VIENNA+ 20: ADVANCING THE PROTECTION OF HUMAN RIGHTS


Written contribution

Advocate Mabedle Lawrence Mushwana

INTRODUCTION

This year, 2013, marks two significant milestones within the international human rights discourse: it commemorates both the 20th anniversary of the adoption of the Vienna Declaration and Programme of Action (VDPA) and the 20th anniversary of the adoption of the Paris Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (Paris Principles) by the United Nations General Assembly.

The Paris Principles relate to the status and functioning of national human rights institutions (NHRIs) and still remains today the key international instrument that defines the role, composition, status and functions of national institutions thereby creating a set of minimum international standards that measure the legitimacy of NHRIs institutions and are used in determining their accreditation for recognition at the United Nations.

The VDPA specifically recognises the Paris Principles and highlights throughout the document NHRIs important and constructive role in the promotion and protection of human rights. It calls upon States to establish and strengthen NHRIs; and encourages the strengthening of cooperation between national institutions, particularly through exchanges of information and experience as well as cooperation with regional organisations and the United Nations. The VDPA has played a central role in providing direction to NHRIs in carrying out their daily duties and functions.

Despite commemorating the 20th anniversary of the Paris Principles, NHRIs are still relatively new actors within the international human rights system. During the past two decades, NHRIs numbers have grown substantially with their being more than 100 NHRIs today, 69 of which are accredited with the ‘A’ status, indicating compliance with the Paris Principles.

1 Chairperson, International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights & Chairperson, South African Human Rights Commission

2 Vienna Declaration and Programme of Action makes reference to national institutions ten times: Section I paragraphs 34 & 36; Section II paragraphs 20, 74, 82, 84, 85 & 86 http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf

The Office of the High Commissioner for Human Rights (OHCHR) has increasingly recognised the important and crucial role that NHRIs can play in exercising their independent mandates to assist in ensuring that States give effect to their international and regional human rights obligations at a domestic level and reporting back thereon at an international and regional level. In this way, NHRIs are uniquely placed to bridge the divide between the international and the domestic by promoting and monitoring the implementation of the States human rights obligations.

NHRIs have been provided with more opportunities and spaces at an international level to make their voices heard; for example NHRIs may participate and speak at the Human Rights Council and may participate in the treaty body processes in their independent capacity distinct from the State and non-governmental organisations (NGOs). Other UN bodies are also increasingly considering the role of NHRIs within the scope of their mandates. This role has become more systematically institutionalised through various legal instruments, policies and procedures of the UN.

At a domestic level, NHRIs can work strategically within their limited resources and often broad mandates to promote and protect human rights and ensure that the State gives effect to the international human rights obligations that it has committed to. This is done in a variety of ways such as: monitoring the state's compliance with its international obligations and ensuring that domestic laws on legislation complies with these obligations; advocating for legislative changes; receiving, investigating and resolving complaints; intervening as amicus curiae; and conducting education and awareness raising programmes.

1. NHRIS AND THE RULE OF LAW

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

The core business of NHRIs is to ensure the promotion and protection of human rights. In carrying out this work, it is clear that the achievement of democracy, the establishment and maintenance of the rule of law and the attainment of development that will eradicate poverty are all interconnected with and inseparable from human rights. The challenge for NHRIs is determining the manner in which they will give effect to their own individual mandates within this increasingly complex environment which now includes more role-players than in the past and holds greater potential than ever before for the achievement of human rights.

NHRIs have a clear role to play in the establishment of democracy, the rule of law in the promotion and protection of human rights at a domestic level. In following the debates and the important documents that have been produced in this area emanating from within the UN system in recent years, it is clear that insufficient attention has been given to the potentially important role and contribution of NHRIs.
NHRIs are small yet important role-players and often lack the resources to be visible and to participate in all forums in which matters that potentially affect them are considered and debated. It is thus not surprising that at this stage, it is clear that NHRIs still have much work to do in infusing themselves throughout the UN system in order to effectively ensure that they give effect to their mandates and that the UN system as a whole can benefit from their unique and independent role. This being said, NHRIs at the domestic level and even collectively at the international level have discussed and debated the rule of law and its interconnectedness with human rights.

NHRIs can build partnerships with key stakeholders such as civil society organisations (CSOs) and non-governmental organisations (NGOs) to ensure effective promotion and protection of human rights and the enhancement of the rule of law. For instance NHRIs and CSOs/NGOs can make joint submissions before the courts, appear as amicus curiae before the courts or judicial commissions, and work together to ensure accountability for human rights violations.

2. THE ROLE OF NHRIS IN PROTECTING HUMAN RIGHTS DEFENDERS

In her most recent report, the Special Rapporteur on the situation of human rights defenders has encouraged and recommended that NHRIs play a more active and vigorous role both as human rights defenders themselves and as an important institutions that can assist in promoting and protecting the rights of human rights defenders.

It is trite that NHRIs as institutions that are seized with a mandate to promote and protect human rights should speak out and take action when human rights defenders are attacked. However, the manner in which this is done will be dependent on the individual mandate of each NHRI given that the Paris Principles does not prescribe but rather gives guidance. In many instances, it is those countries that provide a weak mandate to their NHRIs and inadequate resources that the conditions are conducive to human rights defenders coming under attack. Most of the Special Rapporteur’s recent recommendations have close synergies with NHRIs responsibilities contained in the Paris Principles and therefore provide helpful and useful practical guidance as to how NHRIs may give effect to their mandates on a daily basis. It is interesting that the Special Rapporteur’s report falls short of directly recommending to NHRIs that they assist in pursuing access to regional courts on behalf of victims once domestic remedies have been exhausted.

The ICC and the NHRI regional bodies also have important roles to play, particularly when NHRIs themselves come under attack. There are already a number of examples of where the ICC and the regional bodies have acted when a NHRI is threatened in response to it carrying out its role as a human rights defender.

3. NHRIS AND THE RIGHT TO AN EFFECTIVE REMEDY

The Working Group Background Paper correctly points out that NHRIs are non-judicial institutions that should supplement rather than duplicate judicial institutions in the protection of human rights. It also points out that victims of human rights violations often experience challenges in accessing justice through the courts.

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Furthermore, that in those instances where the NHRI has a mandate to accept individual complaints, these mechanisms are often more informal and easier to access\(^5\).

The Special Rapporteur on the situation of human rights defenders made a number of recommendations in her most recent report in relation to the role of NHRI s in protecting human rights defenders\(^6\). These recommendations provide a much needed practical interpretation of the Paris Principles in this area. Recommendation 119(j) states that NHRI s should be entrusted with adequate powers to provide “remedy to victims”\(^7\). The recommendations do not go further in setting out the possible nature of this remedy. However, the degree to which NHRI s can intervene is limited to a large extent by the latitude granted by the State when prescribing their mandates and the resources that they receive.

NHRI s should be encouraged to give effect to the right to a remedy in creative manners whether or not their mandates provide that individual complaints may be received. Those which NHRI s do not have a direct mandate or resources to provide a remedy in individual cases, can indirectly through their broad mandates work to ensure that the right to a remedy is realised at a broader level. The Special Rapporteurs other recommendations are particularly useful in this regard as she clearly articulates how this can be done.

NHRI s should also be encouraged to receive individual complaints from human rights defenders where its mandate so provides. NHRI s should have clear procedures and policies in terms of how these complaints will be dealt with. The NHRI ought to clearly and unambiguously state what it can realistically do for a victim in order not to create false expectations and thereby potentially diminish public confidence in the institution or open itself up to criticism and be accused of not acting impartially.

4, CHALLENGES

While NHRI s have been recognised as key actors in the international and regional human rights architecture, they face numerous challenges in meeting their obligations effectively. One particular challenge is that being State created institutions they rely heavily on funding from the State which is often limited. This in turn impacts on the capacity of NHRI s to effectively perform their duties and engage substantively with international and regional human rights systems. The Paris Principles indicate that NHRI s should have an adequate infrastructure and funding and be able to manage these funds independently. However many NHRI s are still limited in the performance of their functions due to a lack of sufficient funds and capacity.

The credibility and legitimacy of an NHRI depends not only on its constitutive framework but also on its independence from the State. However, as indicated in the report of the Special Rapporteur on the situation of human rights defenders, some NHRI s face, members and staff face threats in response to carrying out their mandates from the State.

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\(^5\) Background Paper, paragraph 7

\(^6\) Special Rapporteur on the situation of human rights defenders, Report dated 16 January 2013

\(^7\) “(j) National human rights institutions should be entrusted with adequate powers of investigation, including authorization to visit detention centres, to allow them to conduct prompt and impartial investigations into all allegations of violations and provide remedy to victims;...”
The impact that NHRIs can have domestically depends to a certain degree on the implementation of recommendations presented before the State and follow up to such recommendations. There are however NHRIs who might have the competence to make recommendations to the State but lack the legal power to oblige the State and other public bodies to implement such recommendations and this has the effect of watering down the impact of their role in ensuring State accountability for human rights violations or the promotion and protection of human rights.

Another key challenge is that while NHRIs strive to comply with the Paris Principles, meeting the standards at every review might well be beyond the NHRIs control. For instance if the State passes a law to limit the competence of the NHRI, or withdraws or limits funds or even interferes with its ability to effectively discharge its mandate then this will compromise the NHRI’s capacity to ensure that it fully complies with the Paris Principles.

Lastly while the State is at liberty to create a NHRI to suit its domestic context, the differences in mandate and structure impact on the development and implementation of common strategies at the international (ICC) and regional levels.

CONCLUSION
Currently, the ICC has 69 ‘A’ status members, whilst the UN has 193 member states. Thus whilst in some forums, recommendations are made to NHRIs these recommendations fall on deaf ears to the majority of UN member states who are either yet to establish a NHRI or have done so but these NHRIs are not compliant with the Paris Principles. Two decades later, there is still a need for recommendations to Member States encouraging them to establish NHRIs in conformity with the Paris Principles. Further, that these NHRIs are adequately resourced in order to give effect to their increasingly expanding role at an international and domestic level. Now more than ever before, the important role of NHRIs is being recognised and with this recognition comes greater clarity and corresponding workload in terms of NHRIs roles and responsibilities.

At the same time, NHRIs also need to be encouraged to participate more actively in processes at both the international and regional levels in order that the NHRI voice may be infused into the important documents that are the building blocks of ensuring greater commitments by Member States towards their human rights obligations.