Nairobi, 7-9 December 2015

THE SUB REGIONAL CONFERENCE FOR EASTERN AFRICA NATIONAL HUMAN RIGHTS INSTITUTIONS

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NATIONAL HUMAN RIGHTS INSTITUTIONS

A Report Consolidating the Highlights of the Nairobi Conference Proceedings

Nairobi, 7-9 December 2015
# CONTENTS

**ACRONYMS**

**EXECUTIVE SUMMARY**

**INTRODUCTION**

Background

The Link Between Good Governance and Human Rights

Development Strategies

Challenges to Good Governance

The Conference Objectives

The Conference Theme and Sub Themes

Overall Outcome of the Conference

Key Conference Actors

**CONFERENCE SESSIONS**

Opening Session

State of The Region and Securing Democracy & The Rule Of Law

Regional Structures For Accountability

Role of NHRIs In Promoting Constitutionalism & The Rule Of Law; Interrogating Mandates & Powers

Securing Democracy; The Role Of NHRIs In Monitoring Elections

Safeguarding Constitutionalism: Promoting Inclusion & Diversity

The Role of NHRIs In Engaging With SDGs: The Right To Development

Conclusion

**ANNEXES**
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>African Charter</td>
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<td>AU</td>
<td>African Union</td>
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<td>CAJ</td>
<td>Commission on Administration of Justice</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of all forms of Discrimination Against Women</td>
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<td>CSOs</td>
<td>Civil Society Organisations</td>
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<td>EA</td>
<td>East [Eastern] Africa</td>
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<td>EAC</td>
<td>Eastern Africa Community</td>
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<td>Executive Director</td>
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<td>HR</td>
<td>Human Rights</td>
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<td>ICC</td>
<td>International Coordinating Committee of National Human Rights Institutions</td>
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<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>MP</td>
<td>Member of Parliament</td>
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<td>NANHRI</td>
<td>Network of African National Human Rights Institutions</td>
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<td>NGO</td>
<td>Non-Governmental Organizations</td>
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<td>National Human Rights Institutions</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>SDGs</td>
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<td>South Sudan</td>
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<td>UN</td>
<td>United Nations</td>
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The recently adopted Sustainable Development Goals (SDGs) are composed of 17 goals and 169 underlying targets, which aim to guide international development priorities and collaboration up to the year 2030. The SDGs are designed to be universally used but the application will reflect at the national level. Many governments, bilateral donors, multilateral institutions, civil society organizations (CSOs) and corporate actors will seek to align their policies and programmes with this new sustainable development agenda as they are significant in the boost they can give to the accountability by states to their people and to the financing and implementation of existing development and human rights commitments.

The next step, now that they have been adopted, will necessarily be application at the national level through national action plans. Due to the fact that the SDGs have a strong rights component, even though they aim at development, the process of developing national action plans will benefit from active engagement by NHRI's, particularly, if the individual is not to be forgotten in the development frenzy.

NHRI's being independent institutions of accountability, mandated to ensure that international commitments are upheld domestically, will undoubtedly have a role to play in promoting and protecting human rights in the context of the SDGs. The boost that these national institutions get from working within supportive networks cannot be overemphasised. This is especially taking into account their role and identity: public (government) bodies that must check the very government responsible for their resourcing. Further, the value of staggering focus to the monitoring, by pooling of co-related thematic areas relevant to full implementation of the SDGs, cannot be ignored, more so in light of the fact that resources will likely be limited.

The past engagement of NHRI's with the MDGs, or with development policies more generally, has been somewhat removed. Many NHRI's face obstacles when it comes to promoting human rights accountability in development contexts; these include narrowly drawn mandates, constraints on their independence, and limited technical capacity.

The sub-regional conference for NHRI's from the Eastern Africa region presented a platform where the NHRI's, together with their key partners, could begin to conceptualize strategies and approaches that may boost their ability to meaningfully contribute to implementation of the SDGs, to regional development and to promoting a culture of respect for human rights and the rule of law.
Background

History and contemporary experience indicates that Eastern Africa countries face similar issues that have a bearing on the achievement of good governance, constitutionalism and the rule of law as well as development. These include intra and inter-state violence around land, governance; fragile governance institutions; poverty; insecurity exacerbated by radicalization and extremism as well as proliferation of small arms and light weapons due to porous borders; and internal displacement. These threats consolidated portend serious threats to the region’s ability to achieve the goals set forth in international instruments and in the Charter that establishes the Eastern Africa Community with regard to regional peace and security.

The common challenges that face countries in the region beg for common/coordinated responses to them, for purposes of sustainability. NHRIs are key to the realization of this goal. NHRIs in the Eastern Africa region are some of the most vibrant on the continent and continue to implement their mandates objectively and fairly in a bid to enhance the realization of human rights of their peoples. The role of these institutions in regional peace and stability has been strengthened following their recognition by the EAC through the establishment of a forum for NHRIs. Through this forum, NHRIs in the region have played a key role in the development of an agenda on good governance and human rights which if adopted will broaden the framework of protection of rights for the people in the region. Eastern Africa NHRIs have also been at the forefront in identifying common approaches to conflict management and mitigation to safeguard electoral and other processes. South Sudan, being a relatively new state and also part of Sub-Saharan Africa was included in the Nairobi conference.

As independent state bodies with a broad mandate to promote and protect human rights, NHRIs can play a significant and necessary role in promoting good governance in Eastern Africa. NHRIs are recognized as a major agent for promotion and protection of human rights at the domestic level – in many cases helping to lessen the “implementation gap” between international standards and the practice of human rights on the ground. They also play a critical role in pushing for State accountability at sub-regional, regional and global levels through their participation in various treaty monitoring mechanisms. In the Eastern Africa region, NHRI’s in the member states of the EAC have been instrumental in the consolidation of human rights and democracy through strategic deployment of their mandates.

These NHRI’s have been responsible for elaboration of the broad bill of rights in constitutional implementation processes thereby fostering the entrenching of a culture of respect of human rights. The NHRI’s have also engaged in building the capacity of citizens in the region on a broad range of human rights issues as a result of which more individuals seek assistance when their rights are
violated. NHRIIs have also been helping their governments meet international and regional treaty obligations. These NHRIIs are active members of the Network of African National Human Rights Institutions (NANHRI) and are committed to the goals of the network, which include establishing strategic alliances for the realization of human rights.

NHRI activities are restricted to their areas of jurisdiction hence they are unable to undertake activities beyond their borders. However these lines are likely to be blurred following the creation of the EAC with an even stronger mandate. NHRIIs find themselves confronted with a number of cross border challenges such as cattle rustling, terrorism and other transnational crimes, among others that have a bearing on the enjoyment of human rights. Political processes also pose serious challenges to the realization of good governance in the region.

These institutions however have very few opportunities to share experiences and learning that could benefit the region. KNCHR in collaboration with NANHRI convened the Nairobi conference for EA NHRIIs to deliberate on critical issues in the region, share experiences and identify areas of mutual interest and collaboration; other NHRIIs from the continent, such as Cameroon and South Africa were invited to the conference. Cameroon is the current chair NANHRI while South Africa is the chair of the ICC.

The Link Between Good Governance and Human Rights

Good governance reinforces human rights principles, which provide a set of values to guide the work of Governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. However, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population.

Where human rights values guide and direct good governance in the reform of democratic institutions, public participation in policymaking either through formal institutions or informal consultations, is entrenched. Mechanisms for the inclusion of multiple social groups and actors in decision-making processes are also ingrained.

In the realm of delivery of State services to the public, good governance reforms, advance human rights when they improve the State's capacity to fulfill its responsibility to provide services which are essential for the protection of a number of human rights, such as the right to education, health and
food. Reform initiatives may include mechanisms of accountability and transparency so as to ensure that services are accessible and acceptable to all.

In relation to the rule of law, human rights-sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal reform, public awareness-raising on the national and international legal framework, and capacity-building or reform of institutions.

Finally, anti-corruption measures are also part of the good governance framework. Although the links between corruption, anti-corruption measures and human rights are not yet greatly explored, the anti-corruption movement is looking to human rights to bolster its efforts. In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information-sharing, and monitoring Governments’ use of public funds and implementation of policies1.

**Development Strategies**

Developmental initiatives are also strongly supportive of social integration and protection in line with a rights based approach. Development implies ‘the process which facilitates for every human and all persons the enjoyment of economic, social, cultural and political development’2.

Furthermore, close to the concept of development comes the now paramount principle of ‘sustainable development’, a principle which emanates from public international law. It is a principle that is considered so important that a number of key international organisations (such as the United Nations, the European Union, the World Trade Organization, the World Bank Group, the North American Free Trade Agreement etc.) willingly subscribe to it. These principles derive from various spheres of International Law, including ‘human rights, State responsibility, economic and industrial law, equity, abuse of rights, among others.

Social protection provides a good basis for a robust development policy that will lead to globally competitive and prosperous nations. However, these lofty intentions must quickly be translated into tangible actions that impact nationals positively.

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1 ‘Good governance practices for the protection of human rights’; a publication of the Office of the United Nations High Commissioner for Human Rights
2 World Bank Group fundamental principles
Challenges to Good Governance

At The National Level

Decentralization: At the national level, the policy of devolution of power and authority to all regions is perceived as a method of re-establishing the African State and rebuilding its legitimacy from the bottom up. This process, although increasingly being implemented in Africa, is subject to some constraints, which include the lack of capacity of the devolved units and the voicing of the population’s needs towards legitimate local governance. Other limitations are the low level of accountability of the devolved units of governance and the necessity to improve the quality of service delivered.

Rule of law and Human Rights: The lack of respect by leaders and citizens for the rule of law and human rights often poses a great challenge to stability. Structural difficulties and inadequate funding handicap the judiciary in many states. The independence, integrity, and performance of the judiciary would only be guaranteed through adequate funding, remuneration, modernization, professional staff, and regular training.

Public Administration: In this area, there are challenges in the reform initiatives undertaken by many African countries. There is an urgent need to enhance public service capacity, the provision of adequate incentives to public servants to retain highly qualified and motivated staff, increase performance and accountability, as well as reducing corruption. The use of ICT in government requires increased uptake as it will contribute to service delivery improvement.

Peace and Stability: At the national level, wars, civil strife and the proliferation of light weapons militate against the efforts of some countries in the establishment of sustainable development. Some countries are still handicapped following current conflicts, and others by the challenges of recovery following the cessation of conflicts. The challenges following these include the consolidation of national capacities for the prevention of governance crises, conflict and natural emergencies and taking initiatives on peace-building. Furthermore, relating to national security, there are challenges in the capacity to manage cross-border population movements and coping with drug and small arms trafficking, epidemics, and human trafficking, to mention a few.

Other challenges: Other important challenges at the national level include the lack of civic education among citizens and civil society leading to low participation in the political process at both national and local levels, low gender participation especially in the legislature, weak exploitation of the potential of traditional rulers in the governance process, and the lack of credibility of the electoral
system, especially of the Electoral Commissions.  

At The Regional (EAC) Level

Institutional Capacity: There are still challenges in institutional capacity in spite of the institutional reforms that have been carried out in the past decade. The limitations are to a large extent emanating from inadequate funding, particularly of oversight institutions.

Supranational Authority and Transfer of Sovereignty: Regional economic integration ultimately implies the creation of a unified political state following the process of market integration. As of now, market integration is gradually occurring at the regional level, however integration of political governance is far out.

Financial Resources: There are also the challenges of inadequate financial resources for the operation of the oversight organizations.

Other challenges: Other important governance challenges are to be found in the development of the harmonization of policies and in access to information.

The Conference Objectives

The overall objective of the sub-regional conference was to explore potential roles and strategic engagements (nationally, regionally and internationally) for NHRI s, individually and collectively with the aim of realizing good governance.

Specific Objectives

The conference expected to address the underlisted key objectives;

- To identify the role of NHRI s in promoting good governance, constitutionalism, democracy and the rule of law in East Africa;
- To strengthen collaboration between NHRI s and Civil Society Organizations in securing democracy and the rule of law in the region;
- To explore regional mechanisms that NHRI s can apply to secure accountability for human rights violations in the EAC region;

*Governance in Africa; Challenges and Prospects. Institute for Research and Debate on Governance*
To strengthen engagement of NHRI’s with government and national partners on the achievement of Sustainable Development Goals;

- To identify capacity gaps of NHRIs in the area of human rights through experience sharing and recommend appropriate interventions;

- To enhance strategic partnerships with UN Agencies, regional bodies/mechanisms and other development agencies for effective participation in good governance.

The Conference Theme and Sub Themes

The overall theme of the conference was “Promoting Good Governance in Eastern Africa: The Role of NHRIs”. The conference commenced with an address on the state of the region whose overall objective was to present a critical analysis of the status of human rights realization within the region. This set the tone for discussions on the role of NHRIs and Civil Society Organizations in securing democracy and the rule of law; regional structures for accountability; the role of NHRIs in strengthening constitutionalism and the rule of law; the role of NHRIs in securing democracy inclusion and diversity; and concluded with an exploratory session on the potential role of NHRIs in the post 2015 development agenda.

Overall Outcome of the Conference

Expected Outcome

The expected conference outcome was the adoption by consensus of a final declaration. The final declaration incorporates a clear strategy and actions for NHRIs, to ensure that the impact of the Conference outcomes is long term.

Key Conference Actors

These include:

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<tr>
<th>Organizers</th>
<th>Co- Moderators</th>
<th>Rapporteur Team</th>
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</thead>
<tbody>
<tr>
<td>KNCHR</td>
<td>Ms. Jane Onyango</td>
<td>Milly Lwanga Odongo</td>
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<td>NANHRI</td>
<td>Prof. Kimani Njogu</td>
<td>Amos Wanyoike</td>
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<td>Rosemary Kirui</td>
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Opening Session

The meeting commenced with the singing of the AU National Anthem.

Professor Kimani Njogu, the Conference Co-Moderator facilitated the opening session by inviting each successive Speaker and wrapping up the session at the close of the speeches. The highlights of the various speeches are presented below:

Ms. Kagwiria Mbogori, Chairperson of the KNCHR; Her speech set the pace, for all subsequent speeches of the session. The Chairperson acknowledged all dignitaries present. Some of these included the Attorney General of Kenya, representatives from various Embassies in Nairobi, the Kenyan Senate, other Commissions both in Kenya and from other countries in the African Continent CSO representatives and other invited guests. The multi-sectoral representation at the meeting was in recognition that various actors have a critical role to play in protecting human rights.

Ms. Mbogori recognised that it was a regional conference bringing together NHRI’s and partners from within the Eastern Africa region. The theme of this first conference on good governance was carefully selected during the program development. The choice for the workshop dates was intentionally designed to take place during the human rights week and climax with activities on the International Human Rights Day.

Human rights and governance are inter related but are affected by violations of human rights such as violence. Internal threats result in displacement of persons that impacts cross border peace and security concerns. The AU and EAC offer umbrellas for the coming together by human rights protection systems under the human rights banner. The gap in implementation of human rights at the national level needs to be mitigated. Successful deliberation during the conference can jump start and/or strengthen programs of NHRI’s aimed at realising human rights protection.

Hon.Prof Githu Muigai, The Attorney General of Kenya; In his address he recognised the dignitaries from various networks and institutions represented as well as the fact that the representation was drawn from all over the continent. The centrality of good governance in achieving the development agenda is key thus there is need to formulate a consensus on engaging in the agenda and thereby move from challenges to solutions. The role of the international mechanisms such as the OHCHR is well articulated and these present platform for NHRI’s to secure support for execution of their mandates more particularly in ensuring that states adhere to good governance standards and that the vulnerable members of the societies are protected.

The proliferation of national human rights institutions in the members states in the recent past has
been key to the protection of human rights. However they must be free and independent of both government and civil society influence. Thus NHRIs need to understand the constraints within which government works and approach their engagement with the state with this in mind thereby gain trust of the government. This will enhance the ability of the institutions to work with the government to improve the human rights protection nationally while promoting good governance.

The nexus between governance and human rights is central, particularly in the discussion of how terrorism impacts stability and social order. There is a wide foray of legislation and other legal instruments in place to address the aspect of terrorism but they are unable to comprehensively deal with the vice in the face of its metamorphosing nature. International and human rights law recognises that states must take measures to protect individuals. This protection of individuals allows the state to take measures to counter terrorist acts. Dialogue on balance between the rule of law, peace and security must be sustained if the nexus between these issues is to be holistically addressed. The success of the conference will be measured in the outcomes and in the implementation of the same. In relation to Kenya, the office of the Hon. AG undertook to consider the conference outcomes and consider areas of address falling within its office.

Ms. Vivian Makunda, Deputy ICC Liaison Officer and representative of the South African NHRI; Terrorism and violence in the region is on the increase and presents a threat to human rights protection. The conference needs to provide solutions for ensuring that protection against terror does not supersede the need for protection of human rights. The recent international resolution made will ensure that NHRI get recognition before international protection systems to support their national
roles. NHRIs have to promote CSO action in line with the Paris Principles which requires that they work with partners with broader outreach to the populace such as NGOs. ICC supports NHRIs in playing this bridging role between government and CSOs in realization of the rights of the peoples. The ICC has a clear and key role to play in support of the work of NHRIs.

The UN Human Rights Representative on behalf of the UN Resident and Humanitarian Coordination and UNDP Resident Representative; Common challenges in the region call for a common approach that will promote realization of durable solutions to the challenges. The formation of regional platforms will deepen and strengthen these common approaches. It would be useful to anchor the sub-regional initiatives under the NANHRI umbrella to promote effectiveness. NHRIs ensure that state obligation are realised at the group/individual level. The conference marks the beginning of a common and unified approach in the need to unpack the role of existing regional mechanisms in addressing human rights violations. The conference need explore potentials for strengthening partnerships across sectors. The SDGs of 2015 renewed impetus to realisation of human rights and present another space for advocating for national processes that will enhance a culture of human rights.

H.E. Frans Makken, Ambassador Royal Netherlands to Kenya; the conference is a milestone to the regional protection agenda and thus commendable. It is relevant to the rights based international development strategy that will see the continued cooperation with NHRIs to realise the development agenda. Additionally, there is need for an enabling environment for human rights defenders who are key to realization of the work of NHRIs. Everyone has a role to play in realizing a culture of respect and adherence to human rights and to this end Diplomats need to speak out when it comes to violations and threat to good governance; beyond their support to human rights institutions and NGOs. Good laws need to be supported by strong enforcement mechanisms, if human rights and good governance are to be realised.

Dr. Chemuta Banda, Chairperson NANHRI & Chairperson National Commission on Human Rights and Freedoms, Cameroon; Multiple cohesive and long term effort is required if development and human rights are to be realised. Human rights and peace and democracy remain key factors in the continent that remains riddled by civil strife. The value of networking has of late been emphasised as the benefit of such networks continue to emerge. Civil strife presents a threat to the state and collapse of rule of law will ultimately lead to gross violation of human rights. Therefore ensuring effective mechanisms to guard against violation of human rights remains key in promoting the development agenda by nations. The remedies to victims need to be effective to enhance confidence for the value of upholding human rights. NHRIs operate as horizontal accountability mechanisms. They must be thus balanced in addressing violations by whichever side of the civil strife. The lead by the NHRIs in conflict management and resolution and peace building is a plus in enhancing the ability of these
institutions to protect human rights in the region. The development of common standards for human rights management and conflict management help propel this common agenda. There is need to infuse human rights in policies and legislations in the region to enhance the protection framework.

State of The Region and Securing Democracy & The Rule Of Law

The objective of the session was: to present a critical analysis of the status of human rights realisation within the region. The analysis being informed by an assessment of countries' performance with regards to respect for the rule of law, promotion of rights based approach to development and measures taken to promote human rights in light of the various challenges that the region faces for example poverty, conflict and insecurity. In addition, the session aimed: to share experiences by NHRIs and CSO on the promotion of democracy and good governance. The session highlighted the challenges that CSOs are facing especially around the shrinking civic space and the interventions that can be made by NHRIs and explored opportunities for collaboration.

Key Points

Session Chair George Morara Vice Chairperson KNCHR; He introduced the session by reminding the participants of the need to forge a common understanding between governments and CSOs on the process of protecting human rights within the state and in finding solutions for promoting good governance, by defining roles of NHRIs and CSOs.

Prof. Shadrack Gutto, Professor and Editor University of South Africa made the key note address. Highlights of his address include the following:
He is a human rights defender from an academic front and was the founder member of Kituo Cha Sheria, [a local NGO in Kenya]. The work in the NGO offered experience in dealing directly with individuals and in seeing how the realisation or non-realisation of the legal provisions outlined in human rights instruments reflects in the lives of individuals. Agitation for rights led to his being in exile for 33 years. Constraint of realization of human rights by states can also be expanded to other state organs such as the judiciary, as was the case with the judiciary in Kenya, which was in the past also drawn in state action of reducing free space to promote rights.

Constitution, constitutionalism, human and people’s rights and duties are thus key if the space for realization of human rights principles is to exist. Most constitutions in the region, were largely originally negotiated with the colonisers and thus contained provisions to support interests of the colonizers. These constitutions focused on civil and political rights. The later (2nd generation) constitutions broadened the sphere of human rights protection at constitutional level. NHRI s should thus adopt a broader paradigm shift in dealing with human rights if they are to help take the country forward within the rule of law. These 2nd generation constitutions are more holistic in dealing with issues of human rights than the independence constitutions were.

Regionally, Africa had provided a wider space for including more interests in the promotion of the rights agenda. For instance, the Protocol (to the African Charter) on Women’s rights is wider and broader than CEDAW and thus African NHRI s need consider how broadly they interpret their mandates and jurisdictions when dealing with human rights. The limitation to the work of NHRI s depends on whether the constitution in their country is 2nd or 3rd generation. Where constitutions are not interpreted progressively they have limited protection outreach.

Human Rights, International Humanitarian Law and Justice are now inter related and inter connected thus there is need to ensure that where there are violations, even if criminal, violations of human rights are addressed. The 2nd generation constitutions were a result of the push by citizens and were largely opposed by politicians. To promote this role by individuals, there is need to broaden the provision that allows for filing of complaints/referrals so as to enhance the approach to rights to a more group oriented approach than the individualistic one.

Monitoring human rights violations need also come with ability to enforce to ensure effective and meaningful protection system against human rights violations. Where the institutions are not strengthened you have constitutions without constitutionalism. The EA region is fraught with human rights challenges and elections have become processes where serious violations of human rights take place. Kenya’s almost collapse; as a result of nationwide civil strife following the contested 2007 presidential elections is just one example. The resultant violation of various rights of displaced citizens etc. is obvious.
Violations of human rights need to be properly recorded to enable systematic seeking of solutions. NHRIs need not adopt an academic approach to resolving human rights problems. They need to be directly connected to the people who actually suffer from these violations. Endemic poverty and inequality is a human rights issue. NHRIs need to think deeply about how they can go about protecting the rights of the individual citizen.

Dr. Livingstone Sewenyana, ED Foundation for Human Rights (FHRI); NHRIs are missing when it comes to expanding space for democracy. Increasingly, the clawback in democracy worldwide comes from within the region. Key Organizations monitoring compliance to democracy have ranked countries and it is important to note where one’s country stands. Threats to freedom of assembly persist. Continued oppression of the vulnerable persons and groups, particularly the poor is increasing. The normal excuse for these is the increase in terrorism. However the fear for mass uprisings has also fuelled these emergent constraints. Political parties, trade unions, CSOs and think tanks are now therefore targeted in restriction of democratic space. This is the situation in which these NHRIs operate.

Legislative framework for NHRIs varies in various countries across the continent. NHRIs exist and derive their powers from the Paris Principles. The level of cooperation between NHRIs and CSO varies. In some countries the tendency is to work more with government while in some countries NHRIs work with CSOs. An example of good cooperation can be seen in the Ugandan Human Rights Commission which has chosen to deliberately work with CSO to address issues such as amendments to laws that limit space to exercise individual freedoms in the country (Public Order Management Act), homosexuality law etc. NHRIs must stand in solidarity with CSOs as a strategy in partnering to reduce the shrinking civic space. Other actions NHRIs can take with NGOs include conducting joint investigations and inspections into incarceration centres where human rights violations occur. Similar and overlapping mandates present an opportunity for cooperation.

Ms. Vivian Makunda, Deputy ICC Liaison Officer and representative of the South African NHRI; Opportunities for NHRIs engagement exist: CSOs are allowed accreditation with ICC. This then allows them to bring to the international level the challenges they face nationally. ICC provides opportunities for human rights defenders to get international protection. The SDGs provide opportunity for NHRIS and CSO to work together as there has been international recognition that for NHRIs to be effective they need to work with CSOs.

Ms. Kagwiria Mbogori, Chairperson of the KNCHR; The Kenyan AG made a strong case for positioning of NHRIs in relation to CSOs and Government. In Kenya civic space is shrinking e.g. deregistration of NGOs, freezing of accounts of NGOs. Under the Paris Principles NHRIs are mandated to work closely
with NGOs and the value of such collaboration is seen in allegory of sharing the burden of carrying the heavy load of human rights protection; the mandates of NHRI is broad and at times entrenched in the constitution yet there aren’t enough resources to enable them execute the mandate. There is value in partnering with government to ensure that systems are adapted for the protection of human rights. There is need to ensure that human rights is not separated from democracy. Peace and stability will continue to be pliable if there is no clear democratic practice. Democracy is diffusion of power and recognition of minorities. NHRI must thus focus on this to protect citizens against violation of their rights. Where the minorities are ignored by the government NHRI need to speak up for their rights. For effective democracy, the electoral process must be clear.

Plenary

Why do we have NHRI? Do we need to establish them? Analysing the responses to these questions will help show how they should relate with CSOs and Government. For example, the SA NHRI was created under the Constitution to support constitutional democracy. In Ghana, the NHRI combines human rights and administrative justice. They have a strong enforcement mandate and write law reports of their decisions. There are thus many reasons for the establishment of NHRI in respective states. They can play a key role in promoting compliance to international rights standards. The Paris Principles provide the basic principles of how NHRI need to operate. They need to be accredited as per the principles. Such accreditation means that the NHRI work within the principles and are reviewed every 5 years. If found to be nonperforming, an institution is downgraded.

The Ugandan NHRI has been cooperating with CSO because the law requires this of it, as both actors are there to protect human rights. Should NHRI be conformist? Or adversarial? They should preferably strike a middle ground. This serves a NHRI well in executing their advisory role while maintaining their monitoring function. The background to the establishment of the various NHRI is also key in determining the direction that they adopt in their engagement or execution of their mandate. Collaboration with CSOs need be managed with the need to promote human rights in mind. For example, some NGOs are formed by persons who have been active politicians and this may present a difficulty to an NHRI. The value of having formal forums that bring together NHRI and NGOs so as to foster these working relations is key.

In Kenya the KNCHR has been collaborating with NGOs as seen from an NGO perspective. Therefore in such circumstance focus needs to be more on how to relate the work done by NHRI, citizens and NGOs to show how these combined efforts impact the lives of the individual/citizen. Forging forward the relation between NHRI and Government need be fostered so that when NHRI work with CSOs and this action is not seen as a hindrance. The focus on identifying partners in promoting the rights
agenda need be located on the objective/mission and not on the description of the person.

There is need to be systematic in defining the independence of both government and CSOs to see how the monetary support from partners is applied before accusing any actor of promoting foreign agendas. NHRIs need to hold government accountable on the stands they take in international human rights forums. Analysis need to be systematically undertaken to determine what NHRIs can do to counter electoral violence, as this has become the trend in the region.

A number of posers were aimed at the NHRIs, consideration of which would help them better exercise their mandate. How does the human rights regime compare within the EA region? How do the NHRIs compare? Do they peer review? Seeing as their concerns are related. Networking in the region has for example helped the local law societies to promote national protection for defenders exposed to abuse at the national level. NHRIs in the region can take a leaf from the law societies approach. How do these NHRIs measure success? Is it by the extent of endorsement by government or support from NGOs? Has the constitution in Kenya impacted the ability of the KNCHR to work? In addition, how does the proliferation of human rights institutions present e.g. in Kenya? ICC has NHRIs as members where they peer review each other and a minimum standard of what they need to be doing is set. The impact of the review and subsequent classification is swift as was in the case where a review was initialised because of a tweet by the Chairperson of an NHRI in support of government action while attending a meeting outside the country.

The review led to a re-grading of the NHRI. Forums that bring together actors with common agenda are useful e.g. as done in SA. This gives CSOs and NHRIs opportunity to work together better. Analysis of the field of operations are undertaken by NHRIs e.g. the KNCHR has presented a report looking at human rights between 2010-2015, which outlines the conditions that affect work of human rights protection in Kenya post the Constitution being promulgated. Before the Constitution 2010, the KNCHR dealt with everything, currently scope reduced because of the number of constitutional commissions in place. The multiplicity of commissions has both positives and negatives. However human rights aspects of the various violations need be focused on the primary institution mandated to protect rights. Therefore there is value in finding a common way of dealing with this aspect of the various mandates through a defined networking channel. The value of developing capacity among the human resource concerned with human rights protection cannot be underplayed.

The session set the tone for the rest of the conference; looking beyond the challenges and exploring tangible interventions that focus on the role that NHRIs can play in promoting good governance in the region. Additionally, the session was framed around the Paris Principles on the functioning of NHRIs and CSO engagement.
Regional Structures For Accountability

The objective of the session was to: explore the extent to which NHRI and CSO have utilised these accountability platforms; identify avenues for increased engagement; and formulate strategies for accountability.

Key Points

Two panelists set the pace for the topic of discussion, which aimed to explore regional structures for accountability. Highlights of the two presentations are presented as follows;

Mr. Gilbert Sebihogo, ED NANHRI; started off by reminding the participants that NANHRI comprises of 44 NHRI in Africa who have come together to network and push common agendas. The tricky aspect of getting a clear definition of good governance contributes to the situation NHRI finds themselves in when trying to work on the issue. However there are a number of working definitions that are commonly adopted in different forums and the common factor in these definitions is that human rights is at the heart and is a key ingredient of good governance. This also makes it an academic question in determining the institutions that contribute to monitoring for compliance to good governance principles. Respect of human rights must be central, not just in unpacking components of human rights but also in monitoring compliance. African structures that exist to promote accountability include the AU through the African Charter, The Banjul Commission, the African Court, The Committee of Children’s Rights, New Partnership for Africa’s Development (NEPAD) and African Peer Review Mechanism (APRM), the Pan African Parliament the regional economic communities among others. They focus on the various/specific aspects of human rights principles.

NHRI are at the centre of national mechanisms for protection of human rights. They have wide mandates that allow them to monitor for violations. NHRI can submit reports before these regional mechanisms but many have not complied. CSOs have used the opportunities offered by the African commission on Human and Peoples’ Rights including the communication procedures and lodge complaints to the commission, while NHRI despite the affiliate status they enjoy with the commission they don’t.

Notwithstanding the silence of the African 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 NHRI. Accordingly, the jurisprudence of the Commission reveals that Communications have been filed by the NHRI of Chad, irrespective
of any status with the Commission. NHRI s can help states to make reports before these regional systems. During the review of the state report by the African Commission, NHRI s based on their neutrality are able to present a parallel report which is politically balanced and likely to be accepted by all as compared to either the state or CSOs.

When the regional systems carry out missions in the states they do so jointly with NHRI s located in these countries and this presents another avenue to execute their mandate. NHRI s can document and compile reports on massive violation of human rights, such as the one the KNCHR and Malawi prepared after elections and which helped the state to channel corrective action. The regional systems should also make reference to and rely on these reports.

Networking sessions that bring together NHRI s and regional mechanisms such as the courts are useful in getting these actors to work together in realizing the protection agenda.

Committee of African Experts on the Rights and Welfare of the Child is little known yet it offers another opportunity to strengthen capacities of NHRI s to execute their mandates. Regional Economic Communities such as the EAC are still unpacking their mandates and were seemingly limited in application of human rights, thus this presents a challenge in using these systems to promote human rights protection in the region. ECOWAS has been more progressive in its approach in relation to human rights protection since it does not require exhaustion of local remedies for it to entertain cases of human rights violations.

Ms. Florence Butegwa, Former UN Women ESARO Advisor on Policy and Governance; Ms. Butegwa set the stage for her presentation by posing a series of questions. Is there a legal basis for NHRI s to work with CSOs? This seems to be largely left to the discretion of the NHRI s and the various policy heads as appointed. Why should people/actors/NHRI s engage in these regional and international networking engagements? Can the engagement be better planned for effect? Regional blocs such as the EAC should plan on engagements for the region that will improve outcomes of such engagement for the promotion of the rights agenda.

Plans for engagement by NHRI s should be disseminated widely and monitored for impact. The factors that inform the strategic engagement by NHRI s need be discussed. The engagement amongst NHRI s need be structured and coordinated for better results. The fluid and highly mobile constitutional provisions within which these NHRI s operate also presents a challenge to the work of NHRI s. Do regular elections mean democracy is working and thus NHRI s need not work on democracy?

To what extent can NHRI s work in a coordinated way in addressing violation in incarceration
centres? NHRIIs must lead the engagement in exploring and emphasising alternative punishment to incarceration as punishment. There is need for NHRIIs to remain abreast and informed on the international agenda as this is key to guiding their engagement with international mechanisms. NHRIIs need for example analyse their role in realisation of the SDGs. The challenges faced by the citizens need guide the agenda of NHRIIs.

CSOs have been at the forefront in legislative reform to enhance protection for vulnerable groups. NGOs contribute a lot to the work of the regional mechanisms even though they do not sit in the bodies. NGOS in the past have organised innovative ways of putting pressure at international platforms on their state parties to take action. E.g. the showing of traffic light colour signs to various countries depending on their state of ratification of instruments thus publicly shaming them without commotion. The link between human rights good governance and democracy needs to reflect in practice. The charter on democracy, good governance and human rights; a relatively new instrument with about 24 ratifications, should be emphasised. The AU is required under the instrument as having the obligation of enforcing compliance.

**Plenary**

It is important to understand the status NHRIIs hold before regional and international accountability mechanisms. In some instances it is direct or through the African Commission. However even where there is no formal relationship, practice before some systems has seen NHRIIs accorded recognition. Article 30 gives NHRIIs mandate to submit references before the African Court.

Future of these regional courts must be clearly and systematically addressed by NHRIIs. Most of the states that ratified the instruments do not want to allow citizens to access these courts; this was set by the provisions of the instruments that established the Court. Therefore engagement to expand the accessibility of the court by citizens is an advocacy question. NHRIIs networks need push for ratification by more states through pressure and these present good action points where NHRIIS and CSOs can work together. Political will to expand the jurisdiction of the regional courts to include criminal jurisdiction was initially lacking, however there has been a shift in the recent past. NHRIIs need to emphasise that the under resourcing of the regional institutions will seriously handicap the enforcement mechanisms such as the courts.

The collaboration between NHRIIs and CSOs need to be re-thought. E.g. in Burundi some CSOs don’t relate well with the government and yet some of their members leave and support the government. Identity of CSOs is key in determining their value as partners yet this is sometimes not clear. Role of NHRIIs in implementing the African Court decisions bearing in mind that majority of states haven’t
ratified the protocol must be analysed and tested by NHRI. Even as NHRIIs foster collaboration with the various regional mechanisms, the collaboration between these mechanisms must be enhanced to allow for full and more engaged participation by NHRIIs.

The past 3 years has seen ICC reconsider its engagement strategy from a talk shop to actionable processes, e.g. concluding with actionable steps. This is positive and should also reflect in engagement within the various NHRIIs.

NGOs should be part of the solution to unpacking the role of NHRIIs. These NHRIIs need support from partners. NHRIIs must speak against government compromising integrity of NGOs, which compromises their ability to monitor the state. NHRIIs need to emphasise the fact that NGOs are not necessarily opposed to government, they have the similar objective as government to realise human rights for its citizenry.

NHRIIs in Africa and more so East Africa need expressly remain committed to human rights principles and present the mechanism for holding government accountable even in the face of the real need to counter terrorism. NHRIIs should promote the space for using dialogue to address the grievances that feed terrorist groups. It is an error to fight terror with terror. The challenges faced by NHRIIs in the region are not new, instruments for protection though not in place, it is the level of commitment by monitoring actors that sets pace for sustainable solutions. The session was framed in recognition of the fact that the continent has numerous legal instruments and frameworks for the advancement of good governance.

Role of NHRIIs In Promoting Constitutionalism & The Rule Of Law; Interrogating Mandates & Powers

The objective of the session was to allow for the sharing of experiences of NHRIIs in promoting Constitutionalism and rule of law.

Key Points

Dr. Otiende Amollo EBS, Commission on the Administration of Justice (CAJ) Chairperson & Secretary General African Ombudsman & Mediators Association; He emphasized the fact that although many states have established NHRIIs, they frustrate the same institutions and even cripple them by limiting resource allocation in many instances and also by encouraging the proliferation of like/similar mandates institutions e.g. in Kenya where the protection of human rights implementation is spread
across mandates of about 6 commissions]. Some states have merged the human rights administration component with human rights (as is the case in Tanzania) others have separated components of the mandate (as is the case in Kenya). Ghana has a hybrid structure where human rights is incorporated in the anti-corruption mandate. Issues of administration of justice have also been placed under ethics and anti-corruption monitoring structures in some countries. Many of the countries have allowed impunity to gain root so there is no serious interest in countering/promoting human rights.

When it comes to independence of these institutions, there is need to define clearly where these institutions are located; are they sui generis or are they core to the executive? If they are located within the executive, the question arises as to how they can be effectively monitor the executive and be deeply embedded in it. There is need to strengthen the enforcement capacities of the institutions for fuller impact. The remedial action taken by NHRIs need be more than just mere recommendations.

The judiciary also sees the NHRI as competitors in determination of legal issues and tend to undermine their decisions. The courts look at the decisions of these institutions from the point of what was stated and not with the backdrop of why they institution was established.

NHRIs must be able to source for funding beyond government coffers, as this buffers the resourcing limitations they often experience.

Constitution entrenchment of monitoring bodies, independence and organizational autonomy to ensure appointment occurs, resource content is diversified and innovative mechanism for implementation of the recommendations by the institutions are entrenched. This will promote the independence of these institutions.

**Dr. Mutakha Kangu, Dean Moi University School of Law;** Started his presentation by emphasising that constitutionalism and rule of law is a concept that seeks to secure a limited government that is limited by law. Government must be limited because “if men were angels then there would be no need for government”... people are selfish and must thus be controlled against excesses. Thus, government, which is often in a representative form, must be checked to ensure that they represent those they are meant to serve. Governments are meant to manage resources and share them equitably. The risk of governments abusing this is real hence need for NHRIs. Many new constitutions are designed to secure rule of law through a variety of mechanisms, such as by divided and separated powers. NHRIs to need guard to ensure that no one arm is intruding on the powers or jurisdiction of others. The context of the constitution that a NHRI is operating under determines the extent of the institutions engagement. Realization of socio-economic rights is key to protection of rights of the citizens and determining the relevant institution in government tasked with ensuring this and monitoring its work.
so as to promote rights is key. NHRI have a major role in the development of policies that will secure
the field for realization of rights, more so socio economic rights that have traditionally been ignored.

Protection of vulnerable groups need to be done with realization of the rights in mind so that the
monies are given and aimed to help ensure that such vulnerable groups are facilitated to progress and
be more equal to the rest of society.

A monitoring institution cannot be wholly part of the government it is meant to monitor. NHRI have
the mandate of ensuring, even where there is a proliferation of institutions, that human rights are
protected.

**Plenary**

In Kenya, the Supreme Court advisory opinion on the National Land Commission mandate appears
to have emphasised that independence of a commission does not translate to the commissions
being the 4th arm of government. Their inter dependence relation with the state and their role
in promoting public participation remains primary. This opinion seems to be a diversion from the
same courts earlier opinion in the IEBC case where the same Kenyan Supreme Court emphasised
the independence of these institutions. Thus lack of clarity by the judiciary threatens application of
human rights in states that have come from a history of violation.

There has always been reluctance by government to embrace the concept of NHRI. This is also
reflected in the length of time it took to adopt the Paris Principles. The push back on democracy
supports the need to have a more concerted and doubled approach to dealing with human rights,
as in Tanzania (where human rights and administration of justice are combined). Hybrids however
diminish the protection of human rights by underscoring key aspects such as administration of
justice. Each institution need be pushed to the limits to realize their mandates. Enforcing values through constitutional provisions may be tricky, thus monitoring every aspect of implementation to ensure that the values are upheld is important in promoting a culture of human rights in governance.

The constitution making process should have entrenched the strengthening of capacities of the commissions to perform. However there remains the need to practice the provisions of the constitutions both in spirit and letter.

Constitutions have bill of rights and the legislative mechanisms to ensure that they are upheld are often lacking. Focus should be had to ensure that legislative making process do not claw back on constitutional gains.

There is need for checks on the traditional governance mechanisms (these being the executive, legislature and judiciary) otherwise there presents a real risk of any one arm becoming dictatorial.

The executives check on NHRIs is not limited to restriction on monetary resource but also extends to recruitment and operations e.g. travel to Geneva to attend international mechanisms sessions, all which limit the ability of NHRIs to execute their monitoring ability. Best practices in striking the independence balances need be shared. Constitutionalism is threatened on daily basis by emerging crisis and the need for NHRIS to determine when to comment effectively in instances where human rights is threatened.

Other than limitation of powers, Constitutions also impose responsibilities on actors and direct what governments should do.

Lack of implementation of recommendations by NHRIs is also occasioned by lack of resources. Enforcing and monitoring to ensure compliance can be an expensive endeavour. The Constitution can be used to support enforcement capacities of NHRIs.

People make offices and not the other way round. The drive for execution of the mandate of an institution is to an extent driven by personalities.

The Public Protector in SA has a foundation of acceptance. This helps them realise their mandate. The judicial support is also key in building public confidence in these institutions and this has been the case with the SA Public Defenders decisions, which have been endorsed by the courts. The merger of the ethics jurisdiction also helps them perform.
NHRIs can support each other and lobby for resource allocation through group pressure. Budgets for constitutional offices should be independently prepared. The structure of accounting offices within commissions, which is linked to the executive, also presents an avenue to impose restriction on the independence of the commissions.

The session recognized that a number of countries in the region have undertaken Constitutional reviews while some are in the process of reviewing their constitutions. In all instances the review has been aimed at improving governance structures, promoting respect for the rule of law, enhance Human Rights protections and the rule of law.

**Securing Democracy; The Role Of NHRIs In Monitoring Elections**

The objective of the session was to draw on the experiences of the NHRIs in the region with regard to monitoring elections.

**Key Points**

**Mr. Dickson Omondi, Resident Country Director, NDI;** Monitoring elections, Key role of NHRIs depending on how they interpret their mandate. Elections are an important human rights issue and gives legitimacy to governments. Elections relate to other rights and show how a country is faring in the realization of civil and political rights such as freedom of assembly, freedom of movement. When NHRIs fail to engage with the electoral process then they expose the citizens to a real risk of their rights being violated. Elections need be inclusive to ensure that all groups in the society are represented in the process. The process of elections need be guided by rules that enhance the principles of equality. NHRIs need ensure that such is the case.

The capacity of NHRIs to meaningfully engage in the monitoring of elections must be enhanced. There is also need to ensure that human rights violations identified by NHRIs are addressed. NHRIs if well informed on the existing electoral process can help foster public confidence in the electoral process and thus forestall violence often related to elections. However NHRIs engagement with the monitoring of elections need bear in mind the fact that elections are a process not an event. All aspects of the process need be carefully addressed. Universal and equal suffrage dictates that the formulations of electoral boundaries present a conflict point that can present in form of human rights violations. Engaging with political parties to ensure that the legislation that governs them promotes equality is key. Where limitations are placed, NHRIs must be able to determine if they are justifiable. NHRIs should be the peoples’ advocate and related to this access to data that will help
Claudine Niyimbonera, Vice Chairperson Burundi NHRI; She outlined the experience of the Burundi institution in monitoring elections. The Burundi NHRI is relatively new as it was created in 2011 after the elections. It was established in the backdrop of a deeply contested election, thus the need for it to monitor elections was clear. In 2015 the elections came in the backdrop of questions to the interpretation of aspects of the constitution more so on the implementation of the electoral provisions; the president was considered unqualified to contest a third time. This dispute on interpretation of the constitution led to a lot of violation of human rights. People were arrested and detained arbitrarily and in harsh conditions. The NHRI had been, since 2014, receiving complaints on effectiveness of the civil and political rights such as on assembly. Thus the NHRI engaged in monitoring to identify the extent, if any, to which these rights were being violated.

The NHRI did not support the monitors report as the rampant violation were visible to it, more so even to the limited extent to which it had been able to monitor the process. The central factor is that the judiciary plays a key role in interpreting the constitutional provisions when it comes to electoral justice and need remain alive to the impact that their decisions have on realization of rights of all.

Mr. Victor Lado, Officer NHRI South Sudan; He gave the experience of South Sudan and started by stating that South Sudan (SS) had recently gone through the first elections and the monitoring was done in liaison with CSOs as the capacity of the NHRI was limited. The monitoring process was guided by a check list. The monitoring covered campaigns and the voting day; it focused more on the actual exercise of campaign and elections. The SS NHRI noted that Political Parties did not exercise democratic principles in nominating their candidates. The impact has now become evident as those who were wrongly locked out are now causing problems that foster human rights violation. The South Sudan NHRI is now planning to start the monitoring for the 2018 elections. For example the census program that is scheduled need to be monitored as political cocoons are being formulated already and this presents a recipe for chaos when outcomes are not seen to present the reality.

Plenary

Uganda has a citizen’s coalition initiative that intends to mobilise voters. Related to it is the citizens observation network which has already started monitoring the process, that already seems fraught with problems. There is need to clearly determine the value addition that NHRI present in an electoral process. There may present a conflict of the mandates as bodies dealing with elections are also independent constitutional bodies. Assessing value addition can also be determined by extent to
which an institution is able to influence a process and not just by ability to enforce certain actions.

When addressing elections the extent to which NHRI are conformist or not will go a long way in determining its ability to be effective. In Cameroon, the NHRI monitored elections and made recommendations, which shook the government, which felt that the institution was leaning on side of CSO. The NHRI report was published. To realise their full capacities, the value of capacity building is key.

It is possible to provide legal basis for the mandate of NHRI to monitor elections. This is the case for example with the Sudan constitution.

Learning from each other is useful in engaging in the area of election monitoring. For example Uganda sent a team to Kenya to learn on the early warning signs that the KNCHR had presented before the last Kenyan general elections, the Uganda NHRI then applied to be monitors and not observers in their coming general elections and have been engaging more meaningfully with the electoral body. For example they have shared reports on identified possible avenues in the electoral process that could result in human rights violations and shared with the electoral commission for its action. The monitoring process has been monitored at each stage. The value addition is in increasing the chances of forestalling human rights violations.

The session concluded with a general observation that election monitoring must take place throughout the electoral cycle. In addition, the session recognized that elections are the bedrock of a sound democracy.

Safeguarding Constitutionalism: Promoting Inclusion & Diversity

The objective of the session was to present cases studies that would provoke discussions on the way forward in adopting actions that would promote inclusion.

Key Points

Hon. Issac Mwaura, MP Kenya; The MP decried the fact that in most communities in the region, with perhaps the exception of Tanzania, loyalty to community rather than to the states seems to be the overriding value. Support for values and importance of other communities is however lacking. Constitutional provisions can present a false depiction that a state is inclusive, however this may not reflect in the practices of the state such as in the appointments to executive offices. In addition
you find that states have ratified a number of international human rights treaties that promote diversity and inclusion but fail to reflect these in their national practices. Inclusion of minority groups promotes good governance and there have been instances where this has been proven. Inclusion of minorities has been seen to include spectres that have traditionally not been considered and this increases effort in development. There need be legal mechanisms that guarantee quota for minorities even where their practical inclusion may be applied in a progressive style. The value of political will however remains key in ensuring realisation of the inclusion agenda. The frameworks need be monitored by NHRIs and CSOs for compliance.

Ms. Paula Biraaro, Senior Programme Officer Uganda NHRI; The Commissioner restated that inclusion requires that all who are relevant are brought on board while by applying a rights based approach to ensure that their physical inclusion as well as that the interests that affect them directly are protected in all action and process of governance. You find that the preambles of most constitutions express the noble intention of promoting diversity and inclusion. Protecting the abilities of the institutions established to implement the constitution is key to promoting this intention of inclusion. The specific role that NHRI play in protecting individual rights by addressing complaints would help promote inclusion. NHRIs also need to aggressively engage in civic education. NHRIs must also monitor the extent to which the interests of all groups are addressed and incorporated in all processes of government and not just in appointments but also in programming, resource allocation etc. Where breaches are identified, in addition to writing reports, NHRIs can take the issues to court, educate the duty bearers on the value and import of taking action and work with the individual to seek compensation for violation.

Gabriel Nonechopo, Head of Division of Protection and Promotion of Human Rights in the NHRI Cameroon; protecting rights of minorities has gained momentum in Cameroon with the recognition of rights of the indigenous people. Cameroon has started implementing human rights instruments that ensure the protection of minority rights. Cameroon has ratified a number of international instruments that protect minority and indigenous rights and this offers a strong legal framework to support their inclusion and diversity agenda. A multiple dimensioned approach is applied in ensuring the promotion of these indigenous groups, which in Cameroon is mostly the Pygmy’s. Political parties and the private sector are also required, by the constitution to include minority groups in their action and programs. An electoral team that is all male is not accepted and in addition the group composition need reflect the various groups that compose the community. The issue of identification has also been addressed by the NHRI to facilitate ability of these minorities to access these vital documents and thus engage with governance and other processes. All actors working or conducting activities within localities occupied by minorities are also required to incorporate the interest and concerns of the minority groups. The NHRI monitors compliance to this requirement.
Plenary

There is need to explore ways in which the legislature can impact on countering corruption and promoting representative appointments by the executive. This can be by ensuring that the process by which people get into leadership sifts the best for those who intend well for the societal agenda.

Political parties control both the executive and the legislature and these parties represent specific interests. Where their interests are not in promoting societal rights this will reflect in their execution of their mandates and engagement with the executive and legislature. Thus the constant reminder through NHRI and CSO remains important to ensuring that the institutions work for the good of the peoples and that political party actions are kept in check.

How can the lofty constitutional provisions reflect in the face of real political negativity or opposition? This requires partnerships to push for realisation of the constitutional intentions as often the judiciary, executive and legislature can collude to suppress the realization of rights.

There was interest in understanding how the NHRI in South Sudan and Sudan work to promote political tolerance. The representatives appreciated the networking opportunity that the conference accorded them to start collaborative initiatives. Sudan has only just formed an NHRI, while SS has had one for a while.

Cameroon presented a case study on how NHRIS work to develop capacities of the vulnerable and indigenous people to promote equality. These include, by ensuring that laws and policies protect affirmative action for realization of the equality rights of the vulnerable and minority groups and do not claw them back. Networking through support groups to protect minorities and vulnerable members affirmative action position is valuable in cushioning the backlash that they face in promoting the inclusion agenda. Financial compensation is also a mode of empowering vulnerable groups.

Representatives shared experience on how they manage relations with other national institutions that have overlapping mandate so as to maximise impact of protection of the vulnerable groups. Some strategies included; regular sharing and planning meetings to ensure that activities of the various institutions complement each other for an all rounded approach to realisation of the rights of these vulnerable and minority members of the communities where they work. The strong and urgent need for NHRI to go beyond restating the constitutional provisions that guide their thinking and begin to quote practical examples of how the provisions need be defined and apply was emphasized.

The session concluded by recalling that NHRI must ensure the inclusion of all excluded groups,
while recognizing that there is no fit it all solution to promote inclusion.

The Role of NHRIs In Engaging With SDGs: The Right To Development

The objective of the session was to entrench the principle that human rights and development are inter related, while unpacking the role of NHRIs in the realization of the SDGs.

Key Points

Ms. Marcella Favretto, Senior HR Advisor OHCHR; SDGs are a result of a most consultative process in history of UN that culminated in the General Assembly September 2015 meeting. They go beyond the narrow scope of MDGs and present a shift in the development agenda and note that civil and political rights must merge with economic, social, cultural rights for full development to be realized. It is grounded on human rights standards and thus human rights language permeates throughout the document. Equality, non-discrimination and inclusion are a major factor in realisation of the SDGs (in particular goals 5 and 10) and are thus presented as focal issues. During the adoption session, the Nations present emphasized the need to protect the letter and spirit of the SDGs at the national level.

NHRIs must take the lead in ensuring that the SDGs are translated into national goals with action plans and time lines, so as to give life to these goals.

Secondly, NHRIs must ensure that all members of the society are included in the action plan development and towards this end must partner with CSOs for increased outreach.

Thirdly, accountability levels must be heightened and standardized so that they are strengthened and thus more effective.

Monitoring will be the bedrock of accountability, therefore NHRIs need to ensure that their capacities are well developed so that they can effectively monitor. NHRIs must help set the baselines for subsequent monitoring post the SDGs.

Goal 16 is on the need to promote peaceful societies for sustainable development and towards this NHRIs should advocate to ensure that they are well resourced to monitor for this and develop sound and effective data collection and assessment systems/tools that can capture a holistic that will reflect the real situation/position of the vulnerable and minority groups. Thus there is need to strengthen advocacy capacities of NHRIs by building more effective links to the regional and international
monitoring mechanisms.

**Gordon Mwesigye; CEO NHRI Uganda:** There is a space and role of NHRI s in the sustainable development agenda. A strategy to realise this is through the development of national human rights action plans that are developed from a NHRI s practitioner’s perspective. The concept of National HR action plans originated from the Vienna conference of 1993 where it was decided that participating countries need develop national action plans. The conference also proposed the establishment of NHRI. These plans can determine the steps that a country need take to ensure human rights becomes integral to their governance system. The states actually develop the plan with the assistance and input of NHRI s.

In Uganda during the peer review session, the government made an undertaking to ensure that human rights would be applied fully through a national action plan. The plan has the outline of the governments’ commitments to protect human rights and empower its citizens. It is a 5 year plan. Its development was very participatory and the Uganda NHRI had charge of the following; management of the finances, technical support, coordination of the national and regional consultations, sat in the national steering committee for development of the action plan, reviewed and coordinated the plan development process to ensure that it remained on course.

Other NHRI s can work along these lines and modify to suit their purposes and thereby ensure that the national plan presents a strong rights position.

The SDGs reaffirm the obligation of states to uphold and respect human rights without discrimination of any kind. They therefore are relevant to NHRI s, as they give a boost for state accountability to its people. The focus on social rights falls squarely within the mandates of NHRI s and this provides a chance for NHRI s to monitor for human rights standards and further the human rights based approach agenda in development. Additionally, the fact that the goals relate to NHRI s gives NHRI s a central role in ensuring that national goals relate to SDGs.

Once programs are formulated, NHRI s can monitor to ensure that they are actually applicable to the individuals they are meant to benefit. NHRI s can present a valuable bridge between the various actors relevant to development.

**Joseph Suliman, NHRI Sudan:** The Sudan NHR commission was established in 2012 on basis of constitutional provisions. It monitors the extent of respect for human rights in the nation. It receives complaints and develops a policy framework that encourages respect for human rights. The Commission aims to work to ensure that citizens are included in the implementation of SDGs.
action plans must be developed in a way to ensure that they will reflect a real benefit to the individual in Sudan. The right to development is key and must be implemented and every member of the society need benefit from this and the Sudan NHRI aims to ensure this and monitor to see that this is done. Priorities need be set by NHRI as this will help keep the process of the implementation of the SDGs real. Focus should be on violation of economic and environmental rights. NHRI must prepare to manage the hurdle of working with government, which often does not see them as partners in the development agenda. The sharing of experiences and views across regions will enhance the ability of NHRI to be able to learn best and most suitable strategies that will heighten and hasten effect to their work.

Ms. Kagwiria Mbogori, Chairperson KNCHR; implementation of the SDGs will ensure that poverty is eradicated and full development achieved. The SDGs aim to eradicate poverty, end hunger, ensure good health and education, realise gender equality, provide clean water, economic growth, improve infrastructure, reduce inequalities among others. They are largely an expansion of the MDGs in a manner that ensures that aspects that were left out in the 15 years of the implementation of the MDGs are included and addressed. The Intergovernmental committee of experts has suggested 4 forms of funding to support the realization of these goals, these are: public, private, international and domestic. The four have been further broken down into domestic public and private finance, international private and international public finance.

The process of implementation of the SDGs need ensure country ownership and leadership that benefits from a supportive international environment. National strategies must coordinate the financing to support the plans.

Effective polices and good governance are crucial for the realization of SDGs. The strategies must be realised and not remain as hopes only. NHRI in the region need unpack the committee of experts’ recommendations and coordinate efforts in their countries. NHRI should play a critical role in financing towards the realisation of the goals and monitor to ensure that the resources are applied to this end.

Plenary

There is need for NHRI to consider an issue that may have a direct influence in the realization of the SDGs, this is how the appointment of a special rapporteur to look at impact of economic sanction will impact on the protection of human rights. It as already been generally considered that economic sanctions affect the realisation of rights of the individuals resident in such countries. The special rapporteur will jump start the process of dealing with the impact of economic sanctions on realization of human rights. NHRI need engage more with this rapporteur. This could perhaps be a topic to
unpack in the next sub-regional conference.

In addition, there is need to analyse the reasons as to why many African countries failed to make much progress in achieving the MDGs. MDGs failed not because African countries alone failed in executing their part but also because advanced economies who were expected to monitor the achievement of the goals did not sustain the monitoring. With goals being set yet no keen monitoring and evaluation is sustained, any goals will likely fail. All must play their part; developing and developed counties must work to ensure realization of the goals. The failure of the MDGs was central to the discussion around the SDGs. The process was lengthy so as to unmask the hypocrisy around human rights and development discourse. Human rights defenders need keep these aspects of the discussion alive throughout the SDGs and national action plans implementation process.

NHRIs are government institution and thus part of state even though they monitor and the level of performance by government. The fact that NHRIs will contribute to realization of good governance must be emphasized. They hold a unique position within government.

Goal 16 on access to justice is important to realization of the right to development, particularly in the eastern Africa region. However development need be defined with protection of rights of individuals in mind. Development must be looked at with impact on poverty in mind. Thus NHRIs, must engage with the unpacking of what development entails.

The big challenge to national action plans is commitment to their realization.

Recently the World Bank revised their rating of who qualifies to be identified as poor person. This is not necessarily reflective of the situation on the ground. It could be argued that SDGs are not reflecting new goals and international community seems to be moving in circles.

If loopholes are sealed and avenues are corrected, monies will have been secured towards the realization of SDGs. Thus the need to lay emphasis on eradicating corruption.

Political will to implement the SDGs is key to their realization.

The process of developing the SDGs took cognizance of the terrorism. This is why for example SDG 16 aims to reduce deaths everywhere including deaths caused by terrorism acts. In addition the SDGs, intend to promote the rule of law and access to justice and controlling illicit arms and finance; actions that if taken will limit access to funding for terrorist activities.

NHRIs need take specific interest in preservation of the environment as this is a human rights violation and in line with Goal 15 on sustainable eco systems and forests, avoiding land degradation as all are directed towards realizing development agenda. The session recognized that sustainable development can only occur when a rights based approach is applied.
Conclusion

Professor Kimani Njogu moderated the concluding session where the conference communiqué was developed in a participatory manner. Discussion as to the implication of each statement preceded adoption.

The action points in the communiqué included:-

1. To deepen the engagement of NHRIs with other actors on the electoral processes for purposes of ensuring free, fair and credible elections;

2. To cooperate with international, regional and national mechanisms and initiatives relevant to the enforcement of human rights obligations so as to promote state accountability.

3. To designate focal points within respective institutions and establish official communication channels on decisions from regional human rights mechanisms to the national levels.

4. To adopt collaborative modalities necessary for the effective realization of the mandates of NHRIs and other related bodies.

5. To continue to network, exchange knowledge, experiences and good practices on identified themes for maximum impact in the realization of human rights.

6. To contribute to the respect for rule of law and human rights by undertaking public education campaigns while emphasizing the individual role in holding government accountable.

7. To coordinate and cooperate with CSOs and other partners relevant to the accountability agenda.

8. To scale up partnerships, collaborations and effective monitoring of SDGs and National Action Plans

The Communiqué was then disseminated to the media, which comprised both national Kenyan and international media representatives.
ANNEXES

CONFERENCE COMMUNIQUÉ

The Sub-Regional Conference for Eastern Africa National Human Rights Institutions

The Nairobi Declaration: The Role of NHRIs in promoting good governance in Eastern Africa

At the Conference of the Eastern Africa NHRIs, Civil Society Organizations and other international, regional and national partners in Nairobi Kenya between 7-9 December 2015 under the theme “promoting good governance in Eastern Africa; the role of NHRIs”, the participants at the conference, organized jointly by the Network of African National Human Rights Institutions (NANHRI) and the Kenya National Commission on Human Rights (KNCHR):

Express concern on the state of governance and strategies used in the region particularly in regard to the rule of law, security, natural resource management, anti-corruption and counter terrorism;

Express deep concern regarding the impact of prevalent practices such as limitation of the independence of oversight mechanisms on fundamental human rights and freedoms of the people, particularly on the vulnerable members of the society who cannot leverage political influence on the governance structures.

Reaffirm that acts of impunity, corruption and disregard for the rule of law constitute violations of international, regional and national human rights law;

Further reaffirm the obligations of States to uphold democracy, respect for human rights and the rule of law, as stated in international human rights instruments, such as the United Nations Convention on Civil and Political Rights, The African Charter on Human and People’s Rights, African Charter on Democracy, Elections and Governance and sub regional instruments such as the Treaty For The Establishment Of The Eastern Africa Community;

Recognize that the adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice are fundamental for the growth and development of the region;
Recognize the importance of entrenching a culture and practice of good governance;

Recognize that a Human Rights Based Approach promotes inclusion and diversity for the realization of democratic and developmental rights;

Underscore the significance of monitoring and data collection to promote accountability in governance and electoral processes;

Note the importance of implementing SDGs in realization of the right to development;

Reiterate the crucial role National Human Rights Institutions compliant with the Paris Principles play in the realization of human rights;

Acknowledge the efforts of NHRI in holding their respective governments to account by executing their advisory roles and partnering with CSOs and other actors to advocate for the full implementation of international, regional and national human rights instruments;

Do hereby agree and commit as follows:

1. To deepen the engagement of NHRI with other actors on the electoral processes for purposes of ensuring free, fair and credible elections;

2. To cooperate with international, regional and national mechanisms and initiatives relevant to the enforcement of human rights obligations so as to promote state accountability.

3. To designate focal points within respective institutions and establish official communication channels on decisions from regional human rights mechanisms to the national levels.

4. To adopt collaborative modalities necessary for the effective realization of the mandates of NHRI and other related bodies.

5. To continue to network, exchange knowledge, experiences and good practices on identified themes for maximum impact in the realization of human rights.

6. To contribute to the respect for rule of law and human rights by undertaking public education campaigns while emphasizing the individual role in holding government accountable.

7. To coordinate and cooperate with CSOs and other partners relevant to the accountability agenda.

8. To scale up partnerships, collaborations and effective monitoring of SDGs and National Action Plans.

Further commit to hold the sub-regional conference by NHRI on an annual basis.
Finally agree that the next Eastern Africa Conference be held in Kampala, Uganda in 2016

Adopted in Nairobi, Kenya

9 December 2015.

Name……………………Signature…………………… Date…………

Name……………………Signature…………………… Date…………

Name……………………Signature…………………… Date…………

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Name……………………Signature…………………… Date…………

Name……………………Signature…………………… Date…………
## Programme of the Sub-Regional Conference for Eastern Africa National Human Rights Institutions

**Theme:** Promoting Good Governance in East Africa; the role of NHRIs

**December 7 – 9th, 2015 Nairobi Kenya**

### Day 1 (December 7, 2015)

<table>
<thead>
<tr>
<th>Time</th>
<th>Activities</th>
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<tbody>
<tr>
<td>8:00am – 9:00am</td>
<td>Registration</td>
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<tr>
<td>9.00am – 10:00am</td>
<td><strong>Opening session, KNCHR Chair Ms. Kagwiria Mbogori</strong></td>
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<td></td>
<td>Speaker 1: Ms. Kagwiria Mbogori, Chairperson of the Kenya National Commission on Human Rights (KNCHR)</td>
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<td>Speaker 2: Dr. Chemuta Divine Banda, Chairperson of the Network of African National Human Rights Institutions and Chairperson of the National Commission on Human Rights and Freedoms – Cameroon</td>
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<td>Speaker 3: Ms. Nardos Bekele - Thomas, Resident and Humanitarian Coordinator and United Nations Development Programme (UNDP) Resident Representative</td>
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<td>Speaker 4: ICC Representative (Ms. Vivian Nasaka Makunda, SAHRC)</td>
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<td>Speaker 5: Mr. Frans Makken, Ambassador of the Royal Netherlands to Kenya</td>
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<td>Speaker 6: : Prof. Githu Muigai, the Attorney General of the Republic of Kenya</td>
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<td>Photo Session</td>
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<td>10:00am – 10:30am</td>
<td><strong>Theme:</strong> Promoting Good Governance in East Africa; the role of NHRIs</td>
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<tr>
<td></td>
<td><strong>KNCHR Vice Chair Mr. George Morara</strong></td>
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<td></td>
<td>Plenary presentation - State of the region address</td>
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<td></td>
<td><strong>Speaker:</strong> Prof Shadrack B. O Gutto – Professor and Editor, University of South Africa</td>
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<td></td>
<td>Session Objective: The overall objective of the session is to present a critical analysis of the status of human rights realisation within the region. The analysis is informed by an assessment of countries’ performance with regards to respect for the rule of law, promotion of rights based approach to development and measures taken to promote human rights in light of the various challenges that the region faces for example poverty, conflict and insecurity. The session sets the tone for the conference; looking beyond the challenges and exploring tangible interventions that focus on the role that NHRIs can play in promoting good governance in the region</td>
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<tr>
<td>10.30am -11.00am</td>
<td>Plenary discussion</td>
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<tr>
<td>11.00- 11.30</td>
<td>Health break</td>
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<td>Time</td>
<td>Session Description</td>
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<tr>
<td>11.30am – 12.30pm</td>
<td>Session 2: KNCHR Commissioner Ms. Jedidah Wakonyo Waruhiu</td>
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<td>Plenary presentation - Securing democracy and the rule of law: NHRIs &amp; Civil Society organisations</td>
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<td></td>
<td>Speaker 1: Dr. Tigere Chagutah – PAN Africa Programme Director (Acting) at Oxfam Great Britain</td>
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<td></td>
<td>Speaker 2: Dr. Livingstone Sewenyana – Executive Director at Foundation for Human Rights Initiative (FHRI)</td>
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<td></td>
<td>Speaker 3: Ms. Kagwiria Mbogori, Chairperson of the Kenya National Commission on Human Rights (KNCHR)</td>
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<td>Speaker 4: Ms. Vivian Nakasa Makunda, Deputy ICC Liaison Officer – South Africa Human Rights Commission</td>
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<td></td>
<td>Time allocation – approx. 15 minutes per speaker;</td>
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<td>Session objective: The session aims at sharing of experiences by NHRIs and CSO on the promotion of democracy and good governance. The session will highlight the challenges that CSOs are facing especially around the shrinking civic space and the interventions that can be made by NHRIs and explore opportunities for collaboration. This discussion is framed around the Paris principles on the functioning of NHRIs and CSO engagement.</td>
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<tr>
<td>12.30pm - 1.30pm</td>
<td>Plenary discussion</td>
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<tr>
<td>1.30pm - 2.30pm</td>
<td>Lunch break</td>
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<td>2.30pm – 3.15pm</td>
<td>Session 3: KNCHR Commissioner Ms. Jedidah Wakonyo Waruhiu</td>
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<td>Regional structures for accountability</td>
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<td>Speaker: Florence Butegwa; Former UN Women ESARO Advisor on Policy and Governance</td>
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<td>Notes:</td>
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<td></td>
<td>The continent has numerous legal instruments and frameworks for the advancement of good governance.</td>
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<td>The session will explore the extent to which NHRIs and CSO have utilised these platforms, identify avenues for increased engagement and formulate strategies for accountability</td>
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<td>Panel duration – 45 minutes. Number of panelists – 3. Time allocation – approx. 15 minutes per panelist;</td>
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<td>Panelists:</td>
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<td>Panelist: Mr. Gilbert Sebihogo, Executive Director for the Network of African National Human Rights Institutions (NANHRI)</td>
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<tr>
<td>3.15pm – 4.15 pm</td>
<td>Plenary discussion</td>
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<tr>
<td>6.00- 9.00</td>
<td>Welcome/Cocktail Party</td>
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Day 2 (December 8, 2015)

9.00am – 9.30am Recap day 1

Theme: Strengthening Constitutionalism and the Rule of Law

9.30am- 10.30am Session 4: KNCHR Commissioner, Senior Human Rights Officer, Antonina Okuta

Role of NHRIs in promoting Constitutionalism and the Rule of law: Interrogating mandates and powers

Speaker 1: Commissioner Otiende Amollo, Chairperson of the Commission on Administrative Justice (Office of the Ombudsman) of the Republic of Kenya

Speaker 2: Dr., Mutakha Kangu, Dean Moi University School of Law

Time allocation – approx. 15 minutes per speaker;

Session Objective: To share experiences of NHRIs in promoting Constitutionalism and rule of law. A number of countries in the region have undertaken Constitutional reviews and some are in the process of reviewing their constitutions. In all instances the review has been aimed at improving governance structures, promoting respect for the rule of law, enhance Human Rights protections and the rule of law.
<table>
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<tr>
<th>Time</th>
<th>Session/Event</th>
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<tbody>
<tr>
<td>10:30am– 11:00am</td>
<td>Plenary Discussion</td>
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<tr>
<td>11.00am – 11.30 am</td>
<td>Health Break</td>
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<tr>
<td>11:30am– 12:15pm</td>
<td><strong>Session 5: Securing Democracy; the role of NHRIs in monitoring elections.</strong> (KNCHR Commoner, Ms. Jedidah Wakonyo Waruhiu)</td>
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<td>Session objectives: Elections are the bedrock of a sound democracy. The session will draw on the experiences of the NHRIs in the region with regard to monitoring elections.</td>
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<td>Notes: Panel duration – 45 minutes. Number of panelists – 3. Approx. 15 minutes per panelist.</td>
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<tr>
<td>12:30pm – 1:00pm</td>
<td>Plenary Discussion</td>
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<td>1:00pm- 2:00pm</td>
<td>Lunch Break</td>
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<td>2.00pm – 3.00pm</td>
<td><strong>Session 6: KNCHR Commoner, Ms. Jedidah Wakonyo Waruhiu</strong></td>
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<td></td>
<td>Safeguarding constitutionalism, promoting inclusion and diversity</td>
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<td>Case study presentations by Countries</td>
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<td>Notes: Panel duration – 2 hour. Number of panelists – 4. Time allocation 15 minutes per panelist.</td>
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<tr>
<td>3:00pm – 3:30pm</td>
<td>Plenary Discussion</td>
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**Day 3 (December 9, 2015)**

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<tr>
<th>Time</th>
<th>Session/Event</th>
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<tbody>
<tr>
<td>9.00am- 9.30am</td>
<td>Recap day 2</td>
</tr>
<tr>
<td>9.30am- 10.30am</td>
<td><strong>Session 7: Mr Gilbert Sebihogo ED, NANHR</strong></td>
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<td></td>
<td>The role of NHRIs in engaging with SDGs - The right to development</td>
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<td>Speaker: Ms. Marcella Favretto, Senior Human Rights Adviser, OHCHR</td>
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<tr>
<td>10:30am– 11:00am</td>
<td>Plenary Discussion</td>
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<tr>
<td>11.00 – 11.30</td>
<td>Health break</td>
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<tr>
<td>1.15pm – 2.15pm</td>
<td>Lunch Break</td>
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<tr>
<td>2.15pm- 4.15pm</td>
<td>Plenary on Communiqué to media</td>
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<tr>
<td>4.15 - 4.45pm</td>
<td>Media briefing and Closure</td>
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**Day 4 (December 10, 2015)**

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<th>Time</th>
<th>Event</th>
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<tr>
<td>9.30am - 1.00pm</td>
<td>Out door event at freedom Corner- Uhuru park</td>
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<tr>
<td>1.15pm</td>
<td>Luncheon &amp; Free afternoon</td>
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**Moderators**

Professor Kimani – Njogu – Twaweza Initiative
Jane Onyango; Consultant Expert

**Rapporteurs**

1. Millie Odongo (Lead Rapporteur)
OPENING REMARKS

Programme of the Regional Conference for Eastern Africa National Human Rights Institutions

Theme: Promoting Good Governance in East Africa: The Role of NHRIs

December 7 – 9th, 2015 Nairobi Kenya

KNCHR Chair. Ms Kagwiria Mbogori

Hon Prof Githu Muigai, the Attorney General of the Republic of Kenya

Dr. Chemuta Divine Banda, Chairperson of the Network of African National Human Rights Institutions and Chairperson of the National Commission on Human Rights and Freedoms –Cameroon

Ms. Vivian Nasaka Mukunda, Deputy ICC Liaison Officer,

H.E Frans Makken, Ambassador of the Royal Netherlands to Kenya

Chairpersons and Members of National Human Rights Institutions represented here today

My fellow Chairpersons of Constitution Commissions,

Members of the Civil Society Organizations,

Our development partners,

Distinguished guests, ladies and gentlemen

Welcome to Nairobi and to our fellow Eastern Africas Karibuni Nairobi.

We are gathered here for the first Regional Conference for Eastern Africa National Human Rights Institutions whose theme is “Promoting Good Governance in East Africa”

The next three days will be a defining moment for Eastern Africa NHRIs as we shall seek to deliberate on critical issues in the region, share experiences and identify areas of mutual interests and collaboration.
This Conference uniquely takes place during the human rights week climaxing with the celebration of the International Human Rights Day on 10th December 2015.

Both history and contemporary experience have shown that Eastern Africa countries face similar issues that have a bearing on the achievement of good governance, constitutionalism and the rule of law as well as development. These include intra and inter-state violence around land governance; fragile governance institutions; poverty; insecurity exacerbated by radicalization and extremism as well as proliferation of small arms and light weapons due to porous borders; and internal displacement.

These threats consolidated portend serious threats to the region’s ability to achieve its goals with regard to regional peace and security. The common challenges that face countries in the region beg for common/ coordinated responses to them for purposes of sustainability.

As a region we converge at the Eastern Africa Community (EAC), the Intergovernmental Authority on Development (IGAD), and the African Union (AU) whose main goal is to foster regional peace and stability. NHRIs are key to the realization of this goal.

As independent state bodies with a broad mandate to promote and protect human rights, NHRIs can play a significant and necessary role in promoting good governance in East Africa. NHRIs are recognized as a major force for promotion and protection of human rights at the domestic level – in many cases helping to lessen the “implementation gap” between international standards and the practice of human rights on the ground. They also play a critical role in advocating for State accountability at sub-regional, regional and global levels through their participation in various treaty monitoring mechanisms.

It is therefore my belief that successful deliberations and outcomes from this Conference will strengthen further the execution of our respective mandates.

Theodore Roosevelt left us these famous words “I am a strong individualist by personal habit, inheritance, and conviction; but it is a mere matter of common sense to recognize that the State, the community, the citizens acting together, can do a number of things better than if they were left to individual action."

Thank you, Asante sana.

H.E. Frans Makken, Ambassador of the Royal Netherlands in Kenya

I would like to commend KNCHR and the Network of National Human Rights Institutions for convening this regional conference on the very important topics of human rights, good governance and the rule of law in the region.

This conference is an important milestone in the build up to this years’ international human rights
day on 10th December, which will mark the 50th anniversary of two key human rights instruments: the ICCPR and the ICESCR.

The topics of human rights, rule of law and good governance are significant to the Netherlands and central to our development cooperation strategy. Netherlands will continue to cooperate with Kenya in its efforts to strengthen its governance sector including the fight against corruption.

In Kenya, the Netherlands supports and works in partnership with key Constitutional Commissions, the Judiciary, UNDP and NGOs to enhance observance of human rights, the rule of law and the fight against corruption thereby contribution to improved democracy and good governance in Kenya.

Of specific importance to the Netherlands is creation of an enabling environment and protection of Human Rights Defenders who undertake important work in fighting corruption, enhancing awareness of basic rights and safeguarding fundamental freedoms that are central to a democratic society.

I therefore urge you to remain at the forefront in supporting Human Rights Defenders in the face of everyday challenges that they encounter.

I wish to acknowledge the very important and good work done by the KNCHR, which has been and remains a strong partner of the Embassy in its human rights promotion and protection work. I similarly acknowledge the work of all other NHRIs represented in this forum.

The Embassy strongly believes that independent institutions such as the KNCHR and NGOs need to be supported and be provided with enabling space to implement their mandate, which ideally complements the Government’s efforts towards consolidating good governance in Kenya and the region.

With the very progressive Kenyan Constitution, much however still remains to be done in entrenching a culture of constitutionalism. I challenge you to take up the role of fostering constitutionalism through your various mandates, as a key step in promoting and consolidating good governance in Kenya and the region.

I assure you of the support of the Embassy and the Kingdom of the Netherlands in your continued efforts to promote observance of human rights, rule of law and promotion of good governance, which are our mutually shared ideals.

I hope that the experience sharing on best practices in human rights work shall extend beyond the region to include, for example, the Netherlands Institute for Human Rights.

I look forward to the outcome of the conference.

Thank you.
OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

KEYNOTE ADDRESS

BY

PROF. GITHU MUIGAI EGH, SC
ATTORNEY GENERAL

DURING
THE REGIONAL CONFERENCE FOR EAST AFRICA HUMAN RIGHTS INSTITUTIONS ON SECURITY AND DEMOCRATIZATION,

AT
HILTON HOTEL, NAIROBI
ON 7-9 DECEMBER, 2015

The Resident and Humanitarian Coordinator and UNDP Resident representative, Ms. Nardos Bekele-Thomas,

The Ambassador of the Royal Netherlands Embassy, Excellency Frans Makken,

Representative of the Chair of the International Coordinating Committee of National Human Rights Institutions, Ms. Vivian Nasaka Makunda
The Chairperson of the Network of African National Human Rights Institutions,

The Chairperson and Commissioners, KNCHR,

Chairpersons and representatives of NHRI of Burundi, Rwanda, Tanzania, Sudan, South Sudan, South Africa and Uganda,

Chairperson of the National Commission on Human Right and Freedoms of Cameroon,

Distinguished participants,

Ladies and Gentlemen,

We are honoured to host you here and welcome you to Kenya.

This conference aligns itself with the aspirations of the continent. I note with pleasure that over the period of the next three days you will be focussing on various sub themes that converge into your major theme of promoting good governance in East Africa.

The continent is focused on building solid democratic states that will provide a conducive environment for sustainable development and peace. The centrality of good governance in the achievement of these goals cannot be overemphasised. The challenges that we face as a continent are numerous but not insurmountable. It is my conviction that we all have a consensus that we must move beyond challenges and instead work on defining solutions that will propel the continent to its rightful position in the community of nations.

The role of National Human Rights Institutions in this regard is well articulated in the UN Guiding principles on the establishment of National Human Rights Institutions. We are also cognizant of the important role that NHRI play in engaging with governments to ensure that their actions conform to national and international human rights standards, providing democratic forums for empowering citizens, and ensuring that justice is done to the victims of human rights violations. In this regard, it should be appreciated that NHRI, which conform to the Paris Principles, are also creatures of democratic states. In addition, the United Nations High Commission for Human Rights has stated that there are six “effectiveness factors” generally applicable to all national human rights institutions: independence, defined jurisdiction, and adequate powers, accessibility, cooperation, operational efficiency, and accountability.

Ladies and Gentlemen,

In the past decade, we have witnessed the creation of numerous national human rights institutions – national human rights commissions, ombudsman offices, or hybrids of both. National human rights institutions are uniquely structured. They have a statutory legal basis and particular legal
responsibilities as part of the state apparatus. On the other hand, national human rights institutions are not NGOs. The main example that differentiates NGOs and NHRI is that is most pronounced is with regard to the capacity to undertake investigation of complaints. National human rights institutions are neutral fact finders, not advocates for one side or another. A national human rights institution must therefore not only be, but be seen to be, independent of the NGO sector, just as it must be independent of the Government.

National human rights institutions are a bridge between civil society and Governments. To be effective they must gain a degree of trust from those working within government, as well as in civil society. It means understanding the constraints within which government operates and helping to design solutions to protect human rights within the constrained contexts. They must support governments put in place practical operational guidelines to support human rights targets, optimizing upon their understanding of government bureaucracy and operation.

This is a most strategic use of the unique character of national human rights institutions. By adopting an enduring militant approach with governments, some of our NHRI fail to optimise upon an opportunity to sustainably entrench human rights principles in daily government operations and programmes.

These are some of factors that I hope you will interrogate and ponder upon as you reflect on how, in fulfilment of your respective mandates and in collaboration with states, regional organisations and civil society, you as National Human Rights Institutions can make your contribution towards promoting good governance in the region.

Ladies and Gentlemen,

The nexus between security and human rights continues to generate considerable debate in local, regional and international platforms.

Terrorism poses a major threat to our peace and security. In addition to the devastating human cost of terrorism, in terms of lives lost or permanently altered, terrorist acts aim to destabilize governments and undermine economic and social order. Addressing the threat of terrorism is made more difficult by the complex and constantly evolving nature of terrorist activity. Its motivations, financing, methods of attack and choice of target are constantly changing.

There has been a proliferation of security and counter-terrorism policy and legislation throughout the world. The measures have also not been restricted to the core security sector, but have also embarked on regulating the banking and financial services sector, immigration and registration of persons, data management, telephony and communication sectors, property sector, social structures and organizations.
International and regional human rights law recognizes that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual, including terrorists. Consequently, in order to fulfil their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts. This has been the basis for the policy and legislative actions taken thus far.

Yet, as part of States’ duty to protect individuals within their jurisdiction, all measures taken to combat terrorism must themselves also comply with States’ obligations under international law, in particular international human rights, refugee and humanitarian law. This quagmire forms the current challenge in the practical implementation of counter terrorism efforts.

The main recommendation therefore lies in encouraging the initiation and sustained dialogue on the balance between rule of law, peace and security within the context of global terrorism and further elaborate a need for international, regional and in-country dialogues establishing new standards applicable in this nexus area.

I encourage you to lead this dialogue, and to steer the objective debate to resolve this challenge. Such dialogue may contribute to emergent jurisprudence that is supportive of the dual objectives of effective security, and protection of human rights.

Ladies and Gentlemen,

The success of this meeting shall be measured by its outcomes and your implementation of the various commitments that you shall make here. Looking at the conference themes and the eminence of the different panellists, I am sure that this conference will achieve its intended objectives.

I look forward to receiving a brief from the KNCHR on what we should learn from the outcome of your deliberations. With these words let me wish you all fruitful deliberations.

I thank you for your attention.
Your Excellences and Distinguished Ladies and Gentlemen, All protocol respected

It is indeed a privilege to be among distinguished delegates and participants, and to have the opportunity to speak to you. Allow me to also take this opportunity to express on behalf of the Network of African National Human Rights Institutions and on behalf of the National Commission on Human Rights and Freedoms of Cameroon, my sincere appreciation to the Kenya National Commission on Human Rights for taking the lead in organizing and hosting this important conference.

Your Excellences, Ladies and Gentlemen,

The development of a stable and prosperous Africa, which can reduce poverty and create jobs while spurring growth, requires multiple, cohesive and long term efforts especially in improving human security, promoting democracy and human rights, and economic integration. Unfortunately, many parts of Africa are still marred by conflict, poverty and fragile states. Conflict prevention, poverty reduction and promotion of human rights, peace and democracy therefore remain highly important to focus on, on the continent as a whole. Similarly, in the countries that currently experience high growth rates there is a need to address these issues, as resources and rights are not distributed equally, which gives rise to concerns about stability and sustainability in the long term.

NHRIs attach importance to networking: the ICC at the international level, NANHRI at the regional level and the EAC at the sub-regional level. African countries must urgently prioritize the promotion of the rule of law and enhance access to justice in order to meet the aspirations of their citizens for a just, safe and secure society, and develop approaches that result in sustainable livelihoods. The absence or collapse of the rule of law in any State will always result in violent conflict or repression, leading to gross violations of human rights. Impunity is often the primary obstacle to upholding the rule of law.
Establishing effective mechanisms to ensure that perpetrators of human rights violations will not go unpunished is an important step in restoring the rule of law in the aftermath of conflict or authoritarian regimes. The existence of national accountability mechanisms are also vital to ensuring that victims obtain appropriate remedies and redress. As we all know that the continent still has a number of countries recovering from conflict or repressive rule, transitional justice is essential for these countries. Furthermore, rooted in the rights to justice, truth, reparations and guarantees of non-recurrence, transitional justice mechanisms constitute a comprehensive approach to combating impunity, ensuring accountability for past human rights violations, redress for victims of violations of human rights and advancing broader institutional reform necessary to address the root causes of strife and conflict.

Your Excellences, Ladies and Gentlemen,

National Human rights Institutions have a major role to play in protecting and promoting human rights and democracy in peaceful times, but their role is not less important in times of conflict. These institutions have been successful in effecting positive change and have assumed a central role in the political life of the state, shaping the discourse on human rights and inspiring new understandings of the responsibilities of the state toward its citizens.

Many NHRIs seek a path between building relationships with governments so that they can collaborate on human rights policy and being independent enough to criticize governments when their human rights programs fall short. You will all agree with me that this is a difficult line to walk.

Your Excellences, Ladies and Gentlemen,

NHRIs are important mechanisms for ensuring accountability of government for the maintenance of human rights in Africa, they close the gap between public authorities and ordinary citizens. Not only are they more accessible to the public than the courts, their procedures are informal, flexible and short, therefore better able than judicial remedies to respond to individual and systemic human rights violations proactively and retrospectively. Since they operate as a horizontal mechanism of accountability, NHRIs are well placed to work closely with state organs to address human rights concerns and other accountability problems.

Your Excellencies, Ladies and Gentlemen

NHRIs in conflict and post-conflict situations are guided by the principles of humanity, impartiality, independence and objectivity as they aim at ensuring the respect and protection of human rights. This calls for consolidation of their role as monitors and promoters of human rights as well as mediators between the parties of conflict who can call on the authorities to initiate, through a participatory approach, deep political and legislative reforms aimed at respecting and guaranteeing human rights and democracy.
These institutions are required to take measures to identify early signs of possible conflict and steps to prevent conflict, including through addressing the violations of human rights; monitoring the situation of human rights in accordance with international and regional human rights standards, documenting and responding to violations regardless of which party in the conflict allegedly committed the relevant acts or omissions, and report thereon to international, regional and national human rights mechanisms;

They are further required to objectively and impartially assess the human rights situation and advise on the respect, promotion and protection of human rights and humanitarian law in conflict and in post-conflict periods. Similarly, national human rights institution must take measures to prevent human rights violations, including against the most vulnerable, marginalized and minority groups in fragile situations. I urge NHRI to prioritize the development of their role in the process of transitional justice, investigation and monitoring both during conflict, post conflict and democratic transition.

**Your Excellences, Ladies and Gentlemen,**

I am happy to note here that EAC NHRI have already taken a lead role in conflict management, through the Network of African National Human Rights Institutions, they have enhanced their capacity in conflict management, resolution and peace building especially conflicts related to electoral processes. A number of them have implemented the Action Plans by putting in place early warning systems, and participation in elections monitoring during the recent elections in Tanzania.

As we are all aware, that the biggest potential conflict triggers in EAC are political; social and economic related such as ethnic divisions; culture of impunity; youth unemployment, poverty and inequitable distribution of resources; and other natural resource related disagreements. It is therefore important to underscore the importance of managing conflict in order to minimize negative consequences. I am persuaded that the collaborations and partnerships between the EAC and NHRI in the region can promote greater peace and respect for human rights in the region.

Furthermore, the EAC has developed common standards geared at conflict management. Some among these are The EAC Treaty which obliges partner states to cooperate to ensure peace and security in the region and the 2006 EAC Regional Strategy on Peace and Security which identifies key strategies for ensuring peace and security. A Peace and Security Unit was established in 2008 under the Department of Political Affairs of the EAC.

I encourage NHRI and CSOs to go further in their intervention of infusing human rights in policies and legislation in the EAC region. You should also consider complementary work such as monitoring the implementation of the provisions of the protocol.
Your Excellences Ladies and Gentlemen

I conclude by reiterating that for a secure and democratic EAC, the rule of law as a concept should be at the very heart of all EAC Member State and the reason is that it is the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

I wish you fruitful deliberations

Thank you for your attention. ASANTE

Chemuta Divine, Chair of NANHRI giving his statement
Good morning!

It is with great privilege and honour that I participate with you today in this 1st meeting of Eastern Africa Community National Human Rights Institutions. This is a noble undertaking and opportunity for the human rights institutions and other human rights actors and practitioners to have a platform such as this to deliberate on critical human rights issues in the region, share experiences and identify areas of mutual interest and collaboration. Eastern Africa countries face similar issues that have a bearing on the achievement of good governance, rule of law, human rights and constitutionalism in general. These common challenges that face countries in the region beg for common and coordinated responses.

As we approach Human Rights Day on 10 December, let me emphasize the key role to be played by National Human Rights Institutions in promoting good governance and protection of human rights in the respective countries. I commend the Network of African National Human Rights Institutions for strategically positioning itself as the continental platform for human rights issues including human rights monitoring, promotion, protection and advocacy. Furthermore and true to one of its key goals, it has continued to establish strategic partnerships for the realization of human rights. The regional
platforms such as the Eastern Africa Community Human Rights Institutions Network will deepen these alliances through the national human rights institutions in the respective countries.

Distinguished guests, Ladies and Gentlemen: The Eastern Africa Community regional integration process is at a high pitch at the moment. This positive and key achievement however has come with some cross border challenges which confronts the national human rights institutions such as crime across borders, terrorism and other transnational crimes all having a bearing on enjoyment of human rights and fundamental freedoms. As we address security challenges, we need to be vigilant to preserve and advance our achievements in the area of good governance, human rights and the rule of law. Ladies and Gentlemen; I acknowledge the important contribution of the national human rights institutions in ensuring that States’ obligations turn into human rights practices on the ground and in advancing the well-being of the women, youth, elderly and other vulnerable segments of our society. Human rights realization means leaving no one behind in defining development objectives, instituting plans for their realization and reaping political, social and economic benefits from such interventions.

Distinguished participants; National human rights institutions operate within their national jurisdiction which may impede activities beyond their borders. This first platform for EAC human rights institutions however marks a new dawn towards a harmonized approach for realization of civil, political, economic, social and cultural rights for the citizens of the respective countries as they identify and interrogate their roles in promoting good governance, constitutionalism, democracy and the rule of law in East Africa. I challenge this gathering to collaboratively explore: What is the role of existing regional mechanisms to further accountability for human rights violations; how do we strengthen partnerships between human rights institutions and civil society organizations; and what are the opportunities to strengthen engagement of national human rights institutions with government and national partners on the achievement of Sustainable Development Goals. The adoption of 17 Sustainable Development Goals (SDGs) in September 2015 provides renewed impetus for fulfilment of human rights. The national human rights institutions together with the CSOs have a unique opportunity and space to advocate for the effective incorporation of SDGs in national and county/local level development plans and budgeting frameworks.

Distinguished guests; As representatives, professionals and experts of the different institutions represented here today to share experiences and learnings that could benefit the region, it is my hope that areas of mutual interest and collaboration will be identified and strategic partnerships with UN Agencies, regional bodies and other development agencies will be enhanced for the ultimate goal of good governance that recognises human rights as the bedrock of truly resilient and stable societies. I am optimistic that the cohort of local, national and international experts present, drawn from government, academia, media, human rights sector and development sector will steer the meeting deliberations to achieve the set agenda as stipulated in the conference theme “Promoting good governance in East Africa: The Role of National Human Rights Institutions”.

I wish to take this opportunity to sincerely thank the KNCHR and the Network of African National Human Rights Institutions for organizing this convening and wish you all fruitful deliberations over the course of the next three days;

Thank You! Asanteni sana!
Abstract

Democracy and the rule of law are often said to be drivers of sustainable development in any society. The rationale being that, although the Constitution\(^4\) guarantees human rights for all, these rights cannot be realized if the state fails to put in place structures, systems, laws and policies that actualize the enjoyment of these rights. It is from this understanding where democracy and rule of law are identified as tools of promoting realization of human rights for all in any state. These tools aim at ensuring that adequate laws and structures of governance are put in place and operationalized in a manner that ensures they work for the people.

This paper highlights some of the best practice initiatives by NHRIs and CSOs towards securing democracy and rule of law. A number of various projects conducted by KNCHR and other CSO has been reviewed to showcase the various strategies, benefits and their ripple effect to promotion of human rights, democracy and rule of law. The main contribution of this paper is to highlight that, democracy and rule of law continues to face threats from various factors such as politics, poor leadership, ignorance and corruption among others. This phenomenon does not only affect the developing countries but also the developed; hence the need to reiterate the importance of collaborative efforts in securing democracy and rule of law as a game changer in attaining sustainable development and a human rights state. The paper further highlights some of the opportunities for NHRIs and CSOs in securing democracy and rule of law and human rights for all.

Introduction

This paper lays out a framework for discussions about the role of NHRIs and CSOs in securing democracy and rule of law under different sub headings which includes; definition of key terms, functions of NHRIs and CSOs, their nexus, best practice case point, emerging opportunities and way forward. This is aimed at ensuring structured discussions that will practically showcase how NHRIs and CSOs can collaborate their efforts for greater advantage in securing democracy, rule of law thus enhance promotion of fundamental freedoms and human rights.

Definition of Terms

What is Democracy?

According to the Black’s law dictionary⁵, democracy is defined as, “a form of government in which the sovereign power resides in and is exercised by the whole body of free citizens, as distinguished from a monarchy, aristocracy, or oligarchy. According to the theory of a pure democracy, every citizen should participate directly in the business of governing, and the legislative assembly should comprise the whole people. But the ultimate lodgment of the sovereignty being the distinguishing feature, the introduction of the representative system does not remove a government from this type. However, a government of the latter kind is sometimes specifically described as a representative democracy.” According to John Calhoun, “Democracy [is] not majority rule: democracy [is] diffusion of power, representation of interests and recognition of minorities.” This view was summarized by Abraham Lincoln as, “Government of the people, by the people, for the people.”

In a nutshell one can define democracy as, a form of government in which the right to make political decisions is exercised directly by the whole body of citizens, acting under procedures of majority rule, usually known as direct democracy. Secondly as a form of government where the citizens exercise right to make political decisions through representatives chosen by and responsible to them, known as representative democracy. Thirdly as a form of government, usually a representative democracy, in which the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee all citizens the enjoyment of certain individual or collective rights which are known as liberal, or constitutional, democracy.

What is Rule of Law?

The rule of law does not have a definite meaning since it is an ambiguous term that means different things in different contexts. However, attempts have been made by different scholars to give an ideal definition of the rule of law. For instance, scholar Rachel Kleinfeld Belton⁶ identifies five common principles that seeks to define rule of law, these are:

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1. A government bound by and ruled by law;

2. Equality before the law;

3. Establishment of law and order;

4. Efficient and predictable application of justice; and

5. Protection of human rights.

UN, the Secretary-General defines the rule of law as:

“A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

This paper will therefore adopt a simpler definition of the rule of law as,

“A principle of governance that requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles for the benefit of all Citizens. This borrows largely from the quote by John Adams, the second president of America who defined rule of law “as a government of laws, not men.”

What is a National Human Rights Institution (NHRI)?

National Human Rights Institutions (NHRIs) refers to institutions that have been established by the National laws to operate in a more independent manner from the rest of the government in exercise of their mandate of ensuring the protection and promotion of human rights. Different countries have NHRIs that either take the form of human rights commission or Ombudsman institutions. Of importance is their mandate and their independence as they play a key role in providing oversight to the government structures, operations and processes in line with their mandates. They also act as a link between the international and domestic human rights systems. Their important role is recognized internationally, including by the UN. NHRIs that comply with the Paris Principles are given special status in the Human Rights Council. Many NHRIs have a mandate to promote the adoption and implementation of international human rights treaties. In addition, their role in the prevention of human rights violations has been increasingly recognized, including in Human Rights

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Council resolutions.\textsuperscript{11}

**What is a Civil Society Organization (CSO)?**

Civil Society Organizations - also known as non-governmental organizations - are critical actors in the advancement of universal values around human rights, good governance, and social development among other spheres. CSO are defined as non-governmental organizations (NGOs), in that they are organizations not affiliated with government, non-profit making and non-violent organizations, which seek to influence the policy of governments and international organizations and/or to complement government services (such as health and education). They have a formal structure, offer services to people other than their members, and are, in most cases, registered with National authorities. NGOs vary hugely in their size, scope of activity and goals. They may operate nationally, or internationally.\textsuperscript{12} Further, the CSOs are grounded on democracy in that they are required to respect the law, rights of individuals, and rights of other groups to express their interests and opinions. Part of what the word “civil” implies is tolerance and the accommodation of pluralism and diversity.

**The Role of NHRI S and CSOs in Securing Democracy and Rule of Law.**

It is notable that NHRI play a critical role in promotion and protection of human rights because of their establishment as part of the Government structures through national legislation and better still their guaranteed independence. This ensures that their oversight function is not compromised by external forces for effective implementation of their mandates. NHRI plays a key role in ensuring that international human rights laws are domesticated at the National level, popularized to the citizenry thorough civic education as well as monitors state compliance in line with international and regional instruments. This enables the NHRI to assume a position of oversight by ensuring that the three organs of Government work towards ensuring a human rights state by; domesticating them, applying them in court cases to create jurisprudence and enforcing them in every day service delivery and governance operations and processes.

Further, NHRI stands out because of they have better resourced institutions which have well defined organizational, power and accountability structures as well as a range of powers which ensure that any barriers to their work is dealt with accordingly including approaching judiciary for interpretation of the legal protections extended to the NHRI where need arises. By virtue of the above advantages, it means that NHRI are expected to play a greater role in ensuring that democratic space is not threatened and that the rule of law forms the basis of all decision made by both state and non-state actors. It is notable that some of the NHRI continue to report successes in their work thus positively informing the discourse of human rights which ensures that both the duty bearers and the claimholders are empowered to understand their rights and responsibilities at any given time. While

other continue to struggle on the ideal strategy to adopt so as to ensure a balance support to the
government of the day and the citizenry.

On the other hand the CSOs plays a critical role in securing democracy and rule of law. This is
largely informed by their flexible organizational structures, diverse areas of expertise and mandates.
The CSOs basic role is to agitate for democracy and rule of law. Often times the dubbed as “good
governance.” The CSOs role is to ensure that the State does not act outside the purview of law
because any democracy needs a well-functioning and authoritative state. But when a country is
emerging from decades of dictatorship, it also needs to find ways to check, monitor, and restrain the
power of political leaders and state officials. They also promote public participation by ensuring that
the citizens are sensitized about their rights, expose the corrupt conduct of public officials and lobby
for good governance reforms, provide shadow reports to the regional and international (UN) bodies
on state’s compliance.

However, it is notable that it is not only the resourceful and well organized who can have their voices
heard. Over time, groups that have historically been oppressed and confined to the margins of society
can organize to assert their rights and defend their interests as well.  

The Nexus between NHRIs and CSOs in securing democracy and rule of law.

NHRIs and CSOs continue to work in countries which are moving from dictatorship, coup de touré,
patronage, institutional corruption, political hegemony and are struggling to march a world class
civilization where they have to be benchmarked with other democracies that have been in existence
for the last five hundred years. Nevertheless, it should be noted that enjoyment of human rights
should not be based to the age of democracy, just like how humanity is not tied to race.

Despite the above challenges, it is notable that these institutions undertake the same work of
ensuring promotion and protection of human rights despite their variance in establishment, resource
availability and structures. It is therefore clear that the NHRIs and CSOs can work jointly to secure
democracy and rule of law and the impact can be even greater if these efforts are well collaborated
under various formalized arrangements such as signing a Memorandum of Understanding (MOU) for
partnership, establishing working groups or networks.

Example of how NHRIs and CSO are working closely to secure Democracy and Rule of law: A case
point of Kenya.

In Kenya the institution that is mandate to promote and protect human rights is the Kenya National
Commission on Human Rights (KNCHR). It is an independent, NHRI established under Article 59
and 59 (4) of the Constitution, 2010 as read together with the Kenya National Commission on Human

Rights Act, 2011. In discharging its functions, the KNCHR also referred to as “the Commission” is required to ensure observance of human rights in all spheres of life in the Republic of Kenya. Moreover, the Commission is required to perform any other function that will assist fulfilment of its mandate.

To this end the Commission has implemented some activities which show case gains made when a NHRI collaborates with CSOs to secure democracy and rule of law notwithstanding challenges that continue to threaten the implementation of the Constitution that has been acclaimed as both progressive and exemplary.

**Gains made in the Civil, Political and Socio-Economic context**

There continues to be instances where the Democracy and rule of law has been threatened despite the Promulgation of the Constitution which ushered in a new legal dispensation. For Example in 2011, former President Mwai Kibaki attempted to appoint the Chief Justice, the Attorney General and the Director of Public Prosecution without due process as had been envisaged under the Constitution. An ensuing uproar spearheaded by civil society and NHRI culminated in court proceedings that challenged the move on Constitutional grounds. Subsequently, the President withdrew the appointments to allow due process envisaged under the Constitution to be followed. The Judicial Service Commission (JSC) interviewed candidates and finally recommended for the President’s appointment, nominees for the positions of Chief Justice and Deputy Chief Justice.

In 2013 both the executive and the parliament passed the Security Laws Amendment Act No.19 of 2014 (SLAA) that had the effect of contravening the bill of rights thus watering down the gains made to the penal by coming into force of the Constitution. The NHRI and CSOs saw this as a well calculated move of amending the bill of rights contrary to the constitutional procedures outlined. For instance, some provisions of that law aimed at interfering with the freedom of the media that that would have muzzled free speech and freedom of information; rights of arrested persons, the principle of fair trial, access to justice right among others. KNCHR and other CSOs moved to file a petition in High court to challenge the Constitutionality of the said law. A 5 bench judge ruled in favour of the KNCHR by finding some clauses as unconstitutional.

Following release of KNCHR report on disappearances and extrajudicial killings, “The Cry of Blood” in 2006. One partner CSO, Independent Medico-Legal Unit (IMLU), a non-government organization working on freedom from torture, moved to file cases at the Eastern Africa Court of Justice and the African Commission due to the failure by state to thoroughly, effectively and impartially investigate, document and redress extrajudicial killings in the country. This has largely contributed to the

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15 Muslims for Human Rights (MUHURI) & 2 others vs Attorney General & 2 others [2011 eKLR].
appreciation of rule of law by Kenyan courts for instance, in one case a Kenyan court courts have upheld the right to life where a father and his son lost their lives while in the hands of the policemen. In 2012 for example, KNCHR filed a petition in the High Court on extrajudicial killing of a father and his son in Kawangware. The court issued judgment in 2014 and found that the two had been extra judicially executed by the police and awarded compensation to the widow of the deceased.\textsuperscript{18}

Further, the recent investigations by KNCHR which brought to light the extra judicial killings and disappearances of young men branded as terrorist suspects is an attempt by Government to violate the principles of rule of law. The report details Human rights abuses in the ongoing crackdown against terrorism\textsuperscript{19}.

Other examples include the KNCHR in collaboration with other CSOs work around monitoring elections and in particular abuse of public resources by State officers and hate speech. For instance in 2003/04 a joint research on wasteful government expenditure was undertaken by KNCHR and Transparency international (TI). The said report documented how state officers were abusing state resources and the net effect to the tax payer who was required to pay more taxes to sustain such wastage. To restore rule of law, the then Minister of Finance who is the current President H.E Uhuru Kenyatta directed that all state officers should surrender their fuel guzzlers and instead replace them with vehicles which had reasonable fuel consumption among other measures.

A recent example that show cases why collaborative efforts between NHRI\textsc{\i}s and CSO is necessary is the Deregistration of some of the civil societies by the Government. The move by Government to target some of the CSO and NGOS under the pretext of funding terrorist activities was a well calculated move to shrink the democratic space. The Government had rushed to deregister and direct freezing of the accounts of Muhuri and HAKI AFRICA (CSOs in the coastal region) without following the outlined legal procedures of air trial. The two CSO\textsc{\i}s moved the High Court in Mombasa to demand for their rights and KNCHR also joined in as a friend of the court in order to give guidance on matters of human rights. The Court ruled in favour of the CSOs by finding that the actions of the Inspector general of police were ultra vires the powers given to him under the Prevention of terrorism Act of 2012 (POTA) and that he had no powers to gazette any entity as those were powers specifically reserved for the Cabinet Secretary. Secondly, that his subsequent action of freezing the accounts was unconstitutional and therefore ordered that the accounts be frozen forthwith.

\textbf{Emerging Opportunities}

The above case points illustrates that there is more that can be done by the NHRI\textsc{\i}s and CSOs in the promotion of human rights. Further, there are the following emerging areas that require more collaborative efforts between the two in order to forestall human rights violation. First is the


extractive sector, which has been hailed as the new economic driver in Africa in the years to come. Nevertheless, based on the past history, some of the developing countries have faced wars and conflicts due to these resources. Often times we all it the curse of natural resources due to wars that are caused by lack of adequate legislative and governance structures in extractive sector, hence the need for the various human rights actors to be keen to ensure adequate laws and structures are put in place in order to safeguard rights of the communities, the government as well as business.

Second is the area of developing communication technologies and the link with terrorism. Whereas terrorism has and still remains a global scourge, the rate at which established democracies continue to use it as an excuse to violate human rights cannot be wished away. However, there is need for sustained collaborative efforts by the NHRIs, CSOs and the government to ensure that the fight against terror is based on the respect of all human rights principles and to avoid creating instances that can lead to more crisis.

The third area is the area of developing technologies in food security debate. NHRIs and CSOs have an opportunity to contribute to the ongoing debate on introduction of genetically modified organisms (GMOs) the merits and demerit to realization of human rights among other concerns. This is due to their mandates and their acquired space to speak for and educate the citizen on various issues that affect them.

Way Forward

In conclusion both the NHRIs and CSOs have their work clearly cut out in ensuring promotion and protection of human rights for all, by ensuring among other things that the democratic space fought for many years is not taken away by retrogressive legislations, policy documents or through actions of some leaders who are head bent on violating the principles of Constitutionalism. They should continue to monitor the governance structures, conduct of the state officers, review laws that perpetuate human rights violations, scrutinize government operations in order to ensure that the rule of law is upheld at all times and so is democracy.

References


9. Muslims for Human Rights (MUHURI) & 2 others vs Attorney General & 2 others [2011 eKLR].


CONSTITUTIONS, CONSTITUTIONALISM, HUMAN AND PEOPLES’ RIGHTS AND DUTIES
INSTITUTIONS IN AFRICA IN THE 21ST CENTURY

*By Professor Shadrack B. O. Gutto

Introductory Remarks

This year marks 33 years since I was forced into exile from my ancestral home, Kenya. I was at the time a lecturer at the University of Nairobi in constitutional law and government, among other subjects. The theme of this conference is therefore very close to my heart, scholarship and real life experiences.

As you all know 1982 escalated the repressiveness of the governing regime by, amongst others, declaring Kenya a de jure one-party state with the adoption of the Constitution of Kenya (Amendment) Act No. 7 and amendments to the elections laws. It was also the year when Judge Sachdeva in his ruling in the case of Willy Mutunga v R stated that “some subversive elements have unfortunately crept into the University and the state cannot simply ignore them”. A year before that another High Court judge dismissed the case of Gutto and Four Others v Ng’weno and Three Others in which 5 lecturers at the UoN sought to challenge the concocted security related media reports that we were importing military arms from some socialist country and storing them at the University with the intention of carrying out an insurrection. Some of us had our passports impounded to prevent us from travelling outside the country, even for scientific interactions. The rest is history.

I take this presentation as an academic and scholarly reflective critique of the role and significance of constitutionalised and/or legislated national human rights institutions (NHRIs) in Africa, with

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20 Prepared for and presented at the Regional Conference for Eastern Africa National Human Rights Institutions on the Theme: Promoting Good Governance in East Africa – the Role of NHRIs, December 7 – 9, 2015, Nairobi Kenya. The author wishes to indicate up-front that in its present form the presentation is not fully written as a publishable research paper for academic or scholarly publication that is ready for peer review. It will be developed for the latter within two weeks from the 10th of December 2015. The reason for this is the late provision of the intended product and the required length and format.

specific focus on East Africa but in the context of broader Africa’s and global human and peoples’ rights landscape.

The analysis deals with a reflection on the different generations and models of constitutions and how they situate official NHRI s. It should be noted however that in some countries, like Kenya, there are non-state civil society human rights activists that are not the subject of this conference. They are nonetheless essential partners of the NHRI s within the broader paradigm of enhancing constitutionalism, responsible and accountable governance.

The presentation also examines the differing scope and paradigms of human and peoples’ rights and duties followed in Eastern Africa countries and the capacity and competence of the institutions to impact meaningfully in promoting and protecting the rights and duties of citizens and peoples in general.

Constitutions, Constitutionalism & the Location of National Human and Peoples Rights and Duties Institutions

- Right from the start, I wish to point out that most NHRI s in Africa have short comers in projecting themselves within the African paradigm and epistemology of the co-existence of individual and collective rights and duties/responsibilities as reflected in the African Charter of Human and People’s Rights (ACHPR) that was adopted by the OAU Summit of Heads of State and Government in Nairobi, Kenya in 1981. The ACHPR’s Maputo Protocol on the Rights of Women in Africa (2003) sets very high standards that go beyond the existing international instruments.

- The reason why many NHRI s fail to push the boundaries of human rights is either because the national constitutional and legislative bases of the institutions are limited in scope or the national institutions themselves are deficient in their conceptualisation of rights, freedoms and duties that require broad national, regional and international perspectives. For example, many regional and international human rights instruments require state parties to report regularly on their implementation. NHRI s can play a major role in working with other relevant organs of state to ensure credible compliance. Similarly, most states committed themselves to develop and implement Nation Action Plans for the Promotion and Protection of Human Rights (NAPs) following the World Conference on Human Rights that was held in Vienna in 1993. Such undertakings place responsibility on the NHRI s but many of them appear to surrender such roles to the mainstream executive arms of government that are moribund, at best.

- Another important dimension is that in the 21st century, human and peoples’ rights are
interrelated, interconnected and interdependence with international humanitarian law and international criminal justice system. This reality requires that NHRIs should always work collaboratively with other institutions of justice. Many aspects of gross human rights abuses also constitute serious crimes and transgressions of humanitarian law.

- Back to constitutions and constitutionalism. Towards the close of the 20th century and the beginning of the 21st century, many African countries moved forward to constructing what should be regarded to 2nd and 3rd generation constitutions. What is significant is that the new constitutions were and are not products of negotiations, technical drafting and adoption or promulgation, like the independence 1st generation ones. The new constitutions were and are made through extensive citizen participation and therefore ownership. Uganda’s Constitution of 1995, South Africa’s 1996 Constitution and Kenya’s Constitution of 2010 are examples. In the Kenyan case, the Citizen’s Coalition for Constitutional Change (4 Cs) and its struggle under the slogan: Kenya Tuitakayo – Katiba Mpya (The Kenya We Want – New Constitution) is written in the annals of history. Tanzania is going through such a process, even though with less vigour and depth as the Kenyan experience.

- The main features of the new people-driven constitution making processes are that they have expanded the scope of the rights, freedoms and duties/responsibilities beyond the limited civil and political rights in the independence constitutions; Social, economic and cultural rights are enshrined; environmental rights are included; they have created norms and standards to deepen the role of women in society; and, importantly, they have entrenched institutions for the promotion and protection of the rights and freedoms, the struggle against the cancer of corruption, in the public and private spheres – the so-called vertical and horizontal application – and some have expressly linked the constitutions to international law.

- Constitutions remain supreme or basic laws of countries on paper only unless they are implemented through progressive and creative interpretation by the judiciary, other institutions of governance such the NHRIs and eminent legal scholars. That is, giving meaning and life to the written words as they are applied to the multiple facts of human interactions on the ground. This is using the constitutions to build constitutionalism which, among other things, include the incorporation of shared common values and the building of human rights culture and the rule of law in society. A few of the new constitutions, such as that of South Africa, have moved away from the limited statist approaches to human rights that only deal with state violations and not holistic approaches that include non-state

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actors who violate and abuse the rights of individuals and communities – private individuals, corporations and other legal entities. Human and people’s rights abuses and violations require corrective action, irrespective of who the perpetrator may be. This does not mean that abuse of state power to undermine rights is reduced.

- The critical questions we need to ask and interrogate are: the powers accorded to NHRIs in the constitutions and other legislative frameworks governing them; what is the degree of independence that the NHRIs have; how are the national human right commissioners appointed and what security of tenure do they enjoy; are these institutions adequately resourced or are they made to scrounge around and queue for donations and “aid” from foreign funders, like many African governments do; importantly, what are their promotion and protection mandats; do they make binding decisions or only research, hold public hearings and produce reports with recommendations; and what remedial measures do they take for the victims and survivors of human and people's rights abuses and violations? Here, the NHRIs in East Africa can learn a lot from Ghana’s Commission on Human Rights and Administrative Justice. Even though its mandate is broader, the important point here is that it is like a tribunal and its decisions are binding and enforceable. Its decisions are also reported, similar to law reports of court decisions.

- Related to these pertinent questions is whether the NHRIs can and are capacitated to litigate in courts of law and seek compliance to the constitutionalised rights, freedoms and duties. Again, here I point to the Constitution of the Republic of South Africa 1996 that provides for enforcement of the Bill of Rights through the courts by individuals, any person acting on behalf of another person who is not able to do so themselves, any member of an association or group acting on behalf of its members, anyone acting in the public interest and an association acting on behalf of its members (section 38 of the Constitution). This has opened the doors for social activism through the courts and empowered the SAHRC with authority to litigate on human rights issues on its own or to join litigants in friends of court (amici curiae) interventions. However, limited resourcing make such interventions rather rare.

- East Africa in a region with serious challenges of individual human and collective peoples’ rights and freedoms abuses. It is fraught with, among others: elections related human rights violations as a result of weak elections management and manipulation by politicians and their political parties and other formations; human rights violations caused by conflicts over access to land, water and other resources; rights violations caused by the outpour of refugees and those trapped in IDPs camps because of political conflicts such as those from

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Burundi at present – caused by the imposed and unconstitutional 3rd term by President Pierre Nkurunziza – and in Kenya from the elections disputes 2007-2008; and, of course, human rights perpetrated in the armed conflicts in Kenya and Somalia (El Shebaab) and in South Sudan (internally and between it and Sudan). The question is what are the Eastern Africa NHRIIs doing about all these and other human and peoples’ rights problems nationally and regionally?
THE ROLE OF THE INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (ICC)

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Abstract

National human rights institutions (NHRIs) have increasingly been recognised for the role that they can play in advancing the promotion and protection of human rights. In addition, during the past two decades, NHRI numbers have grown substantially. Today more than 100 NHRI s exist with 72 accredited with the A status, that is, are compliant with the Principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles). The Paris Principles relate to the status and functioning of NHRI s and remain today the key international instrument that defines the role, composition, status and functions of national institutions thereby creating the minimum international standards that measure the legitimacy of NHRI s and determine their accreditation. Accreditation is crucial as it attests to the credibility and legitimacy of the NHRI and indicates the degree to which the NHRI can engage substantively with the international and regional human rights mechanisms and in turn influence the domestic human rights discourse to bring about positive change in the realisation of human rights. One of the key strengths that characterise NHRI s is independence.

An NHRI’s ability to operate without influence from not only the State but also other stakeholders is crucial for its credibility and its level of accountability. NHRI s are human rights defenders, not just against the State but also against practices and systems that do not guarantee adequate promotion and protection of human rights. NHRI s complement the role of other institutions supporting democracy in ensuring that human rights issues not only remain high within the political discourse in a society but that systems are put in place to ensure that the people enjoy the full realisation of their rights.

Chairperson of the South African Human Rights Commission and the Chairperson of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
Through their global alliance, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), NHRIs are finding a definitive space within the international human rights architecture to enhance the promotion and protection of human rights including by cooperating with and promoting the role of civil society organisations.

This paper sets out the role that the ICC can play in securing democracy and the rule of law through cooperating with and promoting the role of the civil society. The paper begins by providing a background on the ICC and the role it plays as the global association of national human rights institutions (NHRIs). The paper then discusses the ICC’s role in sharing experiences between NHRIs and civil society organisations on the promotion of democracy and the rule of law through the application of the Paris Principles and how this role may contribute to mitigating the shrinking civil society space that is occurring in many countries. Finally the paper highlights some of the challenges that are currently experienced by the ICC and that impact on its relationship with civil society before offering some conclusions.

Background: The ICC

In 1991, several representatives of national human rights institutions (NHRIs) gathered at a workshop in Paris and drafted a set of principles which would provide the minimum standards under which NHRIs could optimally promote and protect human rights. In 1993 the United Nations General Assembly (GA) endorsed these principles as the Principles relating to the status of national institutions for the promotion and protection of human rights, commonly referred to as the Paris Principles. The Paris Principles provide a broad normative framework for the status, structure, mandate, composition, power and methods of operation of the principal domestic human rights mechanism. The Paris Principles remain the key international instrument that measure the legitimacy of NHRIs and determine their accreditation. NHRI accreditation is crucial as it attests to the credibility and legitimacy of the NHRI and indicates the degree to which the NHRI can engage substantively with the international and regional human rights mechanisms. Accreditation is undertaken by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights or ICC under the auspices of the Office of the United Nations High Commissioner for Human Rights (OHCHR) which also serves as the ICC’s secretariat.

The ICC is the global alliance of NHRIs established in 1993 to promote and strengthen NHRIs to be in compliance with the Paris Principles, and provides leadership in the promotion and protection of human rights. Initially a loose network of NHRIs the ICC is now a legal association under Swiss law and has grown both in membership and status. The ICC currently has over one hundred (100) members with seventy-two (72) members being in full compliance with the Paris Principles, that

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29The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7–9 October 1991. They were adopted by the United Nations Human Rights Commission (Resolution 1992/54 of 1992) and by the UN General Assembly through resolution 48/134 of 1993
is have been through the accreditation process and achieved the “A” status. The ICC coordinates its activities through a Bureau which consists of sixteen representatives from the four geographical groupings of NHRIs, that is Africa, the Americas, Asia Pacific and Europe. These four geographical groupings are referred to as the Regional Coordinating Committees which represent and support NHRIs at the regional level- Network of African NHRIs (NANHRI), Network of the NHRIs of the Americas (RED), Asia Pacific Forum for NHRIs and the European Network of NHRIs (ENNHRI) respectively. A representative from the regional network known as the Regional Coordinator acts as the regional focal point on the Bureau. The regions are responsible for nominating members to the ICC’s Bureau and Sub-Committees. They are also responsible for nominating the position of ICC Chairperson and Secretary which rotate through the four regions every three years.

In addition to accrediting NHRIs to ascertain their compliance with the Paris Principles, the ICC coordinates the activities of Paris Principles-compliant NHRIs at an international level and promotes the establishment and strengthening of NHRIs in conformity with the Paris Principles in order to strengthen human rights domestically. The ICC also holds an annual General meeting and international conferences to strengthen cooperation and share good practice between NHRIs. In sum, the ICC supports NHRIs in fulfilling the “bridging” role that they play between the State and other actors with respect to the application of international human rights norms and standards to ensure the effective promotion and protection of human rights.

Through its advocacy efforts on behalf of NHRIs, the ICC is recognised at a global level as representing the collective voice of NHRIs that promotes and conveys the crucial role that is carried out by NHRIs at a domestic level. The ICC is responsible for ensuring that the important role of NHRIs is recognised at an international level, that recognition is granted at the international level to NHRIs through increased participation rights within the UN human rights mechanisms and processes. This is vital as NHRIs are distinct from CSOs in that they derive their mandates from the State and enjoy an independent status that is guaranteed by either the constitution or legislation. In addition to this, the requirement that NHRIs must comply with the Paris Principles in order to be recognised at the international level, strengthens NHRIs' legitimacy at a domestic level. In terms of their international recognition, NHRIs are required to advise the State on the implementation of international human rights norms and standards and in turn provide their own independents to international and regional bodies on the situation of human rights in a country and the progress or lack thereof of the adherence to and implementation of a State’s international human rights treaty body obligations. The ICC plays an important role in ensuring that the role of NHRIs in carrying out their international responsibilities and duties remains high on the global agenda.

During the past decade through the advocacy work of the ICC, its regional bodies and members, NHRIs have become increasingly recognised as important role-players at an international level alongside State Parties and CSOs. This increased recognition has provided NHRIs with more opportunities and
spaces at the international level to actively contribute to the promotion and protection of human rights. This has been achieved through opportunities for NHRI to provide independent information gathered at a domestic level in relation to a State’s conduct and progress in the promotion and protection of human rights. For example, A-status NHRI may participate and speak before the Human Rights Council and in the treaty body processes in their independent capacity distinct from the States and CSOs. In the latter half of 2015, the General Assembly’s Third Committee concluded negotiations on an NHRI resolution which will be formally adopted in mid-December 2015 by the General Assembly. This groundbreaking resolution which was co-sponsored by ninety States actively encourages UN processes and mechanisms to enhance the participation of NHRI by creating modalities that will allow for their contribution.

The ICC also enjoys the support of the NGO sector for increased participation rights within the UN system. For example, the well recognised NGO, International Service for Human Rights which has offices in New York, has worked closely alongside the ICC for a number of years in advocating for the formal recognition and participation rights for NHRI within relevant UN processes and mechanisms that are based in New York.

The Statutory and Formal Basis for NHRI Engagement with Civil Society Organisations

Through its accreditation process, the ICC ensures that NHRI engage with civil society thereby supporting the role of civil society in securing democracy and respect for the rule of law. One of the ways in which this is achieved is through engaging, cooperating and working with civil society organisations. It is thus not accidental that NHRI and CSO often work closely together. In order to comply with the Paris Principles, NHRI are required to cooperate constructively and consult with CSO, in the course and scope of their activities.

The Paris Principles recognise at the outset, the importance of the expertise and knowledge that lies within CSO to the work of NHRI. The section on composition and guarantees of independence and pluralism states that:

“Composition and guarantees of independence and pluralism

1. 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 protection and promotion 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;\[33\]

[Own emphasis]

The Paris Principles go further to require that one of the criteria that an NHRI must meet to ensure that it operates effectively is by working with civil society organisations. It is expressly stated under the section on methods of operation that:

**“Methods of operation**

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

(...)  

(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.”\[34\]

[Own emphasis]

Also in terms of the Rules of the Sub-Committee on Accreditation (SCA), the SCA may develop General Observations which are then adopted by the ICC Bureau. These General Observations serve as interpretative tools of the Paris Principles and provide additional support for the requirement that NHRI work with CSOs. In the ICC's General Observation 1.4 on “Interaction with the International Human Rights System”, it is stated that:

“In considering their engagement with the international human rights system, National Institutions are encouraged to actively engage with the Office of the United Nations High Commissioner for Human Rights (OHCHR), the ICC, their Regional NHRI Coordinating Committee and other National Institutions, as well as international and national NGOs and civil society organizations.”\[35\]

Further in the ICC’s General Observation 1.5 on “Cooperation with other human rights bodies”, it is stated that:

\[33\] http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx
\[34\] Ibid
“Regular and constructive engagement with all relevant stakeholders is essential for NHRI to effectively fulfil their mandates. NHRI should develop, formalize and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including sub-national statutory human rights institutions, thematic institutions, as well as civil society and non-governmental organizations.”

The General Observation goes on to provide the justification for such cooperation as being necessary to ensure the full realisation of human rights within the State. The General Observation correctly points out that “the effectiveness of an NHRI in implementing its mandate to protect and promote human rights is largely dependent upon the quality of its working relationships with other national democratic institutions such as: government departments; judicial bodies; lawyers’ organizations; non-governmental organizations; the media; and other civil society associations.”

This is because it is only through broad consultations and effective working relationships with all key stakeholders that NHRI will be in a position to fully appreciate the breadth and depth of human rights issues on the ground, enhance resource allocation by pooling resources and reduces potential overlap and duplication of activities that are undertaken.

Secondly, NHRI by virtue of their unique characteristic of being independent State institutions distinct from both State bodies and civil society often places them in the enviable position of being able to act as a convenor and bridge between these actors thereby ensuring that information is shared and human rights challenges are discussed and where possible acknowledged and addressed by the State through publicly making commitments to which they may be held accountable. In turn, CSOs with their characteristic grassroots presence and wider networks provide NHRI with a means of accessing vulnerable and marginalised groups at the geographic, political or social levels. Fourthly, CSOs and other bodies provide a large pool of specialised human rights expertise from where NHRI can draw information and advice in order to carry out their functions more effectively and even in some cases positively influence programming and policy design.

At the time of the formal accreditation and re-accreditation of an NHRI, the SCA requires specific information to ascertain the extent to which an NHRI is compliant with the stipulation in the Paris Principles that NHRI develop relationships with CSOs. The SCA requests specific information from NHRI on the following matters:

1. Whether the provisions in the NHRI’s founding law formalize relationships between it and civil society;

2. How the NHRI has developed relationships with NGOs in practice;

3. Which civil society groups the NHRI cooperates with (e.g., NGOs, trade
unions, professional organizations, individuals or organizations espousing trends in philosophical or religious thought, universities and qualified experts, parliament, and government departments); and,

4. How frequent and what type of interaction the NHRI has with NGOs (e.g., workshops, meetings, joint projects, through complaints handling).”

The SCA also invites CSOs to make submissions about the functioning of the NHRI under review and the relationship that the CSOs have with the NHRI domestically. While this process is still developing it has been lauded for enhancing the transparency of the ICC’s accreditation process.

II/C’s Cooperation with Civil Society Organisations

Beyond setting the minimum standards for NHRI engagement with CSOs, the ICC involves CSOs in its processes and continually draws from expertise outside its membership. The ICC Statute provides under Article 9 that:

“The ICC may liaise with other human rights institutions including the International Ombudsman Institute and non-governmental organizations. The ICC Bureau may decide to grant such organizations observer status at any meetings or workshops of the ICC or the ICC Bureau.”

Article 38 further stipulates that:

“(…) The Chairperson, after consultation with ICC members, may invite NHRIIs who are not members of the ICC and any other person or institution to participate in the work of the ICC as an observer.”

[Own emphasis]

In addition, the ICC’s current Strategic Plan (2014-2016) in its second strategic goal identifies CSOs as key external stakeholders that the ICC must cooperate with in order to meet its strategic priorities. The ICC also regularly invites CSO representatives as panellists at the thematic sessions of the annual General Meetings and also at the thematic triennial conferences. In fact the ICC’s Rules of Procedures for Conferences provides for an NGO Forum to be held prior to the ICC Conference from which an NGO declaration that may inform the Conference’s deliberations and outcome document is adopted. Furthermore the ICC hosts workshops (including side-events) and trainings in partnership with CSOs. The presence of civil society within ICC’s processes has ensured that the value of civil

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38 ICC (2009), Template: Statement of Compliance with the Paris Principles, Section 8
40 ICC Statutes, Op cit
41 Strategic Goal 2: Build partnerships and engage external stakeholders
society engagement is continually highlighted and provides a good example of the relationship that NHRIs should have at the domestic level.\textsuperscript{42} \textsuperscript{43}

ICC's Role in Securing Democracy through Promoting the Role of Civil Society Organisations

The above overview of the relationship between the ICC (and NHRIs) and CSOs provides the basis for the discussion on the role that ICC can play in securing democracy and the rule of law through promoting the role of civil society organisations. According to the United Nations the rule of law refers to:

"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."\textsuperscript{44}

Therefore, human rights, democracy and the rule of law are all interdependent and mutually reinforcing. Despite this, the promotion of the achievement of these principles have until recently been running mostly in parallel trajectories. Increasingly, more attention is being given to the need to integrate human rights, democracy and the rule of law and the manner in which this can be done effectively in an increasingly complex world in which a varied number of actors are being recognised as integral to their achievement.

NHRIs' core business is to ensure the promotion and protection of human rights. In carrying out this work, it is clear that the achievement of democracy and the establishment and maintenance of the rule of law are all interconnected with and inseparable from human rights. The challenge for NHRIs is determining the manner in which they will give effect to their own individual mandates including promoting the role that civil society plays in securing human rights, democracy and the rule of law.

The 2008 Nairobi Declaration on Administration of Justice adopted at the ninth ICC International Conference of National Human Rights Institutions sets out the particular role that NHRIs can play in ensuring that States adhere to certain standards to safeguard the rule of law and to ensure just administration of justice. The Nairobi Declaration recognized "the fundamental importance which the rule of law and administration of justice has in ensuring the promotion and protection of human rights."\textsuperscript{45}

\textsuperscript{43} See also APF (1999), The Kandy Programme of Action: Cooperation between National Institutions and Non-Governmental Organisations http://nhri.chhr.org/EN/Regional/AsiaPacific/Workshops/Kandy%20Program.pdf accessed 26/11/2016 10:07
\textsuperscript{44} http://www.un.org/en/ruleoflaw/ accessed 26/11/2015 11:10 am
\textsuperscript{45} The Nairobi Declaration adopted at the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi,
While the role that NHRIs can play in this context is clearly defined, one of the current challenges in securing democracy and the rule of law is that the civic space is shrinking globally. Restrictive legislation being enacted in many places around the globe and rising cases of reprisals are raising concerns about the future of effective promotion and protection of human rights at all levels. States bear the primary responsibility of safeguarding human rights for all, but ensuring accountability requires a vibrant civil society with strong organisations that can operate freely and openly.

NHRIs when interacting at the international level including through the ICC can be a valuable resource for CSOs. The ICC can serve as a bridge between CSOs and the international human rights protection mechanisms. The ICC can raise concerns about reprisals faced by CSOs as human rights defenders and may call for accountability at the international level where a State fails to meet its international human rights obligations. The ICC and NHRIs in full compliance with the Paris Principles have standing before a number of UN mechanisms and processes. These include the Human Rights Council (HRC) and its processes notably the Universal Periodic Review (UPR), human rights treaty bodies and special procedures mandate holders. The ICC may present reports and documentation including on behalf of NHRIs to these mechanisms and processes. The importance of such reports lies in their independence and credibility. As a result, the ICC can provide valuable, expertise-based and authoritative information to inform the basis upon which decisions are taken at the international level including with respect to the protection of the civic space.

Crucially, the latest 2015 General Assembly NHRI resolution once adopted will have an enormous impact on the space that will become available to the ICC and NHRIs to engage with international human rights mechanisms and processes. The resolution “underlines the value of national human rights institutions, established and operating in accordance with the Paris Principles, in the continued monitoring of existing legislation and in consistently informing the State about the impact of such legislation on the activities of human rights defenders, including by making relevant and concrete recommendations.” The resolution further “recognises the role that national human rights institutions can play in preventing and addressing cases of reprisals as part of supporting the cooperation between their Governments and the United Nations in the promotion of human rights, including by contributing to follow-up actions, as appropriate, to recommendations made by international human rights mechanisms.” It goes on further to encourage “United Nations human rights mechanisms and relevant United Nations agencies, funds and programmes to work, within their respective mandates, with Member States and national institutions in the promotion and protection of human rights with respect to, inter alia, projects in the area of good governance and the rule of law.”

47 See paragraphs 15-19 http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.49%01%02%03&referer=/english%01%02%03&Lang=E accessed 26/11/2015 03:20pm
48 http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.49%01%02%03&referer=/english%01%02%03&Lang=E accessed 26/11/2015 03:20pm
49 Ibid
50 Ibid paragraph 19
Similarly, NHRIs too may need to draw on the protection that CSOs may provide. In her fifth Report on the situation of human rights defenders the former Special Rapporteur on the situation of human rights defenders pointed out that NHRIs in compliance with the Paris Principles can also be considered as human rights defenders.\(^5\) For that reason, where NHRIs face threats or reprisals for discharging their mandates, they too should be able to count on the support of CSOs to bring attention to their plight and CSOs are encouraged to do so.\(^5^2\) Such was the case of the Human Rights Commission of the Maldives whose Commissioners were charged with high treason in September 2014 following their submission of the NHRI report to the Universal Periodic Review (UPR) mechanism when their State came under review. The reprisal they faced was brought to the world’s attention by the ICC, the Asia Pacific Forum for NHRIs and several NGOs.\(^5\) There was also an incident in Malawi in 2012 when the then Chairperson of the Malawi Human Rights Commission, John Kapito was arrested on spurious grounds whilst boarding an aircraft to attend UN meetings in Geneva.\(^5^4\) In its statements to the UN human rights mechanisms and processes, the ICC continually highlights the need for States to address reprisals.

One of the core functions of the ICC is to promote the establishment and strengthening of NHRIs in conformity with the Paris Principles\(^5\) with the key activity being accreditation. In meeting this function, the ICC assists NHRIs to reinforce the rule of law in various ways. Paris Principle 3 (b) requires that NHRIs “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.”\(^5^6\) This requires that NHRIs monitor State practices related to commitments to international human rights norms and standards. It further requires that NHRIs provide opinions and proposals on legislation and policies to ensure that these comply with international human rights norms and standards. The ICC may thus call upon States to ensure that legislation where enacted with respect to CSOs facilitates an enabling environment for the human rights work undertaken by CSOs.

Human rights, democracy, the rule of law are also inextricably linked to sustainable development. The implementation process of the recently adopted 2030 Agenda for Sustainable Development\(^5\) including the 17 sustainable development goals provides another area where the ICC can support the role of CSOs. In particular, within the business and human rights field the growth of the extractive industries sector in natural resource exploitation in developing countries has been flagged as one of the areas that poses great risks and opportunities.


\(^{52}\) A/HRC/25/55, ibid.


\(^{55}\) ICC Statutes, Article 7

\(^{56}\) Paris Principles op cit


ADV. MABELE LOURENCE MUSHWANA
While extractive industries have the potential of generating large amounts of funds to support sustainable development, extractive activities usually occur in areas largely inhabited by poor, vulnerable and often marginalised communities especially indigenous peoples and often leave many such communities adversely affected. 58 Often civil society actors defending the rights of those affected by the activities of business within the extractive sector become the targets by both the businesses and the State.59 In his first report to the Human Rights Council, the current Special Rapporteur on the situation of human rights defenders, Michel Forst, pointed out that human rights defenders working in the areas of business and human rights, economic, social and cultural rights and minority rights were the most vulnerable to threats60 including limitations on the space within which they operate.

At its twelfth international conference held in October 2015, the ICC affirmed that the SDGs will not only be relevant to all right-holders including NGOs and civil society but strongly reaffirmed that civil society had an important role to play in contributing to the realisation of the 2030 Agenda and that this reaffirmation opened up opportunities for collaboration, partnership and synergies, to ensure that civil society fully participated in monitoring and implementation of the 2030 Agenda.61 This presents an important area for collaboration between the ICC and CSOs not only in terms of monitoring and implementation but also in terms of the possibility of the ICC providing an avenue, including through both its working groups on Business and Human Rights and that of Sustainable Development Goals, to bring attention to the international human rights system those human rights defenders that may be under threat or are facing reprisals.

On another front, the ICC’s tri-partite partnership with the United Nations Development Programme (UNDP) and OHCHR provides an opportunity for the ICC (and NHRI s) to promote CSOs’ role in advancing human rights. UNDP, OHCHR and the ICC concluded the tripartite partnership framework agreement in 2011. The goal of the partnership is to strengthen cooperation to enhance coordination and the leveraging of knowledge, expertise and capacity amongst the partners. The key objectives of the partnership are to:

(i) Facilitate and support engagement on key thematic issues towards strengthening the work of National Human Rights Institutions;

(ii) Strengthen and support regional networks through joint capacity building activities and exchange of knowledge and expertise;

(iii) Engage and support information sharing and knowledge management at the national, regional and global levels between and within NHRI s; and

58 UNDP (2012) UNDP Strategy on Civil Society and Civic Engagement p 6
Facilitate and support the engagement between United Nations agencies and NHRIs, in particular drawing on their national human rights expertise, as appropriate.

The importance of this tripartite partnership within the context of human rights, good governance and the rule of law is also highlighted in the 2015 General Assembly NHRI resolution which in its paragraph nineteen encourages:

“all United Nations human rights mechanisms and relevant United Nations agencies, funds and programmes to work, within their respective mandates, with Member States and national institutions in the promotion and protection of human rights with respect to, inter alia, projects in the area of good governance and the rule of law, and in this regard welcomes the efforts made by the High Commissioner to develop partnerships in support of national institutions, including the tripartite partnership between the United Nations Development Programme, the Office of the United Nations High Commissioner for Human Rights and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, and in this respect encourages all United Nations human rights mechanisms and relevant United Nations agencies, funds and programmes to enhance their interaction with national human rights institutions, including facilitating their access to relevant information and documentation.”

Both UN agencies have well-established relationships with CSOs at the international, regional and national levels. The ICC too has a long-standing and productive working relationship with CSOs including at the regional level through the Regional Coordinating Committees. However, these interactions occur without locating synergies among the four actors. It would be worth exploring the possibilities that the tripartite partnership may have for developing common strategies for engagement with CSOs in the promotion and protection of human rights.

Current Challenges Facing the ICC

While the ICC has grown immensely in size since its creation in 1993 and has earned its rightful place in the international human rights architecture, it faces numerous challenges. The opportunities presented by building partnerships with CSOs are important and cannot be understated. The reality however, and as with those challenges faced by NHRIs, the ICC too is limited in its capacity to fully engage substantively with some of the opportunities. Currently, the ICC relies almost wholly on membership fees to undertake most of its activities and the accreditation process on in-kind donations from OHCHR and individual NHRIs. Further the ICC has only two full-time staff members serving over 100 members with additional limited support from the NHRI that hosts and supports the ICC’s Chairperson. The ICC’s capacity limitations in turn hamper the extent to which the ICC can for example provide direct support to an NHRI in need, under threat or those working in conflict


*ADV. MABELE LOURENCE MUSHWANA*
situations and by extension other human rights defenders.

The ICC’s hallmark is its peer review accreditation process. Both the credibility of the ICC and NHRI’s relies heavily on the extent to which this process is deemed to effectively measure an NHRI’s compliance with the Paris Principles. Given the resource challenges and the increase in the demands for an enhanced accreditation process, the ICC finds itself in a difficult situation to meet the expectations vested on the ICC’s SCA and to balance this against its resource –constrained reality. In addition the ICC encourages submission of CSO reports when an NHRI is being reviewed. However this also requires a significant degree of investment in assessing the CSOs’ credibility and adds to the strain of meeting the requirement for transparency that places demands on already limited resources.

Conclusion

NHRIs and many CSOs share a common goal of advancing the promotion and protection of human rights though each remain a distinct actor with specific roles to play. NHRIs established in accordance with the Paris Principles, are independent State institutions with constitutional or legislative mandates which enables them to fill the bridging role between the State and other actors with respect to the application of international human rights norms and standards. NHRIs are themselves human rights defenders and are thus well placed to fill the protection gaps that may exist with respect to those undertaking similar activities to advance the promotion and protection of human rights. Through the global alliance, the ICC, Paris Principles-compliant NHRIs are not only able to work at the domestic level, they are also able to directly influence the human rights agenda at an international level and bring international attention to the challenges faced by CSOs at the domestic level. Building partnerships with CSOs that is underpinned by credibility and transparency serves to enhance the human rights system at all levels and will augment the efforts required to secure democracy and the rule of law.
“MODIFIED-POWER POINT PRESENTATION”

NHRIS ENGAGEMENT WITH REGIONAL HUMAN RIGHTS MECHANISMS: PROMOTING GOOD GOVERNANCE IN E. AFRICA

*Florence Butegwa, Independent Expert

Introduction

- Outline the linkages between the NHRIs and global human rights institutions.
- Focus on the interactions between the NHRIs and the Africa regional human rights system;
- Propose some questions for discussion at this conference and in other forums

Nature of NHRIs

- NHRIs - rooted in their national founding legislations
- Part of a network of institutions that support the domestic implementation of the international and regional human rights obligations of the state.

UN Human Rights System and NHRIs

- Various global instruments encourage UN member states to set up NHRIs in accordance with the Paris Principles
- Role – promote, protect and monitor implementation of human rights treaties at national level
- Support from UN to facilitate compliance
- NHRIs and continental h/rts system

Normative frameworks

- African Court of Justice and Human Rights (& predecessors)
- African Committee of Experts on the Rights and Welfare of the African Child
- African Commission on Human and Peoples’ Rights
- AU Commission
- NHRI and the East Africa H/Rt System
The fundamental principles that govern the achievement of the objectives of the EAC include promotion and protection of human rights.

The observance of human rights is a condition precedent to joining the EAC (Article 3(3) of the EAC Treaty).

But no institutional mechanism for handling h/rts issues

E. African court has no jurisdiction on human rights

Looking forward to the NHRI s from the region engaging on this issue

CSO engagement

- Critical and proactive engagement by CSOs at global, regional and national levels
- Creation of human rights standards, and the effort to encourage ratifications; and periodic reporting
- Monitoring through advocacy and constructive engagement at the national level
- Initiating communications at the ACHPR or the African Court
- A very proactive and close engagement with the ACHPR in its promotional activities and capacity building
- Engagement with the AU Summits, and AU Commission not just on civil and political rights but on peace and security; women’s rights, children’s rights etc.
- Multisectoral approach
- Innovative in its engagement

Why engage?

- Normative and institutional frameworks for engagement with regional institutions exist (varying degrees)

- Engagement must be strategic and purposive. I would encourage some focus on this issue. What have been the strategic objectives for engagement? When and how do we review success and/or failure in our stated objectives?

- How responsive are the objectives to the prevailing political and human rights context in the East Africa and beyond?
Challenges to inform engagement

Political environment

- Terrorism and national/regional/global responses and the potential impact on human rights
- Rather fluid constitutions even as we celebrate more regular formal elections (implications for accountability and good governance)
- Political instability and armed conflict within the region
- Endemic corruption and its impacts on human rights including effective access to justice, and basic services for the majority of EAC citizens

Human rights context

- Pervasive de jure and de facto discrimination and gender inequality (crow backs?)
- Deplorable conditions in our prisons
- Land grabbing and related disputes that are threatening livelihoods of people, and threatening the right to life.
- Threats associated with the emerging extractive industries in the region
- Challenges in access to justice
- Threats to CSO effectiveness
ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PROMOTING CONSTITUTIONALISM AND THE RULE OF LAW: INTERROGATING MANDATES & POWERS

*Dr Otiende Amollo

Introduction

The establishment of National Human Rights Institutions (NHRIs) in the past five decades has been one of the significant developments of the contemporary global democratisation process. Conceived by the United Nations Economic and Social Council (ECOSOC) in 1946, NHRIs have grown in variety and number to strengthen the democratic processes in the context of protection and promotion of human rights.\(^{63}\)

According to the United Nations, a National Human Rights Institution refers to a ‘body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.’\(^{64}\) These bodies have taken the form of human rights commissions, ombudsmen offices or more specialized institutions, for instance, on gender equality or racial discrimination.\(^{65}\) The nature, structure and powers of these institutions have largely been determined by the unique political, historical, cultural and economic circumstances of every country. It is noteworthy that in a number of countries or those emerging from conflicts, as is the case in Africa, Asia and Latin America, the adaptation of the institution has taken the form of hybrid institutions combining human rights and administrative justice, and in some instances the anti-corruption functions. Presently, NHRIs have been established in virtually all countries with varied functions and powers, and have come to play a significant role in governance.

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63 ECOSOC Resolution 9(ii) of 21st June 1946.
Evolution of NHRIs

The evolution of NHRIs can be traced to 1946 when ECOSOC sought to strengthen the protection and promotion of human rights at the national level.66 At its second session in 1946, ECOSOC invited members of the United Nations (UN) to ‘consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the newly established Commission on Human Rights. However, the mandate, powers and designation of such institutions were never defined.

It should be noted that the concept of the ombudsman preceded this initiative, with the history of the modern ombudsman being traced to Sweden in 1809 when Swedish Parliamentary Ombudsman, Justitie Ombudsman, was established as a representative of Parliament to control the observance of the law by courts and government employees. He was empowered to take action against those who committed illegal acts or failed to do what was expected of them. To this extent, he acted as a protector of people’s rights thereby explaining the reason for the adoption of the nomenclature, ‘Public Defender’ (Spain), ‘Civic Defender’ (Italy), ‘Supplier of Justice’ (Portugal) and ‘Public Protector’ (South Africa), ‘People’s Advocate’ (Austria), and Protector of the Citizen’ (Quebec–Canada) among other. Indeed, it was in recognition of the role of the Ombudsman in the protection and promotion of human rights that led to its hybridization in Denmark in 1953 to include human rights function, and was later adopted in other countries.

Elsewhere, ECOSOC continued pressing for the establishment of NHRIs by UN member countries. As such in 1960, it passed a Resolution in which it invited governments to encourage the formation and continuation of NHRIs.67 These efforts were complemented by the Commission on Human Rights which organized a seminar in 1978 where a set of guidelines on the functions of NHRIs were developed. The guidelines had six functions which included, acting as a source of human rights information; public education on human rights; making recommendations as to human rights in a particular state; advising the government on human rights matters; studying and reporting on a state’s legislation and judicial decisions regarding human rights; and performing any other function the government may wish in connection to the state’s duties under international human rights agreements.68 The guidelines, which were later adopted by the UN General Assembly, also urged the UN Member States to take steps to establish NHRIs.

Further initiatives were made by the UN Secretary General that culminated in a workshop by the Commission on Human Rights in 1991 to ‘review patterns of co-operation between national and international institutions, and examine the factors that could improve the effectiveness of NHRIs.’69 The workshop culminated in a set of guidelines, popularly known as the ‘Paris Principles’ of 1991.70

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66ECOSOC Resolution (No. 1 above)
67ECOSOC Resolution 772 B (XXX) of 25th July 1960
The Principles set the basic guidelines for the establishment and standards of operations of NHRI. They address four aspects of NHRI: competence and responsibilities, composition and guarantee of independence, methods of operations, and principles relating to the status of the institutions as quasi-judicial bodies. The Principles are considered to be the most elaborate and widely acknowledged normative standards on NHRI. The Principles also enhanced the status of NHRI at the national and international fronts in the promotion and protection of human rights.

Post the Paris Principles, the Vienna World Conference on Human Rights reaffirmed the ‘important and constructive role played by NHRI in the promotion and protection of human rights, especially their advisory role to the competent authorities, their role in remedying human rights violations, the dissemination of information and education in human rights.’ The Vienna Declaration also encouraged the establishment and strengthening of NHRI and recognised the right of each state to choose the framework which is best suited to its particular needs. Further refinement was made by the International Council on Human Rights and Office of the United Nations High Commissioner for Human Rights in 2005 which outlined the features of an effective NHRI.

Elsewhere, the Commonwealth adopted the Human Rights Institutions Best Practice Principles in 2001 to guide its members on the establishment and operations of NHRI. In Africa, the Yaoundé Declaration of 1996 reaffirmed the important role played by NHRI in the promotion and protection of human rights, and called for their creation to foster the rule of law and guarantee human rights in Africa. It also established a Coordinating Committee of African National Institutions to work closely with the International Co-ordinating Committee and the UN Commission on Human Rights.


Models of NHRI

As has been stated earlier, while the establishment and operationalization of NHRI worldwide has
largely followed the Paris Principles, the design has not been uniform. Different models have been adopted in different countries depending on their specific historical and obtaining circumstances and needs. The models have primarily taken four different forms: human rights commissions, ombudsman, hybrid human rights ombudsmen and human rights institutes.

**Human Rights Commissions Model:** The human rights commission model represents the classical NHRI whose express mandate is to protect and promote human rights. In a number of countries where this model exists, they do not directly deal with maladministration as conceptualized in Sweden since there are separate bodies (the ombudsman) to specifically deal with maladministration. This model is predominant in Commonwealth countries such as the United Kingdom, Canada, New Zealand, Australia, India, Sri Lanka, and some Africa countries.

In East Africa, all the countries except Tanzania have stand-alone human rights commissions although they are complemented by other interrelated bodies such as the ombudsman and anti-corruption commissions.75 In yet other countries, specialized commissions dealing with unique and specific human rights issues have been established. For instance, in Kenya besides the Kenya National Commission on Human Rights, there exists the National Gender and Equality Commission to handle gender, equality and discrimination human rights issues. In South Africa, the other human rights institutions that complement the South African Human Rights Commission are the Commission for Gender Equality, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Public Protector.

**Ombudsman Model:** The ombudsman has provided a platform for promoting and protecting human rights globally. While originally designed in its classical sense to control the exercise of power by public officials, the ombudsman has come to play a significant role in the human rights movement. The mandate of the classical ombudsman was to monitor the conduct of public officials to ensure legality and fairness in public administration. It is noteworthy that while the classical ombudsman does not have express human rights mandate, they nonetheless promote and protect human rights in the context of addressing maladministration by ensuring social justice and protection of citizens against the vast administrative state juggernaut. In addition, the classical ombudsman conducts investigations that invariably involve human rights issues and norms, and can make recommendations and proposals on matters relating to human rights. This is further supported by the fact that administrative justice has now been recognised as a right worldwide. This model mainly exists in Europe and some African countries.

**Hybrid Human Rights Ombudsmen:** One of the significant features of the evolution of the ombudsman was its modification to expressly handle human rights in addition to administrative justice. This came to be known as the Hybrid Ombudsman. The hybridization of the Ombudsman began in Denmark

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75The country specific commissions are the Kenya National Commission on Human Rights (Kenya), Independent National Commission on Human Rights (Burundi), National Commission for Human Rights (Rwanda), and Uganda Human Rights Commission. The Commission for Human Rights and Good Governance of Tanzania has a dual role of human rights and administrative justice.
in 1953 and moved to other countries in Europe, Latin America, Asia and Africa, influenced by the need to not only address maladministration, but also protect the fundamental rights of citizens, especially arising out of the new constitutional and political dispensation. In countries transiting from civil wars and autocratic regimes, the hybridization was more radical with the jurisdiction of the ombudsman being expanded to include human rights and anti-corruption functions. This has come to be known as the ‘New Ombudsman’ or ‘Second Generation Ombudsman.’ Notably, these new bodies were granted extensive powers hitherto known in ombudsmanship or human rights movement such as prosecution, adjudication and enforcement powers. In Africa, the hybridization was partly necessitated by the fact that:

Most post-independence states in Africa were military regimes or one-party states...a number of African states continue to suffer from recurrent civil conflict...as a result...African ombudsmen did not duplicate the classical ombudsman model, and adapted the concept to fit the political, legal, economic and social peculiarities of Africa.

As an illustration, the Tanzanian Commission for Human Rights and Good Governance deals with both human rights and administrative justice; the Ghanaian Commission on Human Rights and Administrative Justice has a three-fold mandate of human rights, anti-corruption and administrative justice. In Namibia, the Ombudsman deals with anti-corruption, administrative justice and environmental protection while in South Africa, Rwanda and Ethiopia, the Ombudsman has an additional mandate of enforcing access to information. A similar initiative is currently before the Kenyan Parliament where the Office of the Ombudsman has been proposed to oversee the implementation of the legislation on the right of access to information.

An interesting point to note is the endowment of the Ombudsman with coercive powers such as powers to prosecute as is the case in Uganda, Rwanda and Namibia. In Rwanda, the Ombudsman has the powers of bailiffs and can request the Supreme Court to reconsider and review judgments rendered at the last instance by ordinary courts, commercial and military courts, in cases of injustices. It is worth noting that no hybrid human rights ombudsman is identical to any other; each has been designed according to historical and specific circumstances of every country.

**Human Rights Institute:** This model has been used in countries that already have some effective human rights monitoring body, and a relatively functioning human rights culture. Their primary roles relate to human rights education, research and documentation instead of investigations of human rights violations. Their work is usually undertaken by professionals with multi-disciplinary expertise in different fields of activity, and are supervised by a governing council. An example is the Danish Institute for Human Rights which was established in 2002.

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Placement of NHRIs in the Governance Structure

One of the unsettled contemporary debates is the placement of independent oversight bodies such as NHRIs in a country’s governance structure. Three schools of thought have emerged. The first school of thought opines that such bodies are part of the Executive while the second school argues that they are institutions of the state outside government. The third school of thought, however, argues that they form the ‘fourth’ arm of government. This debate is mainly predominant in countries with ‘modern’ and ‘progressive’ constitutions that provide for such bodies. In South Africa, for instance, the debate has been along the first two schools of thought. The first school of thought has been of the viewpoint that there are only three branches of government, and the State Institutions Supporting Constitutional Democracy, as they are commonly known, fall within these branches.  

The second school of thought, however, opines that they are state institutions outside government; they are neither within any of the three branches of government nor form another branch of government. In this category is Murray who asserts that:  

Under the traditional framework of separation of powers, government is divided into three branches within which all government institutions fall. However, the Chapter 9 institutions are not legislative, judicial or executive – they are not a branch of government. And they do not exercise power in the same way as the executive, legislature or judiciary do. Although they all have some form of investigatory powers and certain administrative powers, they do not govern. (Emphasis added).

Further, she states that:

The traditional checks and balances intended to control government and the use of power have... not always been effective. In particular, in parliamentary systems, the relationship between the executive and legislature often leaves the majority in parliament disinclined to exert control over the executive. Instead, it interprets its role as supporting the government. This problem is exacerbated in systems like that in South Africa in which one party dominates and under an electoral system in which accountability to citizens is easily perceived as less important than accountability to party structures. Institutions like Chapter 9s are intended to supplement the traditional methods of securing accountable government...But the checking role of the Chapter 9s is different from that that one branch of government exercises over another in a system of separation of powers with checks and balances.

This position has now been affirmed by the Supreme Court of South Africa in the recent case, the South African Broadcasting Corporation Soc. Limited and Two Others versus the Democratic Alliance

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78See Goldstone J in President of the Republic of South Africa v Hugo, 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 11. The State Institutions Supporting Constitutional Democracy or Chapter 9 Institutions are the Public Protector, the Auditor General, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality.

and Six Others where it held that although Chapter Nine institutions execute their mandates in terms of national legislation, they are neither organs of the state within the national sphere of government nor are subject to control or direction by the Executive.\

Drawing from the South African experience, it is safe to state that NHRIs are institutions of the state which are outside government, but which are *sui generis*. This position finds support in the primary objective of these bodies of protecting the sovereignty of the people, which Murray aptly notes ‘relates to the power to monitor government and cannot, therefore, be through the exercise of power.’ Moreover, in terms of the specific mandates, some of these institutions perform functions that make it impossible to place them within any of the arms of government. In Kenya, for instance, the Ombudsman has a quasi-judicial mandate to deal with maladministration, which can be taken to traditionally fall within the Judiciary; handles complaints from the public against public agencies (investigations), a traditional function of the Executive, Legislature and Judiciary; and participates in the review of legislation affecting public administration, a traditional role of the Legislature.

Similarly, the Kenya National Commission on Human Rights is empowered to handle complaints of violations of human rights (investigations), traditionally vested in the Executive and Legislature; adjudicate on matters relating to human rights, judicial function; and act as the principal organ of the state in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights, a traditional executive function. Kumar alluded to this predicament when he stated that ‘the fact the institutions outlined in the Paris Principles did not fit easily in the traditional three-division of state powers but appeared to have a role in the legislative, executive and judicial field, must have confused many governments.’

The foregoing further finds support from McMillan who examines the situation in Australia by stating that:

> It is misleading to classify many of these agencies as Executive; both their independence and the watchdog role they play in government differentiate them from other agencies in the Executive branch. The alternative…is to re-think their classification by taking stock of the enormous change that has occurred in the framework of government.

-This position does not derogate from the famous preposition by Montesquieu on the principle of separation of powers. Instead it supplements it. In any event, Montesquieu’s theory was not static; it reflected the position of a small and uncomplicated government at the time.

**Role of NHRIs in Promoting Constitutionalism**

NHRIs play a significant role in constitutionalism. This stems from the centrality of human rights

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81 Sections 8 and 26 of the Commission on Administrative Justice Act, 2011.
82 Section 8 of the Kenya National Commission on Human Rights, 2011.
83 Section 26(c) of the Kenya National Commission on Human Rights Act, 2011.
84 Kumar (No. 6 Above)
in the contemporary governance discourse. Human rights law has become dominant in international development agenda, the respect of which is one of the components of good governance. This can be traced to the Charter of the United Nations which recognised respect of human rights as one of its objects, and which was later endorsed by the UN General Assembly in 1948 through the adoption of the Universal Declaration of Human Rights.\textsuperscript{87}

NHRIs as the primary bodies for the promotion and protection of human rights play a central role in the promotion of good governance. This centrality is more apparent in countries in transition from civil wars or autocratic regimes than the developed countries. Indeed, the establishment of a human rights commission to protect and promote human rights has become one of the redress prescriptions worldwide. In Sierra Leone, for instance, the Lome Peace Agreement of 1999 had a provision on the establishment of a human rights commission to promote peace and foster accountability and respect for human rights in the country.\textsuperscript{88} Similar prescriptions were made for East Timor, Guatemala and Kosovo as part of the national rebuilding and development.

In particular, NHRIs contribute to good governance by investigating complaints of violations of human rights and recommending remedial action. This also applies to redress of complaints of administrative injustices due to the intertwinement of maladministration and human rights violations. This ensures the protection and promotion of human rights within the particular states. In this regard, as Reif has aptly stated, they improve the legality and fairness of public administration, and respect for human rights thereby enhancing government accountability and compliance with international obligations.\textsuperscript{89}

Second, NHRIs provide an important platform to the public to participate in governance which is key in constitutionalism. Investigations and remedial action on maladministration by the Ombudsman, for instance, enable the public to participate in the regulation of the conduct of public officials. This also applies to investigations of human rights abuses by the human rights commission occasioned by public complaints against public officials or private actors. Through this, NHRIs not only empower citizens to participate in governance, but also ensures accountability in administration.

Third, NHRIs contribute to good governance through their advisory jurisdictions or diagnosis of the inherent weaknesses in administration. This may take the form of systemic investigations of broad areas of administrative injustices or human rights abuses, and prescription of remedial action, including recommendation of policy, legislative or administrative changes.

Fourth, NHRIs complement the existing mechanisms in the protection of human rights and improvement of public administration. In a number of countries, especially in Africa and Asia, NHRIs have been endowed with quasi-judicial mandate to protect human rights. This mandate enables them

\textsuperscript{87}Article 1(3) of the Charter reaffirms ‘faith in fundamental human rights, in the dignity and worth of the human person’ and the UDHR sets the ‘common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society...shall strive...to secure their universal and effective recognition and observance...’

\textsuperscript{88}Sierra Leone Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999.

\textsuperscript{89}Reif (No. 3 Above).
to deal with non-justiciable complaints that would ordinarily not be entertained by the courts of law.

Fifth, NHRIs play a significant role in the development of a strong human rights culture which is key in constitutionalism. This is achieved through civic education, human rights standards setting and redress of violations of human rights and administrative injustices.

**Mandates and Powers**

As earlier discussed, a number of international instruments provide guidelines on the establishment, mandate and powers of NHRIs. Notably, the Paris Principles and the Commonwealth Secretariat Best Practice Guidelines of 2001 recommend an effective framework for NHRIs. While these instruments have inspired the establishment of NHRIs worldwide, countries have nevertheless modified such institutions according to their legal systems and specific historical and obtaining needs and circumstances. It is worth noting that NHRIs vary considerably in terms of their establishment, mandate and powers. As such, while some have been established by the Constitution, others have been established by ordinary legislation, and in some cases by Executive decree through legal notices. Similarly, some have extensive and multiple competencies and powers while others have limited competencies and powers. In Africa, it is instructive and refreshing to note that many of these institutions have been established by the constitutions of the various countries. This is importance since it gives such bodies permanency and independence thereby enhancing their effectiveness.

Generally, NHRIs are primarily mandated to protect and promote human rights in the countries where they operate. The Paris Principles require states to endow the NHRIs with broad and clear mandates as possible to enable them operate effectively. This primarily includes, investigations and reparations of alleged violations of human rights, domestic promotion of human rights as prescribed in the various international human rights legal instruments, human rights education and awareness, providing advice and proposals on matters relating to human rights, and ensuring the states’ compliance with their obligations under the various international human rights law.

Investigations of abuses of human rights provide the most potent tool to NHRIs to effectively address impunity that relate to human rights violations, administrative injustices or corruption depending on the mandate of the particular institutions. Accordingly, the mandate should be broad and exhaustive together with the attendant powers. In Africa, all the NHRIs have been endowed with this mandate, albeit with limitations in some cases. For instance, the South African Human Rights Commission has been given a broad mandate to investigate all alleged violations of human rights in South Africa.\(^{90}\) The Uganda Human Rights Commission also has a similar mandate “to investigate a violation of any human right.”\(^{91}\) Similar jurisdiction obtains for the Kenya National Commission on Human Rights, the Commission on Administrative Justice (Office of the Ombudsman of Kenya) and the National Gender

\(^{90}\)Article 184(1) of the Constitution of the Republic of South Africa.

\(^{91}\)Article 52(1) of the Constitution of Uganda
and Equality Commission, the Rwandan National Commission for Human Rights, the of Ghana, the Ombudsman of Namibia and the Commission on Human Rights and Administrative Justice of Ghana, Independent National Commission on Human Rights of Burundi and the Commission for Human Rights and Good Governance of Tanzania among others. However, given the potency of this jurisdiction, some countries have restricted the scope and powers of the investigations by their NHRIs. Accordingly, in some countries, the institutions lack the jurisdiction to investigate certain state officials such as the Head of State and members of the Judiciary while in others they lack the power to investigate the security areas, and also take up complaints *suo motu*.\(^2\)

Similarly, all the NHRIs have been given the powers of investigations which vary from country to country. Generally, these are investigative powers and include powers of the court and other additional powers that facilitate investigations. These usually include powers to issue summons, require production of documents, conduct interviews, require disclosure of relevant information, take statements under oath and conduct searches and inspections. In India, the National Human Rights Commission has been given powers of a civil court, particularly, with respect to summoning and enforcing the attendance of witnesses, examining them on oath, discovery and production of any documents, receiving evidence on affidavit, requisitioning any public record or copy thereof from any court or office, and issuing commissions for the examination of witnesses or documents and also any other matter that may be prescribed.\(^3\)

In other countries, NHRIs have been given adjudicative power which has enabled them to establish tribunals to adjudicate on matters that relate to their mandates. Such tribunals exist in South Africa, Uganda and Kenya and have had varied results. In South Africa, the Tribunal has been one of the most active tribunals and has handled many issues relating the South African Bill of Rights. The decisions of the Tribunal have been informative and important in setting human rights standards in South Africa. In Uganda, the Tribunal has handled and pronounced itself on a number of human rights issues and awarded remedies to the victims, including compensation.

One of the innovative mechanisms, perhaps the most effective for some NHRIs is the power to ‘take remedial action’ on matters handled by them.\(^4\) The power facilitates the implementation of decisions of the NHRIs and enables them to provide tangible remedies, including binding decisions as was recently stated by the Supreme Court of South Africa thus:

> Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance...any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent of a review application, however, such person is not entitled

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\(^{2}\)For instance, the Commission of Human Rights and Good Governance lacks jurisdiction over the President of the United Republic of the Tanzania or the President of Zanzibar by virtue of Section 16 of the Commission of Human Rights and Good Governance Act, 2001.

\(^{3}\)Kumar (No. 6 Above) 274 - 275

\(^{4}\)See for instance Article 59(2)(j) of the Constitution of Kenya
to simply ignore the finding, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process triumphs the findings, decision or remedial action taken by the Public Protector. 95

In Ghana, the recommendations of the Commission on Human Rights and Administrative Justice can be enforced thought the courts. Failure to implement the decisions would amount to contempt and attract penal action. In Malawi, the Human Rights Commission is empowered to assist the complainants in bringing their cases to court. In Uganda, the decisions of the Human Rights Commission have the same force of law as those of a court of law, and are enforced in the same manner. 96 The Commission can also commit persons for contempt of its orders thereby making it effective. Any person who is dissatisfied with the decision of the Commission has the right of appeal to the High Court.

**NHRIs and the Courts**

The quasi-judicial mandate is important in the protection and promotion of human rights in that it provides citizens with a platform for redress of their complaints which world ordinarily not be suitable for the courts. In addition, it enables NHRIs to address systemic violations of human rights and administrative injustices. In the context of redress of administrative injustices, it has been noted that:

> In Latin America, the Ombudsman is often more effective than the courts in protecting human rights and also has an important complementary role in the resolution of conflicts. The Office of the Ombudsman is able to do this because of its particular characteristics, such as not being subject to formalities or legal restrictions for the handling of cases; being an organization that does not charge fee; and being independent of other state bodies. 97

A similar philosophy applies to other NHRIs; they complement the work of the courts in promoting and protecting human rights. Accordingly, NHRIs and the courts should appreciate the jurisdiction of each other and co-operate since protection and promotion of human rights is a collective mandate. The Supreme Court of Ghana had an occasion to pronounced itself on this matter by stating thus: 98

> It is not open to the Court before which the application (judicial review) was made to reopen the matter as it were, by calling evidence afresh. The court as stated is not sitting on appeal on the case either. It is when the court finds that in hearing the case, the Commission on Human Rights and Administrative Justice did not observe the rules of natural justice or

95 SABC vs DA (No. 18 Above).
exceeded jurisdiction of...that the application must fail (Emphasis added).

In spite of the foregoing, courts have not appreciated the role of these bodies in the review of administrative action. In a number of countries, the approach by the courts has been to consider such bodies as competitors or threats to the judiciary and ended up making decisions that undermine them. A case in point is the Republic of Kenya vs Vision 2030 Delivery Board and the Commission on Administrative Justice, Ex-Parte Eng. Judah Abekah, where the issue before the High Court was the enforcement of a decision of the Kenyan Ombudsman against the Vision 2030 Delivery Board, a public body which had been found to have acted unfairly. The High Court surprisingly held that there was no legal obligation for public agencies to comply with the recommendations of the Commission. Interestingly, the Court made reference to the Australian Ombudsman notwithstanding the different contexts and legal framework. The Court failed to appreciate the nature of the jurisdiction ‘take remedial action’ which does not exist in the classical context.

However, on a positive note, in the earlier cited case of SABC versus DA decided on 8th October 2015, the Supreme Court of South Africa aptly applied the law by holding that cases from developed countries could not be used in the context of South Africa since they reflected a jurisdiction different from South Africa. Accordingly, it held that the mandate of the Public Protector ‘to take remedial action’ meant that the Office could make binding decisions with legal consequences.

Concluding Remarks

NHRIs play a key role in constitutionalism. While their formation marks an important step for addressing impunity relating to human rights, their existence may not be meaningful to the public if they are ineffective. The establishment and scope of mandate and powers usually directly determine their effectiveness. However, as stated by Reif, a number of NHRIs worldwide are presently facing challenges of limited jurisdiction and powers, lack of independence, inaccessibility to the public, lack of co-ordination and cooperation with other human rights actors, lack of legitimacy, lack of operational efficiency and accountability, indifference by the government towards their activities, personality deficits of the leadership, and inadequate resources among others.

It is instructive to note that performance and accountability are inextricably linked to the effectiveness and legitimacy of NHRIs without which they would remain paper tigers; aggravating the frustration and disillusionment of the victims and society as a whole. Accountability in this context goes beyond regular reporting to Parliament or Executive, to include responsiveness to the needs of the public. In some cases, the leadership of NHRIs has failed to display the requisite personal character to steer the institutions forward. As stated by Maina, some NHRIs have failed to properly interpret

99Nairobi High Court Judicial Review Case No. 223 of 2014.
100SABC vs DA (No. 18 Above).
101Reif (No. 3 Above)
102Kumar (No. 6 Above) 283.
their roles and instead act as government lapdogs – protecting the government in power. In one rare case, a NHRI in an African country received only 40 complaints for the three years of its operations which pointed to inaccessibility or public apathy towards it.

Given the challenges, the following is recommended for NHRI:

i) Constitutional entrenchment is preferable since it guarantees independence and security of tenure. Where appropriate, the jurisdiction and powers should be enhanced through legislative review.

ii) NHRI should be independent, representative and organizationally powerful since these determine their effectiveness.

iii) Legitimacy provides NHRI with the credibility platform since their actions and outcomes require public approval and acceptance. Accordingly, they should be effective, responsive, transparent and accountable to the public since these determine their overall effectiveness.

iv) Given the resource constraints, NHRI should diversify their resource mobilization strategies, including lobbying their governments to allocate adequate resources in line with the Paris Principles.

v) It is important to design innovative mechanisms for effective implementation of the decisions of NHRI, including empowering them to enforce their own decisions in the same way as the courts of law.

vi) Co-ordination and co-operation with other stakeholders especially with national oversight institutions and non-governmental institutions is key to the success of NHRI. This not only ensures harmonious relationship, but also legitimacy and protection in numbers in cases of politicization of activities or attack on NHRI.

vii) There should be regular monitoring and evaluation of their activities to assess the quality and extent of achievement of the overall goals. This ultimately assists in agenda setting and improvement of operations.

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103C.M. Peter, Human Rights Commissions in Africa – Lessons and Challenges, p368.
SECURING DEMOCRACY AND THE RULE OF LAW: NHRIs & CIVIL SOCIETY ORGANISATIONS

*Dr Livingstone Sewanyana* 105†

Introduction

Governmental support for democracy and human rights is on a steady decline across the African continent. 106 Five African countries rank among the worst ten in political rights and civil liberties globally.107 This recession in democracy is not peculiar to Africa. The International Centre for Not-for-Profit Law reports a worldwide decline in democratic space.108 A growing number of governments are erecting barriers to rule of law, democracy and rights programs such as judicial independence, access to justice, free and fair elections and civic education, among others. More than ninety laws “constraining the freedoms of association or assembly” have been enacted since 2012.109

This trend explicates the interplay between local and global politics. By several accounts, two factors are at the core of anti-democracy sentiments: terrorist activity which has led to increased concerns about national security and mass uprisings such as the Arab Spring, 2011 and earlier revolutions (Rose, 2003 and Orange, 2004).110 These events marked a watershed in world affairs and spurred an epiphany among semi-authoritarian regimes: the transformative power of mass organization. This in turn precipitated a backlash against popular organizations such as NGOs, political parties, trade unions and think tanks, among others.111 There has been no exception to the pushback. Civil society as a whole – from humanitarian organizations to human rights advocacy groups has fallen victim.112

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106 States in this category include Kenya, Rwanda, Ethiopia, Eritrea, Central African Republic, Uganda, and the Democratic Republic of Congo, among others.
110 Id.
111 Id.
Detailed accounts of shrinking civic space are documented exhaustively elsewhere, and will not be reiterated.\textsuperscript{113}

Instead, the paper draws attention to the difficulties born of these events and the role of National Human Rights Institutions (NHRIs) in safeguarding whatever liberties are left and expanding civic space for all. The role of NHRIs is examined in light of the Paris Principles on the Status of National Human Rights Institutions.\textsuperscript{114} The paper briefly recounts the history and legal framework of NHRIs to set the stage for an understanding of challenges faced by CSOs and opportunities for new and mutually beneficial forms of cooperation with NHRIs.

**Situating National Human Rights Institutions**

Obligations undertaken by states at the global level must evolve into concrete mechanisms of enforcement at the national level. African Union member states are under an obligation to respect democratic principles, human rights, the rule of law and good governance.\textsuperscript{115} The Protocol Relating to the Establishment of the Peace and Security Council of the African Union reiterated the duty to respect of the rule of law, human rights, the sanctity of human life and international humanitarian law.\textsuperscript{116} In response, states have instituted structural frameworks to protect human rights at the sub-regional and national levels. The adoption of the Treaty Relating to the Establishment of the African Economic Community in 1991 saw the establishment of regional economic and integration bodies such as the Economic Community of West African States (ECOWAS) and the Eastern Africa Community (EAC) with courts/tribunals with jurisdiction over human rights violations.

At the national level, states have established NHRIs. NHRIs bridge the global and the local, and while seemingly new, the UN first mooted the idea in 1946. This culminated in draft guidelines for their establishment in 1978, and later, the Principles relating to the Status of NHRIs (Paris Principles) in 1991.\textsuperscript{117} The importance of NHRIs has been emphasized over the years,\textsuperscript{118} and has led to recognition and privileges in UN structures.\textsuperscript{119}

The mandate of NHRIs derives from either constitutions or statutes and varies from country to country.
country. According to the Paris Principles, a NHRI should ideally possess the following traits: a broad mandate; independence, pluralism; adequate resources; and investigation powers. Overall, the mandate and powers of NHRI\textsuperscript{s} include advising government on human rights matters; monitoring the implementation of regional and international obligations; investigating and adjudicating complaints of rights violations; research, publication and documentation; and civic education and/or mass sensitization on human rights. In line with these functions, NHRI\textsuperscript{\textregistered}s find themselves at the center of human rights protection. These functions, however, are not the sole reserve for NHRI\textsuperscript{\textregistered}s. Across the continent, CSOs have undertaken similar functions for decades and in some respects, predate NHRI\textsuperscript{\textregistered}s. The result is dual yet parallel functions, which warrant an investigation into opportunities for constructive forms of engagement.

**Justification for CSOS - NHRI\textsuperscript{\textregistered}S Cooperation**

There is a lack of congruity in the relationship between CSOs and NHRI\textsuperscript{\textregistered}s. While some CSOs and NHRI\textsuperscript{\textregistered}s work closely,\textsuperscript{121} others work independently and/or with minimal cooperation. Much like the nature of cooperation, the reasons for limited cooperation are varied. Some NHRI\textsuperscript{\textregistered}s are more inclined to building relationships with government institutions in order build trust and cooperate on specific human rights interventions. For these NHRI\textsuperscript{\textregistered}s, independence from the civil society, particularly the NGO sector is paramount.\textsuperscript{122} This is more likely the case where governments are hostile to CSOs and reticent to democratic reform. On the other end of the spectrum are NHRI\textsuperscript{\textregistered}s that are cautious about engagement with CSOs because of the large numbers and a perception that they are ‘politically partisan, prone to inaccurate or exaggerated reporting of violations, too confrontational, lacking in adequate expertise themselves, and unrepresentative or driven by external/donor agendas.’\textsuperscript{123} On their part, CSO engagement with NHRI\textsuperscript{\textregistered}s is largely determined by the personalities in the governing body.\textsuperscript{124} The more progressive members of NHRI\textsuperscript{\textregistered}s appear, the higher the likelihood of cooperation.

The importance of cooperation between CSOs and NHRI\textsuperscript{\textregistered}s has been emphasized over the years. The Paris Principles specifically call for cooperation with civil society including human rights organizations, coalitions and networks, persons with disabilities, community based organizations, faith-based groups, unions, social movements, victims’ relatives and public or para-public institutions.

The Paris Principles state:

> 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.125

The justification for CSO-NHRI engagement includes improvement of NHRIs’ access to the grassroots where the most disenfranchised abode. Across the globe, NHRIs rely heavily on CSOs for information and access to vulnerable groups. CSOs tend to have wide networks of CBOs and other community groups in remote areas. In this respect, they bridge the gap between the rural/urban poor and governments/NHRIs. It is thus judicious from a strategic point of view for NHRIs to cooperate with CSOs.

The ever-growing human rights field combined with the limited capacity of NHRIs presents a unique opportunity for engagement with CSOs. Several CSOs are specialized and highly resourceful in their areas of specialty. In addition, the sheer number of CSOs allows for in depth examination of a wide range of human rights issues. In contrast, the limited capacity of NHRIs hinders consistent analysis and investigation of the whole range of human rights issues. Newer areas such as climate change, trafficking in persons, privacy in the digital age, social security, to mention but a few, tend to remain on the periphery. CSOs could potentially serve as information hubs for non-core protection areas.

As government institutions, NHRIs have access to institutions that are ordinarily opaque and hostile to CSOs.126 Cooperation could ease the work of CSOs in areas such as inspection of detention centres and access to information. In the past, the Foundation for Human Rights Initiative (FHRI) and the Uganda Human Rights Commission (UHRC) conducted joint prison visits. This collaboration gave FHRI a pass to places to where torture and other human rights violations were rife.

As key players in the national human rights protection system, NHRIs occupy a unique position, complete with unparalleled access to highly placed sources and influence on matters relating to human rights. Yet NHRIs cannot, in and of themselves, protect human rights. In this respect, the success of NHRIs depends in part on the vibrancy of civil society and the level and nature of engagement the two maintain.

The Uganda Experience

Many will agree that the human rights record of a state mirrors the space accorded to civil society. The proposition that an independent and active civil society is the bedrock of a democratic society cannot be understated. Civil society plays an important role in holding the state accountable and steering civic participation in governance at all levels. In Uganda, there is a paradox between rights as asserted by the law and rights as experienced by civil society. To overcome this anomaly, the government embarked on a tactical alignment of the law with practice. There has been a string of

126 Commonwealth Human Rights Initiative, supra note 16 at 35.
highly restrictive legislation in recent years that reveals a systematic use of the law to constrain freedoms. The ostensible goal is to safeguard national interests and security but the real aim is to disempower CSOs and stymie scrutiny of sensitive issues such as lucrative oil deals, electoral malpractices, excessive government spending and corruption. The result has been crippling legal barriers buoyed by mendacious propaganda that depicts CSOs as foreign agents. The freedoms of assembly, association and expression articulated in Article 29 of the Constitution of the Republic of Uganda, 1995 (Constitution) are the most affected. The paragraphs that follow offer a glimpse into CSOs experiences in Uganda.

In October 2013, the Public Order Management Act, 2013 (POMA) was signed into law. Section 8 thereof grants the police powers to regulate public meetings while Section 9 confers powers on police to determine suitable venues for conducting public assemblies. Organizers of public meetings must give police at least three days’ notice. Police has cited the law on several occasions as a justification for unlawful arrests. In March 2015, Phil Wilmot, the founder of Solidarity Uganda – a human rights organization based in Northern Uganda, was charged with holding an illegal meeting at a guesthouse in Lira and ‘recruiting people into activism’ contrary to sections 5 (1) and (8) of POMA.

In February 2014, the now annulled Anti-Homosexuality Act (AHA) criminalized natural and legal persons who supported or failed to report ‘unnatural’ sexual activities thereby thrusting CSOs in a situation where they could face prosecution for not reporting gays, lesbians and transgender persons to authorities. The Prohibition of Unnatural Sexual Practices Bill, 2014 replicates several AHA provisions. Also in 2014, the Anti-Pornography Bill, 2014 was enacted into law. The definition of pornography is vague and susceptible to abuse. The law has come under severe criticism for infringing personal freedoms and perpetrating sexism in a society where the prevalence of violence against women is recurrent.

In April 2015, the government introduced the Non-Governmental Organizations (Amendment) Bill, 2015. The clauses of the bill are a far cry from the stated objective of providing an enabling environment for NGOs. What is apparent is a swathe of provisions accurately described by the UN Special Rapporteur on the Rights to Freedom of Peace Assembly and Association as likely to “severely restrict the right to freedom of association” and to “have a detrimental impact on the formation and work of associations.” In response to concerns raised by civil society, the Committee on Defence and Internal Affairs recommended significant revisions to align the bill with human rights. Indeed, a much more progressive version was passed by Parliament on November 27, 2015. The bill awaits presidential assent and the final text is yet to be availed to the public. It is however widely believed...
that the final version retains the original form of clause 40 (special obligations). The clause requires organizations to sign an agreement with every local government of the area it intends to work. The clause further prohibits work that is contrary to national interests, security and dignity of the people of Uganda. The clause does not enumerate prohibited acts, lacks clarity and likely to abet abuse and misinterpretation by authorities.

The legislative torrent aside, the overall operating environment for CSOs is a matter of concern. State forces often engage in circuitous and violent attacks against journalists and opposition politicians. As players at the frontlines, journalists suffer the brunt of state excesses in form of assault, confiscation of equipment and trumped-up charges.\textsuperscript{131} On January 12, 2015 police inflicted grievous harm on journalists covering a demonstration of a handful of unemployed youth.\textsuperscript{132} In 2013, the Daily Monitor and other outlets were shut down for ten days after publication of reports that President Yoweri K. Museveni was grooming his son, Brigadier Muuhozi Kainerugaba to succeed him as President.\textsuperscript{133} In another example, in 2012, CSOs launched the Black Monday Movement—a campaign to create awareness about the dangers of corruption following reports of massive corruption in the office of the Prime Minister. In an unexpected move, the government arrested and charged participants with treason in a case that has since been dismissed.\textsuperscript{134}

It is commonplace for police to disperse public gatherings. There are numerous reports of disruptions of peaceful and lawful assemblies with excessive force. The incidence of such events tends to surge during elections. In 2011, police dispersed campaigners for free and fair elections in Mbale, Eastern Uganda, by shooting in the air and spraying tear gas.\textsuperscript{135} Still in 2011, HRDs were subjected to physical surveillance, arrest and harassment. In the current election cycle (2015-2016), the media is under immense pressure not to host critical voices. Sensitive topics such as presidential term limits, repressive legislation and competence of the Electoral Commission are generally perceived as off-limits. On October 10, 2015, police officers undressed and dragged a Forum for Democratic Change party official along the Masaka- Mbarara (South West Uganda) high way. The official had accompanied Dr Kizza Besigye, the party flag bearer, to Rukungiri, Western Uganda to mobilize supporters ahead of presidential nominations that took place in November 2015.\textsuperscript{136} State excesses are common and speak volumes of the levels of impunity.

There is a security dimension to civil society experiences in Uganda. NGOs, particularly human rights advocacy organizations have fallen prey to unexplained burglaries. The thefts have had ripple effects: Some NGOs, according to Amnesty International, have counterintuitively “stopped or significantly

\textsuperscript{133} Supra note 26 at 14.
\textsuperscript{134} Supra note 26 at 14.
\textsuperscript{135} Supra note 26 at 14.
\textsuperscript{136} Supra note 26 at 14.
changed their work on “sensitive” areas because of this targeting, including by self-censoring for fear of closure”\textsuperscript{137} while others have scaled-back their activities to avert collision with the state.\textsuperscript{138}

**CSOs/NHRIs Cooperation - Experiences**

While there are largely no requirements in domestic laws for NHRIs to cooperate with CSOs, some NHRIs have proactively established partnerships with CSOs. In Uganda, the UHRC has partnered with CSOs to foster respect for human rights since its inception in 1997. The nature of partnership has varied over the years and ranges from consultation to joint missions.

In response to shrinking civic space, some NHRIs have advocated for a favorable working environment for CSOs. In 2014, the UHRC organized a forum on the rights of HRDs to gain insight into their experiences. The forum informed an action plan on how to improve the working environment of CSOs.\textsuperscript{139} In its 17th annual report to the Parliament of the Republic of Uganda, the Commission recommended that the Uganda Law Reform Commission review the POMA to conform offending provisions with the Constitution.

On the whole, the NHRIs have stood in solidarity with HRDs. The UHRC for instance released two press releases this year condemning the brutal arrests of journalists.\textsuperscript{140} The Commission stated that such acts contravene Articles 24 (freedom from torture, cruel, inhuman and degrading treatment or punishment) and 44 (non-derogable rights) of the Constitution. In addition, the Commission published a report on media freedoms in December 2014 and established a Human Rights Defenders Desk to ease engagement with HRDs by tracking their complaints and monitoring their rights.

NHRIs in Kenya, South Africa, Ghana and Uganda, among others, have formed alliances with CSOs on numerous occasions over the years. In 2009, for instance, the UHRC partnered with the civil society Coalition against Torture (CAT) to advocate for the Prohibition and Prevention of Torture Bill, 2010 (now the Prohibition and Prevention of Torture Act 2012). Following the enactment of the law, the Commission organized a workshop in partnership with the Association for the Prevention of Torture and the African Centre for Treatment and Rehabilitation of Torture Victims to develop an action plan to ensure effective implementation of the law. On June 26, 2015, the Commission and members of CAT commemorated the International Day in Support of Victims of Torture under the theme ‘Fight torture; implement the law.’\textsuperscript{141}

NHRIs-CSOs cooperation covers a wide spectrum – from joint investigations to mass sensitization.


\textsuperscript{138} Id.

\textsuperscript{139} Uganda Human Rights Commission (UHRC), 17th Annual Report, 2014 at 128.

\textsuperscript{140} UHRC, Statement on Police Brutality against some Journalists, January 13, 2015. See also, UHRC, Statement on Saturday’s incident on police use of unnecessary force on Fatuma Naigaga, October 15, 2015.

\textsuperscript{141} UHRC, Joint Press Release, Commemoration of the UN Day in Support of Torture Survivors, June 26, 2015.
programs. In 2014, the UHRC collaborated with several CSOs across the country to sensitize the public on human rights on a range of issues including land rights, corruption, children’s rights, women’s rights, the right to health, rights of refugees and the Prevention and Prohibition of Torture Act, 2012. In February 2015, the Commission partnered with members of the Civic Education Coalition in Uganda to implement civic engagement programs through civic education.

**New Engagement Opportunities**

As constitutional bodies, NHRIs enjoy legitimacy and credibility in government circles. NHRIs have relatively easy access to government institutions, power players and policymakers. The reports and recommendations of UHRC are for instance, subject to analysis by Parliament and the Standing Committee on Human Rights Affairs. In this regard, UHRC wields influence in the realm of human rights standard setting. CSOs and NHRIs could cooperate in this respect by jointly scrutinizing bills, conducting research and reviewing existing laws to improve the regulatory framework for CSOs.

NHRIs could consider establishing a CSO-government forum to foster regular dialogue between civil society and government entities such as security forces in order to find common ground on sticking points such as vandalism of NGO premises, physical surveillance of HRDs, disruption of lawful assemblies, harassment of journalists, the role of police and its legal character as a non-partisan force, among others. A neutral meeting point facilitated by a NHRI will go a long way in enhancing understanding of the rights of HRDs and the role of the broader civil society among state forces.

The Paris Principles construe the main responsibilities of NHRIs in terms of protection and promotion. The responsibility to promote human rights essentially includes fostering a ‘national culture of human rights where tolerance, equality and mutual respect thrive.’ The Paris Principles further require the composition of NHRIs to be representative of ‘social forces’. The forces in question specifically refer to human rights NGOs, faith based organizations, institutions of higher learning and government departments. The Sub-Committee on Accreditation interpreted this provision to mean that the governing bodies of NHRIs should include various segments of society—including CSOs.

In line with this interpretation, the NHRIs could consider co-opting CSOs in all programmatic aspects. NHRIs could for instance co-opt representatives of CSOs during monitoring visits. As bodies accountable to both the state and the public (Paris Principles) NHRIs should ensure that CSO voices are taken into consideration and addressed during investigations and reporting. This intervention will enhance civic participation.

The protection role on the other hand includes prioritization of the rights and security of HRDs.

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142 See UHRC Annual Report, supra note 34.
143 Members include several government institutions and CSOs such as Judicial Service Commission, Office of the Prime Minister, Uganda National NGO Forum, Abantu for Development Uganda, among others.
144 OHCHR supra note 12 at 20.
145 Id., at 21.
The United Nations Declaration on Human Rights Defenders recognizes the vulnerability of HRDs and urges states to establish protection mechanisms.\textsuperscript{147} The UHRC has made commendable efforts towards this end by establishing a desk for defenders at risk and working closely with CSOs specializing in protection of HRDs. However, more could be done by NHRIs to ensure timely and appropriate responses to threats before they materialize. This could take the form of regular and high level meetings with coalitions of HRDs to continually assess the situation and devise strategies on how best to operate in the current environment.

NHRIs could institutionalize cooperation with individual CSOs or CSO coalitions for consultation and advisory purposes. Potential areas of cooperation include joint research and publications, awareness campaigns, fact-finding and information sharing. Cooperation in these areas will limit duplicity of work and promote efficient utilization of limited resources. The advantage of formal partnerships over ad hoc and informal arrangements is that the former tend to delineate roles of individual players and are thus likely to be more effective.

Conclusion

As players with similar and overlapping mandates, cooperation between NHRIs and CSOs presents an opportunity for mutual benefit and coordinated protection of human rights, promotion of the rule of law and democracy. The success of NHRIs greatly depends on the vibrancy of civil society. CSOs have networks across the country and the ability to reach the most vulnerable. In this way, they create pathways to NHRIs by for instance, lodging complaints on behalf of those who cannot. On the other hand, it is much more difficult for CSOs to operate effectively in isolation. Monitoring and documentation of human rights violations requires access to information, unfettered mobility and a level of ‘legitimacy’ in government circles/institutions. Only a few CSOs meet this threshold. CSO-NHRI cooperation is therefore strategically important for both players and key to effective human rights protection.

### ATTENDANCE SHEET

Theme: Promoting Good Governance in East Africa: Role of NHRI’s
Venue: Nairobi, Kenya

**Dates: 6th – 9th December, 2015**

<table>
<thead>
<tr>
<th>NAME</th>
<th>ORGANISATION/ INSTITUTION</th>
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<td>Abdirahman Isack</td>
<td>Northern Advocacy Organization</td>
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<td>Abdurrahman Isaac</td>
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<td>Goodnews Broadcasting System</td>
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<td>Network of African National Human Rights Institutions (NANHRI)</td>
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<td>Commission Nationale des Droits de l’Homme et des Libertes, Cameroon</td>
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<td>Usalama Forum</td>
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<td>National Commission on Human Rights and Freedoms, Cameroon</td>
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<td>United Nations- Kenya</td>
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<td>Kenya Human Rights Commission</td>
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<td>Dickson Omondi</td>
<td>National Democratic Institute (NDI)</td>
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<td>Dr. Benaeh Mutsotso</td>
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<td>Foundation for Human Rights Initiative</td>
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<td>Eunice Oloo</td>
<td>Office of Director of Public Prosecution</td>
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<td>Evans Habib</td>
<td>Daily Nation</td>
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<td>Kenya National Commission on Human Rights</td>
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<td>Network of African National Human Rights Institutions, Kenya</td>
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<td>Gitau Wanguthi</td>
<td>Rights Promotion and Protection Centre</td>
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<td>Uganda Human Rights Commission</td>
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<td>Halima Hassan</td>
<td>West Africa Network for Peacebuilding</td>
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<td>Henry O. Maina</td>
<td>Article 19 East Africa</td>
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<td>Hon. Isaac Mwaura</td>
<td>Kenya Disability Parliamentarians Association</td>
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