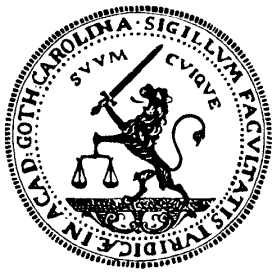

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Sweep First in Front of your own Door:

The Existence of a National Human Rights Institution in Sweden

Master thesis
30 credits

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Contents

Summary

This thesis is about national institutions, referred to as NHRIs (National Human Rights Institutions) and the standards regulating them. The real breakthrough of national institutions came with the adoption of a set of principles in 1991, the Paris Principles, which since have been endorsed by the United Nations' different organs. The Principles guide the mandate, responsibilities, independence and methods of operation of national institutions, which could be described as permanent, independent bodies established by the state with the specific purpose of promoting and protecting human rights at the national level.

The thesis consists of two parts. The approach to the subject matter in part I, has been to establish the legal status of the Paris Principles and whether Sweden can be considered to comply with them; i.e. if Sweden has a proper independent national institution with a broad mandate to promote and protect human rights. The conclusion drawn was that Sweden has a binding legal obligation to comply to some extent with the Paris Principles, and that they should be fully complied with out of a moral and political obligation.

The evaluation of compliance with the Principles was done on a legalistic level by examining the legal framework regulating four Swedish institutions (the Parliamentary Ombudsmen, the Chancellor of Justice, the Equality Ombudsman, and the Children's Ombudsman), which have a long history in the area of human rights. The benchmarks used to evaluate their compliance are two of the core elements of the Paris Principles; the *mandate* of the institution and its *independence*. The analysis of the institutions showed that neither of them fulfils the standards set forth in the Paris Principles; either their mandates are too narrow or their independence too circumcised, or both. Hence, it was concluded that Sweden does not have a national institution in accordance with the international standards with the implication that one ought to be established.

The second part of the thesis further examines the Paris Principles' regulation of independence, and how it could be achieved if a national institution was established within the Swedish system. This is done on the basis of the conclusions from previous sections about the already existing four Swedish institutions and by using good examples of other countries, but also of authorities within the Swedish system. The conclusion from this section suggests that the Parliament would be the appropriate organ to assign the principal responsibility over an NHRI to, and that it would neither be foreign nor unrealizable, as it has been perceived by several up until now, to establish a Swedish independent national institution in line with the Paris Principles.

Sammanfattning

Den här uppsatsen handlar om nationella institutioner för mänskliga rättigheter, även kallade NHRIs (National Human Rights Institutions) och reglerna som styr dem. De nationella institutionernas verkliga genombrott kom med antagandet av en samling principer 1991, Parisprinciperna, som sedan dess har omhuldats av Förenta Nationernas olika organ. Principerna reglerar mandatet, uppgifterna, oberoendet, och arbetsmetoderna för nationella institutioner, som kan beskrivas som permanenta, oberoende organ bildade av staten med det specifika syftet att främja och skydda mänskliga rättigheter på den nationella nivån.

Uppsatsen består av två delar. Mitt angreppssätt på ämnet i del I har varit att fastställa Parisprincipernas legala/juridiska status och huruvida Sverige kan anses uppfylla dem; dvs. om Sverige har en oberoende nationell institution med ett brett mandat att främja och skydda de mänskliga rättigheterna. Slutsatsen som drogs var att Sverige har en juridiskt bindande skyldighet att till en viss del följa Parisprinciperna, och att de i varje fall ska följas till fullo utifrån en moralisk och politisk skyldighet.

Utvärderingen av uppfyllelsen av principerna gjordes på lagnivå genom undersökning av de lagar som reglerar de fyra svenska institutioner (Justitieombudsmannen, Justitiekanslern, Diskrimineringsombudsmannen och Barnombudsmannen), som har en historia inom området mänskliga rättigheter. Som utgångspunkt för utvärderingen användes två av kärnelementen i Parisprinciperna; institutionens *mandat* och dess *oberoende*. Analysen av institutionerna visade att ingen av dem uppfyller Parisprincipernas standarder; antingen är deras mandat för snävt eller deras oberoende för beskuret, eller bådadera. Följaktligen konstaterades att Sverige inte har en nationell institution i enlighet med de internationella standarderna, med konsekvensen att en sådan borde tillskapas.

Den andra delen av uppsatsen undersöker närmare Parisprincipernas reglering av oberoende, och hur det skulle kunna uppnås om en nationell institution skapades i det svenska systemet. Detta görs mot bakgrund av slutsatserna från föregående kapitel om de redan existerande fyra svenska institutionerna och genom att använda goda exempel från andra länder men också ifrån myndigheter inom det svenska systemet. Slutsatsen ifrån denna del visar på att Riksdagen skulle vara den lämpligaste huvudmannen till en NHRI och att det varken skulle vara främmande eller ogenomförbart, vilket flera ansett fram till nu, att bilda en svensk oberoende nationell institution i enlighet med Parisprinciperna.

Acknowledgements

Frankly, it has to be said; without Anna Nilsson (Programme Officer at the Raoul Wallenberg Institute) this thesis would have never been written! I would not have been able to pull myself together without your support and confidence in me. Neither would I have dared to take on this particular subject matter or been able to finish it. You have been brilliant, patient, and generous and I am so lucky to have crossed paths with you!

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In this regard, I especially want to mention my supervisor Christina Johnsson who once, several years ago, took the time to sit down with me in her office and by so doing inspired a disillusioned student to see beyond the limits of conventional law studies. Thank you for making me believe in something different!

In addition to this, I want to thank Johanna Gillström at the Delegation for Human Rights in Sweden, and Jonas Grimheden at the European Union Agency for Fundamental Rights (FRA) for their advice and helpful guidance in my work.

Finally, thanks to my family and friends. You all know what you mean to me.

Karin Bengtsson

Malmö, 25 May 2010

Abbreviations

CAT	Convention Against Torture
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DIHR	Danish Institute for Human Rights
GIHR	German Institute for Human Rights
HRC	Human Rights Committee
ICC	The International Coordination Committee of National Institutions
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
INTOSAI	International Organization of Supreme Audit Institutions
IPU	International Parliamentary Union
NHRI	National Human Rights Institutions
OAS	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights
OP-CAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SNAO	The Swedish National Audit Office

1 Introduction

1.1 Purpose and research question

In 1991 the Paris Principles were adopted. They consist of a set of guidelines regulating the establishment and functioning of National Human Rights Institutions (NHRIs). Such institutions, created by the state, shall be mandated with the competence to protect and promote human rights in an independent manner. Since their adoption the Paris Principles have been endorsed by the United Nations' different organs and over 60 NHRIs have been established throughout the world.

NHRIs are crucial for ensuring national implementation of international human rights instruments and for keeping an eye on the national government's efforts to live up to its international commitments. Furthermore it plays an important role in monitoring that the citizens (and others lawfully in the country including irregular migrants) in practice actually does enjoy the human rights that belong to them. To put it short, it could be asserted that the future success of human rights implementation to a large extent rides on the work by NHRIs.

The issue of the existence of a Swedish NHRI, as defined by the Paris Principles, is particularly interesting to examine since Sweden was one of the driving parties when these Principles were adopted,[1] and since it considers that an NHRI already exists in the shape of the Equality Ombudsman in the country. So far the Swedish positive position towards the Paris Principles and the establishment of NHRIs has mainly been a subject of its foreign policy.

A number of scholars and practitioners have contributed to the interpretation and writings of the Paris Principles. Much literature about different NHRI's experiences, both in terms of their findings about the situation of human rights in their respective countries but also on best practices regarding the establishment of NHRIs, currently exists. However, the subject of NHRIs has not been thoroughly examined in the Swedish context. No comprehensive evaluation of the Swedish institutions in the area of human rights have been conducted in terms of their compliance with the two most important elements of the Paris Principles; the mandate and independence of a national institution. Only parts of the Principles have been addressed in regard to the Swedish institutions in some governmental inquiries and they have only concerned separate human rights conventions. Neither has the existing best practices been applied to the Swedish context, or any steps been taken to establish an institution in total compliance with the Paris Principles' requirements. However, in 2006 a governmental inquiry called *The Delegation for Human Rights in Sweden* was created, which among other things was mandated to examine how the enjoyment of human rights in Sweden could be ensured after that delegation's termination

[1] Depiction made by Christina Johnsson of her conversation with the Special Advisor on National Institutions to the UN High Commissioner for Human Rights, Brian Burdekin; Lund, Sweden, 2010-05-01. The Special Advisor, who was present at the adoption of Paris Principles, described Sweden as a particularly driving force in this regard.

in September 2010.[2] In an additional mission assigned to the Delegation in 2009 the Government instructed it to *examine how the issue of monitoring human rights in accordance with the Paris Principles could be resolved in the Swedish context.*[3] From this instruction, there appears to be an opening for the Delegation to actually look into the establishment of an altogether new Swedish NHRI.

The purpose of this thesis is to examine the Swedish context in relation to the concept of NHRIs and the Paris Principles. In order to do so it purports to answer whether Sweden can be considered to comply with the Principles' standards. The findings and its implications in this regard were necessary for, and lead to an examination of how an NHRI could be established in Sweden to remedy the found deficiencies. Consequently, the thesis sets out to answer the following questions:

1. *Does Sweden have an NHRI complying with the Paris Principles?*
2. *If not, how could one be established in order to comply with them?*

1.2 Scope and method

In order to find the answers to these questions I have made an implementation study of two legal orders; the international legal system and the Swedish national legal system, establishing the latter's implementation of the former. The focus in this regard was put on the Paris Principles' normative content and the Swedish legislation regulating the independence and mandate of four different institutions (the Parliamentary Ombudsmen, the Chancellor of Justice, the Equality Ombudsman and the Children's Ombudsman). The examination was limited to a legalistic level not taking into account any practical experiences of the institutions that might go beyond what is set forth in law. In Swedish terms this method is referred to as "rättsdogmatisk metod".

Another restriction was made in regard to the number of Swedish institutions that were analyzed. The choice of the four examined here, was made on the basis of their human rights mandates and their particular relevance to the subject (selection criteria are motivated in more detail in the section dealing with this).

The Paris Principles are drafted in rather general terms and need to be analysed and interpreted in order to be useful as a measuring stick against which the Swedish context can be evaluated. Hence, the legal analysis of the Paris Principles and the Swedish legislation and how the latter complies with the former, has been made with the help of authoritative[4] interpretations of the Principles. In turn, the content of the Swedish laws

[2] Delegationen för mänskliga Rättigheter i Sverige: *Om delegationen,* http://www.mrdelegationen.se/extra/pod/, 25 May 2010.

[3] SOU 2009:36: Främja, Skydda, Övervaka – FN:s konvention om rättigheter för personer med funktionsnedsättning, Delbetänkande av Delegationen för mänskliga rättigheter i Sverige, Stockholm, 2009, p. 108.

[4] Which interpretations that are considered to be authoritative is explained in section 1.3.

have been analysed in accordance with the Swedish method for interpretation of legal provisions (rättskälleläran) where the preparatory works play an important role.[5]

Finally, it should be noted that though the Paris Principles are not the only existing guidelines for NHRIs, they are the international standards with the largest state support and also developed within and endorsed by the UN. For the purposes of this study the analysis is limited to two core elements of the Principles; namely the mandate of an NHRI and its independence. (In the section about the Paris Principles' legal status I also conclude that at least the standards relating to the mandate and independence might very well be close to passing over into binding customary law.)

To appreciate the consequences of the compliance-analysis for Sweden an assessment of the Paris Principles' status was made using traditional juridical tools of evaluation. Even though the purpose of this thesis is not to establish whether or not the Paris Principles are legally binding it is necessary to understand their status in order to draw conclusions from the findings of the part of the study examining the Swedish compliance with them; i.e. whether any measures are required in order for Sweden to honour its international commitments.

For the purpose to suggest different options for fulfilling the Paris Principles' requirements of independence in a Swedish context, good examples of different European countries are used to recommend possible alternatives. In addition to this, more elaborate descriptions of already existing institutions in the Swedish system are used to suggest how to best establish a new Swedish institution in line with the Principles' requirements of independence, as described and explained at the outset of this thesis.[6] The reasons for choosing the Parliamentary Ombudsmen and the Swedish National Audit Office (the SNAO) as good examples are further described in the relevant sections.

1.3 Sources

For the introductory description of the concept of NHRIs writings of scholars and practitioners were used. The interpretative tools used to convey an understanding of the Paris Principles consist of both scholars and different UN-actors. These were chosen carefully to give a fair conception of the Principles, and are mainly made up by the former Special Advisor on National Institutions to the UN High Commissioner for Human Rights; Brian Burdekin, the UN Centre for Human Rights Geneva, and the ICC Sub-Committee on Accreditation[7]. The Special Advisor was one of the drafters of the Principles and as such had a unique insight to the will of the drafters and the purpose of the standards. His interpretative help is hence valuable for understanding their content. The ICC Sub-Committee has been regarded as too permissive and inclusive in its interpretations (which will be

[5] Also this work was carried out using the method referred to in Swedish as "rättsdogmatisk metod".

[6] Some aspects of the Paris Principles' requirements of independence are further developed only in section 6.

[7] For a description of this organisation see section 2.

further commented in later sections of this thesis) and were hence used to put across an understanding of the Principles at the other end of the interpretative spectrum. Somewhere in between these two, the UN Centre has elaborated on the Principles and given recommendations of how to establish an NHRI in accordance with them in its *Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.* The interpretation of the UN Centre is less strict than that of the Special Advisor, but still stricter than that of the ICC. However, all three can be considered as authoritative interpreters of the standards, and taken together they clarify the understanding of the Paris Principles' content.

When evaluating the importance and relevance of each of these three interpretative sources, the less strict approach of the ICC was found to have a lower value for several reasons (elaborated on in the specific section dealing with this matter) and hence the other two came to form the primary interpretative basis of the Principles serving as the point of departure for the whole of this thesis.

To establish the status of the Paris Principles, different UN-documents and statements made by scholars and practitioners were used to verify both their support by states and by the UN.

For the compliance analysis of the Swedish institutions' legal framework, both preparatory work and statements by different state organs were used as well as recommendations and critique regarding the Swedish compliance issued by several UN committees.

Finally, for part II the SNAO and the Parliamentary Ombudsmen were used as models of how to achieve proper independence (as prescribed by the Paris Principles) for an NHRI. They were chosen due to their fine regulation of independence and the fact that they are already existing institutions in the Swedish system demonstrating that a legislative arrangement like theirs is possible. In addition to this, good examples of different solutions for independence in other EU countries were used. The proximity of culture and political systems of the EU member states make them especially interesting for Sweden to learn from. All of these examples however, were reported by the member states themselves to a compilation put together by the European Union Agency for Fundamental Rights (the FRA) and hence a reservation should be made in regard to their effectiveness since they have not been verified or evaluated by any external sources. Consequently, recommendations derived from them only make up a smaller piece of part II.

This section further presents and discusses different arguments brought up in the legal and political debate regarding the establishment of a proper NHRI in Sweden. In this way, the thesis gives the reader a fair understanding of possible problems, counterarguments and ways to overcome existing challenges when establishing a Swedish NHRI.

Some of the legal acts, state organs and other Swedish terms used in this thesis lack an official translation in English. Such terms have been translated by the author with the help of dictionaries and is stated in brackets in connection to every case. Furthermore, all translations of significant Swedish terms are stated in brackets in Swedish to assist the orientation of readers who are familiar with the Swedish system.

Throughout the thesis “NHRI” is used synonymous with “national institution”, the “Paris Principles” synonymous with the “Principles”, and “she” or “her” as the only pronouns for human persons.

The indication of references is done in brackets in the main text when the sources are made up of legal acts or of decrees, whereas all other sources and literature are put in footnotes.

1.4 Outline

This thesis is structured in two parts. After the introduction (section 1), Part I starts with a historical description (section 2) and then moves on to explain the content of the Paris Principles taking a stand in regard to their preferable interpretation (section 3). Section 4 examines the legal status of the Paris Principles in international law. Finally, section 5 examines the compatibility of four Swedish institutions with the Paris Principles’ requirements, and the implications for Sweden thereof.

Part II (section 6) elaborates on different models of NHRIs and provides advice on how to establish a Swedish NHRI in line with the Paris Principles’ requirements of independence.

PART I

2 The international development of the concept of NHRIs

At the end of the cold war, a number of communist countries and other totalitarian states (between 1990 and 1996 more than 60 countries) began a democratization process. The main focus of these states was to create formal democracies and multi-party elections. This desire however, wasn't accompanied with a democratic culture sensitive to human rights. It was not until the mid-1990s that the recognition of the interrelatedness of these two elements; democracy and human rights, gained ground. This set the stage for a need of an organization that could raise awareness and monitor human rights and facilitate in the creation of a culture of human rights, something that was perceived as not possible to achieve by NGOs, since their work had developed in a more biased manner.[8]

Already in 1946 during the UN ECOSOC's second session, member states were encouraged to establish local information groups or human rights committees to serve as bodies for collaboration with the UN Commission on Human Rights.[9] Except for a set of guidelines endorsed by the UN Commission on Human Rights and the General Assembly from 1978[10], up until the beginning of the 1990s the profile of these national institutions, however, was unclear and the idea was not really acted upon internationally before 1991 when the First International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris. At this workshop a set of principles, the so-called *Paris Principles*, guiding the mandate, responsibilities, composition, independence and methods of operation, of a national institution, were created. These were later approved of by the UN Commission on Human Rights, the World Conference on Human Rights, and adopted by the UN General Assembly in December 1993[11].

The development of this new kind of organization, which could be described as a permanent, independent body established by the state with the specific purpose of promoting and protecting human rights at the national level[12], started and, as stated above, was given nourishment in the new democracies of Africa, Asia and Eastern and Central Europe. The initial attitudes of governments in Western Europe was reluctance and they claimed that sufficient structures for human rights protection were already in place and that human rights were part of the foreign policy organs.[13] Increasingly, however, the subject became part of the domestic legal body also in these countries and hence a growing number of NHRIs were established during the late 1990s.

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[8] Kjærum, Morten: *National Human Rights Institutions Implementing Human Rights*, 2005, p. 5.
[9] Ibid, p. 6; The UN Commission of Human Rights is now replaced by the Human Rights Council, HRC.
[10] Pohjolainen, Anna-Elina: *The Evolution of National Human Rights* Institutions, 2006, p. 120.
[11] Kjærum, op. cit. p. 6.
[12] Pohjolainen, op. cit. p. 1.
[13] Ibid, p. 122.

In 1990 eight NHRIs existed worldwide and in 2005 that number had increased to 60. This development has taken place globally and every region has experienced an increase of national institutions.[14]

The main forum for NHRIs, endorsed by the UN Commission on Human Rights, at the global level is the International Coordination Committee of National Institutions, ICC, which was established by the institutions participating in the Second International Workshop in 1993. The ICC is not an independent organization with any programme of its own, but a *mechanism for coordination* among NHRIs linking them with each other and with the UN at the global level, by *accrediting membership of the organization* to those institutions that comply with the Paris Principles, and by *organizing an international conference* every other year. The accreditation of institutions is important in establishing their legitimacy to act on the international arena. Being an accredited NHRI is important for the institution's possibilities to speak in different fora of the UN. [15]

[14] Kjærum, op. cit. p. 5.
[15] Ibid, p. 16.

3 NHRIs according to the Paris Principles

Below follows an account of the Paris Principles focusing on two core elements; the *(material) mandate* of a national institution and its *independence*. In order to outline the regulation related to these issues I have selected the rules in the Principles, which I find are the most relevant to them.

3.1 Mandate – the legal basis

According to the Paris Principles a national institution shall *promote and protect* human rights (*Competence and responsibilities* §1). To this end, NHRIs should have a *mandate as broad as possible, clearly* set forth either in a *constitutional or in a legislative text* (ibid, §2).

The meaning of the wording "a mandate as broad as possible" has been interpreted to refer to both the *range of responsibilities* assigned to the national institution and to the *legal basis of human rights* ranging from only domestically constitutional rights to those of the international human rights treaties/conventions. NHRIs with a limited mandate to promote and protect a single or a few human rights will normally not be categorized as a national institution but rather as a *specialized institution*. Prior to 2007 the ICC, however, recognized that a *group* of such institutions taken together could be viewed as an NHRI if their collective mandate covered a *broad range* of human rights issues (this was for example the case with the Swedish Equal Opportunities Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman, and the Ombudsman against Discrimination on Grounds of Sexual Orientation)[16] but this policy has now been changed and such collective accreditations are no longer likely (see section 2.3 below).

The reason for the Paris Principles' requirement of a "broad mandate" was the concern of the drafting group that governments would establish bodies to protect the rights of solely one single group or to ensure only certain human rights omitting others. This concern was also addressed by the Special Advisor on National Institutions to the UN High Commissioner for Human Rights when he prepared guidelines in cooperation with Amnesty International which emphasizes that the legal basis for the mandate of an NHRI should not only refer to the rights in the national constitution but rather use the definitions set forth in international human rights instruments regardless of if the state has ratified them or not.[17] The Special Advisor further contends that the reference to these treaties in the mandate is motivated by the fact that it facilitates the assessment of the national implementation and legislation on human rights in relation to international human rights law, and that it remedies the problem of human rights

[16] Pohjolainen, op. cit. p. 7.

[17] Burdekin Brian, and Naum, Jason: *National Human Rights Institutions in the Asia-Pacific Region*, 2007, p.13.

violations falling through the gaps in domestic legislation.[18] The ICESCR Committee further emphasizes the importance of a broad legal basis for the mandate stating that "national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights".[19] This is further emphasized in the 2006 UN General Assembly Resolution which urges states in order to ensure the indivisibility of all human rights to make sure that "all human rights are appropriately reflected in the mandate of their national human rights institutions when established".[20]

In line with the above statements made by the drafters and the UN on the meaning of a "broad mandate" it appears to be clear that the Paris Principles prescribe that the legal basis of the mandate of a national institution shall include the *whole range of international human rights*. Furthermore, as is evident from the below account of the responsibilities bestowed upon national institutions by the Principles to advice the government on the implementation of and promote the ratification of the international human rights instruments, it is implicit that the mandate must be based on, at least the major UN human rights treaties.

3.2 Mandate – the range of responsibilities

The responsibilities of NHRIs listed in the Paris Principles can be divided into five categories; *advisement, monitoring, communication with international organizations, education* and *quasi-judicial operation.*[21] These responsibilities are however non-exhaustive (ibid, §3).

3.2.1 Advisement and monitoring

The *advisory role* shall take the form of submissions of opinions, recommendations, proposals and reports to the Government, Parliament or any other competent body and concern the following issues: legislative and administrative provisions on human rights, the national situation on and violations of human rights (e.g. recommend new legislation or administrative measures or amendments of these to ensure that they conform to fundamental principles of human rights, propose initiatives to put an end to violations on human rights) (ibid, §3.a.i-iv). The advisement shall also relate to the promotion of the effective implementation of international human rights instruments to which the state is a party (ibid, §3.b.) and of the ratification of those that are not ratified (ibid, §3.c).[22]

In order for the institution to be able to make such submissions the NHRI needs to be able to *monitor* the legislation in force and the compliance with the international treaty obligations by both public and private sector actors,

[18] Ibid, p. 14-15.
[19] Committee on Economic, Social and Cultural Rights: *General Comment No. 10. The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (E/C.12/1998/25), 14/12/98.
[20] UN General Assembly: *National institutions for the promotion and protection of human rights*, A/RES/60/154 (23.02.2006), paragraph 5.
[21] Kjærum, op. cit. p. 6-7. I have chosen to employ this categorization, made by Morten Kjærum, since I find that it makes it easier to overlook the principles.
[22] Ibid, p. 7.

situations of violations of human rights and the national situation on human rights in general (ibid, §3.a.i-iv).

3.2.2 Communication with international organizations

The *communication with international organizations* shall consist of cooperation with the UN, regional and national institutions competent in the area of human rights (ibid, §3.e), and of contributions to the state reports which governments are required to submit to the UN bodies pursuant to their treaty obligations. In regard to the latter the NHRI shall express an opinion on the subject with respect to its independence (ibid, §3.d). The latter has been interpreted to mean that the NHRI shall not only present hard facts, but shall rather be given a role to think for itself.[23] In this regard, it should be noted that NHRIs shall not produce the entire state report but may assist in its preparation and presentation with advice. Ideally, it shall issue a parallel report (shadow report) and it also has an important task in distributing and raising awareness of the concluding observations from the international treaty bodies and to follow up on their recommendations.[24]

The UN Handbook on the Establishment of National Institutions explains the inclusion of international cooperation in the Paris Principles as a necessary measure in order for an NHRI to function effectively and that it cannot work alone.[25]

3.2.3 Education

The responsibility to *educate* is another key task. This includes the formulation of programmes for the teaching of and research into human rights and the participation in these in schools, universities, and in professional trainings (ibid, §3.f). It shall also include publicizing reports on the situation of human rights (particularly the fight against discrimination and in particular racial discrimination) and increasing public awareness (reaching also marginalized groups) by the use of press organs (ibid, §3.g).

3.2.4 Quasi-judicial operation

The fifth category of responsibilities, *to hear and consider individual complaints,* was widely disputed when the Principles were negotiated. Hence, it ended up being facultative and, contrary to the former four groups of responsibilities, not necessary to be included in the mandate of the NHRI for it to be considered as fulfilling the Paris Principles. (However, more and more institutions are given such a mandate.[26] In the Asia-Pacific region, all NHRIs can investigate individual complaints, albeit the types of complaints they investigate vary significantly.[27])

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[23] Kjärum, op. cit. p. 6-7.
[24] Burdekin and Naum, op. cit. p. 72.
[25] UN Centre for Human Rights Geneva: *Professional Training Series No. 4. National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, New York and Geneva 1995, p. 14.
[26] Kjärum, op. cit. p. 7.
[27] Burdekin and Naum, op. cit. p. 17.

If this competence is included in the mandate of the institution, complaints may be brought by the individual victim herself, third parties, NGOs, trade unions, or other representative organizations. The work of the NHRI when dealing with these issues may be focused on seeking amicable settlements, issuing binding decisions within the limits of the national law (*Additional principles concerning the status of commissions with quasi-jurisdictional competence* §a), or on referring complaints the NHRI won't or cannot address itself to other competent authorities within the limits of the law (ibid, §c). When carrying out these tasks the NHRI may ensure that the complaining party is informed of her rights (e.g. the available remedies) (ibid, §b).

In conclusion, it could be stated that national institutions as they are outlined in the Paris Principles do not fit the traditional three-division of state powers but rather appears to have a role in both the legislative, judicial and executive field[28].

3.3 Mandate – methods of operation

Under a separate section of the Paris Principles called "Methods of Operation" a number of measures are prescribed in order to fulfil the responsibilities outlined above. These measures could be interpreted to consist of actual responsibilities and might as such be included in the above account. However, I view them more as what they are actually called; i.e. (working) methods, or even powers of the institution. Hence, they do not really qualify to be included in the material mandate of the NHRI, but to make the description of the Paris Principles adequate and fair a short line up of them is nevertheless justified.

In order to fulfil the above responsibilities The Paris Principles provide that the institution shall (inter alia) have the powers to:

- hear any person and obtain any information and documents necessary for assessing situations falling within its competence (*Methods of operation* §b),
- publicize its opinions and recommendations (ibid, §c), set up local or regional sections to assist in discharging its functions (ibid, §e),
- consult other bodies responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar organs) (ibid, §f), and
- develop relations with NGOs working with human rights, economic and social development and protection of vulnerable groups and areas since these organizations play a significant role in expanding the work of national institutions (ibid, §g).

3.4 Independence

In the UN Handbook the importance of independence and autonomy of the national institutions is strongly emphasized. However, the Handbook

[28] Pohjolainen, op. cit. p. 8.

also states that NHRIs can never be completely cut off from the state since they will always depend on it for their establishment and the regulation of their mandate, composition and funding in law. Accountability and transparency are other important requirements affecting the issue of independence.[29]

The provisions ensuring independence are scattered over a number of paragraphs in the Paris Principles, and could probably be grouped together or arranged in a number of different ways. The four main features in the Principles that I have chosen to focus on, which in my view are the most important to ensure independence, are;

- the regulation of the *composition* in law*;*
- *pluralism* of the membership*;*
- principles to ensure *adequate funding;* and
- the *statutory mandate* of the institution.

The Principles prescribe that the composition, competence and the mandate shall be specified in a legislative text (*Competence and responsibilities* §2) that it shall ensure pluralist representation of civilian society (*Composition and guarantees of independence and pluralism* §1), and that the funding shall be adequate in order to ensure independence from the Government (ibid, §2).

3.4.1 Composition

The Paris Principles specify the regulation on composition, in order to ensure independence and a stable mandate of the members, requiring that their *appointment* shall be regulated in an official act establishing the *duration* of the mandate and its *possible renewal* (ibid, §3).

These principles are further elaborated on in the UN Handbook and in practice, there has been a development of a "principle of continuation" of the individuals operating national institutions, which serves to prevent governments from being able to change the founding laws of the institutions to appoint more pro-government staff.[30] The Handbook, together with the Special Advisor and the ICC Sub-Committee also argues that the founding legislation of NHRIs should specifically regulate *the method and criteria for appointment*, and *who may dismiss* the members and for *what reasons*. It is asserted that these tasks are critical for ensuring independence why it is appropriate to assign them to a representative body like the *parliament*. The provisions on method should specify *voting and other procedures* to be followed and those on criteria should specify *profession and qualifications* etc.[31] The Special Advisor and the ICC Sub-Committee argues that appointment procedures should, in order to ensure independence, be *transparent, include consultations with civil society* and result in a *fixed term* in office for those appointed.[32] The founding law of the institution shall empower it to adopt its own internal rules on management, personnel,

[29] UN Centre for Human Rights Geneva, op. cit. p.10.
[30] Ibid, p.7.
[31] UN Centre for Human Rights Geneva, op. cit. p. 11; Burdekin and Naum op. cit. p. 39-40.
[32] Burdekin and Naum, op. cit. p.40; ICC Sub-Committee on Accreditation: *General Observations*, Geneva, June 2009, section 2.1.

and financial administration so that as a principle it can appoint its own staff.[33]

Regarding the dismissal, it is argued that the legislation should *specify as detailed as possible* under what circumstances a member may be removed from her position and be conditional to *serious wrongdoing* on behalf of the member.[34] The ICC Sub-Committee on Accreditation argues in its interpretation of the Paris Principles, that dismissal-decisions shall not be based solely on the discretion of the appointing authorities.[35]

3.4.2 Pluralism

The composition of the NHRI and its competence (which shall be specified in the national founding law (*Competence and responsibilities* §2)) is regulated by the Paris Principles in a way to ensure a *pluralist representation of civil society* involved in human rights protection. The Principles particularly list that representatives from human rights-NGOs, trade unions, social and professional organizations (e.g. doctors, lawyers, scientists, journalists) and representatives of philosophical and religious trends, of universities, Parliament and Government (the latter only in an advisory capacity in deliberations) shall be *members* of the NHRI (*Composition and guarantees of independence and pluralism* §1.a-e).

This kind of pluralist representation is an additional possible safeguard for independence from the government, given that it prevents any group from gaining more influence than the other.[36] The UN Handbook states that true pluralism requires the greatest possible diversity both in terms of sociological and political origin, and that the Paris Principles shall be interpreted to call upon NHRIs to create procedures that guarantee representation of all relevant social forces. It further contends that a national institution composed of only one person (a single-headed institution), which is the case of many ombudsmen offices, will have a difficult time fulfilling the pluralist criteria, whereas commission-like institutions or multiple-member ombudsman offices composed of a number of individuals are "in a better position to use this instrument of independence fully and effectively".[37]

The ICC Sub-Committee lists the four following ways to ensure pluralism: the members of the governing body[38] represent different segments of society, the appointment procedure of the governing body is pluralist (e.g. diverse societal groups recommend the candidates), the institution employs procedures for effective cooperation with diverse societal groups (e.g. advisory committees, networks, consultations, or public forums), and the institution has a staff comprised of different societal groups.[39] The cooperation with NGOs, which would be included in the third

[33] UN Centre for Human Rights Geneva, op. cit. p. 16; Burdekin and Naum, p. 35, 41.
[34] Burdekin and Naum, op. cit. p. 41; UN Centre for Human Rights Geneva, op. cit. p.11; ICC Sub-Committee on Accreditation, op. cit. section 2.1.
[35] ICC Sub-Committee on Accreditation, op. cit. section 2.9.
[36] Pohjolainen, op. cit. p. 7; The UN Centre for Human Rights Geneva, op. cit. p. 12.
[37] UN Centre for Human Rights Geneva, op. cit. p. 12.
[38] The governing body is the organ that manages the NHRI, and it is made up of what is referred to as the *members* of the institution.
[39] ICC Sub-Committee on Accreditation, op. cit. section 2.9.

listing by the ICC, is even prescribed for by the Paris Principles themselves as a method of operation of NHRIs (*Methods of operation* §g), but does not constitute their primary regulation of pluralism which is rather expressed in §1.a-e.

The UN Handbook adds to this the importance of pluralism not only at the governing level of the institution but also among the staff. It is argued that the credibility of an NHRI to a great extent may depend on the public confidence in its staff and leaders.[40]

From the above it appears that the interpretation of how to best achieve pluralism in line with the Paris Principles' requirements is to have the founding law prescribe that the management of an NHRI shall consist of a governing body with several members. One way of realizing that these members are actually diverse and representative of civil society is to let different actors be active in the appointment and nomination procedure. The other two measures mentioned by the ICC (cooperation with diverse societal groups and a pluralistic staff) as means to achieve pluralism must, in my view, be regarded as complementary to the previously mentioned since they alone cannot accomplish the kind of pluralism prescribed for by the Paris Principles.

3.4.3 Funding

The third feature of independence required by the Paris Principles relates to the regulation on funding by the state. The funding shall be *adequate* to enable the institution to have its own staff and premises and prevent it from being subject to financial control (affecting its independence) (*Composition and guarantees of independence and pluralism* §2).

The importance of sufficient funding and financial autonomy of the national institution in order for it to be able to work effectively and have a functional independence as well as a long-term credibility is stressed both by the UN Handbook and by the Special Advisor.[41] However, they also recognise the problem of contradiction between on the one hand the requirement of independence and on the other the actual dependence on the state for funding. Hence, they suggest that the *source and nature* of the funding should be specified in the founding legislation and prescribe that it *shall be sufficient* for the NHRI to perform its basic functions.[42] The Handbook proposes that the NHRI drafts its own annual budget and then submits it to the parliament for approval. This would limit the role of the parliament to the review and approval of the NHRI's draft budget and to the evaluation of financial reports. Government officials should not prepare the budget. Any linkages between the budget of the NHRI and government departments/ministries are not advisable since it may affect the institution's possibility to act critically in its advisory role to the government.[43]

The ICC Sub-Committee is less strict in its interpretation of the Paris Principles' rule on funding and asserts that should the budget be determined by the government the regulation providing for this must clearly define the

[40] UN Centre for Human Rights Geneva, op. cit. p. 16.
[41] Burdekin and Naum, op. cit. p. 7; UN Centre for Human Rights Geneva, op. cit. p. 11.
[42] Burdekin and Naum, op. cit. p. 38; UN Centre for Human Rights Geneva, op. cit. p. 15.
[43] UN Centre for Human Rights Geneva, op. cit. p. 11.

relationship between the institution and the government in order not to compromise the independence of the former.[44]

3.4.4 Statutory mandate

The Paris Principles prescribe that the mandate of the institution shall be clearly set fourth in a legislative text (*Competence and responsibilities* §2).

This provision serves to guarantee that the government or parliament cannot on an ad hoc basis instruct the institution on what or what not to work with, which for example would have been possible had it been established by a decree of the executive. Hence, the UN Handbook states that the creation of an NHRI by an instrument of the executive is insufficient to ensure its permanency or independence. According to the Handbook "an effective national institution will be one which is capable of acting *independently of government, of party politics and of all other entities and situations* which may be in a position to affect its work". Independence from the executive of the day is an essential condition for the effectiveness and credibility of the institution. By maintaining distance from the government the NHRI can make unique contributions to a country's promotion and protection of human rights. The Handbook goes on to state that it is this independence of action that distinguishes the national institution from governmental institutions. However, it adds that the limit for this independence is set by the state in the legislative text regulating the mandate and responsibilities of the institution (i.e. in the statutory mandate). These restrictions on independence however, "should not be such as to interfere with the ability of an institution to discharge its responsibilities effectively", and could be achieved by making the institution directly answerable[45] to *parliament* or to the *head of state.*[46]. In addition, the Copenhagen Declaration adopted by the sixth World Conference on national institutions in 2001 emphasized the principle that national institutions should be independent from the executive branch of government and appealed to states to respect this principle.[47]

The independent functioning of the institution includes the ability to draft its own rules of procedure relating to management, personnel and financial administration (not subject to external modification).[48]

Except for the limits on independence, set in the statutory mandate, the demand for accountability further clarifies the boundaries of independence. The Special Advisor stresses that independence does not in any way preclude the legitimate demand for accountability, but that the balancing between the two nevertheless sometimes may be difficult.[49] He argues that the NHRI should *report to the Parliament.* In cases where this is done to the executive, the responsible minister should forward the report to the

[44] ICC Sub-Committee: *General Observations developed by the ICC Sub-Committee at its November 2008 session*, Section 2.10 Administrative regulation.
[45] Independence from a state organ does not preclude that an NHRI is answerable to the same.
[46] UN Centre for Human Rights Geneva, op. cit. p. 10.
[47] South Asia Human Rights Documentation Centre Publication: "ICC of NHRIs: Quality required, not quantity" in: *Human Rights Features*, Geneva, 13-18 April 2004, p. 5.
[48] UN Centre for Human Rights Geneva, op. cit. 11; Burdekin and Naum op. cit. p.35.
[49] Burdekin and Naum, op. cit. p.36.

parliament that should devote time for serious debate about the recommendations of the report. This operates to hinder the government from stalling a report, which might serve the interests of its political opponents in the parliament.[50]

In order to manage the difficult balance, referred to above, the UN Handbook states that *reporting requirements should be specified in the founding legislation* of the institution and be as detailed as possible in regard to the frequency of reports, subjects to be dealt with and the procedure for evaluation.[51]

From the above outline of the different comments to the Paris Principles, it appears that what was intended by "independence" is a position of autonomy of the NHRI in relation to *both the executive and the parliament*, but that it should *answer to the parliament (i.e. report to the parliament)*. This conclusion is supported by the fact that the Principles and the commentators, referred to above, all recommend that the mandate should be regulated by law detailing the composition and funding of the institution. In parliamentary democracies, in which the Paris Principles appear to take its departure, laws can only be changed by the parliament. Such a procedure requires a broader consensus and more time for preparation than a change of a governmental decree. By letting NHRIs be governed by laws and by having them accountable to the parliament, a high level of independence is ensured, in line with the intention of the drafters of the Principles. It is also evident that the accountability of an NHRI to the parliament rather than to the government will enhance its independence since the former body consists of a wider representation of political views that will enable the institution to act more freely and critically of the state.

3.5 Inclusive/permissive versus exclusive/strict interpretations of the Paris Principles

As can be concluded from the above account, the Paris Principles only provide a general framework for the operation of national institutions. Hence, depending on the perspective one chooses to take the Paris Principles can be viewed either as *minimum standards* or as a *maximum set of guidelines* to strive for, hardly met by any institution in the world. The reasons for the lack of details of the Principles are both political and pragmatic; the authors realized that detailed guidelines would not be able to fit all the different national contexts in the world and that too much details might be counterproductive. The risk of not achieving a wide endorsement of the Principles by governments was also one of the reasons behind the inclusion of the saving clause recognizing the "right of each state to choose the framework that is best suited to its particular needs" for implementing the Principles, by the Vienna World Conference.[52] The UN Commission on Human Rights also recognized this when it stated that it is for each state to choose the legal framework that best suits its needs and circumstances to

[50] Ibid, p. 35, 52.
[51] UN Centre for Human Rights Geneva, op. cit. p. 17.
[52] Pohjolainen, op. cit. p. 14.

promote and protect human rights in accordance with the international standards.[53]

A wide acceptance of different kinds of NHRIs has also been endorsed by the OHCHR, which in its Fact Sheet No. 19 in 1993 expressed that it supports not only one model of national institutions as a mechanism for countries to fulfil their international human rights obligations. The development of these should take into account the local culture, legal traditions and political organization. The OHCHR has also continued to cooperate with both human rights commissions and human rights ombudsmen.[54]

The regional organizations, such as the Council of Europe and the OAS have displayed an even more flexible view on what kind of institutions they agree to have as participants in the human rights work at the national level. Also the ICC itself, which is responsible for the accreditation of NHRIs, has for pragmatic reasons opened its membership to institutions which in strict terms do not fully comply with the Paris Principles; e.g. the case of some ombudsmen in Europe and Latin America (not pluralistic enough), the human rights commissions in Canada and Australia etc.[55] The cause of this "pragmatic reason", is discussed in *the Human Rights Features* (South Asia Human Rights Documentation Centre's news service). The author argues that it is the eagerness of the ICC to promote and support NHRIs that has resulted in this flexible approach. The ICC has hence been caught in a conflict between accrediting members and providing technical assistance to encourage establishments of NHRIs leading to the accreditation of institutions that "fall short of the Paris Principles in terms of mandate and practice". The article continues to contend that such inclusive ICC-membership has flawed the reputation of the organisation and the credibility of the NHRIs concerned. The questionable behaviour of the ICC is further strengthened by the statement that the organisation has ignored reviewing institutions, which it is obliged to do according to its rules of procedure, that have been suspected of no longer complying with the Paris Principles.[56] ICC's inclination to accredit institutions even if they do not fully comply with the Principles, is even supported by the wording of the Preamble of the General Observations of the ICC Sub-Committee on Accreditation, which is its document for interpretation of the Paris Principles. The Preamble states that if an institution falls substantially short of the standards in the General Observations the ICC *could* find it not to be Paris Principles-compliant and hence not grant it accreditation. Using the word 'could' implies that not even its own interpretations of the Paris Principles need to be complied with in order for it to accredit an institution. The statement by the Sub-Committee in its 2007 Decision Paper that it is no longer inclined to grant collective accreditation to several institutions from one state with limited

[53] Commission on Human Rights: *Resolution 2002/83*, Office of the United Nations High Commissioner for Human Rights, Geneva, 26 April 2002.
[54] Pohjolainen, op. cit. p.14.
[55] Ibid, p. 15.
[56] South Asia Human Rights Documentation Centre Publication, op. cit. p.5.

mandates,[57] verifies that even the organisation itself has recognised that its evaluation of institutions might have been to permissive.

On the other hand, contrary to the claim of low credibility is the argument that a flexible and inclusive approach to the creation of NHRIs probably has contributed to the big increase in institutions e.g. in states where human rights advocates have not been welcomed before. It has also been questioned by some experts that the mere fact that an institution is established in accordance with a legal framework guarantees its effectiveness. It has been asserted that institutions without a broad mandate, strong founding statute, independent appointment processes and adequate funding have in fact been effective and that institutions fulfilling the formal standards haven't always lived up to its expectations or mandates.[58] These experiences might suggest that the success of an NHRI depends on more than a good normative basis, like for instance the trust of the public, even if a legal mandate in line with the Paris Principles often means that the majority of the political power is in favour of it.[59]

Regarding the understanding of the Paris Principles either as minimum or maximum standards there are of course different views. Ever since 1994, the UN Commission on Human Rights and the General Assembly have however, taken the view that the Principles, irrespective of their (im)perfection, represent a consensus view of the basic essentials of an NHRI.[60] This understanding of the Principles as minimum standards is shared by the Special Advisor, who was also one of the drafters. He argues that they "were intended to be, and still are, only minimum normative standards for NHRIs".[61]

3.6 Conclusion regarding the preferable interpretation

It is natural that the choice of what type of national institution to establish in each state is affected by its political and legal system and influenced by its culture and historical experiences.[62] However, I do not regard that fact as an obstacle to comply with the Paris Principles. The Paris Principles can be complied with even if consideration is had to the national context. As is evident from the above account the drafters and the UN wished for as many states as possible to endorse the Principles and to start setting up NHRIs, which explains their inclusive approach to interpreting and applying them. This was however, the situation almost twenty years ago and much has changed since then. The Paris Principles, as will be shown in section 3 of this thesis, are now widely accepted and endorsed, and many countries have established national institutions. Hence, there is no longer a need to apply

[57] European Union Agency for Fundamental Rights: *National Human Rights Institutions in the EU Member States. Strengthening the EU fundamental rights architecture I*, Luxembourg: Publications Office of the European Union, 2010, p. 12.
[58] Pohjolainen, op. cit. p. 15.
[59] Ibid, p.16.
[60] South Asia Human Rights Documentation Centre Publication, op. cit. p.5.
[61] Burdekin and Naum, op. cit. p.93.
[62] Pohjolainen, op. cit. p. 16.

the Principles permissively. The fact that ICC has employed a very inclusive and permissive interpretation of the Principles (which now has actually evolved to become much more restrictive) appears to be due to the fact that the organisation has had an agenda of its own. The risk of damaging the credibility of national institutions by applying the Principles in such a permissive manner speaks louder, in my mind, than the claim that complete compliance with the formal standards haven't always ensured that institutions lived up to their expectations or mandate. Moreover, even if examples of the last kind exists, the desirable point of departure, I think, would be not to take any chances but rather to aim at properly and more strictly applying the Principles. An additional support to a stricter interpretation is the fact that an inclusive approach does not call for adherence. For countries with poorly developed institutional infrastructure, some of the Paris Principles' requirements might be difficult to comply with, which could justify deviations from a few of the requirements. The core principles of independence and a broad based mandate must however be intact. As for developed states, a stricter interpretative approach from a perspective of the Principles as minimum standards is appropriate.

In the following sections of this thesis, describing the Swedish institutions in the area of human rights, I will, for the previously outlined reasons, apply the Paris Principles in a stricter manner and employ the interpretations of them made by the authoritative commentators referred to above in section 2.2 (the UN Handbook, the Special Advisor, and the ICC). The fact that the ICC is permissive in its interpretations of the Paris Principles in regard to accreditation of individual national institutions does not preclude that its commentaries and interpretations of the provisions are valuable and helpful in establishing their intended meaning. However, when the ICC's view of the Principles is more permissive than that of the other two interpreters, the latter are used as the basis for my analysis.

Before the conception of the Paris Principles, a very broad group of organs were included in the NHRI-concept (the judiciary, the legislature and social welfare structures) but the Principles made an important contribution in clarifying it. If they were now also to be applied in a manner closer to the intentions of the drafters, i.e. strictly and as minimum requirements, the evolutionary process of NHRIs could take yet another important step forward.

3.7 Different categories of NHRIs

As is evident from the above account, the Paris Principles afford a broad discretion to the national government on how to compose, fund and regulate the mandate of the national institution. Consequently, governments have interpreted the Paris Principles in line with their own national interests resulting in a wide range of institutions with different legal basis, responsibilities, powers, and composition.[63] The different kinds of institutions can be divided into five groups; *consultative commissions*, *commissions with judicial competence and such but with an additional ombudsman competence*, *national human rights institutes*, and *human rights*

[63] Pohjolainen, op. cit. p. 16; Kjærum, op.cit. p. 8-9.

ombudsmen.[64] It should be noted however, that this is only one out of many categorizations used to classify NHRIs and that most institutions do not fall neatly into any of them but might on the contrary fit two or more categories at the same time.

3.7.1 Consultative commissions

Consultative commissions are found in France, Greece and the French speaking countries of Africa. Their membership is often broad-based and the members take an active part in the decision-making. The activity of the institution aims at building bridges between civil society and the government, and, in general, it does not handle individual complaints or devote time to education.[65]

3.7.2 Commissions with judicial competence and with additional ombudsman competence

Commissions with judicial competence exist in several common law countries (e.g. India, Ireland, South Africa, Australia, Canada, the UK and New Zealand) and has inspired the institutions in for example Latvia and Nepal. These commissions have either full- or part-time commissioners appointed in line with certain criteria and they handle complaints about human rights violations. They also have proactive and preventive tasks advising the government and doing awareness raising.

In some countries like Ghana, Mexico, Mongolia and Tanzania the mandate of these commissions is extended to include also that of a traditional ombudsman, focusing on monitoring the legality of public administration, and hence they turn into commissions with judicial- *and* ombudsman competence[66].

3.7.3 National Human Rights Institutes

The fourth category of institutions has developed in Northern Europe (e.g. Denmark, Norway and Germany) and resembles the consultative commissions with its broad-based membership. However, they differ in the regard that the institutes are education and research-based and their members take a less active part in the work of the institution, mainly giving policy directions to the management. These institutions also do not handle individual complaints in general or have investigative powers.[67]

3.7.4 Human rights Ombudsmen

The human rights ombudsmen can be said to be situated in the gray zone as to their status as national human rights institutions, due to their composition (as single-headed institutions) and limited mandate. Some ombudsmen's mandates are limited to the public sector and others are specialized on one certain issue or group of the population. However, a

[64] Kjærum, op. cit. p. 8-9.
[65] Kjærum, op. cit. p. 8-9; Pohjolainen, op. cit. p. 16-17.
[66] Ibid.
[67] Kjærum, op. cit. p. 8-9.

narrow mandate has in some cases been compensated for by looking at the collective work of several specialized ombudsmen. This has led to the fact that such ombudsmen have been recognized as national institutions by the ICC; e.g., the one mentioned above in Sweden, and some with strong human rights mandates in Latin America and in Eastern and Central Europe (as was stated above, this practice is however abandoned now).

The lack of formal membership from civil society, i.e. pluralist representation, of these normally single-headed institutions, could be considered to be compensated for by a very dynamic interaction with civil society groups, even if such an exception is not granted per se by the Paris Principles. (The issue of pluralism will be further elaborated on in sections 5.3.1.2.2, 5.3.2.2.2, 5.3.3.2.2, 5.3.4.2.2, and 6.2.3 below).

Moreover, most human rights ombudsmen have extensive powers within their field, including judicial competence, monitoring, advisory and educational functions. It could be said that this kind of ombudsmen institutions and human rights commissions with judicial competence have converging/coinciding mandates.[68]

3.8 Status at UN meetings

Since the UN World Conference on Human Rights in 1993, when NHRIs for the first time were allowed to speak in their own capacity, this practice has continued in that forum (thanks to ad hoc decisions by each Conference[69]) and has also been established in the UN Commission on Human Rights since 1998, however limited to the subject matter of national institutions. Time constraints and redundant views in light of those already presented by states and NGOs speak against the continuation of the their right to appear in the Commission (now the Human Rights Council), whereas their unique and in-depth insight into specific human rights problems, possessed by neither of the other parties, speak in their favour. In addition to this, the views of the NHRIs are more difficult to disregard than those of NGOs and might assist to develop a more open dialogue than has been the case in the Commission. With willingness, the time problem could be resolved. Whereas the ICC is in favour of limiting the right to speak to the fully accredited institutions according to the Paris Principles, the Commission has been more permissive and willing to allow this possibility to anyone who purports to be a national institution.[70]

[68] Kjærum, op. cit. p. 8-9; Pohjolainen, op. cit. p. 18-19.
[69] Burdekin and Naum, op.cit. p. 10.
[70] Kjærum, op. cit. p 17.

4 Status of the Paris Principles

The Paris Principles is one instrument among a variety of guidelines developed by different actors (international institutions, NGOs and expert bodies) to promote the most efficient NHRIs as possible. The Principles are however, the most authoritative *normative* instrument of these, forming something like a so-called doctrine of national institutions.[71] When developed the Paris Principles were framed as recommendations and are as such not legally binding rules, however since 1991 they have gained both significant political and moral weight as a result of their endorsement both by many *national and international organizations* and *by governments* and by explicit reference to them in UN Conventions.[72]

This section aims at examining the status of the Principles as regulation for NHRIs and if an obligation to establish national institutions can be derived from them.

4.1 UN support

Different *UN bodies*, including the *General Assembly*, have been the driving forces in supporting and promoting the Paris Principles and the establishment of NHRIs. *The Commission on Human Rights* (now the UN Human Rights Council) has adopted resolutions every year encouraging states to set up NHRIs based on the Paris Principles and *the OHCHR* has decided to assist them in doing so.[73]

Other authoritative international statements have been made by the *UN treaty bodies* in their *General Comments* on the member states' compliance with their legally binding human rights treaty obligations. Three treaty bodies have recommended the establishment of national institutions in accordance with the Paris Principles to ensure effective implementation of their respective convention obligations; the ICERD Committee in 1993 and 2002,[74] the ICESCR Committee in 1998[75] (however not explicitly mentioning the Principles but enumerating tasks in line with them), and the CRC Committee in 2002[76]. Moreover the CEDAW Committee encouraged states, already in 1989 in its General Recommendation No. 6, §1, to establish a national body with tasks very similar to those set forth in the Paris Principles[77].

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[71] Pohjolainen, op. cit. p. 7, 9.
[72] Ibid, p. 10.
[73] Ibid, p. 10.
[74] Committee on the Elimination of Racial Discrimination: *General Recommendation No. 17. Establishment of National Institutions to Facilitate Implementation of the Convention, 42nd Session*, 25/03/93; *General Recommendation No. 28. The follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 60th session*, 19/03/2002.
[75] Committee on Economic, Social and Cultural Rights, op. cit.
[76] Committee in the Rights of the Child: *General Comment No. 2. The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child* (CRC/GC/2002/2), 15/11/2002, §§ 1, 4.
[77] Pohjolainen, op. cit p. 11-12.

In addition to the General Comments the treaty bodies have also emphasized the importance of national institutions in their dealing with state reports, e.g. in their *Concluding Observations*. This is the case with the CRC, ICESCR, and ICERD committees, which systematically refer to the Paris Principles. The HRC also point at the importance of a national institution, however without explicit reference to the Principles. The importance of national institutions and the Paris Principles have also been increasingly recognized by the *UN Special Rapporteurs* and *Representatives*.[78]

As a result of the growing number of NHRIs in the world, emphasis has been put on improving the international benchmarks for these, inter alia on the complaints-handling function, which is now recognized as one of the core tasks of these bodies. This has for instance been acknowledged by the *Commission on Human Rights* in its resolutions[79] where it takes note "with satisfaction of the efforts of those States that have provided their national institutions with more autonomy and independence, including through giving them an investigative role or enhancing such a role, and encourages other Governments to consider taking similar steps"[80]. This recent development could be seen as a call for an improvement of the Paris Principles.

4.2 NGO support

Except for the work of the UN, a range of international NGOs have also encouraged governments to implement the standards set fourth in the Paris Principles. Two of the most prominent of these are Amnesty International and Human Rights Watch, and the former has even developed its on separate guidelines and recommendations for best practices and for the establishment of national institutions.[81]

4.3 Government and state support

Also governments themselves have come to accept the idea that all NHRIs should fulfil certain *minimum standards*. This is evident through the approval of the Paris Principles by the 1993 World Conference on Human Rights where the governments of the participating states themselves adopted the resolution.[82]

Furthermore, the recommendations of the 1993 World Conference were reflected in resolutions of several intergovernmental actors by the end of the 1990s, such as the International Parliamentary Union (IPU) in its 1994 resolution and the Council of Europe Committee of Ministers' recommendation of 1997 both referring to the Paris Principles and hence giving these additional legitimacy. Moreover, the African and Latin American regional organizations recognized the role of national institutions

[78] Ibid, p. 13.
[79] Commission on Human Rights Resolutions 2002/83 and 2003/76, Office of the United Nations High Commissioner for Human Rights, Geneva, 26 April 2002 and 25 April 2003.
[80] Pohjolainen, op. cit. p. 8, footnote 8.
[81] Ibid, p. 7, 10.
[82] Pohjolainen, op. cit. p. 122.

in promoting and protecting human rights during the 1990s. In addition to this the World Conferences on Women in Beijing 1995, and Against Racism in Durban in 2001, have all urged states to establish national institutions according to the Paris Principles (the latter even pressing for the competence of investigation to be included in the mandate of NHRIs).[83]

4.4 Treaty law support

The first international hard law instrument obliging states to establish a national institution having regard to the Paris Principles is the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the OP-CAT, of 2002.[84] This treaty prescribes that each state party shall establish an "independent national preventive mechanism" to prevent torture and that this shall be done with due consideration taken to the Paris Principles.[85]

The next hard law instrument requiring states to set up national institutions and to take into account the Paris Principles in so doing, is the Convention on the Rights of Persons with Disabilities, the CRPD, of 2006.[86]

In addition to this, it could be argued that also the International Covenant on Economic, Social and Cultural Rights, the ICESCR, and the Convention on the Rights of the Child, the CRC, contain such obligations. The previously mentioned General Comment No. 2 by the CRC Committee and General Comment No. 10 by the ICESCR Committee actually does more than just encourage states to establish NHRIs. The CRC Committee asserts that article 4 of the Convention, obliging states to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention", includes the commitment to establish NHRIs for the states that have ratified the Convention.[87]

Similarly, the ICESCR Committee notes that one of the means intended in article 2.1 of the Convention, obliging states to progressively achieve the convention rights, is the work of an NHRI. This Committee is however cautious in its recommendations on national institutions, stating only that

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[83] Pohjolainen, op. cit. p. 8 footnote 8, p. 10; Burdekin and Naum, op. cit. p. 10, footnote 20.

[84] Ibid, p. 12.

[85] OP-CAT (2002) art. 17 reads: "Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions."
Art. 18.4 reads: 4. "When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights."

[86] CRPD (2006) art. 33.2 reads: "States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."

[87] Committee on the Rights of the Child, op. cit. §1.

"one such means" can be made up by an NHRI, and hence leaving the state parties with the ability to choose other means.[88]

4.5 Conclusion on the status of the Paris Principles and the obligation of states to apply them

As is evident from the outline above those states that are parties to the OP-CAT and the CRPD are legally bound by international law to establish national institutions or mechanisms taking due consideration to the Paris Principles (albeit that it is sufficient that the mandates of such institutions remain within the subject area of the respective treaty). In addition to this, the authoritative (though not binding as such) statements made by the ICESCR and CRC Committees bodies have clarified that the obligation to implement their respective treaties actually implies the establishment of national institutions in line with the Paris Principles.

It is hence clear, that within the first two areas of human rights law states parties are *legally bound* to establish NHRIs and that the most desirable way for them to do so is in accordance with the Paris Principles.

Outside of these treaty areas, the possible legal obligation of states to establish NHRIs in accordance with the Principles has to be assessed in the light of other policy expressions, which in this case are made up of General Assembly resolutions, statements by the Commission on Human Rights and the different treaty body Committees, as well as state practice. One might reflect on whether these instruments have turned *the establishment of NHRIs according to the Paris Principles into international customary law.* In order for this to be the case, there must be an established, widespread and consistent *practice* of states coupled with a belief of those states that the practice is obligatory according to an existing law, the so-called *opinio juris.*[89]

The Paris Principles were not adopted as law and do not explicitly oblige states to set up national institutions, but the mere fact that they regulate how such institutions should function implies that the establishment of NHRIs is an inherent requirement of them. Hence, their possible status as customary law would be accompanied by an obligation of states to actually establish national institutions. Could these guidelines then be considered as having passed into the status of customary law?

General Assembly resolutions and other UN statements[90] can make up evidence of either existing law or create the opinio juris or state practice required to create new customary law.[91] In the case of the Paris Principles and the issue of establishing NHRIs the many non-contested General Assembly resolutions, and treaty body General Comments on how states should implement their legally binding treaty obligations are in my view in this regard significant indications of a widespread recognition in the world

[88] Committee on Economic, Social and Cultural Rights, op. cit.

[89] Thirlway, Hugh: "The Sources of International Law", in: *International Law (editor Malcolm D.Evans)*, 2006, p. 122.

[90] An account of the level of support by states of these UN documents is unfortunately out of the scope of what this thesis purports to deal with.

[91] Boyle, Alan: "Soft Law in International Law-making" in: *International Law (editor Malcolm D. Evans)*, 2006, p. 142.

that such bodies should be set up in accordance with the Paris Principles. These instruments are however, still only framed as recommendations and as such alone I don't believe that they suffice to imply the necessary opinio juris. Nevertheless, it could be argued that they in combination with policy instruments in this area might be able to do so.

As has been shown, the Paris Principles have not only been endorsed by the UN organs, but also by states themselves. For instance at the World Conferences, when programmes urging states to establish NHRIs in accordance with the Paris Principles were adopted, as well as at different regional fora. Such actions can in my opinion be taken as an indicator that those states regard the setting up of national institutions in line with the Paris Principles as a sort of obligation. This in conjunction with the fact that many of them actually have established such (since the 1990s approximately 60 new NHRIs have been established) implies the existence of an opinio juris on the subject coupled with a wide spread practice. Furthermore the pressure from the Durban World Conference and the Commission on Human Rights to strengthen the investigatory functions of NHRIs implies that states worldwide have moved beyond the basic requirements of the Paris Principles and are now ready to take on the more facultative provisions of that document, which in turn implies that the former are highly accepted and now taken for granted.

In addition to this, the incorporation of the obligation to establish NHRIs in accordance with the Paris Principles into the two treaties, referred to above, could be regarded as a sign of both state practice and opinio juris of such an obligation even outside of the areas of the treaties in question. This process of law creation where lex ferenda turns into lex lata has been viewed by the ICJ as having a crystallizing effect on the emerging customary law.[92]

Just as treaties and policy instruments each alone can indicate opinio juris and state practice, they can also operate together to provide evidence of this and the possible emergence of customary law. Moreover, policy instruments, which are not even incorporated into the treaty, may represent an agreed understanding of its terms, and hence their interaction with legally binding related treaties may transform their legal status into something more.[93] This could for example be the case for the Paris Principles in regard to their reference in the OP-CAT and the CRPD.

To sum up, there are indicators that the Paris Principles have passed into customary law, with the resulting obligation for states to establish NHRIs accordingly. Such a conclusion is, however, very uncertain and my arguing will hence limit itself to contending that such law may indeed be emerging. For now, one might have to settle for viewing the obligation as a *moral and political one.* This conclusion might be better illustrated by the way the researcher Anna Pohjolainen puts it: "The fact that the Paris Principles have become widely accepted as a benchmark for governmental human rights bodies implies that the concept of national human rights institutions has become something of a "norm".[94] The moral obligation of compliance with the Paris Principles is also evident from the great endorsement they have

[92] Thirlway, op. cit. p. 131.
[93] Boyle, op. cit. p. 148.
[94] Pohjolainen, op.cit. p. 13.

received by two of the world's biggest human rights NGOs. In regard to such obligation it should be noted that the extent to which the Principles can be considered as binding depends on whether one is interpreting their content and terminology in a restrictive or permissive manner. It is evident that a permissive and inclusive interpretation of the Paris Principles makes it easier for states to sign policy documents in their support and hence the resulting opinio juris is dependent on the meaning assigned to them. Since the declared interpretative position for the purposes of this thesis is a restrictive one (see section 2.4), I am further hesitant to argue that the entirety of the Paris Principles would constitute emerging customary law. However, I do contend that the core elements of the Principles; the establishment itself of a national institution and its independence and broad mandate, in line with the previous reasoning, are morally binding on states to comply with (and may be close to passing over into binding customary law).

4.6 Implications in the Swedish context

The implication of the above conclusions for Sweden is of course that it has an obligation to make sure that it has a national institution established in line with the Paris Principles. This obligation is *legally binding* in regard to the CRPD- and the OP-CAT treaties, since they have both been ratified by Sweden. However, in line with the previous reasoning, Sweden also has a *moral and political obligation* to establish such an institution according to the Principles and particularly with regard to their core requirements of independence and a broad mandate, taking account of the rest of the international human rights law. This position will be my point of departure for the rest of this thesis, and the following section 5 aims at exploring what this obligation implies and whether Sweden can be said to fulfil it.

5 Swedish institutions in the area of Human Rights

This section will explore the Swedish institutions, including their development, in the area of human rights protection and how they measure up to the requirements set forth in the Paris Principles. I have chosen to take my departure from two core standards in the Paris Principles; namely the *material mandate and responsibilities* of an NHRI and its *independence* in terms of composition, pluralism, funding and the statutory regulation of its mandate. The assessment of the Swedish institutions will hence be carried out using the disposition and classification of the Paris Principles used above in section 3.2, with the exception of "methods of operation" in section 3.2.3.[95] Furthermore it will be based on the *legal regulation* of these institutions, and not consider accounts of their activity in practice outside of what is prescribed for by the legal instruments governing them. The examination will be finalized with a conclusion of its implications.

5.1 The Swedish form of government and administrative authorities

Sweden is a parliamentary democracy, which means that all public power proceeds from the people,[96] with a constitutional division of powers between the Parliament and the Government. The Parliament, which is elected by the people, enacts legislation and holds the Government accountable. The Government, which is formed by the party, or group of parties that make up the majority of the seats in the Parliament then manage the state affairs (The Instrument of Government (Regeringsformen, one out of four laws making up the Swedish Constitution) §§ 1:1, 1:4, 1:6). To assist with this it has a multitude of state administrative authorities (förvaltningsmyndigheter), all of which are subordinate to its power. The organisation of administrative authorities subordinate to the Government is the main model of the Swedish system, and the Constitution only allows for exceptions to this when it is prescribed for by the Constitution itself or if another law specifically prescribes that the authority shall be subordinate to the Parliament (The Instrument of Government 11:6, 11:8).[97]

The implications of being an authority under the Government are that the Government *appoints the officials* of the institution (The Instrument of Government 11:9), and that the government can instruct it on how to work and act in different aspects, through *appropriation directions* (regleringsbrev), albeit within the frame of the laws governing the activity of the particular authority. Through these directions, the Government

[95] The compliance with the rules relating to "methods of operation" will not be analysed for the same reasons outlined above in section 2.2.3.

[96] Government Offices of Sweden: *Sweden's democratic system,* http://www.sweden.gov.se/sb/d/2853, 30 April 2010.

[97] SOU 2006:22: *En sammanhållen diskrimineringslagstiftning. Del 2. Slutbetänkande av Diskrimmineringskommittén*, Stockholm, 2006, p. 259-260.

usually assigns the authority tasks to carry out during the coming year attached with an obligation to report back on its achievements. The governmental commission of inquiry for the establishment of the new Equality Ombudsman (the Equality Ombudsman-commission of Inquiry) put the implications of the appropriation directions like this:

> ”As long as such missions or directions are within the frames of the law, the Government is in principle able to direct the authorities without consulting the Parliament. In that regard it could be stated that an authority subordinate to the Government is not self-governed or independent from the Government.”[98]

Hence, it could be concluded that an authority that is subordinate to the Government cannot be regarded as independent. However, the Commission went on to establish that this is not something remarkable against the backdrop of the Swedish system of government and its division of powers.[99] Administrative authorities in Sweden are by tradition more independent than those in most other countries. They have a constitutional right of autonomy in regard of exercising their authority against individuals (myndighetsutövning) (Instrument of Government 11:7).[100] However, except for this, a duty of loyalty to the Government is the norm and prescribed for by the provision of 11:6 in the Instrument of Government.[101]

5.2 Development of the institutions

The birth of the first Swedish institution in the area of human rights/good governance and rule of law dates as far back as the 16th century. At that time the Office of the Ombudsman was created by King Charles XII as a part of the Executive. That institution still exists today in the shape of *the Chancellor of Justice* (Justitiekanslern). The main task for the Chancellor of Justice was to safeguard the interest of the Executive rather than the protection of individual rights and hence, it was not viewed as impartial either by the Parliament or by the people, which argued that the power to protect individual rights and freedoms should be afforded an organ independent of the Executive. The struggle between the Executive and the Parliament on this issue was not settled until the adoption of the new Constitution of 1809. That Constitution enabled the Parliament to appoint its own Ombudsman, called *the Parliamentary Ombudsman* (Riksdagens Justitieombudsman), independent both from the Executive and the Parliament itself. Thus, the Parliamentary Ombudsman and the Chancellor of Justice came to exist side by side both exercising control over public administration but within their own respective fields of jurisdiction.

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[98] This quote has been translated into English by me. The original quote in Swedish reads: ”Så länge sådana uppdrag eller direktiv är förenliga med lagregleringen kan alltså regeringen i princip styra myndigheterna utan att riksdagen tillfrågas. I den meningen kan sägas att en myndighet under regeringen i princip inte är självständig eller oberoende av regeringen.”

[99] SOU 2006:22, part II, p. 259-260, 262-263.

[100] This entails a prohibition against interference from the Government and Parliament in the decision making of the authorities in individual cases (förbud mot ministerstyre).

[101] SOU 1999:65, p. 171.

The creation of the Parliamentary Ombudsman, did not take place in a democratic system of government but was the result of much struggle by the people for better systems of government, institutions and laws that could guarantee their basic rights and freedoms.[102]

The task of the Parliamentary Ombudsman (now called the Parliamentary Ombudsmen) was, and still is, to ensure that the rule of law is respected by courts, administrative authorities and municipalities. Through its monitoring activities, the Parliamentary Ombudsmen counteracts abuse of power within these institutions to ensure that judges and civil servants fulfil their duties towards the public as set forth in Swedish law. Throughout history the people of Sweden has viewed the institution with respect and high esteem and the Swedish Ombudsman-model has served as a prototype for many similar institutions around the world.[103]

Since the creation of the Parliamentary Ombudsman the development in Sweden has been to establish more and more ombudsman institutions. The first to be created was *the Equal Opportunities Ombudsman* (Jämställdhetsombudsmannen) in 1980 whose founding law on equal opportunities concerning gender to a large extent was inspired by the experiences in the US (the 1964 Civil Rights Act) and the work in the UK.[104] The next was *the Ombudsman against Ethnic Discrimination* (Diskrimineringsombudsmannen), which was established in 1986, followed by *the Children's Ombudsman* (Barnombudsmannen) in 1993, *the Disability Ombudsman* (Handikappombudsmannen) in 1994, and finally *the Ombudsman against Discrimination on Grounds of Sexual Orientation* (Ombudsmannen mot diskriminering på grund av sexuell läggning) in 1999. These institutions differed from the Parliamentary Ombudsmen in respect of their *subordination* since unlike the Parliamentary Ombudsmen they were not placed under the Parliament but under the Government. The Government appointed and hired the chief ombudsmen of the institutions. It was also the Government, which in annual appropriation directions determined what goals the institutions should have, and it assigned special tasks to them, often demanding reports back.[105]

The main task of the ombudsmen was and is to monitor that the different laws prohibiting discrimination, in their respective areas of protection, are complied with at the workplace, in educational settings as well as in the commercial areas of society and to handle individual complaints either in or outside of the courts. The responsibilities of the Ombudsman against Ethnic Discrimination and the Disability Ombudsman were mostly prescribed for in law, whereas for the Equality Ombudsman and the Ombudsman against Discrimination on Grounds of Sexual Orientation the mandates were established in governmental decrees.[106]

In terms of mandates, that of the Children's Ombudsman differs from the rest of the other ombudsmen. This ombudsman does not have the

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[102] al-Wahab, Ibrahim: *The Swedish Institution of Ombudsman*, 1979, p. 20, 24-27.
[103] Ibid, p. 13, 20, 31, 35.
[104] Equinet European network of equality bodies, Interview with Katri Linna: *The Swedish Equality Ombudsman in the Spotlight*, http://www.equineteurope.org/403.html, 1 April 2010.
[105] SOU 2006:22, part II, p.170, 174, 179, 184, 188.
[106] Ibid, p. 171, 175, 180, 184; Proposition 2007/08:95: *Ett starkare skydd mot Diskriminering*, Stockholm, 2008, p. 368.

competence to handle individual complaints and take them to court and she neither possesses the ability to monitor any laws of discrimination.[107] Instead, this institution has the responsibility to promote the rights of children in general by representing young people's rights in line with the Swedish commitment to the CRC and by promoting the implementation of that convention.[108]

As of the 1 of January 2009, a new institution was created constituting a merge of four of the ombudsmen outlined above; the Equality Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman, and the Ombudsman against Discrimination on the Grounds of Sexual Orientation. The new institution called *the Equality Ombudsman*, (Diskrimineringsombudsmannen), hence replaced the former four which have ceased to exist, whereas the office of the Children's Ombudsman has been left intact.[109] The main task of the new ombudsman is to monitor that the likewise new and extended discrimination law (which incorporates all of the former grounds of discrimination but which has also been complemented with the additional grounds of transgender identity/expression and age and a number of societal areas to which the prohibition applies) is followed.[110]

The reason for the creation of a new ombudsman was that the Government considered the different discrimination laws to exert their protection very similarly regardless of their particular ground of discrimination or the societal area they applied to. Hence, this enabled them to be replaced by a new single statute monitored by only one ombudsman institution. The Government contended that the creation of one comprehensive discrimination law and of one single institution also prevented the undermining of the authority of the ombudsman institution, which inevitably would be the case, if, in line with the former system, new ombudsmen had to be added as soon as new discrimination grounds were added.[111] In addition to this one ombudsman would be cost efficient, give the institution a larger impact on society, mark the equal value of all of the discrimination grounds, and facilitate the accessibility for the individual turning to the institution for help.[112]

Due to the fact that the Constitution prohibits the Parliament from executing administrative functions except in certain cases allowed for by the Constitution or the the Riksdag Act (Riksdagsordningen) (Instrument of Government 11:8), it has been considered a natural consequence and in line with the form of government outlined above, that the Swedish ombudsmen, except for the Parliamentary Ombudsmen, have been and still are subordinate to the Government.[113]

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[107] Proposition 2007/08:95, p. 365.
[108] SOU 2006:22, part II, p. 188.
[109] The Children's Ombudsman was considered too different from the other ombudsmen in terms of the legal basis for its mandate, consisting of the Convention on the Rights of the Child, and in regard of its responsibilities, to be eligible for the merger (Prop. 2007/08:95, p. 2).
[110] Proposition 2007/08:95, p. 2.
[111] Ibid, p.363.
[112] Ibid, p. 364.
[113] SOU 2006:22, part II, p. 259-260.

5.3 Compliance with the Paris Principles

The subjects of the following examination of the Swedish institutions' compliance with the Paris Principles are the Parliamentary Ombudsmen, the Chancellor of Justice, the Equality Ombudsman, and the Children's Ombudsman. As is evident from the previous account of their development, they all have a connection to human rights protection/monitoring and in addition to this, the Equality Ombudsman has itself applied for accreditation as an NHRI at the ICC.[114] It might furthermore be appropriate to reiterate that the stricter authoritative interpretations of the Paris Principles, as accounted for in section 3.6, will be employed when evaluating the compliance with the Principles by the Swedish institutions.

5.3.1 The Parliamentary Ombudsmen

5.3.1.1 Mandate and responsibilities

The main duty of the Parliamentary Ombudsmen is set fourth in the Swedish Constitution and consists of *monitoring* that the civil servants of the public sector comply with the Swedish laws and other regulations, and that they fulfil their duties (The Instrument of Government 12:6).[115] This mandate of the Ombudsmen is regulated more in detail in the Act with Instructions for the Parliamentary Ombudsmen (*Lag med instruktion för Riksdagens ombudsmän).*

§2 of this act prescribes that in principle all state and municipal authorities and their staff as well as public enterprises where the state has a decisive influence is under the supervision of the Parliamentary Ombudsmen. However, members of the Parliament and Government and some other agencies are exempted from the scrutiny. The supervision shall in particular ensure that the courts and public authorities obey the constitutional requirements of objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon by these organs (Act with Instructions for the Parliamentary Ombudsmen §3). The mandate to monitor not only the lower courts but also the Supreme Court and the Supreme Administrative Court makes the Swedish Parliamentary Ombudsmen stand out in comparison to many other countries with this kind of institution.[116]

Furthermore, the Parliamentary Ombudsmen shall contribute to remedying deficiencies in legislation by *making recommendations of amendments* to the Government or Parliament when such a need is detected by the institution (ibid, §4). They are also entitled to *give advice* and express their

[114] That application is currently under consideration and the Sub-Committee has not yet given its answer as to whether it will be accredited. See http://www.nhri.net/2009/Chart_of_the_Status_of_NIs__January_2010.pdf, p. 6, 2010-06-11. There are in addition to the mentioned Ombudsmen a number of other Swedish ombudsmen, e.g. the Press Ombudsman and the Consumer's Rights Ombudsman, but they are not considered here since their connection to human rights is almost non-existent.

[115] Konstitutionsutskottets betänkande (1997/98:KU21), Stockholm, 1998.

[116] Rowat, Donald C: "Why an Ombudsman to Supervise the Courts?" in *The InternationalOmbudsman Anthology. Selected Writings from the International Ombudsman Institute, (edited by Reif, Linda C.),* The Hague, 1999, p. 528.

opinion on the application of the law in order to make it more uniform (ibid, §6).

The supervisory activities are carried out by the ombudsmen through their handling of individual complaints as well as through other inquiries and inspections that they consider necessary (ibid, §5). They either conclude cases with an adjudication declaring whether the public decision was taken in breach of the law or otherwise inappropriate, or they can prosecute a servant suspected of committing a crime while in service (ibid, §6). The procedure for the handling of individual complaints is regulated in detail in several paragraphs in the act (§§7, 9, 10, 17-24) and complemented by a provision in the Constitution granting them full insight into the public administration (Instrument of Government 12:6).

As is evident from the above account of the mandate of the Parliamentary Ombudsmen, its legal basis refers to the *fundamental rights and freedoms of the citizens*. However, the precise content of these rights and freedoms are not clarified. Neither is it specified whether their basis is to be found in national or international law. In addition to this the monitoring activity is aimed at ensuring that public servants apply the rule of law and not particularly aimed at supervising their compliance with and application of human rights law. Hence, despite the fact that the mandate seems to have a very broad basis, including "the fundamental rights and freedoms of citizens", in my view the human rights-element is not defined clearly enough to fulfil the requirements of the Paris Principles.

The range of responsibilities of the Parliamentary Ombudsmen however, seems to come closer to complying with the requirements of the Principles. As for the monitoring task of the institution, this is prescribed for in detail in the Act with Instructions for the Parliamentary Ombudsmen, but since the mandate of the institution is not to oversee human rights treaties in particular, also this supervisory task misses its target in regard to what the Paris Principles require. In addition to this, the monitoring activity is limited to more reactive tasks, in the shape of quasi-judicial powers and does not focus particularly on prevention. Thus this responsibility which the Paris Principles prescribe should be assigned to a national institution is lacking for the Parliamentary Ombudsmen. This conclusion is further supported by the critique presented by the UN CAT Committee in its evaluation of the Parliamentary Ombudsmen as a "National Preventive Mechanism" for the monitoring of the CAT. The requirements of that mechanism in the Optional Protocol to the Convention, which Sweden has ratified, are equivalent to those in the Paris Principles and even refer to them (articles 17-23). The CAT Committee was of the view that the Parliamentary Ombudsmen, which has been designated by the Swedish Government as the Swedish national mechanism, does not have a mandate broad enough for this, particularly in the sense that its activity is not preventive but rather reactive.[117]

The advisory task is regulated somewhat better for the institution. The fact that the Ombudsmen has the ability to recommend amendments to legislation with regard to fundamental rights and freedoms and is free to

[117] Committee Against Torture: *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Concluding observations of the Committee Against Torture*, (CAT/C/SWE/CO/5), 4 June 2008, p. 8-9.

express its opinion on the application of the law in order to facilitate its uniform application leads me to conclude that some of the provisions on advisement in the Paris Principles are fulfilled. However, the Parliamentary Ombudsmen does not have the required mandate to promote the effective implementation of the ratified international human rights treaties, or the ratification of those that are not yet ratified, and hence the institution cannot be considered to fully comply with the Paris Principles in terms of advisement.

Regarding the Principles' requirement of communication with international organizations, and in particular with the UN, the regulation governing the activity of the Parliamentary Ombudsmen is altogether silent. No provision deals with this, nor the issue of state reporting or the matter of human rights education and research. Thus, in regard to these two areas of responsibilities the activity of the Parliamentary Ombudsmen does not comply with the Paris Principles.

Overall, and for the above reasons I do not consider the Parliamentary Ombudsmen to reach the standards set by the Paris Principles either in regard to its legal basis or in regard to the responsibilities of its mandate.

5.3.1.2 Independence

5.3.1.2.1 Composition

The composition of the Parliamentary Ombudsmen is regulated for in the Constitution, which states that the Parliament elects one or several ombudsmen to carry out the monitoring tasks described above (Instrument of Government 12:6). The more detailed instructions on the composition are laid down in the Riksdag Act, which has an intermediary status between that of the Constitution and the status of ordinary laws.[118] According to this act four ombudsmen shall be appointed; one chief ombudsman and three ordinary ombudsmen. In addition to these the institution can have deputy ombudsmen (the Riksdag Act 8:11).

The ombudsmen are elected for a term of four years, but can before the expiration of their term be removed from office (if more than half of the parliamentary votes agree on the removal (ibid, 5:6)) should they no longer enjoy the confidence of the Parliament. They are all appointed one at a time, either by acclamation[119] or, if any member of Parliament asks for it, by secret ballot (ibid, 8:11, 7:3). If the procedure of secret ballot is employed, the candidate given more than half of the votes (simple majority) is the one appointed for the post. Should such predominance not be achieved, a new election will be arranged, and if the same happens again, the two with the most votes from the last election will compete in a third election for the post (ibid, 8:1, 2). The election is preceded by a preparation by the Parliamentary Committee on the Constitution (Konstitutionsutskottet) and the appointment of the different ombudsmen do not follow the election of Parliament, but takes place whenever a position becomes vacant (ibid, tilläggsbestämmelse 8.11.2).

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[118] Sveriges Riksdag: *Riksdagsordningen*, http://www.riksdagen.se/templates/R_Page____6056.aspx, 14 May 2010.

[119] Close to a unanimous approval of a proposal, rendering a ballot vote unnecessary. Decisionmaking without a ballot. (lat. acclamare).

The chief ombudsman is the head of the administrative tasks and determines the general focus of the activity of the institution (ibid, 8:11, 8:11, 2). It is also she who hires the staff of the institution (The Act with Instructions for the Parliamentary Ombudsmen §28). Further regulation on when the deputy ombudsmen are allowed to serve and who shall stand in when the chief ombudsman is prevented from performing his duties are set fourth in the Act with Instructions for the Parliamentary Ombudsmen (§§15-16).

Clearly, the composition oft the Parliamentary Ombudsmen is regulated for in law as is prescribed for by the Paris Principles, even if it is not concentrated to one sole founding law but rather dispersed over three statutes (with the more general features of this in the Constitution). As for the procedure for appointing the ombudsmen and the duration of their mandate this is also prescribed for by law. The fact that the procedural rules for this is set fourth in the Riksdag Act requiring more than half of the Parliament to agree does provide the appointment with democratic legitimacy, as well as a certain independence from the Parliament (and evidently from the Government) since the changing of that act is more difficult to bring about than one of an ordinary law. In addition to this the appointment procedure is prepared by the Parliamentary Committee on the Constitution which reflects the composition of the Parliament and hence the will of the people. However, this cannot be equated with the consultative process with civil society which is suggested by the ICC and the Special Advisor to be a part of the appointment-/nomination procedure. Furthermore, the independence of the Ombudsmen is weakened both by the fact that no qualifications or other criteria are set forth in the law and by the fact that the Parliament can remove any of the ombudsmen from office if it no longer has confidence in her. Hence, quite contrary to what the ICC recommends, the dismissal is left to the discretion of the appointing organ, i.e. the Parliament. The one thing that perhaps is the most striking regarding the level of independence is the fact that the ombudsmen, upon request of the secret ballot procedure by any parliament member, are elected by simple majority. Consequently, this means that the Government in practice can control the appointment of the ombudsmen.[120]

The principle of continuation, which could be considered as employed for the Parliamentary Ombudsmen in the sense that the appointment of the ombudsmen do not follow the election of Parliament, might however work to increase the element of independence of the institution. Another aspect speaking in favour of independence is the fact that the institution itself adopts its internal rules and hires its own staff, and that the external body with power over it is in fact the Parliament and not the Government. Nevertheless, taken together it is uncertain if the requirements of independence set forth in the Paris Principles is entirely fulfilled by the regulation on the composition of the Parliamentary Ombudsmen.

[120] Since the Government in Sweden either has a 50 % parliamentary support of its own or by the help of alliances with other parties, decisions requiring simple majority voting will almost inevitably be won by the Government.

5.3.1.2.2 Pluralism

As stated above the ombudsmen shall be four to their number, with one of them being the chief ombudsman deciding on the focus of the work. According to §13 of the Act with Instructions for the Parliamentary Ombudsmen, the chief ombudsman may hire specialists and expert advisers when needed but provided that there are resources available for it.

Except for the provision on the possibility of cooperation with expert advisers and the fact that different political views are represented and active in the appointment procedure of the ombudsmen, no legal rule exists to really ensure pluralism of the institution. Even if the institution is managed by a collegium of four ombudsmen equivalent to the Paris Principles' requirement of a multiple-member institution, there is no provision requiring a nomination-/appointment procedure of these that result in their representativeness of different groups of society, or of a diverse staff. Keeping in mind that the access to experts is limited by the supply of financial resources and that the appointment procedure only involves politicians and no NGOs, scholars or trade unions etc. leads to the conclusion that the Parliamentary Ombudsmen do not comply with the Paris Principles' requirement of pluralism.

5.3.1.2.3 Funding

The budget for the Paliamentary Ombudsmen is decided annually by the Parliament (Instrument of Government 9:3-5,the Riksdag Act 9:4). In connection with this, the goals of the institution are set forth. In practice, they have been held very general. For example, one goal has been to uphold the quality of the complaint handling procedure and to (in accordance with the Instruction) keep the time spent on such activities within a certain limit as well as to engage in other investigative activity to a certain extent. In its annual report, the Parliamentary Ombudsmen shall indicate how the goals of the institution have been met and comment on the efficiency in relation to funds spent.[121](Act with Economy-administrative Rules etc. for the Administration of the Riksdag (my English translation for Lag med ekonomiadministrativa bestämmelser m.m. för riksdagsförvaltningen)).

The Paris Principles' requirement of adequate funding, as specified in the UN Handbook and by the Special Advisor to include the prescription of source and nature of the funding in the NHRI's founding legislation, appear to be met in the Act of the Parliamentary Ombudsmen. The instructions on tasks to be carried out by the usage of the resources are kept short and general, hence leaving the institution with a fair amount of independence. The annual report on the use of the funds, regulated in law, also seems to comply with the limited role of the Parliament to only evaluate how the funds have been spent, rather than exerting financial control trying to decrease the autonomy of the institution, in line with the UN Handbook interpretations of the Paris Principles. The fact however, that the Parliament does provide the institution with instructions, as general as they may be, renders it not altogether financially independent of the Parliament.

[121] SOU 1999:65, p. 117.

5.3.1.2.4 Statutory mandate

The Parliamentary Ombudsmen is one out of a very small number of the Swedish authorities, that are subordinate to the Parliament. As has been described above its mandate and responsibilities are laid down in three legislative texts; the general rules are contained in the Constitution and the Riksdag Act and the more detailed in the Act with Instructions for the Parliamentary Ombudsmen.

In addition to these provisions, the Instruction affords the management of the institution a certain freedom of action to decide on its work. This power is entrusted to the Chief Ombudsman and in accordance with §12 of the Act with Instructions he is to announce rules for the organisation and distribute the complaints between the ombudsmen. The chief ombudsman is not entirely free however, to decide on organisational issues on her own, but is obligated to consult the Parliamentary Committee on the Constitution regarding issues of high importance (§14 the Act with Instructions for the Parliamentary Ombudsmen). This Committee shall also consult the Parliamentary Ombudsman on such issues if it otherwise finds it appropriate or if one of the ombudsmen initiates it (the Riksdag Act tilläggsbestämmelse 8.11.1).

Moreover, there are a range of quite detailed provisions governing the procedure for handling individual complaints and similar cases in the Act with Instructions for the Parliamentary Ombudsmen (§§18-24).

In terms of the Parliamentary control of the activity of the institution, the ombudsmen are obligated to report on their work annually. This report shall inform the Parliament on the previous year's efforts on recommendations of legal amendments, prosecutions of public servants, other important decisions reached by the Ombudsmen, and an account of the overall work of the institution and be submitted alongside with journals, protocols, and registries (Act with Instructions for the Parliamentary Ombudsmen §§11, 25). The report is considered by the Parliamentary Committee on the Constitution, which usually suggests to the Parliament, without additional comments, to put it aside. The report very seldom gives rise to motions in the Parliament.[122]

As is evident from the above account, the mandate of the institution is provided for by law and hence the Ombudsmen is not a creation of the Government. The rules in the Act with Instructions are rather detailed in terms of the tasks bestowed upon the institution, and well balanced with the possibility of the democratically elected Chief Ombudsman to decide on organisational matters. This seems to provide it with 'real' independence and flexibility in terms of its ability to carry out its responsibilities effectively.

The obligation to consult the Committee on the Constitution however does not seem to be compatible with the requirement of independence set forth in the Paris Principles.

Regarding the duty to report on its actions this order of things is clearly in line with what the UN Handbook and the Special Advisor argues that the

[122] SOU 1999:65, p. 117-118.

Principles should mean. The report is to be submitted to the Parliament and the procedures for this is clearly set out in one of the founding laws.

In conclusion, it can be said that the fairly detailed provisions governing the complaints mechanism of the Parliamentary Ombudsmen and the other rules on responsibilities in combination with the lack of detailed instructions from the Parliament, except for some very generally kept funding directions, renders the institution fairly independent from its superior, i.e. the Parliament. Hence, the Parliamentary Ombudsmen must be regarded as complying with the Paris Principles in regard to having a clearly stated mandate set forth in a legislative text, albeit the independence resulting from this is mitigated by the obligation to consult the Committee on the Constitution.

To sum up, it should be noted that the existence of the Parliamentary Ombudsmen is prescribed for in the Swedish Constitution and as such, the institution should be regarded with great respect. However, the mandate of the Ombudsman does not rest on a legal basis that refers sufficiently to international human rights in line with what the Paris Principles prescribe. Neither is the regulation on its composition and pluralism, or the independence in terms of decision making power and funding fully satisfactory in regard to the requirements of the Principles. Hence, the Parliamentary Ombudsmen cannot purport to be a national institution.

5.3.2 The Chancellor of Justice

5.3.2.1 Mandate and responsibilities

Most of the regulation governing the activity of the Chancellor of Justice is set forth in the Ordinance with Instructions for the Chancellor of Justice (Förordning med instruktion för Justitiekanslern), and in the Act concerning the Monitoring of the Chancellor of Justice (my English translation for Lag om justitiekanslerns tillsyn). The former states that the Chancellor, under the Government, shall guard the rights of the state and in matters concerning such rights be the spokesperson of the state. The Chancellor of Justice shall furthermore assist the Government with *advice and investigations* on legal matters (Ordinance with Instructions for the Chancellor of Justice 2§). When handling *individual complaints,* the Chancellor shall undertake the investigations needed (ibid, §15).

In addition to this, the Chancellor of Justice has an almost identical mandate as the Parliamentary Ombudsmen in regard to *monitoring* that state- and municipal authorities abide by the laws and also otherwise fulfil their duties (Act concerning the Monitoring of the Chancellor of Justice §§1-3). The Chancellor of Justice is mandated to prosecute civil servants suspected of crimes committed when on duty (ibid, §5). However, this act does not oblige her to suggest legislative amendments, or to take up complaints by individuals. Hence, the regulation on monitoring activities is far more extensive and detailed in the law regulating the Parliamentary Ombudsmen than in that governing the Chancellor of Justice.

Except for the tasks bestowed upon the Chancellor of Justice in the previously mentioned acts, she shall supervise the *freedom of expression*

and the *freedom of press* in accordance with the provisions on this in the Freedom of the Press Act (Tryckfrihetsförordningen) and in the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen), both of which are part of the Swedish Constitution. The Chancellor of Justice is the exclusive prosecutor of crimes against the freedom of press (Freedom of the Press Act 9:1-2) and he has the power to confiscate documents and publications in performing this task (ibid, 10:2-4). She is also mandated to prosecute crimes against the freedom of expression, even if this can be handed over to a general prosecutor, and to confiscate technical recordings (Fundamental Law on Freedom of Expression 7:1, 7:3). The monitoring activities of the Chancellor also extends to the Bar Association and an additional range of laws[123] authorise the Chancellor of Justice to appeal against a number of authority decisions in order to look after the public's interests.

Similar to the case of the Parliamentary Ombudsmen, the legal basis of the mandate of the Chancellor of Justice does not explicitly include international human rights treaties. The only reference to human rights is the responsibility of the Chancellor to prosecute crimes against the freedom of expression and against the freedom of press, and to monitor authorities' compliance with the law (the application of the rule of law). This however, and in line with the reasoning above regarding the Parliamentary Ombudsmen, cannot be considered as sufficient to comply with the requirements of the Paris Principles. This legal mandate simply does not make up what is needed in order to be able to promote and protect human rights in line with what the Principles prescribe. In addition to this, it should be noted that one of the tasks of the Chancellor is to be the spokesperson of the state and to guard its rights. This is not equivalent to the rights of the citizens, but could rather be considered as quite the opposite. Hence, it might be argued that these tasks of the Chancellor are incompatible with the protection and promotion of human rights as it is intended in the Paris Principles.

Since the legal basis for the mandate does not refer to human rights in a broad sense, the task of supervising compliance with the legislation will not fulfil the Principles' requirement of monitoring. The task of the Chancellor of Justice, as is evident from the account above, is not to supervise the situation of human rights in general in the country. In addition to this, the same lack of preventive work that is the case for the Parliamentary Ombudsmen is a problem for the Chancellor of Justice, and the UN CAT Committee also did forward the same critique against the Chancellor in this regard.[124]

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[123] Datalagen (1973:289) (Act concerning Data), kreditupplysningslagen (1973:1173) (Act concerning Credit Information), inkassolagen (1974:182) (Act concerning Debt Collection), lagen om behörighet för justitiekanslern att överklaga vissa beslut enligt rättegångsbalken (1985:400) (Act concerning the Authorisation of the Chancellor of Justice to Appeal Against Certain Decisions According to the Act of Judicial Procedure), lagen om automatisk databehandling vid taxeringsrevision, m.m. (1987:1231) Act concerning the Handling of Data in Regard to Tax Auditing), och lagen om allmän kameraövervakning (1998:150) (Act concerning Public Camera Surveillance). All of these acts were translated into English by me.

[124] Committee against Torture, op. cit. p. 8-9.

Concerning the advisory element of NHRIs' responsibilities prescribed for in the Paris Principles, except for the obligation to assist the Government with legal advice set forth in the Ordinance, there is nothing in the mandate of the Chancellor of Justice requiring her to fulfil such tasks. The legal advice does not specifically refer to human rights issues, and no corresponding provision to that of the Parliamentary Ombudsmen's obligation to suggest legal amendments exists for the Chancellor. Hence, the Chancellor of Justice cannot be regarded to comply with the Paris Principles in this regard.

Furthermore, there is no provision in either of the acts mentioned above that regulate communication with international organisations, and hence neither in this regard can the Chancellor of Justice be said to comply with the Paris Principles. Similarly, there is no mentioning of education or research anywhere in the instruments regulating the activities of the Chancellor, and thus this part of the Principles is not fulfilled by the institution.

As for the quasi-judicial operation, this appears to be the area where the Chancellor of Justice best complies with the Principles.

All in all, and for the above reasons I do not consider the Chancellor of Justice to reach the standards set by the Paris Principles either in regard to the legal basis or in regard to the responsibilities of its mandate.

5.3.2.2 Independence

5.3.2.2.1 Composition

The Chancellor of Justice is subordinate to the Government (Instruction of Government 11:6) and is its highest Ombudsman. The Chancellor is chief of her institution, and is employed with a power of attorney by the Government (Instrument of Government 11:9; Ordinance with Instructions for the Chancellor of Justice §§13, 20). The vacancy of any of the chief positions of the governmental authorities have up until recently not been made public as a matter of policy of the Swedish Government (the possibility to do so can be derived from 6§ of the Ordinance concerning Employment (my English translation for Anställningsförordningen), but has now been changed and the Government has announced that the principal rule shall be an open appointment process, however with a few exceptions left to the Government to determine. One of these exceptions is made up by the Chancellor of Justice, which shall not be appointed by an announcement of the post or by an open hiring process.[125] The appointment criteria are set forth in the Constitution consisting in inter alia the requirements of relevant work experience and skills as an expression of the *principle of objectivity* (objektivitetsprincipen). [126] The constitutional provision furthermore, requires that the person serving as the Chancellor of Justice is a Swedish citizen (Instrument of Government 11:9). The employment by power of attorney of the Chancellor affords her a particularly secure form of employment, similar to the employment conditions of judges.[127] This means that the Chancellor cannot be removed from her office in the manner that

[125] *Regeringens utnämningspolitik* 2009/10:43, p. 21-22.
[126] Strömberg, Håkan: *Allmän förvaltningsrätt*, 17th edition, Malmö, 1995, p. 47.
[127] Ibid, p.44.

applies to ordinary public servants (uppsägning) but that only the more serious procedure for termination of an employment (avsked) is possible for her, requiring strong reasons for dismissal (Act concerning Enabling Employment 7§ (my translation for Lag om fullmaktsanställning), Act concerning Security of Employment §18 (my English translation for Lag om anställningsskydd)).

Regarding the management of the authority it is the Chancellor of Justice that makes the decisions of the institution, if she does not choose to delegate easier cases to the subordinate staff (Ordinance with Instructions for the Chancellor of Justice §§17-18).

There are no provisions guiding the duration, or possible renewal of the mandate or any rules concerning the appointment process of the Chancellor of Justice in any legislative texts. The only provision on the matter is that in the Constitution declaring that the Chancellor of Justice is an organ subordinate to the Government and that experience and skills shall be among the objective grounds for her appointment. None of the provisions above say anything about the appointment procedure, or make any detailed account of the competence required (except for that on the citizenship) of the person eligible for the position. Rather the process of appointment appears to lack transparency and is controlled by the Government. Hence, the application of the so-called principle of objectivity could be called into question. As for any other authority under the Government, and as has been described in section 5.1 above, this means that it is the Government that has the main power over the institution. Thus, it can be concluded that, contrary to what the interpretations above of the Paris Principles prescribe, the task of determining the method and criteria for appointment and dismissal of the Chancellor is assigned to the Government and not the Parliament. Neither is the appointment procedure preceded by a consultative process with civil society. As is obvious from the previous reasoning the Paris Principles' requirements of the composition in law of a national institution cannot be regarded as fulfilled in the case of the Chancellor of Justice.

5.3.2.2.2 Pluralism

When the Chancellor of Justice finds that there is a need, she may hire experts and specialists (ibid, §20).

Since the Chancellor of Justice is an authority governed by one single person, the Paris Principles requirement of a multiple-member institution is not fulfilled. Even if the feature of pluralism could be enhanced by an effective cooperation with civil society (which is actually possible, albeit voluntary through §20 in the Ordinance) or through the employment of a diverse staff, this would only be complementary to the main feature of pluralism, consisting of a membership representative of different groups of society. Hence, the Chancellor of Justice do not comply with the Principles' provision on pluralism.

5.3.2.2.3 Funding

The budget of the Chancellor of Justice is determined in the usual manner for an authority under the Government, which is through the parliamentary

approval of a proposition by the Government.[128] As is the case for all authorities governed by appropriation directions, the Government can set up more detailed conditions as to the usage of the funds in addition to those decided by the Parliament.[129]

As is evident the funding of the Chancellor of Justice is controlled by, and tied to he wishes of the Government in terms of its distribution on different tasks. Hence, there are no provisions in law either on the source or on the nature of the funding. Neither is the budget drafted by the institution itself but rather by the Government (before it is approved by the Parliament).

Hence, in this regard the Chancellor of Justice cannot be considered to comply with the Paris Principles' provisions requiring the funding of the institution to afford it sufficient independence.

5.3.2.2.4 Statutory mandate

As is outlined above the mandate and the responsibilities of the Chancellor of Justice are set forth in the Ordinance with Instructions for the Chancellor of Justice, the Act Concerning the Monitoring of the Chancellor of Justice, the Freedom of the Press Act, the Fundamental Law on Freedom of Expression, and in several other laws.

In addition to the regulation in the acts just mentioned the institution is also governed by the governmental appropriation directions, since it is an authority subordinate to the Government. These directions usually start with some general goals, as for instance that the rule of law shall be upheld and that the efficiency of the public administration shall be improved. The rest of the goals set up for the activity of the institution are similar to those of the Parliamentary Ombudsmen, like for example the obligation to report back on what measures have been taken in a certain sphere of action and the number of cases and costs of certain kinds. It is also relatively common that the Government assigns the Chancellor of Justice specific missions to, among other things, investigate certain affairs, sometimes coupled with additional earmarked funding.[130]

The mandate of the Chancellor of Justice is evidently regulated for in a range of legislative texts, but the most important of these instruments only has the status of a governmental decree (the Ordinance) and can therefore easily be changed to fit the interests of the Government. In addition to this, the legal regulation of the mandate and responsibilities of the Chancellor is complemented to a large extent with appropriation directions containing instructions and missions to be carried out by the institution as well as the obligation to report back on different achievements. It should be noted that the room for instructions through appropriation directions is large since the laws regulating the Chancellor of Justice are not detailed (the Act concerning the Monitoring of the Chancellor of Justice is for instance much less detailed than the equivalent law of the Parliamentary Ombudsmen). Hence, the institution cannot be considered as independent from the

[128] SOU 1999:65: *Barnombudsmannen – företrädare för barn och ungdomar*, Stockholm, 1999, p. 119.
[129] Ibid, p.38-39.
[130] Ibid, p. 119.

Government. This conclusion is further strengthened by the fact that the Chancellor does not report to the Parliament at all. Its reports are not even forwarded to the Parliament for discussion.

The fact that the existence of the Chancellor of Justice is mentioned in the Constitution (Instrument of Government 11:6) does not really have any implications for its independence since the Constitution does not regulate anything about its mandate or composition. The former is completely in the hands of the Government and as for the latter, the power to decide on its composition is partly left to the Government. Neither of the other elements of independence, i.e. pluralism and funding, comply with the requirements set fourth in the Paris Principles. The same conclusion applies to the range of responsibilities of the Chancellor of Justice and the legal basis for those. Overall, it must hence be concluded that this institution does not comply with the Paris Principles and cannot be regarded as a national institution.

5.3.3 The Equality Ombudsman

5.3.3.1 Mandate and responsibilities

The mandate and responsibilities of the new Equality Ombudsman, are regulated in the Discrimination Act (Diskrimineringslag), and the Act concerning the Equality Ombudsman (lag om Diskrimineringsombudsmannen), none of which have the status of constitutional laws. The Discrimination Ombudsman shall *monitor* that the new Discrimination Act is followed, and shall primarily try to induce those who are bound by it to comply voluntarily (Act concerning the Equality Ombudsman §1:1; Discrimination Act 4:1). As a secondary recourse she is mandated to *bring a court action* on behalf of an individual who claims that his or her rights according to the law have been violated (Discrimination Act 4:2). She also has the power to fine those who refuse to cooperate in connection with investigation and monitoring activities (ibid, §4:4).

The new Discrimination Act prohibits *discrimination* in a number of areas in society (working life 2:1-2, education 2:6, labour market policy activities and services 2:9, membership of a certain organization 2:11, supplies of goods, services, and housing 2:12, health and medical care, social services and insurance, other financial aid 2:13-14, military and civilian service 2:15) and prescribes the obligation of certain positive measures to be taken by both public and private actors to prevent discrimination and promote equality within the education system and in the labour market (chapter 3, and scattered provisions in chapter 2).

In addition to the tasks outlined above, the Equality Ombudsman shall also work to ensure that discrimination do not occur in any other areas of society (Act concerning the Equality Ombudsman §1:2), *promote* equal rights regardless of the discrimination grounds covered in the Discrimination Act (ibid, §1:3), and *advice* individuals who have been subject to discrimination how to claim their rights (§2, ibid). Furthermore, the Equality Ombudsman shall *inform, educate and discuss* with the government, enterprises, organisations and individuals, *follow research* and development work, follow the international development and have *contacts*

with international organisations, and propose legislative amendments and other anti-discrimination measures to the Government. All of this however shall be done *within the Equality Ombudsman's "sphere of activities"* (ibid, §3).

The promotion referred to in §1:3 is explained by the Swedish Government to aim at making the Equality Ombudsman assist in the creation of a society where peoples´ human rights will not be limited by any of the discrimination grounds in the Act.[131]

Regarding the contact with international organisations, mentioned in §3, according to the Swedish Government, this means contacts in the area of discrimination with for instance the UN Treaty Bodies.[132]

Furthermore, the Swedish Government considers that "other anti-discrimination measures" proscribed for in §3 includes for instance publication of independent reports and recommendations on discrimination, and influencing public opinion.[133]

The Swedish government pointed out that it wanted the *mandate* for the new Equality Ombudsman to be *as broad as possible* and *principally* regulated in law, and furthermore that it should not be limited to only monitoring but also include promotion.[134]

As is evident from the outline just made the breadth of the *legal basis for the mandate* of the Equality Ombudsman does not match the requirement set forth in the Paris Principles, or the statement, just referred to, made by the Swedish Government. According to the founding laws of the institution, all of the activities and responsibilities assigned to the Equality Ombudsman have to remain *within the area of discrimination*. No other human rights, like the right to education, healthcare, and work or the right to privacy etc, are covered by the mandate of the Equality Ombudsman. Only the limited legal area of equality and discrimination rights are covered, which does not set any minimum standards for the human rights they address. It only deals with the *relative* issue of treatment; nobody shall be treated less favourably than any other person due to any of the discrimination grounds. Since the Discrimination Act doesn't set a minimum standard for what is acceptable the Equality Ombudsman does not monitor a legislation guaranteeing any human rights except the sole, and relative right not be discriminated against. Despite the fact that the discrimination prohibition and the activities of the Equality Ombudsman extends over a very wide area of society and over all of the UN Human Rights Treaties that Sweden has ratified it still only includes the right to equal treatment. The reasoning of the Swedish Government when it states that the mandate of the Equality Ombudsman should be as broad as possible, reveals that it either tries to neglect the fact that such breadth not only implies a wide range of practical responsibilities, but also needs to be based on a wide range of international human rights**.** The conclusion that the Equality Ombudsman does not comply with the Paris Principles in regard of the legal basis for its mandate is further supported by the ICCPR Committee which, when recognising the merger of

[131] Proposition 2007/08:95, p. 380.
[132] Ibid, p 381.
[133] Ibid, p 382.
[134] Ibid, p 378.

the former four ombudsmen, stated that it was concerned that Sweden "has still not established an independent national institution, with a *broad competence in the area of human rights* [emphasis added], in accordance with the Paris Principles".[135]

In addition to this the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, stated after his visit to Sweden that "Sweden is rightly famous for, and proud of, the ombudsman institution", but "although these institutions are carrying out indispensable work, their responsibilities do not extend to all aspects of all human rights". In this statement of his he was referring to the former ombudsmen institutions, but since the legal basis for the Equality Ombudsman hasn't been extended beyond discrimination his critique is still valid for the new institution.[136]

Regarding the range of responsibilities, and in line with what was previously implied, the institution comes closer to compliance with the Paris Principles. The monitoring and advisory elements of the Principles are clearly tasks that are assigned to the Equality Ombudsman, however their practice is limited to the legal area of discrimination and hence the institution does not fully comply with the requirements of the Principles in this regard either. The same reasoning applies to the tasks of education, research, moulding of public opinion and cooperation with international organisations. The exact content of the provision regulating "contacts with international organisations" in §3 of the Act concerning the Equality Ombudsman is however uncertain. Before the establishment of the Equality Ombudsman, the old Disability Ombudsman and the Equality Ombudsman-commission of Inquiry argued that the institution should be given the ability to issue independent reports to the UN Treaty Bodies or at least be able to participate in the governmental reporting to the UN.[137] The Swedish Government however, does not mention anything about this in its proposition to the Act concerning the Equality Ombudsman and hence it is hesitant if this possibility could be interpreted into the wordings of §3. Consequently this means that it is uncertain whether the Equality Ombudsman does comply with §3.d of the Paris Principles requiring the national institution to contribute to state reports.

The area in which the Equality Ombudsman appears to comply with the Paris Principles the best is the quasi-judicial field.

In conclusion, the Equality Ombudsman cannot be regarded as complying with either the Paris Principles' requirement of a broad legal basis for its mandate, or with the tasks of monitoring, education and advisment in the area of international human rights. The latter problem is very much a result of the former.

[135] Human Rights Committee, op. cit. p. 3.

[136] Hunt, Paul: *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. Mission to Sweden*, 28 February 2007, p. 11.

[137] Proposition 2007/08:95, p. 377, 656.

5.3.3.2 Independence

5.3.3.2.1 Composition

When the merger of the four previous thematic ombudsmen working to combat discrimination into the new Equality Ombudsman was about to take place the Equality-commission of Inquiry proposed that its form of management should be regulated in legislation. This was however dismissed by the Government, in its proposition to the founding law of the Equality Ombudsman.[138] Hence, there is nothing in the two acts, accounted for above, that regulate the leadership of the institution. Instead, which is the case of all administrative authorities in Sweden subordinate to the Government, the composition of the Equality Ombudsman is determined by the Government. However, the same rules in the Constitution that apply to the Chancellor of Justice also apply to the Equality Ombudsman, in terms of objectivity requirements and citizenship for her appointment (Instrument of Government 11:9). Similarly, there is no legal requirement of transparency or consultation in the appointment procedure, but only the new statement that such an open procedure shall be the principal rule for the government authorities.[139] In contrast to the Chancellor of Justice however, the Equality Ombudsman is hired for a fixed term ("tidsbegränsad anställning"), according to a governmental ordinance (Ordinance concerning Employment 9§). Two legal acts regulate the removal of the Equality Ombudsman. When less grave wrongdoing is at hand the removal can be handled by transferral, and when it is serious it may result in an actual dismissal (Act concerning Public Employment (my English translation for Lag om offentlig anställning) §32; Act concerning Security of Employment §18). The dismissal shall be determined by the State Committee for Professional Liability (Statens ansvarsnämnd) which handles disciplinary issues for high-level public servants (Act concerning Public Employment §34).

The lack of regulation in law on the actual composition of the institution does not mean that there is a lack of rules altogether. The relevant provisions are contained in governmental decrees and according to the Authority Ordinance (my English translation for Myndighetsförordning), which applies to all authorities under the Government (§1), they shall all be managed by a chief of the authority (myndighetschef), by a board, or by a panel of lay assessors (nämnd) (§2). For the Equality Ombudsman the Government has chosen the chief model, meaning that the institution is headed by one person (Ordinance with Instruction for the Equality Ombudsman §§ 3,4 (my English translation for Förordning med instruktion för Diskrimineringsombudsmannen) made up by the Ombudsman herself, for the sake of simplifying the delegation of responsibility and to have one clear representation of the Equality Ombudsman externally. The Government argued that having five managing ombudsmen, in line with what the Commission of Inquiry had suggested, would create confusion as to their respective responsibility, and risk making the ombudsman institution anonymous.[140]

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[138] Ibid, p. 367.
[139] *Regeringens utnämningspolitik* 2009/10:43, p. 21-22.
[140] Proposition 2007/08:95, p.366.

Once the Ombudsman has been appointed the rest of the employees are hired by the institution itself (ibid, §23).[141]

As is evident from the previous account, the composition of the Equality Ombudsman is not set fourth in law, and hence the requirement of the Paris Principles in this regard is clearly not complied with. Rather the power to control this essential feature of independence lies with the Government; the state organ in relation to which the Paris Principles primarily aim at establishing autonomy for the national institution. Hence, the regulation on the composition of the Equality Ombudsman go against the Principles in the same regard as that of the Chancellor of Justice in terms of the appointment procedure. It should also be noted that the newly created possibility of an open appointment process is totally in the hands of the Government and not laid down in any legislative text. In addition to this, it is neither consultative. What might seem more in line with the Principles is the fact that the power to decide on dismissal is removed one step away from the Government to a special board. However, this organ ultimately also answers to the Government. It could well be argued, that the kind of appointment procedure which is applied for the Equality Ombudsman in the long run will jeopardize the inclination of the institution (including the Ombudsman herself as well as her staff) to criticize and question the Government.

5.3.3.2.2 Pluralism

As was accounted for in the previous section, the office of the Equality Ombudsman is headed by one person, and for the rest it is composed of subordinate staff. The Government contended that the competence of the former different ombudsmen could be preserved even if the authority would not be managed by them as a collegium,[142] but in order to strengthen the access to expert knowledge a *Council* should be established, composed of persons with expertise on discrimination, and on other relevant issues. With regard to the importance of the autonomy of the Equality Ombudsman the members of this Council should not be appointed by the Government but by the authority itself i.e. by the Ombudsman and, except for herself, consist of ten members (ibid, §5).[143] In addition to this, the Act concerning the Equality Ombudsman requires the institution to work with enterprises, organisations, and individuals (§3).

As is evident from the above account the leadership of the Equality Ombudsman is taken care of by a single person and hence the representation of different parts of society in a multiple-member management, which is required by the Paris Principles, is ruled out.

In some aspects however, this lack of pluralism might be compensated for by the special Council that can be attached to the institution, and by the above mentioned cooperation-requirement in the Act concerning the Equality Ombudsman. There are however, no guarantees that the special

[141] Given that the Equality Ombudsman was created through a merger of the previous Ombudsmen working against discrimination, staff employed by either of these institutions were offered a position at the new Ombudsman.
[142] Ibid, p. 367.
[143] Ibid, p 362.

Council will be composed of members from diverse societal groups, since its composition is not established in any legal instrument but rather decided by the Ombudsman herself, who in turn is appointed by the Government. In addition to this, the Government has also established that the work of the Council should not have a decisive effect on the activity of the institution or be able to influence what cases it decides to take to court.[144] The possibility of pluralism in this form is hence in the hands of, and dependent on the good will of the Ombudsman. The same applies to the possibility of having independent and critical staff hired to carry out the work of the institution. The composition of the working force is indirectly controlled by the Government through its appointment of the Ombudsman.

The other feature of pluralism in the form of cooperation with civil society and the extent to which it has to be practised is not regulated for in detail and hence it appears to be a weak pluralistic complement. In sum, it must be concluded that the Equality Ombudsman does not comply with the requirement of pluralism as it is set forth in the Paris Principles.

5.3.3.2.3 Funding

The funding of Swedish administrative authorities is decided by the Parliament in accordance with a proposition from the Government. The allowance is then handed over to the authority in appropriation directions from the Government. The same order applies to the Equality Ombudsman.[145]

It is hence obvious that the funding of the institution is not regulated for in law, which the Paris Principles are interpreted to favour. Neither is the budget prepared entirely by the Equality Ombudsman itself, but rather and quite contrary to what the UN Handbook prescribe, it is drafted by the Government. Thus, the funding of the institution cannot be regarded as complying with the requirements of the Paris Principles.

5.3.3.2.4 Statutory mandate

The government asserted that due to the need for the Equality Ombudsman to be independent from the Government its primary responsibilities should be laid down in law, i.e. determined by the Parliament and hence requiring the approval of the Parliament for changes of its mandate.[146] As accounted for above, this has been accomplished through the Discrimination Act and the Act concerning the Equality Ombudsman. However, in accordance with the Swedish form of government the Government is still able to direct the work of its authorities through appropriation directions. According to the Equality Ombudsman-commission of Inquiry it is not in conformity with the Paris Principles' requirement of independence that the Government imposes tasks on the authority through instructions, and hence such directions should be limited. They should not contain any directions that encroach on the Equality Ombudsman's actual ability to decide on the course to take in carrying out the mandate set forth in the Discrimination Act and the Act concerning the

[144] Ibid, p 362.
[145] SOU 2006:22, part II, p. 262-263.
[146] Proposition 2007/08:95, p. 369.

Equality Ombudsman, and hence no detailed goals could come in question.[147]

As is evident from the accounts of the legislation above, only the fundamental features of the mandate of the Equality Ombudsman is laid down in law, while the rest of its tasks can be determined by the Government through appropriation directions. The suggestion of the Commission to leave these more or less blank is hence left to the good graces of the Government. Should the Government not choose to do so a difficult drawing up of boundaries will arise; when will the instructions be too detailed, etc? A previous example might illustrate the problem: In October 2009, the Swedish Government gave the Equality Ombudsman the assignment to map out the existence and extent of discrimination on the housing market in the country, and to report back on its results.[148] Clearly, this is an instance of governmental direction of the work of the institution. Furthermore, the somewhat open formulated provisions of the Act concerning the Equality Ombudsman affords the possibility of appropriation directions to encroach on the area of the legislative mandate. The Ombudsman shall for instance, according to the act, "have contacts with international organisations". In a case of harsh criticism of the Government and its state reports one might be inclined to wonder if this vague wording of the act could allow the Government to steer such future contacts somewhat in a direction suited to its needs. With the existence of governmental appropriation directions the room for interpreting and carrying out the mandate given to it will not be left to the Equality Ombudsman itself but can be directed by the Government. The same applies to the ability of the institution to draft its own internal rules.

For these reasons, I do not consider the regulation of independence in terms of the statutory mandate and autonomic decision-making power of the Equality Ombudsman to comply with the requirements of the Paris Principles.

To sum up, all in all the Equality Ombudsman cannot be considered as complying with the Paris Principles either in regard of its mandate, or in regard of its independence from the government. Even if the responsibilities laid down in the founding act of the authority are in line with the Paris Principles their legal basis is too narrow, and their formulation to vague leaving far too much room for governmental instructions. Furthermore, the lack of pluralism, and the lack of legal regulation of the appointment of the management is contrary to what the Principles prescribe. This conclusion of non-compliance is further supported by the ICCPR Committee statement, referred to above.[149]

It might be argued that since the former Ombudsman Against Ethic Discrimination was accredited as a member and hence viewed as a national institution by the ICC, also the new Equality Ombudsman should be considered to be an NHRI. The membership of the Ombudsman Against

[147] SOU 2006:22, part II, p. 262-263.
[148] Regeringsbeslut 1 IJ2009/1834/DISK, 15 October 2009.
[149] Human Rights Committee, op. cit. p. 3.

Ethnic Discrimination was made possible by letting that institution be a representative of all the Swedish Ombudsmen and as such it was considered pluralistic enough to be accredited.[150] However, even if the new Equality Ombudsman is made up of the former ombudsmen-institutions the fact that "they" were accredited by the ICC is not an argument to transfer this status onto the current institution. As has been concluded above the ICC employed a very inclusive interpretation of the Paris Principles at that time, and had an agenda of its own in so doing. Hence, this disqualifies the argument that the old accreditation would imply that the new Equality Ombudsman complies with the Paris Principles. The above analysis shows that the new institution should not be regarded as a national institution.

5.3.4 The Children's Ombudsman

5.3.4.1 Mandate and responsibilities

According to the Children's Ombudsman Act (Lag om Barnombudsman) the Children's Ombudsman has the responsibility of *representing* the rights and interests of children and young people in the light of Sweden's undertakings under the UN Convention on the Rights of the Child, the CRC. §2 prescribes that the Ombudsman shall *encourage the implementation* of and *monitor* the compliance with the Convention, and that she in this regard shall give particular attention to ensuring that laws and other statutes and their application comply with the Convention. Hence, the legislative basis for the work of the institution is the CRC. This Convention contains political and civil rights as well as social, economic and cultural rights, and is hence not limited to discrimination issues, even though discrimination is included in article 2 of the CRC, which prohibits discrimination of an individual child or groups of children.[151] The breadth of its legal basis has had implications with regard to the responsibilities given to the Children's Ombudsman. The Children's Ombudsman focus on monitoring and promoting the rights of children and young people as they are set forth in the CRC, but only at a *general level*. This means that the institution lacks the ability, granted to all the other Swedish ombudsmen, to investigate individual complaints and litigate cases of discrimination before court, or order fines[152][153]. Instead, to facilitate its monitoring activities, the Children's Ombudsman is vested with the power to request authorities and other state organs to report on the measures taken to implement the rights in the CRC (Children's Ombudsman Act §5).

To fulfil it's task, §3 of the Children's Ombudsman Act prescribes that the Children's Ombudsman shall *propose amendments to laws* or other measures needed to protect the interests of children, *disseminate information* on children's rights, *mould public opinion* and take other suitable measures. Furthermore, it states that the Ombudsman shall represent the rights of children in the public debate, and *assemble knowledge and compile statistics* on the living conditions of children.

[150] Pohjolainen, op. cit, footnote 49.
[151] SOU 2006:22, part II, p.267.
[152] Cases where the persons discriminated against are children, are however investigated and litigated by the Equality Ombudsman (Discrimination Act §§4:1-2).
[153] SOU 2006:22, part II, p. 269; SOU 1999:65, p. 18, 135-136.

Finally, the law prescribes that the institution shall follow the international development regarding the interpretation of the CRC. All of these tasks provided for in §3 shall be carried out within the remit of the Ombudsman, which is framed and defined by the UN Convention.[154]

The task of *educating* and in particular the responsibility to *actively follow research* concerning children was emphasized both by the Government in the proposition leading up to the establishment of the Children's Ombudsman and by the governmental Committee of Inquiry made to evaluate the work of the institution, the Children's Ombudsman-commission of Inquiry[155]. The latter even went so far as to suggest that the task of maintaining contacts with research institutions should be set forth in the founding act of the institution.[156] This however, was not acted upon when the act was actually amended and thus the clearest provision guiding the task of research is that in §3, passage 4 stating that the Children's Ombudsman shall assemble knowledge and compile statistics.

Regarding contacts with international organizations in terms of state reporting there is no mentioning in the founding act of the institution. However, the Swedish Government states in its proposition to the act that the draft state report shall be submitted to the Ombudsman for comments, which will be attached to the final report sent off to the CRC Committee.[157]

From the above account of the mandate of the Children's Ombudsman it should be noted that the legal basis of this institution is broader than it is for any of the other previously mentioned Swedish ombudsmen. It specifically refers to the CRC as the foundation for the Ombudsman's work. Hence it based on an international human rights treaty that includes civil, political, economic, social and cultural rights and in this regard in line with the intentions of the Paris Principles' drafters. However, the mandate of the Children's Ombudsman is nevertheless limited to the sole Convention on the Rights of the Child and its activity does not cover any of the other UN Human Rights Treaties. This of course has the implication of only addressing the interests and rights of one single group in society (children below 18 years of age). Even if that is a very large group, this was not what the drafters of the Principles intended when they used the wordings "as broad a mandate as possible".

About the range of responsibilities assigned to the Children's Ombudsman it can be observed that the institution complies with the requirements of promotion and protection in the Paris Principles in terms of its monitoring and advisory activities. These aspects of the mandate are reflected in the founding law both in §2 and §3, but also in §5. In regard to contacts with international organizations it should be noted that the only provision establishing such is §3 passage 5 which entitles the Ombudsman to follow international developments regarding the interpretation of the CRC. As was stated above, however, the Government finds the participation in state reporting important and hence it does take place in practice, even if it is not established in law. In this regard, the compliance with the Paris Principles

[154] Proposition 2001/02:96: *En förstärkt Barnombudsman,* Stockholm, 2002, p. 39.
[155] SOU 1999:65, p. 81.
[156] SOU 1999:65, p. 201.
[157] Proposition 2001/02:96, p. 36.

requiring such a responsibility to be clearly set forth in a legislative text, halts.

Regarding the responsibility to educate and undertake research into human rights the Children's Ombudsman can be regarded as complying with the Paris Principles. The institution is mandated to inform and mould opinion, and to represent children in the public debate. In terms of research, this could be viewed as covered by the task of assembling and compiling statistics. It is interesting, however, to note that the Government, contrary to what was suggested by the Committee of Inquiry, did not think that there was a need to entrench activities and contacts with researchers and their networks in the founding act of the Children's Ombudsman. The lack of any legal provision clarifying such a mandate of the institution as well as the lack of one establishing the ability to contribute to state reports is troubling in terms of compliance with the standards set forth by the Paris Principles. In addition to this, it should be noted that the institution is not vested with any of the voluntary quasi-judicial powers of the Paris Principles to hear individual complaints, which was criticized by the CRC Committee in its 38th Session.[158]

Conclusively, it must be contended that overall the Children's Ombudsman is the one, out of the four institutions dealt with in the examination in section 5, that best complies with the requirements of the Paris Principles in terms of mandate and responsibilities since these are based on an international human rights convention. However, since the legal basis is restricted to only one UN convention this will affect the foundation for the promotional and protective work assigned to the Ombudsman and hence even if the responsibilities entrusted to her cover the enumeration of these in the Principles they only refer to one convention and not the whole range of human rights instruments. This means that neither the Children's Ombudsman complies with the Paris Principles' requirement of a broad based mandate.

5.3.4.2 Independence

5.3.4.2.1 Composition

According to §3 of the Ordinance with Instructions for the Children's Ombudsman (my English translation for Förordning med instruktion för Barnombudsmannen) the Children's Ombudsman is the head of the institution, and she is appointed by the Government for a specific period of time. As for the Chancellor of Justice and the Equality Ombudsman the Constitution prescribes that only objective grounds shall be considered in the appointment procedure and that the person has to have Swedish citizenship (Instrument of Government 11:9). In addition, the lack of a legal requirement of transparency and announcement of the vacancy of the position applies also to the Children's Ombudsman. Hence only the new promise, mentioned above, that an open appointment procedure shall now be the principal rule for the governmental authorities exists in this regard (Ordinance concerning Employment 6§).[159] Regarding removal from the

[158] Committee on the Rights of the Child: *Recommendation. Sweden 38th Session,* (CRC/C/15/Add.248), 28 January 2005, p. 48.
[159] *Regeringens utnämningspolitik* 2009/10:43, p. 21-22.

position the same procedure as for the Equality Ombudsman applies to the Children's Ombudsman (Act concerning Public Employment §§32, 34; Act concerning Security of Employment §18).

When appointed the ombudsman herself decides on the organization and focus of the work of the institution (Children's Ombudsman Act §6). According to the Committee of Inquiry a thematic ombudsman, as the Children's Ombudsman, easily becomes a symbol of the area she is working in and hence a lot of the activity of the institution will be focused on the ombudsman herself not least in mass media, despite the fact that there are many employees at the office. This makes it possible for the ombudsman to put her own personal touch on the work of the authority, and hence the appointment of the ombudsman by the Government has huge implications on the institution. Through its choice of ombudsman the Government can be said to announce the direction it expects the institution to take in its work.[160]

In regard to the composition of the Children's Ombudsman it is clear from the above account that this is not dealt with by the founding law, as is required by the Paris Principles, but only to a very limited extent by the Constitution. Consequently, the same deficiencies that have been pointed out in regard to the Chancellor of Justice and the Equality Ombudsman affects the Children's Ombudsman in terms of lack of independence from the Government. The only element of the regulation complying with the interpretations of the Principles' rules on composition is that enabling the Ombudsman herself to decide on the focus and internal organization of her work. However, this is mitigated by the fact that the provision is set forth in a decree rather than in law, and by the fact that since the Ombudsman is appointed by the Government also this will be determined by it indirectly.

5.3.4.2.2 Pluralism

Before the amendments of the Children's Ombudsman Act in 2002 the act envisaged the establishment of a *Special Council* with expert knowledge assembled from different parts of society (§2), appointed by the Government, to assist the ombudsman in her work. This however, was abolished with the new legislation, with the intention of strengthening the independence of the Ombudsman. It was contended by the Government that detailed rules on the organization of the institution or what experts to assist it would counter that purpose, and that the person best suited to determine what knowledge is needed is the Ombudsman herself.[161] Even if the Special Council was abolished, in practice cooperation and contacts with experts was intended to continue, however in a more flexible manner.[162] The Ombudsman and the members of the former council shared in the Government's view and contended that the flexibility and pluralistic gains would be increased if the composition of the council could be adapted quickly to the special needs of the institution and determined by the Ombudsman herself.[163] Hence, after the amendments it is totally left to the

[160] SOU 1999:65, p. 226.
[161] Proposition 2001/02:96, 37-38.
[162] SOU 1999:65, p.43-44, 79.
[163] Ibid, p.227-228.

Ombudsman to staff the institution and to determine the competence needed.[164]

According to its former instruction, the Children's Ombudsman should maintain contacts with NGOs and authorities.[165] However, in the new Ordinance and Act there is no mentioning of cooperation with NGOs. The only cooperative activity mentioned is that with authorities, municipalities and county councils in §5. This despite the fact that the Commission of Inquiry emphasized the importance of a close cooperation with such organizations and suggested that it should be included in the new founding law of the institution in order for it to comply with the Paris Principles' requirement of taking part in wide networks of human rights-NGOs.[166] The Government however, contended that since maintaining such cooperation was a natural part of the activity of the Children's Ombudsman there was no need for it to be set forth in the founding law, and that such regulation would encroach on the independence of the institution. The Ombudsman itself stated that having contacts with NGOs and authorities should be viewed as a working method rather than as a working task and that hence the need for legislation was absent.[167]

In conclusion, and as was pointed out in regard to the Equality Ombudsman, the system of a single-headed institution does not fulfil the Paris Principles' requirement of a pluralistic membership. Since the appointment of the Ombudsman is handled and determined by the Government also the possibility of a pluralistic appointment procedure is lacking. This could however, be compensated for to some extent by having a wide range of society represented in the staff and by cooperating with civil society and tying different expert groups to the institution. In the case of the Children's Ombudsman the real possibility of this is however questionable. It has already been stated by the Commission of Inquiry that the Government has a huge influence on the institution through its appointment of the ombudsman and hence indirectly on the kind of staff hired. Furthermore, since the existence of an expert council was abolished in the founding law it is now left to the Ombudsman to decide whether there is a need for such, resulting in the possibility that in practise such council might never be employed. The flexibility of being able to substitute experts and recruiting new reference groups, as was put forward as some of the gains by removing the mandatory existence of a council from the law, would not have to be lost by keeping the requirement of such groups in the founding law. The Ombudsman could still have the power to appoint the members and decide on the time period for their mission, while the existence of a council at least would be ensured by the law.

The same reasoning applies to the abolition of the regulation on NGO-cooperation. The Government's argument that such rules would encroach on the autonomy of the institution is in my view a fallacy. Contrary to its contention and in line with the previous reasoning, I believe that the guarantee of cooperation with civil society in law does not have to encroach

[164] Proposition 2001/02:96, p. 37-38.
[165] SOU 1999:65, p. 75.
[166] Ibid, p.76, 206.
[167] Proposition 2001/02:96, p.32.

on the independence and flexibility of the institution. A mandatory cooperation can still afford the Ombudsman the freedom to choose what actors to cooperate with and when. In addition to this, such cooperation should not be viewed, as the Children's Ombudsman itself argued, merely as a working method but rather as a task in itself, or both. Either way the fact that it could be viewed as method of operation does not preclude it to be set forth in law. Furthermore, as a consequence of the system of appropriation directions the space for governmental instructions increases to the same degree as the regulation in law decreases, resulting in less independence rather than more.

To sum up, the absence of a multi-member management of the institution and the lack of consultation in the appointment procedure leads to the conclusion that the Children's Ombudsman does not comply with the requirements of pluralism in the Paris Principles. Furthermore, the lack of regulation on a special council and regular contacts with NGOs in the founding law does little to help increase its pluralism.

5.3.4.2.3 Funding

The funding of the Children's Ombudsman is determined annually by the Parliament by the proposition of the Government.[168] The funding is then made available to the authority through the appropriation directions from the Government. As is the case for all authorities governed this way, the Government can set up more detailed conditions as to the usage of the funds in addition to those decided by the Parliament.[169]

According to the Commission of Inquiry, the size of the budget for a specific authority is ultimately a measurement of the importance the Parliament and the Government are granting it.[170] The Commission has further stated that adequate resources are necessary for the effective functioning of the Children's Ombudsman.[171] In this regard, the Commission noted that the resources granted to the institution to a large extent had been tied up to different tasks assigned to it in the appropriation directions.[172]

As is the case for the Equality Ombudsman and the Chancellor of Justice, the funding of the Children's Ombudsman is not regulated in any law, neither is the budget prepared entirely by the institution itself but by the Government, and hence the Paris Principles are not complied with in this regard. In addition to this the Government has, as was stated by the Commission, actually made use of the possibility to direct the usage of funds by the institution in its appropriation directions. Naturally, this limits the possibilities for independent decision making of the ombudsman herself.

5.3.4.2.4 Statutory mandate

Prior to 2002, the responsibilities of the Children's Ombudsman, now contained in its founding law, were set forth in the governmental decree

[168] SOU 2006:22, part II, p.188.
[169] SOU 1999:65, p.38-39.
[170] Ibid, p. 225.
[171] Proposition 2001/02:96, p. 15.
[172] SOU 1999:65, p. 153.

with instructions to the institution.[173] It was the Commission of Inquiry that suggested this move of regulation from decree to an actual law in order to strengthen the independence from the Government. The fact that, the task of the Ombudsman to protect human rights of children in Sweden is based on an international treaty, the CRC, has given rise to a variety of interpretations.[174]

Except for the provisions in the founding law enumerating the different responsibilities of the Children's Ombudsman and as was mentioned also in the previous section, §6 gives the Ombudsman the right to decide the focus of her work.

A clear regulation of the responsibilities of the institution coupled with a limitation of the appropriation directions would in the Commission's view increase the autonomy of the Ombudsman letting it prioritize its work and take initiatives on its own.[175] The Commission even went so far as to question the compatibility of the governmental appropriation directions with the requirement of independence in the Paris Principles, despite the traditional restrictive use of such in practice in Sweden.[176] The independence of the Children's Ombudsman has also been called into question by the UN CRC Committee.[177]

The suggestion by the Commission of Inquiry to limit appropriation directions was supposed to remedy this lack of independence.[178] However, the Government's response to this suggestion was vague,[179] and such directions are still issued, albeit to a lesser extent, containing inter alia the annual goals for the institution coupled with a duty to report back to the Government.[180]

Another problem with the subordination of the Children's Ombudsman to the Government, according to the Commission, was its freedom of expression. This right, as for any other state organ, is granted to the institution by the Constitution, but the Commission argued that, in practice it was nevertheless restricted by the duty of loyalty owed by the Ombudsman to the Government (Instrument of Government 11:6) and hence it suggested that the task of being a policy organ of the Government should be toned down.[181]

In conclusion, the reform of the Children's Ombudsman in terms of increasing its independence must be regarded as positive. The move from decree to law regulating the mandate and responsibilities of the institution as well as the decreased appropriation directions serves this purpose well, but in my view, it is not enough to comply with the requirements of the Paris Principles. As the Commission stated, the legal basis of the mandate consisting of the CRC and the large group of right holders opens up for

[173] Proposition 2001/02:96, p.365.
[174] SOU 1999:65, p. 169.
[175] Ibid, p. 168, 171-172.
[176] Ibid, p 171.
[177] Committee on the Rights of the Child: *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Concluding observations: Sweden* (CRC/C/15/Add.101), 10 May 1999, p. 2.
[178] SOU 2006:22, part II, p.188.
[179] Proposition 2001/02:96, p. 15.
[180] SOU 2006:22, part II, p.188.
[181] SOU 1999:65, p. 172-173.

many possible interpretations. This coupled with the fact that the regulation of the mandate in the founding law does not consist of any detailed account of responsibilities, must lead to the conclusion that the mandate is not clear enough. This in turn leaves the floor open for the appropriation directions to determine the work of the institution. Even if such directions are decreased, they still exist, and the decision to increase or decrease their use is totally in the hands of the Government (compare with the conclusion on the Equality Ombudsman in this regard). Also the toning down of the role of the Children's Ombudsman as a policy organ is dependent on the good graces of the Government. The legal possibility for the Government to rule the institution is still present and granted to it by the Constitution.

In addition to this, the Ombudsman is obligated to report back on its achievements to the Government and not to the Parliament, which is contrary to the interpretations of the Paris Principles. Neither are there any requirements set forth in the founding law regulating this report activity, or any provision requiring the report to be discussed in the Parliament. The lack of accountability to the Parliament was also criticized by the CRC Committee in its 38th Session when it recommended that "the annual report of the Children's Ombudsman be presented to the Parliament, together with information about measures the Government intends to take to implement the recommendations of the Children's Ombudsman".[182]

The fact that §6 in the Children's Ombudsman Act leaves to the ombudsman to decide the focus of her work could be viewed as a measure that might increase the independence of the institution. However, it could also be argued that since the Government appoints the ombudsman the possible gains of independence from this provision is lost.

All in all, this leads to the conclusion that the Children's Ombudsman does not comply with the Paris Principles' requirement of independence in terms of its statutory mandate.

To sum up, even if the legal basis of its mandate and the range of responsibilities make the Children's Ombudsman the best, of the Swedish institutions described above, at complying with the Paris Principles in these regards, it is still not enough for full compliance. Furthermore, when it comes to the element of independence the institution has much of the same problems as those of the other institutions that are subordinate to the Government. Consequently, the Children's Ombudsman cannot be considered as complying with the requirements of the Paris Principles in terms of mandate and independence and should not be regarded as a national institution.

5.3.5 The right to work - an example

> "The promotion of employment is an important human rights question at any time, but especially so in a time of economic crisis."[183]

[182] Committee on the Rights of the Child: Recommendation op. cit. p. 48.

[183] Swepston, Lee, ILO's Senior Adviser on Human Rights: Lecture speech, Lund, Sweden, 3 September 2009.

This statement made by the ILO Senior Adviser on Human Rights, Lee Swepston, pinpoints the current relevance of this human rights issue. Any of the international human rights could have been used to illustrate the deficiencies of the Swedish Equality Ombudsman purporting to be a national institution. However, the recent economic crisis and the resulting unemployment makes this particular right (or actually this set of rights, as will be evident from the account below) especially interesting to use as an example of rights which according to the Paris Principles (see section 2.2.1), should be included in the legal basis of an NHRI's mandate.

The international standards on the right to work are inter alia contained in article 23 of the Universal Declaration of Human Rights, articles 6 and 7 of the ICESCR, and in the ILO Employment Policy Convention No. 122 (C-122).

The ICESCR prescribes that the right to work includes the obligation of states parties to *take appropriate steps to safeguard this right* which consists of the *right to have access to work and not be deprived unfairly of ones work, to have safe working conditions and decent remuneration*, and *not to be discriminated against* or stopped from forming trade unions (ICESCR art. 6.1, 7).[184] In its General Comment, the ICESCR Committee further clarifies that the "appropriate steps" for instance shall entail the recognition of the right to work in national legislation and the adoption of a national policy on the right to work and a plan for its realisation particularly aimed at reducing unemployment among women and other disadvantaged groups. Measures addressing the latter could consist of the implementation of technical and vocational training programmes.[185] All of these measures are considered to make up *progressive obligations* for states to fulfil, whereas state obligations in relation to the right not to be discriminated against is immediate.[186]

In addition to elaborating on the meaning of the right to work, the General Comment also provides that states parties should develop mechanisms to *monitor* progress made in achieving the right to employment, to identify difficulties affecting the degree of compliance, and to adopt corrective legislation. In realizing and defending the right to work at the national level, *human rights commissions as well as trade unions should play an important role.*[187]

Similar to the CESCR General Comment, the C-122 sets forth a number of obligations in relation to the right to work. It prescribes that every member state shall pursue an *active policy designed to promote full, productive and freely chosen employment* (art. 1.2 a-b). Furthermore, it is required that there is freedom of choice in regard to employment and the fullest possible opportunity for each worker to qualify for a job "irrespective of race, colour, sex, religion, political opinion, national extraction or social origin" (art 1.2 c). This means that states are under an obligation to create an environment that is propitious to work including reducing unnecessary

[184] Committee on Economic, Social and Cultural Rights: *The Right to Work. General comment No. 18* (E/C.12/GC/18), 6 February 2006, p. 3-5.
[185] Ibid, p.10.
[186] Ibid, p.6-8.
[187] Ibid, p. 11.

regulation, to set conditions under which work can be performed with dignity, to provide employment services and to ensure the rule of law (including non-discrimination).[188] The same convention further establishes that each member shall take the appropriate measures to achieve these ends and keep them under *review* (art 2).

Sweden has ratified both the ICESCR and C-122 (the ratification dates are 6 December 1971 and 11 June 1965) and it can hence be established that both of these instruments shall be complied with by the Swedish state. It is evident that both conventions attach two types of obligations to the fulfilment of the right to work; namely *the implementation of a general policy* and *the abolition of discriminatory practices* in regard to employment. In addition to this, they both require that states *monitor* its compliance with, and the progress made in achieving the right to work. In Sweden it is the Equality Ombudsman that comes the closest to fulfilling the role of monitoring body.[189] The monitoring by this institution, however, only covers the discrimination prohibitions contained in the Discrimination Act and hence only *one of the aspects* of the international human right to work. The other obligations of this right that Sweden is required to fulfil cannot be monitored by the Equality Ombudsman. This, however, does not mean that they are not reviewed or monitored by any other Swedish authority or institution, such as the Swedish Work Environment Authority and the trade unions. The Swedish order of dividing the monitoring activities among different institutions does however violate the rules of the Paris Principles requiring *one* institution to exercise the monitoring and promotion tasks for the whole range of human rights (see section 2.2.1 above). In addition to this, it appears illogical to separate the two elements of the right to work and entrust their respective monitoring to different organs. For example, the purpose of certain measures to ensure work opportunities for vulnerable groups, such as technical and vocational training programmes, can be twofold; the overall purpose can be to decrease unemployment rates, but also to counteract discrimination. Hence, it would certainly be preferable if their execution and fulfilment was monitored and promoted by the same national institution. The current order enables the Equality Ombudsman to criticize labour-market policies to the extent they should be discriminatory, but it cannot criticize the *lack* of such policies or *possible other flaws of the labour market*.

Since the ICESCR has been interpreted to include an obligation of states to establish national institutions in accordance with the Paris Principles (see section 4.5, and is further emphasized in regard to the right to work in the General Comment mentioned above) it seems all the more illogical to only have half of one of the rights contained in that convention, i.e. the right to work, entrusted to the institution put forth as the Swedish NHRI. It is tempting to speculate why the so called Swedish national institution has been given the mandate to handle discrimination but not other human rights. The obligation to counter discrimination is, as was stated above, of an

[188] Swepston, Lee: Lecture speech, Lund, Sweden, 3 September 2009.

[189] Perhaps it could also be argued that some aspects of the right to work is monitored by the Parliamentary Ombudsmen but since the human rights mandate of this institution is so unclear and vaguely framed the Equality Ombudsman is a better example.

immediate character and as such, Sweden might have considered this particular right to be more important than other human rights which are perceived as progressive, when it comes to investing resources to fulfil it.

The division into two parts, as described above, of the right to work is also true for the rest of the human rights. They can all be viewed as consisting of both a material right and of the right to exercise that without being discriminated against. The fact that the former sometimes is not of a progressive character does not preclude that it can and should be monitored. The separation of the two and the division of monitoring among different authorities not only violates the Paris Principles but also the indivisibility of the human rights.

From the above account of the content of the right to work and the lack of a comprehensive monitoring responsibility over it by any of the four Swedish "human rights institutions" it is evident that the legal basis for the mandates of those institutions is to narrow.

5.3.6 Conclusion on Sweden's compliance with the Paris Principles

None of the four institutions outlined above fulfil the requirements of a broad mandate of the Paris Principles. The primary functions of the Parliamentary Ombudsmen and the Chancellor of Justice are to ensure the rule of law and good governance in the public administration and not to specifically concern themselves with human rights, which to a larger extent is the case for the Equality Ombudsman and the Children's Ombudsman. However, even if the dealing with human rights is more comprehensive for these latter the legal basis of their mandate is still far too narrow in order to comply with the Paris Principles. One important conclusion to be drawn from the work of the Children's Ombudsman, however, is that it is doable in a Swedish context to let an international convention of human rights serve as the basis for an institutional mandate.

Neither in regard of independence can it be asserted that either of the institutions above fulfils the requirements of the Paris Principles. The primary reason for this when it comes to the Chancellor of Justice, the Equality Ombudsman and the Children's Ombudsman is that they are all authorities subordinate to the Government with the inevitable consequences this brings with it. First, it entails a duty of loyalty to the Government and an obligation to follow its directions. Since the responsibilities entrusted to the institutions in their respective laws have been established as too unclear the existence of appropriation directions rules out any possibility of real independence. Second, the subordination to the Government also affects the composition and funding of the institutions and results in a dependence, which is contrary to the standards set forth in the Paris Principles. As single-headed institutions neither in regard to the Paris Principles' provision on pluralism can they be said to comply.

A few features of the Parliamentary Ombudsmen are however better in fulfilling the Paris Principles' requirements of independence. The collegial management of the institution and the lack of directions from the Parliament coupled with a more detailed regulation of its responsibilities render it the most independent of the four institutions outlined above. In addition to this its accountability to the Parliament is regulated for in law and does not give

rise to parliamentary actions. However, as good as these features are they are not sufficient to afford the institution the degree of independence required by the Paris Principles. No procedures handling the composition and funding of the institution comply with the Principles.

The mere fact that the four Swedish institutions do not comply with the Paris Principles does not imply that they are poorly organized or established in the wrong way. It simply means that they are not appropriate to fill the role of a national institution and hence should not be presented as such. The question of considering them as eligible for this role as a collective with their mandates in some sort of combination might arise. However, not even the ICC Sub-Committee, which is inclined to favour inclusive interpretations of the Paris Principles, recommend such solutions. It rather encourages the trend towards having only "one consolidated and comprehensive national human rights institution" for the protection of human rights in the state,[190] and since 2007 it has declared that it no longer grants collective accreditations (see section 2.3).

5.3.7 Implications of the Swedish non-compliance

Not only does the non-compliance with the Paris Principles violate the Swedish commitment to those standards, but it also violates the Swedish undertakings under the CRPD and the OP-CAT. As was pointed out above, those instruments require the ratifying states to establish institutions with regard to the Paris Principles to monitor and promote the respective conventions, and since Sweden has not done so, *it is in breach of those obligations.*

At the backdrop of the conclusion under section 4, that Sweden has an obligation to comply with the Paris Principles, and considering the previous conclusion, that the current institutions by which Sweden purports to do so does not comply with the Principles, the logical consequence is to declare a need for a new institution.

Not only does my examination lead to that conclusion, but also numerous UN actors support the establishment of a Swedish NHRI. To start with, two of the UN treaty bodies have called upon Sweden to do so. The ICCPR Committee urges Sweden to "establish a national institution with a broad human rights mandate, and provide it with adequate financial and human resources, in conformity with the Paris Principles".[191] The ICESCR Committee recommends that Sweden consider "the creation of a national human rights institution to deal with the protection and promotion of all human rights, including economic, social and cultural rights".[192] Also the UN Special Rapporteur, Paul Hunt, "strongly recommends that steps be taken urgently to establish a Swedish national human rights institution, consistent with the Paris Principles, in a manner that does not jeopardize the vital work of Sweden's existing ombudsmen. Such an initiative will help to ensure that Sweden remains abreast of contemporary developments in the

[190] ICC Sub-Committee on Accreditation: *General Observations*, p.5.
[191] Human Rights Committee, op. cit. p. 3.
[192] Committee on Economic, Social and Cultural Rights: *Recommendation: Sweden 27th Session, (*E/C.12/1/Add.70), 30 November 2001, p.10.

field of national and international human rights".[193] In addition to this, the plain declaration by the Children's Ombudsman-commission of Inquiry that no monitoring of the ICESCR or the ICCPR is entrusted to any Swedish institution[194] is a further support of the fact that there is a need for the establishment of a national institution in line with the Paris Principles.

As the examination in section 5 has shown, the narrow mandate and the lack of adequate independence of the Swedish institutions are two core issues which have to be addressed when establishing a future NHRI. It would be out of the scope of this thesis to deal with them both, and hence only the issue of independence and how it can be resolved in the Swedish context will be the subject of the next section. The following chapter will try to answer how the *issue of subordination* can be organized in the most appropriate way and how independence (in line with the Paris Principles) can be ensured through proper *formulation of the statutory mandate, and regulation on composition, pluralism and funding.*

[193] Hunt, op. cit. p. 11.
[194] SOU 1999:65, p. 180.

PART II

6 How to create a Swedish NHRI

6.1 The Parliament as the choice of organ with pricipal responsibility

As was concluded in the previous section the choice of subordination has affected the independence of the current Swedish institutions and hence a closer look at the different alternatives of subordination for a future national institution in the Swedish context is appropriate. There are more or less four models of subordination; either the Government, the Parliament or the Court can be chosen as the organ with principal responsibility over the institution. The fourth alternative would be a model where the institution does not answer to any organ, except to the Parliament in the sense that it would have to enact its founding law and grant the funds needed.

The last alternative can be dismissed fairly easy since such an organization of an authority never have, and currently does not exist in the Swedish constitutional system. Even if this would not per se be a reason to disregard it as an option, the fact that somehow the Parliament would have to be involved in the financing and establishment of the institution makes this alternative overlap with that where the Parliament actually is the organ with principal responsibility to a fuller extent. For these two reasons I contend that the most relevant and useful stance in this regard is to dismiss the alternative of a national institution as a free, unattached "island" in the Swedish constitutional system.

As has been shown in the evaluation above the order of having the Government as the organ with principal responsibility over an institution does not comply with the Paris Principles' requirements of independence. But, could the subordination under the Government be set up in any other way to make it comply with the Principles? The answer to this question must be replied in the negative. Since most of the problems with the lack of independence, as was previously stated, originate in the fact that authorities under the Government in Sweden has a duty of loyalty (lydnadsplikt) to it (Instrument of Government 11:6) which entails the possibility of appropriation directions, this would have to be abolished in the case of a national institution in order for it to comply with the requirements on composition and funding. Furthermore, even if the problem of pluralism and a vague statutory mandate could be remedied through better legislation the duty of loyalty, would still need to be abandoned in order for the Government to be unable to infringe on the independence in these regards. Hence, for an institution under the Government to comply with the Paris Principles the duty of loyalty and the possibility of appropriation directions would have to be removed by law, so that all the important decision making, in line with the above analysis of the Paris Principles, would be left to the Parliament in its capacity as legislator. This would however, leave no practical or even logical reasons for establishing a national institution under the Government. The whole point of the Swedish system with authorities subordinate to the Government is to assist it in executing its policy and for

the Government to be able to direct them in doing so. Hence, also this alternative of subordination appears uninteresting.

Regarding the option of placing a new institution under the authority of the Courts, actually the same reasoning as that for the Government-alternative applies. Since the Courts in their turn are subordinate to the Government[195] (ibid, 11:6) this alternative would mean that the Government would still ultimately be the head of the institution, albeit one step further away.

With this logic, only the alternative of the Parliament as the organ with the principal responsibility over the national institution makes sense in the Swedish context as eligible to comply with the standards of independence set forth in the Paris Principles. However, it is not so easy as to only choose this alternative for the reasons just mentioned. The question of establishing a new institution under the Parliament has been debated in Sweden over the years, but apparently has not led to any change in that direction. The next section, 6.1.1, will thus explore the main arguments that have been used *against* having the Parliament as the organ with principal responsibility over a national institution as well as the arguments *in favour* of such a solution (except for the conclusion that this would be the best suited alternative in order to comply with the Paris Principles' requirements of independence). The section will be completed with an account of possible solutions of how to create a new institution under the Parliament in terms of statutory mandate, composition, pluralism, and funding.

6.1.1 Arguments against the Parliament

Over the years, several motions by Parliament members have been put forward suggesting either that the current ombudsman institutions should be merged together and placed under the Parliament, or that an entirely new institution dealing with human rights should be created under the Parliament. Because of this, the Parliamentary Committee on the Constitution and the Parliament asked the Government to include this issue in the tasks of the Equality Ombudsman-commission of Inquiry in 2000. The matter was examined by that Commission but the option of having the Parliament as the organ with principal responsibility over the Equality Ombudsman was discarded for a number of reasons and not completely settled. It was concluded that the new authority could not wait for the extensive special inquiry needed for such a change of subordination and hence the issue was transferred to another inquiry whose conclusion on the matter has not been presented.[196] Also, the Children's Ombudsman-commission of Inquiry elaborated on different reasons why the Parliament would not be the appropriate organ with principal responsibility over an institution dealing with human rights.

6.1.1.1 The constitutional tradition

One of the main arguments put forward by the two Commissions, referred to above, and supported by the Government, against placing the ombudsman

[195] Sveriges Domstolar: *Regleringsbrevet styr*, http://www.domstol.se/templates/DV_InfoPage____898.aspx, 4 April 2010.
[196] SOU 2006:22, part II, p. 253-254, 260.

institutions under the Parliament, is that it would be *against the Swedish constitutional tradition* and a *deviation from the current division of responsibility* since according to the Constitution the Parliament cannot carry out *administrative tasks* (förvaltningsuppgifter) or manage authorities responsible for such tasks to a wider extent than what is provided for by law (Instrument of Government 11:8). This however, is one of the main duties of the Government (ibid, 11:6) and hence it has been argued that the natural way to organize these institutions is to have them accountable and subordinate to the Government.[197]

This line of arguing presupposes that the authority in question has "administrative tasks". In order to understand whether the reasoning is valid, one must hence understand the meaning of the term "administrative task". This is however, very difficult to establish. The prominent Swedish scholars on the subject agree that the content of the term is cloudy. However, what they conclude is that the actual *character* of the tasks that the authority deal with, is decisive.[198] The term can hence be divided in two functional parts; one that is concerned with the *exercise of authority against individuals* (myndighetsutövning) in the execution and ordering of different instructions with the support of the Constitution (ibid, chapter 8)[199] and one dealing with inter alia the *provision of different facilities* to the citizens like health care, education, communication- and social services,[200] and the *provision of information and advice and other activity of a non-binding nature*.[201]

Are these concerns regarding administrative tasks relevant to the establishment and mandate of a possible Swedish national institution in line with the Paris Principles? My answer would be in the negative. To start with, the provision of societal services is not something that the national institution would be concerned with. It would not be an authority acting as a policy organ of the Government, which is typical of the usual administrative authorities,[202] since according to the Paris Principles it shall work independently of the Executive (see section 2.2.4.4 above). It shall promote and monitor the situation of human rights without the interference of the Government in its legal mandate and without it dictating the activity. However, it shall also educate and advice both the public and state organs on the matter of human rights (see section 2.1.1 above). In the capacity of these latter tasks it could be considered to carry out "administrative tasks" and also if it would be afforded quasi-judicial competence. Such responsibilities however, are not a convincing argument against having the Parliament as the organ with principal responsibility over the institution. The Parliamentary Ombudsmen has comparable advisory and quasi-judicial tasks (see section 4.3.1.1 above) but this does not hinder it from being an authority under the Parliament. The two Commissions and the Government however contends, that these similarities shall not be exaggerated since the position of the Parliamentary Ombudsmen is regulated for in the

[197] SOU 2006:22, part II, p. 259-260; SOU 1999:65, p. 176; Prop. 2001/02:96, p. 12.
[198] Strömberg, op. cit. p. 16; Marcusson, Lena: *Offentlig förvaltning utanför myndighetsområdet*, Uppsala, 1989, p. 61-62.
[199] Marcusson, op. cit. p. 63-65.
[200] Strömberg, op. cit. 16-17.
[201] Ibid, p.20.
[202] SOU 1999:65, p.181.

Constitution and also because the sphere of activity of the institution is not limited to one factual matter, like it is for the Ombudsman institutions dealing with discrimination. Not even the fact that the legislative regulation could be transferred to the Constitution convinced them otherwise.[203] This reasoning does not hold up to scrutiny however, since once it is established that the mandate of a new authority could actually be provided for in the Constitution all that is left of the argument is that the area of activity of the relevant authorities would be too narrow to be compared to the Paliamentary Ombudsmen and its form of subordination. Possibly this might be valid for the ombudsman institutions but not for a new national institution, since the mandate of the latter according to the Paris Principles would not be limited to one sphere of activity but rather include the whole spectrum of human rights touching upon all aspects of the human life (see section 2.1.1 above).

In conclusion, the argument of "administrative tasks" put forward by the Commissions as a reason that it would not be appropriate to place any of the existing Swedish institutions dealing with human rights under the Parliament is not applicable to a possible future national institution with a broad mandate according to the Paris Principles. Furthermore, it is noteworthy that given the assertion by scholars of the difficulty to establish the meaning of the term "administrative tasks" it is nevertheless used by the Commissions of Inquiry, without any declaration of the intended interpretation, as one of the primary arguments against a proposal put by many members of Parliament.

6.1.1.2 Divided mandatorship

The other main argument why the Parliament would not be appropriate as the organ with principal responsibility over an ombudsman institution, put forward by the Commissions, is that such responsibility would be divided in a negative sense. It was contended that the Government is always unified in its standpoint outwards in a formal regard, whereas the Parliament necessarily is organised differently with its representatives of all the different political views. Hence, the work of the Parliament is characterized by the negotiation of factual matters and compromises. This led the Commissions to conclude that the composition and working method by the Parliament may result in obscurity for an ombudsman with the responsibility to promote and protect human rights. The ombudsman will be forced to take a stand on matters where the political parties in the Parliament disagree, and moreover it can not be excluded that there might be expectations that she shall be sensitive to all the parliamentary views on matters within her mandate.[204]

The reasoning by the Commissions that promotional and protective work would be hindered by having the Parliament as the organ with the principal responsibility is not transferable to an NHRI. First, the argument of division of opinion in the Parliament as opposed to the agreement within the Government echoes falsely at the backdrop of the current political scene in Sweden. Since 2006, the Government is made up by four different parties in an alliance, which certainly do not always agree on their policy. Furthermore, the competing opposition has formed their own collaboration

[203] SOU 2006:22, part II, p. 260, Prop. 2001/02:96, p. 12.
[204] SOU 2006:22, part II, p. 260-261, SOU 1999:65. p. 177.

and government-alternative consisting of three political parties for the upcoming election in the fall of 2010, and hence the division of political opinions nowadays is just as much a reality of the Government authority as it is of the Parliament. Second, the so-called division would not carry with it any important implications for a national institution, since the opinions of the organ with principal responsibility over the institution shall not direct or influence the activity of the latter in any way. The institution shall act solely on the basis of its statutory mandate and independently of party politics and other external forces (see section 2.2.4.4 above). The "expectations" referred to by the Commissions hence cannot be used as an argument against placing a national institution under the Parliament. In this regard, it is also noteworthy that there is no debate about party political expectations of the activity of the Parliamentary Ombudsmen. The only valid expectations to have, both in the case of the Parliamentary Ombudsmen and in the case of a future national institution, is and would be evident from their respective statutory mandates.

Finally, the different opinions in the Parliament, which are publicly known, will probably work more to the advantage of the NHRI than the opposite. The more secretive views of the Government, which only presents one opinion outwards may cloud the different perspectives on an issue, whereas the diverse standpoints of the Parliament may give the institution a nuanced basis to depart from in its relations to the Parliament and its decisions.

6.1.1.3 The moulding of public opinion

The third main argument that has been presented relates to the activity of public moulding. The Children's Ombudsman-commission of Inquiry contended that this task, which in the case of that particular Ombudsman has its basis in an international convention (the CRC), might present it with difficult balancing acts since the formulations in the convention are very general and hence their interpretation will be dependent on political values and ideologies. To have the Parliament with all of its different political views as the organ with principal responsibility would thus not lead to any clarification as to their meaning.[205]

This reasoning of the Commission does however, not hold up to scrutiny. First, it seems to presuppose that in the case of obscurity as to the content of a provision of the convention/mandate it is for the organ with the principal responsibility over the institution to clarify the meaning. This however is not what the Paris Principles prescribe (see section 2.2.4.4 above). Quite contrary, shall the work of a national institution be carried out independently of party politics and hence this is the case also when the moulding of public opinion is concerned. Second, the Commission seems to have overlooked the possibility of actually clarifying the supposedly obscure provisions of the convention in the *act* governing the institution.

The Commission rather takes its reasoning one step further, insinuating that possible harsh criticism by the institution of a governmental legislative proposal, on which the Parliament is deeply divided, would be a form of meddling in the law making process by one of the Parliament's own organs. This and similar issues might cause the institution to withhold its criticism

[205] SOU 1999:65, p.177.

and keep a lower profile than would have been necessary had it been an organ under the Government with a strong independent position.[206] This line of arguing was also supported by the Government in its proposition following the Commission report.[207]

Neither this reasoning of the Commission and the Government, however, stands closer examination. First, the activity of moulding public opinion is to a certain extent also a part of the activity of the Parliamentary Ombudsmen. That institution, similar to most other public authorities in Sweden, may be asked to express its opinion on legislative proposals and in addition to this the Parliamentary Ombudsmen shall if it finds deficiencies in legislation or state measures suggest remedying actions to the Government or Parliament (See section 4.3.1.1). Hence, the work of the Parliamentary Ombudsmen in this regard would also consist of meddling in the legislative process of the Parliament. This is however not how things are perceived and therefore this cannot be used as an argument against placing a national institution under the Parliament. On the contrary the adding of such an organ to the Parliament would contribute to an open and multifaceted debate about human rights legislation, and be more in line with the democratic values of the Swedish Constitution. As the Special Advisor put it; the fact that the NHRI gives advice on politically sensitive matters in an impartial manner does not mean that it becomes involved with party politics.[208] Furthermore, the argument by the Commission that an institution under the Parliament would cave to its pressure but not to that of the Government is illogic. As has been shown in the previous sections (see particularly section 5.1) an organ in the Swedish constitutional system subordinate to the Government, can never obtain a strong independent position in relation to its superior. The likelihood of daring to criticise is rather greater when the responsible organ is the Parliament with its variety of political opinions where at least some members may share in the critique.

6.1.1.4 Depreciatory of the implications of the subordination choice

Another assertion that has been made in regard of the issue of subordination is that the independence of the institution and ability to criticise would be more dependent on the statutory mandate than the choice of subordination.[209]

As is evident from the above outline of the Swedish constitutional system the choice of subordination is inevitably intertwined with the implications of the statutory mandate. When the Government is the organ with primary responsibility over the institution it has the power to instruct it, to appoint its manager and indirectly its staff, and to control its funding. Hence, the choice of subordination has great implications on the institution and its independence. The suggestion by the Children's Ombudsman-commission of Inquiry that blank appropriation directions, and a mandate in law instead of in a decree would achieve the appropriate independence[210] does not reach

[206] Ibid, p.177.
[207] Proposition 2001/02:96, p. 12 f.
[208] Burdekin and Naum, op. cit. p. 52-53.
[209] SOU 2006:22, part II, p. 262.
[210] SOU 1999:65, p. 16-17, p. 178.

the standards set out by the Paris Principles. It is evident, as was concluded in previous sections, that the *mere possibility* of external direction of the institution violates the Principles' meaning of independence.

If instead the Parliament was to be the organ with principal responsibility, everything concerning the national institution (its mandate, composition, and funding) could be laid down in law and a prohibition of parliamentary instructions be created to secure the independence of the NHRI (the recommended way of doing this is further elaborated on below in section 5.2.1.2) Thus with such an order any influence on the independence of the institution would require a change in law, which turn requires a broad and democratic parliamentary agreement. One important point to be stressed in this regard however, and which will be further elaborated on in the next sections, is the kind of majority required for such parliamentary decisions. It can be concluded that more than the usual 50 % support must be required in order for the Parliament to constitute a difference to the Government as the organ with principal responsibility. Hence, it should be stressed that it is not self evident that having the Parliament as the organ with this responsibility over the institution will guarantee independence, but as has been stated before; it is the alternative under which a national institution in the Swedish context best stands the chance of achieving the independence required by the Paris Principles.

6.1.1.5 The time issue

When the new Equality Ombudsman was to be created the Commission of Inquiry finished off its arguing for keeping the Government as the organ with principal responsibility over the institution, by contending that changing the order in this regard would have time consequences, implying a consequent delay of the merge.[211]

This reason for dismissing the Parliament as the responsible organ does however only apply to the Equality Ombudsman and the perceived rush to establish that institution, and is not valid for a possible future national institution.

6.1.2 Arguments in favour of the Parliament

Except for the conclusion above under the introductory section 6.1 that the Parliament as the organ with principal responsibility over a national institution would be the most appropriate choice in order to comply with the Paris Principles, a number of other reasons have been put forward during the years by prominent public actors.

To start with, the former Disability Ombudsman, the Director General of the Integration authority (Integrationsverket), the Equal Opportunities Ombudsman and the Ombudsman against Ethnic Discrimination already in 1998 contended that a public inquiry needed to be carried out to investigate the possibility of placing a merged ombudsman institution under the Parliament.[212] Furthermore, a change to make the Parliament as the organ

[211] SOU 2006:22, part II, p. 259-260, 266.

[212] Claesson Wästberg, Inger, the Disability Ombudsman; Stjernkvist, Lars, Director General of the Integration authority; Svenaeus, Lena, the Equal Opportunities Ombudsman; Wadstein, Margareta, the Ombudsman against Ethnic Discrimination: “”Skyddet mot

with principal responsibility over the Children's Ombudsman was suggested by several authorities in the Inquiry set up to investigate possible means to strengthen that institution.[213]

In addition to this, as was previously stated, several motions from the whole spectrum of political views in the Swedish Parliament have suggested that the Parliament should be the responsible organ of either a merge of the former ombudsmen or of a new institution for human rights. The common reasons used in their arguing can be summarized and exemplified by the contentions that this mark a *bigger independence, constitutional importance and democratic control* over the human rights institutions,[214] and that all public ombudsmen should be *elected by the Parliament* and controlled by its audit mechanism.[215]

A couple of noteworthy parallels can also be drawn to the question of subordination for a national institution from the reasoning regarding other Swedish authorities. Concerning the Parliamentary Ombudsmen the Constitutional-commission of Inquiry (Grundlagsutredningen) stated that it has been considered important for the citizens' trust in the legal system to have a completely independent organ, based on the parliamentary confidence, to which individuals can turn with their complaints on authorities.[216] Such quasi-judicial competence is recommended by the Paris Principles as part of the mandate of a national institution and similar to the Parliamentary Ombudsmen a national institution that complies with the Principles shall also work in various ways to remedy deficiencies in legislation. Hence, both institutions shall serve to enhance the trust of the citizens in the democratic state and its system, and they share very common working methods in their quest to do so. This makes the case for placing a national institution under the Parliament even more convincing. If it can work for the Parliamentary Ombudsmen, why would it not work for a future national institution?

Also regarding the Swedish National Audit Office, the SNAO, (Riksrevisionen) a clear parallel can be drawn to the subordination issue of a future Swedish national institution. Preceding the creation of the SNAO from two previous organs (one under the Government and the other under the Parliament) in 2003 the Parliamentary Committee on the Constitution, the Parliamentary Committee on Finance (finansutskottet) and the Committee on the Riksdag (Riksdagskommittén) contended that a coherent audit mechanism under the Parliament would result in a *stronger and more independent position* for the state audit. This would in turn lead to better and more accurate facts for political decisions to be based on and an enhanced confidence from the public. The results from the monitoring activity would

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diskriminering försämras". Jämställdhets-, handikapp- och diskrimineringsombudsmannen riktar skarp kritik mot regeringen" in *Dagens Nyheter, DN Debatt*, 9 October 1998. http://www.presstext.se/online/display.php?set=S6&xid=DN199810090041, 29 March 2010.

[213] These were: the Swedish Agency for Administrative Development, the Ombudsman against Discrimination on the grounds of Sexual Orientation, the Swedish Unicef, Save the Children Sweden, University of Linköping, and the National Association for Disabled Children and Youths; Proposition 2001/02:96, p. 14.

[214] Järrel, Henrik S (m): *Motion 2000/01:K358.*

[215] Persson, Betil (m): *Motion 1998/99:K288.*

[216] SOU 2008:125: *En reformerad grundlag, Del 1, Betänkande av Grundlagsutredningen,* Stockholm, 2008, p. 283, which refers to KU 1975/76:22 p. 48 f.

be dependent on whether the objects of audit were chosen independently and whether the people carrying out the audits could express their results independently. All of this led to the conclusion that a high level of independence was essential for the new authority.[217] The Committee on the Riksdag further contended that it was reasonable as a matter of principle to put the national audit organ under the Parliament and that it would be a democratic expression of the fact that the elected members of Parliament are responsible to their voters regarding tax money and the enactment of laws.[218]

Similar to the reasoning above regarding the Parliamentary Ombudsmen, the monitoring role of the SNAO is comparable to that of an NHRI (Instrument of Government 12:7; Act concerning Audition of State Operations etc; Act with Instructions for the SNAO (my English translation for Lag om revision av statlig verksamhet m.m, and for Lag med instruktion för Riksrevisionen)). They both deal with issues of crucial importance in a democratic society; the latter shall see to it that the human rights of the citizens are respected, and the former makes sure that the tax payers' money are spent in an effective and honest manner. Consequently, they are both set up to supervise the interests of the citizens. Hence, the need for independence of a national institution is equally important to that of the SNAO and it carries with it the same positive consequences of better accuracy and public trust in the system. Furthermore, it could be asserted that if it is a matter of principle to guarantee the independence of the national audit office and make it accountable to the voters via the Parliament the same should apply to a national institution concerned with the human rights of the citizens. Transferred to the establishment of a national institution the reasoning of the Committees leads to the conclusion that also an NHRI in the Swedish context should be placed under the Parliament.

Another interesting fact to be noticed is the attention that the international organ for cooperation between national audit institutions, INTOSAI (International Organization of Supreme Audit Institutions) and its guidelines, in the Lima Declaration of 1977 for the position and responsibilities of the national audit institutions, was given by the Inquiry leading to the creation of the SNAO (the SNAO-commission of Inquiry). The Lima Declaration states that a national audit institution shall be guaranteed independence towards external actors and that its functional and organisational autonomy shall be provided for in the constitution. It also prescribes that adequate funding for its operation shall be provided.[219] The reference to INTOSAI by the Parliamentary Committee on the Constitution and the Government when arguing that the new SNAO should be placed under the Parliament is interesting since INTOSAI and the Lima Declaration displays a number of similarities to the ICC and the Paris Principles. INTOSAI was also created with the support of the UN, and the Lima Declaration provides pretty much the same standards as the Paris Principles in regard to independence (its rules on composition, statutory mandate, independent activity and adequate funding are very similar to

[217] Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen* (2000/01:KU8), Stockholm, 2000, p 17.
[218] Ibid, p. 4.
[219] Ibid, p.8; Proposition 2001/02:190: *Riksrevisionen*, Stockholm, 2002, p. 55-56.

those in the Paris Principles). Nevertheless, the Paris Principles have not been afforded the same weight by the Swedish Inquiries and decision makers when the issue of subordination has been examined for the ombudsman institutions or for an altogether new institution in the human rights area. The lack of a coherent reasoning by the state in this regard is hence striking and it is difficult to appreciate why it does not apply the same standards to the protection of human rights as it does to financial matters. Apparently, the latter have been afforded a greater constitutional significance. This difference of approach was actually manifested in the Inquiry leading up to the merging of the new Equality Ombudsman. The Equality Ombudsman-commission stated that neither international experiences nor Swedish legal tradition appeared to demand any changes in regard to the issue of the principal responsibility over the institution, hence clearly disregarding the requirements set fourth in the Paris Principles.[220] Not only did the Government value the Paris Principles different from the Lima Declaration but apparently it also attached less importance to the independence of institutions dealing with human rights as opposed to institutions dealing with financial matters. The purpose of establishing a new national audit authority subordinate to the Parliament was to ensure autonomy and impartiality in its monitoring activities,[221] something which clearly wasn't considered as important for the Equality Ombudsman when it was established.

6.1.3 Conclusion

As has been concluded above none of the arguments against having the Parliament as the organ with principal responsibility hold up or are valid for a future Swedish national institution. Either because its tasks would not correlate to those referred to in the reasoning above or because the reasoning actually halts and displays an inclination to produce problems where they actually do not need to exist. The solution suggested for the Children's Ombudsman is a good example of this, where the arguing avoids the importance of what organ has the principal responsibility and suggests a middle solution in order to strengthen the independence of the institution. That is also the best that can be achieved through such means; not independence per se, *but a mere strengthening of it*, by ignoring the implications that subordination has for the autonomy of an institution.

There has however been pressure for a change of subordination during the years by prominent public actors and politicians. The biggest support could probably be derived from the parliamentary majority, which views the subordination of the Parliamentary Ombudsmen and the SNAO to the Parliament as natural, and the fact that a national institution has many features in common with these authorities. Nevertheless, the ruling power has displayed a resistance to a new order and maybe the reason for this could be discerned in a statement made by the Swedish Social Insurance Agency (Försäkringskassan, called Riksförsäkringsverket at the time of the statement) before the creation of the SNAO, displaying concern that the independence of such an institution (the SNAO) with the strengthened

[220] SOU 2006:22, part II, p 265.
[221] Proposition 2001/02:190, p. 57.

position of different public servants could only be achieved at the expense of the parliamentary democracy.[222] Based on this utterance one might speculate whether the resistance of the Swedish politicians towards a parliamentary subordination consists of a fear that the political power over human rights and their content would be lost if a change was made and that this in some way would be undemocratic.

6.2 How to arrange an institution under the Swedish Parliament

It has been concluded that the most appropriate alternative of subordination for a future Swedish national institution is that where the Parliament has the principal responsibility over it, and the arguments against such a solution have been disarmed. As was stated by the Equality Ombudsman-commission of Inquiry, the independence in relation to the Government will be enhanced if the principal responsibility over the institution is placed with the Parliament.[223] The mere placement of a national institution under the Parliament however, does not guarantee that it will be able to act free of interference from that organ. The Paris Principles' require that the national institution enjoy independence in relation to *both* the Executive and the Parliament (see section 2.2.4 above). The following section will hence examine the issue of independence and different solutions of how the statutory mandate, composition, pluralism, and funding of a Swedish national institution subordinate to the Parliament could be arranged in order to comply with the Paris Principles. Good examples of NHRIs in other countries as well as other relevant institutions within the Swedish system will be used to illustrate how certain complex issues can be resolved. This is in line with what the UN Handbook has pointed out in connection to the establishment of national institutions; "states will benefit from the experience of others, particularly those in *geographical, political, economic or cultural proximity*" [emphasis added by me].[224] The states used as "best practices" here are hence members of the European Union. The Swedish institutions used as examples are the Parliamentary Ombudsmen, the SNAO and to some extent the National Bank (my English translation for Riksbanken). The SNAO and the Parliamentary Ombudsmen were chosen since their tasks, as was pointed out in the previous section, have several similarities with those of a national institution and because the arrangement of their independence complies fairly well with the requirements of the Paris Principles (As mentioned in the conclusion after the assessment of the current Swedish institutions the Parliamentary Ombudsmen is the best at complying in terms of independence.). Taken together the material mandate of the Parliamentary Ombudsmen (which is primarily based on individual complaints) and that of the SNAO (which is based on the independent decisions of the auditors to perform monitoring activities) are tantamount to the monitoring tasks of an NHRI as prescribed by the Paris Principles (see sections 3.2.2.1, 5.3.1.1 above and Instrument of Government 12:7 passage

[222] Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen*, p.12.
[223] SOU 2006:22, part II, p. 258.
[224] UN Centre for Human Rights Geneva, op. cit. p.10.

2). The National Bank has been used as a good example since the regulation of its independence is in some regards more far reaching than that for the SNAO and the Parliamentary Ombudsmen and hence serves as an appropriate complement to their examples. All three institutions provide valuable solutions to the regulation and establishment of a national institution, since they are a product of the national legal tradition and culture emphasised by the UN as having importance when establishing an NHRI (see section 3.3).

6.2.1 Statutory mandate

6.2.1.1 Level of the legal acts

The Paris Principles require that the mandate of the NHRI is clearly "set forth in a constitutional *or* legislative text" [emphasis added] (*Competence and responsibilities* §2). Hence, they open up to the possibility of not regulating the existence of such an institution in the constitution. However, this is not what is encouraged by the Special Advisor, who rather recommends that the role and independence of the authority are *briefly described in a constitutional text* whereas the *detailed provisions* on mandate, membership, powers and functions shall be included in *parliamentary acts.*[225] This view of the legal foundations of an institution under the Parliament was shared by the previously mentioned Equality-commission of Inquiry[226] and the Swedish Parliament and Government when they recently established the SNAO. In this context, the Parliamentary Committee on the Constitution stated that the integrity (independence) of the SNAO ought to be safeguarded by provisions in the Constitution and in the Riksdag Act.[227] The Government agreed and referred to the Lima Declaration (see previous section 5.1.2), which requires that the functional and organisational independence of national audit institutions and their establishment shall be set forth in the Constitution and that complementary rules may be provided for in ordinary laws.[228] This is also how the regulation of the SNAO was shaped. It's activity is now regulated by four different legal acts; the Instrument of Government 12:7, the Riksdag Act 8:12-14, the Act concerning Audition of State Operations etc. (my English translation for Lag om revision av statlig verksamhet m.m) and the Act with Instructions for the SNAO (my English translation for Lag med instruktion för Riksrevisionen).

This choice of regulation for the SNAO seem to comply well with what the Paris Principles prescribe and with what the Special Advisor recommends. It is a compelling reason that also the establishment and regulation of a Swedish national institution should be arranged in the same way. If it was considered appropriate and feasible in order to fulfil international policy requirements for a national audit institution it could very well be arranged for a national institution.

In addition to this, it seems to follow from the Swedish Constitution itself in the Instrument of Government 11:8, which forbids the Parliament to carry

[225] Burdekin and Naum, op. cit. p. 35.
[226] SOU 2006:22, part II, p.265.
[227] Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen*. p. 22.
[228] Proposition 2001/02:190, p. 55.

out administrative tasks to a wider extent than what is provided for by the Constitution or the Riksdag Act, that a constitutional regulation in this area is necessary.

6.2.1.2 Formulation/design of the independence provision

How strictly is it then advisable to regulate the independence from the organ with principal responsibility? Two different alternatives of constitutional regulation, which were suggested for the creation of the SNAO, are interesting to note in this regard. One less rigid provision was suggested by the Government and is that which was eventually enacted by the Parliament, whereas a stronger phrased provision was proposed by the Parliamentary Ombudsmen. The former and milder suggestion is the current provision 12:7 of the Instrument of Government.[229] The provision states that the national auditors shall decide independently in accordance with the law what to monitor, how the supervision shall be carried out and which conclusions to draw from their findings. The Government (and most of the bodies to which the proposed measure was referred for consideration) contended that a special emphasis on this in the Constitution was necessary and sufficient. Hence, it did not find any further guarantees for independence necessary and dismissed the proposal put forward by the Parliamentary Ombudsmen.[230]

The stricter regulation suggested by the Parliamentary Ombudsmen was that the constitutional provision for the SNAO should resemble that of the National Bank in 9:13 of the Instrument of Government[231] containing a *prohibition* of any authority to instruct the Bank on matters concerning financial policies. Normally the Parliament does have the power to do so in the case of its subordinate authorities in accordance with 8:16 of the Riksdag Act. Hence the difference between the two provisions (12:7 and 9:13 of the Instrument of Government) is that the former prescribes that the national auditors shall make their decisions independently whereas the latter sets forth a clear prohibition of authoritative meddling in the work of the Bank, and which due to the provision in 8:16 of the Riksdag Act appears to be necessary in order for it to enjoy real independence in relation to the Parliament. The Government did not consider that there was a need for the, in my opinion, more far reaching and necessary provision of 9:13 for the SNAO since it had been brought about by EU rules concerning the National Bank that did not exist for the SNAO.[232] Neither did it consider a provision similar to that in 11:7 of the Instrument of Government,[233] prohibiting any

[229] Instrument of Government 12:7 reads: ”Riksrevisionen leds av tre riksrevisorer, som väljs av riksdagen. Riksrevisorerna beslutar självständigt med beaktande av de bestämmelser som finns i lag, vad som skall granskas. De beslutar självständigt och var för sig hur granskningen skall bedrivas och om slutsatserna av sin granskning.”

[230] Proposition 2001/02:73: *Riksrevisionen – ändringar i regeringsformen*, Stockholm, 2001, p. 13.

[231] Instrument of Government 9:13 reads: ”Riksbanken är rikets centralbank och en myndighet under riksdagen. Riksbanken har ansvaret för penningpolitiken**.** Ingen myndighet får bestämma hur Riksbanken skall besluta i frågor som rör penningpolitik.”

[232] Proposition 2001/02:73, p. 12.

[233] Instrument of Government 11:7 reads: ”Ingen myndighet, ej heller riksdagen eller kommuns beslutande organ, får bestämma, hur förvaltningsmyndighet skall i särskilt fall besluta i ärende som rör myndighetsutövning mot enskild eller mot kommun eller som rör tillämpning av lag.”

authority, including the Parliament, to instruct an administrative authority on how to act in its exercise of authority against individuals, to be necessary. It contended that no situations relevant to either of those provisions would be characteristic of the activity of the SNAO.[234] This might be true for the SNAO, but for a national institution complying with the Paris Principles to their fullest extent such regulation certainly would be relevant not to say the least for its quasi-judicial competence. Even if the provision in 11:7 of the Instrument of Government might already cover a future national institution under the Parliament, it would still clarify its independence if this could be combined with that of 9:13 (adapted to the mandate of an NHRI) in a separate provision specifically establishing the new institution. It is crucial that nothing similar to the mechanism of the governmental appropriation directions is possible for the national institution subordinate to the Parliament. By legislating in the previously proposed way, *all* of the activities of the national institution would be protected against interference from the Parliament and other state organs and hence its independence would be ensured in accordance with the Paris Principles' requirements (see section 3.2.4.4).

Having the main responsibilities laid down in the Constitution (which requires a longer and more rigorous process to change according to 8:15 of the Instrument of Government) coupled with a clear prohibition of external instructions will afford the national institution stability and continuity in its monitoring of the international human rights conventions. In this way the institution will not have to adapt its work to the changing composition of the Parliament but can employ a long-term strategy, which is important when approaching and dealing with international human rights standards. Human rights should never be subject to political considerations. This is essential for its credibility in the eyes of the public but also for Sweden's international reputation.

In addition to the stability it will gain, also the ability or even inclination of the institution to present critique against the Government and Parliament is protected through the suggested constitutional prohibition of interference, something which was emphasized by the Equality-commission of Inquiry as being an essential feature of independence.[235]

6.2.1.3 NHRI's relatiohsip with the Executive, the Parliament and other state organs

It was contended by the Equality- and Children's Ombudsman-commissions of Inquiry, that communication between the institution and the organ with principal responsibility over it, if the latter was to be the Parliament, might be complicated, whereas the dialogue with the Government would be easier since contacts would then take place with *one* responsible minister.[236] This problem could however, easily be eliminated by creating a parliamentary committee responsible for the national institution. Having a specific committee responsible for authorities under the Parliament is the usual way to arrange such communication in the

[234] Proposition 2001/02:73, p.13.
[235] SOU 2006:22, part II, p. 262.
[236] SOU 2006:22, part II, p.261.

Swedish system (the Parliamentary Committee on the Constitution is responsible for the Parliamentary Ombudsmen and the SNAO, tilläggsbestämmelse 4.6.1 the Riksdag Act), and it is also the way that is recommended by the Special Advisor. He argues that a permanent committee specialized on human rights shall be responsible for the cooperation with the NHRI.[237] Naturally, the Riksdag Act, which regulates issues of parliamentary organisation, should provide the regulation for the future national institution in this regard. For the SNAO a special board was created with representatives from the parliamentary parties which shall follow the work of the SNAO and make suggestions to the Parliament. The current form of the board however also has decision making power in regard to the appropriation proposal of the institution and in regard to the adoption of its annual financial report (Instrument of Government 12:7, passage 3). One of the reasons for the establishment of the board was to facilitate the insight of the Parliament into the activity of the institution and to ease the communication between the two.[238] An organ such as this board might be a good way to facilitate transparency and communication between the national institution and the Parliament. A few important adjustments would however, need to be made. This is due to the fact that the board actually has decision-making powers which would compromise the independence of the national institution and the Principles' requirements in this regard (see further section 6.2.4 below). The model to copy for the set up of a parliamentary organ responsible for the NHRI would rather be that which has been suggested to replace the SNAO-board. The SNAO-commission of Inquiry has proposed that a Parliamentary Council without any decision making power should replace the Board. The task of the Council should be to function only as an organ of consultation between the institution and the Parliament and it should consist of one representative from each parliamentary party elected by the Parliament.[239]

As is clear from section 3.2.2 a national institution shall provide advice and recommendations to the Government on how to improve the situation of human rights in the country. Since these are of a non-binding nature, their effectiveness depends on a good dialogue with the relevant government bodies. An examination of the different NHRIs across the world in 2009 made by the OHCHR revealed that approximately 65% of the responding institutions work in a situation where government bodies are *formally required to respond* to the resolutions of the national institution, and that a correspondingly high percentage of institutions had put in place *mechanisms to follow up* on these resolutions and recommendations. However, despite the existing follow up mechanisms and provisions only 30% indicated that the government bodies take on board the recommendations well, which according to the OHCHR, suggests that the formulation of such legal

[237] Burdekin and Naum, op. cit. p. 53.
[238] Proposition 2001/02:73, p. 12.
[239] Riksrevisionsutredningen: *Uppföljning av Riksrevisionsreformen. Riksrevisionens styrelse, ledning och hanteringen av effektivitetsgranskningar, Delbetänkande* (2008/09:URF1), Stockholm, 2008, p. 65.

frameworks need particular attention and strengthening.[240] Evidently, this is something that requires particular consideration, and hence should be addressed in the legislation governing a future Swedish national institution.

An additional way to ensure that the recommendations of the institution are effective, and which has implications on its independence, is to give the NHRI the right to make suggestions to the Parliament. This could be done with the example of the Parliamentary Ombudsmen as a model, as these have such competence (the Riksdag Act 3:8, tilläggsbestämmelse 3.8.4; Act with Instructions for the Parliamentary Ombudsmen §4). A regulation like that would enable the NHRI to bring forth its recommendations in the Parliament and make them the subject of debate. (Not only does such regulation have implications on the independence of the institution but it is also actually required by the Paris Principles to be included in the material mandate, see section 3.2.2.1).

Another issue that requires special attention is the regulation on accountability. It has been established, by both the UN Handbook and the Special Advisor that managing the balance between the legitimate demand for accountability and the need for independence may be very difficult and hence the Handbook recommends that the reporting requirements are detailed in the founding legislation specifying the *frequency of reports*, the *subjects* to be dealt with and the *evaluation procedure* (see section 3.2.4.4 above). In this regard, again, the arrangements made for the SNAO may serve as an appropriate model for a national institution. The SNAO reports to both Government and Parliament, even if it per se is an authority under the Parliament. This might be a useful arrangement to employ also for an NHRI. The emphasis of the Special Advisor is put on the fact that different arrangements may be made as long as the report is really debated in and handled by the Parliament (section 3.2.4.4). Since the reporting activity of the SNAO was considered as an essential part of the authority's work the Government chose to regulate its reporting process in the legal act governing its work (Act concerning Audition of State Operations etc.).[241] This law refers to the auditors' report and to the most important cases of supervision during the year to be included in the report and specifies the time for submission. Hence, a corresponding enumeration of subjects to be included in the report of the national institution coupled with clear provisions on the evaluation procedure should be provided for in law. Also, the provision regulating the reporting duty of the Parliamentary Ombudsmen could serve as a model for the future NHRI (see section 5.3.1.2.4 above). This also puts forth the subjects to be reported on and the consideration of the report seldom leads to any measures by the Parliament. Hence, the reporting procedure is more a formal matter of accountability than an actual meddling in the activity of the institution by the Parliament. Legislation such as these will serve to protect the national institution against unforeseen measures from the Parliament risking to hold it back in its reports.

[240] Office of the High Commissioner for Human Rights: *Survey on National Human Rights Institutions. Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide*, Geneva, 2009, p. 55.
[241] Proposition 2001/02:190, p. 52-53.

6.2.2 Composition

In order to comply with the Paris Principles and its accompanying interpretations/recommendations in terms of the composition of an NHRI a few innovations might be needed to complement the traditional Swedish way of regulating matters of this kind. The following section is divided into five parts, including a concluding remark, dealing with the different aspects of composition and the relevant requirements of the Paris Principles.

6.2.2.1 Appointment

As was stated in section 3.2.4.1 the *method* (voting- and other procedures) and *criteria* (required qualifications) for appointment shall be specified in the *founding law* of the national institution. Ideally, the appointment procedure shall be *transparent* and preceded by *consultations* with civil society, and ultimately *determined by the Parliament*.

According to the OHCHR study approximately 80% of the responding institutions indicated that appointment procedures were specified in their founding law, 50% that they advertised vacancies, and 45% that consultation with civil society were held by for instance including NGO representatives on selection panels and by having the public comment in the media.[242] The study further showed that the majority of countries employed systems where multiple groups could nominate candidates, among which the most common were the parliament, civil society, and the candidates themselves. Some systems also afforded advisory panels, the institution itself, universities, and the government the right to make nominations. The relatively low percentage of institutions that employed consultative and transparent procedures caused the OHCHR to urge the strengthening of procedural requirements for the selection of members.[243]

When establishing a Swedish national institution the OHCHR-recommendation should of course be observed as well as the many examples of good practice in its study. It is apparent that an inclusive nomination process (which constitutes a form of consultation) inviting participation by different actors in society coupled with public advertisement of posts and transparent recruitment procedures will contribute to the institution's independence and legitimacy in the long run.

In the appointment of members of the SNAO, which was used as a model in the previous section, it is the Parliament that elects the three national auditors one by one after a preparatory procedure by the Parliamentary Committee on the Constitution (The Riksdag Act 8:12). This practice of the SNAO was in turn modelled after the one which is applied to the Parliamentary Ombudsmen in 12:6 of the Instrument of Government and 8:11 of the Riksdag Act. This legislation would however need to be complemented with a more inclusive and consultative nomination procedure in order to comply with the Paris Principles. (The importance of a participatory nomination procedure will be further elaborated on in section 6.2.3.)

[242] Office of the High Commissioner for Human Rights, op. cit. p. 12.
[243] Office of the High Commissioner for Human Rights, op. cit. p. 52.

To further ensure a fair appointment procedure and to avoid that party politics influence the choice between candidates, it is preferable to employ an *open application procedure* where the *qualifications are stated publicly,* something which was pointed out by the National Panel of Auditors (my English translation for Revisorsnämnden) and by the National Audit Authority (my English translation for Riksrevisionsverket) before the establishment of the SNAO. The National Audit Authority further proposed that either the preparatory process for the election itself should be prescribed by law or the law should provide the required qualifications.[244][245] These proposals could hence be used as a model for the legislation on the appointment procedure for a Swedish national institution under the Parliament, and appear to comply well with the requirements of the Paris Principles.

6.2.2.2 Duration and renewal of mandate

The Paris Principles also require the *duration* and *possible renewal* of the mandate of the NHRI's members to be regulated in law (see section 3.2.4.1). In the OHCHR study almost 80 % indicated that the terms of their members were between *three to five* years which, according to the OHCHR, "is a reasonable period to ensure tenure of membership" and will allow the members to develop expertise and be vocal without fear of hindering their future prospects, and hence enhance the independence of the institution.[246]

Against this backdrop, it is interesting to note the reasoning of the Swedish Government and Parliament when preparing the legislation in this area for the SNAO. The duration of the three national auditors' mandate is *seven years without the possibility of renewal*. That time period was motivated by the need for continuity in their work and need of consistency in the direction of the authority. Furthermore, the denial of renewal was enacted to protect against the striving for re-election that might affect the work of the auditors and to ensure that they would not risk appearing as dependent in relation to the Parliament. These two considerations weighed heavier than the possible need of the Parliament to be able to contemplate the appointment of a new auditor after a shorter time than seven years, which for eaxmple is the order used for the Parliamentary Ombudsmen.[247]

These considerations seem suitable also for the membership of a national institution. Continuity and the lack of disrupting incentives to get re-elected appear especially appropriate for the members of an NHRI whose work may be politically sensitive (and much more so than for example that of the Parliamentary Ombudsmen with a shorter and renewable mandate time). The seven-year period can also serve as a mechanism to ensure that the principle of continuity referred to in section 3.2.4.1 is complied with, since the election of a new member of the institution in such a system would take place after the next parliamentary election has been carried out.

Another interesting feature of the SNAO-regulation regarding its membership which could be copied for a national institution, is that the

[244] However, the Government disagreed and considered such provisions redundant since it was for the Parliament to assess whether the demands it felt necessary were fulfilled by the person up for election (Proposition 2001/02:190, p 108).
[245] Proposition 2001/02:190, p 108.
[246] Office of the High Commissioner for Human Rights, op. cit. p. 14.
[247] Proposition 2001/02:190, p. 112.

three auditors are appointed at different times with an interval of two years (to set this system in motion at the very first election the auditors are elected for seven, five and three years respectively). This procedure of appointment results in a gradual renewal of the members and also ensures that the elections take place at different parliamentary meetings.[248] These are two facts which both might enhance the possibility of diversity and independence of the members. (The practical implications of this system for the SNAO has however not been established since it has been in operation too short of a time to ascertain any conclusions.[249])

Finally, the question of future job prospects for a member of the national institution may be of relevance to her independence in that position. The desire to attain a certain employment after the term as a member of the NHRI has expired may affect the monitoring activities she will decide to carry out on behalf of the institution. For the SNAO there are currently no regulation to protect against such implications, but for the delegates at the National Bank rules hindering certain employments the year following their leave are employed to prevent unduly influence of their work at the Bank (Act concerning the Swedish National Bank (my English translation for Lag om Sveriges Riksbank) 3:1).[250] Similar provisions to ensure that future carrier opportunities do not affect the monitoring activities of the NHRI would be advisable.

In conclusion, it can hence be stated that using the legislation of the SNAO as a model, with appropriate adjustments and complimentary provisions, for the duration of the member-mandate of a Swedish national institution would serve its need for independence and comply with the Paris Principles.

6.2.2.3 Dismissal

The Paris Principles and its authoritative interpreters require that the possibility to dismiss a member of a national institution is laid down in its *founding law* and that it is specified *who* may make such a decision and for *what reasons*. The latter, as asserted by the UN Handbook and Special Advisor, should consist in *serious wrongdoing* and the decision making shall be assigned to the *Parliament*. The ICC Sub-Committee however, contends that the decision *shall not be based solely on the appointing authorities' discretion* (see section 3.2.4.1). These two assertions about the decision making power may appear irreconcilable, but at a closer examination, they might actually turn out to be compatible. If the law providing the required reasons for dismissal contains both procedural requirements and more elaborate substantive requirements than only "serious wrongdoing" the decision of a dismissal will not be left *completely* to the appointing authority's discretion but will follow certain set and clear procedures. Such legislation is hence recommendable when it comes to regulating the removal of an NHRI's members.

As was previously stated (see section 6.2.2.2), the security of tenure is an important means of protecting a national institution's independence. Evidently, the security of tenure is affected by the regulation on dismissal,

[248] Ibid, p. 113.
[249] Riksrevisionsutredningen, op. cit. p. 89-90.
[250] Ibid, p. 90.

why the requirements for dismissal of any member of a Swedish national institution should have a strong legal basis in order to comply with the Paris Principles. Such legislation would also be in line with the reality of 70% of the NHRIs in the OHCHR-study which indicated that their founding laws contained dismissal grounds. These generally relate to *absence, incompetence, incapacity, criminal misconduct or bankruptcy.*[251] The majority of institutions (56%) also indicated that their founding law included a procedure for dismissal. Examples of such procedures included trial before an independent tribunal, establishment of a panel to investigate the alleged misconduct and provisions requiring a two thirds majority vote by Parliament.[252]

When approaching possible options for such legislation in the Swedish context, once again the reasoning of the Government and the Parliament regarding the regulation of the SNAO is interesting to note and to take departure from. According to that legislation the Parliament may dismiss a national auditor only if she *no longer fulfils the required qualifications* for her position or if she is guilty of "*serious wrongdoing"* at the request and after the preparation by the Parliamentary Committee on the Constitution (Instrument of Government 12:7; the Riksdag Act 8:13, tilläggsbestämmelse 4.6.1 passage 5). The Government contended that this provision should be interpreted to require *clear and "obvious matters-of-fact" of the "serious wrongdoing"*. This would include for example serious neglect of duties by taking external instructions, or the commission of a serious crime leading to a reduced confidence in the institution. Furthermore, the procedure for such dismissal, it was contended, would take place with the possibility of openly debating different opinions, hence allowing the public to form its own opinion on the faults of the member.[253] In my opinion however, the safeguards in the SNAO provision are not enough. Although the law provides that it is the Parliament who makes the ultimate decision, it does not comply with the requirements outlined above in terms of indicating substantial reasons and procedures for a dismissal. Even if the governmental proposition provides some guidance in this regard, it still affords the Parliament a lot of discretionary power. Neither can the public debate in the Parliament about the reasons for a dismissal remedy the lack of procedural rules. Hence, this would have to be addressed in the law for a Swedish national institution. The examples of *absence, incompetence, incapacity, criminal misconduct or bankruptcy* provided by the various institutions in the OHCHR-study could be used as examples. However, there might be a need to further define the meaning of 'incompetence' and 'incapacity' to protect against undue influence of the dismissal decision. Furthermore, the inadequate regulation of procedures for the SNAO could be remedied in the case of an NHRI by following the models of some of the institutions in the OHCHR-study outlined above with the establishment of either an independent tribunal or panel to investigate the alleged misconduct of the members or by the requirement of a so called qualified parliamentary majority (2/3 or 3/4 of the votes) for the dismissal decision. The argument against the latter, held by the Swedish Government in the case of the SNAO,

[251] Office of the High Commissioner for Human Rights, op. cit. p. 14.
[252] Ibid, p. 52.
[253] Proposition 2001/02:73, p 15.

that the requirement of "serious wrongdoing" was sufficient to ensure the members' independence does not hold up to closer scrutiny and does not comply with the Paris Principles. It is on the contrary the lack of a clear meaning of those words that cause the problem. Even if a better clarity in accordance with the previous recommendation on dismissal criteria would be provided for in law the practise of the simple majority-rule (over 50% of the votes) does not provide sufficient guaranties of a fair and independent dismissal procedure. The reason fir this is to be found in the fact that a Government with enough parliamentary support could have a critical member of the institution dismissed simply by applying its own interpretation of the different dismissal criteria. The implications of the simple majority-order are hence similar to those when the institution is actually subordinate to the Government. This inevitably leads to the conclusion that if the SNAO provision in 12:7 of the Instrument of Government is to be used as the model regulation for a national institution it must be complemented by either a requirement of qualified parliamentary majority for dismissal, or by an independent panel/tribunal, perhaps similar to the State Committee for Professional Liability (my English translation for statens ansvarsnämnd) used for some of the governmental administrative authorities (Act concerning Public Employment §34).

The fact that the dismissal provision is provided for by the Constitution however, which is the case for the SNAO, is a fact that will work in a positive way to consolidate independence and it should be copied for the regulation of the national institution.

6.2.2.4 Form of organisation

The OHCHR has found that when the governing body of an institution, which is made up of its decision-making commissioners, ombudsmen and deputies (all of which previously have been referred to as its members) has only a *small number* (10 or less) of *full-time* employees it tends to be the most effective.[254] In terms of the Swedish tradition of authority-organisation, two main orders can be discerned; the *collegial* and the *bureaucratic*. They are both based on how the decision making is carried out. In the collegial, the decisions are made by a group of members on an equal footing with each other, and in the bureaucratic by a superior official after the presentation of reports by subordinate staff members. Sometimes the two are combined so that the authority both has a board of equal members and a subordinate bureaucratic organisation of civil servants.[255]

The issue of the best-suited organisational form for a Swedish national institution will be further elaborated on in the following section on *pluralism*, so for now it will only be concluded that based on the OHCHR-study, the most appropriate form of governance of such an institution is apparently one that in Swedish terms would resemble the collegial type. This would make it the most efficient and would be a familiar way to arrange the organisation in the Swedish system (even if this is not how the related Equality Ombudsman- and The Children's Ombudsman institutions are organised). Even the combined type might be appropriate since a national institution needs to be accessible and its activity shall stretch over a

[254] Office of the High Commissioner for Human Rights, op. cit. p.51.
[255] Strömberg, op. cit. p. 33.

wide range of human rights requiring it to be flexible and able to delegate certain decision-making within the organisation. Both the SNAO and the Parliamentary Ombudsmen may be used as examples of how to arrange a collegial management of a Swedish national institution, and will be further examined for that purpose in section 6.2.3.

Furthermore, the interpreters of the Paris Principles and the FRA emphasize the importance of the ability of a national institution to appoint its own staff (see section 3.2.4.1).[256] Legislation regulating this for a Swedish national institution could be created with that of the Parliamentary Ombudsmen as a model. According to this the Chief Parliamentary Ombudsman, or the Administrative Director upon delegation, appoints the officials in the secretariat and the other staff (Act with Instructions for the Parliamentary Ombudsmen §28).

Finally, a national institution needs to be competent to establish its own rules of procedure and administration to comply with the Paris Principles (section 3.2.4.4). In this regard yet again the SNAO can serve as a model. It is provided for in §§4-5 of the Act with Instructions for the SNAO that the SNAO has the ability to determine independently what areas to monitor and prioritize, what organisational structure to employ, and what rules of procedure and administrative arrangements to make. This power over the internal activity of the institution is an important feature of the enjoyment of independence, and should hence be provided for a future Swedish national institution.

6.2.2.5 Concluding remarks

In conclusion, there are several arguments for letting the SNAO serve as an appropriate model for the legislation on the composition of a Swedish NHRI. It would however need to be complemented by some features of the regulations governing the Parliamentary Ombudsmen and by some new legislative innovations inspired by the good examples of other countries.

6.2.3 Pluralism

The Paris Principles' requirement of pluralism serves to enhance the independence of the national institution by *diversifying its composition*. Diversification affords the institution a democratic feature and hence the possibility of an anchoring of its decisions in broad layers of the public.

6.2.3.1 A collegial body

The Principles' require that the members of the NHRI are *representative of civilian society* involved with human rights (e.g. NGOs, trade unions, social and professional organisations), of philosophical and religious trends, of scholars, and of the government and parliament (the latter however, in advisory capacities only). In this regard, the UN Handbook states that *commission-like institutions* or *multiple-member ombudsman offices* are better placed than single-headed institutions to make use of pluralism as an instrument for independence (see section 3.2.4.2). This stance is further supported by scholars (see for instance Pohjolainen who contends that a national institution in the shape of a commission with judicial competence

[256] European Union Agency for Fundamental Rights, op. cit. p. 9.

fits the Paris Principle model the best[257]). Moreover the ICC Sub-Committee lists four different ways of how the requirement of pluralism can be fulfilled, one of which is having a governing body consisting of the representatives outlined above.

In addition to this, there are yet a few significant reasons for choosing a multiple-member model of management for a Swedish national institution, consisting of recent EU-recommendations. In 2002, the European Commission issued a recommendation urging member states to have the management of their discrimination bodies be representative and consist of different societal groups to increase their independence.[258] Another EU recommendation is that issued by the FRA, stating that the national institutions of the member states should "be or include a broad collegial body reflecting the composition of society, as far as possible.[259]

The above considerations inevitably lead to the conclusion that a national institution purporting to comply with the Paris Principles should be created as a commission or a multiple-member institution where the decision-making power is shared by several persons. An additional argument for choosing a collegial model is based on the fact that a national institution has both promotional and monitoring responsibilities, which, as the Children's Ombudsman-commission of Inquiry put it, places great demands on the management to resist external pressure and to maintain a high level of integrity.[260] The arrangement of a collegial body is likely to be less vulnerable to attacks on individual members than a single-headed institution. This, taken together with the fact that the competence of the institution increases with a collegial management, led the Parliamentary Auditors (my English translation for Riksdagens revisorer) and the Swedish Agency for Administrative Development (Statskontoret) to favour the collegial model as the most suitable for the SNAO.[261]

In sum, a collegial body will fulfil the requirements of pluralism the best and is furthermore, as was stated in section 6.2.2.4, the most effective according to the OHCHR-study. That section also concluded that such a collegial governing body should consist of ten or less full-time members, and the examples of the SNAO and the Parliamentary Ombudsmen were put forth as models for the management of a Swedish NHRI. The Government expressed a different opinion in relation the new Equality Ombudsman. The Government's view was that a collegial management would make the division of responsibility obscure and that one single ombudsman as the external face of the institution would be better and more suited to make it known to the public.[262] This argument however, does not stand when one examines the arrangements made for management in a number of other Swedish institutions. As shown, both the SNAO and the Parliamentary

[257] Pohjolainen, op. cit. p. 16-17.
[258] SOU 2006:22, part II, p. 203 (PLS Ramboll Management for the EU Commission within the European Community Action Programme to combat discrimination 2001–2006: *Specialised bodies to promote equality and/or combat discrimination*, May 2002).
[259] European Union Agency for Fundamental Rights: *National Human Rights Institutions in the EU Member States. Strengthening the EU fundamental rights architecture I*, Luxembourg: Publications Office of the European Union, 2010, p. 9.
[260] SOU 1999:65, p. 226.
[261] Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen*, p. 17-18.
[262] Proposition 2007/08:95, p. 366.

Ombudsmen make up good examples for a new national institution and can serve to overthrow old scepticism in regard to collegial decision making.

First, the division of responsibility does not have to be obscure. It could be resolved as it has been for the SNAO where one of the auditors is given responsibility for administrative tasks (appointed by the Parliament) and where the law clearly states which decisions shall be taken jointly and what the auditors can decide on individually. The regulation of the administrative decision making power is sensitive to the fact that the auditors need to enjoy independence in their monitoring work. This feature of their regulation is similar to that of the Parliamentary Ombudsmen and that of the judges in the Court system. The regulation for the SNAO prescribes that the three managing auditors shall decide jointly on the distribution of monitoring tasks between themselves, on the organisation and procedure of work of the institution (arbetsordningen), on staff rules and on the annual report. The individual decision making power of the auditors consist in choosing the objects of supervision within each auditor's respective assigned area of monitoring (after mutual consultation), and to settle their own cases (Act with Instructions for the SNAO §§ 4, 5, 7). The same principles of division of responsibility could be applied in the case of a Swedish national institution subordinate to the Parliament. It makes sense that the members shall be able to determine the direction of the work of the institution jointly and then independently choose the direction within that area in terms of monitoring objects and promotional activities. Individual complaints could also be assigned to the respective members in accordance with their particular field of specialisation, but of course be settled and determined by each member individually. This would afford the members the necessary independence both in relation to each other and in relation to the organ with principal responsibility (the Parliament).

The reason why the specific number of three members of the SNAO was chosen and not six, which is the number of delegates of the National Bank-management (Instrument of Government 9:12; Act concerning the Swedish National Bank), is the consideration that the advantages of a collegium would be best balanced against the risk of indistinctness and inefficiency at this particular number.[263] Since it is difficult to recommend a specific number of NHRI-members, both the SNAO (with three national auditors), the Parliamentary Ombudsmen (with four Ombudsmen) and the National Bank could be used as good examples, though not ruling out the suitability of any other number less than 10.

Another good example of pluralistic governance is made up by the German, GIHR, and Danish, DIHR, national institutes (these lack the competence to handle individual complaints). They aim at reflecting pluralism in the composition of the *boards* managing their respective institutes.[264] The board of the DIHR is responsible for substance and professional issues and meets four to five times every year. In addition to this it has a special *council*, the Council on Human Rights, which meets twice a year and discusses overall principles guiding the activities of the institute. The daily professional management is handled by an Executive Director. Similarly, the GIHR is composed of a Board, a Board of Trustees

[263] Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen*, p. 17-18.
[264] European Union Agency for Fundamental Rights, op. cit. p. 32, 28.

and a General Assembly.[265] Even if these institutes do not have the competence to handle individual complaints, their structure of governance may still serve as a model of how to attain pluralism for a Swedish national institution with such mandate, and may be an alternative to that of the SNAO and the Parliamentary Ombudsmen.

6.2.3.2 Regulation on appointment to ensure pluralism

As was concluded in section 3.2.4.2 the mere existence of a multi-member governing body of the NHRI is not enough to ensure pluralism in accordance with the Paris Principles' requirements. The members also need to be *representative* of civil society. To accomplish this ICC Sub-Committee, as one of its measures for pluralism, puts forth a nomination system where different societal groups nominate candidates for the election of the governing body. In the case of a Swedish NHRI this method appears to be a good help in achieving pluralism since, according to the previous recommendations (see section 6.2.2.1) it would be the Parliament that elected the members. The Polish Commissioner can serve as a good example for such procedures, as well as the proposed procedures for nomination of members of a future Belgian national institution. The law of the former provides that minority parties of the Polish Parliament may propose candidates for the position of the Commissioners.[266] The latter proposes that the law regulating the future Belgian institution should require that three out of eleven members be nominated by human rights NGOs.[267] Legislation like this for a Swedish national institution would hence ensure pluralism in the governing body, and would also constitute a means to achieve the required consultative process referred to in 6.2.2.1.

Another way of achieving pluralism in a system where the parliament has the final say about who will manage the NHRI is to set forth different requirements of diversity in the founding legislation of the institution. This could either be an alternative to any of the nomination systems outlined above or coexist with them. Just over half (54%) of the respondents in the OHCHR-study indicated that their founding laws contained a requirement of pluralism in their governing bodies. Most of these provisions concerned the qualifications the candidates must have, the organisations they must come from, their ethnic origin, or their sex. However, the study showed that only 55 % of those who had such requirements of pluralism in law actually rated their governing body as diverse.[268] This suggests that when enacting such laws much attention must be paid to their formulation in order to make them effective in practice. Perhaps it is advisable not to enumerate different required categories exhaustively in the legislation since this may make the appointment of members less flexible and less adaptable to changes in society and to what groups or areas, which for the time being, are in need of protection.

[265] Ibid, p. 28.
[266] European Union Agency for Fundamental Rights, op. cit. p. 32.
[267] Ibid, p. 30.
[268] Office of the High Commissioner for Human Rights, op. cit. p. 10-11.

Yet another way to achieve pluralism is to leave the appointment procedure altogether to other actors than the parliament, which for example is the case in Denmark where the 13 members of the Board are appointed by the Council for Human Rights (an organ of the institute itself), by university representatives and by the staff.[269]

This method to achieve pluralism appear to be somewhat more effective since to a large degree it is actually civil society actors themselves that elect the members, but it probably takes place at the expense of democracy and the anchoring of the institution in the elected representatives of the people. For these reasons, the Danish model might not be the best to use when establishing a Swedish national institution if the aspiration is to have it enjoy the trust of the public.

6.2.3.3 Complementary methods to facilitate pluralism

The ICC Sub-Committee also mentions a couple of other methods to achieve pluralism; cooperation with diverse societal groups, and a diverse staff. As was concluded in section 3.2.4.2 these cannot in themselves fulfil the Paris Principles' requirement of pluralism since they do not guarantee that the *members of the institution will consist of representatives of different groups.*[270] They can however, be considered as good complements to the above arrangements.

In the case of civil society-cooperation, again the regulation of the SNAO can serve as a good example. Its model of a *Scientific Council* (Vetenskapligt råd) could be used to elaborate on and develop from in order to enhance the pluralism of the future Swedish national institution. The Scientific Council of the SNAO serves as an advisory organ to the three national auditors, consisting of six members who meet three times per year. It provides recommendations on methods and strategies (Act with Instructions for the SNAO 3§).[271]

Another similar method to achieve pluralism, which was suggested by members of the Swedish Parliament in regard to the establishment of the SNAO, is to give individual citizens, along with NGOs and other organisations the ability to initiate monitoring tasks at the NHRI. For individuals this could be done in the same simple manner as is the case for the Parliamentary Ombudsmen where they simply register their case with the authority.[272] This proposal could be applied also to the national institution. In order for it not to compromise the independence of the members of the institution, however, it would be important that such a provision also clarified that the final decision of what cases to handle and monitor would rest with the individual member and would have to be taken in accordance with certain procedural and material requirements prescribed by law. Such regulation would serve to protect against undue lobbying and the risk of interference with the independence of the members.

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[269] European Union Agency for Fundamental Rights, op. cit. p. 32.

[270] Good relations with NGOs is however important for any NHRI in order to function effectively and accordingly a requirement of the Paris Principles' regulation on "methods of operation".

[271] Proposition 2001/02:190, p 123.

[272] Dissenting views by Jan Bergqvist (s), Bengt Silfverstrand (s), Lisbet Calner (s), Sonia Karlsson (s), Carin Lundberg (s), Yvonne Ruwaida (mp) och Tommy Waidelich (s), Konstitutionsutskottets betänkande: *Riksdagen och den statliga revisionen,* p. 32.

The German Institute further tries to achieve pluralist representation through its participatory action research model, which requires consultation with a wide range of NGOs representing different interests, opinions and groups.[273] This German way of requiring cooperation with civil society actors is something that might be copied for a Swedish NHRI. The older legislation of the Children's Ombudsman requiring such cooperation (see section 5.3.4.2.2), could be used as an example of how to arrange this in a Swedish context, and could complement the pluralistic effect of the activity of a body like the Scientific Council and the ability for individuals and organisations to initiate monitoring tasks.

The feature of a pluralistic staff representing different segments of society might not prove to be particularly difficult to achieve if the previous recommendations outlined are adhered to. If the members of the national institution are given the competence to hire the staff (in accordance with what the Paris Principles prescribe and with what was recommended for a Swedish NHRI in section 6.2.2.4), and if the members themselves are more than one to their number, nominated and appointed in a pluralistic manner, then it seems logical that the staff of the institution will also be pluralistic and reflect society. Consequently, if adequate consideration is had to all of the above recommendations, good conditions are created to ensure that the composition of the staff will fulfil the requirement of pluralism.

In conclusion it can be stated that in order for a Swedish national institution to comply with the Paris Principles' requirement of pluralism it should be governed by a collegial body of equal members, which are nominated by, in part or altogether, civil society actors. An alternative or even a complementary way to such a nomination procedure to guarantee that the members are representative of society is to provide requirements of diversity in law. In addition to this, it would be appropriate to include cooperation with civil society and other actors, in line with the Paris Principles' requirement, as a responsibility in the mandate of the institution, as well as the establishment of an advisory council and the competence for individuals to initiate monitoring tasks.

6.2.4 Funding

The Paris Principles are not particularly detailed in their regulation on the funding. They only prescribe that it should be *adequate* and *not subject to financial control* affecting the independence of the NHRI. The UN Handbook and Special Advisor, as outlined in section 3.2.4.3, are a bit more elaborate when they interpret this provision.

The current order of the SNAO where a special parliamentary board (described in section 6.2.1.3 above) adopts an appropriation proposal for the Parliament to approve ("förslag till anslag på statsbudgeten") and decides on the annual financial report could not be considered to fulfil the requirements put forth by the UN Handbook in regard of financial independence (see section 3.2.4.3). In order to comply with those the NHRI would have to

[273] European Union Agency for Fundamental Rights, op. cit. p. 32.

draft its own budget proposal. This would however be the case should the *new proposal* by the SNAO-commission of Inquiry be accepted. That suggestion places the responsibility to decide on the appropriation proposal and the annual financial report with the institution itself. The Commission suggests that the administrative chief should prepare the appropriation proposal, with some exceptions for collegial decision-making, and that the annual financial report should be adopted by the national auditors jointly.[274] This suggested order would hence be recommendable for a Swedish national institution subordinate to the Parliament. It would however have to be complemented with a few provisions establishing also the "nature" of the funding and perhaps a minimum level of funding in order to comply with the recommendations of the UN Handbook and the Special Advisor (see section 3.2.4.3). The rules/guidelines governing the appropriation proposals for the parliamentary authorities are currently decided by the Administration of the Riksdag (Riksdagsförvaltningen) (Act with Instructions for the Administration of the Riksdag 2§ passage 2). In my view it would be preferable to have such rules/guidelines laid down in law. This would better comply with the recommendations of the UN Handbook and Special Advisor (see section 3.2.4.3). In this regard the provision with budget instructions to the SNAO should be considered, since it states that rules related to funding may not limit the independence of the monitoring activities of the institution (Act with Economy-administrative Rules etc. for the Administration of the Riksdag 41§).

Assigning the drafting of the appropriation proposal to the institution itself would further be in line with the procedure of the majority of NHRIs worldwide. 85 % of the institutions in the OHCHR-study indicated that their institution drafts its own budget.[275]

Furthermore, the legislation on funding for the Swedish national institution would have to address the financial control of the institution by the Parliament and provide that it should be limited to the mere evaluation of the annual report in order to comply with the recommendations on funding (see section 3.2.4.3). Here the regulation in the Act with Economy-administrative Rules etc. for the Administration of the Riksdag which applies to both the Parliamentary Ombudsmen and the SNAO could be used as a good example (see section 5.3.1.2.3). This acts sets forth the financial reporting requirements and focuses on the efficiency in relation to the funds spent by the institutions, and not on the prioritization of factual matters.

In conclusion the proposal by the SNAO-commission of Inquiry to hand over the budget drafting to the institution itself could be transferred to a national institution and together with a few complementary legal provisions on financial accountability in relation to the Parliament it would by and large comply with the Paris Principles' requirement of independent funding.

[274] Riksrevisionsutredningen, op. cit. p. 88.
[275] Office of the High Commissioner for Human Rights, op. cit. p. 16-17.

6.3 Concluding remarks

This thesis has argued that Sweden has a moral and political obligation to comply with the Paris Principles, that that obligation is not fulfilled, and that hence an NHRI should be established. The Swedish people's struggle for an institution to protect their rights dates back all the way to the 19th century. The struggle resulted in the establishment of the Parliamentary Ombudsmen in 1809. At the backdrop of that struggle it might be appropriate now in the 21st century to move up the ambition in the human rights area and create a proper national institution in line with the Paris Principles. In this regard it is interesting to note that at the most previous Universal Periodic Review-session with Sweden at the UN, France made us painfully aware that also the rest of the world recognises the lack of a national institution in Sweden.[276]

Furthermore, this thesis has shown that much of the necessary legislation to establish an NHRI in accordance with the Paris Principles actually already exist for other institutions and that all that is needed is the right combination of provisions and some adaptations to the special circumstances of a national institution. Another international policy instrument, not very different from the Paris Principles, has been applied in regard to the establishment of another Swedish institution (i.e. the Lima Declaration for the establishment of the SNAO) but in a different policy area. The same approach is appropriate in the field of human rights. Moreover, my thesis shows that it is possible and doable. The remaining, necessary ingredient is hence a political will to honour and live up to the international human rights commitments that Sweden has made. Put in other words; Sweden ought to sweep in front of its own door.

[276] Human Rights Council: Draft Report of the Working Group on the Universal Periodic Review. Sweden, 8th Session, Geneva, 3-14 May 2010, p. 6.

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