

Implications and opportunities of the international refugee protection regime for national human rights institutions in Africa

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Summary: *The upsurge in the global numbers of refugees and asylum seekers since 2015 and the resultant protection failures witnessed particularly in Europe led to renewed debates on the need to reform the refugee protection regime to identify pathways that would enhance protection. Key in these debates was the need to identify actors that could enhance the refugee protection regime, including accountability for failures to protect. Among such actors identified are national human rights institutions. This article situates NHRIs within the nexus between international human rights law and international refugee law to frame an understanding of their role in the refugee protection regime. It then considers the evolution of the international refugee protection regime in light of the emergence of NHRIs and critically reviews their positioning with reference to the mandate of the United Nations High Commissioner for Refugees and the Global Compacts on Refugees and Migration. Specific opportunities at the African regional level are subsequently discussed to support the assertion that NHRIs can perform a specific role in promoting the effective implementation of refugee rights, including as avenues for state accountability.*

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1 Introduction

The international refugee protection regime has evolved to include a myriad of legal instruments, institutions and mechanisms. In its infancy it merely was a series of agreements, which confirmed states' acceptance to cooperate to deal with refugees.¹ The regime has evolved to include binding obligations on states to protect refugees and guarantee them specific rights. The United Nations (UN) through the United Nations High Commissioner for Refugees (UNHCR) has been the lead actor in promoting refugee protection through encouraging the implementation of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol,² and by leading and coordinating international refugee protection and response.³ However, the process of implementation of its key refugee-related legal instruments has laid bare the normative and implementation gaps that hamper the effective protection of refugee rights.⁴ This has resulted in calls for the revitalisation of the protection regime.⁵ It is in this context of a pursuit for an effective protection regime that a role for national human rights institutions (NHRIs) is considered.

National human rights institutions are public institutions created to promote and protect human rights.⁶ They usually derive their mandates from legislation or a constitution.⁷ NHRIs have distinct characteristics in that, while being state institutions, they are

1 G Jaeger 'On the history of the international protection of refugees' 2001) 83 *International Review of the Red Cross* 727-736.

2 UN General Assembly 'Convention relating to the status of refugees' 28 July 1951 United Nations Treaty Series vol 189 137, <https://www.refworld.org/docid/3be01b964.html> accessed 7 May 2022); UN General Assembly 'Protocol relating to the status of refugees' 31 January 1967 United Nations Treaty Series vol 606 267, <https://www.refworld.org/docid/3ae6b3ae4.html> (accessed 7 May 2022).

3 S Collinson & E Schenkenberg *UNHCR's leadership and coordination role in refugee response settings: Desk review* (2019).

4 VN John-Langba 'The role of national human rights institutions in promoting and protecting the rights of refugees: The case of South Africa and Kenya' PhD thesis, University of Cape Town, 2020 88-101.

5 See eg K Koser 'Reforming the international protection regime: Responsibilities, roles and policy options for Australia' (2016) 3.

6 UN General Assembly 'Principles relating to the status of national institutions' Paris Principles (1993) para 1, <https://www.un.org/ruleoflaw/blog/document/principles-relating-to-the-status-of-national-institutions-paris-principles/> (accessed 29 April 2021).

7 Paris Principles (n 6) para 2.

required to be independent in form and function.⁸ They also have broad human rights mandates that serve both a promotional and protection function.⁹ They have evolved in the human rights system from peripheral actors to ones that have legal standing in UN processes and have had a normative effect in recent international law developments with respect to directly monitoring the implementation of certain human rights.¹⁰

While the trajectory of NHRIs in the international human rights system can be easily mapped, their role in the international refugee protection regime is not immediately apparent. One reason for this is the nature of the development of the two branches of international law. International human rights law and international refugee law have evolved as distinct branches of international law and the view that refugee law is a sub-set of international human rights law has been contested.¹¹ It was not until the 1980s when legal scholars such as Hathaway argued about the need to view these branches of public international law as complementary or others who viewed international refugee law as a specialised branch of international human rights law.¹² However, the trajectories had been set and the actors in the two fields of international law more or less determined. For international refugee law, the UNHCR as the custodian,¹³ and by virtue of implementing its mandate, demarcated the boundaries for formal engagement with carefully-chosen implementing and operational partners, whose activities focused on refugee rights and not human rights.¹⁴

8 Paris Principles (n 6) 'Composition and guarantees of independence and pluralism'.

9 Paris Principles (n 6) para 2.

10 See eg UN General Assembly (2015) 'Resolution adopted by the General Assembly on 17 December 2015 (on the report of the Third Committee A/70/489/Add.2) 70/163. 'National institutions for the promotion and protection of human rights A/RES/70/163 Resolution A/RES/70/163', <https://undocs.org/en/A/RES/70/163> (accessed 17 May 2021); see also art 184 of the Optional Protocol to the Convention against Torture (OPCAT) and art 332 of the Convention on the Rights of Persons with Disabilities (CRPD).

11 V Chetail 'Are refugee rights human rights? An unorthodox questioning of the relations between refugee law and human rights law' in R Rubio-Marín (ed) *Human rights and immigration* (2014) 19.

12 JC Hathaway 'Reconceiving refugee law as human rights protection' (1991) 42 *Journal of Refugee Studies* 113; JC Hathaway *The rights of refugees under international law* (2005) 1-14; Chetail (n 11).

13 UNHCR 'The 1951 Refugee Convention' (2022), <https://www.unhcr.org/1951-refugee-convention.html> (accessed 7 May 2022).

14 The UNHCR Statute states that the UNHCR shall undertake its protection mandate by: 'keeping in close touch with the governments and inter-governmental organisations concerned' (para 8(g)); 'Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees' (para 8(i)); and 'The High Commissioner may invite the co-operation of the various specialised agencies' (para 12); see also UNHCR 'UNHCR and human rights: A policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection' 1: UNHCR notes in the introductory part that 'extreme caution traditionally marked UNHCR's

International human rights law, on the other hand, did not evolve with such rigidity and thus there are more actors including a prominent role for non-state actors, for instance in the field of business and human rights. NHRIs therefore found a natural home in the 'traditional' international human rights system given their definition as institutions created to promote and protect *human rights*¹⁵ and not specifically refugee rights. Indeed, it is quite rare that a NHRI has a definitive legislative mandate to address refugee rights. This function generally is taken as implied, although there are significant implementation and operational challenges that arise in the absence of such an explicit mandate.¹⁶

Thus, the pattern of NHRI engagement with the promotion and protection of refugee rights varies widely, from some NHRIs actively engaged in such matters, such as the Uganda Human Rights Commission and the Kenya National Commission on Human Rights, to others having minimal, non-existent or *ad hoc* engagement, for example the Malawi Human Rights Commission.¹⁷ The limited engagement with refugee issues can be attributed to the NHRIs' structure (with implications for access both physical and informational) and the prioritisation of limited resources to address broader human rights concerns.¹⁸ For instance, in terms of structure, refugees and other non-citizens are unlikely to be aware of or to have access to the complaints-handling function, common among NHRIs.¹⁹ Refugee protection also tends to be highly politicised at the domestic level, and NHRIs may be reluctant to engage substantially on such matters.²⁰

A review of the global refugee protection regime indicates that there are significant opportunities for NHRI engagement with refugee rights promotion and protection in a manner that would significantly impact the realisation of refugee rights. First, considering the complementarity of the two international law regimes and the need to forge linkages between the two fields in the application and effective implementation of refugee law, naturally leads to the

approach to any suggestion that it should cooperate and collaborate with established mechanisms for the promotion and protection of general human rights principles', <https://www.refworld.org/pdfid/3ae6b332c.pdf> (accessed 9 May 2022).

15 My emphasis.

16 John-Langba (n 4) 179.

17 A Kämpf *National human rights institutions and their work on migrants: Results from a survey among NHRIs* (2016) 25; Network of African NHRIs (NANHRI) *Study on the state of African NHRIs* (2016).

18 R Carver 'Refugees and national human rights institutions: A growing engagement: Opinion piece' (2017) 9 *Journal of Human Rights Practice* 219.

19 As above.

20 As above.

determination of actors that 'serve' both fields. NHRIs are such actors and, therefore, can be located within the nexus between international human rights law and international refugee law. As such, they could provide a reimagined avenue for advancing refugee rights. Second, effective implementation requires specificity, for instance in the identification of the role that needs to be played, or the presence or acquisition of the requisite skills required for such an endeavour. Therefore, the identification of NHRIs as critical actors is not sufficient. Such a process requires that a defined role for NHRIs is determined and specific avenues for engagement created. In addition, NHRIs would need to acquire specialised skills in refugee law or bolster existing skills.

This article situates NHRIs within the nexus between international human rights law and international refugee law to frame an understanding of their role in the refugee protection regime. It then considers the evolution of the international refugee protection regime in light of the emergence of NHRIs and critically reviews their positioning with reference to the UNHCR's mandate and the Global Compacts on Refugees and Migration. Specific opportunities, including at the African regional level, are then discussed to support the assertion that NHRIs can perform a specific role in promoting the effective implementation of refugee rights, including as avenues for state accountability.

2 Situating national human rights institutions within the international refugee protection regime

National human rights institutions are considered a bridge between the international and domestic human rights systems because they facilitate the diffusion of international human rights norms and standards, including those with respect to refugee rights, into national spheres. NHRIs are increasingly considered critical actors, separate and distinct from non-governmental organisations (NGOs) and other civil society actors, with respect to the promotion and protection of human rights in general,²¹ but remain at the periphery of the refugee protection regime.

21 Paris Principles (n 6); Office of the High Commissioner for Human Rights (OHCHR) *National human rights institutions: History, principles, roles and responsibilities* (2010) 13; E Ferris 'Protracted refugee situations, human rights and civil society' in G Loescher et al (eds) *Protracted refugee situations: Political, human rights and security implications* (2008) 93.

However, the expansion of the understanding of refugee rights to include those derived from human rights instruments provides a basis for NHRIs to interpret their human rights mandates to include refugee rights and, even broadly, migrants' rights, thereby carving out a place within the nexus of international human rights law and international refugee law. Indeed, evidence from NHRI practice indicates that NHRIs across Africa are promoting and protecting migrants' rights primarily through the interpretation of their mandates broadly to encompass rights of all persons in a given state's territory.²² However, evidence also indicates that the focus is broad with few having systems in place to address refugee rights as distinct from other categories of migrants' rights²³ – a critical issue in the promotion and protection of refugee rights as the conflation of refugees and asylum seekers with other migrants hinders their access to protection, reinforces the notions of securitisation of asylum and focuses attention on border security.²⁴ This lack of demarcation of refugee rights from general migrants rights perhaps is reflective of the limited specialist expertise on forced migration or refugee law in NHRI structures.

The second aspect of the discussion on the nexus between refugee law and human rights law and its implications for NHRIs is with respect to the grounds for persecution contained in the refugee definition. In terms of the refugee definition, the 1951 Refugee Convention in article 2 does not ascribe meaning to the content of the term 'membership of a particular social group'.²⁵ However, human rights law has influenced the development of the term to include gender and sexual orientation as encapsulating membership of a particular social group and, therefore, grounds for a refugee status claim.²⁶

22 Kämpf (n 17) 25.

23 Kämpf (n 17) 27-30.

24 See eg K Moyo & F Zanker 'No hope for the "foreigners": The conflation of refugees and migrants in South Africa' (2022) *Journal of Immigrant and Refugee Studies*, DOI: 10.1080/15562948.2021.2007318; M Deridder, L Pelckmans & E Ward 'Reversing the gaze: West Africa performing the EU migration-development-security nexus (2020) *Anthropology and Development* 9-32; Mixed Migration Centre 'The ever-rising securitisation of mixed migration' 17 December 2019, <https://mixedmigration.org/articles/the-ever-rising-securitisation-of-mixed-migration/> (accessed 10 May 2022); LB Landau & C Kihato 'Securitising Africa's borders is bad for migrants, democracy, and development' *The New Humanitarian* (Johannesburg) 5 July 2017; A Ilgit & A Klotz 'How far does "societal security" travel? Securitisation in South African immigration policies' (2014) 452 *Security Dialogue* 137.

25 Neither does the 1951 Refugee Convention define the term 'persecution'. The meaning of persecution derives from human rights law. Hathaway and Forster define it as 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'. JC Hathaway & M Forster *The law of refugee status* (2014) 104-105.

26 Chetail (n 11) 27-28. There is a large body of literature on gender-related asylum law. See eg M Dustin & N Ferreira 'Improving SOGI asylum adjudication: Putting persecution ahead of identity (2021) 40 *Refugee Survey Quarterly* 315, <https://>

It has also facilitated the consideration of the specific protection needs for women refugees and asylum seekers.²⁷ Furthermore, states have applied human rights norms to determine that certain forms of violence against women, such as rape, other forms of sexual violence and female genital mutilation, constitute serious harm in the scope of persecution.²⁸

For NHRIs, especially those with a specialised mandate to promote and protect gender equality, this evolution of international refugee law to include a gendered view of the refugee experience and the persecutions that may arise on the basis of gender provides a strong basis to advance the rights of refugee and asylum-seeking women, girls and sexual minorities. Specialised NHRIs such as gender commissions already have a legal mandate to promote and protect gender equality, for example the South African Commission on Gender Equality and the Kenyan National Gender and Equality Commission. Their role in ensuring that asylum systems integrate a gendered approach and in particular take cognisance of the rights of those who either claim asylum on the basis of gender or face particularly discrimination due to their gender or perceived gender, ideally, should occur naturally.

3 The international refugee protection regime and the emergence of national human rights institutions

The foundations of the contemporary international refugee protection regime can be traced back to the League of Nations (League).²⁹ The League's legal and institutional actions with respect to refugees initially focused on Russian and Armenian refugees, but broadened with the emergence of other refugee categories in the 1920s and 1930s.³⁰ The League's work predates any informal or formal discussions on the influence that national institutions may have on the promotion and protection of the rights of refugees. However, there were hints that states needed to consider the role of

doi.org/10.1093/rsq/hdab005; M Kapron & N LaViolette 'Refugee claims based on sexual orientation and gender identity: An annotated bibliography' (2014), <https://www.oramrefugee.org/wp-content/uploads/2016/05/SOGI-Refugees-Annotated-Bibliography.pdf> (accessed 5 June 2020).

27 UNHCR 'Refugee women and international protection No 64 XLI – 1990'.

28 DE Anker 'Refugee law, gender, and the human rights paradigm' (2002) 15 *Harvard Human Rights Journal* 138-149, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:11357476> = (accessed 5 June 2020).

29 Hathaway (n 12) 75-147.

30 Hathaway (n 12) 83.

other state organs, other than foreign ministries, in advancing the League's overall goals.

As elucidated by Dubin, the idea was to decentralise the League, by transferring much of the engagement and popularisation of its ideals at the national level with the League serving a coordinating role.³¹ This would have been achieved through the creation of national offices for purposes of liaising directly with the League.³² However, it was a highly-contested issue and fell away in favour of the creation of a secretariat, staffed and run by persons independent of national processes or having direct ties to national governments.³³ The idea of the national offices gives an inkling of the views on the influence that national actors or institutions with direct ties to the international processes and mechanisms could have in advancing global ideals domestically.

This idea was taken up by the UN Economic and Social Council (ECOSOC) when in 1946 it adopted a resolution that encouraged states to establish local human rights committees to promote human rights norms domestically.³⁴ At that time, however, there was reluctance among the member states to establish such institutions as many considered human rights concerns domestic and at the states' discretion,³⁵ echoing the sentiments that led to the death of the idea of the creation of national offices directly linked to the League.

Thus, when the UN replaced the League in 1945 and took over refugee protection, there was no consideration of a role for national institutions in protecting refugees. Rather, the UN General Assembly (UNGA) resolved to establish UNHCR and tasked it with protecting refugees and overseeing the implementation of the 1951 Refugee Convention and its 1967 Protocol.³⁶ As the UNHCR's role grew, so did the notion of the importance of national human rights institutions though these trajectories run in parallel, with the UN human rights processes pushing for the recognition of these institutions, while the UNHCR trudged on independently.

Three important milestones mark the NHRI trajectory of significance in the field of international human rights. The first was in 1962 when

31 MD Dubin 'Transgovernmental processes in the League of Nations' (1983) 373 *International Organisation* 469.

32 Dubin (n 29) 471.

33 Dubin (n 29) 487-489.

34 UN ECOSOC 'ECOSOC Resolution 9 (II), 21 June 1946'.

35 S Cardenas *Chains of justice: The global rise of state institutions for human rights* (2014) 28.

36 D Kennedy 'International refugee protection' (1986) 81 *Human Rights Quarterly* 3.

the UN Commission on Human Rights (Commission) adopted a resolution that recommended the establishment of national human rights bodies by states.³⁷ These institutions would take the form of a national advisory body or local committees tasked with addressing human rights concerns and would examine the human rights situation in their respective states, offer advice to the government, and promote a culture of human rights.³⁸ This resolution built on ECOSOC's 1946 resolution, mentioned above, which sought to encourage states to establish local human rights entities tasked with promoting human rights domestically.

The second milestone was in 1978 when the Commission adopted a resolution on 'national institutions in the field of human rights' that would provide states with a reference on the basic structure and minimum functions of NHRIs.³⁹ In the subsequent decade, following the adoption of the 1978 resolution, the UN prepared a series of reports on the viability of national institutions as mechanisms for the promotion and protection of human rights.⁴⁰ The findings from these reports formed the basis for the 1991 UN International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris, France, and marks the third milestone.⁴¹ This workshop led to the drafting of guiding principles on national institutions for the promotion and protection of human rights, which were eventually adopted and endorsed by the UN as the Paris Principles in 1993.⁴²

Thus, the 1990s proved seminal for NHRIs. The idea of setting up NHRIs as an essential component of the domestic human rights system became widely accepted, including in Africa, where between

37 CHR Res 9 (XVIII) of 27 March 1962, https://digitallibrary.un.org/record/220223/files/E_3616_Rev.1_E_CN.4_832_Rev.1-EN.pdf (accessed 9 May 2022); see also A Pohjolainen *The evolution of national human rights institutions: The role of United Nations* (2006).

38 UN Commission on Human Rights, Report of the 18th session 19 March – 14 April 1962/ ECOSOC official records 34th session supplement (1962) 43, https://digitallibrary.un.org/record/220223/files/E_3616_Rev.1_E_CN.4_832_Rev.1-EN.pdf (accessed 9 May 2022).

39 UN Commission on Human Rights 'Resolution on national institutions in the field of human rights'; Annex: Some possible functions which could be performed by national institutions in the field of human rights, if so decided by the government concerned, CHR Res 23 (XXIV) of 8 March 1978 131, <https://digitallibrary.un.org/record/220211?ln=en> (accessed 9 May 2022). See also GA Res 46, 83, UN GAOR, 33rd sess, UN Doc. A/RES/33/46 (1978)

40 UN Seminar on national and local institutions for the promotion and protection of human rights organised by the United Nations Division of Human Rights, Geneva, 18-29 September 1978, <https://digitallibrary.un.org/record/731550?ln=en> (accessed 9 May 2022); A/36/440 (1981); A/38/416 (1983); A/39/556 (1984); E/CN.4/1987/37; E/CN.4/1989/47.

41 GANHRI '25th anniversary of the Paris Principles', <https://nhri.ohchr.org/EN/Pages/25thAnniversary.aspx> (accessed 9 February 2021).

42 Paris Principles (n 6).

1990 and 2010 over 25 NHRIs were established,⁴³ although this proliferation was closely linked with political reform rather than the idea that NHRIs could promote specific rights or group rights.⁴⁴ As such, there was no formal agreement on the definition of a NHRI or a standard model for the design of such institutions resulting in variation in legal frameworks and methods of operation. For instance, among African NHRIs, establishment occurred through legislation, constitution, by decree or a combination of these legal bases.⁴⁵ In addition, these considerations of the nature and status of NHRIs did not include a specific role for such institutions in the realm of refugee rights, reflecting the divergence between the two fields of international law with implications on the extent to which NHRIs could draw support in engaging with the UNHCR and in turn with refugee protection.

4 The United Nations High Commissioner for Refugees, its mandate and the implications for national human rights institutions

The UNHCR is described as the guardian of the 1951 Refugee Convention and its 1967 Protocol.⁴⁶ It is tasked mainly with providing international protection to refugees and other persons within its competence and to seek permanent solutions to their problems.⁴⁷ The UNHCR has both direct and indirect mandates. Its direct mandate stems primarily from its statute and from resolutions of the General Assembly or ECOSOC. It should be noted that while these resolutions extend the UNHCR's functional responsibilities, they do not directly impose obligations on states as state obligations derive from the relevant treaties.⁴⁸

43 T Pegram 'Diffusion across political systems: The global spread of national human rights institutions' (2010) 323 *Human Rights Quarterly* 738, DOI: 10.1353/hrq.2010.0005.

44 Human Rights Watch *Protectors or pretenders? Government human rights commissions in Africa* (2001), <https://www.hrw.org/reports/2001/africa/overview/record.html> (accessed 18 April 2021).

45 NANHRI (n 17) 14.

46 UNHCR, <http://www.unhcr.org/1951-refugee-convention.html> (accessed 18 April 2021).

47 These categories of persons that fall within its mandate are provided in the UNHCR Statute paras 1, 8, 9 and 10 and in subsequent General Assembly or ECOSOC resolutions. These are refugees and asylum seekers; stateless persons; returnees; the internally-displaced and persons threatened with displacement or otherwise at risk; UN, Statute of the Office of the High Commissioner for Refugees, UN General Assembly Resolution 428 (V) 14 December 1950 art 8.

48 Hathaway (n 12) 94; GS Goodwin-Gill & J McAdam *The refugee in international law* (2007) 428.

The UNHCR also derives its mandate from international refugee law and international human rights law. For instance, article 35 of the 1951 Refugee Convention and article 2 of its 1967 Protocol define a supervisory role for the UNHCR.⁴⁹ At the African regional level, the UNHCR derives this role through article 8 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Refugee Convention) which recognises the Convention's complementary nature to the 1951 Refugee Convention (article 8(2)) and requires member states to cooperate with the UNHCR (article 8(1)).⁵⁰ From international human rights law, Türk⁵¹ notes that it derives an indirect mandate from provisions such as articles 22 and 45 of the 1989 Convention on the Rights of the Child (CRC)⁵² and article 11 of the 1961 Convention on the Reduction of Statelessness.⁵³ It thus straddles both branches of international law, but has played a minimal role as an actor in the international human rights law sphere.

The UNHCR plays an important role in international refugee protection. It operates in a complex and dynamic context that is heavily influenced by states and limited in resources, which has resulted in implementation challenges. Yet, it has made important strides towards advancing refugee protection. For example, the UNHCR promoted the understanding of refugee protection through a human rights-based approach, for instance by encouraging the notion that human rights law can reinforce and supplement existing refugee law.⁵⁴ This has opened up avenues for the protection of refugees (and other forcibly-displaced persons) beyond the traditional refugee framework.⁵⁵ Notwithstanding this, there is limited evidence, both in terms of research and practice, that the UNHCR has engaged with NHRIs as key actors in advancing refugee protection. This may be viewed as surprising given that the UNHCR

49 Art 35 of the 1951 Refugee Convention; art 2 of the 1967 Protocol to the 1951 Refugee Convention.

50 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) 10 September 1969, 1001 UNTS 45, <https://www.refworld.org/docid/3ae6b36018.html> (accessed 7 May 2022).

51 V Türk 'The role of UNHCR in the development of international refugee law' in F Nicholson & P Twomey (eds) *Refugee rights and realities: Evolving international concepts and regimes* (1999) 155.

52 UN Commission on Human Rights Convention on the Rights of the Child 7 March 1990, E/CN.4/RES/1990/74, <https://www.refworld.org/docid/3b00f03d30.html> (accessed 7 May 2022).

53 UN General Assembly Convention on the Reduction of Statelessness 30 August 1961 United Nations Treaty Series 989 175, <https://www.refworld.org/docid/3ae6b39620.html> (accessed 7 May 2022).

54 Türk (n 51) 153-174; UNHCR 'Human rights and refugee protection' (1995), <https://www.unhcr.org/3ae6bd900.pdf> (accessed 9 May 2022).

55 Türk (n 51).

also derives its mandate from international human rights law and has promoted the understanding of refugee rights as human rights.

National human rights institutions have been identified as key in the domestication of human rights norms and standards and exert significant influence in some of the UN processes that directly relate to human rights and, in turn, state accountability for poor human rights implementation and violations. Recent developments in international human rights law, such as the drafting of the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention against Torture (OPCAT), were heavily influenced by contributions by NHRIs.⁵⁶ The inclusion of accountability mechanisms that comply with the UN Paris Principles in both treaties is evidence of their influence. In addition, African NHRIs participated in the commemoration of the Robben Island Guidelines for the Prohibition and Prevention of Torture of the African Commission on Human and Peoples' Rights (African Commission) in 2012, in collaboration with the South African Human Rights Commission.⁵⁷ Furthermore, the Network of African National Human Rights Institutions (NANHRI), the regional grouping of African NHRIs, has identified torture prevention as a thematic area and has developed close working relationships with expert organisations in the field such as the Association for the Prevention of Torture (APT) to build the capacity of African NHRIs in the prevention of torture.⁵⁸ The continued reference to NHRIs in other important agreements, such as the Global Compact on the Safe, Orderly and Regular Migration (Global Compact on Migration)⁵⁹ points to their growing influence in the development of norms in the international system.

On the other hand, the near complete absence of NHRIs in the processes related to refugee protection until recently may be due to several factors. As discussed above, NHRIs, traditionally viewed as functioning in the traditional human rights context and evolved as such, did not receive substantive consideration in the UN processes until the 1970s, that is, almost two decades after the signing of the

56 An NHRI working group participated in the OPCAT drafting process.

57 SAHRC '10th anniversary of the Robben Island Guidelines: Putting an end to torture in Africa' (2012), <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/163-10th-anniversary-of-the-robben-island-guidelines> (accessed 9 May 2022).

58 See eg NANHRI, APT 'Preventing torture in Africa: Lessons and experiences from national human rights institutions' (2016).

59 UN General Assembly 'UN global compact on safe, orderly and regular migration' A/RES/73/195 paras 15(j), 18(c), 27(c), 28(c), 31(d), 33(d) & 44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement> (accessed 9 May 2022).

1951 Refugee Convention and a few years after the conclusion of its 1967 Protocol.

In addition, in the UN architecture NHRIs' guardianship rests with the OHCHR through its National Institutions and Regional Mechanisms section.⁶⁰ This positioning of NHRIs under the auspices of the OHCHR may have influenced the focus on issues traditionally viewed to fall within the scope of international human rights law rather than broadly to also include the UNHCR's work. This is also reflected by the fact that the UNHCR's annual consultations have been held for over three decades with NGOs and civil society, but not with NHRIs.⁶¹

The result is that NHRIs are peripheral actors in the international refugee protection regime and their engagement with the UNHCR at global and country levels is not systematic and might not yield the optimal results to ensure effective promotion and protection of refugee rights. For instance, the UNHCR's governing body, the Executive Committee, holds annual meetings that precede the UNHCR's annual consultations with partners.⁶² The Executive Committee, which comprises states, not only discusses budgetary and organisational matters, but also prevailing refugee protection concerns.⁶³ In terms of the latter, the Executive Committee adopts Conclusions on International Protection which, while not binding, have persuasive authority and can be the basis for NHRIs to leverage positive state behaviour with respect to refugee protection including compliance with reporting on domestic progress made with respect to meeting obligations towards refugees and asylum seekers.⁶⁴

NHRIs may also occupy a peripheral role, as they might be viewed as lacking the specialist expertise on refugee rights characteristic of the organisations with which the UNHCR works.⁶⁵ The UNHCR is also categorical in its requirement to work with organisations or institutions that address refugee rights either in part or wholly and

60 OHCHR 'OHCHR and NHRIs', <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> (accessed 30 May 2020).

61 Based on a review conducted up to May 2020 of information on consultative meetings as available on UNHCR's website.

62 Established by ECOSOC Resolution 672(XXV) in 1958, came into existence on 1 January 1959; UNHCR 'Executive committee's origins and mandate', <https://www.unhcr.org/executive-committee.html> (accessed 17 April 2021).

63 As above.

64 As above.

65 Recognition of partnership with UNHCR includes a 'demonstrated interest in refugee matters'. See UNHCR 'A guide for participants: Annual consultations with NGOs', <https://www.unhcr.org/afr/events/conferences/5aa7e1377/2018-unhcr-annual-consultations-ngos-guide-participants.html> (accessed 30 May 2020).

are not merely human rights organisations. This is reflected in the UNHCR's guide for participants for the annual consultations which sets out the strict criteria that participants must meet in order to participate in the consultations.⁶⁶ Thus, for instance, a NHRI must either be a member of the International Council of Voluntary Agencies; have a consultative status with ECOSOC *with a demonstrated interest in refugee matters*; or be a *UNHCR implementing or operational partner*, which has received a *formal letter of recommendation from a UNHCR official* to participate.⁶⁷ Given their distinct characteristic as legislative institutions established by states and the need to reinforce their difference from civil society organisations, NHRIs coalesce through an independent network, the Global Alliance of National Human Rights Institutions (GANHRI).⁶⁸ It would thus be logical for NHRIs to rather influence participation independently through GANHRI rather than through membership of the International Council of Voluntary Agencies, a civil society organisation-based network.

However, GANHRI, being constituted of only NHRIs, has not garnered the refugee rights expertise profile necessary to demand such recognition in the UNHCR's processes. The latter two criteria point to the need for specialist skills relevant to UNHCR's mandate. Few NHRIs have the express mandate to address refugee rights. In Africa only two NHRIs have a specific role in refugee protection that is defined by their establishing legislation. These are the Rwandan National Commission for Human Rights⁶⁹ and the Zimbabwean Human Rights Commission.⁷⁰ Some NHRIs, such as the South African Human Rights Commission and the Kenya National Commission

66 As above.

67 UNHCR (n 66) (my emphasis).

68 GANHRI, <https://ganhri.org/> (accessed 4 August 2021).

69 This explicit function was included following an amendment to its establishing legislation done initially in 2013 and expounded upon in 2018: Law 61/2018 of 24/08/2018 Modifying Law 19/2013 of 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018. Art 1: Special responsibilities of the Commission as regards the protection of human rights; art 6 of Law 19/2013 of 25 March 2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows: Regarding the protection of human rights, the Commission has the following special responsibilities: (1) to monitor the compliance with the human rights, in particular with the rights of the child, woman, persons with disabilities, people living with HIV/AIDS, *refugees*, migrant workers and members of their families and elderly's rights. Law 61/2018 of 24 August 2018 Modifying Law 19/2013 of 25 March 2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018.

70 The Zimbabwe Human Rights Commission is constitutionally entrenched in ch 12, secs 232-244 of the Constitution. It provides as follows: '243 Functions of Zimbabwe Human Rights Commission (1) The Zimbabwe Human Rights Commission has the following functions ...(k) to visit and inspect (i) prisons, places of detention, refugee camps and related facilities'. Zimbabwe Constitution ch 12 secs 232-244 of the Constitution.

on Human Rights, have created what is termed as a focus area on migrants.⁷¹ This is based on an assessment of pertinent human rights concerns in their respective countries that have been identified as requiring focused attention – usually as a result of higher levels of rights violations experienced by the category of persons.⁷² Surveys conducted by NHRIs have also determined that there is a general lack of expertise among NHRI staff to effectively address such rights, a low level of interest or a legal requirement not to deal with the rights of non-nationals.⁷³ This would mean that participation would be on a case-by-case basis limiting the potential for the development of a coherent process through which NHRIs can engage with the UNHCR's processes.

However, the UNHCR recently developed guidelines for engagement with NHRIs through a process that the UNHCR described as 'widely consultative and supported by comprehensive desk research'.⁷⁴ This is a commendable step as erstwhile there was little if any formal collaboration with NHRIs at the global level.⁷⁵ Where collaboration existed, it appeared *ad hoc*. For instance, in Kenya the UNHCR collaborated with the Kenya National Commission on Human Rights on the constitutionality of the decision of the Kenyan government to summarily close refugee camps but not as part of a long-term strategic collaboration on addressing protection challenges faced in the Kenyan context.⁷⁶ In South Africa the UNHCR developed and implemented a comprehensive national anti-xenophobia campaign in collaboration with the South African Human Rights Commission,⁷⁷ but this did not result in the development of a long-term collaborative intervention strategy to address xenophobia and xenophobic violence against refugees and asylum seekers.⁷⁸ The guide thus provides a good starting point for a coherent and perhaps strategic engagement with NHRIs. Crucially, the development of this guide points to the recognition of the importance that actors such as NHRIs can play in the refugee protection regime. It may

71 John-Langba (n 4) 226.

72 John-Langba (n 4) 180.

73 Kämpf (n 17); NANHRI (n 17).

74 UNHCR *Guide on UNHCR's engagement with national human rights institutions* (2020), <https://www.unhcr.org/protection/operations/5f92a5604/guidance-unhcrs-engagement-national-human-rights-institutions.html> (accessed 3 May 2021).

75 John-Langba (n 4).

76 *Kituo Cha Sheria & 8 Others v Attorney-General* [2013] eKLR 2.

77 J Parsley "'We are not treated like people": The roll-back xenophobia campaign in South Africa' (2003), <https://odihpn.org/magazine/we-are-not-treated-like-people-the-roll-back-xenophobia-campaign-in-south-africa/> (accessed 9 August 2019).

78 UNHCR *Protection from xenophobia: An evaluation of UNHCR's regional office for Southern Africa's xenophobia related programmes* (2015) 25; John-Langba (n 4) 211.

also serve as a catalyst to address some of the implementation and accountability gaps that exist in the refugee protection regime, ultimately relocating NHRIs from the periphery of the international refugee protection regime to a defined place within it. This would be especially important for African NHRIs, given that Africa hosts some of the largest refugee and asylum-seeker populations on the globe.⁷⁹

The guide as is merely seeks to explain what NHRIs are and are not and simply recommends possible ways for working with NHRIs and lists some of these without exploring the possible challenges that may be faced in partnering with these institutions and recommending ways to navigate these challenges.⁸⁰ It also is not a document that proposes to grant NHRIs formal recognition in the UNHCR's work in a similar manner to the guidelines that several treaty bodies have developed which formally grant NHRIs *locus standi* resulting in more robust engagement.⁸¹

Despite the absence of explicit mandates for refugee rights promotion and protection, several NHRIs have formally designated either 'refugees' or 'migrants' as a thematic area of work or have undertaken activities with respect to these categories of persons and others such as 'asylum seekers' and 'stateless persons'. These include the South African Human Rights Commission; the Uganda Human Rights Commission; the Mauritius National Human Rights Commission; the Commission for Human Rights and Good Governance of Tanzania; and the Kenya National Commission on Human Rights.⁸² The Malawi Human Rights Commission has also

79 UNHCR 'Africa' (2022), <https://www.unhcr.org/africa.html> (accessed 9 May 2022).

80 UNHCR (2020) (n 75) 63-64; see John-Langba (n 4) for challenges encountered by NHRIs in the context of refugee protection.

81 Besides a number of resolutions on NHRIs that the General Assembly adopts, the Human Rights Committee (HRC) and the following treaty bodies have formally recognised NHRIs in their working methods: the Committee Against Torture (CAT); the Committee on Migrant Workers (CMW); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Rights of Persons with Disabilities (CRPD); the Committee on Enforced Disappearances (CED); and the Committee on the Elimination of Discrimination against Women (CEDAW). See eg CEDAW (2008) 'Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions' E/CN.6/2008/CRP.1, <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/StatementOnNHRIs.pdf> (accessed 27 February, 2021); HRC (2012) 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session 15 October–2 November 2012, CCPR/C/106/3', http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en (accessed 27 February 2021); and CED (2014) 'The relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6, 28 October 2014'.

82 See CM Fombad (ed) *Compendium of documents on NHRIs* (2019).

extended its role in torture prevention to include monitoring refugee camps.⁸³

5 The global compacts on refugees and migration – Missed opportunities for national human rights institutions?

The Global Compact on Refugees (GCR)⁸⁴ and the Global Compact for the Safe, Orderly and Regular Migration (Global Compact for Migration)⁸⁵ are the outcomes of a UN-led process to determine avenues for the international community to effectively respond to migration, whether forced or voluntary. The two compacts are complementary but non-binding and their implementation relies on global consensus through a multi-stakeholder approach.⁸⁶ The Global Compact on Refugees, which is the blueprint for states' responsibility sharing for refugees and asylum seekers, is silent on NHRIs. In contrast, the Global Compact for Migration includes NHRIs as key partners in its implementation.⁸⁷

The Global Compact for Migration adopts the emerging normative trend to promote independent human rights institutions such as NHRIs as a monitoring mechanism.⁸⁸ For example, it proposes that NHRIs would monitor migrants' access to basic services and that they would play a vital role in preventing, detecting and responding to racial, ethnic and religious profiling of migrants by state authorities.⁸⁹ It also envisages a key role for NHRIs in addressing systemic challenges related to intolerance, xenophobia, racism and all other multiple and intersecting forms of discrimination.⁹⁰ While the compacts have been conceived as complementary, with the assumption that their implementation would draw from both processes where overlaps occurred,⁹¹ in the context of this article the challenge identified is linked to the inclusion of NHRIs in one process and the absence of

83 Fombad (n 83) 510.

84 UNHCR Global compact on refugees, A/73/12 (Part II) affirmed by UN General Assembly Resolution A/RES/73/151.

85 UN General Assembly (n 60).

86 UNHCR (n 85) B5 Guiding Principles 3; UN The Global Compact for Migration (n 60) paras 15 & 44.

87 UN (n 60) paras 15, 18(c), 27(c), 28(c), 31(d), 33(d) & 44; a NHRI task force was set up to lead NHRI engagement with the global consultative process for the Global Compact for Safe, Orderly and Regular Migration (GCM) and its implementation, which resulted in the inclusion of NHRIs in its implementation. Kämpf (n13) 17.

88 See art 33 CRPD and art 182 OPCAT.

89 UN (n 87) para 31(d).

90 UN (n 87) para 33(d).

91 V Türk 'The promise and potential of the global compact on refugees' (2018) 304 *International Journal of Refugee Law* 577-578.

a defined role for NHRIs in the other process. As such, would this influence the NHRIs focus on migration rights broadly at the expense of refugee rights?

The reported NHRI activities seem to indicate that this is the case. GANHRI and NHRIs across the globe have embarked on the process of operationalising their role with respect to the compact on migration at the expense of that on refugees – in other words, the rights of migrants and not the rights of refugees. For instance, GANHRI conducted a baseline survey to determine the extent to which NHRIs worked on migration issues.⁹² While the survey provided specific examples of the work of NHRIs with respect to refugees and asylum seekers, these activities fell within the broader migrants' rights theme and there was no specific delineation of refugee rights given their distinct legal status. According to GANHRI, the focus of the survey was on human rights issues of migration and not specifically on asylum and refugee-related aspects as these fell within the purview of another compact (that is, the Global Compact on Refugees).⁹³ However, this survey would have served as an important basis to determine the extent to which NHRIs specifically addressed refugee rights and, in turn, inform a strategic approach for implementing the compacts as complementary rather than parallel processes.

At the African regional level the Network of African National Human Rights Institutions (NANHRI) is implementing a migration programme that focuses on the role of NHRIs in addressing irregular migration in the context of the compact on migration. NANHRI comprises 46 NHRIs and is mandated, among others, to coordinate NHRI activities, to support their establishment and to build NHRIs' capacity to discharge their mandates.⁹⁴ The inclusion of the objective on monitoring refugee rights was a compromise and the agreed intervention with respect to refugee rights was only with respect to immigration detention.⁹⁵ This compromise was directly influenced by the political context within which the programme was conceived – the European migrant crisis and the role that frontier African countries such as Morocco and Tunisia could play in stemming the flow of irregular migrants and asylum seekers into Europe.⁹⁶ Therefore, while the specific areas noted for NHRI responsibility in the Global Compact for Migration apply equally to refugees and asylum

92 Kämpf (n 17).

93 Kämpf (n 17) 17.

94 NANHRI 'Our members' (2022), <https://www.nanhri.org/members/> (accessed 9 May 2022).

95 John-Langba (n 4) 70; see NANHRI 'Migration in Africa: Promoting respect of fundamental rights for refugees and migrants in transit camps' (2018) 3 5.

96 John-Langba (n 4) 70.

seekers, the subsequent NHRI practice reinforces a separation rather than synergising efforts to address migrants' rights and refugee rights.

6 Refugee protection in Africa: Opportunities for national human rights institutions

In the African region the refugee rights regime is governed primarily by the 1969 OAU Refugee Convention. The OAU Refugee Convention is silent about the role of national institutions in the promotion and protection of refugee rights. However, in the African context the entity tasked with the promotion and protection of human rights is the African Commission on Human and Peoples' Rights (African Commission). The African Commission was created under article 30 of the African Charter on Human and Peoples' Rights (African Charter) and plays an oversight role in the implementation, interpretation and application of all other human rights treaties, including the OAU Refugee Convention.⁹⁷ In article 26 the African Charter requires states to establish and improve national institutions mandated to promote and protect human rights.⁹⁸

Thus, the African Charter formally recognises a role for institutions such as NHRIs and provides a legal basis for the African Commission to formally work with NHRIs, including in the context of the promotion and protection of refugee rights. This is by virtue of its function to oversee the implementation and interpretation of the African Charter and its protocols, including with respect to those articles that specifically relate to refugee rights, and the promotion of the implementation of the 1969 Refugee Convention. While the regional framework locates NHRIs clearly within the human rights regime, there is limited evidence of substantive engagement between the African Commission and NHRIs either with respect to the promotion and protection of human rights, broadly, or specifically with respect to refugee rights.⁹⁹

Other regional mechanisms that could provide opportunities for NHRIs to promote and protect refugee rights are the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the new merged court (through the amalgamation of the African Court on Human and Peoples' Rights

97 Art 30.

98 Art 26.

99 John-Langba (n 4) 74-80.

(African Court) and the African Court of Justice).¹⁰⁰ The African Commission, the African Children's Committee and the African Court have all addressed refugee rights matters.¹⁰¹ However, it is the African Commission that has engaged more frequently and substantively on refugee-related matters, including through the creation of the mandate of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons (Special Rapporteur) and signing a memorandum of understanding with the UNHCR to facilitate the promotion of refugee rights in the region.¹⁰²

There are other entities within the African Union (AU) that have a mandate for refugee rights promotion and protection, but these operate distinctly from the African Commission and this has led to an incoherent approach for advancing refugee rights at the regional level.¹⁰³ However, this part will focus on the African Commission and its mechanisms with respect to refugee rights given its formal recognition of NHRIs.

The relationship between the African Commission and African NHRIs is facilitated primarily through the regional NHRI network – NANHRI. For instance, it is through NANHRI that NHRIs have negotiated their recognition before the African Commission. It is also through NANHRI that NHRIs coordinate their participation at the African Commission's public sessions. NANHRI has also developed guidelines for NHRIs to support their engagement with the regional mechanisms.¹⁰⁴ While the guidelines do not specifically address engagement in terms of refugee rights promotion and protection, they provide a succinct approach which, if implemented by NHRIs, would result in an enhanced engagement between them and the regional mechanisms and processes.

100 See also M Sharpe *The regional law of refugee protection in Africa* (2018) 155-188, 205, 218.

101 G Bekker 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 9; Sharpe n (100) 192-218.

102 African Commission 'Resolution on the renewal of the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa' 61st ordinary session 1-15 November 2017 ACHPR/Res.379.

103 Sharpe (n 100) notes that the African Commission's work on refugee issues occurs largely in isolation of AU's efforts and that it has failed to collaborate with other AU refugee-related entities (156-219). These include the Specialised Technical Committee (STC) on Migration, Refugees and IDPs; the Permanent Representatives' Committee (PRC) Sub-Committee on Refugees, Returnees and IDPs; the Coordinating Committee on Forced Displacement and Humanitarian Action; and the Divisions of Humanitarian Affairs, Refugees and Displaced Persons.

104 Eg NANHRI *Guidelines on the role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples' Rights and judgments of the African Court on Human and Peoples' Rights* (2016).

The African Commission offers specific avenues for engagement through its public sessions and special mechanisms, but these remain substantially underexplored by African NHRIs.¹⁰⁵ The interaction between the African Commission and the NHRIs is governed by the resolution on the granting of affiliate status to NHRIs and its rules of procedure as revised in 2020.¹⁰⁶ The resolution affords NHRIs legal standing before the African Commission. It sets out the criteria for granting the status and the responsibilities that arise for NHRIs once accorded the affiliate status.¹⁰⁷ It is through this affiliate status that NHRIs can participate in the work of the African Commission and its mechanisms, including attendance at its public sessions.

During the African Commission's public sessions NHRIs with an affiliate status can address any human rights issue of concern, including demanding state accountability for violations of refugee rights.¹⁰⁸ The NHRIs can also propose items for the agenda (subject to the Commission's Bureau's final approval) and address those issues during the public sessions.¹⁰⁹ NHRIs are also required to report on their activities and can utilise this function to raise issues of concern to the African Commission. Crucially, both the updated affiliate status resolution and the rules of procedure have widened the scope of human rights institutions recognised by the African Commission to include specialised human rights institutions.¹¹⁰ This would include institutions such as the gender commissions and ombudsman that are generally left out where UN processes are concerned because of the strict gatekeeping role that GANHRI implements which limits formal engagement with those that have an accredited status based on the Paris Principles.

Of note, the African Commission adopts country-specific as well as thematic resolutions specifically on refugees and displaced persons during its sessions that require follow up in terms of implementation

105 BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 41-43; NANHRI (n 84) 7. See also RD Nanima 'The ACHPR and ACERWC on ending child marriage: Revisiting the prohibition as a legislative measure' (2019) 203 *Economic and Social Rights Review* 12; John-Langba (n 4) 243-244, 287, 303.

106 The Resolution on Granting Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa (ACHPR NHRI Resolution) ACHPR/Res.370LX(2017) replaced the 1998 Resolution on Granting Observer Status to National Human Rights Institutions in Africa ACHPR/Res.31.

107 ACHPR NHRI Resolution (n 106) paras 1-5.

108 Sharpe n (100) 198: The African Commission has interpreted its mandate to encompass the other African human rights treaties other than the African Charter.

109 Centre for Human Rights (CHR) *A guide to the African human rights system* (2016) 14.

110 ACHPR NHRI Resolution (n 106) paras 1-5.

– a role that fits within NHRIs’ mandates.¹¹¹ The Commission has also made Concluding Observations about areas of concern as well as the need for action in respect of the protection of refugee rights.¹¹² The Commission also develops interpretative guidance on the content of certain rights, which may have implications for the rights of refugees and asylum seekers. For instance, General Comment 5 on article 12(1) of the African Charter on the right to freedom of movement and residence provides detailed guidance on the situation of refugees, asylum seekers, internally-displaced persons and migrants.¹¹³ NHRIs, for example, can participate in the development of such General Comments and advocate state consideration of the General Comment with respect to the realisation of the relevant right. However, the African Commission lacks a mechanism to follow up on its recommendations and Concluding Observations. NHRIs can bridge this identified gap given that they perform a similar function within the UN mechanisms and processes, with respect to state reporting and follow up on recommendations or Concluding Observations. Importantly, the African Commission revised its Rules of Procedure at its twenty-seventh extraordinary session to require the transmission of its Concluding Observations on state reports to NHRIs of which the states were under review.¹¹⁴ This amendment to the Rules of Procedure was done precisely to enhance the role of NHRIs in following up with the African Commission’s recommendations.¹¹⁵

The African Commission also has a special procedure, namely, the Special Rapporteur. The creation of this mandate has contributed to the Commission’s promotional activities with respect to refugee rights and those of internally-displaced persons in the region.¹¹⁶ There have been various critiques related to the value of the mandate. For instance, Naldi and D’Orsi conclude that the mandate has had limited

¹¹¹ Bekker (n 101) 20-25.

¹¹² As above.

¹¹³ African Commission General Comment 5 on the African Charter on Human and Peoples’ Rights: The right to freedom of movement and residence (art 121), <https://www.achpr.org/legalinstruments/detail?id=74> (accessed 9 May 2022).

¹¹⁴ African Commission Rules of Procedure of the African Commission on Human and Peoples’ Rights 2020, adopted by the African Commission on Human and Peoples’ Rights during its 27th extraordinary session held in Banjul, The Gambia, 19 February-4 March 2020, https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf (accessed 9 May 2022).

¹¹⁵ Ch XV Rules of Procedure of the African Commission 2020. The African Commission notes: ‘In order to enhance the role of national human rights institutions (NHRIs) in follow-up on recommendations of the Commission, provides that the Concluding Observations on State Reports would be transmitted to the NHRIs in addition to the government.’ African Commission ‘Press release on publication of new rules of procedure of the African Commission on Human and Peoples’ Rights, 2020’, *ACHPR* 7 July 2020, <https://www.achpr.org/pressrelease/detail?id=518> (accessed 12 July 2020).

¹¹⁶ Sharpe (n 100) 24.

effect and that the African Commission should reconsider its role.¹¹⁷ Viljoen argues that the special procedure mandates, in general, take away from the Commission's limited resources and detract from its core protective function.¹¹⁸ In addition, Sharpe found that the current focus was not on refugees and asylum seekers, but rather on internally-displaced persons, nationality and statelessness, noting here that the mandate as provided for in its enabling resolution refers only to activities with respect to 'refugees, asylum seekers and internally-displaced persons'.¹¹⁹ The UNHCR's relationship with the mandate has also evolved to focus entirely on issues related to nationality and statelessness and not on refugees and asylum seekers, as had been indicated in its memorandum of understanding with the African Commission.¹²⁰

With respect to NHRIs, the Special Rapporteur has a comprehensive mandate that includes the requirement to 'cooperate and engage in dialogue with member states, *National Human Rights Institutions*¹²¹ ... in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons'.¹²² Thus, NHRIs can engage directly with the Special Rapporteur. Notwithstanding this, a review of the Special Rapporteurs' activity reports revealed scant reference, if at all, to NHRIs. Of the nine publicly-available reports, only two Special Rapporteur's activity reports make any specific recommendations to NHRIs.¹²³ The Special Rapporteur's report presented in 2012 to the fifty-second ordinary session refers to the mandate holder's participation in only one event organised by NHRIs, that is, a conference in 2007, and offers general recommendations to NHRIs.¹²⁴ The Special Rapporteur's report to the forty-sixth ordinary session makes recommendations to NHRIs to promote the ratification

117 GJ Naldi & C d'Orsi 'The role of the African human rights system with reference to asylum seekers' in A Abass & F Ippolito (eds) *Regional approaches to the protection of asylum seekers: An international perspective* (2014) 40, cited in Sharpe (n 100) 209.

118 F Viljoen *International human rights law in Africa* (2012) 296-297.

119 African Commission 'Resolution on the renewal of the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internationally Displaced Persons in Africa' 61st ordinary session, 1-15 November 2017 ACHPR/Res.379.

120 Sharpe (n 100) 209.

121 My emphasis.

122 African Commission (n 115).

123 Based on a review of the reports conducted in 2020 by the author of reports available on the African Commission's website. These are the report presented to the 52nd ordinary session in October 2012 and the report presented to the 46th ordinary session in November 2009.

124 M Sahli-Fadel 'Report of the mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced and Migrants in Africa since its creation, 52nd ordinary session of the African Commission on Human and Peoples' rights, Yamoussoukro, Cote d'Ivoire, from 9 to 22 October 2012' paras 46 & 61, <https://www.achpr.org/sessions/intersession?id=142> (accessed 4 August 2021).

of the Kampala Convention.¹²⁵ There is no specific reference or indication that the Special Rapporteurs have engaged substantively with NHRIs with respect to refugee rights promotion and protection. From the reports it appears that the relationship with NHRIs is not necessarily deemed distinct from that with civil society organisations.

As indicated earlier, there are challenges that hamper the constructive engagement between the African Commission as the custodian of the African human rights treaties and NHRIs as one of the implementation conduits. Nonetheless, the discussion above highlights important ways through which NHRIs can engage substantively with the mechanisms and processes in place. Also, the African Commission has displayed goodwill towards working with NHRIs. Beyond adopting the NHRI resolutions and incorporating these in its Rules of Procedure, the African Commission has also contributed to the development of some modalities for engagement with NHRIs in various thematic areas. These include in the prevention of torture, in the follow up with implementation of its recommendations and access to information for Africa.¹²⁶

In addition, numerous former NHRI commissioners have served or currently serve as commissioners in the African Commission, thereby precluding notions that NHRIs may be unfamiliar actors for human rights promotion and protection in Africa.¹²⁷ Should further clarity on the modalities for substantive engagement be determined, especially with the Special Rapporteur on Refugees, NHRIs could make important contributions to the promotion and protection of refugee rights. In turn, this would influence the development of clearer channels for engagement between the domestic and regional levels with respect to the realisation of refugee rights and contribute to the development of norms for African NHRIs' engagement with refugee rights.

Unlike international human rights law, the regional human rights law in Africa has codified NHRIs as constituent elements of an effective human rights framework. Their inclusion within the

125 BTM Nyanduga 'Report of activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the intersession period between May and November 2009' para 13, <https://www.achpr.org/sessions/intersession?id=131> (accessed 4 August 2021).

126 NANHRI coordinated NHRI involvement in these processes. The author was involved in the launch of the Robben Island Guidelines for the Prohibition and Prevention of Torture while working for the SAHRC and several SAHRC employees were included in the consultation process during the development of the guidelines. In addition, several SAHRC staff members were also involved in the development of the Model Law on Access to Information for Africa through the SAHRC's Access to Information Unit.

127 CHR (n 109) 13.

regional human rights and processes has both legal and political support. However, what is lacking is the uptake of the opportunities for engagement to enhance the realisation of refugee rights due to operational challenges and institutional weaknesses faced by the African Commission and the NHRIs.

7 Conclusion

The evolution of the international refugee protection regime has occurred to the exclusion of some key actors, namely, NHRIs. From its infancy, the refugee protection regime has been characterised by the pursuit of national interests and a reluctance by states to fully commit to the responsibility of effectively resolving forced displacement. States have shifted their consideration of refugee protection from a humanitarian and protection character to that of national interest, which has little regard for complying with international legal obligations. Therefore, a reconceptualisation of refugee protection in human rights terms presents practical opportunities to remedy both the normative and implementation gaps that exist. It is in such a reconceptualisation that NHRIs may have a pivotal role.

Crucially, is the task of determining whether having an explicit refugee rights mandate has a direct impact on a NHRI's effectiveness on promoting and protecting these rights. In this regard, the first hurdle that would need to be overcome would be measuring the impact that NHRIs have on the realisation of any human right in the first place. Therefore, while it is encouraging that there are NHRIs in Africa with explicit mandates for the promotion and protection of refugee rights, it is difficult to determine whether this has a higher degree of impact on the realisation of refugee rights without conducting an empirical evaluation. However, one can assume that an explicit mandate for refugee rights promotion and protection allows for better allocation of scarce resources to the promotion and protection of these rights. Assuming also that the operational context allows the NHRI to engage with refugee rights, there is a higher likelihood that these rights would have a prominent place on the NHRI's agenda. In turn, this may determine the extent to which the NHRI engages with these rights at the domestic, regional and international levels to influence positive outcomes for refugees and asylum seekers.