



European Network of
National Human Rights Institutions

Promoting and Protecting Human Rights in Non-Government Controlled, Non- Recognised and Other Disputed Territories*

The Role and Responsibilities of National Human Rights Institutions

Full Report

September 2020

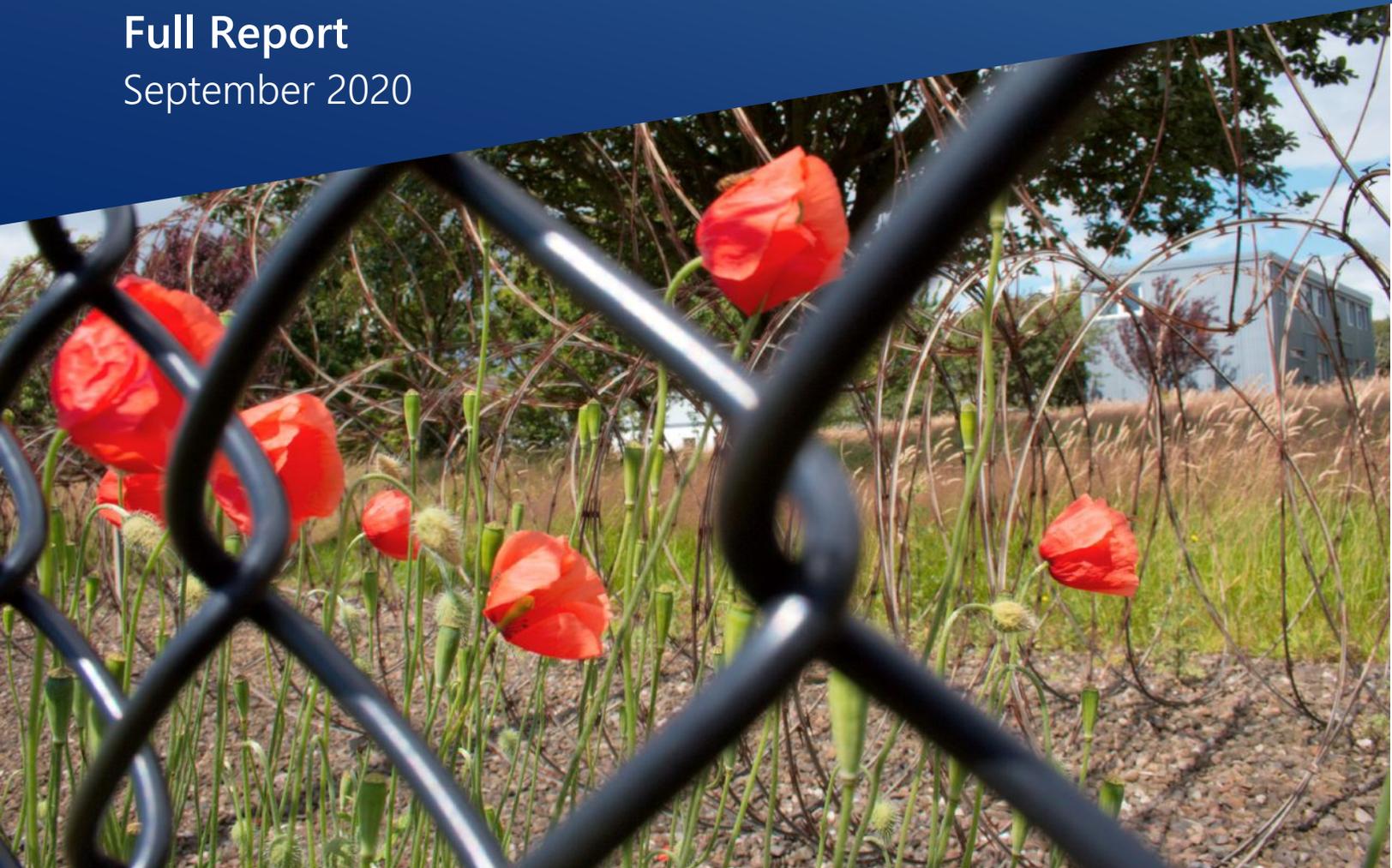


Table of Contents

List of abbreviations.....	3
Introduction and Summary.....	3
Setting the Context: Considerations Based on International Law	7
The First Scenario.....	8
The Second Scenario.....	9
The Third Scenario.....	11
Considerations Based on the Paris Principles.....	13
Independence.....	14
Jurisdiction.....	14
Broad human rights mandate.....	15
Pluralism.....	16
Cooperation with other human rights bodies and civil society	17
Interaction with the international human rights system.....	18
A Way Forward.....	19
General Principles.....	19
The Role of NHRIs: Examples of Possible Activities within the NHRI Mandate.....	23
Overcoming challenges.....	33
Conclusion.....	40
Annex 1. References to international mechanisms (United Nations, Council of Europe and OSCE) in support of stronger engagement by NHRIs with human rights in non-government controlled territories (NGCT)	42
Annex 2. Principles for engagement of National Human Rights Institutions (NHRIs) with the <i>de facto</i> human rights bodies (to be shared with the <i>de facto</i> human rights body)	51
Annex 3. Code of conduct for NHRIs operating in the context of conflict	56

* The terminology and presentation of the material do not imply the expression of any political view or opinion regarding the legal status of any territory or authorities in control of it. The title in this paper is used to encompass all situations in Europe when the territorial (parent) state has no effective control over parts of its territory, for example occupation or separatist insurgency, in the context of an international armed conflict (between states) or a non-international armed conflict (conflict between governmental forces and armed non-state actors/armed groups). It includes all relevant legal designations regarding these situations and territories. While the paper does not specifically cover territories governed by the United Nations or other international organisations, some discussion within the paper might also be relevant in such situations. The paper is without prejudice to the determination of the obligations of Paris Principles compliant NHRIs in such situations by the GANHRI Sub-Committee on Accreditation.

List of abbreviations

CoE	Council of Europe
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GANHRI	Global Alliance of National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IO	Intergovernmental Organisations
NGCT	Non-government controlled territory
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
OHCHR	Office of the United Nations High Commissioner for Human Rights
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
SCA	Sub-Committee on Accreditation
UN	United Nations

Introduction and Summary

In the recent past Europe has seen a number of armed conflicts which resulted in situations where the state was no longer controlling parts of its internationally recognised territory (referred to as 'Non-Government Controlled Territory' (NGCT) in this Paper). The human rights of individuals who live in these territories are especially at risk, given the cultural, ethnic, religious, political tensions that often characterises these situations and a lack of effective remedies and meaningful access to regional and international human rights protection mechanisms. Conflicts around NGCT often last for decades and entail long-lasting and complex situation of abuses and associated griefs.

Strong and independent National Human Rights Institutions (NHRIs) have a vast potential to ensure greater respect for dignity of people in NGCT.¹ Their role is often pictured as a bridge between the civil society and the state, connecting human rights and other actors as well as policy development and compliance at the local, national and international levels. At the same time the conflict context poses difficult questions as to the role and responsibilities of NHRIs in addressing the human rights situation in these territories, and for NHRIs to be in full compliance with the Paris Principles.²

Several key arguments point to such a role of NHRIs with regard to human rights in NGCT. Although the Paris Principles do not directly address situations of conflict, General Observations to the Paris Principles refer to the state of emergency and the situation of conflict, emphasising the importance of NHRI's work in such circumstances.³ NHRIs are expected to observe human rights compliance by their governments and within their jurisdiction. The international human rights mechanisms emphasise that the state does not

¹ This potential has been acknowledged internationally, and importantly also by NHRIs themselves. See, for example, The Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situation, at http://ennhri.org/IMG/pdf/the_kyiv_declaration.pdf.

² The Paris Principles are internationally recognised standards for NHRIs to effectively protect and promote human rights (endorsed by the UN General Assembly in 1993, Resolution A/RES/48/134), see <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.

³ General Observations (GO) were developed by the Sub-Committee on Accreditation (SCA), the body that reviews NHRIs' compliance with the Paris Principles, and adopted by GANHRI. GO is an interpretative tool of the Paris Principles, for application during the accreditation process, aiming to assist NHRIs in developing their own practices and procedures in compliance with the Paris Principles, see https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf

cease to have jurisdiction over territories that it no longer controls as result of a war or insurgency, and therefore it has continuing obligations towards the individuals within this territory.⁴ In some cases responsibility and corresponding obligations can be attributed to another state that exercises effective control over that territory, directly or through non-state armed groups. In most cases where the *de facto* authorities exercise control over an NGCT and have an identifiable structure, they will also have certain obligations in line with the international human rights law and international humanitarian law. The question of obligation and responsibility to guarantee human rights in NGCT is central to understanding of the role of NHRIs in this context.

All scenarios presented above activate the role and responsibility of an NHRI, requiring NHRIs to take extra steps compared to what they are usually expected to do. The situation may call for engagement with an NHRI on the “other side of the conflict” and/or a *de facto* human rights body, or relevant authorities of the state in effective control and/or those in *de facto* control of an NGCT. It also requires NHRIs to build stronger institutional capacity to be able to deal with new challenges, such as training to develop sensitivity to conflict in their staff.

The legal arguments for such engagement are presented in more detail in part 2 of this Paper and Annex 1, supported by the practice of many NHRIs in Europe and other regions and by leading international organisations, which proactively work in human rights in NGCTs.

Engagement with *de facto* human rights bodies (or authorities) may be seen by some actors as recognition or legitimisation. NHRIs should carefully plan their work to avoid that risk. NHRIs can also face a variety of other challenges, such as lack of access, safety and security, uncertainty of the NHRI’s mandate, lack of trust, and political and societal pressures, which could raise issues of NHRIs’ compliance with the Paris Principles when engaging in the NGCT. All these approaches need to be properly reviewed and analysed, to ensure effective and strategic work of NHRIs for the protection and promotion of human rights in these situations. Parts 3 and 4 of this Paper outline principles and suggest approaches to the engagement of NHRIs in NGCTs.

This Paper has been drafted following the request of several members of the European Network of National Human Rights Institutions (ENNHRI) to gain clarity about their role to

⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 26: Continuity of Obligations*, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1 § 4; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, 48787/99, 8 July 2004, § 333.

promote and protect human rights in NGCT. It aims to discuss possible approaches and provide a clearer understanding of NHRIs' roles and responsibilities. The document is a work in progress and does not provide ready-made guidance easy to fit to any conflict context. It is based on relevant international law and jurisprudence, and also takes account of the evolving practice by NHRIs and insights from intergovernmental human rights organisations (referred to as 'IOs') and civil society organisations (CSOs). It reflects the discussions and findings of ENNHRI's meetings on the role and responsibilities of NHRIs to promote and protect human rights in NGCT held in Brussels on 13-14 February and 11-12 June 2019, and ENNHRI's capacity-building workshop on the role of NHRIs in peacebuilding held in Zagreb on 29-31 October 2019.⁵

The document was complemented by further consultations with ENNHRI members, the Global Alliance of NHRIs (GANHRI), regional NHRI networks, and stakeholders, and is supporting the activities conducted within the ENNHRI Project on the role of NHRIs in situations of (post-)conflict (2016-2020)⁶ and its [guidance](#) on the role of NHRIs in this area. It has also been considered in the context of peacebuilding activities, and could support prevention of conflict or violent responses to human rights violations.

⁵ Participants of the meetings – NHRIs, international organisations and civil society representatives - shared numerous examples of work to address human rights in the non-government controlled territories in Europe and their role in peacebuilding. Results of the meetings' discussions (examples of practices, concerns, opportunities, etc.) are included in this Paper.

⁶ For more information, see: <http://ennhri.org/our-work/topics/human-rights-in-post-conflict/>

Setting the Context: Considerations Based on International Law

In its decision *Cyprus vs Turkey* the European Court of Human Rights (ECtHR) established a general principle that should guide NHRIs in their approach to the human rights situation of individuals in an NGCT: "...life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions (...). To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled".⁷

The ECtHR noted that there should be no vacuum in human rights protection.⁸ The UN Human Rights Committee also stressed that "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them."⁹

In Europe, at least three general scenarios regarding the NGCT, depending on who exercises effective control over the territory in question, can be distinguished – they are presented below.¹⁰ In reality, however, situations may be more complex and may not be clear cut cases to place in one of the three scenarios. The scenarios are drawn here to provide the patterns and lines of legal arguments for NHRIs. NHRIs should analyse these scenarios, guided by the general approach outlined above, and identify the applicable international law and relevant obligations of the parties to the conflict, so that they can plan and carry out their mandate efficiently and in line with the Paris Principles.

⁷ Judgment on the merits delivered by the ECtHR Grand Chamber, *Cyprus v Turkey* [GC], no. [25781/94](#), § 96, 2001. In elaborating this approach, the Court drew on the Advisory Opinion of the International Court of Justice (ICJ) in the *Namibia* case, that "even if the legitimacy of a State was not recognised by the international community, international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory", *Cyprus v Turkey*, § 96 and p. 56, § 125 of the ICJ Advisory Opinion.

⁸ ECtHR, *Al-Skeini and Others v. The United Kingdom*, [55721/07](#), § 74 7 July 2011.

⁹ *Supra* note 4.

¹⁰ There may be many more scenarios, for example, territories under the control of United Nations or cases when one scenario is transforming over time into a different one.

The First Scenario

The first scenario concerns situations where non-state armed groups (often with statehood claims, referring to the right to self-determination¹¹) exercise effective control over the specific territory. These groups establish their administrations, law enforcement, justice-like institutions, legal frameworks and act as *de facto* authorities. While only states can become parties to international treaties, *de facto* authorities have been increasingly recognised to have obligations under International Human Rights Law (IHRL) while International Humanitarian Law (IHL) have long established such responsibility.¹²

There are norms of international law that are binding on all groups and individuals. Thus, *de facto* authorities must at all times respect, at a minimum, peremptory norms of international human rights law¹³ and non-derogable rights (which are close by their nature to peremptory norms) that can never be limited¹⁴: the prohibition of torture, of genocide and of slavery; other crimes against humanity (such as deportation or forcible transfer of population, taking hostages or enforced disappearances); prohibition of arbitrary deprivation of liberty; prohibition of arbitrary arrest and detention; imposing collective punishments; fundamental principles of fair trial, such as presumption of innocence; prohibition of propaganda for war, advocacy of national, racial or religious hatred that

¹¹ The right to self-determination is one of the core principles of international law. See International Court of Justice Advisory Opinion "Accordance with international law if the unilateral declaration of independence in respect of Kosovo", ICJ 423 (ICJ 2010) para 82, and General Recommendation No. 21 of the Committee on Elimination of Racial Discrimination: Right to self-determination. 23.08.1996. In paragraph 6 of the Recommendation, the Committee stresses though that "international law has not recognised a general right of peoples unilaterally to declare secession from a State... This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned."

¹² See annex 1 for references to resolutions, reports and statements. There is a certain degree of willingness and readiness on the part of *de facto* authorities needed, to accept such obligations (some *de facto* states unilaterally commit to respecting international law). See also article by Andrew Clapham: https://www.researchgate.net/publication/228159211_Human_Rights_Obligations_of_Non-State_Actors_in_Conflict_Situations, and the 2018 report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Armed non-State actors: the protection of the right to life), A/HRC/38/44/.

¹³ See the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, that refers to peremptory norms as a minimum obligation, [A/HRC/19/69](https://www.un.org/rukdmdocs/ohchr/hrc/eng/resolutions/A/HRC/19/69), § 106.

¹⁴ See the Council of Europe's Venice Commission Report "Are there differentiations among human rights? jus cogens, core human rights, obligations erga omnes and non-derogability", [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD\(2005\)020rep-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2005)020rep-e); Article 26. Compliance with peremptory norms. International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

would constitute incitement to discrimination, hostility or violence; prohibition of discrimination and no punishment without law.¹⁵ *De facto* authorities in NGCT must also respect, at a minimum, the Common Article 3 of the 1949 Geneva Conventions, customary IHL¹⁶, and (when meeting the criteria) Additional Protocol II, all of which apply to a non-international armed conflict.¹⁷

Reports by international bodies, such as for example the Office of the United Nations High Commissioner for Human Rights (OHCHR)¹⁸ and the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE/ODIHR)¹⁹ address recommendations to *de facto* authorities, stressing their responsibility for guaranteeing peremptory human rights norms. Annex 1 to this Paper includes more references to universal and regional mechanisms to clarify which human rights obligations may apply to *de facto* authorities.

In at least a few cases in Europe the first scenario transformed into a situation where the separatist entity was subsequently recognised by some states. While it is not the purpose of this Paper to examine the issue of international recognition, and especially because this Paper tries to avoid the politicisation of the context, this is an important factor that NHRIs cannot ignore in their strategic work. Avoiding legitimisation or recognition of *de facto* authorities by the NHRIs will be addressed in more detail in the final part of this Paper.

The Second Scenario

The second scenario covers situations where the non-state armed groups act as a proxy of another (intervening or occupying) state. In this scenario, acts by the non-state armed groups may directly engage the responsibility of the state which exercises effective control over the non-state armed group.²⁰ It is important to stress that this scenario may be the

¹⁵ See General Comment No. 29 States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 31 August 2001; and European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.

¹⁶ Majority of the rules identified in the customary IHL study conducted by the ICRC are applicable in non-international armed conflicts. See https://www.icrc.org/customary-ihl/eng/docs/v1_rul.

¹⁷ Geneva Academy of International Humanitarian Law and Human Rights, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', Academy in-Brief n. 7, https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

¹⁸ See, for example, <https://www.ohchr.org/en/countries/enacaregion/pages/uareports.aspx>.

¹⁹ See, for example, <https://www.osce.org/odihr/118476?download=true>.

²⁰ See Article 8. Conduct directed or controlled by a State. International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two.

most difficult for analysis, as it concerns matters where the legal interpretation of the factual situation on the ground may remain debatable, despite the decisions of the relevant international bodies. Central here is the notion of “effective control” and the related test that allows to draw conclusions as to which state exercises such control and therefore is subject to corresponding international obligations.

The “effective control” test articulated by the International Court of Justice (ICJ) in the *Nicaragua*²¹ and *Genocide*²² judgments sets a high threshold for proof of degree and nature of control of a state over armed groups.²³ The International Criminal Court for the former Yugoslavia (ICTY), in the *Tadić* case, questioned the need to establish “a high threshold for the test of control in each and every circumstance” and suggested to distinguish various situations, arguing for a more flexible approach.²⁴

The ECtHR is primarily concerned with establishing the jurisdiction of the state parties, which for the Court, is mainly territorial but not restricted to it, also extending to acts of authorities outside of national boundaries (extra-territorial jurisdiction). For example, extra-territorial jurisdiction as a result of lawful or unlawful military action when the state exercises effective control of an area outside its national territory. “The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”²⁵

The ECtHR stated that in the establishment of responsibility, it was not necessary to “determine whether another state exercises detailed control over the policies and actions of the (de facto) authorities. In the final judgment *Loizidou v. Turkey*, the ECtHR established that “effective overall control” equals “presence of a large number of troops engaged in

²¹ ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), judgment of 27 June 1986, § 105 – 115.

²² ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 Feb. 2007, § 398 - 407.

²³ For example, in Nicaragua case, the ICJ stressed that the “effective control” test was to prove that (the US).. “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State”, § 115.

²⁴ ICTY, Appeals Chamber, *Tadić*, 15 July 1999 (Case no. IT-94-1-A), § 117 - 121. The Court mentioned, for example, that, depending upon the situation, to prove the “effective control” there may be a necessity to establish the “issuance of specific instructions” by a state to the private individual performing illegal acts on the territory of another state, acting as a *de facto* state agent. While in the situation with “organised and hierarchically structured groups” it may be “sufficient to require that the group as a whole be under the overall control of the State.”

²⁵ ECtHR, *Loizidou v. Turkey*, 15318/89 (Preliminary Objection), 23 March 1995, § 62.

active duties” (in a certain part of the country) and entails state’s responsibility for the policies and actions of the de facto entity.”²⁶ The Court confirmed a similar approach of “effective overall control” in subsequent cases, examining and citing in particular “military and political support (...) to help set up the separatist regime” and “military, political and economic support to the separatist regime “being sufficient for engaging the state’s responsibility”.²⁷

Thus, there are no rigid criteria for assessing the degree of control of the state over the non-state armed groups or private individuals who may in fact act on behalf of that state. At the same time, a broader approach, adopted by the ECtHR presents itself as the most relevant for NHRIs to base the human rights analysis on. Such an approach is aimed at preventing states from escaping international responsibility, which is at the heart of the system of international law.

The Third Scenario

The third scenario is about situations where a state directly claims its sovereignty over a territory under the jurisdiction of another state and establishes therein a new legal regime and administration. Such scenarios, though seemingly most clearly defined, may present serious challenges for NHRIs’ assessments. For example, even when in some cases the relevant situations in Europe have been designated in UN General Assembly resolutions as “occupation”, some states, including the occupying state, may refuse to acknowledge this. It may become very difficult for NHRIs, especially in the latter case, to manoeuvre between the official position of its state and the conclusions according to international law, and to find the balanced approach in line with the Paris Principles.

In both the second and third scenarios a state which exercises effective overall control over a certain area on another state’s territory that is not part of its internationally recognised territory has direct obligations under IHRL. It must ‘refrain from actions incompatible with the European Convention on Human Rights (ECHR), and guarantee respect for the rights and freedoms secured under the Convention.’²⁸ Also, under the International Covenant on Civil and Political Rights (ICCPR) “[...] a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party,

²⁶ ECtHR, *Loizidou v. Turkey*, 15318/89, 18 December, 1996, § 56.

²⁷ ECtHR, *Cyprus v. Turkey*, §77; *Ilaşcu and Others v. Moldova and Russia*, 48787/99, 8 July 2004, § 382, 392 - 394.

²⁸ *Ibid*, *Ilaşcu and Others v. Moldova and Russia*, § 331 - 333.

even if not situated within the territory of the State Party.²⁹ The two last scenarios also invoke obligations under IHL governing the conduct of parties to an international armed conflict, such as section III of the Fourth Geneva Convention and the Additional Protocol I.³⁰

All three scenarios engage human rights obligations of the 'territorial state', no longer controlling parts of its internationally recognised territory.³¹ According to the ECtHR jurisprudence, territorial states do not cease to have jurisdiction within the meaning of Article 1 of the ECHR over that part of its territory. Even in the absence of effective control, states still have a positive obligation to take the diplomatic, economic, judicial or other measures available vis-à-vis foreign states and international organisations, to continue to guarantee the rights to individuals.³² Under the ICCPR, states have a continuing obligation to ensure respect for the rights recognised in the Covenant in relation to the population in the NGCT within the limits of the territorial state's effective power.³³

²⁹ United Nations Human Rights Committee (HRC), *General comment no. 31 [80]*, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10, <https://www.refworld.org/docid/478b26ae2.html>.

³⁰ See interpretative notes by ICRC, <https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm> and <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

³¹ It must be noted, however, that specific circumstances of the situation may need to be examined. In the case of *Cyprus vs Turkey*, the ECtHR established that Cyprus had a "continuing inability to exercise their Convention obligations in Northern Cyprus..." (para. 78). At the same time, the Court underlined positive obligations of Moldova (that also lacks effective control over the NGCT) in the case of *Ilaşcu and Others v. Moldova and Russia*.

³² ECtHR, *Ilaşcu and Others v. Moldova and Russia*, § 331,333 and 339.

³³ Human Rights Committee, Concluding Observations on Moldova (CCPR/C/MDA/CO/2(2009), paragraph 5, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FMDA%2FCO%2F2&Lang=en.

Considerations Based on the Paris Principles

The Paris Principles endorsed by the UN General Assembly in 1993 are the key international reference framework outlining NHRIs' role and mandate. The standards outlined in the Paris Principles in relation to NHRIs' independence, mandate, jurisdiction, cooperation with civil society and human rights bodies, and interaction with the international human rights system provide important considerations for NHRIs' actions in the above scenarios and must be at the basis for any discussion in this area. The Global Alliance of NHRIs (GANHRI) has adopted General Observations³⁴ which, as interpretive tools of the Paris Principles, are used to instruct NHRIs in developing mechanisms and processes to ensure Paris Principles compliance.

The General Observations to Paris Principles recognise the responsibility of NHRIs to protect and promote human rights in situations of conflicts: "...disruptions to peace and security in no way nullify or diminish the relevant obligations of the National Institution. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. In such circumstances, the protection of human rights becomes all the more important, and National Institutions must ensure that individuals have accessible and effective remedies to address human rights violations".³⁵

NHRIs are expected to promote and ensure respect for human rights, democratic principles and the strengthening of the rule of law in all circumstances and without exception. In situations of conflict or a state of emergency, this may include monitoring, documenting, "issuing public statements and releasing regular and detailed reports through the media in a timely manner to address urgent human rights violations".³⁶

Thus, in fact, the General Observations stress the responsibility of NHRIs to undertake a greater role in times of conflict, which could potentially include addressing human rights in NGCT. The key requirements under the Paris Principles are considered below in the context of NHRIs' role and responsibility in NGCT.

³⁴ See General Observations at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/SCAGeneralObservations.aspx>.

³⁵ GANHRI's explanatory notes on General Observation 2.5.

³⁶ General Observation 2.5.

Independence

Independence is the cornerstone of NHRIs' mandate. The Paris Principles require an NHRI to have both formal independence safeguards in law, as well as real and perceived independence in practice (functional independence). The Paris Principles are unambiguous about an NHRI being able to "freely consider any questions falling within its competence". The General Observations further detail that in times of conflict a NHRI should conduct itself with a heightened level of vigilance and independence in the exercise of its mandate.³⁷ All NHRI functions must be exercised in a manner that underlines its independence from the state, including – where relevant - its position vis-à-vis the conflict.

When read jointly with the need to respect the mandate, within its jurisdiction, a situation of conflict may pose serious challenges to real and perceived independence. NHRIs may be seen as supporters of the "government's line" or, depending upon the situation, accused of aiding the "separatists". Challenges are different for NHRIs belonging to a state that is internationally recognised as being in effective control of a relevant territory of another state (scenarios 2 and 3). Such NHRI engagement, without safeguards and proper assessment in place, may have a negative reputational impact (on association with the occupying state) and may also potentially affect the compliance of the NHRI with the Paris Principles and the requirement of perceived independence of the NHRI in particular.³⁸

Jurisdiction

The Paris Principles require that NHRIs be mandated by legislative or constitutional provisions to promote and protect human rights in their state. They must be given as broad a mandate as possible. NHRIs must exercise their core functions, within their jurisdiction, including when they engage with state bodies, CSOs, international human rights mechanisms and the public.

As independent institutions established by states, with a national jurisdiction, the *de facto* disputed status of an NGCT may represent obvious challenges for NHRIs (including linked to the compliance with the Paris Principles), and will require proper legal analysis regarding the jurisdiction and corresponding international obligations. The Paris Principles do not provide specific guidance as to whether NHRIs' jurisdiction should always be interpreted as

³⁷ General Observation 2.5.

³⁸ In line with the Rules of procedure for the GANHRI SCA, https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/SCA%20Rules%20of%20Procedure/ENG_GANHRI_SCA_RulesOfProcedure_adopted_21.02.2018_vf.pdf.

coinciding with that of the “NHRI state” but this Paper supports such approach. This would mean that both an NHRI from a territorial state (often having limited jurisdiction but still having positive obligations) and an NHRI from a state with effective control (through state’s extra-territorial jurisdiction) would have a jurisdictional duty (mandate) to address the human rights situation in an NGCT.

Of particular relevance to NHRIs in determining jurisdictions are resolutions of the UN General Assembly and the UN Security Council and decisions by international judicial and quasi-judicial bodies. In reality, states may deny having such jurisdiction, rejecting also the obligation to secure rights and freedoms in an NGCT. An NHRI, being independent from the state, may have a different position on this matter.

For NHRIs in states with effective control over an NGCT it may be most pragmatic *not* to treat the territory in question as an NHRI’s “direct” jurisdiction aiming to stay outside of the political dimension of the territorial dispute. This is especially true when the UN or other mechanisms present a clear view of an NGCT falling within the jurisdiction of an NHRI’s state. It is crucial for such NHRIs to look at own state’s compliance with the international human rights and humanitarian law obligations, and in certain cases also monitor and report on human rights situation in an NGCT. Reporting to international bodies on these territories, or any public statements thereon could be coordinated with the counterpart NHRI on the “other side of the conflict” so as to avoid possible criticism of lacking autonomy from government and independence. The situation becomes more complicated in case of no or limited cooperation between NHRIs and lack of access of international monitoring bodies to such territories.

Broad human rights mandate

The General Observations state that ‘an NHRI’s mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights, which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights’.³⁹ The broad human rights mandate should cover actions by NHRIs to address their own government’s human rights obligations in relation to parts of their territory that may no longer be under their state’s effective control.

³⁹ General Observation 1.2.

The fact that the territory in question is internationally recognised to be part of the NHRI's state, but under the effective control of another state or de facto authority may suffice for NHRI to activate its mandate in relation to this territory. At the same time mechanisms may be lacking to fully implement this mandate in practice, such as because of lack of physical access to such territories. An NHRI should at all times also oversee its own government's actions (or lack thereof) in case of its government's extra – territorial jurisdictional obligations, when it exercises effective control over territories.

The broad human rights mandate of an NHRI should also be interpreted to include protection of human rights of all persons who continue to be affected by conflict, especially those who had to leave their homes. Such persons have a right to return. The promotion and protection of human rights of the conflict affected population cannot be seen in isolation of the settlement of the conflict. NHRI mandates may not always be formulated in a way that directly refers to taking actions aimed at ending the confrontation and building stable peace. However, this work should at least be seen as an important preventive function of NHRIs, to avert the return to hostilities and potential mass human rights violations. As independent institutions, NHRIs may be best positioned to build trust and approach reconciliation between communities, across the divides, based on the inherent dignity of every person.

NHRIs should be guided by the General Observations, which set out that, in situations of conflict, an NHRI should take 'steps to the maximum of its available resources to provide the greatest possible protection for the human rights of each individual within its jurisdiction'.⁴⁰ Furthermore, NHRIs' actions should not focus on certain ethnicities or nationalities over others, but acknowledge the dignity of each individual and treat persons equally.

Pluralism

The Paris Principles emphasise that NHRIs must ensure, in their composition and election procedures, the 'pluralist representation of the social forces (of civil society) involved in the promotion and protection of human rights'⁴¹. Indeed, the requirement of pluralism reinforces the actual and perceived independence, and public trust in an NHRI, by showing that all sections of society are represented.

⁴⁰ General Observation 2.5.

⁴¹ Paris Principles, 'Composition and guarantees of independence and pluralism', section 1, <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/PARIS%20PRINCIPLES-ENG.docx>.

According to General Observation 1.7, different models can be applied to ensure the requirement of pluralism, including the composition of the decision-making body and staff, and procedures for cooperation with a wide range of stakeholders (for example advisory committees, networks, consultations or public forums). Pluralism should be considered in the context of gender, ethnicity or minority status. To stress independence, credibility, effectiveness, and accessibility, it is therefore important for the NHRI of the territorial state to reflect in its composition and work representation the diversity of the population in the NGCT. More principles will be addressed in part 4 “A way forward”.

Cooperation with other human rights bodies and civil society

The Paris Principles require NHRIs to “maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions)”, and specifically recognise “the fundamental role played by the non-governmental organisations in expanding the work of the national institutions”, and therefore encourage NHRIs to, “develop relations with the non-governmental organisations devoted to promoting and protecting human rights.”⁴²

The General Observations also emphasise that it is essential for NHRIs to engage regularly and constructively with all relevant stakeholders, including civil society and other human rights bodies.⁴³ This provides a better understanding of the range of the human rights issues, improved access to vulnerable groups, and additional expertise to seek human rights protection.

The General Observations’ explanatory notes stress that: ‘The NHRI’s relations with civil society and NGOs is particularly important in improving its accessibility to sections of the populations who are geographically, politically or socially remote. These organisations are likely to have closer relations with vulnerable groups as they often have a more extensive network than NHRIs and are almost always likely to be closer to the ground. In this way, NHRIs may use civil society to provide an outreach mechanism to engage with vulnerable groups’.⁴⁴

⁴² Paris Principles, ‘Methods of Operation’ section, paragraph (g). The OSCE Copenhagen document (para. 27) suggests that NHRIs may also serve as focal points for collaboration between various institutions in the society, see <https://www.osce.org/odihr/elections/14304?download=true>.

⁴³ General Observation 1.5.

⁴⁴ General Observation 1.5.

While cooperation with the *de facto* human rights bodies⁴⁵ and civil society from a NGCT may represent an important dimension of an NHRI activity, in reality it may be very challenging for NHRIs to access such territories and engage with stakeholders. Part four will specifically address possible approaches. Additionally, Annex 2 suggests principles for engagement with a *de facto* human rights body.

Interaction with the international human rights system

The Paris Principles and the General Observations recognise that monitoring and reporting to the international human rights system, in particular the Human Rights Council, its mechanisms (Special Procedures and Universal Periodic Review), and Human Rights Treaty Bodies, are effective tools for NHRIs in the promotion and protection of human rights domestically. NHRIs' independent submission of information to universal and regional human rights mechanisms on the human rights situation in NGCT contributes to the work of international mechanisms in assessing the extent to which states comply with their human rights obligations.

The mandate of NHRIs would suggest that it is an NHRI's role to provide information about the human rights situation in areas outside of its government's effective control, but within the territorial jurisdiction. However, this may be practically very difficult, and cooperation with actors that have access might be needed, such as with the NHRI of the state with effective control of the territory. NHRIs representing the state recognised as having effective control over parts of another state should also submit information to international fora covering human rights in these territories, focusing on the obligations of its state with regard to that territory. If an NHRI was to act in such situations, it could seek cooperation with the NHRI of the territorial state and other actors.

The General Observations state that, "[i]n considering their engagement with the international human rights system, NHRIs are encouraged to actively engage with the OHCHR, GANHRI, their Regional Network and other NHRIs, as well as international and national NGOs and CSOs".⁴⁶ This cooperation would be particularly important for NGCT, and is discussed in Part 4.

⁴⁵ "*De facto* human rights bodies" will refer to a human rights entity (such as ombudsman, as the case in most European NGCT) set up by *de facto* authorities to protect and promote human rights of people in an NGCT.

⁴⁶ General Observation 1.4.

A Way Forward

This part first outlines general principles regarding NHRIs' work in an NGCT; then the role of NHRIs based on functions and cooperation with various stakeholders; and finally the challenges that NHRIs face in such situations, and the approaches they may take to deal with these difficulties. These considerations are based on discussions at the Brussels meetings on 13 and 14 February and 11 – 12 June 2019, on the Paris Principles and General Observations, relevant international legal framework, as well as practice of NHRIs, UN, Council of Europe (CoE) and OSCE institutions, as well as on strategies outlined in UN methodological manuals on preparing and implementing monitoring missions.⁴⁷ This Paper recognises the unique circumstances of each situation of conflict, but suggests approaches, which may be applicable to multiple contexts, upon proper analysis.

General Principles

Situational Review and Analysis

Any decision on the forms and methods of work in a NGCT depends upon specific considerations that must be examined by the NHRI. It is important that this decision is based on solid understanding of the problems an NHRI seeks to address, and backed up by proper analysis, that may include:

- Assessment of the human rights situation of individuals and groups, including those who may be at particular risk;
- Legal analysis (applicable international legal framework, relevant obligations);
- Risk analysis (to the NHRI and to the individuals and organisations it will come into contact with);
- Assessment of available methods and tools, based on the NHRI's specific mandate recognised by law and the NHRI's resources, in line with the Paris Principles and General Observations;

⁴⁷ 2001 edition of the OHCHR Training Manual on Human Rights Monitoring (No. 7) <https://www.ohchr.org/Documents/Publications/training7part1618en.pdf>, Chapter XVI "Monitoring during periods of armed conflict"; and UNDP's Trainer's Guide "Human Rights Monitoring and Fact-Finding for National Human Rights Institutions, http://ennhri.org/wp-content/uploads/2020/05/undp_trainer_s_guide_on_fact_finding_and_monitoring.pdf.

- Analysis of the conflict (its underlying factors and problems, the current stage and dynamics, leverage points to change the situation, etc.);
- Stakeholder mapping (assessment of all stakeholders that may provide a better understanding of the range of the human rights issues at stake, or have a role to play in the realisation of these human rights).

These actions should become part of the basis for setting the strategic priorities of NHRIs.⁴⁸ It is crucial that NHRIs undertake any steps in conformity with the Paris Principles that will ensure internal coherence and quality of work, as well as trust and validity for its actions from the side of the national public and international institutions.

Independence

In accordance with the Paris Principles, independence should be central to any NHRI and its activities. Risks to independence during work in an NGCT can be mitigated by NHRIs focusing on respect for human rights standards, the Paris Principles and other key principles, outlined below and closely linked with each other. It is also crucial at all times to use the IHRL and IHL standards as key reference frameworks for NHRIs' engagement in such situations, especially when stressing the responsibility of the *de facto* authorities for carrying out their human rights obligations. Assessing the situation by reference to the applicable international law framework would additionally allow avoiding accusations of political influence when referring to the relevant national legislation or of recognition of the *de facto* normative framework.

Impartiality

It is not possible to be independent without exercising the mandate in an impartial manner. Impartiality in the context of the conflict would primarily mean looking into allegations of human rights violations, without any bias, including those committed by the bodies and representatives of the NHRI's state. It also means avoiding purely political statements and messages, on any levels, focusing only on human rights standards. NHRIs' pluralism, required under the Paris Principles⁴⁹ can assist in enhancing (perception of) impartiality. Where it is alleged that human rights violations have been committed by another state, the NHRI should seek cooperation with its counterpart in that state, as opposed to making

⁴⁸ The list of the types of analysis to undertake, presented here, cannot be exhaustive. Its depth will depend, for example, upon the urgency and severity of the situation, the mandate and available capacity of the NHRI. A lot of information would already be available, it would just need to be analysed.

⁴⁹ General Observation 1.7.

statements itself about the other state, in order to avoid risks to its perceived independence and neutrality.

Objectivity

Impartiality to a large extent depends upon objectivity, denoting the non-biased character of any information, relying on facts based on various credible sources as well as using credible information collection methods. The participation and engagement with a wide range of actors can assist in ensuring the real and perceived objectivity of an NHRI.

Accountability and Transparency

As a state mandated body, an NHRI must be accountable to the public. It is important that an NHRI can show that all activities have been carried out within its mandate, and according to the Paris Principles, IHRL and IHL standards. NHRIs should be transparent about engagement with an NHRI from another state, civil society, *de facto* human rights bodies and the *de facto* authorities in NGCT. First, this may preclude any accusations of legitimisation of the *de facto* authorities in the eyes of the national public as well as the international community. Secondly, it adds more validity to NHRI's work, by holding the *de facto* authority (or/and a state with effective control) accountable for human rights obligations. Finally, it can make the NHRIs' work safer, as it raises the stakes to physically attack someone who is working openly. It is noted, however, that such engagement could also lead to a presumption of support and protection of the *de facto* authorities, which could undermine the credibility of the NHRI.

In situations of conflict and in an NGCT, some NHRI activities would be most effective without visibility. Even in times of relative peace many NHRIs carry out parts of their work by engaging confidentially with relevant actors. Therefore transparency about engagement with anyone in an NGCT must also be balanced with the risks posed to the safety and security of those organisations, as well as the peace and reconciliation processes.

Broad Mandate and Functions

The Paris Principles require that an NHRI has a broad mandate to both promote and protect human rights. The Paris Principles clarify that these functions could include: monitoring and reporting on the human rights situation; advising government, parliament and other competent bodies; cooperation with a wide range of bodies, for example by ensuring communication to investigate the fate of the missing persons; complaints handling; human rights education; and awareness-raising. In practice, many NHRIs also use the courts, through strategic litigation or *amicus curiae* interventions, or provide legal

assistance. An NHRI should first carry out these functions in relation to action or inaction of its own government, in relation to the conflict context and the NGCT in particular.

Engagement with Stakeholders

In any context, the Paris Principles make clear that NHRIs should cooperate with a range of stakeholders. The General Observations and their explanatory notes make clear that this cooperation can assist in accessing hard-to-reach communities, in receiving more complete information about the human rights situation and in following-up on recommendations.

On the basis of the Paris Principles and all considerations outlined above, NHRIs should consider an array of possible means of cooperation and engagement. These might include:

- Direct work with people living in the NGCT (monitoring, documenting, complaints handling, where relevant);
- Work with or engagement with independent CSOs and human rights defenders, including those in an NGCT;
- Cooperation with international organisations present in the NGCT and/or those that have access to NGCT as well as advocacy for a broader access of international monitoring bodies to an NGCT;
- Cooperation with/through the relevant *de facto* human rights body (or NHRI on the other side of the conflict, if there is a state with effective control);
- Advocacy with the *de facto* authorities, where appropriate and relevant.

Safety, Security, and 'Do no Harm'

There are serious safety and security risks related to the possible gaps in protection of NHRI staff working in the areas controlled by *de facto* authorities or at the contact line. At the same time, communication with victims or witnesses of human rights violations may create an even higher risk for these individuals' safety and health. Therefore, the "do no harm" principle should guide NHRIs engagement. NHRIs should respect the confidentiality of and protect their sources of information, as well as document and store any information in a secure and reliable way.

All safety and security concerns, as well as risks related to re-traumatisation must be carefully assessed prior to any contact. Risks to security includes physical threats, but also risks related to IT attacks and other types of virtual intimidation. NHRI staff should be trained on IT risks and mitigation measures when working on NGCT, as it will raise the likelihood of cyber-attacks for the NHRI staff and institution.

The Role of NHRIs: Examples of Possible Activities within the NHRI Mandate

This part of the document is enriched with examples, practices and ideas by NHRIs and other stakeholders who were participants of the Brussels meetings.

In some cases, the political and legal environment, as well as emotions involved, will become insurmountable obstacles for NHRIs' effective work in protecting and promoting human rights in an NGCT. NHRIs should first and foremost observe the implementation of human rights obligations by their own government, which may easily be overlooked in the heat of the conflict tensions. This will strengthen trust towards an NHRI and increase the chances for access and true dialogue with the actors on the other side of the contact line.

In the work with an NGCT it is of primary importance to maintain the reputation of an NHRI as an independent institution that does not pursue political aims. It is necessary to make efforts to win this reputation also among the people who live in an NGCT and *de facto* authorities. The image of an NHRI as a non-political mechanism is key to its engagement with an NGCT, therefore its actions and words should expressly show openness, readiness for dialogue, respect but also its firm and principled position in support of rights and freedoms of all people living in an NGCT.

This will require of NHRIs that work in the conflict context to include the conflict angle in their policy (strategy, code of conduct) and operational (instructions, plans) documents. NHRIs' staff will have to undergo training in conflict sensitivity, for example, to be able to do simple analysis of how their work may influence the conflict framework and how the conflict dynamics may influence the activities of the institution.

Monitoring and reporting

NHRIs can monitor the situation and document relevant information, including to identify early signs of conflict' and take measures to prevent its re-escalation. NHRIs can broaden the scope of monitoring to the most affected communities and populations, such as internally displaced persons (IDPs), refugees, ethnic minorities, children, elderly, and often women and girls.

Monitoring of the right to life (and enforced disappearances) as well as human rights in places of detention often becomes a priority for NHRIs in situation of armed conflicts. At the same time violations of economic and social rights, as well as non-discrimination issues should continuously be on the agenda, as they often relate to the causes of the conflict and may also be part of the solution to its ending. Unfortunately, specific mechanisms for

monitoring potentially grave human rights violations are often absent, or difficult to deploy because of access or the security situation.

Therefore, NHRIs should seek alternative access to relevant information. Among possible approaches employed by NHRIs regarding human rights situation in an NGCT are monitoring missions at the border, cooperation with civil society, as well as the use of social media and open source monitoring. In the latter cases, NHRIs should ensure safe means of communication, e.g. through encryption, so as to protect their sources and partners from possible reprisals, in line with the “do no harm” principle. Those sources and the NHRI may be particularly at risk of cyber and other types of intimidation. NHRIs may also rely on cooperation with international organisations who have access to an NGCT, for example through exchange of information.

Monitoring their own government’s compliance with human rights should be among the priorities for NHRIs. Such work will contribute to the reputation of an NHRI as an independent and unbiased institution that works to protect and promote rights of all persons within its mandate. NHRIs should also monitor and report on how *de facto* authorities carry out their human rights obligations, for example by analysing the “legislation” they pass and the practices they use. NHRIs could use possible international reports on an NGCT as the starting point or benchmarks for assessment (for example reports by Senior human rights expert Mr Hammarberg issued on Abkhazia and Transnistria).⁵⁰

NHRIs should report fully on their monitoring activities, to the public, the state and to relevant regional and international bodies. They can inform the public through *ad hoc* and annual reports, including information on the situation in the NGCT. NHRIs also formally report to parliament. Some NHRIs include in their annual report, which is debated in parliament, a chapter on human rights in the NGCT or publish separate reports on human rights in NGCTs.

⁵⁰ Report on Abkhazia, issued in 2017, written by Thomas Hammarberg and Magdalena Grono, is available here <https://www.palmecenter.se/wp-content/uploads/2017/07/Human-Rights-in-Abkhazia-Today-report-by-Thomas-Hammarberg-and-Magdalena-Grono.pdf>. Hammarberg’s reports on Transnistria, respectively, from 2013 and 2018 are available here: https://www.undp.org/content/dam/unct/moldova/docs/pub/Senior_Expert_Hammarberg_Report_TN_Human_Rights.pdf and https://www.undp.org/content/dam/unct/moldova/docs/Follow-up_Report_TH_2018.pdf

National inquiries (or public inquiry) is another method to consider when dealing with the systemic and complex human rights problems involving multidimensional issues. Public hearings could be organised around the inquiry to give voice to the victims, witnesses, hear the position of the government and the experts. This requires a large investment of the NHRI's capacities, and so analysis must be conducted of available resources in the NHRI in support of the objectives that could be achieved. It is important to avoid conducting this exercise only partially, which could lead to frustrations and allegations of bias, and damage the perception of the NHRI.

Finally, NHRIs can report to regional and international human rights mechanisms (such as CoE, EU and UN). When doing so, NHRIs should explain the reason for their dealing with the situation in the territory concerned, and should avoid any appearance that their report expresses a view on the legitimacy of the powers exercised within that territory.

Advisory role

NHRIs can provide advice to the government and other competent bodies on policies, draft laws and programmes relating to the NGCT. They also make relevant recommendations, for example on compliance of military and law enforcement personnel with IHRL and IHL standards. In this context, the NHRI can underline the state's human rights and humanitarian obligations. This also applies to the human rights situation of persons affected by the conflict, including IDPs and refugees and other vulnerable groups.

NHRIs should also advise the government about the importance of ensuring that judgments of the ECtHR are executed and recommendations of regional or international human rights bodies implemented (even if the state has no effective control). NHRIs can also advise the government to encourage and facilitate access of international human rights monitoring bodies to these territories and to follow-up on international recommendations. They should also advocate that the relevant legislation regulating access to the NGCT is in full compliance with the international standards.

Complaints handling and legal support

In the context of work with NGCT, NHRIs can provide information on legal avenues and available remedies for human rights violations, and depending on its mandate, it can also receive complaints and bring strategic litigation. In some cases, NHRIs decide to focus on addressing individual cases, such as right to life, arbitrary detention, torture and ill-treatment, land rights and property claims, IDPs' right to return, livelihoods, missing persons and enforced disappearances. There are also examples of NHRIs assisting

individuals from an NGCT with accessing official documents, such as birth certificates. This can in turn facilitate access to other rights, e.g. social security.

Complaints may also be considered an early warning instrument: an increased number of complaints may indicate a sudden rise in human rights violation. NHRI may advise the government to take preventive measures to deal with the issue and avoid a possible escalation of situation. In some countries early warning indicators were developed by NHRIs. This may help NHRIs and states to foresee where the tensions may erupt and, possibly, even prevent conflicts.

In case the NHRI cannot handle a complaint, they can refer it to a CSO, international NGO or IOs. NHRIs can also refer cases to other competent public national bodies. It is important that NHRIs have a full picture of the situation of all groups of people and communities, to better support them. The creation of NHRI regional offices could help for this purpose. For example, the Moldovan NHRI (People's Advocate) opened a regional office situated right on a contact line with Transnistria. Handling complaints and supporting individuals from this NGCT (majority of cases relate to documentation) became the key task of the office.

The importance of good relations with the civil society, other NHRIs or *de facto* human rights body is also hard to overestimate in the context of complaints. In some situations it may be possible for NHRIs to seek support for individual cases from these partners, or be at the receiving side, for example through referral mechanisms or on an ad hoc basis.

Promoting Human Rights

NHRIs should increase awareness about their mandate and role, as well as about human rights and relevant obligations, among the authorities, including the *de facto's*, and the general public, for example, through working with the mass media and educational initiatives. This is essential in (post) conflict contexts, where human rights can help to bridge divided societies and address hostility and mistrust through confidence building measures. Individuals' understanding and assertion of their human rights can help to empower communities, including IDPs, refugees and other groups affected by the conflict, by focusing on rights instead of politics and grievances. This can in turn assist in the prevention of further conflict.

NHRIs can also engage through human rights education which is a powerful tool in changing people's mind-sets and perceptions. In particular, educating young people about, through and for human rights can contribute to ending the cycle of conflict and bringing the communities closer to each other. Some NHRIs build the capacity of human rights

NGOs and lawyers, including from the NGCT, to increase the quality and quantity of their reports. This can support the development of opportunities for new and stronger partnerships with those individuals and organisations, and thus also be beneficial in the longer run.

Cooperation with civil society actors

Engaging through civil society is a clear strategy by some NHRIs who stress that CSOs may know the situation on the ground better, often having access to the people living in NGCT. CSOs may enjoy more trust or respect of the *de facto* authorities, their work is often more long-term and influence on the public opinion may be quite high.

In Europe, many NHRIs have reported cooperating with independent CSOs, as human rights defenders and contact points in NGCT, to collect information on the human rights situation on the ground. In one case, the CSOs were trained and accredited to work on the NHRI's behalf. Cooperation can take place in person, or remotely where access poses challenges. Some NHRIs have also built further their engagement with CSOs through their regional representations, including those close to the contact lines. It is possible to set up joint advisory or monitoring groups with CSOs, or sign agreements with some of them, and/or work closely with human rights defenders, including defence lawyers. NHRIs should also increase the capacity of CSOs in NGCT to monitor and report on human rights situation, and to promote awareness about human rights among the people and the *de facto* authorities.

At the same time, considerations of safety and security of individuals with whom the NHRI is having contact, must be assessed: depending upon the political environment, communication with the civil society may have repercussions for these individuals (and potentially may also harm an NHRI). In such cases, meetings might not be advertised, and electronic communication protected. There may be arguments against engagement, and depending on analysis no action at all may be the best option, in line with the underlying principles of "do no harm".

Cooperation with international bodies

Cooperation with IOs, International and regional courts (such as the International Criminal Court and the ECtHR) and international institutions that have a special status, such as the International Committee of the Red Cross (ICRC), should be considered for every situation, and in combination of work with other stakeholders. These bodies are not affiliated to any parties in the conflict and usually have more leverage in contacts with the *de facto* authorities. For example, depending upon the context and issue, IOs may try to facilitate

contacts between the NHRI and stakeholders in NGCT. At the same time, NHRIs should be able to account for all actions taken, in order to avoid risks that their role and responsibilities will be blurred.

NHRIs can also actively use the documents, such as statements or reports, released by IOs, to increase awareness of human rights in the NGCT, and provide input to such documents and mechanisms (Universal Periodic Review Reports, Treaty Bodies reporting, Special Procedures reports, regional mechanisms). They can also provide information to the ECtHR as *amicus curiae*, and to the Committee of Ministers of CoE on the execution of judgments.⁵¹ Work through IOs can shield NHRIs from inference or accusations of cooperating with “the other side” by its own government and help generate understanding and acceptable conditions for engaging in human rights work in the NGCT. A lot of this work is done behind closed doors, confidentially. For example, in some contexts NHRIs have worked closely with the ICRC, an organisation for which confidentiality is critically important, such as in facilitating the release of prisoners and transferring mortal remains. In other cases the UN established special committees to deal with the restoration of heritage or missing persons, in which NHRIs could also be involved.

The UN OHCHR, OSCE/ODIHR, Council of Europe, the European Union can provide support to NHRIs working in such contexts, through capacity building (such as in conflict prevention, mediation, conflict sensitivity), financial support, or by reinforcing NHRIs’ recommendations and promoting their advocacy towards peace and reconciliation. Some IOs, like the CoE, have special programmes for confidence-building that can facilitate dialogue, including through NHRIs and with *de facto* human rights bodies. The EU has adopted policies for non-recognition and engagement with NGCTs, that promote confidence-building measures in the sphere of human rights.⁵² It was also proposed, by participants at ENNHRI meetings in 2019, that the UN system could consider setting up an independent mandate dedicated to engagement with NGCTs.

⁵¹ See ENNHRI Guide for NHRIs on implementation of ECtHR judgments: http://ennhri.org/wp-content/uploads/2019/10/ennhri_guidelines-v2_a4_web.pdf.

⁵² See the seminar report on EU Non-Recognition and Engagement Policy towards Abkhazia and South Ossetia, <https://www.iss.europa.eu/content/non-recognition-and-engagement-eus-policy-towards-abkhazia-and-south-ossetia>. The policy was endorsed in December 2009 but is not available as a public document.

Cooperation with NHRIs on “the other side of the conflict”

In order to promote and protect human rights in an NGCT, an NHRI may consider engaging with its counterpart on “the other side of the conflict”. In one of its recent cases in the context of NGCT, the ECtHR stressed that “...in the absence of formal diplomatic relations [between states in conflict with each other], formalised means of cooperation are more likely to fail and States may be required to use other more informal or indirect channels of cooperation (...).”⁵³ Thus, cooperation between NHRIs in such cases becomes an opportunity not to be missed, considering the independent status of NHRIs in their countries. There are examples of positive cooperation between NHRIs, which can also be mentioned by the Sub-Committee on Accreditation during its accreditation status review.⁵⁴ Annex 3 of this Paper offers a Code of conduct for NHRIs operating in the context of conflict, to support the dialogue between the ENNHRI members.

The use of a membership network to arrange such meetings can allow for a less public approach and give NHRIs the time and space needed to work towards cooperation for best protecting human rights in the territories involved. ENNHRI can provide such a platform to facilitate cooperation between the member NHRIs within its network, through meetings, both formal and informal, dialogue and potentially more structured cooperation.

Cooperation with *de facto* human rights bodies and engagement with *de facto* authorities

In carrying out their mandates, NHRIs may also decide to engage with the *de facto* human rights body (in the European context generally called ‘ombudsman institutions’) and potentially other actors in the NGCT. Paris Principles require NHRIs to “maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions).” There is some existing record of good contacts between an NHRI and a *de facto* human rights body, such as to facilitate prisoners’ transfer, children’s return (those who were separated from parents during the conflict), information exchange on missing persons, joint detention visits, and the return of mortal remains. There is at least one known example when the NHRI decided to raise the capacity of the *de facto* human rights body by passing its own good experience to the staff of its counterpart (seeing this

⁵³ ECtHR, *Güzelyurtlu and others v Cyprus and Turkey* [GC], no. [36925/07](#), 29 January 2019, § 237.

⁵⁴ See, for example, GANHRI (at the time ICC) SCA Report of October 2014, p. 35,

<https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

as a way to increase access of people in an NGCT to human rights mechanisms), organising joint training sessions for the staff of two institutions.

Any engagement between an NHRI and a *de facto* human rights body cannot and should not be interpreted by any side as a sign of recognition of the *de facto* authorities. It is a principle that is increasingly supported by international practice and policy, outlined in the reports and resolutions by UN and regional intergovernmental bodies.⁵⁵

NHRIs are publicly accountable institutions, with regard to the use of public funds but also its operations. Therefore engagement with the *de facto* human rights body and, possibly, the *de facto* authorities should always be in line with the principle of accountability. Such approach, accompanied by educating the public about the role of an NHRI, would allow avoiding possible accusations of legitimisation of the *de facto* authorities and send a clear signal of holding the *de facto* authority responsible for guaranteeing human rights.

An NHRI and a *de facto* human rights body are not in conflict with each other. In principle, they should stand for the same values, and therefore should communicate with each other with respect, trying to build trust. A *de facto* human rights body does not have a similar status as an NHRI, but it can have a similar mandate. It cannot be formally accredited under the GANHRI system, but it can aspire to apply the standards set by the Paris Principles that could serve as an indicator of their independence and credibility. NHRIs should take due care to analyse the status and credibility of such a human rights body before engagement. Annex 2 contains Principles for engagement with the *de facto* human rights bodies that should be of practical help for NHRIs planning such actions.⁵⁶

It can be well justified and understood that some NHRIs have a policy of no contact with the *de facto* authorities or the state exercising effective control. However, it is important to

⁵⁵ On the UN level on various occasions it has been stressed that work with “de facto authorities on human rights issues does not amount to their legitimization. (...). See for example the Opening statement by the UN High Commissioner for HR at Human Rights Council, 12 September 2011. It has been emphasized also that work with all those who are in effective control of a territory is important in order to reach out to people in need. See the press statement at the conclusion of the UN High Commissioner for Human Rights mission to the Republic of Moldova, 4 November 2011. See also [Resolution 2240 \(2018\)](#) of the Parliamentary Assembly of the Council of Europe, para 3. The issue is addressed in more detail below and in annex 1.

⁵⁶ ENNHRI was requested by the participants of the 11-12 June 2019 meeting in Brussels to put together Principles which would support NHRIs who wish to engage with *de facto* human rights bodies. Such principles can be shared with the *de facto* human rights body in advance of engagement.

keep in mind the independent status of an NHRI, and objectives it aims to achieve, which may be a sufficient basis for depoliticised human rights work.

In order to bring human rights to an NGCT, engagement with *de facto* authorities may also be a realistic option. In some contexts (e.g. continuing hostilities) work with *de facto* authorities may seem impossible and counterproductive. This engagement, however, can take various forms, and does not have to mean close cooperation. Often *de facto* authorities do not realise that they have obligations in line with international law. Thus it is very important to call for respect for human rights and humanitarian law. NHRIs can seek and monitor the minimum commitment from *de facto* authorities through a human rights accord (as was the case in Nepal).⁵⁷ Interesting practice has also been developed by NGOs such as Geneva Call in the 'deed of commitment' with *de facto* authorities.⁵⁸ NHRIs can also issue public appeals, or write direct letters (when situation permits) to the *de facto* authorities. In some contexts it may even be possible to conduct joint meetings or educational events for and with the *de facto* authorities.

NHRIs' independence and impartiality should be expressed by its principled position to hold all those responsible in human rights violations to account, be it its own government or *de facto* authorities. Engagement with *de facto* authorities may still potentially invoke the risk of legitimisation of *de facto* authorities (addressed in Section 4.3 below). The same Section also included specific recommendations with regard to official communication, such as language and designations used.

Conflict Resolution and Peace-building

NHRIs can also actively contribute to building of peace and reconciliation processes. NHRIs may consider peacebuilding a totally new and may be even unnatural area in which to engage, but there are obvious links between human rights work and peacebuilding. Both share the same aims spelled out in the UDHR. They use the same legal framework of international law. There are also common methods and tools of work, such as education or

⁵⁷ Presented at one of the Brussels meetings by the senior staff of the Nepal's National Human Rights Commission. See also research paper by Prof. Andrea Durbach, <http://www.austlii.edu.au/au/journals/UNSWLRS/2010/18.html>.

⁵⁸ The Deeds of Commitments are formal documents signed by armed non-State actors which undertake to respect specific international humanitarian norms. See example here <https://www.genevacall.org/geneva-call-launches-an-innovative-new-deed-of-commitment-on-protecting-health-care-in-armed-conflict/>.

documenting violations, and the same guiding principles, like non-discrimination, participation and rule of law, as well as “do no harm”⁵⁹.

NHRIs, through their mandate are bridging various parts and levels of society. They provide a human rights based approach, and a more objective reflection of the whole society, including on conflict dynamics, and therefore reinforce the chances for any peace agreement to endure. As an independent, credible institution with a broad mandate, including vast local expertise, with public support, access to national and international venues, NHRIs are uniquely positioned to engage in dialogue about conflict transformation. NHRIs can be established by or become part of the peace negotiation framework (Bosnia and Herzegovina, Moldova, Northern Ireland, Nepal, Sri Lanka, Guatemala, Uganda). By monitoring, documenting and reporting on human rights situation on the ground, they are well aware of the rights-based needs of the people affected by the conflict, and can provide a different perspective to the peace process.

The Kyiv Declaration calls on NHRIs “to take measures to overcome the consequences of conflict in society” for the sake of peace, social cohesion and reconciliation. Ensuring human rights for all persons in the conflict context is a difficult, but important imperative. NHRI can help address impunity and injustices, and protect the disadvantaged. Their input must be restricted to human rights, rather than political negotiation. In some cases, an NHRI can become part of the negotiation and conflict resolution framework, as is the case for one active working group, which provides access to the “other side” and the opportunity to hold a real dialogue on human rights issues.

The level of hatred among societies is often high in situations of conflict, and the emotional impacts cannot be underestimated. As independent institutions, NHRIs may be well positioned to build trust between communities. The NHRI can make such efforts by promoting human rights and engaging with a wide range of actors, including politicians. NHRIs can play an essential role for community rehabilitation, reintegration and confidence-building measures (CBMs), through trainings and joint events and opportunities, such as human rights education sessions, research projects, sports events, media publications, exhibitions, theatre plays, debates.

All these activities should involve broad range of society, schoolchildren, university students, elderly people, teachers, doctors, and make sure that women and girls are adequately represented. The focus on human rights issues and things that unite the

⁵⁹ These issues were discussed at the workshop in Zagreb “Exploring the role of NHRIs in peacebuilding”, 29 - 31 October 2019.

communities can help avoid political deadlock and encourage contact between different groups. To achieve this, NHRIs themselves must increase their capacity to work in the conflict context (for example, at the minimum, by sensitising staff and policies) and be prepared to advocate for its more active role in the peacebuilding processes among the key players in this field.

Overcoming challenges

Addressing the challenge of legitimisation

Notwithstanding the concrete circumstances, work in NGCT will raise many issues of concern for NHRIs. At the Brussels meeting in February 2019 NHRIs agreed that the key concern relates to legitimisation or recognition of the *de facto* authorities. NHRIs need to analyse this limitation, and develop relevant approaches to minimise the risk and make its work more effective.

International law and the practice developed by intergovernmental organisations, such as OHCHR, provide safeguards for NHRIs to avoid the risk of legitimisation. The universal character of human rights, based on the inherent dignity of every individual, set forth in the IHRL framework, envisages protection of all persons at all times, notwithstanding the status of territories and conflicts. On various occasions the UN officials stressed that work with *de facto* authorities on human rights issues does not amount to their legitimisation.⁶⁰ This approach is encouraged by the relevant OHCHR and UNDP guides.⁶¹ The Resolution passed in the framework of the Council of Europe's Parliamentary Assembly is also very direct about it, stating that "...contacts with such [*de facto*] authorities and visits to the territories in question, do not constitute and should not be presented as recognition of those authorities' legitimacy under international law."⁶²

⁶⁰ See for example, OHCHR press release on the first visit to the Republic of Moldova of the UN Human Rights Chief Navi Pillay <https://www.ohchr.org/EN/NewsEvents/Pages/HCVisitMoldova.aspx> or her opening statement at Human Rights Council, 12 September 2011, https://www.nesri.org/sites/default/files/Pillay_statement_9-12.pdf

⁶¹ These and other key principles are mentioned in relevant UN publications, such as the UN OHCHR Manual on Human rights monitoring, <https://www.ohchr.org/documents/publications/training7introen.pdf>, and UNDP Trainer's Guide "Human rights monitoring and fact finding for national human rights institutions", http://ennhri.org/wp-content/uploads/2020/05/undp_trainer_s_guide_on_fact_finding_and_monitoring.pdf.

⁶² Para 3 of the Resolution 2240 (2018) of the Parliamentary Assembly of the Council of Europe, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25168&lang=en>

The common Article 3 of the Geneva Conventions, representing the minimum protection guarantees of IHL, that also binds *de facto* authorities, states that humanitarian activities by impartial humanitarian bodies ... “shall not affect the legal status of the Parties to the conflict”. The present Paper does not aim to conclude that the context covered by Article 3 is fully applicable to NHRIs (for example that they can be considered an “impartial humanitarian body”). This does not, however, preclude the possibility of an NHRI offering its services to the parties to the conflict (for protection, for example). Such an offer and eventual engagement do not confer legitimacy on *de facto* authorities.⁶³ It is important to explain this principle to the respective government(s) and all other relevant stakeholders, prior to engagement, to continue enjoying public confidence that is the prerequisite for effective action. Annex 1 to this Paper includes more references to universal and regional mechanisms stressing that work with *de facto* authorities on human rights issues does not amount to their legitimisation.

Still, despite the growing international awareness and consensus about this matter, NHRIs’ actions, and especially any engagement with the *de facto* authorities or bodies associated with them may be interpreted by any side as a sign of recognition of the *de facto* authorities. NHRIs should treat this matter very carefully, and be highly selective about the methods of work and engagement with stakeholders in the NGCT. A risk analysis should be conducted prior to engagement, including with NHRI staff involved.

For example, the conflict context places a heightened duty on the NHRI with regard to the form, quality, and content of its statements, messages and reports. Any information that is made public or is passed to the *de facto* authorities, as well as the ways in which this is communicated needs to be carefully analysed and properly phrased.

One of the ways to avoid the legitimisation of the *de facto* authorities is to limit the engagement, such as to urgent interventions in exceptional cases, or when all other ways of information collection/corroboration, such as communication through the *de facto* human rights body, the counterpart NHRI on the other side of the conflict, civil society or direct contact with individuals, have been exhausted. An approach suggested by some IOs is to avoid making direct demands, such as calls for investigations, not to imply the legitimacy of *de facto* authorities. In the most sensitive cases, NHRIs could proceed through indirect engagement, for example by encouraging victims of human rights violations to bring issues to the attention of the *de facto* authorities, or where relevant, follow up on

⁶³ See ICRC commentary to Article 3, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5>, paragraphs 815-826, 834 – 840, 854 – 858, 891-896.

complaints, and raise questions about already opened investigations. An example of engaging with *de facto* authorities without direct contact with them is calling on them to abide by their obligations under international law commitments. Some NHRIs may decide to limit direct contacts with the *de facto* authorities to communication by special designated staff or representatives, avoiding any appearance of recognition.

The risk of legitimisation can also be prevented by NHRIs respecting at all times the key principles of the functioning of NHRIs (primarily the Paris Principles, but also the relevant enabling legislation) and principles of any professional human rights work, such as independence, impartiality, credibility, do no harm/safety and security, and transparency. It is important to function in line with these principles and undertake measures to avoid situations that may lead to violation of such principles.

The risk of legitimisation can be further reduced by NHRIs staying outside of the political dimension of any territorial and other disputes, and respecting at all times not only the Paris Principles, but also ENNHRI values.⁶⁴

Communication with a *de facto* human rights body (and *de facto* authorities where relevant)

Language and designations used in communication with any *de facto* body can be one of the most sensitive issues that can seriously undermine or even nullify the efforts. It can also help strengthen relations and improve outcomes. Therefore special attention should be paid to the language used in correspondence and in formal meetings. It is advised to use the language that is understood best by both partners, with possible translations into own languages.

Each country with an NGCT most probably would have its own relevant governmental procedures with regard to designations used in correspondence and in formal contacts with an NGCT, that include the suggested terminology to use by governmental offices. NHRIs should familiarise themselves with such guidelines and procedures. However, being independent from the government, NHRI should be able to deviate from the established practice of the governmental agencies, and find its own designations to ensure a balanced and respectful approach to its communication with a *de facto* human rights body. In that regard international documents (UN Security Council Resolutions, where available, but also reports by international human rights mechanisms) can be very helpful, because they

⁶⁴ See: <http://ennhri.org/about-us/>

usually refer to NGCT in an unprejudiced language that can be acceptable to all. Below are a few concrete suggestions for the language to use, based on the European context:

- Avoid referring to the NGCT as a state. For example, instead of “Pridnestrovian (or Transnistrian) Moldavian Republic” use “Transnistria” that is more common and acceptable to all; or use “Abkhazia” instead of the Republic of Abkhazia;
- Refer to the human rights body (e.g. Ombudsman) and other bodies in an NGCT with a “*de facto*” in front of the relevant title. An option is to call a body the way they are formally called in the *de facto* context, but just adding the main city of the NGCT in the title, for example “Ombudsman in Tiraspol”. *De facto* officials could be addressed in the same way in the formal correspondence (e.g. To: Mr. A., *de facto* Ombudsman, Transnistria, or simply “Ombudsman, Tiraspol” or a combination thereof);
- It may be relevant and important to add in all written documents (correspondence and reports) a short disclaimer in the bottom, for example “The use of such terms as ‘Constitution’, ‘Law’, ‘President’, ‘Minister’, ‘Prosecutor’, ‘Supreme Soviet’, “Ombudsman”, etc... as well any other bodies and corresponding functions does not indicate any *de jure* recognition of these normative acts and *de facto* authorities.”⁶⁵

Official correspondence can be limited to cases when strictly necessary, or/and when requested by either of the sides. Correspondence to *de facto* bodies other than the human rights body can be sent directly or through the mediation of a *de facto* human rights body. Some degree of flexibility may be needed in finding the acceptable language (formulations).

Persons engaged in the dialogue on behalf of NHRI should be protected from any legal or other action against them in connection with their work in an NGCT. Paris Principles provide for functional immunity of NHRI staff for acts undertaken in good faith in their official capacity.⁶⁶

Avoiding (the perception) of politicisation

Reference to objective, international, human rights standards helps to show the independence of the NHRI, and avoid accusations of political action. Focus on human

⁶⁵ See Report on Human Rights in the Transnistrian Region of the Republic of Moldova by Thomas Hammarberg, Senior Expert, 14 February 2013, <http://md.one.un.org/content/unct/moldova/en/home/publications/joint-publications/report-on-human-rights-in-the-transnistrian-region-of-the-republ.html>.

⁶⁶ General Observation 2.3 to Paris Principles.

rights issues can help NHRIs to engage in this sensitive context, and introduce confidence building measures. In order to show impartiality, it is important for NHRIs to use objective human rights language, and hold all relevant duty bearers to account, dealing first of all with their own state's actions. In some instances, language based on international standards may not be perceived as a sign of impartiality, for example by those who consider themselves unfairly excluded by international mechanisms. NHRIs can design strategies for reaching out to such communities and actors. In all cases, the NHRI should conduct careful analysis of the type of language and engagement that may put at risk (the perception of) its fulfilment of its core mandate.

The pluralistic make-up of the NHRI, and those with whom it cooperates, also reinforces the (actual and perceived) independence of the NHRI. Indeed, dialogue with a broad range of stakeholders, inside and outside of the NGCT, can help avoid politicisation and build trust. Confidentiality may serve to better manage some sensitive processes in the conflict transformation context. NHRIs should also develop sensitivity to conflict in all steps it takes by making regular assessments of how its action or inaction may (negatively) impact on peace framework.

Addressing jurisdiction

As NHRIs must have a constitutional or legislative mandate to promote and protect human rights within the relevant state, the NHRI of the territorial state should always have jurisdiction within the NGCT. However, particularly where that state does not have effective control, access might be difficult. The NHRI of a state found to have effective control of a relevant territory (for example, in a ECtHR judgment) might have access, but the question may remain as to whether a NGCT does fall within its jurisdiction, which needs to be properly analysed.

From the discussion of international law (see Section 2), NHRIs from either states could interpret that their mandate includes the jurisdiction of the NGCT, although the analysis for engagement, including viability, security, 'do no harm' and other contextual considerations must be taken into account. It is recommended that an NHRI considers both the short and long-term impacts of its interventions to promote and protect the human rights of the individuals in the territory and that it should make efforts to cooperate with its NHRI counterpart "on the other side". NHRIs can use ENNHRI as a facilitator for such talks, and

otherwise should be guided by the Code of conduct for engagement with another NHRI, that is included in Annex 3.⁶⁷

Facilitating access to the NHRI

Where the situation allows, NHRIs should always seek to engage directly with the people living in the NGCT. Where access to a particular area is not possible, such contact can be arranged in offices situated just outside the contact line or in other areas that are easily accessible to groups of people who remain in those territories. For example, one NHRI receives complaints from people living in the NGCT, through its local office in the village situated right on the contact line. Some NHRIs rely a lot on information campaigns, such as simple leaflets left on the contact line crossing points, or even media campaigns in the various languages that would also be understood by the people living in the NGCT. Many stress the need to reach out especially to the young people, on both sides, through social media and training.

Facilitating access to the territory

Where physical access to individuals is limited, NHRIs should consider the monitoring of open source data available online. It is important to assess the safety and security risks of any individual prior to speaking to him/her, or even an online search. These persons may come under attack of authorities from both sides, which may not be pleased with them sharing information. NHRIs should ensure that any interview or other contact is done in conditions that allow for full confidentiality.

NHRIs can also work with and through credible CSOs from the NGCT that have direct access to victims or witnesses, as well as individual human rights defenders, including defence lawyers. Often, international organisations are the only external human rights actors that have access to NGCT, and NHRIs can cooperate with such actors to gain access or information from the territory in question.

Access is sometimes limited due to restrictions set by the territorial state, for example in prohibiting or criminalising access. NHRIs of the territorial state should recommend to their authorities to remove those restrictions for their entry and decriminalise them for all, in line

⁶⁷ ENNHRI code of conduct for NHRIs operating in the context of conflict was approved by the participants of the 11-12 June 2019 meeting in Brussels.

with the position taken by the Venice Commission on rules of entry⁶⁸. NHRIs can also be key in advising the government to facilitate the access of international human rights mechanisms to NGCT, which in Europe is often obstructed⁶⁹.

When possible, engagement with the *de facto* human rights body or NHRI of the state with effective control could be particularly beneficial when access to the area and/or specific individuals or groups is difficult. The issue of access to NGCT is addressed in more detail in Annex 1.

Clarifying NHRIs' Role and Responsibilities

It has been noted that the lack of clarity regarding NHRIs' role and responsibilities in NGCT can impede action. The complexity of international law in this context has been noted above. Also, the practical, political and contextual challenges in taking action could prevent NHRIs from taking on a role to promote and protect human rights in such territories. This Paper, and ultimately ENNHRI's Guidance on the role of NHRIs in situations of conflict and post-conflict, is intended to assist NHRIs in developing their strategy and approaches.

⁶⁸ See Venice Commission Opinion On The Law On Occupied Territories Of Georgia adopted at its 78th Plenary Session (Venice, 13-14 March 2009) and Venice Commission opinion on the 2013 Draft Amendments To The Law On The Occupied Territories adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013)

⁶⁹ See PACE Resolution 2240 (2018) on Unlimited access to member States, including "grey zones", by Council of Europe and United Nations human rights monitoring bodies

Conclusion

In many protracted conflicts in Europe, human rights protection mechanisms are weak, access to the conflict areas is limited and the divisions created by the conflict remain fresh. In such situations NHRIs, being independent from their governments, having broad human rights mandates, and enjoying public trust can become key actors for strengthening the human rights in NGCT.

Paris Principles place an increased responsibility on NHRIs in times of conflict, and require them to play a more active role to protect and promote human rights within their jurisdiction. It is important that NHRIs remain aware of their independent mandate, and that, as a matter of priority, they continue holding their own government to account for human rights violations in all situations when their state is party to the conflict (even when the state denies effective control over recognised parts of territories of other states).

NHRIs need to be accountable to the public they serve and therefore also be transparent about their actions to promote and protect human rights in NGCT. Some cases will require confidential approach, and all situations will oblige NHRIs to act objectively and impartially, guided by the do no harm principle, safety and security of own staff and persons it comes across.

NHRIs should monitor human rights in NGCT, even if there is no physical access; report on the situation inside their country and to the international human rights mechanisms; advise their own governments regarding its actions and situation in NGCT; receive complaints and provide legal support; raise awareness about the need for protection of each individual, and educate the public about the need to respect and protect dignity that each person is endowed with, and especially of the most vulnerable persons – those who had to leave their homes and those who were left in NGCT. NHRIs should also engage with the “other side”, keeping some lines of communication open, and in particular cooperate closely with other human rights bodies, NHRIs, civil society and IOs.

Expectations with regard to the role of an NHRI in a specific situation may be incomparable to its existing capacity and mandate. In times of conflict, additional issues of funding and structural reorganisation may also come into play, jeopardising the independence and ability of an institution to carry out its functions effectively. In other cases, NHRIs may need to adapt to the situation and change their priorities, for example from monitoring to

human rights education or promotion of transitional justice initiatives. It is, however, the responsibility of each NHRI, in accordance with the Paris Principles, to implement their mandate and ensure that individuals have access to effective remedies to address human rights violations in NGCT.

NHRI engagement with the NGCT will most probably remain a contentious issue that cannot be easily resolved. The role of NHRIs in promoting stable peace and reconciliation should remain high on the agenda, given that respect of human rights is inherent to building the peaceful future. There is hope that this discussion will further contribute to the development of relevant practice and new approaches by NHRIs to promote and protect human rights in conflict and post–conflict situations.

Annex 1. References to international mechanisms (United Nations, Council of Europe and OSCE) in support of stronger engagement by NHRIs with human rights in non-government controlled territories (NGCT)

Annex 2. Principles for engagement of National Human Rights Institutions (NHRIs) with the *de facto* human rights bodies

Annex 3. ENNHRI Code of conduct for NHRIs operating in the context of conflict

Annex 1. References to international mechanisms (United Nations, Council of Europe and OSCE) in support of stronger engagement by NHRIs with human rights in non-government controlled territories (NGCT)⁷⁰

In the conflict context, engagement with de facto authorities is often the only way to secure access to people living in a NGCT and hold those responsible to secure human rights of all people living under their control to account. The UN Human Rights Council Special procedures stress that “non-State actors are becoming ever more important in world affairs” and that we need to “respond in a realistic but principled manner”.⁷¹

This annex to ENNHRI’s Paper on ‘The Role and Responsibilities of NHRIs in the Promotion and Protection of Human Rights in Non-Government Controlled, Non-Recognised and other Disputed Territories (NGCT)’ aims to provide additional references – extracts from international and regional standards and documents, representing both hard and soft law and evolving practice – related to issues that are at the heart of the Paper. The annex was requested to put together by participants of the 11 – 12 June meeting in Brussels, to provide more substantive arguments to NHRI engagement with de facto authorities in NGCT.

Human rights are universal, they transcend borders. Each person has human rights. Everyone’s human rights must be protected at all times.

Article 1 of the Universal Declaration of Human Rights (UDHR) affirms that “all human beings are born free and equal in dignity and rights”. Preamble to the UDHR stresses the responsibility of every individual and every organ of society to strive to promote respect for the rights and freedoms and by progressive national and international measures, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The United Nations has stressed the need for increased protection for human rights of all persons who continue living in NGCT in profound uncertainty, and those who had to

⁷⁰ The list of documents and other sources presented in the current Annex is not exhaustive.

⁷¹ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Philip Alston, 2004, (E/CN.4/2005/7), para 76., https://ap.ohchr.org/documents/alldocs.aspx?doc_id=10460.

leave.⁷² UN High Commissioner for Human Rights underlined, in relation to NGCT, that “there should not be human rights protection gaps”.⁷³ Also the European Court of Human Rights (ECtHR) emphasised that there should be no vacuum in human rights protection.⁷⁴ “Human rights do not have any borders. It is vital to address underlying human rights issues in disputed territories, regardless of the political recognition or the legal status of a territory”.⁷⁵

The OSCE participating States confirmed in 1994 that “Human rights and fundamental freedoms, the rule of law and democratic institutions are the foundations of peace and security, representing a crucial contribution to conflict prevention, within a comprehensive concept of security. The protection of human rights, including the rights of persons belonging to national minorities, is an essential foundation of democratic civil society. Neglect of these rights has, in severe cases, contributed to extremism, regional instability and conflict.”⁷⁶

Engagement with human rights in NGCT does not mean legitimisation of de facto authorities

On various occasions, the UN stressed that work with “de facto authorities on human rights issues does not amount to legitimisation of these authorities.”⁷⁷ It has also been emphasised that work with all those who are in effective control of a territory is important in order to reach out to people in need.⁷⁸

⁷² Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the 33rd session of the Human Rights Council, 13 September 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20474>.

⁷³ UN High Commissioner for Human Rights, press statement at the conclusion of her mission to the Republic of Moldova, 4 November 2011, <http://www.scoop.co.nz/stories/WO1111/S00124/un-high-commissioner-for-human-rights-navi-pillay.htm>.

⁷⁴ ECtHR, *Al-Skeini and Others v. The United Kingdom*, 55721/07, § 74 7 July 2011, <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2255721/07%22%5D%7D>.

⁷⁵ UN High Commissioner for Human Rights urges action in disputed areas with first report of Thomas Hammarberg on Transnistrian region, press statement, 14 February 2013, <https://news.un.org/en/story/2013/02/431992-un-rights-chief-urges-action-disputed-areas-first-report-transnistrian-region>.

⁷⁶ CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era, VIII The Human Dimension, para. 2, <https://www.osce.org/mc/39554?download=true>

⁷⁷ Opening statement at Human Rights Council, 12 September 2011 by the UN High Commissioner for Human Rights, https://www.nesri.org/sites/default/files/Pillay_statement_9-12.pdf.

⁷⁸ Supra note 4.

The United Nations has called on various bodies to collaborate with all stakeholders who strive to protect and promote human rights. UN OHCHR emphasised that “all stakeholders must ensure that the human rights needs of affected people are addressed as swiftly and effectively as possible”.⁷⁹ Also, UN missions working on such areas are strongly encouraged to engage with groups in *de facto* control. For example, UN Security Council Resolution (SCR) 1919 (2010) on the situation in Sudan called for “all parties to cooperate by providing full and unrestricted access to UNMIS (UN Mission in Sudan) in monitoring and verification within its area of responsibility, ... and urges UNMIS, consistent with its mandate and within its means and capabilities, to consult with the parties...”⁸⁰

By addressing recommendations to *de facto* authorities, international human rights bodies do not recognise these entities, but expect them to act on recommendations, which are often difficult to implement without at least some degree of engagement and support from outside of a NGCT.⁸¹

In one of its recent cases in the context of NGCT, the European Court of Human Rights (ECtHR) also encouraged member states to engage with all stakeholders, by stressing that “...in the absence of formal diplomatic relations [between states], formalised means of cooperation are more likely to fail and States may be required to use other more informal or indirect channels of cooperation (...).”⁸² Earlier, the Council of Europe’s Commissioner for Human Rights noted the importance of developing in NGCT “local human rights monitoring capacity as well as credible local national human rights protection system” and emphasised that “both civil society and ombudsmen have a critical, constructive role to play in this respect; this deserves political and economic support”.⁸³

Referring to the activities of human rights monitoring bodies with respect to territories under the control of *de facto* authorities the Parliamentary Assembly of the Council of Europe (PACE) underlined that these do not constitute and should not be presented as recognition of those authorities’ legitimacy. “...exercise of *de facto* authority brings with it a

⁷⁹ Report of the Office of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus (A/HRC/25/21), para. 11, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=22760.

⁸⁰ UN Security Council Resolution 1919 (2010) on the situation in Sudan, <http://unscr.com/en/resolutions/1919>.

⁸¹ Report of the Special Rapporteur on freedom of religion or belief to the Human Rights Council from December 2012 (A/HRC/22/51/Add.1) following his mission to Cyprus from 29 March to 5 April 2012, paras. 81 – 87, <https://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51.Add.1.pdf>.

⁸² ECtHR, *Güzelyurtlu and others v Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, § 237.

⁸³ Report “Special follow-up mission to the areas affected by the South Ossetia Conflict”.

duty to respect the rights of all inhabitants of the territory in question.”⁸⁴ The same PACE Resolution stated that “...contacts with such [*de facto*] authorities and visits to the territories in question, do not constitute and should not be presented as recognition of those authorities’ legitimacy under international law”.⁸⁵

ECtHR also referred to the issue of legitimisation of the *de facto* authorities. It noted that despite the reservations that may exist regarding the remedies, such as courts that function in NGCT, “the absence of such institutions would work to the detriment of the members of the community [living in NGCT]. Moreover, recognising the effectiveness of those bodies for the limited purpose of protecting the rights of the territory's inhabitants does not (...) legitimise the [*de facto* authority] in any way.” The Court also stated that “where it can be shown that remedies exist [in NGCT] to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies”.⁸⁶

Access to NGCT

UN High Commissioner for Human Rights underlined the importance of access to NGCT for effective protection of human rights and carrying out of the relevant mandate.⁸⁷ UN regularly voiced concerns about the lack of access to NGCT and the importance of such access: “...consequently, conflicting claims of human rights violations cannot be verified, and the plight of hundreds of thousands of internally displaced people and refugees has not received the kind of human rights scrutiny that it deserves, for the past decades.”⁸⁸ The UN Human Rights Council Special procedures assessed that facilitation of the public access to NGCT positively influences the enjoyment of human rights by all living in NGCT and those who live outside but have family ties.⁸⁹ Chief UN human rights body emphasised the crucial role of human rights protection mechanisms and effective legal remedies to be enjoyed by all persons, and in that regard noted the vital importance of all relevant bodies

⁸⁴ Parliamentary Assembly of the Council of Europe, (PACE) [Resolution 2240](#) (2018) on Unlimited access to member States, including “grey zones”, by Council of Europe and United Nations human rights monitoring bodies, 18 September 2018.

⁸⁵ [Resolution 2240](#) (2018) of the Parliamentary Assembly of the Council of Europe, para 3.

⁸⁶ ECtHR, *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001: § 91 – 92.

⁸⁷ *Supra* note 7.

⁸⁸ *Supra* note 3.

⁸⁹ *Supra* note 11, para. 38.

having access and ability to work with non-State actors that exercise government-like functions and control over a territory.⁹⁰

The Parliamentary Assembly of the Council of Europe (PACE) stressed the need to allow human rights monitoring mechanisms visits in NGCT indicating that "...states are presumed to have consented to visits by human rights monitoring bodies in circumstances where there is reason to believe that there are serious violations of fundamental human rights and dignity". (...) This includes a duty for territorial states "to co-operate fully and in good faith with international human rights monitoring mechanisms". The same PACE resolution encourages states "which exercise effective control over territories where local *de facto* authorities operate to exercise their influence so as to enable effective monitoring by international human rights bodies." emphasising that such access „requires a constructive attitude on the part of both the central *de jure* and local *de facto* authorities".⁹¹

The issue of access is also relevant from the point of view of the territorial state, that often itself aims to limit access to NGCT, criminalising illegal – usually other than from its own territory – entry into a NGCT. In this regard the Venice Commission of the Council of Europe advises to decriminalise all violations of the rules of entry to the occupied territories (recommendation made in the context of Georgian law On Occupied Territories), including them rather under the Administrative Code. The Venice Commission also stresses that such a measure would have encouraged the engagement policy with the occupied territories.⁹²

Those in effective control of an NGCT have the obligation to guarantee basic human rights to everyone under their power

Basic human rights of all people living in NGCT must be safeguarded at all times, including during the armed conflict. The UN Office of the High Commissioner for Human Rights (OHCHR) has repeatedly stressed that "protracted conflicts may involve a number of duty-bearers, including States and non-State actors. On the one hand, States parties must respect and ensure the rights laid down in international human rights treaties to anyone within the State party's power or effective control, even if not situated within the territory of that State party. On the other hand, non-State actors that exercise government-like

⁹⁰ Supra note 9.

⁹¹ Supra note 14.

⁹² Venice Commission, Opinion on the 2013 draft amendments to the law on the occupied territories of Georgia (CDL-AD(2013)036), para 15, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)036-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)036-e).

functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.”⁹³

International Covenant on Civil and Political Rights (ICCPR) obliges each State party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights recognised within it (article 2). The International Court of Justice determined that ICCPR is also “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.⁹⁴ The Human Rights Committee has clarified that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”.⁹⁵

The International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contain no provision limiting their application to the territory of States parties. Articles 2 (1) and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) refer to each State party’s obligation to prevent acts of torture “in any territory under its jurisdiction”.⁹⁶ The OSCE participating States have also committed to – “ensure human rights and fundamental freedoms to everyone within their territory and subject to their jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁹⁷

The case-law of the ECtHR coincides with the UN position regarding state obligations in NGCT. In *Cyprus v. Turkey* the ECtHR stipulated that Turkey’s effective overall control over northern Cyprus engaged the responsibility not only for the actions of its own soldiers but also the acts of the local administration which “survives by virtue of Turkish military and other support.” The Court concluded that “Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and

⁹³ Supra note 9.

⁹⁴ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, para. 111, <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

⁹⁵ Human Rights Committee General comment No. 31 (2004), para. 10, <http://ccprcentre.org/ccpr-general-comments>.

⁹⁶ Joint mission of Special Rapporteurs to Lebanon and Israel, 7- 14 September 2006, Report, A/HRC/2/7, para. 18, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=12400.

⁹⁷ OSCE Vienna Document, 1989 (Questions Relating to Security in Europe: Principles) (13.7 <https://www.osce.org/mc/40881?download=true>)

those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey". The Court further stated that because of Cyprus' "continuing inability to exercise their Convention obligations in northern Cyprus, any other finding [than the one presented above in para. 77] would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court".⁹⁸

The territorial state continues to have positive obligations under Article 1 of the Convention even in the absence of effective control over the NGCT, as the ECtHR stressed in *Ilaşcu and Others v. Moldova and Russia*, "to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention".⁹⁹

Non-state actors and *de facto* authorities, particularly those with significant control over territory and an identifiable political structure, are also recognised to have obligations in line with international human rights and humanitarian law norms, despite some legitimate concerns. The Special procedures of the Human Rights Council explained some difficulties at the heart of the issue of obligations of non-state armed groups: "The traditional approach of international law is that only Governments can violate human rights and thus, such armed groups are simply committing criminal acts. (...) In reality, however, that is often not the end of the matter and in some contexts it may be desirable to address the activities of such groups within some part of the human rights equation. This could mean addressing complaints to them (...) and calling for respect of the relevant norms. This may be both appropriate and feasible where the group exercises significant control over territory and population and has an identifiable political structure... (...) any such approaches would in no way diminish the central human rights responsibilities of Governments, nor does it seek to give legitimacy to opposition groups. The condemnation of such groups and insisting that they respect international human rights law should not be taken as equating them with States..."¹⁰⁰

In another report, around the country visits, UN Human Rights Council Special procedures expresses more certainty that non-state armed groups do have human rights obligations:

⁹⁸ Supra note 16.

⁹⁹ ECtHR, *Ilaşcu and Others v. Moldova and Russia*, [GC] 48787/99, 8 July 2004, 8 July 2004, § 331

¹⁰⁰ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Philip Alston, 2004, (E/CN.4/2005/7), para 76, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=10460.

“Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. The Security Council has long called upon various groups which Member States do not recognise as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.¹⁰¹

Many UN Security Council Resolutions (UN SCR) appeal to the obligation of non-state armed groups in control of a territory to observe basic human rights in NGCT. For examples, UN SCR 1919 (2010) on the situation in Sudan called for “compliance by all parties with their obligations under international humanitarian and human rights law”.¹⁰² Resolutions 1925 (2010) and 1991 (2011) on the situation in the Democratic Republic of the Congo demanded that “all armed groups ... immediately cease all forms of violence and human rights abuse against the civilian population...”¹⁰³

Some international legal instruments, such as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict have direct reference to the obligations of the armed groups.¹⁰⁴ The same position is advocated in numerous UN reports and statements by UN top officials.¹⁰⁵ The independent international

¹⁰¹ Supra note 26, para. 19. See also Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolution 7/1 (A/HRC/8/17), para. 9, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=14200.

¹⁰² Supra note 10.

¹⁰³ [Resolution 1991 \(2011\)](#) on the situation in the Democratic Republic of the Congo. UN resolutions 1943 (2010), 1974 (2011), and 2011 (2011) on the situation in Afghanistan consistently urged all parties to armed conflict to “comply with their obligations under international humanitarian and human rights law...” Resolution 2014 (2011) on the situation in Yemen stressed that “all those responsible for violence, human rights violations and abuses should be held accountable” and called upon “all concerned parties to ensure the protection of women and children...” Resolution 2000 (2011) on the situation in Côte d’Ivoire stressed “the importance to investigate alleged human rights abuses and violations committed by all parties, further reaffirming that those responsible for such abuses and violations, regardless of their affiliation, must be held accountable”.

¹⁰⁴ Article 4 of the Optional Protocol states that “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”

¹⁰⁵ The Report of the High Commissioner for Human Rights on the implementation of [Human Rights Council resolution 7/1](#), para. 9 (A/HRC/8/17), see. See also Report of the United Nations High Commissioner for Human Rights on cooperation with Georgia, 2017 (A/HRC/36/65), para. 40 (“While some entities are not a party to international human rights treaties, it has been stressed in various reports that these entities are obliged to respect international human rights law when they exercise significant control over territory and

commission of inquiry on the Syrian Arab Republic noted that “at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified”.¹⁰⁶

UN Human Rights Council Special procedures also address specific recommendations not only to member states, but also to *de facto* authorities, stressing the importance of ensuring that there are no human rights gaps. For example, Special procedures reiterated that “the international community, Member States and all relevant *de facto* entities exercising government-like functions should direct all their efforts to ensuring that there are no human rights protection gaps and that all persons can effectively enjoy their fundamental rights... wherever they live.”¹⁰⁷

De facto authorities in NGCT must also respect, at a minimum, the Common Article 3 of the 1949 Geneva Conventions, customary IHL, and (when meeting the criteria) Additional Protocol II, all of which apply to a non-international armed conflict.

Violations of international human rights and humanitarian law, can also result in individual criminal liability, for example for war crimes, crimes against humanity and genocide.¹⁰⁸ Awareness of such responsibility is an important element that further enforces international law, emphasising the duty of all individuals, especially those in political control (acting on behalf of a state or a *de facto* authority) and in military, to respect human rights and humanitarian norms.

population and have an identifiable political structure”). See also [Statement](#) by the UN Deputy High Commissioner for Human Rights, Flavia Pansieri, at the end of her mission to the Republic of Moldova, Chisinau, 11 April 2014), see and Press statement at the conclusion of the UN High Commissioner for Human Rights mission to the Republic of Moldova, 4 November 2011), where she stressed the “responsibility, if not the obligation, of the *de facto* authorities to respect human rights and the need for them to cooperate with all relevant international and regional human rights mechanisms”, *supra* note 4.

¹⁰⁶ [Report HRC/19/69](#), February 2012, para. 106.

¹⁰⁷ Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt to the Human Rights Council from December 2012 (A/HRC/22/51), para. 38, https://www.ohchr.org/Documents/Issues/Religion/A.HRC.22.51_English.pdf. In another report Special Rapporteur on freedom of religion or belief, addressed the *de facto* authorities in the northern part of Cyprus, making specific recommendations with regard to the “police” conduct, local legislation and specific acts governing freedom of movement and freedom of religion or belief, stressing the need for investigations of allegations of human rights violations, *Supra* note 11.

¹⁰⁸ For example, ICTY case *The Prosecutor v. Dusko Tadić*, <http://www.icty.org/case/tadic/4>.

Annex 2. Principles for engagement of National Human Rights Institutions (NHRIs) with the *de facto* human rights bodies (to be shared with the *de facto* human rights body)¹⁰⁹

Who we are

NHRIs are established by law and have a broad mandate to protect and promote human rights. They seek to comply with the United Nations Paris Principles¹¹⁰ (UN agreed minimum standards for NHRIs) and undergo an international accreditation process. NHRIs do not represent the government. Independence is the cornerstone of NHRIs' mandate.

Human rights bodies (in most contexts in Europe - Ombudsman institutions) of the *de facto* states do not aspire to become internationally accredited, but are established to protect and promote human rights of people living in the relevant territory.

What we seek

Cooperation between an NHRI and a *de facto* human rights body, which have the same aim, should contribute to the enjoyment of human rights by all persons. Human rights of individuals who live in a territory controlled by *de facto* authorities are at higher risk, given the lack of meaningful access to regional and international human rights protection mechanisms under the United Nations, Council of Europe and other auspices. Therefore engagement by an NHRI, which is part of the national and international human rights architecture, can ensure greater respect for dignity of people living in a *de facto* entity. Paris Principles require NHRIs to "maintain consultation with the other bodies (...)

¹⁰⁹ These Principles have been informed by work of various international organisations (UN OHCHR, Council of Europe, OSCE/ODIHR and the European Union) and discussions held during the ENNHRI Brussels meetings in 2019. Principles may be adjusted to the specific conflict context with additional provision(s), and may also be relevant for engagement with *de facto* authorities and civil society in NGCT. The need for these principles was articulated by participants of the 11-12 June 2019 ENNHRI meeting in Brussels. The Principles are based on the relevant engagement practice of NHRIs, intergovernmental and non-governmental organizations, and other approaches outlined in the ENNHRI Paper on 'The Role and Responsibilities of NHRIs in the Promotion and Protection of Human Rights in Non-Government Controlled, Non-Recognised and other Disputed Territories (NGCT)', including the Code of Conduct for NHRIs on the two sides of the conflict (Annex 3).

¹¹⁰ United Nations Paris Principles, <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.

responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions)."

Which principles shall guide our cooperation?

1. Human rights are universal. Everyone's human rights must be protected

All human beings are born free and equal in dignity and rights (Art. 1 of the Universal Declaration of Human Rights). There should be no vacuum in human rights protection (*Al-Skeini and Others v. The United Kingdom*, European Court of Human Rights). The universal character of human rights, based on the inherent dignity of every individual envisages protection of all persons at all times, notwithstanding the status of territories and conflicts.

2. Common interest and responsibility in promoting and protecting human rights in a NGCT

Respect for human rights and fundamental freedoms of all persons living in a *de facto* territory is in the interest of both institutions. It is also the responsibility of both to promote and protect human rights in accordance with their mandates.

3. De facto authorities also have human rights obligations

While only states can be parties to international treaties, peremptory norms of international law, including international humanitarian law, are binding on all sides, including the *de facto* authorities, placing relevant obligations also on them¹¹¹. International human rights standards (particularly peremptory norms or *ius cogens*¹¹²) and human rights principles¹¹³ set the normative framework for engagement.

¹¹¹ The UN Office of the High Commissioner for Human Rights repeatedly stressed that "non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control", see Report of the Office of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus (A/HRC/25/21), para. 11, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=22760.

¹¹² See [Report HRC/19/69](#) of the Independent international commission of inquiry on the Syrian Arab Republic, February 2012, para. 106: "at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities (...)". For the list of non-derogable rights (which are close by their nature to peremptory norms) see General Comment No. 29 States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 31 August 2001.

¹¹³ Universality, indivisibility, inalienability, interdependence of human rights, equality and non-discrimination, participation and inclusion, accountability and rule of law, see <https://www.unfpa.org/resources/human-rights-principles>.

4. Engagement and cooperation of NHRI and a *de facto* human rights body does not mean legitimisation of *de facto* authorities

Activities that promote and protect human rights cannot be seen as legitimisation of the *de facto* authorities.¹¹⁴ Dialogue should be free from politicization, building on human rights norms. Engagement should be in relation to all individuals, without any distinction including based on ethnicity or nationality.

5. Trust as the foundation for engagement and cooperation

An NHRI and a *de facto* human rights body stand for the same values, and therefore shall try to establish trustful relations, talking to each other with respect, keeping the lines of dialogue open and constructive.

6. Impartiality and Objectivity

The two institutions will strive to exercise their mandate in an impartial manner, i.e. analysing allegations of human rights violations, without any bias, holding all relevant duty bearers to account. Both shall make effort to rely on facts based on credible sources and use credible information collection methods. They will use the language of human rights standards, avoiding politically charged statements.

7. Accountability, Transparency and Confidentiality

Both institutions are accountable to the public (including in relation to the use of public funds), requiring each to be transparent about engagement. It is possible that some activities are most effective without publicity, and confidentiality will need to be applied. Both partners should respect the confidentiality of and protect their sources of information, where relevant.

8. Safety, Security and “Do no harm”

There may be safety and security risks, related to the possible gaps in protection, of an NHRI or partner *de facto* human rights body staff or other stakeholders involved. An even higher risk may be attached to victims or witnesses of human rights violations. Therefore, the “do no harm” principle should guide any engagement where such a risk is at stake. Persons engaged in the dialogue on behalf of NHRI and the *de facto* human rights body

¹¹⁴ [Resolution 2240 \(2018\)](#) of the Parliamentary Assembly of the Council of Europe, para 3.

should be protected from any legal or other action against them in connection with their work.¹¹⁵

9. Contributing to peace

Promotion and protection of human rights in the conflict context cannot be seen in isolation of settlement of the conflict. As independent institutions, NHRI and a human rights body are well positioned to build trust between communities, across the divides, based on the inherent dignity of every person. The development of trust between human rights bodies can also act as a catalyst for confidence building measures between all communities.

10. Focusing on practical outcomes

Cooperation should result in concrete action for human rights, such as events, visits, discussions. It should also produce reports, such as NHRI's national reports, special reports, reports to the international and regional human rights system, as well as other engagement with such mechanisms.

Possible areas for actions/methods of joint work

Engagement between an NHRI and a *de facto* human rights body should translate in a variety of actions, including joint, to promote and protect human rights. These may include: monitoring (for example detention conditions); reporting; advising governments, parliament and other competent bodies (also *de facto* actors where relevant); cooperation with various stakeholders; complaints handling; human rights education; confidence-building measures to bring communities closer together; litigation or *amicus curiae*; legal assistance; informing about available remedies and regional/international human rights protection mechanisms.

¹¹⁵ Paris Principles provide for functional immunity of NHRI staff for acts undertaken in good faith in their official capacity (General Observation 2.3 to Paris Principles), https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.

Practical questions for engagement (where, how, who, when)

An NHRI and a *de facto* human rights body should agree in advance of the dialogue on the practical issues regarding: the format and the modalities of engagement. They should establish lines of communication, and exchange relevant contacts (phone, email, social media accounts, etc.), to be able to connect at any moment, by designated staff or the leadership. An NHRI and a *de facto* human rights body will make efforts to keep each other informed about human rights issues of concern to each other, and, when possible, facilitate and support each other's work. A simple document, with minimum formalities, outlining concrete modalities for engagement could be agreed upon separately, if useful, in addition to these Principles.

The European Network of NHRIs (ENNHRI)'s goal is to enhance the promotion and protection of human rights across the wider Europe region, by bringing together NHRIs to work on a wide range of human rights issues and supporting their development. ENNHRI stands ready to support cooperation of an NHRI and a *de facto* human rights body. It can provide advice and expertise, mediate and/or otherwise facilitate the engagement efforts.

Read more about [ENNHRI's Human Rights and \(Post-\)Conflict Project](#)

Annex 3. Code of conduct for NHRIs operating in the context of conflict

1. We share and we practice the same ENNHRI values: respect of international human rights standards, including respect for inherent dignity of every person, transparency, cooperation, accountability, participation, non-discrimination and respect for diversity, independence, solidarity.
2. We use human rights language, that is free from political statements, and instead focus on how NHRIs can promote and protect human rights, and prevent human rights abuses, violations and conflict.
3. We are not in conflict with each other, therefore we talk to each other with respect, and communicate where possible, and keep the lines of dialogue open.
4. We collaborate to promote human rights and peace in our communities, and make efforts to keep each other informed about steps and human rights issues that concern the counterpart NHRI, and, when possible, facilitate and support each other's work.
5. We respect the principles of international law. We shall avoid any involvement that may be of political nature and intend to cooperate with the counterpart NHRI, whenever possible and practicable, when addressing human rights issues related to that context, especially before raising them at the international level (such as when preparing reports to the UN and other fora).
6. We respect the confidentiality of any information received from a counterpart NHRI and shall ask for their express consent in case we want to share it.

The European Network of NHRI (ENNHRI) stands ready to support dialogue between NHRIs. It can provide advice and expertise, mediate and/or otherwise facilitate the dialogue and other engagement efforts.



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This paper is part of the EU-financed Project on the Role of NHRIs in Situations of (Post-)Conflict, implemented by ENNHRI. The contents of the paper are the sole responsibility of ENNHRI and can under no circumstances be regarded as reflecting the position of the EU.

Funded by
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