

Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus

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Abstract

This paper seeks to challenge the general notion held by most human rights non-governmental organizations and scholars that national human rights commissions in Africa are meaningless institutions used by African leaders to deflect criticism of human rights abuses. It argues that the deflectionist idea is part of the condemnation syndrome that has infected international human rights NGOs and has led them to be unduly and excessively sceptical of Third World institutions, even when the evidence does not warrant the level of scepticism. It conducts a case study of the Kenya National Commission on Human Rights and concludes that the institutions are a valuable resource in human rights struggles.

1. Introduction

In recent times, international scholars have begun to recognize that the most effective possible contribution to the realization of internationally recognized human rights can be made by situating struggles for human rights protection at national levels.¹ This was also the dominant feeling in the United Nations (UN), which directed national governments to establish human rights institutions for the protection of human rights. One of the most notable forms of human rights institutions instituted in response to this call is the national human rights commission.² The last two decades have witnessed a proliferation of national human rights institutions in different countries in Africa. This began with the Togolese National Human Rights Commission, which was established in June 1987, and was followed by several other African states which have created similar institutions.³

However, the establishment of these commissions by African countries was too often greeted with deep suspicion and scepticism by human rights scholars and activists.

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¹ See J. Donnelly, 'Post-Cold War Reflections on the Study of International Human Rights', in J. H. Rosenthal (ed.), *Ethics and International Affairs: A Reader* (Washington, DC, 1995) 236, 252.

² A national human rights commission has been defined as 'a state sponsored and state funded entity set up under an act of parliament or under the constitution, with the broad objective of protecting and promoting human rights.' See M. Gomez, 'Sri Lanka's New Human Rights Commission' (1998) 20 *Hum. Rts. Q.* 281.

³ See Benin Republic (1989); Cameroon (1990); Ghana (1993); South Africa (1995); Nigeria (1996); Sierra Leone (1996); Uganda (1997); Mauritania (1998); Rwanda (1999), and so forth. Similar institutions were also established in Asia and other parts of the world. For more on state institutions established with the aim of protecting and promoting human rights, see B. Burdekin, 'Human Rights Commissions' in Hossain, Kamal et al., (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* (The Hague, 2000) 801.

Reacting to the establishment of these institutions, Peter Takirambudde notes that, 'African governments are jumping on the human rights bandwagon, but they don't seem truly interested in helping victims.'⁴ Likewise, Human Rights Watch issued a report on the state of human rights in Africa in 2001, which stated that 'many of the commissions appear designed to deflect international criticism of human rights abuses rather than to address the abuses themselves.'⁵ Nonetheless, the commissions have continued to function since their establishment. It is therefore relevant to assess the disapproval of the institutions as being deflectionist of human rights abuses.

This work conducts the analysis by engaging in a case study of the Kenya National Commission on Human Rights.⁶ It is amongst the commissions that have received the highest condemnation for being used as a deflection, a deluge of criticisms that has congealed into what is hereby regarded as the 'deflectionist' conception of national human rights commissions. This conception is that national human rights commissions play no meaningful role in human rights protection and promotion in states. It enjoys the support of many international human rights scholars⁷ and non-governmental organizations (NGOs) alike.⁸

On the other hand, there are scholars who feel that these institutions are relevant to human rights struggles and do make valuable contributions towards human rights protection and promotion.⁹ These views have given rise to the 'activist' conception of national human rights commission. In order to completely assess the claims of these two thoughts, a holistic conceptual framework is employed to measure the utility and effectiveness of the Kenyan National Commission on Human Rights in human rights protection and promotion in

⁴ See P. Takirambudde, Executive Director, African Division, Human Rights Watch, quoted in Human Rights Watch, 'Africa: Human Rights 'Commissions' Have Little Effect', available at <http://www.reliefweb.int/w/rwb.nsf/0/b2d4311ac463357b852569fc006f2dc3?OpenDocument> (last visited 4 July 2004).

⁵ See Human Rights Watch, 'Africa: Human Rights "Commissions" Have Little Effect', (New York, 2001), available at <http://www.hrw.org/press/2001/02/hrc022201.htm> (4 July 2004).

⁶ The commission was originally established as a Standing Committee on Human Rights. In the following analysis, efforts will be made to create a distinction between the Standing Committee on Human Rights (hereinafter: 'the Standing Committee' or 'the Committee') and the Kenya National Commission on Human Rights.

⁷ See V. Sripathi, 'India's National Human Rights Commission: A Shackled Commission?' (2000) 18 *B.U. Int'l L.J.* 1 at 4 (noting that the Indian national human rights commission was established by the Indian government 'primarily to assuage the international pressure placed upon it by Amnesty International' in connection with the atrocities and human rights abuses by state security forces in response to trans-border terrorism); O. Okafor and S. Agbakwa, 'On Legalism, Popular Agency and 'Voices of Suffering': The Nigerian National Human Rights Commission in Context' (2002) 24 *Hum. Rts Q.* 662 at 665 (stating that the establishment of the Nigerian national human rights commission in 1996 was widely regarded as a deflection from that particular regime's 'ultra-dismal human rights records'); A. Whiting, 'Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission' (2003) 39 *Stan. J. Int'l L.* 59 (observing that when the Malaysian government announced its intention to establish a national human rights commission, opposition parties and human rights activists were sceptical of government's motives).

⁸ See Human Rights Watch, n. 5 above; Amnesty International viewed the establishment of the Indian national human rights commission as a deflection from international criticisms and pressure on the government. See Amnesty International, *India: Torture, Rape and Deaths in Custody* (New York, 1992).

⁹ See J. Donnelly, n. 1 above at 236, 252; Okafor and Agbakwa, n. 7 above; L. Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harv. Hum. Rts. J.* 1; M. Mulgan, 'Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution' (1993) 5 *Canterbury L. Rev.* 35.

Kenya. In the ensuing analysis, several questions are apposite. From the performance of the Standing of Kenya and the Kenyan National Commission on Human Rights, can it be safely said that these institutions are objects of deflection in the hands of the successive Kenyan governments? What features distinguish a deflectionist national human rights commission from an activist one? With regard to human rights protection and promotion, what is the reasonable expectation of a national human rights commission? Alternatively, what standards or factors should be taken into cognizance in an assessment of national human rights commissions?

Several conclusions are discernible from the analysis. The Kenyan National Commission on Human Rights has made modest accomplishments in human rights protection and promotion. The impact of such institutions on a nation's human rights culture fairly depends on the influence of factors such as the vibrancy of the civil society, the legitimacy of its composition, the nature of existing political climate and other social and economic situations. It is erroneous to conclude that national human rights commissions in Africa are merely used by African governments as window dressing. It is argued that these institutions are valuable resources in human rights struggles and as such, their modest accomplishments should be acknowledged and harnessed to facilitate the protection and promotion of human rights, not only in Kenya and Africa but also in other parts of the world.

2. Origins of National Human Rights Commissions

National human rights commissions date back to 1946 when the United Nations Economic and Social Council requested 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.'¹⁰ The Commission on Human Rights also organized a seminar in Geneva in September 1978 where, for the first time, a set of guidelines on the functions that national human rights commissions should discharge evolved.¹¹ In the 1980s, the UN Secretary-General submitted a series of reports on human rights institutions to the General Assembly.¹² The UN efforts led to the organization of a workshop in 1991 by the Commission on Human Rights in which national and regional institutions participated. The workshop reviewed patterns of cooperation between national and international institutions and examined the factors that could impact on the effectiveness of national human rights commissions. It came to certain conclusions, which were adopted as the 'Paris Principles' of 1991.¹³ These principles provide guidance on the formation of national human rights commissions and also detail the standards and principles that human rights institutions should comply with to function

¹⁰ United Nations, 'Fact Sheet No. 19: National Institutions for the Protection and Promotion of Human Rights', available at <http://www.unhchr.ch/html/menu6/2/fs19.htm> (4 July 2004).

¹¹ United Nations, 'Fact Sheet No. 3 (rev. 1): Advisory Services and Technical Cooperation in the Field of Human Rights', available at <http://www.unhchr.ch/html/menu6/2/fs3.htm> (4 July 2004).

¹² See for example, 'National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary General', UN GAOR, 36th Sess., Agenda Item 79 (b), UN Doc. A/36/440 (1981) on 'Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms'.

¹³ See Paris Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (hereinafter: the Paris Principles), G.A. Res. 134, UN GAOR, 48th Sess., UN Doc. A/RES/48/134 (1993). Available at <http://www.unhchr.ch/html/menu6/2/fs19.htm#annex> (4 July 2004).

effectively. The UN's efforts drew further support from the African Charter on Human and People's Rights.¹⁴ Acting on the strong recommendation by these international and regional bodies, many African states established national human rights commissions, including Kenya.

It is not disputed that the essence of the support the UN has given towards the formation of national human rights commissions by states serves to increase human rights promotion and enforcement in the domestic arena and to strengthen national respect and compliance with international human rights treaties. The UN trilogy of documents, namely, the Paris Principles Relating to the Status of National Institutions for the Protection of Human Rights, the *Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights*,¹⁵ and the UN 'Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights',¹⁶ provide, in a harmonious manner, the minimum standards and guidelines for the establishment and evaluation of national human rights commissions.

In sum, these standards and guidelines state that the national human rights commission should be established by constitution or legislation; be clothed with competence for the promotion and protection of human rights; be independent of national and sub-national governments; be vested with a broad mandate; be composed of a plural membership that excludes representatives of government departments; be given adequate powers of investigation; be provided with adequate resources for the performance of its duties; be given the power to manage its finances and budget and be afforded the jurisdiction to hear and consider complaints.¹⁷ These guidelines constitute the UN's conception of an ideal national human rights commission and have been conceptualised as the 'dominant' image of an ideal national human rights commission.¹⁸ They have come under severe criticism for being 'overly legalistic', 'so significantly limited', and incomplete.¹⁹ Okafor and Agbakwa have argued that a holistic conception of national human rights commission is imperative as only such a model will guarantee the animation of the vision of national human rights commission and create room for it to attain a greater transformative potential.²⁰ Such a commission, as argued by the scholars, should have a deeper connection with popular agency, be connected to the 'voices of suffering', and be capable of being used as a resource by civil society groups in human rights struggles.²¹

The effectiveness of the Standing Committee and the Kenyan National Commission on Human Rights has to be evaluated in a holistic manner. A national human rights commission that has the best chance of succeeding or making the desired impact on the promotion and protection of human rights in the society should, apart from complying with

¹⁴ See Article 26 of the African Charter on Human and Peoples' Rights, adopted 28 June 1981, 21 *ILM* 58 (1982), entered into force 21 Oct. 1986 (encouraging state parties to establish human rights institutions).

¹⁵ See Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights*, UN Professional Training Series No. 4, UN Sales No. E.95.XIV.2. at 39 (1995) (hereinafter: 'the UN Handbook').

¹⁶ See n. 10 above.

¹⁷ See the Paris Principles, the *UN Handbook* and the *UN Fact Sheet*, n. 13, 15 and 10 above respectively.

¹⁸ See Okafor and Agbakwa, n. 7 above at 674.

¹⁹ *Ibid.* at 682-698.

²⁰ *Ibid.* at 681-699.

²¹ *Ibid.* at 693-695.

the standards laid down in the trilogy of documents mentioned above, have a strong partnership with human rights non-governmental organizations. Currently, the UN standards for national human rights commissions dominate the mainstream of scholarly and activist literature in this subject. Linda Reif, who conducted the first major assessment of these institutions through case studies of several jurisdictions, developed her own conception of an ideal national human rights commission that is entirely based on the UN standards.²² Other scholars equally adopted the same UN standards of assessment in their respective works.²³

It is conceded that such an enlargement of the vision of an ideal national human rights commission as espoused above is necessary for the improvement of the capacity of a national human rights commission to attain its goals, but it is doubtful whether this enlarged vision makes the national human rights commission 'complete' for its functions. There are other factors which should be taken into consideration as well, and which have significant implications for the holistic conception of a model as ingeniously conceived by Okafor and Agbakwa. Regrettably, these factors are not within the precinct of this paper and will be referred to in an upcoming work by this writer.

3. Overview of the Kenya National Commission on Human Rights

The state of human rights in the country prior to the formation of the Standing Committee and the Kenyan National Commission on Human Rights is chequered. In the last two decades, Kenya has moved from a single party authoritarian system to a nascent multi-party state. In the early 1980s, Kenyans struggled against repression occasioned by a one-party dictatorship, until December 1991 when the government conceded an amendment of the constitution to allow a multi-party democracy.²⁴ Between 1991 and 1998, several politically motivated instances of ethnic violence occurred throughout the country.²⁵ These precipitated many violations of human rights, ranging from murder, torture, disappearances, and unlawful detentions to restriction of freedom of speech, association and assembly, amongst other rights abuses. On the whole, it was the past political elections that generated increases in human rights abuses.²⁶ Most general elections in Kenya were marred by bloodshed and serious violence occasioning untold violations of human rights. In Nairobi, violence erupted in two slums, Kibera and Kariobangi, in 2001 and 2002 respectively.²⁷ At least twenty-five

²² See Reif, n. 9 above.

²³ See E. Quashigah, 'National Human Rights Institutions in Africa: Functions and Weaknesses' (1999) 11 *Afr. Soc'y Int'l & Comp. L. Proc.* 134; Sripathi, n. 7 above at 5 (assessing the Indian national human rights commission against the backdrop of the Paris Principles and UN Handbook guidelines); Gomez, n. 2 above; J. Hatchard, 'A New Breed of Institutions: The Development of Human Rights Commissions in Commonwealth Africa with Particular Reference to the Ugandan Human Rights Commission' (1999) 32 *Comp & Int'l L.J. S. Afr.* 28.

²⁴ See W. Mutunga and A. Mazrui, 'Rights Integration in an Institutional Context: The Experience of the Kenya Human Rights Commission' (2002) 8 *Buff. Hum. Rts. L. Rev.* 123 at 132 (noting that the formation of the vibrant and vociferous Kenya Human Rights Commission in the US in early 1991 was merely to support the agitations by Kenyans for liberation and multi-partyism).

²⁵ See Human Rights Watch, 'Human Rights Overview: Kenya', available at <http://hrw.org/english/docs/2003/12/31/kenya7271.htm> (4 July 2004).

²⁶ See Human Rights Watch, 'Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya,' available at <http://www.hrw.org/reports/2002/kenya/> (4 July 2004) (detailing the human rights violations that have marred Kenya in various different stages of its development).

²⁷ See M. Kiai and W. Mutunga, 'Human Rights '98: A Tale of Two Cities' in Kenya Human Rights Commission, *Human Rights as Politics* (Nairobi, 2003) 247 at 249.

people died in Kariobangi at the hands of vigilante gangs allied to certain ethnic groups and politicians. In Kibera, on the other hand, the police went on their own rampage, raping, beating, looting and destroying property while thousands of residents fled. Due to public pressure and clamour, within and outside Kenya,²⁸ together with deference to the UN's exhortations for a body to promote and protect human rights, the Moi government established the Standing Committee.

3.1 The Standing Committee on Human Rights of Kenya

President Arap Moi established the Standing Committee on Human Rights in May 1996.²⁹ The Standing Committee's membership was made up of many lawyers, including a renowned law professor, Onesimus Mutungi, who was the chair. Regrettably, its establishment was not backed by Statute and for this reason the Committee was mostly castigated as lacking legitimacy and autonomy. The Standing Committee was empowered to investigate complaints of alleged injustice, abuse of power and violations of fundamental rights and freedoms set out in the Kenyan Constitution. It had the duty to educate the public and to raise the public awareness of individual and collective rights.

Commenting on the establishment of the Standing Committee on Human Rights in Kenya, Human Rights Watch noted that it was a 'tactic by the Moi government in deflecting international and national criticism of his human rights record.'³⁰ In further criticism, the body alleged that the Standing Committee was established by the government 'to make some gesture to satisfy international and domestic pressure.'³¹ Similar condemnation trailed the formation of the Nigerian National Human Rights Commission. As Okafor and Agbakwa note, 'the establishment of the commission was widely viewed as a red herring, as a design to deflect attention from that regime's ultra-dismal human rights record, and as an entirely cynical move on the part of the regime.'³² Furthermore, another notable human rights observer in Africa notes that 'the Nigerian example of the creation of the National Human Rights Commission by the dictatorial Abacha regime was a typical example of this effort by African leaders to hoodwink the international community.'³³ Binaifer Nowrojee summarized and based the total condemnation of African national human rights commissions on the grounds that 'millions of Africans are being displaced, tortured or killed.'³⁴

The Kenyan government's perception of the Standing Committee appears to be diametrically opposed to the views of human rights scholars expressed above. On 5 July 1996, when the Kenyan Attorney-General formally launched the Standing Committee, he said that the Kenyan government was committed to address all violations of human rights and to provide mechanisms for remedies and protection, to guarantee enjoyment of these rights enshrined in both the constitution and international conventions. This seems to

²⁸ See Mutunga and Mazrui, n. 24 above at 132.

²⁹ The Standing Committee on Human Rights came by way of a Presidential Order. It was subsequently gazetted by the President Moi's government.

³⁰ Human Rights Watch, n. 5 above.

³¹ Human Rights Watch, n. 5 above.

³² Okafor and Agbakwa, n. 7 above at 664.

³³ See Quashigah, n. 23 above.

³⁴ See B. Nowrojee, quoted in Human Rights Watch, 'Africa: Human Rights 'Commissions' Have Little Effect', available at <http://www.reliefweb.int/w/rwb.nsf/0/b2d4311ac463357b852569fc006f2dc3?OpenDocument> (4 July 2004).

present a picture of the government's commitment to human rights protection and promotion, a situation that, *prima facie*, reflects the image of human rights activism. A demonstration of a direct vigorous action by the Kenyan government in pursuit of these objectives, it appears, will support its intention to create an activist body. However, the substantiation of the concept of human rights activism will involve an assessment of several factors, which include the manner of selection of commissioners, the level of its independence from the government, its activities in human rights protection and promotion, funding issues and relationship with civil society groups.

It is now appropriate to examine holistically the nature of the Standing Committee and how it has carried out its functions. The result of this assessment is pivotal to this work as it assumes the plank upon which either the deflectionist or the activist conceptions framed in this paper will stand or fall. Put differently, the Standing Committee's level of compliance with the guidelines, under a holistic lens, will give an indication as to whether it was established to pay lip service to human rights or not.

With regard to the mode of establishment, the Standing Committee fell short of the dominant standard set by the UN for the mode of establishment of national human rights commissions. As regards its mandate, though the Standing Committee was vested with powers to promote and protect locally and internationally recognized human rights in Kenya, its powers of investigation were quite limited. The Standing Committee had no power to order the production of documents or to subpoena witnesses. A broad mandate for such institutions is necessary due to the nature of their work. It gives them the latitude to widen the scope of their activities to deal with unforeseen situations, and also offers the opportunity for elastic interpretation of their powers. Nonetheless, a broad mandate is not a magic wand. It is essential that the body be proactive enough to utilize the elasticity of its broad mandate and interpret its powers boldly and widely to cover necessary situations.

The Standing Committee seems to have exercised its mandate moderately. In demonstration of this assertion, it is noteworthy that, as of the year 2000, the Standing Committee had intervened in several human rights issues and carried out investigations. It issued six private reports for the Kenyan government. It issued its first public report in December 1998, which consisted of a general overview of human rights laws and definitions, with references to human rights abuses. Its most laudable performance lies in the improvement of the prison conditions in Kenya. The impact of its prison inspection and monitoring activities is positive.³⁵ The Standing Committee was able to deal with such issues as torture and ill-treatment, health in prisons and general concerns about the welfare of prisoners.³⁶

The Standing Committee also made progress in educating the public on human rights and checking the excesses of the state forces. Human Rights Watch conceded this much when it noted that the Committee 'showed new vigour in stepping up pressure for police reform'. It condemned torture and recommended that police officers receive compulsory human rights training. The Standing Committee also blamed 'trigger-happy' police for a 'pattern of shootings of unarmed civilians and subsequent cover-ups.'³⁷ Furthermore, the

³⁵ See Standing Committee on Human Rights, 'Prison Special Report 2002' (on file with the author).

³⁶ Ibid. Of greater concern to the Standing Committee was the fact that the human rights of prisoners are more susceptible to violation.

³⁷ Human Rights Watch, 'World Report 2002: Kenya', available at <http://www.hrw.org/wr2k2/africa6.html> (4 July 2004).

Committee published its findings on the murder of six inmates on death row by prison wardens in 2001.³⁸ Notwithstanding the progress made, human rights violations in Kenya remained sources of worry for its people and NGOs.³⁹

A pluralistic membership that does not include representatives of government departments and cuts across all facets of society is another very important standard for measuring national human rights commissions' capacity for success. This is a key factor because human rights are multidisciplinary in nature and every part of society is affected one way or the other. It is therefore desirable that social pluralism be reflected in its membership in order to draw from their respective human rights experiences. The Standing Committee appears to have fairly satisfied this requirement. As it stood, the membership of the Standing Committee reflected the diverse groups in the society, especially the parties interested in the subject of human rights.

The appointment of commissioners with robust human rights credentials is another significant requirement in assessing the potential success of a national human rights commission. This particular feature appears to guarantee the commissioners' personal commitment to human rights struggles, strength of character and public credibility, which are vital to a successful performance of their duties. Though the Standing Committee had distinguished persons as members, the same cannot be safely said of their respective human rights records. Professor Mutungi, the Chairman of the Standing Committee, is a remarkable law professor, but it appears that being a lawyer does not speak vigorously of one's human rights credentials.

Another important standard by which a national human rights commission is measured is the level of independence it enjoys from the ruling government. Independence is necessary to ensure that the Commission is insulated from the executive influence. In most cases, the members of the Commission sit at the pleasure of the President, who reserves the right to fire them. Thus, independence from the executive is vital to enable the commissioners to carry out their duties without fear or favour. In this regard, the record of the Standing Committee did not satisfy this requirement. Apart from the fact that the President created the Standing Committee, its members were appointed by him and were responsible to him. These are antithetical to the Standing Committee's independence. In addition, the Committee had to face the challenges posed by a one-party authoritarianism that compromised its independence and impeded its work.

One other factor that is looked upon while assessing the capacity of a national human rights commission to achieve its success is its accessibility to the persons and groups that the Commission is set up to serve. As learned authors have argued, positive connection to the 'voices of suffering' is pertinent.⁴⁰ This connection is desirable so as to make the national human rights commission physically accessible to laypeople and urban dwellers who are in the greatest need of protection. In this regard, it appears that the Standing Committee recorded meaningful strides. By February 1998, 394 written petitions/complaints were received by the Committee on various human rights issues, ranging from petitions to

³⁸ See Standing Committee on Human Rights, 'Report 2001' (on file with the author).

³⁹ See Amnesty International, 'Report 2002: Kenya', available at <http://web.amnesty.org/web/ar2002.nsf/afr/Kenya?open> (4 July 2004) (noting that rights violations subsisted in Kenya).

⁴⁰ Okafor and Agbakwa, n. 7 above.

challenge unfair dismissal from the police force to arbitrary imprisonment.⁴¹ The Committee also dealt with cases of torture, lack of fair trial, unfair dismissal from the Teachers' Service Commission, reinstatement of back pay, police harassment, loss of earnings resulting from human rights abuse, denial of the right to education, and ethnic discrimination. Regrettably, the Committee was only able to investigate and address eighty-seven of those cases, due in part to a lack of resources. Also, due to lack of resources, the Committee was not able to establish its presence in various locations of the country where it could easily be reached.

The optimality of national human rights commissions as a resource for human rights NGOs has been well demonstrated by human rights scholars.⁴² On the other hand, NGOs are effective tools in the hands of national human rights commissions in securing human rights protection and promotion. The important message in this interesting symbiotic relationship is that both sides are in dire need of each other in order to achieve success in the struggles for human rights. There are similar scholarly arguments in favour of a close relationship between human rights NGOs and national human rights commissions.⁴³ The UN also supports this relationship and exhorts that:

[a] national institution [including national human rights commissions] should establish and maintain close contact with nongovernmental organizations (NGOs) and community groups which are directly or indirectly involved in the promotion and protection of human rights.⁴⁴

Though the interaction with civil society is part of the UN's standards for creating an effective human rights institution of this kind, Okafor and Agbakwa have argued forcefully that the effectiveness of national human rights commissions would be more achievable through a resourceful employment of national human rights commissions by civil society in human rights struggles.⁴⁵ This reasoning is quite apt, having regard to the great commitment of human rights NGOs to human rights struggles.⁴⁶ Thus, the level of cooperation between the two appears to significantly determine the level of success the national human rights commission achieves.

The major players in the NGO movement in Kenya include the Kenya Human Rights Commission (KHRC),⁴⁷ the Federation of Women Lawyers, Kenya (FIDAKENYA),⁴⁸ League of Kenyan Women Voters, Kenyan Section of the International Commission of Jurists (ICJ-Kenya), People Against Torture, and Child Rights Advisory

⁴¹ See Standing Committee on Human Rights, 'Report 1998' (on file with the author).

⁴² See Okafor and Agbakwa, n. 7 above at 689 (noting that the value of national human rights commissions should also be looked at from 'what other agents are able to do with it').

⁴³ See Gomez, n. 2 above at 288-289; S. Spencer, 'A Human Rights Commission for the UK?' (1999) 3 *Int'l J. Hum. Rts.* 25 at 34.

⁴⁴ See UN Handbook, n. 15 above at 108

⁴⁵ Okafor and Agbakwa, n. 7 above at 689.

⁴⁶ See M. Kiai, and W. Mutunga, 'Why the Civil Society is under Constant Attack' in Kenya Human Rights Commission, n. 27 above at 228 (noting that civil society acts as checks and balances in the Kenyan society).

⁴⁷ This NGO should not be confused with the government-established institution for the protection and promotion of human rights in Kenya, the Kenya National Commission on Human Rights.

⁴⁸ FIDAKENYA receives scholarly contributions from members of the Kenya National Commission on Human Rights: For example, Wambui Kimathi, a commissioner, contributed to FIDAKENYA publications. See FIDAKENYA, 'Step By Step, Backwards or Forwards: The 2003 FIDAKENYA Revised Annual Report', available at <http://www.fidakenya.org/reports/fidaannualreport2003.pdf> (4 July 2004). This underscores the collaboration that has become the hallmark of the relationships between NGOs and human rights institutions in recent times.

Documentation and Legal Centre (CRADLE). Some international human rights NGOs such as Human Rights Watch and Amnesty International maintain offices in Kenya.

It is apposite to note that the Standing Committee generally maintained a low profile relationship with the NGOs. There was no remarkable partnership with local or international NGOs for defending human rights in Kenya at the early stages of the Standing Committee's development. As has been noted by a popular NGO:

The Standing Committee for Human Rights has neither developed a working relationship with these NGOs, nor does it provide a protective umbrella to these groups. For example, the Standing Committee was silent when, in March 1998, President Moi threatened to deregister a number of human rights NGOs following their support of a broad-based constitutional reform movement. Prof. Mutungi and his fellow commissioners have adopted an arms-length relationship with the human rights NGO world.⁴⁹

This lack of interaction was mainly caused by suspicion and distrust. It was a case of mutual lack of faith and confidence between the Standing Committee and human rights groups. The Committee was wary of the hypercritical attitude of the civil society groups, while the civil society groups were suspect of the Committee's genuine intentions in defending and promoting human rights in Kenya on the grounds of the circumstances surrounding its creation.⁵⁰ The human rights groups harboured the impression that the body was a government lackey. This notion was strengthened by the Committee's attack on the NGOs in its report in 1998 on the political violence that occurred in both the Coast Province and the Rift Valley Province. The Committee denounced NGO communities for being 'unguarded, to the extent of recklessness in their assumptions about the causes of the violence . . . especially as regards the role of the government on this matter [which] has been exaggerated and even distorted.'⁵¹ Despite the significant achievements of the Standing Committee in promoting and protecting human rights in Kenya, the clamour for a full-fledged national institution for the protection of human rights in Kenya continued. This agitation by interest groups led to the establishment of a better equipped and more independent commission for rights protection in Kenya as discussed next.

3.2 Kenya National Commission on Human Rights

Despite recurrent criticisms, the Standing Committee on Human Rights functioned until 2002, when the Kenyan Parliament passed a bill to establish an autonomous Kenya National Commission on Human Rights.⁵² The Act is the most revolutionary instrument enacted by any African government with regard to human rights protection. This is on account of its far-reaching and proactive provisions. The manner of establishment of the Commission complies with the UN standards, having been established by the Act of National Assembly of Kenya as required by the UN guidelines.⁵³ The Commission has as its chairman Maina Kiai, a former executive director of the Kenya Human Rights Commission, an active human rights non-governmental organization that has been in the forefront in struggles for human rights protection in Kenya. The majority of its membership was drawn from the human rights groups in Kenya, such as for instance activists Tirop Kitur and Wambui Kimathi.

⁴⁹ Human Rights Watch, n. 5 above.

⁵⁰ See Mutunga and Mazrui, 'Rights Integration in an Institutional Context: The Experience of the Kenya Human Rights Commission' (2002) 8 *Buff. Hum. Rts. L. Rev.* 123.

⁵¹ Standing Committee on Human Rights, n. 41 above.

⁵² See the Kenya National Commission on Human Rights Act, 2002, *Kenya Gazette Supplement, Acts*, 2003, assented 24 Oct. 2002, came into force 12 Mar. 2003 (hereinafter: 'the Act').

⁵³ See section 3 of the Act.

In appointing members of the Commission, the Act has made provisions for such relevant factors as proven integrity, knowledge and experience in human rights matters, pluralistic representation, gender equality, ethnic, geographical, cultural, political, social and economic diversity, amongst others.⁵⁴ The Act makes provision for the National Assembly to nominate twelve persons for appointment as commissioners to the President. The President has powers to appoint nine commissioners from the National Assembly nominees.⁵⁵ The Commissioners appoint the Chairperson from amongst them. They hold office on a full time basis for a term of five years and are eligible for re-appointment for another term of five years.⁵⁶ Further, while the Chairperson enjoys the status of an Appeal Court judge, other commissioners enjoy the status of a High Court judge in carrying out their functions.⁵⁷

The Commission's mandate is quite broad as stipulated in the UN standards. It has powers 'to investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of any human rights.'⁵⁸ Also, sections 17 and 18 of the Act provide for the objects and principles of the Commission and its general powers respectively. Interestingly, the novel and most radical provision of the Act is the investment of the Commission with the powers of a court.⁵⁹ The Commission is empowered to issue summonses, order the production of documents, question any person in respect of any matter under its investigation and require the disclosure of relevant information.⁶⁰ Of utmost importance, if the Commission is satisfied that human rights or freedom have been infringed, it has power to order the 'release of any unlawfully detained or restricted person', 'payment of compensation' or 'any other lawful remedy'.⁶¹ In this regard, the Commission is fundamentally empowered to deal with human rights issues effectively and expeditiously.

It is worthy of note that disobedience to the Commission's orders attracts sanctions. Thus, any person who fails to appear before the Commission after having been summoned, or refuses to answer any question or produce any document without lawful excuse, or gives false information, commits an offence and may be liable to a fine or term of imprisonment for six months.⁶² The Act empowers the Commission to employ the services of any public servant (state forces inclusive), which shall be under its cost, or any investigation agency of government in carrying out its functions.⁶³ The ability to fashion an enforcement mechanism is one of the admirable provisions of the Act. In dealing with complaints of human rights violation, the Commission may 'in its own name, commence and prosecute appropriate proceedings in the High Court under section 84 (1) of the Constitution for such orders, writs or directions as may be appropriate.'⁶⁴

⁵⁴ See sections 5 and 6 of the Act.

⁵⁵ See specifically section 6(6) and (7) of the Act.

⁵⁶ Section 9 of the Act.

⁵⁷ See section 6(10) of the Act.

⁵⁸ See section 16(1)(a) of the Act.

⁵⁹ Section 19(1) of the Act.

⁶⁰ See section 19(1)(a)–(c).

⁶¹ See section 19(2)(a)–(c).

⁶² See section 19(6)(a)–(c).

⁶³ Section 20(1) of the Act. The Commission may use such public servants to give teeth to its orders.

⁶⁴ Section 25(b) of the Act.

The Commission's independence is safeguarded by its open and democratic mode of appointment, termination and funding.⁶⁵ With regard to accessibility, the Act has made provisions for the establishment of regional offices as it deems fit for the performance of its duties.⁶⁶ With regard to the Commission's relationship with civil society groups, the situation is remarkably different from the era of the Standing Committee on Human Rights. The Kenyan National Commission on Human Rights commissioners are mainly drawn from the NGO movement in Kenya. While it is premature to assess the impact of this relationship on human rights struggles in Kenya, strong evidence exists in the composition of the Commission and the present political climate that their relationship and partnership would be fruitful. This indication and hope are bolstered by the fact that the government has embraced civil society and sought partnership with it in the project of national reconstruction. The NGOs appear to have respect for members of the Commission.⁶⁷

Apart from the factors discussed previously, another important determinant of the impact of national human rights commission is its popular credibility. In fact, the appointment of Maina Kiai as the chairman, and the appointment of other human rights persons such as Kimathi and Kitur, speaks vigorously about the nature of the potential of the Kenyan National Commission on Human Rights. The Commission has recently launched its Strategic Plan of Operation, through which it would tackle cases of human rights violations.⁶⁸ Also, the Commission is in the process of developing a comprehensive prisons programme that will go beyond inspections and monitoring, as was the case under the Standing Committee, into facilitating the review of the Prisons Act, enhancement of rehabilitation, probation, and community service programmes, amongst others. The Commission organized a workshop in June 2004 in which it asked the Kenyan government to establish a truth, justice and reconciliation commission before the end of 2004 to probe past human rights abuses.⁶⁹

4. Conclusions

In the preceding sections, this work has taken a swipe at the general and unbridled labelling of African national human rights commissions as deflective of African governments' so-called rampant human rights abuses by engaging in a case study of Kenya. It concludes that both the Standing Committee on Human Rights and the Kenyan National Commission on Human Rights have made modest contributions to the building of a positive human rights culture in Kenya. It is admitted that, despite their existence, human rights abuses persist in Kenya. It is important to note that no particular body or institution is capable of eliminating human rights abuses single-handedly or totally. Conflicts of rights and abuses are facts of

⁶⁵ See sections 5, 6, 9, 10, 11 and 26 of the Act. While section 11 makes rigorous provisions for termination of appointment of commissioners, section 10 charges the salaries of the commissioners to the Consolidated Funds, which are special funds arranged and supervised by the Kenyan National Assembly to ensure the independence of the Kenya National Commission on Human Rights and create freedom from executive interference.

⁶⁶ See section 14 of the Act.

⁶⁷ FIDAKENYA described Wambi Kimathi, one of the commissioners, as having 'enormous experience in the field of Human Rights.' See FIDAKENYA, n. 48 above.

⁶⁸ Communication with Mr Maina Kiai, Chairman of the Commission (5 July 2004).

⁶⁹ See 'Right Groups Seek a Truth Commission', *The East African Standard*, 6 June 2004.

every given society. The struggle against human rights violations is a struggle against human oppression, abuse, injustice, and for the benefit of humanity, which is so often under threat.

On the whole, although the Standing Committee failed to live up to the expectations of human rights promotion and protection in Kenya, it does not appear, as the evidence of the Committee's performance could attest, that its sole utility was that of deflection of government's human rights abuses. A holistic appraisal shows that the Committee had its good sides. It represented the first step in Kenya towards protecting and promoting human rights through such a body. It monitored and reported several abuses on human rights. It also carried out human rights education in Kenyan provinces, as stated earlier in this work, and made tremendous advancement in prison reforms. Importantly, it was the weaknesses found in the Committee that made manifest the challenges facing the body. These culminated in its radical transformation to a full-fledged human rights institution. It acted as a stepping-stone to a greater mechanism for protecting and promoting human rights in Kenya.

The nature, composition and mandate of the young Commission represent a positive response to the criticisms levelled against the Standing Committee. The Commission came to life as a result of an act of the National Assembly of Kenya. It has a broad mandate and is composed of well-known human rights activists. The manner of its creation also gives it greater independence from executive interference. As could be seen earlier in this work, the Act has laid a firm foundation for the Commission to enforce human rights and freedom in Kenya and thereby to overcome the greatest problem that militates against efforts to protect human rights, namely, enforcement.⁷⁰ Unlike the Standing Committee, the Commission has drawn tremendous applause from human rights groups in Kenya due to the manner of its creation and composition. Though we are yet to witness significant contributions and evidence of its effectiveness as the Commission is still in its early stages, nevertheless, it has clearly demonstrated that it has features which place it on a sound pedestal to garner popular credibility and achieve optimum success. It has already mapped out its strategic plan of operation.

It is discernible that the foregoing does not give any scintilla of impression that such a body was established by the government to deflect criticism of human rights abuses. Branding the Committee or the Commission or other African human rights institutions as deflectionist goes a long way towards creating undue apprehension, hampers their activities and makes them more vulnerable to executive interference. Needless to say, constructive criticism of such bodies is welcome, and will indeed facilitate their work, but the blanket denunciation of it as being 'deflectionist' should be avoided, as this not only fails to capture the factual situation, but also jeopardizes human rights protection efforts.

Furthermore, scholars and human rights NGOs should not view national human rights commissions as the panacea to human rights abuses. They are merely a resource towards the enhancement of human rights standards in states. As Okafor and Agbakwa insist:

⁷⁰ On human rights protection and the problems of enforcement, see T. Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms' (2002) 15 *Harv. Hum. Rts. J.* 183.

Even the best NHC [National Human Rights Commission] cannot eradicate human rights violations from the body politic ... can only become a valuable resource, and not a panacea. *We should therefore not expect too much from these institutions lest we fail to appreciate fully the significance of their usually modest accomplishments.*⁷¹

It therefore appears incorrect to assert that these institutions are of no use in human rights struggles merely because '[m]illions of Africans are being displaced, tortured, or killed' as alleged.⁷²

Human rights struggles are neither won on a platter of gold nor cataclysmically attained. They take years of strenuous struggles, activism, dedication, and the building of popular legitimacy. Kenya has taken a big leap forward on the part of this struggle, as the Act attests, and has thus been able to have an increasing impact on human rights education and protection in Kenya. On a final note, the Kenyan National Commission on Human Rights is not a deflection but a useful resource that, if well managed, could significantly support human rights struggles in Kenya.

⁷¹ See Okafor and Agbakwa, n. 7 above at 720.

⁷² Nowrojee, n. 34 above.