



FACULTY OF LAW
Lund University

Fatima Brobeck Khan

NHRIs and the Challenges of Independence in a Kenyan Context

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Supervisor:
Dr. Karol Nowak

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Summary

The concept of National Human Rights Institutions (NHRIs) with a mandate to protect and promote human rights have been addressed by the UN for more than half a century, and such institutions have been established in several countries around the world for the last two decades. The establishment of a national human rights institution is however not equal to the commitment of human rights, and in some countries it has been used as a mean to deflect international criticism of human rights abuses. One example of that was the Standing Committee on Human Rights in Kenya established in 1996. The Committee was however replaced in 2003 by Kenya National Commission on Human Rights (KNCHR), which in contrast to the Standing Committee, was established in accordance with the guiding Paris Principles of NHRIs. The Paris Principles are recognized as a set of normative minimum standards and are used as guidance in the establishment and operation of NHRIs. NHRIs can play a crucial role if they are effective, especially in a country such as Kenya, with a long history of violations of human rights and where impunity for such has prevailed.

Kenya has ratified many of the core human rights treaties but this does not reflect the state of human rights in the country. There is still a big gap between human rights in theory and practice. One way to understand the challenges related to the implementation of human rights in Kenya is to understand the challenges of a national body vested with the mandate to enhance the promotion and protection of human rights in the country. This thesis examines the challenges of independence for KNCHR. It assesses how national law corresponds to international recommendations and furthermore, how the independence granted in law corresponds to the independence of the KNCHR in practice. It also examines how NHRIs effectively can exercise both the watchdog role and the advisory role.

Despite a legal foundation providing KNCHR with a broad mandate, relevant functions and far reaching powers, to a large extent in accordance with the Paris Principles, the independence of KNCHR is under constant threat. The study shows that there are several factors, such as legal proceedings against the Commission; political influence of the appointment procedures; perceptions of a divided commission; attempts by politicians to undermine its credibility; and attempts by politicians to direct the work of the Commission, that risk to curtail the independence of the Commission.

Recently the Commission was entrenched in the Constitution, that is a step in the right direction and will presumably enhance its authority, but the entrenchment in the Constitution will not solve all the legal challenges and it will not change the political culture in the country. In comparison with the KNCHR Act, the new Constitution is not as detailed with regards to the mandate, functions and powers of the Commission as well as regarding appointment procedures and qualifications of commissioners. Hence,

additional legislation and amendments of current laws are needed to ensure coherence with the Paris Principles and other recommendations. New legislation and amendments of current laws are also required in order to overcome the challenges related to independence and to provide the Commission with adequate functions and powers, to ensure that the effective functioning of the Commission is not hampered. Furthermore, it remains to see if the legal improvements in the Constitution will have the desired effects in practice.

To overcome the constant threats to the independence of the Commission, these threats need to be acknowledged and addressed. In many aspects the Commission reflects the Kenyan society. Pluralism and diversity in the society as well as in the composition of the Commission shall be used as an asset and not as a ground for divisions. It requires that commissioners and staff let human rights be the leading force, and partisan interests such as negative ethnicity should be left behind. In this regard the Commission should set a good example. A strong leadership is hence important, that can bring together the Commission and make it work as a team towards the same goal, and to avoid polarization and internal conflicts. If people perceive the Commission as being busy fighting each other instead of fighting human rights violators this can ruin its public credibility and legitimacy.

To effectively combine the two-sided mandate of advisory and watchdog is not always easy, as has been shown in Kenya. Effective exercise of the watchdog role, risks to hamper the effectiveness of the advisory role and vice versa. The previous and the current chair have different styles of leadership and approach. The previous chair was more advocacy oriented, often used media and the public podium to highlight human rights violations and criticize violators of human rights. The current chair is not seen as much in media, and is perceived to be working more behind the scenes. To combine the two roles of advisory and watchdog, both above mentioned approaches are needed. To have the ability to do both, requires commissioners that are able to take on these different roles. However, for such strategy to be effective, when to go public and when to work behind the scenes needs to be a conscious choice, and most of all it is important that the Commission act as one group, no matter what approach it chooses. Only then the Commission will be perceived as a strong and decisive force for human rights in the country, which will make it less vulnerable for attempts to challenge its independence, legitimacy and in the end its effectiveness.

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Abbreviations

Abbreviation	Explanation
AG	Attorney-General
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CIPEV	Commission of Inquiry into the Post Election Violence
CRC	Convention on the Rights of the Child
DP	Democratic Party
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECK	Electoral Commission of Kenya
ECOSOC	UN Economic and Social Council
ED	Executive Director
GA	General Assembly
HR	Human Rights
ICC	International Criminal Court
ICC	International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
IDP	Internal Displaced Persons
ILO	International Labour Organization
IREC	Independent Review Commission on the General Elections
KANU	Kenya African National Union
KNHREC	Kenya National Human Rights and Equality Commission
KNCHR	Kenya National Commission on Human Rights
MP	Member of Parliament
NARC	National Rainbow Coalition
NGO	Non Governmental Organization

NHRI	National Human Rights Institution
OAU	Organization of African Unity
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PEV	Post Election Violence
RWI	Raoul Wallenberg Institute
SCA	Sub-Committee on Accreditation
SIDA	Swedish International Development Agency
UN	United Nations
UNCT	United Nations Country Team
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCHR	United Nations High Commissioner for Human Rights
UPR	Universal Periodic Review

1 Introduction

1.1 Background

I was given the opportunity to do an internship at the Embassy of Sweden in Nairobi, Kenya during a period of six months in the spring of 2009. During my stay in Nairobi my attention was drawn to the fact that, as in many countries around the world, the gap between human rights in theory and in practice is significant in Kenya. I met a lot of people who was working with the implementation of human rights to reduce that gap, and that is how I got to know about the Kenya National Commission on Human Rights, their role and work in Kenya.

Kenya has ratified most international human rights treaties and has several times claimed commitment to the protection and promotion for human rights.¹ Kenya has established a number of institutions to monitor the respect and protection of human rights in the country, such as the national Council on Persons with Disabilities, Kenya National Commission on Gender and Development, and the Kenya National Commission on Human Rights.² It seems, at least in theory, that the Government of Kenya is committed to the respect and protection of human rights. However, reality reflects a different picture.

Violations of human rights occur frequently in Kenya, not only caused by poverty, but many of the violations are in fact a direct or indirect result of actions or omissions by the Government or its agencies, e.g. extrajudicial killings by the police; intimidation and harassment of human rights defenders; widespread corruption and impunity for such; rape of women and use of excessive force by the security agencies during the post election violence in the beginning of 2008; and failure to protect citizens from systematic violence.³ Despite reform programmes and various institutions established to monitor human rights, the progress in the field of human rights is slow. The reasons for the big gap between human rights in theory and in practice are many. One way to understand the challenges related to implementation of human rights in Kenya is to understand the challenges of a national body vested with such a mandate.

¹ United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, 8th session. National Report submitted in accordance with para. 15 (a) of the annex to Human Rights Council Resolution 5/1 Kenya, UN Doc. A/HRC/WG.6/8/KEN/1.

² *Ibid.*, p. 4.

³ United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, 8th session. Compilation Prepared by the Office of the High Commissioner for Human Rights in accordance with para. 15 (b) of the annex to Human Rights Council Resolution 5/1, UN Doc. A/HRC/WG.6/8/KEN/2, pp. 5-11.

KNCHR was established in 2003 through an Act of Parliament. The Commission has the mandate to enhance the protection and promotion of human rights in Kenya. Its two key roles are to act as a watchdog over the Government in the area of human rights and to play a key leadership role in moving the country towards a human rights state.⁴ To understand the difficulties of realising human rights in Kenya, a first step is to look at its NHRI and to understand what challenges and obstacles that exist for the effective implementation of its mandate.

1.2 Scope and Delimitations

A NHRI with the mandate to enhance the respect and protection of human rights and to act as a watchdog over government in the area of human rights can play an important role in the implementation of human rights.

The purpose of this paper is to identify and to highlight the challenges of independence for KNCHR, since independence is one of the most crucial factors of effectiveness.⁵ Independence signifies freedom from control or influence of another which implies that the Commission should be autonomous and able to carry out its duties without interference or obstruction from any branch of government or any public or private body or person.⁶ Independence is related to aspects such as legal and operational autonomy; financial autonomy; independence through good appointment and dismissal procedures; and independence through composition.⁷ Knowledge about and understanding of *what* obstacles and challenges that exist with regards to the independence of KNCHR and *why* they exist, is significant in order to be able to address them and find ways to overcome them. This can subsequently lead to a more effective commission. To identify problems and weaknesses and find ways to overcome them is also relevant in order to know what is worth putting effort and resources on.

This thesis is not an assessment of the effectiveness, accomplishments and failures of KNCHR since its establishment seven years ago, but an attempt to highlight the challenges of independence, which covers various aspects of the mandate and functions. It includes the unique and many times difficult position that NHRIs occupy between government and civil society. NHRIs usually have a two-sided mandate, to act as an advisor to government in issues relating to human rights, as well to act as a watchdog over the same government with regards to its compliance with human rights norms and

⁴ Kenya National Commission on Human Rights, *Strategic Plan 2009- 2013* (KNCHR, Nairobi), p. 1.

⁵ United Nations Centre for Human Rights, *National Human Rights Institutions: a Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations, New York, 1995), para. 66.

⁶ Smith, Anne, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?', 28:4 *Human Rights Quarterly* (2006), p. 912.

⁷ UN Handbook, *supra* note 5, paras. 70, 73, 77 and 82.

standards. These two roles have sometimes proved to be difficult to combine. My research questions can be summarized as follows:

1. What are the challenges of independence for KNCHR with regards to:
 - legal and operational autonomy
 - financial autonomy
 - appointment and dismissal procedures
 - composition
2. How can these challenges be addressed in order to not let them compromise the independence of KNCHR?
3. How can the watchdog role and the advisory role of NHRIs be combined effectively, or does the effective exercise of one role necessarily curtail the effectiveness of the other?

This study examines the concept of independence in a Kenyan context with KNCHR as a practical example, however, many of the problems related to independence in Kenya are applicable to NHRIs in general. Hence, the issues highlighted in this study may be of interests not only in a Kenyan context, but for anyone who is interested in understanding the difficulties of independence for NHRIs. Nevertheless, some of the challenges are related to the historical and political context that KNCHR operates in, factors which should be taken into consideration when examining the challenges of independence of any NHRI.

The decision to focus specifically on the challenges regarding the *independence* of KNCHR, is a result of the fact that most challenges and obstacles to the effective functioning of KNCHR mentioned by the interviewees, were related to the concept of independence.

There might be other factors than those discussed in this paper that pose a threat to the independence of the Commission, thus the challenges of independence discussed below might not be exhaustive.

1.3 Method and Sources

This study examines how national legislation of Kenya, i.e. the KNCHR Act and the new Constitution, corresponds to international standards and recommendations concerning the independence of NHRIs. Furthermore, it examines how the independence of the Commission in practice, corresponds to the independence granted in law.

In order to gain knowledge about the independence of KNCHR in practice and to examine what factors that constitutes a threat to its independence, I spent two months in Nairobi April-May 2010. During my stay I was given the opportunity to meet with and interview people who had knowledge

about and experience of the Commission and of the environment in which it operates.

A part of the study is hence based on information gathered through semi-structured interviews. The interviews were conducted with a total number of 16 interviewees with different experience of the Commission. My aim was to speak to persons working *for* or *with* the Commission in various ways. Hence, my selection of interviewees was based on type of engagement with the Commission. In order to get different perspectives on the matter the interviewees were selected from the following categories:

1. Persons who currently work for the Commission
2. Persons who previously had worked for the Commission
3. Representatives from Civil Society
4. Development partners
5. Academics
6. Government officials
7. Lawyers

My aim was also to speak with Members of Parliament, but those who I tried to reach were not accessible for interviews.

The interviews aimed to reveal the opinions, perceptions and experiences of the interviewees about the challenges and problems KNCHR faces when implementing its mandate, in order to gain knowledge about the independence of the Commission in practice. The 16 interviews were conducted with four persons who currently work for the Commission, three persons who previously worked for the Commission, two representatives from civil society, three development partners, one academic, one government official, and two with lawyers.

In addition to national law, international law and recommendations, and the empirical material, the study is based on secondary sources such as books, reports, resolutions, and articles written about NHRIs and the issue of independence. In a few places, newspaper articles have been used as sources in order to illustrate national media coverage of certain issues.

1.4 Structure of the Study

The first part of the study, chapter 2, aims to give the reader a background of and knowledge about the concept of NHRIs and what is required for their effective functioning in general. Subsequently the Kenyan context is introduced in chapter 3, aiming to give the reader an understanding of what political and to some extent legal and historical context and environment KNCHR operates in, since that is closely related to the challenges experienced. Furthermore, Kenya's obligations according to international human rights law and the human rights situation in the country are presented. In chapter 4 the mandate, functions and powers of KNCHR are

described. The following part of the study, chapter 5, explores the concept of independence for NHRIs in general and highlights the challenges of independence for KNCHR. It also constitutes an assessment of the independence of KNCHR in law and practice. In this part the empirical material as well as an initial analyse of it is integrated in the study. The last part of the study, chapter 6, consists of a more comprehensive analysis of the challenges of independence for KNCHR.

2 National Human Rights Institutions

2.1 Implementation and Enforcement of Human Rights

Human rights involve relationships among individuals, and between individuals and the state.⁸ The protection of human rights is furthered both at national and international level.⁹ However, effective implementation and monitoring of international human rights standards must primarily be accomplished at national level.¹⁰ In order to obtain an effective enforcement of human rights, states must implement international human rights law into domestic laws and procedures.¹¹ Nevertheless, the fact that laws exist to protect certain rights is not a guarantee of their desired effects, these laws must also provide for the legal powers and institutions necessary to ensure their effective realization.¹² An effective domestic protection of human rights requires a network of complementary norms and mechanisms such as; states adherence to international human rights treaties; implementation of international human rights obligations in domestic law; a domestic legal system that provides comprehensive and procedural human rights law; effective and accessible state institutions; a vibrant civil society and a population that has developed a strong human rights culture.¹³

Human rights entail both rights and obligations. States have obligations and duties under international law to *respect*, to *protect* and to *fulfil* human rights. The obligation to respect signifies that states must refrain from interfering with or restrict the enjoyment of human rights e.g. not arbitrary arrest or arbitrary evict from homes. The obligation to protect requires states to prevent others e.g. foreign governments, individuals or businesses, from interfering with the enjoyment of the rights, i.e. protect individuals and groups against human rights abuses. The obligation to fulfil means that states must adopt appropriate measures towards the full realization of the rights, e.g. through establishing an independent judicial system and providing affordable housing.¹⁴

⁸ UN Handbook, *supra* note 5, para. 16.

⁹ Reif, C. Linda, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection', 13 *Harvard Human Rights Journal* (2000), p. 3.

¹⁰ Burdekin, Brian, assisted by Naum, Jason, *National Human Rights Institutions in the Asia-Pacific Region* (Martinus Nijhoff, Lieden, 2007), p. 5.

¹¹ Reif, *supra* note 9.

¹² United Nations, *National Institutions for the Promotion and Protection of Human Rights*, Fact sheet no. 19 (United Nations, Geneva, April 1993), p. 1.

¹³ Reif, *supra* note 9, p. 3.

¹⁴ United Nations, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact sheet no. 33 (United Nations, Geneva, December 2008), p. 11.

International, regional as well as national treaties provide for human rights. However, providing for human rights in documents is not the same as implementing human rights, which requires more effort by the state who usually is the addressee. To ensure implementation of human rights and to enforce those remains more difficult at all levels. This may be due to reasons such as technical blockades, lack of effective institutions, or lack of political will.¹⁵

International human rights law has increasingly been recognised and applied in national courts as well as in international tribunals and accountability has increasingly been demanded for human rights violations. It has been a growing awareness of international human rights norms and jurisprudence, and a growing demand for remedies to be more accessible. Alongside with this development there has been and increased recognition of the need for alternative investigation and dispute resolution mechanisms with a proactive mandate. One such mechanism is NHRIs.¹⁶ In order to provide for the effective enjoyment of human rights, national infrastructures are important and NHRIs can be used as a mechanism to strengthen the protection of human rights.¹⁷ NHRIs through the exercise of their mandate can support governments in ensuring that international human rights norms are applied at national level, including by facilitating follow-up actions to the recommendations resulting from the international human rights system.¹⁸ A NHRI differ from an NGO in the sense that it is a statutory body with specific powers and mandate to promote and protect human rights. Unlike an NGO a NHRI is created by the state, hence it has a different status in the community and different tools at its disposal, to hold the state and other bodies accountable for violations of human rights.¹⁹ Although a well functioning NHRI can be an effective mechanism of strengthening a country's human rights record, NHRIs should be considered as one of several democratic institutions in a country, intended to act as a complement to other democratic government institutions and non-state actors in the promotion and protection for human rights.²⁰

2.2 The Concept of NHRIs

There is no uniform definition of NHRIs but the United Nations (UN) centre for human rights define a NHRI as "a body which is established by a government under the constitution, or by law or decree, the functions of

¹⁵ Peter, Chris Maina, 'Human Rights Commissions in Africa – Lessons and Challenges', in Bösl, Anton and Diescho, Joseph (eds.), *Human Rights in Africa, Legal Perspectives on their Protection and Promotion* (Macmillan Education Namibia, Windhoek, 2009), p. 351.

¹⁶ Burdekin, *supra* note 10, p. 2.

¹⁷ UN Handbook, *supra* note 5, para. 19.

¹⁸ Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, 21-24 October 2008, The Nairobi Declaration, para. 5.

¹⁹ Smith, *supra* note 6, p. 909.

²⁰ Reif, *supra* note 9, p. 68.

which are specifically defined in terms of the promotion and protection of human rights".²¹ The UN Centre for Human Rights has classified NHRIs as belonging to three broad categories: human rights commissions, specialized institutions, and ombudsmen.²² However, there have been several attempts within the doctrine to classify them into categories.²³

The concept of national institutions originates from the Swedish Ombudsman for Justice founded in 1809 and from other Scandinavian ombudsman institutions. The classical ombudsman did not have an expressed human rights mandate but rather focused on ensuring the rule of law in public administration i.e. to ensure propriety and legality in public administration and to investigate bureaucratic omission, malfeasance and neglect.²⁴ The main difference between the classical ombudsman office and the human rights commission is that, human rights commissions generally are involved in more specific functions related to the promotion and protection of human rights such as an advisory function, an educative function and an impartial investigatory function. The classical ombudsman office is generally associated with the impartial investigatory function regarding fairness and legality in public administration.²⁵

Furthermore, the traditional ombudsman is usually headed by one individual concerned with public administration and not the private sector, while human rights commissions are generally multi member institutions, with a mandate to promote and protect human rights in both public and private sectors and which apply both national and international law.²⁶ However, the ombudsman may still play a role as a domestic mechanism for implementation of international human rights law since he or she applies domestic law, including human rights law to determine both legality and fairness of administrative conduct.²⁷ Moreover, ombudsman offices with a mixed mandate receive and investigate human rights complaints about e.g. discrimination in the provisions of administrative services, restrictions on freedom of expression, treatment during criminal proceedings and rights of the child in the care of the state.²⁸

Specialized institutions are generally established to promote a social policy which has been developed for the protection of minority groups in a country. They are usually authorized to investigate instances and patterns of discrimination against individuals in that group and against the group as a

²¹ UN Handbook, *supra* note 5, para. 39.

²² *Ibid.*, paras. 41, 46 53 and 56.

²³ See e.g. Jeong-Woo Koo and Francisco O Ramirez, classical ombudsman office, human rights commission and human rights ombudsman office. Linda C. Reif, ombudsman, human rights commission, hybrid human rights ombudsman, and other variations.

²⁴ Koo, Jeong-Woo and Ramirez, O Francisco, 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions 1966-2004', 87:3 *Social Forces* (2009), p. 1324 and Burdekin, *supra* note 10, p. 86.

²⁵ UN Handbook, *supra* note 5, paras. 42-43.

²⁶ Burdekin, *supra* note 10, pp. 86-87.

²⁷ Reif, *supra* note 9, p. 20.

²⁸ *Ibid.*, p. 21.

whole.²⁹ NHRIs can be distinguished from NGOs by their very establishment as quasi-governmental agencies occupying a unique place between the judicial and executive functions of the state.³⁰ The roles of NHRIs and NGOs are complementary.³¹

Some NHRIs have quasi-judicial powers but they are still not judicial bodies and cannot issue enforceable decisions. Initially the quasi-judicial function giving NHRIs the mandate to deal with complaints was optional. It is still optional but lately stronger emphasis has been placed on the importance of the investigative and complaints-handling function of NHRIs and it is now recognised as one of the core functions of NHRIs.³² One of the advantages of NHRIs is that they usually are flexible, less bureaucratic and more accessible to the common person compared to courts, which usually are more technical and procedural. NHRIs usually offer opportunities for the parties to discuss, negotiate and reach amicable solutions to problems. They are useful for peaceful settlements of disputes since they are no losers and winners in the same meaning as before a court where the court deliver a judgment on who is right and who is wrong.³³ NHRIs can also refer matters to other relevant state agencies e.g. the public prosecutor, when they are more appropriate to deal with a matter or when the NHRI lacks jurisdiction.³⁴

NHRIs can be important mechanisms in enhancing the protection and promotion of human rights, in particular in states that are in the transition to democracy as well as in states in need of the strengthening of their democratic structures and where other institutions important for the protection of human rights are not functioning.³⁵

2.3 National Human Rights Commissions

Human rights commissions have an important role in promoting and educating the public about human rights. The authority, functions and jurisdiction of National Human Rights Commissions vary from country to country and are usually defined in a legislative act or decree under which it is established.³⁶ However, the functions of NHRIs including National Human Rights Commissions, can be divided into six categories; research and advice; education and promotion; monitoring; investigating, conciliating and providing remedies; cooperating with other national and

²⁹ UN Handbook, *supra* note 5, paras. 53-55.

³⁰ Amnesty International, *NATIONAL HUMAN RIGHTS INSTITUTION: Amnesty International's recommendations for effective protection and promotion of human rights* (Amnesty International, October 2001), p. 1.

³¹ Burdekin, *supra* note 10, p. 62.

³² Pohjola, Anna-Elina, *The Evolution of National Human Rights Institutions: the Role of the United Nations* (Danish Institute for Human Rights, Denmark, 2006), pp. 8-9.

³³ Peter, *supra* note 15, p. 369.

³⁴ Burdekin, *supra* note 10, p. 7.

³⁵ Reif, *supra* note 9, p. 69.

³⁶ UN Handbook, *supra* note 5, paras. 49-52.

international organizations; and interacting with the judiciary.³⁷ One of the most common functions vested in a human rights commission is to receive complaints from individuals alleging human rights abuses committed in violation of national law.³⁸

Many commissions engage in conciliation and arbitration in order to find a solution between the parties in a conflict. Some commissions are even granted authority to impose legally binding decisions. In some cases a special tribunal can hear and determine issues outstanding from an unresolved complaint, and in cases where no tribunal has determined the dispute, the Commission may transfer the unsolved complaints to regular courts for a final and binding termination.³⁹

Another function of human rights commissions is to review government's human rights policy in order to make sure it is in compliance with international standards and make recommendations of improvements. Human rights commissions may also monitor the state's compliance with international human rights law and national law, and when necessary recommend changes or propose new legislation. A human rights commission can also initiate inquiries on alleged human rights violations, which in particular is important with regards to situations involving individuals or groups who do not have financial or social resources to lodge individual complaints.⁴⁰

2.4 The Paris Principles of 1993

The issue of NHRIs has been addressed by UN human rights bodies since the establishment of the UN and was first discussed by the Economic and Social Council (ECOSOC) in 1946.⁴¹ In October 1991 a workshop was held in Paris to review patterns of cooperation between national institutions and international organizations, such as the UN, to explore ways of increasing the effectiveness of NHRIs.⁴² This workshop led to the creation and adoption of the "Principles relating to the status of national institutions" often referred to as the "Paris Principles", which were endorsed in resolution 1992/54 in 1992 by the Commission on Human Rights and were subsequently endorsed by the General Assembly (GA) in resolution 48/134 of 20 December 1993.⁴³ The principles are a set of international normative standards for NHRIs and the UN and other organizations use them as a measurement for NHRIs.⁴⁴ The creation of the principles marked the

³⁷ Burdekin, *supra* note 10, pp. 22-23.

³⁸ UN Handbook, *supra* note 5, paras. 48-49.

³⁹ UN Handbook, *supra* note 5, paras. 49-52.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 20.

⁴² UN, *supra* note 12, p. 3.

⁴³ UN Handbook, *supra* note 5, para. 25.

⁴⁴ Human Rights Watch, *Protectors or pretenders?: Government Human Rights Commissions in Africa* (Human Rights Watch, New York, 2001), p. 3.

beginning of an important international co-operation and standardisation of NHRIs.⁴⁵

According to the Paris Principles, NHRIs should be vested with competence to promote and protect human rights and should be given as broad mandate as possible, which shall be clearly set forth in a constitutional or legislative text (Principles Relating to the Status of National Institutions, GA 48/134 of December 1993, Competence and Responsibilities, art 1 and 2, hereinafter referred to as the Paris Principles). NHRIs should *inter alia* have the following responsibilities:

- To submit to the government, parliament or any other competent body opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights.
- To promote and ensure the harmonization of national legislation, regulations and practices with international human rights instruments, to which the state is a party and to promote their effective implementation
- To encourage ratification of or accession to international human rights treaties and to ensure their implementation
- To contribute to reports that states are required to submit to the UN bodies and committees and to regional institutions pursuant to their treaty obligations, and where necessary express an opinion on the subject with due respect for their independence
- To cooperate with the UN, regional institutions and national institutions of other countries that are competent in the areas of promotion and protection of human rights
- To assist in the formulation of programmes for the teaching of, and research into human rights, and to take part in their executions in schools, universities and professional circles
- To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs (Paris Principles, Competence and Responsibilities, art 3).

Furthermore, the Paris Principles provide for guidelines regarding composition, guarantees of independence, pluralism and methods of operation. There should *inter alia* be a procedure of appointment that guarantees a pluralistic representation of the social forces of civil society. The state should provide adequate funding and the national institution should not be subject to financial control in order to ensure independence. The appointment of members of the national institution shall be effected by an official act that should establish the specific duration of the mandate (Paris Principles, Composition and Guarantees of Independence and Pluralism, art 1-3). Within the framework of its operation the national institution should consider any questions falling within its competence; hear

⁴⁵ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (International Council on Human Rights Policy, Versoix Switzerland, 2005), p. 6.

any person and obtain any information and any documents necessary for assessing situations falling within its competence; address public opinion; meet on regular basis; set up local or regional sections to assist it in discharging its functions; consult with other bodies responsible for promotion and protection of human rights e.g. ombudsmen or mediators; and develop relations with human rights NGOs (Paris Principles, Methods of Operation, a-g).

NHRIs may also be provided with quasi-judicial competence and be authorized to hear and consider complaints and petitions concerning individual situations, however it is not a requirement. Within this framework they may seek an amicable settlement through conciliation, through binding decisions or on the basis of confidentiality. When a NHRI exercise its quasi-judicial function it may inform petitioners about their rights and remedies available to them and promote access to them. They may hear any complaints or petitions or transmit them to other competent authorities and they could make recommendations to relevant authorities e.g. regarding amendments or reforms of laws, regulations and administrative practices (Paris Principles, Additional Principles concerning the Status of Commissions with quasi-jurisdictional competence).

The Paris Principles are generally considered to be minimum standards for NHRIs. The principles have been criticised for being too general and drafted from a classical human rights commission perspective, thus not addressing the structure and role of the ombudsman or hybrid institutions in the protection of human rights.⁴⁶ It has been suggested that the Paris Principles should be supplemented with requirements for fundamental democratic processes, including free elections, the rule of law and an independent judiciary. It might be desirable to develop and to make the Paris Principles more detailed or covering. However, there has been no decisive attempt to amend these broadly supported minimum guidelines, and the Paris Principles are still the most authoritative normative basis that exists for defining the mandate and functions of NHRIs.⁴⁷

2.5 NHRIs on the International Arena

In 1993 a world conference on Human Rights was held in Vienna, where the 171 participating states *inter alia* agreed upon the fact that human rights are universal, indivisible and interdependent.⁴⁸ The states also adopted the Vienna Declaration and Programme of Action which can be regarded as a common plan for the strengthening of human rights work around the world. The Vienna declaration reaffirmed the important and constructive role of national institutions for the promotion and protection of human rights and encouraged states to establish and strengthen national institutions in line

⁴⁶ Reif, *supra* note 9, p. 24.

⁴⁷ Pohjola, *supra* note 32.

⁴⁸ UN Handbook, *supra* note 5, para. 30.

with the Paris Principles.⁴⁹ The conference also called on states to develop a national human rights plan in order to ensure that states actually implement treaty commitments.⁵⁰ The Vienna declaration also called for the establishment of a High Commissioner for Human Rights.⁵¹ Since the beginning of the 1990s both the Office of the High Commissioner for Human Rights (OHCHR) as well as three treaty bodies: CERD, CERC, and CRC have recommended the establishment of NHRIs in accordance with the Paris Principles. Following the adoption of OP to CAT in December 2002, the creation of a certain type of national institutions was for the first time incorporated into an international legal instrument. During the last two decades the importance of NHRIs and the Paris Principles have got an increased recognition at international level and can be one reason for the expansion of NHRIs worldwide.⁵² Increased recognition of the importance of NHRIs on the international arena can also be seen by the number of resolutions adopted throughout the years by the UN regarding NHRIs and their role in the promotion and protection of human rights.⁵³

2.5.1 The International Coordinating Committee

The same year as the Paris Principles were endorsed by the GA the International Coordinating Committee (ICC) of NHRIs was established at the second international workshop of NHRIs held in Tunis. ICC was established with the aim to coordinate activities of NHRIs at international level and to develop joint programmes of action of NHRIs around the world.⁵⁴ It was also created to support the creation and strengthening of NHRIs and to liaise with international human rights organizations, in particular with the OHCHR.⁵⁵

In 1998, rules of procedures were developed for the ICC and its membership was enlarged to 16 members, four from each of the geographical regions, Africa, Asia Pacific, Europe and America. The ICC also decided to create a process for accrediting of institutions. The Sub-Committee on Accreditation (SCA) of ICC has the mandate to review and analyze accreditation applications and to make recommendations to ICC Bureau members on the

⁴⁹ United Nations General Assembly, World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna June 1993, UN Doc. A/CONF.157/23, (Part I) para. 36.

⁵⁰ Burdekin, *supra* note 10, p. 12.

⁵¹ UN Doc. A/CONF.157/23, *supra* note 49, (Part II) para. 16.

⁵² Pohjolainen, *supra* note 32, p. 12.

⁵³ E.g. GA resolution 48/134 the Paris Principles are as annex; CHR resolution 2005/74 National institutions for the promotion and protection of human rights; HRC resolution 5/1 Human Rights Council Institutions Building Package – note “Rules of Procedure - Rule 7”; GA resolution A/RES/63/169 The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights; GA resolution A/RES/63/172 National institutions for the promotion and protection of human rights; GA resolution A/RES/64/161 National institutions for the promotion and protection of human rights.

⁵⁴ UN Handbook, *supra* note 5, paras. 32 and 115.

⁵⁵ Pohjolainen, *supra* note 32, p. 24.

compliance to the Paris Principles by NHRIs. The following classifications for accreditation are used by the ICC:

- A: Compliance with the Paris Principles;
- B: Not fully in compliance with the Paris Principles
- C: Non-compliance with the Paris Principles.⁵⁶

As of June 2010 there were 67 NHRIs around the world accredited with “A status” by the ICC secretariat.⁵⁷ Only NHRIs with A status, i.e. which comply fully with the Paris Principles are eligible to be voting members of the ICC.⁵⁸ NHRIs with B status are eligible to become a non-voting member.⁵⁹

ICC holds various meetings throughout the year *inter alia* annual meetings and international conferences, which all are held under the auspices of and in cooperation with OHCHR. The 10th International Conference for NHRIs was held in Edinburgh in October 2010 and addressed the theme “business and human rights, the role of NHRIs” and resulted in the creation and adoption of the Edinburgh declaration. The Edinburgh declaration calls for more national and international monitoring of states and non-state actors including businesses’ compliance with human rights, and advise all relevant actors on corporate responsibility and how to prevent and remedy human rights abuses.⁶⁰

2.6 NHRIs in Africa

According to the Paris Principles, states should respect and ensure the independence of NHRIs and fully fund them, a relationship that might be difficult since it requires both political maturity and tolerance.⁶¹ Although a few ombudsman offices were established in Africa in the mid- 1960s and 1970,⁶² there was only one state-sponsored national human rights commission in Africa in 1989, the Togolese National Human Rights Commission. Since then the establishment of NHRIs have clearly increased, in Africa as well as in the rest of the world, in particular during the 1990s.

In Africa many of the human rights commissions were established alongside the “seemingly intractable civil strife and authoritarian rule in many parts of

⁵⁶ Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Accreditation status as of January 2010.

⁵⁷ <www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

⁵⁸ ICC Statute of Incorporation, Adopted 31 July 2008 and as amended 21 October 2008 and as amended 24 March 2009, p. 6.

⁵⁹ *Ibid.*

⁶⁰ International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), the Edinburgh Declaration.

⁶¹ Peter, *supra* note 15, pp. 352-353.

⁶² Reif, *supra* note 9, p. 61.

Africa”.⁶³ The emergence of NHRIs may be seen as a reflection of the increased awareness of human rights issues on the part of governments.⁶⁴ As of 2009 there were NHRIs in about 31 African countries⁶⁵. These institutions vary in terms of mandate, mode of establishment and in terms of willingness of the state concerned to be subject to human rights standards, but they all have two main aims, to promote and protect human rights and they adhere to the Paris Principles of 1993 as their main guidance.⁶⁶

According to Human Rights Watch the performance of most national human rights commissions in Africa during the 90s was disappointing, and many of the commissions were formed by governments with poor human rights records, weak state institutions, and little or no history of autonomous state bodies. Others, such as the Standing Committee on Human Rights in Kenya, were created just to deflect international criticism of human rights abuses, rather than to address those abuses. Other human rights commissions were undermined by the appointment of commissioners who were unwilling or unable to protest against abuses for fear or hope for government favour. Some of the commissions that were functioning reasonably well still had their limitations by the fact that they focused on promotion and education of human rights and avoided more politically sensitive and challenging human rights protection issues.⁶⁷

Nevertheless, an increased awareness of human rights and the increased recognition of NHRIs among African states can be seen in the drafting and signing of the African Charter of Human and Peoples’ Rights (the Banjul Charter), which entered into force 1986 after ratification of a majority of the member states of the Organization of African Unity (OAU).⁶⁸ The charter encourages member states to establish appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the charter (African Convention on Human and Peoples’ Rights, art 26). However, the mere creation of a NHRI is not the same thing as enhanced respect for human rights or even a genuine commitment for such. It is thus of importance to consider the strengths and weaknesses of such bodies and assess whether support to a country’s NHRI is the most effective means to promote human rights within the particular political and cultural context.⁶⁹

⁶³ Human Rights Watch, *supra* note 44, pp. 1-2.

⁶⁴ Carver, Richard and Hunt, Paul, ‘National Human Rights Institutions in Africa’, in Hossein, Kamal *et al.* (eds.), *Human Rights Commissions and Ombudsman Offices, National Experiences throughout the World* (Kluwer Law International, The Hague, 2000), p. 733.

⁶⁵ Algeria, Angola, Benin, Burkina Faso, Cameroon, Chad, the Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia, Uganda and Zambia.

⁶⁶ Peter, *supra* note 15 pp. 352-353.

⁶⁷ Human Rights Watch, *supra* note 44, pp. 4-5.

⁶⁸ Carver and Hunt, *supra* note 64.

⁶⁹ Human Rights Watch, *supra* note 44, p. 8.

2.7 Factors of Importance for Effective Action

NHRIs can play a key role in promoting and protecting human rights, in particular with regards to their unique position between government, civil society and NGOs.⁷⁰ Adherence to the Paris Principles will increase the chances of ensuring an effective and serious human rights commission, but it is not a guarantee in itself.⁷¹ Furthermore, the Paris Principles does not address all relevant factors essential for NHRIs to be affective e.g. accessibility.⁷² Moreover, there is a growing recognition that human rights, good governance, democratisation, the rule of law and sustainable development are closely inter related and that NHRIs only can function effectively to the extent that other democratic institutions, government authorities, parliament, the judiciary and the executive are fulfilling their legitimate roles.⁷³ Hence, the degree of success that NHRIs will have in carrying out its functions depends on different political, financial and social factors, which are often interrelated. Thus, these factors need to be addressed in order for a NHRI to operate effectively. Often these factors fall within the power of the legislature and the executive branch of government, hence the actions of these two branches of government will in the end be critical in determining the strength and weaknesses of the NHRI.⁷⁴

The UN Centre for Human Rights has identified six “effectiveness factors” generally applicable to NHRIs, namely independence; defined jurisdiction and adequate powers; accessibility; cooperation; operational efficiency; and accountability.⁷⁵ In addition to these six factors, other important factors for the effective functioning of NHRIs have been addressed by a number of experts within the field e.g. the democratic governance structure of the state, powers to investigate, behaviour of government, and public credibility and legitimacy.⁷⁶ This thesis focuses on the challenges of independence and in particular for KNCHR, hence other factors of importance for the effective functioning of NHRIs are mentioned below but are not analysed further. The factors of effective action listed below are not exhaustive.

2.7.1 Independence

An independent NHRI is acting independently of government, of party politics and of other entities that may be in a position to affect its work. However, independence for a NHRI can never mean a total lack of connection to the state since it will always be linked to the state by law.

⁷⁰ Smith, *supra* note 6, p. 904.

⁷¹ Human Rights Watch, *supra* note 44, p. 12

⁷² Burdekin, *supra* note 10, p. 7.

⁷³ *Ibid.*, p. 10.

⁷⁴ Reif, *supra* note 9, p. 68.

⁷⁵ UN Handbook, *supra* note 5.

⁷⁶ Reif, *supra* note 9, p. 24.

That is in fact *inter alia* what distinguishes a NHRI from an NGO. However, a NHRI should enjoy qualified independence and restrictions on its independence should not be such as to interfere with the ability to discharge its mandate effectively. The UN Centre for Human Rights has identified four layers of independence, independence through legal and operational autonomy; independence through financial autonomy; independence through good appointment and dismissal procedures; and independence through composition.⁷⁷ There will always be a tension between a government and its NHRI due to the two-sided mandate of NHRIs which requires the ability to cooperate and work with the same government that it is supposed to monitor.⁷⁸ This delicate balance is not always easy to maintain in practice, a matter which will be discussed further in chapter 5. KNCHR, its independence and the challenges of independence will be assessed in the light of the four above mentioned layers of independence.

2.7.2 Defined Jurisdiction, a Broad Mandate and Adequate Powers

The functioning of NHRIs is governed by the mandate of the institution which determines the scope of its work and areas of jurisdiction. The mandate should be included in the founding legislation, since it provides the fundamental framework for the operation of NHRIs.⁷⁹

The jurisdiction of NHRIs concerns the areas in which it is mandated to work, and can be formulated with reference to human rights principles such as e.g. civil and political rights and economic and social rights or to a more narrowly defined right or freedom e.g. discrimination. Jurisdiction can also be formulated with reference to the categories or entities encompassed by its operations e.g. government officials or private employers, or it can be referred to legislative basis e.g. international treaties or the domestic constitution or statutes.⁸⁰ A NHRI with a clearly defined jurisdiction which allows it to operate within identifiable limits will probably be stronger and more effective than a NHRI with a broad or vaguely defined jurisdiction. Then it is easier to make the institution work on less important issues.⁸¹ A NHRI should have jurisdiction over all relevant authorities, and not be excluded from monitoring authorities e.g. police or the military.⁸²

⁷⁷ UN Handbook, *supra* note 5, paras. 68, 70, 73, 77 and 82.

⁷⁸ Smith, *supra* note 6, p. 905.

⁷⁹ Lindholt, Lone *et al.* 'Jurisdiction and Subject Matter of Complaints: A General and Comparative Perspective', in Lindsnaes, Birigt (eds.), *National Human Rights Institutions, Articles and Working Papers, Input to the Discussions on the Establishment and Development of the Functions of National Human Rights Institutions* (Danish Centre for Human Rights 2000), pp. 84-85.

⁸⁰ *Ibid.*

⁸¹ UN Handbook, *supra* note 5, paras. 86-88.

⁸² International Council on Human Rights Policy, *supra* note 45, p. 8

NHRIs should be structured in a way as to complement already existing bodies. Sometimes however, national institutions may have overlapping jurisdictions. It is then important to ensure that such technical conflicts do not hinder the effectiveness of either of the institutions. When a NHRI have the powers to receive and act on complaints and act as a dispute-resolution mechanism, its jurisdiction may overlap with that of the judiciary. However, NHRIs are always only complementary to the judiciary, and the final jurisdiction belongs to the courts. The complementary role of NHRIs that are capable of receiving complaints is emphasised in situations where a matter that is brought before a NHRI not involves a justiciable claim under national law.⁸³

A NHRI should not be a purely advisory body to advise the government on human rights issues, but should also have the mandate to receive complaints of human rights violations. The mandate should cover international human rights as they are defined in international human rights law and not only cover rights defined in a country's constitution.⁸⁴ The mandate should be broad and cover civil, political, economic, social and cultural rights. NHRIs should identify and react on issues that are of general concern, by way of investigations, public inquiries and policy reports. When NHRIs have a mandate to consider individual complaints, they should handle complaints effectively and quickly. The procedure should be simple, accessible, and affordable.⁸⁵ The institution should monitor the state's compliance with obligations under international law and take steps to ensure that domestic laws and practices form a framework where abuses of human rights by non-state actors are effectively addressed. NHRIs should make recommendations for changes in national laws when these are not in compliance with international law and they should recommend and facilitate the signature and ratification of new human rights treaties.⁸⁶

NHRIs should carry out human rights education for the population, and also target professionals, who may have to consider and apply human rights in their work e.g. law makers, judges, administrative decision makers, teachers, prison officers, police officers and the armed forces. NHRIs should be able to visit places of detention and be able to recommend changes of conditions to prevent incidence of torture and other inhuman and degrading treatment.⁸⁷

Adequate powers, meaning the ability to perform a certain act or compel others to perform, are also necessary for effectiveness. However, the powers must be enforceable and should be made with reference to the functions that the institution should exercise. Hence, the powers of a NHRI should be established by law and provide for legal or administrative sanctions when

⁸³ UN Handbook, *supra* note 5, paras. 91-94.

⁸⁴ Amnesty International, *supra* note 30, p. 7.

⁸⁵ International Council on Human Rights Policy, *supra* note 45, p. 8

⁸⁶ Amnesty International, *supra* note 30, pp. 7-8.

⁸⁷ *Ibid.*, pp. 18-19.

the powers of the NHRI is blocked or hindered.⁸⁸ A NHRI should also have powers to refer their findings to courts for adjudication when issues arise beyond their jurisdiction and should monitor to what extent relevant authorities follow their advice and recommendations.⁸⁹

2.7.3 Accessibility

One of the advantages of NHRIs in comparison with courts is that NHRIs are more accessible.⁹⁰ In order to ensure that access, NHRIs should be accessible for the people whose interest it is established to protect and promote. People must be aware of the institution and the institution must therefore make itself visible to those who are likely to benefit from what it can offer.⁹¹ This can be achieved through the use of media. In places where illiteracy is high or where newspapers are hard to get hold of media such as radio broadcasts, can be an effective way of reaching out to as many people as possible. Media should also be used to publicise its role as an institution independent from the executive arm of the state.⁹²

A NHRI should be physically accessible for those who live in remote areas without the possibility to travel. This can be accomplished through the opening of regional offices, which also need to be accessible for disabled people and be located close to public transport routes. The composition of a NHRI is relevant in this regard as well, and should hence include those whom the institution has been established to serve.⁹³

NHRIs should also be welcoming and the public and partner organizations should feel that they are being taken seriously. A NHRI with an open organizational structure that are self-critical will be more likely to respond to the needs of the public and other organizations and to identify shortcomings in its practice.⁹⁴

2.7.4 Cooperation

NHRIs should cooperate with other independent national agencies, other NHRIs and the UN, in particular with the various treaty bodies established to monitor governments' implementation of international human rights treaties.⁹⁵

⁸⁸ UN Handbook, *supra* note 5, paras. 91-96.

⁸⁹ International Council on Human Rights Policy, *supra* note 45, pp. 8-9.

⁹⁰ Burdekin, *supra* note 10, p. 44.

⁹¹ UN Handbook, *supra* note 5, paras. 98-105.

⁹² Amnesty International, *supra* note 30, pp. 20-21.

⁹³ UN Handbook, *supra* note 5, paras. 98-105.

⁹⁴ International Council on Human Rights Policy, *supra* note 45, p. 8.

⁹⁵ Burdekin, *supra* note 10, p. 60.

Good relations and cooperation with NGOs are useful for several reasons. Support by NGOs can enhance the visibility of the NHRI by informing the public of its existence and can be used to strengthen the public's support for its work. It is also useful in the sense that NGOs can serve as intermediaries between victims of human rights violations and NHRIs, since people vulnerable to human rights violation might be unwilling to approach any official body directly to lodge a complaint or to seek redress. Moreover NGOs are usually more spread over the country and can thus be useful sources of information regarding the human rights situations in different parts of the country. NGOs can also be used as partners for projects or programmes regarding e.g. education, training and information dissemination.⁹⁶ Some NHRIs have established "advisory boards" consisting of representatives from NGOs, professional groups and other members of civil society that help establishing priorities and to implement programmes.⁹⁷

Regarding cooperation with other NHRIs it can be useful in sharing best practices and experiences, exchange reports and publications and address issues of common interests.⁹⁸ A NHRI should also be able to cooperate and establish good relationships with government agencies, since it is these agencies it is supposed to influence. At the same time it is important to keep the independence, hence it is necessary to find a way to balance the roles of advisory and watchdog. A NHRI must still be able to tackle controversial issues even if it brings the institution into conflict with a government or its agencies.⁹⁹

NHRI should also develop effective international relations since they can be an important link between national human rights enforcement systems and international and regional human rights bodies.¹⁰⁰ NHRIs should participate in meetings and foras with the treaty monitoring bodies and UN political bodies concerned with human rights. Doing so they should not represent themselves as part of the government delegation but represent themselves as independent NHRIs.¹⁰¹ NHRIs can be helpful in monitoring the states' implementation of recommendations made by treaty bodies, and should make the recommendations known to the public so the public know what their governments are expected to deliver.¹⁰² Intergovernmental organizations can provide resources, expertise and facilitating contacts between NHRIs in different countries.¹⁰³ It might be useful to develop a memorandum of understanding between NHRIs and other institutions to facilitate such relationships.¹⁰⁴

⁹⁶ UN Handbook, *supra* note 5, paras. 106-117.

⁹⁷ Burdekin, *supra* note 10, p. 61.

⁹⁸ UN Handbook, *supra* note 5, paras. 106-117.

⁹⁹ Smith, *supra* note 6, pp. 935-936.

¹⁰⁰ International Council on Human Rights Policy, *supra* note 45, p. 8.

¹⁰¹ Amnesty International, *supra* note 30, pp. 8-9.

¹⁰² Burdekin, *supra* note 10, p. 91.

¹⁰³ UN Handbook, *supra* note 5, paras. 106-117.

¹⁰⁴ Amnesty International, *supra* note 30, p. 4.

2.7.5 Operational Efficiency

NHRIs are often understaffed, under resourced and overburdened, hence operational efficiency is of importance for the capacity of the institution to discharge its mandate. Operational efficiency includes having adequate resources, good working methods, competent staff, and to have regular review and evaluation processes.¹⁰⁵ Adequate and continuing funding and sufficient human resources are prerequisites for operational efficiency. There might be reasons to question a government that establish a NHRI and then doesn't give it enough funding. Since most institutions work under financial constraints it is necessary to develop an effective management of resources and it requires a strict setting of priorities and adherence to a fixed and approved budget plan. Rules of procedure and working methods should be developed and timing and frequency of staff meetings should be decided.¹⁰⁶

A NHRI should have the power to recruit its own staff. The efficiency of individual staff members can have a critical role both for the operation of the institution as well as on its public image. In the recruitment and selection process NHRIs should set a good example in a non-discriminatory way of hiring staff. The staff should be familiar with national and international human rights law, and relevant training and education should be given for specific functions.

Self-examination can be done through constructive review and evaluation, and can be done by measuring standards related to individual performance of staff members as well as to general goals and objectives of for the institution as a whole.¹⁰⁷

2.7.6 Accountability

Institutional efficiency that will ensure effective action to address human rights violations requires a system of accountability based on specific goals.¹⁰⁸ Accountability will also prevent the NHRI from becoming an instrument of impunity.¹⁰⁹ NHRIs should not answer to government but to an authority other than the executive.¹¹⁰ Preferably the NHRIs should be legally and financially accountable to parliament and should therefore publicly report its activities to a parliamentary body.¹¹¹ The report can take form of an annual, special or public report.¹¹² Reporting requirements should be specified in the founding legislation and should be as detailed as

¹⁰⁵ UN Handbook, *supra* note 5, paras. 119, 121, 125, 126 and 131.

¹⁰⁶ *Ibid.*, paras. 119-125.

¹⁰⁷ *Ibid.*, paras. 126-132.

¹⁰⁸ *Ibid.*, paras. 136-138.

¹⁰⁹ Amnesty International, *supra* note 30, p. 7.

¹¹⁰ International Council on Human Rights Policy, *supra* note 45, p. 12.

¹¹¹ UN Handbook, *supra* note 5, paras. 136-137.

¹¹² Reif, *supra* note 9, p. 27.

possible regarding frequency; possibility of submitting special reports; issues to be reported on and procedure for examining reports.¹¹³ Statistics on the number and types of cases received, action taken and results achieved in resolving the cases should be included in the annual report.¹¹⁴ This layer of accountability can be called formal accountability.¹¹⁵

A NHRI should also be accountable to the public, which it is established for. Official reports of the institution should be open to public scrutiny. Transparency through publication and dissemination of reports will enhance the accountability and also the institutions external credibility.¹¹⁶ High expectations from the public on what a NHRI should and is supposed to do and offer, especially if it is given a broad mandate, can give rise to conflicts. It is hence of great importance, in order to gain and keep public credibility, to work out parameters and frameworks and ensure that the public is aware of those. Restrictions of a NHRI should be acknowledged, and it should then be able to operate strategically with the existing conditions.¹¹⁷ It has been argued that in addition there are two more layers of accountability; accountability to civil society and government accountability.¹¹⁸

2.7.7 Constructive Working Relations with Government

The advisory role of NHRIs presupposes a good working relation with government departments.¹¹⁹ However, the monitoring role of NHRIs is the most important function, and should not be compromised because of close working relations established with governmental bodies. It is a fine balance that requires professionalism on both sides.¹²⁰ A responsive government is crucial for the institutions effectiveness and if the work and recommendations made by the institutions are ignored or unreasonably criticized by government the effectiveness will suffer.¹²¹ In many countries politicians in power are violators of human rights, either through their action or passivity. They might not support initiatives aiming to enhance the respect for and awareness of human rights or they might try to block funding or spoil initiatives or in other ways hamper the effectiveness of the NHRI, which can be a great challenge.¹²² Recommendations made by NHRIs must be followed up, and the government should respond to the

¹¹³ UN Handbook, *supra* note 5, paras. 136-137.

¹¹⁴ Amnesty International, *supra* note 30, p. 21.

¹¹⁵ Smith, *supra* note 6, p. 937.

¹¹⁶ UN Handbook, *supra* note 5, para. 138.

¹¹⁷ Smith, *supra* note 6, pp. 939-940.

¹¹⁸ *Ibid.*, pp. 940-941.

¹¹⁹ International Council on Human Rights Policy, *supra* note 45, p. 22.

¹²⁰ Kjaerum, Morten, 'The Experience of European National Human Rights Institutions', in Lindsnaes, Birigt (eds.), *National Human Rights Institutions, Articles and Working Papers, Input to the Discussions on the Establishment and Development of the Functions of National Human Rights Institutions* (Danish Centre for Human Rights 2000), p. 119.

¹²¹ Reif, *supra* note 9, p. 27.

¹²² Peter, *supra* note 15, pp. 369-370.

findings, conclusions and recommendations made by the institution. The government's response should be made public. In cases where the government fails to respond, or refuse to respond or implement recommendations, the NHRI shall take all possible measures to press government through e.g. the media, parliament or through international pressure of opinion. NHRIs can make the international treaty monitoring bodies aware of the lack of actions by the state.¹²³

2.7.8 Good Relations with Parliament and the Judiciary

A good working relation and effective interaction with parliament is crucial since it is many times parliament that determines the "fate" of the recommendations given in reports by NHRIs. To ensure that MPs actually understand the role of NHRIs, read their reports and debate their content requires contact with MPs throughout the year. Experience shows that reports on special issues, preceded by public hearings or media coverage, are more likely to engage MPs and to make governments respond appropriately, than annual reports (which are still necessary).¹²⁴ A good relationship with the judiciary is also important, in the end it is the courts that ultimately ensure that human rights are protected. NHRIs should play a complementary role to that of the courts. In cases where e.g. human rights violations not are "unlawful" but which involves practices or omissions in violation of human rights, NHRIs are more appropriate to deal with the matter than a court. In cases where a public inquiry discloses criminal conduct, the NHRI should refer the relevant information to appropriate authorities such as the public prosecutor.¹²⁵

2.7.9 Public Legitimacy

The population of a country must perceive that the institution can provide it with real benefits e.g. through its right to complain about human rights breaches, to obtain an impartial investigation of the matter, and to see positive results if violations are found. If the public develop a negative perception or attitude against the NHRI, it can be hard to change and persons might hence avoid using the institution. A NHRI established in a newly democratizing state may experience the challenge of public distrust because of bad experience from a prior authoritarian regime.¹²⁶ Then it is of even more importance to show that the institution stands up for the rights of the powerless against powerful interests.¹²⁷

¹²³ Amnesty International, *supra* note 30, p. 18.

¹²⁴ Burdekin, *supra* note 10, pp. 66-67.

¹²⁵ *Ibid.*, p. 69.

¹²⁶ Reif, *supra* note 9, p. 28.

¹²⁷ International Council on Human Rights Policy, *supra* note 45, p. 7.

3 Kenya

3.1 A Political, Historical and Legal Overview from 1963

3.1.1 Elections, Political Parties and Politicians

After 68 years of colonial ruling, Kenya gained independence in December 1963. One year later the country was declared a republic with Jomo Kenyatta as the first Kenyan President. Jomo Kenyatta was the leader of KANU (Kenya African National Union) party that won the general election in May 1963. Kenyatta was re-elected three times and ruled until he died in 1978. He was known for being reclusive and autocratic. When Kenyatta died, Daniel Arap Moi succeeded him. Moi became increasingly intolerant of criticism and in June 1982 Kenya's Constitution was amended to create a one-party state. Moi reinforced the power of the presidency and in July 1982 the National Assembly approved constitutional amendments that allowed the President to dismiss judges at will. In 1990 a group of academics, lawyers and religious leaders established an alliance working for the legalisation of political opposition. Their work resulted in the arrest of several leaders of the movement. The Moi regime was criticised by the international community for the force used in suppressing pro-democracy demonstrations, arresting opposition activists and torture. Several international donors suspended aid disbursements in an attempt to push for economic and political reforms.

As a result of international and domestic pressure Moi re-introduced the multiparty political system in 1991 and several new parties were registered in 1992, including the Democratic Party (DP) established by Mwai Kibaki (the current president).¹²⁸ Kibaki was earlier the vice president and minister of health in the Moi government.¹²⁹ Despite the newly introduced multiparty system, Moi was re-elected in the general elections in 1992 and 1997. There was a split opposition and Moi was accused for electoral fraud and political violence.¹³⁰ Between 1992 and 2002 politicians created political alliances, new political parties and shifted side from one party to its opposition. In 2002 Kibaki and his newly formed National Rainbow Coalition (NARC) won the presidential elections. However, in 2006 the NARC coalition collapsed as a result of the constitutional crises in the country and Kibaki established a new governing party, NARC-Kenya, in an effort to re-impose

¹²⁸ Jennings, Michael, 'Kenya Recent History', in Frame, Ian *et al.* (eds.), *Africa South of the Sahara 2010* (Routledge, London 2010), p. 624.

¹²⁹ Järtelius, Arne, *Kenya: tio år med Moi, Världspolitikens Dagsfrågor*, Nr. 9 (Utrikespolitiska Institutet, Stockholm, 1988), p. 6.

¹³⁰ Jennings, *supra* note 128, p. 623.

his authority. Raila Odinga, (the current prime minister) also left NARC and established the Orange Democratic Movement (ODM).¹³¹

In the forth presidential election in December 2007, since Kenya became a multi party state in 1991, the victory stood between Odinga representing (ODM) and Kibaki representing the newly established Party of National Unity (PNU). After delays to the count, Kibaki was declared winner. ODM and its supporters refused to accept the results, claiming the victory was theirs.¹³² A wave of violence broke out over the country and more than 1100 people were killed, 3500 injured and 600 000 forcibly displaced.¹³³ After the election the Government banned public gatherings and the police confronted street protests with excessive force, killing and wounding hundreds of peaceful demonstrators with live ammunition. Meanwhile, some people took advantage of the lack of law and order to loot, rape and riot.¹³⁴ Independent observers reported major flaws in tallying the votes.¹³⁵ After two months of violence Kibaki and Odinga signed a power sharing agreement, under the auspices of Kofi Annan and the African Union Panel of Eminent African Personalities. In accordance the Grand Coalition Government was established and a Prime Minister post was created. The signing of the power sharing agreement resulted in an end to the violence, but tensions remain between the two parties and their leaders.¹³⁶

A national Commission of Inquiry into Post-Election Violence (CIPEV) was established to investigate the facts and circumstances surrounding the violence and the conduct of state security agencies in their handling of it. In October 2008 CIPEV issued a report. To break the cycle of impunity, CIPEV recommended a special tribunal to be established, to prosecute crimes committed as a result of the PEV.¹³⁷ The proposed Bill to establish a special tribunal was rejected in February 2009 by the National Assembly and a list of suspected perpetrators was handed over to the International Criminal Court (ICC) by Kofi Annan in July the same year.¹³⁸ Two cases are currently pending before the ICC regarding six Kenyan individuals, suspected for crimes against humanity during the PEV, amongst them are the suspended Agriculture Minister; the Deputy Prime Minister and Minister

¹³¹ Jennings, *supra* note 128, p. 624.

¹³² Kenya National Commission on Human Rights, *On the brink of the precipice: A human rights account of Kenya's Post-2007 Election Violence final report* (KNCHR, Nairobi 2008), p. 8.

¹³³ ICC, 'Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity', *ICC Press Release*, 15 December 2010.

¹³⁴ Human Rights Watch, *Ballots to Bullets, Organized Political Violence and Kenya's Crisis of Governance* (Human Rights Watch, March 2008), pp. 3-4.

¹³⁵ KNCHR, *supra* note 132.

¹³⁶ Agreement on the Principles of Partnership of the Coalition Government, 28 February 2008 and The National Accord and Reconciliation Act 2008, 28 February 2008.

¹³⁷ Commission of Inquiry into the Post-Election Violence, *Report of the Commission of Inquiry into Post-Election Violence* (CIPEV, Nairobi, October 2008), pp. vii.-ix.

¹³⁸ Saturday Nation, 'Annan: Why I had to strike', *Daily Nation*, 10 July 2009 and Kariuki, Anthony, 'Annan warns Kenya over tribunal delay', *Daily Nation*, 24 February 2009.

of Finance; the Minister of Industrialization; and the former Police Commissioner.¹³⁹

3.1.2 Ethnic and Election-related Violence

Since 1991 violence has been part of Kenya's electoral processes. Many people have been killed and made homeless in state-sponsored election-related violence during the general elections in 1992 and 1997¹⁴⁰. So far no one has been prosecuted for these crimes, despite several high profile reports naming and shaming senior politicians for their role in organizing and financing violence.¹⁴¹ The election in 2007 and the PEV were seen as evidence of continued use of ethnic identity as a mobilizing force in Kenyan politics. Efforts by the KANU under Moi in the 1990s to politicise ethnic identities, and subsequent political manipulation of ethnic groups by politicians from all parties, provided a foundation for the violence that broke out in the beginning of 2008.¹⁴²

3.1.3 Legal Reforms

In 1997 constitutional reforms prohibited detention without trial, granted greater freedom to hold rallies, appointed opposition members to the electoral commission and relaxed the rules in registering political parties. A referendum was held in November 2005 on the draft Constitution, the "Bomas draft", but was voted down.

A constitutional reform had been a central element of the opposition campaign in 2002. Odinga and his supporters advocated for the creation of a strong prime ministerial position, reducing the powers of the president. Kibaki and his supporters on the other hand, sought to retain a strong presidency. When the draft Constitution was dismissed by 57% of the voters, Kibaki who lead the Yes campaign dismissed the entire cabinet and banned opposition rallies and demonstrations.¹⁴³ In January 2009 Kibaki signed a new media law, granting the Government power to raid media offices, tap phones and assert control over news content on the grounds of national security.¹⁴⁴

3.1.4 Corruption and Land Grabbing

International donors and organizations have constantly raised concerns about the widespread corruption in the Kenya. In 2001 the IMF and the

¹³⁹ ICC, *supra* note 133.

¹⁴⁰ Kenya National Commission on Human Rights, *supra* note 132, p. 7.

¹⁴¹ Human Rights Watch, *supra* note 134, backside.

¹⁴² Jennings, *supra* note 128, p. 625.

¹⁴³ *Ibid.*, pp. 623-624.

¹⁴⁴ *Ibid.*, p. 626.

World Bank suspended aid to Kenya due to setbacks in reforms.¹⁴⁵ Despite several established commissions and inquiries to fight and investigate corruption not much has been accomplished through the years to get rid of corruption and to prosecute people responsible for corruption. Instead, ministers accused to be involved in corruption scandals have continued to work undisturbed, been redeployed to other minister posts, or asked to resign in order to later be reappointed.¹⁴⁶ John Githongo, Permanent Secretary for Governance and Ethics, lead the anti corruption campaign in 2002 but resigned in 2005 accusing the Government of undermining efforts to tackle graft. In September 2007 a report was leaked from the Kroll Associates, accusing family members and key associates of former President Moi of stealing public finances amounting to more than £ 2 000m. Within two weeks the National Assembly passed legislation banning the investigation of corruption prior to May 2003, hence granting an amnesty to leading politicians and officials accused of corruption.¹⁴⁷

In 2004 an official report (the Ndungu Report) stated that millions of hectares had been illegally acquired since the independence in 1963. The Government repossessed illegally held land owned by 60 individuals. In 2005 the National Assembly approved a motion requesting the Government to set limits on the amount of land that an individual could possess. The Government also distributed unused land to landless people. The allocation of land by the Government to squatters in the Mount Elgon District led to clashes over land rights that left 45 000 people displaced and at least 137 people dead by March 2007.¹⁴⁸

3.2 Obligations of Kenya According to International Human Rights Law

3.2.1 International Treaties

Both international and regional human rights treaties are important sources of norms for states and national offices, in states that have become parties to them. These treaties are also relevant to NHRIs in their work for promotion

¹⁴⁵ *Ibid.*, p. 623.

¹⁴⁶ E.g. George Saitoti, in February 2006 alleged to be involved in the Goldenberg Scandal, resigned and was reappointed to the Cabinet in November 2006. Kiraitu Murungi, in January 2006 alleged to be involved in the Anglo Leasing Scandal, resigned and was reappointed to the Cabinet in November 2006. Amos Kimunya, at that time Minister of Finance, in July 2008 alleged to be involved in corruption in connection with the sale of a luxury hotel, reappointed to the Cabinet in January 2009. William Ruto, now Minister for Higher Education, at that time Minister of Agriculture, in January 2009 implicated in a maize-purchasing scandal as serious food shortages in Kenya led to the declaration of a state of emergency in January 2009, Ruto denied any involvement and remained in office. However, Ruto is currently suspended from cabinet due to other allegations of corruption.

¹⁴⁷ Jennings, *supra* note 128, p. 627.

¹⁴⁸ *Ibid.*, p. 625.

and protection of human rights.¹⁴⁹ Kenya has ratified¹⁵⁰ several of the core human rights treaties such as ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC and ICRPD. Kenya has signed but not yet ratified ICED and OP-CRC-SC, and has neither ratified nor is a signatory to ICRMW, OP-ICESCR 4, ICCPR-OP 1, ICCPR-OP 2, OP-CEDAW, OP-CAT, OP-CRPD. Kenya has not recognised art 14 of ICERD and art 22 of CAT, which allows individual complaints, and art 41 ICCPR and art 21 CAT that allows interstate complaints, or art 20 of CAT, which provide for inquiry procedures.

Kenya is also a state party to other relevant international instruments such as the Rome Statute of the International Criminal Court; the Palermo Protocol;¹⁵¹ the 1951 Conventions and Protocols relating to refugees and stateless persons; and the four Geneva Conventions of 1949 and their Additional Protocols, except from Additional Protocol III. Kenya is also a party to all ILOs conventions, except from No. 87. Kenya is not a party to the Convention on the Prevention and Punishment of the Crime of Genocide, or UNESCO Convention against Discrimination in Education.¹⁵² Kenya has also ratified the regional African Charter on Human and Peoples' rights.

3.2.2 Concerns by Treaty Bodies

During the Universal Periodic Review (UPR) process in Geneva in June 2010, several UN treaty bodies and member states raised concerns about various human rights issues in Kenya. Below follows some of the main areas of concern raised during the process that I believe are important to highlight, however the issues presented below are not exhaustive, but does to a certain extent reflect the state of human rights in Kenya.

3.2.2.1 Constitutional and Legislative Framework

The Human Rights (HR) committee noted that provisions in international human rights treaties, in particular ICCPR, are not in practice invoked in courts. CAT noted that the Penal Code does not contain a definition of torture. United Nations Country Team (UNCT) noted that since 2004 several laws have been enacted to promote human rights in Kenya but the problem of implementation undermines the impact of these laws, and key legislation on matrimonial property, marriage, family protection, equality and trafficking in persons has not been passed.¹⁵³

¹⁴⁹ Reif, *supra* note 9, p. 21.

¹⁵⁰ Ratification includes: ratification, accession or succession.

¹⁵¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Conventions against Transnational Organized Crime.

¹⁵² UN Doc. A/HRC/WG.6/8/KEN/2, *supra* note 3, p. 2.

¹⁵³ *Ibid.*, p. 3.

3.2.2.2 Equality and Non-Discrimination

According to the HR Committee, systematic discrimination against women persists in law and practice and the continued application of some customary laws undermines the scope of non-discrimination provisions in the Constitution and other legal texts. CRC expressed concern regarding the de facto discrimination faced by children born out of wedlock, children infected with HIV/AIDS, orphans, street children and children born of Kenyan mothers but with non Kenyan fathers. UNCT reported on a general feeling of perceived exclusion and marginalization of residents, in particular in the northern and coastal parts of the country, where residents have been trapped in a continuous cycle of poverty and armed violence. OHCHR reported about discrimination in distribution of wealth, as well as economic and political power, which together with the absence of adequate protection and effective remedy have fed grievances within the population.¹⁵⁴

3.2.2.3 Right to Life, Liberty and Security of the Person

The Special Rapporteur on extra judicial, summary or arbitrary executions reported about extra judicial killings by the police and police death squads, operating on orders of senior police officials with the task to eliminate suspected leaders and members of criminal organizations. In addition, the Sabaout Land Defence Force militia and security forces of the government have been involved in widespread brutality, including torture and unlawful killings in Mt. Elgon in western Kenya. During the PEV in early 2008 more than thousand people died and hundreds of thousands of people had to leave their homes as a result of the violence. The security forces used excessive force against demonstrators and other civilians, and the State failed to take all appropriate measures to protect the right of its citizens to life, physical integrity, property, freedom of expression, assembly and movement. The recommendations by CIPEV have not yet been implemented and those responsible for extra judicial killings and the PEV, including police force members and officials that had organized or instigated violence, remained immune from prosecution almost 18 months later. In 2009 OCHA reported about 323 people who were killed in pastoral areas due to resource-based conflicts.

General insecurity and criminal activities by militia groups and criminal gangs such as the Mungiki have been on the rise. UNCT and CAT reported that torture, detention without trials and ill treatment and massive violations of rights of detainees continued unabated. Prisons are overcrowded, there is a high level of violence and there is lack of appropriate health service. A high number of people die in custody. There is also widespread corruption among police officers.

CEDAW, CESCR, CAT and the HR Committee noted with concern that female genital mutilation is still practiced in Kenya. There is a large number of street children who are denied their right to education and health care and

¹⁵⁴ *Ibid.*, pp. 5- 6.

are extremely vulnerable to all sorts of violence such as sexual abuse and arbitrary and abusive arrest. CRC was concerned about allegations of trafficking of children and instances of child prostitution, and the failure to prosecute and punish trafficking offences.¹⁵⁵

3.2.2.4 Administration of Justice, Including Impunity and the Rule of Law

UNCT stressed that the judiciary is considered as lacking independence. Due to *inter alia* widespread corruption, access to judicial courts and remedies are limited. There is moreover, a frequent failure to enforce court orders and judgments. Furthermore, there is a general lack of respect for the rule of law and a culture of impunity is prevalent and widespread. CAT and CRC were concerned that the age of criminal responsibility is eight years of age. The culture of impunity contributes to and fosters resurgence and persistence of violence and conflict according to the OHCHR mission.¹⁵⁶

UNCT reported that the witness protection system is weak and ineffective and the Special Rapporteurs on extra judicial killings, on the situation for human rights defenders, on the question of torture, and on the right to freedom of expression, raised concerns about the intimidation, harassment, arbitrary arrests, interrogation, torture and murder of human rights defenders and witnesses, as well as the violent repression of demonstrations.

3.2.2.5 Right to Social Security and to Adequate Standard of Living

The CESCR and the OHCHR mission expressed concern that more than half of the population in Kenya lives in extreme poverty and that violations of economic and social rights were widespread due to *inter alia* lack of access of water, food, health and decent housing. There is also a high rate of youth unemployment.¹⁵⁷

There are big areas of informal settlements in particular in the outskirts of Nairobi, where there are limited facilities for disposal of excrement and due to overcrowding there is no space for garbage disposal. Kenya should address issues of forced eviction, legislation of informal settlements and slum-upgrading.

There are hundreds of thousands of Internal Displaced Persons (IDPs) in Kenya who lack access to basic rights and services. Reconciliation measures involving returning IDPs and the local communities are crucial and have to address the underlying cause of displacement.¹⁵⁸

¹⁵⁵ *Ibid.*, pp. 6-8.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, pp. 8-9.

¹⁵⁸ *Ibid.*, pp. 9-10.

3.2.3 Issues Raised by other UN Member States

A number of UN member states were highlighting issues of concern regarding human rights in Kenya during the interactive dialogue in the UPR process. Issues raised were among others; extra judicial killings and excessive force by the Police; the need for police reform; abolishment of the death penalty; systemic corruption; lack of implementation of the recommendations by CIPEV and of the Special Rapporteur on extra judicial killings; lack of a functioning witness protection programme; threats and harassment of human rights defenders by law enforcement officials; discrimination of and intolerance against same-sex relationships; impunity for crimes committed following the 2007 election; culture of impunity for perpetrators of human rights violations; torture and ill treatment of detainees; weak institutions; lack of independence and ineffectiveness of the judiciary; lack of basic rights and services for hundred of displaced; and limitation of freedoms of expression and assembly. Kenya was also urged by other member states to ratify international human rights instruments such as ICRMW and the optional protocols to above mentioned conventions. Kenya was also urged to fully cooperate with the ICC and its investigations, in accordance with its responsibilities as a state party to the Rome Statute, in order to seek accountability for people bearing the greatest responsible for crimes committed during the PEV.¹⁵⁹

As of 6 January 2011, Kenya had accepted 139 recommendations given by the member states, rejected one and had no clear position on seven of the recommendations. Twelve recommendations were still pending.¹⁶⁰ Kenya has hence accepted seven more recommendations, which as of June 2010 were rejected.¹⁶¹ The only recommendation currently rejected is the recommendation given by a number of states, to take concrete steps to provide for the protection and equal treatment of lesbian, gay, bisexual and transgender persons and to decriminalize same-sex activity between consenting adults.¹⁶² Kenya rejected the recommendation with the explanation that “same sex unions were culturally unacceptable in Kenya”.¹⁶³

¹⁵⁹ United Nations General Assembly, Human Rights Council, 15th session. Report of the Working Group on the Universal Periodic Review, Kenya, UN Doc. A/HRC/15/8, pp. 5-12.

¹⁶⁰ UPR-info.org Promoting and strengthening the Universal Periodic Review, *Responses to Recommendations*, p. 1.

¹⁶¹ UN Doc. A/HRC/15/8, *supra* note 159, pp. 22-23.

¹⁶² UPR-info.org, Promoting and strengthening the Universal Periodic Review, *supra* note 160, p. 9.

¹⁶³ UN Doc. A/HRC/15/8, *supra* note 159, p. 23.

4 Kenya National Commission on Human Rights

4.1 The Standing Committee on Human Rights

The Standing Committee on Human Rights (here in after the Committee) was the predecessor of KNCHR. The Committee was established on 21 June 1996 through a presidential decree and consisted of ten members, who all worked on part-time basis. The Committee was established as a response to several reports during the years, by both national and international human rights organizations, on the Governments' inadequate human rights record. Initially the Committee was announced as a national body, then changed to be a ruling party committee and then changed again to become a national government body on human rights. The announcement by the President Daniel Arap Moi was initially not followed by any enabling statute, which raised concern about the autonomy and legitimacy of the Committee. Not until later the same year, when the members already were appointed, the Government published a Gazette¹⁶⁴ notice declaring the establishment of the Committee.¹⁶⁵ The Government appointed the members of the Committee and set out its functions and powers. The chair subsequently created the procedural rules, despite that the constitution applicable then only permitted parliament the power to legislate.¹⁶⁶

The Committee was hence a body that was under the direct control of the government. It was formed at the discretion of the president, its members were appointed by him and could also be removed by him, it reported only to the president and its actions were decided by him. Furthermore, the members did not have strong human rights records.¹⁶⁷ The powers of the Committee were weak since it was not permitted to make public statements. It could only make recommendations to the president, and its reports were confidential and not for publication until in 1998.¹⁶⁸ The visibility of the Committee in the Kenyan society was more or less non-existent, and unwillingness to take up politically sensitive issues and its lack of cooperation with NGOs resulted in little or no public credibility or legitimacy.¹⁶⁹ The lack of autonomy and powers resulted in a non-controversial approach. For example, when President Moi threatened to deregister a number of human rights NGOs because of their support of a

¹⁶⁴ The official weekly Government publication.

¹⁶⁵ Human Rights Watch, *supra* note 44, p. 173.

¹⁶⁶ *Ibid.*, p. 174.

¹⁶⁷ Idike, Chinedu, 'Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus', 1:1 *Essex Human Rights Review* (2004), p. 47.

¹⁶⁸ Human Rights Watch, *supra* note 44, p. 175.

¹⁶⁹ *Ibid.*, p. 180.

broad-based constitutional reform movement in March 1998, the Committee remained silent on the issue. Another sign of lack of genuine commitment for human rights of the Committee was illustrated when Amnesty International in April 1998 wanted the chair of the Committee to put his signature to a global signature campaign that pledged a commitment to support the Universal Declaration of Human Rights, and he declined to do this.¹⁷⁰

However, despite lack of autonomy, lack of credibility and limited powers the Committee wrote a few reports, and by the year of 2000 it had produced six reports. The Committee worked on improving prison conditions, educated the public on human rights, put pressure on the Government to carry out police reform and published its findings on the murderer of six inmates on death row by prison wardens in 2001.¹⁷¹ It also developed the bill that eventually led to the establishment of the KNCHR.¹⁷² Nevertheless the Committee faced challenges posed by a one-party authoritarianism, which compromised its independence and hampered its work. Human rights violations in Kenya continued.¹⁷³

As a result of disappointment over the Committees' performance, continued human rights violations by the state and pressure from civil society a new better equipped and more independent body was established in 2003, the Kenya National Commission on Human Rights.¹⁷⁴

4.2 Mandate and Functions

KNCHR was accredited with "A" status by the ICC in 2005, which was reconfirmed in 2008.¹⁷⁵ KNCHR was established by the Government through an Act of Parliament in 2003, the Kenya National Commission on Human Rights Act 2002 (here in after the KNCHR Act), and succeeded the Standing Committee on Human Rights established seven years earlier. Its core mandate is to further the protection and promotion of human rights in Kenya. Its two key roles are to act as a watchdog over the Government in the area of human rights and to play a key leadership role in moving the country towards a human rights state. The Commission consist of the secretariat and nine commissioners including one chair who is appointed from amongst the commissioners. The Secretary is appointed by the commissioners and serves as the Chief Executive Officer of the Commission. All the commissioners work full time.¹⁷⁶ The commissioners are nominated by the National Assembly and are appointed by the President

¹⁷⁰ *Ibid.*, p. 181.

¹⁷¹ Idike, *supra* note 167.

¹⁷² Kenya National Commission on Human Rights, *Strategic Plan 2004-2009* (KNCHR, Nairobi), p. 7.

¹⁷³ Idike, *supra* note 167.

¹⁷⁴ *Ibid.*, p. 49.

¹⁷⁵ UN Doc. A/HRC/WG.6/8/KEN/2, *supra* note 3, p. 3.

¹⁷⁶ Kenya National Commission on Human Rights, *supra* note 4.

(KNCHR Act, section 4 b). The Statute provides the Commission with a broad mandate and far reaching powers. The Commission sets its own priorities, hires its own staff and determines how to use the resources allocated to it. At cabinet level, the Commission is placed under the Ministry of Justice and Constitutional Affairs.¹⁷⁷

The Commissions function is to

- a) investigate on its own initiative or upon complaints made by any person or group of persons, the violation of any human rights
- b) visit prisons and places of detention or related facilities and assess and inspect the conditions under which the inmates are held and make appropriate recommendations
- c) inform and educate the public about human rights by means of a continuing programme of research, publication, lectures and conferences and by other appropriate means
- d) recommend to parliament effective measures to promote human rights, including provisions of compensation to victims of violations of human rights
- e) to formulate, implement and oversee people's awareness of their civic responsibilities and an appreciation of their rights and obligations as free people
- f) act as chief agent of the compliance with its obligation under international treaties and conventions on human rights
- g) encourage other institutions working for human rights and cooperate with such institutions
- h) to investigate and conciliate complaints of alleged human rights violations, where conciliation is both possible and appropriate
- i) perform such other functions as the Commission may consider necessary for the promotion and protection of human rights (KNCHR Act, section 16.1 a-i).

In order to carry out the functions mentioned above the Commission is supposed to have all the powers necessary for the proper performance of its functions and should not be subject to the direction or control of any other person or authority (KNCHR Act, section 18). In the performance of its functions, the Commission should consider guiding principles such as to accommodate the diversity of the Kenyan people, observe the principle of impartiality and gender equity, have regard to applicable international human rights standards and observe the rules of natural justice (KNCHR Act, section 17).

4.3 Quasi-Judicial Functions

The Commission has powers of a court in the performance of its functions under the act and can issue summonses or orders requiring the attendance of any person before the Commission, and the production of any document or

¹⁷⁷ *Ibid.*

record relevant to any investigation by the Commission (KNCHR Act, section 19.1). A person who fails to cooperate with the Commission when it is carrying out these functions commits an offence and shall, on conviction be liable to a fine or to imprisonment for a term of maximum six months or both (KNCHR Act, section 19.6). The Commission also has the right to question any person in respect of any matter under investigation before the Commission and require any person to disclose information relevant to any investigation by the Commission. The Commission may also for the purpose of conducting an investigation pertaining an inquiry, utilize the services of any public servant or any public investigation agency of the government (KNCHR Act, section 20.1). If an infringement of any human rights is found the Commission can through its function of a court order the release of any unlawfully detained or restricted person, order the payment of compensation or any other lawful remedy or redress (KNCHR Act, section 19.2 a-c). A person or authority who is not satisfied with an order made by the Commission can appeal to the High Court within 21 days of such order (KNCHR Act, section 19.3). If such appeal is not filed, the party whom the order is in favour of may apply *ex parte* by summons for leave to enforce the order as a decree and the order may be executed in the same manner as an order of the High Court to the same effect (KNCHR Act, section 19.5).

Anyone can lodge a complaint of a violation of human rights and can do that orally or in writing to the Commission (KNCHR Act, section 22.1). The Commission can when receiving such complaint call for information or a report regarding such complaint from the government or any other body or it can initiate an inquiry into the matter (KNCHR Act, section 22.3 a-b). If the Commission, when it conducts an inquiry into a complaint, finds that a public servant is responsible for a violation of human rights, the Commission may recommend to the Attorney-General or another relevant authority, to prosecute the person or take other actions deemed appropriate against the person or persons concerned. The Commission can also in its own name commence and prosecute appropriate proceedings in the High Court under section 84.1 of the Constitution (of 1963 as amended 2008) or recommend to the petitioner and to the government or other body concerned, other appropriate methods of settling the complaint or to obtain relief. The Commission may also send a copy of its quarterly report together with its recommendations to the President (KNCHR Act, section 25 a-f).

The Commission cannot investigate any matter which is pending before a court or a judicial tribunal, a matter essentially involving the government and a foreign state or international organization, or a matter relating to the exercise of the prerogative of mercy (KNCHR Act, section 32 a-c). The Commission lacks powers to act as *amicus curiae* in legal proceedings.¹⁷⁸

No suit or legal proceedings shall lay against the Commission, any commissioner or any person acting under the direction of the Commission, in respect of anything which is done in good faith or intended to be done in

¹⁷⁸ Commonwealth Secretariat, *Comparative Study on Mandates of National Human Rights Institutions in the Commonwealth* (Commonwealth Secretariat, London, 2007), p. 64.

pursuance of the act or in respect of any report, paper or proceedings of Commission (KNCHR Act, section 33).

4.4 Appointment and Qualifications of Commissioners

To be appointed as commissioner the following qualifications are required; the person should be a Kenyan citizen, he/she should be a person of high moral character and proven integrity, and have knowledge and experience in matters relating to human rights. The chair should be qualified to hold office as a judge of the High Court of Kenya¹⁷⁹ (KNCHR Act, section 5.1 a-c). A person who is a Member of Parliament, a member of a local authority or a member of the executive body of a political party cannot be appointed as commissioner (KNCHR Act, section 5.2 a-c).

Applications for the post as commissioner may be made by any qualified person or by any person, organization or group of persons proposing the nomination of any qualified person. The application should be forwarded to the National Assembly (KNCHR Act, section 6.2 a-b). The Parliamentary Committee responsible for legal and constitutional affairs should consider all applications received and recommend to the National Assembly 12 persons for nomination as commissioners (KNCHR Act, section 6.4). The National Assembly should upon receipt of the recommendations from the Parliamentary Committee nominate 12 persons for appointment as commissioners and shall submit the list of nominated persons to the Attorney-General, who transmit the list to the President who subsequently appoints nine commissioners from the list by notice in the Gazette (KNCHR Act, section 6.6-7).

When nominating and appointing commissioners, regard should be taken to Kenya's ethnic, geographical, cultural, political, social and economic diversity and gender equality (KNCHR Act, section 6.8 a-b). The commissioners should from within the group elect a chair and a vice-chair who shall be of opposite gender. The commissioners hold office on a fulltime basis and the chair enjoys the status of a judge of appeal and the other commissioners enjoy the status of a judge of the High Court (KNCHR Act, section 6.9-10 a-b). The Secretary, appointed by the commissioners enjoys status of a Permanent Secretary (KNCHR Act, section 7.1). The commissioners hold office for at term of five years and can be re-appointed for one further term of a period of maximum five years (KNCHR Act, section 9).

¹⁷⁹ This means that the chair either must be or have been judge of a court with unlimited original jurisdiction in criminal and civil matters somewhere in the Commonwealth or in the Republic of Ireland, or should be an advocate of the high court of Kenya, for at least seven years standing.

4.5 Removal of Commissioners

The commissioners enjoy the status as judges of appeal and judges of the High Court and may only be removed from office because of misbehaviour or misconduct, or if a commissioner is convicted of an offence involving moral turpitude but is not sentenced to a term of imprisonment. A commissioner can only be removed in accordance with the act (KNCHR Act, section 11.3).

If the removal from office of a commissioner or the chair arises, the Chief Justice shall by notice in the Gazette, appoint a tribunal which shall consist of a chair and two other members selected by the Chief Justice from among persons who hold or have held office as judges of the High Court. The tribunal shall conduct an inquiry and report on the facts to the Chief Justice and recommend whether the chair or the commissioner should be removed from office. The Chief Justice shall then communicate the recommendations of the tribunal to the President. The President may then suspend the commissioner or the chair. The President may at any time revoke the suspension and in any case the suspension should cease to have effect if the tribunal recommends that the commissioner or the chair should not be removed (KNCHR Act, section 11.4-5).

4.6 Reporting Obligations

The Commission is supposed to submit an annual report to the National Assembly through the Attorney-General and may at any time submit special reports on any matter to the President or to the National Assembly. The annual report shall include an overall assessment of the government's performance in the field of human rights during the period under review. The Attorney-General shall lay the report before the National Assembly within two months of receipt (KNCHR Act, section 21.1-3).

4.7 Funding

According to the act the Commission shall receive such sums as may be appropriated by parliament. The Commission may receive grants and donations from any other source as long as they are not received for purpose of influencing the decision or ability of the Commission and shall be disclosed in the annual report of the Commission (KNCHR Act, section 26.1-2). The Commission is required to submit its annual estimates of expenditure to the Minister for approval.¹⁸⁰

¹⁸⁰ Kenya National Commission on Human Rights, *supra* note 4.

4.8 The new Constitution and Kenya National Human Rights and Equality Commission

A new constitution was passed through a referendum in August 2010 and came into force 27 August 2010. In terms of human rights protection this is an improvement since the new bill of rights include political, civil, economic, social and culture rights compared to the previous one, that only covered civil and political rights (The Constitution of 1963 as amended 2008, section 5 and the Constitution of Kenya 2010, section 4). Furthermore, the Constitution obliges the state to observe, respect, promote and fulfil the rights and freedoms in the bill of rights, and to enact and implement legislation to fulfil its international obligations in respect of human rights (The Constitution of Kenya 2010, section 21).

The new Constitution also introduces the principle of checks and balances by outlining the roles and powers of the executive, the legislator and the judiciary. There are provisions that check the exercise of presidential and other executive powers and it introduces a decentralization structure that seeks to ensure that public resources are fairly distributed across regional government units.¹⁸¹

KNCHR is entrenched in the new Constitution and is merged with the National Commission on Gender and Development. Together the two commissions become the Kenya National Human Rights and Equality Commission (The Constitution of Kenya 2010, section 26.1). The new Constitution provides the Commission with functions similar to those it had as the KNCHR. However, there are few differences. The new Constitution stipulates provisions regarding funding; composition; appointment and terms of office; removal from office; functions and powers; incorporation and reporting obligations (The Constitution of Kenya 2010, section 248-254). Even if the Commission has relevant functions according to the new Constitution, functions such as; inform and educate the public about human rights; recommend to parliament effective measures to promote human rights; visit prisons and places of detention; and cooperate with other institutions, which are stipulated in the KNCHR Act, are not set out in the new Constitution (KNCHR Act section 16 and the Constitution of Kenya 2010, section 59.2).

Furthermore, the powers of KNCHR given in the Complaints Procedure Regulations of 2005, to set up a tribunal (complaints hearing panel) and to hear cases of human rights violations are not provided in the new Constitution (Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005, Legal Notice 115/05, section 27). The above

¹⁸¹ Amnesty International, 'Kenya: New Constitution offers a basis for better protection and fulfilment of human rights but measures to end impunity still needed', *Amnesty International; Public Statement*, 13 August 2010.

mentioned functions are recommended in the Paris Principles and the doctrine for the effective functioning of NHRIs.¹⁸² However, additional functions to those prescribed in section 59 of the new Constitution can be created by legislation (The Constitution of Kenya 2010, section 59.2).

Provisions regarding funding; composition; appointment and terms of office; removal from office; functions and powers; incorporation and reporting obligations applicable to the Commission also differ to some extent. According to the new Constitution, the number of commissioners can vary from three to nine, in comparison with the fixed number of nine commissioners according to the KNCHR Act (KNCHR Act, section 6.7 and the Constitution of Kenya 2010, section 250.1). Furthermore, the Constitution does not provide for provisions regulating the process of selection and appointment of commissioners, and qualifications required for commissioners are not stipulated. Instead the new Constitution refers to qualifications defined in national legislation (The Constitution of Kenya 2010, section 250.2 and 3). Hence, it should imply that the KNCHR Act is still applicable in those parts that the Constitution leaves gaps, at least until appropriate legislation has been passed. It is however disputed and it remains unclear whether the Constitution coming into force also invalidated the KNCHR Act, or if the KNCHR Act still is applicable as long as it doesn't contradict the Constitution.

Commissioners are not eligible for re-appointment and the term of office is six years, compared to five years with possibility for re-appointment according to the KNCHR Act (KNCHR Act, section 9 and the Constitution of Kenya 2010, section 250.6). Furthermore, commissioners may serve on part-time basis and there is no provision stipulating that MPs, members of local authorities or members of the executive body of a political party, are not qualified for appointment (KNCHR Act, section 4.2 and the Constitution of Kenya 2010, section 250.5).

Regarding reporting responsibilities, the Constitution requires the Commission to submit a report after the end of each financial year to the president and the parliament (The Constitution of Kenya 2010, section, 254.1). However, it does not stipulate the content of such report. Should such report contain an assessment of the Commission's activities, its finances or should it contain an evaluation of the Government's compliance with human rights throughout the year, or both? The Commission can be required to submit a report on special issues and such reports shall be published and publicized (The Constitution of Kenya 2010, section, 254.2 and 3).

One particular improvement is that the Constitutions stipulates, as have been recommended by several scholars within the field, an obligation of parliament to allocate "adequate" funds to enable the Commission to perform its functions (The Constitution of Kenya 2010, section 249.3).

¹⁸² See chapters 2.4 and 2.7 above regarding the Paris Principles and Factors for Effective Action.

The Constitution makes all international treaties or conventions ratified by Kenya part of Kenyan law, hence Kenya becomes a monistic state instead of a dualistic state that it was previously, which required international treaties to be domesticated through legislation by parliament (The Constitution of Kenya 2010, section 2.6).

5 Independence and challenges of such for KNCHR

*“NHRI are only as good as they are independent.”*¹⁸³

Independence is a relative concept. An independent NHRI is acting independently from government, party politics and other entities or institutions that may be in a position to affect its work. However, a NHRI is and always will be linked to the state by law, which *inter alia* is one of the characteristics that distinguish a NHRI from an NGO.¹⁸⁴

The unique position between government and civil society that NHRIs occupy distinguish them from being a traditional government agency or an NGO. This position does not only bring advantages. It also involves challenges, such as maintaining independence from these actors. At the same time NHRIs must have the ability to establish good working relations with them. NHRIs can take different forms and operate in different cultural, political, social, economic and legal contexts, but the issue and many times challenge of independence is applicable to all NHRIs.¹⁸⁵

The term independence signifies freedom from control or influence of another which implies that a person or organization should be autonomous and able to carry out duties without interference or obstruction from any branch of government or any public or private body or person. The organization should thus be given adequate funding, operational autonomy and powers to perform its functions.¹⁸⁶ But is it at all possible for a NHRI to be independent from the state, the same state which established the institution, which funds it and gives it its mandate and powers? What does this relationship imply in practice and how can independence be obtained and maintained?

Below I seek to highlight the challenges of independence for KNCHR in a Kenyan context, by comparing international recommendations such as the Paris Principles with national laws particularly the KNCHR Act and the new Constitution, and the challenges and threats to the independence of KNCHR that have been experienced in practice. The question then arises whether a good legal basis in conformity with the Paris Principles,

¹⁸³ Interview with Maina Kiai, former chair of KNCHR, Nairobi April 2010.

¹⁸⁴ UN Handbook, *supra* note 5, paras. 68-69.

¹⁸⁵ Smith, *supra* note 6, pp. 906-907.

¹⁸⁶ *Ibid.*, p. 912.

providing an institution with a broad mandate and far-reaching powers is enough for a NHRI to be independent in practice.

5.1 Legal and Operational Autonomy

Legal and operational independence is vital for the effective functioning of NHRIs. The founding statute of a NHRI is hence a critical first step in ensuring its legal independence, in particular from government.¹⁸⁷

The mandate and powers of an institution should be defined in an act of law or in a constitution (Paris Principles, Competence and Responsibilities, art 2) This will give the institution a degree of formal independence and it is then less easily abolished and less vulnerable to influence from government, than if it is established by an executive order or decree.¹⁸⁸ If a NHRI is constitutionally entrenched, the constitution should briefly describe the role of the NHRI and stipulate its independence from the executive, while a more detailed description of its mandate, power and functions, and membership should be embodied in an Act of Parliament.¹⁸⁹ A NHRI entrenched in the constitution is the most secure way to guarantee its independence, as well as to defend its legal powers if these are challenged.¹⁹⁰

Compared to the predecessor the Standing Committee on Human Rights, which was established by a presidential decree, KNCHR is established by an Act of Parliament. This gives the Commission a first step of formal independence and any amendments in the Commission's mandate or powers must first be debated in parliament and must adhere to proper legislative procedures. Since the new Constitution was passed in August 2010, KNCHR is now entrenched in the Constitution which presumably will increase its legal independence.

Preferably, a NHRI should be granted separate and distinct legal personality which will permit it to exercise independent decision-making power.¹⁹¹ The KNCHR Act satisfies this criterion by making KNCHR a legal entity, a body corporate with perpetual succession and a common seal. It also stipulates that KNCHR should not be subject to the direction or control of any other person or authority (KNCHR Act, section 3.2 and 18). Neither shall any suit or legal proceedings lay against the Commission or any commissioner in respect of anything which is done in good faith or intended to be done in pursuance of the act or regulations or in respect of any reports of the Commission (KNCHR Act, section 33). Similar provisions can be found in the new Constitution (The Constitution of Kenya 2010, section

¹⁸⁷ UN Handbook, *supra* note 5, para. 70.

¹⁸⁸ Smith, *supra* note 6, p. 913.

¹⁸⁹ Burdekin, *supra* note 10, p. 43.

¹⁹⁰ International Council on Human Rights Policy, *supra* note 45, p. 13.

¹⁹¹ UN Handbook, *supra* note 5, para. 70.

250.9). These provisions are in accordance with the Paris Principles and provide for an adequate legal ground for the Commission's independence.¹⁹²

Nevertheless, a good legal framework does not necessarily assure operational independence. A good legal framework in accordance with the Paris Principles and other relevant recommendations should not be seen as an end in itself.¹⁹³ In fact, despite a good legal framework it would be an exception if the Commission would be as independent as its law sets out with regards to the history of national bodies in Kenya. Kenya's post-independence history is full of political tumult and ever since 1963 there has been a considerable executive control of all state institutions e.g. the judiciary. Despite enabling legislation granting institutional autonomy, state institutions have had no or little independence from government.¹⁹⁴

Operational autonomy refers to the competencies and capacity that a NHRI has at its disposal.¹⁹⁵ Operational autonomy also implies that institutions conduct their day-to-day affairs independently of any other individual, department, organization or authority.¹⁹⁶ This is related to operational efficiency (see chapter 2.7.5) and requires that NHRIs should be able to appoint its own staff and manage its own resources without government interference.¹⁹⁷ Rules of procedures should be developed and should not be subject to external modifications. Reports, recommendations or decisions issued by the NHRI should not be reviewed by any other authority.¹⁹⁸

State authorities shall guarantee a secure and conducive environment for NHRIs, and those responsible for acts of threats to the security of the institution or its staff should be held accountable.¹⁹⁹ In Kenya there is a threatening environment for anyone who works with human rights. There have been several cases where human rights defenders have been harassed, intimidated, arbitrarily arrested and there have even been cases of murder of human rights defenders.²⁰⁰ The fact that staff members of the Commission have had to leave the country due to a risk for their security shows that even people working for a state institution are not secure. If persons working for and defending human rights feel insecure, even within a national body, that is a major threat to its operational autonomy. What one diplomat said illustrates how compromised the operational autonomy might be,

¹⁹² Kindiki, Kithure, 'On the Independence of the Kenya National Commission on Human Rights: A preliminary Comment', 2:2 *East African Journal on Human Rights and Democracy* (2004), p. 122.

¹⁹³ Amnesty International, *supra* note 30.

¹⁹⁴ Kindiki, *supra* note 192.

¹⁹⁵ Smith, *supra* note 6, p. 914.

¹⁹⁶ UN Handbook, *supra* note 5, para. 71.

¹⁹⁷ Smith, *supra* note 6, p. 914.

¹⁹⁸ UN Handbook, *supra* note 5, para. 71.

¹⁹⁹ Smith, *supra* note 6, p. 930.

²⁰⁰ UN Doc. A/HRC/WG.6/8/KEN/2, *supra* note 3, pp. 8-9.

“It’s dangerous to talk about certain issues in Kenya. There are some buttons that you just don’t push. After being a while in Kenya you just know that there are some dangerous zones, you just don’t go into it, and Kenyans know this.”²⁰¹

Apart from the need of a secure environment, the law should clearly state that members and staff should not receive instructions from government ministers or other public officials, neither directly or indirectly, in order to ensure operational autonomy.²⁰² Despite an explicit prohibition against direction or control of the Commission in the KNCHR Act, this seems to have been a problem since the establishment up to today. The difficult task for a new state institution to implement independence is illustrated by the first chair.

“Ministers and civil servants, they don’t understand yet this whole idea of independent institutions, so they think they can direct you and tell you what to do. Constant in the beginning, the Minister would call me and, the Kenyan Government is very hierarchical so they try to place you at a level, and the idea is if you are at this level those above you can tell you what to do. So there was a big fight, very big fight...”²⁰³

“We fought really hard right through to maintain independence, so that is the biggest challenge everywhere. You have to fight for it, let me not pretend that they give you, no government gives you independence, you have to fight for it, you have to grab it, that is the biggest challenge.”²⁰⁴

This challenge seems to still remain today, probably not only for KNCHR but for any institution with a mandate that entails monitoring of the Government. This very direct form of political pressure is pointed out by a diplomat.

“...sometimes in Kenya it happens that a group of five to six Permanent Secretaries from different ministries call you to a meeting behind closed doors in a bar or restaurant somewhere, and they try to talk sense to you.”²⁰⁵

In order to keep independence in such extreme situations and to not be compromised, requires courageous commissioners with strong integrity. Qualifications of commissioners will be discussed further below.

5.1.1 Legal Proceedings against KNCHR

Investigating and reporting on allegations of human rights abuses are crucial functions of NHRIs, in particular with regards to their protective function. To be vested with appropriate powers of investigation is also an indicator of operational autonomy. If a NHRI does not have these powers or is failing to

²⁰¹ Interview with a West European Diplomat (name withheld for confidentiality reasons), Nairobi May 2010.

²⁰² International Council on Human Rights Policy, *supra* note 45, p. 12.

²⁰³ Kiai, *supra* note 183.

²⁰⁴ *Ibid.*

²⁰⁵ West European Diplomat, *supra* note 201.

take on sensitive human rights issues, it will not gain credibility and public confidence.²⁰⁶

The two examples mentioned above where ministers seek to influence commissioners and to give instructions are very direct form of political interference. There are less direct ways of challenging the independence of KNCHR.

According to the KNCHR Act, no suit or legal proceedings shall lay against the Commission in respect of anything which is done in good faith or intended to be done in pursuance of the act or regulations, in respect of any reports, papers or proceedings of the Commission (KNCHR Act, section 33). However, two cabinet ministers, Uhuru Kenyatta, Minister of Finance and Deputy Prime minister as well as William Ruto, Minister for Higher Education²⁰⁷ have both taken legal proceedings against the Commission in court due to the content in KNCHR's report on the PEV.

The Commission was exercising its function under section 16 of the KNCHR Act, to investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of human rights. The investigations and the final report 'On the brink of the precipice: A human rights account of Kenya's post – 2007 election violence', identified and named several alleged perpetrators of the PEV, among them the two cabinet ministers. They were alleged to have been involved in the planning, funding and organising of the PEV.²⁰⁸ The report was handed over to the President, the Prime Minister, the Attorney-General, the Police, the CIPEV and the ICC. Kenyatta, claimed that he was aggrieved by a section in the report and that the report adversely affects him and has brought his character and reputation into disrepute. He consequently sought an order of certiorari to quash and annul the part of the report concerning him.²⁰⁹ Kenyatta lost the case and the court stated that "This court has the onerous task of maintaining the delicate balance between an individual right and those of the public. Sometimes private rights have to bow to public interest." The court then concluded "...in the circumstances of this case, public interest far outweighs the right of the *ex-parte*..."²¹⁰ The decision was later appealed.²¹¹

Regarding the prohibition for suits or legal proceedings against the Commission according to the KNCHR Act section 33, the court stated that since "what the *ex-parte* applicant has done is to invoke the supervisory jurisdiction of the court, which is a jurisdiction *sui generis*. The above section (intending section 33 of the KNCHR Act) is therefore not

²⁰⁶ Smith, *supra* note 6, p. 917.

²⁰⁷ Suspended in October 2010 for allegations of corruption.

²⁰⁸ Kenya National Commission on Human Rights, *supra* note 132, pp. 181 and 184.

²⁰⁹ Republic v. Kenya National Commission on Human Rights Ex-Parte Uhuru Muigai Kenyatta [2010] eKLR. Miscellaneous Civil Appeal 86 of 2009 (*In the matter of: The Report by National Commission on Human Rights on the cause of post election violence in Kenya in 2007-2008*).

²¹⁰ *Ibid.*

²¹¹ Kiplagat, Sam, 'Uhuru files appeal in Kenya chaos case', *Daily Nation*, 24 June 2010.

relevant.”²¹² Nevertheless, could this be seen as an attempt by a few powerful individuals to challenge the independence of the Commission? The Commission was sued in court because it exercised one of its most important functions, investigations of human rights abuses, and when doing so, the Commission did not refrain from revealing its findings, despite the fact that it contained sensitive information about individuals in the cabinet. In my opinion that seems to be a challenge of its independence, in particular with regards to the fact that the very same individuals have taken further actions against the Commission.

Both Ruto and Kenyatta are amongst the six key suspects for crimes against humanity committed during the PEV.²¹³ Ruto has attempted to undermine the credibility of KNCHR by accusing KNCHR to have coached and bribed witnesses to implicate him in the PEV. This in turn has led to police investigations of commissioners. A move that has been criticized by *inter alia*, the ed. of International Commission of Jurists Kenya (ICJ), as an attempt to intimidate the Commission.²¹⁴ Ruto has also tabled a motion in parliament, aiming to make Kenya withdraw from the Rome Statute and has together with a number of MPs from the Rift Valley called for the disbandment of KNCHR.²¹⁵ The Ministry of Finance headed by Finance Minister Kenyatta, in July 2009 decided that commissioners should start to pay tax, and that they retroactively should pay tax from the day they were appointed.²¹⁶ Without adding any value in whether commissioners should pay taxes or not, the retroactive nature of the proposal is questionable, since such a bill will end up in quite a lot of money. This might be an attempt to punish the Commission, for its exercised independence resulting in the PEV report.

5.1.2 Challenging the Quasi-Judicial Functions of KNCHR

Not all NHRIs have the authority to hear and consider complaints concerning individual cases and to make binding decisions, but KNCHR is provided with powers of a court and may according to the KNCHR Act and

²¹² Republic v. Kenya National Commission on Human Rights, *supra* note 209.

²¹³ ICC Prosecutor Luis Moreno-Ocampo has requested the International Criminal Court to issue summonses to appear against six Kenyan citizens to face justice for massive crimes committed during the PEV in Kenya. The Prosecutor has concluded there are reasonable grounds to believe crimes against humanity were committed *inter alia*, by: William Ruto and Uhuru Kenyatta. The Prosecution considers that William Ruto was one of the principal planners and organizers of crimes against PNU supporters and that Uhuru Kenyatta during the PEV helped to mobilize the Mungiki to attack ODM supporters.

²¹⁴ Daily Nation, ‘Forum asks Wako to act on chaos witnesses recanting evidence’, *Daily Nation*, 3 December 2010.

²¹⁵ Shiundu, Alphonse, ‘Kenya MPs fight to kill Hague trials’, *Daily Nation*, 16 December 2010 and The Standard, ‘Omar hits at Ruto as Annan renews calls for tribunal’, *The Standard*, 13 November 2010.

²¹⁶ Kadida, Jillo, ‘Human Rights Teams opposes tax demands’, *Daily Nation*, 17 May 2010.

its associated regulations set up a tribunal to hear and rule upon cases brought before it by a complainant (Powers under section 22 of the KNCHR Act, and the (Complaints Procedures) Regulations 2005 Legal Notice 115/05, section 27 and 33). However, its quasi-judicial jurisdiction to investigate, hear and issue decisions upon received complaints of human rights violations has been constitutionally challenged. In December 2008 the High Court quashed all relevant regulations in order to hear cases and set up a tribunal (complaints hearing panel), on the grounds that those regulations were inconsistent with section 84.2 of the Constitution (of 1963 as amended 2008) which, according to the court, confers exclusive original jurisdiction to the High Court covering all fundamental rights and freedoms.²¹⁷ Since the ruling came, KNCHR has not been able to exercise this function, and only three cases have been finally determined since the panel was first set up in 2005.²¹⁸

If KNCHR already at that time had been entrenched in the Constitution it would have been protected from such constitutional challenges. It is thus quite obvious why a NHRI established by a constitution instead of by an Act of Parliament grants greater independence. Since KNCHR now has become a constitutional body, its powers and functions hopefully will be more respected in the future. However, the entrenchment of the Commission in the Constitution will not automatically provide the Commission with quasi-judicial jurisdiction. Such powers are not explicitly mentioned in the Constitution, but it refers to functions and powers prescribed by legislation (The Constitution of Kenya 2010, section 252.1 d). Hence, if appropriate, clear and detailed legislation is passed regarding the powers, functions and jurisdiction of the Commission, the problem will hopefully be solved.

5.1.3 Authority to Compel Cooperation

The authority to compel cooperation of government agencies and other actors on the national arena is another prerequisite for full operational autonomy. Hence, a NHRI with power to investigate complaints should have a legislation which states that all officials and public authorities are to facilitate the work of the institution, including answering requests for information and assisting in investigations.²¹⁹ It has been said that NHRIs that have the power to collect evidence and compel the attendance of witnesses, hardly exercise their quasi-judicial powers because the mere existence of such powers is usually an adequate incentive to bring compliance with requests.²²⁰

²¹⁷ Kenya Commercial Bank Ltd v. KNCHR, MISC. APPLICATION NO. 688 OF 2006.

²¹⁸ 1) Anne Njogu vs Republic 2) Medo Misama vs The Attorney General & The Registrar of Societies 3) Peter Makori vs The Attorney General, Permanent Secretary Office of the President, Provincial Administration & Internal Security among others, available at <www.knchr.org>

²¹⁹ UN Handbook, *supra* note 5, para 72.

²²⁰ Smith, *supra* note 6, p. 914.

This does not seem to be applicable in the Kenyan context. Despite far reaching powers to issue summonses or orders requiring the attendance of any person before the Commission or the production of documents relevant to investigations, the right to question any person about a matter under investigation and require any person to disclose any information relevant to an investigation (KNCHR Act, section 19.1 a–c), there is always a risk that senior government officials such as cabinet ministers, ignore such orders. This has been the tendency since the independence in 1963 with ministers ignoring court orders.²²¹ The problem seems to remain as illustrated by the behaviour of the police, which as well as court proceedings, tends to hamper the operational efficiency of the Commission. As a human rights officer express it.

“The police are quite difficult to work with. We receive a lot of complaints regarding them, police harassment, police shooting, and disappearances... But there is a lack of cooperation by the Police and obviously it curtails our work to some extent. Sometimes we just have to close a file because we are not able to cooperate with the police, and then the issue is never addressed....That is one huge challenge.”²²²

Despite a provision stating that a person who fails to cooperate with the Commission when it exercises its powers of a court, commits an offence and shall, on conviction be liable to a fine not exceeding 20 000 shillings or to imprisonment for a term of maximum six months, or both (KNCHR Act, section 19.6), such orders are not obeyed. The distinction between having powers in theory according to the law and having such powers in practice is explained by a commissioner.

“...it’s one thing to be said you have powers of a court, and you can summon information. That alone doesn’t give you those powers. What enables you to exercise those powers that are in the Act is the political culture of your environment. If the political culture is such as that summonses are not obeyed, too bad for you, then it doesn’t matter what that Statute says, you will not be able to do that...”²²³

It is clear that a solid legal base solely, does not provide the Commission with operational autonomy, hence a good law cannot be an end itself. There needs to be political will, and knowledge and understanding of the importance of human rights and why they should be respected. Only then can an institution with such mandate be able to carry out its functions effectively.

5.1.4 Accountability and Transparency of Work

Another important element in establishing independence is transparency of work. Transparency of work allows the public to determine the

²²¹ Kindiki, *supra* note 192, p. 123.

²²² Interview with a Human Rights Officer of KNCHR (name withheld for confidentiality reasons), Nairobi May 2010.

²²³ Interview with Wambui Kimathi, Commissioner of KNCHR, Nairobi May 2010.

independence of the NHRI which is crucial for the credibility of the institution. Transparency of work can be accomplished through the publishing of the findings of inquiries.²²⁴ NHRIs should be empowered to publish their materials at any time.²²⁵ If the findings of an investigation are public, it will be easier to hold the government accountable for its actions, and reduce the risk for abuse.²²⁶ NHRIs that are not able to make statements and reports public will not be perceived to be protectors of human rights and may instead be perceived to be protectors of human rights violators.²²⁷

Unlike the Standing Committee on Human Rights that was only allowed to report its findings to the President²²⁸ and was not allowed to make public statements²²⁹, there is no provision in the KNCHR Act that stipulates a prohibition to publish findings of reports. The Commission has published findings of human rights violations in several reports since the establishment and is often seen in media making public statements.²³⁰ In this regard the new Constitution is an improvement since the Constitution stipulates that every report required from the Commission shall be published and publicized (The Constitution of Kenya 2010, section 254.3). Inquiries into alleged human rights violations and published reports on human rights violations, criticizing government officials and MPs for their acts and omissions have increased KNCHR's credibility to be perceived as a human rights defender.

Independence does not entail lack of accountability and NHRIs should be accountable to parliament. They should submit annual reports that should be tabled in parliament and then be made available for the public.²³¹ By making the institution answerable to parliament is one way of achieving independence.²³² KNCHR is supposed to submit an annual report to the President and to the National Assembly through the Minister of Justice and may at any time submit special reports to the President and to the National Assembly on any matter. The annual report should include an assessment by the Commission of the performance of the government in the field of human rights during the period under review. The report should then be tabled in parliament within two months (KNCHR Act, section 21.1-3). However, the KNCHR Act does not stipulate any requirement to report on the Commission's work or achievement and one problem generally applicable

²²⁴ Smith, *supra* note 6, p. 917.

²²⁵ Amnesty International, *supra* note 30, p. 21.

²²⁶ Carver and Hunt, *supra* note 64, p. 754.

²²⁷ Human Rights Watch, *supra* note 44, p. 16.

²²⁸ Not until 1998 the committee for the first time published a report, see Human Rights Watch, *supra* note 44, p. 175.

²²⁹ *Ibid.*

²³⁰ On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence; Behaving badly; The Malindi Inquiry Report 2006; Referendum report; Unjust enrichment the Making of Land Grabbing millionaires; and Living Large-Counting the Cost of Official Extravagance in Kenya, are some examples of published reports by KNCHR.

²³¹ Burdekin, *supra* note 10, pp. 43-44.

²³² UN Handbook, *supra* note 5, para. 70.

when the reports are tabled in parliament, is that they are usually not debated, as the former vice chair said.

“...a lot of times you write the report, the reports go to Parliament but I don’t think they were ever discussed.”²³³

The whole idea of accountability then loses its point, and it also makes it harder to get a hearing for recommendations made in the reports. In the end, support from parliament is needed to enforce recommendations, to put pressure on government and to amend and create new laws in conformity with international human rights treaties.

5.2 Independence through Financial Autonomy

A national institution that does not have control over its finances will be dependent of the ministry or other governmental body that controls the budget, hence it should be decided by a vote in parliament.²³⁴ To avoid interference from government, the source and nature of funding should be specified in its founding legislation. The budget should not be linked to the budget of a government department or ministry since that can give rise to a damaging conflict of interest, especially if the national institution has a complaints procedure or capacity to advise government. In fact, the budget should if possible in some way be “secured” so that no official decisions or actions of the institution will affect its budget allocation. The funding must also be adequate and continuing, so that the institution is capable of performing its functions.²³⁵ Relying on development partners when it comes to funding can leave the institution stranded if they decide to quit the support of such project.²³⁶

Allocation of adequate resources increases the possibility of impartiality of the institution and leads to financial security and freedom from political manipulation.²³⁷ The Paris Principles states that NHRIs should have an infrastructure which enables the NHRI to conduct its activities, in particular with regards to adequate funding. The funding should enable the NHRI to have its own staff and premises, in order to be independent of government and it should not be subject to financial control (Paris Principles, Composition and Guarantees of Independence and Pluralism, art 2). According to the KNCHR Act the funds of the Commission should be derived from such sums as may be appropriated by parliament for that purpose. The Commission may also receive grants or donations from any other source as long as it’s not given with purpose to influence decisions or

²³³ Interview with Violet Mavisi, former vice chair of KNCHR, Nairobi May 2010.

²³⁴ International Council on Human Rights Policy, *supra* note 45, p.13.

²³⁵ UN Handbook, *supra* note 5, paras. 73-76.

²³⁶ Peter, *supra* note 15, pp. 369-370.

²³⁷ Kindiki, *supra* note 192, p. 125.

activities of the Commission, and such funds should be disclosed in the annual report of the Commission (KNCHR Act, section 26.1 – 2). The new Constitution obliges parliament to allocate “adequate” funds to the Commission (The Constitution of Kenya 2010, section 249.3). This is an improvement but the question is, does such provision actually provide the Commission with adequate funds in practice?

If the Commission doesn’t receive adequate funding from parliament it might have to rely on external funding which can compromise its independence.²³⁸ If most of the funding is given by e.g. donors, it could result in prioritising issues from donors’ interests rather than what is most important for the people. This in turn could affect the legitimacy of a NHRI. Donor funding could also lend legitimacy to a weak commission that is being restricted by the executive. Moreover it adds another level of accountability, since the institution subsequently has to report to donors of its activities which might lead the accountability to the grassroots, supporters and staff away to donors.

Despite the risks with funding coming mainly from donors, it could also strengthen the institution. A government that knows that there is international scrutiny of its human rights commission might be more careful in interfering with its work. However, funding from donors should not be used as an excuse for governments to not give NHRIs adequate funding.²³⁹ It is still the government that has the primary responsibility to ensure adequate funding since a NHRI is a public body, and if the majority of the funding comes from government it will minimize the effects of a possible withdrawal of donor funds.²⁴⁰ On the other hand, if most of the funding comes from government, and the institution therefore relies on the same government or department of government that it is supposed to monitor, for its effective functioning, there will be a tension with regards to independence of the institution. Even if the institution actually is independent in that sense, it might be perceived to be an extension of the government. Funds should thus, as mentioned above, be allocated by parliament to relieve this tension.²⁴¹ This has also been emphasised by the South African constitutional court, which regarding financial independence for the Independent Electoral Commission in South Africa stated that,

“... It is for parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.”²⁴²

²³⁸ *Ibid.*

²³⁹ Smith, *supra* note 6, p. 921.

²⁴⁰ Kindiki, *supra* note 192, p. 125.

²⁴¹ Smith, *supra* note 6, pp. 918 and 922.

²⁴² *The New National Party of South Africa v. The Government of the Republic of South Africa*, Case CCT 9/99, para. 98.

5.2.1 Challenges of Funding and Financial Autonomy

According to the KNCHR Act the Minister of Justice²⁴³ should approve the Commission's budget, or amendments in it (KNCHR Act, section 30.3). The fact that the Minister of Justice has to approve the budget and thus have the final say regarding the budget does not comply neither with the Paris Principles, which state that a NHRI should not be subject to financial control which might affect its independence (Paris Principles, Composition and Guarantees of Independence and Pluralism, art 2), nor with the KNCHR Act which stipulates that the Commission should not be subject to the discretion or control of any person or authority (KNCHR Act, section 18).

The budget should be approved by parliament and not by the treasury, finance department or other government ministries.²⁴⁴ The required approval by the Minister of Justice may create problems of independence when it comes to investigating and criticising government and in particular the Ministry of Justice. It would thus be more appropriate to let the Commission submit its budget proposals directly to parliament.²⁴⁵ This was also recommended by the Sub-Committee of ICC when reviewing Kenya's accreditation. The Sub-Committee also stressed the need to receive adequate funding in order to hire the necessary staff and to be able to establish permanent regional offices in order to have a regional presence.²⁴⁶ Furthermore, a NHRI should be able to defend its budget and address parliament and relevant ministries when its budget is being considered.²⁴⁷ This was also stated by the South African constitutional Court, and should apply to KNCHR as well.

It has been said that the budget provided a NHRI can be a strong indicator of the government's commitment to its human rights commission.²⁴⁸ Around 70% of the KNCHR's budget comes from donor funds.²⁴⁹ The challenges of funding and financial independence are explained by both a current and a former commissioner.

“You create a commission and then don't give it enough money to exercise its mandate broadly...So what you do is you severe its mandate through

²⁴³ According to the KNCHR act the commission is under the AG on cabinet level, however, in May 2003, President Kibaki issued a revised allocation of duties to ministers in the cabinet, in which the commission was placed under the ministry of Justice and constitutional affairs, hence the responsible minister is the Minister of Justice, see Kindiki, *supra* note 185, p. 126.

²⁴⁴ Burdekin, *supra* note 10, pp. 47-48.

²⁴⁵ Kindiki, *supra* note 192, p. 126 and Smith, *supra* note 6, p. 922.

²⁴⁶ United Nations General Assembly, Human Rights Council, 10th session. Process currently utilized by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights to accredit national institutions compliant with the Paris Principles, UN Doc. A/HRC/10/55, annex III, para. 4.6.

²⁴⁷ Burdekin, *supra* note 10, pp. 47-48.

²⁴⁸ Human Rights Watch, *supra* note 44, p. 21.

²⁴⁹ Interview with Hassan Omar, vice chair of KNCHR, (resigned as vice chair 20 May 2010), Nairobi May 2010.

inadequate funding. So once you don't have enough funding as a government agency then you are not able to realise the broad context of the mandate."²⁵⁰

Lack of funding and financial independence seems to have been a problem from the very first beginning.

"The first challenge we faced that I think is still there is the question of implementing independence...In the case of the Commission the first challenge was financial independence...when we were starting in 2003 we found that there was a structure where the resources were controlled by the Ministry of Justice, and then they would release them when you asked for them. So we actually engaged in a long fight, a long battle to receive the sources ourselves and keep them..."²⁵¹

"...money that was allocated by parliament to us, the Ministry of Justice had used to do other things, because they considered it all their money, so the first problem that happens is always financial independence."²⁵²

It is recommended that NHRIs should be provided with "adequate" funding, but who decide how much adequate funding is? Two different perspectives are illustrated below regarding the amount of money that the State provides the KNCHR with.

"For me it shows that you are not committed to the Commission and probably not even committed to human rights."²⁵³

On the other hand, a government official looks at it in a different way.

"They expect to be funded a lot of money without considering the priorities of Government. They are a single issue institution, so they see only human rights in a strict sense. So you don't see that when a draught comes, funds must be diverted to save lives first before you deal with other issues. So the funds of Government are not always that available, but then they interpret it as a denial of funds. That has been quite a challenge, that they feel that they are not funded enough. But no institution of Government, in my experience, feels funded enough. All institutions want more funds because the budget is very constrained. But they interpret it as a denial of funding rather than that funds are not available..."²⁵⁴

To limit the budget of a NHRI is an effective way of limiting its effectiveness. Governments have deliberately reduced budgets of human rights commissions as a direct way of exerting state control in e.g. Cameroon, Zambia and Liberia, when they have criticised the government.²⁵⁵ In Kenya there are different ways of looking at the issue of funding, and it can be argued that other government institutions also lack funding. However, whether or not the lack of adequate funding is a

²⁵⁰ *Ibid.*

²⁵¹ Kiai, *supra* note 183.

²⁵² *Ibid.*

²⁵³ Omar, *supra* note 249.

²⁵⁴ Interview with a Government Official (name withheld for confidentiality reasons), Nairobi May 2010.

²⁵⁵ Human Rights Watch, *supra* note 44, pp. 21-22.

deliberate way of limiting the effectiveness of KNCHR, it can be stated that there would have been more money available for all institutions, if not such huge amount of money kept disappearing due to corruption²⁵⁶.

5.3 Independence through Proper Appointment and Dismissal Procedures

An institution is only as independent as the individuals of which it is composed. Despite legal and financial independence, an institution is not ensured independence if its members, individually and collectively, are not capable of generating and sustaining independence of action.²⁵⁷ With regards to the importance of good and independent people within the Commission, the selection, appointment and dismissal procedures are crucial.

5.3.1 Appointment Procedures

Since the method of appointment can be critical in ensuring independence, the task should be given to a representative body such as parliament.²⁵⁸ To enhance independence and the sense of ownership, the selection and appointment process should involve civil society as far as possible, through the representatives of human rights defenders, NGOs, opposition leaders, trade unionists, social workers and journalists, whom should also be able to nominate candidates in order to ensure a broad representation.²⁵⁹ This is recommended in the Paris Principles (Paris Principles, Composition and guarantees of independence and pluralism, art 1 a-e). The processes should be transparent and politically neutral and should ensure independence from the executive.²⁶⁰

Above mentioned recommendations have been taken into account to some extent in the KNCHR Act. It is the parliament that is in charge of the process although it is the president that ultimately appoints the Commissioners. The National Assembly must by advertisement in the Gazette and in at least three daily newspapers invite applications for nominations as commissioners. The Parliamentary Committee in charge of legal affairs then has to consider all applications and recommend twelve candidates to the National Assembly. The National Assembly then nominates twelve persons for appointment as commissioners, forward the names to the AG who transmits the list to the president. The president

²⁵⁶ E.g. Corruption Scandals like Anglo Leasing and Goldenberg.

²⁵⁷ UN Handbook, *supra* note 5, paras. 77-81.

²⁵⁸ *Ibid.*, para. 79.

²⁵⁹ Amnesty International, *supra* note 30, p. 5.

²⁶⁰ Smith, *supra* note 6, p. 923.

subsequently appoints nine commissioners from the list of 12 (KNCHR Act, section 6.1, 4, 6 and 7).

The KNCHR Act permits individuals, groups and organizations to nominate commissioners and the Parliamentary Committee may co-opt any person who in its opinion possesses relevant experience in the field of human rights (KNCHR Act, section 6.2 b and 6.5). The recommendation to involve civil society in the process is hence taken into consideration to some extent.²⁶¹ However, there is no requirement on the Parliamentary Committee to actually ensure involvement of civil society in the short listing of the nominees, but it is up to the Parliamentary Committee to co-opt anyone if the Committee considers it desirable.

To let civil society, including legal academics, and not only parliamentarians be part of the appointment committee, could reduce the risk for politicization of the process and enhance national legitimacy and credibility.²⁶² The new Constitution does not in detail regulate the method of appointment, it only stipulates that the nominees should be approved by the National Assembly and appointed by the president. How the nominees should be selected and recommended should be regulated by law (The Constitution of Kenya 2010, section 250.2). Hence, either the KNCHR Act is still applicable in that regard or new legislation shall be passed. Either way, guarantees of civil society involvement in the selection of nominees should be introduced in the applicable law in order to increase the independence.

5.3.2 Political Influence

Commissioners must be appointed on merit and not on the basis of their past or present allegiances to a president, government or political parties.²⁶³ It has been recommended to let a representative body such as parliament to be in charge of the selection process. Even though it is a representative body, it can give rise to issues of independence due to political influence and interests. One commissioner expressed it this way.

“Us commissioners, are appointed through a political process, it is possible that by being here I know a politician, and I think that probably applies to literally everybody else. The process is not as insulated from political manipulation, and therefore it is likely that the spill over is such that you get a quality of commissioners that strikes to certain political leaning, and that definitely can sever the integrity and independence of the Commission or the implementation or realising the mandate of the Commission.”²⁶⁴

²⁶¹ Kindiki, *supra* note 192, p. 123.

²⁶² *Ibid.*, p. 125.

²⁶³ Matshekga, James, ‘Toothless bulldogs? The Human Rights Commissions of Uganda and South Africa: A comparative study of their independence’, *2 African Human Rights Law Journal* (2002), p. 89.

²⁶⁴ Omar, *supra* note 249.

Politicization of the appointment process could in the end result in a politicization of the Commission itself, which would indeed infringe the independence of the Commission. What in law seems to be an inclusive appointment procedure in accordance with the Paris Principles does not necessarily reflect how it is carried out in practice. It seems like the law aiming to ensure independence in the appointment process can be manipulated. According to some people, including representatives from two NGOs, the appointment process is open for political interference.

“The other way they (KNCHR) are being challenged is through the process of appointment. I think both Parliament and the Executive have realized, and we saw that in the second round of appointments, they don’t want people who are too independent working at the Commission.”²⁶⁵

“The first Commission that was Maina’s²⁶⁶ commission, we (civil society) had a lot of control in terms of who got into it... So the majority were reformers. But I think the State realised that the Commission was very progressive and pro reforms. What I’ve seen in the new commissioners, I could see that the Parliament and the State basically trying to bring in people who have lobbied for those jobs...now, it’s business as usual, you go to your MP or your godmother or father and say you want to be there because it’s a good job.”²⁶⁷

It might be time to revise the role of parliament in the process. To have an independent panel, which could receive applications, conduct interviews and recommend nominees based on expertise and competence, and not for political contacts, might be a proper alternative. From there, a Parliamentary Committee could take over, and in case of an amendment of the nominated names, the committee would have to explain why it changed the names once nominated by the independent panel.²⁶⁸

5.3.3 Terms and Conditions

The terms and conditions applicable to members of NHRIs should be specifically set out in the founding legislation, and should, apart from the method of appointment, address the method of removal and requirements for appointment, such as criteria of nationality, profession, and qualifications, to ensure that qualified and competent people are appointed. Furthermore, the duration of appointment and whether members may be re-appointed should be set out. It is generally accepted that there should be a fixed-term that is not of short duration and to permit reappointments for an additional term.²⁶⁹ However, long non-renewable terms are better guarantees of independence than short renewable terms and ensure

²⁶⁵ Interview with Muthoni Wanyeki, Ed. Kenya Human Rights Commission, Nairobi May 2010.

²⁶⁶ The first chair of KNCHR.

²⁶⁷ Interview with Willy Muthunga, Representative for Ford Foundation in Nairobi and former ed. Kenya Human Rights Commission, Nairobi May 2010.

²⁶⁸ Kindiki, *supra* note 192, p. 125.

²⁶⁹ UN Handbook, *supra* note 5, paras. 77-81.

consistency in leadership.²⁷⁰ The KNCHR Act protects commissioners from being arbitrarily removed. According to the Act, commissioners should enjoy security of tenure for five years and can be re-appointed for another five years (KNCHR Act, section 9). However, the new Constitution changes these conditions and the commissioners will now be appointed for a single term of six years and is no longer eligible for re-appointment (The Constitution of Kenya 2010, section 250.6 a).

Commissioners should preferably be appointed on a full time basis. Experience has demonstrated that full time commissioners can work more effectively.²⁷¹ According to the KNCHR Act, commissioners should hold office on a fulltime basis (KNCHR Act 6.10). However, the new Constitution gives commissioners the possibility to serve on a part time basis (The Constitution of Kenya 2010, section 250.5). Furthermore, there is no provision in the new Constitution that states that MPs, members of local authorities or members of the executive body of a political party, are not eligible as commissioners, which the KNCHR Act stipulated (KNCHR Act, section 5.2 a-c and the Constitution of Kenya 2010). If this implies that any of the above mentioned categories of people can be appointed as commissioners and continue to hold such office even when appointed, this can give rise to issues of independence for the Commission in the future.

5.3.4 Removal of Commissioners

The Paris Principles do not mention anything about powers of dismissal, but who may dismiss members and for what reasons should be addressed in the founding legislation, since powers of dismissal are closely related to independence. Considering the nature of the activities of a NHRI it is preferable that power to dismiss should be vested in parliament or any other representative body at that level. Reasons for dismissal should relate to proved wrongdoing of a serious nature or failure to participate in the work of the institution.²⁷²

According to the KNCHR Act commissioners can be removed for misbehaviour or misconduct, or if they are convicted for an offence involving moral turpitude but are not sentenced to a term of imprisonment. Furthermore, the office of a commissioner becomes vacant if the person is convicted for an offence and sentenced to imprisonment for a term of three months or more, or is mentally or physically unable to discharge his/her duties, is absent from three consecutive meetings of the Commission without reasonable cause, or is declared bankrupt by a court of law (KNCHR Act, section 11.1 a-f and 11.3). If a commissioner is misbehaving or is convicted of an offence involving moral turpitude he/she can be removed through a recommendation of a tribunal established by the Chief

²⁷⁰ International Council on Human Rights Policy, *supra* note 45, p. 12.

²⁷¹ Burdekin, *supra* note 10, p. 49.

²⁷² Smith, *supra* note 6, p. 923.

Justice for that purpose (KNCHR Act, section 11.3-4). It is thus not the executive that determines whether to remove a commissioner or not.

The new Constitution does not change these procedures dramatically. Nevertheless there is an additional ground for removal; incompetence. A tribunal will be set up that will issue a binding decision to the President on whether to remove or to not remove the commissioner. However, the petition will first pass by the National Assembly that assess whether it discloses one of the grounds for removal, before it is passed to the president who then shall appoint a tribunal (The Constitution of Kenya 2010, section 251.1-4 and 6).

Privileges and immunities to members of a NHRI is another legal means of securing independence, especially for NHRIs that can receive and act on complaints of human rights violations. Hence, members of a NHRI should enjoy immunity from civil and criminal proceedings in respect of acts performed in official capacity.²⁷³ This is a way to protect commissioners against unwelcome governmental interference.²⁷⁴ However, decisions taken by members of the Commission in their official capacity should be subject to judicial review by the courts.²⁷⁵ According to the KNCHR Act no suit or legal proceedings shall lay against the Commission, any commissioner or any person acting under the direction of the Commission, in respect of anything which is done in good faith or intended to be done in pursuance of the Act or in respect of any report, paper or proceedings of the Commission (KNCHR Act, section 33). This provision is reflected in the new Constitution (The Constitution of Kenya 2010, section 250.9).

Members of NHRIs should avoid conflict of interests and should not serve on the board of other public bodies. Members should remove themselves from areas of activity and decisions where conflicts of interest may arise.²⁷⁶ The new Constitution stipulates that unless a commissioner serve on part-time he/she should not hold any other office or employment for profit whether public or private (The Constitution of Kenya 2010, section 250.6 b). However, this provision doesn't necessarily provide protection from conflicts of interest.

5.4 Independence through Composition

Independent commissioners have been said to be one of the key ingredients in ensuring independence of a NHRI. Freedom from bias, strong integrity and impartiality of commissioners and staff are critical, and they must be able to maintain their neutrality even when they are under pressure to do otherwise, especially when it comes to deciding matters before them.²⁷⁷ The

²⁷³ UN Handbook, *supra* note 5, paras. 77-81.

²⁷⁴ Carver and Hunt, *supra* note 64, p. 753.

²⁷⁵ Amnesty International, *supra* note 30, p. 6.

²⁷⁶ International Council on Human Rights Policy, *supra* note 45, p. 12.

²⁷⁷ Amnesty International, *supra* note 30, pp. 5-6.

members must also have public credibility and be insightful to issues relating to e.g. ethnicity, the rights of indigenous people, and other vulnerable groups.²⁷⁸ Since human rights commissioners are entrusted with a great responsibility, they must be able to inspire public confidence and the members have the responsibility to ensure that they are not merely an extension of government but an independent oversight agency willing to speak out against their appointers if necessary.²⁷⁹ The commissioners must be committed to ensure that respect for human rights becomes reality and not only a signed document.²⁸⁰

Expectations for further career advancement, allegiances to political parties and strong links with the executive arm of government can be a threat to the independence of commissioners and staff. If the appointment as commissioner is a stepping stone in a political career or a career within the judiciary, one might be less willing to criticize the government. For this reason it is of further importance that commissioners and staff are selected on the basis of proven expertise, knowledge, and experience in the promotion and protection of human rights and that the commissioners of the institution have practical experience and abilities.²⁸¹

5.4.1 Qualifications

To ensure impartiality of NHRIs the selection of members should be widely respected across political, economic, social, and culture lines. The members should be people who can lead the institution effectively and make it respected so that its recommendations are generally followed. If not, the people for which interests it is established to protect, risk losing faith in it.²⁸²

As mentioned above in chapter 5.3.3, the criteria for appointment and qualifications required should be set out in the founding legislation, to ensure that qualified and competent people are appointed. However, the risk with membership criteria is that they may be chosen in order to exclude specific groups of individuals, thus the criteria should be made public and subject to discussion by all stakeholders, in particular civil society organizations, before adoption.²⁸³

The qualifications necessary, according to the KNCHR Act, in order to be appointed as commissioner, are quite vague.²⁸⁴ To be appointed as a commissioner one must be a Kenyan citizen, a person of high moral

²⁷⁸ Commonwealth Secretariat, London, *National Human Rights Institutions, Best Practice* (Commonwealth Secretariat, London, 2001), p. 13.

²⁷⁹ Smith, *supra* note 6, p. 925.

²⁸⁰ Human Rights Watch, *supra* note 44, p. 12.

²⁸¹ Amnesty International, *supra* note 30, pp. 5-6.

²⁸² Kindiki, *supra* note 192, p. 123.

²⁸³ International Council on Human Rights Policy, *supra* note 45, p. 14.

²⁸⁴ Kindiki, *supra* note 192, p. 123.

character, and proven integrity and have knowledge and experience in matters relating to human rights. The chair must be qualified to hold office as a judge of the High Court of Kenya (KNCHR Act, section 5.1 a-c). The new Constitution does not stipulate any required qualifications for commissioners, but refers to national legislation (The Constitution of Kenya 2010, section 250.3).

What does knowledge and experience in matters relating to human rights imply? Expertise and practical experience is mentioned to be important qualifications for commissioners of NHRIs. This is emphasised by a civil society representative.

“For me what is really clear is that a lot of people coming in to or applying for jobs as commissioners are not necessarily people who come from the human rights movement. They might be professionals with some sort of relevant qualifications, but we need people who have a background in working for and defending human rights... Professional qualifications are fine but experience I think is really important.”²⁸⁵

A criterion that requires practical experience from human rights work or from the human rights movement is one way of ensuring that people who apply for the job as commissioners not simply see the job as a stepping stone in a political career or a career within the judiciary. Such experience might also indicate something about the commitment to human rights.

“Commissioners they have the same pay as judges, Florence has the same pay as a court of appeal judge. So they basically want to leave the Commission and join the bench. And they don’t hide it. Given the Kenyan situation, you got to play safe, because someone has to recommend you, you have to lobby. The whole notion of independence is not the real thing, and that does impact their work.”²⁸⁶

As much as it is valuable to have representatives from the human rights movement and civil society in the Commission, in order to ensure practical experience of human rights and good cooperation with those sectors, a combination of people with different backgrounds would probably be preferable with regards to the importance of creating good working relations with ministers and MPs as well. This is explained by a commissioner.

“There is always useful that commissioners are of a certain calibre and competence, because that networking at certain senior level of government helps a lot. People who can then interact comfortably with Members of Parliament and therefore they can reach certain issues.”²⁸⁷

²⁸⁵ Wanyeki, *supra* note 265.

²⁸⁶ Muthunga, *supra* note 267.

²⁸⁷ Kimathi, *supra* note 223.

5.4.2 Pluralism

The Paris Principles recommend pluralism to permeate both the appointment process and the composition of NHRIs (Paris Principles, Composition and Guarantees of Independence and Pluralism, art 1). Pluralism in the composition of a NHRI can be a further guarantee of independence, and as a public body a NHRI should as far as possible reflect the social profile of the community within which it operates. Hence, commissioners and staff should entail representatives from all parts or sections of the society, including women, ethnic minorities, and people with disabilities. These people might be underrepresented in other official bodies and might have relevant experience of the needs of those sectors of society.²⁸⁸ To have a multi-member structure also ensures expertise of local issues and contributes to co-operation with relevant sectors of society. Pluralism may as well guarantee that the institution carries out its work impartially without any particular approach or group gaining a dominant position.²⁸⁹ It also enhances public legitimacy, since the common people will be able to identify with these people and perceive the institution as a representative of their interests instead of “creatures of governmental processes born out of closed-door negotiations between bureaucrats and politicians.”²⁹⁰

In societies divided within ethnic, political or religious lines, it has been said that it is of further importance to have pluralistic representation, especially to provide a visible indication that the NHRI stands equally for all sectors of society and represents the whole community.²⁹¹ Without diversity there is a risk that the NHRI and the work that it performs, will not be viewed with public confidence, which will then damage its credibility and legitimacy.²⁹²

According to the KNCHR Act consideration should be taken to Kenya’s ethnic, geographical, cultural, political, social and economic diversity, and gender equality in the appointment and nomination of commissioners. This is to some extent reflected in the new Constitution, (KNCHR Act, section 6.8 a-b and the Constitution of Kenya 2010, section 250.4). Moreover, the chair and the vice chair should be of opposite gender (KNCHR Act, section 9 and the Constitution of Kenya 2010, section 250.11). These provisions are in line with the recommendations given in the Paris Principles regarding composition to ensure independence and a pluralistic representation (Paris Principles, Composition and Guarantees of Independence and Pluralism, art 1). KNCHR consist of commissioners with different political, cultural, geographical and ethnic background, as well as of men, women, and disabled persons. However, the purpose to obtain a pluralistic composition in the Commission might not necessarily contribute to increased independence, as one academic puts it.

²⁸⁸ Amnesty International, *supra* note 30, p. 6.

²⁸⁹ Pohjolainen, *supra* note 32, p. 7.

²⁹⁰ Kindiki, *supra* note 192, p. 123.

²⁹¹ Human Rights Watch, *supra* note 44, p.17.

²⁹² Smith, *supra* note 6, p. 928.

“NHRI need to have individuals who are above partisan interests, ethnic interests and so on. My greatest problem with the current commission, most commissioners are good and well skilled individuals, but they were appointed on bases on regional representation so they represent regional interests... which tends to regionalize and ethnicities the Commission... and that is reducing you to a regional commissioner...”²⁹³

He continues

“..The commissioners do not come there on issue basis, they come on ethnic basis and if you come on ethnic basis you also com on political basis. A few regions are also political regions and representing that region also means that you are representing certain political orientations and certain political interests.”²⁹⁴

Ethnicity has ever since independence permeated politics and decisions by people in power. All political parties formed after the re-introduction of a multi party state have drawn their core support from the ethnic group of their top leadership. The political system in Kenya has during the years, before the prime minister post was established in 2008, given extremely much power to the president and has contributed to the reduction of political competition. Winning the presidency has meant taking it all, and the power has been used to enrich people from one’s own ethnic group and, as a consequence of that, marginalised people from other ethnic groups. Hence, many Kenyans have come to believe that ensuring that one of their own ethnic groups wins the presidency is the best assurance of benefiting as individuals and as communities.²⁹⁵ Politicians have over the years “engineered ethnic animosity for short-time personal gain” and politically instigated ethnic clashes have resulted in a lot of violence, forced displacement, and deaths over the years.²⁹⁶

The PEV and its causes affected the whole Kenyan society, and the divisions in society were also reflected within the Commission. There seemed to have been disagreement on whether to name and shame alleged perpetrators in their report on the PEV.

“When you look at Kenyans in any particular setting, don’t underestimate ethnic, racial and religious conflicts, because they get reflected in a lot of the work. That’s why I think human rights work is so important because if people look at the human rights aspect then these other divisive problems will disappear, so in that report there were lots of ethnic and religious concerns. People were trying to get their own people out of the report so that they don’t get prosecuted. Which in my view confirms that as long as the Commission doesn’t know where it’s heading and is not committed to reforms, then they will get caught up in those issues. I think the report shows very very clear that they were unable to deal with those challenges posed by politicians.”²⁹⁷

²⁹³ Interview with Karuti Kanyinga, Senior Research Fellow at the Institute for Development Studies (IDS), University of Nairobi, Kenya, Nairobi May 2010.

²⁹⁴ *Ibid.*

²⁹⁵ Kenya National Commission on Human Rights, *supra* note 132, p. 18.

²⁹⁶ Kenya National Commission on Human Rights, *supra* note 172, p. 13.

²⁹⁷ Muthunga, *supra* note 267.

The Commission reflects the diversity in society which both has its good and bad points. Pluralism and diversity in society as well as in the composition of the Commission shall be used as an asset and not as a ground for divisions. It requires that people let human rights be the leading force, and partisan interests such as negative ethnicity should be left behind. In this regard the Commission should set a good example. These are critical issues that need to be addressed within the Commission in order to avoid polarisations and divisions among commissioners and staff.

5.4.3 Leadership and Style of Leadership

Actions taken by the senior leadership usually sets the tone for the activities of the institution as a whole. Thus an independent and effective leadership is of primary importance and only the highest calibre candidates with proven expertise of practical human rights work should be appointed.²⁹⁸ The leader's personality tends to influence the institution for good or bad. It is preferable to have a leader who is prestigious and well respected in order to give credibility of the work of the Commission. It is also important that the leader has the ability to negotiate with different sectors of society, and is willing to speak out when necessary.²⁹⁹ To both develop and sustain the capacity to work with government in a constructive way, as well as criticizing government actions inconsistent with the states human rights treaty obligations is not always easy to do in practice. Criticism of government should be accompanied by acknowledgements of positive steps taken by government to improve the human rights situation in the country.³⁰⁰ However, there will always be elements of tension between NHRIs implementing their mandate and governments, especially when it comes to sensitive human rights issues or direct criticism of the government.³⁰¹

The difficulty to exercise the two-sided mandate as an advisor to and watchdog over the government have been apparent for KNCHR, and it seems like there are certain human rights issues where the government is willing to cooperate and others where it is less cooperative.

“... Some issues are not a problem when we are doing some level of advisory work e.g. when we work with the Ministry of Justice to develop a working manual for treaty monitoring, that is usually not very difficult, to relate on those kind of issues. Where we have problems is when it comes to hardcore accountability work, where the Commission has to play the watchdog role. In particular with the Ministry of Internal Security, where there are massive violations of human rights in police departments and other departments. Then you have quite a tussle in terms of them appreciating your

²⁹⁸ Amnesty International, *supra* note 30, p. 5.

²⁹⁹ Smith, *supra* note 6, p. 927.

³⁰⁰ Burdekin, *supra* note 10, pp. 63-64.

³⁰¹ *Ibid.*, p. 65.

mandate and us trying to work with them in terms of monitoring human rights violations and investigating into human rights violations.”³⁰²

In a state such as Kenya where human rights are frequently violated by acts or omissions by the State, the question of what approach the Commission and its leadership should have in relation to the State has been discussed. Since KNCHR was established in 2003 it has had two chairs. Both are advocates of the high court as the KNCHR Act requires. The former chair has a long experience from the human right movement, was very advocacy oriented, and was often seen in the media, criticising cabinet ministers, MPs, and the police for their acts and omissions.³⁰³ The current chair does not have particular experience from human rights work but has experience from the judiciary and other legal works as well as from lecturing at University.³⁰⁴ The current chair is not seen as much in media and there seems to be a perception that she works more behind the scenes. Due to the apparent difference in approach and style of leadership of the two chairs, the question of what approach is the most effective one is of interest. One government official describes the differences as follows,

“Maina’s style was very good, that was in the start of the Commission and it was very important to profile the Commission. He was very aggressive and very public in his statement. That was important because is established the Commission, in the eyes of the public, as a strong defender of rights. But then after you established you need to consolidate, that is I think where Florence comes in. Because she is more of a consolidating force than Maina would be. Maina is more of activism and advocacy... So I think both are ok at different times. If Florence was the one who started she would not have made much of an impact, on the other had if Maina was the one who would now take the Commission forward he would not have made much of an impact.”³⁰⁵

Irrespective of what approach the leader of the Commission chooses, it will imply difficulties on one hand or the other. This constant tension is described by a lawyer.

“If you speak out a lot you get a lot of credibility from the public and the public feels you are fighting for them and they are able to trust you with all their problems...But you also eliminate Government, they shot you out of the process so you become an outsider. You get credibility, you raise expectations but you can eliminate the inside track to an extent that you are not effective internally or you are completely closed out from the internal process, so it limits access. On the other hand, if you have a more quite approach, the public can assume that you’ve been co-opted, can’t necessarily see that you are fighting for them, which can generate a level of distrust. But

³⁰² Omar, *supra* note 249.

³⁰³ For background of Maina Kiai *see*

<www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/Maina%20Kiai%20Profile%20-Sept%202009.pdf>

³⁰⁴ For background of Florence Jaoko *see*

<www.knchr.org/index.php?option=com_content&task=view&id=5&Itemid=37>

³⁰⁵ Government Official, *supra* note 254.

on the other hand it enables to get access to Government and its processes and make you a lot more effective as working from within.”³⁰⁶

The difficulty of both working with and criticizing the government, which is required by the two-sided mandate that the Commission has as an advisory body and as a watchdog, reflects some of the challenges that NHRIs have to manage and which is related to their unique position between government and civil society. However, some people claim that an outspoken, advocacy oriented approach, to create public demand for change, is necessary in order to force government to take action on human rights issues. In particular in a country that has a history of widespread violations of human rights and where impunity for such prevails. This is expressed by one of the commissioners.

“I believe that most human rights institution in Africa must of essence have an activist punch. So that they are able to move public opinion and to redirect policy, to influence public debate and charter out the direction, I believe that is almost a requisite for any NHRI in Africa.”³⁰⁷

“I think all hr actors in this country indentify impunity as the biggest impediment to the realisation of hr, and tied to impunity is accountability. There is no accountability across the spectrum. You kill, you don’t want to investigate, you violate the Kenyans rights and you don’t want to investigate.”³⁰⁸

“...Government needs to be put on the toes, to deliver to its people. ...So far nothing has come out of the good will of the Government, it has been essentially by the demand created by the people... For you to be effective and legitimate in this kind of environment, you must be right in the centre of public discourse.”³⁰⁹

Other people mean that, in order to actually improve the human rights situation in the country, the Commission must be able to get government, which is actually in power to make sure that human rights are enforced, on its side, and that can only be achieved through a less antagonistic approach.

“I think in the first commission there were quite a bit of doors that closed...I think we are too quick to use the public podium, and that has closed quite a number of doors, which has taken us much longer to influence Government as I think we would have otherwise, if we had developed a different kind of approach...”³¹⁰

However, there are situations when the State is violating the human rights of its citizens, where the Commission must be critical and outspoken, which is part of its watchdog role, as a former principal human rights officer puts it,

³⁰⁶ Interview with George Kegoro, Ed. International Commission of Jurists Kenya, Nairobi May 210.

³⁰⁷ Omar, *supra* note 249.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ Kimathi, *supra* note 223.

“The extra judicial killings had been ... in the media, and we were working with the media in terms of highlighting what we are doing about it and the police didn't like that at all. So they'll say, you come and speak to us behind the scenes and we were saying, no no no, people have died, we can't speak to you behind the scenes... if someone has been shoot as a human rights commission you cannot sit and say let's work on our relations... you appear to become very compromised. How do you sit and say lets discuss and somebody has been shot. So that was a real key issue for us.”³¹¹

It is important for any human rights commission to be able to balance these two roles, but how that can be done is the question that needs to be answered.

A strong leadership is equally important for any organization, to avoid internal struggles and divisions in the group and to ensure that it is working towards the same goal and is on the same track. Internal conflicts in a group are not unique, but it is a problem if these internal struggles spill out to the public. Lately several matters relating to internal disputes in KNCHR have been reported in media. Everything from attempts to remove the chair, the resignation of the vice chair, allegations of misbehaviour of commissioners and request for tools to hold commissioners accountable, allegations of commissioners leaking information on witness protection as well as allegations of conflicts between the chair and the vice chair.³¹² Whether or not these conflicts actually exist, the fact that all these rumours are flourishing in media is a problem. If the Commission is perceived to be busy with internal struggles instead of focusing on discharging its mandate to promote and protect the human rights of Kenyans, for which it was established, it is definitely a threat to its independence, public legitimacy, and in the end its effectiveness.

³¹¹ Interview with Alice Nderitu, former Principal Human Rights Officer of KNCHR, Nairobi April 2010.

³¹² See articles in Daily Nation and The Standard, available at <www.nation.co.ke> and <www.standardmedia.co.ke>

6 Analysis

6.1 Human Rights and NHRIs

Human rights are universal, indivisible and interdependent, meaning that everyone in the world is entitled to them, all human rights have equal status and the denial of one right invariably impedes enjoyment of other rights, and the fulfilment of one right often depends, completely or partially upon the fulfilment of others. This was endorsed by 171 states on the world conference on human rights in Vienna in 1993.

States have the obligation to both respect, protect and fulfil human rights. One way for a state to actually implement these obligations is to establish a NHRI with the mandate to promote and protect human rights. The idea of NHRIs has been addressed by the UN for more than half a century and the ombudsman office has a history of 200 years. Hence, the idea to have a national state body with the mandate to enhance the protection and promotion of human rights is not new. However, not until the 1990s a considerable number of NHRIs were established around the world, including in Africa. As of 2009 about thirty-one African states had established NHRIs. However, the establishment of a NHRI is not equal to the commitment to human rights and the improvement of such in a country. Some states have established human rights institutions in order to deflect international criticism of human rights abuses. One of these institutions was the Standing Committee on Human Rights in Kenya.

The Paris Principles are recognized as being a set of normative minimum standards and are used as guidance in the establishment and operation of NHRIs around the world. The principles address issues of competence and functions; composition and guarantees of independence; methods of operation; and quasi-judicial jurisdiction of NHRIs. They are also used as measurement of NHRIs in the accreditation process by ICC. In addition to these quite general principles, the doctrine of NHRIs has further developed a number of recommendations for the effective functioning of NHRIs such as independence; defined jurisdiction and adequate powers; accessibility; cooperation with other government agencies, with parliament and the judiciary, with other national human rights institutions and with international organizations; operational efficiency; accountability and public credibility and legitimacy. This set of standards and recommendations have created a framework of norms which can be applied on the various NHRIs, such as ombudsman, specialised institutions or human rights commissions.

6.2 Effective NHRIs

It has been argued that the establishments of NHRIs are not effective ways of improving the human rights situation in a country, that they can be institutions of impunity, protectors of human rights violators and a way for governments to satisfy donor's demands for democratic institutions. However, it can also be argued that NHRIs can be useful tools to enhance the protection and promotion of human rights in a country and to reduce the gap between human rights on a signed treaty and human rights in practice. For NHRIs to play that role, they need to meet the requirements of the Paris Principles and other recommendations that have been mentioned above.

One of the most important factors for the effective functioning of NHRIs is independence. The concept of independence covers aspects such as legal and operational autonomy; financial autonomy; procedures of appointment and dismissal; and composition. A NHRI should have a broad mandate, specified in a legal and preferably a constitutional text and it should be given adequate powers to discharge its functions and obtain operational autonomy. NHRIs should receive adequate funds to be able to ensure operational efficiency and their budgets should not be controlled and decided by a government or a ministry, but should be allocated by the parliament.

The process of appointment should be free from executive control, handled by a representative body such as parliament and should be transparent. It should involve civil society as far as possible to enhance ownership, pluralism and independence. Commissioners shall be protected from arbitrarily removal and thus powers of dismissal shall not be given solely to the executive. Furthermore, NHRIs should be composed of individuals with strong integrity that have knowledge and preferably practical experience in the field of human rights, appointed on the basis of qualifications and not as a result of political connections. The commissioners should be individuals, who are committed to human rights and determined to discharge the mandate of the NHRI and the employment should not be seen simply as a stepping stone in a political or judicial career. The NHRI should consist of individuals that represent and reflect the differences in society. A strong leadership is important that can appreciate different backgrounds and experiences of commissioners and ensure that they are used as an asset to strengthen the group instead of a ground for divisions. A strong leadership is also important to make the group work as a team towards the same goals.

If a NHRI, its members and staff enjoy these qualities, such an institution can be a strong defender of human rights in a country. This is particularly important in countries with a long history of political suppression, human rights violations and weak state institutions. Even if there is a vibrant civil society, as in the case of Kenya, a public body that shows the lead for human rights serves a different and complementary purpose. A public body has a different authority and other tools available in its work for human rights. NHRI's unique position between government and civil society gives

it the advantage of being able to obtain relevant information and work closely with both government agencies and NGOs.

Nevertheless, this unique position, as has been argued above, does not only entail advantages. It also gives rise to difficulties related to independence. It is recommended, and practical experience shows that NHRIs that are able to cooperate with government, parliament and NGOs are more likely to be successful, but on the other hand, the success also requires a certain distance in order to ensure independence from the very same actors, in order to not be perceived an appendage of one or the other.

A NHRI cannot on its own improve the human rights situation in a country, it is an institution complementary to NGOs, the judiciary, parliament and other such actors. It is therefore of equal importance that these actors discharge their mandate accordingly. NHRIs need parliament to debate their reports, push government to implement its recommendations and to pass relevant legislation for a greater protection of human rights. The judiciary needs knowledge and competence about human rights in order to make such rights enforceable in courts, and the government and its various departments need to have a human rights based approach when they design and implement their policies. Thus, it is necessary to create good working relations with these actors, in order to positively influence their work and responsibilities. At the same time it is crucial to be able to speak out and criticize these actors when their actions or lack of action violate human rights, which is part of the watchdog role of NHRIs. As have been demonstrated these two roles are not always easy to combine.

6.3 KNCHR and the Challenges of Independence

Kenya has had two NHRIs, the Standing Committee on Human Rights, established in 1996 through a presidential decree and the KNCHR, established in 2003 through an Act of Parliament. The Standing Committee on Human Rights lacked most of the qualities recommended in the Paris Principles and the doctrine of NHRIs. Hence, the establishment of KNCHR with a founding legislation, to a large extent in accordance with the Paris Principles and other recommendations, providing the Commission with a broad mandate and far-reaching powers, was a major improvement. Nevertheless, as has been illustrated and argued above, a good law does not *per se* make the KNCHR independent and effective.

This thesis focuses on the challenges of independence in a Kenyan context. It has been done through an assessment of to what extent the KNCHR Act and the new Constitution correspond to the Paris Principles and international recommendations with regards to independence. Furthermore, it compares the concept of independence provided in law, and the challenges

of independence experienced in practice, thus how theory and practice correspond with each other.

In a country with such history of political disturbances, human rights violations, corruption and impunity, and where the environment for human rights defenders is hostile, Kenya needs a strong, credible and effective human rights body that can defend the rights of marginalized people, a body that can highlight human rights violations and demand accountability for such, even from the highest political elite.

To have these desired functions, such body needs to be highly independent. Taking into account the history of Kenya, where politicians have taken advantage of their power to enrich themselves, where politics is more about individual interests than interests of the people, where state institutions have had little or no autonomy from the executive, and where corruption among state officials is widespread, independence for a state institution such as the KNCHR is of even greater importance.

6.3.1 International Standards, National Law and Experienced Challenges of Independence

The KNCHR Act provides the Commission with a quite solid legal foundation. The Commission has a broad mandate, relevant functions and is vested with certain powers of a court. With regards to provisions related to the different aspects of independence, the KNCHR Act is adequate but not perfect, and despite a sufficient law there are several challenges of its independence in practice.

6.3.1.1 Legal and Operational Independence

The Commission is since August 2010 a constitutional body, which presumably will contribute to a greater authority of its mandate, powers and functions and hence, be respected accordingly in the future.

Despite very clear provisions in the KNCHR Act, in accordance with the Paris Principles, prohibiting legal proceedings against KNCHR and prohibiting external direction or control of the Commission, this is what the KNCHR has experienced. When the Commission was established, ministers and civil servants attempted to direct the Commission on what to do and not to do. There has been a ruling by the High Court that have tied the hands of the Commission in respect of its powers and functions to act as a tribunal, to hear and issue decisions upon individual complaints of human rights violations. Furthermore, two cabinet ministers have sued the Commission due to the content in their report on the PEV. Despite far-reaching powers to issue summonses, order the production of documents and to get access to relevant information, these powers have been ignored by e.g. the police. If there is no will by state agencies to cooperate with the Commission, despite powers to compel such cooperation by law, how can it then exercise its

functions? It makes it even harder when these actors try to undermine the legitimacy of the Commission through various allegations. These are all challenges that infringe the legal and operational autonomy and effectiveness. In addition to that, the threatening environment for human rights defenders does not make the situation easier for those who work with human rights.

Furthermore, transparency of work is said to be important, which can be done through the publishing of reports and to make them available to the public. The Commission has published several reports on various issues related to human rights *inter alia* reports on corruption, land grabbing, misuse of public resources, and monitoring hate speech in election campaigns, criticising government, MPs, the police and security forces for their act and omissions. This shows that the Commission has exercised its independence in a fearless manner which has contributed to credibility and public legitimacy. The KNCHR's documentation of the PEV has contributed to investigations and reports of CIPEV and ICC, which have led to the fact that cabinet ministers today face charges for crimes against humanity by ICC. Hence, KNCHR has been a strong voice in the fight for accountability of people in power, for their acts and omissions that affect the lives of ordinary Kenyans.

Accountability is also said to be an important factor to ensure independence, which can be enjoyed through reporting to parliament. However, there seem to have been a lack of interest in discussing the reports of the Commission, hence the Commission might not be as accountable as it is supposed to. The lack of debate about the reports in parliament also makes it more difficult for the Commission to enforce its recommendations, since they are not binding. There will always be a risk that those are ignored by the government and the parliament, and then it is not much the Commission can do about it. Therefore, it is important to create good working relations with the members of Parliamentary Committees. If the Commission had the possibility to address parliament when their reports are tabled, the risk that the parliament ignores such reports would perhaps be reduced.

6.3.1.2 Independence through Financial Autonomy

Lack of funding and financial autonomy from the State has been experienced by KNCHR, and could be seen as a lack of commitment to the Commission and human rights in general. There could always be argued that all institutions lack funds and that it is not particularly directed to KNCHR, however, it could as well be argued that, if corruption within government wasn't so widespread and impunity for such prevailed, there would have been a lot more money for state institutions commissioned with the mandate to improve the lives of Kenyans. Hence, it is about time to deal with corruption.

Funding should be decided and allocated by parliament and not by the government. The provisions in the KNCHR Act about funding are not very

clear and the fact that it stipulates that the Minister of Justice has to approve any amendments to the budget does not comply with the Paris Principles or other recommendations, since it compromises the independence of the Commission. However, the new Constitution stipulates that parliament shall allocate “adequate” funds to enable the Commission to perform its functions, which is a clear improvement. The Commission should in order to enhance its financial independence, as has been recommended by the Sub-Committee of ICC, submit its budget directly to parliament, and have the possibility to address parliament and defend its budget when it is being considered in parliament.

6.3.1.3 Independence through Proper Appointment and Dismissal Procedures

The law with the aim to ensure an inclusive and fair appointment procedure doesn't seem to have protected the process from political manipulation. Civil society was to a larger extent involved, in the selection of the first set of commissioners than the second one. This seems to have resulted in a different type of commissioner and a different style of the Commission. Political contacts seem to be a tacit requirement for appointment as commissioner, which can result in a politicised commission which is definitely a threat to its independence. It might hence be time to revise the role of parliament in the appointment process. To ensure that civil society is part of the selection of nominated candidates, would reduce the risk for political manipulation and influence from government. Another way of avoiding political manipulation is to set up an independent recruitment panel to make the first selection of names based on expertise and qualifications, and then handle over the process to the National Assembly. The new Constitution doesn't regulate the method of appointment but refers to national legislation. If new legislation is supposed to be passed with regards to the method of appointment, it should ensure that civil society will be part of the selection process. In case the KNCHR Act is still applicable, amendments in accordance with above mentioned recommendations should be considered, in order to reduce the apparent risk for political interference and manipulation.

The new Constitution changed the term of office from five renewable years to six years without the possibility for renewal. To choose non renewable terms might be an attempt to enhance the independence, however, six years is not a very long period of time, and the fact that it does not include any provision excluding members of the executive arm of a political party to be elected as commissioners and permits commissioners to serve on part-time basis is questionable.

6.3.1.4 Independence through Composition

The individual commissioners and their qualities are pivotal for how effective and independent the Commission will be. It has been said that an institution can only be as independent as the individuals of whom it is

composed. Thus, it is important to ensure that people with the right qualities and experiences are part of the Commission, and to avoid people who merely consider the job as a stepping stone in a judicial or political career or desires it for a high salary. Criteria of qualifications should thus be set out in the founding legislation, which should require practical experience from the human rights field. Practical experience from the human rights field is an indication of real commitment to human rights, and such requirement will help to sift out the above mentioned categories in the selection process.

Furthermore, a pluralistic representation reflecting the diversity of a society is recommended to enhance the independence. It can contribute to the fact that people can identify themselves with the individuals in the Commission, it can also contribute to impartiality of work and prevent that a particular approach or group dominate, and it can ensure expertise on local issues. The KNCHR Act provide for a pluralistic representation, which has been reflected in the composition of commissioners, but it has not had desired effect only. Some of the divisions in society are also found in the Commission. This was shown when the Commission's PEV report was published, and there were internal disagreements on whether or not to name and shame, and attempts were made to protect certain politicians from accountability. This is a major threat to the Commission's independence, and it is alarming when it appears in situations related to accountability for gross violations of human rights that have been committed in the country.

It is positive that KNCHR reflects the Kenyan society and the diversity should be taken into consideration when appointing commissioners. However, to appoint commissioners to represent certain issues e.g. civil and political rights, economic, social and culture rights, children's rights, gender equality, non-discrimination and so on, might be more appropriate, then having commissioners representing different regions in the country. To appoint commissioners on the basis of expertise in certain areas of human rights might reduce the risk for the above mentioned divisions and lead focus to the core human right issues.

A strong leadership is important in order to make the group work as one team towards the same goal, and to avoid polarization and internal conflicts. If people perceive the Commission as being busy fighting each other instead of fighting human rights violators this can ruin the public credibility. If the credibility of the Commission is spoiled it can be hard to regain and it becomes more vulnerable to attempts aiming to undermine the legitimacy of the Commission or the commissioners. This has been shown lately, with MPs accusing the Commission of bribing witnesses, calls by some MPs to disband the Commission, and KNCHR's involvement in taxations disputes. These issues are major threats to the independence of the Commission, and thus, the Commission need a strong leader that can reunite the group.

The previous and the current chair have different styles of leadership and approach. The previous chair was much more advocacy oriented, often used the media and the public podium to highlight human rights violations and

criticize violators of human rights. The current chair is not seen as much in media as the previous one, and is perceived to be working more behind the scenes. Due to the very different approaches, it has been discussed which one is the most effective one.

The answer is probably not the one or the other. Both styles have desired effects as well as less desired effects. A more outspoken commission, seen in media criticising people in power, will make it perceived as a strong defender for human rights. However, to always go public and name and shame, may also close doors in government. Government or those individuals or agencies that are criticised will be less willing to cooperate. If a leader instead is working more behind the scenes, creating good working relations with the government and its various departments, it might be easier to influence them and their work from within. Conversely, it could be argued that if the Commission does not name and shame, in order to create a public demand for change, actions will not be taken by government, due to lack of political will.

To combine the two roles of advisory and watchdog, both above mentioned approaches are needed. To have the ability to do both, requires commissioners that are able to take on these different roles. However, for such strategy to be effective, when to go public and when to work behind the scenes needs to be a conscious choice, and most of all it is important that the Commission act as one group, no matter what approach it chooses. Only then the Commission will be perceived as a strong and decisive force for human rights in the country, which will make it less vulnerable for attempts to challenge its independence, legitimacy and in the end its effectiveness.

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