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## NATIONAL HUMAN RIGHTS INSTITUTIONS AND PEACE AGREEMENTS: ESTABLISHING NATIONAL INSTITUTIONS IN DIVIDED SOCIETIES

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### 1. Introduction

1. Promoting justice and the rule of law is a key imperative in divided societies emerging from armed conflict once a peace agreement has been signed. Failure to attend to this will impact both on the consolidation of peace on the short-term and the sustainability of peace on the long-term. In the immediate post-settlement period, this imperative is rooted in the need to establish a degree of stability and order, protect vulnerable groups, facilitate legitimate redress for grievances, and build confidence amongst the population at large about the benefits of peace. On the long term, it is related to the fact that the absence of justice was often a primary reason for the absence of peace. Factors such as authoritarian rule, exclusion of minorities from governance, disparities between identity groups in access to resources and opportunities, ineffective or unfair law enforcement, institutionalised discrimination, and lack of accountability and transparency, have been underlying causes in numerous conflicts. Hence, the maintenance of peace on the long-term depends in large part whether such causes of civil strife are addressed once violence has halted.
2. It is against this background that recent peace agreements have dedicated attention to strengthening national justice systems and creating monitoring and enforcement mechanisms to ensure respect for human rights. A mechanism increasingly used in this regard is the national human rights institution, a state-sponsored body mandated to protect and promote human rights. Such national institutions have become one of the most common mechanisms to be found in peace agreements nowadays. Out of the eight agreements that are the subject of this research project, four included measures for the creation of national human rights institutions, namely the agreements related to armed conflict in El Salvador (1992), Bosnia-Herzegovina (1995), Northern Ireland (1998), and Sierra Leone (1999). A fifth agreement,

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Guatemala's (1996), underlined the importance of an existing institution and allocated additional roles to it. National institutions have also been provided for in peace agreements not studied in this project. For example, South Africa's Interim-Constitution of 1993 provided for the establishment of several national institutions, including a national human rights commission. The 1993 Arusha Peace Accords for Rwanda, the Bonn Agreement of 5 December 2001 for Afghanistan, and the Naivasha Peace Accords for Sudan of 31 December 2004 also made provision for such commissions. National institutions were also envisaged in two other peace processes: in East Timor and Kosovo, the mandate of international administration missions provided for their establishment.<sup>2</sup>

3. This paper examines the nature of references in peace agreements to national human rights institutions and seeks to assess their contribution to ensuring respect for human rights and sustaining peace. To this end, the paper will first provide a general introduction to such national human rights institutions by explaining the nature and functions of such bodies as well as existing international standards for their establishment and operation. It then discusses the circumstances facilitating their increasing inclusion in peace agreements, after which it outlines some trends in the types and mandates of national human rights institutions created by peace agreements. Next it summarises the provisions pertaining to such bodies in various peace agreements, and comments on their subsequent establishment in specific national settings. It then considers whether and in what way such national institutions impact on the promotion and protection of human rights and the building of peace in divided societies, taking into account constraints that exist in this transitional environment. Finally, some recommendations are made as to possible provisions on national institutions that could usefully be included in peace accords.

## 2. National Human Rights Institutions

4. The United Nations defines national human rights institutions as bodies established by governments under the constitution, by law or decree, to protect and promote human rights.<sup>3</sup> While their specific tasks may vary considerably from country to country, they have some common features: they are quasi-governmental or statutory institutions with a mandate that is defined in terms of human rights; they are administrative in nature, in that they are neither judicial nor law-making; and they have on-going, advisory authority in respect of human rights at the national and international level. National human rights institutions belie easy classification as the term is used to refer to a range of bodies that have 'human rights' as an essential component of their mandate. Institutions can be differentiated in terms of their membership (multi-member or single-member institution); their mandate (human rights, equal treatment, advisory role); their focus (human rights in general or a limited spectrum of

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<sup>2</sup> The July 1999 mandate of the OSCE mission in Kosovo, acting under the auspices of the UN Interim Administration Mission in Kosovo (UNMIK), included the establishment of an Ombudsman institution. (Such a body was earlier provided for in the failed NATO-led Rambouillet peace plan for Kosovo of March 1999.) Similarly, the UN Transitional Administration in East Timor (UNTAET) received a mandate from the UN Security Council to develop local democratic institutions, including an independent human rights institution. On Kosovo, see Organisation for Security and Cooperation in Europe Press Release, *OSCE Permanent Council Decides on Mandate for Kosovo Mission*, 1 July 1999, available through [www.osce.org/item/4762](http://www.osce.org/item/4762). On East Timor, see S.C. Res. 1272, UN SCOR, 54<sup>th</sup> Session, 4057<sup>th</sup> mtg., UN Doc S/RES/1272 (1999): par. 8. Less attention will be devoted in this paper to these two cases because they do not originate from peace agreements.

<sup>3</sup> United Nations, *National Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Protection and Promotion of Human Rights* (New York: United Nations, 1995): p. 6, s. 36-40.

rights); or the political or legal tradition from which they originate (for example, Commonwealth, Hispanic, or Francophone).<sup>4</sup>

5. Nevertheless, it may be useful to note how the United Nations categorises national human rights institutions. It distinguishes three main types: human rights commissions, ombudsmen, and specialised institutions that focus on the rights of specific vulnerable groups such as refugees, minorities, women, children or indigenous peoples.<sup>5</sup> Human rights commissions are generally multi-member bodies with mandates that relate to a broad spectrum of rights and include investigation of complaints, review of legislation and government policy, and education. Ombudsman's institutions (which may have one or more members) focus on ensuring fairness and legality in public administration. Their jurisdiction only relates to conduct in the public sector, while human rights commissions may also be able to investigate abuses committed by non-governmental actors. Finally, specialised institutions tend to have functions similar to those of human rights commissions, but are primarily concerned with issues of discrimination.
6. The UN typology is limited in that it does not recognise the many hybrid institutions that have evolved over the years. Institutions that combine the roles of an ombudsman with the functions of a human rights commission are the most frequently occurring hybrid, though their exact form varies from case to case. Their mandate is geared towards the protection and promotion of human rights and monitoring public administration.<sup>6</sup> This paper will concentrate on human rights commissions and such hybrid institutions, for these are the two kinds of national human rights institution most commonly established through peace agreements.
7. All national human rights institutions have a similar overall purpose, namely the protection and promotion of human rights in their respective countries. There is however great variation in their formal mandates, powers, and working methods. National institutions generally assist the three branches of government, by, amongst other things, contributing to the formulation of policy, reviewing legislation to ensure that it is in line with international human rights standards, assisting victims in seeking legal redress and contributing to the development of human rights jurisprudence. It has been suggested that the functions of national institutions are geared towards both ensuring compliance with international norms and rules and contributing to the transformation of the state and other societal actors so that they are more respectful of human rights.<sup>7</sup>

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<sup>4</sup> International Council on Human Rights Policy, *Performance and Legitimacy: National human rights institutions* (Versoix: ICHRP, 2004): 3-4.

<sup>5</sup> United Nations, *Fact Sheet No. 19*, "National Institutions for the Protection and Promotion of Human Rights," (United Nations, 19 April 1993.) Available at URL: <http://www.unhchr.ch/html/menu6/2/fs19.htm>.

<sup>6</sup> Reif also identifies a range of other hybrids, including single-member human rights offices; human rights offices that self-identify as an ombudsman's office even though they are human rights complaints institutions; and ombudsman's offices whose mandate includes corruption-fighting. See Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection," (2000) 13 *Harvard Human Rights Journal*: pp. 1-69: 11-13.

<sup>7</sup> Sonia Cardenas, "Emerging Global Actors: the United Nations and National Human Rights Institutions," (2003) 9 *Global Governance*: pp. 23-42: 25-27. She distinguishes between regulative and constitutive functions. The former concentrates on ensuring domestic implementation of international norms, while the latter is geared towards transforming the identity of the state and other actors. Her categorization does however not recognize that 'regulative functions' (such as advising government on legislation and policies) may well have 'constitutive' value.

8. These functions include lobbying for treaty ratification, assisting government in reporting to treaty bodies, providing advice on existing and draft legislation, and helping government in designing national action plans for human rights protection and promotion. Other functions may be investigating complaints, referring human rights cases to courts, participating in legal proceedings, inspecting prison facilities, holding public enquiries, and reporting on human rights issues in the country. In addition, national institutions are usually tasked with developing public awareness campaigns, conducting human rights education and research, and disseminating information on human rights. They are also meant to collaborate with non-governmental organisations and network with regional and international rights institutions.
9. National institutions have quasi-judicial competence when they have the authority to hear and settle individual complaints. They are then expected to investigate and make recommendations on how the complaints should be addressed. This may range from recommendations for settling individual cases to suggestions for more systemic reform. The (formal) enforceability of national institutions' recommendations is often limited. Few can issue binding recommendations or decisions.<sup>8</sup> The record tends to vary widely in terms of authorities' implementation of the suggested measures; much depends on the political and social conditions in the country, government's commitment to human rights, the stature of the institution and its relationships with government. Institutions' follow up on their own recommendations and government compliance also differs from body to body. In some instances, however, national institutions can enforce their findings and recommendations by referring cases to a court for adjudication.
10. The primary standard against which national human rights institutions have been measured are a set of principles known as the *Paris Principles*, originating from the first major gathering of such bodies in Paris in 1991 under the auspices of the United Nations. The UN Commission for Human Rights and the General Assembly later endorsed these Principles which are broad and general in nature, and apply to all national institutions.<sup>9</sup> The Paris Principles identify a range of measures designed to enhance independence and pluralism, recommend methods of operation, identify functions and powers, and emphasise the importance of effective co-operation with civil society organisations, parliament, and government departments. They stipulate that the mandate of a national human rights institution should be as broad as possible and be laid down in the constitution or a law. The latter is also noted as important for ensuring independence of a national institution. The independence and pluralism of a national institution is further to be achieved through a representative membership, infrastructure that will allow the institution to carry out its functions, and adequate funding. Such funding should ensure that the institution can have its own staff and premises, and is "not subject to financial control which might affect its independence."

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<sup>8</sup> An exception is the Ugandan Human Rights Commission, which has quasi-judicial powers to convene a human rights court to adjudicate complaints. The decisions of the court are binding. Some ombudsman's offices have the power to issue final determinations or to instruct prosecutors to prosecute. Whether such prosecution will happen, however, generally depends on the ombudsman's powers of persuasion and relationships with the judicial system.

<sup>9</sup> UN Comm. for Human Rights Res. 1992/54, 3 March 1992; UN Gen. Ass. Res. 48/134, 20 December 1993. An International Coordinating Committee of National Institutions (ICCNI), representing institutions around the world, assesses institutions against these Principles to determine whether they are 'Paris-compliant.' If they are, the ICC will accredit them and they can participate in the biennial international conferences of national institutions. Accreditation by the ICC also generally enhances the eligibility of institutions for donor support.

11. On methods of operation, the Paris Principles specify that national institutions should consider any issues falling within their competence, without authorisation from a higher authority. They are to do so on their own initiative or in response to anyone who approaches the body, and should hear any person or gather any evidence as may be necessary for assessing matters falling within their competence. National institutions are also expected to publicise their decisions and concerns, meet regularly, and to set up working groups to deal with specific issues and establish local or regional sections. In addition, they should consult with other bodies responsible for the promotion and protection of human rights, including the court system. Finally, they should develop relations with non-governmental organisations given “the fundamental role played by [NGOs] in expanding the work of national institutions.”
12. The Paris Principles do not require that national institutions be authorised to consider complaints from individuals whose rights have allegedly been violated, but do specify certain obligations for institutions with quasi-judicial competence. Such institutions should seek an amicable settlement through conciliation, binding decisions, or on the basis of confidentiality. They should inform the person submitting the complaint of her rights, especially the available remedies, and promote access to these. They should hear complaints and transmit them to any other competent authorities. Finally, they are to make recommendations to the competent authorities, especially by proposing amendments or reforms to specific laws, regulations or administrative practices.
13. In recent years, the Paris Principles have been criticised for being limited in scope or, as one study puts it, “curiously inadequate in a somewhat paradoxical way.”<sup>10</sup> It notes that the Principles, on the one hand, “lay down a maximum programme that is met by hardly national institution in the world,”<sup>11</sup> referring in this respect to the appointment processes necessary to ensure social pluralism and the notion of ‘adequate funding.’ At the same time, “the Paris Principles do not even take it as given that a national institution will deal with individual complaints, which most observers and practitioners [...] would probably regard as an essential characteristic.”<sup>12</sup> The latter point is indeed echoed in criticism that the Paris Principles should have specified investigative powers as a key feature of national institutions, rather than leaving it up to states to determine whether or not to grant them.<sup>13</sup>
14. Another, perhaps more fundamental, criticism of the Paris Principles is that they envision an institution that overemphasises legalism by stressing ‘court-like features’ and is insufficiently connected to the most vulnerable persons and groups in society.<sup>14</sup> In this view, this conception of a national institution is “significantly limited” and should be revised to inform the design of national institutions “that are more likely to contribute effectively to the

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<sup>10</sup> ICHRP, *Performance and Legitimacy*, 2.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Reif, “Building Democratic Institutions,” 24. Reif’s other criticism of the Paris Principles is that they provide insufficient guidelines for institutions that do not conform to the classical human rights commission model.

<sup>14</sup> Obiora Chinedu Okafor and Shedrack C. Agbakwa, “On Legalism, Popular Agency and ‘Voices of Suffering:’ The Nigerian National Human Rights Commission in Context,” (2002) 24 *Human Rights Quarterly* No. 3 (August): pp. 662-720. The third aspect of their criticism is that the Paris Principles do not sufficiently recognise popular agency. By this they mean that the Principles suggest that national institutions are or should be the primary agents for national action on human rights and hence relegate non-governmental organization to the mere status of resources to be drawn on by such bodies. This ignores the potential dynamic relationship between such institutions and NGOs, especially the extent to which ‘popular agents’ may utilize such bodies as a resource to enable them to reach rights-related objectives.

positive transformation of the human rights situations in most target societies.”<sup>15</sup> This perspective advocates for greater emphasis on the promotional, educational and advisory functions of national institutions since this would contribute towards the prevention of human rights abuses in the long term. Moreover, vulnerable individuals and groups should be placed at the centre of the conception, design and operations of national institutions if these bodies are to achieve their stated objectives. In doing so, minority rights, inter-ethnic relations, poverty and other matters relating to social and economic rights would receive the necessary attention. “Without tackling these issues,” it is argued, “many of the violations that contribute to the oppression of the most vulnerable in society may never be addressed or redressed effectively.”<sup>16</sup>

15. This perspective is interesting for two main reasons. First, it draws attention to the question of why national human rights institutions are meant to fulfil particular functions, rather than focusing mostly on what they are supposed to do. It emphasises the potential transformative role of national institutions in the wider societal context, and suggests a need to be creative in finding alternative strategies to promote and protect human rights. As such, it underscores that the protection and promotion are not just significant in their own right but serve a larger purpose: they are imperative for the creation of an environment in which people’s dignity and integrity are respected, their relationships and interactions are constructive, and their potential can be developed; and in which the state is organised in such a way that it is accountable and legitimate, allows for the effective participation of diverse groups and interests, and does not abuse its powers. This is a relevant perspective when assessing the value of including provisions pertaining to the establishment of national institutions in peace agreements, and the impact, if any, of such bodies on enforcing human rights and sustaining peace in divided societies coming out of armed conflict.
16. Second, underlying this perspective is the realisation that national institutions may operate in social, political, and economic conditions that may impede their functioning as suggested by the Principles and/or may result in a mandate and structure which do not fully comply with the Paris Principles. This, however, does not necessarily preclude the effective functioning of such institutions; there may be other creative ways of enhancing the human rights situation in a country. The authors positing this perspective refer to the example of the National Human Rights Commission of Nigeria, which was established during a military dictatorship and has limited independence from the executive and limited powers. Despite these and other constraints, the body was able to offer protection to non-governmental organisations and facilitate their interaction with the state during repression, and has significantly improved the rights situation of prisoners and detainees in Nigeria.<sup>17</sup> Elsewhere it has also been recognised that the Paris Principles, while constituting important formal criteria, are in themselves not a guarantee for effectiveness or even a precondition for effectiveness. A forthcoming study on impact assessment indicators for national human rights institutions notes that the formal structure of a national institution does not necessarily “determine performance on the ground.”<sup>18</sup> Still, this study suggests that generally, “national institutions that conform to the Paris Principles are more likely to be effective.”<sup>19</sup>

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<sup>15</sup> Okafor and Agbakwa, *On Legalism*, 682.

<sup>16</sup> *Idem*, 692-696.

<sup>17</sup> *Idem*, *On Legalism*, 699-720.

<sup>18</sup> International Council for Human Rights Policy (ICHRP), *Draft Report. National Human Rights Institutions: Impact Assessment Indicators* (Versoix: ICHR 2005): par. 44.

<sup>19</sup> ICHR, *Impact Assessment Indicators*, par. 85.

17. This last discussion highlights that while it is important to assess institutions in light of the Paris Principles, compliance with these formal requirements alone does not translate into effectiveness; other factors must also be considered. In particular, the difficult conditions within which national institutions often work must be recognised. Given the challenges encountered by such bodies originating from peace agreements in the post-settlement environment, this is highly relevant in the context of this paper. Therefore, any assessment of national institutions must not only take into account the global standard of the Paris Principles, but must also consider the circumstances in which the institution has to operate.<sup>20</sup>

### 3. Increasing References in Peace Agreements

18. The increasing inclusion of references to national human rights institutions in peace agreements probably stems from the convergence of three different but inter-related developments. First, there has been a general tendency to devote more attention to human rights in peace agreements from the 1990s onwards. As this provides the basis for the very project undertaken by the ICHRP, this is commented on in more depth in the overall report and hence does not warrant elaboration here. The second development of importance has been a rapid proliferation of national human rights institutions around the world since the beginning of the 1990s. This is perhaps most clearly illustrated by the exponential growth in the number of such bodies on the African continent. In 1989 only one national human rights institution existed in Africa, while by January 2005, twenty-four African states had established national institutions while an additional two were in the process of creating them.<sup>21</sup>
19. Factors underpinning this proliferation included a growing acceptance of international human rights as a normative framework by the international community and a global wave of democratisation following the end of the Cold War. In many instances, these led governments to establish institutions as part of efforts to deepen and consolidate democracy. In other cases, institutions were created in repressive contexts under regimes eager to deflect international attention away from their human rights record.<sup>22</sup> Their establishment was at times also due to a desire on the part of states to control the challenge posed by international human rights discourse to their national sovereignty.<sup>23</sup> Further contributing to the rapidly growing number of national human rights institutions has been the increasing tendency amongst donors to make the disbursement of development aid conditional on the protection and promotion of human rights and good governance. In addition, in the last decade, the Office of the UN High Commissioner for Human Rights has made national institutions a major policy priority, viewing them as key mechanisms at the national level to protect and promote human rights. Without the active support of the UN, which has included capacity-building, technical assistance and other services, it is questionable whether the global rise of national institutions would have taken place.<sup>24</sup>

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<sup>20</sup> For example, in a repressive context, merely being able to conduct some investigations and reporting on these might be a considerable achievement, while in a liberal environment, the production of the same number of investigations and reports would be deemed to be a poor performance.

<sup>21</sup> Office of the UN High Commissioner for Human Rights, *List of National Human Rights Institutions*, Jan. 2005 (on file with author.)

<sup>22</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*. (New York, Washington, London: HRW, 2001): 2.

<sup>23</sup> Sonia Cardenas, "National Human Rights Commissions in Asia," 2002 *Human Rights Review* 4 1 (October): pp. 30-51.

<sup>24</sup> Cardenas, "Emerging Global Actors." She distinguishes between four related 'mechanisms of influence': standard-setting, capacity-building, network facilitating and membership granting (28-34.) She also suggests

20. The third development fuelling the inclusion of provisions relating to national institutions in peace agreements has been a growing emphasis on ensuring national capacities for the constructive management of conflict and the protection and promotion of human rights. This is in part related to the recognition that much contemporary armed conflict is intra-state in nature; the need to develop and strengthen institutions at the national level capable of addressing conflict in a fair and legitimate manner has thus become more and more highlighted. Paradoxically, a contributing factor in this respect may have been the increasing involvement of the international community in efforts to resolve such internal conflicts. As the number of UN missions has grown, and as their functions have expanded in scope and complexity, it is increasingly emphasised that intense international involvement is only possible for a limited time. Attention must thus be devoted to developing national mechanisms that can handle matters when the international community diminishes its involvement. This is reflected in the UN Secretary-General's statement that, "our main role is not to build international substitutes for national structures, but to help build domestic justice capacities."<sup>25</sup>
21. In terms of human rights, it is also clear that international institutions alone do not suffice in the struggle for human rights. The role of international action is, as Donnelly puts it, "ultimately subsidiary," since "the fate of human rights – their implementation, abridgement, protection, violation, enforcement, denial, or enjoyment – is largely a matter of national, not international, action."<sup>26</sup> Similar emphases on strengthening and building on local and national capacities can also be found in conflict transformation and peacebuilding literature.<sup>27</sup>

#### 4. Trends in Agreement-Related Institutions

22. As noted in the introduction, the peace agreements for El Salvador, Guatemala, Bosnia-Herzegovina, Sierra Leone, Northern Ireland, South Africa, Rwanda, Afghanistan and Sudan all include provisions relating to national human rights institutions. This section outlines some broad trends in the types and mandates of national human rights institutions created by these peace agreements. It is based on a review of the agreements and the mandates subsequently adopted for the institutions. More detailed information on the content and framing of these can be found in the next section.
23. In most instances, the national institutions provided for in peace agreements have been new institutions, to be established following the peace agreement's signing. Only in Guatemala did the peace agreement refer to an already existing national institution. The case of

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that the UN has framed national institutions in such a way that they appeal to various state interests, by positioning them as democratic institutions, a sign of commitment to international norms, and "the emblem of membership in a liberal community of states" (35.)

<sup>25</sup> Kofi Annan, *The rule of law and transitional justice in conflict and post-conflict societies (Report of the Secretary General*, UN Doc S/2004/616, 23 August 2004. Available from URL: [www.un.org/Docs/sc/sgrep04.html](http://www.un.org/Docs/sc/sgrep04.html) (last accessed 4 January 2006.)

<sup>26</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice. 2<sup>nd</sup> Edition*. (Ithaca, London: Cornell University Press, 2003): 173.

<sup>27</sup> See for example, John Paul Lederach, *Building Peace. Sustainable Reconciliation in Divided Societies*. (Washington DC: United States Institute of Peace 1997); Taisier M. Ali and Robert O. Matthews (eds.), *Durable Peace. Challenges for Peacebuilding in Africa* (Toronto: University of Toronto Press 2004); John Prendergast and Emily Plumb, "Building Local Capacity: From Implementation to Peacebuilding," in Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens (eds.), *Ending Civil Wars. The implementation of peace agreements* (Boulder, London: Lynne Rienner Publishers 2002): 327-349.

Northern Ireland falls in between: the Human Rights Commission provided for replaced a Standing Advisory Commission on Human Rights but got an extended role.<sup>28</sup> In Sierra Leone, the Lomé Peace Agreement provided for the creation of a human rights commission, even though a National Commission for Democracy and Human Rights already existed. Formally, however, that body is not a national human rights institution in terms of the Paris Principles, and the legislation subsequently enacted for the Human Rights Commission of Sierra Leone is new.<sup>29</sup> In most cases the institutions have actually been established: human rights institutions now exist in El Salvador, Bosnia-Herzegovina, Northern Ireland, South Africa, Rwanda and Afghanistan (and in the case of Northern Ireland and South Africa, more than one.) The Sudanese national institution is in the process of being established; draft legislation has been prepared.<sup>30</sup> Sierra Leone is the only case where the national institution has not been established within a few years after the signing of the peace agreement. Legislation was adopted in August 2004, but since then the government has taken little action to move towards the Commission's establishment.

24. The institutions provided for in peace agreements generally fall in two main categories: human rights commissions (Northern Ireland, South Africa, Rwanda, Afghanistan, Sierra Leone, and Sudan) and human rights ombudsmen (El Salvador, Guatemala, and Bosnia-Herzegovina).<sup>31</sup> The latter is a hybrid institution as noted earlier, comprising a focus on administrative justice and human rights protection and promotion.<sup>32</sup> The agreements for South Africa and Northern Ireland provided also for specialised human rights bodies geared towards non-discrimination, partly in response to the identity-based discrimination and marginalisation that was central to the conflicts in both contexts. Hence, the Good Friday Agreement provides for an Equality Commission that replaces several already existing statutory bodies relating to discrimination.<sup>33</sup> A Commission for Gender Equality was provided for in the South African Interim Constitution.<sup>34</sup> The case of Bosnia-Herzegovina is confusing in that the Dayton Peace Agreement provided for a 'Commission on Human Rights' which consisted of an Ombudsman Office and an adjudicative body, the Human Rights Chamber, which formed part of the Constitutional Court of Bosnia and Herzegovina.<sup>35</sup> This Chamber has, however, not been considered a national human rights

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<sup>28</sup> *Good Friday Agreement*, Sect. 6 Art. 5.

<sup>29</sup> Reportedly, months after the peace agreement was signed it was still being debated whether the mandate of the NCDHR should be expanded or whether a new body should be created. See Human Rights Watch, *Protectors or Pretenders?*, 284. The new legislation amends the National Commission for Democracy and Human Rights Act (1994) in changing its title to the National Commission for Democracy Act. See the Human Rights Commission of Sierra Leone Act, 2004 (No. 9), 26 August 2004, art. 25. Available through URL: <http://www.sierra-leone.org/gazette.html> (last accessed 5 January 2006.)

<sup>30</sup> Phone conversation with officer in the National Institutions Unit, OHCHR, 5 January 2006.

<sup>31</sup> The institutions established in Kosovo and East Timor, belong to the latter category: the Timor Leste Office of the Ombudsman (Provedor) for Human Rights and Justice, and the Ombudsperson Institution in Kosovo.

<sup>32</sup> A traditional, straightforward, ombudsman's office has only been provided for in the South African agreement, in the form of an Office of the Public Protector.

<sup>33</sup> *Good Friday Agreement*, 10 April 1998, Sect. 6 (Rights, Safeguards and Equality of Opportunity), Art. 5. Available through URL: <http://www.usip.org/library/pa.html> (last accessed 5 January 2006.) The Equality Commission replaces the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI), and the Disability Council.

<sup>34</sup> *Interim Constitution*, Act 200 of 1993, Chapter 8, Art. 119-120. Including a Commission for Gender Equality was in large part due to the strong women's lobby within the liberation movement, notably the Women's League of the African National Congress. The Final Constitution provides for an additional national institution, namely a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Minorities. *Constitution of the Republic of South Africa 1996*, Act 108 of 1996, Ch. 9, art. 185-186.

<sup>35</sup> *Dayton Peace Agreement*, 14 December 1995, Art. VI and Annex 6, Ch. Two.

institution given its judicial nature, nor has its successor, the somewhat misleadingly-titled Human Rights Commission. Only the Human Rights Ombudsman is considered one.<sup>36</sup>

25. The bodies established generally have a strong human rights protection and promotion mandate. They have quasi-judicial competence and can thus receive and investigate complaints of human rights violations. Most can also undertake investigations at their own initiative and a few have extensive powers, including those of subpoena, search and seizure; more regularly, institutions can compel the production of evidence. Aside from complaints handling, their functions generally include the major ones as outlined earlier: reviewing legislation, making recommendations regarding state reform; advising on remedies; reporting on the human rights situation; raising public awareness on human rights; providing human rights education, etc. The Human Rights Ombudsman of Bosnia-Herzegovina is the only institution which is exclusively protection oriented; it has no educational function like the other institutions. The extent to which these national institutions have wider monitoring and advisory functions differ from case to case. In most instances, the decisions and recommendations of these bodies are not binding though some institutions have recourse in being able to refer matters to the executive or to the courts in the case of non-compliance with recommendations made or for prosecutorial purposes. Some mandates provide explicitly for the amicable settlement of disputes; some also make provision for the institution to initiate proceedings in court or to assist an individual in doing so. Many institutions are entrenched in the country's constitution; this is the case in El Salvador, Rwanda, South Africa, Bosnia-Herzegovina, Guatemala, and Afghanistan.
26. It is noteworthy that national institutions created through peace agreements are seldom given direct or explicit responsibility for monitoring the human rights provisions contained in a peace agreement. There are a few that do, however. The Sudanese peace agreement, after listing human rights and fundamental freedoms to be enjoyed under Sudanese law, stipulates that these "shall be monitored by the Human Rights Commission."<sup>37</sup> The South African Human Rights Commission is to protect and promote the human rights of all South Africans as laid down in the Bill of Rights contained in the Constitution (which served as the peace agreement ending apartheid.) In Guatemala, the Comprehensive Agreement on Human Rights requested the *Procurador de los Derechos Humanos* (PDH: Counsel for Human Rights) to include information on the scope and content of the Agreement in its work,<sup>38</sup> while the Human Rights Ombudsman of Bosnia and Herzegovina was mandated to protect the rights contained in the European Convention on Human Rights and in the fifteen international instruments that formed an integral part of the Dayton Peace Agreement.<sup>39</sup>
27. A more regular occurrence in peace agreements are provisions pertaining to the national institution that are reflective of the conflict without making this link explicit. For example, the Guatemalan PDH was to determine whether members of volunteer civil defence

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<sup>36</sup> Email correspondence with human rights officer in National Institutions Unit, OHCHR, 3 January 2006 (on file with author.) The title of the current Human Rights Commission of Bosnia and Herzegovina is called 'misleading' because the body is different from what is commonly understood by 'a human rights commission:' it is a judicial rather than a quasi-judicial body.

<sup>37</sup> *Power Sharing Protocol signed between the Government of Sudan and the Sudanese People's Liberation Movement, Naivasha*, 26 May 2004, annexed to the Comprehensive Peace Agreement, Naivasha, 31 December 2004: art. 1.6.2.16(c). Available through URL: <http://www.usip.org/pa.html> (last accessed 5 January 2006.)

<sup>38</sup> *Comprehensive Agreement on Human Rights*, 29 March 1994, annexed to the *Agreement on a Firm and Lasting Peace*, 1996, Sect. 5 Art. 8. Available through URL: <http://www.usip.org/pa.html> (last accessed 5 January 2006)

<sup>39</sup> *Dayton Peace Agreement*, 14 December 1995, Annex 6 Art. II.2.b.

committees had been forced to join such paramilitary structures against their will, and whether their human rights had been violated.<sup>40</sup> The Salvadoran peace accords emphasised that the legislation to be prepared for the National Counsel for the Defence of Human Rights had to provide means to “to identify and eradicate any groups which engage in a systematic practice of human rights violations, in particular, arbitrary arrests, abductions and summary executions” and noted the need “to identify, abolish and dismantle clandestine jails or places of detention.”<sup>41</sup> The Dayton Peace Agreement instructed the Human Rights Ombudsman of Bosnia and Herzegovina to give “particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds.”<sup>42</sup>

28. Usually, however, institutions are mandated to monitor the state of human rights in general without clear or direct reference to the peace agreement or the conflict; sometimes reference is made to international instruments to which the state is a party. Most national institutions originating from agreements can therefore consider civil and political rights and social and economic rights. The legislation for the South African Human Rights Commission and the Afghanistan Independent Human Rights Commission include provisions that explicitly relate to social and economic rights.<sup>43</sup> It seems nevertheless that in the types of cases received and investigated more emphasis is put on civil and political rights, although this depends on the nature of the conflict. The complaints handled generally reflect the pattern of violations that prevailed during the conflict. This is for example the case in Bosnia and Herzegovina, where many complaints concern freedom of movement, citizenship rights, and property. In Guatemala, complaints have often related to violations by the police, including abuse of power and mistreatment of detainees.<sup>44</sup>
29. Most institutions created through peace agreements are distinctly national bodies, in that their members are citizens of the country. Only the Ombudsman in Bosnia and Herzegovina has had international membership, reflecting the extent of the international community’s intervention in the conflict and the lack of trust between the parties signing the agreement. The national character of most institutions has however not precluded other kinds of international involvement in their establishment and functioning. In fact, in most cases such involvement has been extensive, ranging from assistance in drafting legislation to capacity-building, technical support, and funding. In Guatemala and El Salvador, the national institutions have functioned alongside UN missions involved in human rights verification; this is still the case in Afghanistan.<sup>45</sup> The relationship between the two bodies appears to have been somewhat tense in Guatemala and El Salvador, due to territorialism, a perception of competition, and limited trust.<sup>46</sup> Yet collaboration did take place, with joint investigations and verification happening in El Salvador from late 1994, and training of national institution staff by the mission in Guatemala prior to its departure.

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<sup>40</sup> *Comprehensive Agreement*, V Art. 2. Where the PDH found that such violations had occurred, he could take whatever decisions deemed necessary and take judicial or administrative action to punish the perpetrator (Art. 4.).

<sup>41</sup> *Peace Agreement (Chapultepec)*, 16 January 1992, Ch. III Art. 2.c.

<sup>42</sup> *Dayton Peace Agreement*, Annex 6, Ch. Two, Art. V(3).

<sup>43</sup> *Constitution of the Republic of South Africa*, Act 108 of 1996 (Final Constitution): Ch. 9 Art. 184(3); *Law on the Structure, Duties and Mandate of the AIHRC*, No. 3471 24/02/1384 (14 May 2005): Art. 4, Art. 21(4.)

<sup>44</sup> Reif, “Building Democratic Institutions,” 51.

<sup>45</sup> The United Nations Verification Mission in Guatemala (MINUGUA); United Nations Observer Mission in El Salvador (ONUSAL); and United Nations Assistance Mission in Afghanistan (UNAMA).

<sup>46</sup> Working papers for ICHR project, Martha Doggett and Ingrid Kircher, “El Salvador,” and Marcia Mersky, “Guatemala,” available from ICHR website, URL: <http://www.ichrp.org>.

30. The national character of the institutions is often enhanced by a provision that the body's membership must reflect the diversity and social pluralism of the national society. Such provisions can be found in the agreement (South Africa, Northern Ireland) and/or the terms of reference later adopted through national legislation (Afghanistan, Sierra Leone.) The mandate of the Ombudsman of Bosnia and Herzegovina contains no such explicit reference, but the institution's representative character is ensured by the fact that the country's Presidency makes a joint proposal about the persons to be appointed to serve as Ombudsmen.<sup>47</sup> Representation is not a concern in the Latin American cases because the Guatemalan and Salvadoran institutions are both single-member bodies; moreover, the conflict in these countries did not revolve around ethnic or cultural identity as was the case elsewhere. In many instances, the executive is central in the appointment process although sometimes parliament plays a role through nominating candidates or approving appointments; this is the case in South Africa and Sierra Leone. In Rwanda this division of labour is reversed, with the government preparing a shortlist of nominations and the National Assembly making the appointments. In Guatemala and El Salvador, appointments are made by Congress (Guatemala) or the Legislative Assembly (El Salvador.)
31. Finally, peace agreements differ in the level of detail provided about the national institution to be established. Of the agreements reviewed here, some merely state that a national institution will be established (El Salvador, Sierra Leone, Sudan). Others state the same and briefly indicate some key functions (Northern Ireland, Afghanistan, Rwanda), while a third set of agreements outlines the national institution's mandate or functions in detail (Bosnia-Herzegovina, Guatemala, South Africa.)<sup>48</sup> The level of detail in the agreement seems to have little bearing on the strength of the terms of reference of the institution as contained in national legislation later adopted.

## 5. National Human Rights Institutions in Agreements

32. This section looks more specifically at the cases where peace agreements referred to national institutions, considering them in chronological order. It summarises the provisions in the agreement (in so far as they have not been commented on yet) and discusses the terms of references later adopted. Where information is available, it also comments briefly on the institutions' activities.

### *El Salvador*

33. The 1992 Salvadoran peace accords stipulated that the *Procurador para la Defensa de los Derechos Humanos* (PDDH), National Counsel for the Defense of Human Rights, should be appointed within 90 days once constitutional reforms resulting from an earlier agreement had come into force. A draft bill was to be prepared by COPAZ, the national mechanism responsible for overseeing the implementation of the agreements.<sup>49</sup> The Constitution of El Salvador was amended to include reference to the Counsel, and a law establishing the PDDH came into

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<sup>47</sup> It appears that the Rwanda Commission for Human Rights is the only multi-member national institution established through a peace agreement of which the mandate does not include an explicit provision on representation and pluralism.

<sup>48</sup> Guatemala is included in the last category even if the entire mandate is not spelled out in the agreement, because the agreement details the additional functions allocated to the PDH.

<sup>49</sup> *Peace Agreement (Chapultepec)*, 16 January 1992, Ch. III Art. 2; the Counsel had originally been mentioned in the *Mexico Agreements* of 27 April 1991, in a section on constitutional reforms meant to improve the judicial system and develop mechanisms for safeguarding human rights.

force in March 1992.<sup>50</sup> The Counsel received a broad mandate relating to rights protection and promotion and the conduct of public administration. Its functions include complaints handling and investigating cases; assisting victims of violations; undertaking judicial or administrative remedies; monitoring the conditions of persons deprived of their liberty; oversee judicial compliance with due process requirements; review draft legislation; promote reforms of state organs; and develop education programs. The Counsel is to be notified of all arrests taking place and has authority to visit places of detention. Aside from investigative, reporting and recommendatory powers, it also has power to issue public criticism if government does not implement its recommendations.<sup>51</sup> The PDDH is elected by the Legislative Assembly for a period of three years, and is supposed to have knowledge of human rights and be of high moral standing and competence.<sup>52</sup>

34. Initially, the PDDH was rather weak, due to limited technical expertise, financial resources, and no clear sense of mission.<sup>53</sup> Little collaboration took place at first between the PDDH and the Human Rights Division of the UN Observer Mission in El Salvador (ONUSAL) as the former seemed reluctant to engage and the latter focused more on handling individual cases than institution-building.<sup>54</sup> This started changing with the formation of a special “Joint Group for the Investigation of Politically Motivated Illegal Armed Groups” in December 1993, consisting of the Director of the Human Rights Division, the National Counsel and two other lawyers.<sup>55</sup> By the end of 1994, ONUSAL was providing technical support to the office and had started to refer complaints received to the office. Joint investigations also took place. Throughout its existence, the PDDH has considered cases related to both civil and political rights, and social and economic rights. Many complaints in the late 1990s related to abuse by the civilian national police.<sup>56</sup> Current specialised areas of the PDDH include childhood and youth; women and family; economic and social rights; civil and individual rights.<sup>57</sup>
35. A key factor in the institution’s performance and credibility has been its leadership, and the National Counsel has had a somewhat chequered history in terms of the individuals who were appointed to serve as ombudsman. Under the first Ombudsman, the institution was said to act rather timidly. It gained in strength and activism with the second Ombudsman who was vigorous in conducting investigations and compiling annual reports that became authoritative sources on human rights violations in El Salvador.<sup>58</sup> In 1998, an Ombudsman was elected who was viewed by some as a conscious effort to undermine the institution just as it was starting to gain legitimacy. He was widely considered to be incompetent and became

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<sup>50</sup> *Ley de la Procuraduría para la Defensa de Los Derechos Humanos*, Decreto No. 183 (20 Feb. 1992.) (on file with author.)

<sup>51</sup> *Ley*, Cap. III, Art. 11-12.

<sup>52</sup> *Ley*, Cap. II, Art. 4.

<sup>53</sup> Call, “Assessing El Salvador’s Transition,” 406.

<sup>54</sup> Martha Doggett and Ingrid Kircher, “*El Salvador*,” research paper for ICHRP project on Role of Human Rights in Peace Agreements, available through URL: <http://www.ichrp.org> (last visited 5 January 2006.): 14, par. 54-56.

<sup>55</sup> Call, “Assessing El Salvador’s Transition,” 405-406. Tasked with investigating the activities of all illegal armed groups since the peace accords, the Joint Group reported in July 1994 on the nature of death squads during and before the war, and commented on the changes in their operations, financing and relationship with the state following the peace process. According to Call, little action was taken against those named in the report, but it seems to have stopped the many high-profile political killings in the period leading up to the March 1994 elections. (406.)

<sup>56</sup> Reif, “Building Democratic Institutions,” 56.

<sup>57</sup> See homepage of the National Counsel for the Defense of Human Rights, at URL: <http://www.pddh.gob.sv> (last visited 5 January 2006.)

<sup>58</sup> Call, “Assessing El Salvador’s Transition,” 407.

embroiled in nepotism and corruption, causing the departure of valuable personnel and withdrawal of international funding.<sup>59</sup> The current Counsel has been able to restore some of the institution's credibility by being active and outspoken in carrying out her functions. A public survey conducted in 2001 showed that the Counsel enjoyed most public confidence amongst all state organs, with 48% of respondents claiming to have some or much trust in the PDDH.<sup>60</sup> Nevertheless, the institution is still recovering from the earlier crisis and it's unclear how influential it can become in the domestic context given its limited resources and ongoing struggle for autonomy.<sup>61</sup> The continued weakness of the Salvadoran judicial system also negatively affects the effective functioning of the PDDH.<sup>62</sup>

## Rwanda

36. In Rwanda, the 1993 Arusha Peace Accords provided for the establishment of a National Commission on Human Rights as outlined in a Protocol of Agreement on the Rule of Law signed in August 1992, annexed to the peace agreement. This Commission was "to investigate human rights violations committed by anybody on Rwandese territory" with particular emphasis on state organs and individuals employed by the state or other organisations. The agreement also specified that the Commission was to be independent; that its investigation work would not be limited in time; and that the institution should be provided with "the necessary means, especially legal means, to efficiently accomplish its mission."<sup>63</sup> The Peace Accords did not last for long, however, and genocide engulfed the country in violence from April 1994 onwards. The genocide ended effectively four years of international efforts to mediate an end to Rwanda's civil war and prompted the return from the Rwandese Patriotic Front (RPF) from its bases in Uganda. After securing military victory in July 1994, the RPF named a multi-ethnic, multi-party government based loosely on the Arusha Peace Accords.<sup>64</sup>
37. The Transitional National Assembly adopted legislation establishing the Commission in March 1999, which was modified in December 2002.<sup>65</sup> The institution, now named the Rwanda Commission for Human Rights, is mandated to handle complaints; conduct human rights education and public awareness campaigns; provide advice on rights-related legislation and ratification of international instruments; visit prisons and any places where violations allegedly occur; request the prosecution of anyone committing human rights violations; and making recommendations to the government on taking action to stop and punish violations.<sup>66</sup> The Commission has the power to question anyone and request any

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<sup>59</sup> Fredrik Uggla, "The Ombudsman in Latin America," 36 *Journal of Latin American Studies* (2004) 423-450: 434. He suggests that this election might have been directly related to the increasing legitimacy of the institution and the high profile of the previous Counsel, Victoria de Aviles (448.)

<sup>60</sup> *Idem*, 438.

<sup>61</sup> *Idem*, 445-446.

<sup>62</sup> Reif, "Building Democratic Institutions," 54; Call, "Assessing El Salvador's Transition," 408.

<sup>63</sup> *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Arusha*, 4 August 1993; *Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic on the Rule of Law*, Arusha, 18 August 1992; URL: <http://www.incore.ulst.ac.uk/services/cds/agreements/africa.html> (last accessed 5 January 2006): Art. 15. The article also stipulates that the Commission shall use its findings for education purposes and to institute legal proceedings where necessary.

<sup>64</sup> Timothy Longman, "Obstacles to Peacebuilding in Rwanda," in Ali and Matthews (eds.) *Durable Peace*: 61-85; Gilbert M. Khadiagala, "Implementing the Arusha Peace Agreement on Rwanda," in Stedman et al, *Ending Civil Wars* 2004, 463-498.

<sup>65</sup> *Law No. 37/2002 of 31/12/2002 modifying and complementing the Law No. 04/99 of 12/03/1999 establishing the National Commission For Human Rights* (on file with author.)

<sup>66</sup> *Law No. 37/2002 of 31/12/2002*, Art. 3.

information, obtain documents, and visit any sites; it can also request authorities to rehabilitate victims unconditionally.<sup>67</sup> The National Assembly selects the seven Commissioners from a list prepared by government for a renewable term of three years. The Commissioners must have the Rwandese nationality and must be known for their high moral standing, integrity and competence.

38. In 2003, the Commission received some 1027 individual complaints, relating to, amongst other things, illegal and arbitrary arrests, disappearances, assassinations of people suspected of involvement in the genocide, property rights, and children's rights. Aside from inspecting conditions in prisons and monitoring national elections, it also monitored proceedings at *gacaca* courts, community courts that have jurisdiction over lower-level perpetrators of the genocide.<sup>68</sup> The Commission's impact on the country has however been questioned.<sup>69</sup> The authoritarian nature of the current regime and its failure to respect human rights, manifested in limited freedom of speech and restrictions on political parties, are matters of concern in this regard.<sup>70</sup>

### *South Africa*

39. During South Africa's transition to democracy, several national institutions were provided for in the 1993 Interim Constitution and the Final Constitution of 1996. These are the Human Rights Commission, the Public Protector, the Commission on Gender Equality, and the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities.<sup>71</sup> Internationally, however, the South African Human Rights Commission (SAHRC) is considered the primary national institution. It is the only statutory body that takes part in the biennial international conferences of national institutions as well as the regional conferences of African national human rights institutions. The Public Protector (PP) participates in international meetings of the International Ombudsman Institute, a worldwide organisation of Ombudsman's offices based in Canada. Since it is beyond the scope of this paper to comment on all institutions, information is only provided on the SAHRC and the PP.
40. In terms of the Constitution, the SAHRC is to develop an awareness of fundamental rights amongst all people in South Africa; make recommendations to organs of state and all levels of government about the progressive realisation of human rights; undertake studies on rights-related matters and report on these; and to investigate alleged violations of human rights and assist any victim of violations to secure redress. The 1994 Human Rights Commission Act lays down more detail about the Commission's functioning and operations.<sup>72</sup> The SAHRC can question anyone under oath or affirmation; can enter and search premises and examine any documentation found there; and has jurisdiction over

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<sup>67</sup> *Law No. 37/2002 of 31/12/2002*, Art. 4.

<sup>68</sup> Rwanda Human Rights Commission, *Annual Report 2003* (Kigali RHRC 2004): Ch. 2. Available in French from URL [www.rhrc-rw/org.2003\\_fr.pdf](http://www.rhrc-rw/org.2003_fr.pdf) (last visited 6 Jan. 2006.)

<sup>69</sup> Longman, "Obstacles to Peacebuilding," 71.

<sup>70</sup> In early 2000, Rwandan President Pasteur Bizimungu resigned, noting his frustration over the authoritarian tendencies of the government. On current human rights violations, see Amnesty International, *Annual Report 2005*, on Rwanda. Available through URL: [www.amnesty.org/ailib/](http://www.amnesty.org/ailib/) (last accessed 6 Jan. 2006.)

<sup>71</sup> *Constitution of the Republic of South Africa*, Act. 200 of 1993, generally referred to as the Interim Constitution. This did not provide for the establishment of the 'Commission with the long name' as it is generally referred to in South Africa. The Final Constitution dates of 1996 (Act 106 of 1996) and provides for the establishment of all four institutions in Chapter 9 relating to state institutions supporting constitutional democracy. For this reason, the bodies are often referred to as 'Chapter 9 institutions.'

<sup>72</sup> *Human Rights Commission Act*, Act. No. 54 of 1999, 7 December 1994.

human rights issues in both the public and the private sectors. It can resolve disputes through conciliation, mediation and arbitration and has the power to bring court proceedings in its own name or on behalf of individuals, groups, and classes of persons.<sup>73</sup> Unique to the SAHRC's terms of reference is that the body must monitor, on an annual basis, state action to implement the economic, social and environmental rights contained in the Constitution.<sup>74</sup> Members of the Commission are appointed by the President following nomination by a joint committee of the Houses of Parliament and approved by the National Assembly and the Senate. They must be South African citizens and 'broadly representative of the South African community.'<sup>75</sup>

41. Since its inception in October 1995, the SAHRC has handled a large number of individual cases, undertaken many human rights education initiatives, and has conducted a number of public enquiries resulting in comprehensive reports with recommendations. Public enquiries have focused on diverse issues, such as human rights violations in the Khomani San community; violations in farming communities; racism in the media; cultural initiation programmes; sexual offences against children; racism and desegregation in secondary public schools; and road closures, security booms and other measures related to 'gated communities.' To fulfil its monitoring role with respect to economic, social and environmental rights, the SAHRC submits questionnaires to various spheres of government to obtain information about the policy, legislative, budgetary and other measures adopted to realise these rights, which is then compiled into reports.<sup>76</sup> In the course of its existence, the SAHRC has been both lauded and condemned for its actions. At times, concerns have been expressed about its independence from the executive and its willingness to take a position in politically sensitive matters, such as the government's response to the Aids pandemic.<sup>77</sup> The Commission has also experienced some internal division over matters of policy and management and it has been questioned whether the institution has a clear and coherent strategy for its work.
42. Like the SAHRC, the Office of the Public Protector was referred to in both the 1993 Interim Constitution and the 1996 Final Constitution. The Public Protector is "to investigate any conduct in state affairs, or in the public administration [...] that is alleged or suspected to be improper or to result in any impropriety or prejudice."<sup>78</sup> The office has jurisdiction over all levels of government including the police and parastatal companies, but cannot investigate court decisions or the private sector.<sup>79</sup> It has the power to report on misconduct and to take suitable remedial action. The PP can investigate abuse of power; unfair, capricious, discourteous or other improper conduct; undue delay by a public official; dishonesty or improper dealings with respect to public money; conduct of a public servant that results in unlawful or improper prejudice to another person; and improper enrichment.<sup>80</sup> Interestingly, the PP can also investigate violations of human rights in terms of its mandate, and considers

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<sup>73</sup> *Human Rights Commission Act*, Act. No. 54 of 1999, Art. 7-11.

<sup>74</sup> *Constitution of the Republic of South Africa*, Act. 108 of 1996 (Final Constitution), Ch. 9, Art. 184(3).

<sup>75</sup> *Constitution of the Republic of South Africa*, Act. 23 of 1993 (Interim Constitution), Ch. 8, Art. 115(3).

<sup>76</sup> Information drawn from the SAHRC website, at URL: [www.sahrc.org.za](http://www.sahrc.org.za) (last accessed 6 January 2006.)

<sup>77</sup> This relates in particular to a Constitutional Court case in which South African civil society organizations challenged the government's refusal to provide drugs to pregnant women to prevent mother-to-child transmission of the virus. Despite some speculation that the SAHRC might appear as *amicus curiae*, the Commission refrained from getting involved in the case. *Minister of Health and Others v. Treatment Action Campaign and Others*, Constitutional Court, CCT 8/02, 5 July 2002.

<sup>78</sup> *Constitution of the Republic of South Africa*, Act. 108 of 1996 (Final Constitution), Ch. 9, Art. 182(1).

<sup>79</sup> *Constitution of the Republic of South Africa*, Act. 108 of 1996 (Final Constitution), Ch. 9, Art. 182(1-3).

<sup>80</sup> *Public Protector Act*, Act. No. 23 of 1994, Art. 6(4)(a).

such violations by government to be covered by the concept of ‘improper prejudice.’<sup>81</sup> The PP is appointed by the President on the recommendation of the National Assembly for a non-renewable term of seven years.<sup>82</sup>

43. Recently, the Public Protector has been involved in a number of high profile and politically contentious cases. These have included, amongst others, a complaint by the Deputy President of South Africa against the National Director of Public Prosecutions and the National Prosecuting Authority<sup>83</sup> and a complaint about so-called ‘Oilgate,’ a large advance payment by a state-controlled company to a private company.<sup>84</sup> The Public Protector’s handling of these cases has been questioned, with his report on Oilgate being labelled a ‘whitewash.’<sup>85</sup> Much of the Public Protector’s ongoing work, however, takes place out of the limelight. In 2004, systemic investigations were conducted on social grants, maintenance matters, and protection of whistleblowers, while the office also enhanced its outreach in rural areas by establishing visiting points throughout the country and conducting clinics in all provinces.<sup>86</sup>
44. The multitude of statutory bodies in South Africa which people can approach with complaints has meant that the SAHRC and the Public Protector, together with the Commission on Gender Equality and other institutions, have had to negotiate the implementation of their respective mandates in relation to and consultation with one another.<sup>87</sup> Referrals between the institutions take place on a continuous basis. Occasionally, voices are heard advocating for a merger between national institutions, but this has received little attention so far.

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<sup>81</sup> See L. Reif, “Building Democratic Institutions,” 66.

<sup>82</sup> *Final Constitution of the Republic of South Africa*, Act. 108 of 1996, Ch. 9, Art. 183.

<sup>83</sup> The National Director of Public Prosecutions, Bulelani Ngcuka, had stated that there was *prima facie* evidence of the Deputy President’s involvement in corruption in a large arms acquisition programme approved by the Government of South Africa, but that he would not be prosecuted since the prospects of success ‘were not strong enough.’ See *Media statement*, 28 May 2004 at URL: [http://www.publicprotector.org/news/media\\_releases](http://www.publicprotector.org/news/media_releases).

<sup>84</sup> Concerns regarding this payment were that part of it was allegedly diverted to the ANC, and that the private company had ignored UN sanctions in seeking to buy crude oil from pre-war Iraq.

<sup>85</sup> Stefaans Brummer and Sam Sole, “Scopa hits out at Oilgate ‘irregularity,’” *Mail & Guardian*, 18 Nov. 2005, available at URL: <http://www.mg.co.za/>. See also [http://www.publicprotector.org/news/media\\_releases](http://www.publicprotector.org/news/media_releases), Media Statement, 29 July 2005, regarding report on so-called Oilgate investigation.

<sup>86</sup> Office of the Public Protector, *Annual Report*, 1 April 2004 – 31 March 2005, available through [http://www.publicprotector.org/report\\_and\\_publications/annual\\_report/public.pr](http://www.publicprotector.org/report_and_publications/annual_report/public.pr)

<sup>87</sup> Aside from the SAHRC, PP and CGE, South Africa also has a statutory body relating to labour matters (the Commission for Conciliation, Mediation and Arbitration, established in 1995); one focusing on the police, the Independents Complaints Directorate, set up in 1997 to investigate police brutality, criminality and misconduct; and one focusing on prison inspections so as to report on the treatment of prisoners and conditions in prisons, the Office of the Inspecting Judge (set up in 1998.).

45. As noted, the 1995 Dayton Peace Agreement provided for a Human Rights Ombudsman and a Human Rights Chamber which together comprised the Commission on Human Rights. Both were mandated protect the human rights set out in the European Convention on Human Rights and the fifteen international instruments that form an integral part of the Dayton Peace Agreement, and to investigate any alleged or apparent violations of rights set out in these instruments, as well as discrimination on any grounds.<sup>89</sup> The Human Rights Ombudsman was to fulfil an investigative role and issue findings and conclusions while the Human Rights Chamber was an adjudicating body. Unique to both institutions was the degree of international involvement for the first five years of the bodies' existence. The Agreement specified that the first Ombudsman was to be appointed by the Organisation for Security and Cooperation in Europe (OSCE) for a non-renewable term of five years and could not be a citizen of Bosnia-Herzegovina or any neighbouring state.<sup>90</sup> A similar construction applied to the Human Rights Chamber, where the Committee of Ministers of the Council of Europe was to appoint eight out of fourteen members.<sup>91</sup> The responsibility for the continued operation of the Human Rights Commission would transfer to Bosnia-Herzegovina five years after the Peace Agreement.<sup>92</sup>
46. The current terms of reference for the Human Rights Ombudsman are contained in national legislation that came into force on 3 January 2001 and define the body as "an independent institution set up in order to promote good governance and the rule of law and to protect the rights and liberties of natural and legal persons."<sup>93</sup> The institution considers cases relating to the poor functioning of any government body, or violations of human rights and liberties committed by such bodies, and can do so at its own initiative or upon receipt of a complaint. It has the power to investigate all complaints of violations allegedly committed by the military administration and all those concerning poor functioning of the judicial system or poor administration of an individual case. It cannot interfere with the adjudicative functions of a court, but may initiate court proceedings and intervene in pending proceedings.<sup>94</sup> Interestingly, the mandate no longer contains a provision that the institution must prioritise especially severe or systemic violations of human rights (as included in the Dayton Peace

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<sup>88</sup> This section focuses primarily on the Human Rights Ombudsman of Bosnia and Herzegovina, since the Human Rights Chamber and its successor, the Human Rights Commission, are not national institutions but judicial bodies. The Human Rights Chamber's mandate ended on 31 December 2003 and was succeeded by the Human Rights Commission, which was created in terms of an agreement between the parties pursuant to Article XIV of Annex 6 of the Dayton Peace Agreement, entered into on 22 and 25 September 2003 and in January 2005. The Commission, located within the Constitutional Court of Bosnia-Herzegovina, is only authorized to resolve pending cases registered with the Human Rights Chamber on or before 31 December 2003 and cannot take on any new matters. For information on the Human Rights Commission, see URL: [www.hrc.ba/](http://www.hrc.ba/) (last visited 6 January 2006.)

<sup>89</sup> *Dayton Peace Agreement*, 14 December 1995,

<sup>90</sup> *Dayton Peace Agreement*, Annex 6 Art. II; Art. IV. A former Ombudsman from Sweden, Frank Norton, was appointed to the post. It seems that a similar construction has been used for the Ombudsperson Institution in Kosovo, where the first Ombudsperson is a Polish lawyer, Marek Nowicki, appointed by the international Interim Administration. In contrast, the Timor Leste *Provedor* and his two deputies are all Timorese.

<sup>91</sup> *Dayton Peace Agreement*, Annex 6 Art. VII.

<sup>92</sup> *Dayton Peace Agreement*, Annex 6 Art. XIV: "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree."

<sup>93</sup> *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*, 3 January 2001 (on file with author.) See also URL: <http://www.ohro.ba/> for brief explanation of the Ombudsman's legal basis.

<sup>94</sup> *Law on the Human Rights Ombudsman*, Art. 2-4.

Agreement.)<sup>95</sup> While its findings and recommendations are not binding, the institution may refer cases of alleged human rights violations to the highest judicial authorities in Bosnia and Herzegovina.<sup>96</sup> The institution is composed of three ombudsmen, who have human rights experience and of recognised and high moral standing, and are appointed by the House of Representatives and the House of Peoples of Bosnia and Herzegovina.

47. The Human Rights Ombudsman has competence to look at cases involving government bodies of Bosnia and Herzegovina, its entities and the District of Brcko. Complaints can be submitted against any public authority in Bosnia and Herzegovina. The body deals with a wide range of matters, such as employment and labour issues (including pensions); problems of the mentally ill and invalids; issuing of documents; police affairs and prisons; delays in judicial proceedings; education (including enrolment and tuition); freedom of religion; freedom of information and other administrative matters.<sup>97</sup> It makes recommendations to authorities about measures to be taken to rectify violations of human rights and cases of maladministration that have been proven. Government bodies must provide the national institution with 'preferential assistance'.<sup>98</sup> They must also inform the Ombudsman of compliance with recommendations made within a certain time period set by the institution, and if such compliance is not forthcoming, the Ombudsman can approach the Minister overseeing the specific government body.<sup>99</sup>

#### *Guatemala*

48. The Counsel for Human Rights or Human Rights Ombudsman (*Procurador de los Derechos Humanos*, PDH) in Guatemala does not originate from a peace agreement, but was established by the 1985 Constitution. The institution promotes the adequate functioning of government administration in matters of human rights; investigates and denounces administrative behaviour detrimental to a person's interests; and investigates complaints of human rights violations. Its powers include those of investigation, making recommendations, issuing public reprimands for unconstitutional acts, and promoting judicial or administrative actions or appeals. It can investigate complaints of human rights violations against private persons and has an educational function.<sup>100</sup> The Ombudsman is appointed for a five year term by Congress. Prior to the end of the civil war, the PDH was credited with positively impacting on the human rights situation in Guatemala, even if only to a limited extent given the difficult circumstances in which it was operating. It helped to contain the government's behaviour on matters of human rights, opened up space for the emergence of local human

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<sup>95</sup> In the absence of insider accounts, it is only possible to speculate as to why no such provision is included in the current mandate of the Human Rights Ombudsman. Possible reasons may be: it was no longer considered necessary, given that the war had been over for some time; it was assumed that systemic violations could or would not occur any longer in present-day Bosnia-Herzegovina; the original provision had little impact on the institution's practices and activities in the first five years of its existence, and therefore was not deemed relevant to include in the later mandate; etc.

<sup>96</sup> *Law on the Human Rights Ombudsman*, Art. 5-6. While the operations of the institution were still regulated by the Dayton Peace Agreement, the Ombudsman could approach the OSCE High Representative in case of non-compliance with his recommendations, or could initiate proceedings in the Human Rights Chamber. See *Dayton Peace Agreement*, Annex 6, Art. V(7).

<sup>97</sup> Homepage, Human Rights Ombudsman of Bosnia and Herzegovina, at URL: <http://www.ohro.ba/> (last visited 6 Jan. 2006.)

<sup>98</sup> *Law on the Human Rights Ombudsman*, VII, Art. 25(1).

<sup>99</sup> *Law on the Human Rights Ombudsman*, X, Art. 32(1-2).

<sup>100</sup> L. Reif, "Building Democratic Institutions," 51-52; *Ley de La Comision De Los Derechos Humanos Del Congreso De La Republica Y Del Procurador De Los Derechos Humanos*, Decrees 54-86 and 32-87 of the Congress of the Republic of Guatemala (on file with author.)

rights organisations and condemned public bodies for involvement in human rights violations.<sup>101</sup>

49. The Comprehensive Agreement on Human Rights, annexed to the 1996 Agreement for a Firm and Lasting Peace, committed the Government of Guatemala to “continue to support the [Counsel’s] work so as to strengthen the institution,” and promote law reform to help the Counsel carry out his functions more effectively. It was also to support initiatives meant to improve the “technical and material conditions available” to the institution in carrying out its tasks of investigation and monitoring.<sup>102</sup> As noted earlier, two additional roles were assigned to the institution: investigating whether participation in paramilitary structures, the civil defence committees, was voluntary and including information on the scope and contents of the Agreement in its work.<sup>103</sup> Both tasks were mentioned in a section focusing on guarantees regarding freedom of movement and freedom of association. The Agreement also acknowledged that “international verification must contribute to strengthening the permanent constitutional mechanisms [...] for the protection of human rights.”<sup>104</sup> To this end, the mission could co-operate with national institutions, carry out institution-building activities, offer its support to the Counsel for Human Rights and other bodies, and promote international technical and financial assistance to strengthen the capacity of the Counsel.
50. Despite these latter provisions, the relationship between the United Nations Verification Mission in Guatemala (MINUGUA) and the PDH was not without difficulty.<sup>105</sup> The Counsel felt that international verification undermined its legitimacy and authority and that the international resources spent on the mission should rather have been used to strengthen the Ombudsman’s office. Formal collaboration was therefore relatively limited, though sharing of information and investigation strategies took place informally at the field level. MINUGUA lobbied for increased financial support for the PDH throughout its existence. Towards the end of the mission’s presence in Guatemala, formal agreements between MINUGUA and the PDH resulted in an extensive training programme to enhance the skills of PDH staff for human rights verification as well as other technical assistance. The Counsel had certainly increased in strength and efficacy by the time the UN mission came to an end, but it is unclear to what extent this can be contributed to the UN.
51. Overall, the PDH has experienced serious challenges in carrying out its human rights mandate effectively. It suffers from a consistent lack of funds and staff members have been subject to intimidation and physical attacks. Other impediments have been the sorry state of Guatemala’s judicial system and tendencies amongst other state organs to disregard the body’s autonomy.<sup>106</sup> Nevertheless, the number of complaints received has remained consistently high over the last few years, indicating a certain level of popular legitimacy.<sup>107</sup> In the course of 2004, the Ombudsman’s office was involved in a range of activities aside from

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<sup>101</sup> L. Reif, “Building Democratic Institutions,” 52.

<sup>102</sup> *Comprehensive Agreement on Human Rights*, II Art. 3.

<sup>103</sup> *Comprehensive Agreement on Human Rights*, V Art.2-8.

<sup>104</sup> *Comprehensive Agreement on Human Rights*, Ch. X Art. 16.

<sup>105</sup> This paragraph draws on Marcie Mersky, “Guatemala,” research paper for ICHRP project, ‘The Role of Human Rights in Peace Agreements,’ 2005, par. 59-61.

<sup>106</sup> Ugglá, “The Ombudsman,” 435-444. On the judicial system, see also Reif, “Building Democratic Institutions,” 54; and William Stanley and David Holiday, “Broad Participation, Diffuse Responsibility: Peace Implementation in Guatemala,” in Stedman et al, *Ending Civil Wars*: 421-462. On attacks on PDH staff, see for example Amnesty International, “Guatemala: Assassination/Fear for Safety Members of the Human Rights Ombudsman’s Office in the Department of Chimaltenango,” 13 June 2003, AI Index: AMR 34/035/2003; available through AI website, URL: <http://web.amnesty.org/library> (last visited 6 Jan. 2006.)

<sup>107</sup> Ugglá, “The Ombudsman,” 438.

investigating individual complaints. It worked with the military to develop human rights training courses; got access to all files from the now-defunct Presidential Military Staff and copied thousands of documents for future analysis on disappeared children and the operations of the military during the civil war; and organised a 'March against Violence' together with the Catholic Church in which some 5,000 people took part.<sup>108</sup>

### *Northern Ireland*

52. The 1998 Good Friday Agreement provided for the creation of two national human rights institutions in Northern Ireland, a Human Rights Commission and an Equality Commission. The Agreement stipulated that the membership of the HRC was to reflect 'the community balance,' and that its functions would include "keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."<sup>109</sup> The Commission was also tasked with advising on a Bill of Rights that would reflect the Northern Ireland context.<sup>110</sup> The Agreement tasked the Equality Commission with advising, validating and monitoring the statutory obligation (to promote equality of opportunity) and with investigating complaints.<sup>111</sup>
53. Both national institutions were subsequently established under the Northern Ireland Act 1998 which sets out their functions and powers. Aside from the functions mentioned above, the Northern Ireland Human Rights Commission (NIHRC) is to advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures necessary to protect human rights; conduct investigations; and publish its advice and the outcome of its research and investigations. (It is noteworthy however that the Act does not grant the NIHRC any formal powers to support its investigation mandate, such as the power compel individuals to talk to the Commission or to produce documentation; moreover, the Act does not specify whether the NIHRC has a mandate to investigate allegations of human rights violations.) The NIHRC can assist individuals in court proceedings on three grounds, namely when the case raises a question of principle; it is very complex; or other special circumstances.<sup>112</sup> The Commission was also expected to make recommendations to the Secretary of State on its effectiveness and how it could be improved, at the end of two years.<sup>113</sup> Appointment to the Commission is made by the executive, the Secretary of State, who must ensure that the Commissioners as a group are representative of the Northern Ireland community.<sup>114</sup>
54. A recent, in-depth study of the NIHRC comes to a mixed conclusion about the body's performance in the first five years of its existence. It finds that the Commission's work "has demonstrated the value of a human rights commission in Northern Ireland. However, it has not proved as effective as many hoped it would and is struggling to make a significant impact on the promotion and, in particular, the protection of human rights in Northern Ireland. It is

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<sup>108</sup> US Department of State, *Country Report on Human Rights Practices 2004. Guatemala*, Bureau of Democracy, Human Rights and Labour, 28 February 2008; at URL: [www.state.gov/aboutstate](http://www.state.gov/aboutstate) (last visited 7 Jan. 2006.)

<sup>109</sup> *Good Friday Agreement*, 10 April 1998, Strand III, Rights, Safeguards and Equality of Opportunity, par. 5.

<sup>110</sup> *Good Friday Agreement*, 10 April 1998, Strand III, Rights, Safeguards and Equality of Opportunity par. 4.

<sup>111</sup> *Good Friday Agreement*, 10 April 1998, Strand III, Rights, Safeguards and Equality of Opportunity par. 6.

<sup>112</sup> *Northern Ireland Act 1998*, section 70(2).

<sup>113</sup> *Northern Ireland Act 1998*, section 69(2).

<sup>114</sup> *Northern Ireland Act 1998*, section 68.

an organisation which has demonstrated significant industry and can claim some successes. However these are overshadowed by its problems.”<sup>115</sup> These problems relate to both the external context in which the Commission has had to operate – which has been highly politicised since the Agreement was concluded – and its internal functioning and operations. Externally, the Commission’s work has been impeded by limited support from the government, manifested in insufficient funding, little consultation, and a low level of compliance with the Commission’s recommendations.<sup>116</sup> Internally, the NIHRC has suffered from a weak organisational structure, a failure to develop a clear strategy for its work and, most importantly, divisions amongst the Commissioners. The process to consult on a Bill of Rights proved especially divisive, with members disagreeing on both its substance and the process by which it should be achieved.<sup>117</sup>

55. Nevertheless, the study notes some achievements of the NIHRC. Its report on juvenile justice and children in custody is considered “an excellent example of what investigation powers can achieve.”<sup>118</sup> The Commission has also produced thorough reports on other topics which have generally been well received; these have included reports on the use of plastic bullets and baton rounds; imprisonment of women; the rights of young gay and lesbian people; and mental health issues and human rights. In some instances, such reports have had concrete results: for example, one juvenile justice centre was closed down, and the police revised its training on human rights offered to its students following a review report by the NIHRC. The Commission has also been very active in commenting on legislation and policies, and its work with other organisations in developing and conducting training and education on human rights has been commended.<sup>119</sup>

#### *Sierra Leone*

56. The 1998 Lomé Peace Agreement for Sierra Leone provided for the establishment of a national Human Rights Commission (HRC) so as to “strengthen the existing machinery for addressing grievances of the people in respect of alleged violations of their human rights.” The autonomous quasi-judicial body was to be established “as a matter of urgency” and “not later than 90 days after the signing of the present Agreement.”<sup>120</sup> The same article also contained a pledge from the parties to promote human rights education throughout the country; acknowledged that technical and material assistance may be sought from the UN High Commissioner for Human Rights, the African Commission on Human and People’s Rights and other international institutions; and indicated that a “consortium of local human rights and civil society groups [...] shall be encouraged to help monitor human rights observance.”<sup>121</sup>

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<sup>115</sup> Stephen Livingstone and Rachel Murray, *Evaluating the Effectiveness of National Human Rights Institutions: the Northern Ireland Human Rights Commission with comparisons from South Africa*. University of Bristol and Queen’s University Belfast 2005: 130.

<sup>116</sup> Lack of funding and low compliance rate were already noted in the Commission’s 2001 report reviewing its own effectiveness in line with its statutory obligations. See Northern Ireland Human Rights Commission, *Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act 1998*. Belfast: NIHRC Feb 2001; available from NIHRC website, URL: [www.nihrc.org](http://www.nihrc.org).

<sup>117</sup> Livingstone and Murray, “Evaluating the Effectiveness,” 130.

<sup>118</sup> Livingstone and Murray, “Evaluating the Effectiveness,” 85. “The work yielded a detailed report which produced new information, analysed law and practice with regard to international standards and offered a detailed set of recommendations which have informed the Commission’s subsequent work in the field.”

<sup>119</sup> Livingstone and Murray, “Evaluating the Effectiveness,” Ch. 4 (Exercise of Powers): pp. 81-112.

<sup>120</sup> *Lomé Peace Agreement*, 7 July 1998, Lomé, Part 5 Art. XXV(1), URL: [www.usip.org/library/pa](http://www.usip.org/library/pa) (visited 6 Jan. 2006.)

<sup>121</sup> *Idem*, Art. XXV(2-4.)

57. Despite the urgency noted in the Agreement, it took until August 2004 before the Parliament of Sierra Leone adopted legislation for the Human Rights Commission. The Act, developed with involvement of local non-governmental organisations, sets down a strong mandate for the Commission. The body is to investigate complaints regarding alleged human rights violations and to promote respect for human rights (through conducting education programmes, disseminating information, publishing guidelines explaining the obligations of public officials, and effective co-operation with non-governmental organisations and other public interest bodies.) It must review existing legislation and is to advise government on compliance with international treaties; draft legislation that may affect human rights; and preparation of reports to treaty bodies. The Commission shall also monitor and document violations of human rights in Sierra Leone and publish an annual report on the state of human rights in the country.<sup>122</sup>
58. The institution will have an impressive array of powers at its disposal to fulfil its functions, comparable to the “powers, rights and privileges as are vested in the High Court of Justice.”<sup>123</sup> These include the power to subpoena witnesses and examine them under oath or affirmation; to compel evidence; and to issue orders to enforce its decisions. The Commission is also empowered to refer any person who refuses to comply with its decisions to the High Court, and has access to all government offices, facilities and places of detention.<sup>124</sup> In addition, it can recommend payment of compensation and award legal cost, and can intervene in court proceedings by issuing *amicus curiae* briefs.<sup>125</sup> The institution has no jurisdiction over matters pending before court (or already decided by court) or violations that occurred before the Act came into force.<sup>126</sup> Members of the HRC will have to have “a proven record of respect for, and interest in human rights,” and be selected by the President from a short-list compiled by a selection panel dominated by civil society organisations. The panel must consider equitable gender and regional representation in selecting persons for appointment.<sup>127</sup>
59. Unfortunately, however, the Commission’s strong mandate has been of little value so far since the HRC has yet to be established at the time of writing (January 2006.) This may be due to a number of factors. In the period after the signing of the agreement, much attention was devoted to the creation of the Truth and Reconciliation Commission and the Special Court. Both the international community and local human rights organisations focused their efforts and resources on developing these mechanisms for accountability and facilitating their effective functioning. Moreover, the situation on the ground deteriorated again in 1999 and 2000, which meant that ongoing monitoring of human rights violations was a high priority for the UN human rights division and local NGOs and little time was available for working towards the establishment of the Human Rights Commission.
60. The most important factor, however, has probably been a lack of commitment on the part of the Sierra Leonean government. Three months after the HRC legislation was passed in

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<sup>122</sup> *The Human Rights Commission of Sierra Leone Act*, Act. No. 9 2004, 26 August 2004, Part III Art. 7. Legislation available from Sierra Leone Web, at URL: [www.sierra-leone.org/](http://www.sierra-leone.org/) (last visited 6 Jan. 2006.)

<sup>123</sup> *The HRCSL Act*, Part III Art. 8.

<sup>124</sup> *The HRCSL Act*, Part III Art. 8-9.

<sup>125</sup> *The HRCSL Act*, Part III Art. 11-12.

<sup>126</sup> *The HRCSL Act*, Part III Art. 16.

<sup>127</sup> *The HRCSL Act*, Section 3(1). The selection panel will comprise one representative from the government and from a number of umbrella organizations: the Inter-Religious Council; the National Forum for Human Rights; the Civil Society Movement; the Council of Paramount Chiefs; the Sierra Leone’s Women’s Forum and the Sierra Leone Labour Congress.

August 2004, the government had done little to implement it. When questioned about this, the Minister of Justice claimed that the government ‘was waiting for the TRC report’ before it did anything on the Human Rights Commission, and that a White Paper was being prepared of which a draft would be tabled for discussion in Parliament in November 2004. Implementation of the HRC bill would only take place once this White Paper would have been published; nevertheless, ‘consultations’ would still start in 2004.<sup>128</sup> Yet neither of these seems to have happened in the course of 2005, and no commissioners have been appointed. At this point, it is not clear whether a strong lobby is developing within local civil society to press for the establishment of the national institution.

### *Afghanistan*

61. The Afghanistan Independent Human Rights Commission (AIHRC) was established pursuant to the 2001 Bonn Agreement, which provided that “the Interim Administration shall, with the assistance of the United Nations, establish an Independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions.”<sup>129</sup> The Commission started operating in June 2002 on the basis of a Presidential Decree establishing the body for an initial period of two years.<sup>130</sup> With the adoption of a new Constitution for Afghanistan by the Loya Jirgah (the Afghan Grand Assembly) on 7 January 2004, the institution became constitutionally entrenched: Article 58 provide for the Commission’s establishment “for the purpose of monitoring the observation of human rights in Afghanistan, to promote their advancement and protection.”<sup>131</sup> Supplementary legislation on the structure, duties and mandate of the AIHRC was subsequently adopted on 14 May 2005.<sup>132</sup>
62. In terms of the Presidential Decree that regulated the Commission’s existence for the first two years, the body was tasked with developing a national action plan for human rights; human rights monitoring throughout the country; investigation of (alleged) human rights violations (on receipt of complaints or at its own initiative); developing and implementing a national programme of human rights education (including integrating human rights in curricula at all levels and in the mass media); undertaking of national human rights consultations (including one on transitional justice leading to a proposal on a national strategy for addressing past abuses); and making recommendations for building and strengthening national human rights capacities and institutions. It could settle cases through amicable settlement; informing complainants of their rights and available remedies; referring them to courts; and making recommendations to the authorities for remedial legal and

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<sup>128</sup> Interview with Francis Carew, Minister of Justice and Attorney-General, 8 Nov. 2004, Freetown, by Gregory Mthembu-Salter; as quoted in Mthembu-Salter, “The Old is Dying and the New Has Not Been Born: the National Commission for Democracy and Human Rights in Sierra Leone,” in Michelle Parlevliet, Guy Lamb, and Victoria Maloka (eds.) *Defenders of Human Rights, Managers of Conflict, Builders of Peace? National Human Rights Institutions in Africa* (forthcoming): pp. 74-96. The link drawn with the TRC report seems disingenuous given that no such link exists in the Peace Agreement.

<sup>129</sup> *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, 5 Dec. 2001, Bonn, Germany (Bonn Agreement): III.C.6; URL: [www.unama.afg.org/docs](http://www.unama.afg.org/docs) (last accessed 7 Jan. 2006.)

<sup>130</sup> *Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission*, 6 June 2002 (on file with author.)

<sup>131</sup> *Constitution of the Islamic Republic of Afghanistan*, Art. 58, at URL: [www.afghansite.com/afghanistan/afghanConstitution.asp](http://www.afghansite.com/afghanistan/afghanConstitution.asp) (last accessed 7 Jan. 2006.)

<sup>132</sup> *Law on the Structure, Duties and Mandate of the AIHRC*, No. 3471, 24/02/1384 (14 May 2005), at URL: [www.aihrc.org.af/law\\_af\\_aihrc.pdf](http://www.aihrc.org.af/law_af_aihrc.pdf) (last accessed 7 Jan. 2006.)

administrative reform. It had the power to hear witnesses under oath or affirmation; subpoena persons to appear before the Commission and give testimony; and to compel evidence.<sup>133</sup>

63. There are some intriguing differences between these initial terms of reference and the institution's current mandate as contained in the 2005 legislation. While its functions are more or less the same, the body's powers are notably weaker. For example, the body has no longer the three powers mentioned above; instead, it has the 'power to collect evidence' in terms of which "the Commission may request individuals or relevant responsible individuals to provide documents and testimonies."<sup>134</sup> Less provision is also made for ensuring the institution's pluralistic and representative character. While the Presidential Decree stipulated that the membership of the AIHRC will be drawn from the "principal ethnic and religious groups," and from "Afghan refugees and internally displaced communities," no such condition is included in the 2005 legislation. Similarly, it was noted in the Decree that the Commission will give due regard to "the need to ensure gender sensitivity and physical, social, cultural and linguistic accessibility" in its own rules and procedures;<sup>135</sup> this is no longer part of the terms of reference. Another difference is that the current mandate does not explicitly provide for activities related to transitional justice, probably because the Commission had already concluded its national consultation on the issue by the time the legislation was prepared.
64. In a few respects however the current terms of reference are more extensive than the initial ones. It specifies that "equal and fair access to social welfare and other services provided by the state are also considered human rights of the citizens."<sup>136</sup> This emphasis on social and economic rights is further enhanced by a provision that the Commission must monitor the performance of state authorities and NGOs concerning the "fair and accessible distribution of services and welfare."<sup>137</sup> The institution also has the duty to research effective ways of harmonising international human rights principles and mechanisms with Afghan culture and traditions, and making recommendations in this regard.<sup>138</sup> Finally, visiting detention centres to monitor the treatment of prisoners is now included explicitly in the mandate, as is the duty to "[plan] and [implement] programmes that include the investigation of crimes and human rights abuses as part of the transitional process."<sup>139</sup>
65. The reasons for these differences are not entirely clear. Nor does it not necessarily matter, provided that the Commission can maintain the credibility it has gained since its establishment and keep up its performance. It has opened seven regional offices throughout the country and has consulted with the Judicial Reform Commission and the Constitutional Commission to ensure that the new Constitution and domestic legislation reflects human rights standards and principles. It collaborates with the Justice Ministry to improve the living conditions of prisoners; with the Ministry of Interior to integrate human rights in the curriculum of the Police Academy; and with the High Court in relation to the many complaints received by the AIHRC about inadequate authority and performance of the courts. It chairs the Human Rights Advisory Group, which is a monthly forum for

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<sup>133</sup> *Decree of the Presidency*, Art. 2, 9-11.

<sup>134</sup> *AIHRC Law*, Art. 24. The Commission may also demand "officials to explain the causes of non-observance of human rights principles" - Art. 21(25).

<sup>135</sup> *Decree of the Presidency*, Art. 10.

<sup>136</sup> *AIHRC Law*, Art. 4.

<sup>137</sup> *AIHRC Law*, Art. 21(4).

<sup>138</sup> *AIHRC Law*, Art. 21(16).

<sup>139</sup> *AIHRC Law*, Art. 21(4) and 21(12).

representatives of the government, the donor community, the UN and NGOs, and serves to co-ordinate broader human rights issues. The Commission currently works on five national programmes, namely monitoring and investigation of human rights abuses; protection and promotion of women's rights; protection and promotion of children's rights; human rights education; and transitional justice. In the course of 2003 and 2004, the AIHRC undertook its national consultation on transitional justice drawing in more than 6,000 Afghans throughout the entire country and leading to an extensive report, 'A Call for Justice.'<sup>140</sup> This consultation will be further commented on below.

## 6. Contextual Constraints

66. The above review of institutions referred to in peace agreements highlights that their establishment and functioning is not without difficulty. Many of the problems experienced relate to or stem from the transitional environment in which the institutions are set up and/or are operating in. It is generally still highly conflictual. Parties continue to fight for their interests, aspirations, and agendas after the signing of a peace agreement; they just use different means, by and large political rather than military. As some put it, "post-war politics is a continuation of the conflict, albeit transmuted into non-military mode," calling this phenomenon 'Clausewitz in reverse.'<sup>141</sup> Thus, the post-settlement environment is not necessarily post-conflict; at best, it is post-*violent* conflict. Concluding a peace agreement does not miraculously solve a conflict that has been as protracted as the ones giving rise to the agreements studied for this project. Agreements seek to end the direct, physical violence and outline what must be done to address the underlying factors and conditions causing the violent conflict. As Ball points out, "peace agreements provide a framework for ending hostilities and a guide to the initial stages of (postconflict) reform. They do not create conditions under which the deep cleavages that produced the war are automatically surmounted."<sup>142</sup>
67. The implications of the politicised and conflictual nature of the post-settlement context will differ from case to case. In some, it may mean that parties are inclined to re-negotiate aspects of the agreement in the implementation phase; this is especially likely where the agreement has left many important issues unresolved. This may result in the national institution being only granted limited powers to fulfil its mandate, or having to operate in an unsupportive or even hostile environment. In fact, the human rights issues that an institution has to engage with can be very divisive in themselves for they touch on questions of accountability and governance. Tension around sensitive issues may not only exist outside but also inside the institution. Especially when it has a pluralistic membership, a national institution is a microcosm of the larger society. It may thus grapple with the same issues that are divisive externally, which can lead to internal polarisation and lack of agreement on core issues.

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<sup>140</sup> Afghanistan Independent Human Rights Commission, *A Call for Justice. A National Consultation on Past Human Rights Violations in Afghanistan*. (Kabul: AIHRC 2004). Available at URL: [www.aihrc.org](http://www.aihrc.org).

<sup>141</sup> Hugh Miall, Oliver Ramsbotham, and Tom Woodhouse, *Contemporary Conflict Resolution*. (Cambridge: Polity Press 1999): 189. In the same vein, Michael Doyle points out that "signing a [peace agreement] does not end political bargaining. After the parties agree to the creation of a peace keeping operation, they continue to compete for advantage. The agreement becomes, as do so many other constitutional texts, an agreement to struggle." See Michael W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder: Lynne Rienner Publishers 1995): 66.

<sup>142</sup> Nicole Ball, "The challenge of rebuilding war-torn societies." In Crocker and Hampson (eds). *Managing Global Chaos: Sources of and Responses to International Conflict*. (Washington DC: United States Institute of Peace 1996): pp. 607-22: 619. Brackets around 'postconflict' added by author in light of argument made in this section between post-conflict and post-settlement; Ball equates the two.

These factors have all been present in Northern Ireland, and served as significant constraints on the functioning of the new NIHRC.<sup>143</sup> Elsewhere, the threat of violence may remain after the signing of an agreement as parties continue to jockey for position and try to force their hand by resorting to violence once more. This has for example been the case in Sierra Leone, Bosnia-Herzegovina, and Afghanistan. Ongoing outbursts of violence, even if only sporadically, are not conducive to the establishment and effective functioning of a national institution. Staff members may be caught in cross fire or may directly be targeted themselves.<sup>144</sup>

68. Of course, no two cases are the same and the differences between those reviewed here are vast. In some instances conditions may well be more favourable; South Africa is a case in point. Still, peace processes and agreements tend to redefine power relationships. As a result, some level of politicisation and proneness to conflict is usually built into the post-settlement environment.<sup>145</sup> Another feature of this context is that there are generally many different imperatives. Establishing a national institution is just one of them – and not necessarily a very pressing one in the eyes of those responsible for maintaining a fragile peace and implementing an agreement. More pressing concerns may relate to demobilisation and disarmament; re-integration of former combatants; resettlement of internally displaced persons; restoring essential infrastructure and facilitating delivery of basic services; getting the police to function in an acceptable way; containing organised crime and warlordism; reforming the judiciary, etc. With the wide range of tasks at hand, there may be little attention and resources available for a national institution. It may also have to compete for funding and staff with other bodies provided for in the peace agreement, as was the case in Sierra Leone.
69. Moreover, a national institution – whether new or previously established – may have to function in an environment that is not only highly charged but also lacks the infrastructure that would complement it in other circumstances. In particular, organs of state such as the judiciary and the police may be defunct or seriously de-legitimised in the eyes of the population because of corruption, involvement in human rights violations, or turning a blind eye. This means that human rights protection and promotion by a national institution have great potential utility given that other institutions are unlikely to be responsive or to deliver on matters of justice and human rights.<sup>146</sup> Yet it has also been suggested that national institutions will find it hard to function effectively “in states that do not have some minimum level of democratic governance.”<sup>147</sup> For example, Putnam notes that Ombudsman in Guatemala only really began to operate once security had improved, civil society had started working again, and institutions such as the reformed judiciary and police had begun to

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<sup>143</sup> See, for example, Livingstone and Murray, *Evaluating the Effectiveness*, 69, 116; they note that the issues that were particularly divisive amongst Commissioners were also most closely related to the political conflict in Northern Ireland, such as non-state abuses, allegations of collusion, parades, victims, and the Bill of Rights. See also Fionnuala Ní Aoláin and Maggie Beirne, “Rights after the Revolution: Progress or Backslide After the Good Friday Agreement,” in Eileen Babbitt & Ellen Lutz, *Human Rights and Conflict Resolution in Context: Case Studies from Colombia, Sierra Leone and Northern Ireland* (forthcoming 2005.)

<sup>144</sup> See for example AIHRC, *A Call for Justice*, 6.

<sup>145</sup> For example, in the case of Rwanda it has been suggested that a primary reason for the failure of the 1993 agreement was the fact that “the agreement challenged the dominant ethnic basis of power without creating a solid alternative in the short term, thus causing an extremist reaction.” See Khadiagala, “Implementing the Arusha Peace Agreement,” 463.

<sup>146</sup> Reif, “Building Democratic Institutions,” 54.

<sup>147</sup> Reif, “Building Democratic Institutions,” 24; see also ICHRP, *Performance and Legitimacy*, 106. It must be noted that some have disputed the notion that a certain level of democracy is necessary for national institutions to operate effectively. See Okafor and Agbakwa, “On Legalism,” 677-679.

function.<sup>148</sup> Indeed, investigating complaints of human rights violations, making recommendations to authorities, assisting victims in seeking redress and referring cases to court makes especially sense when other state institutions are relatively functional and can play their part. This then is a paradox of the post-settlement context: where this functionality does not exist, national institutions may be particularly valuable and useful yet are also hindered in delivering on (aspects of) their mandate.

70. The state-sponsored nature of a national institution can be both an asset and a liability in the post-settlement context and beyond. It is the former in that it provides the institution with a certain status and access to funding, at least in principle. As a state body, its establishment may serve to highlight a break with the past and can signal government's desire to establish the rule of law and protect human rights; in that sense a national institution can also help to re-build public trust in the state. At the same time, its nature opens it up to political manipulation and obstruction – whether in the form of getting insufficient funding or in who is appointed to serve on the institution. Especially when those previously dominant still hold significant political control once a settlement has been reached, it is unlikely that people in leadership positions will be keen to enable a national institution to the fullest extent possible, given the fact that it may well subject their actions to scrutiny. Thus, for example, the first Salvadoran appointed as the Human Rights Ombudsman was a former Minister of Labour without any human rights experience, despite the fact that the legislation stipulates that the candidate must have knowledge of human rights. All institutions reviewed here have been chronically under-funded, which may reflect genuinely limited state budgets, a desire to restrain the institution's capacity from the outset, or both. International support for a national institution can serve as a counterweight to direct and more subtle attempts by the state to undermine the body, but this carries its own dilemmas. Such support is also unlikely to be infinite.
71. This suggests a last feature of the post-settlement context to be highlighted here: international support for a national institution and the possible presence of an international verification or assistance mission that must coexist with the institution. It has been suggested that “one of the biggest obstacles” for institutions created through peace agreements is that “people will not feel any sense of ownership over such an institution, since it is either the product of negotiations between warring parties or, possibly worse, a solution formulated by the international community.”<sup>149</sup> The cases of El Salvador and Guatemala moreover illustrate that the relationship between an international mission and a national institution can be complicated. (The fact that fewer issues appear to have arisen in Bosnia-Herzegovina is probably due to the overall dominance of the international presence, including in the national institution itself.) Various concerns may be at play for the national institution, including a fear of being overshadowed; a desire to prove its own competency and self-sufficiency and/or to secure a place in the domestic landscape as the primary human rights actor; frustration about the resources allocated to the mission as compared to its own feeble financial base; wanting to benefit from these resources; and an awareness that the mission may have skills and expertise that the institution itself lacks. A close association with international actors may also open the institution up to claims or accusations by powerful national actors that it is pursuing a foreign, imperialist agenda.<sup>150</sup> At the same time, the international mission (or its human rights division) will be dealing with its own set of

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<sup>148</sup> Tonya Putnam, “Human Rights and Sustainable Peace,” in Stedman et al, *Ending Civil Wars*: pp. 237-271: 248.

<sup>149</sup> ICHRP, *Performance and Legitimacy*, 107.

<sup>150</sup> Guy Lamb, Michelle Parlevliet and Victoria Maloka, “Conclusion,” in Parlevliet, Lamb and Maloka (eds.) *Managers of Conflict*, 137-149: 145-146.

interests and wide range of tasks and must strike a balance between institution-building and human rights monitoring and investigation while avoiding feeding into the high level of politicisation and creating dependencies.

72. When considering the constraints intrinsic to the post-settlement context, it may be surprising that national institutions referenced in peace agreements actually *do* get established and start functioning. This suggests that such constraints are not necessarily insurmountable. For example, the Afghanistan Independent Human Rights Commission has established a strong and collaborative relationship with UNAMA, the UN Assistance Mission in Afghanistan. The two bodies have undertaken a range of joint activities and communication appears to have been constructive and regular from the outset. The issue of ownership can be mitigated as well, for example through the individuals that are appointed to the new national institution. Most institutions reviewed here have grounded themselves solidly in the domestic context, and seem to be regarded a fully-fledged part of the national state infrastructure. Advantages and disadvantages associated with their state-sponsored nature are inherent to national human rights institutions and as such not exclusive to those established through peace agreements. In fact, this feature is often a double-edged sword in other respects as well, related to the unique position of national institutions in being located between civil society and the state's executive. Such bodies may be loath to alienate government for fear of jeopardising political patronage and funding, but they also need to establish and maintain credibility in the eyes of civil society, the general public, and others. In general, therefore, national institutions have to balance activism and political acumen in their efforts to protect and promote human rights.
73. Constraints such as those noted in this section must be taken into account when assessing whether and in what way national human rights institutions contribute to the development of durable peace in divided societies once a settlement has been reached. Awareness of them should temper unrealistic expectations about what such institutions can deliver in transitional contexts; clearly there are limitations to what they can achieve. National institutions are no panacea. At the same time, being realistic also means not discarding the increasing inclusion of national institutions in peace agreements as a mere trend with little significance. It is important to examine the value they can have and the roles they do play – within the confines of the post-settlement environment– in enhancing the human rights situation and contributing to peacebuilding in countries in transition.
74. It should also be acknowledged that the tactics required for effective human rights promotion and protection in post-settlement contexts may be different from those usually applied in response to human rights abuses taking place in relatively stable societies with established governments.<sup>151</sup> While undeniably valuable, focusing mainly on monitoring and reporting human rights violations in order to enhancing accountability and facilitating redress is insufficient in settings where violent conflict has just ended. This is not just because of the likely weaknesses of the judicial system and other organs of state; it also relates to the question of how to affect long-term change in the context. Most emphasis should probably be put on detecting patterns of abuses and identifying the underlying factors and conditions giving rise to these, so as to develop strategies to prevent their recurrence. This highlights the significance of methods such as institution-building, standard-setting, and human rights education in post-settlement environments.<sup>152</sup> It also suggests that an approach geared

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<sup>151</sup> Putnam, "Human Rights," 237.

<sup>152</sup> Putnam, "Human Rights," 252-255; and William G. O'Neill, "Reform of law enforcement agencies and the judiciary," *Working Paper*, International Council for Human Rights Policy: par. 14, 57. Available from ICHRP website, URL: [www.ichrp.org](http://www.ichrp.org).

towards problem-solving and constructive engagement with existing institutions and state agencies may be more relevant than one inclined towards exposure and denunciation.<sup>153</sup>

## 7. Contributions to rights protection and promotion and sustaining peace

75. Reviewing activities undertaken by institutions created through peace agreements suggests that their contributions lie in a range of areas. Some relate to the traditional roles of investigation, monitoring and reporting, while others entail the development of human rights capacities through human rights education and assisting in institutional and legislative reform. National institutions can also play a valuable role in facilitating dialogue amongst various actors on issues of national importance, for example through undertaking national consultations. In addition, they can impact on peacebuilding in more abstract and symbolic ways, by helping to restore trust in state institutions; facilitating constructive management of disputes related to human rights; and role-modelling social pluralism. These various contributions are discussed below with examples drawn from various cases. This discussion does not imply that each of the institutions studied for this paper managed to have an impact in all areas; this is seldom the case because of contextual circumstances and/or an institution's specific terms of reference.
76. Individual complaints handling. Receiving and investigating individual complaints of human rights violations has been a key strategy of national institutions to protect human rights. In contexts where the population is hesitant to engage the judicial system because of its (real or perceived) bias, corruption, or inefficiency, a national institution serves as an alternative agency to approach. Where the judicial system is relatively functional, an institution complements existing mechanisms for upholding the rule of law and safeguarding justice in that it has a specific focus on human rights. The accessibility of national institutions is usually a valuable feature: submission of complaints is free of charge and often regional offices are established which limits the distance people have to travel to raise allegations of human rights. Their non-judicial nature also tends to make such bodies less intimidating to members of the public. As noted, there may be limitations in the extent to which national institutions can facilitate redress for individual victims, especially if cases cannot be pursued in court or recommendations are not followed up. This however does not render complaints handling useless: investigations yield valuable information for human rights reports and larger programmes of reform since analysis of individual cases points to systemic problems that need to be addressed. Besides, institutions are often able to settle complaints through conciliation, negotiation or mediation which does not require the involvement of the judicial system. In addition, the very fact that a national institution, as a state body, is receptive to matters of human rights brought forth by individuals is meaningful in contexts where the state has generally become discredited; it can help to re-build trust in the state. This is also the case when the institution handles complaints related to social and economic rights (for example, rates, electricity, property) because of their relevance to people's daily lives.
77. Monitoring leading to institutional reform and standard-setting. Many institutions studied for this paper undertake wider, more systemic, monitoring with a view to developing practical proposals for action that address the causes of human rights violations and hence prevent abuses from recurring. An example is the work of the Northern Ireland Human Rights Commission on juvenile justice and the use of plastic bullets. In both instances, in-depth

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<sup>153</sup> Putnam, "Human Rights," 252 and O'Neill, "Reform," par. 14, 57-58.

studies analysed current practices, clarified human rights standards and provided guidelines to be followed to ensure greater fairness, accountability, and legitimacy. Other institutions, including the Salvadoran, Guatemalan and Afghan, have focused on monitoring and investigating conditions in particular sectors, for example the court system, the police and/or prisons. Such monitoring has helped to identify areas for institutional reform, leading to training programmes, revision of existing regulations and policies, recommendations for legislation to be adopted, and other measures. For example, the AIHRC has been able to facilitate improvements to prison conditions, such as separate facilities for child and adult prisoners; better and more regular food; visitation rights for prisoners' families; an end to the practice of shackling prisoners' feet in detention centres in Kabul; registration of detainees; and the establishment of literacy and vocational training programmes within prisons. It has also collaborated with other organisations to provide defence attorneys to prisoners who cannot afford to hire their own, after realising that prisoners' lack of access to legal services was a major factor in their incarceration.

78. The institution's work on children's rights serves as another example of the range of practical activities that can flow from systemic monitoring. Identifying child trafficking as an increasing problem in Afghanistan, the AIHRC has developed an action plan to address this together with the government; made recommendations on legislation to counter child trafficking; and monitored the deportation of children from neighbouring countries and the re-integration with their families. It has also convened meetings of senior police and government officials to discuss strategies to stem child-trafficking; trained police units that interact with children and youth; helped to set up a co-ordination mechanism involving the government and civil society organisations for advocacy; and developed guidelines in local languages for teachers and parents to prevent trafficking. In addition, it follows up on the prosecution of alleged traffickers.<sup>154</sup>
79. Precedent-setting cases and development of human rights jurisprudence. Where national institutions have the mandate to institute legal proceedings, they have the potential to shape government policy and develop human rights prudence by taking precedent-cases to court. Of the institutions reviewed here, it seems that only the Northern Ireland Commission has tried to work in this area. Its limited budget has however been a significant constraint on its ability to have an impact through litigation. The Commission has countered this to some extent by deciding to intervene in cases brought by others. This was not only much less costly but has also allowed the institution to focus directly on the development of human rights standards by the courts.<sup>155</sup>
80. Human rights education. All institutions reviewed in this paper, with the exception of the Human Rights Ombudsman of Bosnia and Herzegovina, devote considerable energy and resources to human rights education programmes. While education is sometimes lamented as an 'easy' choice as compared to the more difficult task of enforcing rights protection, it is highly relevant in transitional contexts. Human rights education does not only sensitise people about their rights, or make state agents aware of their obligations under international standards, but can also assist in facilitating buy-in amongst various groups and actors in society about the new dispensation or a new constitution. Many institutions target education at specific organs of state in an effort to affect change in behaviour and attitudes, such as the police, the army, prison officials, and teachers. The South African Human Rights Commission, for example, has done much training of people working in the criminal justice

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<sup>154</sup> Information drawn from website AIHRC, Child Rights Section and Monitoring and Investigation. Available from URL: [www.aihrc.org](http://www.aihrc.org).

<sup>155</sup> Livingstone and Murray, "Evaluating the Effectiveness," 89.

sector and has also targeted activists working with asylum seekers and immigrants. Human rights education may take the form of non-formal training workshops, but can also consist of integrating human rights into the formal curriculum of training colleges, universities, and the school system. The latter is a more structural approach in that it ensures that all students receive human rights education. It is pursued by, amongst others, the human rights commissions of South Africa, Northern Ireland, and Afghanistan.

81. Facilitating public dialogue on issues of national concern. Several national institutions have played a valuable role in facilitating public discussion on important issues in the domestic context. For example, after the signing of the peace agreement, the Guatemalan Human Rights Ombudsman convened dialogue sessions on the question of reparations in which some 60 to 70 groups were involved which eventually led to the development of concrete reparation programmes. While its role in the process diminished over time, the institution's initial agency conferred legitimacy on the discussions and helped to bring a wide range of organisations together.<sup>156</sup> In the course of 2003 and 2004, the AIHRC undertook an extensive national consultation on the question of transitional justice following decades of civil strife in Afghanistan. The consultation involved interviews with 4,000 individuals and drew another 2,000 into focus groups discussions throughout the country. It led to a very thorough report, 'A Call for Justice' which outlines Afghanistan's legacy of human rights abuse, discusses judicial and non-judicial mechanisms for transitional justice, as well as forward-looking measures for reform and reconciliation.<sup>157</sup> Follow-up discussions have led to the development and adoption of an 'Action Plan on Peace, Justice and Reconciliation' by the Presidency, the AIHRC and the United Nations Mission in Afghanistan (UNAMA) in June 2005.<sup>158</sup>
83. The Plan identifies four key areas for action, namely symbolic gestures (including a national remembrance day and memorial sites); institutional reform (improving the fairness and transparency in appointment procedures, vetting procedures based on officials' human rights record; reform of the justice sector); truth-seeking and documentation (including consultation on an appropriate truth-seeking mechanism for Afghanistan; conferences on other countries' experiences and lessons learned; drafting of legislation for a truth-seeking mechanism); and reconciliation (facilitating public debates on reconciliation, supporting conflict resolution initiatives, encouraging return and reintegration of armed groups and diaspora.) The Plan also highlights the importance of effective accountability mechanisms and indicates that a Presidential Task Force will be established to advise the President in this regard, and that amnesty will not be granted for war crimes, crimes against humanity and gross human rights violations.
84. The AIHRC's national consultation has been valuable in a number of respects. It has provided a clear and coherent strategy for government, civil society, and the international community on concrete activities to be undertaken to support peace, reconciliation and justice in Afghanistan. It has laid bare the profound lack of trust amongst Afghans in public authorities due to the absence of justice and protection of their human rights, highlighting this as an area warranting urgent intervention. The process also constituted the first effort ever to consult the general public on their experiences of violence and suffering, and their views on the way forward in Afghanistan. It thus has had great symbolic meaning in

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<sup>156</sup> Conversation with Marcia Mersky at ICHRP meeting, Belfast, 8 March 2005.

<sup>157</sup> Afghanistan Independent Human Rights Commission, *A Call for Justice. A National Consultation on Past Human Rights Violations in Afghanistan*. (Kabul: AIHRC 2004). Available at URL: [www.aihrc.org](http://www.aihrc.org).

<sup>158</sup> *Peace, Reconciliation and Justice in Afghanistan. Action Plan of the Government of the Islamic Republic of Afghanistan*, 6-7 June 2005. Available at URL: [www.aihrc.org](http://www.aihrc.org).

signifying people's participation in society and the willingness of the state to engage and listen.<sup>159</sup>

85. Unfortunately, the consultation undertaken by the Northern Ireland Human Rights Commission on the development of a Bill of Rights for Northern Ireland has been a less resounding success. After a promising start, it has been marred by internal divisions amongst Commissioners on the content and process and disappointment amongst civil society organisations about delays, extension of deadlines, and lack of progress and clarity about the way forward. Whether and how to draw in political actors has also been a challenge for the NIHRC and drafts of the Bill of Rights have come under considerable substantive criticism.<sup>160</sup> An initial comparison of the AIHRC's and the NIHRC's efforts towards consultation suggests that the former allowed more time for preparation and was more deliberate and focused in how it managed and conducted the process. The NIHRC, on the other hand, in its eagerness to move quickly, took little time to clarify internally its own vision for a Bill of Rights and did not sufficiently consider in advance how best to approach the process, including the question of how to deal with submissions from various quarters versus its own views.<sup>161</sup>
86. Admittedly, the subject matter of the two consultations differs significantly, and it is possible that questions of transitional justice are less controversial in Afghanistan than a Bill of Rights is in Northern Ireland. The flaws in the Bill of Rights process do however not diminish the useful role national institutions can play in facilitating debate on important issues in the national context. Instead, the Northern Ireland case provides valuable insights in challenges that may be encountered during such a consultation and highlights the importance of good process, clarity of vision and thorough preparation. When designed and implemented carefully, a consultation process can bring together a wide range of actors and will assist in facilitating buy-in and ownership.
87. Experiences from other national institutions functioning in transitional contexts confirm that such bodies can serve as meaningful interlocutors that bring together disparate groups and facilitate public dialogue. For example, the Ugandan Human Rights Commission has helped to establish civil-military centres in North Uganda (where a long-running war has been raging between the state and an armed rebel group, the Lord's Resistance Army), to enhance accountability and transparency of the military and improve relations between the military and civilians. During the military dictatorship, the National Human Rights Commission of Nigeria created space for non-governmental organisations to interact with state institutions and provided some protection for them. The unique position of national institutions between the executive and civil society serves as a comparative advantage in enabling such bodies to facilitate exchanges between actors with diverse viewpoints. National institutions are also able to develop and maintain relationships horizontally (across different sectors of society) and vertically (across different levels of authority), which is important from a peacebuilding perspective.<sup>162</sup>
88. In sum, national institutions appear to contribute to the protection and promotion of human rights and the development of peace in various ways in transitional environments. Some of

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<sup>159</sup> AIHRC, "Introduction," *A Call for Justice*, 4-6: 6.

<sup>160</sup> Livingstone and Murray, "Evaluating the Effectiveness," 102-112. The comments on the AIHRC's consultation are based on reviewing the methodology for the consultation as contained in AIHRC, *A Call for Justice*, 55-57.

<sup>161</sup> *Ibid.*

<sup>162</sup> Parlevliet, Lamb and Maloka (eds.), *Defenders of Human Rights*.

these relate to traditional means of enforcement while others involve alternative approaches to rights protection such as institution-building, standard-setting, education, and facilitation of public dialogue. It seems that the impact of national institutions may also be of a more abstract and symbolic nature. Institutions can assist in re-building trust in the state by the activities they undertake, the processes they utilise and their responsiveness to issues raised and people approaching them. It is also important to recognise that national institutions constitute mechanisms for constructive conflict management. They help to raise and settle disputes related to human rights in a non-violent way within parameters set by law and human rights standards and facilitate exchange between actors with divergent perspectives and experiences. From a peacebuilding perspective, this is significant because the state in divided societies often has limited capacity to manage discord constructively and non-violently. The creation of a national institution through a peace agreement can thus help to develop new norms and capacity within the state and society to manage tensions around sensitive or controversial issues in a fair, transparent and legitimate manner.<sup>163</sup> Finally, the representative nature of many institutions set up through peace agreements has both practical and symbolic value. Practically, it enhances the institution's legitimacy and accessibility and ensures that a wide range of human rights concerns are considered. Symbolically, it reflects the pluralism that exists in society and role-models coexistence and collaboration between members of different groups.

89. Of course, we do not know how the situation in the various cases reviewed in this paper would have evolved without the national institution being established. In that sense it is difficult to assess exactly whether and what difference a national institution makes; it would entail a counterfactual argument. Similarly, in the case of Sierra Leone it is unclear whether the situation would be any different had the institution been established. It does appear, however, that a vacuum exists since the departure of UNAMSIL, the UN Mission in Sierra Leone, since there is no official and credible body that can take over human rights monitoring in the country and advise on reforms necessary from a human rights perspective. The government-sponsored human rights body that does exist, the National Commission for Democracy and Human Rights, is very weak and discredited for its perceived bias towards the state and lack of strategy and direction.<sup>164</sup>

## 8. Conclusions & Recommendations

90. Overall, should peace agreements provide for national human rights institutions to be established? No straightforward answer to that question is possible. The review in this paper indicates some cause for optimism given the potential national institutions have to contribute to the protection and promotion of human rights and the development of peace in various ways. At the same time, it is clear that institutions set up in post-settlement contexts will encounter a range of challenges which limit what they can achieve. Externally, the transitional environment presents many constraints while internal challenges relate to the

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<sup>163</sup> At times, this dimension of national institutions manifests itself in a concrete way, in that bodies may be called upon function as a conflict management actor in disputes that are not directly or primarily rights-related. Such requests are then due to an institution's general legitimacy and the trust that parties in conflict have in its ability to function as an impartial intervener. For example, in Guatemala, the Human Rights Ombudsman was approached by communities to address actual conflict situations related to land; it also intervened in a few instances of hostage-taking (conversation with Marcia Mersky, ICHRP meeting, 7-8 March 2005, Belfast.)

<sup>164</sup> Mthembu-Salter, "The Old is Dying," in Parlevliet, Lamb and Maloka (eds), *Defenders of Human Rights*, 90-97.

availability of skills, expertise and resources; the need to develop a clear strategy, sense of direction, and an understanding of what it means to be a state body mandated to protect and promote human rights; and striking a balance between individual cases and wider advisory work based on systemic monitoring and investigation.

91. Clearly, on no account should national institutions be considered a panacea, nor should they be set up as the sole or chief mechanism for strengthening the rule of law and upholding human rights standards. Instead, such bodies should be established as part of an overall institutional framework, and with a clear understanding of what they can and cannot achieve. They can play a valuable role in institution-building, legislative reform, monitoring, education, facilitation of public dialogue on rights-related issues, and dealing with allegations of human rights violations. They cannot, however, substitute for an independent judiciary and legitimate and accountable law enforcement agencies. Efforts to establish a national human rights institution must be complemented by a programme of broader judicial change and reform of the police and prison system.
92. If the parties in conflict agree that a national institution is to be set up as part of the overall settlement, a first question concerns the level of detail to be included in the agreement. Three options exist in this regard (fully fledged mandate; broad outline of functions; mere stipulation that an institution will be created), none of which seems to hold more or less promise for the strength of institution eventually established. Providing for the functions and powers in detail will tie the parties to firm commitments and may reduce the risk that parties afterwards try to re-negotiate or ‘claw back’ on the independence or strength of the institution. Yet those at the table are generally few and have particular interests themselves, and thus may overlook elements that are important to include. It might therefore be preferable indicate in general key functions and powers with a provision that the terms of reference are to be detailed further in national legislation. This will allow for consultation with a wider range of actors, particularly civil society organisations. It would be wise to ensure that any national institution abides by internationally accepted standards (for example through a reference to the Paris Principles in the agreement) and to note the independence of the institution explicitly. A provision that assistance may be sought from the United Nations and/or the international community is helpful in facilitating and legitimising international support for the establishment of an institution and its subsequent operation. Whether or not to include a time frame for the establishment of an institution and adoption of subsequent legislation in the agreement is another question. In El Salvador, the time frame of 90 days was upheld, while in Sierra Leone it came and went without any action taken. If included, the time frame should be realistic in light of other implementation tasks and could possibly entail an outer limit (‘the institution is to be set up within one year of the signing of this agreement.’)
93. When detailed terms of reference are prepared, functions should include, but not be limited to, monitoring and reporting on human rights, investigation of alleged human rights violations (both at receipt of complaints and at the institution’s initiative) and assisting victims in seeking redress; reviewing legislation, policies and practices to ensure that human rights standards and principles are reflected and complied with; making recommendations to the state about reforms necessary to enhance the protection and promotion of human rights; conducting public inquiries on human rights matters; and promoting awareness and understanding of human rights amongst the general public and key sectors of society. It would be particularly relevant to include a reference to the importance of systemic investigations and detecting patterns of abuses so as to counter a tendency to concentrate primarily on individual complaints and view allegations of human rights violations in

isolation, and to prompt the institution to focus instead on broad human rights concerns, underlying factors and conditions, and the development of strategies needed to prevent the recurrence of abuses. Other functions that could usefully be included in the mandate relate to initiating or intervening in judicial proceedings; undertaking national consultations; and helping to develop domestic institutions and capacities for human rights protection and promotion. Finally, it is important to ensure that no important organs of state are excluded from the purview of a national institution (for example, the Indian Human Rights Commission cannot examine the conduct of the national security forces) and that the mandate includes civil, political, social and economic rights.

94. Generally, the terms of reference should provide for sufficient powers to enable the institution to undertake its functions effectively, including, in particular, the power to collect and compel evidence and to access state facilities, including places of detention. It would also be useful if the institution is enabled to refer matters to court in the case of lack of collaboration or non-compliance with recommendations and/or has other forms of recourse (for example, approach the executive or legislative.) The strength of the institution is further enhanced if it is enshrined in the constitution, and if the body reports directly to parliament rather than to the Minister of Justice or the President.
95. In establishing a national institution in the post-settlement context, further consideration should be given to the following:
  - Appointment procedures should be fair, transparent, and accountable and allow for involvement of the legislative and consultation with civil society organisations;
  - Individuals to be appointed to the institution should have knowledge and experience of human rights and be of high moral standing;
  - Where the institution is to have multiple members, the membership should be representative and pluralistic in order to reflect society's diversity and must entail both men and women; and
  - The importance of sufficient funding should be emphasised and funding relationships should be clarified and designed so as to reduce interference from the executive.
96. In addition, it would be important to consider whether any other special interest bodies are to be established (for example, bodies with more specific or focused mandates), and how these would relate to the national institution and vice versa. It may be useful to refrain from providing for the creation of a whole host of bodies so as to avoid overlapping mandates and confusion about which body to approach for what. (In this regard, the South African example may not be one to emulate.)
97. Where an international mission is (or will be) present in the country when a national institution is to be set up, a peace agreement can usefully include a provision recommending collaboration and joint protection and promotion activities. The terms of reference for the mission should probably include a similar recommendation for collaboration with the national institution, as well as provisions emphasising the need to assist in institution-building, share technical expertise, and facilitate a transfer of skills and knowledge. The international mission can also assist in ensuring the involvement of civil society in developing national legislation for a national institution if the agreement includes no detailed terms of reference. Once a national institution is established, a mission – and other international actors, such as donors and international non-governmental organisations – can assist the body in some specific areas, including funding and the development of internal systems. Particularly useful may be assistance geared towards helping the institution to develop a clear

understanding of its mandate and its role as a state-sponsored body with a responsibility for rights protection and promotion, and helping it to develop a clear vision and strategy with specific priorities. Such assistance should however be carefully thought through so as to avoid imposing on the body (and/or avoid creating a perception of imposition) which would be both counter-productive and undermine the institution. The role of international actors in this regard may be mostly one of facilitating reflection, discussion and planning within the institution.

## Websites

### Specific Institutions:

Afghanistan Independent Human Rights Commission: [www.aihrc.org](http://www.aihrc.org)

Bosnia and Herzegovina Human Rights Ombudsman: [www.ohro.ba](http://www.ohro.ba)

El Salvador Procuraduría para la Defensa de los Derechos Humanos: [www.pddh.gob.sv](http://www.pddh.gob.sv)

Guatemala Procuraduría de los Derechos Humanos: [www.derechos.org/nizkor/guatemala/pdh](http://www.derechos.org/nizkor/guatemala/pdh)

Kosovo Ombudsperson: [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org)

Northern Ireland Human Rights Commission: [www.nihrc.org](http://www.nihrc.org)

Northern Ireland Equality Commission: [www.equalityni.org](http://www.equalityni.org)

Rwanda Commission for Human Rights: [www.rhrc-rw.org](http://www.rhrc-rw.org)

South African Human Rights Commission: [www.sahrc.org](http://www.sahrc.org)

South African Office of the Public Protector: [www.publicprotector.org](http://www.publicprotector.org)

### Networking:

National Human Rights Institutions Forum (UN): [www.nhri.net](http://www.nhri.net)

Asia Pacific region: [www.asiapacificforum.net](http://www.asiapacificforum.net)

African region: [www.sahrc.org.za](http://www.sahrc.org.za)

### Peace Agreements:

[www.usip.org](http://www.usip.org)

[www.incore.ulst.ac.uk](http://www.incore.ulst.ac.uk)

### Other:

Sierra Leone web: [www.sierra-leone.org](http://www.sierra-leone.org)