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

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

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1 Introduction

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

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

3 S Collinson & E Schenkenberg UNHCR’s leadership and coordination role in refugee response settings: Desk review (2019).
5 See eg K Koser ‘Reforming the international protection regime: Responsibilities, roles and policy options for Australia’ (2016) 3.
7 Paris Principles (n 6) para 2.
required to be independent in form and function. They also have broad human rights mandates that serve both a promotional and protection function. They have evolved in the human rights system from peripheral actors to ones that have legal standing in UN processes and have had a normative effect in recent international law developments with respect to directly monitoring the implementation of certain human rights.

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

8 Paris Principles (n 6) ‘Composition and guarantees of independence and pluralism’.
9 Paris Principles (n 6) para 2.
14 The UNHCR Statute states that the UNHCR shall undertake its protection mandate by: ‘keeping in close touch with the governments and inter-governmental organisations concerned’ (para 8(g)); ‘Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees’ (para 8(l)); and ‘The High Commissioner may invite the co-operation of the various specialised agencies’ (para 12); see also UNHCR ‘UNHCR and human rights: A policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection’ 1: UNHCR notes in the introductory part that ‘extreme caution traditionally marked UNHCR's
International human rights law, on the other hand, did not evolve with such rigidity and thus there are more actors including a prominent role for non-state actors, for instance in the field of business and human rights. NHRI therefore found a natural home in the ‘traditional’ international human rights system given their definition as institutions created to promote and protect human rights and not specifically refugee rights. Indeed, it is quite rare that a NHRI has a definitive legislative mandate to address refugee rights. This function generally is taken as implied, although there are significant implementation and operational challenges that arise in the absence of such an explicit mandate.

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

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

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15 My emphasis.
16 John-Langba (n 4) 179.
19 As above.
20 As above.
determination of actors that ‘serve’ both fields. NHRIAs are such actors and, therefore, can be located within the nexus between international human rights law and international refugee law. As such, they could provide a reimagined avenue for advancing refugee rights. Second, effective implementation requires specificity, for instance in the identification of the role that needs to be played, or the presence or acquisition of the requisite skills required for such an endeavour. Therefore, the identification of NHRIAs as critical actors is not sufficient. Such a process requires that a defined role for NHRIAs is determined and specific avenues for engagement created. In addition, NHRIAs would need to acquire specialised skills in refugee law or bolster existing skills.

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

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

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

However, the expansion of the understanding of refugee rights to include those derived from human rights instruments provides a basis for NHRI s to interpret their human rights mandates to include refugee rights and, even broadly, migrants’ rights, thereby carving out a place within the nexus of international human rights law and international refugee law. Indeed, evidence from NHRI practice indicates that NHRI s across Africa are promoting and protecting migrants’ rights primarily through the interpretation of their mandates broadly to encompass rights of all persons in a given state’s territory.\textsuperscript{22} However, evidence also indicates that the focus is broad with few having systems in place to address refugee rights as distinct from other categories of migrants’ rights\textsuperscript{23} – a critical issue in the promotion and protection of refugee rights as the conflation of refugees and asylum seekers with other migrants hinders their access to protection, reinforces the notions of securitisation of asylum and focuses attention on border security.\textsuperscript{24} This lack of demarcation of refugee rights from general migrants rights perhaps is reflective of the limited specialist expertise on forced migration or refugee law in NHRI structures.

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

\textsuperscript{22} Kämpf (n 17) 25.
\textsuperscript{23} Kämpf (n 17) 27-30.
\textsuperscript{25} Neither does the 1951 Refugee Convention define the term ‘persecution’. The meaning of persecution derives from human rights law. Hathaway and Forster define it as ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’. JC Hathaway & M Forster The law of refugee status (2014) 104-105.
\textsuperscript{26} Chetail (n 11) 27-28. There is a large body of literature on gender-related asylum law. See eg M Dustin & N Ferreira ‘Improving SOGI asylum adjudication: Putting persecution ahead of identity (2021) 40 Refugee Survey Quarterly 315, https://
It has also facilitated the consideration of the specific protection needs for women refugees and asylum seekers.\textsuperscript{27} Furthermore, states have applied human rights norms to determine that certain forms of violence against women, such as rape, other forms of sexual violence and female genital mutilation, constitute serious harm in the scope of persecution.\textsuperscript{28}

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

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

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

\textsuperscript{27} UNHCR ‘Refugee women and international protection No 64 XLI – 1990’.
\textsuperscript{29} Hathaway (n 12) 75-147.
\textsuperscript{30} Hathaway (n 12) 83.
other state organs, other than foreign ministries, in advancing the League’s overall goals.

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

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

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

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

32 Dubin (n 29) 471.
33 Dubin (n 29) 487-489.
34 UN ECOSOC ‘ECOSOC Resolution 9 (II), 21 June 1946’.
the UN Commission on Human Rights (Commission) adopted a resolution that recommended the establishment of national human rights bodies by states.37 These institutions would take the form of a national advisory body or local committees tasked with addressing human rights concerns and would examine the human rights situation in their respective states, offer advice to the government, and promote a culture of human rights.38 This resolution built on ECOSOC’s 1946 resolution, mentioned above, which sought to encourage states to establish local human rights entities tasked with promoting human rights domestically.

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

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

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42 Paris Principles (n 6).
1990 and 2010 over 25 NHRIs were established, although this proliferation was closely linked with political reform rather than the idea that NHRIs could promote specific rights or group rights. As such, there was no formal agreement on the definition of a NHRI or a standard model for the design of such institutions resulting in variation in legal frameworks and methods of operation. For instance, among African NHRIs, establishment occurred through legislation, constitution, by decree or a combination of these legal bases. In addition, these considerations of the nature and status of NHRIs did not include a specific role for such institutions in the realm of refugee rights, reflecting the divergence between the two fields of international law with implications on the extent to which NHRIs could draw support in engaging with the UNHCR and in turn with refugee protection.

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

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

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45 NANHRI (n 17) 14.
47 These categories of persons that fall within its mandate are provided in the UNHCR Statute paras 1, 8, 9 and 10 and in subsequent General Assembly or ECOSOC resolutions. These are refugees and asylum seekers; stateless persons; returnees; the internally-displaced and persons threatened with displacement or otherwise at risk; UN, Statute of the Office of the High Commissioner for Refugees, UN General Assembly Resolution 428 (V) 14 December 1950 art 8.
48 Hathaway (n 12) 94; GS Goodwin-Gill & J McAdam The refugee in international law (2007) 428.
The UNHCR also derives its mandate from international refugee law and international human rights law. For instance, article 35 of the 1951 Refugee Convention and article 2 of its 1967 Protocol define a supervisory role for the UNHCR. At the African regional level, the UNHCR derives this role through article 8 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Refugee Convention) which recognises the Convention’s complementary nature to the 1951 Refugee Convention (article 8(2)) and requires member states to cooperate with the UNHCR (article 8(1)). From international human rights law, Türk notes that it derives an indirect mandate from provisions such as articles 22 and 45 of the 1989 Convention on the Rights of the Child (CRC) and article 11 of the 1961 Convention on the Reduction of Statelessness. It thus straddles both branches of international law, but has played a minimal role as an actor in the international human rights law sphere.

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

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55 Türk (n 51).
also derives its mandate from international human rights law and has promoted the understanding of refugee rights as human rights.

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

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

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56 An NHRI working group participated in the OPCAT drafting process.
58 See eg NANHRI, APT ‘Preventing torture in Africa: Lessons and experiences from national human rights institutions’ (2016).
1951 Refugee Convention and a few years after the conclusion of its 1967 Protocol.

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

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

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

61 Based on a review conducted up to May 2020 of information on consultative meetings as available on UNHCR’s website.
63 As above.
64 As above.
are not merely human rights organisations. This is reflected in the UNHCR's guide for participants for the annual consultations which sets out the strict criteria that participants must meet in order to participate in the consultations.66 Thus, for instance, a NHRI must either be a member of the International Council of Voluntary Agencies; have a consultative status with ECOSOC with a demonstrated interest in refugee matters; or be a UNHCR implementing or operational partner, which has received a formal letter of recommendation from a UNHCR official to participate.67 Given their distinct characteristic as legislative institutions established by states and the need to reinforce their difference from civil society organisations, NHRIs coalesce through an independent network, the Global Alliance of National Human Rights Institutions (GANHRI).68 It would thus be logical for NHRIs to rather influence participation independently through GANHRI rather than through membership of the International Council of Voluntary Agencies, a civil society organisation-based network.

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

66 As above.
67 UNHCR (n 66) (my emphasis).
69 This explicit function was included following an amendment to its establishing legislation done initially in 2013 and expounded upon in 2018: Law 61/2018 of 24/08/2018 Modifying Law 19/2013 of 25/03/2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018. Art 1: Special responsibilities of the Commission as regards the protection of human rights; art 6 of Law 19/2013 of 25 March 2013 determining missions, organisation and functioning of the National Commission for Human Rights is modified as follows: Regarding the protection of human rights, the Commission has the following special responsibilities: (1) to monitor the compliance with the human rights, in particular with the rights of the child, woman, persons with disabilities, people living with HIV/AIDS, refugees, migrant workers and members of their families and elderly’s rights. Law 61/2018 of 24 August 2018 Modifying Law 19/2013 of 25 March 2013 Determining Missions, Organisation and Functioning of the National Commission for Human Rights Official Gazette 38 of 17 September 2018.
70 The Zimbabwe Human Rights Commission is constitutionally entrenched in ch 12, secs 232-244 of the Constitution. It provides as follows: ‘243 Functions of Zimbabwe Human Rights Commission (1) The Zimbabwe Human Rights Commission has the following functions …(k) to visit and inspect (i) prisons, places of detention, refugee camps and related facilities’. Zimbabwe Constitution ch 12 secs 232-244 of the Constitution.
on Human Rights, have created what is termed as a focus area on migrants.\textsuperscript{71} This is based on an assessment of pertinent human rights concerns in their respective countries that have been identified as requiring focused attention – usually as a result of higher levels of rights violations experienced by the category of persons.\textsuperscript{72} Surveys conducted by NHRIs have also determined that there is a general lack of expertise among NHRI staff to effectively address such rights, a low level of interest or a legal requirement not to deal with the rights of non-nationals.\textsuperscript{73} This would mean that participation would be on a case-by-case basis limiting the potential for the development of a coherent process through which NHRIs can engage with the UNHCR’s processes.

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

\begin{thebibliography}{99}
\bibitem{71} John-Langba (n 4) 226.
\bibitem{72} John-Langba (n 4) 180.
\bibitem{73} Kämpf (n 17); NANHRI (n 17).
\bibitem{75} John-Langba (n 4).
\bibitem{76} Kituo Cha Sheria & 8 Others v Attorney-General [2013] eKLR 2.
\bibitem{78} UNHCR \textit{Protection from xenophobia: An evaluation of UNHCR’s regional office for Southern Africa’s xenophobia related programmes} (2015) 25; John-Langba (n 4) 211.
\end{thebibliography}
also serve as a catalyst to address some of the implementation and accountability gaps that exist in the refugee protection regime, ultimately relocating NHRIs from the periphery of the international refugee protection regime to a defined place within it. This would be especially important for African NHRIs, given that Africa hosts some of the largest refugee and asylum-seeker populations on the globe.79

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

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

80 UNHCR (2020) (n 75) 63-64; see John-Langba (n 4) for challenges encountered by NHRIs in the context of refugee protection.
extended its role in torture prevention to include monitoring refugee camps.\(^{83}\)

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

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

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

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83 Fombad (n 83) 510.
84 UNHCR Global compact on refugees, A/73/12 (Part II) affirmed by UN General Assembly Resolution A/RES/73/151.
85 UN General Assembly (n 60).
86 UNHCR (n 85) B5 Guiding Principles 3; UN The Global Compact for Migration (n 60) paras 15 & 44.
87 UN (n 60) paras 15, 18(c), 27(c), 28(c), 31(d), 33(d) & 44; a NHRI task force was set up to lead NHRI engagement with the global consultative process for the Global Compact for Safe, Orderly and Regular Migration (GCM) and its implementation, which resulted in the inclusion of NHRIs in its implementation. Kämpfe (n13) 17.
88 See art 33 CRPD and art 182 OPCAT.
89 UN (n 87) para 31(d).
90 UN (n 87) para 33(d).
a defined role for NHRIs in the other process. As such, would this influence the NHRIs focus on migration rights broadly at the expense of refugee rights?

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

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

92 Kämpf (n 17).
93 Kämpf (n 17) 17.
95 John-Langba (n 4) 70; see NANHRI ‘Migration in Africa: Promoting respect of fundamental rights for refugees and migrants in transit camps’ (2018) 3 5.
96 John-Langba (n 4) 70.
seekers, the subsequent NHRI practice reinforces a separation rather than synergising efforts to address migrants’ rights and refugee rights.

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

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

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

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

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97 Art 30.
98 Art 26.
99 John-Langba (n 4) 74-80.
The African Commission, the African Children’s Committee and the African Court have all addressed refugee rights matters. However, it is the African Commission that has engaged more frequently and substantively on refugee-related matters, including through the creation of the mandate of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons (Special Rapporteur) and signing a memorandum of understanding with the UNHCR to facilitate the promotion of refugee rights in the region.

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

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

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100 See also M Sharpe *The regional law of refugee protection in Africa* (2018) 155-188, 205, 218.
103 Sharpe (n 100) notes that the African Commission’s work on refugee issues occurs largely in isolation of AU’s efforts and that it has failed to collaborate with other AU refugee-related entities (156-219). These include the Specialised Technical Committee (STC) on Migration, Refugees and IDPs; the Permanent Representatives’ Committee (PRC) Sub-Committee on Refugees, Returnees and IDPs; the Coordinating Committee on Forced Displacement and Humanitarian Action; and the Divisions of Humanitarian Affairs, Refugees and Displaced Persons.
The African Commission offers specific avenues for engagement through its public sessions and special mechanisms, but these remain substantially underexplored by African NHRIs. The interaction between the African Commission and the NHRIs is governed by the resolution on the granting of affiliate status to NHRIs and its rules of procedure as revised in 2020. The resolution affords NHRIs legal standing before the African Commission. It sets out the criteria for granting the status and the responsibilities that arise for NHRIs once accorded the affiliate status. It is through this affiliate status that NHRIs can participate in the work of the African Commission and its mechanisms, including attendance at its public sessions.

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

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

107 ACHPR NHRI Resolution (n 106) paras 1-5.
108 Sharpe n (100) 198: The African Commission has interpreted its mandate to encompass the other African human rights treaties other than the African Charter.
110 ACHPR NHRI Resolution (n 106) paras 1-5.
– a role that fits within NHRI s’ mandates. The Commission has also made Concluding Observations about areas of concern as well as the need for action in respect of the protection of refugee rights. The Commission also develops interpretative guidance on the content of certain rights, which may have implications for the rights of refugees and asylum seekers. For instance, General Comment 5 on article 12(1) of the African Charter on the right to freedom of movement and residence provides detailed guidance on the situation of refugees, asylum seekers, internally-displaced persons and migrants. NHRI s, for example, can participate in the development of such General Comments and advocate state consideration of the General Comment with respect to the realisation of the relevant right. However, the African Commission lacks a mechanism to follow up on its recommendations and Concluding Observations. NHRI s can bridge this identified gap given that they perform a similar function within the UN mechanisms and processes, with respect to state reporting and follow up on recommendations or Concluding Observations. Importantly, the African Commission revised its Rules of Procedure at its twenty-seventh extraordinary session to require the transmission of its Concluding Observations on state reports to NHRI s of which the states were under review. This amendment to the Rules of Procedure was done precisely to enhance the role of NHRI s in following up with the African Commission’s recommendations.

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

111 Bekker (n 101) 20-25.
112 As above.
116 Sharpe (n 100) 24.
effect and that the African Commission should reconsider its role. Viljoen argues that the special procedure mandates, in general, take away from the Commission’s limited resources and detract from its core protective function. In addition, Sharpe found that the current focus was not on refugees and asylum seekers, but rather on internally-displaced persons, nationality and statelessness, noting here that the mandate as provided for in its enabling resolution refers only to activities with respect to ‘refugees, asylum seekers and internally-displaced persons’. The UNHCR’s relationship with the mandate has also evolved to focus entirely on issues related to nationality and statelessness and not on refugees and asylum seekers, as had been indicated in its memorandum of understanding with the African Commission.

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

120 Sharpe (n 100) 209.
121 My emphasis.
122 African Commission (n 115).
123 Based on a review of the reports conducted in 2020 by the author of reports available on the African Commission’s website. These are the report presented to the 52nd ordinary session in October 2012 and the report presented to the 46th ordinary session in November 2009.
of the Kampala Convention. There is no specific reference or indication that the Special Rapporteurs have engaged substantively with NHRI with respect to refugee rights promotion and protection. From the reports it appears that the relationship with NHRI is not necessarily deemed distinct from that with civil society organisations.

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

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

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

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

127 CHR (n 109) 13.
regional human rights and processes has both legal and political support. However, what is lacking is the uptake of the opportunities for engagement to enhance the realisation of refugee rights due to operational challenges and institutional weaknesses faced by the African Commission and the NHRI.

7 Conclusion

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

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