in Africa and expressed the hope that these institutions would be given a proper representative status before the African Commission on Human and Peoples' Rights (the African Commission).

At the second conference of African NRHIs held in Durban, South Africa, from 1 to 3 July 1996, the need for a clear relationship and unique status vis-à-vis the African Commission was reiterated.

After some preliminary deliberation on the matter, the African Commission, meeting at its 24th Ordinary Session from 22 to 31 October 1998 in Banjul, The Gambia, decided to grant a special status (Affiliate Status) to any African NRHI established and functioning in accordance with internationally recognised norms and standards, cf. resolution 31(XXIV) 98. The objective of the African Commission through the resolution, being to count on the cooperation of NHRIs as essential national mechanism to ensure the effective implementation of the African Charter on Human and Peoples' Rights at the national level.

The Commission also stated that:

- a) NHRIs shall have the following rights and responsibilities
 - Be invited to sessions of the African Commission according to rule 6 of its Rules and Procedures;
 - Be represented in public sessions of the Commission and its subsidiary bodies,
 - Participate, without voting rights, in deliberations on issues which are of interest to them and to submit proposals which may be put to the vote at the request of any member of the Commission;
- b) Any NHRI shall be required to submit reports to the Commission every two years on its activities in the promotion and protection of the rights enshrined in the Charter; and
- c) NHRIs will assist the Commission in the promotion and protection of human rights at the national level.

However, since 1998 when this resolution was adopted, there has been little cooperation between the African Commission and the African NHRIs. Of the over 20 NHRIs that exist in

Africa, few attend the bi-annual sessions of the Commission and only 3 have submitted their reports to the Commission. The Commission's objective, therefore, of setting up a cooperation framework with national human rights institutions in order to promote the exchange of information and experience has not been realised.

In order to boost the cooperation between the African Commission and African NHRIs, the Network of African National Human Rights Institutions has decided to conduct a study to analyse and assess the current situation and the role that national human rights institutions can play in different aspect of the work of the African Commission. In addition to strengthening the African Commission, a main aim is to strengthen African NHRIs to enable them to effectively participate in the implementation of the African Charter on Human and Peoples' Rights (the African Charter) at the national level.

OBJECTIVES

The study on the relationship between African NHRIs and the African Commission will aim at establishing the status of the cooperation between NHRIs and the African Commission and shall cover the following areas:

- Provide a clear understanding of the meaning and the legal aspects of granting affiliate status to African NHRIs and the other elements of the African Commission's resolution 31(XXIV)98;
- Raise awareness on the part of the African Commission on the need to recognise African NHRIs as privileged partners in the effective implementation of the African Charter at the national level; and
- Strengthen the capacity of African NHRIs to be fully involved in the work of the African Commission to better help to implement the African Charter

SCOPE OF WORK

The consultant shall conduct a detailed analytical study on the relationship between African NHRIs and the African Commission, which shall cover the following aspects:

- The content and scope of the Resolution 31(XXIV)98 adopted by the African Commission during its 24th Ordinary Session held from 22 to 31 October 1998 in Banjul, The Gambia;
- The role of NHRIs in state reporting mechanisms as enshrined in the African Charter (Article 62);
- The role of NHRIs in the implementation of the recommendations and observations of the African Commission at the national level;
- The role of NHRIs in the examination of state reports;
- The role of NHRIs in the African Commission's communications (complaints) procedure (Articles 47-59 of the African Charter) , both during the phase of investigation and decision and with respect to implementation; and

- Other possible roles of NHRIs vis-à-vis the African Commission.

EXPECTED OUTCOMES

The expected outcome is a report containing analyses and practical recommendations on all the aspects of collaboration between the African Commission and African NHRIs, as indicated above under Objectives and Scope of Work. The Network of African National Human Rights Institutions shall be able to use the report as the basis for establishing closer ties with the African Commission and between African NHRIs and the African Commission and for developing projects aimed at the implementation of joint activities between the African Commission, the Network of African National Human Rights Institutions and its member institutions.

QUALIFICATIONS /EXPERIENCE REQUIRED

- The Consultant must have knowledge of human rights and political developments on the African continent;
- The Consultant must have extensive experience and strategic vision for addressing human rights issues on the African continent;
- The Consultant must be familiar with applicable regional and international human rights standards and have extensive knowledge of the African Commission and the African Charter;
- The Consultant must have outstanding knowledge of the Paris Principles and their application by African national human rights institutions;
- The Consultant must have knowledge on the working methods of the United Nations Treaty Body to enable him/her to make comparison.

PERFORMANCE INDICATORS

The Consultant must:

- i. produce a report within the agreed time frame;
- ii. that covers the areas set out in these Terms of Reference; and
- iii. contains practical recommendations on all these areas;
- iv. produce a report written in clear manner and in a form that can be presented to the African Commission and the Steering Committee and member institutions of the Network of African Human Rights Institutions

EVALUATION

The selected Consultant will hand over the work to the Executive Director of the Network of ANHRIs who will evaluate the work of the Consultant based on the criteria set out under Performance Indicators.

PROPOSED PERIOD AND DURATION OF CONSULTANCY

The estimated duration of the consultancy is 30 working days starting from 15th August 2008.