Chapter 4

The Role of Non-Judicial Bodies

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1. Introduction

> The classic means of protecting human rights, through independent and impartial courts, while indispensable in a democratic society based on the rule of law, may not always be sufficient for ensuring, at the national level, that human rights are fully respected by national authorities.[1]

This statement by the Council of Europe (CoE), which dates from 1998, expresses an early awareness of the need to go beyond a paradigm of human rights where protection is monopolised by the judiciary,[2] at least within the States of the CoE.

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[1] Non-judicial Means for the protection of human rights at the National level, Council of Europe's Directorate General on Human Rights (May 1998), quoted by G DE BURCA, 'New Modes of Governance and the Protection of Human Rights' in P ALSTON and O DE SCHUTTER (eds), *Monitoring Fundamental Rights in the EU*, Hart Publishing, Oxford 2005, p 32.

[2] A similar view was expressed in M NOWAK, 'National Institutions for the Promotion and Protection of Human Rights' in P ALSTON and O DE SCHUTTER, above note 1, p 93: 'The idea of promoting national human rights institutions is based on the conviction that courts are only one of the several mechanisms for the promotion and protection of human rights. In order to prevent future human rights violations and to establish a genuine culture of human rights, awareness-raising

Almost 20 years later, the need for such a paradigm shift, towards a system where various non-judicial bodies work beside and even before courts to prevent human rights violations and monitor human rights implementation, is still relevant and concerns the global arena of human rights protection.

The awareness of this is neither new nor recent: this was the idea underpinning the creation of the Fundamental Rights Agency of the EU (FRA), as fostered by Alston and Weiler[3] in their seminal contribution on the need to establish a monitoring body of fundamental rights protection within the EU legal framework. Indeed, this was expected to be a turning point in Europe's protection of human rights policy, which finally seemed to be conceived not only as an ex post and ad hoc activity (through the role of the judiciary), but also as an ex ante and preventive action, through the operation of a non-judicial body committed to monitoring and identifying issues of concern.

Currently, we can say that a real paradigm shift never happened; in practice, the role of non-judicial bodies has been limited by the still-dominant role given to courts in the protection of rights. However, the need expressed by the CoE and leading scholars

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through human rights education and advocacy, preventive visits to place of detention, advisory services and similar non-judicial mechanisms seem to be as important as judicial review of alleged violations in the past.'

[3] P ALSTON and JHH WEILER, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658.

still remains. Starting from this unresolved issue of human right protection mechanisms, this chapter aims to take the first step towards diverting the scholar's attention from the judicial protection of human rights and refocusing it on the role of agencies and institutions (non-judicial bodies) as human rights actors in the global arena.

This attempt cannot but start from a definition of what is meant by non-judicial bodies acting in human rights protection at the national, supranational and international levels. As the field of research is extremely wide, the analysis will focus on regional organisations such as the FRA, the Inter-American Commission on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR); some remarks will also be dedicated to national human rights institutions (NHRIs), since they provide a useful insight into the central issue of the independence of those organisations.

This chapter analyses a selection of non-judicial bodies and the tools employed by them, as well as the institutional guarantees they enjoy. In this way, we intend to highlight the lines of convergence of non-judicial action at the national, supranational and international levels in the new global landscape, as opposed to the many diverging features of those bodies. The assessment of converging features in the field can be the basis for mutual sharing of working methods, good practices and experiences; it could also

assist in strengthening the coordination of common efforts and multiplying links aimed at creating global networks.

The analysis will conclude with the ultimate fundamental question that we aim to address: whether non-judicial bodies will be capable of becoming fundamental actors of human rights protection, engaging in a dialogue among themselves to share common practice and outcomes, similar to the well-known dialogue among courts. This will prompt our research even further: if it is quite clear that the role of non-judicial bodies is complementary to that of courts, would it be possible to foster a dialogue between courts and such bodies in order to strengthen the global protection of human rights?

2. Non-judicial Rights Promotion and Judicial Protection as Essential Elements of a Fully Fledged Human Rights System

Moving to the relationship between non-judicial rights promotion and judicial protection, the main question is whether they should be considered competitors or cooperators.

Within the European landscape, the evolution of the judicial protection of fundamental rights has been extensively examined, whereas the non-judicial promotion has received little attention from

legal and non-legal scholars.[4] Therefore, scholarly efforts specifically devoted to examining the two levels in relation to each other are still lacking, even though the need to integrate courts and agencies was already highlighted at the end of the twentieth century by Alston and Weiler. These two leading scholars have in fact underlined the necessity for the European Union (EU) to adopt a comprehensive human rights policy. They emphasised 'the need for more systematic and reliable information, the need to identify institutional responsibility for upholding human rights, the need to be able to hold those in power accountable, the need for a system of checks and balances, and the need for more openness and transparency'.[5] The authors called for the establishment of an agency dedicated to the collection of relevant data, which would be the basis for the development of a comprehensive human rights policy.

This suggestion of Alston and Weiler was followed in the first decade of the new century by the European institutions. They

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[4] Among the most recent works on the judicial protection of human rights in Europe, see M CARTABIA and S NINATTI, 'Fundamental Rights in the European Court of Justice and the European Court of Human Rights' in S DUGLAS-SCOTT and N HATZIS (eds), *Research Handbook on EU Law and Human Rights*, Edward Elgar, Cheltenham 2017, pp 211–225; W SANDHOLTZ, 'Expanding Rights: Norm Innovation in the European and Inter-American Courts' in A BRYSK and M STHOL (eds) *Expanding Human Rights: 21st Century Norms and Governance*, Edward Elgar, Cheltenham 2017, pp 156–176. As examples of the few contributions on the non-judicial promotion of human rights, see A VON BOGDANDY, J VON BERNSTORFF and C MAK, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law' (2009) 46 *Common Market Law Review* 1035; and P ALSTON and JHH WEILER, above note 3.

[5] P ALSTON and JHH WEILER, above note 3, 661.

created the FRA by Council Regulation (EC) No 168/2007 of 15 February 2007, laying out the agency's functions and structure. The tasks attributed to the FRA by Article 4 of the Founding Regulation are: (1) the collection, recording, dissemination and analysis of data and the development of methods and standards to improve the comparability of such data; (2) the performance of, or cooperation in, scientific research and surveys; (3) the issue of opinions on specific topics, at its own initiative or at the request of the EU institutions; (4) the issue of an annual report on fundamental rights issues and of thematic reports; (5) the promotion of dialogue with civil society.

In other parts of the world, similar phenomena might be observed. Since protection and promotion are perceived as essential aspects of a consistent rights policy, several examples were put in place both in Africa and America. In all these areas, policy-makers created monitoring systems in order to reinforce court decisions, hoping that such bodies could become allied with the judicial protection of rights, performing a preventive control on the violation of human rights by the national authorities. The two entities together can significantly contribute to creating a sound policy for enhancing the value and the effectiveness of human rights;[6] however, this can

[6] For details and references about the inter-American human rights system, see P CAROZZA, 'The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights' (2015) 5 *Notre Dame Journal Of International and Comparative Law* 1; J CONTESSE, 'Contestation and Deference in the Inter-American Human Rights System' (2016) 79 *Law and Contemporary Problems* 2; L CAPPUCCIO, 'La Corte interamericana e la protezione dei diritti fondamentali: una bussola per gliStati' in L CAPPUCCIO, A LOLLINI and P TANZARELLA (eds), *Le*

be considered a sort of wishful thinking, since in the history of non-judicial bodies (e.g., of the IACHR), only a few cases were submitted to the ICHR in the beginning of its activities by the IACHR. This situation remained for many years until the reform related to the proceeding was set.

3. Non-judicial Bodies: A Survey

This section provides an overview of various kinds of non-judicial bodies acting in the field of human rights at the national and regional (international) levels. As a premise, it is worth noting that the structure and functions of non-judicial bodies vary widely among jurisdictions, thus making it difficult for them to engage in dialogue similar to that in the area of judicial protection of fundamental and human rights.[7]

3.1. Human Rights Institutions at the National Level

Despite the existence of national non-judicial bodies dealing with human rights since, at least, the beginning of the second half of the twentieth century, the adoption of the so-called Paris Principles by

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Corti Regionali tra Stati e Diritti. I Sistemi di Protezione dei Diritti Fondamentali Europeo, Americano e Africano a Confronto, Editoriale Scientifica, Napoli 2012, pp 133–144. For the African system, see A LOLLINI, 'La Corte africana dei diritti dell'uomo e dei popoli e il "nuovo" sistema regionale di protezione dei diritti fondamentali', in ibid, pp 203–230.

[7] For a recent and interesting contribution on this point, see A MÜLLER, *Judicial Dialogue and Human Rights*, Cambridge University Press, Cambridge 2017.

the UN General Assembly with Resolution 48/134 of 20 December 1993 has set the tone for the establishment of new NHRIs[8] and for the reform of existing ones. As suggested, the United Nations (UN) has played a significant role in the establishment of NHRIs by means of 'standard setting, capacity building, network facilitating, and membership granting'.[9] As evidence of the success of this UN strategy, it should be noted that independent human rights bodies have been established not only in well-consolidated democracies, but also in developing economies, like Tunisia and Egypt.[10]

According to the Paris Principles, NHRIs, created by the constitution or by statute, 'shall be vested with competence to promote and protect human rights' and be entrusted with a very broad mandate. Among other competences, they should be able to submit to the government, upon request or independently, opinions, recommendations, proposals and reports on any matter regarding human rights, and publicise them. Moreover, NHRIs should stimulate the ratification of international instruments and be involved in the formulation of programmes to increase public awareness. Specific principles are dictated with regard to NHRIs entrusted with quasi-jurisdictional competence: they should be able

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[8] See K MEUWISSEN, 'NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?' (2015) 15 *Human Rights Law Review* 441, 443.

[9] S CARDENAS, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 *Global Governance* 23, 28.

[10] In both cases, the role of the NHRIs is highly significant: e.g., the Tunisian Human Rights Commission must be consulted on draft laws affecting human rights, can conduct investigations into violations of human rights and is required to deliver an annual report to the National Assembly, which, in turn, must discuss it in a plenary session.

to seek amicable settlements, hear complaints and petitions or transmit them to other competent authorities, and, most importantly, they should be able to 'make recommendations to the competent authorities, especially by proposing amendments or reforms of laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing petitions to assert their rights'. The institutional functions are guaranteed by a specific set of principles on the composition of the institution and the appointment of its members, which will be analysed in section 4.

In order to ensure the networking of NHRIs, an International Coordinating Committee for National Human Rights Institutions (ICC) was established in 1993 and was tasked, *inter alia*, with the accreditation of national institutions. As of May 2017, there are 121 NHRIs accredited by the ICC, 78 of which have acquired A-Status (i.e., they are considered fully compliant with the Paris Principles).

When considering the different types of institutional structures of the NHRIs, it is worth noting that the classification of such institutions is not straightforward. The ICC, for instance, lists six types on its website: (1) human rights commissions; (2) human rights ombudsman institutions; (3) hybrid institutions; (4) consultative and advisory bodies; (5) institutes and centres; and (6) multiple institutions. However, Linos and Pegram[11] group NHRIs into two categories: human rights commissions, organised as a multimember council and generally (but not exclusively) tasked with

[11] K LINOS and T PEGRAM, 'Interrogating Form and Function: Designing Effective National Human Rights Institutions' (2015) 8 *Danish Institute for Human Rights: Matter of Concern Human Rights Research Paper Series*.

advisory functions; and human rights ombudsmen, whose powers of investigation make them able to more effectively deal with individual complaints.

3.2. Non-judicial Bodies in the Framework of Regional Organisations Dealing with Human Rights

Human rights monitoring functions are entrusted to institutions acting at the regional level in Europe, America and Africa. We can divide such non-judicial bodies into two groups: on the one side, those with common roots in the original institutional structures of the CoE, the now-abolished European Commission of Human Rights, the IACHR, part of the Organization of American States (OAS) and the ACHPR, now acting under the umbrella of the African Union; and on the other side, the FRA, an independent administrative agency that complies with the Paris Principles.

The IACHR was established by the OAS Charter, which entered into force in 1951. It was originally designed to promote the protection of human rights (as set out in the Charter) and to serve as a consultative organ of the OAS in such matters. In the framework designed by the OAS Charter, the IACHR had no jurisdictional or quasi-jurisdictional functions; however, according to the American Convention on Human Rights of 1969, two human rights regimes involving the IACHR exist: one originally created by the OAS Charter and another, involving a smaller number of States, in which the IACHR also exercises quasi-judicial functions, acting as a first-

instance organ for complaints from individuals and States parties, filtering the cases to be submitted to the Inter-American Court of Human Rights. The IACHR is composed of seven members elected by the General Assembly of the OAS from a list of candidates proposed by the governments of Member States, each of which can propose up to three candidates, who may be nationals of the States proposing them or of any other Member State of the OAS. The members of the Commission are elected for a four-year term and can be re-elected only once.[12]

The functions of the Inter-American Commission are laid out in Article 41 of the American Convention on Human Rights and can be summarised as follows:[13] (1) developing awareness of human rights; (2) making recommendations to the governments of Member States; (3) carrying out studies and issuing reports; (4) requesting information from Member States; (5) responding to inquiries made by Member States on matters related to human rights and providing them with advisory services; (6) taking action on petitions and other communications (this function is exercised only with regard to States which have ratified the ACHR); and (7) submitting an annual report to the General Assembly of the OAS.

On the other side of the Atlantic, on the African continent, the ACHPR was created in 1981 by the African Charter on Human and Peoples' Rights and was tasked with monitoring functions. In

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[12] See www.oas.org (accessed 26 October 2017).

[13] Space limitations do not permit us here to explain how the IACHR has been working in practice since its creation. More references and details about can be found in L CAPPUCCIO, above n 6.

2004, it also acquired quasi-jurisdictional functions for a limited number of countries, according to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The African Commission is composed of 11 members elected by secret ballot by the Assembly of Heads of State and Government, chosen from a list of persons nominated by the States parties, each of which can nominate two candidates. The members of the Commission are elected for six years and can be re-elected.[14]

The functions of the ACHPR are detailed in Article 45 of the African Charter on Human and Peoples' Rights,[15] which tasks the Commission with: (1) collecting documents, undertaking studies and research, organising conferences and disseminating information regarding human and peoples' rights; (2) giving its views and making recommendations to governments; (3) formulating principles and rules 'aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms'; (4) cooperating with other African and international institutions concerned with the promotion and protection of human and peoples' rights; (5) 'ensur[ing] the protection of human and peoples' rights'; (6) interpreting the Charter at the request of the States parties or the OAS institutions; and (7) performing other tasks entrusted to it by the Assembly of Heads of State and Government.

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[14] See www.achpr.org (accessed 26 October 2017).

[15] Space limitations do not permit us here to explain how the IACHR has been working in practice since its creation. More references and details about can be found in A LOLLINI, above n 6.

The functions of the IACHR and the African Commission are similarly laid out in their respective founding instruments, and one would therefore expect them to converge. However, the two Commissions diverge inasmuch as their practical impact depends on the history of the regions and on the socio-economic context. The divergence is even stronger due to the fact that the rights enshrined in the relevant international instruments are not identical: for example, the African Charter encompasses a wider catalogue of rights (and duties) which are peculiar to the African continent and can be traced back to 'the human values [which] in pre-colonial times in Africa were … recognized and observed according to African socialism, African family values, and customs and traditions'.[16] Furthermore, different political contexts give rise to different types of human rights violations. For this reason, despite their common origin, there is significant divergence in the effectiveness of the functions of regional non-judicial bodies.

In the framework of the CoE, since the dissolution of the European Commission on Human Rights in 1998,[17] there has been no single body tasked with promoting and monitoring functions.

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[16] DDC DON NANJIRA, 'The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights' in J SYMONIDES (ed), *Human Rights: International Protection, Monitoring, Enforcement*, Ashgate, Aldershot 2003, p 219.

[17] M TARDU, 'The European Systems for the Protection of Human Rights' in J SYMONIDES (ed), above n 16, p 139. The entry into force of Protocols 9 and 11 provided the suppression of the European Commission of Human Rights. In order to rationalise the procedure for enforcement of rights, admitting direct individual complaints, without the prior assent of the national governments involved, the functions of the Commission were assumed by the European Court of Human Rights.

However, the Commissioner for Human Rights, created in 1999, is entrusted to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the CoE, complementing the role of supervisory bodies created by the various human rights instruments of the CoE.

As the Commissioner cannot receive individual complaints, he or she cannot be considered an ombudsman. Instead, according to Article 3 of Resolution (99) 50 of the CoE Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999, the Commissioner shall: (1) promote education and awareness regarding human rights and contribute to the promotion of their effective observance; (2) provide advice and information on the protection of human rights and the prevention of human rights violations, cooperating with NHRIs or encouraging their establishment; (3) facilitate the activities of national ombudsmen; (4) identify possible shortcomings in the law and practice of Member States concerning compliance with human rights and promote the effective implementation of these standards; (5) address reports concerning specific matters to the Committee of Ministers or to the Parliamentary Assembly and the Committee of Ministers and submit an annual report; (6) respond to requests made by the Committee of Ministers or the Parliamentary Assembly; and (7) cooperate with other international institutions for the promotion and protection of human rights.

The CoE and its institutions[18] share with the EU the task of protecting human rights. In 2007, the EU framework was complemented by the creation of the FRA. As noted by Von Bogdandy and Von Bernstorff,[19] 'within the EU administrative landscape [the FRA] is to be classified as an information agency', while 'at the same time, the Agency tends toward the UN standardized model of independent national human rights institutions'. The institutional structure of the FRA consists of: a management board, which is composed of independent experts (one appointed by each Member State, two representatives of the European Commission and one expert appointed by the CoE) and performs planning and monitoring functions; an executive board; a scientific committee composed of 11 independent experts, who are highly qualified in the field of fundamental rights and a director.[20] Despite being structured according to the framework of the European independence agencies, the FRA is peculiar as its five-year Multiannual Framework is adopted by the Council instead of the EU Commission. Having as its institutional reference the (intergovernmental) Council rather than the Commission 'attests to the sensitivity of the subject matter'[21] and neutralises Member States' fears of undue interference by the EU into their internal fundamental rights policies.

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[18] Within the CoE, we have two main bodies: the European Court of Human Rights and the European Committee of Social Rights (specifically committed to social rights protection).

[19] A VON BOGDANDY and J VON BERNSTORFF, above n 1, p 1047.

[20] See http://www.fra.europa.eu (accessed 18 October 2017).

[21] A VON BOGDANDY and J VON BERNSTORFF, above n 1, p 1050.

4. Forms of Non-judicial Action in the Field of Human Rights: An Insight into the Work of Regional Organisations

The forms of action or, in other words, the tools employed by non-judicial bodies show a significant degree of convergence, although some of them vary in terms of their impact on the different legal systems. The reason for convergence can be attributed to the common inspiration and duties of the different non-judicial organisations, i.e., to create the cultural and factual conditions necessary to ensure effective human rights protection, as opposed to the rationale of judicial action, which aims to provide redress to individuals. This section focuses on non-judicial bodies acting in the framework of regional organisations and their basic tools: monitoring, reporting, inspection powers and quasi-judicial powers. The basic set of tools available to non-judicial bodies is, to some extent, standard. This commonality of tools shows significant convergence among non-judicial bodies, in spite of their divergence in several institutional aspects and in their relation of the political and cultural contexts.

4.1. Monitoring

Monitoring is the primary tool through which non-judicial bodies assess the level of human rights protection in a given legal system. It has been noted that monitoring ‘is essentially an ambivalent

concept, being potentially either preventive or repressive'.[22] In general, the monitoring function exercised by non-judicial bodies can be exercised through data gathering (as in the case of the FRA) or direct inspections (e.g. IACHR). Data are mainly collected from stakeholders, which can be State authorities or civil society organisations. In some instances, monitoring might involve a periodic reporting system submitted by stakeholders, which are then reviewed by the human rights body. In general, however, the institution independently gathers data from various sources and obtains a comprehensive picture of the situation.

The outcome of monitoring activities can be varied, sometimes resulting in recommendations, but generally leading to the issuing of reports, whether general or thematic. Reports are then disseminated through networks of experts, civil society organisations and national institutions, to reach the public and perform a *lato sensu* educational role.

4.2. Reporting

Reports are the main outcomes of the activities performed by non-judicial bodies. Through them, the body can both make the product of its monitoring activity available to the public and exercise its function of increasing awareness on specific human rights issues. Reports can be either general or thematic and, when issued by bodies acting within regional organisations, they can concern specific

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[22] M TARDU, above n 17, p 138.

States. In this case, they might be supplemented by recommendations to the government. It follows that, under the same name, we can find documents that vary in scope and effect.

Since the FRA has no power to control the policies of a specific Member State and can only issue thematic reports dealing with a number of Member States, it also issues an annual report on the overall protection of fundamental rights in the EU.[23]

In addition to general and thematic reports, the IACHR also publishes reports directed at a specific State, usually issued after having received individual or State complaints and sometimes after carrying out State visits.[24] Such papers, however, are not automatically made public. The specific procedure of the IACHR will be analysed in the following section.

The African Commission issues an annual report and analyses State reports concerning human rights. The main documents issued by the ACHPR are resolutions and guidelines.

4.3. Inspection Powers

In addition to collecting data from interested parties, monitoring can be also done through inspections, which can be carried out by members of the governing body of the organisation. While the High Commissioner, which is a single-handed organ, performs on-site

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[23] The Archive of Annual Activity Reports is available at: http://www.fra.europa.eu (accessed 18 October 2017).
[24] The Archive of Annual, Thematic and Country Reports is available at: http://www.oas.org (accessed 18 October 2017).

visits within the framework of the CoE, in the American and African systems, delegations are headed by members of the Commissions. The members of the IACHR, for example, can be directly tasked with on-site visits, a procedure that, since 1961, has been performed 95 times.[25]

The procedure is provided for in Article 48 of the Inter-American Convention, which regulates individual complaints. It aims both to collect information and issue recommendations to States parties. Field missions are very important when there is no effective cooperation by the State governments, and the Commission therefore believes it is necessary to gain a first-hand account of the situation. A similar method is employed by the African Commission, which can also enact subsidiary mechanisms (special rapporteurs, committees and working groups); at the moment, there are 15 such mechanisms in place, two of which, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa and the Working Group on Indigenous Populations/Communities in Africa, have frequently made use of local visits.[26]

In general, field missions are powerful instruments for directly assessing respect for human rights. However, the use of such forms of action is not universal; for instance, FRA, which cannot perform State-specific studies, is not entitled to carry out on-site visits either. This limitation can be linked to the division of tasks between the CoE and the EU; indeed, the former occupies the role

[25] See http://www.oas.org (accessed 18 October 2017).
[26] See http://www.achpr.org (accessed 18 October 2017).

of human rights watchdog for individual States parties, while the latter focuses on the EU. Another reason for the lack of inspection powers is the extent to which the FRA makes use of the networks it has put in place. Indeed, the overall networking system can be considered an expression of the principle of horizontal subsidiarity,[27] according to which, whenever possible, the exercise of functions of public relevance should be attributed to private sector organisations, such as NGOs. Through the use of its extensive networks, then, the FRA can, without displacing its staff, be correctly informed of the level of protection of human rights in Member States.

4.4. Networking

Networking is a growing phenomenon in the field of non-judicial promotion of fundamental rights. As mentioned, in 2017, the International Coordinating Committee for National Human Rights Institutions grouped 121 NHRIs established under the Paris Principles, and it continues to organise annual meetings with their representatives. In addition, there are regional networks acting in various areas of the world (Asia and the Pacific, Europe, Africa and the Americas) that organise working groups tackling region-specific issues.

Along with these forms of coordination, there are those put in place by regional organisations. Although, as shown above, all

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[27] A MALTONI, 'The Principle of Subsidiarity in Italy: Its Meaning as a "Horizontal" Principle and its Recent Constitutional Recognition' (2002) 4(4) *ICNL*.

regional non-judicial rights bodies are tasked with cooperating with human rights institutions, the one body which has focused the most on creating networks has been the EU FRA. The main networks are directly instituted by the Founding Regulation and are: (1) the network of National Liaison Officers (NLOs), defined in Article 8 as 'the main contact point[s] for the Agency in the Member State'; and (2) the Fundamental Rights Platform (FRP), a cooperation network, which, pursuant to Article 10, is 'composed of non-governmental organisations dealing with human rights, trade unions and employers' organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations'. Moreover, pursuant to Article 6, paragraph 3 of the Founding Regulation, which provides that 'the Agency may enter into contractual relations, in particular subcontracting arrangements, with other organisations, in order to accomplish any tasks which it may entrust to them', the FRA has also established the FRANET, a multidisciplinary research network composed by contractors which provide the agency with data. In addition, the agency has established a number of thematic cooperation platforms with NHRIs.[28]

[28] There are four thematic platforms: the CoE-FRA-Equinet-ENNHRI Platform on rights of migrants and asylum-seekers (coordinated by the FRA); the CoE-FRA-Equinet-ENNHRI Platform on hate crime (coordinated by the FRA); the CoE-FRA-Equinet-ENNHRI Operational Platform for Roma Equality (coordinated by the CoE); and the CoE-FRA-Equinet-ENNHRI Platform on advancing social and economic rights and socio-economic equality (coordinated by the CoE).

As the FRA's experience suggests, dialogue and networking with experts, civil society and other non-judicial bodies are essential for these institutions to increase their ability to perform their tasks. While we can find an example of such interaction within the practice of the FRA towards NHRIs and other non-judicial bodies working in the EU legal space, a similar experience is still missing if we look at the relationship between different regional bodies (e.g., between the FRA and the ICHR). In other words, while the judicial dialogue is spreading around the world, non-judicial bodies seem to play a kind of monologue, focused on their specific regional sphere. How to transform such monologue into dialogue is one of the most challenging tasks that policy-makers and scholars involved in human rights protection will face in the years ahead.

5. Convergence and Divergence on the Independence of Non-judicial Rights Bodies

Independence is the most significant common feature of non-judicial bodies, both at the national and international levels. Therefore, independence can be considered the most important point of convergence between the different bodies active in the field of rights promotion. Nonetheless, since the term 'independence' has different meanings, it is worth analysing the different features of independence in order to assess whether convergence really exists.

5.1. A Multifaceted Understanding of Independence According to the Paris Principles

Independence is one of the requirements for NHRIs to be accredited by the ICC. In order to qualify as an independent body, the Paris Principles require:

a) that the composition of the institution be 'established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights' with the presence of representatives of NGOs responsible for human rights, trade unions, social and professional organisations, 'trends in philosophical or religious thought', universities, parliament and government departments (with consultative functions only);
b) that the institution should have 'an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding' being enabled 'to have its own staff and premises, in order to be independent from the Government and not be subject to financial control';
c) that the appointment of the member 'be effected by an official act which shall establish the specific duration of the mandate', which can be renewable.

Therefore, according to the Paris Principles, independence is related to the personal qualities of the members of the institution, which should represent the plurality of trends present in societies, and to the staffing and funding of the institution itself.

As to the first aspect, independence is different from the traditional guarantee of independence of the judicial branch of government (from the legislative and executive branches). Instead of focusing on this traditional type of independence, the Paris Principles emphasise plurality in the composition of the body and expertise, both in the field of human rights and in management. For example, the members of the Management Board of the FRA, pursuant to Article 12 of the Founding Regulation, should have 'appropriate experience in the management of public or private sector organisations'.

As to the staffing and funding of the institution, the guarantee of independence can be more closely compared with the independence/sovereignty enjoyed by parliaments at the State level.

5.2. Scientific Consistency

Along with these two traditional interpretations of independence, there is another aspect of independence which is not referenced in the Paris Principles, i.e., the agency's working methods. The reason why working methods can enhance independence is because a fact-oriented approach that is based on scientific premises and periodically controlled by a specific scientific committee (as is used

by the FRA of the EU) contributes to the availability of reliable information from the agencies. In other words, the scientific consistency of the organisation's working methods is particularly relevant as results which are obtained through a sound scientific method cannot, in principle, be disputed and should therefore be persuasive for the concerned parties.

5.3. Rules for the Appointment of the Members of Non-judicial Bodies

Another more traditional way to assess the independence of national and regional non-judicial bodies would be to examine how members are elected, particularly whether those who perform a controlling function in the field of human rights can be influenced by the State government which appointed them and whose activity they control. This is why it is necessary to analyse the criteria for candidates to be considered for appointment. It is worth noting that such requirements indicate different understandings of independence.

The case of the FRA is particularly interesting as the agency's two main bodies, the Management Board and the Scientific Committee, have members drawn from various categories of experts. As mentioned, members of the Management Board must have 'appropriate experience in the management of public or private sector organisations and, in addition, knowledge in the field of

fundamental rights'[29] and, with regard to the persons appointed by each Member State, they should have 'high level responsibilities in an independent national human rights institution or other public or private sector organisation'.[30] As regards the members of the Scientific Committee, the Founding Regulation specifies that they should be 'eleven independent persons, highly qualified in the field of fundamental rights', appointed by the Management Board 'following a transparent call for applications and selection procedure'.[31] Moreover, they should ensure geographical representation.

According to Articles 2 and 3 of the Statute of the IACHR, which was approved by the General Assembly of the OAS in 1979, the seven members of the IACHR 'shall be persons of high moral character and recognised competence in the field of human rights' (emphasis added), representing all the Member States of the organisation and elected by the General Assembly from a list of candidates proposed by Member States.

According to Article 31 of the African Charter on Human and Peoples' Rights, the 11 members of the African Commission are 'chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'

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[29] Article 12.1 of Council Regulation (EC) No. 168/2007 of 15 February 2007, establishing a EU Agency for Human Rights.
[30] Ibid, Article 12.1, lett. a).
[31] Ibid, Article 14.1.

(emphasis added), elected by the Assembly of Heads of State and Government from a list compiled by State governments.

The examples of the FRA and the Inter-American and African Commissions shows that expertise in the field of human rights is the most recurrent requirement, whereas other accessory requirements may vary, ranging, as mentioned, from organisational expertise to moral character and high reputation. When considering the profiles of the current members of these institutions, the most represented category of human rights experts is university professors.[32]

5.4. The Transparency of the Results of Non-judicial Bodies

Independence is also linked to the transparency of non-judicial bodies' activities. In many cases, however, proceedings and reports on human rights violations by States are confidential. As mentioned above, the IACHR, for instance, does not publish recommendations directed at States parties unless such States do not comply. The procedure is laid out in Articles 50 and 51 of the American Convention on Human Rights. Article 50 stipulates that if, following a petition or communication alleging a violation of human rights, a settlement is not reached, the Commission shall draw up a 'report setting forth the facts and stating its conclusions' and making recommendations to be transmitted to the State concerned. This

[32] It was not by chance that the first Chairman of the FRA Scientific Committe was the Italian Law Professor Stefano Rodotà.

report cannot be published. However, according to Article 51, 'if, within a period of three months from the date of the transmittal … the matter has not either been settled or submitted … to the Court', the Commission may, by an absolute majority, 'set forth its opinion and conclusions concerning the question', making, 'where appropriate', pertinent recommendations and 'prescrib[ing] a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined'. Only when the period has expired is the Commission entitled to decide, by an absolute majority, whether to publish the report.

The complexity of the procedure and the need for qualified majorities to decide on the publication of reports bring about a substantial lack of transparency in the activity of the Commission,[33] which in principle could have an impact on its independence. Indeed, the existence of public hearings and proceedings is one of the ways in which judicial independence is demonstrated, so much so that it is required by Article 6 ECHR for all trials and by Article 8 ACHR for criminal trials. The transparency of proceedings and the publication of reports would be at least a partial antidote to undue external influence. Moreover, it would allow other human rights bodies, both non-governmental and public, such as NHRIs, to receive a flow of information which could help foster cooperation and dialogue among them, which would in turn promote the networking of non-judicial bodies, which we have examined above.

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[33] H CAMINOS, 'The Inter-American System for the Protection of Human Rights' in J SYMONIDES (ed), above n 16, p 192.

6. Conclusions

Shifting from description to prescription, in this last section we would like to make some conclusive remarks in support of the paradigm shift in human rights protection invoked at the beginning of this chapter.

Human rights, as well as fundamental constitutional rights, have a strong universal vocation: they belong to every human being in every nation and in every region of the world. Nonetheless, their judicial protection is influenced by different 'boundary conditions'[34] which contribute to divergence in rights interpretation and protection. Non-judicial bodies are also characterised by a high degree of fragmentation, which can be even stronger than the fragmentation experienced in the field of judicial protection. In fact, while in many cases courts share the same basic structure regarding, for example, the independence of their members[35] and the fact that all cases should be decided according to the law, non-judicial bodies have both converging and diverging features. They act at various

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[34] C O'CINNEIDE, 'The Problematic of Social Rights: Uniformity and Diversity in the Development of Social Rights Review' in L LAZARUS, C MCCRUDDEN and N BOWLES (eds), *Reasoning Rights: Comparative Judicial Engagement*, Hart Publishing, Oxford 2014, pp 199 ss.

[35] Of course, not all cases are the same and not all courts are independent from the other powers. During the current year, for example, the Polish Parliament approved a landmark measure that restructured the Supreme Court, putting it under the effective control of the governing party (see P MIKULI, 'An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland', *International Journal of Constitutional Law Blog*, 23 February 2017).

levels of government under different denominations and have different institutional features, even though they are charged with comparable functions (monitoring, promotion, etc.). They are often committed to improving equality and to assessing violations of human dignity, a concept that encompasses a broad range of specific rights, which are present in virtually every charter, treaty or constitution. Therefore, despite the differences among them, they seem to converge towards a common vision of rights as a sustainable global system – according to the Sustainable Development Goals approved by the General Assembly of the UN in September 2015[36] – able to improve not only the legal status of individuals, but also the overall quality of public life.

In order to increase the sustainability of a political and legal system, a reappraisal of the judicial protection of rights in the global arena is needed. The proliferation of non-judicial bodies at every level clearly shows that the protection of human rights by courts is perceived to be inadequate. This insufficiency becomes even more problematic if we consider that, in the last decade, the social and financial turmoil created by the global economic crisis has put all developed countries under pressure. In Europe, both the EU and its Member States (or at least many of them)[37] are now committed to

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[36] A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

[37] However, recently in some Member States we can see violations of fundamental rights and of the core principles of democracy. In response to this, in May 2017 the European Parliament delivered a Resolution (2017/2656 – RSP), according to which 'recent developments in Hungary have led to a serious deterioration in the

demonstrating their ability to design and implement reliable human rights policies to improve the quality of life of people in Europe. The achievement of this goal will require additional efforts which must be performed by all components of the State structure, in which non-judicial bodies play an important role.[38]

The promising prospect of supplementing the judicial approach with a non-judicial approach to human rights is demonstrated by the evolution of both European institutions in the field and NHRIs. On the one hand, the FRA, even if it is not always considered effective in promoting human rights protection, has increased its influence in the field of human rights since its creation.[39] On the other hand, the establishment of NHRIs in countries struggling for democracy, such as Tunisia and Egypt, is a

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rule of law, democracy and fundamental rights which is testing the EU's ability to defend its founding values'.

[38] Policy-makers are aware of this task, as is shown in statements made by the President of the Commission, Jean-Claude Juncker, as well as other members of the EU Commission. Junker, in particular, shortly after his election, affirmed that there would be 'a strong political commitment from the whole College to ensure that the Charter [be] respected and complied with within all EU policies for which the Commission is responsible'. Such a commitment is not limited to European citizens: in the currently uncertain international context, the EU is increasingly being called upon to be an effective global player in the field of human rights protection, not only internally, but also beyond EU borders. Evidence of this trend can be found in recent actions taken by the EU with regard to third countries, such as the Roadmap 2014–2017 approved in the 14th EU-African Summit held in Brussels in April 2014.

[39] See GN TOGGENBURG, 'The Role of the New EU Fundamental Rights Agency: Debating the "Sex of Angels" or Improving Europe's Human Rights Performance?' (2008) 3 *European Law Review* 385; L VIOLINI, 'The Impact of the Charter of Fundamental Rights on European Union Policies and Legislation' in G PALMISANO (ed), *Making the Charter of Fundamental Rights a Living Instrument*, Martinus Nijhoff, Brill 2015.

sign of the relevance of non-judicial rights promotion in the arena of global constitutionalism.

However, this awareness, despite being a significant step towards legal systems adjusting to higher human rights standards, is not enough. Non-judicial dialogue and interaction between human rights agencies must now be triggered, and different forms of coordination among non-judicial bodies must be fostered in order to share information, exchange working methods and promote mutual cooperation, thus contributing to the overall sustainability of human rights protection.