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Anne Smith

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The Unique Position of National Human Rights Institutions: A Mixed Blessing?

Anne Smith*

ABSTRACT

National Human Rights Institutions can play a key role in promoting and protecting human rights. They are able to do so by the unique position they occupy between government, civil society, and nongovernmental organizations (NGOs). However, this unique position which holds out opportunities for national human rights institutions also gives rise to problems for such institutions. National human rights institutions have to define and defend their role or space in relation to where they fit in with government and civil society. This can create difficulties for national human rights institutions with respect to their independence and accountability; two key concepts which are crucial for a national human rights institution's legitimacy, credibility, and ultimately its effectiveness. This article explores these challenges and opportunities using examples from different countries. It further draws out a more subtle understanding of independence and accountability by conceptually unearthing the different layers within the two concepts. In conclusion, a number of recommendations are made as to how national human rights institutions can maintain their independence, while engaging with and being accountable to both government and civil society. The article is supported in its conclusions by a series of semi-structured interviews with key institutional players in the national human rights institution world.

* Anne Smith is a lecturer, Transitional Justice Institute, University of Ulster.

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I. INTRODUCTION

In recent decades there has been a worldwide increase in the creation and/or consolidation of what are commonly known as National Human Rights Institutions (NHRIs). The International Council on Human Rights Policy¹ reported that the reasons for this phenomenon are diverse and broadly speaking such institutions are established in one of three circumstances: first, in countries making the transition from conflict, such as Northern Ireland, South Africa, the Philippines, Spain and Latvia; second, in those countries where a Commission is established to consolidate and underpin other human rights protections, such as Australia, Canada, and France; finally, in those countries that come under pressure to respond to allegations of serious human rights abuses and to establish a commission in order to be seen to be doing something to address the problem, for example, as in Cameroon, Nigeria, Togo, and Mexico.²

These bodies play a crucial role in promoting and protecting human rights in a wide variety of ways, though much depends on the allocation of the NHRI's powers, as a variety of national human rights institutional forms exist. They can range from monitoring the human rights situation, auditing laws, making recommendations to government, training personnel, educating the public, reporting to international bodies, holding inquiries, and handling complaints. NHRIs can also deal with an enormous variety of issues such as employment rights, torture, discrimination, and environmental rights. These institutions can take many forms, such as Ombudsmen, Hybrid Human Rights Ombudsmen, or Human Rights Commissions.³

One of the most noteworthy features of NHRIs is the unique position they occupy between government, on the one hand, and civil society and nongovernmental organizations (NGOs), on the other hand. It is this conceptual space which gives NHRIs a potentially distinctive role in society. However, this same idiosyncrasy creates difficulties for NHRIs. NHRIs have to grapple with the uncomfortable dilemma of how to be independent from both government and NGOs, while at the same time establishing working relationships with both actors.

Equally, NHRIs are accountable to government, NGOs, and civil society. There must be mechanisms in place to enable NHRIs to explain and justify their actions and how they have discharged their responsibilities, including their financial duties. This includes NHRIs asking themselves a series

1. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, PERFORMANCE AND LEGITIMACY: NATIONAL HUMAN RIGHTS INSTITUTIONS 58–59 (2000); (2004).

2. *Id.*

3. For a typology of NHRIs see *id.* at 3. See also Linda Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection* 13 HARVARD HUM. RTS J. 1, at 5–13 (2000).

of questions such as: how can we better hear what people are concerned about, and how do we distinguish between valid criticism and complaints, and invalid ones? If the complaints are legitimate, should we view these not as an attack on our independence but as a wider form of accountability? How do we respond to what we hear? How do we draw positive ideas and suggestions from peoples' responses?⁴

Therefore, NHRIs have multiple accountabilities: "downwards" to their partners, beneficiaries, staff, and supporters; and "upwards": to their funders, parliament, and host governments. Likewise, there is a parallel obligation on those who have created, appointed, and funded NHRIs (in most countries, it is the government) to ensure they have sufficient autonomy and resources to achieve their tasks.

Independence and accountability are key objectives and key problems for NHRIs. The two concepts are crucial components of claims to a NHRI's legitimacy, credibility, and ultimately its effectiveness. However, while independence and accountability are inextricably linked and operate on a continuum, this article highlights the tensions between independence and accountability in terms of a NHRI's relationship with government, and independence and public legitimacy in terms of a NHRI's relationship with NGOs and civil society. In terms of government, NHRIs must be independent; yet, someone must appoint NHRIs, give them money, and make them account for their actions and spending. Regarding civil society and NGOs, NHRIs must be independent; yet, NHRIs must also win some amount of public legitimacy by responding to their concerns, interacting with, and being accountable to these stakeholders.

The term "public legitimacy" is often mentioned when the terms accountability and independence appear. Public legitimacy, as opposed to formal legitimacy, which refers to the legal basis of the institution, covers issues such as deciding who is a member of the institution? Are they independent of government? Does their mandate cover tackling unpopular issues such as the rights of terrorists and not to be afraid of criticizing government when necessary, even if this could bring the institution into conflict with the government? In other words, public legitimacy is pivotal to a NHRI's reputation and credibility. This article argues that independence and accountability are multi layered concepts, and it is only by unearthing the different levels within each concept that one captures the problems facing NHRIs and those responsible for establishing them.

This article aims to initiate discussion about the problems NHRIs face in establishing the space between government and civil society, how dif-

4. Some of these questions are drawn from the Humanitarian Accountability Project (HAP), *Key components of Humanitarian Accountability*, HAP Briefings 2. These and other questions are available at <http://www.hapinternational.org/en/>.

difficult and vaguely defined that may be, and how they can work closely with both while retaining their independence. While all NHRIs operate in different cultural, political, social, economic, and legal contexts, and can take many different forms, this conceptual position, and the cognate issues of independence and accountability, are applicable to all NHRIs. These difficulties are illustrated throughout using a number of examples from NHRIs (in particular from the experience of the Northern Ireland Human Rights Commission (NIHRC)).

This article is being published in a period that has witnessed a global trend towards the establishment of NHRIs. The issues raised will have relevance for recent, well established, and proposed/future NHRIs;⁵ those responsible for establishing NHRIs (most notably governments)⁶ and international bodies who encourage and assist in the creation of independent NHRIs.⁷ Far from being unique to NHRIs, the issues of independence and accountability will be central to the work of the institutions that have been, or will be, set up as a result of the introduction of recent European Union (EU) Directives.⁸ The article, therefore, stands at a praxis of academic interface with real policy issues and may be of assistance to such bodies.

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5. Some examples include the Scottish Human Rights Commission, which has produced two consultation documents: *Protecting our Rights: A Human Rights Commission for Scotland*, 2001; and *The Scottish Human Rights Commission*, 2003. For an analysis of the responses see The Scottish Human Rights Commission: Analysis of consultation responses, 2004, available at <http://www.scotland.gov.uk/library5/social/hrcaacr.pdf>; The British Government announced in October 2003 its plans to establish a single equality body for Great Britain. See White Paper, *Fairness for All: A New Commission for Equality and Human Rights* (CEHR)(12 May 2004)(published by the Department of Trade and Industry). Following its announcement in October 2003, the British government set up a task force to explore and develop ways in which the new body would function, available at http://www.womenandequalityunit.gov.uk/equality/project/task_force.htm. In December 2003, the task force published a draft paper, *A vision for the Commission for Equality and Human Rights*, available at http://www.womenandequalityunit.gov.uk/equality/project/minutes_reports.htm. It is anticipated the CEHR will begin its work in 2006, subject to the passage of the necessary legislation.
 6. For example the Canadian government are reviewing the operation and structure of the Canadian Human Rights Commission. The author attended a meeting at the Department of Justice in Toronto in August 2004 where representatives from government, civil servants, academics and others discussed how to improve human rights commissions in Canada.
 7. For example, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Commonwealth Human Rights Initiative (CHRI). The CHRI is an independent, nonpartisan, international NGO mandated to ensure the practical realization of human rights in Commonwealth Countries.
 8. The European Community lays down the principle of equal treatment irrespective of racial or ethnic origin in a directive which came into force on the 19 July 2003. It requires member states to "designate a body or bodies for the promotion of equal treatment." See Council Directive 2000/43, art. 13, 2000 O.J. (L 180) 25 (EC). Two further EU Directives also stipulate the establishment of bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex, which must be in place by October 2005. See Council Directive 2002/73, art. 8a, 2002

Although there does exist some literature on these issues, notably reports by Human Rights Watch,⁹ the International Council on Human Rights Policy,¹⁰ and the Carr Centre for Human Rights Policy,¹¹ the dilemmas arising from the theoretical conceptualization of the independence and the accountability of NHRIs and their conceptual space have yet to be studied in some detail. As the issues of independence and accountability are central to the effectiveness of NHRIs and bedevil all NHRIs, cutting across differences in political, social, and organizational structures, this article seeks to fill the gap and add to the nascent literature on NHRIs.

In framing this article, Section II details the conceptual position that NHRIs potentially occupy with respect to the other relevant bodies in a society, including government, NGOs, and other civil society organizations. In sections III and IV, the article highlights the different layers of independence and multiple accountabilities of NHRIs with different state and NGO actors, and the problems therein. Section III examines the difficulties for a NHRI in maintaining independence while developing relationships with the government, NGOs, and government agencies. Regarding the relationship with government, four levels of independence are identified: legal and operational autonomy; financial autonomy; appointment and dismissal procedures; and composition and plurality. Section IV deals with the four layers of accountability: formal, public/popular, broad, and government accountability. Section V concludes by making recommendations on how NHRIs can maintain their independence while engaging with and being accountable to both government and civil society.

II. CONCEPTUAL SPACE OF NHRIS

NHRIs can be described as sitting at the crossroads between government and civil society. Their position between civil society and government distinguishes them from being either a classic government agency or a NGO.

O.J. (L 269) 19 (EC). A similar body is to be established which implements the principle of equal treatment between men and women in the access to and supply of goods and services. See Council Directive 2004/113, art. 12, 2004 O.J. (L 373) 42 (EC).

9. BENAIFER NOWROJEE, HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA (2001), available at <http://www.hrw.org/reports/2001/africa/overview/factors.html>.
10. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 1; NATIONAL HUMAN RIGHTS INSTITUTIONS: IMPACT ASSESSMENT INDICATORS, DRAFT REPORT FOR CONSULTATION (2005); Michelle Parleviet, International Council on Human Rights Policy, *National Human Institutions and Peace Agreements: Establishing National Institutions in Divided Societies*, Working Paper (2006), available at http://www.ichrp.org/paper_files/Michelle_Parleviet_125_w_02.doc.
11. Sonia Cardenas, *Adaptive States: The Proliferation of National Human Rights Institutions*, Working Paper (2001).

NHRIs are statutory bodies and are usually state sponsored and state funded, set up either under an act of parliament, the constitution, or by decree with specific powers and a mandate to promote and protect human rights. Unlike NGOs, which are not appointed by the people or parliament, NHRIs, which vary considerably in composition and structure, have a different status in the community and different tools at their disposal to hold the state and other bodies to account for violating human rights standards. To do so effectively, NHRIs must possess autonomy from the state so as to be able to investigate the state and other actors committing human rights abuses. This leads to two paradoxes. First, states are creating institutions that will or should act as a watchdog of the very body that created them. This raises the question as to why governments create these institutions in the first place. One proposition is that NHRIs are “created largely to satisfy international audiences; they are the result of state adaptation.”¹² In other words, governments opine that establishing such bodies “will be a low-cost way of improving their international reputation.”¹³ Domestically, others have attributed “the rise in NHRIs to a global wave of democratization”¹⁴ facilitating a country’s transition from conflict to a more democratic regime. Second, some of the credibility of NHRIs comes from the fact that they are state sponsored and state funded entities. A NHRI’s integrity also comes from how independently they exercise that function and their relationships with NGOs.

Therefore, as most NHRIs are set up and funded by government, there is a perception in a number of countries that they are government bodies.¹⁵ While this may be the case in some countries, there is also the sense and expectation that NHRIs interact actively with civil society and provide societal groups with effective channels to make their claims. Ideally, their location within government should help them engage other institutions and coordinate their activities with the work of these organizations. Their “official status” *should* also allow NHRIs access to information and documents that NGOs may not easily be able to obtain and a closer engagement with government officials. Though, as is discussed later, this is not always the case. Generally, as a result of the different tools at their disposal and the differing method of creation, NHRIs should command more respect and authority than NGOs.¹⁶ Consequently NHRIs can act as a bridge by providing the practical link between the governing and the governed.

12. *Id.* at 1.

13. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, PERFORMANCE AND LEGITIMACY, *supra* note 1, at 1 (2004).

14. Cardenas, *supra* note 11, at 9.

15. Interview with Dr. Mohammad-Mahmoud Mohamedou, former Research Director, ICHRP, and Robert Archer, Executive Director, International Council on Human Rights Policy, in Geneva, Switzerland, (Nov. 2002).

16. *Id.*

Concomitantly this can and has, as is illustrated later, lead to tension over a NHRI's relationship with these actors. The two sets of actors, governments and NGOs, are often viewed as the two opposite ends of the spectrum. As the etymology of the term "nongovernmental organizations" makes clear, they are nongovernment, and by their very "nature claim not to be 'doing' government."¹⁷ Therefore, if a NHRI is seen as being too close to the government or holding an agenda dictated by government departments, especially those who provide the funding, then they will be viewed by NGOs and the civil society at large as simply a puppet of the government and, therefore, damage their credibility. Conversely, if a NHRI allows NGOs to influence its workings such that an overly close relationship develops between the two, a NHRI will simply be seen as another "pro-NGO."

This is particularly the case where, as in many countries, commissioners are drawn from the human rights community.¹⁸ However, as is discussed in more detail in Section III, some do not view the fact that members of NGOs are also human rights commissioners as problematic. Indeed, some international experts view it as one of the essential criteria of being a human rights commissioner, as this relates to the expertise and legitimacy of a NHRI.¹⁹ Notwithstanding, if it is deemed to be pro-NGO, the NHRI's credibility in the eyes of the most powerful group, the government, will be diminished. However, a NHRI's ability to develop healthy working relationships with NGOs may well increase a NHRI's standing in countries where NGOs exercise considerable influence on policy-makers, government, the media, and public opinion.

NHRIs also play a legitimizing role. In other words, as Christine Bell states, NHRIs "signal the stamp of democratic legitimacy on the deal arrived at: they constitute part of the 'politically correct' approach to constitutionalism."²⁰ NHRIs will face decisions where their integrative positions will be compromised with their legitimacy positions. For example, should NHRIs speak out on unpopular and contentious issues such as the rights of terrorists, even though this may bring them into conflict with everyone or a group of people? If they do, what effect will this have on its integrative role? The answer to these questions is compounded in transitional societies where the very concept of human rights has been contested.

For example, in Northern Ireland, the NIHRC has been erroneously viewed by some in the Unionist community, including Unionist politicians, as a body pursuing a Nationalist/Republican agenda. One Unionist politi-

17. Christine Bell & Johanna Keenan, *Human Rights Nongovernmental Organizations and the Problems of Transition*, 26 *HUM. RTS. Q.* 330, 334 (2004).

18. Interview, Mohamedou & Archer, *supra* note 15.

19. Interview with Brian Burdekin, Former Specialist Adviser, UN High Commissioner for Human Rights, in Belfast, N. Ir. (Oct. 2002).

20. CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 198 (2000).

cian explained the reason for this belief: “the human rights discourse still remains largely alien to most grassroots members of my community.”²¹ The same politician continues: “it would have been . . . an anathema” for the Protestant/Unionist community to challenge the decision of the state on human rights abuses as they “trusted their politicians.”²² Conversely, the Nationalists/Republican movement, as McEvoy states, has sought to “use law to ‘internationalize’ the conflict through usage of international human rights instruments to which Britain was a signatory.”²³ Thus, while Nationalists have used the language of rights,²⁴ Unionists have considerable problems “thriving in the human rights field.”²⁵ Consequently, many Unionist politicians’ perception of human rights is a “zero-sum” agenda, in that if one side gains, the other side loses. Viewing human rights through this lens has inevitably resulted in negative consequences for the NIHRC. In such situations, how a NHRI prioritizes its work and defines human rights are central in dealing with their dual integrative and legitimizing roles.

Thus, the key challenge for a NHRI is not only to define its space, but also to protect itself from excessive interference, be it from government, NGOs, or other institutions in society. However, as Robert Archer stated, “clearly . . . this is a desirable space to be in but it is a little contradictory to achieve . . . and is quite difficult to do it in practice.”²⁶ The difficulties arise from the multi-dimensionality of independence and the multiple accountabilities of NHRIs.

21. Arlene Foster, *Protestants Need Rights Explained to Them*, FORTNIGHT MAGAZINE, Feb. 2003, at 12.

22. *Id.*

23. Kieran McEvoy, *Law, Struggle and Political Transformation in Northern Ireland*, 27(4) J.L. & SOC’Y 542, at 555 (2000). Some of the decisions have been critical of the UK Government’s human rights record in Northern Ireland. See *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 97 (1995); *Brogan and Others v. United Kingdom*, 145B Eur. Ct. H.R. (ser. A) at 16 (1987); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 79 (1978).

24. Paul Mageean & Martin O’Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT’L L.J. 1499, 1503 (1999).

The experience of the Nationalist community within the state of Northern Ireland was forcefully articulated in the language of rights as early as the beginning of the current conflict. Indeed, many would say that the violence of the state’s reaction to that expression of discontent led to the re-birth of militant republicanism and the subsequent violence.

25. Mick Fealty, Trevor Ringland & David Steven, *A Long Peace? The Future of Unionism in Northern Ireland* (2003).

26. Interview, Mohamedou & Archer, *supra* note 15.

III. MULTIDIMENSIONALITY OF INDEPENDENCE

A. The Relationship between Government and NHRIs

As touched above, while independence is a key objective for NHRIs, it also presents a central theoretical conundrum for NHRIs. How can NHRIs, which are usually set up by the state, funded by the state, given powers and a mandate by the state, and financially accountable to the state, at the same time be visibly and clearly independent of the state? Given this intricate set of relationships and different levels at which NHRIs must work with government, some question whether it is possible for these bodies to be truly independent of government. If it is possible, how? If not, what are the consequences? These questions of independence go to the very heart of the debate about the effective functioning of a NHRI and highlight the difficulty for NHRIs in defining and protecting their space. Unfortunately, there is no magical formula for answering these questions, and the difficulties experienced by NHRIs illuminate this point. However, it is possible to identify several mechanisms in determining independence. In doing so, the different facets of independence that take into account the different levels and the complex set of relationships between government and NHRIs will be emphasized.

Broadly speaking, the term independence implies freedom from control or influence of another. This means that a person or organization should be autonomous and able to carry out duties without interference or obstruction from any branch of government or any public or private body/person. This in turn requires that the organization be given the requisite resources, autonomy, and power to perform its functions. These, and other meanings of independence, are reflected and enumerated in the Paris Principles.²⁷

The starting point for discussion on independence of NHRIs is the Paris Principles, formally known as the Principles relating to the status of national institutions. These Principles, adopted in March 1993 by the United Nations Commission on Human Rights, have become the internationally accepted minimum standards for states seeking to establish such institutions.²⁸ They set

27. *National Institutions for the Promotion and Protection of Human Rights*, adopted 4 Mar. 1994, G.A. Res. 48/134, U.N. GAOR, 48th Sess., U.N. Doc. A/Res/48/134 (1994)[hereinafter Paris Principles]. The Paris Principles arose from the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris in 1991. They were endorsed by the UNCHR in March 1992.

28. While the Paris Principles have helped to make the profile of NHRIs become more distinct, the issue has been raised as to whether the Principles should be adjusted or revisited, see INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, PERFORMANCE AND LEGITIMACY, *supra* note 1, at 107–10 (2000). There is a review of the Paris Principles in process by the OHCHR.

out guidelines designed to contribute to the independence of NHRIs. Specifically, the institution must be independent of government control, including financial control.²⁹ It should have an appointment process providing political independence and a body composed of persons broadly representative of those bodies involved in the protection and promotion of human rights. It should have adequate funding to fulfil its functions effectively and be given as broad a mandate as possible in order for it to be able to promote and protect human rights. Other features include adequate powers, including the right to initiate investigations without referral from a higher authority or receipt of an individual complaint, the power to access information, prisons, and other places of detention, and the power to compel witnesses to testify. These guidelines were complemented by the Office of the United Nations High Commissioner for Human Rights (OHCHR) Handbook, which provides comprehensive guidance on establishing and strengthening the independence of NHRIs.³⁰ The handbook stresses that an institution should be able to “perform its functions without interference or obstruction from any branch of government or any public or private entity.”³¹

Four different levels of independence regarding a NHRIs relationship with the government can be identified: legal and operational autonomy; financial autonomy; independence with regard to appointment and dismissal procedures; and independence concerning pluralism and composition. Each level will be examined respectively.

1. Independence through Legal and Operational Autonomy

NHRIs should be created by a constitution or a legislative act, rather than by executive order or decree.³² The statutory basis is the most secure way of guaranteeing various safeguards of an institution’s independence, as well as giving it powers that can be defended in legal proceedings if challenged. By creating and setting out the powers and mandates of a NHRI constitutionally or legislatively, the institution is given a degree of formal independence and is less easily abolished and less vulnerable to influence from government than if it were established by an executive order or decree. Although, this will not guarantee greater autonomy or activity, as Human Rights Watch noted, it is a fact that all of the more active or promising human rights commissions were set up either constitutionally or legislatively.³³ Having

29. Paris Principles, *supra* note 27, ¶ B(2).

30. UNITED NATIONS HANDBOOK ON 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, 1995).

31. *Id.* ¶ 70.

32. COMMONWEALTH SECRETARIAT, NATIONAL HUMAN RIGHTS INSTITUTIONS: BEST PRACTICE 10–11 (2001).

33. NOWROJEE, HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS, *supra* note 9. For example, the National Human Rights Commission of Indonesia, Komnas HAM, was created under a

formal legal standing will also make changing the powers of a NHRI more difficult, as any amendments will have to be debated in parliament and must adhere to the proper legislative procedures. Moreover, any changes would likely precipitate reaction from international and national actors, especially with the (proposed) introduction of the early warning system set up by the International Co-Ordinating Committee at OHCHR to mobilize support for NHRIs facing closure.

Operational autonomy refers to the competencies and capacity a NHRI has at its disposal. The ability of a NHRI to appoint its own staff members and manage its resources and affairs free from government interference is key in this regard. Perhaps one of the most important indicators of operational independence is the ability of a NHRI to undertake investigations autonomously and to be vested with the appropriate powers of investigations.³⁴ Such powers include the ability to demand the production of written documentation, to compel answers to questions, to threaten court proceedings if a person or organization is not cooperative, to publish the outcome of the investigation, and to access prisons and places of detention.³⁵

While not all NHRIs have the full panoply of such powers,³⁶ most NHRIs have been given some powers of investigation.³⁷ Those NHRIs who have the power to subpoena evidence and compel the attendance of witnesses, if necessary, have rarely used their quasi-judicial powers because the mere existence of such powers is usually a sufficient incentive to bring about compliance with requests. For example, a former member of the Australian Human Rights and Equality Opportunity Commission (HREOC), Chris Sidoti, commented:

If there were no powers, those with information essential to the effective functioning of a national human rights institution could withhold the information without fear of the consequences. The institution would be stymied in its work, unable to obtain the information it requires and so unable to form any conclusions about the matter under investigation. But, where the powers exist, those with information have no incentive to withhold it and will almost always provide

presidential decree, not an act of parliament, yet by its actions, it has gained credibility notwithstanding its lack of legal status.

34. For an excellent commentary on the role of NHRIs in protecting human rights see the cross-selection of contributions from present and former chairpersons of different NHRIs in *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* (Bertrand G. Ramcharan ed., 2005).
35. Paris Principles, *supra* note 27, ¶ C(2).
36. However, the Irish Human Rights Commission comes close; see *The Human Rights Commission Act, no. 9, 2000 (Ir.)*, available at <http://www.oireachtas.ie/documents/bills28/acts/2000/a900.pdf>.
37. For example, the South African Human Rights Commission (SAHRC) has investigatory powers, see *S. AFR. CONST. 1996 (Act No. 108 of 1996)*, ch. 9, § 184(2); as does the Australian Human Rights and Equality Opportunity Commission (HREOC), see *Human Rights and Equal Opportunity Commission Act, 1986*, pt. II, div. 2 (Austl.).

it without any compulsion—because they know that they can be compelled if they refuse to tender it voluntarily.³⁸

However, in the absence of such powers, as Brian Burdekin stated, “you can be ignored with impunity.”³⁹ The NIHRC’s experience is an edifying example of this “impunity.” The NIHRC was not given a specific power of investigation, but rather a more general power by the Northern Ireland Act of 1998 (NIA 1998) to conduct “such investigations as it considers necessary or expedient . . . for the purpose of exercising its functions.”⁴⁰ As this description of the NIHRCs powers was not accompanied by provisions indicating how they could be exercised, there were concerns from the outset as to whether the NIHRC could effectively conduct investigations in the absence of any express powers to obtain documents or subpoena witnesses. These concerns have been well justified; the NIHRC’s investigations have been severely hampered due to the absence of such powers. The NIHRC has been obstructed during a number of its investigations and has had to resort to the costly route of judicial review.⁴¹ The incongruity of the situation is compounded given that other UK statutory organizations, such as the Ombudsman, the Commission for Racial Equality, and the Equality Commission for Northern Ireland (ECNI), have these powers.⁴²

Fortunately, the British government in December 2004 decided that the NIHRC should be granted the right of access to places of detention and reiterated this position in a recent consultation paper in 2005.⁴³ While this

38. Sarah Spencer, *Access to Information Powers* (Feb. 2002) (Unpublished paper presented at the Scottish Executive Conference, Establishing our Rights: Roles for Scotland’s Human Rights Commission, Edinburgh, Scot., 17 Feb. 2002).

39. Interview with Burdekin, *supra* note 19.

40. Northern Ireland Act, 1998, c. 47, § 69(8), available at <http://www.opsi.gov.uk/acts/acts1998/80047-j.htm> (hereinafter NIA 1998).

41. The NIHRC lists a myriad of examples where its work has been frustrated to the lack of investigatory powers. See Northern Ireland Human Rights Commission, *Report on Effectiveness: Report to the Secretary of State Required by Section 69(2) of the Northern Ireland Act of 1998* at 35–41 (2001). The NIHRC in a recent case against the Secretary of State on seeking access to the Juvenile Justice Center in Rathgael, Bangor, reached a settlement that allows the NIHRC access to the Center by 1 May 2005. This will enable the NIHRC to see if the recommendations contained in its report are being properly implemented. NORTHERN IRELAND HUMAN RIGHTS COMMISSION, *IN OUR CARE: PROMOTING THE RIGHTS OF CHILDREN IN CUSTODY* (2002).

42. For example see Fair Employment and Treatment (Northern Ireland) Order 1998, art. 11; Sex Discrimination (Northern Ireland) Order 1976, art. 57; Race Relations (Northern Ireland) Order 1997, art. 46. The ECNI has different powers depending on whether the investigation is formal or informal.

43. The “Review of Powers” document refers to the Northern Ireland Human Rights Commission, *Report on Effectiveness*, *supra* note 41. Under NIA 1998, *supra* note 40, § 68(2), ¶ 4(1), Sched. 7, the NIHRC had to submit a report on whether it needed greater powers to be effective after two years of its existence which it duly submitted in 2001. Four years later, the final response of the government is still awaited. The government has responded by producing two consultation papers. The first was in May 2002, when the government rejected most of the recommendations. See Northern Ireland Office, *The*

announcement is welcomed, had the British government originally clarified and increased the NIHRC's investigatory powers, the NIHRC would not have launched judicial reviews and, therefore, would have saved the NIHRC's time, the court's time, and public money:

One lesson that has been learnt from the NIHRC's experience is that when Human Rights Commissions are established, but especially for one operating in as generally hostile an environment as is the case with the NIHRC, it is imperative from the outset to have specific and detailed statutory powers. Without these specific powers, state agencies and public authorities . . . will not accept that such powers exist.⁴⁴

The concern is that there were instances when the NIHRC decided not to investigate because it knew that the investigation would be thwarted.⁴⁵ Ultimately, those who lose are those the NHRIs are trying to protect, i.e., the most marginalized and vulnerable groups, such as children in detention centers, mental health patients, and people with disabilities. As one international expert stated, "if you are going to run a human rights commission, it has to have the power to conduct investigations which means essentially, it has got to have quasi-judicial powers to subpoena evidence and if necessary compel the attendance of witnesses."⁴⁶

Government's Response to the Northern Ireland Human Rights Commission's Review of Powers Recommendations: A Paper for Consultation (May 2002), *available at* http://www.nio.gov.uk_powers_recommendations.pdf. Since then, the NIHRC has withdrawn some of its earlier recommendations. See Northern Ireland Human Rights Commission, Response to the UK Government's Consultation Paper on the Review of Powers of the Northern Ireland Human Rights Commission (Aug. 2002); Northern Ireland Human Rights Commission, The Commission's Powers: A Supplementary Review (21 Apr. 2004). The second consultation paper was published in November 2005. See Northern Ireland Office, The Powers of the Northern Ireland Human Rights Commission, Consultation Paper 18–20 (Nov. 2005), *available at* http://www.nio.gov.uk/the_powers_of_the_northern_ireland_human_rights_commission.pdf. In responding to the government's paper, the Chief Commissioner stated:

We are delighted that the Secretary of State has issued this consultation paper which, although it does not offer the Commission everything that it sought, includes several recommendations, which if accepted, will empower us to more effectively carry out our investigations work . . . it is gratifying that, at long last, we may soon be able to more effectively investigate allegations of human rights abuse.

NIHRC, Press Release, Human Rights Watchdog Welcomes Extra Powers (17 Dec. 2004), *available at* http://www.nihrc.org/index.php?page=press_news_details&category_id=2&press_id=211&Itemid=65. The NIHRC has formally responded in Northern Ireland Human Rights Commission, Consultation Paper on the Powers of the Northern Ireland Human Rights Commission: Response of the Commission, (Feb. 2006). The government will next produce a summary of the responses received and in light of those responses, the government intends to legislate to enact proposals.

44. Anne Smith, *Access to Intervene: The Northern Ireland Human Rights Commission and the Northern Ireland Act 1998*, 4 EUR. HUM. RTS. L. REV. 423, 435 (2003).
45. Northern Ireland Human Rights Commission, Report on Effectiveness, *supra* note 41.
46. Interview with Brian Burdekin, *supra* note 19.

Investigating and reporting allegations of human rights abuse are perhaps the most significant functions of NHRIs and are an essential aspect of their protective functions. This is one of the crucial advantages that an official human rights body has over a nongovernmental body. Without these powers, a NHRI will lack independence, which creates an increased risk of losing credibility and public confidence by failing to take on sensitive human rights issues. In India, where the National Human Rights Commission (NHRC) can receive complaints or investigate “violation[s] of human rights or abetment thereof or negligence in the prevention of such [human rights] violation[s], by a public servant,”⁴⁷ the NHRC’s powers relating to violations of human rights by the armed forces have been restricted. The NHRC is unable to summon witnesses for claims relating the armed forces and, instead, may simply seek a report from government and issue recommendations.⁴⁸ By building in such structural limitations, governments create methods to limit the independence of the institution in protecting the people against the government and/or its agencies.

These select examples show that the quality of the independent space occupied by NHRIs is severely impinged upon if NHRIs do not have adequate and concrete powers to facilitate the carrying out of their mandate. Without adequate autonomy, NHRIs are at the whim of government and other agencies. One way to guarantee and strengthen a NHRI’s independence would be to include a provision that stipulates that “any person who willfully obstructs or interferes with the exercise of [the NHRIs] functions is liable . . . to a fine . . . or imprisonment not exceeding two years or both.”⁴⁹

Transparency of work is also an important element in helping a NHRI establish its independence and allows the public to ascertain the independence of the body. Transparency could be guaranteed by allowing NHRIs the capacity to publish the findings of their investigations and their work generally, as this will allow the public to ascertain the independence of the body. Without transparency, the credibility of the institution would be damaged, as happened with the Kenyan and Cameroon human rights commissions. Their mandates were limited to presenting their findings to the president of the country. To quote the Human Rights Watch report: “By not making statements or reports public, a human rights commission is hampered in its ability to be seen by the public as a protector of their rights, and may even be complicit in the secrecy that protects perpetrators of human rights violations. Transparency should be an indispensable part of a commission’s

47. The Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994, ch. 3, § 12(a).

48. Mandeep Tiwana, *Needed: More Effective Human Rights Commission in India*, 11 CHRI NEWSLETTER 4 (2004), available at http://www.humanrightsinitiative.org/publications/nl/newsletter_summer_2004/newsletter_summer_2004.pdf.

49. See Uganda Human Rights Commissions Act, 1997, § 23.

work.”⁵⁰ Therefore, imposing structural limitations on NHRIs makes the task of establishing and maintaining independence even more difficult.

2. Independence through Financial Autonomy

If a NHRI is to be truly independent, then its budget should not be subject to interference, by the executive or any other government branch. This principle of financial independence has been emphasized in a number of reports and by the UN, which states that a “national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.”⁵¹ The purpose of funding should be to enable a NHRI to have its own staff and premises, independent of government, and not subject it to financial control, which might affect independence. This requirement covers both financial and administrative independence, and, thus, a NHRI should not only be able to determine its own priorities and activities, but should also have the freedom to appoint its own staff⁵² and have adequate resources to carry out its functions effectively. The importance of being financially and administratively independent was unanimously upheld by the Constitutional Court in South Africa in the case of *New National Party of South Africa v. Government of the Republic of South Africa*.⁵³ Although the decision concerned the independence of the Independent Electoral Commission, it is equally applicable to all institutions, including NHRIs.

However, experience shows that few NHRIs are financially and administratively independent of government, and most rely on the government to provide sufficient financial resources. This creates ongoing tension with the need for NHRIs to maintain independence. In addition, it depends on which government department a NHRI technically reports to. For example, if a NHRI is dependent on a government’s finance department for its overall budget as well as for each of its requirements, as is the situation with the Jammu and Kashmir State Human Rights Commission (SHRC), the NHRI will be reduced to a dependent extension of the state government.

The NIHRC is a stellar illustration of the difficulties NHRIs may encounter in establishing independence and defining the conceptual space a NHRI occupies when it is wholly dependent on state government for funding. The NIHRC receives funding from the Northern Ireland Office (NIO), a branch

50. NOWROJEE, *supra* note 9.

51. Paris Principles, *supra* note 27, ¶ B(2).

52. For example: “In 2002, the Amendment to the Jammu and Kashmir Protection of Human Rights Act (PHRA) stripped the SHRC of its ability to appoint its technical staff and transferred this power to the government.” *J & K State Human Rights Commission: The healing can begin here*, HUMAN RIGHTS FEATURE FORTNIGHTLY, 28 Sept. 2005, available at <http://www.hrdc.net/sahrdc/hrfeatures/HRF127.htm>.

53. *New National Party of South Africa v. Government of the Republic of South Africa*, (5) BCLR 489 (CC) (1999).

of the British government, and also must approach the NIO every time it requires an appropriation. This has occurred on several occasions, especially at the beginning, as the NIHRCs budget was minuscule.⁵⁴ This resulted in the unfortunate and unacceptable situation where the NIHRC was required to interact with the NIO to negotiate supplementary biddings for various projects. The outcome has been delay of various projects while the NIHRC was forced to wait on approval of terms of references from the NIO. For example, although the NIHRC produced a report in September 2004 on issues arising from investigations on hospital deaths,⁵⁵ and remains in the process of working on a larger report relating to the inquest system, the NIHRC had been trying to attain money for this investigation since August 2002. Most worrying is evidence from two former commissioners to the United Kingdom Joint Committee on Human Rights (JCHR) showing detailed correspondence between the NIHRC and the NIO regarding funding for the investigation.⁵⁶ The two former commissioners' concluded that "government vetting of the Commission's position . . . is a direct attack on Commission independence."⁵⁷ Equally relevant is the development of a communications strategy for the NIHRC, as the NIHRC waited years before implementing a communication strategy. The NIHRC had been trying to develop a communication strategy since December 2000.

Furthermore, even when the NIHRC initiated an independent assessment of its functions and effectiveness, carried out by a former member of the New Zealand Human Rights Commission, Peter Hosking,⁵⁸ the government tried to obfuscate the process by refusing to pay for the evaluation.⁵⁹ Hosking admits that this was due not so much to disagreement over the detail of the terms of reference, but more to the fact that the "government was not happy with some of the things that I'd said and that was probably more of

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54. The NIHRC received an annual budget of £750,000 in its first three years. It has now been agreed that the core annual budget for the next financial years will be £1.3 million for 2003–2004, £1.3 million for 2004–2005, and £1.35 million for 2005–2006. See JOINT COMMITTEE ON HUMAN RIGHTS, WORK OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (FOURTEENTH REPORT), 2002–3, H.L. 132, at 19, ¶ 34, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132.pdf>.
 55. TONY MCGLEENAN, INVESTIGATING DEATHS IN HOSPITALS IN NORTHERN IRELAND: DOES THIS COMPLY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS? (Sept. 2004).
 56. Memorandum from Christine Bell, Inez McCormack, The Northern Ireland Human Rights Commission: Written Submission to the Inquiry by the Joint Committee on Human Rights 6 (2003), available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132we05.htm>.
 57. *Id.*
 58. Independent monitoring of a NHRIs activity is strongly recommended: "Commissions should evaluate their own performance and make the outcome public." SARAH SPENCER & IAN BYNOE, A HUMAN RIGHTS COMMISSION: THE OPTIONS FOR BRITAIN AND NORTHERN IRELAND 56 (1991).
 59. The government initially agreed to pay the costs for the review.

an incentive for them not to pay for the report."⁶⁰ A further example of the government's control over the NIHRC was the Commission's inability to employ its own staff without approval.⁶¹ Fortunately, this impediment was removed following the review of the NIHRC's powers, wherein the government indicated acceptance in principle of the Commission's recommendation that it should control its own resources, at least as far as the employment of staff is concerned.⁶²

Far from being unique to the NIHRC, this experience is shared by a number of NHRIs. Governments have deliberately reduced the budgets of the human rights commissions in Cameroon, Chad, and Togo, when they exercised their independent right to criticize their respective governments.⁶³ In Cameroon, the commission's funding was dramatically reduced for two years after it criticized government abuses in a confidential report on the state of emergency in the North-West Province in 1992. In Zambia, the commission, already short on funding, lost government premises promised to it after it commented on the torture of coup detainees in 1996.⁶⁴ As Orest Nowosad stated, "to hold back funds because the institution has lashed out . . . is an intimidating approach . . . but if your government is upset with you it means that you are doing some good work."⁶⁵

These examples amplify the perennial problems of being a state-funded body while simultaneously endeavoring to establish your distance and independence from the "hand that feeds you." However, failure to do so can and has resulted, as the above examples show, in the negation of a NHRI's independence. This, consequently, raises questions about credibility and legitimacy in the eyes of the public.

In Northern Ireland, it is arguable that the situation could have been improved if the government allowed the NIHRC to secure financial support from external donor agencies. When Brice Dickson was interviewed for the post of Chief Commissioner of the NIHRC, he specifically asked if the NIHRC would be authorized to raise money on its own account and was told that this would probably be so.⁶⁶ The government has provisionally rejected this, despite the fact that most other national human rights commissions can and do accept funding from sources other than their government, stating that money

60. Interview with Peter Hosking, former member of the New Zealand Human Rights Commission, in Belfast, N. Ir. (July 2003).

61. NIA 1998, *supra* note 40, § 68(2), ¶ 4(1), Sched. 7.

62. Northern Ireland Office, *The Government's Response*, *supra* note 43, ¶ 21.

63. NOWROJEE, HUMAN RIGHTS WATCH, *PROTECTORS OR PRETENDERS*, *supra* note 9.

64. *Id.*

65. Interview with Orest Nowosad, OHCHR, in Geneva, Switzerland (Nov. 2002).

66. Northern Ireland Human Rights Commission, *Report on Effectiveness*, *supra* note 41, at 11.

received without NIO approval could lead to the duplication of funding.⁶⁷ The JCHR⁶⁸ concludes that the problem of duplication is surmountable and “should in part be addressed by the Commission’s obligation to submit its annual accounts for scrutiny.”⁶⁹

International experience shows that receiving funds from outside donors can be extremely useful. The Indian NHRC has been able to carry out specific projects due to international funding,⁷⁰ and the South African Human Rights Commission (SAHRC) has set up a Trust Fund. However, it is important to acknowledge the problematic nature of receiving financial support from donors. As one report has stated, such support can be a:

[D]ual-edged sword. On the one hand, it can positively bolster a human rights commission, both materially and politically. A government that is aware that there is international scrutiny and support of its human rights commission is less likely to overtly interfere in the work of the commission. On the other hand, international funding to human rights commissions that are being fettered by the executive branch can lend legitimacy to a weak commission that is not contributing towards the protection of human rights.⁷¹

The same report also pointed out the danger of allowing governments to use international financial support as an excuse not to give a NHRI adequate finances and to substitute government support for donor funding.

Other risks include paying too much attention to a particular issue depending on the donors’ interests. This has happened in the context of donor funding for NGOs, where one author observed “at the moment it’s gender, then it’s the environment, then it’s sustainable development and God knows what the year after that.”⁷² Thus, increased reliance on donor funding may also affect a NHRI’s legitimacy. Further, it adds another layer of accountability as NHRIs have to explain to their donors what they are doing and why the cost of their activity is justified. While this is justifiable and reasonable, as one author has pointed out, “there is an obvious fear that donor funding may

67. Northern Ireland Office, *The Government’s Response*, *supra* note 43, ¶ 33. In the 2005 consultation paper, the NIO had not changed its view on this particular issue, *see id.* at 8.

68. The JCHR is appointed by the House of Lords and the House of Commons and part of its remit is to examine whether, following the passing of the Human Rights Act 1998, there is a need to establish a UK Human Rights Commission. See JOINT COMMITTEE ON HUMAN RIGHTS, *THE CASE FOR A HUMAN RIGHTS COMMISSION: INTERIM REPORT (TWENTY-SECOND REPORT) 2001–2* H.L. 160, available at <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/160/160.pdf>; JOINT COMMITTEE ON HUMAN RIGHTS, *THE CASE FOR A HUMAN RIGHTS COMMISSION (SIXTH REPORT), 2002–3* H.L. 67–I, available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf>.

69. JOINT COMMITTEE ON HUMAN RIGHTS, *WORK OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (FOURTEENTH REPORT)*, *supra* note 54, ¶ 37.

70. NATIONAL HUMAN RIGHTS COMMISSION, *RESPONDING TO CRISIS REPORT* (2003).

71. NOWROJEE, *supra* note 9.

72. TERJE TVEDT, *ANGELS OF MERCY OR DIPLOMATS: NGOs & FOREIGN AID* 90, at n. 2 (1998).

reorient accountability upward, away from the grassroots, supporters and staff."⁷³ Finally, while NGOs receive financial support from donors, it may be more troublesome for NHRIs, as they are different from NGOs. As noted above, NHRIs are part of the global trend of "national institution building" and, as an organ of the state, being able to raise funds from outside may not be as appropriate for NHRIs as it would be for NGOs.⁷⁴

For these reasons, it would be helpful if national parliaments, to whom most NHRIs are accountable, were involved in setting a NHRI's budget. This would be in line with the Paris Principles, as well as the findings and recommendations of numerous reports.⁷⁵ To quote from one of the reports: "to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable."⁷⁶ The report continues: "[a]pproval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public,"⁷⁷ and concludes by recommending that funds be provided by parliament, not the Executive.⁷⁸ Not only would this enhance a NHRI's independence, but according to a member of the SAHRC, "there would be greater engagement with parliament and greater assessment of our ethics and the role that we play."⁷⁹ It would also assist in the formidable task of carving out a NHRI's conceptual space because, as the examples vividly illustrate, it is the issue of funding that clearly affects the perceived independence of NHRIs and has dogged the financial independence of numerous NHRIs.

73. Michael Edwards, David Hulme, *Too Close For Comfort? The Impact of Official Aid on Nongovernmental Organizations*, 1(1) CURRENT ISSUES IN COMPARATIVE EDUCATION (1998), available at http://www.tc.columbia.edu/cice/Archives/1.1/11edwards_hulme.pdf

74. However, this does not imply that NGOs who are dependent on donors do not experience problems. For further information on this issue, see International Council on Human Rights Policy, *Deserving Trust: Issues of Accountability for Human Rights NGOs*, Draft Report for Consultation 129–31 (2003), available at http://www.ichrp.org/paper_files/119_w_01.doc.

75. On this issue see JOINT COMMITTEE ON HUMAN RIGHTS, *WORK OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (FOURTEENTH REPORT)*, *supra* note 54; see also HUGH CORDER, SARAS JAGWANTH, & FRED SOLTAU, *REPORT ON PARLIAMENTARY OVERSIGHT & ACCOUNTABILITY* (1999). In the NIHRCS recent response to the British Government's consultation paper on the review of powers, it too supports this recommendation. See Northern Ireland Human Rights Commission, *Consultation Paper on the Powers of the Northern Ireland Human Rights Commission*, *supra* note 43, at 4.

76. CORDER, JAGWANTH & SOLTAU, *supra* note 75, ¶ 7.2.

77. *Id.*

78. *Id.*

79. Interview with Karthy Govender, member of the SAHRC, in Capetown, S. Afr. (Aug. 2002).

3. Independence through Appointment and Dismissal Procedures

Appointment mechanisms are one of the most important ways of guaranteeing the independence of a NHRI. The appointment process should be transparent and politically neutral, and commissioners should be appointed in a manner that ensures independence from the executive. One method to ensure this independence is involving the legislature and civil society in making the appointments through “wide consultation and a process for public nomination of candidates.”⁸⁰ Without consultation with civil society, there is a high risk that the NHRI will fail to win national and international legitimacy and support. The United Nations (UN) and Angolan civil society groups have raised such concerns; the National Assembly of Angola may debate the legislation for the creation of a NHRI without consulting civil society organizations. If this occurs, not only will it fail to address the minimum international standards of the Paris Principles, but the NHRI will not have the necessary shared ownership it needs for it to be effective as a bridge between government and civil society.⁸¹ Thailand is perhaps one of the best examples where a genuine participatory approach to selection with civil society involvement took place. Although the process of appointment took two years, the public was fully consulted and the process was publicly advertised. The commission is, therefore, much more empowered in the public eye due to the open and inclusive nature of the selection process.⁸²

The Paris Principles and the UN handbook guidelines also recommend that the founding statute set out terms and conditions applicable to the appointment and dismissal of commissioners, including appropriate safeguards against arbitrary dismissal or non-renewal (for example, the head of the institution should be given security of tenure). It is also important that the founding statute clearly set out procedures and time limits in the event of a vacancy of a position due to the ending of tenure, resignation, or death. These must be clear and precise in order to prevent a crisis or long periods without a head or commissioner.

The NIHRC faced exactly this situation. Since 28 February 2005, the NIHRC had been without a Chief Commissioner, as the then Chief Commissioner Professor Brice Dickson’s term of office finished at the end of his second three-year contract.⁸³ Despite the Secretary of State’s announcement

80. Appointment Procedures of National Human Rights Institutions, Paper for the Discussion of the International Coordinating Committee of National Human Rights Institutions 4 (13 Apr. 2006), available at http://www.nhri.net/pdf/OHCHR_Appointments_Procedure_Paper_E.pdf.

81. National Human Rights Institutions Forum, news alert, *Establishment of a national human rights institution in Angola* (11 Aug. 2005), available at <http://www.nhri.net/news.asp?ID=889>.

82. The commission is still appointed by the Senate and given the blessing by the King.

83. Brice Dickson was appointed Chief Commissioner on 18 January 1999. The Commissioners and Chief Commissioner are appointed by the Secretary of State for Northern Ireland; see NIA 1998, *supra* note 40, § 68(2).

on the 5 May 2004 to appoint a Chief Commissioner and other commissioners with a closing date of 16 July 2004, it was not until the 16 June 2005 that the appointments were made, which took effect from the 1 September 2005.⁸⁴ This was a very worrying situation because the number of commissioners declined from thirteen to two since September 2002 as the result of resignations and a number of commissioners' terms of office ending.⁸⁵ As the outgoing Chief Commissioner stated, this hiatus "could have serious consequences for human rights cases within Northern Ireland."⁸⁶ Furthermore, the failure to appoint commissioners to fill the vacancies was incompatible with the legislation creating the NIHRC, the NIA 1998, which requires the composition of the NIHRC to be "representative" of the community in Northern Ireland.

This in turn raises questions about the government's commitment to an effective human rights commission and their consideration of human rights as a priority. If the undue delay was the result of negligence, such gross oversight is astounding. If, on the other hand, the lack of appointments is the result of a deliberate attempt to impair the NIHRC, the problem is far more serious. It highlights two issues relating to the general themes of this article. First, it magnifies the problems for NHRIs who are trying to establish their independence from the body that appoints them. Yet, NHRIs are at the mercy of governments who have the final say as to who and when appointments are made. Second, without an effective appointment procedure that includes clear regulations for the appointment of commissioners and chief

84. On the 16 June, a new Chief Commissioner, Monica McWilliams was appointed along with seven new Commissioners who will serve a term of three years, and whose positions took effect from September 2005. The appointments will supplement two current Commissioners, Lady Christine Eames and Kevin McLaughlin who were re-appointed in November 2004 for a further period of three years. The NIO stated that it was unable to proceed with the appointments as planned, due to the general and local elections which occurred on the 5 May 2005.

85. The first round of Commissioners appointed in March 1999 were Christine Bell, Margaret Ann Dinsmore, Tom Donnelly, Harold Good, Tom Hadden, Patricia (Paddy) Kelly, Inez McCormack, Frank McGuinness, and Angela Hegarty. In January 2001 Angela Hegarty resigned, all other existing Commissioners were confirmed in their positions and four new commissioners were appointed, one to replace her and an additional three to expand the membership of the Commission: Lady Christine Eames, Chris McGimpsey, Kevin McLaughlin, and Patrick Yu, each to serve for three years. In September 2002 Christine Bell and Inez McCormack resigned; in July 2003 Patrick Yu resigned; and shortly after two Commissioners, Frank McGuinness and Paddy Kelly, withdrew from active service. Chris McGimpsey resigned on 3 November 2003 as he was standing as a candidate for the Ulster Unionist party in the Assembly elections. Paddy Kelly resigned in July 2004 and a number of commissioners have finished their second term. Up until September 2005, following the recent re-appointment of two members to the board of the NIHRC, there were only two Commissioners, Lady Christine Eames and Kevin McLaughlin.

86. Debora McAleese, *Human Rights Boss Raps Lack of Support; Government not Taking the Issues Seriously*, BELFAST TELEGRAPH, 23 Feb. 2005.

commissioners in the case of vacancy⁸⁷ and involves both the legislature and civil society, government control over appointments is increased. This decreases the NHRI's lack of guaranteed independence and national and international legitimacy.

4. Independence Through Composition and Pluralism

B. Composition of a NHRI: Commissioners and Staff

In addition to the method of appointment, those who are selected as commissioners and the chairperson are equally vital for a body's independence. As noted by the Commonwealth Secretariat: "whatever the appointment process, the crucial requirement for appointees is that they are demonstrably politically neutral and persons of high integrity and standing. Without these characteristics, the office is unlikely to gain the confidence of the public."⁸⁸ As human rights commissioners are entrusted with great responsibility, they must be able to inspire public confidence. This can be ensured if the public believes the members are politically neutral and committed to human rights. The onus of achieving a neutral and committed commission is on those who appoint the members; the appointment procedure must be open, transparent, and democratic. The NHRI also bears responsibility to ensure that they are not merely an extension of the government, but an independent oversight agency willing to speak out against their appointers if necessary. This helps the NHRI find and defend its conceptual space while simultaneously bolstering its independence from government and increasing its legitimacy and support.

Notwithstanding these guarantees, the following examples illustrate that the quality of the independent space occupied by NHRIs is always under threat from government, who will simply impose political appointees. For example, in India, despite the provision that the Leader of the Opposition in the House of the People and the Leader of the Opposition in the Council of States form part of a committee that recommends the appointment of the Chairperson and Members of the NHRC,⁸⁹ the appointment of P.C Sharma, a former Central Bureau of Investigation (CBI) chief to the HRC led to the resignation of Ravi Nair, the executive director of the South Asia Human Rights Documentation Centre, from the NHRCs NGO core committee. In

87. In South Africa, a vacancy in the SAHRC is required to be filled as soon as practicable, in accordance with constitutional provisions. See Human Rights Commission Act, § 11(2)(b) (1994)(S. Afr.), available at <http://www.polity.org.za/html/govdocs/legislation/1994/act94-054.html?rebookmark=1>.

88. COMMONWEALTH SECRETARIAT, *supra* note 32, at 29.

89. The Protection of Human Rights Act, *supra* note 47, § 4(1).

the letter of resignation, Nair commented that the commission was not “forthright in its condemnation of an appointment that appeared to have been practically forced on it” and is “another indication of NHRC’s continuing emasculation by the state. I believe, it reflects the extent to which the establishment is willing to undermine the cause of human rights in this country.”⁹⁰ The recent reports of corruption and mal-administration surrounding the National Human Rights Commission in Nepal also raises questions of political neutrality among certain commission members.⁹¹ Additionally, even in South Africa, where the appointment process for the SAHRC is seen as transparent because of the involvement of civil society and a parliamentary committee responsible for nominating the candidates, the danger of political appointees still exists. As one former commissioner admitted herself: “I was initially appointed by Mandela, . . . he was of course the President and therefore could have quite a lot of say in these appointments.”⁹²

The same criteria applies to the staff independently appointed by the NHRI. This includes financial independence (the ability to set staffing and structures and salaries as the NHRI wishes as noted earlier), and not on deputation from government departments or re-employment after retirement, as happens in India. This is unsatisfactory as “experience has shown that most have little knowledge and understanding of human rights issues.”⁹³ This is an experience shared by a number of NHRIs who regard knowledge of human rights issues as desirable but not essential. For example, in the NIHRC, one commissioner admitted that “I wouldn’t claim to be an expert on human rights by any means or shape or form and I’m conscious that that is an issue that I need to address and look at.”⁹⁴ Despite a number of recommendations from several bodies that knowledge of human rights be an essential criterion, the government rejected the proposition as “too restrictive.”⁹⁵ It seems incredulous that for a NHRI, whose overall purpose is to promote and protect human rights, knowledge of human rights is not a pre-requisite for members at the level of staff, commissioner, or chief commissioner.

90. Akshaya Mukul, *NHRC Member Resigns*, THE TIMES OF INDIA, 14 Jan. 2005, available at <http://www.timesofindia.indiatimes.com/articleshow/990994.cms>.

91. For further information on this issue and for other issues of the Nepalese human rights commission see BIPIN ADHIKARI, BUILDING CAPACITY OF NATIONAL HUMAN RIGHTS INSTITUTIONS: THE CASE OF NEPAL (2004), available at http://www.nhrcnepal.org/publication/doc/books/Building_Capacity_of_NHRIs-Nepal_case.pdf.

92. Interview with Helen Suzman, former member of the SAHRC, in S. Afr. (Aug. 2002).

93. Tiwana, *supra* note 48, at 5.

94. Interview with a member of the NIHRC, (name withheld for confidentiality reasons), in Belfast, N. Ir. (Apr. 2003).

95. Northern Ireland Human Rights Commission, Response to the 14th Report of the Joint Committee on Rights in the Session 2002–03, ¶ 4 (Mar. 2004), available at <http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/65/122.pdf>.

Of course, there are other criteria to be taken into consideration, as one must consider cases such as Ghana, where the commissioner, Francis Emile Short, had no notable prior human rights experience yet “created one of the most credible human rights commissions.”⁹⁶ The quality of the independent space a NHRI carves out for itself also depends on the chairperson’s leadership. Generally, the leader’s personality tends to influence the institution, for good or bad. As one international expert stated “a great leader will actually try to keep his influence in a way at bay, trying to translate it into institutional processes.”⁹⁷ It is vital to remember that the leader is *primus inter pares* (first among equals)—although he or she may be the “leader” of the organization, he or she is still one in a number of commissioners who must work collectively. Ideally, the leader should be prestigious and well respected so as to give credibility to the work of the organization. He or she should also have the ability to negotiate with different sectors of society. For example, the ex-president of the HREOC, Sir Ronald Wilson, a former High Court judge and head of one of the three biggest churches in Australia, was an extremely influential person. Indeed, in some countries the legislation establishing the NHRI specifically requires that the head of a NHRI be a former judge. For example, in India, the Human Rights Act of 1993 requires a former Chief Justice of the Supreme Court to be appointed Chairperson and three of the five members of the Indian National Human Rights Commission to be former judges. While this may give a NHRI a certain degree of legitimacy and credibility, there is a risk of the NHRI becoming a “retired persons’ den”⁹⁸ and adopting an overly legalistic approach. The leader’s political will, vision, and willingness to speak out when necessary are the important requirements. For example, the former Chief Commissioner of the NIHRIC openly criticized the British government’s delay in disclosing the truth about the murder a solicitor, Patrick Finucane,⁹⁹ and “obstructionism” during the Bloody Sunday inquiry.¹⁰⁰

96. Nowrojee, *supra* note 9.

97. Interview with Mohamedou & Archer, *supra* note 15.

98. Reenu Paul, National Human Rights Commission of India: A Human Rights Evaluation (Sept. 2003) (unpublished M.Sc. dissertation, London School of Economics) (quoting Dutta Ritwick), at 25, available at <http://www.nhri.net/pdf/National%20Human%20Rights%20Commission%20of%20India%20-full%20version.pdf>.

99. There have been allegations of state collusion in the murder of Patrick Finucane. The Bloody Sunday inquiry was set up by the British government to establish the truth of the events in 1969 when thirteen civil right marchers were killed by British soldiers. See BRITISH HOUSE OF COMMONS, CORY COLLUSION INQUIRY REPORT: PATRICK FINUCANE, H.C. 470 (Apr. 2004) (prepared by Peter Cory, Retired Justice of the Supreme Court of Canada), available at <http://www.cain.ulst.ac.uk/issues/collusion/cory/cory03finucane.pdf>.

100. McAleese, *supra* note 86.

C. Independence through Pluralism

Generally speaking, pluralism is a simple recognition that there are many different groups active in a country, and NHRIs need to accommodate and recognize these differences across a wide spectrum, including different cultures, languages, education, religion, and so on. This diversity, the importance of which is emphasized in the Paris Principles, needs to be reflected in the composition of a NHRI, where both members and staff should be drawn from a broad cross-section of society, ensuring multiplicity of opinion. A NHRI's composition should reflect differences such as religion, language, geographical and socioeconomic factors, ethnicity, gender, sexual orientation, and disability. This will help the NHRI establish and increase the quality of the conceptual space occupied by a NHRI.¹⁰¹

In societies divided among ethnic, political, and/or religious grounds, the criterion of pluralist representation takes on an added significance. Without diversity, there is a danger that the NHRI and its work will not be viewed with public confidence, therefore damaging its credibility and legitimacy. This link between plurality, independence, and public legitimacy is aptly illustrated by the NIHRC's experiences, as its composition has been criticized by certain sections of the community in Northern Ireland as lacking in plurality and representativeness. This, in turn, damaged NIHRC's independence and credibility.

From the very outset of the NIHRC's existence in March 1999, its composition was criticized as unrepresentative of ethnic minorities, persons with disabilities, and persons who were openly gay or lesbian.¹⁰² However, the most serious criticism came from the Protestant/Unionist community who regarded the NIHRC as a body skewed towards Catholics/Nationalists. Several representatives from the Protestant/Unionist community echoed this view:

[T]here is nobody on the Commission who would treat us fairly . . . there is nobody there who can represent our constituency, there needs to be somebody there who can understand when you say, we put something in a certain light, every community has their own idea, there is nobody we think we would be confident there would be able to translate that properly. At the end of the day that is what it takes . . . we can see nobody who's going to fight on our part.¹⁰³

101. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, PERFORMANCE AND LEGITIMACY, *supra* note 1, at 112 (2004).

102. It has been noted that some members of the Commission did not wish to disclose their disabilities or sexual orientation, see the report Stephen Livingstone & Rachel Murray, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission with Comparisons from South Africa* 39 (Feb. 2005)(unpublished manuscript, on file with author).

103. Interview with Ulster Protestant Movement for Justice, (names withheld for confidentiality reasons), in Ballymena, N.Ir. (Nov. 2002).

I think there would also have been a view that the NIHRC was not actually representative of our community at all. So again that would make life difficult for the NIHRC because they were coming up almost against a brick wall of opposition, not necessarily because of what they were dealing with but just because of the perceptions of where it had come from and the fact that they weren't in the views of people, representative.¹⁰⁴

Even with the second round of appointments,¹⁰⁵ the criticism did not decrease, rather, if anything, it increased—this time coming from both Unionists and Nationalists. On the one hand, Unionists, especially those who opposed the Good Friday Agreement, felt that even with the new additions “it doesn't reflect any divide in the Unionist community and therefore there is a key problem in that over half the community in Northern Ireland feel alienated from the HRC.”¹⁰⁶ On the other hand, the Nationalists opined that “it is unbalanced at the minute and it's heavily weighed towards those more from the Unionist side of the community and that is an issue of concern.”¹⁰⁷

The NIHRC's experience illustrates two points. First, it reiterates the importance of pluralist representation on a NHRI. Second, it illustrates the twofold challenge presented to those responsible for appointing members to NHRIs. The first challenge is to ensure that the body is representative and reflects the particular characteristics of society, especially as most societies are not homogeneous. However, “care must be taken to ensure that the effort to address diversity does not become tokenism that weakens the work of the commission by the presence of political appointees who know nothing about human rights.”¹⁰⁸ The second challenge concerns the appointing body's responsibility to defend its choice of commissioners following criticism of the composition or of particular individual commissioners. This raises difficult issues regarding the balance between independence and accountability, which will be discussed further in Section IV. On the one hand, NHRIs should be careful to prevent undue governmental influence from impinging on their conceptual space. At the same time, as Section IV notes, part of government accountability is endorsement and, if need be, defending unwarranted criticism of NHRI members. By taking such a stance, a government is not implicating a NHRI's independence, rather, as

104. Interview with a representative from the Orange Order, in Belfast, N. Ir. (name withheld for confidentiality reasons), (Feb. 2003).

105. Angela Hegarty resigned in January 2001; all other existing Commissioners were confirmed in their positions and four new commissioners were appointed, one to replace Angela Hegarty and an additional three to expand the membership of the Commission: Lady Christine Eames (Church background); Chris McGimpsey (Ulster Unionist Party member); Kevin McLaughlin (disability sector); and Patrick Yu (ethnic minority background).

106. Interview with Edwin Poots, Democratic Unionist Party, in Belfast, N. Ir. (Jan. 2003).

107. Interview with Chrissie McAuley, Sinn Féin, in Belfast, N. Ir. (June 2003).

108. NOWROJEE, *supra* note 9.

Linda Reif states, “political and government support must be given to the institution, its work and its recommendations. A responsive government in the positive sense is crucial to the effectiveness of a national human rights institution.”¹⁰⁹

The tension between the government’s desire to avoid interference with a NHRI’s independence and failing to discharge its responsibility is once again illustrated by the British government’s failure to defend the appointments made to the NIHR. A classic example of the government’s blatant lack of support occurred when the Ulster Unionist Member of Parliament (MP) Ken Maginness commented in Parliament that commissioners were downright “evil,” to which the government minister responded “while I do not necessarily agree,” implying that there was a possibility that the government did agree with the outrageous statement. As one former commissioner stated, this shows that “there was not even rhetorical support for the Commission as a worthwhile or effective body.”¹¹⁰

This was echoed by the then Chief Commissioner:

They (the government) haven’t done enough certainly . . . when we’ve been criticized publicly, the Government has not stood up in the way they ought to have done and said in Parliament or elsewhere that they’re happy with the composition of the Commission, they’re happy with the fact that it’s doing its work independently and so forth. I don’t expect the Government to endorse everything we say, but I expect them to endorse the way in which we’re working, which I think is beyond reproach (well not beyond reproach, that would be claiming too much, it’s good and it stands up to scrutiny).¹¹¹

There have also been calls on the state and the state authorities to guarantee a secure and conducive environment for the National Human Rights Commission in Sri Lanka following a break-in of the head office. The FORUM-ASIA is deeply concerned that if those responsible for such acts are not brought before justice, the work of the Commission as an independent institution will be totally undermined. It stated that “[i]t is not sufficient to create a National Human Rights Commission. State authorities should ensure a conducive and safe environment to enable the Commission to carry on their legitimate responsibilities.”¹¹²

Although the appointments will normally be beyond the NHRI’s control, it is vital for the legitimacy of a NHRI, especially those operating in

109. Reif, *supra* note 3, at 27.

110. Interview with Christine Bell, former commissioner, NIHR, in Derry, N. Ir. (May 2003).

111. Interview with Brice Dickson, former Chief Commissioner, NIHR, in Belfast, N. Ir. (April 2003).

112. Anselmo Lee, Executive Director of FORUM-ASIA, Press Release, FORUM-ASIA Condemns the attack on the National Human Rights Commission Office in Sri Lanka (22 Oct. 2005), available at <http://www.nhri.net/news.asp?ID=920>.

a hostile political environment, to ensure that adoption of strategies that attract the confidence to grow in all sections in the community, especially those in the community who may be most apathetic to a NHRI. To borrow a term from Christine Bell, this “integrative ambition”¹¹³ may be a difficult role to play out, especially in divided societies, but it is a vital function for NHRIs. Again, the NIHRC’s experience of playing this integrative role, and their difficulty bringing Unionists on board, is a good illustration of some of the problems NHRIs face in divided societies. Perhaps the controversy over the NIHRC’s appointments and the allegations of lack of representation inhibited their integrative function.

D. The Relationship of NHRIs to Civil Society and NGOs

NHRIs also have to work out a relationship with civil society, especially with the NGO community, given that the strength of such a relationship is integrally connected with a NHRI’s popular/public legitimacy. This necessitates establishing a partnership approach with NGOs and community-based groups working in the human rights field, allowing them to be involved in drawing up and implementing programs and activities. The Paris Principles emphasize the need to develop an active working relationship with NGOs.¹¹⁴ It has been found that commissions that cooperated with NGO communities were inevitably those with the strongest record. Uganda and Ghana are prime examples. In some cases the importance of this link is recognized by formal mechanisms. For example, a number of commissions include representatives from the NGO community.¹¹⁵ Others have a formally constituted advisory body including representatives of the community or of community organizations.¹¹⁶ In other cases, the human rights commission is

113. BELL, *supra* note 20, at 199.

114. Paris Principles, *supra* note 27, ¶ C(7).

In view of the fundamental role played by non-governmental organizations in expanding the work of national institutions, national institutions shall develop relations with non-governmental organizations devoted to promoting and protecting 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 specialized areas.

115. The National Human Rights Commission of Togo (set up in 1987) included an elected representative of the Togolese Red Cross, elected representatives of women, youth, workers and traditional chiefs and two lawyers elected by the Bar Association. The NIHRC when first established included six members of the Committee on the Administration of Justice. In Benin, Morocco, and Senegal, representatives from the NGO community are mandated members of the human rights commissions. See, e.g., NOWROJEE, *supra* note 9; Brian Burdekin, *Human Rights Commissions, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD* 801 (Kamal Hossain et al. eds., 2001).

116. In Mexico, the National Commission on Human Rights has a Council composed of human rights experts which conducts studies and makes recommendations to the Commission.

mandated to work with NGOs.¹¹⁷ Thus, “[a] human rights commission can be a constructive interlocutor between the government and civil society on human rights issues, and provide an umbrella of protection and support to the NGO movement.”¹¹⁸

However, just like its relationship with government, NHRIs need to be independent from NGOs and civil society groups so as to ensure that they are not overly influenced by a particular interest group. Human rights commissions must realize that they are not NGOs. They are a statutory body with specific powers and a mandate to promote and protect human rights. Unlike NGOs, who are not appointed by the people or parliament, NHRIs have a different status in the community and different tools at their disposal to hold the state and other bodies to accountable for violating human rights standards.

The situation is exacerbated when members of a NHRI are, or have been, members of NGOs. Northern Ireland again provides an illustration of how this tension has complicated and undermined the conceptual space occupied by NHRIs. A number of former members of the NIHRC are very active in the main human rights groups in Northern Ireland, most notably the Committee on the Administration of Justice (CAJ) and Amnesty International (AI). Initially the NIHRC adopted a cautionary approach to the CAJ and AI, as they wanted to maintain independence. However, it has been reported that this created some ill-will within some of the NGOs:

[W]e never wanted a privileged relationship with the Commission but we certainly weren’t prepared to settle for a second-rate relationship with the Commission, we weren’t prepared to be punished, if you like, for the fact that there were some members of their Commission who were or had been members of our organization. So I think there was, and I imagine there still is, a certain amount of, it feels like distrust and hostility in fact that we are always up to something and that they need to guard against having a close relationship with us.¹¹⁹

Although the NIHRC is right to be cautious about its independence, this should not be at the expense of excluding organizations that have cam-

In Morocco the Human Rights Consultative Council serves as a forum for consultation on human rights between NGOs and the government.

117. The Australian national commission’s charter mandates the commission to work with NGOs on different issues such as policy, projects and inquires. See Burdekin, *Human Rights Commissions*, *supra* note 115, at 821–22. The Human Rights Commission Act, *supra* note 87, § 5, allows for the creation of standing committees composed of members of the South African Human Rights Commission and others. See Barney Pitjana, *National Institutions at Work: The Case of the South African Human Rights Commission*, in *HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD* 627, 629 (Kamal Hossain et al. eds., 2001).

118. NOWROJEE, *supra* note 9.

119. Interview with an NGO, (name withheld for confidentiality reasons) in Belfast, N. Ir. (Nov. 2002).

paid for the establishment of a strong and effective human rights commission.¹²⁰

Furthermore, the fact that members of NGOs are members of a human rights commission is not problematic when those concerned are clear about their role and responsibilities. Indeed, it can be argued that clarity is one of the essential criteria of being a human rights commissioner. This view is shared by Brian Burdekin, former head of the Australian HREOC:

All of my commissioners had been in half a dozen NGOs. There wasn't anybody who I would have as a commissioner on my commission who had not a background in human rights, either academically or in an NGO and in many cases both.¹²¹

In Northern Ireland, it has been reported that there is a "certain prickliness" between the NIHR and the Human Rights Consortium, a broad based coalition of NGOs and community-based organizations where the CAJ and AI are the co-convenors. While the NIHR shares the same objectives of the Consortium, which is to campaign for a strong and inclusive Bill of Rights, as one of the co-convenors stated, "because we have exercised our right to be critical and to ask critical questions at times of their (NIHR) performance and their activities, I think that they have been very sensitive."¹²²

It is unfortunate that the relationship is not as productive or positive as it could and should be. Especially given the fact that the broad range of groups comprising the Human Rights Consortium could be useful to the NIHR as a means of reaching into communities that are skeptical and openly hostile to the NIHR. This is exactly the case with groups affiliated with the Loyalist/Unionist community. Groups such as the Ulster Human Rights Watch (UHRW) and the Ulster Protestant Movement for Justice (UPMJ) view the NIHR as a "factor of grievance."¹²³ A good example of the benefit of having a strong relationship with civil society is the Danish Institute for Human Rights.¹²⁴ At a time when the Danish Institute was experiencing huge difficulties as a result of changes of government policy involving institutional mergers and re-organizations, there was a fear that the Institute would collapse. As a result of strong civil society backing, institutions rallied around and gave the Institute political support and it emerged from the crisis stronger.¹²⁵

120. Especially given the prestige of the Committee on the Administration of Justice (CAJ): one of Northern Ireland's foremost human rights groups and the winner of the Council of Europe's Human Rights Prize in 1998 for its work to place human rights and equality at the heart of the peace process.

121. Interview with Burdekin, *supra* note 19.

122. Interview with Patrick Corrigan, Amnesty International, in Belfast, N. Ir. (Oct. 2002).

123. Interview with Ulster Protestant Movement for Justice, *supra* note 103.

124. It was formerly known as the Danish Human Rights Centre.

125. Correspondence with Robert Archer via email (Dec. 2004).

It seems establishing an independent and effective relationship depends on the issue, the commissioner, and the department within a NHRI. For example, it has been noted that the education and parliamentary departments within the SAHRC have been very effective in creating relationships with NGOs. The Parliamentary Monitoring Officer uses all the parliamentary monitoring NGOs, whose input is then fed back into the submissions made by the SAHRC. Likewise, a training center has been established within the education department. NGOs play a pivotal role in the Centre to the extent that they have become “an extended arm of the Training Centre.”¹²⁶ There is also a national forum for democracy in human rights education consisting of almost 90 percent of the NGOs.

On the other hand, the SAHRC’s legal, research, and advocacy departments find it more difficult to partner, due to the type of work and issues involved. According to one interviewee, the head of SAHRC’s Department of Research had huge difficulties with civil society given the Commission’s mandate under the Final South African Constitution:¹²⁷

Each year, the Human Rights Commission must require relevant organs of state to 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.¹²⁸

SAHRC initially contracted the research of the information out to organizations and developed protocols around the reporting requirements of the Constitution. However, when it came to producing the report, the SAHRC refused these organizations access to the information until the report was made public. According to a former member of staff, there was a “complete relationship breakdown,”¹²⁹ as the organizations claimed that their input was central to the research process.

This is an illuminating example of the dangers of being territorial and endangering the relationship with an important sector of society. Once such territorial battle lines are drawn, a NHRI’s legitimacy and integrity are justifiably questioned. To avoid a “relationship breakdown,” a clear contractual agreement should be drawn up between NHRIs and NGOs. Further, a NHRI needs to display good leadership to ensure everybody operates effectively within a finite framework. However, cooperation requires mutual respect; something which is not always present on either side.

126. Interview with Andre Keet, staff member, Education Department, SACHR, in Johannesburg, S. Afr. (Aug. 2002).

127. Interview with Faranaaz Veriava, former worker of the Provincial Office, SAHRC, in S. Afr. (Aug. 2002).

128. S. AFR. CONST. 1996, *supra* note 37, ch. 9, § 184(3).

129. Interview with Veriava, *supra* note 127.

E. The Relationship between NHRIs and Government Agencies

Just as it is important to develop relationships with NGO bodies, it is important for NHRIs to establish relationships with government agencies while remaining independent. Again, like its relationship with civil society and NGOs, achieving the right balance between independence and engagement presents a difficult task for NHRIs. However, for the sake of legitimacy and credibility, it is vital for NHRIs not to capitulate to the inevitable pressure from these state bodies to downplay or ignore human rights abuses. This is particularly the case where the police have been accused of violations of human rights. The NIHRC found itself in this position in what has become known as the "Holy Cross dispute."

In September 2001, Loyalist protestors sought to prevent Catholic primary school children traveling up a section of the Ardoyne Road (the Glenbryn Road, where Protestant residents live) from the Holy Cross Primary School. Initially the police dealt with the problem by routing those attending Holy Cross away from Glenbryn, but in September 2001, the then Chief Constable of the Police Service of Northern Ireland (PSNI) decided to deploy officers in order to clear a path for the parents and children to enter by the front door. A parent of one of the children brought a case against the PSNI for failing to protect her child while going to and from school. The NIHRC agreed to fund the legal action,¹³⁰ but without the parents or the NIHRC's knowledge, the then Chief Commissioner Brice Dickson wrote a letter with the support of three commissioners to the former Chief Constable, the respondent in the legal proceedings, recording their opposition to the case. Most importantly, Dickson stated: "I myself am strongly of the view that the policing of the protest at the Holy Cross School has not been in breach of the Human Rights Act."¹³¹ The then Chief Constable replied by saying his

130. NIA 1998, *supra* note 40, § 70(2), provides that assistance may be granted (a) where the case raises an issue of principle; (b) where it would be unreasonable to expect the person to deal with the matter without assistance because of its complexity, or because of the applicant's position to another person involved, or for some other reason; (c) whether there are other special circumstances which make it appropriate for the Commission to provide assistance. The NIHRCs additional criteria specifies what it will take to be "special circumstances." The NIHRC revised its criteria, see NORTHERN IRELAND HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2003, Appendix 4 at 54 (2003), available at http://www.nihrc.org/documents/pubs/hrc/ann_report_2003.pdf. The NIHRC has indicated that it may wish to recommend specific amendments to Section 70(2) in order to make it more clear and precise. See Northern Ireland Human Rights Commission, Report on Effectiveness, *supra* note 41, at 12. Assistance can take different forms including providing formal legal advice, paying for the costs of solicitors and barristers in court proceedings or paying got expert evidence to be submitted to a court.

131. Written Evidence to the Joint Committee on Human Rights, Memorandum from Madden and Finucane, Solicitors' Memorandum Submitted to the Joint Committee on Human Rights (July 2002), available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/132/132we13.htm>.

lawyers were anxious to use Dickson's letter in court and suggested that the NIHRC review its funding decision. At a subsequent NIHRC meeting on the 8 April 2002, Dickson proposed to withdraw funding on the grounds of financial pressure.

The NIHRC continued to fund the case, which was eventually heard in June 2004 when the Lord Chief Justice dismissed the application.¹³² Whether the outcome of the case was influenced by the former Chief Commissioner's conduct is debatable.¹³³ What is unequivocal is that such pressure from a government agency cannot be tolerated and both the then Chief Constable and the then Chief Commissioner's behavior was "a cause of concern."¹³⁴ Indeed the former Chief Commissioner denied that the correspondence from the Chief Constable influenced his decision to propose dropping the case, stating that he acted to prevent resignations among divided NIHRC members. He admitted that: "Looking back . . . I might have dealt with those divisions differently."¹³⁵

As noted earlier, it is vital for the legitimacy of a NHRI not to yield to pressure from a government agency in carrying out its role, especially when dealing with controversial cases. Indeed, this is the public legitimacy litmus test for a NHRI: tackling controversial issues even if it brings the institution into conflict with a government or its agencies.¹³⁶

There are other lessons to be learned from what has become known as the "Holy Cross dispute." First, it illustrates the need for all NHRIs to have clear legal criteria and procedures in place when operating with a controversial case, especially in a delicate political and legal environment. Second, great care must be taken to ensure that the NHRI is seen as an impartial and neutral body. Only then will its opinions in cases carry any authority. Undoubtedly, the Holy Cross dispute was a very complex situation and, indeed, has been described by the Lord Chief Justice as "one of the most shameful and disgraceful episodes in the recent history of Northern Ireland."¹³⁷ Independence was compromised and concomitantly the NIHRC's

132. In the Matter of an Application by "E" of a Judicial Review [2004] NIQB 35 (N.Ir.), available at http://www.courtsni.gov.uk/NR/rdonlyres/1475F1C5-0646-4639-BFB5-14E4D5705A1E/0/j_j_KERF4184.htm.

133. One former commissioner, Paddy Kelly, stated that "we can never be certain that the letter by the chief commissioner and signed by three other commissioners did not adversely affect the applicant's case." However Brice Dickson said: "the solicitors for the applicant are on record as saying my letter was irrelevant to the outcome of the case and I agree with that." *Body still reeling from Holy Cross affair*, IRISH NEWS, 1 July 2004, at 10.

134. JOINT COMMITTEE ON HUMAN RIGHTS, WORK OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (FOURTEENTH REPORT), *supra* note 54, at 16.

135. Stephen McCaffery, *Commission chief 'will stay' in post*, IRISH NEWS, 23 July 2003, at 1.

136. For example, the Nigerian Human Rights Commission intervened when passports of human rights activist were confiscated by government. The Uganda Human Rights Commission has been successful in highlighting police brutality, prison conditions, arbitrary arrests and abuses by security forces.

137. In the Matter of an Application by "E" of a Judicial Review, *supra* note 132, ¶ 63.

credibility and legitimacy have also been seriously hindered from all quarters, including the solicitors who acted for the applicant, political parties, and civil society.¹³⁸ Such attacks on the NIHRC's conduct cannot be viewed as trying to compromise the NIHRC's independence, but must be viewed as legitimate expressions of the lack of confidence that reflect the increasing lack of public legitimacy in the Commission.

IV. MULTIPLE ACCOUNTABILITIES

The notion of accountability is also central to the work of a NHRI. Just like the concept of independence, accountability is multi-layered. It is only when the layers are unpacked that the nature of accountability begins and the range of dilemmas for NHRIs are uncovered. There are four layers of accountability: formal accountability, public/popular accountability, broad accountability, and government accountability. Each layer presents its own dilemmas, some are more problematic than others. Each layer will be dealt with respectively by drawing upon comparative examples of NHRIs that highlight the difficulties and tensions facing NHRIs.

A. Formal Accountability

The first layer of accountability, sometimes referred to as *formal accountability*, is the basic textual level of accountability, which requires NHRIs to submit an annual report and special reports to the authority that appoints them, usually the legislature, and to their funders. Formal accountability should be relatively straightforward. It *should* be an opportunity for parliament (or whichever body receives the annual or special reports) to engage in a discussion about the reports. However, for this to occur, sufficient parliamentary time must be made available, and this is not always the case. As one former Commissioner from the SAHRC stated, "Parliamentarians don't read, nobody ever interrogates the report. . . . Parliament has often not highlighted issues raised in the Human Rights Commission reports."¹³⁹

138. See Written Evidence to the Joint Committee on Human Rights, *supra* note 131:

[H]is (the Chief Commissioner's) correspondence amounted to a significant breach of trust, it raises issues as to breach of confidentiality . . . As a firm of solicitors with a significant human rights practice and which will, in the interests of our clients, of necessity have to apply to the Commission for funding on future occasions we are concerned with the lack of professionalism; the lack of transparency and the unethical conduct of the Chief Commissioner in dealing with the Commission's casework function.

See also Sinn Féin, Press Release, Human Rights Commissioner's Disgraceful Comments Influenced Holy Cross Judgement (16 June 2004), available at <http://www.sinnfein.ie/news/detail/5270>.

139. Interview with former commissioner, SAHRC. (name withheld for confidentiality reasons), in S. Afr. (Aug. 2002)

Unsurprisingly, the level of knowledge amongst parliamentarians about the role of the SAHRC is minimal. As one politician admitted “I don’t think we know enough.”¹⁴⁰

A similar position is found in Northern Ireland. The NIHRC must submit an annual report to the Secretary of State,¹⁴¹ who in turn places it before the Westminster Parliament. However, it is not the case that knowledge of the NIHRC is limited, but as the former Legal Advisor to the JCHR stated, it is more that the number of people with in-depth knowledge of the NIHRC is limited, and most people who lack such knowledge have not taken a particular interest in it.¹⁴² For example, the JCHR has taken a keen interest in the workings of the NIHRC and published a number of weighty reports, both to ensure accountability and to assist its inquiry into establishing a UK Human Rights Commission.¹⁴³ That aside, as one MP stated, “I think other than the Joint Human Rights Committee very few people are aware of it.”¹⁴⁴

B. Public/Popular Accountability

The second layer is a wider form of accountability, known as *public/popular accountability*. This is the mainstay of a NHRI’s support: that is, accountability to the public at large, including “victims” of human rights abuses.¹⁴⁵ A NHRI’s reports ought to be distributed to the public and made available in different formats accessible to the public at large: for example, leaflets, short summaries in the media, and other public presentations of the institution’s work. By doing so, the public can see what is being done in their name and ensure that the NHRI is performing properly. This wider understanding of accountability, as Dawn Oliver argues, requires that a person or body

140. Interview with Dene, Smuts, MP, S. Afr. (Aug. 2002).

141. NIA 1998, *supra* note 40, Sched. 7, ¶ 5(1).

142. Interview with David Feldman, former Legal Advisor to the JCHR, in London (Nov. 2002).

143. On the work of the NIHRC see JOINT COMMITTEE ON HUMAN RIGHTS, WORK OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION (FOURTEENTH REPORT), *supra* note 54. The NIHRC produced a response to this report in March 2004, see Northern Ireland Human Rights Commission, Response to the 14th Report of the Joint Committee on Rights, *supra* note 95. For the inquiry to establish a UK Human Rights Commission, see JOINT COMMITTEE ON HUMAN RIGHTS, THE CASE FOR A HUMAN RIGHTS COMMISSION (SIXTH REPORT), *supra* note 68.

144. Interview with Kevin McNamara, MP, Labour, in London (Nov. 2002). In the House of Lords the NIHRC has quite a high profile, albeit a negative one, due to the legionary parliamentary questions asked by Lord Laird.

145. This language has been widely challenged, in particular by women’s rights organizations. As a result, concepts of “empowerment” or “agency” (emphasizing the importance of actions that a supposed “victim” takes herself) are becoming more common and have replaced reference to “victims” in the terminology used by some, but not all, NGOs. See International Council on Human Rights Policy, *Deserving Trust: Issues of Accountability for Human Rights NGOs*, *supra* note 74.

explain and justify, against criteria of some kind, their decisions or actions.¹⁴⁶ As noted earlier, such accountability helps the public to ascertain the independence of a NHRI.

This public/popular accountability is more problematic, as it brings into question the tensions between accountability and public legitimacy. When NHRIs are established, they are usually accompanied by high expectations of what such institutions are to achieve, especially when they are given a very broad mandate where almost anything could be framed as a “human rights” issue. The situation is compounded for NHRIs in divided societies where there is a history of community division and, therefore, differing notions or expectations of what a NHRI is supposed to offer.

This is perhaps most dramatically illustrated by examples from the NI-HRC, who has faced this exact dilemma. The first example is the accusation by some from the Unionist tradition that the NIHRC is only interested in state violations of human rights, to the exclusion of human rights violations by non-state actors, principally Republican and Loyalist terrorists.¹⁴⁷ For example, the NIHRC’s decision to grant legal assistance to a well known high profile Loyalist, Johnny Adair, on a fair trial issue attracted criticism. But is it not part of a NHRI’s mandate to tackle unpopular issues, such as the rights of terrorists, and not to be afraid of criticizing government when necessary, even if this could bring the institution into conflict with other stakeholders?

This issue of non-state actors is prevalent in the second example, that is, the NIHRC’s role in the bill of rights debate. One of the NIHRC’s central tasks is to consult and advise the British government on which rights to include in a proposed bill of rights for Northern Ireland, one which would “reflect the particular circumstances of Northern Ireland.”¹⁴⁸ The resultant discussions arising from this debate illuminate the dichotomy of opinion in Northern Ireland. On the one hand, groups and politicians affiliated with Loyalism/Protestantism have argued that issues regarding parading, flags, communal identity, political allegiances, and deaths resulting from non-state violence should have been at the core of the NIHRC’s proposals. This section of the community also favored a parochial and narrow approach to a bill of rights for Northern Ireland.¹⁴⁹ On the other hand, the Nationalist/Catholic

146. Dawn Oliver, *Law, Politics and Accountability*, PUBLIC LAW 238, 246 (1994).

147. It has been pointed out that 83 percent of the killings and a higher proportion of injuries have been perpetrated by Republican and Loyalist paramilitary groupings. See MARIE-THERESE FAY, MICHAEL MORRISSEY & MARIE SMYTH, *NORTHERN IRELAND’S TROUBLES: THE HUMAN COSTS* (1999).

148. Good Friday Agreement, 10 Apr. 1998, Ir-U.K., Strand 3, ¶ 4 of the Human Rights Section, available at <http://www.nio.gov.uk/agreement.pdf>.

149. This issue was also debated in the NI Assembly in September 2001 where Esmond Birnie of the UUP argued that the NIHRC should have addressed the constitutional issues of NI instead of remaining silent and referred to the particular circumstances of NI as deaths from non-state actors and does not include socioeconomic rights. See *NORTHERN IRELAND ASSEMBLY, OFFICIAL REPORT (2001–2002)*.

community tended to focus on Irish language rights, a strong equality provision, and the need to ensure parity of esteem. Unlike some Unionists, they supported the broad and expansive approach adopted by the NIHRC. As a result, both the consultation process and the draft documents produced by the NIHRC attracted criticisms from the Unionist community.¹⁵⁰

Where there are conflicting ideas or expectations of what a NHRI is suppose to offer, it is vital for that institution to work out its parameters and be certain of its limitations and ensure its public are aware of this role. Another related point is that, instead of trying to provide everything for everyone and to be universally popular, a key element to balancing accountability and public legitimacy is for a NHRI to think through what it can do in a limited sense, acknowledging its restrictions and being strategic about its plans. This necessitates a NHRI communicating and informing the public of its identity, work, and role. Such an information exercise is essential, especially in countries such as Northern Ireland, where, as noted above, the very concept of human rights is itself contested.

C. Broader Accountability: Relationships with Civil Society

The third type of accountability is a *broader accountability*, establishing relationships with civil society groups and professional human rights organizations, which allows the NHRI to benefit from their experience and insight while also providing civil society bodies an opportunity to scrutinize the NHRI's performance. By establishing these relationships, NHRIs can give societal groups effective channels to make their claims and act as "[r]eceptors and transmitters in the cycle of human rights activity [as] they endeavor to implement international norms in practice while simultaneously filtering information from civil society back to the state."¹⁵¹ Such relationships have an inherent duality: they increase the NHRI's accountability by creating a link with NGOs and provide NGOs with an opportunity to monitor the institution's performance, while the NHRI benefits from using the knowledge, experience, and expertise of grass root NGOs.

150. Nationalists too have criticized the NIHRC's handling of the Bill of Rights process and some of the draft Bill of Rights provisions, especially those which could potentially endanger equality legislation in Northern Ireland. See Christopher McCrudden, *Not the Way Forward: Some Comments on the Northern Ireland Human Rights Commission's Consultation Document on a Bill of Rights for Northern Ireland*, 52 N. IRELAND LEGAL Q. 372 (2001). After considerable discussion on the controversial issues, the NIHRC has made a number of changes to the 2001 draft provisions in NORTHERN IRELAND HUMAN RIGHTS COMMISSION, MAKING A BILL OF RIGHTS FOR NORTHERN IRELAND: A CONSULTATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION 14 (Sept. 2001); its latest thinking is in the most recent document: NORTHERN IRELAND HUMAN RIGHTS COMMISSION, PROGRESSING A BILL OF RIGHTS FOR NORTHERN IRELAND: AN UPDATE (Apr. 2004).

151. John Hucker, *Bringing Rights Home: The Role of National Human Rights Institutions*, in HUMAN RIGHTS PROTECTION: METHODS AND EFFECTIVENESS 29, 34 (Frances Butler ed., 2002).

However, such duality raises tensions at a number of levels. First, as noted earlier, NHRIs must ensure that their independence is intact while simultaneously allowing NGOs some role in developing their programs. Second, in establishing a close relationship with NGOs, NHRIs should be conscious that NGOs are not representative of the public, they are not appointed by the people or parliament, and as such may be perceived as lacking some form of the legitimacy that a NHRI may have. Third, there may well be professional jealousy between human rights NGOs and NHRIs, to the extent that the former view the latter (or vice versa) as their competitors. For example, although there is a core group comprised of NGOs working in the field of human rights in India, it has been reported that the NHRC provides little information about the protection of the rights of NGOs. More disturbing is the NHRC's silence on the restrictions imposed on NGOs' activities by the Indian government when it introduced the Foreign Contribution (Regulation) Act 1976.¹⁵² Fourth, when NGOs criticize a NHRI's performance, the latter may view this not as a legitimate form of accountability (as it should), but rather an attack on its independence, which may well jeopardize future relationships. As noted above, the criticisms by the Human Rights Consortium in Northern Ireland of the NIHRC, resulted, at that time, in a "certain prickliness" between them and the Commission.

D. "Government" Accountability

The fourth layer of accountability is referred to as *government accountability*, and is accountability on the other side of the coin: in other words, the authority who appoints and funds NHRIs (such as government or parliament) is also accountable in the sense that they are responsible for ensuring that NHRI's work effectively. This entails allowing a NHRI to operate financially and administratively independent, free from interference and obstruction. Equally important, it requires governments, or those involved in negotiating the remit and powers of the institution, to ensure NHRIs live up to their writ and to investigate if the institution is not working effectively.

This layer is arguably the most problematic layer of accountability. Governments have a clear obligation to provide adequate resources and powers to the bodies they created. In western democracies, governments should be able to provide NHRIs with sufficient staff and financial resources.

152. See Foreign Contribution (Regulation) Act 1976, No. 49, Acts of Parliament, 1976 (India). This Act requires all Indian organizations and individuals that seek to receive foreign contributions to receive clearance from the Ministry of Home Affairs, in the form of either registration or prior permission. The fact that this Act existed long before the NHRC was established (created in 1993), it has been reported that the NHRC should have condemned this long ago. Such condemnation is imperative as it has also been noted that the Ministry of Home Affairs uses the Foreign Contribution (Regulation) Act, id., as a political tool against the disfavored NGOs; see Paul, *supra* note 98, at 37.

In other parts of the world, in developing countries, donor support may well be needed. Without such resources, NHRIs can be beholden to the whims of government and prevented from carrying out their mandate effectively by imposing budgetary constraints. As noted earlier, this has been the experience of many NHRIs in countries such as Cameroon, Zambia, and Northern Ireland.

It is pivotal that the government understand that NHRIs exist to highlight issues and be critical of government when necessary. Furthermore, in light of the reality that most NHRIs are financially dependent on government,¹⁵³ it is crucial for NHRIs to establish a positive working relationship with key government departments. This is particularly important when NHRIs are dependent on government for adequate facilities such as buildings, infrastructure, and technical staff. Failure to work towards such a relationship results in NHRI failing to influence and sensitize government officials to human rights issues.

For example, in Northern Ireland, it has been noted that there was the perception that the NIHRC did not want to be seen to be too close to government, which would implicate its independence. As one politician observed, it sent out signals that engaging with a political party is “dangerous” and by keeping “these dreaded political trends”¹⁵⁴ at arm’s length, the NIHRC would be insulated from any political influence. Ironically, as its predecessor, the Standing Advisory Commission on Human Rights (SACHR), was a directly linked to the government through its secretariat. As one former commissioner stated “there was more of an expectation that SACHR would become involved in discussions and now that the Commission is more independent, it has lost that direct track into the Government machine.”¹⁵⁵

Governments are also accountable in the sense that they are required to respond to NHRIs due to their “semi official status.” As was noted above, their status as national institutions *should* allow them to engage with government officials more closely than NGOs. Their reports and recommendations *should* have a stronger impact within government than NGO reports. However, the NIHRC’s experience shows that governments are not always willing to show such respect. According to the former Chief Commissioner of the NIHRC, “the Commission has not been given the status that it deserves by the NIO officials.”¹⁵⁶ On numerous occasions the NIHRC’s recommendations

153. There is an audit of the Paris Principles regarding the financial independence being carried out by the umbrella body of International Co-ordinating Committee of National Human Rights Institutions supported by the OHCHR.

154. Interview with Bairbre de Brún., Sinn Féin, in Belfast, N.Ir. (Nov. 2003).

155. Interview with a former commissioner, (name withheld for confidentiality reasons), NIHRC in Belfast, N.Ir. (May 2003).

156. Interview with Dickson, *supra* note 111.

to government were totally rejected or worse, ignored.¹⁵⁷ It has also been reported that a NGO met the Secretary of State for Northern Ireland three times before the government minister finally met the NIHRC.¹⁵⁸

Similarly, the Jammu and Kashmir State Human Rights Commission's (SHRC) recommendations have been disregarded by senior civil servants and government:

The SHRC has also repeatedly called for the government to provide an Action Taken Report (ATR) on its recommendations. For several years, this call [was ignored until 2005, when] the government is known to have delivered an ATR to the Assembly. The ATR reportedly details the action taken by the government in 141 cases in the 2003–2004 report, in which the SHRC made recommendations. The SHRC report however had listed 152 cases in which compensation had been ordered—eleven more than the number mentioned in the ATR. The Ministry of Home Affairs reportedly asserted that for those 11 cases, no recommendations had been made, although this conclusion is at odds with the SHRC's report. More disturbingly, according to at least one source, in 108 of the cases in which the government took "action," the government did not, in fact, provide compensation.¹⁵⁹

Finally, governments who have been involved in negotiating the remit and powers of a NHRI are responsible to ensure that such institutions abide by and live up to what was agreed. If a NHRI is acting improperly, under this form of accountability, the government is required to express concern in order to ensure that NHRIs are adhering to their remit as agreed under the enabling legislation. In such situations, NHRIs must accept that they should be held accountable and not view criticisms as an attack on their independence. Put a different way, NHRIs must be careful not to abandon the very concept of accountability they seek to promote. If there is any dysfunction, this should not result in government abandoning the NHRI, but instead, there should be an assessment of what further support is necessary.

However, this can and has resulted in creating tension between accountability and independence. The following example is a clear manifestation of the polemics in maintaining a healthy balance between government accountability and ensuring that governments do not use the excuse of not wanting to impinge on a NHRI's independence as a means of not carrying out their responsibilities. The Irish government, one of the guarantors of the Good Friday Agreement, has made strong points about the NIHRC's powers

157. See Northern Ireland Human Rights Commission, Report on Effectiveness, *supra* note 41, at 15–19. In the NIHRC's fifth annual report, it is reported that the "Commission is not always provided, at least unprompted, with information on legislation and policy originating within the UK government but intended to apply in Northern Ireland." See NORTHERN IRELAND HUMAN RIGHTS COMMISSION, FIFTH ANNUAL REPORT 35 (2004).

158. Interview with an NGO, *supra* note 119.

159. *J & K State Human Rights Commission*, *supra* note 52.

and funding, and has been engaged in ongoing negotiations with the British government. It has also expressed concerns publicly and privately about the resignations.¹⁶⁰ The NIHRC itself charged that the Irish government acted inappropriately in asking questions about the functioning of the commission after commissioners resigned. While this would have been the case had it been intervening if a human rights issue was being debated, was it the case with dysfunctionality? Arguably, it is not. As one of the guarantors of the Good Friday Agreement, it is the responsibility of both governments, not just the British government, to ensure that those institutions which arose from the Agreement, including the NIHRC, operate effectively. The Irish government should therefore be able to hold the NIHRC accountable and express concern when the NIHRC is ineffective. If the Irish government and/or British government fail to do so, it is arguable that both governments are shying away from their duties and are guilty of shirking their responsibility by using independence as a shield.

V. CONCLUSIONS

From the above observations, it is clear that NHRIs do occupy a unique space between government and civil society. Their location close to government places them in a position to influence policy and engage with government officials, a reach that few organizations have. It also enables them to negotiate with nongovernmental actors and act as an umbrella for human rights NGOs. However their *locus standi* presents a paradox: while needing to establish relationships and alliances with both government and civil society, they have to remain independent of both. By unpacking the implications of this paradox, as this article has endeavored to do, a series of important questions are unearthed about how NHRIs are to manage their independence while simultaneously forging links and creating partnerships with governmental and nongovernmental bodies.

One important effect of the analysis is to focus attention on what is meant by the terms independence and accountability. The key to understanding these fundamental principles for NHRIs is a reconceptualization that recognizes the different levels within which NHRIs need to operate with government and civil society. This reconceptualization also takes cognizance

160. When Patrick Yu resigned the then Minister for Foreign Affairs, Brian Cowen expressed his "serious concern" especially on the "stated grounds of resignation which appear to give troubling implications for specific equality and rights aspects of the Good Friday Agreement." Statement by Minister Cowen on resignation of Mr. Patrick Yu from NIHRC, Press Release, Government of Ireland, Department of Foreign Affairs (8 July 2003), available at http://www.foreignaffairs.gov.ie/Press_Releases/20030708/1237.htm.

of the tension between independence and accountability, in terms of the relationship between NHRIs and government, and independence and public legitimacy, in terms of the relationship between NHRIs and NGOs. How this is all balanced and managed is a central component to the credibility and effectiveness of NHRIs.

The opportunities and dangers arising from this paradox suggest a number of initial responses for NHRIs, governments and their agencies, human rights NGOs, and civil society. First, governments, having established NHRIs, are under a clear obligation to make sure that NHRIs are based on a solid legal foundation. Further, they must use a transparent and consultative process in appointing commissioners and staff (the latter should be independently recruited) who are representative of society and will have credibility in the eyes of the public. NHRIs must be financially secure with budgetary oversight being exercised by Parliament, not the executive. Also, they should have clear and well-defined powers to carry out their mandate effectively and efficiently, especially for NHRIs operating in a hostile political and legal environment. Governments must show respect for the work of NHRIs by implementing or taking on board some of the institution's decisions, reports, and recommendations, showing support when the body receives unfair attacks, filling in vacancies within NHRIs as soon as possible to avoid creating any vacuums, and holding the NHRI accountable for proper performance.

Second, NHRIs must establish a close, yet independent, relationship with governments if they are to have any influence over policy and government's decisions. Therefore, NHRIs need to find the right balance between independence and influence in managing that relationship on a day to day basis. The approach, authority, and tone the NHRI adopts will be vital to the success of that relationship. They must demand the respect and legitimacy they deserve from government, given their semi-official stature. NHRIs cannot afford, for the sake of their public legitimacy, to be or be seen as subservient to government's needs, and they must not tolerate any interference in their work.

Further, NHRIs must find creative ways to establish strategic partnerships with civil society, especially human rights NGOs, as they are relative newcomers to human rights work. In this way, not only is a NHRI's legitimacy and credibility enhanced, but reciprocally another line of accountability is created that enables civil society to see if the NHRI is conducting its mandate in a proper and appropriate manner. Such a mechanism is extremely useful, especially in divided societies where a NHRI may find it more difficult to command public legitimacy. While NHRIs and NGOs are different bodies, they do have one commonality: both groups are notoriously under-resourced and, as Kofi Kumado states, "utilization of and reliance on each other's work should provide an important way of meeting the resource deficit and

remaining effective.”¹⁶¹ It is vital that NGOs do not see NHRIs as competitors, and vice versa, and that NGOs do not feel their existence and relevance are being threatened. Rather, to quote Kumado again, “the emergence of NHRIs must be seen by the NGO world as evidence of their success in sensitizing their societies to the need to take the promotion and protection of human rights seriously.”¹⁶² Therefore, civil society groups need to continue to be vocal, criticizing a NHRI’s action that undermines human rights protection and promotion, without interfering with the NHRI’s independence. They also need to identify where the powers and functions of a NHRI are deficient and are capable of review and augmentation, and to subsequently lobby government to ensure NHRIs are Paris Principle compliant.

To conclude, the unique position of NHRIs as intermediate bodies positioned between the state and citizens does present difficulties. As the above study illustrates, they have to strike a balance between engagement and independence. However it is not an insurmountable challenge. If NHRIs and other actors are able to tap into the more nuanced understanding of the concepts of independence and accountability as outlined above, as well as taking on board some of the recommendations on the issues that have arisen as a result of the broader conceptual dilemmas presented in this article, NHRIs will be able to play a crucial role in promoting and protecting human rights: the ultimate purpose of any human rights commission.

161. Kofi Kumado, Working with NGOs, Paper to the British Council Conference on the Effectiveness of National Human Rights Institutions, 26 Oct.–1 Nov. 2003, Belfast and London, at 7.

162. *Id.* at 9.