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AN OVERVIEW OF NHRIS IN EASTERN AND SOUTHERN AFRICA

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1 Introduction

Although national human rights institutions (NHRIs) are now an integral part of the human rights protection system in Africa,[1] the forms they take, the nature of their mandates, and numerous other features that are crucial for them to work effectively differ from one country to another. The factors responsible for these differences of approach include the country's legal tradition, its political and human rights history, and the role that each country believes such an institution can play in protecting and promoting respect for human rights within its territory.

This compendium covers 15 countries in two regions – eastern and southern Africa – that combine many similarities as well as differences. For example, until the 1990s South Africa was governed by apartheid, which was undoubtedly one of the most inhumane systems ever contrived by man against man and led to massive, systemic and institutionalised violations of the fundamental human rights of the black majority. Just over a decade earlier, Angola and Zimbabwe succeeded in gaining independence after dismantling similar systems of white minority rule.

In terms of legal tradition, there is remarkable diversity in the legal systems of the 15 countries. For example, the Roman-Dutch legal tradition underlies the law in Botswana, Eswatini, Lesotho, South Africa and

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1 See UNDP, *Study on the State of National Human Rights Institutions (NHRIs) in Africa*, available at https://bit.ly/2fHKhG2 (accessed in May 2019), p 12.

Zimbabwe. The English common law is the foundation of the legal systems in Kenya, Malawi, Tanzania, and Zambia. There is a mixed common law and civil law system in Mauritius, whilst the civil law legal tradition prevails in Angola, Burundi and the Democratic Republic of the Congo (DRC). Unlike the others, the Ethiopian legal system is largely indigenous.

The 15 countries also vary considerably in their state of democracy and good governance. At one extreme, Botswana, Mauritius, Namibia and South Africa stand out as having made reasonable progress towards democratic consolidation; at the other extreme are Angola, Eswatini (an absolute monarchy), Rwanda and Zimbabwe, where the democratic transition has stalled and there are signs of a resurgence of authoritarianism. Given the inextricable link between democracy and respect for human rights, how are these differences reflected in the way that NHRIs in these countries implement their human rights mandate?

This chapter provides a broad overview of the NHRIs in these countries against their different legal and historical backgrounds. It looks at a number of issues. Following this introduction, section 2 briefly examines NHRIs in general and identifies the different models that operate in the countries under review. Section 3 sets out the analytical framework used in the study. The legal framework used for establishing the different NHRIs is discussed in section 4. Other issues examined are the independence of these institutions (section 5), the appointment of staff (section 6), their mandates (section 7), and their accessibility to members of the public (section 8). The final section offers some concluding remarks.

2 The diversity of NHRIs

NHRIs are state bodies with a constitutional and/or legislative mandate to protect and promote human rights. Although they are referred to as NHRIs, there is no universally accepted standard form or model to which they adhere. In fact, their names, practices and functions vary widely.

The names of NHRIs differ depending on the region, the legal tradition, and common usage. The common names used are, "civil rights protector", "commissioner", "human rights commission", "institute" or "centre", "ombudsman", "parliamentary ombudsman" or "commissioner for human rights", "public defender/protector", and "parliamentary advocate". As we shall see in subsequent chapters, countries in eastern and southern Africa have adopted one or other of these names or a variation of it.

As noted, no standard model exists. Although the Paris Principles,[2] which are discussed below, set out some minimum international standards for the roles and responsibilities of NHRIs, they do not dictate what particular model or structure states should adopt. There are five different NHRI models:

- human rights commissions;
- ombudsman institutions;
- hybrid institutions;
- consultative/advisory institutions; and
- institutes and centres.[3]

All but two of the countries in this study have human rights commissions. The exceptions are Botswana and Tanzania, which have hybrid institutions known, in the case of Botswana, as the Office of the Ombudsman and, in the case of Tanzania, the Commission for Human Rights and Good Governance. They are classifiable as hybrid institutions because their primary functions are to deal with maladministration and other aspects of administrative malfeasance rather than to protect and promote human rights.

One may add the Ombudsman of Lesotho here. Although the Sixth Amendment to the Lesotho Constitution in 2011 provided for the Lesotho Human Rights Commission, it has not been established yet. As a result, the Lesotho Ombudsman – whose broad mandate includes dealing with human rights violations – continues to act as the NHRI in the country.

The NHRIs that are the focus of this compendium must be distinguished from other national institutions or special commissions that are occasionally given a mandate, sometimes exclusive, to deal with certain specific aspects of promoting and protecting human rights. There are many examples of these in the countries studied. For instance, the DRC has, in addition to its National Commission on Human Rights, other institutions, such as the National Agency for the Fight against Violence against Women, Young Girls and Children, the National Commission for Refugees, and the High Council of Audio-visual and other Communication. In South Africa, Chapter 9 of the 1996 Constitution provides not only for the South African Human Rights Commission but the Commission for the Promotion and Protection of the Rights of

2 United Nations, Principles Relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 (20 December 1993).

3 See Commonwealth Secretariat, *National Human Rights Institutions. Best Practices*, London, Commonwealth Secretariat (2001).

Cultural, Religious and Linguistic Communities as well as the Commission for Gender Equality.

It should also be noted that NHRIs are separate and distinct from civil society organisations (CSOs), including non-governmental organisations (NGOs), that are involved in human rights issues. What is hence important is not the nomenclature of the institution but rather the mandate it has been established to discharge – this and a number of other factors have determined the framework of analysis adopted in this study, a matter to which we now turn.

3 Analytical framework

The analytical framework used for preparing the introductory commentary on each of the 15 NHRIs discussed in this compendium is the Paris Principles. As already noted, these principles are now universally accepted as setting the minimum standards that such institutions must meet to be considered as legitimate and credible by their peers as well as within the international community, especially the UN system. They provide benchmarks against which proposed, new and existing NHRIs can be assessed.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights is the international and independent body set up to promote the establishment of NHRIs in conformity with the Paris Principles. It uses these principles as a basis for accrediting states in accordance with the extent of their conformity to the Paris Principles.

The Paris Principles set out the six main elements that a fully functioning NHRI should have to be effective:

- mandate and competence: this is required to be broad and based on universally recognised human rights standards;
- autonomy from government: institutions are required to be protected from manipulation by the government;
- independence: this has to be guaranteed by statute and/or the constitution;
- pluralism: This is supposed be reflected in the diversity of membership and procedures that enable effective cooperation with all the diverse social and political forces in the country;
- adequate resources; and
- adequate powers of investigations.

The Principles are broad and general in their formulation and should therefore apply to any NHRI regardless of its structure or type. They do not require that NHRIs should have a quasi-jurisdictional function that enables them to handle complaints or petitions from people whose human rights are alleged to have been violated. However, where such functions are conferred on them, then NHRIs are required to:

- seek an amicable settlement through conciliation, binding decision or on the basis of confidentiality;
- inform petitioners of their rights and available remedies, and promote access to them;
- hear complaints and transmit them to competent authorities; and
- make recommendations to competent authorities.

Although the Paris Principles are not legally binding under international law as treaties are,[4] and despite the criticisms levelled against them,[5] the fact that they have been endorsed by both the United Nations (UN) Commission on Human Rights[6] and UN General Assembly[7] has legitimised the Principles as the normative standard for the establishment and strengthening of NHRIs.[8] In general, NHRIs are said to be more effective when they:

- enjoy public legitimacy by standing up for the powerless against powerful interests in society;
- are accessible to all in society;
- have an open organisational culture;
- ensure the integrity and quality of their members;
- have diverse membership and staff;
- consult with civil society;
- have a broad mandate;

4 See J Dugard, *International Law: A South African Perspective* (2011), p 33; D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000).

5 The principles have been criticised for being general and broad; for failing to state the optimum conditions requisite within the local jurisdiction before the establishment of an NHRI; and for being non-mandatory. For some of these criticisms, see, for example, M O'Sullivan, "National Human Rights Institutions Effectively Protecting Human Rights?" 25 *Alternative Law Journal* (2000), p 236.

6 See Commission on Human Rights Resolution 1992/54.

7 See General Assembly Resolution 48/134 of 20 December 1993.

8 M Brodie, "Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights", 80 (143) *Nordic Journal of International Law* (2011), p 151.

- have an all-encompassing jurisdiction;
- have the power to monitor compliance with their recommendations;
- treat human rights issues systematically;
- have adequate budgetary resources;
- develop effective international links; and
- handle complaints speedily and effectively.[9]

As mentioned, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights subjects NHRIs to an accreditation process in which their alignment with the Paris Principles is assessed. One of three classifications is assigned at the end of the process. The first, "A" status, is reserved for a voting member who complies fully with the Paris Principles. The second is "B" status, where the observer member does not fully comply with the Principles or has not yet submitted sufficient documentation to make that determination. The third, "C" status, is for non-members who do not comply with the Paris Principles.

The latest accreditations of the Global Alliance of National Human Rights Institutions cover only 11 of the 15 countries in this study.[10] As at 4 March 2019, nine of those 11 have "A" status[11] and two, "B" status.[12] Absent from the list are Angola, Botswana, Eswatini and Lesotho. If this assessment is taken not just as a measure of compliance with the Paris standards but an indication that the relevant NHRI is able to discharge its mandate to promote and protect human rights effectively, does it truly reflect the reality on the ground? Put differently, does compliance with the Paris Principles necessarily mean an acceptable standard of human rights promotion and protection?

The question is particularly important when one takes into account the year when some of the accreditations were carried out. Of interest in this respect are when the NHRIs in countries such as the DRC, Rwanda, Zambia and Zimbabwe were given their "A" status.

9 See, generally, International Council on Human Rights Policy and OHCHR, "Assessing the Effectiveness of National Human Rights Institutions", available at https://www.ohchr.org/Documents/Publications/NHRIen.pdf (accessed in May 2019), pp 7-9.

10 See GANHRI, *Chart of the Status of Institutions Accredited by the Global Alliance of National Human Rights Institutions,* available at https://bit.ly/2LudOCh (accessed in May 2019).

11 These are the DRC (May 2018), Kenya (October 2014), Malawi (November 2016), Mauritius (October 2014), Rwanda (October 2018), South Africa (November 2012), Tanzania (November 2017), Zambia (October 2018) and Zimbabwe (May 2016).

12 The two countries in this category are Burundi (November 2017) and Ethiopia (November 2013).

The overview below considers the general legal framework as well as a few key issues, albeit that it only touches on them – they are discussed more fully in the individual country studies.

4 Legal framework

The Paris Principles require that the mandate of the NHRI should be "clearly set forth in a constitutional text or legislative text". The Sub-Committee on Accreditation has indicated that this requirement is not complied with if the mandate is contained only in executive instruments, such as presidential or ministerial decrees and orders, or similar subsidiary instruments.

In most of the countries, the requirements for setting up the NHRI are provided for both in the constitution and in other legislative texts. It is only in Botswana, Burundi, the DRC, Mauritius and Rwanda that this is provided for in legislative texts. It is clearly advantageous for an NHRI to be established in a constitution – depending on how detailed the provisions are, constitutional entrenchment affords a greater safeguard against arbitrary change to the NHRI's mandate or structure to suit the convenience of the government.

Such certainty is not provided for where, as in the case of Ethiopia, the Constitution merely authorises the House of Peoples' Representative (HOPR) to establish a NHRI. The NHRI is then the same as an institution whose creation depends on ordinary legislation and whose mandate or structure can be changed with a simple parliamentary majority.[13] It must be pointed out, though, that where, as is the case in the DRC, the NHRI is a creature of an organic law, there is indeed some measure of security, given that these laws, whilst inferior to the constitution, are superior to ordinary legislation and usually require a super-majority to be amended.

Finally, it is worth noting that although an NHRI based solely on an executive instrument is not compliant with the Paris Principles – for the obvious reason that such an instrument is even more susceptible than ordinary legislation to being changed at any time at the whim of the executive – it is nonetheless the case that executive instruments are necessary for the purposes of providing detailed rules and regulations as to how the NHRI operates.

13 The same is true of the Commission for Human Rights and Good Governance of Tanzania, since Article 242 reserves to Parliament to power to make legislation determining, inter alia, the functions, composition, tenure and manner of appointing members of this commission.

5 Autonomy

The requirement that NHRIs be independent and autonomous is the most important of the Paris Principles, but also arguably the most controversial as well as the most difficult to implement. It is clear that an institution which is not independent of the government is unlikely to function properly, given that the government is often not only the primary actor responsible for promoting and protecting human rights but also their primary violator. The fact that NHRIs are created by and funded by the government suggests that the independence and autonomy required here are relative and not absolute. In other words, what is required is a degree of structural, procedural and functional independence to ensure they can function without undue interference impairing their ability to operate effectively in accomplishing their mandate.

Important elements of institutional autonomy and independence include legal autonomy, operational autonomy, financial autonomy and independence in appointment and dismissal procedures. The countries vary considerably in how they have each implemented this. What emerges from the case studies is that there is not only wide variation in the manner in which the principles of autonomy and independence are expressed in the legal frameworks, but even wider variation in the disparity between what the texts provide for and what happens in practice. A few examples will suffice.

Legal autonomy requires that an NHRI is granted a distinct legal personality to allow it to make decisions and act independently. In most of the countries, legal autonomy, particularly the legal personality of the institution, is stated either implicitly or explicitly (as it is, for example, in Burundi, the DRC and Lesotho). In practice, this is seldom respected. For instance, in Malawi, the institution operates like a government department, whilst in Eswatini and Tanzania, it operates as an office or unit within the Ministry of Justice and Constitutional Affairs.

As the case studies will show, operational autonomy is also a major challenge. It relates to the ability of the NHRI to conduct its day-to-day affairs – such as deciding on what investigations to carry out, preparing reports, and making recommendations – without external interference. An extreme example of such interference occurs in Ethiopia where the institution often submits some of its reports to Parliament, the HOPR, for prior review before publication. Certain of these sensitive reports are then never released, presumably thanks to parliamentary embargo.

Financial autonomy is critically important for the effectiveness and sustainability of an NHRI. Without control over its resources and how they are to be used, the institution cannot discharge its mandate independently and effectively. With the possible exception of Eswatini, most of the legal frameworks provide for financial autonomy in way or another. However, in almost all cases – with the exception of Kenya, where there is direct parliamentary allocation to the institution – the funds are usually allocated based on proposals submitted to intermediary ministries.

It is thus no surprise that all the NHRIs in the region are in dire financial crisis, some to the extent that they are unable to pay for suitable accommodation or recruit enough qualified staff, given the low salaries they offer. All these institutions now depend heavily on donor funding, which is not only limited in practice but controversial in principle.

6 Independence of appointment and dismissal procedures

The manner of appointment, and conditions for dismissal, of members of NHRIs is one of the most important ways of guaranteeing their independence. The Paris Principles require that the manner of appointment should be specified in an official Act that indicates the duration of appointments and ensures pluralism in the institution's membership. This raises issues regarding the method of appointment, criteria for appointment, duration of appointment and possibility of reappointment, manner and grounds for dismissal, and privileges and immunities. Best practice requires broad consultation and the involvement of all stakeholders, particularly CSOs, in the process.

Generally, in spite of purported adherence to the Paris Principles, the appointment processes vary from country to country. The practices fall into five categories.

First, in some countries such as Lesotho, Mauritius and Zambia, appointments are made exclusively by the executive. In a second category, for example, Angola, they are made by the legislature. In a third, with Burundi and South Africa being examples, they are made by both the legislature and executive. In a fourth category, with Ethiopia an example, appointments are made by the legislature with the involvement of various actors. In the fifth category, appointments are made by the executive in a process bringing in other actors. Such is the case in Eswatini, Malawi and Tanzania. Finally, in the DRC, Kenya, Rwanda and Zimbabwe, the

appointment process involves the intervention of the executive, the legislature and various CSO actors. Tenure varies from three years (for example, Malawi, Tanzania and Zambia), to five (for example, Ethiopia and Zimbabwe), to seven (as in South Africa). In Mauritius, the tenure of members of the National Human Rights Commission is unclear.

In some countries, the commissioners who are appointed to the NHRI work only part-time, as in Eswatini, or the institution is required to have both full-time and part-time members. An example of the latter is South Africa, where the law states that the South African Human Rights Commission must have not less than six full-time commissioners and not more than two part-time commissioners. Whilst the legal framework in countries such as the DRC, Tanzania and Zimbabwe provide elaborate provisions to ensure that there pluralism, in some other countries, there is silence.

At the end of the day, the critical question is whether the process of appointment is fair and ensures the appointment of qualified people with integrity, skill and competence. From this perspective, the evidence from the country case studies points to numerous problems. These are often caused by the extensive scope for political manipulation of the appointment processes, obscure criteria for appointments, lengthy delays in making appointments, and weak and obscure conditions for the removal of commissioners. For example, in Angola, the Ombudsman was appointed 13 years after the office was established and the incumbent then stayed in office for four years after his term expired.

7 Mandate and competence

The Paris Principles provide that an NHRI should be given "as broad a mandate as possible". The requirement reflects an acknowledgement of the diversity of institutional models that exist. The need for clarity in defining the mandate of an NHRI is particularly important given that, as we saw, many countries have similar institutions that co-exist with NHRIs and exercise some limited but overlapping human rights functions. For example, South Africa has, in addition to the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

Two main roles have been assigned to NHRIs, namely the promotion and protection of human rights.[14] Accordingly, the case studies examine the various ways in which these two functions have been performed and the legal framework provided for this. Human rights promotion involves activities such as public education and awareness campaigns, training CSOs and others such as police, prison officials and the armed forces, issuing publications, holding seminars and workshops, conducting community-based initiatives and organising media events.

Protection, on the other hand, involves ensuring respect for the rule of law by ensuring the administration of justice and combating impunity. Key activities in human rights protection include investigation, alternative dispute resolution, seeking redress or remedies through courts and other tribunals, receiving individual complaints, holding public inquiries, and conducting monitoring activities. The primary focus is on the prevention of human rights abuses such as torture, arbitrary detention and disappearances and on acting as a watchdog that monitors and reviews certain activities, for example by visiting detention centres.

A number of further responsibilities and functions flow from these two major roles. They include:

- advising government departments and parliaments;
- cooperating with national stakeholders, CSOs, NHRIs from other countries, and regional bodies;
- protecting and promoting the rights of specific groups, particularly those who are vulnerable due to their age, gender, disability, sexual orientation, or status as migrants or minorities of other kinds; and
- linking human rights to developmental initiatives through rights-based approaches and especially through economic, social and cultural rights.

Countries whose constitutions do not recognise socio-economic rights, such as Mauritius, or where they are recognised only as directive principles of state policy, such as Zambia, hardly give their NHRIs the mandate to deal with such rights. By contrast, the South African Human Rights Commission has an elaborate programme for protecting socio-economic rights; in turn, cultural rights are promoted by its fellow Chapter 9 institution, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

14 For a full discussion of these roles, see Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, available at https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf (accessed in May 2019), pp 21-28.

In countries where there is internal conflict (such as the DRC), or in countries emerging from conflict (as was the case in Burundi and Rwanda just over a decade ago), NHRIs are often given the additional responsibility of supporting or managing peacebuilding and transitional justice. In Burundi, the Truth and Reconciliation Commission (TRC) was created to deal with human rights abuses and violations of international humanitarian law committed from 1885 to December 2008. In Rwanda, the National Commission for Human Rights was given the powers to monitor the traditionally inspired *gacaca* courts launched in 2002 as a transitional measure to deal with genocide cases.

NHRIs are also beginning to play a role in working with and monitoring businesses in the private sector, this in recognition of the role of the sector plays in national, regional and multinational human rights issues. So far, it is only the South African Human Rights Commission that has done so, having undertaken initiatives in the past six years to raise awareness of the impact businesses have on human rights.

8 Accessibility

In the interests of having it carry out its mandate effectively, the Paris Principles require that an NHRI should be easily accessible to all the inhabitants of a country, especially those living in rural areas. This means it should have a broad presence and, ideally, establish local offices in all the country's provinces and districts.

However, due largely to insufficient funds and inadequate human and material resources, limited accessibility is a serious problem in almost all the countries under study. For example, Zimbabwe has only two offices to serve the entire country, whilst Angola's NHRI is present in only six of the country's 18 provinces. In Malawi, the Human Rights Commission is present in two of the country's three regions, but has no permanent presence in any of its 28 districts.

Barriers to accessibility restrict the avenues of recourse open to those whose human rights have been violated and who wish to lodge complaints; even where they do lodge complaints, the same barriers make it difficult for the NHRI to investigate these complaints, particularly when they involve violations in remote parts of the country. Barriers to accessibility are also among the reasons that NHRIs are still not well-known in many countries, especially in large countries such as the DRC, South Africa and Zimbabwe.

The case studies illustrate the enormity of the problem as well as the measures that some NHRIs are taking to decentralise themselves and make their services more accessible, particularly to those in rural areas.

9 Pluralism

With a view to enhancing effectiveness through collaboration, the Paris Principles require that an NHRI's composition should ensure a pluralist representation of social forces in a country through the presence of representatives of CSOs and professional associations. The composition should also reflect trends in philosophical or religious thought, and include qualified experts and members of universities, legislatures and government departments.

The Sub-Committee on Accreditation of the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights notes that pluralism in composition could be ensured in a number of ways. For example:

- members of the governing body come from and represent different segments of society;
- diverse groups take part in suggesting or recommending members of the NHRI;
- the NHRI promotes cooperation and collaboration with diverse groups, especially CSOs involved in human rights issues;
- the NHRI's staff represents a diversity of groups in society; and
- steps are taken to be inclusive, especially of marginalised groups and minorities.[15]

These elements are evident to varying degrees in the country studies. The Kenyan Constitution has probably gone the furthest to provide a solid basis for pluralism in public institutions. In addition to Articles 100 and 197 (which strive to promote diversity), Article 27(8) places an obligation on the legislature to "implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender". Article 250 goes further to provide that appointments to commissions and independent offices must reflect the regional and ethnic diversity of the country. The principle of pluralism is also promoted in other ways by the DRC, Lesotho and Zimbabwe.

Ensuring that the diversity of social forces in a country is reflected in an NHRI's membership and staff can be extremely difficult if the country

15 *Ibid*, p 37.

has a wide range of ethnic, religious and linguistic minorities. However, since pluralism is not a static principle, it can be realised progressively over time.

10 Concluding remarks

The Paris Principles set out the minimum standards expected of institutions that deal with the complex task of promoting and protecting human rights. The NHRIs of nine of the 15 countries in this study – or 60 per cent of them – are accredited with "A" status. However, the test of the effectiveness of a NHRI is the extent to which it is able to ensure that the human rights of all citizens are respected, protected and fulfilled. This it can do in a wide variety of ways. Should "A" status be taken, then, to mean that the institution is also highly effective?

The case studies that follow will enable us to draw our own conclusions. More than that, the constitutional and other legal documents that accompany each of them may go a long way in explaining the state of human rights promotion and protection in the country. Combined, the case studies and documentation give rise to many questions. For example, was there an appropriate constitutional and legal framework to enable the NHRI to operate efficiently? What lessons could the country in question learn from the way other countries have regulated their NHRIs?

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