

Performance & Legitimacy:

National human
rights institutions

The International Council on Human Rights Policy

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Second edition

This publication, and the research project from which it originated, were financed by the Ford Foundation, New York, and the Département fédéral des affaires étrangères of Switzerland.

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International Council on Human Rights Policy
48, chemin du Grand-Montfleury, 1290 Versoix, Switzerland

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Performance & legitimacy: national human rights institutions
International Council on Human Rights Policy, Versoix, Switzerland.

ISBN 2-940259-03-8

Design & layout by: Aplin Clark, London, UK

Cover illustration: © The British Museum. Hieroglyphs. Details from a list of kings' names found in the temple of Ramesses II at Abydos Nineteenth Dynasty, c 1300 BC.

Printed by: Imprimerie SADAG, Bellegarde/Valserine, France

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Acknowledgements

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- Mexico:** Aída María Noval and Phil Gunson, independent researchers.

The research team has been working under the supervision of an Advisory Group composed of the following:

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The Council would like to thank all the above for their contributions to this report.

Foreword

This report was first published in early 2000, based upon research conducted during the previous year. Its approach to national human rights institutions was innovative. Where previous studies had focused primarily on legal and institutional issues, this report took as its starting point what made national institutions effective. The answer to this question would be found partly in the legal basis for the institution, as well as in its composition, but the study also identified various other considerations that needed to be taken into account: the relations of the national institution with other bodies, including non-governmental human rights organisations; the accessibility of the institution to the most vulnerable sectors of society; and the capacity of the institution to enforce its rulings, among other factors.

The report was well-received – presumably because it answered questions that had never really been addressed before, but which were of considerable practical importance to national human rights institutions themselves. The continuing interest in the report has prompted this reprinting.

The main bulk of the text has been left exactly as it was when it was published in 2000. To update the country chapters would have meant repeating the primary research carried out in 1999. The researchers discovered then that some of the existing literature was not entirely reliable and it would have been unwise to update from secondary sources. Also, it was in the very nature of this report that it would become out of date, seen purely as a status report on national human rights institutions. It could never aspire to be anything more than a snapshot of a small number of national institutions at a particular moment. Although the temptation to update was considerable – especially given important developments in relation to the Mexican and Indonesian human rights commissions – any second edition would have suffered the same defect as the original. It would rapidly have become out of date. It was decided, therefore, to leave the existing report intact. However, a final postscript has been added, noting some significant developments in relation to national institutions over the past four or five years and identifying a continuing agenda for research on the topic.

* * *

In the past decade, we have witnessed the creation of numerous national human rights institutions (NHRIs) – national human rights commissions, ombudsman offices, or hybrids of both, in Indonesia, Sri Lanka, Fiji, Uganda, South Africa, Ghana, Mexico, Guatemala, Latvia and Uzbekistan, to name but a few. As their numbers increase, national institutions are becoming more prominent actors in the national, regional and international human rights arena.

Efforts have been made to establish clear objectives and international standards, and to improve the effectiveness of existing national institutions. Substantial work has also been done to develop normative standards and agree on the most

desirable constitutional and legal foundations for such institutions. A set of guidelines – the Paris Principles – was developed following an International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in October 1991. Much energy has been put into promoting regional and inter-regional co-operation, and a number of initiatives have been launched to provide assistance to national commissions.

Nevertheless, national institutions are new in the human rights field. We need to deepen our understanding of how effectively they promote and protect human rights. The tendency has been to assume that creating them is a good thing in itself. Unfortunately, while some have certainly won widespread respect, others have not.

Much of the discussion so far has tended to concentrate on the *standards* against which these institutions should be measured, rather than on their performance and operational effectiveness. Most research has focused on the elaboration of normative standards rather than on how human rights institutions have evolved in practice. The Paris Principles recognised that national institutions should be formally established, that they must have some form of guarantee of independence, and that they ought to be distinguished from an *ad hoc* body. It is equally important, however, to see what the *public perception* of national commissions is, and whether those who use the services of national institutions believe them to be effective.

Most national human rights organisations have been established by governments and have governmental or quasi-governmental status. Their social *legitimacy* is not well understood, even though the credibility of national commissions and similar bodies depends in the longer term on their ability to earn and retain the trust of the public, whose needs they are intended to serve. It is particularly critical to assess whether poor people and other groups who are especially vulnerable to abuse are being protected by national human rights institutions.

It is certainly true that many institutional factors influence the effectiveness of NHRIs, including their degree of independence, their functions and whether they have adequate powers, their accessibility and accountability, their ability to co-operate with other institutions, and their operational efficiency. The efficiency of commissions and similar institutions cannot be assessed in isolation. They intermesh frequently and at many levels with the work of government departments, judicial bodies, lawyers' organisations, non-governmental organisations, and other civil society associations. The general political culture, and the way these bodies behave, facilitate or obstruct the activity and effectiveness of national human rights institutions.

The crucial measure of the effectiveness of a national human rights institution is nevertheless its capacity to respond to the needs of those in society who are most at risk of suffering violations of their rights.

Operational performance and public legitimacy are the central themes of this publication. This study is the outcome of a project conducted by the International Council on Human Rights Policy that spanned twenty-one months. It is a careful examination of the degree to which national human rights institutions are successful in carrying out their mandate to promote human rights and protect the rights of citizens. National human rights institutions, national organisations that work closely with these commissions and donors, should welcome this international comparative study. Its objective is to establish what lessons might be drawn to improve good practice.

The study is significant because it focuses its analysis on the actual performance of national institutions. Based on field research in three countries – Ghana, Indonesia, and Mexico – and an examination of secondary sources in several additional countries, it offers the most comprehensive overview to date of global experience of national institutions. It includes a series of conclusions and practical recommendations for the creation and strengthening of national human rights institutions which should interest anyone working with an NHRI (including members, staff, government officials and civil society) and anyone involved in the process of establishing a new NHRI.

The report demonstrates that the performance and legitimacy of a commission are no less important than meeting requirements such as independence. Rather than presenting a catalogue of deficiencies, the researchers have preferred to highlight those aspects that are crucial to an efficient and legitimate institution. A fair assessment needs to measure both positive achievements and perceived deficiencies.

The study presented in these pages demonstrates that the legitimacy and performance of national human rights institutions must keep in view the different socio-political circumstances under which the institutions have emerged. There is no single model of national human rights institution for the world. There are, however, principles of independence, integrity and good performance which must be kept in view. National human rights institutions must be open to national and international scrutiny. They should work in an open and participatory way. In order to avoid becoming remote and irrelevant, they should not seek to imitate practices drawn from other settings without taking into account their immediate context.

In addressing these important issues, this report is a welcome contribution to the international debate about the place, role and effectiveness of national human rights institutions.

Dr. Kamal Hossain

On behalf of the Advisory Group

INTRODUCTION

These days every country has to have a national human rights commission. Their numbers have burgeoned in the 1990s, especially since the 1993 World Conference on Human Rights, helped by the increasingly ready material assistance available from intergovernmental and other donor bodies. Many countries in transition from dictatorship to democracy have established such institutions in the genuine hope that they will prevent and curb the abuses of the past. Governments presiding over continuing serious violations of human rights calculate that establishing a commission will be a low-cost way of improving their international reputation.

The paradox, inevitably, is that the institutions that have the greatest formal guarantees of effectiveness and independence are almost certainly going to be those where the government has the greatest commitment to protect human rights. Those in countries where human rights violations are most serious are likely to be those that have the weakest powers and resources to address these issues effectively.

The Paris Principles

In 1991, the first major international gathering on this issue, meeting under United Nations (UN) auspices, formulated the Paris Principles.¹ These have become the benchmark against which national human rights institutions are measured. The Paris Principles fall into four parts:

- Competence and responsibilities: it is suggested that a national human rights institution (NHRI) be given as broad a mandate as possible “which shall be clearly set forth in a constitutional or legislative text”. Its responsibilities shall include reporting to the government on human rights matters; ensuring harmonisation of national laws with international human rights standards; encouraging ratification of international human rights instruments; contributing to states’ reports to UN treaty bodies and committees; co-operating with international, regional and other national human rights institutions; assisting in human rights education; publicising and promoting human rights.
- Composition and independence: independence is guaranteed through three means. The first is composition, which ensures “the pluralist representation of the social forces (of civiliansociety) involved in the promotion and protection of human rights”. The second is a level of funding and infrastructure that allows it to be “independent of the Government and not be subject to financial control

¹ United Nations Commission on Human Rights Resolution 1992/54 (March 3, 1992), *Official Records of the Economic and Social Council, 1992, Supp. No. 2, E/1992/22*, ch. II, s. A, Annex I; G.A. Res. 48/134 (December 20, 1993), Annex. Reprinted in United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, New York and Geneva, 1995. See also Appendix.

which might affect its independence". The third is that the mandate of the institution be established by law.

- Methods of operation: provisions here include that an NHRI shall "freely consider any questions falling within its competence" whoever refers them, including "any petitioner". This section also makes specific reference to maintaining "consultation with the other bodies, whether jurisdiction alor otherwise" responsible for human rights issues. It also stresses the "fundamental role played by the non-governmental organisations in expanding the work of the national institutions" and enjoins NHRIs to develop relations with Non-Governmental Organisations (NGOs).
- Finally, the Principles state that an NHRI *may* be authorised to hear and consider complaints, and provide guidelines for such procedures, including an emphasis on "amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions".

The Paris Principles, inevitably, were the starting point for most discussion of national human rights institutions in the 1990s. They are indeed a vital reference point, yet they are curiously inadequate in a somewhat paradoxical way. On the one hand they lay down a maximum programme that is met by hardly any national institution in the world – certainly none of the ones that this research has studied. For example, how many NHRIs have appointment processes that genuinely guarantee the social pluralism set out in the Paris Principles? How many have "adequate funding" – a condition which is set down, quite correctly, without qualification? On the other hand, the Paris Principles do not even take it as given that a national institution will deal with individual complaints, which most observers and practitioners in this field would probably regard as an essential characteristic.

Inevitably much of the discussion of NHRIs has been legal and largely normative. Much discussion has taken place largely under UN auspices, often in the context of extending UN technical assistance in this area, with the result that it has concentrated on implementation of the Paris Principles rather than on the broader political dynamics of the role and effectiveness of human rights institutions. Similarly, documentation of this issue from international human rights NGOs has concentrated on propagating normative standards rather than analysing the variety of ways in which human rights institutions have evolved in practice.² All that is good and proper; but this study has approached the discussion from the other end. The starting point for research has been to look at what already exists and at what works.

Much of this research leads back, in one way or another, to the Paris Principles. There is no doubt, for example, that a broad mandate, a founding statute, an

² For example, Amnesty International, *Proposed Standards for National Human Rights Commissions*, IOR 40/01/93, January 1993.

independent appointments process and adequate funding all aid effectiveness. But there have been institutions that have been effective in their own context without any of these things. To put it bluntly, we were interested in why some institutions set up more or less in conformity with the Paris Principles have been completely ineffective, while others that had little independence and inadequate funding have made a positive impact on the human rights situation in their country.

Types of national institution

“National human rights institution” is a hybrid category and includes many different varieties within it. As far as this study is concerned, the defining point is simply that it is a quasi-governmental or statutory institution with human rights in its mandate. That would exclude a government department on the one hand (say a human rights office in the foreign ministry) and an NGO on the other. But it would include human rights commissions, ombudsmen, *Defensores del Pueblo*, procurators for human rights and an infinite variety of other institutions. The number of members that an institution has is not a criterion for inclusion in this study (although it might arguably be for recognition under the Paris Principles). The national human rights institution is a recent creation that has two venerable precursors: the ombudsman-type institution that deals with matters of maladministration and the *ad hoc* commission of inquiry. Many national human rights institutions have a mandate that goes beyond human rights and includes administrative justice issues as well. That does not rule them out of the study either – indeed, we are interested in how effectively these different functions might be combined.

Another interesting question relates to institutions whose mandates only extend to a limited spectrum of rights or the protection of a particular sector of society – for example, bodies established to promote racial or sexual equality, or even human rights commissions, such as the Canadian commission, whose mandate with regard to individual cases focuses entirely on the prevention of discrimination. We have included them in the study too.

It is no doubt foolhardy to attempt a typology of national human rights institutions, since it would be so easy to name an institution that did not fall into any of these. Common attempts to categorise national institutions do so in a number of ways: by membership (commission versus ombudsman), by mandate (human rights, discrimination, advisory role, etc.) or by political tradition (the “Commonwealth model”, the “Francophone model” and so on). Any of these may be perfectly valid in their own terms, but the typology used in this study is slightly different since it combines consideration of membership and mandate but attaches less importance to issues of political tradition. It appears, for example, that African human rights commissions, whether English or French-speaking, have far more in common with each other than either have with a “Commonwealth model” (such as Canada or Australia) or a “Francophone model”. The main types of national institution identified are the following:

- A national commission on human rights – a multi-member institution whose mandate is likely to include: investigation of complaints, education and review of potential legislation. Examples would include Indonesia, India, South Africa, Togo, Benin, Cameroon and Uganda among others.
- A national advisory commission on human rights: as above but with no mandate to investigate complaints and an orientation primarily towards advising the government on matters of human rights policy. Examples would include France and Morocco.
- A national anti-discrimination commission: this would have many similar functions to a national human rights commission, but its mandate would be confined to discrimination issues. Examples include: Canada, Australia and New Zealand. The British Equal Opportunities Commission and Commission on Racial Equality are variants of this with a narrower mandate.
- An ombudsman: a single-member institution. As derived from the original Scandinavian model, the ombudsman is likely to have a specifically defined mandate – maladministration, ethnic discrimination, gender discrimination, children’s rights – in a system of interrelated institutions.
- A *Defensor del Pueblo*: this is usually seen as a variant of the ombudsman. The principal difference is that a single institution covers the various mandates that would usually be dealt with by different ombudsmen. The model originated in Spain and has been broadly adopted in Latin America. Peru has a particularly successful *Defensor del Pueblo*. The *Procurador de Derechos Humanos* (Human Rights Counsel) in Guatemala falls into the same category. So, despite its name, does the National Human Rights Commission in Mexico. Although this is largely a Hispanic phenomenon, the Latvian Human Rights Office probably also falls into this category.

It will be immediately obvious that even one of our chosen case studies – Ghana – does not fit within this typology. The Commission on Human Rights and Administrative Justice (CHRAJ) is a hybrid of the multi-member institution and the ombudsman or *Defensor del Pueblo*, both in its composition and structure and its mandate. Such is the real world.

This attempt at categorisation is not intended to rank the different types of national institution one above the other. Indeed, what seems particularly important is that national human rights institutions should be developed in consonance with the political and institutional traditions of the country – rather than being an imported “model” – provided that they meet certain basic standards of independence and impartiality.

The research questions

We refined our basic interest in the question of what makes a human rights institution effective into three areas of research:

- How far have national human rights institutions succeeded in gaining public, as opposed to merely formal legitimacy? Under what conditions do they become an effective and trusted part of the human rights machinery?
- How do national institutions make themselves accessible to those sections of society that are most vulnerable to human rights violations? Implicit in this question is the assumption that those who are most likely to have their rights violated are least able to gain access to formal and governmental-style institutions.
- How far does the effectiveness of national institutions derive from the linkages that they are able to build with other institutions in society? This question addresses both link with civil society, including non-governmental organisations, and with official and governmental institutions – especially the judiciary, which may be vital for enforcing decisions of the NHRI.

Clearly this is not an exhaustive list of criteria for effectiveness – rather it is a way of approaching the issue that highlights the importance of the acceptability of an NHRI to civil society at large. Inevitably a series of other issues arose in the course of carrying out the research and from the comments that were made on the initial draft. In some instances we have simply chosen not to address issues that were beyond the aims of the research, rather than address them inadequately. In other instances – for example, the issue of international assistance to NHRIs – the report touches on the subject but does little more than raise questions for further discussion and research.

Methodology

Developing the methodology of the study posed considerable difficulties. Although there is a wealth of written material about national human rights institutions, most of it is generated by the institutions themselves. While interesting source material, it lacks context and, ultimately, does not really communicate how effective the institution is on the ground. The only serious way of judging that is by first-hand research. But to carry out such research across the board is immensely time-consuming. The compromise has been to carry out substantial research visits to three countries – Ghana, Indonesia and Mexico – and make a shorter visit to a fourth, South Africa. These were chosen to represent a variety of different types of institution and the geo-political circumstances of their creation. In the case of the first three, a significant proportion of the research period was spent out of the capital cities, looking at the work of local branch offices or other devolved structures, or in areas of particularly significant human rights abuse. In Indonesia, time was spent in Irian Jaya; in Mexico, Jalisco State; and in Ghana, the Ashanti and Northern regions.

These case studies have been supplemented by secondary research on a number of other countries – principally Australia, Canada, Guatemala, India, Latvia, the Philippines, Spain and Togo – and interviews with activists, practitioners and experts from these and other countries. The selection of secondary case-studies was intended to fill some of the gaps created by our initial selection of countries.

The result, inevitably, is a snapshot – and one which rests heavily on the experience of our three primary case-studies. Given that it is quite clear that national human rights institutions have to be carefully adapted to local circumstances to be effective we are therefore cautious in the conclusions that we draw. However, enough similar themes recurred in the different countries that we studied to give us some confidence that at least some of our conclusions have a general application.

Structure of this report

This report is organised by relevance to the three case studies and the three research questions. The three case studies – Ghana, Indonesia and Mexico – are addressed first. These are followed by three chapters dealing separately with the issues of public legitimacy, accessibility and links between NHRIs and other institutions. Interspersed in the latter three chapters is factual information about a number of the institutions studied, to help the reader understand references to them in the thematic discussion. The thematic chapters could be read without reference to the three main case studies, although much of the richness of this study lies in the primary research.

Inevitably the division between the three thematic chapters is arbitrary. For example, much of the public legitimacy of NHRIs, we conclude, lies in the extent to which they succeed in developing links with civil society institutions. Likewise

their accessibility may hinge upon these same links and in turn affect public acceptance of the institution. A degree of overlap or cross-referencing is therefore inevitable.

Finally, a concluding chapter attempts to draw some tentative conclusions followed by some of recommendations addressed to national human rights institutions, to governments, to international donors and to non-governmental organisations.³

³ For ease of reading, footnotes have been kept to a minimum. Most of the information in this study was gathered in the course of interviews, which have usually not been referenced. Nor has non-controversial information, much of which derives from the public reports of the institutions studied. References have been reserved for published quotations and facts that may be controversial or contested. Also, in a few cases comments from readers of the first draft have been included where they substantially clarify the text or substantially diverge from the position taken in this report. The many instances where text has been changed as a result of a correction or comment by a reader have not been indicated.

One: **GHANA**

The Commission on Human Rights and Administrative Justice (CHRAJ) was created under Ghana's new democratic constitution of 1992 and brought into existence by an act of Parliament the following year. The process of constitution-making was broad and consultative. The framers of the constitution chose to establish a single national institution encompassing all aspects of human rights and administrative justice. The CHRAJ subsumes the ombudsman who had been created in the 1979 constitution and came into being in 1980. However, the CHRAJ was one of a number of autonomous national institutions charged with ensuring the accountability of the various branches of government. The others are the National Media Commission, the National Commission for Civic Education and the Electoral Commission.

In 1957 Ghana became the first colonised country in sub-Saharan Africa to gain its independence from the European colonial power. However, poor governance and an unfavourable global environment contributed to a decline and the military seized power in 1966. It continued to govern with only two brief interludes of civilian government, until the creation of Ghana's Fourth Republic in 1992. Prior to the 1980s, military rule was an unmitigated disaster. However, under the Provisional National Defence Council (PNDC) government of Flight-Lieutenant Jerry Rawlings, Ghana closely followed the economic nostrums of the Bretton Woods financial institutions and substantially improved its global economic position. It achieved this at the expense of increased domestic inequality. At the same time, civil and political rights remained strictly circumscribed.

Under some pressure from its economic allies, the PNDC oversaw a return to civilian rule. Flight-Lieutenant Rawlings' hastily constructed National Democratic Congress (NDC) won elections in 1992 (although these were not above criticism). Ghana's new democracy is imperfect and the former military rulers still retain many of their authoritarian reflexes, yet serious human rights violations, such as the killings and disappearances of the 1980s, are largely a thing of the past. This has undoubtedly provided a reasonably favourable context for the growth of Ghana's new constitutional commissions.

The Commission on Human Rights and Administrative Justice is composed of a commissioner and two deputies who are appointed by the President, in consultation with the Council of State, which is an advisory body of distinguished elder figures in society. The sole qualification specified in the Commission on Human Rights and Administrative Justice Act is that the commissioner should be qualified to be a judge of the Court of Appeal and the deputies to be High Court judges. There is no guarantee of independence in the appointment process, but the independence of the institution thus far has been greatly bolstered by the tenure enjoyed by the commission members. They enjoy the same tenure as judges: they cannot be removed before retirement age, except in a small number

of very specific circumstances. The commissioner, Emile Short, was a lawyer in private practice. NGOs say that, although he was a presidential appointee, he has shown both vigour in carrying out his mandate and independence of the government. This has been most marked in the CHRAJ's willingness to tackle politically sensitive issues such as ministerial corruption.

The appointment process of the National Media Commission (NMC) is substantially different: commission members are nominated by a variety of civil society organisations and serve a fixed term. The differences are instructive. The NMC has a substantial degree of independence, but the government applied considerable pressure on some of the nominating organisations when the time came to nominate for the commission's second term of office. The result was that, with the exception of one member, there was a complete turnover in the composition of the NMC. By further contrast, the National Commission on Civic Education (NCCE), which has an appointment process similar to the CHRAJ, is generally regarded as being completely subservient to the government.

The functions of the CHRAJ are extremely broad, including:

- investigating complaints of violations of fundamental rights, injustice, corruption, abuse of power and unfair treatment by a public officer;
- investigating complaints about the fairness of the functioning of various public services;
- investigating complaints about the actions of private individuals or institutions where these may violate fundamental rights and freedoms guaranteed by the constitution; and
- educating the public on human rights.

In addition, under the transitional provisions of the constitution, the CHRAJ is empowered to restore any property confiscated by the two previous military governments under certain specified conditions.

The CHRAJ is obliged to report annually to Parliament. Article 225 of the constitution provides that the CHRAJ is independent and not subject to the control of any person or authority. It does not fall under any ministry or government department.

In conducting its investigations, the commission has the power to issue subpoenas for the attendance of a witness or the production of evidence. But where the CHRAJ's powers are particularly extensive is in the enforcement of decisions. The constitution lays out four possible courses of action for resolving a complaint:

- negotiation and compromise;
- reporting the complaint and findings of an investigation to a superior officer;

- bringing proceedings in court to stop the offending action;
- bringing proceedings to stop the enforcement of legislation which may be in violation of constitutional rights.

Article 220 of the constitution specifies that the enabling legislation shall provide for the creation of regional and district branches of the commission. This has been interpreted in the Commission on Human Rights and Administrative Justice Act to mean that there should be an office in every region and all 110 districts in the country.

Article 227 of the constitution provides that the commission's budget should be charged to the Consolidated Fund. Before the proposed budget is agreed it is the subject of stringent hearings conducted by the Ministry of Finance which always cuts the proposed budget. It is subsequently submitted to Parliament. The CHRAJ recommended that it should present its budget directly to Parliament. From 1998 a new budgetary system was adopted whereby the commission was given a reasonable ceiling figure with which to plan its budget. In the 1998-99 financial year the budget was consequently not cut by the ministry, but whether all the funds will actually be released is another matter. Meanwhile the CHRAJ has depended heavily upon financial support from foreign donors for its operational costs. Foreign donors – with the Danish Government leading the way – meet the costs of library facilities, training, computers and the educational programme.

Structure

The commission itself is constituted by the commissioner and the two deputies. Thus, although there is only a single individual with the title of Commissioner, the commission is in fact a collegial body. There are currently discussions about expanding the membership of the commission to take account of the massive workload. The two deputy commissioners have a broad responsibility for legal and administrative matters respectively. There are four departments under the commission: Legal, Operations (which includes both investigations and public education), Administration, and Finance. The CHRAJ has more than 600 staff. There are offices in all 10 regions of the country and in 64 out of 110 districts. The plan is to open offices in all districts within two years which would raise the number of staff by a further 200 or more.

Each regional office is headed by a regional director, who is a lawyer. He or she is assisted by legal officers and investigators. Each district office is headed by a district officer, who must be a university graduate. Typically a district office might also be comprised of an assistant investigator, an assistant registrar, a bailiff and a secretary.

When the Commission on Human Rights and Administrative Justice Bill was before Parliament, the government argued, in line with the decentralising approach adopted in the 1988 Local Government Act, that the regional and

district branch offices should have total discretion to determine complaints without reference to the central commission. However, Parliament rejected this approach. Instead, district and regional offices act as local representatives of a centralised body.⁴ The district has the power to mediate but not to make recommendations without the approval of the headquarters in Accra. This approach might not have served the cause of decentralisation as some would have wished, but it has certainly ensured a consistency in the commission's decision-making which is essential for its public credibility.

In Ashanti, where there are currently 13 district offices for 18 districts, the CHRAJ began by creating offices in the furthest outlying districts, so that the regional headquarters could cover the nearer districts directly. In the Northern Region, the usual practice is for an office in one district to have jurisdiction over nearby districts with no office – an essential practice given the large distances that complainants would have to cover to reach the regional office in Tamale.

Most district offices and some regional offices are housed in premises owned by the government. Both district offices visited were extremely short of space – a problem not only because of cramped working conditions but also because of the need to maintain confidentiality in consultations with complainants. In one district office visited, where the district officer, unusually, was a lawyer, he was used by the local administration as a source of informal legal advice. The officer involved was clearly aware of the potential conflict of interest. However, what was less easy to gauge was the public reaction to this apparently close relationship between the local executive authorities and the commission. It is in general a cause for some concern. As one regional director put it: “We have to sing a nice song to the authorities concerned”. Commissioner Short commented that providing informal legal advice to the administration was “wrong and it is without my knowledge and authority”. He said that he would “take steps to remedy this anomaly”.⁵

At the district level the number of complaints was relatively few, probably because of lack of familiarity with the CHRAJ in the rural areas, as well as transport difficulties in reaching the district capital to file a complaint. The Adansi West district office in Ashanti received some 8-10 complaints each month, although there are many more where it dispenses informal advice. The Walewale district office in the Northern Region received only 27 complaints in the whole of 1998.

Complaints procedure

A complaint received by the commission will in all cases be logged by the registrar of the office. The complaint can be received in written or oral form and can,

⁴ Mike Oquaye, “Human Rights and Conflict Resolution in Ghana’s Fourth Republic: the case of the Commission on Human Rights and Administrative Justice” in M. Oquaye (ed.), *Democracy and Conflict Resolution in Ghana*, Gold-Type Publications, Accra, 1995, pp. 268-70.

⁵ E-mail, 3 November 1999.

in practice, be in any of the major languages spoken in Ghana. Although the district and regional offices are not entirely staffed by local people, the practice is to ensure that every office has someone capable of speaking local languages who can receive complaints. An investigator or legal officer will then determine the admissibility of the complaint: whether it is a serious complaint – in other words not frivolous or vexatious – and whether it falls within the mandate of the commission.

The investigator will gather information on the case by correspondence with the respondent and, if necessary, through on-site visits. In the resolution of cases there is a bias towards resolving by amicable settlement – between 50 and 60 per cent of cases are resolved this way. Aside from the culture of mediation that tends to prevail in NHRIs, there is also a practical problem with the shortage of lawyers in the CHRAJ. If the commission is to issue a recommendation, this must be determined by a panel hearing chaired by a lawyer. Almost none of the district officers are lawyers and there is even a shortage in the regional offices.

It is welcome that the CHRAJ should see its role as problem-solving rather than taking a legalistic approach. However, the tendency towards mediation has its dangers. One regional director told the research team that a complaint against the police would be filed against the individual officer responsible rather than against the police force as a whole. A district officer recounted a case where a police officer had solicited a bribe for withdrawing criminal charges against the complainants. The case was resolved privately between the CHRAJ and the officer concerned, when he agreed to return the bribe money. Both approaches suggest a worrying tendency at the lower levels of the commission to regard complaints as discrete matters to be settled to the satisfaction of the individual complainant rather than indications of wider and more systemic human rights problems, which it is also the responsibility of the CHRAJ to address.

There is no separate mechanism for following up whether a particular recommendation has been complied with. It is assumed that a complainant will come back to the commission if the respondent has not complied.

Use of enforcement powers

Ghanaian legislation is unusual for the powers of enforcement that it gives to the human rights commission. The constitution allows the commissioner to “bring an action before any court in Ghana and may seek any remedy which may be available from that court”. The enabling act gives the respondent three months in which to implement the CHRAJ’s recommendation. If it fails to do so, the commissioner may bring an action in court to enforce the recommendation. In practice this power has been used sparingly – fewer than 20 times in the life of the commission – and has always entailed an action in the High Court. It has been a matter of debate (unresolved by the wording of the Act and the constitution) whether the court’s role is to hear the case in its entirety or merely to register the

CHRAJ's decision and give it the force of an order of the court. The commission's position, not surprisingly, has been the latter: that barring any procedural irregularity in the CHRAJ's handling of the case, the High Court should simply enforce the recommendation. In general the High Court has taken the same view, with a judge only once reopening the substance of a case.

The commissioner proposes that the law should be amended to do away with the three-month wait before the application to the court. He proposes that a recommendation should be registered with the High Court immediately, which would allow a party to apply to the court for it to be enforced.

Nature of cases

In 1997, the most recent year for which there is an annual report, the CHRAJ received 5,876 complaints. Of these, the highest proportion – 33 per cent – were labour-related. Dismissal from employment was the commonest issue under this heading. Twenty-three per cent of the total were property-related, of which landlord-tenant issues were the most significant. Twenty-one per cent related to basic rights – a category which covered wrongful arrest and detention, ill-treatment and a whole variety of miscellaneous violations. Fifteen per cent of cases were family-related, with child and spouse maintenance providing a large majority of cases.

An analysis of the type of cases handled shows what a small proportion comprise human rights matters as conventionally understood. A substantial proportion of these involved complaints against private parties – employers, landlords, family members – sometimes in circumstances that stretched the constitutional definition of the CHRAJ's role:

To investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.

It has been a moot point whether the CHRAJ has jurisdiction in cases where a complainant alleges wrongful dismissal against a private employer. But in practice the commission's jurisdiction does seem to have been accepted. The state is the largest employer in the country, so a large proportion of labour cases involve public enterprises. However, in one district office visited, at the gold-mining centre of Obuasi, the vast majority of complaints handled were labour complaints involving private employers – often the multinational Ashanti Goldfields Corporation. It appears that employers were generally prepared to accept the role of the CHRAJ as a *de facto* labour tribunal. Ghana is, by African standards, a country with a high trade union membership. The view of the Ghana Trades Union Congress was that the CHRAJ was useful only in circumstances where the workers were not unionised. However, it seems that it has also functioned

effectively in situations where aggrieved workers feel that the collective procedures negotiated by the trades unions have failed to work to their benefit.

The loose interpretation of the CHRAJ's mandate is deliberate. Just as the framers of Ghana's constitution reasoned that ordinary citizens would not be able to find their way through a thicket of different statutory institutions, so the CHRAJ itself tries as far as possible to be a one-stop advice centre even on matters where it has no formal jurisdiction. A common case in point is estate and inheritance matters – issues where people are often in need of legal advice which they cannot afford to pay for. Sometimes the CHRAJ can simply refer a caller to a more appropriate agency. For example, there is much cross-referring between the Ashanti regional office and the advice centre of the International Federation of Women Lawyers (FIDA) in Kumasi. More often in the rural areas the CHRAJ itself simply offers advice, provided that matters can be settled in a non-confrontational manner at a district level. The effect is to enhance the credibility of the CHRAJ as a responsive and helpful institution. Whether this approach is so helpful in educating the public on human rights is another matter.

The wide variety of cases handled by the CHRAJ has led to a need for greater specialisation among its staff – although high turnover and staff shortages have not so far made this possible. Family matters and corruption – to name just two widely varying areas handled by the commission – require very different skills. While at the district, or even regional level, specialisation would be neither possible nor desirable, in the headquarters it is probably inevitable and will certainly make for a higher quality of investigation. There is talk, for example, of developing a separate anti-corruption unit within the CHRAJ.

Suo motu investigations

Neither the constitution nor the enabling legislation explicitly give the CHRAJ the authority to conduct an investigation without receiving a complaint, although in practice it has done so. One category of case, for example, has been of sick children whose parents refuse necessary medical intervention on religious grounds. Here the commission has intervened on the child's behalf. It has investigated allegations of corruption contained in media reports. It is also in practice prepared to accept complaints from a third party: for example, by a teacher on behalf of a child, by the press on behalf of a prisoner or even by the Office of the President. On a number of occasions the commission has intervened to secure the release on bail or arraignment before court of persons who have been held by the police for longer than the constitutionally prescribed limit.

However, this discretion is not clearly spelt out in the legislation and on other occasions the CHRAJ has refused to investigate when a complainant has not demonstrated a personal interest in the matter. A politically sensitive example of this came when the leader of an opposition party called for the commission to investigate "disappearances". The complaint was dismissed because of the

complainant's lack of personal standing in the case.⁶ Section 13(6) of the CHRAJ Act provides that where a person who might have made a complaint is dead, the complaint "may be made by his personal representative or by a member of his family or other individual suitable to represent him".

Prison visits

In 1995 the CHRAJ carried out a nation-wide inspection of all prisons and police lock-ups to ensure that they met minimum international standards for the treatment of prisoners. The commission issued a report of its findings and thereafter has conducted annual follow-up visits. Unsurprisingly, the investigation uncovered overcrowding in many prisons and poor sanitation in police cells. The report recommended an increase in the feeding allowance and the removal to separate prisons of juvenile prisoners being held with adults. The government has complied with both recommendations.

The CHRAJ's inspections have also uncovered significant numbers of "forgotten" remand prisoners – people who have been charged and never brought to trial. In one case a prisoner had been held for 16 years and others had been in prison on remand for up to eight. A number of such prisoners have been released as a result.

Cultural practices

One particularly sensitive area that the CHRAJ has tackled with some success has been traditional cultural practices that violate rights – particularly those of women and children. One of these has been the practice of *trokosi*. This is a form of servitude and forced labour prevalent in the Volta Region. Women and children are sent to shrines to serve fetish priests as a punishment for alleged transgressions by their family. The CHRAJ has collaborated with a local NGO, International Needs Ghana, to produce public education and open a dialogue with those who practice *trokosi*. This has succeeded in securing the release of some women and children from fetish shrines. In 1996, for example, Commissioner Short took part in several liberation ceremonies in which some 400 *trokosis* were freed.

Similarly, the CHRAJ has investigated the banishment and, on occasions, lynching of women in the Northern Region suspected of being witches. A CHRAJ investigation in September 1997 identified more than 800 people – all but a handful of them women and most elderly – housed in witches' camps, where they had been driven from their communities. The commission launched a campaign of public education on the issue, including a round-table meeting in Tamale in December 1998.

More difficult has been confronting the issue of local taboos or prohibitions. Typically, these may be bans on farming or fishing on certain days of the week. Their origins may often lie in the need to conserve resources, but complainants to

⁶ Oquaye, *op. cit.*, p.262.

the CHRAJ have challenged them as a violation of their constitutional rights, including the right to work. The CHRAJ has upheld such complaints and issued public statements on the issue.

The general approach is low-key and involves diplomatic contact with the traditional authorities. In Ashanti, for example, some teachers defied a taboo that they should not work their land on a particular day of the week. The traditional authority ordered them to slaughter a sheep in forfeit, which they refused to do. The chief complained to the paramount chief and, as they continued to refuse to comply, the case went to the Kumasi Traditional Council. Meanwhile, the teachers complained to the CHRAJ which, despite an initially very hostile attitude from the Traditional Council, was able to negotiate an amicable settlement.

Corruption

In 1996, the CHRAJ conducted investigations into allegations of corruption, illegal acquisition of wealth and abuse of office against three government ministers and a presidential staffer. The commission made adverse findings against two of the ministers and the presidential staffer, all of whom resigned. The government provoked controversy by issuing what it described (inaccurately) as a White Paper which rejected some of the CHRAJ's findings and recommendations. In response to the subsequent public outcry, the government was obliged to state that the CHRAJ was at liberty to take whatever steps were necessary to enforce its recommendations. One recommendation, which the government accepted, was to expand the category of public officers required by law to declare their assets.

Ghanaians interviewed by the research team were almost unanimous in their view that the corruption investigation had enormously increased the public credibility of the CHRAJ by demonstrating its independence and its willingness to confront the government on sensitive issues. Most would have echoed the view of Commissioner Short that this episode led to "greater public confidence in the Commission as a credible agency in the struggle against corruption, as well as the struggle for greater social justice and for probity, transparency and accountability in our society".⁷ Almost the sole dissenting voice, interestingly, was an employee of CHRAJ who felt that the inquiry had made it more difficult for the commission to have its budget approved by the Ministry of Finance. As a matter of fact, this may be true. Commissioner Short did not demur when this possibility was put to him. To their credit, no senior official of the CHRAJ seemed to have any regret that the investigation had been carried out.

Conditions of service

The CHRAJ has extreme difficulty in retaining staff, especially lawyers, in its service. At headquarters it shares premises with the Serious Fraud Office, whose pay and conditions are much more attractive. In some regions staff shortage has

⁷ Emile Short, "The Commission on Human Rights and Administrative Justice in Ghana", mineo, n.d.

had a disastrous impact. In the Northern Region, for example, there is only one lawyer – the Regional Director himself. Since a lawyer must sit on every panel hearing this creates an enormous bottleneck as well as imposing a very heavy burden on the director, who must in effect function as head of the legal department as well.

The salary and conditions of service of the commissioner and his deputies are pegged to those of a Court of Appeal judge and High Court judge respectively. This has the effect of depressing the salaries of those below them. CHRAJ argues that its salaries and conditions should be equivalent to those of the Attorney General's office, which are more favourable.

Most lawyers working for the CHRAJ were previously in private practice or came to the commission directly after finishing their studies. Many investigators, however, were absorbed from “revolutionary” government institutions which were abolished after the transition from military to civilian rule. This does not seem to have coloured the politics of the institution in the public perception. By contrast the National Commission on Civic Education, which also absorbed many personnel from the defunct Committees for the Defence of the Revolution, is generally identified with the government and ruling party.

Education

Although the commission itself says that public education has been a central part of its activities from the outset (and indeed it is part of its constitutional mandate), equally it is clear that this aspect of its work has been less prominent than in many other national human rights institutions. The reasons for this are probably to be found first in the CHRAJ's origin as an ombudsman and secondly in the constant lack of resources. In practice many educational activities have been funded by external donors rather than from the commission's core budget.

Public education has been largely carried out through seminars and workshops aimed at public officials – military, civil servants and District Assembly members among others. Given the large proportion of complaints received by the CHRAJ that are labour-related, that has been something of a focus in educational activities, with seminars for management staff and trade union officials.

Increasingly, it has become apparent that the low level of complaints received by the CHRAJ in its district offices is due to the lack of public awareness either of the commission itself or of constitutional rights. Consequently public awareness programmes are being seen in a more integrated fashion as a means of increasing the CHRAJ's interaction with the rural population.

The CHRAJ has carried out education and training programmes of officials and, in 1997, embarked on a pilot educational programme for rural communities. Initially focused on the Upper East and Volta regions, this pilot programme has since been extended to other parts of the country. The aim is to educate the public on the

rights contained in the 1992 constitution, to emphasise civic responsibilities and to identify means of redress when rights are violated.

The CHRAJ's activities and pronouncements are widely reported in the media. This plays an important educational role. Work on controversial issues such as witchcraft and *trokosi* is itself as much an aspect of human rights education as it is of the complaints process. On these issues, as well as politically sensitive ones such as corruption, the commission has perceived that a large part of its function is to open a dialogue on what the constitutional Bill of Rights has to say and what would be best practices in these areas.

Work with NGOs

The commission meets monthly with a co-ordinating committee of human rights NGOs to discuss priorities and strategy. The collaboration between the CHRAJ and NGOs is particularly strong in human rights education. However, on the complaints side the relationship is rather different from that in some other countries studied. In many other cases the NGOs provide an essential form of outreach for the NHRI and a route for complainants to reach an otherwise inaccessible institution. In Ghana, by contrast, the CHRAJ's network of more than 60 district offices is much more extensive than that of most NGOs, which consequently play a less significant role in channelling complaints. This said, organisations like the International Federation of Women Lawyers (FIDA), which offer a legal advice service, are an important source of referrals.

Media

The media are extremely important in the work of the CHRAJ. The commission issues press releases on cases that may be of particular public interest, but more often it is the media themselves that take the initiative in approaching the CHRAJ. However, the Commissioner remarked that the CHRAJ has to be cautious in its public statements. There is a danger if it makes a general statement on a certain type of issue that it may appear to prejudge the merits of particular cases of that type. This might be the case, for example, where the relationship between traditional taboos and prohibitions and individual rights is the subject of a complaint.

Conclusion

One academic observer describes the CHRAJ as being the independent commission with the highest public approval. She describes its operation as a "restraint on abuse of office in the public service in a country where the powerful have long been perceived as being above the law". She continues:

In the exercise of its jurisdiction as an enforcer of human rights, it has also demonstrated the value of constitutional democracy to the ordinary person by a zealous protection of human rights. Its acts of intervention in matters affecting the ordinary person such as causing the release of

*those detained for unreasonably longer periods; or coming to the aid of children denied of medical treatment on the grounds of the parents' religious beliefs; and upholding sexual harassment charges against a powerful individual have in no small way maintained its stature as the "people's champion".*⁸

The research team's investigation seemed to confirm that the CHRAJ has succeeded in winning a high degree of public legitimacy. This primarily derives, without question, from its willingness to hold senior public figures to account over sensitive matters such as corruption. At a different level it also derives from the relative accessibility of the commission at a local level and its willingness to adopt a problem-solving approach to dealing with people's complaints rather than a legalistic one. However, lack of resources severely hampers the operation of the district offices with the result that local outreach is much less effective than it could be. The objective of opening offices in all 110 districts is seriously questionable if the means do not exist to make the existing offices function properly.

However, another source of the CHRAJ's legitimacy is more formal: it appears to be fairly widely understood that the commission derives its authority from the constitution – which is the property of all Ghanaians – rather than from the government of the day. This may only be another way of saying the same thing – perhaps the CHRAJ's willingness to tackle politically uncomfortable issues derives from its constitutional foundation. That is, no doubt, what the framers of the Paris Principles had in mind. Nevertheless, it is striking, in a country where public respect for national institutions has seriously declined over the years, that this one enjoys a considerable measure of confidence and credibility.

⁸ H.J.A.N. Mensa Bonsu, "Democracy, Good Governance and Accountability: The Role of the Independent Commissions of Ghana", mimeo, Accra, 1999, p.27.

Two: **INDONESIA**

In June 1993 President Suharto established the National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia* or Komnas HAM).⁹ The timing was significant in a number of ways. Decree No. 50 which created Komnas HAM was issued just a week before the World Conference on Human Rights in Vienna. It also followed eighteen months of intense and growing international pressure on the Indonesian government since a massacre of peaceful demonstrators by the army in Dili, East Timor. The new permanent commission was fashioned after the *ad hoc* National Commission of Inquiry that Suharto had created to investigate the Dili killings. This commission had been neither impartial nor adequate in its investigation but, by acknowledging that the army had committed a serious violation of human rights, it had played an important role in heading off criticism, especially on the international stage. It was generally assumed that Suharto was creating a permanent mechanism to repeat the same operation.

The global context for this development was the end of the Cold War. President Suharto seized power in 1967 amidst the massacre of Indonesian Communists, possibly in their hundreds of thousands. This made him not only a tolerable ally for the United States, but a desirable one in the context of the struggle then being waged in Southeast Asia. Thus the United States engineered the Indonesian take-over of the former Dutch colony of West Irian, now known by the Indonesians as Irian Jaya, while the Western world largely ignored Indonesia's invasion and illegal annexation of East Timor in 1975. Both processes were accompanied by extensive and gross violations of human rights. By the early 1990s, however, international criticism of Indonesia's human rights record was being voiced more frequently. The Indonesian regime had been one of the foremost advocates of a view of human rights that denied their universality and propounded the existence of a specifically Asian human rights tradition.

The years of Komnas HAM's existence have seen the continuation of serious human rights violations in East Timor and Irian Jaya. Aceh, in the northern part of Sumatra, has also been the scene of an increasingly vigorous pro-independence movement harshly suppressed by the armed forces. Indeed, the 1990s saw a splintering of the Indonesian polity in ethnic, religious and communal conflict and the emergence of overt opposition to the long-standing rule of Suharto, his "New Order" regime and the ruling Golkar party. Predominantly student opposition broadened into a democratic movement which led to the fall of Suharto in 1998, followed by parliamentary elections in June 1999. The opposition Indonesian Democratic Party (PDI-P) won the largest share of the vote.

The new Komnas HAM had been some time in the making. The First National Workshop on Human Rights, held in January 1991, had recommended the

⁹ Hak Asasi Manusia is the term for "human rights" in Bahasa Indonesia and the acronym HAM is widely used.

creation of a human rights commission and the issue had apparently been discussed at an internal government meeting in 1990. A regional human rights workshop had been planned for December 1991 in order to gather international experience of human rights commissions. However, this was postponed because of the Dili massacre and only finally held in January 1993, at which point Foreign Minister Ali Alatas announced that the government would create a commission. The Ministry of Foreign Affairs convened a committee to draft the presidential decree establishing Komnas HAM.¹⁰ The role of Ali Alatas and his ministry was significant if, as seemed likely, the main purpose of the new body was to divert international criticism of Indonesia.

The composition of the new commission appeared to support this interpretation. It was chaired by a senior army officer and former chief justice, Ali Said. A number of those appointed were senior civil servants or ruling party insiders. Most non-governmental human rights activists invited to serve on the commission refused. Many of the members of the commission were academics, lacking much experience of human rights issues, but enjoying a degree of integrity and independence. The secretary-general was Baharuddin Lopa, who was Director General of Corrections in the Ministry of Justice. He continued to occupy both posts for the next eighteen months – a somewhat curious combination – and Komnas HAM operated out of his office at the ministry.¹¹

Decree No. 50 of 1993, which governed the operations of Komnas HAM until 1999, gave only sketchy guidance as to its powers and mandate – which has been both its strength and weakness.¹² The guiding philosophy of the commission is the national ideology of *Pancasila*.¹³ The objectives of Komnas HAM are to “help develop conditions conducive to the implementation of human rights in conformity with *Pancasila*, the 1945 Constitution, the United Nations Charter and the Universal Declaration of Human Rights” and to “enhance the protection of human rights” in order to support national development. In order to achieve these objectives the commission would carry out four categories of activity:

- disseminating “the national and international views” on human rights;
- making proposals on which United Nations human rights instruments should be ratified;
- monitoring and investigating the implementation of human rights; and

¹⁰ Jessica M. Ramsden Smith, *Komnas HAM and the Politics of Human Rights in Indonesia*, MA thesis, Australian University, March 1998, p. 31.

¹¹ *Ibid.*, pp. 35-37.

¹² In 1999 (after the research team’s visit) a new Human Rights Act was passed, which among other things established a new statutory basis for Komnas HAM’s activities. Although the new law is briefly reviewed in the text, all the research for this chapter was conducted while the commission operated under the old law.

¹³ *Pancasila* means “five principles”. These are: faith in God, humanity, nationalism, representative government and social justice.

- establishing regional and international co-operation in the promotion and protection of human rights.

Thus the commission had no complaints or investigatory function set out in the law, save for the third of these points. It had no powers with which to carry out investigations – for example by compelling the attendance of witnesses – nor any authority to ensure that its recommendations were complied with.

The 1999 law amplifies these functions without essentially modifying them, although Komnas HAM has now acquired investigatory powers, including power to require the attendance of witnesses. A complaints process has been elaborated in some detail in the new law.

Structure

The Komnas HAM consists of 25 members, including a chairperson and two vice-chairpersons elected by the plenary session of the commission. The extremely unusual – indeed, probably unique – feature of the appointment process is that since the first round of members, who were appointed by the President, the commission has determined its own procedure for appointment. This has involved the plenary commission itself voting in secret ballot on who the members shall be. Komnas HAM members are proud of this procedure and argue that it guarantees their independence from government.¹⁴ Whether or not this is true, it unarguably has a second less desirable effect, which is to lessen the diversity of the commission's membership. All Komnas HAM members are based in Java, with only a couple coming from outside Jakarta.¹⁵ This is in a country where regional diversity, national sovereignty and separatism are crucial political issues – indeed, the ones most likely to be a cause of human rights violations. While the initial appointments were formally made by the President, it appears that the selection of commissioners was in fact made by Ali Said and a senior official from each of the Cabinet Secretariat and the Foreign Ministry.

There are three sub-commissions: Education and Public Awareness, Examination of Human Rights Instruments, and Monitoring the Implementation of Human Rights. The chairperson, vice-chairperson and staff of these sub-commissions are full-time, as is the secretary-general of Komnas HAM.¹⁶ No other commissioners work on a full-time basis.

¹⁴ Under the new law the commission continues to nominate new members, who are appointed by the legislature.

¹⁵ Several readers of the first draft of this report pointed out that this did not mean that all Komnas HAM members were therefore Javanese. Nevertheless, interviews on the ground in Irian Jaya, as well as with human rights activists from Aceh, North Sumatra, East Kalimantan and East Timor, clearly showed that such people did not feel that the Komnas HAM membership represented them.

¹⁶ Under the 1999 law the secretary-general is not a commissioner.

In addition a separate Komnas HAM Perempuan, with specific responsibility for human rights violations against women, was established in 1999 after the research team's visit. It is headed by Professor Saparinah Sadli, a member of Komnas HAM.

Decree 50 stated that "all expenses incurred in the operations of the National Commission shall be charged to the budget of the State Secretariat". Once again, on the face of it this control of Komnas HAM's budget by, in effect, the Office of the President, was a serious brake on the commission's independence. Insiders argue otherwise. They say that if Komnas HAM had a fixed and predetermined budget this would be a far greater restriction on its operations. In fact, the money for a number of politically sensitive investigations has been granted by the State Secretariat over and above the normal and predicted expenditure of the commission.

However, the current annual budget is a mere 1.8 billion rupiahs. This works out at a spending of 9 rupiahs (or one US cent) per head of the population.

At the time of the research team's visit, Komnas HAM had 32 staff members – barely more than the number of commissioners and clearly not adequate for the tasks that face them. Secretary-General Clementino dos Reis Amaral estimated that a staff of 75 was needed. All the present staff are located in the national headquarters in Jakarta, except for a small staff in a single branch office in Dili, East Timor. Most are university graduates in politics or law. Secretary-General Amaral said that the commission needed more economists with experience of work in private companies to deal with the increasing volume of corruption-type cases.

In the last year or two Komnas HAM has belatedly begun to professionalise its mode of operation. An executive director has been appointed to run the secretariat and a number of bureaux have been established. Three of them correspond to the sub-commissions of Komnas HAM – promotion, human rights instruments and monitoring – while the other two are corporate services and the library.

Complaints

Komnas HAM receives between 30 and 40 complaints each day. There are just 10 staff with responsibility for monitoring who can deal with these. Of the complaints received, the majority come from Java followed, in descending order, by Sumatra, Sulawesi, Bali and Kalimantan. Those parts of the country where human rights violations are most serious, such as East Timor and Irian Jaya,¹⁷ submit the fewest complaints, which indicates a failure on Komnas HAM's part to make

¹⁷ The formal name of the province is Irian Jaya. Many of its inhabitants do not accept Indonesian sovereignty over what was formerly the Dutch colony of West Irian. They refer to their country as West Papua. The official name is used here only for ease of reference and should not be taken to suggest any position on the legitimacy or otherwise of Indonesian rule.

itself accessible to those sections of the community most vulnerable to human rights violations.

The 10 monitoring staff at Komnas HAM's headquarters have responsibility for processing and investigating complaints. Complaints are usually made by letter, but staff can assist illiterate complainants. Both NGOs and complainants interviewed by the research team said that for personal complainants who could visit the office, Komnas HAM was an informal and welcoming organisation and that it took trouble to satisfy individual callers. This is a positive and not negligible quality. However, the picture from Irian Jaya – the one area visited outside Java – was a very different one. Although the commission had conducted a number of high profile investigations in Irian Jaya, routine complaints were not being processed. These included particularly land and labour cases. In one case of a labour complaint about a logging company in Merauke, lawyers in Jayapura had received no response to a complaint filed in July 1998, seven months before the research team's visit. We were supplied with details of other such cases dating back to 1996. It was not claimed that Komnas HAM had taken no action – simply that no results had been reported back to the complainants which, from their point of view, amounted to more or less the same thing. As one NGO lawyer in Jayapura said:

Komnas HAM works if people turn up physically. They're very responsive to the media, for example. But here we only communicate through correspondence.

The investigation itself is usually conducted by a combination of staff and the commissioners themselves. The individual commissioners clearly enjoy a respect and authority that does not seem to attach to the commission staff in the same way.

However, a common criticism of Komnas HAM has been that frequently it has not properly investigated complaints, but simply passed them on to the relevant government department. The most absurd example of this was when the Legal Aid Institute in Jakarta complained to the secretary-general of Komnas HAM, Baharuddin Lopa, that the imprisoned East Timorese opposition leader, Xanana Gusmão, was being denied visits. Lopa referred them to the Directorate-General of Corrections – of which he himself was the head.¹⁸

The commission has established considerable public legitimacy through its intervention in a series of high profile political cases. While there was a tendency to shy away from cases in which former President Suharto was personally involved, Komnas HAM has nevertheless often been outspoken on controversial issues. For example, in February 1994 two commissioners made an unannounced

¹⁸ South Asia Human Rights Documentation Centre, *National Human Rights Institutions in the Asia Pacific Region*, New Delhi, March 1998, p. 39.

visit to the prison at Lhokseumawe in Aceh. By keeping the visit a surprise they discovered eleven detainees who had been held without charge or trial – one for nearly five years. The prisoners had been arrested by the army and handed over to the prison by the regional military command, so the action represented a real challenge – the first one by Komnas HAM – to military authority. Four of the eleven prisoners were released. The incident led to an increase in public credibility, but the initiative was not repeated, and subsequent prison visits were notified to the authorities in advance. A similar high profile challenge to the military also came in Aceh four years later. One of the same two commissioners, Clementino dos Reis Amaral, was involved in the public excavation of the mass grave of civilians killed by the army. As an exercise in forensic science the “excavation” was poorly executed, resulting in the destruction of valuable evidence. Yet as an exposure and public challenge to the army’s secret war and human rights violations in Aceh, it was another triumph. It established an important point by demonstrating that the remains excavated dated from the 1990s – that is the period when Aceh was constituted as a “Special Military Zone”, rather than from the 1960s as the army had claimed.

In an early case, in December 1993, 21 students protested outside Parliament demanding that Suharto be called to account. They were arrested and charged with insulting the President. Komnas HAM called for their transfer to house arrest and questioned whether the case should go to court. The commission did not succeed in securing their release but its intervention was generally well received.¹⁹

In another high profile case in its early months, the commission was more successful. A watch factory worker and labour activist in Surabaya, named Marsinah, was murdered after she had protested to management about the dismissal of some of her colleagues. Nine people were arrested and confessed to the murder – confessions that they retracted at the start of their trial, claiming that they had been tortured. In April 1994 ten Komnas HAM commissioners travelled to Surabaya to investigate – an early example of the use of commissioners in force to make a political point. They issued a statement concluding that the accused had been physically and mentally tortured, accusing the local military authorities and saying that it was likely that others were involved in Marsinah’s murder. The nine were acquitted. In an interesting postscript Komnas commissioner Roekmini, a former police general, was banned from speaking at a seminar in Surabaya. This was generally interpreted as an official response to the commission’s intervention in the Marsinah case.²⁰

In another high profile case in 1994, Komnas HAM received a complaint about the arrest of trade union leader Mochtar Pakpahan. It approached the East Java police commander about an alleged breach of the Code of Criminal Procedure in the

¹⁹ Ramsden Smith, *op. cit.*, p. 49.

²⁰ Human Rights Watch/Asia, *The Limits of Openness: Human Rights in Indonesia and East Timor*, New York, 1994, pp.129–134.

arrest – even though Pakpahan had in fact held an illegal meeting. The trade unionist was released.

In a further politically sensitive case in 1994, Komnas HAM criticised the banning of the magazine *Tempo* and two other publications, which it described as a “setback in the new emerging process of democratization”.

An even more controversial incident where Komnas HAM publicly contradicted the government position came in July 1996, when the authorities ousted Megawati Soekarnoputri from the leadership of the opposition Indonesian Democratic Party and stormed the party headquarters.

In 1998, the commission issued a strong statement on the enforced disappearance of a number of pro-democracy activists. Komnas HAM concluded:

...that the enforced disappearance of persons was conducted by a well-organized group. There are strong indications within the society that the possibility is not foreclosed that elements of the security forces were involved...²¹

If this is scarcely a categorical statement it is nevertheless followed by criticism of the “basic attitude of the government and Armed Forces” which “has not convinced the public of their political and legal accountability”. It calls for co-ordinated action to investigate the disappearances and prosecute the perpetrators.

Also in the context of the 1998 disturbances, Komnas HAM issued a very strongly worded statement on the widespread rapes of ethnic Chinese women. The statement was courageous, given the extensive hostility to the Chinese community. It displayed a sensitive understanding of both the politics of the incident and the sexual politics of rape in general.²²

Many of the cases tackled by Komnas HAM have been land disputes. After independence occupants of land were supposed to register their title. But many people were either unaware that they had to do this or could not prove their title to the land. The result was that large development companies acquired the title to much peasant land. Komnas HAM encouraged litigation on land cases, but in many cases peasants lost because they did not have title, while the developers whom they were challenging did. Komnas HAM concluded that the land issue would have to be resolved at the political level. Some commissioners are pressing for a special commission on land.

This is an area where the commission is generally regarded as having been a successful mediator. One of the most celebrated cases was the Rancamaya

²¹ “Statement of the National Commission on Human Rights Regarding Enforced Disappearance of Persons”, 30 April 1998.

²² “Statement of the National Commission on Human Rights Concerning the Sexual Assault Including Rape of Ethnic Chinese and Other Indonesian Citizens”, 2 June 1998.

development in West Java. In this case, the thumbprints and signatures of the farmers occupying the land had been used to draw up a certificate of ownership which was sold without their prior consent to a developer who wanted to use the land for a golf course and luxury housing development. The residents demanded the return of their land or compensation and in September 1993, 300 of them were arrested after a protest. Komnas HAM intervened, visiting the site several times. Eventually it brokered an agreement whereby compensation would be paid on the basis of the loss of productive plants.

A similar success story was a case at Sei Lapan in North Sumatra where a palm oil company forced farmers to plant cash crops, driving them from the land in search of food. The company then destroyed their houses. Komnas HAM mediated and secured land and housing for 88 displaced families.

But other land cases have been less successfully resolved. At Tanah Lot in Bali the Student Forum complained about a golf course and hotel development next to the temple. Komnas HAM dismissed the complaint as politically motivated. Similarly it refused to get involved in a complaint from Cimacan in West Java where a farmer lost land to a golf course development in which President Suharto's daughter and her father-in-law had a stake.²³

The research team visited the site of a land dispute at Tapos in West Java which well illustrated how the President was effectively immune from sanction. The Suharto family had forced 600 peasant families from their land in order to create a cattle ranch. After Suharto's fall in 1998, the farmers reoccupied their land but were violently harassed by the security forces. A number of them were beaten and arrested. However, after the former President was called into the Attorney General's office for questioning about the sources of his wealth, the intimidation ceased. In this case a delegation of farmers had visited Komnas HAM and had succeeded in securing recommendations for the unconditional release of those arrested and the prosecution of those responsible for the beatings. However, the farmers were critical of the fact that Komnas HAM had never visited the site nor had any power to enforce its recommendations.

Lawyers and NGO human rights activists in Irian Jaya also criticised the lack of direct intervention by Komnas HAM. All complaints are dealt with by correspondence, which is usually ineffective. An additional problem in Irian Jaya is that when Indonesian land law was crystallised into statute in 1960, the region was still a Dutch colony and so its traditional land tenure system was not taken into account. Land conflict began in Irian Jaya in 1971 when Indonesian land law began to be implemented. Lawyers in Jayapura argue that Komnas HAM should be advocating the incorporation of Irianese land law into the 1960 statute.

²³ Ramsden Smith, *op. cit.*, pp. 43–46.

Accessibility outside Java

The secretary-general of Komnas HAM acknowledges that branch offices are needed to create a real presence of the commission on the ground. But without an adequate budget – or indeed any independently controlled budget at all – he has been reduced to making fruitless requests to the President. The exception has been in East Timor and, more recently, in Aceh, where an office was opened in September 1999.

In the absence of branch offices, Komnas HAM has implemented a system of liaison officers. These are part-time representatives of the commission who, in order to retain a perception of independence, are not usually associated with local human rights NGOs, but are often academics. In Irian Jaya, for example, a respected university lawyer was chosen, but not replaced when he moved to Java after only six months in the post. In North Sumatra, responsibility for liaison is split between three officers. Although NGOs welcome the system because it makes it easier for them to make informal approaches to Komnas HAM, they believe that those appointed should be activists with a track record of human rights work.

Komnas HAM is highly dependent on NGOs in its contact with the population. The research team's impression from interviews outside Jakarta – and with human rights activists from elsewhere in the country – was that there was little public awareness of the commission. Rather it was NGO activists who took the decision to file complaints with Komnas HAM. Lawyers from a legal aid centre in West Java – not very far from Jakarta – said that they filed complaints with Komnas HAM for two reasons: first because this was a means of generating publicity which might help the victims of human rights violations, and secondly to remind Komnas HAM that it was their job to resolve such cases. An NGO activist from North Sumatra said that in his organisation's advocacy work they always told people about Komnas HAM. His objectives were similar to those of his Javanese counterparts: to tell people that Komnas HAM existed as a possible option for resolving their complaint and to gain public exposure by writing to the commission.

The non-governmental East Kalimantan Human Rights Committee has a close relationship with Komnas HAM. When the organisation was launched in 1995, Komnas HAM members presided at the opening ceremony. The local people regard it as the local branch of Komnas HAM and address letters to it as such. The negative side of this is that the NGO fears that its own reputation will be harmed by the commission's ineffectiveness.

The role of Komnas HAM in East Timor raises questions of legitimacy which go beyond the issues of accessibility and outreach that arise in relation to the commission's work in other parts of Indonesia. Indonesia invaded and occupied East Timor after the authoritarian regime of Caetano was overthrown in Lisbon in 1974. Its rule over East Timor has been illegitimate and was not recognised either by the United Nations or by the majority of East Timorese. Yet, East Timor has

been an important influence on Komnas HAM. As described, the organisation was formed in response to international pressure after the 1991 Dili massacre. As it happens, the commission's current secretary-general is an East Timorese. Finally the commission's first branch office was established in Dili, although this has not been a conspicuous success. It was originally located opposite the military headquarters in the city and headed by an Indonesian regarded as being unsympathetic to the pro-independence aspirations of most local complainants at Komnas HAM's office. According to Amnesty International, with the possible exception of one case of alleged "disappearance", the office did not investigate any human rights violations by the armed forces.²⁴ The only effective investigations were conducted by commissioners travelling from Jakarta.

That said, an independent observer of Komnas HAM remarked to the research team that, paradoxically, the commission was relatively responsive to human rights violations in East Timor. This he attributed to Komnas HAM's external orientation and preoccupation with international opinion.

After a visit to East Timor in 1994, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions concluded that "[t]he Indonesian National Human Rights Commission was not the most appropriate body to deal with human rights violations in East Timor. Its mandate, means of action and methods of work [were] insufficient. Furthermore, it [was] not trusted by the population of East Timor". He recommended the establishment of an independent commission for human rights in East Timor.²⁵

In Irian Jaya, although Komnas HAM generally fails to respond effectively to day-to-day complaints from the public, it has been much more vigorous in addressing allegations of major human rights violations. The commission has investigated three major sets of incidents in Irian Jaya. A review of these experiences is a good indication of the strengths and weaknesses of Komnas HAM as an investigative body.

The first investigation was into army killings of civilians in the Timika area in 1994-95. These took place in the context of military operations against alleged insurgent activities and in defence of the security of the Freeport mine. This is a massive copper mine, owned by the US multinational Freeport McMoRan, which makes an important annual contribution to the Indonesian exchequer. It has been highly destructive of the local environment and the livelihoods and culture of the Papuans. The incidents were already the subject of a detailed report by the Roman Catholic Church in Irian Jaya and Komnas HAM was prompted to investigate after a complaint was lodged by five NGOs.²⁶ A team of six commissioners made two

²⁴ Amnesty International, *East Timor: Broken Promises*. ASA 21/24/98, London, March 1998.

²⁵ UN document E/CN.4/1995/61.

²⁶ *Violators of Human Rights in the Timika Area of Irian Jaya, Indonesia*, Catholic Church of Jayapura, August 1995.

visits to the area in August and September 1995. According to their own account, they interviewed 40 witnesses. This may be correct – a Catholic official said that Komnas HAM met “almost every witness” – but if local activists from Timika are to be believed these interviews cannot have been very extensive. The commissioners spent three days in Timika and, in the case of the worst affected village, Hoesa, they flew in by helicopter and spent only 30 minutes there. Worse, the helicopter was owned by the Freeport company, which local people saw as being ultimately responsible for the killings. Nevertheless, a Catholic official involved in compiling the original report described Komnas HAM’s contribution as “very important” and the commission’s involvement as a “very positive experience”.

The commission’s findings were strongly worded. It concluded that “clearly identifiable elements of the security apparatus” had committed a number of serious human rights violations against the local communities, namely indiscriminate killings, torture, unlawful arrest and arbitrary detention, disappearance, “excessive surveillance” and destruction of property. Komnas HAM identified 16 killings of civilians and four disappearances, which was fewer than the number claimed by local activists. The commission’s recommendation was for military disciplinary and legal action against those responsible and government compensation of the victims or their families. Even Freeport did not escape implicit criticism. It was said to have “an automatic responsibility to participate in solving problems in the local environment”.²⁷

There is in the commission’s findings no detailed account of the human rights violations that took place, but it constituted a vital endorsement of the earlier NGO and church investigations. The main shortcoming of the whole process was the failure of the military to take effective action to implement the recommendations. Legal proceedings were opened against six soldiers. It is unclear precisely what the outcome was, but it seems that none of those responsible is currently in custody. Another weakness is that Komnas HAM’s recommendation is diplomatically, but rather excessively, fulsome in its praise for the role of the armed forces in maintaining security in Irian Jaya. This helps to sustain the illusion that human rights violations such as those in Timika are isolated aberrations by individual personnel rather than a frequent and perhaps inevitable outcome of the constant attempt to find military solutions to political problems. Perhaps the most positive outcome of the Timika findings, if only indirectly, was Freeport’s creation of a trust fund consisting of one per cent of its turnover, to benefit local people. Though Papuan political activists and anti-mining campaigners deride this as inadequate – and it is certainly a small price to pay for what Freeport extracts from the Irianese economy – it does represent a step forward.

²⁷ “Results of Review and Investigation into Five Incidents in the Kecamatan (District) of Timika and One Incident in the Village of Hoesa, in Irian Jaya in the Period between October 1994 to June 1995”, Komnas HAM, 1995.

Komnas HAM's second major investigation in Irian Jaya followed a similar pattern, but had an even less decisive outcome. In 1996, the guerrilla Free Papua Movement (*Organisasi Papua Merdeka – OPM*) kidnapped a number of European scientific researchers and held them hostage near the village of Mapnduma. After a bloody military operation to release them, the army launched a campaign of indiscriminate killings and disappearances against the populations of Mapnduma, Bela, Alama and Jila. The churches in Irian Jaya investigated and published a well-documented report in May 1996.²⁸ This was submitted to Komnas HAM, which responded promptly with an informal visit and a brief but not very clear statement. Non-governmental activists criticised them for the brevity of their visit and for talking too much rather than listening. This was shortly after the fall of Suharto and the local people perceived Komnas HAM's main mission as being to explain why things were now different – they must look to the future not the past. This might have been the view from Jakarta but it was certainly not how things were perceived locally. For very many people in Irian Jaya, the underlying factor behind human rights violations is the illegitimate character of Indonesian sovereignty over the region. It was insensitive, to say the least, for representatives of an Indonesian institution not to understand this or to listen to the local view.

In the third serious case investigated by Komnas HAM in Irian Jaya, the research team had the opportunity to interview an eyewitness (who had himself been interviewed by Komnas HAM) and to study first-hand evidence. In July 1998, supporters of independence raised the West Papuan flag at a number of places throughout Irian Jaya. At Biak, where pro-independence activists gathered under the flag on the harbour front for several days, troops opened fire, killing demonstrators. According to witnesses, others were taken away on a boat and never seen alive again. A number of bodies were later washed ashore. These were said by the authorities to be victims of a *tsunami* (giant wave) which had struck Papua New Guinea, but the bodies were buried rapidly without an autopsy. Komnas HAM's investigation appears to have been brief and cursory. One of those wounded in the shooting was visited in hospital by the commission's investigators who, he alleges, blamed him for bringing the incident on himself. Non-governmental activists in the Irianese capital, Jayapura, said that the investigators were only in Biak for a day and, when they arrived in Jayapura, repeated the official line that the army had tried to disperse the demonstrators peacefully. Komnas HAM informed the research team that it had made a statement condemning the army action, but activists in Irian Jaya were unaware of this and the commission was unable to provide a copy of the statement.

In its investigations in Irian Jaya, Komnas HAM has two major problems which are not of its own making. First, it has no means of compelling the authorities to comply with its recommendations. This undermines its own credibility and inclines

²⁸ *Human Rights Violations and Disaster in Bela, Alama, Jila and Mapnduma, Irian Jaya*, Indonesian Evangelical Church, Catholic Church, Christian Evangelical Church, 1996.

the public not to bother co-operating with the commission. Its second problem is that it is an Indonesian institution in a region where pro-independence sentiment is strong and growing. The more sophisticated local activists want Komnas HAM to pronounce on human rights issues in Irian Jaya because it will strengthen pressure elsewhere in Indonesia and internationally. But many community-based militants have little time for what they see as a foreign institution that promises much but delivers little. It is perhaps an irony that, as the general political environment becomes more liberal, Komnas HAM's stock has fallen in Irian Jaya. Local non-governmental monitors remark that the quality of the commission's investigations has declined since its first outspoken findings on the Timika killings.

Education

The approach adopted by the education and training sub-commission of Komnas HAM has been based on a strategic plan that identifies four key issues:

- to build a co-operative network with educational institutions and NGOs to establish a human rights education system;
- to integrate a gender perspective into all human rights education activities;
- to develop a human rights education system through pilot projects with a number of strategic groups; and
- to organise a public campaign to raise awareness of human rights.

The public campaigning dimensions of the plan have perhaps taken off less effectively than the educational ones, although the commission did carry out awareness activities in 1998 around the fiftieth anniversary of the Universal Declaration of Human Rights. Komnas HAM has begun to produce a series of pamphlets on general human rights issues. Pamphlets on children's rights and women's rights have already been published. However, the commission is so concerned about the danger of being overwhelmed with the complaints that these may generate that it has not included contact details on the publications.

Perhaps the most effective public campaigning has been through the mass media, which generally regard Komnas HAM as a trustworthy source and regularly depend on it to generate stories. The commission, for its part, has been eager to use the media to generate public pressure on human rights issues – lacking any enforcement mechanism of its own – but now wishes to steer the media towards coverage that may be more reflective and explicitly educational.

The area where Komnas HAM appears to be achieving some success is in its education programme. The approach has been to identify key figures in a number of strategic sectors, give them a basic grounding in human rights principles and provide them with the framework for designing their own human rights training programmes. The four sectors initially identified were the armed forces, the media,

non-governmental organisations and primary and secondary school educators. To these have later been added religious leaders.

This core group has now been gathered in two “training of trainers” workshops. The aims have been to provide the participants with an improved understanding of human rights concepts, to give them skills to conduct training sessions and help them design templates for human rights training sessions for their respective sectors. The key to this approach is the balance between providing those being trained with a framework of human rights concepts and information and allowing them to develop their own training materials based on their understanding of the target group. There has also been a clear benefit in mixing trainees from widely varying backgrounds. Both the military and NGO activists, for example, have found it mutually beneficial to sit alongside each other in “training of trainers” workshops.

International instruments

The sub-commission on international instruments is currently reviewing all existing legislation against Indonesia’s international treaty obligations. It expects to propose the repeal of a number of existing laws. The sub-commission also makes proposals for the ratification of international human rights instruments. So far, Indonesia is only party to five. Komnas HAM has written to the government urging the ratification of the two International Covenants and the Convention on the Elimination of All Forms of Racial Discrimination. The National Action Plan on Human Rights, drawn up by the government in consultation with Komnas HAM, includes the ratification of these instruments.

Conclusion

A public opinion survey in the magazine Kompas found that 45 per cent of those surveyed believed Komnas HAM to be the most credible institution for defending human rights. The next highest institution scored just 21 per cent. The survey was conducted in Jakarta and is clearly not a reliable scientific measure. But it does give some indication of how successful Komnas HAM has been in identifying itself with human rights in the public view.

However, it is clear that the commission urgently needs serious structural reform if it is to meet the twin requirements of making itself accessible to the vast bulk of the Indonesian population and adapting to an era in which there are at last realistic expectations of increased respect for human rights and the rule of law.

In the early days Komnas HAM derived much of its authority from the personality and reputation of its first chairperson, Ali Said. The presidential blessing conferred on the commission was also vitally important, of course, but it seems that Suharto took little interest in the work of Komnas HAM. Ali Said was not only a presidential confidant, but also a strong independent figure in his own right – and a military man. Some observers remark that the commission was weakened after his death

in 1996. Retired police general Roekmini Koesoemo Astoeti, who also died in 1996, was another key figure in the early days.

Komnas HAM was repeatedly criticised for conforming to the corporatist model of public institutions under Suharto's New Order regime and there is no question that it lacked the most basic guarantees of independence that a national human rights institution should enjoy. However, there is no doubt either that it was this very corporatist character – bolstered by the presence of retired generals and other political insiders – which gave it a certain leverage over the powerful institutions of state, especially the armed forces. It seems that these close links with the armed forces helped Komnas HAM to resolve other types of cases as well – for example, the Rancamaya land dispute in West Java – so crucial was the military in all walks of life.

In the early years public statements of the commission were actually cleared through the armed forces' headquarters and the Presidency before being released. In at least one high profile case, that of the Marsinah murder, the wording of the statement was changed.

The current chairperson of Komnas HAM, Marzuki Darusman, is also chairperson of Golkar, the ruling party until the June 1999 general elections.²⁹ While there is much respect for Darusman's individual integrity, there is equally a widespread feeling both outside and within the commission that the two roles are incompatible and he must choose between them. Yet it is an indication of how alien was the concept of political independence within the New Order system that such a dual role could even be contemplated.

This is precisely what reduces the public legitimacy of Komnas HAM, despite the good work it has done. For example, non-governmental human rights activists interviewed, while unanimous in their willingness to work with Komnas HAM, were equally decided in characterising it as an organ of government rather than an independent body. NGOs have taken a generally sophisticated line of working with the commission despite its deficiencies, but a public that is increasingly alienated from the old governmental style is likely to find Komnas HAM less attractive in the future.

A proposed new law governing the commission is a positive step. It will give the commission a separate budget, although the somewhat idiosyncratic appointment process will remain as it is. The new draft law also gives the commission the power to refer cases to the courts, including a newly created Human Rights Court which initially will have a jurisdiction over matters affecting the rights of women, children and people with disabilities. In the new law, although mediation is the preferred method of settlement of complaints, there is a provision allowing a party to go to

²⁹ In November 1999, as this text was being finalised, Marzuki Darusman was appointed Attorney General in the new government of President Abdurrahman Wahid.

court if the other party fails to implement the terms of a mediated settlement which all had agreed upon. Giving the commission limited powers of enforcement will undoubtedly strengthen its public credibility.

Three: **MEXICO**

The National Human Rights Commission (*Comisión Nacional de Derechos Humanos – CNDH*) was established in 1990. In 1985 the government had established a directorate on human rights in the Ministry of Home Affairs. The CNDH was set up in June 1990 effectively to pre-empt criticism of Mexico's human rights record. The measure was rushed through in 48 hours. There was no consultation with non-governmental activists in the NGO field – nor with anyone else, for that matter. A respected legal academic and member of the Supreme Court, Jorge Carpizo, was the first president and Rosario Green, who was later to be Foreign Minister, was the executive secretary.

In 1992, under considerable pressure to ensure the autonomous nature of the commission, the government introduced a constitutional amendment that provided for independent “non-jurisdictional” human rights commissions at both federal and state level. These bodies were to be for the “protection of the human rights recognised by Mexican law”. The bodies would “have competence to hear complaints regarding acts or omissions of an administrative nature by any official or public servant” apart from those by the judiciary, except that they have no power in electoral, labour or jurisdictional matters. The institutions can make “non-binding public recommendations as well as denunciations and complaints to the relevant authorities”. The national commission has jurisdiction when the officials complained against belong to a federal authority, while the state or municipal commissions have jurisdiction when the case involves local officials. When a single case involves both federal and local officials, the CNDH has jurisdiction.

Structure

The National Human Rights Commission Act fleshed out these constitutional provisions. The president of the CNDH was appointed by the President of the Republic subject to the approval of the Senate. There is a council, chaired by the president of the commission, which is also appointed by the President of the Republic. The council's powers are of a general supervisory nature and are, in practical terms, purely advisory. The council's 10 members include journalists, academics and lawyers. The council meets monthly to review cases dealt with by the CNDH. It can suggest general areas of work and comment on recommendations made, but has no power to change them.

In June 1999 Article 102 of the constitution was amended to transfer the power of nomination of the president of the commission from the President of the Republic to the senate. The Human Rights Commission of the Chamber of Deputies – and the CNDH itself – had proposed a redrafted law in which the CNDH would also be given the power to investigate labour, electoral and judicial matters. In the event, the reform was less sweeping than had been hoped. This constitutional reform took place after the research team's visit to Mexico and, at the time of writing, has

not yet been followed by enabling legislation. Consequently, all the research on which this section is based was carried out while the old legislation was in force.

The functions of the CNDH as set out in the 1992 law included the following:

- to receive complaints about human rights violations and to investigate them, either in response to a complaint or on its own initiative;
- to issue non-binding recommendations;
- to work for the conciliation of complainants and authorities “when so allowed by the nature of the case”;
- to promote the observance of human rights;
- to propose legal changes for the protection of human rights;
- to promote human rights education;
- to oversee respect of human rights in prisons;
- to promote the international human rights standards to which Mexico is party; and
- to propose to the executive the signing of international human rights conventions or agreements.

The National Human Rights Commission law is unusual in that it makes a number of provisions about the procedures of the CNDH that are directly relevant to the question of accessibility. Article 4 states that the commission’s procedures shall be “brief and simple” and only involve those formalities that are essential. Investigations shall also be implemented in accordance with “the principles of immediacy, concentration and speed”.³⁰ The article also states that as far as possible complainants should be dealt with on a face-to-face basis “to avoid the delays inherent in written communications”. Article 29 obliges the CNDH to provide a translator at no cost if a complainant does not speak Spanish. Article 4 also states that all information and documents received should be treated with “strict confidentiality”.

The executive, through the *Secretaría de Hacienda y Crédito Público*, allocates the budget of the CNDH. The annual budget is not disbursed in its entirety. Rather any item must be specifically requested from the Treasury Ministry leading to delays – whether for political or merely bureaucratic reasons. Nevertheless, the CNDH was the only institution visited in the course of this study that did not complain of a shortage of funds. The commission is evidently well-resourced. It

³⁰ These terms have specific meaning in Spanish law. “Immediacy” means that the adjudicator must receive the evidence directly and personally and not through third parties. “Concentration” means that, as far as possible, all the evidence should be heard and discussed in one single hearing. “Speed” is self-explanatory.

operates from four office blocks in a middle-class area of Mexico City. It has a massive publishing programme in both Spanish and English, including on CD-ROM. There are more than 600 staff.

Many of the staff of the CNDH have a background in government employment and return there after working at the commission. Certainly the organisational culture of the CNDH – insofar as it is possible to identify something so intangible – seemed governmental, hierarchical and very bound by rules and procedures. No doubt this is true of many Mexican institutions, but there was a distinct contrast with the less formal atmosphere in the two local commissions visited: the State Commission of Jalisco and the Federal District (*Distrito Federal*) Commission.

Complaints

The CNDH (in common with Federal District Commission) has a 24-hour complaints service. Normally a case will take three days to register in the complaints directorship before being passed to one of four “visitorships” which are responsible for the investigation. However, in urgent cases they will be transmitted more quickly. The complaints directorate will determine whether the complaint falls within the CNDH’s mandate. The CNDH’s competence extends only to federal authorities – not including judicial authorities. On private matters that are not either human rights violations or maladministration, the complaints directorate will give advice or refer a claimant to another agency. Complaints staff only speak Spanish, although if a complainant wished to use an indigenous language the National Indigenous Institute (INI) could be approached to provide an interpreter. In cases involving alleged sexual abuse there is an effort to ensure that details are taken by a woman lawyer and there are also two women psychiatrists on hand. The CNDH can launch an investigation on its own initiative. A unit monitors the media to identify issues that might be a possible subject for a *suo motu* investigation. However, these powers have been seldom used.

The four visitorships, staffed largely by lawyers, are the main investigative mechanism of the CNDH. (The local commissions follow a very similar structure.) In principle, the visitorships will each handle any type equally. In practice, there is a division of labour between the visitorships, with the fourth having responsibility for indigenous affairs, the third for prisons and the second for complaints against the army. The aim is to resolve all cases within six months. The CNDH receives some 300 complaints each month and issues about 10 recommendations.

The CNDH has developed a standard classification of human rights violations to ensure consistency in the approach adopted by its investigators.³¹ However, NGOs criticise the commission’s failure to classify human rights violations adequately in its recommendations. For example, many recommendations relating to complaints of torture do not classify the human rights violation as such and refer

³¹ CNDH, *Manual para la Calificación de Hechos Violatorios Derechos Humanos*, Mexico City, 1998.

instead to “injuries” (*lesiones*). Similarly, although the CNDH has received more than 90 complaints relating to extrajudicial executions, only one recommendation classifies an execution as such. The Aguas Blancas massacre in 1995 in which 17 unarmed peasants were killed by the state motorised police was classified as a murder. The Acteal massacre in Chiapas in 1997 was not even described as a murder.

The CNDH has it in its power to recommend that a criminal prosecution be launched against an official who has committed a human rights violation that is an offence under Mexican law. Lawyers at the commission say that it cannot, however, be a party to proceedings in a court. Independent lawyers consulted by the research team took the view that no principle in law within the Mexican legal system prevents the CNDH from being party to judicial proceedings. One expert even stated that he believed the CNDH already enjoyed that power, and no amendment to its statute would be necessary.

In the event that there are criminal proceedings, the entire file on the case is not made available to the *Procurador General de la Republica* (Procurator General of the Republic), only the recommendation of the CNDH. This is because the file is regarded as confidential for the protection of the complainant. It also serves as a guarantee against self-incrimination by witnesses before the commission.

However, the policy of confidentiality does not seem to have been followed with any great consistency. The research team was told of instances where the entire file on a complaint had been handed over to the authority complained against. This was an issue with a number of commissions. The commission of the *Distrito Federal* agreed in writing to stop the practice. However, the CNDH apparently still continues the practice and the research team was supplied with the details of a number of such cases.

One related to a series of arrests of opposition activists in 1996, prior to a visit by US President Clinton. Ten human rights NGOs submitted complaints to the CNDH, which filtered them to local commissions – but also apparently to local governmental authorities. The representative of one NGO went to the security police and saw a complete copy of the complaint it had submitted to the CNDH.

In the second case, the NGO forwarded to the CNDH a complaint from a member or supporter of the *Ejército Popular Revolucionario* (EPR) guerrilla group who alleged that he had been abducted and tortured by the army. The military justice department summoned an official of the NGO to attend. Since the complaint involved an armed opposition group, there was clearly a concern about the security of the NGO activist, even though the organisation had only forwarded a complaint received in the mail. It became apparent that the CNDH had forwarded full details of the complaint to the army. The NGO raised the matter with the CNDH, right up to the President who apologised and suggested that it submit a formal complaint. The complaint was rejected.

The practice of forwarding files to the authority complained against is presumably not done out of a deliberate desire to put complainants at risk, but it reflects the weakness of the CNDH's investigative methodology. Instead of conducting its own fact-finding, including on-site visits, there is an expectation that the authority itself will do this. This is a particular problem in relation to the army, because of the close collaboration with the military justice department. When the authority denies the complaint, there is a tendency to throw the onus back on the complainant. When the complainant is an NGO, the likelihood is that it will have better investigative techniques – although far fewer resources – than the CNDH. One NGO described a case in the region of Oaxaca where a complaint of collective torture had been submitted. When the CNDH conducted its on-site visit it found no evidence of torture – but it had gone to a different area and interviewed the wrong people.

Part of the problem appears to be an organisational culture that demands that complaints be handled speedily, even if this means that they are not investigated adequately. Not that cases are always handled with the speed that they might be. Indeed, a frequent complaint voiced by NGOs was that in politically sensitive cases, especially those involving the army, a common problem was the delays of many months if not years in investigating and resolving a case. The same organisational culture leads to an excessively statistical approach towards human rights issues, with figures published on the numbers of cases resolved, regardless of how they were handled.

The CNDH's mandate specifically excludes investigation of complaints related to labour and electoral issues. Many human rights and labour activists question the first exclusion in particular. Certainly for other national institutions studied – such as in Indonesia and Ghana – labour issues form an important, if not the largest, part of their work. Labour activists argue that since the trade union movement has been part of the corporatist political regime, without genuine independence from the government and ruling party, there is a serious need for an independent adjudicator on labour issues. Unions are required to register with the government and have to re-register every time a new leadership is elected, allowing an official veto on the election results. A government representative is present in all trade union meetings. Such issues raise fundamental questions of freedom of association and it is difficult to see why, even with its present restricted mandate, the CNDH does not intervene.

The process of friendly settlement of complaints has been criticised for excluding the claimant. Essentially a settlement is negotiated between the CNDH and the authority complained against. The claimant is also given no guarantee that a friendly settlement will be enforced.

The CNDH has the power to refer to the Procurator General of the Republic any case where it believes that there should be a criminal investigation. One frequently

voiced criticism is that it does not refer cases early enough – rather it allows its own investigation to run its course before handing the matter on for prosecution. Aside from the fact that this may sometimes make a prosecution vulnerable to the statute of limitations, it will almost invariably make an investigation more difficult, because of the long passage of time, and a successful prosecution consequently less likely.

One weakness of the CNDH's handling of cases – which is a common problem with institutions studied elsewhere – is a tendency to treat each case as a discrete matter to be dealt with to the satisfaction of the individual claimant, rather than as an example of a systemic problem. Too few recommendations address systemic issues. A notable exception would be the CNDH's handling of prison issues.

An independent study of the CNDH's treatment of torture cases in the second half of 1998 found that in most cases the commission downgraded them to “ill-treatment”. Out of 58 complaints of torture it only issued nine recommendations.³²

The statistics published by the CNDH are confusing and potentially unreliable. For example, in its 1996 Annual Report, the commission stated that, it had from its inception until May 1997, received 1,273 complaints of torture, of which only 46 were in the year under review.³³ This was presented as evidence of a decline in the incidence of torture. Yet in a report of October 1997 to the UN Special Rapporteur on Torture, the CNDH stated that it had received 2,109 complaints of torture up until September 1997, again stating that the incidence had declined year on year.³⁴ It must be concluded either that these figures are inaccurate or that the CNDH received 836 complaints between May and September 1997 which would cast doubt on the reported improvement.

An analysis of the CNDH's recommendations over the period June-October 1998 found that out of 40 recommendations 80 per cent related to complaints that had been filed with local commissions and referred upwards. Of the remainder, five were complaints by prominent citizens. Thus, almost none of the recommendations issued during this period arose from complaints filed by ordinary claimants directly with the CNDH. In most cases, it is claimed, research into the cases had already been carried out by the local commission.³⁵ This echoes a commonly heard criticism that the CNDH does too little direct investigation of human rights violations – including on-site investigations.

³² Antonio López Ugalde, “Las limitaciones de la CNDH: entre la falta de autonomía y la simulación”, *Bien Común y Gobierno*, Año 5, núm 50, Fundación Rafael Preciado Hernández, AC, Mexico City, January 1999.

³³ Comisión Nacional de Derechos Humanos, *Informe Anual de Actividades*, May 1996–May 1997, p. 32.

³⁴ “Informe de la Comisión Nacional de Derechos Humanos”, October 1997, p. 5.

³⁵ Interview with Miguel Sarre and Antonio López Ugalde, Instituto Tecnológico Autonomo de Mexico (ITAM), Mexico City, 8 April 1999.

A consistent problem reported to the research team was a failure by the CNDH to follow up its recommendations. There exists a unit within the presidency with responsibility for monitoring compliance with the commission's recommendations, but in practice NGOs and complainants report that the CNDH seems to regard a case as closed once a recommendation is issued. There seems in practice to be an assumption that complainants themselves will bring the matter back to the CNDH if they are not satisfied with the outcome, yet this may often not be the case. The UN Special Rapporteur on Torture is only one of several external human rights investigators to note that the CNDH "does not consistently pursue its recommendations regarding prosecutions".³⁶

In 1992 the CNDH issued a recommendation against the prison authorities over a case of torture of inmates at a prison in San Luis Potosí. This included the issuing of arrest warrants against those found responsible. In 1994, the CNDH considered that the recommendation had been complied with, even though no warrants had been issued. Indeed, no warrant was issued until 1996, after the case had been submitted to the Inter-American Commission on Human Rights.³⁷

One former complainant interviewed by the research team was a journalist who had been unlawfully arrested and detained by the police. He had only lodged a complaint because he was approached by an official who worked in a special unit in the commission dealing with the human rights of journalists. Otherwise, he said, he would not have bothered because he did not "have much faith in the institutions". However, he was impressed with the speed and vigour of the commission's investigation, which resulted in a recommendation in his favour. The recommendation included disciplinary action against the officers responsible and a payment of compensation to the journalist. He does not know if the first part of the recommendation was complied with, but he does know that he has not received any compensation from the police.

The CNDH and the army

A large proportion of complaints against the armed forces are dealt with in the second visitorship. Many of these are from service personnel themselves and officials at the CNDH were at pains to emphasise that it played the function of "military ombudsman". The CNDH relates directly with designated units within the armed forces: the military Procurator General in the case of the army and the Director General of Legal Affairs in the case of the navy. The CNDH does not seek information directly from the unit allegedly responsible for the human rights violation, but from the military lawyers, although it may subsequently conduct on-site investigations. The research team was concerned that this method of operating did little to dent the notion that the military was a law unto itself. In

³⁶ UN Document E/CN.4/1998/38/ Add.2, 14 January 1998.

³⁷ Amnesty International, *Mexico: Amnesty International's concerns regarding torture and ill-treatment in Mexico*, AMR 41/17/97, April 1997.

practice units alleged to have committed offences would be answerable to military lawyers rather than to an external human rights commission. The tiny number of recommendations against the military only reinforces this impression and a general sense of impunity. As of October 1999, the CNDH had only made 20 recommendations against the army in total, although nine of these were in 1997-99.³⁸ One study of the CNDH's performance in relation to the army found that up until June 1998 it had received at least 908 complaints. An independent academic, Sergio Aguayo of the Colegio de Mexico, has reviewed the CNDH's handling of complaints from Chiapas. Since the beginning of the conflict in 1994, the commission has received more than 1,200 complaints, of which, according to an unpublished CNDH document, about half are plausible. Of these 600 or so complaints, 44 per cent involve the army. Yet, the CNDH has not made a single recommendation against the army in Chiapas.

Perhaps one reason why the second visitorship went to some lengths to describe itself as a "military ombudsman" is that the question of whether there should indeed be such an ombudsman has been a matter of considerable controversy in recent years. In 1993, Brigadier-General Jose Francisco Gallardo Rodriguez was arrested after publishing an article in the magazine *Forum*, which summarised the argument in his Master's thesis that a military ombudsman should be established. He was charged with "damaging, libelling and slandering the Mexican army and the institutions that it oversees". A year later he was acquitted of that charge but was subsequently charged with "unjust enrichment" and "embezzlement". Amnesty International argues that these additional charges have been formulated simply to prevent his release and has adopted him as a prisoner of conscience. Other international human rights organisations have taken up his case and the Inter-American Human Rights Commission has issued a series of resolutions against Mexico over the Gallardo case.

General Gallardo's family has filed more than 20 complaints with the CNDH over various aspects of his case from the fact of his imprisonment to various aspects of his treatment in prison. The family says that they have always been treated courteously and their complaints have been accepted – but no conclusion is ever reached. The CNDH never corresponds with the family in writing, presumably for fear that something written may be regarded as its formal position. The Gallardo family detects a difference in approach over the years. Initially the CNDH refused to accept complaints on the basis that it had no jurisdiction over military matters – though it now claims to act as a military ombudsman. Especially since the Inter-American Commission made its resolution in October 1996, the CNDH has been much more responsive. Nevertheless, in a statement that indicates that the commission constantly plays the role of government spokesperson on human

³⁸ Letter from Dr Carlos Morales Paulín, Director de Asuntos Internacionales, Estudios, Proyectos y Documentación, CNDH, to the International Council, 15 October 1999.

rights issues rather than independent watchdog, President Mireille Roccatti³⁹ stated that “the case of General Gallardo does not represent a violation of individual guarantees” and that “he has been imprisoned for fraud committed previously”.⁴⁰

One of the clearest instances of the CNDH’s failure to investigate complaints against the army was the extrajudicial execution of peasants in Ejido Morelia, Chiapas, in 1994. This was the subject of a complaint to the CNDH, which issued no recommendation. It was, however, the subject of a recommendation against Mexico by the Inter-American Commission on Human Rights.

The Mexican constitution is unambiguous in laying down that any criminal charge against a member of the armed forces which involves a civilian must be tried in a civil, not a military court. This provision seems to be frequently breached and certainly the CNDH, which has close relations with the military justice system, has been willing to allow issues to be resolved as internal military matters rather than allowing the victim’s constitutional rights in this regard to be respected. The CNDH directs its recommendations to the military Procurator General rather than to the civil authorities for criminal investigation, despite the clear constitutional responsibility of the latter.

The indigenous population

The fourth visitorship, which deals solely and specifically with indigenous affairs, was established as a result of the 1996 San Andrés accords between the Mexican government and Zapatista rebels of the *Ejército Zapatista de Liberación Nacional* (EZLN). It works in three main areas:

- indigenous people in prison, whom it visits to monitor conditions and to establish if there is a possibility of early release. Between February 1998 and the research team’s visit, 1,280 prisoners were freed in this way;
- specific indigenous human rights issues, such as agrarian matters or labour issues, where the visitorship provides advice and guidance; and
- training of indigenous authorities on human rights issues.

In addition, the visitorship conducts investigations into complaints or reports of human rights violations against indigenous people. Many of these cases are generated in Chiapas, which has led the CNDH to create an office in the state.

In some instances the CNDH has provided humanitarian assistance to victims of human rights violations, even though that is not directly within its mandate. This

³⁹ On 11 November 1999, as this report was being completed, Jose Luis Soberanes Fernández, previously Director of the Instituto de Investigaciones Jurídicas (IIJUNAT) was appointed in place of Dr. Roccatti.

⁴⁰ Amnesty International, *Mexico: Silencing dissent: The Imprisonment of Brigadier General José Francisco Gallardo Rodríguez*, AMR 41/31/97, May 1997

was the case, for example, with the community of Las Abejas, the survivors of the Acteal massacre of 1998, who did not want to receive assistance directly from the government.

Training of traditional authorities tends not to be seen as distinct from collecting complaints. The process of raising awareness of human rights is likely to lead to complaints being brought forward. Staff of the fourth visitorship present their approach as being more outgoing and pro-active than that of the others. Multi-disciplinary teams of anthropologists, ecologists, sociologists, psychologists and lawyers travel to the indigenous areas to do training and research and to solicit complaints.

Language is undoubtedly a problem. It is clearly much more difficult for non-Spanish speakers to come forward – the more so since none of the 57 staff of the fourth visitorship are themselves of indigenous origin. An NGO from Guerrero told the research team that its representatives had been excluded from an interview between the CNDH and an indigenous claimant, even though the latter spoke only poor Spanish and wanted the NGO to represent him.

Officials of the CNDH cited the Sierra Huichola in Jalisco as an example of where it had done positive work. Undoubtedly, the commission has had some success in stopping the security forces from harassing Huichole Indians who are transporting *peyote*, a psychotropic cactus that is used traditionally. However, local indigenous rights activists were highly critical of what they described as the inconsistent approach of the CNDH. Although the commission has visited and expressed interest in developing work among the Huicholes, one local NGO described having a complaint lodged with the CNDH since 1993. A common problem with complaints from indigenous communities is that when there is a long delay in processing the complainant will not get in touch and the commission may conclude that there is a lack of interest in pursuing the matter – leading it to close the file. In this case, however, the NGO continued to request the CNDH to come and carry out an on-site investigation. Instead, it archived the case. The perception from the complainant was that since it was an agrarian case involving a powerful political figure, this was simply too hot for the CNDH to handle.

NGO activists from Guerrero and Oaxaca were simply not aware of the existence of a visitorship specialising in indigenous affairs. They were extremely surprised when told that the CNDH had 57 staff devoted to this area. “Where are these 57?” said the representative from Guerrero. “They are not in the mountains. They are in the Distrito Federal or in Acapulco.” Similarly the NGO representative in Oaxaca said that no one in the indigenous communities knew about the CNDH. What complaints the commission received came from NGOs – making it particularly worrying that the NGOs themselves noted so little CNDH presence.

Prisons

The third visitorship of the CNDH is responsible for all its work on prisoners. Unusually this includes not only those held in Mexico, at all stages of the criminal investigation process, but also Mexican prisoners held abroad, including those under sentence of death in the United States – some 41 at present. Its responsibility also includes those detained by the immigration authorities. The visitorship is empowered to visit all detention centres, whether federal or local. If the latter, it would contact the state commission and might conduct a joint visit.

Prison conditions have been a major cause of recommendations from the CNDH. All state governments have received recommendations on this issue. Overcrowding in prisons exceeds 25 per cent – in some prisons in the *Distrito Federal* the CNDH believes that the overload may be as high as 95 per cent. The regular programme of prison visits itself generates complaints, although most of these relate not to conditions but to the substance of the case against a prisoner or a request for early release.

In its early years, the CNDH had immediate access to all civil prisons, but later this was amended to exclude top security prisons where the commission had to give seven days' notice of a visit. At that stage the commission's visitors even went without notice to military prisons. More recently, all visits are planned within a well-arranged schedule, which gives the authorities good notice of any impending visit.

There is a total of 445 detention centres of all types. The method of visiting is to cover all the detention centres in a given state over the space of one or two weeks. This work involves almost all the 50 professional staff in the visitorship. In a state like Oaxaca where there is a high indigenous prison population, they will be supported by staff from the fourth visitorship. They work in teams of two or three people, each of which will have responsibility for several prisons. The Third Visitor insists that the CNDH does not give the prison authorities prior notice of visits, although it does tell the state human rights commission, which may often mean that the state government will also know in advance. Once the visits start in one part of the state word spreads rapidly to other prisons but, as the Third Visitor points out, there is not a great deal that the prison authorities can do to change the situation in the space of a few days. The problem with this method of "state sweeps" is that it means visits cannot be carried out very frequently because there are 32 states to cover. On each visit the CNDH team will check whether recommendations from previous visits have been complied with, but the likelihood is that these will have been issued at least a year earlier.

The CNDH receives almost no complaints from women prisoners. However, in the course of visits it has detected a number of issues specific to women: sexual harassment by the prison authorities, lack of segregation from male prisoners and lack of work. It also notes that there is a tendency for women prisoners to be abandoned by their families (which may also explain why there are so few

complaints filed, since prisoners often depend on their families to help them with this). The visitorship does not have a policy of assigning women staff to deal with issues specific to women prisoners, although more than half the staff in the visitorship are in fact women. The third visitorship also has to address the specific problems of children in prison. These include living conditions, the lack of educational activities and the problem of separation. Although they are often separated from adult prisoners, the youngest offenders, who in some states will be as young as six years old, may also share accommodation with 16- or 17-year-olds.

Disappearances

In the second visitorship there is a specialised Programme on Disappearances. The disappearances within its brief fall broadly into three categories. Previously there existed a government office on disappearances which dealt with the so-called “historical” cases dating from the 1970s. In addition, the programme deals with new cases from the 1990s arising either out of the operations against drug trafficking or out of counter-insurgency operations, mainly in the southern provinces of Chiapas, Oaxaca and Guerrero.

However, one problem with the CNDH's work on disappearances was an insufficiently clear definition of what constituted an “enforced and involuntary disappearance”. Among the cases investigated by the CNDH are common criminal cases. One was described which turned out to be a simple criminal murder in which there was no apparent political element. The victims were Canadian nationals, which presumably gave the case a certain diplomatic profile. Other cases involved people who had fled home and changed their identity. In other words the CNDH programme on disappearances functions more like a missing persons bureau and thereby loses the essence of the problem of disappearance as a human rights violation. Staff of the programme justified this with two arguments. First, they said that in many cases they were responding to queries from international organisations, including the UN Working Group on Enforced and Involuntary Disappearances. Thus the CNDH had to investigate, whatever the nature of the disappearance. Second, they argued that their work was humanitarian rather than “legalistic” in nature. Thus if they received an inquiry about someone who was missing, they would try to resolve it regardless of whether the case was, properly speaking, a disappearance. The second of these arguments, if true, is an indictment of the failure of the Mexican law enforcement agencies to investigate common crimes – or alternatively of the lack of public confidence in them. But, like the first argument, it is also somewhat disingenuous. In the past quarter century – especially in Latin America – disappearance has become a frequent and widely recognised phenomenon. The Mexican public understands perfectly well the distinction between an enforced disappearance carried out by the security forces and somebody just going missing. There may be the odd case where it is unclear which category it falls into, but generally the

blurring of this distinction seems to be entirely the work of the CNDH. This impression is reinforced by the fact that, extraordinarily, it is the CNDH which answers for the Mexican Government when complaints are received from the UN Working Group. Thus it clearly has an interest in playing down the number and seriousness of enforced disappearances by the security forces.

Another weakness is a tendency to regard disappearances as “resolved” once the fate of an individual is established, especially if he or she reappears alive. For example, in Oaxaca since 1996 there has been a pattern of short-term disappearances by the security forces. In one case, three people disappeared and a complaint was lodged with the CNDH. The three were released after 11 days, having been tortured in custody. CNDH investigators arrived a year later to confirm that the three had reappeared and took no further action.

In another case in Oaxaca, some 50 people temporarily disappeared. After their reappearance it emerged that they had been held by the judicial police who had beaten and tortured them. An NGO compiled a report and submitted a complaint to the CNDH. But the programme on disappearances refused to investigate on the grounds that the disappeared had already been located.

Amnesty International commented that the CNDH's draft law on disappearances was a “positive step” but that it failed “to meet international standards in the definition of the offence, nor does it contain other important provisions, in particular those referring to the exclusion of military jurisdiction in cases of ‘disappearance’”.⁴¹

The CNDH has displayed some confusion about its role as an autonomous national institution. The United Nations Working Group on Enforced and Involuntary Disappearances has welcomed the role of the CNDH in formulating the government's response to its inquiries, presumably because of the extensiveness of the reports presented to the Working Group, in marked contrast to the late and cursory reports offered by many governments. In the research team's view, however, this is a dangerous misconception about the role of a national human rights institution. It is no part of the function of an NHRI to represent the government in its dealings with external human rights monitoring bodies, whether they be inter-governmental or non-governmental. To do this compromises the public perception of the commission as an autonomous national institution and inhibits it in its own investigations of alleged human rights violations. To put it bluntly, how can a complainant have any confidence in the impartiality of a CNDH investigation into a disappearance, when they know that the same commission – indeed, the same unit within the commission – is responsible for presenting the government's position at the UN?

⁴¹ Amnesty International, Mexico: *“Disappearances”: a black hole in the protection of human rights*, AMR 41/05/98, May 1998.

Education

The CNDH has a massive programme of public education, which is perhaps the most effective aspect of its work. Freed from the political sensitivities that attach to its handling of complaints and endowed with considerable resources, the commission has succeeded in mounting education and training activities for a wide variety of social groups. In 1998 the CNDH held some seven hundred educational sessions targeted at public servants, vulnerable groups, the formal education sector, NGOs and religious associations. These sessions reached a total of nearly 40,000 people.

In many instances the sessions for vulnerable groups were in areas identified by NGOs. One of the particular groups targeted was children. Not only were many reached through formal education – about half the sessions in that sector were for primary and secondary age students – but also more than eight thousand were reached in 86 specially designed activities.

The CNDH has established good relations with the army. This closeness has been a source of criticism when it comes to its handling of complaints, but there is no doubt that the mutual trust has allowed the two institutions to build up substantial training programmes. Inevitably, perhaps, these are focused more on the officers than the mass of soldiery. However, the army has produced its own human rights manual and the handling of human rights training is handled by army instructors themselves. The CNDH gives seminars at the *Escuela Superior de Guerra* (Higher War School) as well as holding other conferences and seminars within the army. The military justice section holds a series of lectures devoted to human rights. How far these activities percolate down to the consciousness of the ordinary soldier – or whether they are seen as an optional extra that can be safely ignored – is difficult to tell.

The CNDH's broader programme of public awareness is probably as substantial as any in the world. It has produced some 650 publications. Some are in English, since it sees part of its function as servicing Mexican diplomatic missions overseas. It has also published basic human rights information in the seven most commonly used indigenous Mexican languages. Publications and pamphlets are distributed through libraries and, to a very significant degree, through NGOs.

The CNDH runs extensive advertising or public information campaigns through radio and television slots. These are thematically grouped into three two-and-a-half-month campaigns each year.

The Human Rights Commission of the Federal District

The research team had the opportunity to visit two of the 32 local human rights commissions in Mexico. All but one of these are state commissions. The thirty-second is the Federal District Human Rights Commission (*Comisión de Derechos Humanos del Distrito Federal* – CDHDF), which is responsible for monitoring human rights in the capital city. The population covered by the Federal District –

some eight million – is larger than the potential clientele of some national human rights commissions, even leaving aside the millions more who travel into the city each day to work.

The CDHDF was established in 1993 and, in formal terms, has the greatest independence of any of Mexico's human rights institutions. The president of the commission is both nominated and appointed by the local legislature, after public comments and opinions have been solicited. At the time of the research, Dr Luis de la Barrera Solorzano, was serving his second four-year term.

The internal structure of the commission mirrors that of the CNDH: complaints are received and registered in a complaints directorate and filtered to two visitorships to investigate and resolve. A technical secretariat maintains external relations with a large number of organisations and the Directorate of Social Communication manages a large publications programme, relations with the media and a number of highly sophisticated, well-produced radio and television slots.

The CDHDF estimates that some 56 per cent of complainants fall into the low income bracket of households that receive less than two minimum wages a month (the minimum wage is approximately US\$100 per month). Thus many of the other disadvantaged groups with which the commission works are embraced by this, the largest group of the vulnerable: the poor. The largest numbers of complaints received relate to the police. Other institutions frequently complained against include prisons, health services and the local courts (where the commission has jurisdiction to deal with administrative matters, such as delays, but not the substance of judicial proceedings).

It was apparent that the level of active collaboration between the CDHDF and NGOs was greater than that of its national counterpart, with the result that the local commission was a more active and sensitive participant in joint activities relating to a variety of vulnerable groups: children, people with disabilities, people with HIV/AIDS, sex workers, the elderly and others.

One particularly impressive initiative is the *Casa del Arbol* (Tree House), which is a children's education centre located alongside the commission's headquarters. In three years some 140,000 children – usually in school groups, but also including street children – have been through a half-day popular presentation about what human rights are and how to protect them. The centre's organisers point out that public human rights discourse is a new phenomenon in Mexico. Their stated aim is to make sure that the next generation is better educated on these issues than past and present ones.

The State Human Rights Commission of Jalisco

The Jalisco State Human Rights Commission (CEDHJ) was established in 1993. Unlike the establishment of the CNDH there was some direct involvement of civil society in its formation. A number of non-governmental organisations lobbied the

Congress for the establishment of the commission. The governor charged several prominent figures from civil society with drawing up a proposal. One outcome of this was a structure, like that in the Federal District, where the commission's president is appointed by and answerable to the state legislature rather than the executive. The first CEDHJ law established that the Congress would elect the president from three names nominated by the governor of the state. In 1998 the law was amended. Now the executive invites nominations from civil society bodies, one of whom will be chosen by the governor and approved by Congress. The Council, a supervisory body with civil society representation, is similarly appointed.

The commission has some 120 staff and its structure mirrors that of the CNDH and Federal District commissions, with a directorate of complaints and advice, four general visitorships to investigate and resolve complaints and an executive secretariat that has responsibility for education and training and links with outside bodies. It has one central office in the state capital, Guadalajara, and five regional offices. The commission works closely with NGOs that are active in the indigenous communities and has experimented with having researchers based in those communities.

The commission has a policy of gender sensitisation, starting with its own staff. There is sensitisation training aimed particularly at complaints staff. In fact the bulk of lawyers in the commission are women. Many of the complaints received from women relate to the domestic sphere and fall outside the commission's mandate. But they still try to give advice and will redirect inquiries to the relevant NGOs or public offices.

The appointment of the commission's president by the state Congress rather than the executive did not pay immediate dividends. The first president was in fact close to the governor of the state. He was not well regarded among human rights activists and reputedly had a nepotistic employment policy. The current incumbent, María Guadalupe Morfín, was appointed in 1997. She has been a far more independent figure, antagonising sections of the political establishment in Guadalajara. Morfín comes from a family with strong past connections with the *Partido de Acción Nacional* (PAN), the ruling party in Jalisco, but demonstrated her independence soon after her appointment. She made strong statements against police check-points and the many unlawful arrests by Guadalajara police of poor children, street workers and windscreen washers. Hostility to her was such that there was an attempt by some of PAN's local congress members to impeach her in Congress on charges of exceeding her mandate and excessive partisan advocacy. This failed, in part because of the widespread support for her in civil society, but it is apparent that she walks a political tightrope.

Paradoxically, her predecessor's method of working was in fact more confrontational. He issued the largest number of recommendations of any human

rights commissioner in the country and tended not to favour amicable settlements to complaints. Morfín issues fewer recommendations, but a number have been politically controversial. All have been made public and a number of them have required sanctions against public officers who violated human rights. These have had a strong public impact.

A particular strength of the Jalisco commission is a disposition to see complaints as instances of systemic human rights problems rather than as isolated and discrete issues. In one case, involving living conditions for migrant workers, it issued a global recommendation to several different bodies: the relevant municipality, the state government and the Ministry of Health. It was an example of the creative approach adopted, since immediate responsibility for the workers' conditions lay with private employers who fall outside the commission's jurisdiction. By issuing a recommendation to various public authorities – which was accepted and largely complied with – the commission was requiring them to take responsibility for protecting the workers' rights.

Perhaps more acutely than the CNDH, the Jalisco commission has to confront the accusation that it is soft on criminals. The commission has in fact been fairly ineffective in addressing a rash of arbitrary detention and false charges by the state police. In the last annual report, the president denounced the involvement of the police in organised crime, including car theft and drug trafficking – her answer to the accusation that the commission was indifferent to the problems caused by criminals.

Morfín has publicly pronounced on a number of human rights issues relating to the army. However, she has good relations with the military, who apparently appreciate her direct and problem-solving approach to issues, and she has succeeded in resolving several matters without the need for a formal complaint. Opposition to Morfín comes from the state government and business interests. It has been principally the chamber of commerce that has voiced upper middle-class fears and accused her of contributing to insecurity in Guadalajara. These views have been echoed in a section of the local media and Morfín was the subject of a well-publicised attack by the Archbishop of Guadalajara, who questioned why the commission only criticised public authorities, and never criminals. But it appears that the commission has considerable legitimacy among those sections of the population that have benefited from its intervention: workers, peasants, the unemployed, street children, as well as NGOs and other activists in the human rights field.

The sources of this public legitimacy are fairly clear. The state commission under President Morfín has demonstrated a practical independence from government. Lawyers and human rights activists might see a particular significance in the fact that the president is appointed by congress rather than the governor, but the public is probably more concerned with the consequences of this. The

beneficiaries of the commission's work are likely to be impressed with the pragmatic, problem-solving approach adopted and its readiness to take on the political and business establishment if that is what is needed to uphold human rights.

Conclusion

Mexico has arguably one of the best resourced systems of human rights protection of any country in the world. In addition to the national commission with a staff in excess of 600, there are 32 local commissions, each with a staff running into dozens, if not hundreds. Its comparative ineffectiveness is not due simply to the massive failure of the judicial system, both civil and military, to tackle the problem of gross human rights violations, since that is a matter that is beyond the control of the commissions. Ineffectiveness can rather be measured in terms of the clear lack of public legitimacy of the CNDH and most state commissions – a failure that can be largely ascribed to the lack of political will on the part of the leaderships of these bodies. The CNDH's successes have generally been in non-confrontational areas, such as human rights education. Its failure to make a single recommendation against the army in the course of the Chiapas conflict is only the most striking example of a general reluctance to be publicly critical of the security forces. Most people interviewed by the research team were inclined to explain this by pointing out that the CNDH president has, up until now, been a direct appointee of the President of the Republic – an explanation which is apparently reinforced by the fact that the two most independent local commissions in the country, Jalisco and the Federal District, are both appointed by the legislature not the executive. Yet in other situations – Indonesia being an obvious example – close links to the Presidency have given a national institution additional backbone when it comes to taking on important bodies like the armed forces. Indeed, the military in Mexico play a less crucial role in the governance of the country than in Indonesia, although a number of observers commented on the growing militarisation of Mexican politics in the 1990s, which may explain why the army seems increasingly to be beyond criticism.

The CNDH, since its foundation, has been overly dependent on the executive branch of government. Since the revolution of 1910 Mexico has been a highly authoritarian, corporatist-style state. Prior to the revolution it was highly decentralised, with the different states even having their own currencies. It was, in part, pressure from the United States that forced a process of centralisation, even though the structure remained a federal one. This corporatist political culture explains why many people – including the government – have difficulty understanding the supposed character of the CNDH as an autonomous national institution. The practice has been for all national institutions, such as trade unions and the ruling party, to be effectively a branch of the state. Politicians rise through these apparatuses, switching between them. Hence the transition of the two past presidents of the CNDH to be Procurator General of the Republic. Hence also the

fact that President Roccatti formerly occupied a senior position with the state of Mexico, while the executive secretary of the CNDH, Ricardo Sanchez Camara (replaced by Patricia Galiana in November 1999) formerly headed a human rights unit in the Ministry of Foreign Affairs.⁴²

However, with the advent of neo-liberal economic policies, from the 1980s onwards, corporatist politics have been superseded by a system that is merely authoritarian. In the words of one academic lawyer: "Mexico is not a state of law; it is a state of power".

One characteristic of the Mexican corporatist state was that it avoided the direct involvement of the army in politics which has been the bane of so many Latin American countries. This has changed somewhat in the 1990s. Although the CNDH was established largely in response to international criticism of its human rights record as the North American Free Trade Agreement (NAFTA) negotiations loomed, in fact the human rights situation in the 1990s got much worse (for reasons quite beyond the control of the CNDH). The expanding traffic in narcotics was characterised in the 1990s by the growth of local Mexican drug cartels (whereas before, the country was merely a transit route for South American drug traffic into the United States). With US support, the army has played the leading role in anti-smuggling operations. At the same time, armed rebellion has broken out in three of the southern provinces with a large indigenous Mexican population: Chiapas, Guerrero and Oaxaca. This development has also pushed the army to the fore. Narco-crime and left-wing insurgency between them have given the army a much more prominent role in the political balance of the country – as well as involving it in many serious violations of human rights. The army's increased political leverage has rendered the CNDH largely powerless to deal with the increase in human rights violations. Although the commission has done much positive work in, for example, human rights education or the resolution of more low-key human rights and administrative complaints, its lack of autonomy has meant that it has been incapable of taking on the army. It is this failure that damns the CNDH in the eyes of many Mexican human rights activists.

⁴² Commenting on the first draft, Dr Carlos Morales Paulín of the CNDH wrote of this paragraph that it expressed:

"Una apreciación muy personal y subjetiva toda vez que los defensores de Derechos Humanos no surgen de la nada, sino de la experiencia previa que fortalece el quehacer de la institución de la que son miembros. No es extraño que personas que han colaborado en organismos de protección de Derechos Humanos, participen en comités o grupos temáticos de Naciones Unidas o en organizaciones no gubernamentales."

Translation:

(A very personal and subjective interpretation since human rights defenders do not emerge out of nowhere, but from [their] previous experience which reinforces the activities of the institution to which they belong. There is nothing surprising about the fact that individuals that have worked in human rights organisations take part in UN committees or NGOs.)

Four: **LEGITIMACY**

This study chose to look at the public legitimacy of NHRIs, rather than the merely formal legitimacy contained in law, because it was assumed that the credibility and effectiveness of such institutions derived more from what they did than from what they said they would do. Yet it was apparent throughout that many of the criteria that people applied to judge public legitimacy went to the heart of the formal legal basis of the institution: who was a member of the institution, whether they were independent of government, whether the NHRI had a mandate to tackle the sensitive human rights issues, and whether its findings had any effect. Beyond that, most of those interviewed made a judgement about the political will of an institution: was it prepared to tackle the difficult issues that would put it into conflict with the government? Would it address the needs of the victims of human rights violations and the priorities of civil society institutions?

Autonomous national institutions

It was apparent in all the countries studied that there are very wide misapprehensions about what constitute autonomous national institutions – or indeed whether such institutions are valid or valuable. In some cases, this is because there is simply no history of independent institutions at all. This is so in many African countries, for example, where national human rights institutions have proliferated in recent years but the political culture of the military or one-party state has not really been overcome. A more sophisticated variant of this is found in countries, such as Mexico and Indonesia, that have a long history of corporatist political culture. In those countries people are used to ostensibly independent institutions (such as the trade unions, and even the judiciary) that are in fact under the control of the ruling party or clique. These nominally autonomous bodies are in practice totally dependent on the political power and are used as a rung on the ladder to preferment by those who work in them. Thus, even when the corporatist system is being replaced by a more democratic and open order (as in both Mexico and Indonesia) the old thinking still lingers on. Governments, the public and the staff of the commissions themselves will still tend to perceive themselves as being beholden to the executive.

An alternative objection to these autonomous national institutions is that they are undemocratic. This is the view that is sometimes quietly voiced in government circles in, for example, Ghana and South Africa. Both countries are young democracies and government supporters argue that human rights institutions are alright in their place but should not be allowed to thwart the democratic will of the people. It is perhaps an irony that the left-leaning governments of these two countries should echo the most conservative of Western political theorists. The weakness of their approach is that it defines the democratic process exclusively in terms of the ballot that is cast once every four or five years. Yet the existence of autonomous (albeit subordinate) institutions is a vital mechanism for ensuring the

accountability of governments and in particular underlining the primacy of constitutional principles. Indeed, this is where national human rights institutions work particularly well – keeping democratic governments on the straight and narrow and providing the electorate with an impartial audit of their performance on human rights.

Yet, there is often a misunderstanding of the character of national human rights institutions from the other side too. Many of the criticisms articulated by NGO activists, for example, amount to saying that NHRIs are not NGOs. Yet the reality is that if national institutions had the attributes and behaviour of NGOs they would be useless at the job they are supposed to do. For one thing, a national institution must be seen to belong to the nation as a whole. It should be endowed with statutory powers which enable it to carry out its functions – such as the power to subpoena evidence or to make recommendations – but that also carries with it a certain accountability. Not least of all, to be effective they must gain a degree of trust from those working within government, as well as in civil society. This does not mean compromise with those who violate human rights. It does mean pragmatically understanding the constraints within which government operates and helping to design solutions to protect human rights in the real world within which they operate. National institutions at their best should act as a conduit through which the grievances of civil society are brought to the attention of government. They can only do this effectively if they stand somewhat apart from civil society.

The independence of the human rights institution from the executive branch of government is generally regarded as a precondition for its effective functioning and credibility. Yet the independence of a human rights institution can only ever be analogous to that of the judiciary – in other words, it should be independent in its functioning, but will have inevitable links to other branches of government in its appointment, its financing and the exercise of its powers. Indeed, one of the values of a national institution in the investigation of human rights violations is its capacity to exercise statutory powers to, for example, compel disclosure of information or the appearance of witnesses. Equally, when a human rights institution reports on violations this constitutes a form of official acknowledgement which is different in quality from reports by non-governmental human rights bodies.

Political context

Broadly speaking, human rights institutions are established in one of three political circumstances:

- A society more or less at the moment of transition establishes an institution to protect against a return to the human rights abuses of the past. Usually such institutions will have constitutional status and occasionally they may also have a mandate to investigate past human rights violations. Into this category

would fall such examples as the Philippines, South Africa, Latvia, Spain, Northern Ireland and Malawi.

- A government under concerted pressure over its human rights record establishes an institution in order to be seen to be doing something to address the problem. The legal basis for such an institution will vary widely from presidential or ministerial decree to statute. Cameroon, Nigeria, Togo, Indonesia, Mexico, India and Zambia all fall into this category.
- Established political systems – often democracies with a generally good record of respect for human rights – set up institutions to deepen their commitment to human rights and strengthen existing investigative and enforcement mechanisms. In such circumstances, institutions are usually founded by statute. Examples include: Canada, Australia and France.

This is a somewhat schematic presentation: in practice countries that establish NHRIs may fall into more than one of these categories.

National human rights institutions in new democracies

When a national human rights institution is established at the moment of political transition, the likelihood is that its public legitimacy will be greatest. In these circumstances, where a whole new constitutional order is being developed, there is a greater chance that the institution will appear to belong to the nation as a whole rather than to the government of the day. Partly, this may be because the new institution is enshrined in a new constitution, as in Ghana and South Africa. Or it may be because there has been some degree of public consultation and participation in the development of new institutions – something that is more likely to happen in the process of political transition than under an established system.

A national institution established at the moment of transition may represent a political compromise between old and new rulers or between different political forces. It may derive strength from that, but this may also make it subject to political pressures. The South African Human Rights Commission bears the influence of the political circumstances of its creation – for example the continuing presence of members of white minority parties on the commission is presumably intended to reassure their communities, even though the principal victims of human rights abuse are found among the black majority.

A situation that is becoming increasingly common, but which holds its own problems and dangers, is for an NHRI to be established as part of a peace agreement or political settlement. In Northern Ireland, the human rights commission was established as part of a political agreement between conflicting parties under the 1998 Good Friday accord. Given that human rights abuses have been at the root of the Northern Ireland conflict this seems proper and understandable. Unfortunately, it is precisely the highly politicised perception of human rights issues which will make it very difficult for the commission to do its

work without encountering serious political opposition.⁴³ In Northern Ireland it seems possible that removing human rights grievances to the impartial forum of the commission would strengthen the peace process. Elsewhere, as in Guatemala, a peace process has given additional life to an existing institution. The *Procurador de los Derechos Humanos* (PDH) had been in existence since 1987 but was strengthened by the 1996 peace accords, which gives the PDH certain monitoring functions and obliges the institution to initiate judicial or administrative action against human rights violators. The peace agreement also assigns the PDH the responsibility of taking on the human rights aspects of the current UN verification mission for Guatemala when it completes its mission in 2000.

Other recent peace agreements have also established NHRIs. The UN-sponsored peace agreement in El Salvador led to the creation of the *Procurador para la Defensa de los Derechos Humanos* in 1992. Most notably the 1995 Dayton and Paris Peace Accords included the establishment of a Human Rights Ombudsman for Bosnia-Herzegovina. The 1999 Sierra Leone peace accords also made a provision for the creation of a human rights commission (within 90 days) and similar proposals are mooted for Kosovo and East Timor. The Bosnian institution is a peculiar one, in that the first incumbent is an international appointee, although control will pass to the Republic of Bosnia and Herzegovina after five years. It is not clear that the external imposition of institutions, including human rights institutions, will work if there is no sense of local participation and ownership.⁴⁴ There is a danger, in this sudden rash of national institutions created through peace agreements, that too little attention is being paid to the difficult questions of consulting civil society in the creation of NHRIs and considering where they fit into the overall framework of new democratic structures in transitional societies.

When an NHRI is established in the process of fundamental constitutional change, at the end of a period of serious human rights violations, the question may arise of whether it should assume some of the functions of a "truth commission", by investigating and reporting on human rights issues prior to its creation. In some instance, South Africa being the prime example, a truth commission has been separately created. Even in that case, however, the issue of past abuses is not entirely closed, since the focus of the Truth and Reconciliation Commission was narrowly on gross human rights abuses. The focus which the South African Human Rights Commission (SAHRC) has adopted – under constitutional mandate

⁴³ Maggie Beirne, "New Institutions for the Protection of Rights", seminar paper, Institute for Commonwealth Studies, London, May 1999.

⁴⁴ See, for example, David Chandler "The Bosnian Protectorate and the Implications for Kosovo", *New Left Review* 235, London 1999. Chandler remarks:

The frailty of Bosnian institutions has perpetuated the fragmentation of political power and reliance on personal and local networks of support which were prevalent during the Bosnian war... The lack of cohering political structures has meant that Bosnian people are forced to rely on more narrow and parochial survival mechanisms, which has, meant that ethnicity has maintained its wartime relevance as a political resource. p. 131.

– on economic and social rights is largely due to the need to undo the systemic abuses of the old political system.

One factor which may limit a national institution from addressing past abuses is the time limitation that many are constrained by. In Ghana and India, for example, a complaint about an alleged human rights violation must be lodged within 12 months of it coming to the complainant's notice. This was one of the grounds on which the Ghanaian CHRAJ turned down a complaint relating to "disappearances" allegedly carried out by the former military regime in the 1980s, before the commission came into existence. This is a weak provision, since it will often be the case that victims of human rights violations (or their relatives) will be reluctant to come forward with a complaint until the political circumstances in which the abuse took place have changed. To penalise complainants because they were afraid does not seem to be in the proper spirit of a victim-friendly human rights system.

The other argument used by the CHRAJ in the Ghanaian case was that the complainant, the leader of a political party, had no personal interest in the cases complained about – in other words he was not a victim of the alleged abuses or a relative of the "disappeared". This also seems an unnecessary restriction. In Ghana the CHRAJ is not specifically permitted to launch investigations on its own initiative, although most effective NHRIs do have that power, but has often done so in practice. It could have chosen to do so in this instance but did not, presumably because of a reluctance to confront the government on an extremely sensitive political issue. Ironically, the CHRAJ is one of the very few NHRIs – perhaps the only one – to have a specific constitutional mandate to address past abuses. The transitional provisions of the constitution empower it to hear cases of forcible deprivation of property by the former military government. It has heard many such complaints and in a number of instances has restored confiscated property to the previous owner.

Malawi is another country where consideration was given to empowering the Human Rights Commission to investigate past abuses. The democratic constitution, adopted in 1994 at the end of 30 years of one-party rule, established a National Compensation Tribunal to investigate complaints by victims of abuse under the old regime. This was with the specific purpose of awarding financial compensation and it has not functioned as a truth commission. The elected government, many of whose members had served in the one-party regime, was reluctant to establish a broad truth commission. At a conference of civil society representatives in 1996 on the need for a truth commission, the Law Commissioner (an *ex officio* member of the Human Rights Commission) argued that that body had the mandate under the constitution to investigate past abuses. However, when legislation establishing the HRC was enacted it made no specific mention of this function and in practice the HRC has not tackled abuses predating its establishment.

The 1999-2002 draft strategic plan of the Northern Ireland Human Rights Commission, issued for consultation in September 1999, states that it is considering whether it should set up some forum to examine Northern Ireland's troubled history. Whether this is done by a separate institution or by the national institution itself, or whether the national institution acts as a facilitator or catalyst, no doubt that it is essential that a truth-telling process takes place. This is not only for all the usual reasons, but also because a failure to do so will undermine the credibility of the future work of a national human rights institution.

National human rights institutions as an answer to critics

National human rights institutions are often established when a government finds it is under pressure – especially internationally – over its human rights record. Of our main case studies, both Indonesia and Mexico fall into this category. In such circumstances it will be much more difficult for an institution to win public legitimacy. It is far less likely that there will be serious public consultation over the creation of the institution, with the consequence that it will be widely seen to belong exclusively to the government and not to the nation as a whole. This does not mean that institutions established in these circumstances are necessarily ineffective.

The National Human Rights Commission of India, for example, was established in precisely these circumstances. Before its establishment the Home Minister stated that the purpose of the commission would be to “counter the false and politically motivated propaganda by foreign and Indian civil rights agencies”. In a similar vein a spokesperson for the ruling Congress (I) party said of the proposed body: “Its findings will act as correctives to the biased and one-sided reports of the NGOs. It will also be an effective answer to politically motivated international criticism.” In May 1993, the government introduced a bill into Parliament. It was referred to a Parliamentary Standing Committee which received some public representations. In September of the same year, a National Human Rights Commission (NHRC) was established by presidential ordinance. This was followed by a new bill which was passed into law as the Protection of Human Rights Act 1993.⁴⁵ Despite the stated political purpose of the NHRC, the slightly eccentric manner of its enactment and the almost total lack of public discussion, the commission which emerged from the new act had much to recommend it.⁴⁶

⁴⁵ South Asia Human Rights Documentation Centre, *National Human Rights Institutions in the Asia Pacific Region*, New Delhi, March 1998, p. 9.

⁴⁶ Commenting on the first draft of this report Mr. N. Gopalaswami, the secretary-general of the NHRC, described this last sentence as “somewhat condescending and we would suggest that it be suitably modified” (E-mail, 28 October 1999). We have noted his factual corrections to the effect that a further five prominent individuals were invited to tender oral evidence. However, this does not seem to constitute extensive public discussion, while the stated government aim in setting up the commission is a matter of public record. Despite his explanation, the withdrawal of the bill from Parliament and its replacement by a Presidential Ordinance also appears a slightly unusual way of proceeding.

The paradox is that if such institutions are to play their primary function of heading off international criticism, then they must also appear to fulfil their nominal role: namely, addressing human rights issues internally. Also, to have any credibility the membership of the institution will need to be respected and fairly independent. Such people are likely to want to do their job properly. Hence a number of institutions established in inauspicious circumstances have turned out better than expected. Inevitably, their strengths are more likely to be in politically non-controversial areas, such as education or resolution of administrative justice-style complaints. Nevertheless these are not negligible achievements.

One of the most important functions a national institution can play is to establish a political space within which other human rights activists – primarily the NGO community – can operate. This phenomenon is examined in further detail in chapter six, but the example of Togo is instructive. When the *Commission nationale des droits de l'Homme* (CNDH) was established there in the late 1980s there was no possibility of independent human rights activism. The formation of the CNDH was an early indication that national institutions established for largely cosmetic purposes might transcend the limitations imposed upon them. It was set up after the Togolese government had been sharply criticised by international organisations, including Amnesty International, over the torture of political prisoners. An *ad hoc* commission of inquiry had investigated these claims and found them to be true, but had then been forced to withdraw this finding – not an auspicious start for the permanent institution which was then established. The CNDH was perceived by most observers as being largely a presidential body, but this was perhaps unfair since it was established by statute and had a large degree of formal independence. Its 13 members were representative of a number of social groups and organisations: lawyers, youth, workers, women, medical doctors and the Red Cross, as well as Parliament, traditional chiefs and the judiciary. The CNDH had extensive investigatory powers.

Although Togo remained a repressive one-party state, the commission operated with increasing independence and effectiveness. In 1990 the chief of police was dismissed after the CNDH had verified allegations of torture of detained students. The same year the commission intervened successfully to stop the banning of an independent newspaper, *Forum Hebdo*. In April 1991, the CNDH investigated the deaths of at least 26 people whose bodies were found in the Bé lagoon in Lomé after anti-government demonstrations. Its report unequivocally held the army responsible for killing the protesters and called on the President to identify the personnel responsible and prosecute them. No action was taken.⁴⁷

This series of high profile cases indicated the surprising extent to which the CNDH was prepared to take its distance from the President who established it. However, this was the high water mark of its effectiveness. The commission's president,

⁴⁷ Richard Carver and Paul Hunt, *National Human Rights Institutions in Africa*, African Centre for Democracy and Human Rights Studies, Banjul, 1991.

Yawovi Agboyibor, became increasingly identified with opposition politics, leaving office to stand as a presidential candidate when multi-party politics was introduced. Never again was the CNDH given the same latitude to investigate human rights violations. In 1996 the statute governing the CNDH was amended to give it a membership of 17 elected by majority vote of the National Assembly. Today it is dominated by government supporters. The last genuinely independent president of the CNDH, Robert Ahlonko Dovi, fled into exile because of the government's failure to guarantee his security. It is reported that since then, the CNDH has carried out no investigations into complaints it has received of alleged violations of human rights.

This pattern seems to be a common one. An imperfect human rights institution may often be better than none at all in a restrictive political context. However, it will not be a durable mechanism for the long-term protection of human rights. Both the Mexican and Indonesian commissions seem to have become less effective as time has passed. In the case of Mexico it was claimed that NGO criticism of the CNDH has diminished even though the performance of the commission has got worse. This is perhaps because NGOs have developed a working relationship with the CNDH that they did not enjoy in the early days and therefore feel less able to be vocal and public in their criticisms. It seems that the crucial factor is the existence of a reasonably vibrant civil society and at least latent human rights activism. Where these conditions do not exist, there is no countervailing force to prevent national institutions from becoming mere mouthpieces of government. That is why current proposals to establish national human rights commissions in countries such as Burma (Myanmar) and China are potentially risky.

The decline in effectiveness of these commissions might seem to run counter to the common-sense expectation that they would gather experience (and assertiveness) that would make them more independent of government in their functioning. In practice it seems that they exhaust the possibilities available to them in the rather limited political space that they occupy. In the early days, no one quite knows the rules whereby they operate, including themselves, and they are perhaps able to get away with more. They belong to a particular historical moment in which a certain liberalisation takes place but they need to develop stronger institutional guarantees of independence if they are to expand their role in changing political circumstances. It is heartening that both the Mexican and Indonesian institutions are taking steps in this direction.

National human rights institutions in stable democracies

On the face of it, the third type of political situation – where a stable democratic system is already in existence – is the least problematic when it comes to reviewing the history and performance of NHRIs. The language of the Paris Principles and other international declarations on NHRIs makes no distinction between countries with different levels of economic development – or for that

matter different levels of respect for human rights – in considering the desirability of such bodies. Yet the relative scarcity of NHRIs in advanced democracies raises the question of whether they are necessary or appropriate in economically developed countries, or are simply a phenomenon of the developing world.

With only a handful of exceptions the boom in NHRIs in the 1980s and 1990s has taken place in the countries of the South. The tradition of the ombudsman originated in Sweden and has been enthusiastically embraced throughout Europe. But such institutions generally deal only with issues of maladministration and not human rights abuse. Few developed countries have fully-fledged human rights commissions. Three Commonwealth countries – Canada, New Zealand and Australia – are notable exceptions. Spain's *Defensor del Pueblo* is an ombudsman-style institution with a human rights mandate. Yet there is no national human rights commission in the United States, Germany or Italy, for example. The United Kingdom government considered the creation of a human rights commission in the context of passing a Human Rights Act and incorporating the European Convention on Human Rights into domestic law. But it decided not to, except in Northern Ireland which is covered by a new human rights commission established under the Good Friday 1998 Peace Agreement. The Republic of Ireland also has a new human rights commission established under the same agreement. It is perhaps instructive that Spain, the other western European country apart from the United Kingdom to have suffered endemic political violence over the past three decades, has a national human rights institution.

France has a *Commission nationale consultative des droits de l'Homme* (CNCDH) which was established by decree in 1984. Its function is to advise the Prime Minister on all national and international human rights issues. This would include, for example, recommending or commenting on draft legislation. The CNCDH issues an annual report on the struggle against racism and xenophobia. The commission is composed of representatives of civil society and the government, the latter in an advisory capacity, and is appointed by the Prime Minister.⁴⁸ The CNCDH does not receive or investigate individual complaints of human rights violations. (A *Médiateur* or ombudsman performs that function in maladministration cases.) This model has had some influence in the French-speaking world. Notably, the *Conseil consultatif des droits de l'homme* in Morocco owes much to the French commission in its conception: it advises the monarch on human rights matters and has a mixed membership of representatives of government and civil society.⁴⁹

Japan has a unique system of 13,662 civil liberties commissioners. But despite their number they are not socially diverse, are dependent on the Ministry of Justice and do not have the authority to perform general investigations on human rights matters. They are not authorised to make recommendations to the competent

⁴⁸ République française, Office of the Prime Minister, *National Advisory Commission on Human Rights*, Paris, 1998.

authorities. Civil liberties activists are lobbying for the creation of a new NHRI conforming to the Paris Principles.

It might be argued that developed countries have less need of national human rights institutions either because they are less prone to violations of human rights, or because the existing judicial system is better able to address what problems there are. Both arguments suggest complacency. Developing countries are not the only ones to suffer from conflict, discrimination, racism, xenophobia and a host of other human rights problems. Equally, the justice systems of rich countries are notoriously inaccessible to their poorer inhabitants. Legal aid schemes are seldom sufficiently comprehensive in their coverage to allow the poor and vulnerable to embark on extensive (and expensive) litigation. Perhaps even more importantly, the legal system of most developed countries remains the preserve of the socially privileged – the wealthy white males of middle-age and older, who are least likely to be victims of human rights violations. The argument for a free, accessible human rights mechanism seems just as compelling in the developed world as elsewhere.

It might also be assumed that NHRIs in advanced democracies operate in a uniformly favourable political environment. In Australia, nevertheless, the Human Rights and Equal Opportunity Commission has recently suffered a massive cut in its budget. In Canada human rights institutions have run into hostility from

- 49 A number of the Francophone African human rights commissions, which might have been expected to follow the French model, have broader powers and are more independent of government. These would include Togo (before recent amendments to the law), Benin and Cameroon. Commenting on an earlier draft, a staff member of the French commission, Emmanuel Decaux, was critical of what he describes as a failure to analyse the characteristics of the "Francophone model". He wrote:

"... le rapport ne raisonnait que sur les cas des IN [institutions nationales] quasi-judiciaires. C'est réduire la catégorie des commissions consultatives à la situation de commissions 'croupion' à qui il faudrait conférer des pouvoirs d'enquête, pour atteindre la 'légitimité publique'... Et dans la mesure où ce préjugé ne correspond en rien aux 'principes de Paris', l'idée sous-jacente du rapport, est de remettre en cause les principes de Paris... Là encore l'empirisme dans l'échantillonnage trahit l'arbitraire et la volonté de mettre en avant un agenda caché, à travers la promotion d'un 'modèle unique' qui serait celui du Commonwealth. En ce sens le choix des principaux exemples valorisants n'est pas innocent, puisqu'il traduit l'influence directe ou indirecte (à travers le rôle fort actif de l'Australie en Asie) du Commonwealth."

Translation:

(The report only dealt with the cases of quasi-judicial national institutions. In so doing, it reduces the category of consultative commissions to rump-type commissions which need to be granted investigative powers for them to gain 'public legitimacy'... . Once again, the sampling's empiricism reveals an arbitrariness and a desire to advance a hidden agenda through the promotion of a 'unique model' which would be that of the Commonwealth. In that regard, the selection of the primary positive cases is not innocent since it bears out the direct or indirect influence of the Commonwealth (by way of the active role played by Australia in Asia).

provincial governments. In 1983, the government of British Columbia repealed the provincial Human Rights Code and dissolved the Human Rights Commission, replacing it with a human rights council with weaker investigative powers. Subsequently a fully-fledged human rights commission was re-established through new legislation. In 1995 the newly elected government in Ontario took a similar step, dissolving the provincial Employment Equity Commission. And the future of the Alberta provincial commission has also been under threat. Recent legislation incorporated certain government responsibilities for multicultural and women's programmes into the human rights commission. This is a clear indication that, however strong institutional guarantees are of a national human rights institution (all these bodies in Canada are founded by statute) it will not necessarily survive a significant change of political will on the part of government.

Mandate

National human rights institutions define the rights that fall within their mandates in a variety of ways. There is a basic distinction between institutions that work on rights as defined in a national bill of rights or legislation and institutions that take as their mandate international human rights standards, whether those to which their country is party or the whole range of customary international human rights law. It seems generally preferable that the mandate be defined as broadly as possible, for a number of reasons. First, national constitutions or definitions of human rights may define rights in terms that are so narrow as to be scarcely in conformity with contemporary international standards. Second, linking a national institution to universal standards allows it to be the mechanism whereby advances and developments in international human rights law and thinking are translated into national practice. Thirdly, giving the NHRI jurisdiction over a broad range of international human rights standards, not simply the treaties that are binding upon the country, allows citizens a broad protection of their rights that bypasses governments' attempts to limit those rights by reservations to international treaties.

When a national human rights institution also has an administrative justice or ombudsman function there is the additional problem that the distinction between rights and good administrative practice is blurred. This report does not necessarily argue against combining the two functions in one institution – indeed, on balance that seems like the best solution for many countries – but there is a need for great conceptual clarity on the part of the institution and a large degree of public education on what human rights are.

A number of national human rights institutions, especially in developed countries, are in fact anti-discrimination bodies. This is the case, for example, with the Canadian Human Rights Commission (CHRC), which only addresses civil and political rights and economic, social and cultural rights to the extent that these are the subject of discriminatory practice. The enforcement of civil and political rights as such rests solely with the courts. This may not be a great practical problem: the

violation of human rights in more developed countries very often takes the form of discrimination against racial or national minorities, women, children, people with disabilities and other vulnerable groups. However, it would be a dangerous model to apply more broadly.

Imprecise definitions of what constitute human rights can lead to an obscuring of government responsibilities. The Philippines Commission on Human Rights (PCHR) has been criticised by NGOs for investigating anything from breach of contract to car theft, even though its mandate specifies that its responsibility is for civil and political rights.⁵⁰ The special unit of the Mexican CNDH responsible for “disappearances” investigates a whole variety of cases involving missing persons. Some of these appear to be purely criminal cases while others arise from domestic disputes. The effect is to muddy the commonly accepted definition of an enforced and involuntary disappearance and thereby to obscure the responsibility of the security forces.

On the other hand, however, the CHRAJ in Ghana has a deliberate policy at district level of accepting any complaints that come to it, whether they are human rights issues or not. Many commissions are familiar with the situation where a complainant presents a grievance which falls outside its mandate. He or she is usually given advice and referred to the relevant institution. CHRAJ goes a step further and deals with the complaint itself, provided that it can be resolved by the District Office without reference to a higher authority within the commission. The rationale is that members of the public do not clearly understand what are, or are not, human rights issues. It is crucial for the credibility of the CHRAJ that it is able to deal efficiently with whatever complaints are brought before it. That is how it gains public legitimacy.

The problem, however, is whether this approach undermines public understanding of the nature of human rights.

Some NHRIs include in their mandate investigation of abuses by non-governmental bodies, such as armed opposition groups. It is not always entirely clear what the legal source of this mandate is, since the obligations on private parties are clearly different from those on governments under international human rights law.⁵¹ The Philippines commission’s mandate covers violations committed by the armed opposition as well as by agents of government. NGOs have also criticised the PCHR’s use of its powers to investigate human rights violations by

⁵⁰ South Asia Human Rights Documentation Centre, *National Human Rights Institutions in the Asia Pacific Region*, New Delhi, March 1998, p.49. See also, “Preliminary critique of the Commission on Human Rights of the Philippines”, by Task Force Detainees of the Philippines, September 1999, for a thorough critique of the PCHR’s interpretation of its human rights mandate.

⁵¹ The International Council is conducting a separate research project looking at efforts to influence the behaviour of armed groups to respect human rights. A final report will be published in July 2000.

opposition groups. A focus on abuses by the opposition New People's Army and the Moro National Liberation Front is said to have diverted the commission's energies away from investigating systematic human rights violations by government forces.⁵² Similarly Indian NGOs criticise the Protection of Human Rights Act, which includes investigation of abuses by non-governmental armed groups in the National Human Rights Commission's mandate. They also criticise the commission for not taking advantage of that power to investigate pro-government paramilitary bodies.⁵³

The most serious limit on the powers of investigation of the Indian NHRC relates to allegations of human rights violations by the armed forces. The NHRC is not empowered to investigate such complaints directly, but only to "seek a report" from the central government. It can make a recommendation to government on the strength of that report, but clearly the practical effect is to put the armed forces beyond the NHRC's reach.⁵⁴ The armed forces are defined as the army, the paramilitary forces and the central police force. This exclusion of jurisdiction has particularly serious consequences in the context of the continuing conflict in Kashmir.

The NHRC itself has requested a change in the Act to extend its powers in this area, while the Human Rights Committee, reviewing India's implementation of the International Covenant on Civil and Political Rights, also voiced its concern:

⁵² The Chairperson of the commission, Aurora P. Navarrete-Recina, disputes this assessment, but states that 9.96 per cent of complaints investigated are committed by armed opposition groups. Letter to the International Council of 12 October 1999.

⁵³ South Asia Human Rights Documentation Centre, *National Human Rights Institutions in the Asia Pacific Region*, New Delhi March 1998, pp. 19–21.

⁵⁴ Mr Gopalaswami, Secretary-General of the NHRC, wrote as follows: "It is true that the NHRC is not empowered to 'investigate' into complaints of allegations of human rights violations by the armed forces. Having said that it should be mentioned that 'seek a report' does not mean merely gathering papers. The NHRC can effectively intervene and has effectively intervened by sending its observations to the Central Government. If on an examination of the case papers, the Commission arrives at a finding contrary to the one held by the armed forces in respect of any particular incident and the persons involved therein, the NHRC has insisted on action being taken in light of its views. This in fact happened in a case of firing resorted to by a para-military unit in Bijbhera near Sringar in Kashmir in 1993. The para-military unit involved accepted this recommendation and initiated court martial proceedings based on the findings given by NHRC. After receiving a report of the Ministry of Home Affairs dated 12 February 1998 informing it of the outcome of the proceedings of the Staff Court of Inquiry (SCOS) and the proceedings of the trial held by the General Security Force Court (GSFC), the Commission considered it essential to call for the records of those proceedings before taking a final view on the matter. The Commission is determined to see this case through to its logical conclusion. At the end of the year under reporting, it was awaiting the records of those proceedings and was contemplating moving a Writ Petition before the Supreme Court if it were denied full access to the records that it had sought. In effect, therefore, NHRC has expanded its jurisdiction effectively and hence distinction between 'investigate' and 'seek a report' is becoming more academic than real." (E-mail to the International Council, 28 October 1999)

The Committee regrets that the National Human Rights Commission is prevented by Clause 19 of the Protection of Human Rights Act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the Central Government... The Committee recommends that these restrictions be removed, and that the National Human Rights Commission be authorized to investigate all allegations of violations by agents of the State.⁵⁵

Accountability

There is much discussion – rightly – about how to guarantee the independence of NHRIs. Less attention is devoted to the question of how they are held accountable for what they do. Accountability cuts both ways. It is partly about creating a line of authority that will ensure the national institution can do its job without interference from those whom it is trying to hold to account. It is also about ensuring that the institution's clientele – the public at large – are able to see what it is doing in their name and ensure that it is performing properly.

The formal accountability of an institution is through the process of appointment of its members, submission of financial accounts and reporting procedures. Wherever possible, responsibility for all these functions should lie with a democratic public body such as the legislature. Although many parliaments are weak in their composition, this creates a distance from the executive power that is important in strengthening the public credibility of an NHRI.

The area where accountability is most likely to become a matter of dispute is over budgetary matters – the most effective means by which a government can render a national institution ineffective. This can happen even when the independence of an institution's budgetary control appears to be assured, as in Ghana. South Africa, where the constitution is apparently unambiguous, has experienced similar problems. The SAHRC is accountable to the National Assembly and is required to report to it at least once a year. But the question of who controls the SAHRC's budget has been a matter of dispute with the government. The commission has been made subject to the authority of the Ministry of Justice – a situation that the SAHRC regards as inappropriate since that is the line ministry with responsibility for human rights. The 1999-2000 budget allocation for the SAHRC was determined by the Ministry of Justice without reference to the commission. The latter argues that it is being prevented from reaching full effectiveness by these budgetary constraints – pointing for example to the failure to set up provincial offices. The government argues that no public institution is immune from the general mood of financial stringency that must prevail. It is bolstered in that view by the mood of the public – or perhaps more

⁵⁵ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, concluding observations of the Human Rights Committee* (CCPR/C/60/IND/3), 1997.

accurately, of a section of the mass media – which holds that money is being wasted on the proliferation of autonomous statutory institutions. These arguments seem false. In fact, financial oversight in relation to the SAHRC should be exercised by Parliament, which is responsible both for approving the overall government budget and for holding the commission to account. It is unclear why the Ministry of Justice should be involved at all. The constitution clearly requires the commission to participate in the budgetary process as if it were a government department, which makes the current situation apparently unconstitutional.

The annual report of an NHRI is a vital public document that not only provides a regular audit of the government's performance on human rights but also an account of what the national institution has done. It is vitally important that all the findings and recommendations of the institution be publicly available, whether through the annual report or some other mechanism. The institution should use the media to publicise exemplary recommendations. There may be some tension between the confidentiality of the investigation process, which is often in the interests of the complainant, and the need to publicise findings. However, the NHRI has an obligation to a public that is broader than the sum of its individual complainants. Rendering a full public account of its action is also part of making an institution effective.

This broader public accountability is also achieved through the relationship that an NHRI has with non-governmental bodies. If membership of the national institution includes non-governmental human rights bodies and other civil society organisations, this creates a line of accountability. Similarly, regular consultations with human rights activists and civil society organisations not only allow the NHRI to benefit from their experience and insights but give the latter an opportunity to scrutinise the institution's performance.

Complaints driven?

An extremely delicate question facing all national human rights institutions is how far they allow their overall priorities to be determined by what complaints they receive from the public. Several considerations must be taken into account.

The first is that an NHRI should be – and should be seen to be – responsive to the expressed needs of the public. An analysis of the complaints that it receives is an obvious starting point for identifying the main human rights problems in society. A serious criticism of all the institutions studied – Mexico and Indonesia in particular – is their tendency to view complaints in isolation. A problem-solving rather than a legalistic approach is a positive attribute for a human rights institution. However, this can veer into an exaggerated pragmatism that sees the role of the institution as being simply to resolve the problems of individual complainants rather than address the broad human rights issues they raise. An example of this would be if, for example, an institution succeeded in securing redress for a complainant who had been maltreated by the police but allowed the officers responsible to continue

without punishment. Such an approach would reinforce impunity and make further human rights violations of the same type more rather than less likely. Thus an individual complaint should be resolved in a manner that has an educational and preventive function as well as simply resolving the complainant's problem. NHRIs should also use the complaints submitted to draw connections between patterns of human rights violations. In the first instance this may make complaints easier to resolve. One criticism that was voiced of the Mexican commission in its investigation of short-term disappearances in the mountains of Guerrero was that it investigated each case completely anew without understanding that there was a pattern of abuse that suggested that each person taken into secret custody was likely to have been treated in more or less the same manner in more or less the same place. If such patterns are looked for, it may become possible to identify systemic human rights problems and thereby to propose measures at an institutional and policy level to resolve them. Measures might include: education, legal reform, institutional reform, a redrawing of departmental priorities or the removal of certain officials. Or it might be that analysis of complaints will identify a pattern of human rights violations which needs to be the subject of further research, for example through a public inquiry.

A second consideration is that complaints are in many ways the motor and the prime function of a national human rights institution. The Office of the United Nations High Commissioner for Human Rights does not consider an institution to be a proper NHRI if it does not have an individual complaints mechanism. The value of this mechanism is that it is much more accessible to the ordinary person than the alternative route of legal proceedings: it is free of cost and it should also be free of jargon and the various bureaucratic impediments that both the judicial system and normal government processes can place in the way of the ordinary claimant. As Barney Pityana, the chair of the South African Human Rights Commission puts it:

...[W]e have a very strong belief that the value of a national institution in a democracy is that it affords many ordinary people an opportunity to be heard sympathetically. People need to have the assurance that without cost to themselves and at minimal inconvenience, they can approach a body of ordinary people to come to their assistance. We believe that a national institution can ensure justice to ordinary people speedily, with minimal fuss and, hopefully, in a less adversarial environment. This requires an attitude of openness and availability.⁵⁶

In other words, a complaints mechanism gives NHRIs the means to be accessible to vulnerable sections of society.

⁵⁶ N. Barney Pityana, "National Human Rights Institutions at Work: The Case of the South African Human Rights Commission", Paper presented at a seminar "Human Rights: Their Protection at the National Level", Belfast, May 1998.

The complication that arises, however, is that the most vulnerable may for various reasons be less inclined to bring complaints. For social and cultural reasons, complainants are more likely to be male than female; they are more likely to be adults than children; they are more likely to be literate than illiterate; they are more likely to speak the major national language than not; they are more likely to live in towns than in the countryside; they are more likely to be nationals than non-nationals; they are more likely not to be people with disabilities. Prisoners are among the vulnerable groups that generate almost the highest proportion of complaints – although very often the main subject of their complaint (that they should be released) cannot be addressed by the NHRI. Even among prisoners, the most vulnerable are unlikely to complain: the Mexican commission, for example, observed that it received very few complaints from women prisoners although it had by its own initiative identified a number of specific and serious abuses suffered by women prisoners.

The answer to this conundrum lies in part in specific measures to make the NHRI more accessible to vulnerable groups. Some of these are suggested elsewhere in this report, including simplifying procedures, having a maximum number of local offices or access points, public education aimed at the most vulnerable groups and so on. It also suggests the need for an approach that goes beyond being complaints-driven. This is where the research capacity of the national institution will come into play, but also where its relations with NGOs will be particularly important. NGOs are likely to have closer relations with vulnerable groups, partly because of their non-governmental character, but also because they will tend to be more specialised than a national institution can hope to be. National institutions must be prepared to listen to NGOs and civil society organisations for advice on what are the major human rights issues affecting those who may have no other effective voice. The complaints mechanism itself is not a wholly reliable barometer of the human rights climate.

The Australian Human Rights and Equal Opportunity Commission has pioneered an approach that to some extent overcomes this dichotomy between a “complaints-driven” and thematic approach. The HREOC has the power to conduct public inquiries: this is broader than the individual complaints procedure and allows the commission to investigate and report upon human rights violations of a general or systemic nature. These entail gathering oral evidence, either in public hearings or confidentially, receiving written submissions and carrying out further research. A report is published and submitted to Parliament with recommendations.

The subjects of these Australian public inquiries have included: homeless children, racist violence, the rights of people with mental illness, the removal of indigenous children from their families, and children and the legal process. There have also been localised inquiries on the provision of various services to indigenous communities. In other words, the public inquiry system has been very effective in

identifying and analysing human rights issues confronting the most vulnerable sections of the community. They have also succeeded in putting these issues on the national political agenda and generating a large amount of public pressure for government action. This has perhaps been most marked in the inquiries into homeless children – the very first national public inquiry – and the “stolen generation” of Aboriginal children who were removed from their parents and communities and permanently fostered with white families.

Economic, social and cultural rights

Aside from the question of whether human rights are universal, no issue has exercised the human rights community as much over the past 50 years as the relationship between civil and political rights on the one hand and economic, social and cultural rights (ESC) on the other. Beyond bland statements about how all rights are indivisible, the relationship is problematic at several levels. At its simplest, the problem is that one set of rights is seen as being enforceable through the judicial system while the other is not. Economic rights become reduced to a set of declaratory principles rather than something that can be measured. On the other hand, many governments – almost invariably those with a record of political repression – protest that it is impossible to have full enjoyment of civil and political rights without economic development. These issues have been worried and teased at for a long time and it is not the intention here to revisit them from a theoretical perspective. However, the reality remains that, however much the principle of indivisibility is stressed, in practice when organisations are for “human rights” or a government talks about its “human rights” policy, they are almost invariably referring to civil and political rights.

The experience of national human rights institutions begins to overturn that conventional perspective. South Africa provides the clearest example, partly because socio-economic rights are explicitly included in the human rights commission’s constitutional mandate, but more broadly because the South African experience has shown that it is absurd to separate the two sets of rights, not only in principle but in practice. Under *apartheid*, deprivation of political freedoms and economic exploitation were not only inextricably linked, they were aspects of the same phenomenon. Similarly any separation between the rights of individuals and the rights of groups became largely meaningless. In general, the work of national human rights institutions (or a set of human rights institutions) that aim to redress such abuses will need to approach all rights in an integrated manner.

The adoption of the country’s final constitution in 1996 gave the SAHRC an additional explicit responsibility to monitor respect for economic and social rights. The SAHRC must require of relevant government bodies each year that they provide the commission with

... information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

In 1998, the relevant departments were sent “protocols” requiring them to provide this information and the first report on the realisation of socio-economic rights was tabled in the National Assembly in March 1999. Also in 1998, the SAHRC, in partnership with the Commission on Gender Equality and an NGO coalition, held public hearings on the issue of poverty. The aim was to raise awareness of the issue, as well as gather information and develop recommendations.

Even where NHRIs do not have the same explicit mandate to address economic, social and cultural rights, they have found creative ways to do so. In the Philippines, for example, the human rights commission has no mandate to investigate alleged violations of ESC rights, but does have a general responsibility to monitor adherence to international treaty obligations. When it received a number of complaints about forced evictions, it interpreted its “monitoring” mandate to include ESC rights. Its advice to the government was that no eviction should take place without judicial sanction – the aim being to establish the justiciability of economic rights.

The Indian National Human Rights Commission has also been creative, although it was following an approach developed in recent years by the country’s Supreme Court. For example, in 1998 it issued a recommendation against the State Government of Orissa, as well as the Union Government, requiring them to take various measures to prevent deaths by starvation in the state.⁵⁷

What is particularly interesting is that a similar relationship between different categories of rights can be seen in the work of other national institutions. This is apparent, for example in the work of institutions in developed countries, which largely have an anti-discrimination focus, where it is very hard in many practical cases to determine where the “civil” element ends and where the “economic” one begins. The New Zealand Chief Commissioner recently commented:

We profess to believe in free markets that have no boundaries, but we place boundaries on human rights in the name of sovereignty. If the challenge of the last fifty years was a world divided by racial apartheid, is the challenge of the next fifty to find a way of dealing with social and economic apartheid?

There are other challenges, but important among them is the need to guard against the “hollowing” out of human rights in developed democracies. There is a tendency to see human rights as interesting international law focused on courts and processes. This is characterised by seeing human rights as something we do to other nations while ignoring the third world country developing within our own borders. The ignoring of child poverty, youth suicide, low participation in elections and democratic processes, and the failure to deliver equal social and economic rights is a blight on nations who profess to be leaders in human rights.⁵⁸

⁵⁷ National Human Rights Commission, *Human Rights Newsletter*, Vol 5, No 3, March 1998.

In their day-to-day work, national human rights institutions constantly deal with cases that defy the conventional divisions between civil and political rights and economic, social and cultural rights. This is especially but not exclusively true when institutions combine human rights and administrative justice mandates. The types of complaints that come daily to national institutions – labour, land, discrimination, education, prison conditions – defy easy categorisation. They have in common that they contain at least an element of economic, social and cultural rights and they are enforceable.

However, those institutions with a purely anti-discrimination mandate are increasingly coming up against the limits of what they can do about ESC rights. It may be in Canada, for example, that deprivation of economic or social rights is related to poverty that does not result from discrimination but from government economic policy or global economic conditions. At present, a commission with an anti-discrimination mandate has no authority to address such issues.

The trend, nevertheless, is for national institutions to give ESC rights greater explicit attention. In 1998 the Committee on Economic, Social and Cultural Rights, the treaty body responsible for enforcing the International Covenant on Economic Social and Cultural Rights (ICESCR), issued General Comment No. 10 on “The role of national human rights institutions in the protection of economic, social and cultural rights”. This outlined a number of types of activities that NHRIs might take in this area:

- promoting educational and information programmes on ESC rights directed both at the general public and at the public service, judiciary, private sector and labour movements;
- scrutinising existing laws and draft bills to ensure that they are consistent with the ICESCR;
- providing technical advice on ESC rights to public authorities and other agencies;
- identifying national level benchmarks for measuring progress on ESC rights;
- conducting research and inquiries on ESC rights;
- monitoring compliance with specific rights in the Covenant;
- examining complaints alleging infringements of ESC rights.⁵⁹

The importance of NHRIs addressing ESC rights can hardly be overstated with regard to its public legitimacy. Most people do not separate their personal experience into categories of rights, whether violated or respected. Rather they live through situations and problems that they want a national human rights

⁵⁸ “Chief Commissioner identifies human rights challenges”, *Tirohia*, New Zealand Human Rights Commission, December 1998.

⁵⁹ E/C.12/1998/25, Committee on Economic, Social and Cultural Rights, Draft general comment No 10, “The role of national human rights institutions in the protection of economic, social and cultural rights”, 10 December 1998.

institution to be able to address. Those who are most vulnerable to violations of their civil and political rights are most likely to be the socially deprived and, indeed, the two categories of rights may often be violated simultaneously and by the same actions. This is the practical day-to-day meaning of the indivisibility of rights.

Members and staff

National institutions stand or fall by the quality of their personnel – especially those at the top. It is not the intention of this report to advocate any particular organisational model, but it is clear that a multi-member institution has greater guarantees in that regard. A single-member institution can be rendered ineffective by poor leadership. Similarly, it was noticeable, for instance, that the record of the Mexican CNDH is almost invariably discussed in relation to the terms of office of its three presidents. By contrast, in Indonesia, with 25 commissioners, the personality of the chairperson, while not irrelevant, was less decisive. The paradox is that if proper guarantees of independence and security of tenure have been put in place, it will be almost as difficult to remove a bad ombudsman/*Defensor*/president as it will to remove a good one. This issue has arisen starkly in Latvia, where there have been repeated efforts to remove the director of the National Human Rights Office on allegations of incompetence but these have been blocked in the National Assembly.

Further, multiple membership gives the opportunity for a variety of different sections of society to be represented in the composition of the institution. Komnas HAM in Indonesia has largely failed to take this opportunity. So has the Indian commission, which has so far had only one woman member. The requirement that three out of its five members should have had judicial experience does not help social pluralism either. The South African and Canadian commissions, by contrast, have a pluralistic membership of the type that was apparently intended by the framers of the Paris Principles.

The question of who appoints members of an institution is often seen, rightly, as an issue that is intimately related to the independence of the body. It also affects the representative character of the institution and has a considerable impact on public perceptions. In a number of instances the members of the institution are direct government appointees: this is so in Canada, Ghana, Mexico and Indonesia before recent legal reforms. Involvement of the legislature is another means of distancing the executive branch of government and providing additional guarantees of independence, as in South Africa, Latvia and Mexico since recent legal reforms. In South Africa there is a specific provision in the constitution for the “involvement of civil society in the recommendation process”. In Malawi human rights commissioners are nominated by “reputable organisations representative of Malawian society”.

In some parts of the world, however, especially in Asia, NGO activists tend to oppose the involvement of the legislature on the grounds that parliamentarians are not independent and credible. In India members of the NHRC are appointed by the President of India on the recommendations of a committee made up of government, opposition and parliamentary representatives. This seems to be regarded as a better mechanism. In Thailand, the new human rights commission will be nominated by a selection committee consisting of senior judges, the Attorney General, political parties and civil society representatives. More than a third of the committee will be made up of representatives of human rights NGOs. The Senate will then vote on the list of nominations submitted by the committee.

In general, the broader the involvement in the nomination process, the more pluralistic the membership of an institution will be. But not always. In India, the membership is restricted by a requirement that three out of five commissioners must have held office as a judge. (Similarly in Ghana the requirement that commissioners be lawyers restricts the membership.) In Canada, however, where commissioners are appointed by the Governor-General – which is to say, the government of the day – three out of eight are women and the commission as a whole reflects a wide variety of ethnic and religious origins.

In South Africa there are currently eight full-time and three part-time commissioners. Four of the commissioners, including the deputy-chairperson, are women. The membership of the SAHRC, appointed by Parliament, might have been expected to reflect the overwhelming political dominance of the African National Congress. In practice, rather to the contrary, the membership has been assiduously balanced in political terms – too much so according to some critics who observe that commissioners are chosen more with an eye to political (and racial) balance than expertise on human rights.

Public attention often focuses on the professional background of nominees to be human rights commissioners. Almost as significant is the destination that they head for after finishing their term of office. In Mexico, both the past presidents of the CNDH have been appointed *Procurador General* of the Republic before completing their term of office, although they came from unexceptionable backgrounds (both university professors). If membership of a human rights institution comes to be seen as a stepping stone to high government office, this will undermine public confidence in the independence of the institution. It may also have a real effect on its independence, as subsequent members behave in a manner which suggests that they are angling for preferment. This is a genuine problem in countries where the pool of educated and qualified personnel is small, but in many cases too little effort has been made to overcome it. In the Indian Protection of Human Rights Act, the issue is addressed explicitly, with a prohibition on a commissioner being allowed to hold any post in central or state government once his or her term of office has ended. In practice, however, this does not always seem to have been observed since two members of the National

Human Rights Commission have been appointed State Governors. The solution adopted in Ghana, where commissioners, like judges, have security of tenure until retirement, avoids this problem but creates a different one: how to remove a commissioner who is not performing his or her functions adequately. Ghanaians, from both the CHRAJ and the non-governmental sector, argued that they were happy with the present arrangement since they were more concerned about governmental intervention to remove an effective commissioner than being saddled with a bad one. Arguably, multi-member institutions would provide some protection by neutralising the influence of members who did not perform their functions adequately.

The personnel of a national human rights institution is crucial to its identity. While there tends to be much discussion about who should be commissioners (or ombudsmen) little attention is given to who should be the staff. Our research suggested that the professional backgrounds of staff varied enormously from one institution to another with some having a predominantly governmental background, while others are hardly recruited from government at all. Lawyers, inevitably, tended to predominate, which sometimes gave institutions an excessively legalistic aspect, but this was not necessarily so. Few institutions appeared to have recruited extensively among NGO human rights activists. They seemed thus to be missing an important source of skill and experience in human rights work, although in situations (like South Africa) where national institutions have recruited heavily from the NGO sector this has tended to leave the latter seriously weakened.

It was clear that in most cases women occupied a larger proportion of posts in national human rights institutions than in other types of public institution. It was clear that some institutions – sometimes but not always those with women in the leadership – had a more welcoming and sensitive “female” organisational culture, quite apart from being more aware of gender issues. Vulnerable groups did not tend to be well-represented. It seemed that little effort had been made in most cases to recruit, for example, members of ethnic minorities or people with disabilities. Of course, a very small institution with serious staff shortages may find it difficult to implement such a policy but little thought seemed to have been given to making institutions more accessible to vulnerable groups by having them represented on the staff.

Education and training

Education is something that most national human rights institutions do, yet few outsiders see it as the cutting edge of human rights work. It is, in effect, a “softer option”. Human rights education is a way of doing human rights work that does not antagonise the perpetrators of human rights violations (or at least not as much as investigating them). So governments like it, donors like it, national institutions themselves like it and even those who violate rights may like it if it makes them look as though they are concerned about human rights. This does not mean that

human rights education is bad, however. On the contrary, when done well it is invaluable and it is an area of work that NHRIs are in a unique position to do well.

The problem is that the task is so massive and the available resources so limited. The potential audience for educational programmes is all those whose rights might be violated and all those who might violate them – that is to say, everyone. However, there are two particular ways of narrowing the role of national institutions. The first is to understand that the entire work of the NHRI is educational. If it publishes its recommendations and a widely disseminated annual report, as well as conducting periodic inquiries into important human rights issues, it will play an extremely important role in educating both public and perpetrators on rights issues. As discussed in chapter six, the role of the media is extremely important in this regard. Secondly, most NHRIs see their role in education and training as being a catalytic one. They work in conjunction with other public and private institutions capable of delivering these services in order to offer expertise and strategic advice. Such institutions may include the formal education sector, the training authorities for government personnel, other government departments, religious organisations, NGOs and the media. The Indian commission has developed a particularly fruitful relationship with the National Council on Teacher Training, for example, while the training of trainers programme developed by Komnas HAM is potentially a very successful example of the role of the NHRI as catalyst.

The educational work of NHRIs covers a whole range of different activities, some of which are scarcely related to each other:

- public education on human rights. This can include work in the formal educational sector, public awareness campaigns, media work, etc., as well as targeted education for particular vulnerable groups.
- training of public officials about the human rights standards and norms to which they must comply.
- training of human rights activists, including the staff of the national institution itself, in the skills required to do their work.

Public education and awareness work cover the broadest range of activities. One of the fundamentals is to communicate to the public in simple terms what human rights are and what are the mechanisms that can protect them. Work in the formal education sector is an important long-term investment but media campaigns, posters and other public awareness tools may be more immediately effective. It is natural to link this to the complaints process – for example by giving the contact details of the NHRI – but some institutions are afraid of the consequences of doing this in terms of the extra complaints that may be generated. Nevertheless, especially in societies with recent experience of popular political struggle, many people may have a very good understanding of what their rights are. The question is how they get access to institutions that can defend them. Commercial

sponsorship may help – the South African commission gets free advertising in the largest circulation daily paper from time to time and is investigating the possibility of putting its message on Coca Cola cans (although a potential conflict looms should a commercial sponsor ever be the subject of a complaint to the commission). Targeted programmes for vulnerable groups are vital, because it is likely that such groups will largely be missed by conventional public awareness campaigns.

The key to training officials is to make them feel that they need this training in order to do their job; it is not simply an optional extra or something that they do in order to impress. The approach that involves the NHRI training trainers from within the public institutions is valuable, not only because no human rights institution is going to have the capacity to do all the training itself, but also because it will give those trained an opportunity to contribute to the structure and content of the different training programmes for each sector. As far as possible human rights elements need to be integrated into the core training programmes, especially of bodies such as the military and police who are most likely to be responsible for serious human rights violations. One area where the Philippines Human Rights Commission has been effective is education, which consumes some 80 per cent of its budget. The programme focuses on the armed forces and police, and increasingly on local government units.

A particularly important target for training will be judges. If, as we argue, the judiciary is crucial to the enforcement of human rights – and that NHRIs depend upon their relationship with the judiciary to ensure maximum effectiveness – then it follows that judges need to be made fully aware of their responsibilities in this regard. There remains a widespread ignorance of international human rights standards among the judiciary, even of treaties to which their country is party. A campaign of education and awareness for judges is one of the most important steps an NHRI can take to enhance its own effectiveness.

It is very difficult for NHRIs in poorer countries to maintain serious programmes for staff development. Many of the skills involved in human rights work – but above all research and investigation skills – need to be taught and there will seldom be anyone to do that. This is where assistance from established commissions can be extremely important.

Five: **ACCESSIBILITY**

It is usually in the nature of human rights violations that they are perpetrated on the weakest and most vulnerable sections of society – usually those who are least able to avail themselves of conventional legal assistance. This may be because they are geographically remote from the major cities or because they are isolated in some other way – for example, they are prisoners. Even many of the most independent national human rights institutions lack the resources or the understanding to establish a presence throughout the country and to acquire powers to make themselves accessible to those in custody.

One obvious way of increasing the accessibility of the human rights institution will be for it to have regional and local offices. The Permanent Commission of Enquiry in Tanzania (an ombudsman-type body rather than a human rights institution) used to be almost permanently on the road, hearing complaints and conducting education in villages throughout the country. In the early days of the Indian National Human Rights Commission, the chairperson spent long periods travelling the country to make people aware of its existence.

Devolved structures

A large part of the challenge of making a national human rights institution accessible to those who are vulnerable to violations of their rights is to give it as wide a geographical reach as possible. Even in a relatively small country like Ghana this is a challenge. A poor communications infrastructure means that it is difficult even for the public to reach a district office – let alone the headquarters in the capital. But in large countries like Indonesia, Mexico, Canada, the Philippines and India, a fully devolved structure for the NHRI is essential.

In a number of these countries there is some sort of federal political structure. The usual approach is for the law to provide for the establishment of state commissions alongside the federal structure. This, of course, is not simply a question of devolving structures, since there will be differences of jurisdiction between state and federal commissions in relation to state and federal political structures. This is the case, for example, in Mexico and Canada, both which have a federal/state division both in political structure and in the human rights institutions. In India, the situation is different since state governments are not obliged by law to establish a human rights commission and many have not done so. Of the 25 states, only eight already have human rights commissions, although three other state governments have announced their intention to establish them. These do not include the two largest states in the country. Even the existing state commissions have hardly been adequate. Only one of them, West Bengal, has so far managed to issue an annual report. In Assam the commission is so lacking in resources that staff have on occasion not been paid. The division of labour between the Indian national and state commissions is also less formalised: for the national commission it is simply determined on the basis of who got there first. If

the complaint was made to the national commission, then it enjoys jurisdiction even if the authority complained against is a state one. In Mexico, by contrast, and in most other places where there is federal/state structure, there is a formal division of jurisdiction. (If the complaint involves both federal and state entities then the national commission can take sole control of the process.) However, the CNDH does sometimes involve state commissions in its investigations, lacking its own state office anywhere other than in Chiapas. The lack of decentralisation of the CNDH is somewhat mystifying given that it is one of the best resourced NHRIs in the world. It is puzzling that almost all of its several hundred staff should be located in the capital city, rather than locating more of them in areas where the most serious human rights violations take place.

There are local human rights commissions in each of Canada's ten provinces. The division of their jurisdictions corresponds to the division of authority between federal and provincial administrations. However, given the enormous size of the country, the Canadian Human Rights Commission also maintains six provincial offices.

Komnas HAM in Indonesia is so short of staff that it does not have that option. Like the Mexican commission it opened one branch office in the area of the country most notorious internationally for human rights problems: East Timor.⁶⁰ However, the office has not been a great success for a number of reasons. The first head of the office was a Timorese regarded as being pro-government and opposed to the independence movement and was therefore not trusted by those most likely to have complaints to bring. The office was also located opposite the military headquarters in Dili, which also discouraged complainants. The commission has not had the resources to open other branch offices and has largely depended on NGOs acting on its behalf to channel complaints. In 1998, however, it adopted a new approach by identifying a local person to act as its formal agent. In the two areas where the research team looked at this practice, those designated were academics. They were chosen for being politically impartial – quite correctly – but one of the effects of this has been that the individuals chosen have not been well-known to the public in the areas. The experiment does not seem to have been a great success and Komnas HAM still depends to a large extent on local NGOs. Another way to make sure that the commission is more closely identified with local areas would be by ensuring a broad geographical representation in its membership. Yet all the commissioners are based in Java – most of them in Jakarta. The peculiar system of self-nomination, whereby the commission appoints its own successors, ensures that Java will remain over-represented in its membership.

Where an NHRI does establish extensive local structures, as in Ghana, this raises its own problems. The first is one of resources. The CHRAJ is mandated by the constitution to establish offices in every region and district of the country. Yet it

⁶⁰ Recently a second branch office was opened in Aceh.

lacks the wherewithal even to properly support the district offices which are already open. One of the greatest problems is transport. At the regional level the available transport and fuel allowance is inadequate to allow officials to visit the district offices on a regular basis. In the Northern Region, for example, the 10-gallon weekly fuel allowance would not allow a return journey to some of the more outlying districts. In most districts there is no transport at all, making officials dependent on public transport both for outreach work and for contact with the region. It would seem most effective to consolidate the work of the existing district offices by providing them with more resources before expanding the network of offices as required by the constitution.

Another issue raised by the development of local offices is the level at which complaints are settled. In Ghana, when a complaint can be resolved by conciliation this will be done at the local level and reported to the region. But if a panel is required to arbitrate on a complaint this will usually have to meet at the regional level, since one panel member must be a lawyer, which most district officers are not. In the Northern Region there is already a bottleneck in the determination of complaints by the Regional Director – who is also the only lawyer in the regional office. If the districts were to develop more effective outreach, the greater number of complaints generated would test the system to breaking point. This in turn is the consequence of another systemic problem: it is often difficult to attract qualified personnel to out-of-the-way local offices when they might find alternative (and better paid) employment in the large cities.

The South African Human Rights Commission has not taken one of the more obvious steps to make itself accessible to the more vulnerable sections of society by opening offices in the various provinces, although budgetary constraints have clearly played a part in this. Apart from a Cape Town office, the SAHRC is only to be found at its headquarters in a Johannesburg suburb. When questioned on this, commissioners argued that provincial capitals are also remote from the rural population. Granted that this is true, there is surely a strong case for establishing a presence as near to the grass-roots as resources allow.

If it does go ahead and open provincial offices, it is likely that these will be housed alongside the Commission for Gender Equality. This is a common-sense and practical move – not only because it will save scarce resources, but also because it will make referrals between the two institutions simpler and may help to counter public confusion about the respective roles of the two bodies.

The Spanish state is composed of 17 autonomous communities, which have their own political institutions, including Parliament and government. Some of the autonomous communities – including Andalusia, Catalonia and the Basque Country – have their own *Defensorías del Pueblo* or other local institutions. However, the Spanish *Defensor del Pueblo* has jurisdiction over all administrations, including the autonomous ones – even the ones with their own

institution. The 1985 law regulates relations between the *Defensor del Pueblo* and the autonomous “parliamentary commissioners” and assumes a division of labour and a policy of co-operation. In practice the local institutions will have responsibility for the actions of local administrations, but there has nevertheless been a considerable overlap.⁶¹

Location

The location of the premises of an NHRI may have considerable impact on its accessibility to the most vulnerable sections of society. Perhaps the grandest location of the institutions studied is that in Ghana, where the CHRAJ is quartered in the old Parliament building, which it shares with the Serious Fraud Office. If this might be off-putting to indigent complainants, at least it has the virtue that it underlines the national and constitutional character of the commission.

Often the problem is that the offices of an institution are located in a wealthy area of town which may not only be off-putting to many complainants, but may also be inaccessible. The headquarters of the South African Human Rights Commission is in a salubrious new office development in Johannesburg. Both the Indonesian and Mexican national commissions have their headquarters in relatively wealthy areas of the capital. In the latter case, the CNDH occupies four well-appointed office blocks.

Away from the capital, the problem will commonly be a general shortage of office accommodation – with that available often largely under government control. This is the problem faced by the Ghana commission in finding premises for its regional and district offices. At the regional level it may be easier to find independent office space – in Kumasi, for example, the Ashanti regional headquarters is housed in a building owned by an insurance company, although the Northern regional headquarters, in the smaller town of Tamale, is in government premises. Nonetheless, district offices are largely in government premises and, indeed, the commissioner has written to the government requesting that it make office space available for new district offices. The problem, clearly, is that the public will already have considerable difficulty distinguishing between an autonomous public body and a government one. If they are housed in the same complex of buildings in the district headquarters, they appear to be different branches of the same organisation.

Most serious of all, however, is when the proximity of commission and government offices not only compromises the apparent independence of the human rights body but actually deters complainants. Often, of course, it is very difficult to determine what impact this has, since it will be almost impossible to discover who has been deterred from complaining. However, in the case of the first branch office

⁶¹ Juan Vintro Castells, “The Ombudsman and the Parliamentary Committees on Human Rights in Spain”, International Conference on International Experiences in Institutions of Human Rights Protection, Addis Ababa, May 1998.

of Komnas HAM, in the East Timorese capital, Dili, there seems little question that its location directly opposite a military headquarters did discourage local people from coming with their complaints.

The question of the location of offices is closely related to that of transport. National institutions often have as much difficulty with transport as with accommodation, but the resort that some of them have made to assistance from government or others has only made matters worse. For example, the Mexican CNDH in Chiapas has used vehicles from the Procurator General's office to travel to troubled areas to carry out investigations. Similarly, in Irian Jaya, Komnas HAM used a helicopter owned by the Freeport mining company to visit remote villages where the army had killed civilians. It was widely believed that the killings had been carried out at Freeport's behest. The point at issue is not the *actual* independence of the investigating body – or even the truth of the allegations under investigation – but the *perception* that the national institution is biased and the lack of confidence and fear that ordinary people feel as a result when they deal with it.

Vulnerable groups

A central rationale for national human rights institutions is that they provide an accessible, no-cost means of redress for the most vulnerable sections of society, who will have particular difficulty gaining access to conventional legal means of resolving their problems. The physical location of the institution is one aspect of accessibility and institutions have adopted a variety of other methods.

Very often NHRIs will have to make an active effort to seek out those who are most vulnerable. This will differ from society to society and may also require a certain political courage: vulnerable groups are often minorities who are generally unpopular, such as Christians in India, Chinese in Indonesia and prisoners almost anywhere. NHRIs have taken up the concerns of each of these groups. This is most effectively done if the institution makes a conscious effort to identify the groups with which it is attempting to work. The Philippines commission, for example, structures its human rights plan around 16 identified vulnerable groups. The approach will be even more effective if the vulnerable groups are themselves represented on the membership of the institution.

The Mexican CNDH is obliged by law to make its procedures as simple as possible to favour vulnerable groups. It has a specific unit within one of its four visitorships with responsibility for matters affecting women and children. The Indian NHRC has a fast track complaints procedure for the most vulnerable sections of society, including children, women and people with disabilities. This procedure also applies to certain categories of complaints, including bonded labour, child labour, child prostitution and allegations involving safety of those detained by the police. It also states that priority is given to gender-related violence and other abuses against women, children and the disabled and those belonging to scheduled castes and scheduled tribes.

The Latvian National Human Rights Office has a responsibility in law to “investigate the situation of observance of human rights in the country, especially in the areas concerning the vulnerable groups of society”. In the latter regard the LNHRO has worked with the Interior Ministry to assist victims of domestic abuse and to educate law enforcement personnel on this issue. It has sponsored an international conference that, among other matters, discussed violence in the home and the workplace. The LNHRO has also reported on the legal situation of prostitutes, as well as the employment rights of non-citizens.

The South African Human Rights Commission has a specific internal mechanism, the Equality Committee, to focus on racism and disability. It has conducted an investigation into racism in public schools.

The Spanish *Defensor del Pueblo* uses his power of *suo motu* investigation extensively to favour some of the most vulnerable groups in society, often including those who would probably not even know of the existence of the *Defensor del Pueblo*, let alone how to contact him. Such cases have included: detention, ill-treatment and illegal expulsion of foreign nationals, including asylum seekers; child labour; child sexual abuse; traffic in women; harassment of gypsies; and violation of the rights of HIV/AIDS sufferers.

Considerable attention needs to be devoted to the design of the procedures for receiving complaints in order to make them receptive to the needs of vulnerable groups. Most institutions studied had a mechanism for receiving complaints orally if a complainant was unable to complete a form. Yet many had a very limited capacity to receive complaints in minority languages. Apparently obvious measures were not applied, such as allowing women complainants to submit their complaint to a female staff member. National institutions have in many instances been fairly effective in campaigning for easy access to buildings for people with disabilities; but they do not all apply such rigorous standards themselves.

There is one section of society that is particularly disadvantaged and vulnerable to having its rights violated, which is at the same time usually well served by national human rights institutions. One of the most successful areas of the South African Human Rights Commission’s work, for example, has been in prisons. A systematic investigation of prison conditions resulted in a report to the National Assembly in 1998. The approach has been to try to deal with prison issues in a comprehensive manner rather than deal with all complaints on an individual basis. Nevertheless, the SAHRC, like many human rights institutions, receives a large proportion of its complaints from prisoners. In its early days, the SAHRC established a system of sealed complaints boxes in prisons which generated a large amount of interest.

NHRIs are often criticised for giving advance warning of their visits to prisons and other detention centres. While surprise visits have a real value in some circumstances – for example they preclude the possibility of removing prisoners whom the authorities do not want seen – there may often be a benefit in giving the

authorities time to prepare. This is the approach taken, for example, by the International Committee of the Red Cross, which has a broader experience of prison visiting than any other organisation internationally. Its attitude is that if the prospect of an ICRC visit prompts the prison authorities to give the inmates more to eat and the walls a new coat of paint, then so much the better.

The other consideration that is often overlooked is that the interests of the authority responsible for holding prisoners may be different from those of the government as a whole. The prison service may welcome outside observers coming in and seeing the straitened circumstances in which it operates. It is, after all, usually last in the queue when it comes to allocation of government resources but the first to bear the brunt of prisoners' discontent.

Women occupy a position that is analogous to "vulnerable groups" in one important respect – that their specific human rights problems and needs are often ignored – but not in others. Most importantly it needs to be recognised, and often is not, that women constitute a sub-category (and usually a majority) of most vulnerable groups. For example, and most universally, women are poorer than men within the same social class, a disadvantage that in turn renders them vulnerable to a series of other types of human rights abuse.

In the institutions studied, the record on women's rights varied. In few instances (except some single-member institutions) were women adequately represented at the most senior levels of an NHRI. This was likely to have an impact on an institution's sensitivity both to women's rights as core human rights and to the gender-specific aspects of human rights issues. In fact, the NHRIs studied probably had a higher representation of women in their staff than in other public institutions in their countries. High representation of women on the staff, as for example in the Federal District Human Rights Commission in Mexico, apparently tended to result in women's rights issues being more central to the priorities of the institution and in the formulation of strategies to make the institution more accessible to women. Employing more women is thus an easy first step for institutions that seek to become more sensitive to gender issues.

Several of the institutions studied had taken strong public stands on women's issues, even at the risk of political unpopularity: for example, the Ghanaian commission's challenge to traditional fetish cults and witch-hunting, and the Indonesian commission's denunciation of political or ethnically-motivated rape of women belonging to the Chinese minority. Too often, however, less than adequate consideration had been given to overcoming the obstacles faced by women who wished to present their grievances to an NHRI or to the procedures needed to make the institution more sensitive to the needs of women complainants.

As with vulnerable groups, NHRIs need to organise their planning, as well as their self-evaluation and reporting, to take account of gender. This would include

disaggregating statistics so that it is possible to assess how far the institution is succeeding in addressing women's rights issues.⁶²

⁶² Sneha Aurora, "Women's Rights and Human Rights Commissions", *CHRI News*, New Delhi, forthcoming.

Six: **LINKS WITH OTHER INSTITUTIONS**

Its position between civil society and the executive branch of the state is one of the defining characteristics of a national human rights institution. This is what distinguishes it from human rights NGOs on the one hand and the organs of government on the other. It also makes an NHRI uniquely well placed to develop the links with other social and governmental institutions that are essential for it to function effectively.

Inevitably, the day-to-day links that NHRIs develop with the governmental institutions whose activities they are scrutinising are crucial to effective functioning. While many NHRIs have quasi-judicial powers to compel the attendance of witnesses or the production of evidence, most are reluctant to use these on a day-to-day basis. The ombudsman tradition, with its emphasis on friendly settlement of complaints, is a strong influence. The danger, however, is that NHRIs develop a relationship with the agencies under investigation that is too friendly – and that they try to conciliate when they should be holding to account.

The formal links that NHRIs have with government – the lines of accountability – have already been discussed in chapter 4. It should be added that governments have particular obligations to ensure the independent and efficient operation of NHRIs. An adequate budgetary provision is one important consideration. An NHRI can never realistically be insulated from the financial restraints under which the whole machinery of government operates. It should nevertheless be in a position to argue the case for its budget directly to Parliament and independently of any ministry if that is the budget-setting body. If the national human rights institution is squeezed for funds, while agencies that violate human rights see their budgets rise, then the public both nationally and internationally will draw its own conclusions about the government's commitment to human rights. Another area where governments need to be sensitive is in the other forms of logistical support that they provide to NHRIs. The investigation of human rights violations, especially in conflict areas, often poses serious logistical problems for a national institution, but these are not very effectively resolved if the solution is to borrow a vehicle from the police or military. Where governments have to provide *ad hoc* logistical support, let it be from a less controversial ministry.

This chapter is primarily concerned with three sets of linkages, all of which seem crucial to the effectiveness of NHRIs: with the judiciary for enforcement of decisions, with civil society in order to respond to public concerns and increase accessibility, and with the international community in order to acquire knowledge and expertise.

Enforcement: links with the judiciary

In its function as a body to receive and investigate complaints, the national human rights institution is in essence a hybrid that shares characteristics of a commission

of inquiry and an ombudsman. Part of the rationale for a national human rights institution is the inaccessibility of the regular judicial process to the ordinary citizen whose rights have been violated, even though in principle there should always be a remedy through the courts. The national human rights institution cannot usurp the judicial function of the courts, but it may take on some of the investigative functions that would otherwise be the responsibility of security agencies such as the police, or the prosecutorial arm of the administration or the judiciary (depending on the nature of the justice system).

The questions to be resolved are: how far should a national human rights institution itself have the power to enforce remedies for the violation of human rights; and how far should it have the capacity to initiate judicial proceedings?

The two traditions from which the national human rights institution derives do not offer much help. The commission of inquiry traditionally has no powers of enforcement – it simply reports to the executive with recommendations. Its terms of reference may, or may not, require that its report be made public. The mandate of the ombudsman usually hinges upon the non-confrontational resolution of cases of maladministration. However, maladministration can in many cases be rectified by requiring the body or individual under investigation to carry out its responsibilities properly. In the case of a human rights violation, the required remedy may be a criminal prosecution or an award of compensation. If it is directly within the competence of the human rights institution to effect such remedies this raises various issues. There is the problem that the human rights institution may be substituting itself for the judiciary or indeed that it may not meet the requirements of natural justice, since its inquisitorial nature will not allow it to simultaneously act as an impartial tribunal to give alleged perpetrators of human rights violations a fair hearing. The solution would seem to be to allow the human rights institution the power to initiate cases before the courts, or to have a relationship with the prosecutorial authorities that automatically allows such cases to proceed. The precise mechanism is likely to vary with circumstances and with different legal systems.

Perhaps one of the biggest factors leading to a loss of credibility and public legitimacy by national human rights institutions is an inability to give their recommendations the force of law. A common complaint by ordinary members of the public, as well as by non-governmental human rights activists, is that an institution that is not capable of enforcing its decisions is no more than window-dressing. Governments that abuse human rights are prepared to tolerate such institutions because they cause them no embarrassment. In fact, this may not be strictly true. The embarrassment resulting from an adverse finding by an official – perhaps even quasi-governmental – body can be quite considerable. Komnas HAM in Indonesia, which until recently had no power to do anything other than embarrass, has nevertheless managed to take this quite a long way. But the underlying point is clearly correct: at worst, if an official or agency is able to

escape being called to account when wrongdoing is uncovered, this may even strengthen a sense of impunity. Many human rights NGOs simply call for NHRIs to be given powers to enforce their findings. However, such an approach is itself problematic. Most national institutions both investigate complaints and adjudicate. They may try to make an internal administrative distinction between investigation and adjudication, but if the institution had the power to issue a binding decision this would fly in the face of natural justice for the body or individual complained against. NHRIs have borrowed much of the style and methodology of the ombudsman – whether or not their mandate includes administrative justice-type issues – and clearly this is better suited to addressing issues of maladministration than human rights violations, which may also constitute criminal acts. In any event, to give NHRIs quasi-judicial powers would also have the effect of weakening the judiciary. And it is with the judiciary that the primary responsibility for enforcing human rights law rests.

The Ghanaian approach seemed an effective one. It did not trespass on judicial prerogatives while still invoking judicial sanction to support its recommendations. One objection that was raised during our research was that such an approach could not work outside a common law system, but the variety of linkages between NHRIs and the judicial system in different jurisdictions suggests to us that there are no hard and fast rules on this. In the Philippines, for example, the human rights commission's lawyers deputise as Special Prosecutors, which means that they can file complaints directly against alleged violators where there is a *prima facie* case.

In Spain, the *Defensor del Pueblo* can issue one of a number of conclusions to an investigation: warnings, recommendations, reminders and suggestions. None of these has any binding power. However, the *Defensor del Pueblo* does have a number of powers that have stronger force. He or she can make an application for *habeas corpus* in a case of illegal arrest. In practice this happens rarely, since many other individuals have standing to apply for such a writ. The *Defensor del Pueblo* may also apply to the Constitutional Court for an injunction to prevent the public powers from committing acts that violate the rights of a citizen. Citizens also enjoy that power and, in practice, it too has been seldom used.

The Australian commission not only has the authority to appear in court to support orders for the enforcement of its determinations; but subject to the leave of the court, it may also intervene in other judicial proceedings to highlight relevant principles of human rights law. The South African commission has a similar authority.

The founding legislation of many national human rights institutions explicitly states the priority that is to be given to resolving complaints by conciliation. This reflects the extent to which modern national institutions draw upon the ombudsman tradition. In many respects this is one of the strengths of the national institution as

opposed to the judicial process and it is closely related to notions of accessibility. However, it holds the danger that those responsible for violations of human rights are not held fully accountable; it may, somewhat paradoxically, extend the culture of impunity. It should never be acceptable to “conciliate” over a serious violation of human rights. The question of where exactly the line is to be drawn may be difficult but it would clearly involve, for example, torture, killing, disappearance or arbitrary detention. Arguably there are other types of behaviour that should not be conciliated either: deliberate acts of racial discrimination for example. The Mexican CNDH has a good practice in this regard. It insists that all complaints of serious human rights abuse that are upheld should be concluded with a recommendation and that a claimant may not withdraw such a complaint – avoiding the danger of pressure being brought to bear upon them.

The CNDH’s “Programme against Impunity” is also a valuable corrective to one of the dangers inherent in a non-judicial handling of serious human rights violations. The practice is to maintain a list of all those officials who have been found responsible for serious abuses in order that they should not hold public office. This may fall short of bringing them to justice but does at least serve a limited punitive purpose as well as an important preventative function.

Specialised human rights tribunals

One approach that seems to be finding increasing favour is the establishment of specialised human rights courts, often created under the same legislation as the national human rights institution. The new Indonesian law creates a Human Rights Tribunal. Similarly, the Indian legislation empowers the state authorities to set up Human Rights Courts as a fast-track procedure to avoid the endless delays in the country’s judicial system.

In New Zealand complaints which cannot be resolved by conciliation may be the subject of proceedings in the Complaints Review Tribunal. This is established under the same legislation as the Human Rights Commission but is entirely separate from it. The tribunal can hear complaints in three areas: discrimination, privacy and health. It is headed by a permanent chairperson who is a lawyer of not less than seven years’ practice. Its decisions are binding but can be the subject of appeal to the High Court. The Human Rights Commission’s decision on whether to issue proceedings is made by an independent Proceedings Commissioner specifically appointed to that role and he or she is the plaintiff in any proceedings. If the commission does issue proceedings it will do so at its own cost. If the Proceedings Commissioner decides against taking the case to the Complaints Review Tribunal, the complainant is still free to do so but at his or her own cost. Several complainants have done this and won in the tribunal. The New Zealand commission has no automatic right to be a party to other court proceedings, but it can apply to be made a party to any case of particular significance.

The Canadian Human Rights Tribunal was established under the 1977 Act that created the commission. The Tribunal is an independent court with binding powers to adjudicate on cases brought by the commission on behalf of an individual complainant. Initially it was funded through the commission, but now enjoys total independence from it. Under a 1998 amendment to the Act the tribunal now has a permanent membership of 15 rather than being constituted on a case-by-case basis, which should speed the hearing of complaints. The tribunal's decisions may only be reversed on appeal to a superior court.

Media and public perceptions

When the need for NHRIs to build links with civil society is discussed, it is non-governmental human rights groups who first spring to mind. Yet another section of civil society has an almost equal importance in developing the effectiveness and public credibility of an institution: the mass media. Perhaps one of the most remarkable positive examples has been Indonesia, where Komnas HAM is weak in power, resources and personnel to confront the country's massive human rights problems. Yet it has managed its relations with the media extremely effectively, using publicity about human rights violations and the moral pressure that generates as a substitute for its non-existent powers of enforcement. The press, for its part, has few resources to pursue human rights stories and is happy to use Komnas HAM as a source for stories which, more often than not, are critical of the government and bolster the media's own independent stand. In Ghana, CHRAJ has developed a similar relationship with the media, which has been extremely important for its public legitimacy, although it does have powers to enforce its recommendations through the courts and therefore has less need to use the media for enforcement.

The role of the media as a tool for human rights education is also important. Advertising in the media may be extremely expensive. The South African Human Rights Commission has an agreement with *The Sowetan*, the country's largest circulation daily, to run an advertisement for free whenever it has space. The ad runs once or twice a month. It is a general item of human rights education – at the time of the research team's visit it was an extremely effective item on domestic violence – with the SAHRC's contact details. The commission receives between 20 and 60 responses every time it runs. However, there is the danger that if it were to run more often the capacity of the legal department to deal with complaints would be overwhelmed. (Komnas HAM suffers the same problem. Often its educational leaflets do not include the commission's contact details because it does not have the capacity to deal with the complaints that might be generated.)

The South African Broadcasting Corporation radio stations run a series of public service advertisements on behalf of the SAHRC. The commission is also planning a series of 45-second radio "dramas" highlighting different human rights issues. Television has been given a low priority, however, because it is extremely expensive. In Mexico, on the other hand, both the national commission and the

Mexico City commission make extensive use of sophisticated and well-made television slots to educate on a variety of human rights issues. Generally speaking, however, neither the Mexican nor South African national commission has a very cordial relationship with the media. The Mexican CNDH is criticised from two perspectives. Those sections of the media that are more critical of the existing order highlight the failure of the CNDH to act as an effective check on abuses by the military. More conservative media organs reflect the view that human rights are in essence a plot to allow criminals off the hook. The CNDH – more often known simply as “*Derechos Humanos*” – embodies human rights and therefore must be a bad thing.

Some of the same factors operate in South Africa: crime is also uppermost in the minds of many people (certainly much of the newspaper-reading section of the public) and the SAHRC is seen as soft on criminals. There is also a perception that there are too many commissions funded out of public money which duplicate each other’s functions, with the consequence that several institutions receive a bad press. In 1998 the SAHRC received complaints of racism against the *Mail and Guardian*. It ruled the complaints inadmissible, but instead decided to launch a public inquiry into racism in the media. There was no doubt that this issue needed to be aired. Racism continues to pervade South African society and the role of the media as a generator of ideology is significant. The complaints by some sections of the media that this inquiry would be an interference with press freedom were not convincing. On the other hand, there was a suspicion on the part of some observers that the SAHRC had a more specific anti-media agenda than simply a disinterested desire to stamp out racism.⁶³

In countries where crime is a major problem, NHRIs may be publicly perceived as being soft on criminals and thus lose public legitimacy. In the countries studied, this was a particular issue in public perception of the commissions in Mexico and South Africa. This view seems to have been fuelled in part by the effective work that both institutions have done in defence of the rights of prisoners. More generally the commissions have emphasised the importance of due legal process in the police investigation and apprehension of criminals when the public mood – or at least that reflected in the mass media – is in favour of summary measures which are believed to be the solution to the problem of crime. In Ghana and Indonesia, by contrast, there seemed to be little public perception that human rights were equivalent to criminals’ rights, even though the commissions there had carried out very similar types of work. The sole difference seems to be the level of crime in society, although the Ghanaian CHRAJ probably also enjoys a higher level of public awareness and legitimacy than the other institutions.

⁶³ “Feebly disguised assault on press”, *Weekly Mail and Guardian*, 20 November 1998.

Links with NGOs

There is no doubt that the links which an NHRI can develop with non-governmental organisations will be a crucial determinant of its effectiveness. But equally one of the very important functions of such an institution – especially one established in a situation where serious human rights violations persist – is that it provides an official endorsement of the very notion of human rights and thereby creates a political space within which human rights groups in civil society can operate. Of the main countries in this study, Indonesia provides the clearest example of this phenomenon. The Indonesian government under President Suharto had been one of the foremost advocates of a peculiarly Asian conception of human rights – which is to say that in practice it felt itself not to be bound by the norms of international human rights law. The creation of a national human rights commission – albeit one explicitly dedicated to preserving the national ideology of *Pancasila* – gave unprecedented legitimacy to any other organisation with the words “human rights” in its title. The interesting twist is that Komnas HAM itself had an interest in co-operating with the fledgling human rights NGOs, since this gave it a public (and international) legitimacy that it would not otherwise have enjoyed. It also came rapidly to realise that it depended upon NGOs to provide a social outreach mechanism which enabled it to receive complaints from sections of the population who were geographically, politically or socially remote. Thereby, Komnas HAM contributed in a significant manner to the development of civil human rights activism – and therein, it might be argued, lies its greatest contribution to the protection and promotion of human rights in Indonesia.

An even more striking example comes from Nigeria, where the military government established a Human Rights Commission in 1996 in a (vain) attempt to convince the international community of its commitment to human rights. The human rights NGO community was already fairly well established but laboured under constant persecution. Human rights activists were frequently detained without charge for months or years at a time and had their passports confiscated. Similarly representatives of international human rights organisations were denied visas and were effectively unable to visit Nigeria. The Human Rights Commission was under-resourced and lacking in any real independence. It was unable to do its job with any effectiveness. Nevertheless, members of human rights NGOs co-operated with the Human Rights Commission and publicly praised its work (often with excessive effusiveness). By carrying out joint work with the commission, they made it much more difficult for the government to restrict their activities. They may thereby have given the commission more credibility than it properly deserved, but they calculated that this was a price worth paying for the extra freedom it gave them. In any case, the government’s general reputation on human rights matters was so poor that the work of the commission could do nothing to restore it in the eyes of the international community or of most Nigerians. The approach of Nigerian NGOs provides an interesting contrast with, for example, that of their Kenyan counterparts who will have nothing to do with the Presidential Standing

Committee on Human Rights. Most NGO activists regard the Committee as being entirely aimed at promoting the country's reputation in human rights matters, while doing nothing to address the abuses that are taking place. Arguably this Committee is no worse than the Nigerian commission under military rule. The difference is that in the generally freer environment of Kenya, NGOs have no need of its protection.

However, collaboration among NHRIs and NGOs and other civil society organisations is a two-way process. Human rights NGOs are a source of knowledge, expertise and public legitimacy that can be of benefit to a national institution. Yet too often the relationship is wary – if not downright hostile – because NGOs consider that a national institution has been set up to apologise for government abuses and discredit their own work. Nevertheless, even in these circumstances, national institutions and NGOs almost inevitably develop a working relationship.

The relationship can be most fruitful if it dates from the inception of a national institution. If the expertise and experience of NGOs and other civil society organisations are consulted when an NHRI is being constructed, a better institution is likely to result and one with greater public legitimacy. It often appears to be a source of some frustration to NHRIs that NGO activists have a closer and more trusting relationship with grassroots communities than do national institutions. But the canny ones recognise that this is in the nature of the different types of organisation and try to capitalise on their respective strengths. It is important that the relationship be not only with NGOs explicitly involved with human rights. Community-based organisations of different types, as well as NGOs working with particular vulnerable groups, will be a vital access point to the national institution for vulnerable communities: indigenous or ethnic minority groups and organisations of women, people with disabilities, prisoners, children and so on. It is best of all if such groups are represented on the membership of a national institution, or at least in the process of nominating the membership. Failing that there can be regular consultations either through a formal consultative council, where civil society can have broad representation, or through regular strategy meetings, or both. Involvement of NGO representatives as members of a national institution will be an effective way to ensure pluralism of membership. For example, women are usually far more prominent in the NGO world than they are in public employment – this could be a way of ensuring adequate female membership of an institution.

The area where NGOs are most often, and highly effectively, involved in national institutions is in their educational activities and public campaigning. Institutions such as the Federal District commission in Mexico have been effective in their campaigning and information programmes with vulnerable groups such as HIV/AIDS sufferers or prostitutes because of the extensive involvement of NGOs in planning and executing these activities. It is often neglected that precisely the

same considerations apply in receiving and investigating complaints. It was striking in our field research that a large proportion of complaints, especially from remote areas of the country, were channelled through NGOs. This was particularly so in Indonesia and Mexico, where NGOs have a far broader geographical implantation than the national institution – but also, noticeably, where the NGOs have considerable misgivings about the independence and effectiveness of the institution. Defenders of the national institution might argue that this relationship confers an additional legitimacy on NGOs, but this is not usually the case. Even in Indonesia, where NGOs were sometimes popularly regarded as the “local branch” of Komnas HAM, activists were constantly worried lest the national commission’s failings reflect badly on the NGOs’ local credibility. It was clear that, on balance, national institutions gained vital credibility and popular legitimacy from their relationship with NGOs. Also, in practical terms, it is doubtful that they could be a fraction as effective without using NGOs and other civil society organisations as a means of reaching into communities that are remote, sceptical and sometimes openly hostile.

International links

The rapid development of national human rights institutions in the 1990s has been reflected at the international level by increased attention to the role of NHRIs and a proliferation of co-ordinating bodies. A systematic evaluation of the work of such co-ordinating bodies would require an extensive and serious study in itself and the focus of this study was largely at the national level. Nevertheless, the links that national institutions have with international bodies is an important dimension of their work. In many cases national governments established NHRIs partly to reassure international opinion about their human rights performance. (Mexico, Indonesia, Latvia, India are some of the most obvious examples studied.) Also, the evolution of NHRIs in the 1990s has been driven in part by developments at the international level: the 1991 meeting that formulated the Paris Principles, the 1993 Vienna Human Rights Conference and the priority given to national institutions during this decade by the Office of the UN High Commissioner for Human Rights among others. Also, in many instances it will be the role of NHRIs not only to monitor adherence to rights guaranteed in national law, but also to police the implementation of international human rights standards at the national level.

One of the advantages of giving national human rights institutions a broad mandate to police international standards is that it may prove a more effective remedy than the various regional and international enforcement mechanisms. The fact is that none of these institutions – whether the thematic mechanisms of the UN Human Rights Commission or the international or regional treaty bodies – is able in practice to deal with the vast numbers of potential issues within their mandates. National institutions are the only realistic means of doing so.

However, this relationship between national and international human rights mechanisms raises a number of other interesting questions. First, most regional

mechanisms and treaty bodies require that domestic remedies have been exhausted before they will entertain a case. Is an investigation and recommendation by a national human rights institution a necessary domestic remedy that must be exhausted? Arguably not, if it has no automatic powers of enforcement. In other words, enforcement comes back in all cases to the judicial process, which is the standard that international bodies will generally look to when determining whether or not to admit a case. However, if one of the aims of national institutions is to relieve pressure on international mechanisms then complainants should certainly be encouraged to go through that process first.

Second, how far do NHRIs represent their country in relation to international human rights mechanisms? For example, the CNDH represents the Mexican government at the UN Working Group on Enforced and Involuntary Disappearances – a role that has been welcomed by the Working Group itself. Yet this seems like a confusion of roles: the task of the CNDH, after all, should be to hold its government to account over disappearances, not to occupy its seat when it is forced to answer international inquiries. In another case, members of the Australian Human Rights and Equal Opportunity Commission have served as advisors (but not members) to government delegations reporting to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. This too requires delicate balance. Such involvement, might, without care, compromise commissions in situations where their governments were determined to conceal evidence of human rights violations from an international body.

A third and related question concerns the role that many national human rights institutions play in helping their governments to formulate reports to international treaty bodies such as the Human Rights Committee. There is no doubt that late, non-existent or inadequate reporting is one of the banes of such bodies. Once again, is it appropriate for national institutions, whose function is to hold the government to account, to help it prepare its defence before international public opinion? It could be argued, with some justification, that the participation of national human rights institutions in formulating a country report to the Human Rights Committee will result in a more honest and useful statement of the human rights situation in the country. Nevertheless, it seems to represent a dangerous blurring of roles. Many governments nowadays have human rights units within the ministry of foreign affairs (or the ministry of justice, or both) and it is more appropriate for such bodies to have responsibility for ensuring that a government properly fulfils its international reporting obligations. They should, of course, draw upon the reports of genuinely independent national institutions in compiling government reports – which would no doubt be much the better for it as a result.

Many national human rights institutions are now constituted to have responsibility for reviewing international human rights instruments and recommending to the government which ones should be signed and ratified. This seems to be a useful and wholly proper function of a national institution.

For some years the question has been debated as to what status NHRIs should have within the UN Commission on Human Rights. The solutions adopted have only been interim ones, but it now seems to be broadly accepted that national institutions have a special status separate from their governments and different from the consultative status enjoyed by many NGOs. Although in principle this seems the best approach, it is criticised by some observers since it has in practice eaten into the time available for NGOs to address the Commission. Also, an international Co-ordinating Committee of National Institutions has been in existence since the mid-1990s, endorsed by a resolution of the Human Rights Commission. Its role is to co-ordinate activities of national institutions, organise workshops, maintain contact with the Office of the UN High Commissioner for Human Rights, and, when requested, assist governments in establishing new national institutions. Membership is only open to institutions deemed to conform to the Paris Principles. An accreditation committee determines which NHRIs may be members of the Co-ordinating Committee.

An increasing number of regional co-ordinating bodies occupy the space between the Co-ordinating Committee and the national institutions themselves, including the Asia-Pacific Forum of National Human Rights Institutions, the Co-ordinating Committee of African National Institutions and the *Federación Iberoamericana de Ombudsman*. The longest-standing co-ordinating body is the International Ombudsman Institute. The Commonwealth Secretariat has also been an important body for co-ordinating the activities of national institutions within its member states and providing training.

The Asia-Pacific Forum of National Human Rights Institutions, for example, appears to have been particularly effective in promoting and assisting the development of national institutions in its region. It requires of its members a commitment to both the Paris Principles and the indivisibility and universality of human rights – thus requiring them to take a stand on an issue that has been a bone of contention in Asia in recent years. It is based at the Australian Human Rights and Equal Opportunity Commission and reflects the priority that Australia gives to the development of national institutions.

The Canadian Human Rights Commission is another well-regarded national institution that has been in considerable demand. Several of the national human rights institutions in this study have benefited from Canadian assistance, including the Mexican, South African and Indonesian commissions. Komnas HAM has a Canadian staff member seconded from the CHRC to help it develop its organisational structures and management expertise.

Promotion of national institutions has been a major priority in the work of the Office of the UN High Commissioner for Human Rights, both as part of its general programme of technical assistance and in a specific programme under the direction of the High Commissioner's Special Advisor on National Institutions, who

is a former Australian Federal Human Rights Commissioner. This is an important priority, partly because NHRIs are important in themselves, but also because it makes sense for UN technical assistance in human rights to have some focus and consistency.

There have been considerable successes in establishing NHRIs, some of which, as in Uganda and Fiji, have gone on to perform an important function. However, potential problems may emerge – and indeed have begun to do so in cases such as Latvia, where the High Commissioner’s Office has been active in supporting the development of the Latvian National Human Rights Office.

It seems important that the High Commissioner’s Office – and others providing assistance in this area – should take account of a number of points that have emerged in the course of this research:

- Beware of prioritising particular models for the development of national institutions that may not be appropriate for the country concerned.
- Beware of prioritising national institutions at the expense of other important developments needed to protect and promote human rights – strengthening the judiciary, for example.
- Pay particular attention to consulting widely within the country concerned about the purpose, structure and role of new national institutions.

On the latter point, for example, it is vital that the High Commissioner’s office should consult civil society human rights activists when it is involved in assisting with the establishment of a national institution. Its involvement, inevitably and almost invariably, will be at the invitation of the government. Yet the creation of a national institution should be a broad consultative process. Popular views should be sought on whether such an institution is needed and what form it should take. It should be a precondition that UN assistance will not be forthcoming unless there has been a public consultation. Lack of consultation was apparently one of the reasons for problems encountered by the Latvian Human Rights Office – beneficiary of a US\$1.8 million assistance programme developed by the High Commissioner’s office in conjunction with the UN Development Programme and bilateral donors.

This latter point highlights the dangers inherent in international co-ordinating bodies. International co-ordination – including conferences, training and financial assistance – is undoubtedly helpful to the extent that it gives national institutions access to ideas and experiences that they cannot find within their own national boundaries. Its weakness is that it is largely conducted in the company of representatives of other national institutions. National institutions also need to be exposed to the more critical opinions held by those outside the professional world of NHRIs – NGO human rights activists, most obviously – in order to make a serious assessment of what techniques and methods of work will be most appropriate to their circumstances.

A further, related danger is the enthusiasm of aid donors for national institutions. Donors who (rightly) favour “institution-building” are tending to shift support away from the voluntary sector towards national institutions. This may also be less politically controversial in their relations with governments. Yet a strong NGO sector – and a strong civil society more broadly – is necessary for national institutions to be effective.

Reduced official funding also threatens the effectiveness of other official institutions that play an essential role in promoting or protecting human rights and the rule of law. The most important of these is the judiciary. Funding of NHRIs should not be at the expense of judicial reform or support of other kinds designed to strengthen the judiciary and the rule of law. Donors should give proper attention to achieving balanced development when they fund national human rights institutions of all kinds that promote human rights and the rule of law.

Funding of new NHRIs should equally take account of the need to give existing NHRIs a sustainable and solid foundation. If existing NHRIs fail to operate well for lack of funding or support of other kinds, the project as a whole is likely to become tarnished, and new NHRIs are likely to fail for the same reasons. Donors need therefore to achieve balanced development here too – consistently with progress made already – by supporting the qualities of existing NHRIs. A policy of rapid expansion in numbers of NHRIs should be avoided if that would result in weakening the qualities of NHRIs’ work across the board.

Seven: **BEYOND THE PARIS PRINCIPLES**

This study has been in large measure about evaluating the effectiveness of NHRIs. Thus it is fair to ask what effectiveness is. Clearly it does not mean, simplistically, ending all violations of human rights. The difficult question is how to assess where the NHRI fits alongside all the other institutions and mechanisms that are essential to protect human rights: the judiciary, NGOs, the media and international human rights mechanisms. Effectiveness of the national institution will also vary according to context. Komnas HAM in Indonesia, for example, has been rather effective in pushing human rights issues to the fore on the public agenda, although not necessarily in resolving cases of serious human rights violations. The CNDH in Mexico has been effective in resolving many non-controversial complaints and in developing education programmes, but has made little impact on the gravest human rights violations of recent years.

A national human rights institution – again Komnas HAM is an appropriate example – may have its principal effectiveness in providing a credible challenge to the “official version” of important events. Because it is itself “official” in some sense, its challenge has a particular value beyond that of NGOs. At the same time, the existence of an NHRI may legitimise the whole notion of human rights and thereby increase the possibility of non-governmental monitoring and activism. That too is a measure of effectiveness.

Perceptions of effectiveness depend, to some extent, of course, on the observer’s interest and point of view. In particular, the individual complainant expects a satisfactory resolution of his or her own complaint. The expectation would include a finding against the perpetrator of a human rights violation followed by action against him or her. A public declaration of a general nature, while it may broadly legitimise human rights criticism of the authorities, will scarcely be seen as an effective outcome for the complainant.

However, the effectiveness of an NHRI should also be measured in terms of its transformative effect on the broader society, and in particular how far it is able to influence the behaviour of officials. This depends in part upon the institution being seen to issue sanctions against those found to have committed abuses. The question of the openness or confidentiality of the investigative process can often be a vexed one. On the one hand, one of the perceived advantages of an NHRI over a judicial process, from the complainant’s point of view, may be avoiding a public airing of the issues. On occasions, a complainant may even wish to conceal his or her identity, for fear of reprisals. The complaint file is usually regarded as confidential (although, as some examples from Mexico show, this is not always respected) whereas in an open judicial proceeding there would normally be a requirement that evidence be fully disclosed.

However confidential the process of complaints investigation might be, nevertheless, it is vital that the outcome be a matter of public record. Both

potential complainants and officials should be able to see what redress was achieved as well as the sanctions taken against those responsible. It is in this way that the notion of accountability for human rights violations can be inculcated. Publication of all decisions and recommendations will be a first step, whether singly or in an annual report. However, this is one of many areas where the media can play a vital role in publicising and popularising the work of an NHRI, since that is how society at large will learn of its decisions and the sanctions taken.

A broader question concerning the effectiveness of NHRIs is whether they have any impact in situations where violations of human rights are extremely grave. Certainly there is a telling contrast, for example, between the ability of the Indonesian and Mexican commissions to deal with low-level non-political abuses and their frequent impotence in the face of serious human rights violations by the security forces in politically sensitive conflicts. The failure of the Mexican CNDH to issue a single recommendation against the army in the five years of the Chiapas conflict bespeaks a fundamental failure. Yet the Indonesian Komnas HAM, while unable to curb or even denounce abuses by the armed forces in a systematic fashion, has nevertheless made some important symbolic findings. The public exhumation of a mass grave in Aceh, for example, signalled a real seriousness in denouncing army abuses in the region over a period of decades. Similarly in Irian Jaya, Komnas HAM is unable to respond to grievances on a systematic basis but has made some important symbolic findings.

More generally, there is little question that NHRIs work most effectively when they are part of a functioning democratic framework rather than a voice in the wilderness. In South Africa, the SAHRC is part of an overall constitutional mechanism to reinforce democracy – the problem there is that perhaps the mechanism is excessively complex. Similarly in Ghana the largely effective CHRAJ operates in a context where human rights violations undoubtedly occur but political and ethnic violence is almost entirely absent. In India, the NHRC operates within a long tradition of democracy and judicial independence. It cannot deal with abuses in the context of armed conflict primarily because it is prohibited from doing so by law. But in Spain, where the *Defensor del Pueblo* has a generally positive record, it has perhaps been least successful in addressing abuses arising from the internal armed conflict in the Basque country. Likewise in Guatemala, the generally respected *Procurador de Derechos Humanos* has been unable to check the most serious violations of human rights arising from violent political conflict.

In this regard, as with the issue of powers of enforcement, public expectations of national human rights institutions may simply be too high. When countries descend into violent conflict it is because institutions have already failed and, possibly, because injustice and inequality have become unbearable. Human rights bodies might bear a responsibility for that descent, but they cannot single-handedly retrieve the situation. They operate most effectively in a context where

the rule of law is generally accepted. When that consensus is absent they may still play a watchdog role but they cannot expect to bring the violators to heel.

This also casts some doubt on the role that NHRIs are increasingly expected to play in repairing war-torn societies. It is seriously questionable whether a national human rights institution can carry the weight of expectation heaped upon it in countries as diverse as Guatemala, Northern Ireland, Bosnia-Herzegovina and Sierra Leone – unless it can be developed as part of an overall institutional framework for developing the rule of law and protecting rights. One of the biggest obstacles in such a situation is that people will not feel any sense of ownership over such an institution, since it is either the product of negotiations between the warring parties or, possibly worse, a solution formulated by the international community.

A general weakness in most of the institutions studied was a failure to evaluate their own performance beyond the publication of an annual report. This latter exercise is important (although some, like the Philippines commission, are not even required by law to do so) but is not usually a substitute for a hard-headed review of how effective an institution has really been. This process must go hand-in-hand with realistic planning. There are all sorts of things that an NHRI might do. The task for an institution, in consultation with both government and civil society, is to develop a programme that sets out what it can expect to do. That programme becomes the standard against which effectiveness is measured. The problem with some of the institutions studied is that they would have difficulty even reaching the first objective of this process, which is to develop a plan that all stakeholders more or less agree on.

The planning process also allows an NHRI to do various other things. It can identify which vulnerable groups it needs to target in its work. It can also determine how far its work is to be driven by complaints and how far it will adopt a strategic approach to human rights issues, for example by conducting public inquiries or publishing reports on crucial human rights issues. This seems to be one of the greatest challenges facing NHRIs today, as they generate popular expectations that are reflected in an enormous number of complaints – a phenomenon evident in institutions as otherwise dissimilar as India and Spain.

The Paris Principles revisited?

In the course of this study we have looked at the workings of national institutions – and by extension the Paris Principles that guide them – from the twin perspectives of effectiveness and accessibility. The aim was never to propose a reformulation of those principles, but in conclusion it is perhaps useful to revisit them and consider how relevant they remain to the practical functioning of NHRIs.

The first section of the Principles, dealing with competence and responsibilities, has been interpreted in many different ways. The suggestion that the institution should have a broad mandate has been enthusiastically embraced in some cases.

Many institutions – the best perhaps – have taken a pragmatic and problem-solving approach which means that they will scarcely if ever turn anyone away from their door. Recognising that public legitimacy is to do, in part, with being responsive to people's needs they will not be too strict about the limits of their jurisdiction and will try to help even on matters which their mandate does not cover. Other institutions, however, are hedged by restrictions. These not only confine them to a narrow definition of what constitutes human rights, but put whole categories of rights or important institutional actors out of bounds. Certain restrictions are quite proper. It would be impractical, unjust and ultimately undermining of human rights if NHRIs could investigate the substance of judicial proceedings (although the capacity to intervene in court cases where human rights are at stake may be an important power, for example as an *amicus curiae*). However, some NHRIs are excluded from looking at the security forces or labour matters, which in other countries constitute a major source of complaints. This undermines the credibility and effectiveness of the institution.

The statement that the mandate be contained in a “constitutional or legislative text” touches on an important dimension of public legitimacy. What was apparent from our research was that the more fundamental the legal basis of an institution, the greater was likely to be its public legitimacy. There is clearly a greater sense of public ownership of the national human rights institutions in Ghana and South Africa, where they are underwritten by the constitution, than in Mexico and Indonesia where they were established by presidential decree. This is not necessarily to do with anything that these institutions have or have not done. However imperfect the public understanding of what an autonomous public institution is, people recognise that an institution that is directly created by the government is likely to belong to the government when it really matters. If it is established under the constitution – especially a constitution that is created in a process of public consultation as in Ghana, South Africa and Uganda – then it belongs to the nation and not the government. The difference is profound. There are intermediate steps of course. Some of the local commissions in Mexico, for example, were established after some process of public consultation. (Also, unlike the CNDH, they were established after and not before a process of constitutional amendment.)

The Paris Principles establish three guarantees of independence. The first is that the institution should be established by law. The other two are its composition and level of funding. Judging by the third of these, very few national human rights institutions in the world meet the criteria of the Paris Principles. Komnas HAM operates on a shoestring. The South African Human Rights Commission needs three times as many staff as it has and has not even been allowed to determine its own budget. The CHRAJ in Ghana is given the bare minimum of government funds to keep running and must raise a large part of its operating costs from external donors. The Australian Human Rights and Equal Opportunity Commission, for long

an effective watchdog on government, has suffered a swingeing cut in its budget. None of these meet the criterion of independence through funding and infrastructure – and they are relatively well resourced by comparison with many African human rights commissions, for example.

Few institutions are representative in their composition either. A nomination process that involves the legislature, rather than just the executive, is a greater guarantee of independence and possibly thereby of greater public legitimacy too. Yet it seems to be small guarantee of pluralism in membership. Very few NHRIs involve civil society in the nomination process. Still fewer have a formal requirement that certain social groups be represented. Many institutions have a requirement that their commissioners or ombudsmen be lawyers, which is overly restrictive to start with. A single-member institution cannot be very representative, almost by definition. Even multi-member institutions, such as Komnans HAM, which do not have restrictive membership requirements and thus could be representative of a wide spectrum of society, in fact choose not to be. There is little doubt that broader membership of national institutions would be the single most effective organisational step to increasing both their accessibility and their public legitimacy.

The Paris Principles make specific reference to the linkages between national institutions and other bodies, singling out “jurisdictional bodies” and NGOs. The former link seems vital. There is no doubt that the inability of most NHRIs to enforce their recommendations seriously undermines their public credibility. There are serious and overwhelming reasons why national institutions cannot be given the power to make binding recommendations in most systems. Nevertheless more thought needs to be given to linking them to specific or general judicial bodies to enforce their findings. In their different ways Ghana, South Africa, Canada, India and Spain all point the way forward on this issue.

In many instances NHRIs would not function without NGOs. The greatest area of formal collaboration is in educational and training activities or sometimes in public awareness campaigns. But the most important relationship is in the complaints process and, in particular, channelling or directing complaints from the remotest, least accessible and most vulnerable sections of society. NGOs often, as in Indonesia, have a far more extensive network than the national institution. Even, as in Mexico, when the national institution has considerable resources, NGOs are deployed more effectively to hear and represent the interests of the victims of human rights violations. This is not to shift the onus from national institutions: they still have an obligation to build more extensive national networks and more sympathetic procedures. Nevertheless NGOs and other civil society organisations are able to specialise to a greater degree than NHRIs and are always likely to be closer to the ground. This is not just a question of physical reach. It is true even in a vast metropolis like Mexico City, where it was to the credit of the local human rights commission that it worked closely with NGOs.

In the Paris Principles, handling of complaints is seen as an optional function of a national human rights institution, although in practice most do it. Yet there seems to be a fundamental divide between those institutions that investigate complaints and those that do not. It is in their handling of complaints that national human rights institutions stand or fall in terms of public legitimacy. Almost everyone outside national institutions whom we interviewed in the course of this study implicitly or explicitly used successful investigation and resolution of complaints as the touchstone of an effective and legitimate national institution. However valuable their other work may be – education, training, scrutiny of laws, study of international instruments – the public judges them in terms of their willingness to tackle violations of human rights. They may do so by resolving individual complaints or by publicly exposing and challenging wrongdoing by the government or other powerful institutions. But these are the measures by which the world judges whether a human rights institution is serious about human rights.

Eight: **RECOMMENDATIONS**

Civil society involvement

National human rights institutions should cultivate and deepen their working relationship with a variety of organs of civil society, especially non-governmental organisations working either in the human rights field or with specific vulnerable groups, such as organisations of women, children, prisoners, people with disabilities, people with HIV/AIDS and racial or ethnic minorities. Such bodies should be represented in the membership of NHRIs, consulted regularly about the institutions' priorities and be partners in the day-to-day work of the institution.

- Governments considering setting up a national human rights institution should consult extensively with all potential stakeholders, including representatives of civil society, to determine the nature, mandate and structure of such a body.
- NGOs should respect the identity and character of NHRIs, which are independent from government but also different from a civil society organisation.
- NHRIs should pay particular attention to their work with the mass media, which are important both for educating the public about human rights issues and for exposing public institutions and officials that have committed human rights violations, thereby contributing to the effectiveness of the NHRI.

Legal basis and mandate

Incorporating national human rights institutions in national constitutions is the single legal measure most likely to guarantee their public legitimacy.

- The jurisdiction of NHRIs should never exclude a major public actor in the field of human rights, such as the security forces.
- The mandate of NHRIs should include powers to receive and investigate complaints, monitor government fulfilment of international and domestic human rights obligations, make recommendations to government (including with regard to initiation of legal proceedings), review national legislation to ensure it is in conformity with human rights obligations, and conduct education and awareness raising programmes.
- The mandate of NHRIs should give them jurisdiction over all categories of human rights (civil, political, economic, social and cultural), including conducting regular audits of their governments' implementation of economic, social and cultural rights.
- The mandate of NHRIs should include specific reference to their role in promoting and protecting women's rights as human rights.
- In some circumstances, the credibility of an NHRI may depend on whether there has been adequate investigation of past human rights violations –

ones committed before the NHRI came into existence. It will not normally be part of an NHRI's own mandate to conduct such an investigation (although it could be on occasion) and it is primarily the responsibility of government to ensure that past abuses are thoroughly uncovered.

- The mandate of NHRIs should be linked to the monitoring of respect for international human rights standards, not simply those rights explicitly protected in national law.

Economic, social and cultural rights

New national human rights institutions should have a mandate to address economic social and cultural rights, while existing institutions are likely to have to address ESC rights and should plan ways to do so. These could include: auditing governments' policies to ensure that they realise ESC rights; addressing cases involving ESC rights in terms of government treaty obligations; looking for ways of making ESC rights justiciable.

- NHRIs with a mandate that deals solely with issues of discrimination already deal with ESC rights to some degree. However, they may consider broadening their mandate to allow them to address systemic issues of economic and social rights that are not covered under the discrimination rubric, such as poverty, poor educational provision etc.

Membership and staffing

Independence, public legitimacy and accessibility are all increased if there is diversity in the membership of an NHRI, including adequate representation of women and vulnerable groups.

- Selection criteria should be established which ensure appointment of qualified and independent-minded members.
- Multi-member institutions offer a greater opportunity for pluralism in an NHRI. Where this is not deemed appropriate because of a country's particular institutional traditions, consideration should be given to establishing a multi-member governing council that can exercise real influence on the direction of the institution.
- Appointment procedures should be under the control of a branch of government separate from the executive. Often the legislature will be the most appropriate body. They should be seen to involve open and fair consultation with civil society.
- NHRIs should prioritise the recruitment of staff from among human rights NGOs, women and vulnerable groups with first-hand experience of human rights violations.

Complaints investigation and patterns of violations

Investigation and resolution of individual complaints is an important part of the work of national human rights institutions. However, individual

complaints should not be resolved in ways that undermine the principle of accountability of public officials. National human rights institutions should use complaints as an indicator of broader systemic human rights issues, which should be the principal focus of their work.

- The NHRI should have the power to conduct public inquiries on human rights issues of broad importance.
- There should be a prescribed period for laying complaints.
- NHRIs should keep complaint files open until it is clear that any recommendation made has been complied with. Systems should be put in place to monitor compliance with recommendations and keep complainants informed of the outcome.
- All NHRIs should have the power to investigate alleged human rights violations on their own initiative (*suo motu*).
- The NHRI should devise procedures to guarantee confidentiality in the investigation process to the extent that is necessary for the protection of complainants and witnesses.
- NHRIs need to devise specific methods to encourage complaints from women, particularly when they are members of groups that are especially vulnerable to human rights violations, such as prisoners.
- NHRIs should make use of their power of *suo motu* investigation to inquire into the conditions of vulnerable groups who may be less able to access the NHRI on their own.
- In the investigation of disappearances, NHRIs should distinguish the human rights violation of enforced and involuntary disappearance from a situation where a person goes missing for personal or purely criminal reasons. The investigation of a disappearance should not conclude when the victim is located but should continue until full responsibility for the human rights violation has been established and appropriate steps taken against the perpetrator.
- NHRIs should encourage the reception of complaints from civil society and where appropriate involve civil society, particularly human rights NGOs and community based organisations, in the investigation of complaints.

Enforcement

Although conciliation is an appropriate tool in minor administrative matters, serious human rights violations should be investigated with a view to the initiation of a full legal process to ensure that officials found responsible are fully accountable for their actions. At a minimum this would involve referring a case to the appropriate authorities for further investigation and possible prosecution.

- NHRIs should have the authority to refer cases to a judicial authority for enforcement of a recommendation. The precise method of doing this will vary – whether through the existing court structure or a specialised human rights court.
- In such cases NHRIs should also monitor the outcome of such proceedings.

Education

Publicising the results of national human rights institutions' investigations, both on complaints and on systemic human rights problems, is a vital part of human rights education. It increases both the transparency and public accountability of the institution and the transformative social effect of its work.

- NHRIs should seek to integrate human rights issues into training programmes of all relevant public officials – this being far more effective than separate, free-standing training activities.
- Representatives of the institutions being trained – schools, security forces, civil servants, etc. – should be involved in planning and devising the human rights element of training programmes.
- Priority needs to be given to training the staff of NHRIs in human rights standards, investigation of complaints, education and other relevant topics.
- NHRIs should draw on the experience of civil society in human rights education, and where appropriate, involve civil society in their education programmes.

Accessibility

National human rights institutions should attempt to create local structures, such as branch offices, to enable them to have full national coverage for the reception of complaints. The body responsible for granting the institution's budget should ensure that is adequate to cover the establishment and the effective functioning of such structures.

- NHRIs should create simplified procedures to ensure that the most vulnerable sections of society have access to their services. This should include receiving complaints orally, including in minority languages.
- The location of NHRI offices is an important aspect of accessibility. NHRIs should avoid locating premises in rich areas or, as far as possible, in government buildings, in order to underline their independence and their accessibility to vulnerable groups.

Budget

National human rights institutions should be able to formulate their own budgets and, in general, answer directly to the legislature in the granting of that budget and accounting for its use.

- Taking account of competing demands on the national treasury, governments should provide NHRIs with adequate resources to fulfil their mandate. The international community should recognise that the level of resources provided to an NHRI is a good measure of that country's commitment to human rights.

Planning and evaluation

National human rights institutions should develop and publish a plan for their work, which will identify priorities and identify the vulnerable groups with which the institution will primarily work. The plan should include indications of how women's rights will be addressed in the institution's work.

- This plan should be developed in consultation with all relevant actors, including civil society.
- NHRIs should develop methods for evaluating their performance. Evaluation should have specific reference to the institution's performance in relation to vulnerable groups and its success in putting gender issues in the mainstream. Evaluations and annual reports should include disaggregated statistics on the institution's handling of complaints from and work with women. Performance should be judged according to results (i.e. success achieved in transforming society) not simply numbers of complaints handled.

International links

International donors offering technical or financial assistance to national human rights institutions should actively seek and take account of civil society opinion as well as the views of governments and NHRIs.

- At the creation of an NHRI, donor organisations should insist that governments conduct a broad public consultation and should themselves solicit the views of civil society, especially non-governmental human rights activists, before launching a programme of assistance.
- The programmes of organisations involved in international co-ordination should ensure that the work of existing national institutions is adequately funded and supported. Steps to promote new NHRIs should take into account any impacts on the effectiveness of existing NHRIs.
- International and national authorities should take into account the needs of other institutions, notably the judiciary, when they support the creation of new NHRIs.

- In any process of accreditation, international co-ordinating organisations should take account of the views of civil society locally.
- NHRIs should not have responsibility for reporting on the government's behalf on treaty obligations or to other international human rights mechanisms. It is, however, appropriate for them to monitor their governments' compliance with reporting obligations.
- When designing assistance programmes to new NHRIs, wherever possible, technical expertise should be mobilised from countries with a similar economic, social and political background to the recipient country.

Relations with other institutions

National human rights institutions should not be seen as an isolated solution to the problem of human rights violations. They only work effectively as part of an overall framework of democratic institutions. Consideration should be given to the interrelationship of the institutions in their functioning.

- Government bodies should provide support to NHRIs and do so in ways that to the maximum degree recognise and seek to protect their independence.
- Where there are multiple national institutions for the protection of human rights, they should engage in joint planning to ensure that activities are co-ordinated to the greatest effect and devise simple access procedures so that the public is easily able to present its concerns to the appropriate institution.
- NGOs and civil society institutions should recognise the specific identity and character of NHRIs, independent bodies that stand between government and civil society.
- Governments should not ask NHRIs to represent them internationally.

POSTSCRIPT

A changing global environment

In two of the three countries that provided detailed case studies for this report, political changes have had a significant impact on the role and functioning of the national human rights institution. The third, Ghana, has also seen a change of government, although, given the greater degree of statutory independence of the human rights commission, the direct impact of this change has been less important.

The greatest change, however, has been in the global environment. The terrorist attacks on the United States on 11 September 2001 and the subsequent “war on terror” have had a dramatic and largely negative effect on respect for human rights. The negative impact has been seen on two levels. First, many governments have used the need to combat terrorism as a justification for new restrictive legislation and other measures that limit or violate human rights. Secondly, there has been a decline in respect for international legality.

Governments had been ready to use security concerns to justify infringements of human rights before September 2001, just as they had ignored international law (for example in the NATO intervention in Kosovo in 1999). The difference perhaps has more to do with a certain cultural shift. In the aftermath of the Cold War, much international diplomacy was cast in the language of human rights. Irrespective of whether governments actually respected human rights any more than they had previously, they became a centrepiece of international relations and a primary stated goal of the international community. National human rights institutions were particular beneficiaries of the primacy given to human rights in the 1990s. Since September 2001, however, human rights have to compete with other international priorities.

The cultural shift is, of its nature, not measurable. Nor is there evidence to suggest that it has been followed by any downgrading of the priority given to national human rights institutions – quite the contrary. Yet the actual work of national institutions has become more difficult in a world more reminiscent of the 1980s and earlier, when security concerns almost invariably trumped respect for human rights.

However, the general enthusiasm for creating national human rights institutions has hardly diminished. A few have even been created as a direct outcome of the “war on terror”. The Afghanistan Independent Human Rights Commission, for example, was established under the terms of the Bonn Agreement, which established provisional governmental institutions after the overthrow of the Taliban government by US and other forces.

This rather unfavourable global context needs to be noted, because it marks a significant shift from the generally optimistic mood underlying the rapid

establishment of many national institutions in the 1990s (and reflected to some extent in this report).

Developing international coordination

Taking place within this context, one important development has already made a significant contribution to the independence and effectiveness of national institutions. International coordination, exchange of information and joint action have accelerated in the four years since this report was first published.

International co-operation is mentioned in passing in the report and included in the recommendations as a desirable means of developing both professionalism and independence. In the 1990s, the Office of the UN High Commissioner for Human Rights had played an important role in establishing national human rights institutions and ensuring that these adhered to the standards contained within the Paris Principles. In recent years, its role has increasingly been to strengthen existing national institutions and facilitate exchanges of information and experience between them.

The International Co-ordinating Committee of National Human Rights Institutions has become more effective. Existing regional co-ordinating bodies continue to do highly useful work (as in Asia), while new regional co-operation has developed (for example in Africa). The NHRI.net website provides a new and essential resource for national institutions themselves, as well as anyone conducting research into the issue.¹ The websites developed by national institutions themselves allow any institution to conduct a quick review of international experience for each new initiative that it undertakes.

Indonesia

When the research for this report was carried out, the Indonesian national human rights commission, Komnas HAM, was operating under the terms of a 1993 presidential decree. This only defined the role and powers of the commission in sketchy terms – a shortcoming in many senses, but one that gave Komnas HAM a great deal of flexibility in its day-to-day operations. In 1999, for the first time, Komnas HAM was given a foundation in statute law. This new law set out a detailed procedure for handling complaints, as well as giving the commission the power to compel witnesses to appear before its investigations.

The same year also marked the end of more than three decades of authoritarian rule by the Golkar party, defeated in multi-party elections. This also marked an expansion of the role of Komnas HAM.

In November 2000, the Indonesian Parliament passed a law establishing Human Rights Tribunals to hear cases of genocide and crimes against humanity. Under the new law Komnas HAM was given sole authority to initiate and carry out inquiries.

¹ <http://www.nhri.net>

The findings of its investigations would be passed to the Attorney General to decide whether prosecution should proceed. This marked a significant expansion of the investigative powers enjoyed by the commission. However, there was some criticism from human rights groups that Komnas HAM should not have been given exclusive authority to conduct preliminary investigations. In principle, it was unclear why such crimes should not be investigated by public prosecutors in the normal fashion. In practice, creating this link between the national human rights institution and the prosecution process might impose an administrative burden that would affect the institution's capacity to carry out its other functions.

In practice, however, Komnas HAM's role under the new law has been limited. A constitutional amendment passed earlier the same year excluded the possibility of retroactive prosecution – genocide and crimes against humanity not having been offences under Indonesian law before the November 2000 law.

Structurally, Komnas HAM recognised the importance of expanding its presence outside Java and thus increasing its accessibility throughout the archipelago. This was an important conclusion of this report. The International Council was invited in 2001 to take part in a consultation with Komnas HAM about expanding its accessibility throughout the country, which has resulted in the opening of new regional offices.

This said, independent observers were sometimes critical of Komnas HAM's performance under the new political dispensation. The situation in Aceh, referred to in this report, has continued to be the source of serious violations of human rights. In a report in 2002, Human Rights Watch was highly critical of a Komnas HAM investigation into the killing of 31 civilians in East Aceh in 2001. The Human Rights Watch report states that investigators from the commission failed to follow up important leads, allowed military officers to attend interviews of witnesses and then did nothing with their findings for five months.² The Asia Director of Human Rights Watch was prompted to say: "Komnas HAM has gone from being the most credible institution in the country to being a real hindrance to human rights progress."³

Mexico

The Mexican National Human Rights Commission (CNDH) was the least effective of the institutions that were the main focus of this study. Yet, from 1999, a series of steps were taken that have transformed the CNDH. As noted in Chapter Three, a constitutional amendment made the commission accountable to the legislature rather than the President. This included the appointment of the CNDH's president by the Senate. This was followed by the appointment of a new commission president, Dr José Luis Soberanes, who has proved more independent of the executive than his predecessors.

² Human Rights Watch, *Accountability for Human Rights Violations in Aceh*, March 2002.

³ Human Rights Watch, "Poor Work from Indonesian Rights Commission on Aceh", press release, 15 March 2002.

The process of disentangling the CNDH from the embrace of the executive was undoubtedly helped by the change of government in July 2000. The ruling Institutional Revolutionary Party (PRI) lost power for the first time since it was established in 1929. The new President, Vicente Fox, pledged to uphold human rights and various steps were taken to end the culture of impunity that had prevailed for decades. These included the publication of a 3,000-page report by the CNDH on torture, “disappearances” and killings during the “dirty war” of the 1960s and 1970s. The names of those alleged to be responsible were handed to the prosecutor’s office.

Although the Fox presidency has since been criticised for failing to live up to its initial pledges, there is no doubt that the break with the institutional continuity of the PRI has created new space for autonomous state institutions such as the CNDH to occupy.

Economic, social and cultural rights

Another significant if unmeasurable trend in the past four years has been the growing priority given to economic, social and cultural rights. This has begun to be reflected in the work done by some national human rights institutions.

Historically, economic, social and cultural (ESC) rights were regarded by many as poor relations to civil and political rights. There is little justification for this unequal status in the founding documents of modern human rights – the Universal Declaration of Human Rights and the two subsequent international covenants – but the priority given to civil and political rights in the West reflected Cold War priorities in the struggle against Communism. Conversely, the Eastern bloc rhetorically prioritised ESC rights at the expense of civil and political rights.

Paradoxically, the defeat of Communism and the end of the Cold War led to focus more on ESC rights. The main reason, clearly, was that this became a genuine grassroots concern. The rapid economic globalisation of the 1990s made protection of vulnerable communities and nations a renewed priority. In a rediscovery of the original language of the Universal Declaration, these struggles became recast in human rights terms.

Grassroots struggles gave impetus to intellectual efforts to define more precisely the content of ESC rights and tackle the question of how they might most effectively be implemented. The appointment of several UN Special Rapporteurs to monitor ESC rights – such as Health, Education and Food – have resulted in the development of increasingly precise indicators of how the “progressive realisation” of ESC rights might be measured.

National human rights institutions are seen to have an important role to play in this process. General Comment 10 of the Committee on Economic, Social and Cultural Rights (quoted in Chapter Four) was an important step towards defining exactly what national institutions should do to help implement ESC rights. While there has

been a strong trend in the last decade towards asserting the justiciability of ESC rights – their enforceability through the courts – in practice the broader nature of the powers enjoyed by national human rights institutions makes them well-suited to play a leading role in asserting the importance of these rights. National institutions can monitor government policy on these issues and hold inquiries into issues of importance, as well as handle individual complaints.

Any attempt to set an agenda for national human rights institutions over the next decade should place ESC rights at the top of the list. The major obstacle – and perhaps the reason why ESC rights were not very fully covered in this report – is that the mandates of so many national institutions explicitly exclude ESC rights. Historically, national institutions have most often tackled ESC rights through their anti-discrimination mandate. Others, such as the Indian human rights commission, have interpreted their mandate creatively to include coverage of ESC rights. Yet in 2004, as five years ago when this report was researched, there is little experience to draw on and few national institutions have the full spectrum of ESC rights within their remit. The example of the South African Human Rights Commission, which has now produced five comprehensive reviews of ESC rights, remains especially important.

The impact of this report

It is naturally difficult for us to consider dispassionately the extent to which this report itself has had an impact and changed the practice of national institutions. In the course of researching and writing the report, the International Council developed its relationship with the Office of the UN High Commissioner for Human Rights. The report's focus on effectiveness clearly corresponded to a new phase in the work of the Office, concerned increasingly with helping existing institutions to work better rather than setting up new ones.

An evaluation commissioned by the International Council found that this report was one of the more widely influential publications that the organisation has produced. So, while it is difficult to determine the report's practical impact, it is clear that its ideas are to some extent reflected in important reports by organisations such as Amnesty International, Human Rights Watch and the Danish Centre for Human Rights.⁴

The important point is that in the four years since this report was first published, the debate has moved beyond the mere desirability of implementing the Paris Principles to serious consideration of what makes national institutions effective. However, none of the issues addressed in the final chapter – Beyond the Paris

⁴ *National human rights institutions - Amnesty International's recommendations for effective protection and promotion of human rights*, 2001, AI Index: IOR 40/007/2001; *Protectors or Pretenders? Government Human Rights Commission in Africa*, Human Rights Watch, 2001; *National Human Rights Institutions, Articles and working papers, Input to the discussions of the establishment and development of the functions of national human rights institutions*, Birgit Lindsnaes, Lone Lindholt, Kristine Yigen (eds.), Danish centre for Human Rights, 2000.

Principles? – has become irrelevant. We underlined the severe financial constraints facing most national institutions. This problem remains as serious as ever. We questioned the effectiveness of national human rights institutions as instruments of investigation and reconciliation in societies emerging from conflict. The question is, if anything, even more relevant today. And the desirability of collaboration with NGOs and other civil society institutions remains equally important.

How to measure effectiveness

The approach taken in this report – an emphasis on effectiveness – raises a large and important question that the report itself does not even attempt to address: how can effectiveness be measured?

This study, in effect, takes popular legitimacy as its measure of effectiveness. It says that a national institution is effective if its popular constituency regards it as being so. This measure is not a negligible one, since it implies that a national institution must be accountable to those whom it serves: vulnerable groups, victims of human rights violations, civil society groups and so on. But is there a more quantifiable measure of effectiveness that national institutions can adopt to help them plan their activities and evaluate their performance?

There has been some progress in recent years in developing indicators to measure how far human rights are respected, protected and fulfilled. This process of “benchmarking” is most developed in relation to ESC rights, where the methods used borrow from techniques used by development agencies. The formulation of indicators for civil and political rights has been less successful and has suffered from being used in an excessively ideological fashion.

All this is of some use to national institutions, but only up to a point. Such indicators measure the general level of respect for human rights within a given society. As such, national institutions can use them as part of the process of monitoring. To measure the effectiveness of the institution itself is more complex, since it requires some way of determining what impact it has had on the human rights situation. Non-governmental human rights groups have usually (and wisely) avoided trying to do this, since they recognise that changes in the human rights situation come about as a result of a variety of factors. However, if sensitive measures of effectiveness were available, human rights organisations could plan their activities to have the maximum impact.

The most common indicator currently used by national human rights institutions is their success in handling complaints. Indeed, comparative data on complaints-handling by national institutions is generally available on the NHRI.net website. This is undoubtedly useful, provided that its limitations are recognised. For example, this report has stressed the point that the most effective national institutions built upon their complaints-handling to carry out inquiries into matters of general importance. If the aim is to resolve human rights problems in a systemic manner, rather than case by case, indicators that relate solely to complaints cannot assess this.

Some national institutions also measure their outputs in other areas – how many training workshops they hold, how many reports or press releases they publish and so on. Again, this is useful as far as it goes. What it does not reveal is how effective those initiatives were in influencing the human rights situation - by delivering services better or changing public attitudes or policy. More sophisticated evaluation techniques would be needed to answer those questions.

The development of serious professional standards among national human rights institutions is a priority. National institutions usually lack the funding that they need, making it especially important that they should be able to marshal their resources to be most effective. Hence the importance of accurate and realistic planning, for which clear indicators of effectiveness are essential. The Office of the UN High Commissioner for Human Rights has recognised this as an important priority for national institutions. The International Council is currently working in collaboration with the Office of the High Commissioner to develop methods for measuring the effectiveness of national human rights institutions.

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The International Council on Human Rights Policy would like to thank the following individuals and institutions for their comments on an earlier version of the present report:

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Appendix

Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights

These principles were adopted in October 1991 in Paris at an international workshop convened by the United Nations Centre for Human Rights to review and update information on existing national human rights institutions. The Commission on Human Rights endorsed the recommendations in March 1992.

A. Competence and responsibilities

1. A national institution shall be vested with competence to protect and promote human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, *inter alia*, have the following responsibilities:

(a) To submit to the government, parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the protection and promotion of human rights. The national institution may decide to publicise them. These opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organisation, intended to preserve and extend the protection of human rights. In that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. It shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government;

(b) To promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To co-operate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicise human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

B. Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective co-operation to be established with, or through the presence of, representatives of:

(a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence.

3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

C. Methods of operation

Within the framework of its operation, the national institution shall:

1. Freely consider any questions falling within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,

2. Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

3. Address public opinion directly or through any press organ, particularly in order to publicise its opinions and recommendations;

4. Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly consulted;

5. Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

6. Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the protection and promotion of human rights (in particular, ombudsmen, mediators and similar institutions);

7. In view of the fundamental role played by the non-governmental organisations in expanding the work of the national institutions, develop relations with the non-governmental organisations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas.

D. Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorised to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organisations. In such

circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

1. Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
2. Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
3. Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
4. Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations or administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

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Inter-American Human Rights Institute: www.iidh.ed.cr

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Australian Human Rights and Equal Opportunity Commission: www.hreoc.gov.au

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ISBN 2-940259-03-8



9 782940 259038