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## National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights

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# NATIONAL HUMAN RIGHTS INSTITUTIONS: GOOD GOVERNANCE PERSPECTIVES ON INSTITUTIONALIZATION OF HUMAN RIGHTS

C. RAJ KUMAR\*

INTRODUCTION .....	260
I. HISTORICAL PERSPECTIVES .....	266
II. THE PARIS PRINCIPLES .....	270
III. IMPACT OF NHRIS – SOCIAL EXPECTATIONS AND UNFULFILLED PROMISES .....	275
IV. FUNCTIONS OF NHRIS – GOOD GOVERNANCE AND MAINSTREAMING HUMAN RIGHTS .....	283
V. NHRIS TAKING COGNIZANCE OF ECONOMIC AND SOCIAL RIGHTS .....	289
VI. NHRIS AND THE JUDICIARY – PERFORMING SEPARATE AND INDEPENDENT FUNCTIONS .....	293
VII. IMPACT OF CIVIL SOCIETY ON THE FUNCTIONING OF NHRIS .....	296
CONCLUSION .....	298

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## INTRODUCTION

The formation of the United Nations ("U.N.") and the passing of the Universal Declaration of Human Rights ("UDHR")<sup>1</sup> were important milestones in the contemporary history of human rights.<sup>2</sup> However, these developments did not automatically result in adherence to human rights becoming a requirement of international legitimacy, participation in international affairs, or, for that matter, culminate in the empowerment of the world's citizens in any significant way.<sup>3</sup> States steeped themselves in notions of sovereignty<sup>4</sup> and non-interference in the internal affairs of other states,<sup>5</sup> and, at best, recognized the UDHR as a normative tool and an ideal to which their activities should conform.<sup>6</sup> However, the passing of the

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1. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

2. See HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 705 (Oxford U. Press, 2d ed. 2000) (reviewing the formation of international human rights); see also *THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING* 201 (Philip Alston & James Crawford, eds., 2000) (discussing the United Nations' role in controlling international human rights enforcement); Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in *THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING* 201 (Philip Alston & James Crawford, eds., 2000) (expressing that the effectiveness of the U.N. human rights treaty system rests on "its ability to encourage and cultivate national implementation of, and compliance with, international human rights standards").

3. See Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 605 (1996) (recognizing that the creation of human standards based on Western cultural and political notions hindered the concept of universality).

4. See Anne-Marie Slaughter, *In Memoriam*, 114 HARV. L. REV. 682, 684-86 (2001) (explaining the perception of state sovereignty and how it affects international relations between nations); see also Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1029-30 (2001) (describing the limited powers states held under the Westphalian concept of state sovereignty).

5. See generally Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1401 (2003) (discussing past and recent issues relating to sovereignty and non-interference in the context of human rights).

6. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1996) (arguing that the UDHR remains the primary source of global human rights standards and is the basis for most human rights instruments).

International Covenant on Civil and Political Rights ("ICCPR")<sup>7</sup> and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")<sup>8</sup> marked an important development in the establishment of legally binding international human rights obligations. Thus, what was an important political, moral, and normative ideal for states in the UDHR became a legal and enforceable right in the form of the ICCPR and, to a certain extent, the ICESCR.<sup>9</sup> These covenants likewise supplied the early institutions of human rights enforcement in their human rights committees, the most serious example being the United Nations Human Rights Committee operating under the Optional Protocol<sup>10</sup> to the ICCPR.<sup>11</sup> Thus, the effort of the human rights movement, first, expanded the notions of what constitutes human rights<sup>12</sup> and how states can encourage their enforcement;<sup>13</sup> and second, worked toward the institutionalization of human rights,

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7. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

8. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

9. See Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1164 n.53 (1998) (explaining how the UDHR formed the foundations of human rights law).

10. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *Optional Protocol*] (establishing a committee with authority to review alleged human rights violations). See generally STEINER & ALSTON, *supra* note 2, at 705-78 (analyzing the functions of the U.N. Human Rights Committee under the ICCPR Optional Protocol).

11. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudications*, 107 YALE L.J. 273, 338-40 (1997) (explaining how the UNHCR monitors states' adherence to the ICCPR).

12. See *Optional Protocol*, *supra* note 10, arts. 1-2 (defining human rights to be those enumerated in the ICCPR and providing options on ways to remedy violations of such rights).

13. See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1408-16 (1999) (noting how states, non-governmental organizations, and individuals all play a role in enforcing international human rights).

whereby states can enforce activities relating to human rights through actual practice.<sup>14</sup>

While the United Nations toyed with the idea of establishing national institutions to protect human rights for a long time, the actual formation of national human rights institutions ("NHRIs") is a recent phenomenon.<sup>15</sup> Though there are exceptions reflected in the early development of constitutionalism in the West, NHRIs have generally emerged out of the international human rights movement.<sup>16</sup> The gradual establishment of NHRIs, however, in some countries of a region dotted with "guided democracies," along with skepticism about international human rights law, and universalistic notions of human rights, provided new challenges and opportunities for exploring the governance perspectives in institutionalization of human rights.<sup>17</sup> NHRIs could only make meaningful contribution if their establishment meets certain standards and principles governing their existence and performance.<sup>18</sup> The purpose was to create human rights institutions<sup>19</sup> that would serve as impartial, independent, and

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14. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1977-78 (2002) (observing that countries that have ratified human rights treaties have better human rights ratings than those countries that have not).

15. See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 2 (2000) (stating that, as of the year 2000, most human rights institutions were created in the past two or three decades).

16. See generally Report of the Secretary-General on National Institutions for the Promotion and Protection of Human Rights, U.N. Commission on Human Rights, 53d Sess., Agenda Item 9, at 2, U.N. Doc. E/CN.4/1197/41 (1997) (explaining the importance of national institutions in the promotion and protection of human rights).

17. See Yash Ghai, *Human Rights and Governance: The Asian Debate*, 15 AUSTL. Y.B. INT'L L. 1, 1-34 (1994) (analyzing the diverse difficulties human rights enforcement faces in different countries).

18. See *id.* at 1 (explaining that there exist "considerable differences among governments and intellectuals on the understanding, scope and importance of human rights").

19. See Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 139-56 (2003) (analyzing the design of institutions that are intended to manage conflict); see also Michael C. Davis, *The Price of Rights: Constitutionalism and East Asian Economic Development*, 20 HUM. RTS. Q. 303, 303 (1998) (discussing the

autonomous entities to enforce national and international human rights norms.<sup>20</sup> From a practical standpoint, there are valid justifications for the United Nations and the United Nations Office of the High Commissioner for Human Rights to be committed to the formation of NHRIs.<sup>21</sup> Because not all human rights violations are of such magnitude to attract international attention or U.N. human rights scrutiny, suitably constituted NHRIs could perform these functions at the national level.<sup>22</sup> Perhaps even states that are overzealous in their sovereignty may favor NHRI formation. Thus, there are significant issues in the concept of NHRIs that deserve deeper examination.<sup>23</sup>

This article examines the historical circumstances that have resulted in the creation of NHRIs.<sup>24</sup> Part I will refer to the initiatives the United Nations took in promoting the institutionalization of human rights in general. Part II provides a critical analysis of the standards and principles that underline the U.N. initiatives in setting

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connection between the creation of human rights institutions and economic development).

20. *Fact Sheet No.19, National Institution for the Protection and Promotion of Human Rights* at 2, Office of the High Commissioner for Human Rights [hereinafter *Fact Sheet*] (indicating the need to create national institutions for promoting human rights to assist the United Nations in effectively implementing its goals in this area), available at <http://www.unhchr.ch/html/menu6/2/fs19.htm> (last visited Nov. 15, 2003),

21. See Brian Burdekin, *Human Rights Commissions, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD* 801, 807-08 (Kamal Hossain et al. eds., 2000) (listing advantages of developing national institutions based on human rights instruments).

22. See Sonia Cardenas, *Emerging Global Actors: The United Nations and National Human Rights Institutions*, 9 *GLOBAL GOVERNANCE* 23, 28 (2003) (asserting that NHRIs "could serve as local counterparts to international human rights commissions).

23. See generally ASIA PACIFIC HUMAN RIGHTS NETWORK, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA PACIFIC REGION, REPORT OF THE ALTERNATE NGO CONSULTATION ON THE SEVENTH ASIA PACIFIC REGIONAL WORKSHOP ON NATIONAL HUMAN RIGHTS INSTITUTIONS (2002) [hereinafter NATIONAL HUMAN RIGHTS] (examining critically the status of institutionalization of human rights in Bangladesh, India, Indonesia, Korea, Malaysia, Nepal, New Zealand, Philippines, and Sri Lanka).

24. See discussion *infra* Part I (explaining how the United Nations encouraged states to form NHRIs, and helped establish standards for NHRIs).

up NHRIs.<sup>25</sup> Part II also critiques the Paris Principles<sup>26</sup> in light of the contemporary development of human rights discourse. It argues that the discussion regarding NHRIs should move beyond the Paris Principles if the independence and effectiveness of NHRIs are to be ensured.

Part III analyzes the general impact of NHRIs in influencing human rights policies.<sup>27</sup> This section provides an evaluation of social expectations created by NHRIs and how states have fulfilled those expectations. It argues that NHRIs could provide meaningful relevance to the human rights movement only if countries continuously challenge, and in this process improve, their legitimacy and functional effectiveness. It further argues that this would provide the much-needed transparency and accountability of NHRIs that would provide them validity as credible partners in the struggles relating to the protection and promotion of human rights.

Part IV examines the general functions of NHRIs to understand the purpose of the institutionalization of human rights.<sup>28</sup> This section includes an analysis of the unique features of NHRIs as opposed to other prevailing institutions whose functions overlap with these NHRIs.<sup>29</sup> The article will also analyze NHRIs' role and functions in promoting good governance policies and in transforming the development agenda in the states through the international law of development,<sup>30</sup> with a view to mainstreaming human rights in all activities of public administration.<sup>31</sup>

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25. See discussion *infra* Part II (discussing the Paris Principles and its strengths and weaknesses in setting forth guidelines for NHRIs).

26. See G.A. Res. 134, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/134 (1993) [hereinafter Paris Principles] (establishing the powers of national institutions for "the promotion and protection of human rights").

27. See discussion *infra* Part III (analyzing the relationship between social expectations and NHRI effectiveness).

28. See discussion *infra* Part IV (defining the role of NHRIs in governmental institutions).

29. See discussion *infra* Part V (relating the importance of NHRIs working with other institutions to further the protection of economic, social, and cultural rights).

30. See James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 307, 311 (1995)

Lastly, this article concludes that NHRIs are extremely important and very useful institutions founded on the basis of objectives that are profoundly significant for institutionalization of human rights.<sup>32</sup> Moreover, the article argues that with the work of NHRIs, international human rights norms can be enforced effectively<sup>33</sup> within state boundaries, particularly when the legal and constitutional frameworks existing in the states supplement them.<sup>34</sup> It is here that NHRIs play a pivotal role.

However, it is important for the United Nations and others who believe in the institutionalization of human rights to understand that NHRIs are indeed double-edged swords. If properly used, NHRIs can play an important role in engaging with governments to make them appreciate the need to conform their actions to national and international human rights norms, provide democratic forums for empowering citizens, and ensure that justice is done to the victims of human rights violations by allowing them to feel that their concerns are heard.<sup>35</sup> However, NHRIs could also be political tools in the hands of oppressive and authoritarian regimes to legitimize the

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(explaining how the international law of development stresses that development be "people-centered" and respectful of human rights).

31. See discussion *infra* Parts VI-VII (emphasizing how NHRIs can work with a state's judiciary and the civil society in reaching the goals of protecting and promoting human rights).

32. See *infra* notes 237-243 and accompanying text (concluding that, although NHRIs have structural weaknesses, they are useful institutions that can further protect human rights within states).

33. See Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 183-85 (2002) (describing the obstacles that make human rights institutions unenforceable).

34. See Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 499-501 (2000) (relating how legal frameworks and judicial enforcement of constitutional rights have contributed to the growth of international human rights).

35. See *infra* notes 151-158 and accompanying text (discussing how NHRIs can aid in bringing human rights to the mainstream and into the concept of "good governance" by protecting human rights locally and accepting and enforcing human rights norms on the international level).

human rights violations that have and are being committed.<sup>36</sup> All of these are genuine concerns that one must keep in mind while advocating the formation of NHRIs.

## I. HISTORICAL PERSPECTIVES

In 1946, the United Nations Economic and Social Council ("ECOSOC") asked Member States to consider the "desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights."<sup>37</sup> In 1960, the ECOSOC passed a resolution recognizing the distinctive "role national institutions could play in the protection and promotion of human rights" and "invited governments to encourage the formation and continuation" of NHRIs.<sup>38</sup> Discussions continued as to what kind of assistance NHRIs would provide for effective implementation of international human rights standards.<sup>39</sup> The Commission on Human Rights followed this by organizing a seminar in Geneva in September 1978, where a set of guidelines evolved as to what functions NHRIs could discharge.<sup>40</sup> The Commission on Human Rights and the U.N. General Assembly later endorsed these guidelines.<sup>41</sup> The United Nations began to involve itself actively and seriously in the project of establishing NHRIs from as early as the

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36. See *infra* notes 126-128 and accompanying text (implying that governments with little respect for human rights would establish NHRIs to appear legitimately concerned with human rights protection).

37. Fact Sheet, *supra* note 20, at 2.

38. *Id.* (discussing the Economic and Social Council's resolution establishing human rights committees).

39. See *id.* at 3 (describing possible guidelines and functions of national institutions).

40. See *id.* (explaining that the guidelines included six functions of NHRIs, including acting as a source of human rights information, educating the public on human rights, making recommendations as to human rights in a particular state, advising the government on human rights matters, studying and reporting on a state's legislation and judicial decisions regarding human rights, and performing any other function the government may wish in connection to the state's duties under international human rights agreements).

41. See *id.* at 4 (noting that when the Commission endorsed the guidelines, they also asked that all Member States take steps to establish NHRIs).

1980s when the U.N. Secretary General began preparing a series of reports on the subject and presented them to the U.N. General Assembly.<sup>42</sup> The efforts of the United Nations culminated in the

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42. E.g., *Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Report of the Secretary-General*, U.N. GAOR, 36th Sess., Agenda Item 79(b), U.N. Doc. A/36/440 (1981); *Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Report of the Secretary-General*, U.N. GAOR, 38th Sess., Agenda Item 100, U.N. Doc. A/38/416 (1983); *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Report of the Secretary-General*, U.N. Commission on Human Rights, 43d Sess., Agenda Item 11 of the Provisional Agenda, U.N. Doc. E/CN.4/1987/37 (1987); *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Updated Report of the Secretary-General*, U.N. Commission on Human Rights, 45th Sess., Agenda Item 11 of the Provisional Agenda, U.N. Doc. E/CN.4/1989/47 (1989); *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Updated Report of the Secretary-General*, U.N. Commission on Human Rights, 45th Sess., Agenda Item 11 of the Provisional Agenda, U.N. Doc. E/CN.4/1989/47/Add. 1 (1989); *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Updated Report Prepared By the Secretary-General*, U.N. Commission on Human Rights, 47th Sess., Agenda Item 11 of the Provisional Agenda, U.N. Doc. E/CN.4/1991/23 (1991); *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission; Alternative Approaches and Ways and Means Within the United Nations System For Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: National Institutions For the Promotion and Protection of Human Rights: Updated*

Commission on Human Rights organizing a workshop in 1990 with the participation of national and regional institutions.<sup>43</sup> The purpose of the workshop was to review patterns of cooperation between national and international institutions and to examine the factors that could result in improving the effectiveness of NHRIs.<sup>44</sup> The conclusions of this important workshop came to be known as the "Paris Principles" of 1991.<sup>45</sup>

The Paris Principles provide enormous guidance and direction on the formation of NHRIs in general, and also about the standards and principles that NHRIs must follow in order to function effectively.<sup>46</sup> In 1993, the Vienna Declaration and Programme of Action (adopted at the end of the Vienna World Conference on Human Rights) stated that NHRIs play an important role in promoting and protecting human rights, disseminating human rights information, and providing education about human rights.<sup>47</sup> It is interesting that the enthusiasm to form NHRIs has largely been positive in different regions of the world.<sup>48</sup> The United Nations has been keen to establish

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*Report Prepared By the Secretary-General: Addendum*, U.N. Commission on Human Rights, 47th Sess., Agenda Item 11(a) &(b), U.N. Doc. E/CN.4/1991/23/Add.1 (1991).

43. See Fact Sheet, *supra* note 20, at 4 (describing how the creation of many new international institutions brought about the workshop).

44. See *id.* (asserting that the purpose of the workshop was to review patterns of cooperation between national institutions such as the United Nations and its agencies).

45. See *id.* at Annex (describing the functions of NHRIs).

46. See Paris Principles, *supra* note 26 (discussing how the Paris Principles relate to the status of national institutions).

47. See *Vienna Declaration and Programme of Action*, U.N. GAOR World Conference on Human Rights, 23d Sess., 157th mtg. ¶¶ 83-98, U.N. Doc. A/CONF.157/23 (1993) (noting the additional importance of NHRIs in advising authorities and in remedying human rights violations).

48. See Philip Eldridge, *Emerging Roles of National Human Rights Institutions in Southeast Asia*, 14 PACIFICA REV. 209, 215-21 (2002) (analyzing the workings of NHRIs in the Philippines, Indonesia, Thailand, and Malaysia); see also Human Rights Watch, *Government Human Rights Commissions in Africa, Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) [hereinafter *Protectors or Pretenders?*] (finding that the number of countries with NHRIs has increased significantly between 1989 and 2000), at <http://www.hrw.org/reports/2001/africa/overview/summary.html> (last visited Oct. 11, 2003).

a regional human rights framework<sup>49</sup> in the East Asian region<sup>50</sup> similar to established bodies such as the Council of Europe, the Organization of American States, and the Organization of African Unity.<sup>51</sup> However, there was neither consensus nor enthusiasm from the Association of Southeast Asian Nations and the Asia Pacific Economic Cooperation on this issue.<sup>52</sup> The grounds for opposition in Southeast Asia<sup>53</sup> to the creation of regional human rights mechanisms ranged from the much-discussed “Asian values” argument<sup>54</sup> to hesitation about compromising national sovereignty.<sup>55</sup>

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49. See Daniel Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 HUM. RTS. Q. 641, 655 (1996) (citing the Universal Declaration of Human Rights and other U.N. documents as standards for promoting human rights in East Asia), available at [http://muse.jhu.edu/journals/human\\_rights\\_quarterly/v018/18.3bell.html](http://muse.jhu.edu/journals/human_rights_quarterly/v018/18.3bell.html) (last visited Oct. 11, 2003).

50. See Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to Go Before I Sleep”*, 2 YALE HUM. RTS. & DEV. L.J. 1, 25-29 (1999) (discussing the problems and prospects of developing human rights regime and institutions in East Asian countries).

51. See *id.* at 6 (stating that East Asia does not have the same political infrastructure of these organizations, which may limit East Asia in working with them).

52. See *id.* at 5-6 (commenting on the lack on consensus within Asia on human rights norms).

53. See Yash Ghai, *Human Rights in the Asian Context: Rights, Duties and Responsibilities*, in ASIAN VALUES: AN ENCOUNTER WITH DIVERSITY 20, 20-38 (1998) (discussing the challenge to the emphasis on human rights asserted by East and Southeast Asian countries).

54. See Yash Ghai, *Asian Perspectives on Human Rights*, 23 H.K. L.J. 342, 342-43 (1993) (noting that the theory of one Asian view of human rights is based on the theory that “human rights as propounded in the West are founded on individualism and therefore have no relevance to Asia, which is based on the primacy of the community”); see also Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 111-114 (1998) (outlining the political and scholarly debate of “Asian values” and what they may encompass, e.g., authoritarianism).

55. See Ghai, *supra* note 54, at 344(asserting that the pressure from Western states for improved human rights “is connected with the project of Western global hegemony”).

## II. THE PARIS PRINCIPLES

Today we must re-examine the Paris Principles since they not only affect our understanding of the institutionalization of human rights in specific countries, but also have an impact on the formation of institutions that achieve the goals of protecting and promoting human rights.<sup>56</sup> It is important, therefore, to question the very rationale of the formation of NHRIs. Any discussion that begins its analysis and understanding of NHRIs from the U.N. initiatives or the Paris Principles perspective presupposes that these institutions are inherently good.<sup>57</sup> For this reason, much of the academic writing on this subject has been largely an evaluation of the working of NHRIs based on national and international standards.<sup>58</sup> While the assessment of the working of particular NHRIs is quite helpful, it is important to move beyond that evaluation.<sup>59</sup> This suggestion is not to say that the U.N. initiatives, the Paris Principles, and national and international standards are in any way inferior or irrelevant for examination, but it

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56. See Paris Principles, *supra* note 26 (explaining the powers and formation of national institutions that work in the international human rights field).

57. See Bell, *supra* note 49, at 656 (questioning the value of U.N. documents as the basis of promoting human rights in Southeast Asia).

58. See Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STAN. J. INT'L L. 59, 72-74 (2003) (using the U.N. initiatives and Paris Principles as a basis for discussing human rights in Malaysia); see also Vijayashri Sripati, *India's National Human Rights Commission: A Shackled Commission?*, 18 B.U. INT'L L.J. 1, 4-6 (2000) (evaluating the success of the U.N. ideals and Paris Principles in India); Stephen Livingstone, *The Northern Ireland Human Rights Commission*, 22 FORDHAM INT'L L.J. 1465, 1468-69 (1999) (discussing the Paris Principles and the U.N. guidelines as the basis for creating NHRIs in Northern Ireland). See generally Mario Gomez, *Sri Lanka's New Human Rights Commission*, 20 HUM. RTS. Q. 281, 282-83 (1998) (assessing positively the value of the U.N. proposals and the Paris Principles); Sonia Cardenas, *National Human Rights Commissions in Asia*, 4 HUM. RTS. REV. 30, 31-32 (2002) (evaluating international human rights against state sovereignty); Sidney Jones, *Regional Institutions for Protecting Human Rights in Asia*, 50 AUSTL. J. INT'L AFF. 269, 269-70 (1996) (remarking on the effectiveness of international commissions on the regional level); *National Human Rights Commission for Japan*, UNIVERSAL PRINCIPLE: HUM. RTS. NEWSL. FROM JAPANESE CIV. LIBERTIES UNION (JCLU Universal Principle, Tokyo, Japan), Winter 2002, at 3-10 (commenting on the National Human Rights Commission for Japan and evaluating its role and purpose in the country).

59. See Cardenas, *supra* note 58, at 32 (noting that human rights commissions working impact is not entirely clear).

underlines the importance of questioning the existence of institutions like NHRIs.<sup>60</sup> It would help us to understand the importance, or otherwise, of this institution as well as to examine better its function, not just with reference to some predetermined set of principles and standards, but with particular emphasis on the context and circumstances surrounding the establishment of these institutions.<sup>61</sup>

The Paris Principles are the first systematic effort to enumerate the role and functions of NHRIs.<sup>62</sup> They are divided into sections comprising certain headings: competence and responsibilities, composition and guarantees of independence and pluralism, methods of operation, and additional principles concerning the status of commissions with quasi-jurisdictional competence.<sup>63</sup> Efforts have been made to ensure that NHRIs have “as broad a mandate as possible”<sup>64</sup> and that such mandate has either constitutional or legislative validity.<sup>65</sup> The comprehensive section on NHRIs’ competence and responsibilities has given the institutions sufficient scope to evolve according to socio-legal and political circumstances, and to include those functions that they deem appropriate.<sup>66</sup> However, the section on the composition and guarantees of independence and pluralism fails to underline the need for measures to ensure the NHRIs’ independence and institutional autonomy.<sup>67</sup> While drafting the Paris Principles, there was an opportunity to emphasize the philosophy underlying the establishment of these institutions, which is to ensure the protection and promotion of

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60. See, e.g., *id.* (questioning the value of international commissions on the domestic level).

61. See, e.g., Jones, *supra* note 58, at 269 (implying that it is important to consider Asia on the sub-regional level when it comes to human rights because of the variation in countries’ political and cultural definitions).

62. See Paris Principles, *supra* note 26 (outlining the responsibilities of NHRIs in the national context).

63. See *id.* (categorizing the status of national institutions).

64. *Id.* (noting the competence and responsibilities of national institutions).

65. See *id.* (stating that the national institution shall clearly establish its mandate in either a constitutional or a legislative text).

66. See *id.* (allowing for flexibility in the composition of national human rights institutions).

67. See *id.* (establishing that NHRIs may represent the pluralism of social forces of civilian society).

human rights and fundamental freedoms of people through the development of national institutions,<sup>68</sup> however, states may have already mandated this task to other institutions, particularly the judiciary and, to a certain extent, the administrative methods of grievance redress mechanisms within the government departments.<sup>69</sup>

“Guarantees of independence and pluralism,”<sup>70</sup> even though mentioned in the sub-heading of the Paris Principles, offer very little guidance to the states as to how to achieve this independence.<sup>71</sup> The Paris Principles emphasize the need to ensure adequate funding for the NHRIs.<sup>72</sup> The Report of the Alternate NGO Consultation on the Seventh Asia-Pacific Regional Workshop on National Human Rights Institution, however, has pointed out inadequacies in the Paris Principles.<sup>73</sup> As part of the responsibilities of NHRIs, the Paris Principles observe that the NHRIs should “promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and ensure their effective implementation.”<sup>74</sup> While this is an important principle in as much as it refers to the compatibility of international human rights law and national legislation, the principles should also ensure that governments take efforts to ratify

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68. See Paris Principles, *supra* note 26 (“Emphasizing the importance of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments for promoting respect for and observance of human rights and fundamental freedoms.”).

69. See *id.* (recognizing and affirming that “priority should be accorded to the development of appropriate arrangements at the national level”).

70. *Id.*

71. See *id.* (allowing NHRIs to establish their composition by “a procedure which affords all necessary guarantees” but not outlining what that procedure may entail, or how independent it must be).

72. See *id.* (providing that the purpose of providing adequate funding for a national institution is to ensure the institution has its own staff and premises).

73. See generally *NATIONAL HUMAN RIGHTS*, *supra* note 23, at 3-8 (noting that, among other shortcomings, the Paris Principles are “not sufficiently clear regarding the ‘quasi-jurisdictional competence’ of NHRIs” and are silent on the powers of certain NHRIs).

74. Paris Principles, *supra* note 26.

international human rights treaties.<sup>75</sup> The NHRIs are not the only institutions that have the task of ensuring compliance with treaty obligations;<sup>76</sup> the Governments' law ministry could perform these tasks while the NHRIs would then supplement the role of the other governmental departments, and to a certain extent the judiciary, in ensuring treaty compliance.<sup>77</sup>

Setting standards in the area of human rights, ensuring treaty ratification, and promoting domestic law reform to elevate the status of international human rights treaties within the domestic law are important aspects of improved governance mechanisms in human rights matters that NHRIs ought to be performing.<sup>78</sup> This assumes significance in light of expanding notions of human rights and the continuous and specialized development of international human rights jurisprudence.<sup>79</sup> The Copenhagen Declaration correctly summarizes this aspect when it emphasizes the need for NHRIs to ensure that "governments ratify international human rights treaties, remove reservations contrary to the object and purpose of the treaty and ensure consistency between domestic laws, programs and policies and international human rights standards."<sup>80</sup> The Paris

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75. See *id.* (stating that a NHRI shall "encourage ratification of [international human rights] instruments or accession to those instruments, and . . . ensure their implementation").

76. See David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 881 (2003) (discussing further issues on human rights compliance in the context of signaling theory).

77. See *id.* at 909 (declaring that courts and other government bodies should cite to human rights instruments in making decisions or legislating in order to show support for treaty compliance).

78. See *The Copenhagen Declaration*, U.N. OHCHR, 6th Conf., Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights (2002) (reaffirming the importance of international human rights treaties, implementing declarations, and adopting policies on the domestic level), available at <http://www.unhchr.ch/html/menu2/copendec.htm> (last visited Nov. 9, 2003).

79. See, e.g., Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 121 (2001) (citing the United States as an example of a country that must reconsider its domestic policies and sovereignty in light of international human rights law).

80. *The Copenhagen Declaration*, *supra* note 78 (affirming that all people are entitled to human rights and liberties set forth in the Universal Declaration of Human Rights).

Principles do not give sufficient guidance regarding how the proposed function of NHRIs would have quasi-jurisdictional competence, which demonstrates an inherent weakness in the formulation of principles.<sup>81</sup> While the Paris Principles laid out the foundational objectives and operational functions of NHRIs, the Principles fail to provide a legal basis for the autonomous existence of the NHRIs, the standards for achievement, and the measures to ensure the effectiveness of the recommendations made by the NHRIs.<sup>82</sup>

Another factor demonstrating that the Paris Principles should have a stronger construction, with a view to ensure the independence and effectiveness of NHRIs, is the fact that the Paris Principles do not have a legal basis to which states may adhere.<sup>83</sup> Ensuring quasi-jurisdictional competence is a welcome measure in the Principles, but there are no operational guidelines for the NHRIs' powers that will assure this competence.<sup>84</sup> Nevertheless, some of the NHRIs have indeed provided for such powers, as does the National Human Rights Commission of India ("Indian NHRC").<sup>85</sup> For example, the Protection of Human Rights Act, 1993 has provided the Indian NHRC<sup>86</sup> with the powers of a civil court,<sup>87</sup> particularly with respect to

81. See Paris Principles, *supra* note 26 (relating that a national institution "may be authorized to hear and consider complaints and petitions" without explaining how the institution would achieve this quasi-jurisdictional power).

82. See *id.* (describing how the national institution should be independent in choosing its composition but without describing how it could be legally independent).

83. See *id.* (laying out the responsibilities that the national institution should exercise within a state).

84. See *id.* (indicating only the duties of NHRIs that have quasi-jurisdictional competence).

85. See Charles Norchi, *The National Human Rights Commission of India as a Value-Creating Institution*, in HUMAN RIGHTS: POSITIVE POLICIES IN ASIA AND THE PACIFIC RIM 113, 127 (John D. Montgomery, ed., 1998) (detailing the positive aspects of India's NHRC and its effectiveness in community decisions). See generally SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, JUDGMENT RESERVED: THE CASE OF THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA, (2001) (providing a working assessment of the Indian NHRC).

86. See T.K. Thommen, *Human Rights Commission*, 17 COCHIN UNIV. L. REV. 1, 4-5 (1993) (discussing the foundational objectives of the Indian NHRC). See generally V. Vijayakumar, *The Working of the National Human Rights Commission: A Perspective*, in HUMAN RIGHTS IN INDIA: HISTORICAL, SOCIAL AND

summoning and enforcing the attendance of witnesses and examining them on oath, discovery and production of any documents, receiving evidence on affidavit, requisitioning any public record or copy thereof from any court or office, and issuing commissions for the examination of witnesses or documents and also any other matter that may be prescribed.<sup>88</sup> States should protect the powers of NHRIs, which the states could best achieve if they enact NHRIs through legislation or, alternatively, by constitutional sanctity.<sup>89</sup> Thus, the Paris Principles are, at best, a good starting point for discussions relating to the formation of NHRIs, but it is not in the human rights movement's best interest to give them more importance than they deserve in light of their weaknesses and limited nature.<sup>90</sup> The discussion regarding NHRIs must move beyond these principles so that U.N. human rights agencies and all others concerned with the objective of promoting NHRIs can expand the scope of the principles. Institutional autonomy and effective enforcement of human rights through statutorily given powers are the only ways by which NHRIs can avoid impunity relating to human rights violations.

### III. IMPACT OF NHRIS – SOCIAL EXPECTATIONS AND UNFULFILLED PROMISES

The formation of NHRIs undoubtedly marks the hope for a possible avenue to address human rights concerns domestically.<sup>91</sup> The nature of the language of human rights, due to its empowering

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POLITICAL PERSPECTIVES 211, 217 (Chiranjivi J. Nirmal, ed., 1999) (describing the establishment of the Indian NHRC).

87. See generally Vijayakumar, *supra* note 86, at 217-20 (analyzing the working of the Indian NHRC and noting its similarities with the court system).

88. See *NATIONAL HUMAN RIGHTS*, *supra* note 23, at 5 (noting some specific powers given to some NHRIs).

89. See Paris Principles, *supra* note 26, at Annex 2 (providing that NHRIs "shall be given a mandate as broad as possible, which shall clearly be set forth in a constitutional or legislative text").

90. See *supra* notes 68-75 and accompanying text (analyzing the weaknesses of the Paris Principles in delineating the powers and duties of NHRIs).

91. See, e.g., Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *CARDOZO L. REV.* 1095, 1099 (2000) (discussing the incorporation of international human rights in the constitutions of India, Canada, South Africa, and Fiji).

tone and the granting of rights to individuals (and at times, groups), creates legitimate social expectations.<sup>92</sup> Regardless of the human rights record of the government that created the NHRI, many countries have social expectations regarding what protections NHRIs can deliver.<sup>93</sup> It is possible that social expectations could change for the better or for the worse after the NHRIs have started to function.<sup>94</sup> Moreover, the levels of social expectations would vary depending upon numerous factors, including the rule of law that prevails in a certain society; the effectiveness of other institutions that are already in place; the nature of the particular government (democratic or autocratic); the nature of the legal system and the existing guarantees relating to rights and freedoms in the Constitution, bill of rights, or other legislation; the freedom of the press; the role of non-governmental organizations ("NGOs"); and the extent of "civil society"<sup>95</sup> participation in public affairs.<sup>96</sup> NHRIs in many respects shape and express the human rights policies of states.<sup>97</sup> Cardenas, while commenting on the inability of NHRIs to fulfill the social expectations they help to generate, has correctly observed that, "if NHRIs are not independent, representative, and organizationally

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92. See Cassel, *supra* note 79, at 126-35 (criticizing the effectiveness and the roles of international human rights law on human rights protection); see also David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RTS. J. 101, 116-17 (2002) (asserting that human rights "promises more than it can deliver").

93. See generally UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 119-20 (Oxford University Press 2002) (describing human rights movements as social movements).

94. See Cassel, *supra* note 79, at 135 (asserting that international human rights law may be more effective in the future after collaborating with different institutions); see also Kennedy, *supra* note 92, at 102-06 (questioning the role of the human rights movement by weighing the costs and benefits derived in different circumstances).

95. See Tom G. Palmer, *Civil Society No Longer Means What it was Supposed to Mean*, J. CIV. SOC'Y, ¶¶ 6, 12 (June-July 1997) (discussing traditional and modern definitions of civil society), at [http://www.civnet.org/journal/journal\\_frameset.htm](http://www.civnet.org/journal/journal_frameset.htm) (last visited Nov. 15, 2003).

96. See Ghai, *supra* note 91, at 1103-04 (citing examples of different countries' social expectations and how they vary according to the governing rule of law, institutions, constitutions, and cultures).

97. See Paris Principles, *supra* note 26 (dictating how states should incorporate national institutions).

powerful, they could be more adept at promoting rather than protecting human rights norms.”<sup>98</sup> NHRIs shape states’ human rights policies independently of the fulfillment of social expectations or, for that matter, the unfulfilled promises for victims of human rights violations.<sup>99</sup> Human rights work by NHRIs, governments, judiciaries, NGOs, and civil society is a continuously evolving activity.<sup>100</sup> The purpose of human rights activism is to ensure that there is, at first, recognition of a human rights violation, and secondly, that justice is done to the victims.<sup>101</sup> When societies recognize human rights and formulate legal, judicial, and institutional frameworks to protect and promote human rights, they commit to ensure that states provide the victims of human rights violations with justice.<sup>102</sup> NHRIs then become defenders of human rights, not just against the state and its apparatus, but also against the practices and the system that does not guarantee adequate protection and promotion of human rights.<sup>103</sup> Hitherto, states were involved in formulating policies relating to human rights in the form of passing laws, rules, and regulations designed to protect human rights.<sup>104</sup> With the arrival of NHRIs in the governance framework, however, the institutional approach of

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98. Cardenas, *supra* note 22, at 38.

99. See Reif, *supra* note 15, at 10-11 (discussing the implementation of NHRIs in social policy without regard to social expectations); see also *Protectors or Pretenders?*, *supra* note 48 (describing how governments can implement NHRIs to protect human rights, and thus limit a NHRIs power to act as much as the governments like).

100. See Cassel, *supra* note 79, at 134-35 (detailing the evolution of human rights law and institutions).

101. See *Vienna Declaration and Programme of Action*, *supra* note 47, pmb1. (noting that human rights derive from the human person and the support of human dignity and worth); see also Cassel, *supra* note 79, at 124-25 (discussing the connection between fundamental rights of all people and enforcement of those rights through international human rights law).

102. See *Vienna Declaration and Programme of Action*, *supra* note 47, ¶ 1 (“Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.”).

103. See Paris Principles, *supra* note 26 (outlining purposes of NHRIs in and beyond their role in the government).

104. See, e.g., Reif, *supra* note 15, at 1 (relying on state regulation and law making as a way to protect and promote human rights).

protecting human rights<sup>105</sup> has been strengthened by empowering NHRIs to intervene in state and agency matters that result in human rights violations.<sup>106</sup>

However, NHRIs generate a certain degree of expectation because of their institutional structure and political context, given that they happen to be the only state-formed agency whose agenda is exclusively to protect and promote human rights.<sup>107</sup> While the judiciary is indeed performing similar tasks, and has been performing this role reasonably well in most jurisdictions, NHRIs have come to supplement the role of other democratic institutions in ensuring that issues of human rights remain the central focus of political discourse in every society.<sup>108</sup> By bringing human rights to every society's political discourse, NHRIs are engaged in the process of empowering individuals and institutions.<sup>109</sup> NHRIs empower individuals to recognize that they do not have to tolerate human rights violations and that there is no reason for victims to suffer silently against violations committed by the state and its agencies.<sup>110</sup> NHRIs also empower institutions because they can potentially influence the policies and practices of other institutions of governance.<sup>111</sup>

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105. See Thio, *supra* note 50, at 60-62 (discussing the value of institutions that protect human rights on an independent national level).

106. See Paris Principles, *supra* note 26 (giving NHRIs a role in national governments).

107. See Reif, *supra* note 15, at 10 ("The human rights commission has as its express mandate the protection and promotion of human rights.").

108. See *Protectors or Pretenders?*, *supra* note 48, at 2 (stating that national legislation, an independent judiciary, the establishment of democratic institutions, and human rights commissions are ways to protect human rights on the national level).

109. See Thio, *supra* note 50, at 62-63 (arguing that institutions have more power through cooperation with NGOs and other national institutions, which in turn empowers individuals); see also Davis, *supra* note 54, at 132 (discussing empowerment in the context of constitutionalism).

110. See, e.g., Vijayakumar, *supra* note 86, at 224 (noting the number of cases initiated in India after the creation of the National Human Rights Commission). These statistics suggest that more individuals are willing to bring claims of human rights violations given the structure of the Commission was then in place. *Id.*

111. See Paris Principles, *supra* note 26 (giving NHRIs influence in legislative processes and governmental institutions).

Moreover, developing a culture of human rights can enhance the social expectations generated by NHRIs.<sup>112</sup> NHRIs create a sense of awareness among civil society by promoting human rights education and a sense of awareness of people's rights.<sup>113</sup> Numerous experiences from different countries demonstrate that NHRIs engage in the process of sensitizing people in human rights related issues by a variety of methods, including knowledge and capacity building initiatives.<sup>114</sup> These initiatives need to begin at the local and community level so that people may understand that human rights are not empty words with little enforcement value, but rather a powerful tool to ensure the legal protection of human dignity.<sup>115</sup> NHRIs can most effectively perform this function by focusing on the laws, constitution, and bill of rights provisions in the domestic legal framework.<sup>116</sup> In addition, the development of international human rights law has shaped the policies and practices of governments and institutions in various countries, and gradually the domestic protection of human rights is fulfilling the standards that international human rights law guarantees.<sup>117</sup> This interplay between the domestic structure for the protection of human rights and the international framework of human rights protection is important for the human rights movement.<sup>118</sup>

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112. See *Protectors or Pretenders?*, *supra* note 48 (articulating the ways in which NHRIs create positive social expectations).

113. See *id.* (asserting that a national human rights commission raises awareness and activism regarding human rights).

114. See Whiting, *supra* note 58, at 73-77 (discussing human rights initiatives in Malaysia); see also Sripati, *supra* note 58, at 4-6 (analyzing the human rights commission in India). See generally Livingstone, *supra* note 58, at 1468-69 (commenting on the presence of a human rights commission in Northern Ireland).

115. See Ghai, *supra* note 91, at 1135 (discussing the legitimization of human rights on the domestic level when these rights comply with cultural and societal norms).

116. See Paris Principles, *supra* note 26, at 4 (stating that national institutions should have their goals clearly outlined in a constitutional or legislative text).

117. See, e.g., Ghai, *supra* note 91, at 1135-40 (evaluating examples of human rights policies in India, Canada, South Africa, and Fiji).

118. See Cardenas, *supra* note 58, at 31-32 (discussing the tension between state sovereignty and human rights); see also BAXI, *supra* note 93, at 119-21 (analyzing the human rights movements over time).

NHRIs rest upon a particular form of public legitimacy;<sup>119</sup> a belief that their functioning in a given society can fulfill certain social expectations.<sup>120</sup> This legitimacy would seriously come into question if NHRIs were not effective in their performance.<sup>121</sup> NHRIs have to overcome the inherent legitimacy challenge to their existence given that they are part of the government.<sup>122</sup> But, as the Human Rights Watch rightly observed in its report on National Human Rights Commissions in Africa,<sup>123</sup> “[e]ven in the most repressive regimes, the establishment of an official state body devoted to human rights may, on occasion, create an official space for a human rights discourse and may foster greater, even if limited, activism and awareness.”<sup>124</sup> While it is accepted that sensitization of human rights is an important outcome of NHRIs and it is possible that NHRIs may cause human rights issues to come to the forefront of governance, NHRIs can only test their institutional legitimacy through their performance and, in particular, their impact on rendering justice to those who fall victim to human rights violations.<sup>125</sup> The Human Rights Watch Report observed that one should not confuse the creation of NHRIs with a government’s greater respect for human rights.<sup>126</sup> It may well be that governments with poor human rights records establish NHRIs to

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119. See Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT’L & COMP. L. 117, 127-28 (1997) (explaining that maintaining a system of global governance depends on legitimizing international rules and institutional processes).

120. See Cassel, *supra* note 79, at 121-22 (supporting the ideal that human rights institutions and international law work together to fulfill societal expectations).

121. See Okafor, *supra* note 119, at 133 (discussing the need to enhance the legitimacy of institutions to avoid “institutional ills and undesirable outcomes”).

122. See *Protectors or Pretenders?*, *supra* note 48 (stating that it is both a strength and a weakness of national human rights commissions that they are part of the government).

123. *Id.*

124. *Id.*

125. See Yash Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT’L J. SOC. L. 179, 179 (1986) (referring to the belief that any type of legitimacy claimed would determine key features of that system’s organization of authority and administration).

126. See *Protectors or Pretenders?*, *supra* note 48 (observing that some nations create NHRIs only to appear concerned about human rights, and to lessen domestic and international pressure).

improve their reputations.<sup>127</sup> For this reason, states should promote NHRIs based on their record in each country, upon evaluation of their suitability, and whether they are the most effective method to protect and promote human rights.<sup>128</sup>

The United Nations views NHRIs as useful contacts within their respective countries on human rights matters.<sup>129</sup> It is important to emphasize the uniqueness of this contact, as it is fundamentally different from that with other pre-existing sources and manifestations of states and their instrumentalities, including legislative, executive, and judiciary branches.<sup>130</sup> NHRIs differ from NGOs because NHRIs have a quasi-governmental status that makes their position vulnerable to government pressure while also giving NHRIs the potential to play a powerful role in promoting human rights policy.<sup>131</sup> Thus, the United Nations advocated local initiatives in this area, as it rightly understood that human rights could become a reality throughout the world by the active and sustained role performed by NHRIs' within states.<sup>132</sup>

NHRIs themselves, as well as the civil society, should constantly assess NHRIs' performance and legitimacy.<sup>133</sup> NHRIs should

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127. *See id.* at 1, 5 (questioning whether NHRIs established in "highly repressive" states should be met with suspicion as to their commitment to protecting human rights). Human Rights Watch further asserts that there are many NHRIs set up in Africa that ignore the human rights abuses in their respective states.

128. *See id.* at 4 (noting that there are a wide variety of human rights commissions and it is unclear whether they are being evaluated to ascertain whether they are successful).

129. *See* Paris Principles, *supra* note 26 (recognizing that the United Nations can play an important role in aiding in the development of NHRIs by helping to exchange information).

130. *See id.* (detailing the nature of the relationship between NHRIs and states as being independent and working with other governmental bodies).

131. *See id.* (relating that states should establish NHRIs, and in turn NHRIs may work with NGOs to further the human rights protection cause).

132. *See* *Protectors or Pretenders?*, *supra* note 48, at 4 (stating that the U.N. High Commissioner is highly encouraging the creation and promotion of NHRIs).

133. *See* PERFORMANCE & LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 57, 70 (International Council on Human Rights Policy 2000) [hereinafter PERFORMANCE & LEGITIMACY] (examining how NHRIs in different countries and contexts acquired a reputation for legitimacy and effectiveness).

conduct their activities in a transparent manner because transparency plays an important role in determining the overall effectiveness of public institutions.<sup>134</sup> NHRIs must strengthen their powers so that they can effectively protect and promote human rights, but accountability must accompany the expansion of the NHRIs' powers.<sup>135</sup> By functioning in a transparent and effective manner, the public can hold NHRIs accountable for their actions.<sup>136</sup> Moreover, the fact that NHRIs work to protect and promote human rights suggest that their functions constantly ought to be in tune with principles of accountability and transparency. NHRIs risk eroding their reputations for legitimacy if the public's legitimate social expectations go unfulfilled and if their recommendations remain unenforced.<sup>137</sup> Operational transparency and institutional accountability assure victims of human rights violations that NHRIs work to provide justice to victims and preserve the rule of law.<sup>138</sup> This faith in NHRIs' institutional responsibility can help in the preservation of the rule of law.

According to the International Council on Human Rights Policy's report, an institution can maintain its formal accountability through appointing its members, submitting its financial accounts, and reporting its procedures.<sup>139</sup> NHRIs can also achieve accountability for their effective performance through independent external audits

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134. See Reif, *supra* note 15, at 18-19 (explaining that transparency improves the accountability of institutions and the government).

135. See *id.* (noting that NHRIs can promote good governance by acting as a mechanism for government accountability through initiating complaints that lead to the investigation of human rights violations).

136. See *id.* at 27 (remarking that NHRIs can be more effective if they are held accountable to the public through communication with the public and other organizations).

137. See *id.* at 27-28 (asserting that a responsive government is profoundly important to the effectiveness of NHRIs, because if the public has a negative view of the NHRI's effectiveness, it will not use the institution).

138. See *id.* 23-28 (reviewing the factors, including transparency and accountability, which strengthen the NHRIs' effectiveness).

139. See PERFORMANCE & LEGITIMACY, *supra* note 133, at 70 (stating that a democratic body such as a legislature should be responsible for the formal accountability of a NHRI).

that evaluate the impact of NHRIs.<sup>140</sup> This could be in the form of an audit report not just confined to evaluate financial and administrative functions of the NHRIs, but also to evaluate the effectiveness of the complaints redress mechanism of the NHRIs.<sup>141</sup> This would promote efficiency and enhance the NHRIs' working quality, while also helping to overcome the legal and bureaucratic hurdles associated with government created institutions. Because NHRIs exist and function on the basis of public trust, they need to constantly assess themselves and evolve their activities to ensure that the protection and promotion of human rights remains their primary objective.<sup>142</sup>

The performance and accountability of NHRIs are inextricably linked to the impact these institutions have in any society. People should view the impact of NHRIs from the degree to which they have fulfilled social expectations and their promises to enforce human rights.<sup>143</sup> Without accountability, NHRIs would remain paper tigers, thereby aggravating the frustration and disillusionment of victims and society as a whole.<sup>144</sup> It is not in the best interests of the preservation of the rule of law to allow any state to create and encourage a dysfunctional institution in the name of human rights protection.<sup>145</sup>

#### IV. FUNCTIONS OF NHRIS – GOOD GOVERNANCE AND MAINSTREAMING HUMAN RIGHTS

NHRIs perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries,

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140. See *id.* at 70-71 (giving an example of the yearly external audit of the South African Human Rights Commission's budget).

141. See *id.* at 71 (discussing how a regular audit, coupled with an account of what the NHRI has done, increases effectiveness).

142. See *id.* at 70-71 (declaring that NHRIs must be responsive to public needs and must be able to assess constantly the main human rights problems in the society it serves).

143. See Reif, *supra* note 15, at 27-28 (emphasizing the importance of public perception of NHRIs in their effectiveness).

144. See PERFORMANCE & LEGITIMACY, *supra* note 133, at 70 (explaining the importance of accountability in NHRIs).

145. See *id.* at 59 (noting the importance of public legitimacy during the establishment of a human rights institution).

exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights education and awareness, promoting interaction, exchange, and better coordination among other NHRIs in the region and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports.<sup>146</sup> The section on competence and responsibility in the Paris Principles provides some guidance as to the various functions that NHRIs may perform.<sup>147</sup> Cardenas made a useful distinction in regard to the regulative<sup>148</sup> and constitutive<sup>149</sup> functions of NHRIs. Regulative functions of NHRIs ensure conformity with international norms, rules, and principles, while constitutive functions change the identity of state or societal actors.<sup>150</sup> Although this classification of NHRIs' functions is useful, it is much more important to recognize that the role and functions of NHRIs are to promote human rights as part of institutionalizing good governance.<sup>151</sup> The concept of good governance<sup>152</sup> is broad and has been influenced significantly by the

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146. See C. Raj Kumar, *Role and Contribution of National Human Rights Commissions in Protecting National and International Human Rights Norms in the National Context*, 47 INDIAN J. PUB. ADMIN. 222, 225 (2001) (outlining the functions and role of NHRIs).

147. See Fact Sheet, *supra* note 20, Annex (listing the responsibilities of national institutions).

148. See Cardenas, *supra* note 22, at 26 (observing that the regulative functions of NHRIs are government compliance, relations with the judiciary, and independent activities).

149. See *id.* (noting that the constitutive functions of NHRIs are domestic socialization and international cooperation).

150. See *id.* at 25 (defining regulative and constitutive functions).

151. See James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 147-55 (1999) (explaining that international human rights principles will play only a marginal role in the World Bank's good governance agenda unless those principles are functionally defined).

152. See Obiora Chinedu Okafor, *Re-Conceiving "Third World" Legitimate Governance Struggles in our Time: Emergent Imperatives for Rights Activism*, 6 BUFF. HUM. RTS. L. REV. 1, 1-2 (2000) (setting forth three basic characteristics of governance; local governance, the relative location of governance, and strategies of movements for legitimate governance in third world states); see also Ngiare Woods, *Good Governance in International Organizations*, 5 GLOBAL GOVERNANCE 39, 39 (1999) (commenting that after the Cold War, many

principles of human rights, development, and democratization.<sup>153</sup> Arguably, in a global governance<sup>154</sup> system, NHRIs demonstrate a method of democratic decentralization that develops, protects, and enforces human rights at the local level.<sup>155</sup> At the same time, human rights norms are also formulated, developed, and institutionalized at the international level.

The United Nations Development Programme ("UNDP") views governance as "the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."<sup>156</sup> Governance encompasses the shape that civil and political societies will take in the process of economic, social, and political development. NHRIs should play a central role in developing good governance policies in states. Reif explains the role of NHRIs, perceiving good governance, as "the responsible use of public authority to manage nation's affairs."<sup>157</sup> According to Reif, good governance includes numerous practices such as:

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international organizations heeded the call from countries to promote democracy and better government); Sakiko Fakuda-Parr & Richard Ponzio, *Governance: Past, Present, Future - Setting the Governance Agenda for the Millennium Declaration*, U.N. Development Programme Paper, at 1 (2002) (referring to the U.N. Millennium Declaration's vision of good governance as a key objective for the twenty-first century). See generally RICHARD FALK, ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS 6-8 (1995) (discussing the institutionalization of humane governance versus world government).

153. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (stating that democratic entitlement requires democracy to validate governance).

154. See John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 206 (2000) (maintaining that global governance has a narrower scope than the more frequently used term 'globalization').

155. See generally Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 THIRD WORLD Q. 795, 801-06 (2000) (examining the emergence of governance and the United Nation's role in the conceptual process).

156. See Fakuda-Parr & Ponzio, *supra* note 152 (defining various international organizations' definitions of governance).

157. See, Reif, *supra* note 15, at 16 (quoting CLARENCE J. DIAS & DAVID GILLIES, HUMAN RIGHTS, DEMOCRACY AND DEVELOPMENT 10 (1993)).

[A] professional civil service, elimination of corruption in government, a predictable, transparent and accountable administration, democratic decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of government, appropriate levels of military spending, and so on.<sup>158</sup>

An expansive understanding of good governance helps to recognize the mandate of NHRIs and how they should function.<sup>159</sup> The effectiveness of NHRIs depends upon numerous factors, including the mode and method of establishment, mandate, level of independence, availability of financial and human resources, scope of powers and integrity of NHRIs' members.<sup>160</sup>

The United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP") observed that eight major

158. See Reif, *supra* note 15, at 16-17 (noting the many ways in which people understand good governance). See generally Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Rights: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW. 149, 152 (2000) (maintaining that in countries where transparency and accountability are lacking, corruption flourishes); Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 495-96 (1999) (examining the relationship between corruption, legitimacy, and human rights and how it restructures political action); NIHAL JAYAWICKRAMA, CORRUPTION – A VIOLATOR OF HUMAN RIGHTS (Transparency Int'l Working Paper, June 1998) (discussing the different ways that a country's corruption violates the protection and promotion of human rights), *available at* [http://www.transparency.org/working\\_papers/jayawickrama/jayawickrama.html](http://www.transparency.org/working_papers/jayawickrama/jayawickrama.html) (last visited Oct. 15, 2003); LAWRENCE COCKSROFT, CORRUPTION AND HUMAN RIGHTS: A CRUCIAL LINK (Transparency Int'l Working Paper, October 1998) (maintaining that the elimination of corruption and strengthening of human rights are interdependent), *available at* [http://www.transparency.org/working\\_papers/cockcroft/cockcroft.html](http://www.transparency.org/working_papers/cockcroft/cockcroft.html) (last visited Oct. 15, 2003); C. Raj Kumar, *The Benefit of a Corruption-Free Society*, H.K. LAW., Dec. 2002, at 39 (arguing that an imminent need exists to formulate a fundamental human right to corruption-free government).

159. See generally Fakuda-Par & Ponzio, *supra* note 152 (providing a general understanding of good governance).

160. See Kamal Hossain, *Human Rights and Development*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 55, 61-62 (Kamal Hossain et al. eds., 2000) (reciting the features to examine when measuring the effectiveness of NHRIs).

characteristics constitute good governance:<sup>161</sup> participation, rule of law, transparency,<sup>162</sup> responsiveness, consensus-oriented, equity and inclusiveness, effectiveness and efficiency, and accountability.<sup>163</sup> The functions of the NHRIs discussed earlier do not fully reflect this approach. Thus, in order to promote a good governance agenda for human rights, NHRIs should alter their present structure to include a more participative, accountable, and transparent approach.<sup>164</sup> Because a NHRI, in its functioning and in its dealing with the government, would stress the fulfillment of these principles, it is important that its own conduct be in conformity with the good governance agenda.<sup>165</sup> Linking human rights and good governance promotes greater transparency and accountability, which may provide more effective communication and engagement between NHRIs, governments, civil society, and victims of human rights violations.<sup>166</sup> In reality, the only way to achieve promotion of human rights is by building national capacities through the expansion of NHRIs' functions to include the governance approach.<sup>167</sup>

One could establish such expansion by mainstreaming human rights, which refers to "the concept of enhancing the human rights

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161. See U.N. Economic & Social Commission for Asia & the Pacific, *What is Good Governance?* (spelling out detailed definitions of each characteristic), available at <http://unescap.org/huset/gg/governance.htm> (last visited Oct 15, 2003).

162. See Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 193, 193 (1999) (supporting UNESCAP's opinion that governments cannot engage in good governance without promoting transparency).

163. See *id.* (explaining generally how to implement good governance through transparency and accountability).

164. See Philip Alston, *Towards a Human Rights Accountability Index*, 1 HUM. DEV. J. 249, 250 (2000) (asserting that a composite index could help achieve good governance).

165. See Reif, *supra* note 15, at 18-19 (explaining how NHRIs should build good governance by being participatory, transparent, and accountable).

166. See *id.* (indicating that NHRI's accountability establishes lines of communication with the public).

167. See Mary Robinson, *From Rhetoric to Reality: Making Human Rights Work*, E.H.R.L.R. 2003, 1, 6-7 (defining national capacities as national protection systems that encompass entire institutional arrangements functioning under national law to ensure human rights).

programme and integrating it with a broad range of United Nations activities,”<sup>168</sup> including development, governance, and administration of the states. In 1997, the U.N. Secretary General designated human rights as a crosscutting issue in his reform program.<sup>169</sup> Even though the United Nations has used mainstreaming in the context of integrating all U.N. activities within the human rights framework, this concept is extremely relevant for reorienting the functions of NHRIs.<sup>170</sup> For example, NHRIs can play an active role if they shape the governance approaches that states adopt to include human rights in all its activities. By including human rights, NHRIs have the potential to ensure that states no longer see human rights as negative obligations, but as positive duties.<sup>171</sup> Thus, mainstreaming human rights would help in promoting rights-based approaches to development, and the NHRIs could be key institutions in initiating such a process of development. The UNDP’s Human Development Report for 2000 suggested that NHRIs should go beyond conventional assessment methods in their annual reports that take into account only civil and political rights (“CPRs”).<sup>172</sup> NHRIs should also take a pro-active role by inquiring into violations of economic, social, and cultural rights (“ESC rights”).<sup>173</sup> In 1998, the

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168. U.N. Office of the High Commissioner for Human Rights, *Mainstreaming Human Rights* (describing the concept of mainstreaming human rights), available at <http://www.unhchr.ch/development/mainstreaming-01.html> (last visited Oct. 15, 2003).

169. *See id.* (referring to how the Secretary General wished to enhance the human rights program and better blend it into the range of U.N. activities).

170. *See generally id.* (stating that the United Nations’ mainstreaming of human rights serves as a vehicle for a new operationalization for development).

171. *See Robinson, supra* note 167, at 4-6 (describing how linking human rights with democracy advances human development).

172. *See Human Development Report 2000*, U.N. Development Programme, at 113 (emphasizing the importance of independent national assessments to advance all human rights).

173. *See* MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 8-16 (Ian Brownlie, ed., Clarendon Press 1995) (noting that violations of CPRs often take priority over ESC rights); *see also* Scott Leckie, *Another Step Towards Indivisibility: Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 82 (1998) (maintaining that states have not given responses to violations of economic, social, and cultural rights the same serious consideration as violations of political and civil rights); ASBJØRN EIDE & ALLAN

United Nations Committee on Economic, Social and Cultural Rights (“CESCR”) adopted a General Comment<sup>174</sup> that dealt with NHRIs’ roles in the protection of ESC rights.<sup>175</sup> The CESCR observed that the General Comment requires each state party “take steps . . . with a view to achieving progressively the full realization of the [Covenant] rights . . . by all appropriate means.”<sup>176</sup> One way to realize these rights is through NHRIs’ work to protect and promote human rights, while exercising their functions to ensure the indivisibility and interdependence of all human rights.<sup>177</sup> Although NHRIs may not have explicit powers to address ESC rights, they should attempt to pursue an integrated approach relating to the fulfillment of human rights.<sup>178</sup>

## V. NHRIS TAKING COGNIZANCE OF ECONOMIC AND SOCIAL RIGHTS

States no longer neglect economic and social rights as they did in the past in relation to civil and political rights.<sup>179</sup> States have begun

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ROSAS, *Economic, Social and Cultural Rights: A Universal Challenge*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 1, 17 (Asbjørn Eide et al. eds., Kluwer Acad. Publishers 1995) (observing that some critics do not consider ESC rights as true rights at all).

174. See General Comment 10, *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, U.N. ESCOR, 19th Sess., Agenda Item 3, at 1, U.N. Doc.E/C.12/1998/25 (1998) (stating that national institutions can take important steps in promoting and protecting human rights).

175. See University of Minnesota Human Rights Resource Centre, *Module 23: National Human Rights Commissions and ESC Rights* (explaining the characteristics of human rights commissions and the activities they could perform that would further ESC rights), available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module23.htm> (last visited Oct. 15, 2003).

176. General Comment 10, *supra* note 174, art. 1, para.1.

177. See *id.* (commenting on the role of NHRIs in the protection of economic, social, and cultural rights).

178. See Audrey R. Chapman, *A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 30 (1996) (concluding that the absence of national institutions committed to the promotion of ESC rights presents challenges to protecting those rights).

179. See Audrey R. Chapman & Sage Russell, *Introduction*, CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 3, 3-19 (Audrey Chapman & Sage Russell eds., Intersentia, Antwerp,

to appreciate the need for developing consensus on the core elements of these rights, formulation and development of international standards, and constituting monitoring mechanisms.<sup>180</sup> The CESCR has engaged in the adoption of general comments<sup>181</sup> on particular rights in the ICESCR,<sup>182</sup> including the rights to food and health and two general comments on education.<sup>183</sup> The U.N. Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights' further accentuated the importance of ESC rights by appointing Special Rapporteurs to investigate and report on the implementation and violation of certain ESC rights around the world.<sup>184</sup> These U.N. bodies have approved certain resolutions on matters relating to these rights in order to strengthen the implementation framework of ESC rights.<sup>185</sup> The 1986 Limburg Principles on the Implementation of Economic, Social and Cultural

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2002) (noting that recent initiatives, such as the Maastricht Guidelines, are encouraging states to focus on protecting economic and social rights).

180. See *id.* (explaining the necessary steps for establishing ESC rights implementation and monitoring).

181. See, e.g., *General Comment No. 11: Plans of Action for Primary Education*, U.N. ESCOR, 20th Sess. at Agenda Item 7, U.N. Doc. E/C.12/1999/4 (1999) (describing the importance of global primary education); *General Comment No. 12: The Right to Adequate Food*, U.N. ESCOR, 20th Sess. at Agenda Item 7, U.N. Doc. E/C.12/1999/5 (1999) (outlining the United Nations' position on the responsibilities of states to ensure availability of and accessibility to food); *General Comment No. 13: The Right to Education*, U.N. ESCOR, 21st Sess., U.N. Doc. E/C.12/1999/10 (1999) (highlighting the U.N. belief that education is a fundamental and indispensable right for all people, especially those who are socially and economically marginalized); *General Comment No. 14: The Right to the Highest Attainable Standards of Health*, U.N. ESCOR, 22d Sess., at Agenda Item 3, U.N. Doc. E/C.12/2000/4 (2000) (describing health as a fundamental human right).

182. See *International Covenant on Economic, Social and Cultural Rights*, *supra* note 8, pbml. (outlining the economic, social, and cultural rights that all people possess).

183. See *supra* note 181 and accompanying text (describing the United Nations' position on and plans of action for specific ESC rights regarding education and health).

184. See U.N. Office of the High Commissioner of Human Rights, *Special Procedures of the Commission on Human Rights* (referring to various reports on human rights issues, including ESC rights, by appointed representatives), available at <http://www.unhchr.ch/html/menu2/7/b/tm.htm> (last visited Oct. 16, 2003).

185. See Chapman, *supra* note 178, at 42 (describing principles that detail a state's obligations to comply with the ICESCR).

Rights<sup>186</sup> and the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>187</sup> are useful documents that provide guidance to states for the implementation of ESC rights. Both sets of guidelines, developed by groups of international academic and human rights experts, have achieved prominence in the international arena and have received *de facto* status within the CESCER as evidenced by their incorporation into the general comments.<sup>188</sup> These developments have undoubtedly paved the way for the development of a framework for recognizing certain core elements of ESC rights, for setting standards, and more importantly, for identifying minimum state obligations.<sup>189</sup> NHRIs have traditionally focused on the protection of CPRs, while there has been little effort, if any, on the part of NHRIs to understand the impact of ESC rights violations.<sup>190</sup>

NHRIs need to ensure that they familiarize themselves with the legal framework of ESC rights.<sup>191</sup> This would help them develop procedures and institutional mechanisms to engage with governments on matters relating to violations of ESC rights.<sup>192</sup> NHRIs need to understand that there is a veritable relationship

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186. See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights*, 9 HUM. RTS. Q. 122, 131-34 (1987) [hereinafter *The Limburg Principles*] (detailing the procedures and consultations states should implement to effectively comply with the goals of the ICESCR).

187. See THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 1 (Theo C. van Boven et al. eds., Utrecht, Netherlands Institute of Human Rights 1998) [hereinafter THE MAASTRICHT GUIDELINES] (commemorating the tenth anniversary of ICESER and expanding on the principles set forth in the Limburg Principles).

188. See Chapman, *supra* note 178, at 43 (interpreting the Limburg Principles as obligations for states under the ICESER).

189. See *id.* (calling for the implementation of a “violations” approach for monitoring international ESC rights).

190. See *id.* at 26 (discussing a discrepancy in states’ approaches to CPRs and ESC rights).

191. See THE MAASTRICHT GUIDELINES, *supra* note 187, at 5 (describing application of legal norms as contributing to development of minimum standards and scope for ESC rights).

192. See *id.* (suggesting that a legal approach helps states fulfill their legal obligation to take immediate steps towards full realization of ESC rights).

between the protection and promotion of CPRs and the enforcement of ESC rights.<sup>193</sup> The role of NHRIs should be to narrow the differences between these two sets of rights so that public policy goals of economic and social development become assertive and enforceable rights for the empowerment of citizens.<sup>194</sup> NHRIs formed under specific political circumstances relating to massive violations of CPRs can pursue the integral development of CPRs and ESC rights.<sup>195</sup> This development would reflect the inherent evolutionary nature of human rights discourse, and thus NHRIs should not hesitate to expand their mandates to include ESC rights.<sup>196</sup> Although there may be legislative and administrative bottlenecks in NHRIs assuming such a role, it is the responsibility of these institutions to engage governments in order to compel them to legislate on matters relating to ESC rights and to empower NHRIs with the jurisdictional mandate to inquire into violations of such rights.<sup>197</sup> NHRIs can handle any opposition from states by mobilizing civil society and other actors in the governance framework so that governments do not neglect their commitments to the protection and promotion of ESC rights.<sup>198</sup> Moreover, since NHRIs are domestic in their origin and development,<sup>199</sup> they are in a better position to formulate the core

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193. See Chapman, *supra* note 178, at 23 (maintaining that there is an interrelation between CPRs and ESC rights).

194. See *id.* at 29-30 (describing the discrepancy between conceptual development of CPRs and ESC rights and calling for greater understanding of ESC rights in order to effectively implement and monitor them).

195. See Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 111-12 (1996) (discussing the need for NGOs to be flexible and open-ended).

196. See *id.* at 110 (noting international relations developments as a driving element in the change of the shapes and purposes of NGOs).

197. See *id.* at 127-28 (relating the power of NGOs to express a third viewpoint, separate from governments and markets); see also *The Limburg Principles*, *supra* note 186, at 135 (explaining the responsibilities of states to utilize international and non-governmental organizations in implementing the ICESCR).

198. See *id.* at 124, 132 (suggesting that states use all elements of governance to implement the ICESCR and make reports on ICESCR implementation a part of broad public discussion on policies and goals).

199. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 185-86 (1997) (noting different definitions and conceptions of NGOs); see also Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM.

minimum obligations necessary for the protection and promotion of ESC rights.<sup>200</sup> The success of this role for NHRIs, however, will depend upon whether these institutions have a certain degree of independence and autonomy in their functioning, including the powers necessary to perform required duties in an effective and efficient manner.<sup>201</sup>

## VI. NHRIS AND THE JUDICIARY – PERFORMING SEPARATE AND INDEPENDENT FUNCTIONS

The role of the judiciary<sup>202</sup> in the protection and promotion of human rights has developed significantly over the last several decades. Judiciaries of different jurisdictions have developed constitutional law to ensure the protection of rights and the preservation of the rule of law.<sup>203</sup> Independence of the judiciary has become an accepted norm relating to the governance framework in most jurisdictions.<sup>204</sup> Constitutionalization of human rights and the interpretation of these rights by the judiciary have helped the development of jurisprudence relating to human rights within the domestic context.<sup>205</sup> In particular, judicial systems in developed

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HUM. RTS. L. REV. 307, 320 (1997) (describing how some human rights advocates include groups established in a single country and rely solely on domestic law in the definition of “NGO”).

200. See Olz, *supra* note 199, at 329-30 (discussing the role of NGOs and NHRIs and absence of limitations that states face in terms of sovereignty and non-intervention in international matters for NGOs and NHRIs).

201. See Otto, *supra* note 195, at 135-39 (relating the “Grotian” formulation of NGO participation in the international community as requiring an expansive and emancipatory role for NGOs).

202. See generally THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS, CIMEL BOOK SERIES NO. 5 (Eugene Cotran & Adel Omar Sherif eds., 1997) (reviewing the judiciary’s role in promoting and protecting human rights).

203. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997) (arguing that the obligation to obey the law arises from the judiciary’s authoritative interpretation of constitutional law).

204. See generally McCrudden, *supra* note 34, at 502 (describing the interaction between judiciaries in various jurisdictions and noting the independence of the judiciary in the field of human rights).

205. See *id.* at 500 (observing developments in human rights protection in national legal systems via primarily legal, *i.e.* judicial, means).

countries have begun to play an important role in terms of human rights by ensuring respect for law and requiring that governance structures and administrative machinery function efficiently.<sup>206</sup> With the advent of NHRIs with a specific focus on human rights, scholars have raised a question as to whether the judiciary's role in the protection and promotion of human rights is in any way diluted.<sup>207</sup> The fact that NHRIs are exclusively designed human rights institutions should not affect, nullify, or even alter the role played by national judicial institutions.<sup>208</sup> One could better understand the role of NHRIs if one recognizes that they are most effective when other social control mechanisms are operating in an efficient manner.<sup>209</sup> A state should not compromise the institutional legitimacy and legal foundation of its judicial institution to provide space for the work of NHRIs.<sup>210</sup> In fact, one of the reasons why NHRIs work for human rights protection and promotion within the governance framework is that the judiciary is concerned with all disputes in society and may not have sufficient time and resources to focus exclusively on human rights issues. This is not to suggest, however, that the judiciary should in any way neglect or marginalize issues relating to human rights.<sup>211</sup>

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206. See, e.g., Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809, 837 (2001) (relating how the South African Constitutional Court played an integral role in certifying the new Constitution and setting forth the new rule of law).

207. See generally Jeffrey Goldsworthy, *Judicial Review, Legislative Override, And Democracy*, 38 WAKE FOREST L. REV. 451, 470 (2003) (discussing whether judicial enforcement of rights actually detracts from the real enforcement of those rights).

208. See Olz, *supra* note 199, at 321 (claiming that the state – and by extension, the state courts – is at the center of the traditional international legal order).

209. See *The Limburg Principles*, *supra* note 186, at 124 (asserting that the government should work with national organizations and NGOs because they can thus play an important role in protecting rights); see also THE MAASTRICHT GUIDELINES, *supra* note 187, at 9 (highlighting the importance of state participation in national organizations to protect ESC and human rights).

210. See Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 652-60 (2003) (arguing that courts have a vital role in the protection of human rights that cannot be ceded).

211. See *id.* (emphasizing the importance of courts in human rights protection and enforcement).

Human rights have been, and will be, an important issue for the judiciaries of the world, as states have most often recognized these rights by their constitutions or because a particular state may have been a party to an international convention resulting in certain treaty obligations under international law or international human rights law.<sup>212</sup> It is the responsibility of the judiciary to determine the scope of the legal obligation<sup>213</sup> of the particular state under the international human rights law.<sup>214</sup> The judiciary will also be responsible for determining the scope of the provisions of their country's constitution, particularly relating to human rights.<sup>215</sup> Judicial institutions will supplement the role of NHRIs by providing them with important legal and constitutional frameworks for the protection and promotion of human rights.<sup>216</sup> Moreover, NHRIs generally tend to have a broader mandate when it comes to their jurisdictional operation. Hence, they are in a better position to take cognizance of human rights violations than the judiciary, which will feel restrained based on certain laws, rules, and regulations as to how and when issues come before the court.<sup>217</sup> The rules relating to standing may also hinder courts generally from taking cognizance of human rights violations, even though certain courts have created progressive

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212. See *id.* at 644 (defining human rights as those articulated in legal texts such as constitutions, judicial decisions and treaties).

213. See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 354-55 (1998) (analyzing the extent of compliance with obligations of international human rights law); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602-03 (1997) (stating the principles of compliance under international law).

214. See Perry, *supra* note 210, at 639-45 (explaining the judiciary's role in protecting human rights).

215. See *id.* at 643-44 (noting that courts are independent and separate from the government or politics when deciding human rights cases, and that they are only beholden to the constitutions of their particular states).

216. See *id.* at 644 (specifically referencing South Africa's constitution, which provides that a court is subject only "to the Constitution and the law" when deciding human rights cases).

217. See Olz, *supra* note 199, at 342-43 (noting national organizations' contributions to human rights issues, particularly in the fields of standard-setting, co-management, and public awareness); see also Charnovitz, *supra* note 199, at 274 (describing the benefits of national organizations' involvement in international issues, including human rights).

systems to overcome the limitations of rules relating to *locus standi*.<sup>218</sup> But NHRIs have no such limitations, and as long as they perceive a particular issue to be of relevance for human rights, they can take cognizance of the matter.<sup>219</sup> However, we should not ignore the supplemental role played by the national judiciaries to the work of NHRIs. Since national judiciaries are designed with an enforcement mechanism, they can assist NHRIs in ensuring that human rights are enforced.<sup>220</sup> Enforcement of human rights is one vital issue in which there could be greater interaction between national judiciaries and NHRIs.<sup>221</sup> It is possible that NHRIs can approach courts of law on matters relating to non-enforcement of human rights by the particular government in order to seek appropriate direction.<sup>222</sup>

## VII. IMPACT OF CIVIL SOCIETY ON THE FUNCTIONING OF NHRIS

Civil society<sup>223</sup> has started to play an important role in the human rights movement.<sup>224</sup> NGOs have altered the state-centered approach

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218. See Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405, 453-61 (1997) (generally observing the role of U.S. federal law in global civil society, including issues of standing and questions of the applicability of U.S. federal law to issues international in nature).

219. See Charnovitz, *supra* note 199, at 245 (arguing that NGOs possess the ability to operate outside of traditional governmental and bureaucratic channels).

220. See generally Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT 455, 473-78 (2000) (reviewing the purpose of the judiciary and its enforcement function); Alexander & Schauer, *supra* note 203, at 1367 (remarking on the function of the judiciary).

221. See Collingsworth, *supra* note 33, at 188-90 (conveying an understanding of the problem of human rights enforcement).

222. See, e.g., Sripati, *supra* note 58, at 15 (illustrating that the Indian National Human Rights Commission has the power to approach courts under certain circumstances to enforce human rights).

223. See generally Mary H. Kaldor, *The Ideas of 1989: The Origins of the Concept of Global Civil Society*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 475, 475-88 (1999) (discussing the concept of "global civil society").

224. See Otto, *supra* note 195, at 125-29 (evaluating the roles envisioned for international civil society).

of human rights protection<sup>225</sup> and brought a renewed sense of enthusiasm to promote human rights activism. Civil society actors have unique characteristics that make them independent and autonomous of any limitations that would otherwise restrict the work of other democratic institutions in any society.<sup>226</sup> An empowered civil society can duly protect human rights and take efforts to redress victimization, on account of human rights violations.<sup>227</sup> The engagement and interaction between civil society and NHRIs are extremely important, as civil society can assess the work of the NHRIs in fulfilling its mandate.<sup>228</sup> Moreover, NHRIs in most states may not have the resources to obtain all the information relating to human rights violations and, hence, could draw from the experience of civil society actors.<sup>229</sup> NHRIs should develop internal mechanisms that involve civil society to ensure that human rights do not remain an official or quasi-official discourse but rather become a democratized debate involving all sections of the society.<sup>230</sup> Only when NHRIs are able to work with civil society actors in ensuring the protection and promotion of human rights can we truly achieve this democratization of the human rights discourse.<sup>231</sup> It is possible that the roles and functions of NHRIs and civil society actors could come in conflict, particularly with regard to approach of dissent when it comes to the policies of the government and its implications

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225. See Charnovitz, *supra* note 199, at 185 (noting the historical and present role of NGOs in human rights protection).

226. See Christenson, *supra* note 218, at 412-17 (discussing the impact of the civil society on international law).

227. See *id.* at 412-13 (remarking that civil society organizations have the power to shape public action).

228. See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1339 (1999) (describing the ability of transnational civil society to demand and oversee state accountability).

229. See *id.* at 1339-41 (declaring the ability of civil society to promote human rights norms and raise concerns about marginalized people and their rights).

230. See *id.* at 1340 (maintaining that a robust civil society can promote democratic governance).

231. See *id.* (stating that a civil society creates a setting in which human rights advocates can work through the application of human rights norms).

for human rights.<sup>232</sup> Even under these circumstances, it is important for both civil society actors and NHRIs to understand that both institutions are performing different functions and legitimate disagreements on issues relating to human rights may occur in democratic societies and ought to be solved within the framework of the democratic discourse.<sup>233</sup> The civil society can actually empower the NHRIs by bringing into focus the human rights issues that affect the governance in a particular society.<sup>234</sup> Moreover, human rights issues are diverse in nature and the input of civil society would be valuable when it comes to evolving expertise on particular issues relating to human rights that affect a specific community.<sup>235</sup> Legislatures must guarantee the engagement of civil society with NHRIs so that participation of civil society does not depend upon the decision of the members of NHRIs.<sup>236</sup> This would help in the development of institutional cultures that respect human rights, as there is a lot to learn from the experience of civil society actors and NHRIs in their different approaches to the protection and promotion of human rights.

## CONCLUSION

NHRIs are useful institutions and can make an immense contribution to the protection and promotion of human rights.<sup>237</sup> However, at present, NHRIs suffer from not only structural problems and functional deficiencies, but they also lack adequate mechanisms

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232. See Olz, *supra* note 199, 326-31 (detailing how national institutions can interact with NGOs to promote and influence international human rights in their particular states).

233. See Mertus, *supra* note 228, at 1371-72 (describing conflicts between NGOs and notions of democracy and civil society).

234. See *id.* at 1338-40 (explaining the importance of civil society to strengthen and promote human rights).

235. See *id.* (asserting that civil society has the ability to look to the community and promote human rights and "raise the concerns of unheard voices").

236. See *id.* at 1374-75 (stressing the need for NGOs to be seen as legitimate and regulated by international law).

237. See Chapman, *supra* note 178, at 27-29 (describing the importance of NHRIs and their ability to effect progress in the development of human rights).

for enforcement of human rights.<sup>238</sup> Mere institutionalization of human rights is not sufficient, unless it helps transform the governance agenda. One should not confuse NHRIs with the courts and other quasi-judicial institutions or other government bodies.<sup>239</sup> The idea underlying the establishment of NHRIs is to ensure that they remain vigilant over those who hold and exercise powers so that their conduct conform to national and international human rights norms. The work of NHRIs, therefore, must constantly evolve and should focus on all those activities that result in the violation of human dignity. If NHRIs understand their proper role and are allowed to function freely, bearing in mind the objectives for which they were established, they would be able to fulfill social expectations and hold promises for victims of human rights violations and society.<sup>240</sup>

At the same time, NHRIs should not compete for the democratic space that has been hitherto within the province of legislature, executive, and judiciary.<sup>241</sup> Since human rights discourse is not only a public policy discourse, but rather a social and political empowerment discourse, we should guarantee NHRIs democratic space to continue their independent functions in fulfilling the mandate to protect and promote human rights. The rationale for such separate space is to elevate the discussion of human rights and rights relating to development from policy guidelines to central political principles of any democratic society.<sup>242</sup> NHRIs must become independent democratic institutions with the institutional capacity to interlink issues relating to human rights, development, and

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238. *See supra* notes 81-84 and accompanying text (explaining the structural weaknesses of NHRIs).

239. *See supra* notes 208-212 and accompanying text (drawing a distinction between judiciary functions and NHRI functions in the context of human rights).

240. *See supra* notes 93-100 and accompanying text (discussing the impact of social expectations on NHRIs' functions).

241. *See supra* notes 203-209, 213-216 and accompanying text (explaining that the judiciary has its own role in preserving human rights that can be supplemental to that of NHRIs).

242. *See supra* notes 216-222 (implying that by working with judiciaries and the civil society, NHRIs can emphasize the importance of preserving human rights within a state and bring human rights to the forefront of the political arena).

governance with a view to meet the social expectations they have generated.<sup>243</sup>

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243. See *supra* notes 81-84 and accompanying text (relating the importance of NHRI independence).